A New Societal Self-Defense Theory of Punishment—

The *Rights-Protection* Theory

Criminal law is an important instrument of rights-protection in liberal societies; it dictates that those who violate the legal rights of others be subject to criminal punishment. However, criminal punishment typically involves treating offenders in ways considered objectionable in other contexts—a fine encroaches upon one's property right, imprisonment limits one's right to autonomy, and capital punishment deprives one of her right to life. Given that liberal societies value individual rights and liberty, how can criminal punishment be morally justified? By what right may the government permissibly encroach upon the rights of wrongdoers?

Recently, there has been a trend in the literature toward meeting this challenge by appealing to the *right of self-defense* (Quinn 1885; Farell 1985; Holmgren 1989; Kelly 2009; Montague 1996; Tadros 2011). Given that the right of self-defense is widely recognized, such a justification, if successful, could meet the above challenge and explain why rights-violating actions are permissible in the context of criminal punishment. In this paper, I will propose a new self-defense theory of punishment—the *rights-protection* theory. After describing this theory, I consider *the threat requirement* objection against the self-defense strategy. I will show that although the proponents of this objection are justified in requiring the presence of threats in circumstances in which one can exercise the right of self-defense, their conception of threat is too narrow. I will show that a more reasonable conception of threat, which I call the *wide conception*, is consistent with the conception of substantive self-defense required for the rights-protection theory.

1. Justifying the Institution of Punishment—A Minimum Requirement

Before describing my new theory of self-defense, it is important to note that the issue at hand is how a liberal society can morally justify the creation of the *institution* of criminal punishment, when the institution may possibly encroach upon the rights of citizens. Justifying the institution of punishment is different from justifying individual practices of punishment (Berman 2008; Quinn 1985: 372). One might be able to morally justify the creation of a system of criminal punishment; however, the permissibility of such an institution does not immediately translate into the validity of any particular practices of punishment (Hart 1968).[1] Likewise, individual practices of private punishment may be morally justified, say, in the state of nature. However, the permissibility of these practices does not entail that a government has a right to create an institution that engages in the same practices. Whether the imposition of a certain form of punishment on an offender is morally justified depends, among other things, on the culpability of the offender, the harm imposed on the victim, the financial and human resources available in society, and the reason why society sustains the institution of punishment. However, most of these issues do not arise when we are at the stage of justifying the institution. At this stage, we just want to know why a legitimate government may permissibly establish a certain type of public institution that may encroach upon the rights of citizens. Governments may establish such an institution without ever putting it to use. For instance, it is possible that, after the institution of criminal punishment is created, no crime was committed and the issue of how to punish a particular offender never arises.

[1] To use Hart's terminology, the problem I consider here is *the general justifying aim* of punishment, not the problem of *distribution* (1968:3-4).

With that in mind, let me begin by describing briefly some of the assumptions I will make in this paper. First, I will assume that a legitimate state has both a right and a duty to protect the basic civil rights of its citizens, including the rights to life, liberty, and property. Second, punishment is different from restitution. It is possible that even after an offender is properly punished, the victim's loss is still not adequately compensated for.[2] In other words, punishment is an offender-centered concept, while restitution is a victim-centered one. Lastly, while all forms of punishment necessarily limit the rights of wrongdoers, punishment need not impose *harm*, *pain*, *suffering* (Boonin 2008; Duff 2001; Hampton 1984; Tadros 2011), *stigmatization, or humiliation* on them (Coleman & Murphy 1984).[3] Accordingly, to defend the right of the state to punish, a theory must explain why it is morally permissible for the state to limit the rights of criminal offenders.

Some might insist that punishment must involve some or all of the above-mentioned ill treatment. Due to length constraints, I cannot consider the soundness of different conceptions of punishment here. Nevertheless, it is important to note how different conceptions of punishment impose different burdens of justification on their supporters. Punishment typically involves treating persons in ways that are normally impermissible. However, there are different forms of punishment and they impose different ill treatment on offenders. Accordingly, they also impose

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[2] This distinction is recognized in many criminal justice systems, see for instance, the case of the Finnish Sanction System (Lappi-Seppälä, 2012:335).

[3] For an example of a system of criminal punishment that aspires to satisfy these conditions, see the Execution of Sentences Act of the Norweigein Correctional Service. http://www.kriminalomsorgen.no/index.php?cat=265199 (Accessed: March 13, 2017). See also Anderson and Groning 2016.

different burdens of justification on philosophers. Those who believe that punishment must impose pain or suffering must explain why the imposition of pain and suffering on offenders can be morally justified. Likewise, those who believe that punishment must involve stigmatization must explain why stigmatization of an offender can be morally justified. On the other hand, those who do not believe that punishment must involve these types of ill treatment need not explain why the ill treatment may be morally permissible. In short, different conceptions of punishment call for different justification.

