

Uwe Steinhoff

Rodin on Self-Defense and the “Myth” of National Self-Defense: A Refutation *

David Rodin denies that defensive wars against unjust aggression can be justified if the unjust aggression limits itself, for example, to the annexation of territory, the robbery of resources or the restriction of political freedom, but would endanger the lives, bodily integrity or freedom from slavery of the citizens *only* if the unjustly attacked state (or someone else) actually *resisted* the aggression. In other words, Rodin argues that a state has to surrender to an unjust invading enemy credibly saying, for instance: “Your territory, or your lives. But if you give us your territory, your lives will be spared (and you will not be mutilated or enslaved).” (Rodin calls this the “conditional threat” made by the agents of a “bloodless invasion” or “political aggression.”)

Rodin is right in claiming that his position is a significant departure from just war theory and from international law. His position is not correct, however. I will show this in several steps. First, I draw attention to the fact that Rodin gives the impression that his account of self-defense closely follows domestic self-defense *law*. In fact, however, Rodin’s comments on the necessity condition and its relation to an alleged “duty to retreat” misinterpret the law, and a correct interpretation of the law is not only compatible with, but *implies* a permission to

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resist the “bloodless invader.” Second, I will turn to Rodin’s remarks on proportionality. Here Rodin advances a free-standing moral argument, but again he also suggests that the moral reasoning he appeals to underlies self-defense law. If his argument at this point were correct, it could perhaps save his invocation of a duty to retreat. I will argue, however, that his argument is flawed. Rodin’s remarks on the proportionality of self-defense against conditional threats focus on physical or material harm but implausibly ignore the severity of the violations of autonomy and of the socio-legal or moral order that such conditional threats involve. Third, I will turn to a more recent (forthcoming) paper of Rodin where he basically argues that (“often”) defensive wars against “political aggression” are disproportionate because they risk the lives of those defended in an attempt to secure lesser interests. I will argue that this take on proportionality misses the point in an important respect, namely by confusing wide and narrow proportionality, and makes unwarranted assumptions about the alleged irrationality or impermissibility of incurring or imposing lethal risks to safeguard less vital interests. Next, I will also show that while Rodin talks of a “myth of national self-defense” and of the necessity of moving beyond traditional just war theory and international law, it is actually his interpretation of just war theory and international law that weaves myths. Finally, I will argue that Rodin’s views on national self-defense on the one hand, and “war as law enforcement” on the other, are incoherent.

I. Necessity and the “Duty to Retreat”

Rodin states that the “legal and philosophical literature on self-defense has identified three

intrinsic limitations to the right [of self-defense]. The limitations are necessity, imminence, and proportionality.”¹ When he then analyzes these limitations over the next eight pages, he distinguishes between morality and “legal discussions” only in the case of imminence, thus giving the impression that his account of the other two conditions is both *legally* and morally adequate. This impression is further supported by the fact that he references more legal texts than philosophical ones in these pages. In other words, his discussion here at the very least implicitly seeks support from the authority of the law. Precisely for this reason it bears emphasizing that in fact the law does *not* support Rodin’s rendering of the conditions of necessity and proportionality.

Rodin’s misinterpretation of the law affects his moral arguments against national self-defense. He claims that a “corollary of the requirement of necessity is that there is a general duty to retreat from an aggressor, if it is possible ... to avoid harm [or rights-violations, as Rodin makes clear in the next sentence] in this way.”² He employs this duty to retreat in an argument against what he calls the “reductive strategy” of justifying national self-defense, namely the strategy of a) seeing “national self-defense as simply an application, *en masse*, of the familiar right of individuals to protect themselves and others from unjust lethal attack,”³ or b) of seeing self-defense as an occasion where the *state* exercises its “defensive right, though the lives of individual persons are viewed as the end of the right.”⁴ Arguing against option (a) he states:

1 David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002), p. 40.

2 *Ibid.*, p. 40.

3 *Ibid.*, p. 127.

4 *Ibid.*, p. 130.

The second reason why the purely reductive view is inadequate is that, as we have seen, the requirement of necessity which is implicit in the right of self-defense generates a requirement for threatened persons to retreat if it is possible to avoid harm without resort to force by so doing. But if national-defense were nothing but an exercise *en masse* of self-defense, this would seem to give rise to a general requirement to appease international aggression, if it were possible to avoid bloodshed in this way. ... This strongly suggests that national-defense cannot be reduced to the defensive rights of individuals.⁵

Let me point out, first, that the expression “duty to retreat” must not be interpreted literally. But interpreting it literally seems to be precisely what Rodin is doing here. It is, however, wrong that according to the legal duty-to-retreat-doctrine I am under an obligation to retreat from an aggressor who is intending to step on my toe if by retreating I can avoid this harm and my only alternative means of avoiding it is to chop off the aggressor’s head. Rather, I am completely justified and well within my rights if I stay where I am and endure the aggressor’s stepping on my toe. Thus, the so-called “duty to retreat” is no duty to retreat

⁵ Ibid., p. 128. The first reason refers to the fact that combatants in war are allowed to use force also against non-imminent threats, *ibid.*, p. 127. I agree with Rodin that such use of force can indeed not count as self-defense and must therefore be justified in other ways; see Uwe Steinhoff, *On the Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007), pp. 98-101. However, pointing out that certain uses of violence in war are not defensive is not the same as showing that forms of killing in war that *are* defensive are unjustified: in other words, it is not the same as showing that there cannot be justified self-defense against political aggression.

at all, but at best a duty not to fight back if you could also avoid the threatened harm by retreating.⁶

Second, according to the majority of scholars of British law there is no duty to retreat in British law.⁷ This can already be seen in the fact that British statutory law (Criminal Law Act 1967, section 3) in principle offers even private persons the permission to arrest offenders. It is, however, obviously hardly possible to arrest an offender while retreating from him. There is also no duty to retreat in a number of state jurisdictions in the USA;⁸ in fact, the duty to retreat seems to be retreating there.⁹ And there is definitely no duty to retreat in German law. A foundational principle of German law is “*Das Recht muß dem Unrecht nicht weichen*” (“Justice/law need not yield to injustice/the unlawful” or “Right need not yield to wrong”).

Third, the duty to retreat, if there were one, would not be a “corollary of the requirement of necessity” at all, but one of the requirement of *proportionality*. This is a conceptual and logical point no less true in morality and philosophy than in law. As Boaz Sangero points out, in the event of an unjust attack, and “despite the possibility of safe retreat, defensive force is necessary ... [A]lthough the interests necessitating defence do not include the life of the

6 Boaz Sangero, *Self-Defence in Criminal Law* (Oxford and Portland, OR: 2006), p. 195.

7 See Richard Card, *Criminal Law* (19th edition) (Oxford: Oxford University Press, 2010), p. 711; Sangero, *Self-Defence in Criminal Law*, p. 199-200.

