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'Infinite Right'

Proportionality and Liability in Early Modern Ethics of War and Self-Defence

Johan Olsthoorn[*]

In confessing that he is my Enemy,
he allows me a licence to use force against him to any degree.[1]

The right of war is infinite
and the just enemy is allowed everything against the unjust enemy.[2]

This makes it Lawful for a Man to *kill a Thief*.[3]

1. Introduction

One striking feature of many early modern theories of just war and self-defence is their omission of what philosophers today call 'narrow proportionality'. Within modern debates on the ethics of interpersonal killing, it is uncontroversial that using armed force is morally permissible only when it is proportionate.[4] Proportionality requires that the bad effects foreseeably caused by fighting are outweighed by the moral good fighting is expected to achieve (above all, prevention of

[*] T. Angier, T. Behme, H. Haara, L. Ramelet, P. Schröder, G. van Nifterik, and audiences at the Universities of Cape Town and Stellenbosch (August 2022) provided helpful feedback on earlier drafts. Research on this chapter was supported by a KU Leuven-Stellenbosch Staff Mobility Grant.

[1] S. von Pufendorf, *The Law of Nature and Nations*, trans. C.H. Oldfather and W.A. Oldfather (Oxford and London, 1934) (VIII.VI.7), 1298.

[2] G. Achenwall, *Natural Law: A Translation of the Textbook for Kant's Lectures on Legal and Political Philosophy*, trans. C. Vermeulen, ed. P. Kleingeld (London, 2020) §265.

[3] J. Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge, 1988) (II) §18.

[4] How proportionality requirements should be understood within ethical theories of war and self-defence is controversial. The literature is vast. Standard accounts of proportionality—as comparing morally good outcomes with bad side effects—include T. Hurka, 'Proportionality in the Morality of War', *Philosophy and Public Affairs*, 33 (2005), 34–66; P. Tomlin, 'Proportionality in War: Revising Revisionism', *Ethics*, 131 (2020), 34–61. For an alternative, rights-based account of proportionality (as restricting permissible means of rights-enforcement), see A. Ripstein, 'Reclaiming Proportionality', *Journal of Applied Philosophy*, 34 (2017), 1–18.

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harms to individuals). Philosophers commonly recognize two distinct principles of proportionality, regulating both just resort to war (*jus ad bellum*) and conduct within war (*jus in bello*). *Wide* proportionality requires that the harms intentionally or foreseeably inflicted upon non-liable (i.e. innocent) persons are (substantially) surpassed by the good fighting will do. *Narrow* proportionality demands the same for the intentional or foreseeable infliction of harm upon people who have made themselves liable to suffer such harm (e.g. by engaging in unjust aggression).[5]

Most philosophers nowadays consider killing a thief in defence of your belongings narrowly disproportionate in all but the rarest circumstances (e.g. when one's life directly depends on them).[6] So is firebombing thousands of unjustly invading combatants to save a single life or to prevent seizure of some uninhabited islet.[7] Such heavy-handed defences are widely considered excessive. People engaging in unjust aggression (whether thieves or unjust belligerents) normally make themselves liable thereby to suffer some degree of defensive harm. But not *any* degree.[8] Unjust aggressors, we believe, do not lose all their rights against bodily harm. An unarmed thief snatching a wallet may have thereby forfeited his right not to be punched by its owner (a response presumably proportionate to the averted wrong). Yet the owner wrongs the thief were he or she to kill him—even if larceny could not otherwise be prevented.

Curiously, the mundane moral and legal doctrine that force used in self-defence can be excessive (i.e. can violate the aggressor's retained rights) was widely *rejected* in the early modern period. Take Samuel Pufendorf (1632–94):

> I may, in order to repel this injury, take even extreme measures. For by his avowing that he is my enemy—and this is the case when he attacks me with injuries and shows no signs of repentance—he gives me, so far as he is able to, an unlimited freedom of action against him.[9]

Call this doctrine *Infinite Right*.[10] *Infinite Right* is a thesis about what degree of armed force unjust assailants are liable to suffer by the hands of their victims (and

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[5] Jeff McMahan introduced the distinction between narrow and wide proportionality in his *Killing in War* (Oxford, 2009), 19–24. Though applying to *ad bellum* proportionality as well, McMahan primarily uses the distinction to assess the permissibility of killing *in* war (*jus in bello*).

[6] D. Rodin, *War and Self-Defense* (Oxford, 2002), 44; F. Leverick, *Killing in Self-Defence* (Oxford, 2006), 142.

[7] Defensive war in response to purely political aggression (unjust threats to non-vital rights) can be narrowly disproportionate according to D. Rodin, 'The Myth of National Self-Defence' in C. Fabre and S. Lazar (eds), *The Morality of Defensive War* (Oxford, 2014), 80–3; McMahan, *Killing in War*, 23.

[8] See e.g. J. Quong, 'Proportionality, Liability, and Defensive Harm', *Philosophy and Public Affairs*, 43 (2015), 144–5.

