

# ENFORCEMENT RIGHTS AGAINST NON-CULPABLE NON-JUST INTRUSION

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Abstract: I articulate and defend a principle governing enforcement rights in response to a non-culpable non-just rights-intrusion (e.g., wrongful bodily attack by someone who falsely, but with full epistemic justification, believes that he is acting permissibly). The account requires that the use of force reduce the harm from such intrusions and is sensitive to the extent to which the intruder is *agent-responsible* for imposing intrusion-harm

What enforcement rights does an agent have in response to a non-culpable non-just rights-intrusion (e.g., wrongful bodily attack by someone who falsely, but with full epistemic justification, believes that he is acting permissibly)? I shall defend a view according to which an agent has an enforcement right to intrude harmfully against another if the defensive intrusion (1) suitably *reduces non-just intrusion-harm* to the agent, (2) is no more harmful to the other than “reasonably” *necessary* to achieve the reduction, and (3) imposes intrusion-harm on the other that is *proportionate* in a specified manner to the reduction achieved. Moreover, although the proportionality restrictions decrease the more the other is *agent-responsible* for imposing intrusion-harm, they can be satisfied even if the other bears no such responsibility. Thus, there are enforcement rights against non-just intruders who are not responsible for the intrusion-harm they impose but not against innocent bystanders (who impose no intrusion-harm).

## 1. Background on the Problem: Intrusion, Unjust Infringement, and Enforcement Rights

I shall defend a principle governing the enforcement rights that individuals have in response to a non-just rights-intrusion, where this is understood as follows.

Individuals have, I shall assume, certain basic rights, such as certain rights of bodily integrity (e.g., the right not to be killed or assaulted). If, as I believe, individuals also have rights to compensation when their primary rights are wrongfully infringed, my discussion below also applies for the rights infringement of failing to provide owed compensation.<sup>1</sup>

A person's rights define certain conditions (e.g., that one not be hit), which, if not satisfied, raise the question of whether the right has been *intruded* upon. If rights are understood as protecting *choices*, then non-satisfaction of the conditions intrudes upon those rights if and only if it is done *without the valid permission of the right-holder*. Rights can, however, be understood as protecting *interests*—with non-satisfaction of the conditions being intrusions, for example, when they are against the interests of the right-holder.<sup>2</sup> I believe that a mixed view is plausible, but, for simplicity of presentation, I shall focus on the choice-protecting account.

The following terminology will be invoked below:

*Intrusion*: The conditions defined by rights are not satisfied by someone (the intruder) without permission of the right-holder.

*Non-autonomous intrusion*: The intrusion is not the result of a (sufficiently) autonomous choice of the intruder (e.g., behaviour of an infant) and thus is neither permissible nor impermissible (and neither just nor unjust).<sup>3</sup>

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<sup>1</sup> I also believe that those who enforce rights against an unjust intruder—whether their own rights or those of others—are owed a financial debt by the intruder equal to the reasonable cost of providing enforcement services in question. Enforcement rights thus also apply to rights-intrusions that are failures to pay the enforcement costs of prior rights-intrusion.

<sup>2</sup> For superb discussion of the debate between choice-protecting and interest-protecting conceptions of rights, see Matthew H. Kramer, N. E. Simmonds, and Hillel Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998).

<sup>3</sup> This terminology departs from that used by Judith Jarvis Thomson, *The Realm of Rights*. Cambridge (MA: Harvard University Press, 1990), pp. 366-69 and Judith Jarvis Thomson, 'Self-Defense', *Philosophy and Public Affairs* 20 (1991), pp. 300-302). She lumps non-autonomous intrusions along with infringements and allows that they can be violations. Michael Otsuka, 'Killing the Innocent in Self-Defense', *Philosophy and Public Affairs* 23 (1994), pp. 74-94, however, successfully argues that such non-autonomous intrusions cannot be violations (e.g., because rocks and bears can intrude upon rights but cannot act wrongly). It follows, I believe, that they cannot even be infringements, since

*Autonomous Intrusion:* The intrusion is the result of an autonomous choice of the intruder (e.g., a normal adult strikes you) and is thus either permissible or impermissible (and either just or unjust).<sup>4</sup>

We can further distinguish between two kinds of autonomous intrusion: infringements and non-infringements. An *infringement* (or unjust intrusion) is an autonomous intrusion for which there is no *strong justification*, where the latter is a justification that is sufficient to ensure that the intrusion *does not wrong* the right-holder. For example, if I shoot an innocent bystander in the leg in order to save a million lives, I infringe her right not to be shot in the leg. By contrast, I do *not* infringe your right not to be shot, if I shoot you in the leg when this is the only way to stop you from wrongly killing me. In this case, there is a strong justification that establishes that you are not wronged.<sup>5</sup>

Among infringements (unjust intrusions), we can further distinguish between those that are *permissible (mere infringements)* and those that are *impermissible (violations)*. The difference is whether there is a *weak justification*, where this is a justification that is sufficient to ensure that the action *is not wrong* in virtue of the intrusion, but which is *not* strong enough to ensure that the intrusion does not wrong the right-holder. For example, if I kill an innocent bystander to save a million lives, I infringe her right not to be killed, but, if saving a million is enough to make the infringement permissible, then I merely infringe her right. By contrast, when I kill an innocent bystander just for fun, there is no weak justification for the

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such intrusions are not wrong even in the absence of special justificatory conditions. Hence, we need the more general notion of intrusion to cover non-autonomous intrusions.