8 *Ibid.*, pp. 200-202.

9 Adam Liptak, “15 States Expand Right to Shoot in Self-Defense,” *The New York Times* (August 7, 2006),

http://www.nytimes.com/2006/08/07/us/07shoot.html?_r=1&ex=1312603200&en=8ed7df43b9942477&ei=5090&partner=rssuserland&emc=rss, accessed on 9 June 2012.

person attacked and his bodily integrity—since these can be saved by means of a retreat—they do include less central interests: the defence of the social-legal order, the freedom of action of the attacked person, and his honour.”¹⁰ And Sangero makes clear that these interests – “less central” or not – are still very important and thus militate against a duty to retreat.¹¹

Fourth, there is most definitely no duty to retreat in Western jurisdictions for law enforcement officers. This is confirmed even by legal scholars who support a far-reaching duty to retreat in the case of private citizens.¹² Thus, there certainly are “individuals,” namely police officers, whose “familiar right ... to protect themselves and others” involves absolutely no duty to retreat. Therefore, and in particular given that as bearers of state force soldiers are more like police officers than like private citizens, the reductive strategy works just fine as far as it concerns the lack of a duty to retreat in the context of national defense.

Rodin’s much discussed “bloodless invasion” argument¹³ against version (b) of the reductive strategy does not fare better than his duty-to-retreat argument against version (a).

10 Sangero, *Self-Defence in Criminal Law*, p. 194.

11 Ibid., pp. 193-215. Sangero defends the duty to retreat in the end (with certain severe qualifications incompatible with Rodin’s position). Since I do not share his proportionality assessments (and certain other elements of his analysis), I disagree with his conclusion. This need not concern us here.

12 Ibid., p. 202-203.

13 It should be noted that exactly this argument, although in other terms, had already been made before Rodin by Richard Norman, *Ethics, Killing and War* (Cambridge: Cambridge University Press, 1995), p. 134-5. There Norman also distinguishes between what Rodin calls the reductive strategy on the one hand and the analogical strategy on the other.

The first premise of the “bloodless invasion” argument is the following conditional: “if ... there are acts of international aggression which generate a legal and moral right [according to traditional just war theory] of national-defense and yet which threaten the lives of no citizens, then the attempt to ground national-defense in the end of defending the lives of citizens must fail.”¹⁴ The second premise is that the “bloodless invasion” example establishes the correctness of the antecedent of the conditional.

Let us just grant, for the sake of argument, that it does establish that. The argument still fails since the first premise is both irrelevant and wrong. It is irrelevant because there is no need for the reductive strategy to ground national defense in the end of defending the *lives* of citizens – it is quite sufficient to ground it in the end of defending their *rights*. In fact, however, the strategy succeeds in doing both. This is shown again by the rights and duties of law enforcement officers. There are, after all, also acts of *domestic* aggression that generate a legal and moral right of the state to use severe force against the aggressors yet which threaten the lives of no civilians. Police officers do not have to throw away their guns and run if armed robbers, in an attempt at bloodless robbery, clearly communicate their intention not to kill anybody as long as they get what they want, and are now approaching the citizen in order to steal his coin collection. If the armed robbers continue their approach and do not surrender, the police are permitted to use force, deadly force, if necessary to defend their own lives (and they are citizens too) while defending the property of others.¹⁵ In other words, the reductive strategy, version (b), *pace* Rodin, does not at all imply that there cannot be a right to national-

14 Rodin, *War and Self-Defense*, p. 132.

15 I thank the German law professors Christoph Enders and Jan Sorth for kindly answering questions of mine on this issue.

defense in the face of a “bloodless invasion.” It implies exactly the opposite.

II. Proportionality in Self-Defense

The example of the law enforcement officers also shows that there must be something severely wrong with Rodin’s ideas about proportionality and “conditional threats.” After all, he thinks that the defense against the bloodless invasion – in contrast to what traditional just war theory suggests – is actually *not* justified. The bloodless invasion example, according to Rodin, thus also “points out that international aggression need not pose an imminent threat to any right of sufficient magnitude to make *proportionate* the use of defensive force.”¹⁶ If this were true, however, then my bloodless robbery example would, for the same reasons, also “point out” that police officers should not resist the robbers in my example with defensive force but rather hand the coin collection over to them. This is absurd, of course, and so, again for the same reasons, this is also a *reductio ad absurdum* of Rodin’s argument.

What, then, has gone wrong? Rodin answers “No” to the question of whether it is “justifiable to use lethal force against a threat to life (or some other central right) which is conditional but not imminent.”¹⁷ If you can save your life either, for example, by killing the armed mugger or by giving him the dollar he demands, you should, so the argument goes,

¹⁶ Rodin, *War and Self-Defense*, p. 133, my emphasis.

¹⁷ Ibid., p. 133. Incidentally, Rodin’s talk about “imminence” is misleading. If the mugger is willing to act on his threat, then the threat to the victim’s life is imminent if the victim will not give in. The point is simply that the threat is conditional, whether imminent or not.

give him the dollar, since the use of lethal violence in defense of property is disproportionate (and Rodin also thinks that it is disproportionate in defense, for instance, of your right to vote or of your right to free expression).¹⁸

But *why* should it be so “clear”¹⁹ that killing the mugger in this situation is disproportionate? After all, there are at least three problems with Rodin’s account.

First, Rodin underestimates the depravity of both the conditional threat and its agent and ignores how this depravity affects proportionality considerations. Rodin first claims that “the right to respond is in some way proportional to the value of what is being extorted.”²⁰ But that is simply wrong, as Rodin then admits two pages later. After all, there might, as Locke pointed out, be good reasons to doubt that the mugger will content himself with the money. Accordingly, Rodin revises his earlier statement as follows: “... a right of response to conditional threats ... is bounded by two factors: the value of what is extorted and the risk incurred .”²¹ Yet, this is also wrong, as Rodin again makes clear himself in a later article and another context: “... proportionality for liability ... is a relationship between the normative status of the acts of agents (of which the good and harm that they produce are but one contributing factor).”²² However, it should be clear that the normative status of the pickpocket’s act of stealing a dollar out of your pocket and running away with it is very different from the normative status of the armed robber’s act of holding a gun to your head

18 Ibid, pp. 43-48, and 132-8.

19 As Rodin claims it is, see *ibid.*, p. 134.

20 *Ibid.*

21 *Ibid.*, p. 137.

