

JUSTIFYING SELF-DEFENSE, DEFENSE OF OTHERS,
AND THE USE OF FORCE IN LAW ENFORCEMENT

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By

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PREVIEW

**JUSTIFYING SELF-DEFENSE, DEFENSE OF OTHERS,
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ABSTRACT

While the permissibility of self-defense may seem obvious, philosophers and legal theorists have had difficulty creating a complete and sound philosophical justification. The right of self-defense has odd contours: in some dimensions, the right is broad, while in others, very narrow. Current theories have difficulty justifying both aspects. Rights-based theories, specifically, can justify the broad permission to use force, but they have trouble explaining the extensive restrictions on exercising the right. Making matters even more complicated, the breadth of one's self-defense right can vary. Law enforcement officers acting in their official capacity, unlike private citizens, never have a duty to retreat before using deadly force. Philosophers generally have ignored such complications.

In this dissertation, I demonstrate how a rights-based account can explain the broad and narrow nature of the right of self-defense. Utilizing concepts from both moral and political theory, I justify the traditional limitations on the right of self-defense, including the necessity and imminence requirements. I argue that unnecessary force interferes with aggressors' right to due process of law and usurps the authority of the state to adjudicate rights-claims and other disputes. Drawing from Kant, I also argue that

individuals lack authority to vindicate their rights. The right of self-defense is a supplementary mechanism by which defenders preserve their right to seek justice in a court of law.

I argue that the positive permission to use force derives from three interests: (1) protection of individual autonomy, autonomy-based rights, and respect for persons; (2) preservation of the ability to seek a full (or almost full) judicial remedy to vindicate a violation of one's rights; and (3) protection of the public peace and security. I argue that unjust aggression, unlike other violations of rights, may be resisted with violence because of the extensive harm to one's person that can result and the inability to seek judicial redress. I also define and justify the proportionality requirement and demonstrate how that requirement is consistent with a theory justifying self-defense based on protecting autonomy and autonomy-based rights. Finally, I apply my theory to non-core cases, including the expanded rights of law enforcement officers.

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PREVIEW

CHAPTER 1: INTRODUCTION AND JUSTIFICATIONS AND EXCUSES

1.1. Introduction

The right of self-defense,¹ or (more accurately) the right of private defense, is the permission by which a person, in order to preserve his or another person's life, body, health, or property may threaten, injure, or kill another being (or damage or destroy that person's property) who, at least in some relevant way, is causally related to (but not necessarily morally responsible for) a threat of future harm against the defender, the defender's property, or another person or that person's property. We classify these actions as moral notwithstanding general prohibitions against causing harm to others. At first glance, without any deep reflection, self-defense's legitimacy is as self-evident as the AAA1 syllogism. Most people (and, indeed, many philosophers) simply see an individual under an unjust and willful attack from an adversary and conclude that the victim has the right to fight back and protect his life.

Yet, with further thought, the right of self-defense remains an odd and, in many ways, paradoxical right. The ability to resolve disputes peacefully and to ensure, within its jurisdiction, peace and security constitute core functions of any sovereign authority and at least part of its *raison d'être*. Without, generally speaking, peaceful resolution of disputes, a state of war would ensue, thereby abrogating the conveniences of having a government. Here we see a paradox: why does a political body, constituted (*inter alia*)

¹ Through most of the dissertation, my use of the term "self-defense" includes, *mutatis mutandis*, other forms of private defense, such as defense of others or defense of property. In Chapters 4 and 5, I will begin to analyze self-defense separately from these other forms of private defense.

to resolve disputes among the people in its jurisdiction in a civilized manner, expressly authorize those people, in certain well-defined circumstances, to engage in violence? Answering this fundamental question of self-defense will shed light on many aspects of this right. Resolving this paradox, for instance, will explain and justify the traditional limitations on the right of self-defense, including imminence, proportionality, and necessity. It will also explain the additional authority given to individuals acting with the authority of a sovereign (e.g., law enforcement officers), and why those who live in a state of nature have a wider permission to use force than those who live within civil society. In short, no theory of self-defense can be complete without taking account of the rights and obligations of, and the relationships between, a potential victim, his attacker, bystanders (if any), society generally, and the governing authority.