<sup>4</sup> I use ‘infringe’ in the sense given by Thomson (e.g., *Realm of Rights*, p. 122) that leaves open whether the intrusion is permissible. Others reserve ‘infringe’ for cases of permissible intrusion. See, for example, Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), p. 10 and Jules Coleman, ‘Corrective Justice and Property Rights,’ in *Property Rights* edited by Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul (Cambridge: Cambridge University Press, 1994), p. 29.

<sup>5</sup> I am intruding upon your right because (I here assume for illustration) you have not completely forfeited your right not to be shot. For example, if I could avoid all harm simply by shooting in the air, then my shooting your body would wrong you (and this would not be so, if your right not to be shot had been completely forfeited).

infringement, and it is a violation (impermissible).

I shall address defence against non-just intrusions, which include both non-autonomous intrusions and unjust ones (i.e., infringements). This is part of a larger project in which I extend this to cover enforcement rights against those who *facilitate* (e.g., aid and abet) non-just intrusions by others, and rights of third parties to defend the rights *of others*. In this paper, however, I shall consider only enforcement rights against an individual who is intruding upon the enforcer.

*Enforcement rights* are a bundle of rights possessed in virtue of some past, present, or future non-just rights-intrusion. They consist roughly of: (1) moral liberty-rights—perhaps protected by claim-rights against interference—to intrude against a person (e.g., injure or restrain), (2) moral powers to give others such liberty-rights (e.g., to help one exercise one’s enforcement liberty-rights), (3) moral powers to acquire additional rights over that person or his property (e.g., to confiscate some of his property or rights over his labour in order to obtain compensation), and (4) moral powers to relinquish such rights (e.g., by pardoning). For simplicity, I shall focus on the liberty-right in (1), since this is the core right.

Like most people, I assume that there are some enforcement rights (and thus that radical pacifism is mistaken) but these rights are limited in some way (and thus that those who infringe rights do not typically forfeit all their rights).

I shall focus on the enforcement rights individuals have in the absence of a state. Although I believe that individuals initially (prior to any transfer, etc.) have the same enforcement rights in the presence of a state, I shall not attempt to defend that view here.<sup>6</sup>

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<sup>6</sup> For discussion, see, for example, Peter Vallentyne, ‘Libertarianism and the State’, *Social Philosophy and Policy*, 24 (2007): 187-205, and A. John Simmons, ‘Philosophical Anarchism’, in A. John Simmons, *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001), pp. 102-21.

## 2. Intrusion-Harm Reduction

Enforcement rights against another are determined, I shall argue, by the extent to which defensive intrusion would reduce, in certain ways, the intrusion-harms that the other would impose. Moreover, they depend on the extent to which the other is agent-responsible for such harm. In this section, I explain the notion of intrusion-harm to which I appeal.

*Intrusion-harms* are harms (i.e., loss of wellbeing) that are the result of a rights-intrusion (whether or not the intrusion is just). The harm you suffer when I take the last seat on the public bus is not an intrusion-harm, if you have no right against me that I not take that seat. *Direct intrusion-harm* is the harm to the intruded-upon right-holder. *Indirect intrusion-harm* from a given intrusion is the harm to others (third parties; e.g., my wife's suffering when I am beaten up). Although I believe that the reduction of indirect intrusion-harm is relevant to the determination of enforcement rights against culpable intruders, it is not relevant to the condition that I defend for non-culpable intruders. Thus, all references to intrusion-harm should be interpreted as references to direct intrusion-harm.

The reduction of intrusion-harm is the central consideration in the approach that I develop below. Throughout, this harm is to be understood as long-term, and not just short-term, intrusion-harm. On the view that I propose, not all intrusion-harm, however, is relevant to the determination of enforcement rights. First, only *non-just* intrusion-harm is relevant. This is intrusion-harm from unjust intrusions (infringements) or from non-autonomous intrusions. It excludes intrusion-harms from just intrusions (e.g., the harm imposed on a criminal to stop her from killing others). Second, for defensive action against another, only *uncompensated* non-just intrusion-harm is relevant, where this is intrusion-harm for which compensation is owed but not provided. Intrusion-harm for which compensation is owed and provided is not relevant to the condition I defend. Finally, only *net* uncompensated non-just intrusion-harm is relevant, where this is net of any compensation that the agent owes the

other. Thus, if the other imposes uncompensated intrusion-harm on the agent, but the agent owed the other some compensation, then the other's *net* uncompensated intrusion-harm to the agent is suitably reduced. For brevity, all references to intrusion-harm should be understood as references to *net uncompensated long-term* intrusion-harm. Enforcement rights, I shall argue, are determined by how well they reduce such intrusion-harm.

