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# Old Wine in New Wineskins? Appraising Professor Bergelson's Plea for Comparative Criminal Liability

Íñigo Ortiz de Urbina Gimeno\*

Three decades ago, using the somewhat naïve language of the first generation of critical criminologists, Nils Christie complained about “conflicts” being “taken away” from the community.<sup>1</sup> The procedural model he offered as an alternative would instead, “first and foremost,” be “victim-oriented.”<sup>2</sup> Thirty years later, it can be said that his plea for a victim-oriented criminal justice system has been amply supported, though in all likelihood not in the way he was hoping.<sup>3</sup> Victim participation in criminal law justice has undergone changes, especially in the United States, and has drawn a great deal of attention among academics as well. Most legal changes and academic discussions, however, have focused on the victim's role in the criminal process<sup>4</sup> and the general influence of the victim's perspective on the elaboration of crime policy.<sup>5</sup> The relevance of the victim's

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1. See Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977).

2. *Id.* at 10.

3. I believe it is safe to assume that Christie was hoping for something similar to restorative justice and its emphasis in victim-perpetrator-community interaction. *Id.* at 10-12.

4. See Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 3 (1999). Especially striking, from a foreign perspective, is the degree of participation given to the victim in the criminal justice system through her involvement in sentencing proceedings and parole hearings via written victim impact statements and oral allocutions. For a balanced account of the pros and cons of victim impact statements, see Trey Hill, *Victim Impact Statements: A Modified Perspective*, 29 LAW & PSYCHOL. REV. 211 (2005). On the regulation and the importance of victim participation in parole hearings (offering empirical evidence showing that victim participation exerts great influence upon parole boards), see Kathryn Morgan & Brent L. Smith, *Victims, Punishment, and Parole: The Effect of Victim Participation on Parole Hearings*, 4 CRIMINOLOGY & PUB. POL'Y 333 (2005).

5. Reams of paper have been devoted to the study of this topic. For a particularly lucid analysis, see DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001). See also Francis T. Cullen, Bon-

conduct when attributing criminal liability remained comparatively underdeveloped in American criminal law.<sup>6</sup> A general approach to the subject was largely lacking before Bergelson's impressive 2005 contribution.<sup>7</sup>

The analysis of victim conduct in substantive criminal law could be said to represent the dark side of the moon of the victims' rights movement. The reforms experimented with by the criminal justice system as a result of the victims' rights movement are "victim-friendly" and have granted victims more rights. Discussions on victim conduct in substantive criminal law, however, tend to move in another (though not quite "the opposite") direction. In substantive criminal law, victim conduct is usually analyzed to determine the extent to which it should lead to a diminution or even an extinction of the perpetrator's own criminal liability.<sup>8</sup> This is most obvious in the case

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nie S. Fisher & Brandon K. Applegate, *Public Opinion About Punishment and Corrections*, 27 *CRIME & JUST.* 1, 57-67 (2000) (offering a critique of the empirical basis of the "that's-what-the-people-want" argument politicians so often use); Paul H. Robinson, *Should the Victim's Rights Movements Have Influence Over Criminal Law Formulation and Adjudication?*, 33 *MCGEORGE L. REV.* 749, 755-57 (2002) (concluding that victim participation in the formulation of crime policy and in the criminal justice process through victims' organizations is generally positive, but victim participation in the adjudication of the victimizer's case is highly problematic and can result in a loss of legitimacy).

6. The question has traditionally received more attention in European criminal law literature, though in a hidden kind of way. It has been studied under many names and in the analysis of various topics such as causation, self-endangerment, and culpability. See Manuel Cancio Meliá, *Victim Behavior and Offender Liability: A European Perspective*, 7 *BUFF. CRIM. L. REV.* 513 (2004) (offering an exhaustive literature review, as well as some new proposals).

7. Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 *BUFF. CRIM. L. REV.* 385 (2005) [hereinafter Bergelson, *Victims*].

8. This trend has been particularly evident in European criminal law for the last thirty years. For an early compelling critique, see THOMAS HILLENKAMP, *DER EINFLUSS DES OPFERVERHALTENS AUF DIE DOGMATISCHE BEURTEILUNG DER TAT* (1983). Within criminology, victimology studies both the harm that crime causes to its victims and the victim-offender relationship. These investigations have shown the impressive number of victims that somehow "collaborate" in the crimes committed against them. For a good review of the literature, see Bergelson, *Victims*, *supra* note 7, at 390-96. The importance of victim precaution for crime prevention is a point also taken up by situational crime prevention, one of the latest additions to the criminological canon. See *SITUATIONAL CRIME PREVENTION: SUCCESSFUL CASE STUDIES* (Ronald V. Clarke ed., 2d ed. 1997) (description of theoretical basis and a collection of studies showing the empirical support for the theory); *ETHICAL AND SOCIAL PERSPECTIVES ON SITUATIONAL CRIME PREVENTION* (Andrew

of proponents of the paradoxically named “victimological principle” who, contrary to victimology’s original intention, propose that protection through criminal law be denied to “undeserving victims.”<sup>9</sup> At first glance, Vera Bergelson’s proposal seems to follow this trend of increasing the relevance attributed to the victim’s conduct. In fact, her thoroughly argued plea for the relevance of comparative liability in criminal law would seem to take it to the next level. However, this apparently broader consideration of victim conduct owes much of its breadth to the fact that Bergelson uses a victim concept different than the one used by other commentators. Specifically, Bergelson’s victims include both the consenting *victim* in cases of validly given consent and the perpetrator-turned-*victim* of a self-defensive action.

Bergelson starts off on the right foot when she states that the widespread rhetorical denial of the significance of victim conduct in the apportioning of criminal liability does not appropriately describe our legal systems.<sup>10</sup> Far from being insignificant, Bergelson contends, victim conduct plays a decisive role in a number of institutions, including some at the very core of criminal law, such as self-defense, consent, and provocation. In fact, the importance of victim conduct in these three institutions had not escaped the attention of European commenta-

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von Hirsch et al. eds., 2000) (contributions assessing legal and ethical problems and possible unintended social effects).

9. See Bernd Schünemann, *Zur Stellung des Opfers im System der Strafrechtspflege (II)* 6 NSTZ 439 1986. “Undeserving victims” are victims of non-violent offenses that can easily protect themselves but fail to do so. *Id.* at 439. The victimological principle is said to be inferred from the *ultima ratio* principle. This principle instructs to use criminal law as a last resort in order to maximize individual rights. It is thus ironic that a proposal similar to Schünemann’s “victimological principle” has been advanced from what could be viewed as the opposite normative standpoint: the social-welfare perspective defended by some proponents of the law and economics movement. See Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181 (1994). For a wonderfully condensed rebuttal of the latter proposal, see Bergelson, *Victims*, *supra* note 7, at 424-25.

10. I concur with Husak’s powerful phrasing of this point: “[A]nyone who contends that victim fault is and ought to be irrelevant in all cases simply does not know what he is talking about.” Douglas Husak, *Comparative Fault in Criminal Law: Conceptual and Normative Perplexities*, 8 BUFF. CRIM. L. REV. 523, 523 (2005).

tors.<sup>11</sup> What is unusual from a European perspective, however, is her attempt to find a common underlying rationale. But the fact that Bergelson's approach is unusual to the European eye does not at all imply that it is faulty. Trying to ascertain what different doctrines have in common in order to see whether it is possible to make them all fall under the same principle or set of principles can be a very useful strategy. One could in fact say that such pursuit has been the very essence of European criminal law theory for some centuries now.<sup>12</sup>

The problem, pointed out by other commentators,<sup>13</sup> is that Bergelson may be aggregating too much. Her unifying general principle states that "the criminal liability of the perpetrator should be reduced to the extent the victim, by his own acts, has diminished his right not to be harmed by the perpetrator."<sup>14</sup> According to her, this principle underlies the doctrines of consent, self-defense, and provocation and (almost inevitably) leads to the admission of comparative fault in the criminal law field. In the next sections, I will go through Bergelson's proposal building blocks. I will very briefly comment on consent (Section I) and devote more space to the analysis of self-defense (Section II) and provocation (Section III). I will conclude by analyzing the methodological status of Bergelson's "conditionality of rights principle" (Section IV).