Nevertheless, regardless of the conception of punishment one believes in, all forms of punishment necessarily constrain the rights of offenders—to life, liberty, or property. Thus, on the one hand, anyone who wishes to defend a system of criminal punishment must, at a minimum, explain why the rights limitation associated with punishment can be morally justified. On the other hand, only those who believe that punishment must involve the imposition of harm, pain, suffering, etc. need to explain why these types of ill treatment can be morally justified. Given that I do not believe that punishment must impose ill treatment on offenders, my task here is limited to explaining why society can permissibly limit the rights of offenders in the context of punishment. In any case, one might leave the justification of ill treatment till later, when the ill treatment seems necessary for a particular offender.

2. Alternative Solutions to the Problem of Justification

Next, let me explain how the justification problem of criminal punishment arises. Liberal societies value individual rights and liberties. The legitimacy of a state depends partly on how well it protects these rights and liberties (Buchanan 2004). This presumption in favor of individual rights gives rise to a problem. If individual rights are so important, how can the state

impose punishment on criminal offenders when doing so necessarily involves treating them in ways that are considered intolerable in normal contexts? What makes it morally permissible for a state to limit their rights? What is the moral justification for the rights encroachment involved in criminal punishment? In the literature, this problem is known as *the problem of justification for criminal punishment* (Boonin 2008; Honderich 1984; Montague 1995; Morris 1991; Tadros 2011; Quinn 1995).[4]

There are two broad strategies one can adopt to address the problem of justification—the *consequentialist approach* and the *deontological approach*. Both theories have their own merits and problems. The consequentialist approach holds that the right action is the one that maximizes certain intrinsic, final value(s). If punishing an offender in a certain way would maximize these intrinsic values, then this particular case of punishment would be morally permissible or even required. Otherwise, it would not be justified. According to the consequentialist approach, the offender does not have any rights in the deontological sense. Whether or not it is permissible to punish him depends on whether doing so would bring about the best overall consequences.

The consequentialist approach could explain why we may permissibly punish a criminal offender. However, it does so at a considerable cost. If punishing a law-abiding, innocent person

[4] Some may wonder whether acknowledging the justification problem of punishment implies the acceptance of the abolitionist thesis. Whether this is so depends on one's answer to the justification problem. One the one hand, some philosophers, such as David Boonin, argue that there is no way to adequately meet the challenge raised by the justification problem. Accordingly, the only morally viable option is abolitionism. On the other hand, quite a few philosophers argue that the challenge to justify punishment can be met. If so, then we may need to reform the system of criminal punishment. However, we need not abolish the system entirely.

would bring about the best overall consequences, the consequentialist strategy would require this punishment. In other words, neither offenders nor law-abiding citizens have any rights. This response cannot satisfy those who raised the justification problem because they are persons who take rights seriously. A solution that denounces all rights must be considered unsatisfactory.

Alternatively, one may adopt the deontological strategy. A deontological theorist can possibly embrace either of the following options—the *Rights-Forfeiture* Theory or the *Permissible-Infringement* Theory. The former holds that an offender, by virtue of his criminal wrongdoing, has forfeited his rights. Because he loses his rights, we cannot violate his rights and this is why criminal punishment can be morally justified (Farrell 1985; Kershner 2002; Morris 1991; Wellman 2012). While the Rights-Forfeiture theory implies that *criminals do not have rights,* the Permissible-Infringement theory holds that *criminals still have rights.* The Permissible-Infringement theory holds that it is sometimes permissible to infringe upon another's right if doing so is necessary for one to protect her important rights (Montague 1995; Quinn 1995; Tadros 2011). For instance, one can break into another's cabin in the wood and thereby infringe upon the owner's property right if doing so is the only way to survive a dangerous blizzard (Feinberg 1978: 102; Wellman 1995). Applied to the context of criminal punishment, the Permissible-Infringement Theory implies that criminal offenders still have rights; nevertheless, we may justifiably infringe upon their rights.

Both theories have their own merits and problems. Some are concerned that the Rights-Forfeiture Theory may inspire smugness, lead to a complete disrespect for the rights of criminals, and result in excessive punishment (Dolinko 1991: 1625; Wellman 2012: 386). Others are concerned that, since the Permissible-Infringement theory assumes that wrongdoers still have rights, criminal punishment would violate their rights and restitution would be owed to the

offenders (Kershner 2002:59-60). This, however, seems implausible. Which theory, then, should we adopt to answer the justification problem?