I assume throughout that the permissibility of actions depends on the objective facts at the time of action, and not merely on what the agent believes or should reasonably believe, nor on how things happen to turn out. I shall therefore appeal to *objective probabilities*, understood as propensities, of events happening. If determinism is true, these probabilities will all be zero or one, but, if indeterminism is true, then some of the probabilities will be intermediate values. Of course, the assumption of the existence of such objective probabilities is controversial, but I shall not defend it here. We shall therefore appeal to the *expected value*, based on *objective probabilities*, of the intrusion-harms imposed on someone by a given action. For example, if, relative to a given action that I might perform, there is a 30% chance of ten units of intrusion-harm to you and a 70% chance of only five units of intrusion-harm, then the expected value of the intrusion-harm to you that my action imposes is 6.5 ( $= .3 \times 10 + .7 \times 5$ ). In what follows, then, the intrusion-harm imposed by a given action should be understood as the *objective expected value* of intrusion harm imposed by that action.

Before formulating and defending principles of enforcement rights against non-just intrusion, let me make two methodological comments. First, my goal is to *specify* reasonably fully a set of morally valid enforcement rights. Giving a reasonably full specification will involve a fair amount of complexity, and this will, no doubt, put off some readers. The main alternative approach is to specify simpler pro tanto principles and to leave open the messy business of how they interact. I believe that both kinds of approach are important and useful, but I prefer to attempt a reasonably full specification. Doing so has the disadvantage of

complexity and of effectively ensuring that the principles are false in some respects. The advantage is that the very real complexity is grappled with and claims are specified carefully enough to be refutable. If all investigation were to end next week, then we should surely focus on the pro tanto approach. If, however, investigation is to continue for a much longer period, then the specificationist approach will be one useful way of making progress over time by uncovering specific errors. In any case, it is in this spirit that I advocate the principle that follows.

Second, I defend these principles as fundamental moral principles to be tested by whether they would be endorsed in reflective equilibrium. This is a matter both of their abstract plausibility and of the plausibility of their concrete implications. Readers should be forewarned, however, that, because I take abstract plausibility very seriously, some of the implications disagree significantly with common sense. I take this as a mark against the theory but not a conclusive one. The most plausible theory overall may indeed be rather revisionary.

### 3. Sufficient Conditions for Enforcement Rights against Non-Culpable Non-just Intrusions

Throughout, let Agent be an agent who is intruding defensively and let Target be a person against whom she intrudes. Typically, Target will be a possible intruder against Agent, but this need not be so. I shall defend the following principle:

**Enforcement:** In a given choice situation, Agent has a moral liberty, against Target, to perform a specific act of intrusion upon Target if each of the following conditions holds:

- (1) **Harm Reduction:** Agent's intrusion against Target lowers the (expected value of net uncompensated direct) non-just intrusion-harm to Agent *by all others* compared with that value if Agent does not intrude upon Target in that choice situation;

(2) **Necessity:** Agent has no alternative action that (a) achieves or exceeds the above reduction in intrusion-harm to Agent, (b) involves no infringements of rights of individuals other than Target, (c) is no worse for Agent, and (d) is better for Target (i.e., leaves him better off);<sup>7</sup> and

(3) **Proportionality:** The intrusion-harm imposed is proportionate, as specified below, to the reductions achieved in intrusion-harm to Agent.

In this section, I explain, with some motivation, these three conditions and the resulting principle. In the next section, I defend the principle against objections that it is too strong. The principle supplies only sufficient conditions for enforcement rights and clearly needs to be strengthened in several ways, but I shall not undertake that project here.

The harm-reduction condition requires that Agent's intrusion against Target reduce non-just intrusion-harm to Agent. This includes unjust intrusion and as well as non-autonomous intrusion-harm, from Target and others. These aspects will be defended below. A more general, but still plausible, version of this condition would allow the relevant harm reduction also to include reductions in the intrusion-harm *to others* (and not merely to the Agent), but here I restrict my attention to the weaker condition.

The necessity condition is satisfied when no more harm is imposed on Target than is necessary to achieve or exceed the reduction in the expected value of the non-just intrusion-harms to Agent, without infringing the rights of others and without imposing further costs on Agent. It does not require that intrusion be a *last resort* in the sense of requiring that all other alternatives have been tried already. If the intrusion suitably reduces the expected unjust intrusions-harms to Agent, then Agent is at liberty to intrude as a first resort, as long as it involves no excessive or needless harm to Target. Although limiting significant intrusion to

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<sup>7</sup> I thank David Sobel for flagging an error in a previous formulation.



the last resort may be useful guide in practice, there is little reason to think that this is required in principle in the literal sense. It would limit defensive action far too much. I shall have little to say about the necessity clause in what follows.

The proportionality condition was referenced above, but it was not specified. The rough idea is that there are limits on the intrusion-harm that may be imposed in order to defend against a given intrusion-harm. For example, a common view is that it is normally excessive to kill someone to prevent him from stealing your chocolate bar. Specifying the exact limits, however, is quite difficult and requires considerable complexity. I do this below.

I shall not appeal to any *theoretical* notion of proportionality (about which there would be competing theories). Instead, I shall simply state some specific conditions that limit the harm that may be imposed on Target. I avoid the appeal to theoretical proportionality because I am sceptical that there is any interesting general theory of proportionality.<sup>8</sup> Because Enforcement invokes very specific proportionality conditions (to be specified below), it is, of course, much easier to refute than if it merely invoked a vague reference to proportionality (leaving open what that requires). I believe, however, that specificity (even if I get it wrong) will help us understand exactly what kind of ‘proportionality’ condition is required for enforcement rights.