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11. See Winfried Hassemer, *Rücksichten auf das Verbrechensopfer*, in 2 FEST-SCHRIFT FÜR ULRICH KLUG ZUM 70. GEBURTSTAG 217, 218 (Günter Kohlmann ed., 1983); Jesús María Silva Sánchez, *¿Consideraciones Victimológicas en la Teoría Jurídica del Delito? Introducción al Debate Sobre la Victimodogmática*, in CRIMINOLOGÍA Y DERECHO PENAL AL SERVICIO DE LA PERSONA: LIBRO-HOMENAJE AL PROFESOR ANTONIO BERISTAIN 633, 635 (José Luis de la Cuesta et al. eds., 1989).

12. This is an endeavor pursued with some exaggeration. On the methodological standpoint of German criminal law theory (by far Europe's most influential criminal law theory), see Marcus Dirk Dubber, *The Promise of German Criminal Law: A Science of Crime and Punishment*, 6 GERMAN L.J. 1049 (2005); Wolfgang Naucke, *An Insider's Perspective on the Significance of the German Criminal Theory's General System for Analyzing Criminal Acts*, 1984 BYU L. REV. 305 (effectively delivering the insider's perspective promised in the title).

13. See Alon Harel, *Victims and Perpetrators: The Case Against a Unified Theory of Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 489, 490, 494-99 (2005); Kenneth W. Simons, *The Relevance of Victim Conduct in Tort and Criminal Law*, 8 BUFF. CRIM. L. REV. 541, 562 (2005).

14. Bergelson, *Victims*, *supra* note 7, at 456.

## I. Consent's Magic Erasure of Victim Status

Nobody has explained the astonishing effects of consent better than Heidi Hurd. According to her:

[C]onsent in many circumstances is "morally magical": by itself it alters the moral ontology of another's act, making it altogether impossible to describe that act as involving even a prima facie rights violation. Thus, consent turns a rape into love-making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift, and a trespass into a dinner party.<sup>15</sup>

The magic of consent is not merely moral. When transposed to the legal setting, a legally valid consent dramatically changes the legal consequences of the conduct involved. In this case too, it is difficult to describe the act as involving even a prima facie rights violation. And if there is not even a prima facie rights violation, what sense does it make to talk about a victim? Bergelson agrees that consent magically transforms the perpetrator's conduct. Why then does this magic stop at the perpetrator and not extend to the victim? Can we meaningfully deny the existence of a perpetrator whilst affirming the presence of a victim? I highly doubt it. Bergelson herself is aware that the criminal law institutions she uses to illustrate her point regarding the general relevance of victim conduct are sharply divided by the issue of the voluntariness of the victim's right reduction. In the event of consent, the victim loses or diminishes her rights voluntarily, whereas in self-defense and provocation, the victim loses them involuntarily. That is why in the former cases Bergelson only requires consent to be valid in order for the conduct of the victim to have legal significance, whereas in the latter cases, she demands that the victim should infringe a legally recognized right of the perpetrator.<sup>16</sup> This makes a big difference. In other words, the voluntary reduction

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15. Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal That Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 BUFF. CRIM. L. REV. 503, 504 (2005) (footnote omitted). For a complete account of Professor Hurd's views, see Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996).

16. See Bergelson, *Victims*, *supra* note 7, at 389.

cases are related to the victim's *conduct*, whereas the involuntary reduction cases are related to the victim's *faulty conduct*.<sup>17</sup>

This idea is also supported by Harel's accurate observation that, in the case of consent, the legal system's aim is to advance the consenting person's autonomy, whereas in self-defense and provocation it is to protect third parties.<sup>18</sup> Turning to rights theory, the criminal law regulation of valid consent grants the consenting party a power in Hohfeldian terms, that is, by consenting, she grants the consent recipient a privilege.<sup>19</sup> The actual exercise of that power (actually consenting) cancels the consent's recipient duty to the awarding party. However, this does not mean that the recipient has a right in the strictest sense of the term, for the consenting party has no duty not to get in the way of the consent recipient and may even oppose the recipient's action (a conduct that may be considered sufficient proof of the withdrawal of consent unless the circumstances indicate otherwise).<sup>20</sup>

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17. See Husak, *supra* note 10, at 523 n.3 (stating that he will focus on Bergelson's thesis of faulty conduct on the part of the victim, thus not addressing the cases of consent). See also Simons, *supra* note 13, at 544 (stating that only provocation necessarily involves fault, since self-defense is triggered by a wrongful threat and this could come from a nonculpable person such as a child or an insane person).

18. See Harel, *supra* note 13, at 496.

19. JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 44 (1990). In this contribution, I will use Thomson's account of Hohfeldian notions, because it avoids some minor inconsistencies incurred by Hohfeld himself. *Id.* at 53. For Hohfeld's original account, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917).

20. I beg the reader not to immediately think about the consent to sex case; "no means no" and apparent opposition almost invariably means no, too (*almost*: one cannot rule out the possibility of apparent opposition being part of the consented sexual behavior of adults). I invite the reader to think about a Karate instructor consenting to be attacked by one of his students and then skillfully evading his attempts to kick him. In these circumstances, the student may reasonably infer that this opposition does not imply withdrawal of consent. The student does not have the right to attack the instructor because there is no duty on the instructor's part to endure the attack. According to the Hohfeldian account, the student does not have a right, but a privilege, which means that, were the student to successfully hit his instructor, the latter would have no claim against him (this is indeed the otherwise not so obvious practical relevance of having a privilege). See THOMSON, *supra* note 19, at 52.

Bearing in mind that voluntariness is the force driving the moral magic of consent, one should be very careful when placing consent in a group together with institutions that pursue the protection of one's interests against other parties' faulty conduct. The underlying rationales are very different, almost opposed, and this enormously complicates the search for a common principle with substantive content.<sup>21</sup>

## II. Aggressor's Conduct in Self-Defense Settings: A Hohfeldian Power?

I will begin the analysis of victim conduct in self-defense cases by offering an argument about the impropriety of calling the unsuccessful attacker a victim. I am quite surprised that even commentators willing to deny the victim condition to consenting parties find it perfectly logical to talk about a victim in the self-defense case. Harel, for instance, states that:

It would be awkward to describe John as a victim if John agreed or invited Suzanne to enter his house. . . . In contrast, it would be natural to describe John as a victim if he is killed (permissibly) by Suzanne in self-defense. Even if his killing is justifiable, John is still a victim although his status as a victim resulted from his own actions.<sup>22</sup>

I think this statement should be qualified. People injured or killed in self-defense certainly qualify as victims in common parlance. The mere fact that they have sustained an injury or may even be dead places them in a larger group of victims together with victims of earthquakes and skiing accidents. But are they victims in the eyes of the criminal justice system? Should they be considered as victims in terms of criminal law theory? I think the answer to both questions is no. In these narrower terms, talking about a victim would seem to require the existence of a perpetrator, that is, of someone who has committed a criminal wrong. Self-defense, however, excludes the existence of such a criminal wrong. Many victim public compensation schemes in Europe accordingly foresee a "public order" or "justice" exception to payment when the victim is the

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21. This also explains the different meaning of consent in terms of rights theory, which is explained in the next section. See *infra* Part II.

22. Harel, *supra* note 13, at 496-97.



perpetrator himself or one of his accomplices.<sup>23</sup> I have already expressed my doubts regarding the fact of talking about a victim in cases of consent.<sup>24</sup> The use of the word in the self-defense setting already implies two problematic uses of the word “victim.”

My second point addresses the proper conceptualization of self-defense under the theory of rights. Alon Harel understands the principle of conditionality of rights as stating that in consent, self-defense, and provocation, individuals have a Hohfeldian power to reduce or extinguish the duties of others towards them.<sup>25</sup> I am afraid Harel’s conceptualization grants Bergelson too much.<sup>26</sup> It does so by suggesting that all these criminal law institutions have the same structure in terms of the theory of rights, thus lending implicit support to the “one underlying principle” idea.<sup>27</sup> However, neither self-defense nor some instances of provocation (those in which the provoking act is legal) meet the Hohfeldian definition of power.

Let’s think about some of the examples of powers granted to individuals offered by Harel: “[T]he power of a person to accept an offer and thus create a binding contract, or the power to appoint an agent who is authorized to conduct legal transactions on one’s behalf.”<sup>28</sup> For color, let me add the power to get

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23. See EUROPEAN COMMISSION, EUROPEAN JUDICIAL NETWORK, COMPENSATION TO CRIME VICTIMS, [http://ec.europa.eu/civiljustice/comp\\_crime\\_victim/comp\\_crime\\_victim\\_gen\\_en.htm](http://ec.europa.eu/civiljustice/comp_crime_victim/comp_crime_victim_gen_en.htm) (last visited February 27, 2008).

