PROPORTIONALITY AND THE PROBLEM OF THE PSYCHOTIC AGGRESSOR: A MORAL ANALYSIS

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I. The Problem of the Psychotic Aggressor

One of the most important but difficult theoretical issues in the theory of self-defence is the problem of the psychotic aggressor. The problem is this: is a potential victim always permitted to respond to a psychotic aggressor with the same degree of force that he uses against a sane aggressor, or are there certain limitations on the potential victim's right to use force in self-defence against the former which do not hold in the case of the latter? Another way of posing the problem is in terms of a principle of proportionality: ought there to be a principle of proportionality which differentiates between the psychotic and the sane aggressor, and if so, what form should this principle take?

The problem of the psychotic aggressor is actually a particular case of a more general problem in the theory of self-defence, which is the determination of the permissible amount of force to be used in self-defence against any aggressor who is not morally to blame for his aggressive propensities. In such situations the interests of both the aggressor and the potential victim require protection.

The solution to the problem of the psychotic aggressor will have important ramifications for a theory of self-defence as a whole. George Fletcher has maintained that "confronting or not confronting this problem generates different theories of self-defence", and determines basic attitudes to the purpose of self-defence.[1] Fletcher's own solution to the problem arises out of a comparative study of several legal systems. First he criticizes English and American criminal law for almost completely neglecting the problem of the psychotic aggressor and for confining themselves to culpable aggressors, and then contends that the best solution to the problem is the one adopted by Soviet and German criminal law, namely, an absolutist perspective which does not distinguish between sane and psychotic aggressor at all. This last approach, Fletcher maintains, rejects the principle of proportionality, and concerns itself instead with the autonomy of the

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[1] Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 Israel L. Rev. 367, at 370 (1973).

innocent defender.[2] Fletcher's rejection of proportionality, though, is implausible. As an alternative approach, this paper shall suggest that a principle of proportionality which differentiates sane from psychotic aggressors can be formulated, consistent with basic legal principles, and that from a moral point of view such a differentiation ought to be made in a theory of self-defence.

II. Imminence and Reasonableness

A principle of proportionality in the theory of self-defence, considered as a moral principle, sets down certain moral constraints on response to threats to one's person. Such threats may involve either the use of deadly force, which is a force likely to cause death or great bodily harm (hereinafter referred to as "harm"), or the use of non-deadly force, which is unlikely to cause death or great bodily harm, but likely only to hurt, such as stepping on a toe, pulling hair or boxing ears. The threats to be considered in this paper are only those that are clearly unwarranted, and thus the issue of self-defence against, for example, an officer of the law obviously doing his duty, or by someone who has provoked an attack upon himself, is left aside. But a principle of proportionality which deals with the degree of force a potential victim may use only comes into play once it is established that the potential victim may use some force or other to defend himself. It is the function of a theory of imminence to decide this latter issue.

In American and Canadian criminal law, one is never permitted to use any force, whether deadly or non-deadly, in self-defence, unless it is reasonable to believe that the threat is one of imminent harm or hurt.[3] But when is the harm or hurt sufficiently imminent?[4] The criminal law has cast some light on this issue in the area of criminal attempt.[5] The law of criminal attempt distinguishes between the stage preparatory to the commission of a crime, such as buying a gun at a gunshop, and an actual attempt which involves a direct movement toward the commission of a crime after preparations are made, and

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[2] *Id.* at 387.

[3] *See* Beale, *Homicide in Self-Defence*, 3 Colum. L. Rev. 526, at 528-31 (1903). *See also*, Model Penal Code, s. 3.04(1) (Proposed Official Draft 1962), and U.S. v. Beard, 158 U.S. 550, 15 S.Ct. 962, 39 L. Ed. 1086 (1895). In Canada the position is similar. *See* Regina v. Nelson, 8 W.W.R. 607, 105 C.C.C. 333, 16 C.R. 407 (B.C.C.A. 1953), and Rex v. Ogal, [1928] 2 W.W.R. 465, 50 C.C.C. 71, [1928] 3 D.L.R. 676 (Alta. C.A.).

[4] The notion of imminence is at the heart of discussions in international law regarding the relationship between self-defence and pre-emptive strikes. The question concerns whether a country is ever permitted, on grounds of self-defence, to engage in a pre-emptive strike against another, or whether pre-emptive strikes are always to be understood as impermissible, aggressive uses of force.