Here, I cannot afford to go into details to compare these two theories. This, fortunately, is not a problem for the *self-defense theory* of criminal punishment. According to the self-defense theory, when the government punishes an offender, it is exercising its right of self-defense. The right of self-defense is widely recognized regardless of how one understands the rights conflict involved. Anyone can exercise the right of self-defense when she is attacked. We may not know why exactly this is so. When a victim harms an attacker in self-defense, is she *violating* the rights of the attacker? Or is she merely *infringing upon* his rights? Rights-forfeiture and Permissible-Infringement theorists disagree on the moral status of the attacker—the former believe that an attacker has forfeited his rights, while the latter insist that the attacker still have rights (Morris 1991; Wellman 2012). Nevertheless, both can agree that the victim can harm the attacker in self-defense. In other words, although a self-defense theorist may not give us details regarding how we should understand the rights conflicts involved in criminal punishment, she can go on to justify the right to punish by appealing to the right of self-defense. Thus, the self-defense theorist may conveniently sidestep the question of why self-defense is permissible and directly address the justification problem. Appealing to self-defense could help explain why the state is justified in imposing on wrongdoers rights-violating treatments that are typically prohibited in normal circumstances.

It is important to note that, just as the right of self-defense is not absolute or unconstrained, so the right to punish is similarly constrained by other rights we already have. Depending on the context, one may or may not use certain self-defense tactics. For instance, it is commonly agreed that it is morally impermissible to kill a thief in self-defense when the thief was stealing a bottle

of water from a convenience store. Likewise, the right to punish is also constrained by the other rights citizens and offenders have. I will explain why this is so in the next section.

Moreover, to claim that the right of self-defense can justify the right to punish, one must explain the sense in which criminal punishment is an exercise of the right of self-defense. After all, paradigm cases of self-defense are very different from paradigm cases of criminal punishment. In particular, it is said that the right of self-defense is exercised in a context in which one must defend oneself against an attack, and in criminal punishment the attack has already been carried out and there is nothing to defend against. Thus, to appeal to the right of self-defense to justify criminal punishment, one must explain how criminal punishment contributes to (societal) self-defense.

I hope to have clarified the justification problem of criminal punishment, how the self-defense theory can avoid this problem, and how this theory allows us to move forward. Next, I will introduce a new societal self-defense theory, *the rights-protection theory*, and explain how it employs the right of self-defense to justify the right to punish.

3. The Rights-Protection Theory

The societal self-defense theory of criminal punishment assumes that punishing the offender is an important way in which a society can justifiably exercise its right of self-defense. Very broadly, the rights-protection model holds that criminal punishment is a part of the larger institution of rights-protection; accordingly, the practice of criminal punishment is both *justified* and *constrained* by the ideal of rights-protection. This theory is a self-defense theory because it sees the right to punish as derived from the right of society to defend itself. Specifically, it sees

the right to punish as *derived from the right to impose various sanctions to protect the important rights of citizens*.

Before I consider the rights-protection theory, I should explain briefly how rights-justification works. I shall use *the interest theory of rights* to illustrate how this can be done. Understanding this framework is essential for the sake of understanding the rights-protection theory. According to the interest theory, a right is based on an interest that is important enough to justify the imposition of duties on others (Raz 1986). To see what rights a person has, we examine the interests she has and see which ones are important enough to warrant imposing duties on others. In addition, we can distinguish between *core* and *derivativ*e rights. Derivative rights are justified by virtue of their contribution to the protection of core rights; core rights are not justified by any other rights. For instance, the right to free speech may be justified by the right to liberty, while the right to liberty is not justified by any other rights.

3.1 Self-Defense, Rights-Protection, and Sanctions

Next, let us consider the right of self-defense. Although there are controversies surrounding the kind of rights we have, it is commonly recognized that we do have the right of *self-defense*. This, however, does not get us very far—there is still the question of what the right of self-defense involves. Does it include the right to adopt *any* measure that would ensure one's survival, or only those that are *necessary*? Does this right apply to the defense of one's life only? Or is it applicable in other non-life-threatening situations? Is the right of self-defense a core or derivative right? If it is a core right, which derivative rights does it give rise to? If it is a derivative right, what is the core right that justifies it? In this section, I shall show that the right of self-defense is composed of a group of derivative rights justified by our basic rights to life, liberty and

property.[5] The right of self-defense is, in essence, *the right to protect our rights*. I shall begin by explaining why the protection of rights requires the institution of punishment.

Here is a quick sketch of the story told by the rights-protection theory. Liberal democratic societies value individual rights and autonomy. However, merely asserting these rights would not ensure sufficient protection. Rights might be violated if the government fails to provide adequate protection. How, then, can we protect rights? One way we may do so is by informing citizens of their rights and educating them about how to respect the rights of others. However, education may not be enough; intentional or unintentional rights violation may still occur. What else can we do? In order to protect rights, we may install more cameras or hire more police officers to watch over society. However, unless we install cameras and station policemen everywhere, including our bedrooms, we still cannot ensure that all rights are protected. Should we install cameras and station policemen everywhere, then? The right way to strategize is to consider the options we have and then to evaluate which option best secures our rights. In this case, we seem to have two options: we can have a police state that invades the privacy of citizens to ensure the best possible protection of other rights, or we can respect the right to privacy, but leave some room for possible rights violation. This is not to say that there is a dichotomy between these two options, but the more surveillance a society has, the less privacy its citizens enjoy. Depending on the culture and the crime rate in society, one may chose the first or the second option. If a society is such that crime is not prevalent, most who take individual rights seriously are likely to reject the first option because it inevitably encroaches upon the privacy rights of all citizens, including