24. That is, when consent excludes criminal liability.

25. Harel, *supra* note 13, at 491-94. According to Hohfeld, a power is “an ability to cause, by an act of one’s own, an alteration in a person’s rights, either one’s own rights or those of another person or persons, or both.” See THOMSON, *supra* note 19, at 57.

26. In all fairness, Harel does include a proviso stating:

[W]hat is characteristic of cases covered by the principle of conditionality of rights is not merely the fact that the victim can reduce or extinguish the duties owed to him but that it is the victim’s action that has such a power rather than a state of affairs than can be brought about by the victim’s actions.

Harel, *supra* note 13, at 493. However, this proviso does not relate to what I am about to say.

27. Bergelson herself says she is grateful to Harel “for bringing up Wesley Newcomb Hohfeld’s typology and showing where the principle of conditionality of rights fits into it.” Vera Bergelson, *Conditional Rights and Comparative Wrongs: More on the Theory and Application of Comparative Criminal Liability*, 8 BUFF. CRIM. L. REV. 567, 572 (2005) [hereinafter Bergelson, *Conditional Rights*].

28. Harel, *supra* note 13, at 491.

married to the list. Following von Wright,<sup>29</sup> modern analytical jurisprudence distinguishes between deontic and constitutive norms.<sup>30</sup> Deontic norms, on the one hand, purport to direct the agent's behavior by forbidding, imposing, or allowing the conduct they refer to (by "deontically qualifying" that conduct).<sup>31</sup> Constitutive norms, however, do not purport to direct the agent's behavior, at least not directly. The legal system is not particularly interested in whether you use the power conferred or not. It doesn't really matter whether you finally enter into a contract, appoint an agent, or marry. Due to practical reasons, the legal system is highly interested in having the power to unilaterally determine what legal effects these institutions have, that is, to determine what entering into a contract, having an agent, or marrying means in legal terms. You may or may not get married, but once you do you cannot determine what the legal effects of marriage are or how being married affects your rights and those of others. Tellingly, all of Harel's examples are instances of these constitutive or "power-conferring" norms. One of the characteristics of power-conferring norms is that they do not foresee sanctions in the event that they are not complied with, at least not in the traditional sense of the term "sanction." If you don't comply with the power-conferring norm, you don't have to pay a fine or suffer any other kind of punishment. What happens is that you simply do not get the desired legal effect. If you don't comply with the requirements established for entering into contracts, appointing agents, or marrying, you just don't have a valid contract, agency mandate, or marriage.

In order to get a clearer picture of this, let's focus on the contract case and compare it to the self-defense case. If you do not use the power to enter into contracts as established by the power-conferring norm (the norm establishing the requirements

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29. GEORG H. VON WRIGHT, *NORM AND ACTION: A LOGICAL INQUIRY* (1963).

30. See JOSEF J. MORESO & JOSEF M. VILAJOSANA, *INTRODUCCIÓN A LA TEORÍA DEL DERECHO* 65-69 (2004).

31. Permissions do not actually direct the agent's conduct; rather, they allow him the freedom to decide what is best to do in that situation. Permissions can, however, be pragmatically relevant when the conduct was previously prohibited or compulsory. They can also be pragmatically relevant inasmuch as they bound lesser authorities. See MANUEL ATIENZA & JUAN A. RUIZ MANERO, *LAS PIEZAS DEL DERECHO* 115-39 (2d ed. 2004).

needed to enter into a contract), the contract will be invalid. Nevertheless, the conduct of invalidly entering into a contract is by itself legal.<sup>32</sup> This is surely not what happens in the self-defense case. Wrongfully attacking someone else is *ab initio* forbidden. The legal system is not indifferent to whether people wrongfully attack others or not; it positively seeks people not to act in that manner at all. The legal system does not grant attackers the power to diminish their rights through their wrongful conduct; it forbids them to act that way. This leads to a second and crucial difference between the two situations.

In the cases of power-conferring norms, the legal system allows for the possibility that you will legally get the result you intended. If you follow the indications set out by the legal system, you will have a valid contract, agency mandate, or marriage. In the self-defense setting, however, the legal system does not foresee that you can carry on with your wrongful attack and (legally) get what you want. Conversely, it instructs you to stop doing what you are doing and grants others the right to stop you even when doing this results in serious disadvantage for you. The deontic status of the "victim's" conduct radically distinguishes the cases of consent and self-defense. It is not only a matter of the voluntariness or involuntariness of the diminution of rights, but also a matter of how that conduct is regarded by the legal system. The deontic status awarded to the conduct by the legal system sharply differentiates consent from the wrongful attack leading to self-defense. You may or may not consent to sex. In either case you remain within the law and you enjoy legal protection. But you may not wrongfully attack. Harel (and Bergelson) are mistaken in considering that the assailant has a power in Hohfeldian terms. His conduct does have "an ability to cause by an act of one's own, an alteration in a person's rights, either one's own rights or those of another person or persons or both"<sup>33</sup> but this is only part of the Hohfeldian story. According to the Hohfeldian notion of power,

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32. Another norm may specify that some types of contractual vices, like threatening the other party, may carry a sanction. However, that is a different norm (it will usually belong to another legal text, too) and what it actually does is declare such conduct forbidden: you may or may not enter into a contract, but you simply may not threaten the other party.

33. THOMSON, *supra* note 19, at 57.

“no power is correlative with a duty.”<sup>34</sup> Can we really say that the attacker has no duty to omit the act that alters the attacked party’s rights? This strikes me as absurd; of course he does. Thus, it cannot be said that the attacker has a power in the self-defense setting.

There is a sense in which it could be said that the legal system grants a power in the self-defense setting. Nonetheless, it is not granted to the perpetrator, but to the victim of the wrongful aggression (that, remember, is *not* the victim in Bergelson’s analysis).<sup>35</sup> The legal system stops holding the victim’s conduct to a prohibitory norm by granting him a permission to act. That permission is a privilege in Hohfeldian terms.<sup>36</sup> The situation is similar to the one in the power-conferring norm. Just as you may or may not use the power awarded to you, you may or may not use the permission to act in self-defense. You may choose to defend yourself or to sacrifice your life; no matter what you choose to do, your conduct remains legal. But it is you, not the attacker, who has that choice.

34. *Id.* at 59.

35. In her response to Husak’s criticism, Bergelson approvingly quotes him, saying that the principle of conditionality of rights “require[s] the *offender* to have the right that the victim not behave as she does . . . .” Bergelson, *Conditional Rights*, *supra* note 27, at 582 (emphasis added). However, according to her analysis in the self-defense cases, the offender *is* the victim whose conduct alters the rights of the parties in the situation. I take Bergelson’s slippage to be a sign of how difficult it is to meaningfully talk about the aggressor as a victim in self-defense settings.

36. THOMSON, *supra* note 19, at 44. It is important to see that the defending party does not have a right in the strictest sense. The difference is elsewhere recognized by Bergelson:

[A] privilege is merely one’s freedom from the right or claim of another; its correlative is not a duty but a “no right.” If *Y* unlawfully attacks *X*, *X* may use force in self-defense. *X* acts under a privilege, and *Y* has *no right* that *X* not act that way. On the other hand, *Y* does not have a duty to stay put and let *X* kill him. *Y* may quite lawfully run away.

Vera Bergelson, *Rights, Wrongs, and Comparative Justifications*, 28 CARDOZO L. REV. 2481, 2489 (2007) [hereinafter Bergelson, *Rights*]. It is also clear that *Y* has a duty not to attack *X*, since *X* poses no wrongful threat to *Y*. However, I believe that *Y* could act against *X* and still be awarded a necessity defense. His action, however, would have to be defensive and cannot suppose any serious disadvantage to *X*. *Y* may, for instance, hold *X* until he calms down at the same time that he shows him that he is no longer a threat (admittedly, this is a *Gedankenexperiment*).

The previous discussion has focused on the status of self-defense according to the theory of rights. It has shown that the conduct of the attacker in self-defense settings is viewed as something completely different from the conduct of the other two victim categories in Bergelson's analysis. This does not prove anything, though it does show that a principle covering these three instances would have to be formulated in extremely broad terms. However, before addressing this problem, allow me to analyze Bergelson's final building block: provocation.