[5] *See* the discussion by Becker, *Criminal Attempt and the Theory of the Law of Crimes*, 3 Phil. & Pub. Aff. 262 (1974).

holds that a person who is free to abandon his criminal purpose during the preparatory stage ought to be given the benefit of the doubt. That is, he ought not to be punished until he makes an actual attempt.[6] Now the same distinction between preparation and attempt can be employed by a theory of self-defence for the purpose of deciding when a person's threat is sufficiently imminent to permit the use of force against him. It will be at the stage of attempt, not preparation, that it becomes so. But it should be noted that this distinction is useful only in so far as we are dealing with persons who are free to correct their behaviour before making an actual attempt, whereas this might not be true of the psychotic aggressor. The preparation-attempt distinction in the law of criminal attempt is of only limited relevance to the case of the psychotic aggressor, then, because he may not be free to back out before making an actual attempt.

Obviously, there are still unresolved problems in the area of imminence but, fortunately, they do not have to be settled here. It is enough to remark that the notion of imminence as it is used for the purposes of this paper is basically a causal notion. By this it is meant that self-defence can permit an act of force or require some non-forceful response only if the potential victim reasonably believes that the aggressor is imminently to cause him hurt or harm. The mere intent to injure is not sufficient to permit the use of force against the one who intends, any more than it allows us to punish him. And if an aggressor should express his intentions, they are relevant to the issue of imminence only in so far as they help the potential victim determine if and how he will actually suffer hurt or harm at the hands of the aggressor.

Assuming that criteria of *imminent* danger can be formulated, then a principle of proportionality to handle the problem of the degree of force the potential victim may use can be considered. Basically, it is a principle of risk-bearing; that is, it determines the nature and extent of the risk to be borne by the person who threatens hurt or harm and by the likely victim. American jurisdictions have mainly addressed themselves to culpable aggressors, uniformly maintaining that the sane aggressor does not have to bear all the costs resulting from his threat of hurt or harm, and that the potential victim is liable for some of them. In this way, the courts have shown concern for the rights even of culpable aggressors. The question remains as to the rights of psychotic aggressors. What kind of consideration do they deserve?

One protection American and Canadian criminal law affords the

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[6] The ability to abandon one's criminal purpose during the preparatory stage is apparently one reason why neither the common law nor the penal codes stemming from it make mere preparation an offence. *See* Becker, *supra* note 5, at 282.

sane aggressor results from the fact that the potential victim is held to a "reasonable man" standard.[7] If sane aggressors deserve such consideration, then surely the same protection ought to be extended to psychotic aggressors. An excessively nervous or paranoid individual might use excessive force in self-defence whenever he believes that he is being attacked. Moreover, when one uses force in self-defence, one is acting both as judge and executioner in one's own case, and there is a propensity for even quite normal people to overreact in such situations. If we agree that aggressors do not forfeit all consideration of their interests as a result of their aggression, then we ought to have recourse to a reasonable man standard to protect aggressors from various sorts of overreaction.[8]

In applying the reasonable man standard to a specific case, one might ask the question: what would a reasonable man in the particular circumstances of the potential victim do? However, this way of applying the standard is unsatisfactory. The reason is that the particular circumstances are the victim's particular circumstances, and these are precisely the ones in which the potential victim is likely to overreact. At the same time that we limit his reaction by appeal to the reasonable man, we seem to sanction his overreaction by drawing attention to the particular circumstances. If the latter are seen from the potential victim's point of view, then the reasonable man is not being used to test the defender's appreciation of his circumstances, but only to test his reaction to the situation as he, perhaps quite idiosyncratically, understands it. Distorted perception of the situation is thus not necessarily ruled out, and although the potential victim's reaction might be reasonable given his particular perception of the danger, if this perception is itself exaggerated, it is likely to motivate exaggerated reaction.[9]

From a moral point of view, the proper question is: what would a reasonable man in the particular circumstances as perceived by a reasonable man do?[10] This way of applying the standard confronts two kinds of error that are apt to arise in cases of self-defence, namely, that men who judge in their own cases, even if they are not suffering from some personality disorder, are apt to overestimate the

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[7] In Canada, *see* Slater v. Watts, 16 W.L.R. 234, 16 B.C.R. 36 (C.A. 1911).

[8] *See* Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, at 81-88 (1908). *See also* G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 208 (2nd ed. 1961).

[9] *See* J. AUSTIN, *A Plea for Excuses*, in PHILOSOPHICAL PAPERS 193-94 (1970), on the distinction between the *executive* stage of an action and the stage of *appreciation* of the situation.

