Proportionate Compensation and Proportionate Defence

Todd Karhu

Abstract: There is widely recognised to be a proportionality constraint on harming others in self-defence, such that a given use of defensive force is impermissible when the harm it would inflict, or be expected to inflict, on the attacker is too great relative to the harm it would prevent. But little attention has been paid to whether there is a corresponding constraint on the right to claim compensation once harm has eventuated, and, if so, what the nature of that constraint is. This article argues that whether a compensation claim is proportionate is in an important way irreducibly comparative: it depends in part on how the victim fares relative to the perpetrator. The article then defends the premise that proportionality in compensation and proportionality in self-defence are symmetrical, such that the limits of one imply the limits of the other. We should therefore accept that proportionality in self-defence has an irreducibly comparative aspect, too.

Philosophers typically recognise two constraints on the right to harm others in self-defence. One constraint holds that one may use only the minimum force necessary to avert a given threat; there must be no way to save oneself from the same probability of the same amount of harm by inflicting a lesser harm on one's attacker. This is known as the "necessity" constraint. But sometime one lacks the right to harm someone in self-defence even when doing so is the only way to avert the threat she poses. It is impermissible to kill someone to stop her stealing your car, for example. Philosophers therefore recognise that even a defensive harm which obeys the necessity constraint can be impermissible if it is

by some measure excessive in light of the injury it would prevent. This is known as the "proportionality" constraint.[1]

It is controversial under what conditions an individual can make herself liable to defensive force. But there is considerable convergence amongst philosophers on what determines how *much* defensive force it is proportionate to inflict upon someone given that she has met the conditions for liability in the first place. The Ratio View appears to be that whether some defensive act is proportionate depends on the ratio of the magnitude of the harm to the victim it would avert to the magnitude of the harm to the perpetrator that averting it will cause (in cases of uncertainty, we look to the expected harm).

This paper has three aims. The first is to take some preliminary steps toward exploring the largely unexamined question of the limits of proportionality in the liability to compensate others for harms already done to them. I shall argue that the standard picture of proportionality I've just sketched is inadequate as an account of the liability to *compensate* because it ignores morally significant facts about how perpetrators fare relative to their victims. The second aim is to argue that proportionality in compensation is nothing more or less than the ex post flip-side of proportionality in self-defence. By this I mean that the extent of one's liability to pre-emptive defensive harm is equivalent to the extent of one's liability to compensate for that harm ex post, should it eventuate. Third, and as a consequence of the two preceding conclusions, I aim to show that the standard picture of proportionality in self-defence should be substantially revised to take into account how perpetrators fare relative to their victims.

1. Proportionality in Compensation

Just as a victim lacks the right to inflict more harm than is necessary to defend herself from a given threat, so it seems she lacks the right to extract a greater cost than is necessary for her to be compensated to a given degree. Even if my total-loss car is the result of your reckless driving, I cannot justifiably insist that you buy me an identical re-

[1] Sometimes a given use of defensive force is excessive not because of its effect on the attacker, but because of its effects on third parties. I am concerned here only with so-called "narrow proportionality"—proportionality as it pertains to the effects, or expected effects, of a defensive act on perpetrators only. For a good overview of recent work on necessity and proportionality in the ethics of defense, see McMahan (2018) "Proportionality and Necessity in Jus in Bello." In Lazar S. and Frowe H. (eds.) *The Oxford Handbook of Ethics of War.* Oxford: Oxford University Press: 418–39.

placement from the more expensive of two dealerships. In that respect claiming compensation is like defensive harm; it has its own necessity constraint. But it is easy to overlook the fact compensation may have, in addition to a necessity constraint, a proportionality constraint, too. Unlike in cases of defensive harming—in which the magnitude of harm necessary to thwart an aggressor often differs greatly from the magnitude of harm he threatens—in cases of compensation, the magnitude of the cost to a perpetrator of providing a given source of compensation often is, or is often assumed to be, roughly equivalent to the benefit to the victim of receiving it. Since it is clear that *if* a given fixed cost must be borne by someone, it should be borne by the perpetrator not the victim, it is easy to slide, too quickly, to the conclusion that there is no upper limit on the amount of compensation it can be proportionate to claim below full compensation. But in many cases the cost of compensation is not the same as the benefit of receiving it, as is the cases for monetary compensation between differently affluent parties (the wellbeing impact of $1,000 is much greater for some people than for others).