### III. Less Wrongful or More Understandable? Bergelson's Thought-Provoking Analysis of Provocation

Provocation may adopt three different forms. First, it may constitute an immediate wrongful threat. This is the least problematic case since whenever *A*'s conduct constitutes an immediate wrongful threat to *B*, he may react in self-defense. On the other side of the spectrum, some instances of provocation are legal in essence. If *A* informs *B* that she is having an affair with *B*'s spouse, *B* may quite understandably be angry, but *A*'s conduct does not constitute an immediate wrongful threat nor is it illegal. The third possibility is that provocation is by itself illegal but does not constitute an immediate wrongful threat (or at least not any more): *A* may shout out loud in a bar that she is having an affair with *B*'s spouse, or she may spit in *B*'s face and subsequently turn around and slowly and peacefully make her way to the door. In either case, after the shouting and spitting, there isn't an immediate wrongful threat or an illegal action. What should we do in these two groups of cases? Let me start with an obvious observation. We all know that some instances of provocation may make people lose their temper. Nevertheless, we still believe that they should have acted in a different way (otherwise we would grant them a complete defense). The problem is how to maximize these conflicting interests. I agree with Bergelson that in order to do it we have to take into account both the conduct of the provoker and the conduct of the provoked party. Still, I would argue that this doesn't force us to affirm the existence of partial justification on the part of the provoked party.

Bergelson asks herself whether in provocation we reduce the defendant's punishment because of his own state of mind or

because the conduct of the victim makes him partially responsible for the harm suffered.<sup>37</sup> I believe that we do it for the former reason, whereas she believes that at least in some cases we do it for the latter. Specifically, consistent with her specification of the conditionality of rights principle for involuntary rights reduction cases, Bergelson believes that provocation is a partial justification whenever the provoker violates the provoked party's legal rights.<sup>38</sup> She also admits that in the rest of cases the perpetrator could still see his liability reduced through a partial excuse.<sup>39</sup> Differentiating the conceptual nature of an institution and stating that it may sometimes function as a justification and other times as an excuse is uncommon but not unknown.<sup>40</sup> However, before agreeing to it, one should carefully examine whether it is possible to prevent this result and offer a unitary account of the institution.<sup>41</sup> Most American commentators concur with me that provocation is best understood as a matter of excuse.<sup>42</sup> Still, vote counting is no substitute for argument, so let's turn to the complex differentiation between justification and excuse.

On the justification-excuse divide, Bergelson seems to support Austin's famous proposal: "In the one defense [justification], briefly, we accept responsibility but deny that it was bad; in the other [excuse], we admit that it was bad but don't accept

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37. Bergelson, *Victims*, *supra* note 7, at 409.

38. In these cases "it is the *act* that is less wrongful, not simply the *actor* that is less culpable." *Id.* at 418 (emphasis added).

39. See Bergelson, *Conditional Rights*, *supra* note 27, at 583.

40. A majority of European commentators and some criminal codes support the "differentiation theory" regarding the necessity defense. According to this theory, necessity can function either as a justification (when the harm avoided is clearly greater than the harm caused) or as an excuse (when the harm avoided is not clearly greater than the harm caused but is somehow understandable). The German criminal code (*Strafgesetzbuch*) follows this approach: § 34 regulates necessity as justification (when the harm avoided is clearly greater than the harm caused) and § 35 regulates necessity as excuse (restricted to avoidance of physical harm and liberty restrictions endangering the agent herself or close persons). On the German regulation, see 1 GÜNTER STRATENWERTH & LOTHAR KUHLEN, STRAFRECHT: ALLGEMEINER TEIL 165-174, 221-25 (5th ed. 2004).

41. Since the consideration of a conduct as justified rather than excused carries practical consequences, such as the extent of the powers granted to the acting party, this is not merely a theoretical endeavor.

42. Bergelson admits that hers is a minority view in the United States. See Bergelson, *Victims*, *supra* note 7, at 411.

full, or even any, responsibility.”<sup>43</sup> Although this formula is seldom referred to by European commentators, I also support Austin’s view (to my students’ satisfaction, I must add). In what I take to be the best interpretation of his statement, “denying that it was bad” means just that, the act was not bad and does not further mean that it was good. But so polemic an issue as this may be,<sup>44</sup> it just concerns the proper limits of justification (though it indirectly affects the distinction between justification and excuse through the number of instances that qualify for justification). What is important now is to focus on the difference between “not bad” and “understandable.”

The fact that the provocation defense demands the existence of certain (passionate) mental states on the defendant’s part provides a compelling argument for the excusatory character of provocation.<sup>45</sup> If we were talking about a justification, why should they be required? Bergelson cleverly retorts by saying that, were it all a matter of passion, we could make no sense of the law’s demand that the provoked party should react against the provoker and no one else.<sup>46</sup>

Bergelson’s argument starts off on the right foot, but is ultimately unconvincing, because it incorrectly interprets the point

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43. J.L. AUSTIN, *PHILOSOPHICAL PAPERS* 176 (J.O. Urmson & G.J. Warnock eds., 2d ed. 1970) (1961).

44. This is a highly contested issue. Prominent commentators have defended both interpretations. The issue was the subject of an interesting exchange between Professors Fletcher (defending the position that an act has to be right to be justified) Dolinko, and, later on, Dressler (defending the “justified as not bad” view). See George P. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse?*, 26 *UCLA L. REV.* 1355 (1979); David Dolinko, *Intolerable Conditions as a Defense to Prison Escapes*, 26 *UCLA L. REV.* 1126, 1178-81 (1979); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking*, 32 *UCLA L. REV.* 61, 69-76 (1984). Although a majority of commentators do not state their opinion, I take Fletcher’s view to be prevalent in Europe. The contending opinion is defended by Enrique Gimbernat and Claus Roxin, considered by many to be the most eminent Spanish and German commentators of the last fifty years. See ENRIQUE GIMBERNAT ORDEIG, *El Estado de Necesidad: Un Problema de Antijuridicidad*, in *ESTUDIOS DE DERECHO PENAL* 228 (3d ed. 1990); 1 CLAUS ROXIN, *STRAFRECHT ALLGEMEINER TEIL* 600 (4th ed. 2006). Bergelson herself endorses the “justification as not bad” view. See Bergelson, *Rights*, *supra* note 36, at 2484, 2492-95.

45. See Joshua Dressler, *Why Keep the Provocation Defense? Some Reflections on a Difficult Subject*, 86 *MINN. L. REV.* 959, 971-72 (2002).

46. See Bergelson, *Victims*, *supra* note 7, at 412-19. She is joined in this critique by Heidi Hurd. See Hurd, *supra* note 15, at 505-06.

of excuses according to Austin's formula. Most of us do not understand the acts of mentally ill people. What we understand is the more general fact that they are mentally ill. The idea behind Austin's excuse definition is that the person to be excused could have controlled himself.<sup>47</sup> Though some people acting under provocation (or duress) may reach the state of temporary mental insanity, most do not and are, as far as we know, capable of acting otherwise. Since they are acting under extraordinary, unfortunate circumstances, however, we also know it will be difficult for them to do so. In these circumstances, we have to decide how much to demand from them, taking into account that fairness to third parties is also involved. That is the reason why a number of codes throughout the world require the excuse to be reasonable. We rapidly understand that people may feel tempted to react against their provokers. They did provoke them, and, depending on the nature of the provocative act, it may well be reasonable to be mad at them. We want them to resist provocation, but at the same time, we understand that it may be difficult to do so. If they succumb to their anger we find good reasons to award them some kind of responsibility diminution. It would be much more difficult, or rather plainly impossible, to understand why on earth they would ever want to react against some other person that did nothing to them; reacting against that person would be unreasonable.<sup>48</sup> Since it is also extremely unfair towards those third persons, the legal system does not award any diminution of responsibility to sane people reacting against third parties. Contrary to Bergelson's opin-

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47. I think this is strongly suggested by the wording Austin chose: "*we accept, we deny, we admit.*" See AUSTIN, *supra* note 43, at 176. I believe it is highly reasonable as well. See also Dressler, *supra* note 45, at 972-73.

48. Note that this does not preclude the discussion in cases where the innocent party has not done anything to the assailant, but yet she does "stand in the way." I am thinking about cases like running out of a movie theatre to escape a rapidly expanding fire and pushing other escaping people in the process. I do not argue that the assailant should be completely excused, but the fear for his life may afford him some understanding (and responsibility diminution) on our part. Were he not merely to push people but to subsequently kick them, our understanding may well cease. Kicking people in these circumstances is not at all understandable, because it is in no way related to the escape from danger (in fact, it makes it more difficult).



ion,<sup>49</sup> the doctrine of misdirected retaliation can be fully explained on excusatory grounds.