22 Rodin, “Justifying Harm,” *Ethics* 122(1) (2011), pp. 74-110, at 80.

and shouting at you “Give me your f... money or I blow your f... brains out.” This difference is acknowledged by both law and morality and explains why armed robbers are justly punished much more severely than mere pickpockets. Thus, since armed robbery is such a severe attack, such a severe rights-violation – an actual one, not merely a conditional one – it can be dealt with accordingly.

In addition, not only the depravity of the act, but also the culpability of the agent is, as again Rodin elsewhere admits, important for the agent’s liability.²³ But since Rodin’s mugger is willing to kill an innocent person for a mere dollar, any claims to protection on his part are obviously severely diminished. He is anything *but* innocent, but rather guilty of a blatant disrespect for other people’s lives.²⁴ Therefore he is hardly in a position to complain if the innocent defender does not value the guilty aggressor’s life more than the aggressor values the life of the victim, and hence he is not being wronged if the defender does to him in self-defense what he, the aggressor, would do to the victim in an act of aggression.

Second, Rodin’s underestimation of the depravity of the mugger and his act is mirrored by his misperception of what is at stake on the part of the victim or defender. Rodin makes it appear as though the only thing that would be directly or “imminently” threatened by the mugger is the victim’s property. After all (Rodin seems to think), the victim can save his life by just giving the mugger what he wants. This view, however, is again not sufficiently informed by legal discussions, and in this case (as in so many others) that also undermines its moral validity. To repeat the Sangero quote from above: “[A]lthough the interests

23 Ibid., p. 89.

24 See on this also Gerhard Øverland, “Conditional Threats,” *Journal of Moral Philosophy* 7 (2010), pp. 334-345.

necessitating defence do not include the life of the person attacked and his bodily integrity—since these can be saved by means of a retreat [or, in this case, by handing over the money]—they do include less central interests: the defence of the social-legal order, the freedom of action of the attacked person, and his honour.”²⁵ And, again, even if these interests were “less central,” they would still be very important.

In particular the defense of the (integrity of the) social-legal order seems to be very important and not peripheral at all. Thus, it should be pointed out that the reigning theory of self-defense in German law (and in many Continental Western European jurisdictions that have been influenced by German law) is the so-called *dual theory*, according to which the defender defends not only himself or herself but *also* the (integrity of the) social-legal order.²⁶ In Germany this is often used to explain the lack of a proportionality requirement (there is only something like a no-gross-disproportionality-requirement). But of course the dual theory also exists in Anglo-Saxon jurisdictions.²⁷ In fact, section 3 of the British Criminal Law Act of 1967 can arguably be read as a recognition of that theory, as can be the distinction between “private” and “public defense” and the actual role it plays in jurisprudence: the defensive act of an individual can often (in fact, it seems, always) be justified as *both* private *and* public defense.²⁸ Last but not least, this dual theory of self-defense is not only a legal theory, but of course also a moral one: it is a venerable part of the

25 Sangero, *Self-Defence in Criminal Law*, p. 194.

26 Volker Erb, “Notwehr,” in Wolfgang Joecks and Klaus Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Vol. 1* (Munich: C. H. Beck, 2003), pp. 1249-1337, at 1257.

27 Sangero, *Self-Defence in Criminal Law*, p. 67-73

28 Card, *Criminal Law*, pp. 708-711.

natural law tradition,²⁹ and indeed, of just war theory.³⁰ Every crime harms and violates the integrity of the social-legal order, every unjust act harms and violates the integrity of the moral order; and this must weigh heavily in favor of resistance against attackers in any proportionality consideration.

Considerations of honor and autonomy must also enter the proportionality considerations. Having a dollar stolen by a pickpocket is not by far such a humiliating experience as being mugged at gun point, having the will of the mugger directly imposed on one's bodily actions – which also points to the fact that the violation of one's autonomy is much more severe in the latter case than in the former. If some pickpocket runs away with my dollar, I will not be able to use that dollar to buy something with it, and in this respect the thief can be said to violate my autonomy. However, I can still *move* how I want, jump up and down, throw a right hook, etc. In other words, the thief violates my ownership of the dollar, *but not my self-ownership*, my ownership of my own body. This is different with the mugger. Under the threat of lethal violence he unjustly tells me what to *do*: to put my hand into my pocket to give him the dollar, or not to grab his arm when he tries to do it himself, or not to try to knock him out with a right hook. In other words, the mugger temporarily takes control of my body, he temporarily enslaves me. This is an extremely grave violation. Thus, in contrast to Rodin's

29 See, to give only one example, Locke's discussion in the *Second Treatise*, Ch. II. I am not aware of any natural law theorist not embracing the dual theory.

30 Rodin knows that, and acknowledges it towards the end of *War and Self-Defense*, p. 174: "The idea that defensive wars may be a form of law enforcement has a long and distinguished history." Indeed, it has. However, in his whole preceding critique of war as self-defense he simply ignores this long and distinguished history.

suggestion, there is much more at stake here than simply property: namely, at the very least, also honor, self-ownership and the integrity of the social-legal order. These factors must not be ignored, and they change the balance of the proportionality consideration dramatically.

III. Wide Proportionality and Imposing the Risk of Death on People One Defends

There is still a third problem with Rodin's account. To set the scene, it should be noted that Rodin's conditional threat argument is certainly not new. Like the bloodless invasion argument, it had already been made before him, although in other terms, by Richard Norman. I have elsewhere³¹ briefly discussed this argument and drawn attention to an early objection to it by Jan Narveson (and later by Jeff McMahan): surely one must have a right to *some* form of resistance against the mugger, and if this then provokes a violent reaction on the part of the mugger (that is, if he is about to make good on his threat), one is at least *then* justified in using lethal self-defense if necessary (and perhaps anticipating this development one is even justified in shooting the mugger right away). I had pointed out, however, that this argument could also be reversed: "If it is clear that the initially non-violent resistance will in the end lead to the killing of a person because of a dollar, shouldn't one then completely forgo resistance?" Yet, I went on to argue that this reversion does not quite work, and that the defender has at best a Kantian *Tugendpflicht* (duty of virtue) but not a duty of justice (*Rechtspflicht*) not to shoot the mugger right away: shooting him is well within his or her

31 Steinhoff, *On the Ethics of War and Terrorism*, pp. 77-8. See there also for the precise references to Norman, Narveson and McMahan.

rights.³² I would like to add now that while I think that the defender might have a *Tugendpflicht* not to shoot the mugger *right away* (if this is not necessary to stop the mugger), he certainly does not have such a *Tugendpflicht* not to resist *at all, even if* he knows that this resistance will escalate and lead to the mugger's death. The reasons for this have of course to do with the two previous problems with Rodin's views about proportionality discussed in the last paragraphs.

