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What Is Self-Defense?\*

### *Introduction*

In this paper, I will provide a conceptual analysis of the term self-defense and argue that in contrast to the widespread “instrumentalist” account of self-defense, self-defense need not be aimed at averting or mitigating an attack, let alone the harm threatened by it. Instead, on the definition offered here, an act token is self-defense if and only if a) it is directed against an ongoing or imminent attack, and b) the actor correctly believes that the act token is an effective form of *resistance* or the act token belongs to an act type that usually functions as a means to resist an attack. While resistance is effective in making the attack more difficult, it can often be overcome and therefore does not necessarily stop or mitigate the attack. This concept of self-defense, I shall argue, not only matches ordinary language use and plausible accounts of self-defense in the legal literature but also has important practical implications in helping to avoid confusions about necessity and proportionality. In particular, it avoids the notorious problem of the “knowingly helpless rape victim” whose futile struggle against the rapist (futile in terms of averting or mitigating harm) counter-intuitively could not count as justified self-defense on an instrumentalist account.

*1. Self-defense is directed against attacks and need not aim at averting or mitigating harm*  
Cicero, in a foundational text on the topic, characterized self-defense as an action that *repels violence* by violence.<sup>1</sup> Samuel Pufendorf defines self-defense as “the warding off of evils which tend to a man’s injury, and are threatened by another man.”<sup>2</sup>

The German Penal Code provides an explicit definition along the same lines. §32 states:

(1) Whosoever commits an act that is required (*geboten*) for self-defense (*Notwehr*) does not act against the law.

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<sup>1</sup> Cicero, “Oration for Titus Annius Milo,” The Society for Ancient Languages, <http://www.uah.edu/society/texts/latin/classical/cicero/promilone1e.html>, accessed on 1 June 2012.

<sup>2</sup> Samuel Pufendorf, *De Jure Naturae Et Gentium Libri Octo*, Volume Two, trans. by C. H. Oldfather and W. A. Oldfather (Oxford: Clarendon Press, and London: Humphrey Milford, 1934), p. 264 (182) [II.V.1].

(2) Self-defense is the defense necessary to avert a present (*gegenwärtig*) unlawful attack on oneself or others.

Section 35.15 of the New York State Penal Code gives at least an implicit characterization of self-defense. Under the heading “Justification; use of physical force in defense of a person,” it states.

A person may ... use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person ...<sup>3</sup>

If one took the wording of section 35.15 of the New York State Penal Code literally, then one could use physical force only against another physical force and not against rights violations that do not strictly speaking constitute the use or imminent use of physical force. However, such a strict interpretation would lead to very counter-intuitive results. Offering someone a poisoned apple, for example, seems not to be an instantiation of physical force strictly speaking (that is, in the sense of fists and knives). Yet one is certainly allowed to tackle the evil queen with physical force in order to prevent her from giving the apple to Snow White if there is no other way to save Snow White. And one is certainly also allowed to use force, if necessary, to stop a person who tries to release a lethal gas in the area where one is innocently standing – although such a use of chemicals does not, according to the United States Court of Appeals, Tenth Circuit, constitute “physical force” because it is not “mechanical” enough.<sup>4</sup> German law, on the other hand, avoids such counter-intuitive results and is therefore to be preferred. In German law, as the commentators make clear,<sup>5</sup> an *attack* is every threat of violation or actual violation of an interest that is protected by law (that is, of a right) insofar as this threat stems from human action.<sup>6</sup>

In any case, all the four characterizations of self-defense referred to above are united in seeing self-defense as *directed against attacks* (even if there might be different interpretations of what counts as an attack). The primary object of self-defense is, according to these formulations, to ward off “evils which tend to a man’s injury” (that is, to ward off attacks), it is *not* to ward off the injuries or harms themselves. (This, incidentally, also shows in the fact

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<sup>3</sup> New York State Legislature, “§ 35.15,” available at [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$PEN35.15\\$@TXPEN035.15+&LIST=SEA5+&BROWSER=BROWSER+&TOKEN=25170822+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$PEN35.15$@TXPEN035.15+&LIST=SEA5+&BROWSER=BROWSER+&TOKEN=25170822+&TARGET=VIEW), accessed on 6 Dec 2013.

<sup>4</sup> Cf. FindLaw, “United States v. Rodriguez Enriquez,” available at <http://caselaw.findlaw.com/us-10th-circuit/1003726.html>, accessed on 17 Feb. 2011.

<sup>5</sup> I am following here the usual commentaries: Heinrich Wilhelm Laufhütte et. al (eds.), *Strafgesetzbuch: Leipziger Kommentar, Großkommentar*, Vol. 2: §§ 32 to 55 (Berlin: De Gruyter Recht, 2006); Wolfgang Joecks and Klaus Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Vol. 1* (Munich: C. H. Beck, 2003); Hans-Joachim Rudolphi et. al. (eds.), *Systematischer Kommentar zum Strafgesetzbuch* (Cologne: Luchterhand, 2010).

<sup>6</sup> Of course, in common parlance – with which I agree – one can also defend oneself against attacks stemming from animals, for instance.

that it is linguistically awkward at best to say “I defended myself against the harm” while it obviously comes naturally to say “I defended myself against the attack.” The words “attack” and “defense” are made for each other; the words “harm” and “defense” are not.)

Consider, for instance, the case of an old gunfighter weary of life. Again and again he is unjustly attacked by young gunslingers who want to build a reputation by killing him. He secretly hopes that one of them will succeed sooner rather than later, but his professional ethics as a gunfighter (or simply habit) does not allow him not to fight back when attacked. So he does fight back, but, given his mood, without the *intention* of averting the harm of being killed. Of course, if he averts the attack, the harm will be averted too, but this is only a side-effect, not an *aim* of his actions. Still, his fighting back clearly counts as self-defense both under law and according to the ordinary use of the term “self-defense.”<sup>7</sup>

But is it not possible, one might object, for someone to *intend* to avert a harm and simultaneously *hope* that he does not avert the harm? Yet, even if that were possible, what the proponent of the view that self-defense necessarily aims at averting harm has to show is that it is *impossible* for someone to defend him- or herself without intending to avert harm. In the light of the above example, however, this is a tall order.