[9] *Law of Nature* (II.V.3), 269.

[10] Some may prefer the label *Infinite Licence* since the jural incident in question is a privilege (not a claim-right). 'Infinite' rights of war correlate on the part of the unjust aggressor, not in duties, but in a 'no-right' against suffering such defensive harms. Pufendorf usually uses '*licentia*' rather than '*ius*' when discussing *Infinite Right*: K. Olivecrona, 'The Two Levels in Natural Law Thinking' in *Jurisprudence* 1 (2010), 221.

their allies). It states that nothing victims do to avert an unjust attack can wrong their assailants. Defensive action cannot be narrowly disproportionate because victims acquire 'the right of exercising violence to an unlimited degree against the enemy'.[11] Thus, defensive action cannot be morally impermissible by dint of exceeding what the aggressor is liable to. Along the way, *Infinite Right* narrows the conditions in which unjust aggressors can rightfully fight back.

As a doctrine about aggressor liability, *Infinite Right* presupposes a theory of rights-forfeiture. For being morally liable to suffer defensive harms just is the condition of having forfeited rights against being so harmed. In a nutshell, 'what it means to say that a person is *liable* to attack is that he would not be *wronged* by being attacked, and would have no justified complaint about being attacked'.[12] Pufendorf glosses *Infinite Right* similarly: 'the person who began the injury has no ground for complaint, if extreme measures are taken against him'.[13] The phrase 'extreme measures' must be taken literally here. Unlike modern rights-forfeiture theories, *Infinite Right* states, shockingly, that unjust aggressors lose their right not to be defensively killed wholesale, whatever the gravity of the attempted injury. Indeed, *Infinite Right* was originally introduced to explain why people can rightfully kill someone who unjustly threatens to punch them.

Infinite Right was remarkably popular among early modern philosophers. Hugo Grotius (1583–1645), John Locke (1632–1704), and Immanuel Kant (1724–1804) all defended versions of it.[14] A particularly clear endorsement of the thesis is found in Gottfried Achenwall (1719–72):

> *the wronged party's right against the wrongdoer is extended infinitely*, i.e., is an INFINITE RIGHT ... And so to that extent *against a wrong of any kind* and *any extent* (a greater or smaller wrong) *the wronged party has the right to violence of any kind* and *any extent*.[15]

Kant used Achenwall's textbook for decades in his lectures on natural right. According to Feyerabend's student notes, Kant defended *Infinite Right* in his 1784 lectures: 'The right of war against an unjust enemy is unlimited. I must be able to use any available means to coerce him and cannot in this way ever wrong him ... none is too much or too strong against him.'[16] *The Metaphysics of Morals* (1797) restates *Infinite Right*—albeit with a qualification:

[11] S. von Pufendorf, *Two Books of the Elements of Universal Jurisprudence*, rev. edn, T. Behme (Indianapolis, IN, 2009) (I.XII.22), 139.

[12] McMahan, *Killing in War*, 8.

[13] *Law of Nature* (II.V.3), 269.

[14] Also e.g. C. Thomasius, *Institutes of Divine Jurisprudence*, ed. T. Ahnert (Indianapolis, IN, 2011) (II.1) §§97, 99; T. Rutherforth, *Institutes of Natural Law*, 2 vols (Cambridge, 1754) (I.XVI.2), 7.

[15] Achenwall, *Natural Law* §261.

[16] I. Kant, *Lectures and Drafts on Political Philosophy*, ed. F. Rauscher and K.R. Westphal (Cambridge, 2016), 27: 1372–3.

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> There are no limits to the rights of a state against an *unjust enemy* (no limits with respect to quantity or degree, though there are limits with respect to quality); that is to say, an injured state may not use *any* means *whatever* but may use those means that are allowed to any degree that it is able to.[17]

Kant outlawed those means of warfare that make mutual trust impossible during future peace.[18] Yet, as per *Infinite Right*, non-banned means can be used against unjust enemies without limit or measure—none exceeds their liability. Other early modern philosophers denounced *Infinite Right*. Francis Hutcheson (1694–1746) was among them: 'Nor should we judge that an unjust enemy has forfeited all his rights, or that every outrage against him is justifiable.'[19]

This chapter makes no attempt to sketch the reception history of *Infinite Right*. I will, instead, defend three novel interpretive claims about this arresting doctrine (rarely discussed in the literature).[20] First, at least two distinct versions of *Infinite Right* circulated in the period. For Grotius, the *in bello* requirement of necessity ('minimum-force') is internal to *Infinite Right*: unjust aggressors can be liable only to so much defensive force as victims require to protect their rights. Pufendorf and Kant, by contrast, posited natural rights of defensive killing even if less harmful ways of avoiding injury are available. Second, *Infinite Right* was defended on various grounds. Grotius and Kant maintained, for diverging reasons, that it must be morally possible for victims of unjust aggression to forcibly protect their rights. Pufendorf and Locke instead supported *Infinite Right* through moral exceptionalism about war: natural law duties are owed only towards those who reciprocally act peacefully and sociably. Third, *Infinite Right* states that defensive action, however heavy-handed, cannot possibly wrong unjust aggressors. This is compatible with the view that to be *all-things-considered* justified, defensive action must meet wide proportionality and necessity requirements (subsumed under either humanity or charity rather than under justice).