In agreement with McMahan<sup>9</sup>, I claim that the relevant proportionality condition is sensitive to Target’s *responsibility* for intrusion-harm and for acting impermissibly. Throughout, responsibility is understood as agent-responsibility (also called attributive, outcome, or moral responsibility), as opposed to both causal responsibility and substantive moral responsibility (e.g., being morally liable to punishment, having duty to compensate). To be responsible for an outcome in this sense, the agent must be causally responsible for the

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<sup>8</sup> It’s often not clear whether appeals to proportionality are meant to be appeals to a theoretical notion of proportionality or simply hand-waving that recognizes the need for greater specificity.

<sup>9</sup> For example, McMahan, *Killing in War*.

outcome and the outcome must be ‘suitably reflective’ of the agent’s autonomous agency. There is much debate about what exactly determines when an individual is responsible for something, but it is clear that one can be causally responsible for harm without being responsible for it.<sup>10</sup> This is arguably so when: (1) one’s *agency* was not involved at all (e.g., because an unforeseeable gust of wind blew one against the right-holder), (2) one’s agency was involved but one’s *autonomy* was radically impaired (e.g., the actions of psychotics or of someone in an extreme panic), (3) one was subject to irresistible duress (e.g., a highly credible threat that one’s family will be tortured and killed if one does not perform the action), or (4) one’s autonomous agency was involved but one *could not have known* that one’s choice would have the specified result (e.g., one could not have known that the terrorist had rigged the light switch to set off the bomb). Although a fully adequate theory of responsibility would recognize that it comes in degrees (e.g., based on the above factors), for simplicity I shall generally treat responsibility as a binary concept.

Responsibility, it should be stressed, is relative to a specified outcome. One can be responsible for some outcomes (e.g., the foreseeable results within one’s control) but not for others (e.g., those results that could not have been foreseen). In particular, one can be responsible for intrusion-harm (responsible for both intruding and for the resulting harm) without being responsible for acting impermissibly and vice-versa—even when one performs impermissible acts that impose intrusion-harm. An agent who deliberately shoots an innocent person in the arm can be responsible for the intrusion-harm, but she is not responsible for acting impermissibly if she could not have known that the person was innocent (e.g., if all

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<sup>10</sup> See, for example, John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility*, (Cambridge: Cambridge University Press, 1999), Peter Vallentyne, ‘Brute Luck and Responsibility’ *Politics, Philosophy & Economics* 7 (2008), pp. 57-80, and the many references in each. For simplicity in the present paper, I often assume that agents are fully responsible for the foreseen or reasonably foreseeable results of their autonomous choices. In ‘Brute Luck and Responsibility’, however, I defend the view that agents are responsible only for the (foreseeable) *probability shift* that their autonomous choices induce. This is a much more limited conception of responsibility.

available evidence strongly supported the view that the ‘victim’ was a criminal about to perform mass murder). Moreover, an agent who knowingly trespasses on a person’s property can be responsible for acting impermissibly, but she may not be responsible for the intrusion-harm (e.g., damage to very valuable flowers) if she could not have known about that impact.

I believe that the correct proportionality requirement is sensitive to both responsibility for intrusion-harm and to responsibility for acting impermissibly. In this paper, however, I only address defence against *non-culpable* intrusion-harm. This is intrusion-harm that results from an action for which the agent is *not* responsible for acting wrongly (e.g., because he could not have known that the action was impermissible). I thus address innocent (non-autonomous) threats and innocent aggressors but not culpable aggressors. I would argue that the proportionality requirements are radically weaker in the case where the intruder is culpable. That, however, is a topic for another paper.

The proportionality requirement that I shall defend is intermediate to two common extremal positions. A *strict liability* approach holds that there are no proportionality limits on the harm that one may impose on an unjust intruder, as long as the harm is necessary to avoid non-just intrusion-harm. Responsibility is deemed irrelevant. A *strict responsibility* approach holds that all harm is excessive (disproportionate) against non-just (and even unjust) intruders who are responsible neither for imposing any intrusion-harm nor for acting wrongly. The condition that I will defend agrees with the strict liability approach that proportionality often allows the imposition of intrusion-harm against a non-just intruder who is not responsible for any intrusion-harm. It also agrees, however, with the strict responsibility approach that the greater the responsibility for intrusion-harm the weaker the proportionality restrictions.

I shall defend the following schema, in conjunction with a specification of when a choice by Agent is Target-admissible:

**Proportionality:** The (expected value of the net uncompensated direct) intrusion-harm to Target by Agent's intrusion is no greater than the largest intrusion-harm to Target imposed by one of Agent's Target-admissible choices.

The notion of a choice by Agent being Target-admissible is just a placeholder for a specification of the relevant conditions (to be given below). The key point to note here is that (1) any Target-admissible choice will satisfy Proportionality, and (2) choices that are not Target-admissible will also satisfy Proportionality as long as the intrusion-harm to Target is no greater than some Target-admissible choice.