Admittedly, intention and hope can diverge. There are, after all, two ways of intending something: as an end in itself or as a means to an end. In my view, Jonathan Bennett’s famous terror bomber<sup>8</sup> – *pace* Bennett himself – does intend to kill the civilians *although* he would welcome a miracle by which the terror effect he aims at would be achieved by the civilians’ merely appearing dead instead of actually being dead. His welcoming this miracle only shows that he does not pursue the death of the civilians as an *end in itself*, but it does not show that he does not intend their death at all. If the terror bomber *knows* that he can only achieve the terror effect through the death of the civilians and tries to cause their death in an attempt to achieve the terror effect, then his trying to cause their death *is* nothing other than pursuing and intending their death as a means to achieve the terror effect – and this intention is indeed compatible with the hope that the civilians survive (but appear dead).<sup>9</sup>

Yet, in the present example of the gunfighter, averting the harm is *not* a means to some further end. Therefore, stipulating that he *must* intend to avert the harm if he fights back is exactly that: mere stipulation. Someone who shoots back at an aggressor need not intend to avert a harm any more than someone who puts sugar in his coffee need to intend to avert a bitter taste. You can do both things for all kinds of reasons (for example, because somebody

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<sup>7</sup> I have come across the claim that if the old gunfighter is really weary of life and only fights back in order to preserve his standing as top gun, the killing of the aggressor would be disproportionate. First, this is irrelevant for my present conceptual point, and second, the objection rests on an implausible account of proportionality. See also the brief discussion of proportionality below.

<sup>8</sup> Jonathan Bennett, “Morality and Consequences,” in Sterling M. McCurrin (ed.), *The Tanner Lectures on Human Values*, Vol. 2, (Salt Lake City: University of Utah Press: 1981), pp. 45-116, at 100-111.

<sup>9</sup> Uwe Steinhoff, *On the Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007), pp. 37-41.

paid for it or because it is customary or a habit of yours).

2. *Although self-defense is directed against attacks it need not be aimed at averting or mitigating them*

In the previous section I argued that self-defense need not be aimed at averting or mitigating *harm* but can for example be merely aimed at averting or mitigating the *attack*. However, we can go still a step further (and here I diverge from what at least the *formulations* used by Cicero, Pufendorf, the German Penal Code, and New York State Law suggest, but not from what some German penal code commentaries explicitly affirm). To wit, if the gunfighter wants to die, he will of course hope that the unjust attempt on his life will *succeed*, and therefore he need *not* intend to avert or mitigate the attack. Although he fights back as competently and fiercely as he always does and indeed knows that this will probably stop the attack, he thinks: “I hope he is able to dodge my bullets and kill me.” Thus, the gunfighter need *not* intend to avert or stop or mitigate the attack against him (since, as before, averting or mitigating the harm is not a means to some further end). (Consider also this example: A singer who knows that her most perfect singing will enthuse the opera critic need not intend to enthuse the opera critic with her perfect technique. There simply is a difference between doing something because you like the perfection and accomplishment of the action itself and abhor compromises, and doing something because you actually *intend* to achieve the *effect* that will foreseeably result from your action.)

Yet, he is nevertheless clearly defending himself in the ordinary sense of the term. We can see this by imagining him victorious again and by considering someone saying in the saloon: “Well, we all know that he hoped that the guy would kill him, so he did not really defend himself.” An inevitable rejoinder by some of the other witnesses of the fight would certainly be something along these lines: “What do you *mean*, ‘He didn’t defend himself’? We *saw* him defending himself, trying his best, as he always does. He put *five bullets into the guy’s chest*. Looks like pretty effective self-defense to me.” Indeed, it does.

Thus, force directed against an imminent or ongoing attack *can* be self-defense (of course certain other measures – not only force – can count as self-defense too, in particular in German law) even if the defender does not *intend* to avert the harm or the attack.

To be sure, that our gunfighter’s shooting back – without the intention to avert or mitigate the harm or attack – *can* be self-defense does not mean that it *is* self-defense. It would not be self-defense if one accepted the assumption that only acts that are *in fact* effective in stopping or mitigating the attack can be self-defense. Yet, this assumption is implausible and flies in the face of ordinary language use. If the old gunfighter had fired one shot at his attacker, intending to hit him, but failed and was killed by the second shot of the attacker, we would still say that the gunfighter had defended himself. Unsuccessful self-defense is still self-defense. This is, at least in my experience, the way people normally speak about self-defense. We say, for example, “He died defending himself” or “She defended his life like a lioness, but in the end she could not save him” – there is certainly no self-contradiction involved in such a statement.<sup>10</sup>

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<sup>10</sup> To be sure, some philosophers and lawyers might talk differently, adapting their language

Furthermore, if a person can be engaged in self-defense without *intending* to avert the threatened harm or the attack, then there is also no reason to assume that she cannot be engaged in self-defense while *firmly believing* that her actions will not even mitigate the harm or the attack.

Consider, for example, the following scenario:

Sally, who has taken a self-defense course, goes through this world firmly believing that she has a good chance of defeating Bill in close combat. One day Bill maliciously pulls at her hair, and she reflexively punches him with a right hook, as she learned to do in the self-defense course.

Is this self-defense? Of course it is. We would say, “Bill pulled Sally’s hair and she defended herself by punching him.” Consider now a different scenario, concerning a world where Superman really exists.

Sally, who has taken a self-defense course, goes through this world firmly believing that any attempt to defend oneself against Superman is entirely futile. One day Superman (power corrupts) maliciously pulls at her hair, and she reflexively punches him with a right hook, as she learned to do in the self-defense course.

Intuitively and semantically (these at least are my semantic intuitions), this is still self-defense. Moreover, in both cases she does exactly the same thing, and, in fact, her belief has no causal effect on her action (which is, as I stated, reflexive). But why should the defensive character of an action hinge on a causally ineffective belief? This would require some – very curious, I suspect – explanation; and without a plausible explanation, denying that Sally’s punching Superman was an act of self-defense seems to be mere stipulation.

A further way of illustrating this is by considering the antonym of “defense,” namely “attack.” Consider Sally (still believing that the man of steel is invulnerable), who waits somewhere on a roof with her heavy machine gun for Superman flying along. When he does, she opens fire at him, and the bullets bounce off his chest. This is clearly an attack on him. If Superman complained to a judge, “I just flew along minding my own business, and then she attacked me,” the judge would hardly say: “Nonsense, she knows that you are invulnerable, so it wasn’t an attack at all.” Shooting at someone with a machine gun *is* an attack, whatever the attacker might believe about the effectiveness of his act. True, the fact that Sally knows Superman to be invulnerable means that her act certainly cannot be attempted murder; it might even qualify as a “prank” (somewhat depending on whether Sally considered her act to be funny or not), but of course even pranks can come in the form of attacks. However, if attacks that the attacker knows to be ineffective are still attacks, it is mysterious why defense that is known to be ineffective cannot still be defense.