[10] This approach is adopted by most American courts. However, the Canadian approach involves a subjective test as to whether the degree of force used in self-defence is reasonable. *See* Regina v. Calwallader, 53 W.W.R. 293, [1966] 1 C.C.C. 380 (Sask. Q.B.) and Regina v. Baxter, 27 C.C.C. (2d) 96, 33 C.R.N.S. 22 (Ont. C.A. 1975).

amount of harm they are actually in danger of suffering, and that their passions often lead them to react more strongly than is necessary.[11] Allowances may still be made for individual differences, incapacities, and the like, but the standard of care itself should not vary from person to person. There ought to be one standard of care for all, although failing to live up to it may still be excusable in certain cases.[12]

Even when the reasonable man standard is applied in the right way, it is quite clear that this standard must still be filled out with other principles before the problems related to risk-bearing can really be settled. By way of example, is it "unreasonable" for a potential victim to prevent a box on his ears by shoving his assailant over a cliff, when the assailant is positioned right on its edge, so that the only alternatives are submitting to the box on the ears or using force which will send him over the edge? We might be inclined to say yes, but until we have more detailed principles of risk-bearing our criterion will not give us much guidance. The more detailed principles are principles of proportionality. They provide predictable, consistent, and definite answers to such questions as: when is a potential victim's response so excessive as to be itself a crime; does an aggressor, or his family, ever have a right to compensation from the potential victim, and if so, when; and, with respect to the question around which the discussion of proportionality will be focused, should psychotic aggressors be treated differently from sane ones?

III. Proportionality and the Psychotic Aggressor

Apart from the distinction between sane and psychotic aggressors, there are two different and possibly conflicting ways in which the notion of proportionality may be used. It seems necessary to make this important difference between these usages explicit in two principles: the principle of *proportional loss* and the principle of *proportional prevention*.[13] Both fill out the reasonable man standard. The distinction rests on an ambiguity in the expression "a person is permitted to defend himself against danger". In the first use of proportionality, the principle of proportional loss, the danger against which a man defends himself refers to the actual character of the anticipated

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[11] The distinction between these two kinds of error is clear: *e.g.*, in State v. Sedig, 235 Iowa 609, 16 N.W. 2d 247 (1944); Smith v. State, 142 Ind. 288, 41 N.E. 595 (1895).

[12] *See* the discussion in H.L.A. Hart, Punishment and Responsibility 154 (1964). He distinguishes between "invariant standard of care" and "individualized conditions of liability".

[13] These two uses of proportionality are distinguished in Howard, *Two Problems in Excessive Defence*, 84 L.Q. Rev. 343, at 353 (1968).

interference with his person. Thus the principle of proportional loss permits a person to take measures proportional to the *seriousness of the personal danger* which he anticipates if he does not escape. In the second use, the principle of proportional prevention, the danger is that of the anticipated wrongful interference itself. The principle of proportional prevention allows a person to take measures proportionate to the *difficulty of escaping* from a situation in which wrongful interference with his person is anticipated.[14]

The principle of proportional loss [*PL*] expresses the beliefs that all aggressors, whether sane or psychotic, deserve some consideration of their interests,[15] and that although psychotic aggressors may deserve more consideration than sane ones, they at least deserve no less. The principle gauges the potential victim's response to what he reasonably believes the aggressor will do, leaving aside as irrelevant

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[14] The two uses of proportionality emerge in the course of Howard's discussion of Australian courts, *supra* note 13, but there is some evidence of a similar ambiguity in American and Canadian courts. For "danger" in the first sense, *see*, in U.S.A.: State v. Gray, 46 Or. 24, 79 P. 53 (1905); Sikes v. Commonwealth, 304 Ky. 429, 200 S.W. 2d 956 (1947); State v. Doherty, 52 Or. 591, 98 P. 152 (1908). In Canada, *see* Rex v. Ogal, *supra* note 3.

For "danger" in the second sense, *see* in U.S.A.: Springfield v. State, 96 Ala. 81, 38 Am. St. Rep. 85 (1892), State v. Bartlett, 170 Mo. 658, 71 S.W. 148 (1902). The decision in the last case quotes approvingly from 3 RUSS. CRIMES (Internat. Ed.) 1896:

> For the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other have a right to meddle with it in any — the slightest — manner.

Id. at 663, 71 S.W. at 152. In Canada, *see* Lowther v. The Queen, [1957] Que. B.R. 519, 26 C.R. 150, at 159, where Casey J. states:

> [The trial judge] then should have asked the jury to decide. . .whether the force employed had been "proportional to the injury or mischief which it [was] intended to prevent".