What, if anything, makes a given claim of compensation disproportionate? According to the most extreme answer to that question, no amount of compensation, however large, is disproportionate, provided it is less than full compensation. On this view, if there is something more that the perpetrator can do for the victim, there is something more that he ought to do for her. Several authors have defended views about compensation which imply the extreme view, though it is not clear that they recognised or endorsed that upshot.[2] And it seems that we ought to reject the extreme view because it is highly implausible at the margins. If for some reason the only way for me to repay you the cost of your broken bicycle is to sell my kidney, it seems clear that you would lack a right that I do so. Sometimes, even though a victim has not been *fully* compensated, she lacks a right against the perpetrator that she be *further* compensated.

I will later offer arguments to the effect that proportionality in the liability to compensate is nothing more or less than the *ex post* flip-side of proportionality in the liability to bear defensive harm—a thesis I call the *substantive symmetry* of the liability to defensive harm and the liability to compensate. But it is worth pausing now to show that, merely *acknowledging* that there is a proportionality constraint on compensation, we are already positioned to answer cases that have

---

[2] Vallentyne, Peter (2009) "Responsibility and Compensation Rights." In De Wijze, S., Kramer, M. H., and Carter, I. (eds.) *Hillel Steiner and the Anatomy of Justice: Themes and Challenges*. Routledge; McCarthy, David (1996) "Liability and Risk." *Philosophy and Public Affairs* 25 (3): 238–262.

sometimes been thought to be counterexamples to the substantive symmetry.[3] Consider:

Feinberg's Cabin: A backpacker is trapped in a blizzard. He breaks into an unoccupied cabin and burns the furniture there to keep himself from freezing to death.[4]

Vincent v. Lake Erie: Lake Erie Transport Company (defendant) tied its ship to Vincent's (plaintiff) dock in the middle of a storm in order to safeguard the ship and crew. Doing so damaged the dock.[5]

Almost everyone would accept that in both cases the offenders acted permissibly. The transport company was later ruled to have been acting under the privilege of private necessity, as would the backpacker have rightly been. More importantly for our purposes, it is also true that it would have been impermissible for the homeowner to use defensive force against the backpacker to prevent him from entering his cabin, could he have done so, and that it would have been impermissible for Vincent to forcibly prevent the transport company from mooring at his dock.

Yet although it would have been impermissible for the owners to prevent the offenders from trespassing, it is also reasonably clear that by acting as they did the offenders incurred obligations to compensate the injured parties after the fact. Feinberg wrote of his example that "almost everyone would agree that [the backpacker] owes compensation to the homeowner"[6], and Vincent later sued the transport company and was awarded $500 in damages.

Because in these cases the threatened party lacks a right to self-defence against a given harm *ex ante*, but retains a right to receive compensation for the same harm *ex post*, these examples may seem to challenge the substantive symmetry of the liability to defensive harm and the liability to compensate. Thus McMahan writes that Feinberg's case presents "[a]n obvious example in which the one form of liability does

---

[3] By, for example, Jeff McMahan ([2008] "Debate: Justification and Liability in War." *Journal of Political Philosophy* 16 (2): 227–244) and Uwe Steinhoff ([2016] "The Liability of Justified Attackers." *Ethical Theory and Moral Practice* 19 (4): 1015–1030).

[4] Feinberg, Joel (1978) "Voluntary Euthanasia and the Inalienable Right to Life." *Philosophy and Public Affairs* 7 (2): 102.

[5] *Vincent v. Lake Erie Transportation Co.* 109 Minn. 456, 124 N.W. 221 (1910).

[6] Feinberg, Joel (1978) "Voluntary Euthanasia and the Inalienable Right to Life." *Philosophy and Public Affairs* 7 (2): 102.

not entail the other".[7] However, the correct defensive analogue of the homeowner collecting compensation is not preventing the endangered backpacker from entering his cabin, but rather forcing the backpacker to pay upfront for the damage that will be done to his property. Likewise, the correct defensive analogue of Vincent collecting compensation would not be preventing the ship from mooring, but rather doing $500 worth of damage to it to spare the damage to his dock. Provided these pre-emptive acts would impose no additional danger on the offenders—as collecting compensation after the fact would not—neither defensive action is disproportionate, so in fact there is no obvious asymmetry here.