Consider the following six cases of self-defense, all of which (unlike too many cases in the literature)² have some basis in real-life possibilities:

(A) Floyd walks home after getting off work. Unbeknownst to him, his arch-nemesis, Randolph, is in town, and holding a grudge, Randolph aims to kill him. Knowing that Floyd walks the same way every day from work, Randolph waits for him to begin his walk, at which point Randolph corners him and attempts to shoot him. Floyd, left with no alternative, pulls out a pistol and kills him.

(B) The same scenario as (A), except that Randolph's gun is loaded with defective cartridges. If Floyd attempts to run, he will successfully escape

² Paul Robinson notes that philosophers often create bizarre hypothetical examples that have little practical value. Paul H. Robinson, *Justification Defenses in Situations of Unavoidable Uncertainty: A Reply to Professor Ferzan*, 22 *LAW & PHIL.* 775, 781-82 (2005). I share his general distaste for bizarre examples when discussing hypothetical cases of self-defense. These hypothetical examples distort the cases by removing key elements (such as inherent uncertainty) of any real defensive case, and these distortions may affect our intuitions on these cases. For this reason, I avoid using them in this dissertation wherever possible.

before Randolph can reload. Floyd, obviously not knowing this, pulls out his pistol and shoots him.

(C) The same scenario as (A), except Randolph has a severe mental illness and therefore cannot grasp normal conceptions of right and wrong conduct. Randolph harbors a grudge against Floyd because Randolph believes that Floyd is the human incarnation of Satan, and by killing him, Randolph believes he will end all the evil in the world. Floyd defends himself, as in (A).

(D) Jane is walking down the street. As she walks, someone grabs her and drags her into a secluded ally. There, he threatens her saying he only wishes to rape her, and that if she does not resist, she will not be killed. Jane believes him but fights back anyway and kills her attacker.

(E) Sam, an obsessive Deputy United States Marshal, always “gets his man.” In this case, he pursues Richard, a fugitive who is wanted on numerous violent felony warrants.³ Richard is stubborn and ruthless; he vows never to let anyone capture him alive. Richard’s ruthlessness does not deter Sam, and he continues to hunt him. Finally finding Richard, he attempts to effectuate an arrest, but during the arrest attempt, Richard pulls out a gun and an extended shootout ensues. Sam may desist from the shootout at any time; if he does this, no one will be hurt, but he will not arrest Richard. Alternatively, he may continue to pursue the arrest, knowing that this will likely lead to someone being killed. Sam chooses the latter, and he kills Richard in the ensuing gun battle.

(F) Jane starts slapping Jack, who grabs her arms and pushes her away to prevent her from hitting him.

Although all of these cases have significant differences, they all share certain similarities:

First, and most significantly, all of the defenders face *unjustified* threats and, except in (C), they face unjustified threats from morally culpable attackers.

Secondly, all defenders were in *imminent danger* of suffering some harm, and, except in (F), a grave harm.

³ This case, of course, is drawn from THE FUGITIVE (Warner Bros. 1993).

Third, the attacks were *unprovoked*, at least in the sense that the defenders did not initiate the violence against the defenders (except possibly in (E) as noted below).

Fourth, all (except arguably (D)) involve *proportionate responses* to the level of the threat; deadly force is only used to respond to threats of deadly force, and lesser force is used otherwise.

Fifth, except in (B) and to some extent (E), the defenders *necessarily* must use force to prevent the harm from occurring. In (B), the defender erroneously but reasonably believed the force was necessary to prevent harm.