[15] For a different view, *see* S. PUFENDORF, 2 DE JURE NATURAE ET GENTIUM LIBRI OCTO 280 (C. Oldfather and W. Oldfather transl. 1964), who summarizes Grotius' answer to the "famous question, whether the danger of receiving a box on the ear, or a similar affront, gives the right to kill the offender":

> His position is as follows. . . Whoever injures another has in himself no longer any right to keep the most extreme penalties from being visited upon him by the other party; or, in other words, he gives the injured person the fullest right against him, although other considerations may often prevent a person from using this right to the full. Nor is it possible for others to urge, as an objection, that equality which should otherwise be observed in justice. For equality prevails chiefly in the exchange of commodities, and the distributions of what belongs to several. But ill deeds, which are mutually exchanged as if war prevailed, are not generally referred in detail to equality, nor need they be. And the statement of Grotius, that 'the way of killing in war should be patterned after the civil custom and manner of reparation and restitution', has the limitation 'in so far as this is possible', and so this moderation does not arise from any right, which inheres in the foe, but from the generosity and virtue of his opponent.

the issue of culpability for the aggression. More specifically, the principle relies on a notion of equality of degree of harm or hurt, and maintains the following:

> *PL*: If *A* is reasonably believed by *B* to pose a threat to him of imminent harm or hurt of degree ϕ, then *B* has a right to inflict harm or hurt of degree ϕ and anything that reasonably appears no more severe than ϕ upon *A* to get *A* to desist. *B* has no right, however, to inflict harm or hurt of degree greater than ϕ.

For instance, if *A* endangers *B*'s life, *B* has a right to take *A*'s life or do anything less severe to *A*, as, for example, shoot him in the leg, to stop him.[16] But note that the principle of proportional loss does not *require* that a defender use the least costly means to the aggressor of defending himself. Thus, if *A* attempts to do *z* to *B*, and *B* may prevent *z* by doing either *x*, *y*, or *z* where either *x* or *y* is less than *z* in terms of severity, *B* is under no obligation to do *x* or *y* as opposed to *z*. The principle imposes no obligation to use the least harmful or hurtful means of response available.

There is one important kind of case that *PL* by itself cannot handle. *PL* maintains that *B* must reasonably believe *A* actually poses a threat to him. Thus, if *A* simply *makes* a threat to *B*, and it is not reasonable for *B* to believe that *A* will actually carry it out, the principle does not apply. However, suppose *A* makes a threat to *B* like "your money or your life". Such threats may be called conditional, because they attempt to convey to *B* that the carrying out of the threat is contingent upon some action it is in *B*'s power to perform. Is *B* morally obligated to comply with the demand? *PL* gives no answer to this question, nor does the principle of proportional prevention which follows. If the victim chooses to comply with the conditions of the threat, and if it is reasonable for the potential victim to believe that he will now be left alone, *PL* will simply not come into operation. Therefore, in order to deal with the problem of conditional threats, a separate principle must be formulated, the principle of *non-compliance* [*NC*]:

> *NC*: A potential victim has no duty to comply with a conditional threat whose conditions the assailant has no right to impose, unless by failing to comply the potential victim will be responsible for sacrificing something of greater moral value than he is protecting.

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[16] In a footnote, Fletcher maintains that the expression "harm is disproportionate" may mean either: (a) that the harm is greater than the interest protected, or (b) that it is unduly greater. My principle of proportional loss conflates these two, and contends that the harm is *unduly* greater just in case it *is* greater than the interest protected. *See* Fletcher, *supra* note 1, at 367, n. 2.

Conjoining *PL* with *NC*, we get the following results in the case of conditional threats. If *A* conditionally threatens *B*, *B* has no duty to comply, unless by not complying he will be responsible for bringing about more evil than he is preventing. If it is reasonable for *B* to believe that *A* will respond to his non-compliance by carrying out his threat, then *B* has a right to inflict the same degree of injury ϕ he reasonably anticipates from *A*, and anything that reasonably appears no more severe than ϕ, upon *A* to get *A* to desist.

We must now consider whether *PL* is morally acceptable once it does come into operation. It appears that it is not, for two reasons. First, violence is an evil and ought to be minimized, other things being equal. By not obligating the defender to use the least costly available means of defending himself, *PL* fails to incorporate this restriction. Second, a principle of proportionality ought to recognize that the diminished responsibility of a psychotic aggressor entitles him to special consideration. A principle of proportionality ought to conform to the moral position taken by legal systems in the area of punishment. We do not think it morally right to punish someone for doing something which, as a result of mental abnormality, he could not have avoided doing or did not intend to do. Similarly, it is suggested that in the area of self-defence the potential victim be required to be more tolerant of the psychotic aggressor than the sane one, where possible.[17]

The other principle, *proportional prevention* [*PP*], attempts to avoid both these criticisms of *PL*. This principle has two parts, one for sane aggressors, [*PP I*], and one for psychotic aggressors, [*PP II*]. To cover the case of conditional threats, the principle of proportional prevention is to be conjoined with *NC*.