We can make this point from the opposite direction, too. The compensatory analogue of preventing the backpacker from taking refuge in his cabin would be the homeowner preventing the backpacker's life from being saved in order to recover the damage to his property. Likewise, the compensatory analogue of Vincent preventing the transport company from mooring is later preventing the ship and crew from being saved from a high risk of harm in order to recover $500. And most would agree that a moral theory which permitted these ways of extracting compensation is implausible.

2. When Is Compensation Disproportionate?

In light of both the implausibility of the extreme answer and the structural similarity of compensation and defensive harm, it is natural to suppose that the factors that determine proportionality in compensation are those that are standardly taken to govern proportionality in the morality of self-defence. Recall that, according to the standard picture, once we know the degree to which a threatener is responsible or culpable for the threat she poses, to find out how much harm it is proportionate to inflict upon her to avert that threat, we look at the magnitude of the harm being threatened. For a given degree of responsibility or culpability for some threat, there is some multiplier M such that a self-defensive action to prevent the threat is proportionate if and only if the harm the victim visits upon the perpetrator does not exceed M times the harm to herself she prevents by doing so. For this reason, we can call this the *Ratio View* of proportionality. Applying the Ratio View of proportionality to the liability to compensate would yield the result that a perpetrator is liable to provide compensation for some harm only if the benefit to the victim of receiving that compensation is

[7] McMahan, Jeff (2008) "Debate: Justification and Liability in War." *Journal of Political Philosophy* 16 (2): 233.

not too small relative to the cost to the perpetrator of providing it, where what counts as "too small" is determined by the perpetrator's responsibility for the harm and whatever the correct multiplier is.

It is worth noting that the term "proportionality" can give the misleading impression that something like the Ratio View is the only possible view. For the term suggests that whether a given act is disproportionate is a matter of some ratio (proportion) between two variables. Yet there is no reason to assume *a priori* that this is the right test for when a certain cost is or isn't excessive. The excessiveness of inflicting a certain cost on a perpetrator needn't have anything to do with the relationship of that cost to the benefit secured, the harm prevented, or indeed anything else—all we are after is a test that delivers the right verdict for those acts we intuitively deem excessive or not (a more accurate, if clumsier term might have been "proportionateness").

I now want to suggest that we should substantially revise the Ratio View of proportionality when it comes to the question of the liability to provide compensation, on the ground that it fails to account for an interpersonal or comparative dimension of liability. In what follows, I will first restrict my discussion to harms for which the perpetrator is fully culpable, for it is in these cases that the interpersonal dimension of proportionality is starkest. I will later explain how the discussion generalises when we relax this assumption. It is my contention that the Ratio View should be rejected because it can conflict with the following principle:

> When a perpetrator is fully culpable for making his victim worse off than himself, he is liable to compensate her at least until he is no better off than she is, unless the victim can be fully compensated at a lesser cost.

When applied to cases in which the marginal cost to the perpetrator of providing compensation is great relative to the marginal benefit to the victim of receiving it, this principle rules as proportionate costs that would be ruled disproportionate by any specification of the Ratio View of compensation. For, if a perpetrator remains better off than his victim after he harms her, the principle implies that he can be liable to bear a very great cost, even when doing so will do comparatively little to improve the victim's condition. Suppose, for example, that you were previously able-bodied, and my fully culpable act leaves you permanently quadriplegic, and there is no way for me to fully compensate you. According to the principle I am proposing, I can be liable to transfer to you whatever goods I can produce beyond those necessary for me to maintain a relatively austere existence for the rest of my life. That is so because I would prefer to toil for the rest of my life at little personal

benefit than be permanently quadriplegic with whatever benefits I could feasibly receive in that state. We can represent a situation like this—in which a perpetrator visits a severe harm upon a victim who is left very difficult or impossible to compensate—as follows:

Table 1

	P	V
Ex ante the harm	100	100
Ex post the harm	100	1

Again, it is my contention that in this situation, the perpetrator is liable to compensate the victim at least until the following state of affairs obtains, provided the necessity constraint is satisfied:

Table 1 (continued)

	P	V
Equality	2	2

Because the gain to V of receiving compensation is very small relative to the cost to P of providing it, bringing about the state of affairs represented by *Equality* would be disproportionate on the Ratio View of compensation. So if I am right that P is indeed liable to bring about *Equality*, we should reject the Ratio View.