Consider yet another example. Someone has thrown Sally to the ground and now tries to sink his knife into her chest, while she has grabbed his wrist, trying to keep the knife away. For reasons of his own, the attacker is determined to have the knife enter his victim’s chest exactly 20 seconds (not earlier, not later) after he has thrown the victim to the ground. He is stronger than Sally, so Sally could at best slow down the pace at which the knife is

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use to their theory. They might thereby, however, not be talking anymore about what people usually call “self-defense.”

unstoppably approaching her chest. And, indeed, she *would* slow the attacker down if he pushed down the knife with all his strength, but he does not do this because of his 20 second rule. What he does do is adapt his aggressive efforts to her resistance: the harder she resists, the harder he needs to push in order to keep his schedule.

Thus, Sally's defense does not even *mitigate* the aggressor's attack: whether she resists or not, the knife will enter her chest at the same time in both cases. In this sense, her self defense is entirely futile. Yet, to say of a woman who has grabbed the wrist of her murderer and applies all her strength to keep the knife away that she is *not* defending herself seems to be extremely odd. It does not, in my view, become less odd if we assume that the woman actually *knows* that she cannot slow down the murderer. Her resistance *is* self-defense.

The same would apply to the old gunfighter even if in the end he succumbs to the attack: the opponent will react and attempt to adapt to the defensive measures of the gunfighter – he will duck, seek cover, be hindered in his attempt to get out a well-aimed shot. The gunfighter's resistance makes the attack more difficult and thus the gunfighter defends himself.

Likewise, an overpowered woman scratching and biting a rapist is defending herself against the attack, even if all she achieves is to make it even more violent. Instead of being able to force his will on the woman without resistance, the rapist is forced to react to her struggle, loosing his grip around her throat to fend off her scratching hands, keeping his head at a distance in order not to be bitten, etc. In short, he has to adapt his strategy and the details of his attack to her resistance. Most people, I submit, will intuitively most certainly say that she is *defending* herself by those means.

At this point, however, I have come across the objection that these acts of the woman can only count as defenses against particular *components* of the rape, not as parts of a defense against the rape itself. (And Sally, I presume, could not even be said to defend herself against components of the murder in process: one would have to say, absurdly, that she is not defending herself at all). However, such a view seems to presuppose either the assumption that only acts that are in fact effective in *stopping* or *mitigating* the attack can be self-defense or the assumption that one cannot defend oneself against an attack if one knows that this alleged defense will not stop or mitigate the attack; and I have already dealt with these assumptions above: in the light of the gunfighter and the Sally example and in light of the way the term “self-defense” is used in ordinary language, they are both implausible. Moreover, such a view would also have the silly implication that the Polish army did not defend itself against the German invasion in the Second World War, but only against “components” of the invasion – which means that such a view is entirely out of touch with ordinary language use.

I conclude that futile self-defense is still self-defense, even if the defender *knows* it to be futile. Accordingly, *self-defense is not necessarily instrumental* in the sense of being aimed at averting or mitigating an attack or the harm threatened by it.<sup>11</sup> (From now on, I will use

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<sup>11</sup> Several present-day ethicists claim that it is instrumental in this sense. See for example Jeff McMahan, “Duty, Obedience, Desert, and Proportionality in War: A Response,” *Ethics* 122(1) (2011), pp. 135-67, esp. at 160; David Rodin, “Justifying Harm,” *Ethics* 122(1)

“instrumental” in this sense, not least because it is precisely the sense in which philosophers claiming that self-defense is “instrumental” use the term.)<sup>12</sup>

3. *Actual self-defense must and can nevertheless be distinguished from a mere attempt to defend oneself*

Of course, sometimes we say that a person merely *tried* to defend himself. However, with such statements we seem to be referring to cases where, for example, the gunfighter only tries to fight back but does not get his revolver out of his holster, or has forgotten to load it.

This distinction between trying to do something and actually doing it must not be erased. After all, there is, with *any* action, a difference between trying to do it and doing it, and this is no different with self-defense. But what then makes an act intended to be self-defense actual self-defense?

I propose the following *definition of self-defense* (I will further develop the reasons for its elements in the course of the discussion):

An act token is self-defense if and only if a) it is directed against an ongoing or

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(2011), pp. 74-110, esp. p. 81; Daniel Statman, “On the Success Condition for Legitimate Self-Defense,” *Ethics* 118(4) (2008), pp. 659-686, esp. pp. 663-4; and Suzanne Uniacke, “Self-Defence, Just War and a Reasonable Prospect of Success,” in Helen Frowe and Gerald Lang (eds.), *How We Fight* (Oxford: Oxford University Press, 2014), pp. 62-74, at 66. In a recent “PEA Soup” online symposium on a dispute between John Gardner and François Tanguay-Renaud on one side and Jeff McMahan on the other there was a consensus among numerous philosophers that self-defense is instrumental. See <http://peasoup.typepad.com/peasoup/2012/01/ethics-discussions-at-pea-soup-john-gardner-and-fran%C3%A7ois-tanguay-renauds-desert-and-avoidability-in-.html>, accessed on 10 February 2012. None of the authors there, however, nor Rodin and Uniacke, provide any argument or conceptual analysis to support their claim. (Statman might appear to try to derive the success condition from the necessity condition, but in fact this alleged derivation already presupposes the instrumentalist account.) Incidentally, my denial that self-defense is *necessarily* instrumental is completely compatible with the explicit affirmation that in most cases self-defense *is* instrumental. But that will then be due to the intentions of the defender, and not due to an essential feature of self-defense.

<sup>12</sup> Incidentally, a “proof” by etymology, of the form “‘defense’ implies ‘fending off’” does not work. According to the same (etymo)logic “‘assassinate’ implies ‘using hashish’” – but as the word is actually used, it certainly does not. Besides, if defense implied fending off, then unsuccessful defense would be no defense at all (it is called “defense” after all, not, for instance, “intendodefense”). But we know that unsuccessful defense can be defense too (and instrumentalists do not seem to deny that): the gunfighter shooting back at the attacker with the intention to avert the attack is clearly defending himself, even if he should be killed. Moreover, the German legal term for self-defense is *Notwehr*. *Not* means “emergency,” and while the verb *wehren* is a part of *abwehren*, which indeed means “to fend off,” it is also a part of *sich wehren*, which merely means “to resist,” “to struggle.” In short, etymology will not be able to tip the scales here.

imminent attack, and b) the actor correctly believes that the act token is an effective form of *resistance* or the act token belongs to an act type that usually functions as a means to resist an attack.<sup>13</sup>

Note that to *resist* an attack is less than to *mitigate* it. In the example of the 20 second killer, Sally resisted the killer's murderous attack, but she did not mitigate it in the least: the knife will be pushed into her chest 20 seconds after she is thrown to the ground, whether she resists or not.