PP I: For sane aggressors:

> If *A* is reasonably believed by *B* to pose a threat to him of imminent harm or hurt, and if a reasonable man would believe that *A* is a sane aggressor, then:
> (a)—*B* has no duty to retreat from, avoid, evade or non-forcefully forestall *A* if so doing is of some inconvenience or danger to himself,[18] and

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[17] I take issue with a view adopted by Fullinwider in *War and Innocence*, 5 PHIL. & PUB. AFF. 90 (1975). Fullinwider contrasts the "Principle of Punishment", which asserts that "no man is to be punished except for his own crime", with the "Principle of Self-Defense", which maintains that one is permitted to kill another who is a "direct and immediate agent of a threat" against one's life. Fullinwider is correct in saying that self-defence may permit killing *anyone* who poses a direct and immediate threat to one's life, but he is wrong to conclude from this that "the notions of guilt and innocence" used in connection with punishment have no place in a discussion of self-defence.

[18] There are a number of ways of non-forcefully preventing, at least temporarily, harm or hurt to oneself. On the duty to retreat in the criminal law, *see* Duffy, *Right*

(b)—treating retreat, etc., as a kind of lower bound, *B* must adopt from among the alternatives employing some force that one which reasonably appears to involve the least amount of force, understood in terms of the effects of the force upon the aggressor,[19] consistent with his own personal safety.

PP II: For psychotic aggressors:

If *A* is reasonably believed by *B* to pose a threat to him of imminent harm or hurt, and if a reasonable man would believe that *A* is psychotic, then:

(a)—*B* has the right to do to *A* or with respect to *A* that, and no more than that, which reasonably appears necessary to eliminate the threat *A* poses, and in particular,

(b)—if *B* can eliminate the danger by using no force at all against *A*, even at some inconvenience and danger to himself, *B* is required to do so.[20] Thus, if *B*, without seriously endangering or inconveniencing himself, can simply avoid *A*, he must do so.

With respect to the use of terminology here, Fletcher would probably prefer to describe the principle of proportional prevention as a requirement that the force used by the defender be *necessary* to protect the threatened interest, and not as a principle of *proportionality* at all.[21] Proportionality, for Fletcher, is confined to a relation between interest spared and harm inflicted on the aggressor. But there is no reason why it must be so confined. The principle of proportional prevention applies the notion of proportionality to the relation between difficulty of warding off danger as such and harm or hurt inflicted on the aggressor, varying the required degree of difficulty in accordance with the culpability of the aggressor. It seems appropriate

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of a Person Attacked to Stand His Ground, 6 NOTRE DAME LAW. 128 (1930); Note, *Duty to Retreat from Deadly Assault*, 9 OREGON L. REV. 469 (1930); Smith, *The Retreat to the Wall Doctrine of Self-Defense*, 39 KENTUCKY L.J. 353 (1951).

[19] Following a distinction made by Harris, *The Marxist Conception of Violence*, 3 PHIL. & PUB. AFF. 192, at 214-15 (1974): I wish to differentiate between a forceful act and an act of force. Almost any action a human being performs can be performed forcefully: a politician may deliver his oration forcefully, an individual may brush his teeth forcefully, the United States' saturation bombing of Vietnam was a forceful act. But I want to use "force" in the classificatory, not adjectival, sense, to refer to a particular type of act producing consequences that fall within a limited range — consequences like death, serious injury, hair pulling, etc. Acts performed forcefully (adjectival sense) need not be acts of force; and conversely, acts of force (classificatory sense) need not be performed forcefully. There are plenty of "efficient" and unvigorous ways of causing suffering.

[20] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS s. 64(2) (1965).

[21] *See* Fletcher, *supra* note 16.

to speak of disproportionate force not only when the cost of protecting a threatened interest unduly exceeds the interest spared, but also when a defender uses excessive force to escape from a threatening situation.