Before proceeding, I must offer some caveats and clarifications. First, the chapter focuses on natural rights to use armed force, governed by natural law (rather than on positive rights instituted by civil or international customary law). Within the

[17] I. Kant, *Practical Philosophy*, ed. M. Gregor (Cambridge, 1996), 6: 349. Kant's conception of 'unjust enemy' is innovative. 'Unjust enemies' are belligerent parties contending through means incompatible with future peace. The *jus ad bellum* status of belligerents—who the unjust aggressor is and who the injured party—can neither be determined peacefully in the state of nature nor settled through war. Kant, *Practical Philosophy*, 6: 349–50, 8: 346; Kant, *Lectures*, 27: 1394. On Kant on just war, see B. Orend, 'Kant's Just War Theory', *Journal of the History of Philosophy*, 37 (1999), 323–53; A. Ripstein, *Kant and the Law of War* (Cambridge, 2021).

[18] Kant, *Practical Philosophy*, 8: 346.

[19] F. Hutcheson, *Philosophiae Moralis Institutio Compendiaria, with A Short Introduction to Moral Philosophy*, ed. Luigi Turco (Indianapolis, IN, 2007) (II.XV.5).

[20] Illustratively, S. Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge, 1994), 57–87 offers splendid analyses of the ethics of self-defence of Grotius and Pufendorf—without mentioning *Infinite Right*.

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state, individual rights of self-defence are heavily curtailed by civil law.[21] Second, many thinkers in the period (including Grotius, Locke, and Pufendorf) theorized 'individual rights of violent self-defence' as rights of war—at least outside the state.[22] This chapter, accordingly, treats their respective treatments of self-defence and war as part of a single moral theory about the permissible use of defensive force (even if the *jus ad bellum* versus *jus in bello* distinction is harder to draw for self-defence). Third, *Infinite Right* being a thesis about just defence against unjust aggressors, I will bracket questions about the permissibility of killing innocent threats (e.g. deluded persons or innocent obstacles).[23] Finally, the chapter deals exclusively with rights to wage war in defence of one's rights (not with offensive wars waged to avenge or punish prior rights-violations).

2. A History of Violence

At the heart of *Infinite Right* lies a denial that defensive action must be narrowly proportionate to the unjust harm it seeks to avert to be morally permissible. Grotius introduces *Infinite Right* when examining whether 'a man in imminent danger of receiving a blow or a similar injury [*alapae aut mali similis*] has the right to prevent it by killing his enemy'.[24] 'Alapa' in Latin means 'box on the ear', 'slap', 'blow with the flat of the hand'. Killing those who are about to slap you is as disproportionate a response as they come.[25] The averted blow is a much lesser harm than that inflicted upon the aggressor ('violent death'). Conceding this, Grotius argues that such striking disproportionality need not render killing to prevent sublethal harm unjust:

> For although death and a blow are not on the same level, yet the man who makes ready to injure me by the very act confers on me a right, a sort of actual and unlimited moral right against him [*facultatem quandam moralem adversus se in infinitum*], in so far as otherwise I cannot ward off the injury from myself.[26]

[21] See e.g. H. Grotius, *De jure belli ac pacis*, 3 vols, trans. F.W. Kelsey (Oxford, 1925) (I.IV.2); *Law of Nature* (II.III.5), 267; (VIII.VI.8), 1299–300.

[22] Grotius, *DJBP* (I.1.2.1–2); *Law of Nature* (VIII.VI.1), 1292.

[23] Grotius, *DJBP* (II.1.3–4); *Law of Nature* (II.V.5), 271–2; *Elements* (II.IV.6), 329–31; S. von Pufendorf, *On the Duty of Man and Citizen*, trans. M.J. Silverthorne, ed. J. Tully (Cambridge, 1991) (I.V.10), 49–50.

[24] Grotius, *DJBP* (II.I.10.1).

[25] Later natural law theorists denounced Grotius's right to kill to prevent being punched. See e.g. Thomasius, *Institutes* (II.1) §118; J.G. Heineccius, *A Methodical System of Universal Law*, ed. T. Ahnert and P. Schröder (Indianapolis, IN, 2008) (I.7) §187.

[26] Grotius, *DJBP* (II.II.10.1). See also ibid. (III.I.2.1).

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By attempting injury, Grotius contends, aggressors make themselves liable to suffer whatever degree of defensive harm is required to protect the victim's rights. Even if that defensive harm is highly disproportionate to the averted injury.