[5] Whether a right is a core right depends on *the order of justification*. In contrast, whether a right is basic depends on the effect of its *enjoyment*. Basic rights, such as the right to safety, are the necessary conditions for the enjoyment of other rights (Shue 1980).

those who would never violate the rights of others. There may also be other reasons why a police state is undesirable from a liberal perspective, e.g. it fails to show its citizens adequate respect; it also seems to treat citizens as potential criminals until proven innocent and thus puts unwarranted burdens on them. However, if the culture of the society is such that crime is more prevalent, then it seems that those who care about rights protection may be more open to the option of mass surveillance as a way to secure the rights of citizens. In any case, a trade-off between rights is inevitable. Moreover, the maximal protection of rights that a liberal society can afford to offer may still leave room for possible rights violations.

Can a society do more to protect the rights of citizens*? If we have any rights at all, we must also have a right to defend and enforce those rights, at least to the extent that in doing so we do not violate more important rights of others.* Otherwise, rights would be meaningless. To ensure adequate protection of rights, we may design and impose certain *sanctions, including criminal punishment*. The word "sanction" means "something that gives binding force (Dictionary.com)." Anything that can bind or constrain the free action of people is considered a sanction, and this may include both reward and punishment. To use sanctions to protect rights, we arrange social institutions in ways that guide citizens to act in manners that are consistent with the rights of one another. This helps to ensure substantive rights protection. [6] For instance, to protect the property of members, a community can announce on its bulletin board that "Intruders on private property will receive a one year prison sentence." By doing so, the community announces that whoever violates the property rights of others will be deprived of her freedom of movement for a certain period of time. This is morally permissible because what the announcement requires is to respect

[6] This seems to be a belief shared by many social contract theorists, including both John Locke and Thomas Hobbes (Simmons 1991; Morris 1991).

the rights of others, and this is an obligation the members already have even before the announcement was made. It does not impose any additional burden or create any new duty. Whoever is making the sanction is merely asserting a reasonable demand that each member respect the property rights of others by not breaking into their private property. No one has the right to intrude into another's private property in the first place.

What about the new sanction attached to the violation? The sanction in this case, i.e., the prison sentence, would limit the rights of the offender. How can this be justified? The answer can be found in Mill's *harm principle*,

> The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

From a liberal perspective, interference with the liberty of another is acceptable only when doing so will help defend someone's proper interests, i.e., those interests that others have no right to harm (Rawls 1971: 214). If so, we may limit the rights of criminal offenders to protect the rights of all citizens. Rights-violating actions involved in sanctions are morally permissible only if they guard society against rights violation. Thus, the rights-protection theory holds that punishment is permissible for reasons of societal self-protection.

Now that I have explained the basic idea behind the rights-protection theory and how it justifies the imposition of various sanctions, including criminal punishment, let us consider what the right of self-defense involves. Philosophical literature on self-defense often focuses on situations in which one's life is in danger. However, life-threatening situations are not the only

cases in which one may exercise this right. Although such cases are frequently cited, presumably because they make the strongest case for the right of self-defense, paradigm cases of self-defense need not involve dramatic violation of the right to life. We must not forget that there are other situations in which we may exercise the right of self-defense to protect our proper interests. For instance, we may exercise such a right when our personal autonomy or property is in danger. One may build fences around her house to prevent others from trespassing, or install CCTV in the garage to see if any intruders break in. One may also use violence to fight against a mugger. All of these actions are also done for reasons of self-defense. And even though these actions appear to violate some rights, they are morally permissible because they help to protect our rights to property and autonomy.

Accordingly, what we call "the right of self-defense" is actually composed of a group of derivative rights. These rights are derived from other more fundamental rights (or core rights) that we have—namely, the rights to life, liberty, and property. Thus, the right of self-defense is not a self-standing core right; it is based on the assumption that we have certain important interests that warrant protection. It is not itself a right to do anything in particular, e.g. to move freely, to vote, or to speak freely. Rather, it is a derivative right that may be supported by many different core rights. One has the right to life; that implies that she also has the right to do things that would help preserve her life. One has the right to property; this provides at least *prima facie* justification to the right to act in ways that would protect her property.

Notice that because the right of self-defense is derived, it is constrained by the core right from which it originates.[7] This means, among other things, that when one tries to protect her interests, only those means that would help to protect the relevant core rights are justified. So if

[7] Rights may have both internal and external constraints (Marmor 2007).