A number of observations about the principle of proportional prevention are in order. First, the difference between *PP I* and *PP II* is not that in the case of the sane aggressor the potential victim must not inconvenience or endanger himself at all, while in the case of the psychotic aggressor the potential victim is required to take certain risks and endure certain inconveniences. The difference consists rather in the *degree* of inconvenience or danger that the potential victim is required to endure. The basic intuitive idea is that the potential victim ought to suffer greater inconvenience and take greater risks to himself in the case of the psychotic aggressor than in that of the sane aggressor. Second, threats can be eliminated by means of retreat, avoidance, etc., as well as force. But for those cases where A's threat can be eliminated only by B's doing y to A, the principle of proportional prevention implies that A loses the right not to be interfered with in manner y, because B must do y, and can do no less, in order to eliminate the threat posed. Third, *PP II* does not have as its consequence that one must retreat from a psychotic aggressor in all cases. Rather, it requires this response only when the potential victim reasonably believes that by retreating he can eliminate the threat the aggressor poses. One can imagine cases in which retreat from a psychotic would not reasonably be believed to do so. In fact, the psychotic aggressor might be more dangerous, because more unpredictable and more difficult to escape from, than a sane aggressor. The principle of proportional prevention no more requires the potential victim to be blind to this probable harm in the case of a psychotic aggressor than in the case of a sane one. Finally, although *PP II* is formulated for *psychotic* aggressors alone, the reasoning behind it should apply in other cases of diminished responsibility as well, for example, that of children. There will of course be differences in what counts as reasonable evidence that someone is a psychotic or a child, but these differences will not be reflected in the formulation of the principle of proportionality.[22]

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[22] Assailants who are either psychotic or who are children should be distinguished from persons who are "innocent threats". R. NOZICK, ANARCHY, STATE AND UTOPIA 34 (1974), defines an innocent threat as "someone who innocently is a causal agent in a process such that he would be an aggressor had he chosen to become such an agent". In an article on justifying famine deaths, Nell, *Lifeboat Earth*, 4 PHIL. & PUB. AFF. 273, at 289-90 (1975), speaks of a right of self-defence against innocent threats:

> In a sense we are all innocent threats to one another's safety in scarcity situations, for the bread one person eats might save another's life. If there were fewer people competing for resources, commodity prices would fall and

The difference between *PL* and *PP* can be illustrated by imagining a situation in which retreat, or some other alternative, is impossible, and the only way to eliminate the threat the aggressor poses is to use a certain amount of force which causes the aggressor harm or hurt of greater severity than the severity of the reasonably anticipated harm or hurt. Suppose, for example, that a man tries to kiss a woman who does not want to be kissed, that retreat is impossible for her, and that the only way she has of putting an end to his interference with her person is by stabbing him fatally. Under these circumstances, it would seem that *PP* permits her to use such force. But since the use of such force would issue in disproportionate harm, and the woman can be expected to know this, *PL* would not permit her to stab her assailant. Here we have a situation in which a proportionate prevention issues in disproportionate harm.

If *PL*, as already argued, is not morally acceptable, what about *PP*? Two criticisms relating to the distinction between *PP I* and *PP II* can perhaps be dealt with rather briefly. First, it might be objected that *PP* requires a layman to do something legislatures, courts, and behavioural scientists have had considerable trouble doing, which is to distinguish sanity from insanity. The difficulty with this objection is that it confuses the definition of a concept with the recognition of its instances. Although it is not easy to conceptualize the difference between sanity and insanity, or to say what, in general, counts as evidence for one as opposed to the other, individuals are in practice able to make reasonable judgments about the mental states of others. It is such judgments that are the concern of *PP*. A second criticism might be that since such judgments are often difficult enough to make even in unexceptional circumstances, it is particularly unfair to expect a defender to make them during the excitement of an attack. The problem with this view, however, is that it invites recklessness on the part of the defender. Surely an aggressor's behaviour may so obviously extreme that it is not unreasonable to expect the defender to be aware of his attacker's insanity. It is because of such cases that the distinction between sane and psychotic aggressors remains a morally important one.

Even if these objections with respect to *PP* can be answered, one further objection remains. Certainly there seems to be something morally wrong with a principle of proportionality which permits a person to kill another with impunity in order to defend against a danger of

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starvation deaths be reduced. Hence famine deaths in scarcity situations might be justified on grounds of the minimal right of self-defense as well as on grounds of the unavoidability of some deaths and the reasonableness of the policies for selecting victims.

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non-deadly force, of which the kissing is an example. There are at least three things which could be done at this juncture to avoid this undesirable consequence. *PP* could be modified; *PP* could be restricted in some way by another principle; or *PP* could be rejected entirely. Since the last alternative seems to be both unprofitable and unnecessary, only the first two alternatives will be examined.