Notwithstanding these similarities, these cases also contain critical differences. In (B), for instance, although Floyd reasonably believes that he is in immediate danger, in fact, he is not. (C) involves a morally innocent (though very dangerous) aggressor, while in (D), Jane uses deadly force to protect herself against a non-deadly threat. (F) applies the principle of self-defense to threats that do not involve serious bodily injury.

In my opinion, though, (E) represents one of the most interesting cases. Many aspects of (E) seem to involve a classical application of normal self-defense: the unjust threat that puts Sam in imminent danger and his proportionate response. However, unlike all of the other cases, Sam has an easy possibility of escape, which he chooses not to pursue. Although nearly everyone would believe Sam is justified, in one sense, he has violated the normal rules of self-defense: he has brought about, in some relevant way, the situation necessitating the use of deadly force.

My dissertation has four major components. In Chapter 2, I will reject as incomplete previous theories justifying self-defense. The first set of theories justifies the permissibility of self-defense by appealing to rights, such as the right to life or the right to

the law's protection. In addition to rights-based accounts, I will examine act and rule utilitarian theories, "lesser evils" justification, and Wasserman's forced-choice theory. I will end the chapter by arguing that the doctrine of double effect cannot provide an adequate justification for the right of self-defense.

After describing why the current major theories do not adequately justify self-defense's permissibility, I will begin to construct my own theory. I will begin this project by justifying the traditional limits on self-defense. These limits restrict permissible self-defense to cases where defensive violence is *necessary* to respond to an *imminent* threat. Focusing on the drawbacks inherent to exercising one's right of self-defense (e.g., the lack of due process of law before harming an aggressor), I argue that self-defense must be only a supplementary mechanism to help vindicate one's rights. In addition, I will derive the imminence requirement from ethical and political theory. The imminence requirement derivable solely from ethical theory remains weak and ill-defined, and thus, defenders have a wider permission to use force in a state of nature. But, in civil society, reasons for the imminence requirement grounded in political theory supplement the purely ethical considerations. As a result, having a sovereign authority strengthens the obligations imposed by the imminence requirement.

While Chapter 3 defends the limitations on self-defense, Chapter 4 justifies the existence of the right to use force in self-defense. The right of self-defense derives from three interests:

- (1) Protection of the following: individual autonomy; autonomy-based rights, such as property possession; and/or respect for persons as

autonomous beings, when these aforementioned interests are illegitimately threatened in fundamental and severe ways (including by impairing the future pursuit of the good);

(2) Preservation of the ability to seek a full judicial remedy to vindicate a violation of the rights described in (1), except that, if the nature of the attack prevents a full judicial remedy of the rights violated, then minimizing the amount of loss one must suffer without a judicial remedy becomes a concomitant interest; and

(3) Protection of the public peace and security.

In Chapter 4, I will begin by explaining why these interests serve as INUS conditions⁴ for justifiable violence. Then, I will defend each condition. During the course of this defense, I will consider other issues my theory raises. These issues include the nature of the proportionality requirement in self-defense and the applicability of my theory of self-defense to defending property.⁵ Finally, I will argue for the moral asymmetry between defenders and aggressors. This moral asymmetry explains why defenders may use defensive force against aggressors but aggressors have no right to use defensive force against the defenders' defensive violence. My argument will draw a moral asymmetry between both culpable and non-culpable aggressors.

In Chapter 5, I will elaborate on my theory justifying the permissibility of self-defense by applying that theory to non-core cases. I will begin by examining the right of

⁴ On the definition of INUS conditions, see J.L. Mackie, *Causes and Conditions*, 2 AM. PHIL. Q. 245, 245 (1965). I have a discussion of these criteria as INUS conditions in § 4.2.