However, in this case Sally's defensive measures were at least effective in the sense that the attacker had to heighten his efforts to get the same results. In contrast, we can assume that Sally's punch against Superman was entirely ineffective, given Superman's superstrength and invulnerability. Yet, it would still appear to be self-defense. A snake biting a hungry bear that just caught it also seems to be thereby defending itself, even if the bear's skin is so thick that the bear does not even register the bite. The snake is fighting for its life against the bear, and isn't fighting for one's life in response to an attack the paradigmatic example of self-defense? The answer appears to be "yes."

But although an act that is entirely ineffective in resisting an attack can still be an act of self-defense, an act that has absolutely no chances of effectively resisting the attack (as Sally effectively resisted the 20 second murderer) *and* does not belong to a type of act that usually functions as a means to resist an attack is *not* an act of self-defense. This is how the difference between actual self-defense and merely attempted self-defense comes back in.

The reason, thus, why the second condition (condition b) of the definition of self-defense above is formulated as an alternative (that is, with an "or") is that it has to account for a variety of things. First, we call even certain kinds of reflexive or even instinctive behavior "self-defense." A spider trying to fight off a spider wasp is – as the narrators in pertinent animal documentaries tell us – certainly defending itself (although it seems that its chances to actually fight off the wasp are slim), but the spider need neither intend nor believe anything to be engaged in self-defense. It is quite sufficient that its instinctive and reflexive counter-moves resist the wasp's attack and make it more difficult. Likewise, the snake's bite will often be very effective in resisting attackers. Thus, the part of the definition after the "or" accounts for the fact that such instinctive behavior can be self-defense, as it accounts for the fact that even entirely *ineffective* behavior (like Sally's punch against Superman) intuitively counts as self-defense if her act is of the right *kind*. On the other hand, the definition also allows, as it must, for merely *attempted* self-defense. The act of scratching her nose does not become an act of self-defense against an armed attack only because an alternative Sally in the 20 second murderer case sillily intends it as such a defense and wrongly believes that it makes the attack more difficult. Likewise, pointing a wand at an attacker and saying "Avada Kedavra" with the intention of killing the attacker with a green light emanating from the wand is *not* a case of self-defense – *unless*, miraculously, a green light really comes out of the wand and kills the attacker. The part before the "or" takes care of such exceptional

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<sup>13</sup> An act token is a concrete, singular act taking place at a specific time. Pat Garret's act of shooting Billy the Kid is an act token of the act type of shooting someone. Note also that in accordance with linguistic usage I do not equate "self-defense" with "justified self-defense."

circumstances. After all, someone who *intends* to resist an attack by a certain means and actually does resist the attack *is* defending herself, whether her belief that her act could resist the attack was reasonable or not, and irrespective of whether any other act of this kind ever had any defensive effect before or thereafter.

Thus, the claim that self-defense need be aimed at averting or mitigating an attack or the harm threatened by the attack does not undermine the distinction between actual self-defense and mere attempts to defend oneself.

#### *4. Self-defense can be partially punitive*

Some worry that non-instrumentalist accounts of self-defense (like the one presented here) are prone to confuse self-defense with punishment. Examples like the following are supposed to illustrate this worry: a woman who is being raped sticks her rapist with a syringe and injects him with a venom she knows will kill him a week later but not in any way avert or mitigate his current attack.<sup>14</sup> On my account, sticking him with the needle is indeed still self-defense. What, however, is supposed to be wrong about this? After all, being stuck with a needle in the midst of a rape is certainly the kind of act that will force a rapist to some adaptive measures or reactions that negatively (from his perspective) interfere with the rape (he might briefly loosen his grip or have to grab her hand in order to make sure that she will not succeed in ramming the syringe into his eye, etc.). Thus, the woman is *resisting* the rape, defending herself against it. She is like Sally in the 20 second murder example, and Sally *is* defending herself on any ordinary language account of self-defense.

Now we have to distinguish two different cases: sticking the needle into the rapist either leads *automatically* to the injection of the drug or the woman has to commit a *separate* act of injecting the drug (by pressing the thumb on the plunger). In the first case the injection of the drug is *part* of a defensive act (since sticking the needle into him *is* injecting him with the drug), in the second case it is not defensive at all if (as is to be expected given what kind of act the separate act of injecting the drug is), it does not interfere with or disturb the rape. The injection of the drug in the latter case is, if the woman wanted to punish the rapist, *purely* punitive (while sticking the needle into him is still defensive). So there is no problem of confusing self-defense and punishment. On the other hand, sticking the needle into the rapist and thereby automatically injecting the drug into him is (again, if the woman thereby also wanted to punish the rapist) punitive *and* self-defensive.

It would seem that *purely* punitive measures taken against an attacker cannot count, for conceptual reasons, as self-defense. I agree, and this is why one has to distinguish between measures that *resist* the attack, make it more difficult, from measures that simply make it more *costly*. A German law commentary, for example, distinguishes between a kidnapped person's futile force against locks, closed doors, surveillance cameras on the one hand, and

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<sup>14</sup> Saba Bazargan (comment at a conference) and Suzanne Uniacke, "Self-Defence, Just War and a Reasonable Prospect of Success," in Helen Frowe and Gerald Lang (eds.), *How We Fight* (Oxford: Oxford University Press, 2014), pp. 62-74, at 67, both advance a similar example against the non-instrumentalist account of self-defense (which is why I took it up here). As my discussion here shows, the example fails to undermine this account.

force directed against a painting hanging on the wall on the other. Since the things belonging to the first group are the *means* of the attack (wrongful imprisonment counts as an ongoing attack under German law as well as in many other jurisdictions), the commentary considers force against these things as self-defense – at least, again, if this force somehow “disturbs” the attack, that is, makes it more difficult. This, however, is different with the painting (even if it is the attacker’s property and thus its destruction also harms the attacker).<sup>15</sup> Destroying it can at best count as punishment, not as self-defense. I agree with this analysis.