The first alternative is to maintain that *PP*, in both of its parts, is too broad as it stands since it includes threats of imminent harm *or hurt*. The problem posed by the kissing example arises, after all, only because *PP* sets down the very same guidelines for response both to threats of harm and hurt. So a simple solution would be to reformulate *PP* solely in terms of harm, leaving out threats of hurt. Now while this solution does manage to salvage a great deal of *PP*, it does so only at the price of making it inapplicable to cases like the kissing example. Ideally, we should like to have a principle of proportionality that is capable of dealing with a wide variety of threats, including both threats of deadly and non-deadly force.

We are thus led to the second alternative, which makes use of the virtues of the principle of proportional loss by attaching to it, as a rider, the principle of proportional prevention. This synthesis can be explained in two steps as follows. First, *PL* is thought of as setting an upper limit to what a person has a right to do in self-defence. In terms of risk-bearing, the defender would be required to compensate the aggressor, or his family, for any loss that exceeds the point of equivalent severity of harm or hurt. The defender would be liable in tort for exceeding the requirements of *PL*, whether or not criminal charges are also brought against him for doing so. Moreover, this upper limit exists whether the aggressor is sane or psychotic, and therefore at this stage there is no need to consider the degree of the aggressor's responsibility for his aggression. Next, *PP*, with its two parts, would be tacked on to *PL*. That is, first it is established that a person is permitted, according to *PL*, to inflict no more than a certain amount of harm or hurt. Then *PP* would come into operation and require the potential victim to use less force, and possibly to retreat, avoid, etc. if this is consistent with prevention of the harm or hurt. Since *PL* is conjoined in this way with *PP*, the moral inadequacies of *PL* discussed above disappear.

The new principle of proportionality [*Q*] that results would read as follows:

> *Q*: If *B* reasonably believes that *A* poses a threat to him of imminent harm or hurt of degree ϕ, then *B* has the right to do something of severity ϕ to *A* to get him to desist, so long as *B* cannot reasonably be expected to be aware of a way of preventing the harm or hurt to himself by

> using less or no force at all. The defender is required to endure greater inconvenience and take greater risks in the case of a psychotic aggressor than a sane one.

Q protects the psychotic, or his family, by entitling him to compensation from the defender should he exceed an upper limit, and by requiring the defender to retreat, avoid, etc., even if at some inconvenience and danger to himself. Only the former protection is afforded the sane aggressor.

Principle *Q* is still not completely satisfactory, however, as appears from a comparison with the view held by the majority of American courts of law on permissible response to a sane aggressor. According to the law, one has a right to defend oneself against both deadly and non-deadly force. A person is not required to sit back and take even a box on the ears, just because it is merely a box on the ears. However, the rules governing response to non-deadly and deadly force used by a sane aggressor are usually different. In the case of non-deadly force, the view of the majority of jurisdictions conforms to principle *Q*, since the majority accept both *PL* and *PP*. Thus, it is claimed that while the potential victim has no right to use deadly force, he is at the same time under no duty to retreat, if he can only do so at some inconvenience or danger to himself. In the case of deadly force used by a sane aggressor, although most courts continue to accept *PP*, they reject *PL*. Thus, most do not require a potential victim to subject himself to some inconvenience or danger by retreating,[23] but neither will they allow a potential victim to use deadly force to resist deadly force if there is reason to believe that non-deadly force will work as well. No court requires a potential victim to submit to great bodily harm, though, when the only way he has of defending himself is by killing the aggressor.[24]

The courts' rejection of *PL* in cases of deadly force used by a sane aggressor is morally preferable to principle *Q*'s approach in such cases. *PL* ought to differentiate between degrees of hurt, and between hurts and harms. A rude shove is not as serious as a forced kiss, and a black eye is not as serious as the loss of an eye. Unlike the loss of an eye, the damage done by a black eye does not persist, and it does not require the victim to make any extensive alterations in his life goals. However, in the domain of harms, such discriminations seem

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[23] *See* Collins, *Self-Defense — The Duty to Retreat*, 3 SETON HALL L. REV. 532, at 534-35 (1972).