Why would P be liable to sacrifice so much just to improve V's wellbeing only slightly? The reason is that anything else would be manifestly unjust. To show this, it will be helpful to first consider a variation on this case in which the unequal distribution represented by *Ex post the harm* in Table 2 is due to natural causes. Suppose that V's poor condition is the result of an unforeseeable accident. In this case, many distributive egalitarians would already hold that V has at least *some* right against P that he compensate her, on the grounds that it is unjust for one person to be worse off than another through no fault of her own.[8]

Of course, only a very hard-nosed egalitarian would believe that when the unfairness is due to no fault of his, P has an all-things-considered duty to go so far as *Equality*. Few believe that morality could

[8] I here make the simplifying assumption that wellbeing—very broadly construed as whatever a person has a self-interested reason to want—is the metric of distributive justice.

demand of a person that he make such an enormous sacrifice just for the sake of making the situation as fair as possible. Egalitarians can avoid that counterintuitive conclusion in either of two ways. On the one hand, they can take what we might call an *external* line, according to which the reason why P is not required to go so far to correct the natural unfairness at hand is that there is a countervailing consideration that tells against the requirement to do what justice demands.

Two possible considerations come to mind. First, as G. A. Cohen has claimed, P may have an agent-relative prerogative not to fulfil his impartial obligation of justice, perhaps on the ground that he may give special weight to his own interests when they conflict with the demands of impartial morality.[9] Alternatively, there may be a separate aspect of impartial morality that competes with justice, like the reason we have to maximise the good. On the credible assumption that equality is not the only good, perhaps P ought not to bring about *Equality* because doing so would be sufficiently worse than not doing so, axiologically speaking, to outweigh what justice itself demands.

On the other hand, those who wish to deny that P must compensate V until *Equality* is reached, even when he is in no way responsible for that inequality, may take an *internal* line. This holds that P would not be required to fully neutralise the unfair inequality not because there is some reason *competing* with justice, but because justice itself simply does not demand so much of a person.[10]

Both lines provide plausible explanations for why a person's all-things-considered duty to correct natural unfair inequality is less than full. But neither is viable when it comes to rejecting the principle I have been defending in the case of wrongful harm.

The external line is unsatisfactory because the existence of morally relevant reasons not to compensate a person do not show that one is not *liable* to compensate her. The strength of the victim's right to be

---

[9] Cohen, G. A. (2008) *Rescuing Justice and Equality*. Harvard University Press: 61. Cohen does not entertain the alternative explanation that I have called the "internal" line, possibly because of his stated commitment to value pluralism.

[10] The thought that there is an internal limit to what distributive justice demands of us is familiar in political philosophy. See, for example, Fleurbaey, Marc (1995) "Equal Opportunity or Equal Social Outcome?" *Economics and Philosophy* 11: 25–55; Olsaretti, Serena (2009) "IX—Responsibility and the Consequences of Choice." In *Proceedings of the Aristotelian Society Vol. 109, No. 1pt2*. Blackwell; Stemplowska, Zofia (2009) "Making Justice Sensitive to Responsibility." *Political Studies* 57 (2): 237–259. In the present context, this explanation of why P would not be required to bring about full equality recalls the "satisficing consequentialism" developed in reaction to the demandingness objection to standard act consequentialism (by, for example, Slote and Pettit ([1984] "Satisficing Consequentialism." *Proceedings of the Aristotelian Society* 58: 139–176).

compensated by the perpetrator is not lessened on the grounds of the perpetrator's agent-relative permission not to compensate her. And the possibility that there is a competing aspect of morality, like the reason one has to maximise the good, is a matter of "wide" proportionality and does not affect the liability of the perpetrator to compensate.