On the other hand, nothing hinders an act from being *both* punitive and defensive. In fact, this double structure is probably the normal one for cases of self-defense.<sup>16</sup> The instrumentalist attempt to deal with this double structure by separating the justification of the “punitive or retributive effects” from the justification of the “defensive effects” seems ill-conceived. Jeff McMahan, an instrumentalist,<sup>17</sup> admits that “desert can help to justify an act that has a defensive effect,” and refers to a case where “a person is liable only to X amount of defensive harm but ... successful defense requires that X+N amount of harm be inflicted on him.” Luckily for the defender, the aggressor in this case has “earlier committed a wrong for which he deserves to suffer N amount of harm, that can make it permissible to inflict X+N amount of harm on him, with the effect of successfully defending his potential victim.” But, insists McMahan, “[w]hen desert makes a necessary contribution to the justification of an act that has a defensive effect, it doesn’t contribute to the justification of the act as an act of defense.”<sup>18</sup>

This argument is odd since one has to ask where the “X” is coming from. *Ex hypothesi*, X alone has no defensive effect at all, while N alone has a retributive effect. The only thing effective in terms of defense here is the *conjunction* of X+N: so how, given instrumentalist premises, can one be *liable* to ineffective X, and how can X be isolated and calculated? The idea of separating the justification of the “punitive or retributive effects” from the justification of the “defensive effects” would therefore, it seems, make no sense.<sup>19</sup>

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<sup>15</sup> Erb, “Notwehr,” in Joecks and Miebach (eds.), *op. cit.*, pp. 1249-1337, at 1305.

<sup>16</sup> Steinhoff, *On the Ethics of War and Terrorism*, pp. 49-50. See also George P. Fletcher, “Punishment and Self-Defense,” *Law and Philosophy* 8(2) (1989), pp. 201-215. It should also be noted that the often-heard claim that punishment is backward-looking and self-defense is forward-looking is somewhat too neat to be true. One can punish not only past acts but also ongoing acts, and one can do this with the intention to deter future acts. Likewise, one can react with self-defense to an ongoing attack with the intention to have a future without attack (since one stopped it in the present). Thus, at least some acts of punishment have exactly the same time-structure as at least some acts of self-defense.

<sup>17</sup> He states, for example: “I have also argued that, because defensive harming is necessarily instrumental, the infliction of harm cannot be justified for defensive reasons unless doing so is to some extent instrumentally effective in averting a threat.” Jeff McMahan, “Duty, Obedience, Desert, and Proportionality in War: A Response,” *Ethics* 122(1) (2011), pp. 135-167, at 160.

<sup>18</sup> Jeff McMahan in the “PEA Soup” online symposium, see n. 11.

<sup>19</sup> This also poses problems for McMahan’s so-called “combined justification” for the

Would the example make sense if X by itself had a partial defensive effect, that is, if it would decrease the harm the victim would suffer, but not prevent all the harm?<sup>20</sup> Such an example would perhaps be coherent, but it would also miss the problem McMahan is faced with. To wit, McMahan's problem is precisely the original example: if we are dealing with a case where aggressor B is allegedly not liable to any "defensive harm" (because the "defensive harm" he is supposed to be liable to is entirely ineffective) but to N amount of "punitive harm," and A successfully commits the act of inflicting this "punitive harm" with the intention to stop the attack, then McMahan still must claim that N "doesn't contribute to the justification of the act as an act of self-defense." This, however, is difficult to understand. After all, N does have a defensive effect, the defender inflicts this effect to defend himself, and B is liable to N. So *why* does N not count as defensive harm in the first place? McMahan provides no explanation.

Thus, the account presented here does not confuse self-defense and punishment, nor does it succumb to the mistake of stipulating that punitive intentions or effects or "liability to punishment" cannot play a role in self-defense or be part of a "liability to defensive attack."

##### *5. Self-defense is not merely accidental*

Intuitively we make a distinction between intentional, reflexive, or instinctive defensive acts or behavior on the one hand and acts or behavior that stop an attack merely *accidentally* on the other. If someone jumps out of the window above me with the intention to crush me and I, unaware of this fact, intentionally open my umbrella because it has started raining, and thereby avert his attack, then hardly anyone would say that I *defended* myself.<sup>21</sup> Such an accidental aversion of a threat is no more an instance of self-defense than malevolently cutting off the tip of someone's nose and thereby accidentally improving his looks is a case of cosmetic surgery. Likewise, not all reflexive or instinctive behavior that on the occasion hinders an attack is defensive. To be defensive, more is required. For instance, certain reflexes are trained, conditioned reflexes, and they are trained precisely for defensive purposes, such as when a boxing coach has his boxer repeat again and again a certain way to block an uppercut. Other reflexes, as well as instincts, are the outcome of evolution, and their function is clearly defensive by evolutionary "design." Thus, if one's knee-jerk reflex through some accidental causal chain stops an armed attack, jerking the knee still does not count as self-defense.

##### *6. Self-defense is directed against imminent or ongoing attacks*

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infliction of harm (which combines a lesser evil justification with a liability justification). See Jeff McMahan, "Proportionality and Just Cause: A Comment on Kamm," *Journal of Moral Philosophy* 11 (2014), pp. 428-453, at 438-442.

<sup>20</sup> As already mentioned, McMahan thinks that self-defense is about averting or mitigating *harm*, see n. 11 and 17.

<sup>21</sup> I discuss this example, however, because one person did claim, to my astonishment, that this is a case of self-defense.

Most Western jurisdictions (and the majority of legal scholars<sup>22</sup>) take it to be a requirement of self-defense that the attack (not necessarily the harm) be imminent (where “imminence” is to be understood as including ongoingness).<sup>23</sup> Some philosophers and very few legal scholars disagree.<sup>24</sup> But even some who do not disagree seem to think that imminence is not an *independent* requirement but at best a proxy for the necessity requirement or even logically implied by it (and hence redundant).<sup>25</sup>

The reasoning seems to be that if we knew with certainty (which, of course, is impossible) that we could only stop a future culpable attack (or the harm that would emanate from the attack) by person X if we already use force against X long before his would-be attack, then we would be justified in doing so.<sup>26</sup>

From a conceptual point of view, however, this line of reasoning is beside the point. The question is not whether we could permissibly use force against X, but whether that force should count as *self-defense*. However, it seems to be semantically far-fetched to call the preacher’s drowning Billy the Baby during the baptism – because the Archangel credibly informed the preacher that this is his only way to prevent Billy the Kid from lethally attacking him 20 years later – an act of *self-defense*.

Someone might object that it does not matter how you *call* it as long as the justifications of counter-force against attacks and counter-force against non-imminent threats are governed by the same criteria. The conceptual distinctions then would make no moral (or legal) difference.

First, however, conceptual distinctions need not always make moral (or legal) differences to be valid. Second, virtually all arguments against the imminence requirement rest on at least one of two dubious assumptions (often they rest on both). The first assumption is that the imminence requirement would make effective self-help against a large array of non-imminent threats unjustifiable and therefore leave the target of the threat with no legitimate remedy. The second assumption is that the necessity condition of the self-defense justification requires that the defender use literally the mildest means to stop the attack (or avert the harm).<sup>27</sup>

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<sup>22</sup> Even philosophers who are determined to stretch the moral concept of self-defense beyond imminent attacks sometimes acknowledge that “[i]n the law, while a threat of imminent attack may justify an individual’s resort to force in self-defence, there is no right to use force to prevent attacks that are not imminent.” See Jeff McMahan, “Preventive War and the Killing of the Innocent,” in Richard Sorabji and David Rodin (eds.), *The Ethics of War: Shared Problems in Different Traditions* (Aldershot: Ashgate, 2006), pp. 169-190, at 172.