What, then, are the requirements for Target-admissibility? Let us start with the case where Target is *not* responsible for any intrusion-harm, even though he is non-justly imposing intrusion-harm. Suppose that Target is about to turn on a light switch, and that, although he could not have known this, it will set off a bomb that will cause Agent a loss of ten units of wellbeing. Here, I stipulate that the Target-admissible choices include any choice by Agent that, relative her choices infringing no one else's rights, *minimizes the total* of Target's non-just intrusion-harm to Agent and Agent's intrusion-harm to Target. The idea is that the intrusion-harm to each matters equally, and any choice that suitably minimizes the total is Target-admissible. When combined with Proportionality, this entails that a choice by Agent is proportionate with respect to Target just in case it imposes no more intrusion-harm on Target than some choice by Agent that suitably minimizes the relevant combined intrusion-harm to the two of them.

To illustrate this, suppose that Agent's options are: (1) doing nothing and suffering a ten-unit non-just harm from Target (10-0 distribution of harms), (2) imposing a ten-unit intrusion-harm on Target and suffering no intrusion-harm from him (0-10), and (3) reducing

the harm to herself to one unit by imposing a two-unit harm on Target (1-2). If these are the only feasible actions available to Agent, and none infringes the rights of others, then only the third option minimizes the total relevant intrusion-harm to the two of them (total of three units vs. total of ten for the other two options). Thus, only the third option is Target-admissible, and only the first and the third option are proportionate (since only they impose no more than two-units of intrusion-harm on Target). This treats the intrusion-harm to Target (who is not responsible for any intrusion-harm) on a par with the intrusion-harm to Agent.

Suppose now that Agent has a fourth option that infringes no one else's rights: to impose a one-unit intrusion-harm on Target and to reduce Target's intrusion-harm to Agent to five units (5-1). This does not minimize the total 'relevant' intrusion-harm to the two: its total is six and the second option has a total of three (one unit to Agent and two units to Target). Nonetheless, Proportionality against Target allows Agent to perform this fourth action, since the one-unit intrusion-harm to Target is less than the two-unit intrusion harm to him from the admissible total-minimizing second option.

Consider then the following full statement of Target-admissibility (where the second clause will be explained below):

**Target-Admissible Choice (definition):** A choice by Agent is target-admissible just in case, for that choice, the sum of Agent's intrusion-harm to Target and Target's non-just intrusion-harm to Agent is no greater than: (1) the smallest feasible total, relative to Agent's choices that infringe no one else's rights, plus (2) the (expected value of) the unjust intrusion-harm to Agent by Target *for which Target is responsible for the harm*, if Agent does not intrude against Target.<sup>11</sup>

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<sup>11</sup> I intend this to be understood as holding when Target's actions will impose an unjust intrusion-harm on Agent and Target is responsible for this action imposing intrusion-harm *on someone*. Thus, it does not require that Target be aware that the intrusion-harm will be imposed on Agent. This issue,

Above, we supposed that Target was not responsible for any of his non-just intrusion-harm. In that case, the second clause above is empty and the specification given corresponds to that introduced above. By contrast, where, in the absence of intrusion-against Target, Target would be responsible for imposing *n-units* of (unjust) intrusion-harm on Agent, clause (2) increases the limit, for Target-Admissibility, on the total relevant intrusion-harm for Target and Agent, from the minimum feasible total to that total *plus n-units*. More actions by Agent are deemed target-admissible, and typically the maximum intrusion-harm to Target allowed by proportionality is thereby increased. Consider, for example, the above three-option example, except that Target is fully responsible for the intrusion-harm of *ten units* that he would impose on Agent in the absence of defensive action. Here, the minimum total relevant intrusion-harm is (again) three, and so any action with a total relevant intrusion-harm of no more than *thirteen* (3+10) is admissible. Thus, unlike the original case, Proportionality judges it non-excessive for Agent to impose the ten-unit harm on Target to eliminate all harm to herself.

I shall now defend Enforcement based on these conditions.

#### 4. A Defence

Enforcement is a relatively weak principle. It only provides sufficient (but not necessary) conditions for enforcement rights against those non-justly intruding against the agent. I believe that it can be strengthened to provide plausible necessary and sufficient conditions by (1) weakening the harm reduction requirement to take into account reductions in non-just intrusion-harms *to others* (and not merely the agent), and (2) extending the proportionality requirements to cover *culpable* non-just intrusion harm (which I believe would be radically

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however, requires further attention.

weaker than those provided here for the non-culpable case) and *facilitation* of intrusion-harm (aiding and abetting). Here, however, I shall limit myself to defending Enforcement against objections that it is already too strong.<sup>12</sup>

A first objection to Enforcement is that it can judge Agent to be at liberty to intrude defensively against Target even when Target is responsible neither for any risk of impermissible intrusion nor for any risk of intrusion-harm. Target may, for example, have been unable to know that he was acting impermissibly and unable to know that he was imposing any intrusion-harm. Indeed, the intrusion may not even have been the result of an autonomous choice (e.g., the wind may have unexpectedly blown Target's body towards Agent). Enforcement can indeed judge that Agent has a liberty of defensive intrusion in such cases. It is important to note, however, that the proportionality clause in such cases is very strict. It requires that the intrusion-harm imposed on Target be no greater than that imposed by at least one of Agent's feasible actions that, relative to her actions that infringe no one else's rights, minimizes the sum of the Target's non-just intrusion-harm to Agent and Agent's intrusion-harm to Target. Although it is not judged excessive to impose a 10-unit intrusion-harm on Target when this is the only way of eliminating his 10-unit intrusion-harm to Agent, it is judged excessive when Agent has the option of imposing a one-unit intrusion-harm and bearing eight units of intrusion-harm from Target.<sup>13</sup>

Of course, Enforcement's proportionality restriction will seem too weak to those who insist that all intrusion-harm is excessive against those who are not responsible for imposing unjust intrusion-harm (especially where the intrusion is not the result of an autonomous choice). Such individuals, it may be argued, are just as innocent as innocent bystanders who

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<sup>12</sup> Due to space limitations, I do not address the concerns that the approach is informationally demanding and that it presupposes the wellbeing is interpersonally comparable.