In the situations of provocation we are analyzing there is no reason to award the attacker a complete justification because he is not being wrongfully attacked by the provoker. Through the immediate wrongful attack requirement, the legal system clearly elucidates the proper limits of that defense. It also clearly sends a message that in the absence of an immediate wrongful attack, it wants the provoked person to abide by the law and not to attack his provoker. Since nobody has proposed awarding a complete defense in these cases, this conclusion holds whether we take provocation to be a matter of justification or excuse. In either case, the reaction of the provoked party will be (partially) wrongful and thus forbidden. This leads to another problem. Bergelson does not consider the possibility that the provoker-then-attacked will be able to overcome the provoked party's attack. Although she suggests that the provoked party would at most be partially justified, his conduct would still remain wrongful. The question arises whether the provoker would have a self-defense claim. Were the provoker able to evade any criminal responsibility by claiming complete self-defense, he would have less incentive to avoid engaging in provoking conduct, and third parties would see their possibilities to assist the provoked person greatly reduced because the now self-defending provoker's conduct would be justified. This would be a distressing result that is safely avoided by the solution provided by the Spanish criminal code.

Section 20.4 of the Spanish criminal code regulates self-defense and provides that in case of provocation, the provoker does not have a claim of complete self-defense; rather it is diminished to a claim of partial self-defense. Thus, his conduct is still considered wrongful but his punishment will be significantly diminished.<sup>50</sup> The Spanish criminal code does not say anything specific about the provoked party. It is considered

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49. Bergelson, *Victims*, *supra* note 7, at 417-19.

50. Simple homicide, for instance, carries a sentence of 10-15 years of imprisonment. C.P. § 138. In the presence of a partial defense, according to Section 68, the penalty has to be reduced either one or two degrees. C.P. § 68. In the case of simple homicide, this would mean a penalty of 5-10 years (one degree reduction) or 2.5-5 years (two degrees).

that, given the case, his responsibility will be diminished according to the general rules regarding culpability diminution. In sum, with this solution the victim's conduct does indeed change the legal scenario in terms of the justificatory claims awarded to the attacker and the attacked party. However, it does so not by awarding a partial justification to the provoked party, but through the denial of complete justification to the provoker. In the provocation setting, Bergelson seems to act in a "zero sum game" assumption: if the provoker sees his justificatory claims diminished, the provoked party must see them amplified. But this is surely not a conceptual necessity, and I hope I have shown it is not the best solution that the legal system can offer either. The denial of complete justification to the provoker and the eventual diminution of the provoked party's responsibility on excusing grounds offer a better global solution to this problematic situation.<sup>51</sup>

#### IV. The Conditionality of Rights Principle

After reviewing the doctrines of consent, self-defense, and provocation, Bergelson concludes that her analysis "demonstrates a common principle underlying all three defenses and perhaps criminal law in general—the principle of conditionality of our rights."<sup>52</sup> I concur with Husak that this principle forms "the philosophical cornerstone of her thesis about the significance of victim fault to perpetrator liability."<sup>53</sup> I also agree that what it exactly means is not entirely clear and needs further explanation. In this section, I will address some of the problems faced by this principle to ultimately conclude that it is devoid of

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51. This perspective actually helps Bergelson's proposal overcome one of Husak's perceived "conceptual perplexities." According to Husak, "[i]f the perpetrator does not contravene any rights of his victim because the victim has lost whatever right the perpetrator might otherwise infringe or violate, victim fault should be a *complete* defense to crime." Husak, *supra* note 10, at 531 (emphasis added). The problem lies in the "whatever right." As shown by the Spanish criminal code solution, people need not lose whatever right. They may lose some, such as the claim of complete self-defense, while retaining others, such as the claim of partial self-defense. Husak's observation seems to imply that Bergelson believes her comparative criminal liability defense can only be partial, but this is not correct, as Bergelson herself has noted. See Bergelson, *Conditional Rights*, *supra* note 27, at 570-71.

52. Bergelson, *Victims*, *supra* note 7, at 465.

53. Husak, *supra* note 10, at 526.

substance and thus cannot offer any guide in the resolution of practical problems. I will divide my analysis in two subsections. The first one analyzes the conditionality of rights principle from the viewpoint of rights theory. The second and final subsection addresses its substantive content.

A. *The Conditionality of Rights Principle According to Rights Theory*

According to Husak,<sup>54</sup> the principle of “conditionality of rights” can be interpreted as a species of the “rights specification” thesis.<sup>55</sup> Since I highly sympathize with that thesis, I was pleased to read it.<sup>56</sup> I was understandably disappointed when I then read that Bergelson herself thinks that “the theory of rights I employ is anything but specification.”<sup>57</sup> One question immediately arises: Who is right? Nevertheless, I believe a second question to be more important: Does it really matter who is right? I think it is doubtful that it does. Specifically, I believe that Bergelson’s conditionality of rights principle does not need to rely on any particular thesis as long as it is compatible with the more general assertion that there are no absolute rights. Still, I also believe that Bergelson’s rejection of rights specification theory on the grounds that it is incompatible with the view that rights are not absolute is premature. Let’s take this step by step, beginning with this latter remark: Is Bergelson right when she asserts that specification theory assumes rights to be absolute?

Let me begin with a transatlantic comparison. Using the specification thesis to analyze the position of the self-defending person, one reaches the same conclusions reached by propo-

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54. *Id.* at 528.

55. Rights specification is based on moral specificationism. This thesis was famously defended by Judith Jarvis Thomson. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

56. Since, to my knowledge, I am the only European criminal law theorist to explicitly support this thesis, I was all the more pleased. I should add that European commentators do not reject or support the rights specification thesis; they just ignore it. This is but a sign of their reluctance to integrate moral theory in their analyses. This undoubtedly relates to the idea of criminal law theory being an independent science with little or no need for outside help. See Dubber, *supra* note 12. I am glad to say that this tendency is gradually being overcome.

57. Bergelson, *Conditional Rights*, *supra* note 27, at 575; Bergelson, *Rights*, *supra* note 36, at 2498-99.

nents of the European bipartite structure of criminal law theory.<sup>58</sup> The basic idea is that a person killing in self-defense (or otherwise justified) is not *prima facie* wrongfully killing someone and then justified. Once the situation is properly specified, it is plain to see that from the moment she begins her defensive action she is not really acting against the law.<sup>59</sup> It makes little sense then to say that she meets the definition of the offense, and thus her conduct is *prima facie* prohibited. It is actually more like she meets the definition of the permission to act in self-defense, and her conduct is *ab initio* allowed.<sup>60</sup> This idea has been the subject of a long, complex, and ultimately rather useless discussion in European law. Though the results have not been particularly impressive, the way the discussion developed merits some space.<sup>61</sup>

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58. It may come as a surprise to American audiences to read that many European commentators support a bipartite structure. However, it is different than the one based on the *actus reus/mens rea* dichotomy prevalent in common law countries. Instead of a three-step theory comprising the “definition of an offense,” “wrongfulness,” and “culpability” elements, these commentators prefer to unite the elements “definition of an offense” and “wrongfulness” into a single larger category under the same “wrongfulness” name. This approach has been traditionally, and erroneously, linked to the clumsily named “theory of the negative elements of the offense” (*negative Tatbestandsmerkmale Theorie*). In fact, said bipartite structure can be defended without recourse to that theory. But this is a rather long story. Suffice it for now to say that although it cannot be considered the prevailing opinion, the bipartite structure does have a large following both in German and Spanish criminal law. On Germany, see ROXIN, *supra* note 44, at 297. Although less widespread than in Germany, the bipartite structure in Spain has the support of some of the most prominent commentators. See ORDEIG, *supra* note 44, at 33-34; see also DIEGO-MANUEL LUZÓN PEÑA, CURSO DE DERECHO PENAL. PARTE GENERAL 296-301 (1996); SANTIAGO MIR PUIG, DERECHO PENAL. PARTE GENERAL, 164-65, 416-17 (7th ed. 2004); JESÚS-MARÍA SILVA SÁNCHEZ, APROXIMACIÓN AL DERECHO PENAL CONTEMPORÁNEO 332-33, 390-98 (1992).

59. There are two versions of rights specification theories: normative and factual. Though I have my doubts about the propriety of the distinction, in the following analysis, I will assume factual specification.