The internal line is unsatisfactory because the cases with which we are concerned do not involve natural unfairness; they are ones in which one person is fully morally culpable for the fact that the other is much worse off than him. When asked to make such a great sacrifice when P himself bears *no responsibility* for the unfair inequality that exists, P could reasonably say to V, "While I recognise it to be unfair that you're worse off, you have no right to demand that I sacrifice so much for your small benefit." But when the unfair inequality is the result of P's wrongdoing, can he truly say something of the sort? He could not, I believe, justifiably say to V, "I know that I am fully culpable for the bad state you are in, but you have no right to demand that I make a great sacrifice for your own small benefit, even though by doing so I would end up in no worse a condition than the one in which I have wrongfully left you." Could not V reply, at any point before *Equality* had been reached, "You're fully responsible for this sad state of affairs. If anything, you should be *worse* off than me. So how could I lack a further right that you improve my condition, while you still remain better off than I am?" I believe V would be justified in responding in that way.

The central case we have been considering involves a very large harm that carries with it the possibility of only minor compensation. I have claimed that even when doing so would come at great cost to the perpetrator and provide little benefit to the victim, the perpetrator is nevertheless liable to do so at least until he is no worse off than she. Perhaps, however, when the amount of benefit V can derive is truly minuscule this is just too hard to accept. For the principle implies that a perpetrator can be liable for arbitrarily small increases (ϵ) to the victim's wellbeing that can only be compensated by arbitrarily large decreases in his own, as in the following case:

Table 2

	P	V
Ex ante the harm	1,000	1,000
Ex post the harm	1,000	1
Equality	1+ϵ	1+ϵ

Though I would maintain that, even in this case, in virtue of his act P becomes liable to compensate V at least until *Equality* is reached, it may be hard to believe that V retains a right to that compensation. If so, that may be because V herself has an obligation to give P what amounts more or less to a *costless benefit*. We are typically morally required to confer large benefits on others—even those who are already better off than us—when we can do so at negligible cost to ourselves. It is a corollary of that principle that we lack a right that others relinquish the benefits in question even if they are independently liable to do so.

The arguments in this section indicate, I suggest, that we should reject the Ratio View of proportionality in the liability to compensate. On that view, recall, proportionality is a matter of the relationship between the magnitude of the cost to the perpetrator of compensating and the benefit to the victim of receiving compensation. Accordingly, whether a compensatory claim is disproportionate, and hence whether the perpetrator is liable to pay it, is a question which can be answered without knowledge about how well off the relevant parties are relative to one another. The principle I have defended implies that, as it pertains to proportionality in compensation, the Ratio View is false. For the principle implies that a sufficiently well-off perpetrator can be liable to compensate his victim to a very small degree, even at a great cost to himself—a cost which would be deemed disproportionate by any specification of the Ratio View.

3. The Substantive Symmetry of Compensation and Self-Defence

On the assumption that the liability to defensive harm and the liability to compensate are substantively symmetrical, the conclusion of the preceding subsection has important implications for proportionality in defensive harm. If the substantive symmetry is correct, a perpetrator who culpably threatens to make someone worse off than himself is liable suffer an enormous harm to prevent even a small portion of the threat he poses. For example, an able-bodied aggressor who culpably threatens to make another able-bodied person permanently paralysed could be liable to suffer permanent paralysis himself even when doing so would serve no greater purpose than rendering the victim's own paralysis a little less severe. That is a result that would be deemed disproportionate by any standard construal of the Ratio View of proportionality in defensive harming.

Suppose we are reluctant to reject the Ratio View of proportionality in the liability to defensive harm. We then face a trilemma. On pain of inconsistency, we must reject one of the following theses:

(I) When a perpetrator is fully culpable for making his victim worse off than himself, he is liable to compensate her at least until he is no better off than she is, unless the victim can be fully compensated at a lesser cost;

(II) The Ratio View of proportionality in self-defence;

(III) Proportionality in the liability to defensive harm mirrors proportionality in the liability to pay compensation.