<sup>13</sup> Enforcement thus agrees with Yitzhak Benbaji, 'Culpable Bystanders, Innocent Threats, and the Ethics of Self-Defense', *Canadian Journal of Philosophy* 35 (2005): 585-622 that the relative sizes of the harm imposed and the harm prevented matter.

pose no threat of unjust intrusion-harm and they should be treated no differently. I agree that they are just as innocent. I deny that they may be treated only as an innocent bystander may be treated. Unlike innocent bystanders, innocent intruders are intruders. I am not here denying that responsibility is relevant for the liberty to intrude defensively. I fully agree that it is highly relevant. My claim is that, although responsibility for intrusion-harm can increase the maximum proportionate intrusion-harm, absence of such responsibility does not reduce it to zero.

Enforcement occupies a position between two more common positions with respect to responsibility for intrusion-harm. On the one hand, some argue that what matters is unjust (or perhaps non-just) intrusion-harm and not responsibility for unjust intrusion-harm. They claim that those who impose unjust intrusion-harm without being responsible for such may be treated the same as those who deliberately impose unjust intrusion-harm.<sup>14</sup> On the other hand, some argue that what matters is *responsibility* for unjust intrusion-harm. They claim that those who impose unjust intrusion-harm without being responsible for such should be treated the same as those who pose no threat of unjust intrusion-harm (e.g., innocent bystanders).<sup>15</sup> Enforcement holds that *both* non-just intrusion-harm and responsibility for intrusion-harm are relevant. Non-responsible intruders are *not* the same as innocent bystanders because they pose a risk of intrusion-harm. Non-responsible intruders are not, however, the same as those who deliberately impose the risk of intrusion-harm; they are not responsible for the risk that they impose. The proportionality clause reflects this dual sensitivity.

A second objection concerns that manner in which Enforcement makes proportionality depend on responsibility for (non-just) intrusion-harm. Relatively

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<sup>14</sup> See, for example, Thomson, 'Self-Defense'.

<sup>15</sup> See for example, Otsuka, 'Killing the Innocent in Self-Defense' and McMahan, *Killing in War* (e.g., pp. 170-181). It should be noted, however, that Otsuka, and to a lesser extent McMahan, focus on non-autonomous intrusions as opposed to autonomous intrusions for which the intruder is not responsible for acting unjustly or for imposing risk of intrusion-harm. For criticism, see Jonathan Quong, 'Killing in Self-Defense', *Ethics* 119 (2009): 507-537.



uncontroversially, it holds that the proportionality restrictions are generally weaker the greater the intrusion-harm for which Target is responsible. More controversially, it holds that the maximum admissible total relevant intrusion-harm is increased by the amount of the (non-just) intrusion-harm for Target will be responsible if Agent does not intrude against Target. This may seem arbitrary. There are an infinite number of ways in which responsibility for intrusion-harm might increase maximum proportionate intrusion-harm. Why is the above manner the correct one?

This is an excellent question and I have no compelling answer. Of course, if one simply appeals to the theoretical notion of proportionality, with no specification of what it requires, one does not confront the problem of apparent arbitrariness. My goal, however, is to be more specific so that such questions can be addressed directly. That, of course, does not guarantee that I have good answers! Still, two considerations provide some support for Enforcement's proportionality requirement. One is the abstract plausibility of increasing the maximum admissible relevant total intrusion-harm by the amount for intrusion-harm for which Target is responsible. This has greater abstract plausibility than appealing to 50%, 300%, or any other percentage. The other consideration in support of this view is that it gives relatively plausible concrete implications. Certainly, 100% is more plausible than .00001% or 10,000%. This leaves open a wide range of possibilities, but the abstract plausibility of 100% then provides special support for 100%. Of course, there may be a more plausible way of making proportionality depend on responsibility, but until one is specified, the proposed view has, I think, enough plausibility to be taken seriously. At a minimum, it should help promote the discovery of more plausible specifications.

A third objection to Enforcement is that it is too strong in that it can permit intrusion against an individual who has never intruded against another and for whom there is no danger of *imminent* intrusion. Indeed, it can permit defensive intrusion against those who *probably*

*will never* intrude against anyone. This is because Enforcement appeals to a reduction in the *expected value* of Target's non-just intrusion-harms. This includes all such possible harms, weighted by their probabilities, that Target may produce now *and in the future*. Thus, Enforcement can recognize enforcement rights against Target when there is only a 1% chance of non-just intrusion-harm 10 years hence, with no chance of any intrusions before then. The principle, that is, can justify preventive attack, and not merely defensive action to intrusions already in progress and pre-emptive attack (in response to imminent intrusions). Many find this implausible.