60. In fact, she abstractly meets both norms. The *legis specialis derogat legi generalis* doctrine, however, intervenes to mandate the application of just the permissive and more specific norms (anyone killing in self-defense is also killing, but the opposite does not hold). Notice that this doctrine intervenes before there is a specific attacker and a specific defending party. The doctrine extends to all eventual norm collision cases. For a wonderful discussion of the logical structure of this doctrine, see Ulrich Klug, *Zum Begriff der Gesetzeskonkurrenz*, 68 ZStW 399 (1956).

61. I have tried to track and dissect this discussion in my contribution to the Festschrift for Enrique Gimbernat Ordeig. See ÍNIGO ORTIZ DE URBINA, *La Teoría de los Elementos Negativos del Tipo: ¿Una Invención Jurídico-penal?*, in ESTUDIOS

Defenders of the tripartite structure have traditionally relied on a powerful statement by Hans Welzel, father of the theoretical approach known as “Finalism” (*Finalismus*) and one of the most distinguished German criminal law professors of all time: killing a person in self-defense and killing a mosquito just cannot be the same.<sup>62</sup> Confronted with this emotive suggestion, defenders of the bipartite structure have defensively struggled to prove they are not ethical monsters and have strenuously insisted that they do not mean that it is *morally* the same.<sup>63</sup> What they assert is that they are the same in terms of the *apportioning of criminal liability*, and, further, that the fact that a moral difference between both cases exists does not constitute sufficient reason to structure the theory of criminal liability in three, rather than two, stages. Finally, they also insist that a justified act can be morally better than an act that does not even meet the definition of an offense. Let me illustrate this last point with the following situations:

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PENALES EN HOMENAJE A ENRIQUE GIMBERNAT, VOL. II 1393 (García Valdés et al. eds., 2008).

62. See 1 HANS WELZEL, *DAS NEUE BILD DES STRAFRECHTSSYSTEMS: EINE EINFÜHRUNG IN DIE FINALE HANDLUNGSLEHRE* 24 (4th ed. 1961). In the second edition of his textbook, the mosquito was temporarily replaced by a rooster. In the Spanish edition, the mosquito was lost (or replaced) in translation and Spanish commentators have since been discussing dead flies instead of dead mosquitoes. I was somehow disappointed to see that Welzel's example and argument had made their way into the Anglo-American discussion (strangely enough, in the fly version, too). See George P. Fletcher, *The Nature of Justification*, in *ACTION AND VALUE IN CRIMINAL LAW* 175, 181 (Stephen Shute et al. eds., 1993).

63. Thus, they concur with Husak. See Douglas N. Husak, *Partial Defenses*, 11 *CAN. J.L. & JURISPRUDENCE* 167, 172 (1998) (“No one who believes that killings in self-defense are completely justified need suppose that the quantum of wrongfulness in all such killings is equivalent to that in, say, scratching one's head.”). The idea is also similar to Judith Jarvis Thomson's notion of a “moral residue,” that is, the possibility of a remaining wrong in a justified act. See THOMSON, *supra* note 19, at 84-86. Although I do not share some of his conclusions, I have found John Oberdiek's discussion of the matter most enlightening. See John Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights*, 23 *LAW & PHIL.* 325, 330-37 (2004). The idea can be extended to the legal field, talking about a “legal residue.” Justification does not necessarily extinguish all rights of other parties. This is obvious in the case of necessity (the legendary cabin owner of the “cabin in the woods/thunder storm” example does not have to bear the costs of repairing the door broken by the desperate mountaineer trying to escape the danger). But the point is more general, as I show *infra* in the text.

A) In most European jurisdictions, incest is not a crime in itself (although incestuous acts can obviously constitute a number of sexual offenses). Jack and Jill have a legal incestuous relation.

B) In most European jurisdictions, tax fraud is a crime only when it reaches a certain threshold. David evades an amount a dime below that threshold.

C) All European jurisdictions grant a justificatory claim to injure a wrongful attacker in order to protect an innocent's life. Ramon is about to shoot an innocent person. Risking her own life, Raquel pushes him to the floor, slightly injuring him in the process.

Raquel's conduct in C is justified, but it also meets the offense definition of slight injury. Jack and Jill in A and David in B, on the other hand, do not even meet the offense definition. Should we infer that it is morally better to commit incest or to defraud a quantity below criminal law's threshold than to push the assailant in C? That would be ridiculous. Raquel is not merely legally and morally justified, she is actually a moral hero as well. Jack and Jill and David, on the other hand, may not have committed a criminal offense, but they sure are morally blameworthy.<sup>64</sup>

Why am I explaining this admittedly not so fruitful European family feud to American readers? Beyond its obvious value as a cautionary tale about the pernicious effects of rhetorically inflated language in academic debates, the discussion helps to show where Bergelson's assertion that specification theory assumes rights to be absolute is wrong. On this point, Bergelson stands in great company indeed. Both Joel Feinberg<sup>65</sup> and Judith Jarvis Thomson<sup>66</sup> share her view that rights specification assumes rights to be absolute. But I believe that their assertions are due to the fact that they have an inadequate concept of right in mind.

Not only are rights not absolute, but a right is actually not "a" right. What we call "a" right when we talk about the "right

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64. Examples could be multiplied. To my knowledge, this counter-example strategy was first used by Jesús Silva Sánchez. See JESÚS-MARÍA SILVA SÁNCHEZ, *APROXIMACIÓN AL DERECHO PENAL CONTEMPORÁNEO* 332-33 (1992).

65. Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 *PHIL. & PUB. AFF.* 93 (1978).

66. JUDITH JARVIS THOMSON, *RIGHTS, RESTITUTION, AND RISK*, 39-40 (William Parent ed., 1986).

to life” or the “property right” is actually a bundle of different legal entitlements,<sup>67</sup> some of which may well not be rights in the strictest sense (that is, privileges correlated with a duty). It is thus incorrect for Bergelson to use the “cabin in the woods” example to show the inadequacy of this approach and to infer that, according to rights specification theory, “the cabin owner’s property rights were limited from the outset and simply did not exist under the described circumstances. Thus, the mountaineer did not infringe on any rights at all.”<sup>68</sup> According to rights specification, the cabin owner does not lose every legal entitlement constituting his property right. Necessity defense does not allow the mountaineer to paint the cabin walls green or to stay for the summer since he had so much enjoyed his stay. Necessity defense does not mean that he does not have to pay for whatever damages he causes either. According to rights specification theory, the existence of a necessity defense means that, in those specific circumstances and while they last, the mountaineer does not have a duty not to trespass the cabin owner’s property and thus cannot be successfully prosecuted for that criminal offense if he chooses to do it. If this is considered enough in order to talk about an absolute right on the part of the mountaineer, then rights specification is indeed an absolute rights theory. But this really seems like a gimmicky way of talking.<sup>69</sup>

Returning to the self-defense setting, according to rights specification theory, the perpetrator’s unjust attack does not mean that he loses whatever rights he has. Even in self-defense, the assailant retains the right to escape. He is under no duty to assist the self-defending party in bringing him down. In this specific situation, however, he does not have the right that

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67. This was cogently argued by Alf Ross fifty-one years ago. See Alf Ross, *Tü-Tü*, 70 HARV. L. REV. 812 (1957). Bergelson recognizes this point. See Bergelson, *Conditional Rights*, *supra* note 27, at 578.

68. Bergelson, *Conditional Rights*, *supra* note 27, at 576. This assertion leads her to the wrong conclusion that “if that were the case, the cabin owner would not be entitled to any compensation for the consumed food or other loss caused by the mountaineers.” *Id.*

69. Bergelson herself makes the assertion that saying that some rights are limited means that “they are conditionally limited, but all that really means is that they are not limited until and unless a certain condition is satisfied.” *Id.* Rights specificationists could make the same point by saying that when that condition is met, we are under a different specification.

the victim does not defend himself, and he does not have the right to injure the defending victim in order to stop her attack. I take this all to be quite obvious. That's why I concur with the European bipartite theory of criminal liability. In criminal law terms, a justified act means the same as a non-criminal act because criminal law provisions, when properly specified, do not hold the justified person to a criminally protected duty.

The former analysis explains why it is also incorrect to refer to the "practical" problem posed by rights specification. According to this objection, since so many different things may occur, it is hardly thinkable that one could ever completely specify a right and in fact, no one has ever done so.<sup>70</sup> Yet again, this objection turns into the wrong concept of what "having a right" means. I agree that it is almost impossible to fully define a right in the abstract. Moreover, I believe it would be of little help. But this is nothing specific to rights specification theory. Take for instance one of its theoretical competitors, forfeiture theory. Can its proponents claim to be able to produce a closed list of situations that lead to the right's forfeiture? My answer is that they cannot, for the same reason that rights specification cannot offer a precise abstract definition of a right. That list and that definition will always be amenable to the process of reflective equilibrium. Just as open texture makes expressions in natural languages always open to the possibility of becoming vague, in ethics, a new situation may call for the modification of the list/specification.