[24] *See* Twitty v. State, 168 Ala. 59, 53 So. 308 (1910); State v. Powell, 5 Pen. 24, 61 A. 966 (Del. 1904); State v. Gray, *supra* note 14. In Canada *see* Lowther v. The Queen, *supra* note 14, 26 C.R. at 163, where Hyde J. states:

> There is no doubt that a person is not justified in killing another because of fear but there are many cases where killing in self-defence has been condoned on the grounds of necessity to preserve life.

inappropriate when considering what a potential victim may do to ward off the danger. A person *is* his body, and sometimes his body and its capacities are damaged to such a degree that he can no longer be considered the same person he was. From this point of view, one can see why a principle of proportionality should not differentiate between great bodily harm and death. Both damage the integrity, the coherence, of the human person.

Since the above reasoning, if correct, should apply whether the aggressor who uses deadly force is sane or psychotic, we are led to the following principle, *R*. *R* is to be conjoined with *NC* in those cases where the aggressor makes a conditional threat.

R: (a) For psychotic aggressors (hurt):

If *A* is reasonably believed by *B* to pose a threat to him of imminent hurt, then *B* has the right to hurt *A* in the same degree to get him to stop, so long as there is not available to *B* a way of preventing the hurt by using less force, measured in terms of the effects on the aggressor, or no force at all, even if it is at some inconvenience or risk to himself. If there is such an alternative available, *B* must take it.[25]

(b) For psychotic aggressors (harm):

If *A* is reasonably believed by *B* to pose a threat to him of imminent harm, then *B* has the right to do to *A*, or with respect to *A*, that, and no more than that, which reasonably appears necessary to eliminate the threat *A* poses. If there is available to *B* an alternative of using no force at all against *A*, even if it involves some inconvenience or risk to himself, *B* must take it.

(c) For sane aggressors (hurt):

If *A* is reasonably believed by *B* to pose a threat to him of imminent hurt, then *B* has the right to hurt *A* in the same degree to get him to stop, so long as retreat, avoidance, etc., are of some inconvenience or danger to *B*, and there is not available to him an alternative of using less force, measured in terms of the effects on the aggres-

[25] J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 234 (2d ed. 1960), makes a similar point:

> In the common law of crimes, when deadly force is not involved, the privilege of self-defense includes that of standing one's ground and giving the assailant as good or better than he gives, so long as no disproportionate force is employed. But if one were to be attacked by an insane person there would be no privilege to "carry on". Although blows necessary to ward off an attack would be privileged, there would be a duty to retreat or to terminate the episode, e.g. by pinioning the arms of the insane person. So, too, if one were "assaulted" by a child, the privilege of self-defense would surely fall short of that of self-defense against the assault of a normal adult.

sor, consistent with prevention of the hurt. If there is a less forceful alternative available, *B* must take it; and he must retreat, avoid, etc., if it is of little or no inconvenience or danger to himself.

(d) For sane aggressors (harm):

If *A* is reasonably believed by *B* to pose a threat to him of imminent harm, then *B* has no duty to retreat, avoid, etc., if doing so is of some inconvenience or danger to himself, and retreat, avoidance, etc., serving as a kind of lower bound, *B* must adopt from among the alternatives employing some force that one which reasonably appears to involve the least amount of force, measured in terms of the effects on the aggressor, consistent with his own personal safety. As in (c), *B* must retreat, avoid, etc., if it is of little or no inconvenience or danger to himself.

An upper limit is retained only in the principles for psychotics and sane aggressors posing threats of non-deadly force. For sane and psychotic aggressors posing threats of deadly force, the principle is just that of proportional prevention confined to threats of harm.

IV. Conclusion

Principle *R* is one solution to the problem of the psychotic aggressor. In brief, the principle places certain limitations on the potential victim's right to use force in self-defence against a psychotic aggressor which do not hold in the case of a sane aggressor. The specific content of the principle is determined by the following moral principles: all aggressors, whether sane or psychotic, deserve some consideration of their interests; violence is an evil, and it ought to be minimized, other things being equal; analogous to our attitude towards justified punishment, a potential victim ought to be more tolerant of the psychotic aggressor than the sane one; a person has a right to defend himself against both deadly and non-deadly force; and finally, discrimination between kinds of harm is inappropriate when we are deciding what a potential victim may do to ward off the danger to himself.

The only argument George Fletcher gives for not doing what is done in this paper and for abandoning the search for a principle of proportionality is that "the rule of proportionality invites excessive caution in order to avoid the risk of conviction", and that "this caution results in undue deference to aggressors and encourages criminal conduct".[26] But is it really inviting excessive caution to expect a defender to be more careful and tolerant of an aggressor who is not morally to blame for his aggression, than of one who is? As for Fletcher's claim about "encouraging criminal conduct", that is as problematic as similar contentions about deterrence in the theory of punishment.

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[26] Fletcher, *supra* note 1, at 382.