⁵ Although my theory builds largely on George Fletcher's work, incorporating the possibility of remedies as an INUS condition for legitimate self-defense attempts to remedy his challenge that a Kantian theory of self-defense lacks a proportionality requirement. See GEORGE P. FLETCHER & JENS DAVID OHLIN, *DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY* 118-21 (2008) (objecting to Kantian/autonomy-based theories justifying self-defense because they lack any proportionality requirement).

bystanders to come to a victim's defense. Two major issues will be discussed: first, whether anyone may come to a victim's aid, or whether that right should be restricted to those having a special relationship (e.g., parent or child) with the victim; and second, whether the alter ego rule or the reasonable belief standard should apply to bystanders who intervene in someone's defense.⁶ In the next section, I will examine in depth case (E), which involves the use of force by law enforcement officers and others with powers of arrest. I will argue that sovereign authorities have the power in certain circumstances to expand the right of self-defense by eliminating the duty to retreat for those making arrests. One goal in this section will be to demonstrate that my theory of self-defense, by drawing from both ethical and political theory, can explain and justify the different rules applicable to those with authority to make arrests. After discussing the power of a state to expand the right of self-defense, I will discuss the rights and obligations of defenders and bystanders, when defenders' exercise of self-defense endangers bystanders. I conclude that bystanders must accept some increase in risk of harm to their persons when someone defends himself. But defenders have obligations to minimize the risks they impose on third-parties. In my view, the current law correctly strikes the balance: defenders may put bystanders at risk provided they do not impose such risk in a criminally reckless or negligent manner.⁷ Defenders have an excuse, but not a justification, for any unintentional injuries to bystanders in the course of self-defense,

⁶ I elucidate each standard in § 5.2.2.

⁷ As I argue in § 5.4, in assessing recklessness or negligence, one must consider all circumstances, including the emergency circumstances in which such defensive actions take place.

provided they do not act recklessly or negligently. I will end Chapter 5, and this dissertation, with some final thoughts on the right of individuals to defend property and suggestions for future research on questions that this dissertation leaves unanswered.

1.2. Justifications and Excuses

Before discussing any theory of self-defense, it is helpful to clarify two concepts and their relation to self-defense. These concepts are justification and excuse in criminal law. The main question is whether self-defense is properly classified as a justification or an excuse. In §§ 1.2 and 1.3, I will present the major issues in the various debates, and I will indicate where I stand on them. I will not give a full-fledged argument for any particular conception, however.

1.2.1. A Brief History of the Legal Terrain

In ancient English law, the execution of a criminal, the killing of a felon incident to attempting his capture, and the killing of an outlaw were examples of fully justifiable homicide.⁸ In contrast, a person acting in self-defense “deserve[d] but need[ed] a pardon,”⁹ which, while initially (and always technically) granted as a matter of grace, soon were granted as a matter of right. By Blackstone’s time, a person acting to prevent a forcible and atrocious felony (e.g., rape or robbery) could justifiably kill his attacker; self-defense was merely excused, however, when necessary to stop an aggressor during a “sudden affray.”¹⁰ This derived from the theory that even the defender likely engaged in

⁸ See 2 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 478 (2d ed. 1899).

⁹ *Id.* at 479.

¹⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES *173-74.

some action to cause or further the fight.¹¹ Additionally, Blackstone surmises that this may be due to law's desire to discourage private citizens from killing fellow citizens outside the legal process.¹² Until relatively modern times, even excusable homicide resulted in a fine or forfeiture of some kind.¹³

By the nineteenth century, however, both excusable and justifiable homicide resulted in a defendant's full acquittal. With little legal difference, the distinction between justifiable and excusable homicide came under attack as an antiquated formalism and fell into disuse. And when most states merged the two classes of homicide, what little legal difference existed (e.g., the duty to retreat in excusable but not justifiable homicide) simply got codified by indicating when one has a duty to retreat.¹⁴

George Fletcher, in *Rethinking Criminal Law*,¹⁵ is credited with having revived the legal importance of the two categories.¹⁶ Though excusable and justifiable homicide equally may imply the lack of legal penalties, a major conceptual distinction exists between a justification and an excuse.¹⁷ To see this distinction, I must define what one means when he calls an action "justified" or "excused."