To start, let us note that, although the harm-reduction condition holds that all future possible non-just intrusion-harm can ground enforcement rights, the proportionality condition limits the relevant impact. If Target has not yet made any autonomous choices that increase the chance of the future non-just intrusion-harm, he is not yet responsible for that harm (even if it is highly likely that he will impose it). Moreover, if Target has made some such choices, but they only slightly increase the chance of intrusion-harm, and he is suitably aware, then he is only slightly responsible for the intrusion-harm. Hence, the proportionality requirements will be fairly strict relative to the harm to Agent. Nonetheless, Enforcement will often allow some enforcement rights in such cases, given that the proportionality requirements allow some intrusion-harm against Target even when he is not responsible for the intrusion-harm that he non-justly imposes. Therefore, a weakened form of the objection remains.

Common sense is indeed sceptical of the permissibility of preventive attack, but I claim that common sense is mistaken in this regard. I see no difference in principle between an individual who is 90% likely to intrude in two years and one who is 90% likely to intrude in two minutes (with no other relevant differences). Of course, typically, one has more options available to stop intrusions two years hence than to stop intrusions two minutes hence. Thus, some just ways of stopping the latter will not be just ways of stopping the

former (because of the necessity requirement). This, however, is merely a contingent difference. Temporal distance in the future as such seems irrelevant. It is the probabilities that matter.

One might agree that there is no principled difference between imminent intrusions and distant intrusions and simply insist that defensive intrusion is justified in neither case. Only intrusions that have *already* taken place, or, less restrictively, are *100% certain* (which could include some future ones), one might argue, justify a defensive response. This view, however, takes an excessively limited view of enforcement rights. We do not have to wait for an intrusion to take place or be 100% certain in order to take just defensive action. Surely, we are sometimes permitted to intrude defensively against 99% or even 90% chance of intrusion. Moreover, there is no reason in principle to limit defensive action to cases where the intrusions are highly likely. It also depends on how large the intrusion-harm will be.<sup>16</sup> Of course, in practice, our knowledge is highly limited, and it may well be advisable in general to limit defensive intrusion to cases that are imminent, highly likely, and/or in process.

A fourth objection to Enforcement is that it holds that intrusion-harm may be imposed on Target in order to reduce the non-just intrusion-harm *from others*. This is because the harm reduction condition only requires a reduction in the total non-just intrusion-harm to Agent *by anyone*. This need not involve any reduction in non-just intrusion-harm from Target. It may simply deter others from non-justly intruding against Agent, or even just reduce the intrusion-harm to her when they do. It is important to keep in mind, however, that the proportionality requirement rules out imposing any intrusion-harm on someone who does not impose any non-just intrusion-harm (innocent bystanders). Thus, only those who are

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<sup>16</sup> For further defenses of preventive attack, see Thomson *Realm of Rights* (p. 364); Thomas Hurka, 'Proportionality in the Morality of War', *Philosophy and Public Affairs* 33 (2005): 34-66; David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), p. 41; Gerhard Øverland, 'Killing Soldiers', *Ethics and International Affairs* 20 (2006): 455-75; and Michael Doyle, *Striking First: Preemption and Prevention in International Conflict* (Princeton: Princeton University Press, 2008), p. 474.

imposing non-just intrusion-harm are liable to being used as means to deter others. Moreover, if they bear little or no responsibility for such intrusion-harm, the proportionality requirements will very radically limit the harm that may be imposed on them for that purpose. For those that bear significant responsibility for non-just intrusion-harm, Enforcement does indeed justify using them as means for reducing non-just intrusion-harm to Agent from others, but they are not being used merely as a means, since even here the proportionality and necessity requirements hold. Moreover, given that in this case Target is (autonomously) unjustly intruding and responsible for significant intrusion-harm, it seems reasonable that he becomes liable to being used to reduce intrusion-harm to Agent.

A fifth objection to Enforcement is that it can judge that one is at liberty to intrude against Target even though this *increases* non-just intrusion-harms *to others*. This is so because Enforcement has no conditions concerning the impact on others. Here, we need to consider two cases: where Target is not acting permissibly and where he is. An example of the former case, is where Agent can obtain a small reduction in unjust relevant intrusion-harm to herself, but enraged Target will then go off and impose enormous impermissible intrusion-harms on each of many other people. It may seem implausible that Agent is permitted to defend herself in such a case. The reply, however, is simple. I am not claiming that Agent is so permitted. I am only claiming that she has a liberty-right *against Target* to defend herself. Such defence may be unjust or impermissible because it infringes rights that *others* hold against Agent. My only claim is that Target is not wronged (i.e., Agent has a liberty-right to so defend herself).

Consider, then, the second case, where Target is *acting permissibly* in unjustly intruding upon Agent. Target's action infringes, but does not violate, Agent's rights. For example, perhaps Agent is fully innocent but Target's attacking her is the only way of saving a billion lives. Here, Agent's liberty, against Target, to defend against Target's attack is more

difficult to justify. Still, given that Agent is innocent and Target is infringing her rights, it is hard to see why Agent would not have some enforcement rights against Target. This is not, however, to say that it is permissible for Agent to exercise those rights. She may owe duties to others that she not do so. Indeed, this is the most plausible explanation. Given that a billion lives are at stake, those individuals may have a claim-right that she not defensively intrude against Target (similar to the situation in which she promised her mother not to do so). Such defensive intrusion may be impermissible, but that does not show that she does not have enforcement rights *against Target*. Obviously, the issue is complex, but I shall not undertake further defence here.