In any case, Rodin now, in a recent paper, does want to avail himself of the reversion of Narveson's argument I just mentioned.³³ However, the way he does this is most peculiar. Let me explain.

To begin with, it has to be noted that in *War and Self-Defense*, Rodin's discussion of proportionality in the context of conditional threats dealt with the question whether lethal force *directed against an aggressor* posing a certain kind of conditional threat (like the mugger) can be proportionate in light of the nature of the mugger's aggression. Accordingly, my discussion in the last paragraphs dealt with this question too. It is, however, a *completely different* question whether the "collateral damage" *done to innocent bystanders* in the course of the defensive act against the aggressor is proportionate. German law, for example, keeps these two things neatly (and helpfully) apart (Anglo-Saxon case law might not be that neat here): even if the harm that has been inflicted on an aggressor and simultaneously on innocent bystanders has been so inflicted by one and the same act (discharging a shotgun, for example), German law answers the question as to whether the force directed against the

³² Ibid., p. 78.

³³ Rodin, unfortunately, fails to mention Norman, Narveson or my humble self in that context.

aggressor was justified under the heading of self-defense, while it uses the heading of justifying emergency to answer the question as to whether the violation or infringement of the bystanders' legally protected interests was justified. This is very wise indeed since the criterion of proportionality operates very differently in these two cases, and for good moral reasons.

Therefore, even if you want to deal with both kinds of proportionality under the heading of self-defense in such a case like the shotgun case (so that the act of self-defense would only be justified if it satisfied *both* proportionality constraints), you still need to distinguish between these two different constraints, that is, between proportionality with respect to the aggressor and proportionality with respect to innocent bystanders.³⁴ And finally, you also have to distinguish between harm that befalls bystanders directly through the defender's action (as in the shotgun case), and harm that is (partly) caused by the defense but befalls other people in very indirect ways or through the intervening action of others (including the aggressor himself). McMahan calls the first kind of proportionality "narrow" and subsumes the second kind of proportionality and proportionality considerations regarding very remote harms under the term "wide proportionality." I will avail myself of this terminology.³⁵

With these preliminaries in mind, let us now see how Rodin tries to reverse the Narvesonian argument. He claims: "... when a direct threat to a lesser interest is

34 See also Suzanne Uniacke, "Proportionality and Self-Defense," *Law and Philosophy* 30 (2011), pp. 253–72, at 254.

35 Compare McMahan's distinction between "narrow" and "wide proportionality" in *Killing in War* (Oxford: Clarendon Press, 2009), p. 20-21. As my final distinction shows, I prefer to distinguish between two kinds of "wide proportionality."

accompanied by a contingent threat to a vital interest, this provides a moral reason *not* to defend the lesser interest, even if using the same level of defensive force would have been proportional absent the contingent threat.”³⁶ I suppose that by “a moral reason” Rodin means a *pro tanto* reason, not an overriding reason. After all, you certainly *are* allowed to knock out the mugger, or to pepper-spray him, or to knock the gun out of his hands or at the very least to violently push him back in order to then quickly shut the iron door in front of him. (You would be allowed to do that even if you were not allowed to fight back against the violence the mugger might now use in response to your resistance.)

But even if interpreted in this way, that is, as meaning that “the likely infliction of the contingent portion of the threat counts against defensive action in the proportionality calculation,”³⁷ Rodin’s statement here is mistaken if it is meant to apply to *narrow proportionality*. It would imply, after all, that you may direct *more* force to and inflict *more* harm upon the relatively harmless pickpocket running away from you with a dollar than to and upon the relatively depraved armed mugger putting a gun to your head, threatening your life, and severely violating your autonomy. This, however, defies law, morality, and reason.

36 David Rodin, “The Myth of National Self-Defence,” unpublished ms., on file with author, p. 11, my emphasis. He explains: “A conditional threat is one that has the structure of the old highwayman’s cry: ‘your money or your life!’ Analytically it consists in two distinct components – a direct threat to a lesser interest (the money) and a contingent threat to a greater interest (the life). The antecedent of the contingent threat is resisting the direct threat to the lesser interest.” Ibid, p. 11. Rodin’s paper will appear in Cécile Fabre and Seth Lazar, *The Ethics of Defensive War* (Oxford: Oxford University Press, forthcoming).

37 Rodin, “The Myth of National Self-Defence,” p. 13.

I need not discuss this any further, not least because Rodin himself does not discuss it any further. Instead, in the remainder of his paper he talks only about the proportionality of harm inflicted on *bystanders*, that is, about *wide* proportionality. This is part of the reason why I said that Rodin's way of availing himself of the reversion of the Narvesonian argument is "peculiar." Recall the course of the discussion: the original question was whether lethal force directed against an *aggressor* posing a conditional threat to a person's life can be proportionate, and Rodin's comments on the disproportionality of taking a life in defense of "peripheral" interests like the protection of property were supposed to show that it is not. One objection against this view (the third one in the present paper) was the argument that surely one must have a right to *some* form of resistance against the mugger, and that if this then provokes a violent reaction on the part of the mugger one is at least *then* justified in using lethal self-defense if necessary. But against this Rodin now offers – and therein lies the peculiarity – his discussion of disproportionate harm to *bystanders*. That is, he offers a discussion that is simply not pertinent to the issue in question: after all, that killing an armed mugger *and 12 innocent bystanders simultaneously* with your shotgun is disproportionate certainly does not imply that *killing the armed mugger* is disproportionate. In other words, Rodin's "answer" to the third objection misses the point. Thus, the third objection stands unrefuted.

But maybe the discussion of the harm inflicted on bystanders in war can still somehow save the conclusion Rodin wants to draw. After all, so-called war pacifists have already argued against war with the argument that the "collateral damage" it produces is unjustifiable (of course, Rodin gives this argument a different spin).³⁸ So let us have a closer look at

³⁸ For a discussion of war pacifism or "contingent pacifism," see Steinhoff, *On the Ethics of*

Rodin's peculiar reversion of the Narvesonian argument. After stating, in the quote above, that the conditional threat against the vital interest provides a moral reason not to defend the lesser interest, Rodin states:

Some actions to defend the political interests of members of a community that would be permissible against a straightforward direct threat (for example non-violently barricading the way against an aggressor), may become impermissible when the direct threat to those political interests is backed up by a contingent threat to life.

This counter-intuitive conclusion follows from the fact that the permissibility of engaging in defensive action is in part determined by the foreseeable consequences that the defensive action will produce.³⁹

I agree with this, with one exception: Rodin is quite wrong to claim that there is anything "counter-intuitive" about this conclusion. Far from being counter-intuitive or innovative, it is banal, and completely in line with traditional just war theory. After all, the tentative "may" in Rodin's statement is entirely justified – and no just war theorist has ever denied that or said anything that would imply such a denial.