¹¹ See *id.* at *187.

¹² See *id.*

¹³ See *id.* at *188.

¹⁴ See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2372-75 n.1 (William Carey Jones ed., 1976 photo reprint, Bancroft-Whitney 1915) (1769) (note of A.M. Kidd).

¹⁵ GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978).

¹⁶ DAVID RODIN, WAR AND SELF-DEFENSE 27 (2002); Joshua Dressler, *New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 63 (1984).

¹⁷ See RODIN, *supra* note 16, at 27 (quoting, J.L. Austin, *A Plea for Excuses*, 57 PROCEEDINGS OF THE ARISTOTELIAN SOC'Y 1, 2 (1956)).

1.2.2. Conceptual Questions Concerning the Definition and Use of the Terms

Unfortunately, there is virtually no agreement on what precisely “justification” and “excuse” mean in the context of criminal law. In *On the Supposed Priority of Justification to Excuse*, Douglas Husak collects several of these proposed definitions.¹⁸ At some level of abstraction, the various definitions appear fairly similar. A justification shows that “the act was not wrongful,” “not *criminal* [instead of merely not punishable],” or “that prima facie wrongful and unlawful conduct is not wrongful or unlawful at all.”¹⁹ Excuses, in contrast, seem to assert that one has committed a wrongful act but does not deserve blame.²⁰

With these similar definitions in hand, in core cases, it is easy to draw the distinction between justifiable and excusable conduct.²¹ Generally, for example, the law prohibits, and it is wrong, to kill another person. It is clearly legally justifiable (and morally justifiable, in the appropriate circumstances) for an executioner to administer a death sentence to a prisoner lawfully sentenced.²² On the other hand, insanity does not

¹⁸ Douglas Husak, *On the Supposed Priority of Justification to Excuse*, 24 LAW & PHIL. 557, 558-59 (2005).

¹⁹ *Id.* (quoting Joshua Dressler, Michael Moore, and Jeremy Horder, respectively) (internal citations omitted). For the original citations, see *id.* nn.7, 10-11.

²⁰ Here are some of the definitions Husak collects. Sharon Byrd: “[A]n excuse . . . not only presupposes the violation of a legal or moral norm, but also the wrongful or unjustified nature of this violation”; Michael Berman: “[A]n excused defendant has committed a crime but is not *punishable*”; Michael Moore: “[A]n excuse does not take away our prima facie judgment that an act is wrongful and unlawful; rather it shows that the actor was not culpable in his doing of an admittedly wrongful and unlawful act.” *Id.* at 558-59 (internal citations omitted). Husak himself questions whether excused acts are wrongful. See Douglas Husak, *The Serial View of Criminal Law Defenses*, 3 CRIM. L.F. 369 (1992).

²¹ See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1899 (1984).

²² 4 BLACKSTONE, *supra* note 10, at *173-74

give someone the right to kill another. A person who, while insane, murders another will be excused from punishment, even though his act is wrongful.

Thus, justifications and excuses are two ways in which we free someone for blame for actions that are *prima facie* wrong. Blaming someone for an action involves looking at both the action and the responsibility of the agent performing the act.²³ While I will go into a more fine-grained analysis of the definition momentarily, at a minimum, when we call an action “justified” we are saying that the agent deserves no blame because, in the circumstances, the agent had a sufficient reason to undertake the action, and therefore, the action was permissible, not wrong. Excused conduct, in contrast, concedes the wrongfulness of the act²⁴ but asserts that some feature of the agent (e.g., insanity or immaturity) or the agent’s circumstances (e.g., ignorance of a certain fact) frees him from blame.²⁵

According to Fletcher, labeling an action as “justified” or “excused” does create actual legal consequences. He asserts that an excuse “does not affect the rights of other persons to resist or to assist the wrongful actor. But claims of justification do.”²⁶

Assume for now that self-defense in case (A) represents a justification. Since we believe Floyd justified (not merely excused) in defending himself, we also believe that others

²³ See, e.g., MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW* 168 (1997); Sarah Buss, *Justified Wrongdoing*, 31 *NOÛS* 337, 362-363 n.3 (1997).