I have argued that we should accept the principle expressed by (I). Someone who finds my arguments to that end persuasive, but who is reluctant to abandon the Ratio View, will want to deny (III), the substantive symmetry. That person may insist that, as McMahan has said, "one cannot infer that a person is liable to defensive action *ex ante* from his being liable to pay compensation *ex post*."[11]

I shall argue that rejecting the substantive symmetry is not a viable option, however, and I shall do so on three counts. First, doing so has implausible implications. Second, grounding liability to defensive harm in duties of redistributive justice makes it less plausible that there could be substantive differences between the two types of liability. And third, a more nuanced understanding of the *contingent* differences between the two types of liability reveals that, when comparisons between them are properly equalised, any substantive difference that remained could be based on nothing but timing.

Firstly, then, suppose for the sake of argument that the symmetry between the two types of proportionality did not hold. Then the highest proportionate cost one would be permitted to inflict on an attacker in self-defence against a given threat would sometimes differ from the highest proportionate cost one could extract from him in compensation should that same threat eventuate. If in a given instance these costs did differ, we would then need to ask on which of the two sides it is higher. But if, on the one hand, it is higher on the defensive side, this would unjustifiably favour those who have the ability to de-

[11] McMahan, Jeff (2008) "Debate: Justification and Liability in War." *Journal of Political Philosophy* 16 (2): 233.

fend themselves over those who do not. And if, on the other hand, it was higher on the corrective side, then in some cases (such as compensation is impossible) a victim would have the perverse incentive to allow herself to be harmed, for then she could permissibly extract more compensation and thereby end up better off overall. Neither result is easy to accept, which provides some support for the substantive symmetry.

My second argument draws on the theoretical underpinnings of proportionality in defensive harming generally. Obviously enough, sometimes when we harm others we also wrong them. When harming a person is both necessary for the sake of some end and (narrowly) proportionate, however, then it does not *wrong* the person to inflict that harm for the sake of that end, by which I mean that doing so neither violates, nor merely infringes, his rights.[12] It is difficult to see how one could inflict harm upon another person without even infringing his rights unless he also had a moral obligation to suffer that harm. So it follows that imposing a cost on someone is (narrowly) proportionate only if they have a duty to bear that cost.

What could explain why a responsible threatener could have a duty to bear some or all of the cost a potential victim can impose upon him? A plausible rationale that has been suggested is that the duty is one of redistributive justice.[13] In cases of self-defence, if the necessity condition is met then some cost will be borne by someone. A natural way to explain why the perpetrator often has a duty to bear the bulk of the cost in question is that he is responsible for the fact that *someone* must bear a cost. Because people have a duty not to excessively *externalise* the costs of their choices onto others without those others' consent, responsible threateners have a duty to *internalise* a greater portion of the total cost that must in the end be suffered by someone.

If this is right, and the duty not to *externalise* the costs of one's choice is what explains the duty *to* internalise them, then it is hard to see how the limits of what proportionality permits could differ between the liability to self-defensive harm *ex ante* and the liability to pay compensation *ex post*, when other things are equal. The choice of the perpetrator and the potential cost someone stands to bear are the same, and it seems unlikely that, when other things are equal, the cost he is forbidden to externalise onto others could depend on whether he did so

---

[12] See Thomson, Judith Jarvis (1986) "Some Ruminations on Rights." In W. Parent (ed.) *Rights, Restitution, and Risk.* Harvard University Press: 51; and (1990) *The Realm of Rights.* Harvard University Press: 122.

[13] For the suggestion that right to defensively harm is grounded in considerations of the just redistribution of costs, see McMahan, Jeff (2005) "The Basis of Moral Liability to Defensive Killing." *Philosophical Issues* 15 (1): 395; Montague, Phillip (2010) "Self-defense, Culpability, and Distributive Justice." *Law and Philosophy* 29 (1): 75–91.

directly (through an un-averted threat) or indirectly (through unpaid compensation).

My final argument for the substantive symmetry involves identifying and factoring out a contingent difference between many cases of self-defence and those of collecting compensation. To that end, it is necessary to distinguish two different modes of correcting for harm, or for the prospect of harm: *negating* and *offsetting*.[14] An act aims at negating a harm when the outcome it would bring about aims to approach the possible world in which the harm was not done in the first place. In the context of corrective justice, the *restoration* to a victim of lost property (rather than compensation for it) aims at negating (rather than offsetting) a harm. On the other hand, an act aims at *offsetting* a harm when it aims to bring about an outcome that is merely *as good as* the possible world in which the harm was not done. Again in the context of corrective justice, monetary compensation paid to a physically injured party for damages aims at offsetting (rather than negating) harms.