Rodin, however, thinks that the distinction between direct and conditional threats is particularly consequential for "political aggression," which he defines as "primarily directed towards obtaining a political or material advantage for the attackers"⁴⁰ (in contrast to "genocidal aggression," against which Rodin considers defensive war to be unproblematic):

There is, indeed, no obvious precedent of morally justified acts of individual self-

War and Terrorism, pp. 52-9 and 76-101.

³⁹ Rodin, "The Myth of National Self-Defence," pp. 11-12.

⁴⁰ *Ibid.*, p. 10.

defence that have the typical structure of war against political aggression – acts of self or other-defence that have the foreseeable likely consequence of generating greater harm to the vital interests of the very people the defensive action is intended to benefit. Expressed in this way, defensive war against political aggression is often straightforwardly self-defeating and hence morally irrational.⁴¹

But again: what is supposed to be the new insight here that traditional just war theory did not have? *Of course* defensive war against political aggression will often be self-defeating and, indeed, unjustified according to traditional just war theory. After all, there is a *proportionality requirement* in traditional just war theory. As the United States Conference of Catholic Bishops succinctly put it in their “Pastoral Letter on War and Peace” (which will hardly count as a document of “unorthodox” just war theory) in 1983: “In terms of the *jus ad bellum* criteria, proportionality means that the damage to be inflicted and the costs *incurred* by war must be proportionate to the good expected by taking up arms.”⁴² (Incidentally, if defensive war against political aggression is only “often,” but not always, “morally irrational,” Rodin’s talk about the “myth” of national self-defense would appear to be a somewhat sensationalist overstatement.)

Rodin’s argument, moreover, is rather one-sided in trying to explain why defensive war against political aggression “may” “often” be unjustified, while not elaborating on his reasons

41 Ibid., p. 17.

42 The United States National Conference of Catholic Bishops, “The Challenge of Peace: God’s Promise and Our Response: The Pastoral Letter on War and Peace”, in Jean Bethke Elshtain, *Just war Theory* (New York: New York University Press, 1992), pp 77-168, at 101, emphasis of “incurred” added.

for his converse implicit concession that at least sometimes they will be justified (at least as far as the “interests of the very people the defensive action is intended to benefit” are concerned). In any case, and *pace* Rodin, there are actually countless pertinent and obvious precedents within individual self-defense that have the allegedly “typical” structure of war against political aggression. The empirically quite common example of the armed mugger who would successfully kill someone (or that person's friends or family members whom he also threatens) for resisting is obviously one such precedent.

However, giving this common example a moment's thought immediately reveals an obvious fact: since resistance against muggers posing conditional threats, even if those conditional threats are directed against your friends or relatives, is often anything but “self-defeating” and “morally irrational,” resistance against “political aggression” will also often be anything but “self-defeating” and “morally irrational”. The reason for this is, of course, that defense against conditional threats, whether they come in the form of muggers or enemy troops, is sometimes highly effective. Sometimes, if you kill the mugger or the enemy dictator, or if you sink the approaching warships or destroy the approaching troops, you remove both the “imminent” and the conditional threat. Rodin actually admits that, but claims that this is “rarely the case in war.”⁴³ But rare or not, it happens, and there is certainly nothing self-defeating about such use of force.

Moreover, even if it is foreseeable that some citizens will die in a defensive war (while surrender would have saved the lives and vital interests of all), the conclusion Rodin draws does not follow. Recall that he claims that it is “typical ... of war against political aggression” that it has “the foreseeable likely consequence of generating greater harm to the vital interests

⁴³ Rodin, “The Myth of National Self-Defence,” p. 16.

of the very people the defensive action is intended to benefit” than surrender or non-resistance would generate, and he then immediately concludes: “Expressed in this way, defensive war against political aggression is often [that is, in the “typical” case, I assume] straightforwardly self-defeating and hence morally irrational.”⁴⁴ But this is too hasty. It seems to be an underlying assumption of Rodin’s argument that in valid proportionality considerations the anticipated death of *some* citizens due to their states’ defensive war will always outweigh the anticipated successful defense of the vast majorities’ property, political freedom, self-determination and way of life. However, while this assumption indeed is innovative and not shared by traditional just war theory, it is also entirely unwarranted.

By way of illustration: if it were wrong for politicians to call their compatriots to arms against a “political aggression” because in the defensive war against it some citizens will be killed, then it is also wrong for politicians to call for the construction of big bridges, for almost inevitably some workers will be killed there too. People are also necessarily killed in car traffic (according to the World Health Organization there are about one million traffic deaths annually, most of them stemming from car traffic) without it in the least being the case that more people would die without traffic than with it (you can, after all, have ambulances without private traffic). People know how dangerous car traffic is and that they themselves might succumb to it; yet, (most) people accept the danger of death in car traffic because they appreciate the additional freedom and convenience car traffic gives them. In other words, most people do not think that the loss of some lives necessarily outweighs any gains in the realm of additional mobility. Why, then, should they think that it outweighs the defense of political freedom or one’s way of life? And why should politicians think that citizens think

⁴⁴ Ibid., p. 16.

that?

These considerations also shed light on Rodin's idea that citizens have a duty of care towards each other. He considers the objection (against his view on conditional threats and "the myth of national self-defense") that perhaps "when faced with a political aggressor the members of a community implicitly waive their rights to care. By doing so they may morally empower their fellow citizens to engage in defensive acts that will expose them to greater risk of death."⁴⁵ In his reply, he invokes "familiar problems" with consent theories but also identifies a "deeper problem," namely that the duty of care towards a person (he takes the duty of a father towards his son as an example) is not simply grounded in the person's right to care, and that therefore the person "may waive his rights to care ..., but he cannot so easily waive the duty that arises out of the paternal bond that I have to him."⁴⁶

Even if this were true, the conclusion against national self-defense against conditional threats of "peripheral" interests like political freedom follows at best if one makes again the unwarranted assumption I just criticized. In other words, if the anticipated death of *some* citizens due to their states' defensive war does *not* always outweigh the anticipated successful defense of the vast majorities' property, political freedom, self-determination and way of life, politicians and citizens engaging in a defensive war against a "political aggression" are *not* always violating their duty of care.