I take Bergelson's (as well as Thomson's and Feinberg's) contention that rights specification is incompatible with the idea that rights are not absolute to be either mistaken or very weak. It is mistaken if it asserts that rights specification is incompatible with the idea that rights are bundle-like, and we may have a right and, at the same time, not have all its entitlements available to us. It is very weak if it asserts that rights specification affirms that we can generally determine whether we have a particular entitlement in a specific situation. Rights specification does say so, but so do all other non-radical approaches to jurisprudence. Asserting the contrary would mean denying the possibility of adjudication.

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70. *Id.* at 575 (citing Feinberg, *supra* note 65, at 99-100).



This leaves us with Husak's objection. Husak states that were Bergelson's proposal to be taken as a form of the rights specification theory, the principle of conditionality of rights would be incompatible with another type of approach: forfeiture theories.<sup>71</sup> Whereas the latter tries to explain how existing rights are lost in certain circumstances, specification theories assert that in those same circumstances after the specification, we can see that those rights actually do not exist and thus cannot be forfeited. According to Husak, the problem is that Bergelson actually moves back and forth between these two supposedly incompatible approaches.<sup>72</sup> Sometimes she says that the victim may reduce his rights, but seldom, if ever, lose them completely.<sup>73</sup> Other times she says that "a person may lose some rights due to his own actions."<sup>74</sup> I think there is a way out of this conundrum. Let me start with a brief analysis of forfeiture and specification theories as applied to the self-defense case. Imagine these three scenarios:

Scenario 1: I walk towards you knife in hand, and I stop and stand still when I am fourteen feet away from you. You point a gun at me. By walking towards you knife in hand, I have put myself in a position where the legal system no longer grants me the right not to be pointed at with a gun. Instead, it grants you a permission to threaten me in self-defense.<sup>75</sup>

Scenario 2: After being pointed at with the gun in scenario one, I do not stop but keep walking towards you. If I do, you may shoot me, for by continuing to walk I have put myself in a position where the legal system does no longer grant me the right not to be

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71. Husak, *supra* note 10, at 528.

72. *Id.* at 529-31 (offering some examples of Bergelson's equivocal language).

73. Bergelson, *Victims*, *supra* note 7, at 465.

74. *Id.*

75. For the ease of explanation, suppose that standing still fourteen feet away from you makes me a threat, but a non-immediate one, and suppose that, according to the law of the relevant jurisdiction, this means that you cannot yet shoot me, but you can threaten me (this would be the situation under Spanish law, so it is not a pure *Gedankenexperiment*). The reader may change the number of feet. What is important is that at some point the defending party will have a permission to threaten but not yet to shoot. See also Bergelson, *Conditional Rights*, *supra* note 27, at 578 ("If I attack you using a stuffed animal as a weapon, I may lose my right not to be attacked but most likely I will not lose my right not to be killed. What happened then to my general right not to be harmed? I retained some of the rights that form it but not all. It became more limited, 'reduced.'").

shot at. Instead, it grants you a permission to shoot me in self-defense.

Scenario 3: After being pointed at with the gun in scenario one, I drop the knife, turn my back, and start to make my way to the door showing no signs of turning back to you. In this situation, the legal system not only grants me a right not to be shot at, but also grants me a right not to be pointed at with a gun (provided I have walked far enough from you not to constitute an immediate threat).

Forfeiture theories would say that in the first scenario, I have forfeited my right not to be pointed at with a gun; in the second scenario, I have forfeited my right not to be shot at as well; and in the third scenario, I have regained the right I had previously forfeited in scenario 1. The specification of rights thesis, on the other hand, would hold that, properly specified, in the first scenario, I have no right not to be pointed at with a gun; in the second scenario, I have no right not to be shot at either; and in the third scenario, I have both rights. Bergelson's claim is that rights are always conditional, and this is compatible with both accounts. In the first scenario, I do not have a right not to be pointed at with a gun (but the fact of not having that right is conditional on my omission to turn and leave). In the second scenario, I have no right not to be shot at (but again this is conditional on the fact of not turning and leaving). In the third scenario, I have the right not to be pointed or shot at with a gun (but these rights are conditional on not posing a threat to you). Think of the three scenarios in geographical terms for a moment. By moving (literally) from scenario 1 to either scenario 2 or scenario 3, I enter into a different deontic space, meaning that in each of these settings my conduct is differently defined by the legal system. But it all depends on what I do. The fact that we describe what I do when moving from scenario 1 to scenario 2 as losing the right to life, or as saying that as long as I am in that scenario I do not have all the entitlements available, is completely irrelevant. As shown by the situation resulting when moving from scenario 2 to scenario 3, the legal system's handling of the situations forces forfeiture theories to admit that lost rights may be regained.<sup>76</sup> Other than that, both

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76. I believe this explains the first of Bergelson's two caveats to the "forfeiture" theory. "[I]t is more accurate to talk about the loss or reduction of rights, not

theories provide equally valid descriptions of the situation. Nothing substantive depends on choosing one over the other. Where then does the problem lie? Has someone as bright as Professor Husak missed something?

I believe Professor Husak's perplexity has its origin in Bergelson's contention that in claiming that rights can be reduced, she *does not* mean that the right not to be harmed "may suddenly drop from 100% to 70%."<sup>77</sup> Husak rightfully asks what she *does* mean.<sup>78</sup> I think I can help to answer the question by using a German criminal law distinction.

German criminal law distinguishes the concepts of *Rechtswidrigkeit* and *Unrecht*. The former is usually translated into English as "wrongfulness,"<sup>79</sup> and the latter we can translate as "wrongful." The first concept (*Rechtswidrigkeit*) is dichotomous: a conduct is either wrongful or it isn't, depending on whether it represents an unjustified breach of other people's rights or it doesn't. In more precise terms, a conduct either exhibits the *quality* of wrongfulness or it doesn't. The second concept (*Unrecht*) is a degree concept and admits further differentiations. So to say, wrongful conduct can be differently wrongful. Murdering, lightly injuring, and stealing an apple from a fruit stand in La Gran Vía in Madrid are all against the law; they all are *Rechtswidrig*. However, it makes perfect sense to inquire about the relative magnitude of the wrong (*Unrecht*) they represent, to question how wrongful each of these conducts is.<sup>80</sup>

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their complete forfeiture. A right that has been lost may be regained; 'forfeit' suggests that the right has been lost forever." Bergelson, *Conditional Rights*, *supra* note 27, at 577.

77. Bergelson, *Victims*, *supra* note 7, at 465.

78. Husak, *supra* note 10, at 529.

79. I believe "unlawfulness" would be a better translation, but "wrongfulness" seems to have established itself. Some German commentators object to translating *Rechtswidrigkeit* as "unlawfulness" because "[t]o an American reader, this might suggest that *Rechtswidrigkeit* has to do only with the state or condition of being inconsistent with positive law. The German term *Recht*, which means both 'law' and 'right' has moral overtones that are independent of positive law." Naucke, *supra* note 12, at 311 n.13. Contrary to Naucke's desires, I want to be understood as talking about the condition of being inconsistent with existing law. If translating *Rechtswidrigkeit* as "wrongfulness" gives another impression, then I definitely support translating it as "unlawfulness."

80. I am aware that American commentators would just talk of the diverse "wrongfulness" of different actions. However, in this subsection I am using

A partial justification operates to diminish the conduct's wrongful character, but does not affect the wrongfulness of the conduct. That conduct is still forbidden but is considered to be "not that wrong."<sup>81</sup> Take for example the Spanish criminal code's regulation of consent to injury. Section 155 establishes that if the injured party has validly (and "freely, spontaneously, and expressly") consented to the injury, the perpetrator's punishment will be diminished one or two degrees.<sup>82</sup> The Spanish criminal code does not recognize consent to injury as a complete defense, but it does recognize that it is not the same to injure with or without the consent of the injured party. It recognizes that these conducts, both being against the law in formal terms, are albeit differently wrongful. In this case, as in all cases of partial defense, the conduct partially justified or partially excused remains prohibited. In other words, the legal system does not declare the rights involved fair game. What changes is their level of protection. If the conduct is not partially justified or partially excused, the rights holder knows that anyone infringing his rights will have to face the full sanction. In the presence of a partial defense, however, they will have to face a lesser sanction. Husak says that "[i]f the perpetrator does not contravene any rights of his victim because the victim has lost whatever right the perpetrator might otherwise infringe or violate, victim fault should be a complete defense to a crime."<sup>83</sup> But there is no need to understand that the victim has lost "whatever right the perpetrator might otherwise infringe or violate."<sup>84</sup> Partial defenses on the part of the perpetrator do not neutralize the victim's rights, but they don't leave them intact

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"wrongfulness" as a dichotomous concept in order to make my conceptual point. I ask the reader to bear with me for a few more lines.