<sup>23</sup> For an overview, see Boaz Sangero, *Self-Defence in Criminal Law* (Hart Publishing: Oxford and Portland, OR: 2006), pp. 153-156; for further discussion see Kimberley Kessler Ferzan, “Defending Imminence: From Battered Women to Iraq,” *Arizona Law Review* 46 (2004), pp. 213-262.

<sup>24</sup> Sangero, *Self-Defence in Criminal Law*, pp. 153-162.

<sup>25</sup> *Ibid.*, pp. 147 and 151.

<sup>26</sup> *Ibid.*, pp. 153-162.

<sup>27</sup> Both assumptions are clearly made, for example, by Richard A. Rosen, “On Self-Defense, Imminence, and Women Who Beat Their Batterers,” *North Carolina Law Review* (71) (1992-

Yet, German law, for example, has a so-called justifying defensive emergency exemption, which closes the gap that the first assumption postulates, and one can, of course, transfer this kind of justification to the moral realm. This justification is governed by *different* criteria than the self-defense justification and hence the conceptual distinction does make a moral difference here.<sup>28</sup> In particular, according to German self-defense law (but not according to justifying defensive emergency law) a defender has to choose milder means *only* if they promise to be at least *as effective as* the harsher means.<sup>29</sup> (Anglo-Saxon law, for that matter, actually also rejects the “mildest means” reading of the necessity requirement,<sup>30</sup> although it might not be as harsh on the aggressor as German law.) Thus, even if milder means would only minimally heighten the risks for the defender but significantly diminish the harm to the aggressor, the defender still need not choose the milder means. On an interpretation of the necessity condition that understands it as requiring literally the mildest means, in contrast, the defender *must* choose that milder means.

Thus, the “necessity” condition of the German legal self-defense justification is very harsh on the aggressor, harsher than the justifying emergency exemption. And far from imminence implying or working as a “proxy” for necessity, it is the other way around: imminence *triggers* the applicability of the harsh necessity condition of the self-defense justification in the first place. I submit that this makes good moral sense since in combination with the justifying defensive emergency exemption such an arrangement fairly provides for the protection of the innocent. For reasons of space I cannot go further into this here.<sup>31</sup> However, I would like to point out that, to the best of my knowledge, no Anglo-Saxon author has ever leveled any attack on *this* construction. It stands unrefuted, and throwing overboard the imminence requirement would therefore be at best premature, not least since the imminence requirement is also widely accepted in Anglo-Saxon jurisdictions.<sup>32</sup>

### 7. Conclusions and Practical Implications

I submit that the conceptual analysis of the term “self-defense” offered here is in line with

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1993), pp. 371-411; Russell Christopher, “Imminence in Justified Targeted Killing,” in Claire Finkelstein, Jens David Ohlin, and Andrew Altman, *Targeted Killings: Law and Morality in an Asymmetrical World* (Oxford: Oxford University Press, 2012), pp. 253-284; and Phillip Montague, “Defending Defensive Targeted Killing,” in Finkelstein et. al, *op. cit.*, pp. 285-299. As far as I am aware, *all* other Anglo-Saxon critics of the imminence requirement make at least the first assumption.

<sup>28</sup> Erb, “Rechtfertigender Notstand,” in Joecks and Miebach (eds.), *op. cit.*, pp. 1346-1416, at 1404-1405.

<sup>29</sup> Erb, “Notwehr,” p. 1296.

<sup>30</sup> See for example Paul H. Robinson’s references to risks and equal effectiveness in *Criminal Law Defenses* (St. Paul: West Publishing, 1984), pp. 4-5, 77, and 79.

<sup>31</sup> I discuss the rationale of the imminence requirement, objections against it, and the distinction between the justifying defensive emergency exemption and self-defense at length in Uwe Steinhoff, *fective in averting a threat*. unpublished ms.

<sup>32</sup> See n. 22.

ordinary language use and plausible accounts of self-defense in the legal literature. However, getting right what self-defense is is not a purely linguistic exercise. The account presented here not only provides conceptual clarity but also bears on the *justification* of self-defense. Let me briefly summarize some of the insights that are to be drawn from the analysis presented above.

1. In common formulations of self-defense statutes in major Western jurisdictions the justificatory conditions of self-defense are formulated not in terms of averting or mitigating *harms*, but in terms of repelling, averting or mitigating force and *attacks*. But this suggests that it is mistaken to connect the justifiability of self-defense to beliefs or facts about the likelihood of harms and chances of avoiding them, that is, it is mistaken to claim, for instance, that the use of “defensive force ... must be justified on the grounds of Victim’s reasonable belief that (a) if he does not kill [the aggressor], then [the aggressor] will kill him, and (b) that he [the victim] is innocent.”<sup>33</sup> In fact, even *lethal* force can sometimes be justified *without* the defender reasonably believing that employing it is the only way of saving his life.<sup>34</sup> The question, rather, is whether he reasonably believes lethal force to be “necessary” (in the harsh sense specified above) to resist the *attack* on his life. That the two beliefs are not congruent can be seen by the example of the special Russian Roulette Revolver. I know (and so does a police officer walking by) that this revolver has 499 empty chambers and one that contains a lethal bullet (an additional feature is that you can pull the trigger only once per day). Thus, if somebody culpably points this gun at me with the intention to kill me and hopes the chamber is full, then I *cannot* reasonably believe that the aggressor will kill me if I do not kill him (the odds against me are simply far too low to make such a belief reasonable). I can, however, reasonably believe that I can repel his *attack* (by preventing him from pulling the trigger) only by killing him, given the circumstances. Am I and the police officer intuitively justified in killing the aggressor? Of course we are: why should an innocent person’s life be put at risk for the benefit of an aggressor who is culpably endangering an innocent person’s life? I am facing an imminent attack with a potentially lethal weapon, that is, I am facing an attempt at my life, someone’s attempt to murder me. If I can stop this attempt only by killing the would-be-murderer I am allowed to do so; and so is the police officer. Thus, this conception of self-defense is much more lenient – and much more plausible – than one formulated in terms of averting harms. (By the way, if I were not allowed to defend myself against the attack with lethal force here, it would seem that the attacker now is permitted – drawing his second, more conventional gun – to kill me in self-defense. This, however, seems highly counter-intuitive. There are, of course, certain counter-moves to avoid this unpalatable result, but in my view they ultimately all fail.<sup>35</sup>)

2. It is worth noting separately that to do justice to the fact that the necessity condition for justified self-defense must not be interpreted as requiring the employment of literally the least

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<sup>33</sup> Helen Frowe, “A Practical Account of Self-Defence,” *Law and Philosophy* 29 (2010), pp. 245-272, at 252.