A steals 50,000 dollars from B, the self-defense right of B would justify taking the money from A plus interest, but not, say, pouring gasoline into A's cereal. The former protects B's property right, while the latter does not.[8] In addition, this also means that acceptable means of self-defense are *limite*d by the rights they intend to protect; this idea is sometimes expressed by the idea of *proportionality*. For instance, we might feel that it is permissible to protect one's property right by violating the property right or some other less important right of an intruder. However, although we acknowledge the right to private property, we consider it disproportionate to protect one's property right by violating an intruder's right to life. Many consider it disproportionate to protect one's property by killing a trespasser. This intuition, however, will typically be overruled when we learn that the trespasser intends to kill the property owner. There might be other constraints to the right of self-defense, and I cannot consider all of them here. Suffice it to say that constraints are defined by the core rights one intends to protect.

Before I consider the idea of sanction and what it involves, I should briefly consider a possible objection to the idea that the right of self-defense is composed of a group of derivative rights. One might believe that the right of self-defense is a self-standing, core right that does not require further justification. This assumption, however, would lead to serious problems. As mentioned earlier, derivative rights are rights justified by a certain core right. What that means is that derivative rights are constrained by the core right that justifies them. Thus, derivative rights can be exercised only because they can protect the interests that the core right is supposed to serve. If an action X cannot serve to protect a core right C, then we cannot derive a right to X by

[8] This difference is best explained, I assume, by reference to the principle of necessity in self-defense (Lazar, 2012).

reference to right C.[9] Therefore, if the right of self-defense is a core right, it would imply that it has no higher, additional constraint other than the constraints it sets for itself. Since it is commonly recognized that the right of self-defense can justify the right to kill, the view that self-defense is a core right would entail the implausible view that we can kill a thief in self-defense. This, however, is contrary to the commonly accepted view that the right of self-defense should be exercised proportionally. Here, it is worth noting that most people do consider the right of self-defense to be constrained by the rights that we intend to protect. We typically believe that to kill a thief to defend one's property right is out of proportion. Unless the thief is about to kill you or put your life in danger, it is not morally permissible for a potential victim of theft to kill the thief who attempts to rob him. The right to protect rights is not unlimited, but is constrained by the right that it is cited to protect.

4. Possible Objections

4.1 Narrow and Wide Self-Defense

So far I have shown that in order to defend the rights of its members, it is sometimes permissible for a society to impose criminal punishment on wrongdoers and thereby limit their autonomy. However, some may still be skeptical about the self-defense strategy and have doubts about grounding the right to punish on the right of self-defense. They claim that the right of self-defense is about *preventing the occurrence* of a crime, but punishment is about responding to a crime that has *already occurred.* When punishment is imposed on a criminal, a right has already been violated; that is, punishment happens *after we fail to protect our rights* (Alexander 1999;

[9] This does not imply a success condition. All that it takes is that the act be a token of a type of action that generally contributes to the defense of an attack (Steinhoff 2014).

Boonin 2008; Ferzan 2004; Fletcher 1996; Nathanson 2001; Goldash 2005). The right of self-defense seems to become irrelevant once the crime is committed. How, then, can criminal punishment be considered a form of self-defense? This question is based on the assumption that the right of self-defense can be exercised only in a context in which a threat is present; I will call this "*the threat requirement.*" It holds that without a threat, claims of self-defense are target-less and unwarranted.

Quite a few supporters of the self-defense theory would recognize the threat requirement. Some, such as Daniel Farrell and Victor Tadros, claim that punishment is about protecting ourselves by deterring *potential criminal wrongdoers* (general deterrence), not the *actual offender*. This is why we can exercise the right of self-defense even after our rights have been violated. When we punish, we protect ourselves against potential future threats, not the threat that has already taken effect.

In this section, I will try to respond to this challenge in a different way. I shall argue that, although the threat requirement is implicit in the idea of self-defense, the opponents' conception of threat is too narrow. I shall show that substantive self-defense allows us to defend ourselves not only against *present, definite threats,* but also against *definite future threats* as well as *indefinite potential threats*. If we can make this case, then we can still exercise the right of self-defense even when a particular threat is gone or becomes ineffectual.

Let me begin by considering Thomson's account of self-defense, which initiated lively philosophical discussion on the right of self-defense and inspired self-defense theories of punishment. When reflecting on her thought experiments, most agree that *regardless of the (lack of) culpability of the aggressor*, an innocent victim is justified in killing an aggressor in self-defense *if doing so is the only way by which she can protect her life*. However, once the

villainous aggressor is no longer a threat to the victim's life, most share the intuition that the victim is no longer justified in killing the villainous aggressor. Why? One explanation is that *the threat to one's life is gone*; one no longer needs to kill him to save one's life (Thomson 1986: 34). In order to justify the right to use violence in self-defense, the presence of a threat is required. Now that the threat is gone, defensive use of force is unwarranted.