To put Rodin's own example of a father's duty to his son to good use: (healthy) children

45 Ibid., p. 14.

46 Ibid. Incidentally, Rodin does not mention the "familiar problems" with consent when he himself relies on it to support his account of punishment. See Rodin, *War and Self-Defense*, pp. 176-7.

obviously have a vital interest in their life. However, they also have, for example, a non-vital interest in riding a bike or a sled, climbing up a tree, visiting friends, being driven by Mom through all the highly dangerous traffic to soccer practice. Yet, engaging in these non-vital activities heightens the risk of the children's death. Does this mean that a father who does not keep his children in the house is a bad parent, and that he violates his “duty of care” by telling his son to switch from a very safe activity to a non-vital more dangerous one: “Stop watching TV, go outside and play”? Certainly not. On the contrary, a fetishistic obsession with absolute security makes for very bad parenting – and very bad politics – indeed, for the obvious reason that a better life often has to be paid for with a higher risk of death. This *is* a fact of life.

This also explains why there is a simple reply to Rodin’s talk about “familiar problems” with consent: you simply do not need the children’s consent to make them engage in somewhat riskier but more rewarding activities; and in the case of adults, you are often entitled to *assume* that the person whom you expose to a certain risk for certain reasons would consent, namely because it is in his or her own interest. A doctor, for instance, who faces an unconscious patient whose nose she could save from amputation with a simple injection, but refuses to give the injection because there is a 1 : 10,000 chance that it might kill the patient, is certainly *not* exercising good care (I would take that chance; wouldn’t you?).

But at least in some wars against “political aggression” the citizens or politicians opting for the defensive war know that some citizens *actually will die*, so there is more than a mere risk imposed on those citizens, isn’t there? No, not really. After all, the citizens or politicians do not know *ex ante* who exactly will die, so when making the decision to engage in defensive warfare against political aggression each and every citizen will *ex ante* only be

faced with the *risk* of death: they are not condemned to certain death. Consider a variation of the injection example: in state *A* there are for some reason every year about 100,000 people whose noses, ears, pinkies, and other non-vital body parts could be saved, while they are unconscious, through the above-mentioned injections. However, due to legal and insurance issues the injections are never given, and each year 100,000 people lose non-vital extremities. Fed up with this, people want a political change. And so indeed, the legislature succeeds in passing a law which makes giving the injection under the described conditions obligatory for doctors. Given the odds involved, this means that each year ten people will die from these injections. However, this of course does not imply that these ten people have been treated unjustly or unfairly (traffic accidents, after all, are no examples of injustice, either). *Ex ante* there was only a *risk* of death imposed on them, as on everybody else, and accepting this risk was no less rational for them than for the others – *ex ante* it was in their own best interest. So these ten (or, more precisely, their relatives) are in no position to complain about the policy afterwards if it turns out that in the end it was them who drew the short straw.⁴⁷

But suppose now that there are a couple of people in state *A* who have such an extreme fear of death that they oppose the new law (suppose further that it is for certain reasons infeasible to search unconscious people for their “injection objection card” or something of that sort: it is not possible to selectively exempt certain people from the application of this injection law). Is this then a sufficient reason to abolish the new law? Obviously not. We also do not allow people with an extreme fear of dying in a traffic accident to bring private traffic

47 For a related application of this idea of the fair imposition of an *ex ante* risk to life, see Jeff McMahan, “The Just Distribution of Harm Between Combatants and Noncombatants,” *Philosophy and Public Affairs* 38 (2010), 342-79, esp. at 363.

to a grinding halt, nor do we allow people with an extreme fear of being killed by dogs to end dog keeping in society – nor should we allow anything like this. Sometimes the rational interest of the many morally trumps the fear of the few, and politicians who do not see that and act accordingly are certainly not taking good care of their citizens.

Thus, Rodin’s argument fails because it is not true that the risk of death (both to combatants and civilians) associated with a defensive war against “political aggression” always outweighs the chances to successfully protect political freedom, territory, property, one’s way of life and other “non-vital” interests.⁴⁸ There are even some things worth dying for, and there are certainly an infinite number of things worth *risking* death for. We do it all the time; we also often impose, quite justifiably, such risks on our children or fellow citizens. Thus, it all depends – and isn’t this obvious? – on how high the risk is, on the value of the goods defended, and on the chances of successfully defending them. Of course, *sometimes* the risk of death will be too high and the chances to safeguard non-vital interests too low to make a war proportionate. But just war theory has never denied that.

IV. Rodin on Just War Theory, International Law, and “Copernican Moments”

Speaking about just war theory: Rodin’s paper “The Myth of National Self-Defense” has all the air of an iconoclastic paper bringing down centuries of thought, in this case traditional

⁴⁸ Frank de Rooze, “Self-defence and National Defence,” *Journal of Applied Philosophy* 7(2) (1990), pp. 159-68, esp. at 165-66, makes exactly the same mistake as Rodin. See on this Steinhoff, *On the Ethics of War and Terrorism*, p. 80.

just war theory and international law. Therefore, it is worthwhile to examine how accurate Rodin's interpretation of these traditions is. I will restrict myself to a few central points.

Rodin claims that "it is a foundational principle of Just War Theory and International Law, that states have the right to defend their sovereign independence through war."⁴⁹ He then claims that this principle, in just war theory, is partly explained by the value of the community that the state represents.⁵⁰ But this, he argues, leads to a contradiction: for it would be "madness" to "accord to non-national communities, such as Cadbury [a chocolate company that according to Rodin was "an independent and self-determining community"⁵¹], rights to defensive force comparable to those possessed by states."⁵²

Let me point out that the principle Rodin refers to is not "foundational" for International Law at all. To substantiate his rather bold contrary claim, Rodin refers in a footnote to the Charter of the United Nations, Art. 51. However, the latter article does not grant a right to violently defend national sovereignty against *any* threat, but it rather states that there is a right to defend it against an *armed attack*, as Rodin correctly quotes in the same footnote (only to then ignore this fact).

Thus, the big contradiction Rodin thinks to have identified is simply not there. For example, with regard to the company Cadbury he states that "it never occurred to anyone, on either side of the debate, that the takeover [through another company] could be resisted

49 Rodin, "The Myth of National Self-Defence," p. 2.

50 Ibid., p. 4.

51 Ibid.

52 Ibid., p. 5.

through force of arms.”⁵³ That is true. However, it is also true that it never occurred to anyone, on either side of the debate, that the complete destruction of the state formerly known as “Democratic Republic of Germany” through a takeover of its *Länder* (federal states) by the Federal Republic of Germany could be resisted through force of arms. A big part of the reason for this is certainly that the takeover was *non-violent*.