Now, one manifest difference between self-defence and compensation that has not, to my awareness, been hitherto acknowledged is this: while paradigmatic acts of defence aim to negate harm, those of compensation aim to offset it. And attending to that difference helps reveal the deeper structural relationships between the two types of act. The *ex post* analogue of defensive harm is restoration, not compensation. And the *ex ante* analogue of compensation is offsetting a harm before it occurs, not defending oneself against it.

We should begin, therefore, by properly equalising cases, such that we are comparing a case of defensive harm with one of negating the harm *ex post*, or a case of compensating a harm with one of offsetting the harm *ex ante*. It is easiest to do so by way of some unrealistic examples. In the following cases, I enter the scene having already lost my left leg for unrelated reasons, and you act so as to cut off my right leg. Assume that you and I are equally well off *ex ante*, that the prudential value for me of keeping my right leg is equal to that of having a left leg and that I am indifferent between having either, and that there is only one corrective action available to me in each of the cases (that is, if I am able to defend myself, I am not able to claim compensation, and vice versa).

Compare, first, two cases of negating:

---

[14] For accounts of this distinction in the context of corrective justice only, see Goodin, Robert E. (1989) "Theories of Compensation." *Oxford Journal of Legal Studies* 9 (1): 56–75; Gardner, John (2011) "What is Tort Law For? Part 1. The Place of Corrective Justice." *Law and Philosophy* 30 (1): 28–37; Slavny, Adam (2014) "Negating and Counterbalancing: A Fundamental Distinction in the Concept of a Corrective Duty." *Law and Philosophy* 33 (2): 143–173.

(1) *Self-defence*: Before you are able to act, I can prevent you from cutting off my right leg, though doing so will cause you to suffer some harm *H*.

(2) Restoration (ex post negating): After you cut off my right leg I can, with minimal pain and effort, reattach that same leg in full working order, though doing so will cause you to suffer *H*.

And next, compare two cases of offsetting:

(3) *Ex ante offsetting*: I cannot stop you from cutting off my right leg, but before you are able to attack me I have the opportunity to proactively regrow my left leg, though doing so will cause you to suffer *H*.

(4) *Compensation*: I cannot reattach my right leg, which you have just cut off, but I can regrow my left leg, though doing so will cause you to suffer *H*.

Since the effect on you of my acting (i.e., *H*) is the same in all four cases, we can distinguish in the following way the four outcomes in which I act:

Table 3

	Negating the harm	Offsetting the harm
Ex ante	(1) *Self-defence* Keep my right leg.	(3) *"Ex ante offsetting"* Regrow my left leg.
Ex post	(2) *Restoration* Lose and regain my right leg.	(4) *Compensation* Regrow my left leg.

When we compare any one of these four acts with its analogue in the same column, it seems to me that the difference between them could not make a difference to proportionality. This is clearest when we compare cases of offsetting: *ex ante* offsetting a harm is just collecting compensation for it before it eventuates. If that is the only way for the victim to have restitution, it is hard to believe that whether *H* is pro-

portionate or not could depend on whether the compensation is collected before or after a threat eventuates.

Provided the threat is already engaged and certain to occur, the difference is nothing but a matter of timing. Consider an analogue of *Feinberg's Cabin*. Suppose the cabin is on a mountain frequented only by wealthy and over-prepared hikers who always take with them a credit card. If the homeowner is entitled to compensation for damages, then surely he could permissibly install a credit card machine on his cabin door such that, in the event of a blizzard, endangered hikers would need to pay upfront the estimated cost of the damages they will do by entering, assuming the necessity of paying would impose no additional risk on the hikers (which compensation *ex post* likewise does not).

When it comes to *negating* harms there is, however, one disanalogy between doing so *ex ante* and doing so *ex post*. Restoration almost always will involve an unavoidable temporary loss of the good in question, while successful defensive harm can mean that not even a temporary loss occurs. Could that difference itself imply that the limits of liability to self-defence differ from those to provide restoration? I believe it could not. For we ought to view a claim to restoration *ex post* as an instance of defence against the *permanent* loss of the relevant good.