Although Boonin, Nathanson, and Thomson all make good points in favor of the threat requirement, I shall show that their conclusion is misleading. Thomson is trying to make her case by exploring our intuitions regarding radical cases. A threat to one's life is present; it justifies one's right to use violence in self-defense. Once the threat is gone, one no longer has the same right to use violence. The right of self-defense seems to be limited to cases in which one can identify a *definite threat* that is *currently in effect*. Therefore, one can exercise the right of self-defense only in those limited cases in which one is facing a present threat. Let me call this conception of self-defense the *Narrowest* conception of self-defense to contrast it with the *Narrow* and the *Wide* conceptions that I will introduce shortly. Is the Narrowest conception plausible? Can we exercise our right of self-defense when no threat is present? One who agrees with the view implicit in Boonin, Nathanson, and Thomson's discussion may be tempted to answer no. In all three cases, the Narrowest conception concludes that we are no longer justified in killing or harming an aggressor because the particular threat that we were trying to forestall has become ineffectual; the fact that it no longer poses a threat to our life explains why we can no longer kill in self-defense.

However, the Narrowest conception is clearly too narrow. For instance, it fails to support the right of self-defense in cases in which one has clear evidence that there will be a definite *future* threat. Here, it would be helpful to consider Farrell's distinction between *direct* and *indirect* self-

defense. One exercises her right of direct self-defense when she faces a present threat and must do something immediately to avert the threat and protect herself. One exercises her right of indirect self-defense when she has proof that she will face a definite threat not now, but at *a later time* (Farrell 1985: 369). Suppose I have proof that Sam, who just tried to hit my head with a comic book, plans to hit my head again with a hammer next Monday. I also know that if I punch him in the face now, he would be intimidated, and this would prevent him from harming me next Monday. In this case, most would agree that even though at this moment I am not seriously hurt by the comic book, I have the right to punch Sam's face now to forestall his future attack. I am justified in exercising my right of self-defense to anticipate a definite future threat, and I do not have to wait until the threat actually takes place to protect myself.[10]

This commonly accepted moral principle is reflected in Just War Theory, according to which preemptive strikes can be morally permissible if we have sufficient evidence to prove that the enemy will wage a war against us (Buchanan & Koehane 2006; Buchanan 2006; Coady 2003; Coates 1997; Kaufman 2004). If this is so, then a present threat is not necessary for the sake of self-defense. The Narrowest conception cannot explain why preventive measures can be permissible because the account requires a definite, present threat. If we can exercise the right of self-defense only when we face a present threat, then we cannot do anything to avert a future threat, and I cannot do anything to prevent Sam from hitting me with a hammer until he actually holds a hammer and wields it near my head. The Narrowest conception sanctions *direct* self-defense only, but not *indirect* self-defense. To many, this conclusion is implausible. To claim the

[10] Here, I agree with Jeffrey Murdoch (2000) and Marcia Baron (2011) that, in determining whether a claim of self-defense was sound, we should give up the *imminence* requirement and favor the *necessity* requirement.

right of self-defense, the Narrowest conception places on potential victims the burden of proof to show that they are subject to an actual attack. However, this burden is unreasonably heavy, and may expose potential victims to higher risks of preventable rights violation. Thus, we should reject the Narrowest conception and favor the Narrow conception, which holds that the right of self-defense includes the right to both direct and indirect self-defense. All it takes to exercise the right of self-defense, according to the Narrow conception, is a clear, definite threat. It does not matter whether the threat shall take effect now or in the future.

In cases of direct and indirect self-defense, we can find definite threats to our rights, and would be justified in taking necessary measures to ward off those threats and protect our rights. Does the right of self-defense include the rights of direct and indirect self-defense *only*, or is it possible to extend the scope of this right further? Can we exercise the right of self-defense when no definite threat can be identified, either now or in the future? Given our earlier discussion, it might still be tempting to say no. If there were no definite threat, then it makes no sense to talk about self-defense.

This intuition is widely shared among philosophers and laymen. Nonetheless, I believe that this view is wrong. If we can justifiably exercise our rights only when we can identify definite threats, then our rights cannot be *effectively* protected, because we cannot take measures to prevent threats from forming. We would then be exposed to higher risks of rights violation. In order to provide substantive protection of our rights, we have the right to take measures to prevent the presence of threats, as long as we do so in a manner that respects people's rights. Our target, then, is not any definite threat, but *indefinite, potential* threats. Such a right is actually commonly recognized, for instance, if we think about legal prohibitions against drunk driving. We do not know who will drink and drive; who the victim(s) will be, or which rights will be

violated. Not all cases of drunk driving pose definite threats to anyone's rights. However, drunk driving poses a potential threat to the safety of society; it is a *potential threat* to the life and property of people. If one believes that we should establish legal prohibitions against drunk driving, then she must also agree that the right of self-defense can be exercised even when we cannot identify any definite threat. For in the case of drunk driving prohibitions are put in place without any definite threat, present or future, and without any specific victim in view or mind. Thus, we may also exercise the right of self-defense when there are *potential threats*. I will call the conception of self-defense that allows us to exercise the right of self-defense in situations where there is no definite threat but only potential threats *the Wide Conception*.