Significantly, Grotius did not invoke *Infinite Right* when justifying the right to kill in defence of one's life, limb, and chastity. In those cases, he believed, the problem of narrow disproportionality does not arise. Killing *is* a narrowly proportionate response to stop violations of these rights. 'Truly the loss of a limb', the Dutchman writes, is 'in a sense comparable to loss of life; further, we cannot be sure that injury to a part of the body will not bring danger of death'.[27] Chastity, too, is 'on a plane with life' (at least, it seems, female chastity is).[28] Grotius thus purposively introduced *Infinite Right* to forestall the objection that killing anyone about to punch you is disproportionate and therefore unjust.

Grotius stresses that *Infinite Right* holds only at the level of 'expletive justice'.[29] His just war theory is multilayered, consisting of several distinct moral and legal principles: (i) expletive justice, (ii) natural law, (iii) the divine positive law (especially biblical injunctions of charity), and (iv) the positive law of nations.[30] Expletive justice ('justice properly or strictly so called') is a separate moral norm falling under the umbrella category of natural law.[31] It captures that part of interpersonal morality covering what people owe to each other: their mutual rights and duties. Justice, so understood, consists wholly 'in abstaining from that which belongs to another'.[32] It exclusively concerns so-called perfect rights. Perfect rights are essentially enforceable: actionable in courts and on the battlefield. Whatever constitutes a ground for legal proceedings within the state, Grotius maintained innovatively, makes for *casus belli* outside it: 'the sources from which wars arise are as numerous as those from which lawsuits spring; for where judicial settlement fails, war begins'.[33] *Infinite Right* supports that original thesis by enlarging the set of rights defendable by just war. Any unjustly threatened or invaded perfect right, however trivial, *pro tanto* justifies resort to war. Not only grave injustices do, as was commonly held.[34] In short, *only* violations of perfect rights can be just causes for defensive war; and *all* those violations are so (at least outside the state). By contrast,

[27] Ibid. (II.I.6).
[28] Ibid. (II.I.7).
[29] Ibid. (II.I.10.1).
[30] On their interlinkages, see J. Olsthoorn, 'Grotius and the Early Modern Tradition' in L. May (ed.), *The Cambridge Handbook of the Just War* (Cambridge, 2018), 33–56. Pufendorf denies the existence of a voluntary law of nations in *Law of Nature* (II.III.23), 226.
[31] Grotius, *DJBP* (I.I.8.1).
[32] Ibid., Prol. 44. See also e.g. ibid. (II.XII.9.2).
[33] Ibid. (II.I.2.1).
[34] Cf. F. Suárez, 'On Charity' in T. Pink (ed.), *Selections from Three Works* (Indiana, IN, 2015) (XIII.IV.2): 'not every cause is sufficient to justify war, but only those causes which are serious and commensurate with the losses that the war would occasion. For it would be contrary to reason to inflict the most serious damage because of a slight injury.'

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imperfect rights (governed by distributive justice) cannot be enforced by either lawsuits or force of arms.[35]

Natural law is a wider category than justice. It obligates persons to perform all their moral duties—both those corresponding to perfect and to imperfect rights. For Grotius, the domain of natural law covers what is naturally obligatory or illicit: 'counsels and instructions of every sort, which enjoin what is honourable indeed but do not impose an obligation, do not come under the term law'.[36] Respecting others' perfect rights is always naturally obligatory (on pain of flouting expletive justice). Doing what another has an imperfect right to, although morally praiseworthy, is not always mandatory. Oftentimes, naturally honest actions can be omitted without violating natural law.[37] However, circumstances might fall out such that natural law obliges us to perform otherwise supererogatory actions: 'In many cases it happens that an obligation [*obligatio*] rests upon us, but no right is acquired by another [*nullum jus in alio*] just as becomes apparent in the duty of having mercy and showing gratitude.'[38] 'Imperfect' duties of charity, mercy, distributive justice, and liberality command us to give away what is ours (i.e. what we have a perfect right to, due by expletive justice) and to not press our rights to the fullest:

> At times the circumstances of the case are such that to refrain from the exercise of one's rights is not merely praiseworthy but even obligatory, by reason of the love which we owe even to men who are our enemies, whether this be viewed in itself or as the most sacred law of the Gospel demands.[39]

Duties of charity—whether derived from natural law or from divine positive law—are more demanding than duties of expletive justice. Either precept of charity can forbid what justice permits.[40] For instance, while expletive justice permits 'the slaying of an assailant in order to escape a blow', 'the law of the Gospel has made such action in self-defence altogether impermissible'.[41] Natural charity discommends, and sometimes forbids, violently defending ourselves against an unjust aggressor (e.g. when doing so requires narrowly disproportionate force). Biblical charity orders victims to abstain from exercising their natural rights to kill in defence of their property, while natural law duties of charity prohibit their exercise if 'the stolen property is of extremely slight value'.[42] Permissions granted