81. This analysis supports Bergelson's defense of the possibility of a partial justification. See Bergelson, *Victims*, *supra* note 7, at 410. ("The fact that, despite a valid defense, we still condemn the defendant's act means only that his defense is partial; it does not determine the nature of the defense.")

82. See *supra* note 50.

83. Husak, *supra* note 10, at 531.

84. Husak seems to believe that Bergelson understands that the defense of comparative criminal liability can only be partial, but this is not right. See Bergelson, *Conditional Rights*, *supra* note 27, at 570-71 (2005).

either. The sanction in case they are breached is less than it would be in the absence of the perpetrator's partial defense.<sup>85</sup>

### B. *The Substantive Content of the Conditionality of Rights Principle*

I believe Bergelson's conditionality of rights principle survives objections based on rights theory. But is it an interesting option? I seriously doubt it. This principle just tells us that we do not have absolute rights. You may or may not agree with this statement. But even if you agree, as I do, it does not tell us anything interesting. Specifically, it does not tell us what the appropriate extent of our rights is, and it cannot tell us when it would be appropriate to take the victim's conduct into account either. To serve as a guide in the resolution of practical problems, that principle needs to be supplemented. In the case of the voluntary rights reduction, Bergelson rests on the normative strength of consent. In the case of the involuntary rights reduction, Bergelson supplements the conditionality of rights principle with another principle, stating that "the offender's liability may be mitigated by the conduct of the victim only if the offender has the right that the victim does not behave that way."<sup>86</sup> These supplements may seem like minor adjustments of a previously articulated principle, but they aren't. These assertions, in fact, carry all the normative weight to an otherwise empty formal structure.<sup>87</sup>

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85. Reconstructing the situation as a case of rights specification or rights forfeiture does not change things either, for we have already seen that both reconstructions are equivalent in deontic terms. In the case of a complete defense, specification theory would say that concrete entitlement was not available in the specific situation, and forfeiture theory would say that it was there but was forfeited. In the case of a partial defense, specification theory would say that the right correctly specified does not receive full protection, whereas forfeiture theory would say that it did receive full protection, but the person in question forfeited part of that protection.

86. Bergelson, *Victims*, *supra* note 7, at 474.

87. See Harel, *supra* note 13, at 499 n.19. ("[I]t is important to understand that Bergelson's conviction that the involuntary reduction of rights triggered by the victim's behavior presupposes the victim's violation of a right is not logically or conceptually derived from the principle of conditionality of rights."). However, Harel continues by saying that the formal principle "asserts that there are victim-specific powers to extinguish or reduce the duties owed to the victim." *Id.* I have already shown the impossibility of conceptualizing self-defense as such a power. See *supra* Part II.

Bergelson is right when, after reviewing the doctrines of consent, self-defense, and provocation, she concludes that her analysis “demonstrates a common principle underlying all three defenses and perhaps criminal law in general, *the principle of conditionality of our rights*.”<sup>88</sup> She may be too right. The principle of conditionality of rights underlies these doctrines and criminal law in general, as well as all law, for the truth of this proposition lies in the fact that rights are not absolute. However, the extent of rights does not only depend on the conduct of the victim or the perpetrator, notwithstanding how these two agents are defined. Their extent also depends on other non-human events, such as the breakout of a fire or a thunderstorm. In these cases, the criminal liability of eventual perpetrators is also modified. The person that pushes another person while rushing out of a department store to escape a fire and the mountaineer breaking the door and entering in the cabin in our favorite out-in-the-woods example also see their criminal liability diminished or even extinguished, though no victim participation is involved. There might be a common underlying principle to the three institutions that form Bergelson’s theory building blocks, which lends support to her plea for a general theory of comparative criminal liability. However, it cannot be one characteristic, the conditionality of rights, that is shared, not only by these three criminal law institutions, but also by every other law institution.

To complicate things, it is highly doubtful that all instances of Bergelson’s unifying trait, the victim’s conduct, can meaningfully be considered to really be an instance of the same thing: legally valid consenting victims, attackers turned victims, and provokers form a motley group. That makes some of Bergelson’s additional arguments not very convincing.

Take for instance the assertion that comparative criminal liability is demanded by consistency. Demanding consistency always seems a very reasonable thing to do, and so the argument is *prima facie* attractive. Bergelson points out two different types of inconsistency. On the one hand, there is the “external” inconsistency of admitting such defense in tort law

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88. Bergelson, *Victims*, *supra* note 7, at 465 (emphasis added).

but not in criminal law.<sup>89</sup> On the other hand, the “internal” inconsistency of allowing some criminal defendants to raise a claim of comparative responsibility (as in the doctrines of consent, self-defense, and provocation) while denying others the opportunity to do so (by refusing the doctrine of comparative negligence to play a role in the apportioning of criminal liability).<sup>90</sup>

Her demand for external consistency, however, has to be reassessed in light of the fact that consistency does not require things to be equal. Without this important precision, the demand for consistency would result in inadmissible consequences. For instance, it would demand the admission of strict liability in criminal law (or, conversely, its ban from tort law). But this would be absurd. The whole point of having tort law and criminal law as two different institutions is that they serve different ends and do so through different means. Consistency among tort law and criminal law cannot and does not mean that a doctrine or institution admitted by one has to be admitted by the other as well. What it means is that existing differences have to be accounted for by their different goals. In tort law, the reduction in the recovery of the victim can plausibly be understood as a corrective-justice limitation to her right to obtain recovery, for tort law is not intended to be an instrument to deal with retributive requirements. However, this latter function is the main function of criminal law. This alone gives reason to think that the tort analogy is less helpful than it might appear at first glance.<sup>91</sup>

Let's turn to “internal consistency” now. As a foreign reader, I was quite shocked to read Bergelson's description of the incoherent regulation of provocation in United States law.<sup>92</sup> I agree with her and Husak<sup>93</sup> that there is no point in admitting the relevance of provocation in one case (killing) while denying it in others (assault, destruction of property). The situation is completely ludicrous. However, this consistency problem is specific to the regulation of provocation and does not say anything

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89. *See id.* at 446-53.

90. *See id.* at 432-35. *See also* Hurd, *supra* note 15, at 507-08.

91. *See* Simons, *supra* note 13, at 549.

92. Bergelson, *Victims*, *supra* note 7, at 432-35.

93. Husak, *supra* note 10, at 523 n.4.

about the admission of comparative liability in criminal law. The problem of consistency should be addressed, allowing provocation to have general effects (or no effects, though I consider this second inconsistency-avoiding solution to be inferior in terms of fairness). In deciding this, I do not see the point to recur to the very different situations of consent and the situation of the attacking party in self-defense settings.

In her response to the first generation of her critics, Bergelson declared to be “somewhat puzzled that Harel and Simons refuse to see the conceptual link between the doctrines of consent, self-defense, and, to some degree (since it is only in part a defense of justification), provocation.”<sup>94</sup> Still, she immediately adds that “[w]hile these doctrines apply to different circumstances, they have a similar effect on one’s rights and, through that, on the attribution of harm and imposition of liability.”<sup>95</sup> Now it’s my turn to be puzzled. I am puzzled that Bergelson refuses to see that many doctrines that have nothing to do with victim conduct also have a say on one’s rights and on the attribution of liability. Nobody disputes that personal interaction in the cases of consent, self-defense, and provocation can have those effects. This is old wine. What is contentious is that a conceptual link between these doctrines can be found, which at the same time is not present in some other institutions, such as duress or necessity, that also affect one’s rights and the apportioning of criminal liability. Bergelson’s magnificent work offers a truly overwhelming number of insightful analyses. But so far I believe she has not offered that conceptual link, and thus her analysis is really old wine in new wineskins.

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94. Bergelson, *Conditional Rights*, *supra* note 27, at 572 (footnotes omitted).

95. *Id.*