Given our earlier discussion, the Wide Conception of self-defense is the most plausible view. It follows that we may still permissibly exercise the right of self-defense even when a crime successfully took place, or we failed to stop a particular crime. As long as we have rights to life, liberty, or property, and as long as there are potential threats to these rights, society may exercise its right of self-defense.

Now, let me consider Thomson's thought experiments again to explain why the victim can still retain her right of self-defense when the attacker no longer poses a threat to her life. I agree that when the aggressor loses his capacity to attack, the victim no longer has *the right to kill him*. However, this does not mean that the victim also loses the *right of self-defense*. In light of the fact that the attacker initiated an attack against an innocent citizen, society has evidence about his intentions or behavioral tendencies. To substantively protect the rights of citizens, society is justified in starting an investigation to determine if he will attack anyone again in the future. Although it is no longer morally permissible to shoot him, other forms of self-protection may be permissible, e.g. close monitoring of the person's whereabouts, etc. This might encroach upon

his privacy right; however, we may justify relevant rights infringement by appealing the victim's right to life, etc. I suppose readers will agree that, given our common sense understanding of human psychology, when one has been attacked by a stranger on the street, even if the attack failed she would still think it necessary to look into the matter and figure out why the perpetrator attacked anyone in the first place. Moreover, if we find sufficient proof that he will attack again, the society is justified in taking necessary measures to anticipate future attacks, even when these measures may infringe upon his rights. In this new context, although we do not have a right to kill in self-defense, we still have the right of self-defense, for we are justified in taking measures necessary to avert definite or indefinite future threats.

In Thomson's example, the reason why one no longer has the right to kill in self-defense is that the aggressor loses his ability to kill the victim, so killing him becomes no longer necessary to save one's life. In Nathanson's discussion, what overrules the right to kill in self-defense is the fact that the object one aimed to protect, i.e., the victim's life, is already gone. In the former case, the interest we would like to protect is still there; however, the means, i.e., killing the aggressor, *becomes unnecessary*. In the latter case, the interest is already gone and there is nothing to protect. In both cases *the means of self-defense,* i.e. killing, is no longer justifiable because what we intend to protect (i.e. the victim's life) no longer provides moral justification to employ the same means. What changed is not the right of self-defense, but *the moral significance of the very same action*—killing. When a threat is present, killing is justified for reasons of self-defense. When a threat is gone, killing is just killing, and cannot be understood as self-defense. What disappeared in those cases is not our right of self-defense, but our *right to use a certain means in self-defense*. What becomes irrelevant is the *right to kill in self-defense,* not the *right of self-defense* itself. Variations in contexts do not affect our right of self-defense. As long as we have

rights, and as long as they are vulnerable to possible violation, we have the right of self-defense. However, *what we can permissibly do* to defend our rights, i.e., permissible means of self-defense, may vary from one context to another. Killing is sometimes necessary to save one's life; it is at other times utterly unnecessary, unwarranted, and indefensible.[11]

So far, I have tried to defend two claims: (1) One can exercise the right of self-defense in a context in which one is not under attack; (2) What one can do for the sake of self-defense is *context dependent*—we have to explore the relation between the interests or rights we intend to protect and the means that would be morally acceptable, practically feasible, and effective before we know whether we are justified in using a particular means.

4.2 Is the Self-defense Theory too *Narrow*?

Now that I clarified the different types of threat, I will go on to consider some more objections. While some are concerned that any kind of self-defense theory would be too narrow, others worry that such a theory would be too wide. I will begin by considering the objection that the self-defense theory is too narrow.

In his examination of Tadros's self-defense theory, Larry Alexander argues that such a theory cannot explain why we can punish *inchoate crimes*, such as attempts and endangerments:

> If D attempts to roll a boulder towards V, intending to kill V, but V knows the boulder will miss him, V cannot kill or harm D in 'self-defense'—for V is not in danger and thus

[11] Supporters of the imminence requirement such as Kimberly Ferzan and Uwe Steinhoff seem to equate the right of self-defense with the use of force in self-defense. This seems to me to be the reason why they insist on the imminence requirement. However, if we make a distinction between the right and the means of self-defense, I suspect that there would not be different judgments with regard to cases of justified self-defense.

> cannot be defending himself. Likewise, if D is driving quite recklessly, but V sees that D will not crash into him, V cannot kill or harm D in self-defense (2013: 172).

I am not sure how Tadros would respond to this challenge. Regardless, if my response to Boonin, Nathanson, and Thomson works, then we can find resources in the rights-protection theory to explain why persons like D—namely, persons who intentionally or recklessly endanger the life of another—may permissibly be punished. Now that we have evidence that D is willing to act in ways that violate important rights of V, D can be regarded as a potential indefinite threat or a future definite threat, depending on the evidence we have. If so, then it is morally permissible for V to take precautionary measures to avoid unjustified aggression upon her rights. It is true that in this case, V has no right to kill D in self-defense. Harming D may also be unnecessary to protect V's rights and thus unjustified. Nevertheless, V is justified in taking necessary steps to protect herself, and this may include steps that encroach upon certain rights of D. If harming D is necessary to forestall serious rights violation of V, then V would be justified in harming D in self-defense.