[35] See e.g. Grotius, *DJBP* (II.XXII.16), (II.XXV.3.4).
[36] Ibid. (I.I.9). See also ibid. (I.I.10.2), (II.XIV.6.1). This paragraph follows J. Olsthoorn, 'Grotius on Natural Law and Supererogation', *Journal of the History of Philosophy*, 57 (2019), 443–69.
[37] See e.g. Grotius, *DJBP* (II.X.11), (III.III.6.2).
[38] Grotius, *DJBP* (II.XI.3) (translation amended). See also e.g. ibid. (II.I.9.1), (II.VII.4.1), (II.XII.9.2), (II.XXV.3.3).
[39] Ibid. (II.XXIV.2.3). See also e.g. ibid. (III.XVIII.4).
[40] Ibid. (II.XX.10.1).
[41] Ibid. (II.I.10.1).
[42] Ibid. (II.I.11). See also ibid. (II.I.10–14), (III.XI.2).

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by expletive justice are not mere legal impunities. Unless countermanded by more demanding moral norms, *Infinite Right* renders defensive action free from moral blame.[43]

Infinite Right is a doctrine about what humans may justly to do others (i.e. without violating their rights). Crucially, others are not wronged by breach of moral duties not falling under expletive justice. By definition, such imperfect duties require us to not do or demand what we have a perfect right to. But as long as I am 'acting within my right, I should be doing no one an injustice'—even if I am morally obligated not to press my rights.[44] Similarly, victims can be duty-bound by norms other than expletive justice to abstain from exercising their 'actual and unlimited moral right' against unjust aggressors, rendering defensive killing all-things-considered wrongful.[45] Pufendorf's just war theory has the same composite structure.

As early as the 1660 *Elements of Universal Jurisprudence*, Pufendorf defended *Infinite Right:* 'hostility itself already furnishes the right of exercising violence to an unlimited degree against the enemy, at all events without impediment to some right which exists in the very enemy'.[46] Across his works, he condones defensively killing unjust aggressors out to mutilate you: 'the man who thus threatens me is my enemy who, so far as in him lies, has given me full licence against him'.[47] Unjust aggression, irrespective of its severity, grants victims infinite rights against their assailants: 'this holds good not merely if an enemy has undertaken to use every extremity against me, but also if he simply wishes to injure me within certain limits, for he has no greater right to do me a slight injury than a severe one'.[48] In short, the unjust aggressor has 'by the injury done me . . . made it impossible for me to do him an injury, however I may treat him'.[49] He 'can only blame his own wickedness'.[50]

What holds true for permissible self-defence also holds for permissible killing in war. Just belligerents are entitled to fight their enemies by all means: 'This is especially true because the end of war, whether offensive or defensive, could not be gained without this licence, if it were necessary to hold the use of force against an enemy within a certain limit, and never to proceed to extremities.'[51] Pufendorf explicitly denies that the principle of narrow proportionality applies within war:

43 On these two senses of 'permission', see ibid. (I.I.17), (II.V.28), (III.IV.5.2), (III.X.1.1).
44 Ibid. (II.I.12.1).
45 Ibid. (II.I.10.1), as noted by S. Uniacke, 'The Proportionality Constraint', *Journal of Applied Philosophy*, 34 (2017), 40.
46 *Elements* (I.XII.22), 139. See also ibid. (II.IV.13), 340.
47 *Law of Nature* (II.V.10), 278. See also *Elements* (II.IV.16), 342; *Duty of Man* (I.V.8), 49.
48 *Law of Nature* (VIII.VI.7), 1298.
49 Ibid.
50 *Duty of Man* (I.V.6), 48.
51 *Law of Nature* (VIII.VI.7), 1298.

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> Nor is it in fact always unjust to return a greater evil for a less, for the objection made by some that retribution should be rendered in proportion to the injury, is true only of civil tribunals, where punishments are meted out by superiors. But the evils inflicted by right of war have properly no relation to punishments.[52]

Pufendorf follows Grotius's ordering of which imminent rights violations justify defensive killing—threats to life, limbs, chastity, and property. Yet, unlike Grotius, he introduces *Infinite Right* at the outset, well before asking whether 'a box on the ear, or a similar affront, gives the right to kill the offender'.[53] Moreover, Pufendorf invokes *Infinite Right* much more frequently than Grotius did, across his discussions of just war and self-defence. What explains these salient differences? In one of the few extant discussions of the doctrine, Olivecrona argues that 'Pufendorf is largely in agreement with Grotius.'[54] The following sections disprove this. Pufendorf's account of *Infinite Right* differs profoundly from that of Grotius, both in terms of its content and its normative rationale.[55]

3. Hugo Grotius

For Grotius (but not for Pufendorf), an *in bello* principle of necessity internally delimits *Infinite Right*. Persons facing unjust threats obtain 'a sort of actual and unlimited moral right' against their aggressor, yet only 'in so far as otherwise I cannot ward off the injury from myself'.[56] Expletive justice allows people to use only so much armed force as is necessary to deflect the threatened injustice. Defensive killing is permissible only if 'no other way of escape is open'.[57] As Grotius writes, 'the person who is attacked ought to prefer to do anything possible to frighten away or weaken the assailant, rather than cause his death'.[58] If, however, a person cannot safeguard their rights except by killing their unjust assailant, then expletive justice permits doing so—even when the imperilled rights pale in value, morally, to the life taken. This holds true for the defence of property as well:

[52] Ibid.. See also *Elements* (II.IV.16), 342.