<sup>34</sup> This is also ignored by Jonathan Quong, “Killing in Self-Defence,” *Ethics* 119 (April 2009), pp. 507–37, at 518.

<sup>35</sup> I argue for this at length in Uwe Steinhoff, “Self-Defense and Necessity,” unpublished ms.

harmful means, it is *not* enough to simply acknowledge, as some ethicists readily do, that the defender only need to *reasonably* (taking into account his epistemic limitations in the heat of the battle) *believe* that the means he employs are necessary. To the extent that what he believes or not is relevant here at all, he need *not* reasonably believe that the means he employs are literally the least harmful ones. What he must believe about the properties and possible effects of the means he employs is *much* less demanding.

3. On the account presented here, an act token is self-defense, as stated above, “if and only if a) it is directed against an ongoing or imminent attack, and b) the actor correctly believes that the act token is an effective form of *resistance* or the act token belongs to an act type that usually functions as a means to resist an attack.” Thus, Sally’s fight against the 20 second murderer is an act of self-defense (and this, again, I submit, is how most people would use the term) *although* the murderer overcomes her resistance and kills her without even being slowed down by her (he is, however, forced to increase his efforts to overcome her resistance – this is what *makes* it resistance). Thus, for an act to be self-defense, *it need not avert or as much as mitigate the harm*. Self-defense that is completely futile in this latter sense – and thus violates the so-called “success condition” of the instrumentalists – can still be both self-defense and justified.

This is a particularly important feature of the account presented here since it helps to avoid an extremely embarrassing implication that the instrumentalist account faces due to the success condition it implies. We have already come across the notorious example of the rape victim who fights on and harms the rapist in doing so (for example by biting and scratching), but subjectively has absolutely no hope – and objectively there is absolutely no hope, either – of thereby stopping or even only mitigating the attack by the rapist. On the instrumentalist account the victim’s struggle could not be, and therefore also not be justified as, self-defense. It seems she would just have to give in. But this is counter-intuitive and appears to be morally entirely unacceptable.<sup>36</sup>

Worse still, if she is not justified in fighting on but does so anyway, she now becomes an unjustified attacker herself, and the attacked rapist would appear to be justified in defending himself against her attack. The perversion of this need not be emphasized. The situation does not change if we talk in terms of “liability to harm”. If an aggressor can only be liable to defensive harm (to be liable to harm means that you are not being wronged if this harm is inflicted upon you) if that harm will be instrumental in averting or mitigating his aggression, then the futile counter-measures of the victim will indeed wrong the aggressor and violate his

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<sup>36</sup> Compare Erb, “Notwehr,” p. 1303. The example of the helpless rape victim is a familiar one in the German legal literature. While the Munich Commentary on Criminal Law and the Leipzig Commentary agree on nearly all points regarding self-defense, the Leipzig Commentary thinks that measures that could not even provide a partial success would be ruled out. See Thomas Rönnau and Kristian Hohn, “Notwehr,” in Laufhütte et. al. (eds.), *op. cit.*, pp. 353-559, at 470. Erb, “Notwehr,” 1303-5, rightly complains that while the Leipzig Commentary acknowledges the problem (namely the problem of a rape victim who cannot even hope for partial success), it does not solve it.

rights;<sup>37</sup> and thus the victim would herself become liable to defensive counter-measures by the aggressor.

Any moral theory implying that the victim in the example is unjustified in harming her attacker or becomes herself liable to attack by doing so is counter-intuitive and morally unacceptable. To be sure, there are means to avoid the implication. One could, for instance, claim that the harm done by the victim to the aggressor is still justified as *punitive* harm. Unfortunately, for the victim's acts to be punishment and thus for the harms she inflicts to be punitive requires that she *intends* to punish. Punching someone in the face because one does not like him, or because one feels a need *to do something* instead of just giving in, is not punishment. However, the victim of the example is still justified to inflict the harms on the rapist, whether she intends them as punishment or not.

At this point one could then try to come up, *ad hoc*, with a completely new kind of justification (which, however, is not quite possible in law, as the justification would need to be introduced first), so that the victim's harmful acts would not be justified as defense or as punishment but as X-ing. Yet, I agree with Joanna Mary Firth and Jonathan Quong that "it is the notion of liability to defensive harm, and not just other considerations, which plays an important role in explaining why the instrumental account's explanation of *Rape* is counterintuitive."<sup>38</sup>

Thus, in order to avoid unpalatable implications, the instrumental account of self-defense is dependent on additional theories of the justified infliction of harm that are still missing.<sup>39</sup> Even these additional theories, however, would not be able to cancel out the considerable unease and puzzlement people will feel in the face of the instrumentalist's declaration that the

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<sup>37</sup> This is indeed suggested by Rodin, "Justifying Harm," p. 93. McMahan has the same problem as Rodin, and so do all authors subscribing to the view that futile self-defense cannot be justified (or is not self-defense in the first place).

<sup>38</sup> Joanna Mary Firth and Jonathan Quong, "Necessity, Moral Liability, and Defensive Harm," *Law and Philosophy* 31 (2012): 673-701, at 690. Their own attempted solution to this problem fails. They develop a "pluralist" account of liability to defensive harm according to which someone can be liable to defensive harm even if the necessity condition is not fulfilled and the harm is futile. However, they do not explain – unlike the account presented here – *why* futile harms could count as *defensive*. In addition, they do not really get rid of the counter-intuitive implications of the instrumental account. For these and further problems with their approach, see Uwe Steinhoff, "Firth and Quong on Liability to Defensive Harm: A Critique," unpublished ms., available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2362549](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362549).

<sup>39</sup> In "On the Success Condition for Legitimate Self-Defense," Statman, however, argues that the victim might still be able to successfully defend her *honor*. I argue elsewhere that this "honor solution" fails, see "The Nature and Scope of Self-Defense under Special Consideration of Killing in War," *Filozofski Godišnjak (Philosophical Yearbook)* 25 (2012), pp. 207-234, at 219-220. For further criticism of Statman's account, see also Gerhard Øverland, "On Disproportionate Force and Fighting in Vain," *Canadian Journal of Philosophy* 41(2) (2011), pp. 235-62, esp. 245-8.

woman's struggle in our example does not qualify as self-defense (let alone justifiable self-defense). The non-instrumental account defended here, however, can do without such additions and puzzlement. By capturing the actual meaning of the term "self-defense" it solves the problem in a straightforward manner.