In fact, at some point Rodin does consider this – quite obvious – possibility. Yet, he makes the surprising claim that “[t]his suggestion doesn’t take us very far”:

Suppose Kraft’s takeover bid was conducted through fraudulent action that was not only criminal, but also violent: breaking into the offices of Cadbury’s accountants to falsify documents and killing a security guard in the process. It would certainly be permissible to use force to prevent the unjust killing of the guard. But the fact that the violent break-in was an unjust threat to the continued independence of the Cadbury Corporation adds little or nothing to the permission to use defensive force against the perpetrators (or to the permission to inflict foreseen but unintended harm on innocent bystanders). It is the life of the guard, not the independence of Cadbury that is properly defended with force.⁵⁴

As an reply to my point that the big contradiction Rodin sees is a myth of his very own, these remarks of his here are *beside* the point: which is that *both* companies *and* states may defend themselves (if other relevant just war criteria are satisfied) against unjust armed aggression. And Rodin seems to flatly concede this point here. *Why* they may so defend themselves is irrelevant as far as the alleged contradiction is concerned.

53 Ibid., p. 2.

54 Ibid., p. 8.

The principle in question is also not “foundational” for just war theory, which might explain why Rodin – like so many other Anglo-Saxon philosophers who make sweeping but unwarranted statements about traditional just war theory – is unable to provide any textual evidence to support his claim. While it is correct that just war theory does not always only regard unjust *violent* acts (or their continuing unjust results) as just causes for war and is more permissive than international law, it is not nearly as permissive as Rodin makes it out to be. For example, it does not regard all infringements on sovereignty as just causes for war, but only, of course, unjust infringements; and in this respect it is important to see that in traditional just war theory a just infringement on sovereignty can be triggered by something else than the previous unjust infringement of the defender’s *sovereignty* (humanitarian intervention, for example, is certainly not a modern invention).⁵⁵ In other words, sovereignty is not nearly such an important concept in traditional just war theory as Rodin claims it is. Moreover, the whole obsession with *states* is completely *alien* to traditional just war theory. Finally, Rodin also informs us that we “are indeed living through a Copernican moment in international ethics. In the old paradigm the rights and interests of individuals metaphorically ‘orbited’ those of the state – they were conceptually and normatively subordinated to the rights and interests of the state. But the human rights revolution inverts this order of priority.”⁵⁶ Really? What “old paradigm” is Rodin talking about? He does not say. One

⁵⁵ A prime example – and a quite representative one for the views of traditional just war theorists – is of course section 3 of Francisco de Vitoria’s “Of the Indians Lately Discovered,” for easy access, see http://en.wikisource.org/wiki/De_Indis_De_Jure_Belli/Part_2.

⁵⁶ Rodin, “The Myth of National Self-Defence,” p. 16.

cannot avoid the nagging suspicion, though, that he simply means Michael Walzer, about whom he states: “Walzer’s arguments belie a thoroughgoing subordination of the rights and interests of individuals to the rights and interests of states.”⁵⁷ But Walzer is certainly not a founding father of international ethics (which includes the just war tradition), nor are his views, contrary to popular opinion, particularly representative of the just war tradition. As already said, Walzer’s obsession with sovereignty and states is not shared by traditional authors. If, however, Rodin really means Walzer, then this is slightly amusing if contrasted with the following statement by Seth Lazar: “Individual rights were first placed at the heart of just war theory in Michael Walzer’s *Just and Unjust Wars*.”⁵⁸ Of course, this surprising claim – I am sure Suárez, Vitoria, Molina, Grotius, and Anscombe would have found it surprising indeed – is not backed up by Lazar with any evidence. The reason for this, and the reason why all these just war theorists would have found Lazar’s claim surprising, is, of course, that in their accounts the rights of individuals were central and indeed “foundational,” and did certainly not merely “orbit” – whatever Rodin might think – the rights and interests of “the state.”⁵⁹

⁵⁷ Rodin, *War and Self-Defense*, p. 194.

⁵⁸ Seth Lazar, “Introduction: Symposium on Jeff McMahan’s Killing in War,” *Ethics* 122(1) (2011), pp. 8-9, at 8.

⁵⁹ A right to self-defense was, based on the *Decretum*, taken for granted by traditional just war theorists, including, of course, Suarez and Vitoria. Molina, in turn, can almost count as precursor of possessive rights-individualism. See Matthias Kaufmann, “Luis de Molina über subjektive Rechte, Herrschaft und Sklaverei,” in Matthias Kaufmann and Robert Schnepf (eds.), *Politische Metaphysik. Die Entstehung moderner Rechtskonzeptionen in der*

Finally, Rodin offers his own position as a “new normative position intermediate between just war theory and pacifism.” And he explains:

It is not just war theory because within that theory defence against political aggression is not only permissible, it is paradigmatic. ... But neither is it a form of pacifism as traditionally conceived, because it permits co-ordinated lethal defensive violence against genocidal aggression.⁶⁰

“Paradigmatic” for what? For justified war? But defense against political aggression is not paradigmatic for justified war in just war theory; rather, wars that satisfy the just war criteria are paradigmatic for justified wars in just war theory. Hence, *disproportionate* defensive wars against political aggression would be paradigmatic for unjustified war in traditional just war theory no less so than in Rodin’s “new normative position.”

It should also be noted, moreover, that his position in *War and Self-Defense*, which prohibits defensive war against what he now calls “political aggression” but allows it against genocidal war,⁶¹ might not be that new either, but rather is already discernible in the writings of philosophers such as Richard Norman or Frank de Roose.⁶² Their “pacifism” is, after all,

Spanischen Scholastik (Frankfurt am Main: Peter Lang, 2007), pp. 205-226. As regards the centrality of rights in Hugo Grotius’s theory, refer to the entry on rights in the index of *The Rights of War and Peace*, ed. by Richard Tuck (Indianapolis: Liberty Fund, 2005), pp. 1946-7.

⁶⁰ Rodin, “The Myth of National Self-Defence,” p. 17.

⁶¹ Rodin, *War and Self-Defense*, p. 139.

⁶² Norman, *Ethics, Killing and War*, esp. Ch. 6, esp. pp. 237-53; de Roose, “Self-defence and National Defence.”

somewhat qualified, which is precisely why they do not actually call themselves pacifists but explicitly say that they take an “intermediate” position between just war theory or “defencism” on the one hand and pacifism on the other. Thus, the similarities between their positions and Rodin’s should not go unnoticed.

However, Rodin’s views about the permissibility of war in the form of effective and proportionate forceful law enforcement do distinguish him considerably from authors like Norman or de Roose, given that this law enforcement is now also permitted against political aggression. Unfortunately, such a stance flatly *contradicts* Rodin’s own premises and his whole previous argument. Some of the reasons for this should be clear by now, but let us have a closer look.