[53] *Law of Nature* (II.V.12), 280. Compare ibid. (II.V.10–12) with Grotius, *DJBP* (II.I.3–13).

[54] Olivecrona, 'Two Levels', 221. See also K. Olivecrona, *Law as Fact* (London, 1971), 292–6.

[55] For numerous other substantive differences between their natural law theories, see J. Olsthoorn, 'Grotius and Pufendorf' in T. Angier (ed.), *The Cambridge Companion to Natural Law Ethics* (Cambridge, 2019), 51–70.

[56] Grotius, *DJBP* (II.I.10.1). See also ibid. (III.I.2.1).

[57] Ibid. (II.1.3). Vitoria maintained that victims are duty-bound to flee only if this can be done without dishonour (a form of injury). Grotius spurned this caveat as resting upon a false notion of honour. F. de Vitoria, *Political Writings*, ed. A. Pagden and J. Lawrance (Cambridge, 1991), 299; Grotius, *DJBP* (II.I.10.2–3).

[58] Grotius, *DJBP* (II.I.4.2).

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> If we have in view expletive justice only, I shall not deny that in order to preserve property a robber can even be killed, in case of necessity. For the disparity between property and life is offset by the favourable position of the innocent party and the odious role of the robber.[59]

Necessity, here, means that rights cannot be protected except through lethal defence: 'a thief fleeing with stolen property can be felled with a missile, if the property cannot otherwise be recovered'.[60]

In requiring that defensive killing be 'necessary', Grotius integrates a traditional just war requirement into his theory of justified self-defence. The *in bello* necessity requirement is the minimum-force condition.[61] To be permissible, defensive action must adopt the least harmful means to achieve a just end, for example, self-preservation. Scholastics commonly held that only 'the minimal force needed to repel the attack' is allowed.[62] Citing a Roman legal maxim, Thomas Aquinas (1225–74) maintained that 'it is legitimate to repel force with force provided one does so with the moderation of a blameless defence [*moderamen inculpata tutela*]'.[63] When is self-defence 'moderate'? What are the due standards of moderation? Pufendorf called this a 'very difficult question: how far am I to moderate my justified self-defense [*moderamen inculpatae tutelae*]—as it is called in the law school?'[64] Aquinas resolved the conundrum as follows: 'if a man, in self-defense, uses more than necessary violence, it will be unlawful'.[65] Francisco de Vitoria (c.1483–1546) concurred: 'A man is required to defend himself with the minimum possible harm to his attacker'.[66] Grotius agreed. Natural law permits defensive killing only when the danger is 'immediate and imminent in point of time'.[67] These qualifications follow from the necessity condition. As long as the threat remains distant (in time and/or space), other ways to protect one's rights will generally be available, rendering defensive killing unnecessary.

[59] Ibid. (II.I.11). See also ibid. (III.XI.2); H. Grotius, *Introduction to the Jurisprudence of Holland*, ed. R.W. Lee (Oxford, 1926) (III.III.39).

[60] Grotius, *DJBP* (II.I.11).

[61] McMahan, *Killing in War*, 23. Like all just war requirements, the necessity condition is a necessary but not a sufficient condition for the permissible use of force.

[62] J. Barnes, 'The Just War' in N. Kretzman, A. Kenny, and J. Pinborg (eds), *The Cambridge History of Later Medieval Philosophy* (Cambridge, 1982), 780.

[63] Aquinas, *Summa Theologica* (2a.2ae.64.7). The expression '*moderamen inculpatae tutelae*' comes from *Codex Justinianus* (8.4.1) (discussing permissible defensive action against robbery). On its meaning and reception, see K. Pennington, '"Moderamen Inculpatae Tutelae": The Jurisprudence of a Justifiable Defense', *Rivista Internazionale de Diritto Commune*, 24 (2014), 27–56. On justified self-defence in Roman law, see also *Digest* (9.2.45.4); *Digest* (43.16.1.27) in A. Watson (ed.), *The Digest of Justinian*, 4 vols (Philadelphia, PA, 1985).

[64] S. von Pufendorf, *The Pufendorf Lectures*, ed. B. Lindberg (Stockholm, 2014), 137.

[65] Aquinas, *Summa Theologica* (2a.2ae.64.7).

[66] Vitoria, *Political Writings*, 299.

[67] Grotius, *DJBP* (II.I.5). See also e.g. ibid. (III.XI.2). For Pufendorf, the imminence condition on permissible violent self-defence applies only to citizens within the state: *Law of Nature* (II.V.6–8), 272–7; *Duty of Man* (I.V.12), 51.