4. The account of self-defense presented here also helps to avoid confusion about proportionality. To wit, if one wrongly regards self-defense to be about *averting harms*, one is easily seduced into thinking that then the proportionality requirement is only about harms too.

Yet, it is not. After all, defenders in many situations are clearly allowed to inflict *greater* harms on the attacker than the attacker himself actually threatens. If proportionality were all about harms, however, this would hardly be possible. It would, in addition, also contradict what all Western jurisdictions and virtually all philosophers writing on the issue take for granted, and for good moral reason: namely, that *culpability* counts in proportionality considerations. All else being equal, the same measures taken against a culpable aggressor in one case and against an innocent aggressor in another can be proportionate in the first case while being disproportionate in the second.

Thus, making proportionality considerations in the context of self-defense all about *harms* is mistaken,<sup>40</sup> and the mistake can be avoided by realizing that the primary object of self-defense is not to ward off injuries or harms – rather, self-defense is *directed against attacks*. This correct understanding of the nature of self-defense then also suggests a correct understanding of the nature of proportionality: proportionality considerations in the context of self-defense must weigh *the severity of the defensive measures* on the one hand against *the severity of the attack they are directed against* on the other. The severity of the attack, in turn, is dependent not only on concrete physical or property harms the potential victim faces, but also on the degree to which her autonomy or even honor is violated by the attack, on the degree of the aggressor's culpability, and last but not least – and this plays a particularly important role in self-defense law – on the degree to which the attack challenges and breaches the social, legal or moral order.<sup>41</sup>

This understanding of the proportionality condition also helps to stave off, once again, the pernicious "success condition." To wit, if one conceives of proportionality in self-defense as, for example, involving a weighing of the harms that can *reasonably be expected to be averted* by one's defensive measures on the one hand against the harms inflicted on the aggressor by those measures on the other, then one can conclude that any defense known to be completely futile in the sense of not being able to avert any harms must be *disproportionate*, since in

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<sup>40</sup> See also Suzanne Uniacke, "Proportionality and Self-Defense," *Law and Philosophy* 30 (2011), pp. 253–72.

<sup>41</sup> For the importance of this latter factor see in particular Sangero, *Self-Defence in Criminal Law*, pp. 67-73. The significance of the defense of the social and legal order is also stressed in the German legal literature, see Erb, "Notwehr," pp. 1257-8. Incidentally, I cannot – and need not – start exploring here which concrete acts are proportionate under which circumstances. Rather, I am concerned here with the *nature* of proportionality: which *kind of factors* have to enter the proportionality calculation.

such a case there is *nothing* (there are no harms that can be averted) that can weigh against the harms inflicted upon the aggressor. However, this is only one way in which the proportionality condition can be interpreted.<sup>42</sup> We can vary it slightly, and the conclusion just mentioned evaporates: instead of appealing to the harms *reasonably expected to be averted* by the defense, we just appeal to the harms *threatened* instead, and futile self-defense can be perfectly proportionate again. After all, a threatened harm is no less threatened because it cannot be averted. Obviously, futile self-defense can also be perfectly proportionate if one appeals – as law, common sense and the account presented here do – to the severity of the attack.

A final note. I have found some philosophers and legal scholars adamantly denying that a woman fighting a rapist without being able to mitigate the harm he is doing to her is actually defending herself against his attack. To me, however, this seems to be simply a stipulation. Yet, I have also found a few ordinary speakers who are not as convinced as I am that it indeed is self-defense. But be that as it may, even those who deny that her acts of resistance are justified as *self-defense* seem, quite understandably, not to be willing to go as far as to deny that they are *justified*. However, since every act of self-defense understood as necessarily involving at least the mitigation of harm (or of the attack) is clearly also an attempt to resist an attack while, conversely, not every attempt to resist an attack would also be an act that mitigates or averts a harm (or an attack), it follows that *attempting to resist an attack* would be a more comprehensive concept than self-defense understood as involving the mitigation of harm (or of an attack) (but it would not be more comprehensive than self-defense as understood in this paper). Moreover, there is absolutely no reason to think that it is more difficult to delineate the justifying conditions of attempts to resist an attack than of delineating the justifying conditions of self-defense understood as involving the mitigation of harm (or of an attack). But then one can and should side-step the more narrow question of justified self-defense and instead inquire into the justifying conditions of attempts to *resist* harm:<sup>43</sup> for every case of justified self-defense would also be a case of a justified attempt to

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<sup>42</sup> Daniel Statman, in “On the Success Condition for Legitimate Self-Defense,” comes to the erroneous conclusion that the proportionality condition implies a success condition (*ibid.*, p. 663) on the basis of exactly this specific rendering of the proportionality condition (*ibid.*, p. 664). He does not discuss any alternative version that would suggest itself.

<sup>43</sup> Note that some authors seem to equate self-defense with resistance to an attack, anyway. See for instance Sanford Kadish, who discusses self-defense under the heading of a right to *resist* aggression in “Respect for Life and Regard for Rights in the Criminal Law,” *California Law Review* 64(4) (1976), pp. 871-901, at 885. And Suzanne Uniacke states that “there is a right of self-defense; that is to say, the use of necessary and proportionate force in directly *resisting* or repelling the infliction or imposition of an otherwise irreparable injustice is something that we are positively entitled to.” See her “On Getting One’s Retaliation in First,” in Henry Shue and David Rodin, *Preemption: Military Action and Moral Justification* (Oxford: Oxford University Press, 2010), pp. 69-88, at 82, my emphasis. Frances Kamm, however, distinguishes the right to resist an aggressor from the right of self-defense. See Kamm, “Self-Defense, Resistance, and Suicide: The Taliban Women,” in Frowe and Lang

resist an attack, but not vice versa. This, however, would make the concept of self-defense morally uninteresting and redundant: it cannot do anything that the concept of an attempt to resist harm cannot do too, and the latter can do more. Thus, the account of self-defense presented here not only captures ordinary language use, it also keeps the investigation of the justificatory conditions of self-defense from being superfluous. This is an additional reason to prefer the account presented here.<sup>44</sup>

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(eds.), *How We Fight*, pp. 75-86. She does not explain why.

<sup>44</sup> Thus, the account presented here is also more “fertile,” which is one of the criteria (next to similarity to ordinary language use, precision, and simplicity) which Rudolf Carnap uses to evaluate the adequacy of conceptual explications. See Carnap, *Logical Foundations of Probability* (Chicago: University of Chicago Press, 1950), 3–8 (§§ 2–3).

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