²⁴ As Michael Moore correctly defines wrongdoing, someone “does wrong whenever his voluntary act causes a state of affairs to exist that instantiates a moral norm that *prima facie* prohibits such acting and such causing, and there is no moral justification for this *prima facie* wrong.” MOORE, *supra* note 23, at 168. As Moore continues, “[w]rongdoing is thus constructed out of the elements of action, causation, and (lack of) justification.” *Id.*

²⁵ See Buss, *supra* note 23, at 362-63 n.1 (defining and explaining these categories).

²⁶ FLETCHER, *supra* note 15, at 760.

may come to his assistance.²⁷ But in case (C), Randolph, the insane aggressor, has an excuse, but not a justification, for his attack on Floyd. Because Randolph is only excused—his attack is wrongful but not blameworthy—others may not come to his aid. Relatedly, individuals subjected to justified actions generally may not resist them, but they generally may resist those who only have an excuse. Finally, justifications are capable of universalization: because a person who is justified, by definition, has a sufficient reason to undertake an action, anyone possessing that reason (absent any further fact that would defeat that reason) also may undertake the action. An excuse, in contrast, connotes no permission for others to undertake similar actions in similar circumstances. Although we may free someone from blame due to some fact, we do not condone anyone, in the same relevant circumstances, performing the action.²⁸

While Fletcher draws these hard distinctions between justifications and excuses, in the more difficult cases, these distinctions seem to break down. Despite “firmly believ[ing] that the basic distinctions between justification and excuse are important in the law,”²⁹ Kent Greenawalt argues in, *The Perplexing Borders of Justification and Excuse*, that “[n]o very precise theory is advanced to distinguish between justifications and excuses”³⁰ In order to distinguish justifications from excuses in difficult cases, we need more than these general definitions I gave above. We need to formulate criteria by which to draw the distinction. Greenawalt offers three possibilities for drawing the

²⁷ I discuss the justification for defending others in Chapter 5.

²⁸ See FLETCHER, *supra* note 15, at 760-62.

²⁹ Greenawalt, *supra* note 21, at 1898.

³⁰ *Id.* at 1897.

distinction: (1) warranted versus unwarranted conduct, (2) general versus individual claims, or (3) examining the rights of bystanders.³¹ None fully works.

While I will not reconstruct Greenawalt's entire argument against each of three categories, I will present some issues he raises to demonstrate the difficulties in classifying actions as justified or excused. With respect to the warranted/unwarranted distinction, a few different problems emerge. First, a person may act within his rights, even though he ought not do what he did or it would be better for him to do otherwise.³² Thus, in most circumstances, a person is justified (i.e., warranted or within his rights) in refusing to render aid, even though in many cases it would be morally preferable for him to aid a person in need. This is not merely an equivocation on moral justification with legal justification. Suppose a child is drowning and a person can jump in and save the child. The person is not the best swimmer, though he is an adequate one; saving the child creates a mild risk. We might say, for instance, that a person has a (moral) right to choose not to increase the danger to himself mildly to aid another (i.e., he is morally justified in choosing himself over the stranger). Yet this does not seem inconsistent with saying that it was morally problematic if he refuses to accept a little increase in risk to save someone from drowning (i.e., his saving the child does not seem supererogatory). Similar issues arise when discussing self-defense. A person may defend himself by shooting an aggressor, even though he likely (but not certainly) could have safely retreated. Do we treat such actions as justified or excused?

³¹ *Id.* at 1898.

³² *See id.* at 1904-05.