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The principle underlying Grotius's *Infinite Right* is that there must be a way, morally, to protect rights from being violated.[68] He defended this principle on conceptual grounds. As perfect rights are essentially enforceable, it must be morally possible to justly resist violations of perfect rights (i.e. without injustice to the aggressor)—otherwise these rights would not be perfect. Kant defended the same principle on moral grounds. Violently resisting unjust aggressors must be somehow morally possible for victims on pain of authorizing unjust aggression. The '*moderamen inculpatae tutelae*' of the scholastics 'means only that I should not use external violence needlessly if a lesser degree is all that is necessary'.[69] The *in bello* necessity requirement is compatible, Kant claimed, with '*jus infinitum* for in general one cannot fix how far he should go but he must go so far as is necessary to defend his right'.[70] Clearly, armed force can be necessary (i.e. the least costly means to secure one's rights), yet inflict disproportionate harm upon the aggressor. *Infinite Right* condones violent defence in such cases.

For Kant, the *in bello* necessity condition holds as a matter of ethics, not of right (*jus strictum*).[71] Unnecessary defensive action therefore does unjust aggressors no wrong. For Grotius, by contrast, the necessity condition is internal to liability (in modern parlance). McMahan glosses internalism as follows: 'A person cannot be liable to attack when attacking him would be wrong because it would be unnecessary.'[72] Nor can one be liable when 'there is an alternative means of achieving the defensive aim that would be better, all things considered'.[73] Liability is not desert. Liability determines how *unavoidable* harm must be distributed as a matter of justice, not what wrongdoers deserve to suffer.[74] For this reason, people cannot be liable to gratuitous harm. 'If killing a person would be ineffective, that person cannot be liable to be killed, even if he has been a culpable supporter of the war.'[75] This is so because 'liability … is essentially instrumental, in that a person cannot be liable to be harmed if harming him will be neither a means nor a side effect of achieving some good effect'.[76] Grotius's internalism departs from McMahan's in at

[68] Grotius, *DJBP* (III.I.2.1): 'we are understood to have a right to those things which are necessary for the purpose of securing a right, when the necessity is understood not in terms of physical exactitude but in a moral sense'. Arguably, Grotius here reinterpreted a traditional just war principle along rights-based lines: 'whoever has the right to attain the end sought by a war, has the right to use the means to that end'; Suárez, 'On Charity' (XIII.VII.17).

[69] Kant, *Lectures*, 27: 1374.

[70] Ibid., 27: 1372.

[71] Ibid., 27: 1374. See also Kant, *Practical Philosophy*, 6: 235.

[72] McMahan, *Killing in War*, 10. See also K. Draper, *War and Individual Rights: The Foundations of Just War Theory* (Oxford, 2016), 104–18; P. Tomlin, 'Distributive Justice for Aggressors', *Law and Philosophy*, 39 (2020), 352–6.

[73] J. McMahan, 'Proportionality and Just Cause: A Comment on Kamm', *Journal of Moral Philosophy*, 11 (2014), 433.

[74] J. McMahan, 'Who is Morally Liable to Be Killed in War', *Analysis*, 71 (2011), 552.

[75] Ibid., 550.

[76] J. McMahan, 'Liability, Proportionality, and the Number of Aggressors' in S. Bazargan-Forward and S.C. Rickless (eds), *The Ethics of War: Essays* (Oxford, 2017), 8.

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least two ways. For Grotius, (i) the sole good effect relevant for determination of liability is safeguarding the victim's perfect rights and (ii) narrow proportionality is not internal to liability.[77]

4. Samuel Pufendorf

Pufendorf radicalized Grotius's doctrine by removing the necessity condition from *Infinite Right*. Unjust aggressors have no right that their victims use the least harmful means to defend themselves. Outside the state, victims do not wrong unjust aggressors by killing them where fleeing, surrender, or a non-lethal disabling shot would have brought safety: 'in a state of nature no right belongs to the assailant, by which the other man is required to avoid his attack by flight'.[78] To justify this radicalization, Pufendorf provided a new normative rationale for *Infinite Right*.

By postulating a natural right to defend oneself *by any means*, Pufendorf reverted to Cicero's extreme position in *Pro Milo*. There is a natural law, intuitively known, Cicero contended, 'which states that, if any attempt is made upon our lives, if we encounter violence and weapons, whether of brigands or enemies, then every method of saving ourselves is morally justifiable'.[79] Alberico Gentili (1552–1608) agreed: 'For to kill in self-defence is just, even though the one who kills may flee without danger and so save himself.'[80] Thomas Hobbes (1588–1679) introduced an extremely bellicose natural right, permitting us 'by all means we can, to defend our selves' when peace is deemed out of reach.[81] Hobbes's conception of 'defensive war' is notoriously expansive. Any use of armed force that the agent judges promotes personal security is warranted by the right of nature, including violent conquest of innocents.[82] Hobbes's right of nature does not presuppose aggressor liability. The guilty and innocent alike have a natural right to wage war against all and sundry:

> as long as a person has no guarantee of security from attack, his primeval *Right* remains in force to look out for himself in whatever ways he will and can, i.e. a *Right to all things*, or a *Right of war* [*Ius in omnia*, sive *Ius belli*].[83]

[77] Cf. McMahan, *Killing in War*, 22; McMahan, 'Proportionality and Just Cause', 433. See also D. Rodin, 'Justifying Harm', *Ethics*, 122 (2011), 79: 'For a person to be liable to a harm, just is for that harm to be narrowly proportionate in the circumstances.'