A sixth objection is that variations among individuals in the capacity for wellbeing will generate variations in the strength of enforcement rights. This arises both because the harm-reduction clause is sensitive to whether a given intrusion harms Agent at all and because the proportionality clause is sensitive to the magnitudes of the intrusion-harms to Agent and to Target. All else being equal, those with greater vulnerability to loss of wellbeing will have stronger enforcement rights and stronger protections against intrusion. Intuitively, this seems inappropriate.

In reply, let us start with the case where an individual is *not responsible* for his greater than average vulnerability to loss of wellbeing (i.e., it is a matter of brute luck and not cultivated). Here, it seems quite appropriate for enforcement rights to be sensitive to the actual intrusion-harm. Next, suppose, as is plausible, that individuals are at least partially responsible for their specific vulnerability to loss of wellbeing from intrusions. We shall consider the case where the individual is Agent and the case where the individual is Target. For the former, there again seems to be little reason not to take their actual harm to be the relevant harm. Suppose that Agent devotes her life to playing the piano well and, as a result, she would lose much more wellbeing from damage to her little finger than most. Still, if

Target is non-justly intruding upon her little finger, surely the strength of Agent's enforcement rights depends on how much actual wellbeing she can protect. She may not be entitled to any help in promoting her cultivated interests, but surely she is entitled to protect them when non-justly intruded upon.

The more difficult case is the second one, where Target is responsible for having a greater vulnerability to loss of wellbeing. Here, it may seem implausible that he could make himself less liable to defensive attack against his non-just intrusion (especially if unjust) merely by cultivating greater vulnerability to intrusion-harm. I believe that this is indeed implausible in the case of *culpable* non-just intrusions (i.e., where the agent is responsible for acting wrongly), but I am not addressing such cases in this paper. Here, we are addressing only non-culpable non-just harmful intrusion, and there are three sub-cases: non-autonomous intrusion, autonomous intrusion with no responsibility for any intrusion-harm, and autonomous intrusion with responsibility for intrusion-harm. For the first two sub-cases, there is no reason to treat them differently from the case of Agent above. In all these cases, the individual is non-culpable and not responsible for any intrusion-harm. His actual wellbeing is what matters. (Keep in mind that I here appeal to the correct account of wellbeing. I do not assume welfarism.) The third case, where the intruder is responsible for intrusion-harm, is not as obviously the same, but, given that he is non-culpable, even here the focus on actual wellbeing seems appropriate. Although he is acting unjustly, and perhaps impermissibly, he is not responsible for so acting (e.g., due to unavoidable ignorance). Obviously, this is a complex issue that requires a more elaborate discussion, but I shall not pursue it further here.

A seventh objection is that Enforcement fails to distinguish between intrusions upon *rights to one's person* and intrusions upon *rights to external things*. Even if Enforcement is correct about the former, it might be argued that it is too strong for intrusions against the latter. Enforcement does indeed lump together intrusion-harms from all kinds of intrusions,

but this, I claim is correct. What matters is the harm *to persons* from intrusions. It does not matter what kind of intrusion produced a given intrusion-harm. The large intrusion-harm from the destruction of a cherished object is far more important to protect than the trivial intrusion-harm of a light punch. One might insist, however, that, because intrusion-harms from intrusions against rights to external property can typically be rectified whereas intrusions against rights in one's person often cannot, enforcement rights are weaker with respect to external things.<sup>17</sup> I fully agree that intrusions-harms that are not fully compensable should be treated differently from those that are. Enforcement is sensitive to this because it focuses on net *uncompensated* intrusion-harms. Intrusion-harms that will be voluntarily, or forcibly, fully compensated provide no justification for defensive intrusion. This provides, however, no reason to treat intrusions against property as fundamentally different from those against persons. Some intrusions against rights to personal external property may be not rectifiable (e.g., one's favourite drawing by one's dead child), and some intrusions against rights to one's person (e.g., a gentle push) are fully rectifiable. What matters is whether the harms will be fully compensated, not the nature of the intrusion.

Obviously, there are other aspects of Enforcement to which one might object, but enough has been said, I hope, to give at least the general shape of Enforcement some plausibility.

## 5. Conclusion

I have formulated and partially defended a sufficient condition for enforcement rights against non-culpable non-just intrusions. I believe the condition can be strengthened to a necessary and sufficient condition by (1) weakening the harm reduction requirement to include non-just intrusion-harm to others (and not just to Agent), and (2) weakening the proportionality

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<sup>17</sup> See Rodin, *War and Self-Defense*, p. 44, for a defense of this view, although his claim is the weaker claim that the *lethal* use of force is limited to the defense of intrusion against persons.

requirement so that higher limits are set for those responsible facilitating non-just intrusion-harm by others and radically higher limits are set for those who culpably intrude. That, however, is a topic for another paper.

I have no doubt that Enforcement, given its specificity, is mistaken in many ways. My hope is that the mistakes are correctible within the general approach, but I will not be surprised if certain fundamental aspects of the approach turn out to be mistaken. I believe, however, that the approach is promising enough to be worthy of further consideration. At a minimum, exposing its errors should be instructive.<sup>18</sup>

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