Thus, consider a variation on (1) (*Self-defence*) in which a *temporary* loss is unavoidable:

> (1*) Whatever I do, you will soon cut off my right leg, but if and only if I strike first, the severed leg will be preserved so that it can be easily reattached thereafter, though striking first will cause you to suffer *H*.

The difference between (1*) and (2) (*Restoration*) really is just one of timing, and it is accordingly highly implausible that there is any value of *H* such that inflicting *H* on you is proportionate in the one case but not in the other.

Of course, when a victim can, by engaging in necessary self-defence, ensure that she incurs not even a temporary loss, then the amount of harm the attacker is liable to bear may well differ from the amount he would be liable to bear in order to negate the injury *ex post*. For, in the latter case, the victim will also have suffered a greater setback. But that is not an argument against the equivalence of *ex ante* and *ex post* negating; rather, it is a matter of the threat of harm being smaller in a case in which it can be averted than in a case in which it eventuates and can only be negated *ex post*. And that difference would typically call for additional restitution. So the limits of liability can sometimes

differ between negating by defence and negating by restoration, but the difference here would not be based on when the negating occurred.

These observations cast serious doubt on the notion that proportionality *ex ante* could differ from proportionality *ex post* when we keep constant whether the comparison is between instances of negating or instances of offsetting. The other step in this argument for the substantive symmetry is to show that what proportionality demands also does not differ on the basis of whether an act involves offsetting or negating.

The equivalence of negating and offsetting harm would be easy to establish if I could show that the harm some act does to a victim is *fungible*, in the sense that its moral relevance *qua harm* is just the extent to which it impacts the victim's wellbeing. Then negating and offsetting would be interchangeable in the requisite way, for what cost the perpetrator is liable to bear would be independent of the manner in which he is required to bear it (whether by offsetting the harm or by negating it). But I do not believe that harms are fungible in that way. If harm were in this way fungible, then it would be up to a perpetrator whether to restore the goods he has wrongfully taken from his victim or merely compensate her for their loss. But it seems clear that the perpetrator is, in the first place, liable to negate a harm, and may compensate his victim for a harm instead only when negating the harm is impossible or she consents to him doing so. Nor, moreover, may a *victim* unilaterally claim compensation for a harm when the perpetrator can negate it and prefers instead to so. In short, if negation is possible, then the perpetrator is liable to do so and only to do so.

Be that as it may, it is very hard to believe that the amount of cost a perpetrator is liable to bear to offset a given amount of his victim's lost wellbeing could differ from the amount he is liable to bear to negate the same loss, other things being equal. To see this, it is helpful to compare cases of harm that cannot be fully rectified and in which the perpetrator can go some way toward making up for it only by partially *negating* it, with those in which the perpetrator can do so only by partially *compensating* for it. It seems that the highest cost a perpetrator can be liable to bear to offset his victim's loss to a given extent could not be *higher* than the cost he would have had to bear to negate it to that same extent, for what would circumscribe the perpetrator's liability to offset a harm, if not the extent to which would have been liable to negate it, were doing so possible? But it also seems that the highest cost a perpetrator is liable to bear to offset a victim's loss to a given extent could not be *lower* than that which he would have had to bear to negate it, if doing so had been possible. Surely wrongdoers cannot get away with less, merely because the best way to make up for the harm they have done—negating it—is unavailable.

I have offered three separate arguments for the substantive symmetry of the liability to defensive harm and the liability to compensate. I conclude that to the extent, and only to the extent, that a perpetrator is liable to defensive harm *ex ante*, he is also liable to pay compensation *ex post*.

4. Conclusion

I have defended two main theses in this paper. First, we ought to reject what I have called the Ratio View of proportionality in the liability to compensate, on the grounds that it cannot account for morally significant facts about how perpetrators fare relative to their victims. And second, we ought to accept that proportionality in the liability to compensate is just the *ex post* flip-side of proportionality in the liability to bear defensive harm. These two theses imply that we ought also to reject what I have called the Ratio View of proportionality in self-defence. Contrary to what has been widely assumed, there are cases in which threateners can be liable to suffer very large harms at the hands of victim even to avert just a tiny amount of the threat they pose.