V. War as Law Enforcement and Punishment: The Incoherence of Rodin’s Account

That there is at least a “tension” in Rodin’s account has already been noted a few years ago by Jacob Blair. Blair correctly notes the obvious (which, however, is worth noting): “If national-defense is a disproportionate response to conditional aggression, then punitive war [and war as law-enforcement, as Blair makes clear later on] is a disproportionate response as well.”⁶³ That is correct, but calling this a “tension” is an understatement. Blair later on says

63 Jacob Blair, “Tensions in a Certain Conception of Just War as Law Enforcement,” *Res Publica* 14 (2008), pp. 303-11, at 303 (abstract). Rodin has commented on a draft of Ilsaas’s article and is thus aware of Blair’s challenge, as Ilsaas’s acknowledgements confirm.

that Rodin faces a “dilemma,”⁶⁴ and this is certainly a more accurate characterization.

Rodin’s position is contradictory.

Rodin himself has never answered to Blair’s challenge, but Peer Ilsaas tries to defend Rodin, claiming that Rodin’s position is “not ... necessarily dilemmatic.” Why? Because, says Ilsaas, within an unjust international order (case 1) the “lesser aggression” (that is what Rodin now calls “political aggression”) of state A against state B only “violates the rights of the citizens of B,” while in an international system governed by Rodin’s “ultra-minimal universal state” (case 2) such an aggression “both violates the rights of B’s citizens *and* offends against the just international legal order,” and this “arguably renders what ... would have been a disproportionate response [in case 1] —the killing of the aggressing soldiers of A—proportionate.”⁶⁵

A first problem with this reply to Blair’s challenge is this: one of my criticisms above was that Rodin ignores factors that are highly relevant for proportionality considerations, for example, precisely, the importance of a just social-legal order. It is, however, inconsistent to appeal to this factor (once you need it) on the international level but to completely ignore it on the domestic one. In other words, if the political aggressor’s violation of the just international social-legal order makes killing him proportionate, than the mugger’s violation of the just domestic order makes killing him proportionate, too. But with this the very foundation of Rodin’s whole argument, namely the claim that killing a mugger who poses a conditional threat is *not* proportionate, crumbles away. Thus, *pace* Ilsaas, Rodin’s overall position is indeed inconsistent.

64 Ibid., p. 308.

65 Peer Ilsaas, “Blair on Rodin: Rejoinder,” *Res Publica* 14 (2008), pp. 313-16, at 314.

A second problem is that the justice of the social-legal order is irrelevant for the *moral* argument. After all, you can also defend *justice*, the *moral* order and *natural* law against unjust attacks that are perfectly *legal*. A slave defending himself against the unjust attack of his “master” might violate the legal order, but not the moral one, on the contrary: *every* defense against a morally unjustified attack is not only a defense of the defender’s rights, but also a defense of the integrity of *natural* law, of the *moral* order, of *justice*. This is no less true in an unjust international legal order than in a just one, and therefore no less true in Ilseas’s first case than in his second one: Blair’s challenge stands unrefuted.

Rodin’s position, however, is not only inconsistent, but involves a bizarre – and so far widely overlooked – inversion of moral facts and values. To wit, first Rodin argues that it would be disproportionate to kill the mugger in self-defense, and states that our appraisal of the “comparative worth of life and property” is the “ethical bedrock” underlying that proportionality assessment.⁶⁶ From this domestic context he then draws conclusions on the international level: defense against political aggression is unjustifiable. But then, however, he develops a justification of war as law enforcement, ignores that self- or other-defense against unjustified aggressors *is* law enforcement, focuses on punishment,⁶⁷ and argues that killing

66 Rodin, *War and Self-Defense*, p. 46.

67 See *ibid.*, pp. 173-88. While Rodin’s exclusion of the moral possibility of private punishment (*ibid.*, pp. 175-9) amounts to little more than stipulation, it is at least correct that private punishment as law enforcement is legally prohibited in Western jurisdictions. However, other forms of private law enforcement are legally expressly permitted, including crime prevention, citizen’s arrest and, of course, self-and other-defense. As this fact undermines Rodin’s whole argument, it might perhaps explain why he prefers to focus on

soldiers *as punishment*, of all things, for their political aggression *is* proportionate.

This is, as I said, bizarre; and we can see just how bizarre it is by being consistent: if you can draw conclusions from the domestic level for the international one, then this must also work in the other direction. But applied to the domestic level Rodin's argument implies: yes, it is disproportionate to kill the mugger posing a conditional threat in *self-defense*, but no, it is *not* disproportionate to kill him *as punishment*. How does this square with "our" intuitions and the "ethical bedrock" Rodin was referring to? In fact, he seems to be turning things on their head.

Of course, Rodin would not allow private punishment.⁶⁸ But that does not make it better. To mirror the international case, in the domestic case it would now have to be permissible to condemn the mugger *in absentia* to death and to send the police out to kill him in execution of the sentence (even if, moreover, the stolen goods had meanwhile been returned to their rightful owner: punishment does not have a necessity condition, after all). This, however, seems not to be particularly desirable.

Besides, another "ethical bedrock" of our legal and moral tradition is that it is better to let many guilty people go unpunished than to punish one innocent person. But Rodin knows very well that modern wars come with considerable "collateral damage," which implies that he seems to be quite willing to leave this principle of our legal and moral tradition behind. Of course, "collateral damage" can be justified. But it can be justified by such justifications as "Otherwise we could not have saved those many other innocent people," and not, as Rodin's approach suggests, by such a justification as "Otherwise we could not have punished those

punishment.

⁶⁸ See the previous note.

few guilty people.”

And finally, regarding Rodin’s argument about care: if it is not permissible to risk the life of people one cares for *even in defense of their own non-vital interests*, then it is certainly not permissible to risk their lives for the mere purpose of punishing somebody.

Thus, while Rodin claims that the right to national self-defense is a “myth” and “unsupported by coherent moral reasoning,”⁶⁹ it is actually the moral reasoning underlying his own position that is incoherent.

Conclusion

Rodin’s position regarding the “myth” of national defense is mistaken because, as we saw, his analyses of necessity, the alleged duty to retreat, and proportionality are defective both from a legal and from a moral perspective. But even if we were not able to say exactly why Rodin’s position is mistaken (though we are), there can be no doubt *that* it is mistaken. After all, Rodin’s opinion that we must not resist an aggressor who uses a “conditional threat” against life in order to extort from us or others the sacrifice of non-vital interests, implies nothing less than the surrender to bullies and the breakdown of law enforcement even on the domestic level. Given that on the other hand Rodin tries to justify “war as law enforcement,” this is probably the strongest possible *reductio ad absurdum* imaginable.⁷⁰

69 Rodin, “The Myth of National Self-Defence,” p. 5.

70 I thank the participants of the conference “Pacifism: Still the Issue?”, *12th International Law and Ethics Conference Series (ILECS)*, University of Belgrade, 21-23 June 2012, for

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