5. Is the Wide Conception of Self-Defense too *Wide*?

On the other hand, some may be concerned that the wide conception of self-defense can be too wide. This conception allows us to defend ourselves not just against definite threats, but also possible indefinite threats. Since many different persons and things can become threats to our basic rights, would this account imply that we have rights to adopt certain overly cautious measures to protect ourselves? [12] For instance, would this theory entail that, to protect ourselves

[12] Some legal theorists insist that some imminent threat be present before one claims a right of self-defense. For instance, consider the following passage by Kimberly Kessler Ferzan: "the right

against drunk driving, we should also prohibit the making of wine and alcohol? Also, since most sexual harassers are male, would this theory entail that, to protect women's rights against harassment, we can lock men up to prevent them from presenting potential threats?

To answer this question, I must stress again the distinction between the *right* of self-defense and the *means* of self-defense. While this theory entails that we have the right of self-defense almost all of the time, it does not say that we also have the right to use every possible means to protect this right.[13] Since the default position is that individuals have rights and rights are important, the burden of justification is placed on those who wish to limit rights. When one wishes to take a measure to protect her right and that measure would inevitably limit the right of another, she must explain why limiting this right is necessary to protect a more important right. Given the commitment to the protection of rights, the rights-protection theory would prioritize means that cause the least damage to other rights, especially basic ones. Measures that would undermine other important rights can sometimes be taken, but only as a last resort. Since the core value of this theory is principally the protection of rights, measures that protect rights in a manner that causes the least damage to other rights are to be preferred over those that do more. For instance, we may, as the Norwegian government does, place non-violent criminals in low-security prisons, allow them to find jobs in the neighborhood, and also allow the use of knives in

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to self-defense is not the right to act as early as is necessary to defend oneself effectively. The right to self-defense is the right to respond to aggression…Without aggression, there is no self-defense, only self-preference (Ferzan 2004:262)."

[13] The fact that one has a right to a certain X does not entail that she also has the right to every means that would help her obtain X. Consider, for instance, Judith Jarvis Thomson's example of the famous violinist and Henry Fonda (Thomson 1971).

prison kitchens. High security prison facilities would be reserved for violent criminals, as it is neither necessary nor morally justified to lock up all criminal offenders in high security facilities.

Moreover, we must be careful about our judgments regarding potential threats. From the skeptical point of view, it is both logically and physically possible that many persons and things can become threats to our rights. However, without any concrete evidence, such a presumption is an implausible guide to public institutions. Whether a person should be considered a threat depends on the evidence we have. If there is no evidence that the person would pose danger to anyone, then there is no reason to regard him as dangerous. We might not be able to rule out the possibility that any person can become a threat; nevertheless, this does not mean that all persons are threats. Unless we take some kind of skeptical stance or adopt the implausible hypothesis that everyone should be assumed guilty until proven innocent, we do not have reason to doubt everyone. Persons should be presumed innocent until proven guilty. If we do not have sufficient evidence, then we should not claim that an individual may harm our rights. What counts as adequate evidence is a difficult issue that I cannot consider here. The point is that we need not subscribe to skepticism. Thus, the theory would not require measures that are overly cautious.

Going back to the drunk driving example, to ensure the safety of the citizens, we must legally prohibit driving under intoxication. Empirical evidence shows that there is strong correlation between drunk driving and diminished capacity to operate motor vehicles. Thus, we have good reasons to see drunk drivers as posing threats to the safety of others. On the other hand, we do not have evidence that everyone who drinks would be likely cause harm. Thus, there is no reason to see every drunken person as potential threat, or to prohibit the making of wine and alcohol. Nonetheless, if we had strong evidence that in a certain society there is a strong correlation

between drinking and a certain type of dangerous behavior, we would have good reason to see drinking as a real danger, and thus legally prohibit the drinking of wine, or even the making of it.

6. Conclusion

In this paper, I have described and defended the rights-protection theory of punishment. I have shown that the right of self-defense is composed of a group of derivative rights that are justified by the core rights to life, liberty, and possibly other basic rights. The implication of this theory is that we may exercise our rights of self-defense so long as we have core rights. However, it is important to bear in mind that what we may permissibly do to in self-defense, i.e., the permissible means of self-defense, is context-dependent and limited by relevant requirements of legitimate self-defense. I have also tried to respond to an important objection against the self-defense theory, i.e., the claim that the right of self-defense can be exercised only in a context in which one faces a clear definite threat. I have shown that the threat implicit in the objection is too narrow and a more reasonable conception of threat would allow us to exercise our right of self-defense even when the threat fails to take effect or is already gone. Therefore, it is possible to justify the right to punish by appealing to the right of self-defense.

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