[78] *Law of Nature* (II.V.13), 282. Cf. *Duty of Man* (I.V.13), 51.

[79] M.T. Cicero, 'Pro Milo' in D.H. Berry (ed.), *Cicero: Defence Speeches* (Oxford, 2000), 186.

[80] A. Gentili, *De jure belli libri tres*, ed. J.C. Rolfe (Oxford, 1933), 58–9. See also Rutherforth, *Institutes* (I.XVI.5). Thomasius, *Institutes* (II.1) §106 argues that victims are obliged to flee only if doing so is easy.

[81] T. Hobbes, *Leviathan*, 3 vols, ed. N. Malcolm (Oxford, 2012), 14.4.

[82] Ibid., 13.4.

[83] T. Hobbes, *On the Citizen*, trans. M.J. Silverthorne, ed. R. Tuck (Cambridge, 1998) V.1. For further discussion of Hobbes's exceedingly lenient just war theory, see J. Olsthoorn, 'Hobbes on International Ethics' in M. Adams (ed.), *A Companion to Hobbes* (Oxford, 2021), 252–67.

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Hobbes's right of nature and Pufendorf's *Infinite Right* diverge greatly in normative status and foundation—as, consequently, do their theories of just war. Pufendorf emphatically denies that *Infinite Right* is primeval. War is not natural: humans are not by nature each other's enemies. As an acquired right, *Infinite Right* arises from others' acts of wrongdoing. It originates in the release from natural law duties owed to unjust aggressors. Therefore, only just belligerents can possess this right.[84] Hobbes held that 'there be in war no law, the breach whereof is injury'.[85] Pufendorf drastically qualifies this claim.[86] Just belligerents cannot wrong their unjust enemies. But unjust aggressors can, and do, wrong their victims. Indeed, those fighting without just cause do wrong at every turn.

Suzanne Uniacke has duly called Pufendorf's right to kill to evade a blow 'very harsh'. Justifying such a far-reaching right, she suggests, requires 'drastically discounting the interests or rights of the aggressor'.[87] In fact, the aggressor's rights are not so much discounted as forfeited: 'For whoever injures another has in himself no longer any right to keep the most extreme penalties from being visited upon him by the other party; or, in other words, he gives the injured person the fullest right against him.'[88] For Pufendorf, natural rights not to be harmed are posterior to, and derived from, others' natural law duties of sociality.[89] Rights-forfeiture is the upshot of annulment of the moral duties grounding those rights. Victims no longer owe any duties imposed by natural law to their aggressor. For unjust aggression severs between them all ties of sociality (the core of natural law).[90] Pufendorf defends a 'localized' theory of rights-forfeiture: unjust aggressors lose their rights against defensive harm only to the injured party. Non-allied outsiders do not acquire any rights of war against them.[91]

Throughout his works, Pufendorf insists that we are duty-bound to act morally only towards those who reciprocate by acting peacefully towards us:

> Now, since the performance of duties due on the basis of the law of nature ought to be mutual, in such wise that he who was the first to break them should absolve also the other person, as far as in him lies, from the obligation to observe the same towards him; it is readily apparent that he who has unjustly hurt me has on his

[84] *Elements* (II.IV.14), 341: 'nature allows me to employ all means of securing my safety against those who *criminally* attack it' (emphasis added). See also ibid. (II.IV.17), 343. Here, as elsewhere, Palladini's Hobbist reading of Pufendorf goes wrong: F. Palladini, *Samuel Pufendorf Disciple of Hobbes: For a Re-interpretation of Modern Natural Law*, trans. D. Saunders (Leiden, 2019), 112–14.

[85] T. Hobbes, *The Elements of Law, Natural and Politic*, ed. F. Tönnies (London, 1969), 19.2. See also Hobbes, *Leviathan*, 13.13.

[86] S. von Pufendorf, *On the Natural State of Men* ('*De statu hominum naturali*'), trans. and ed. M.J. Seidler (Lewiston, NY, 1990) Sect. 17, 129.

[87] Uniacke, *Permissible Killing*, 87.

[88] *Law of Nature* (II.V.12), 280.

[89] H. Haara, *Pufendorf's Theory of Sociability: Passions, Habits, and Social Order* (Cham, 2018), 140–1.

[90] *Law of Nature* (II.III.15), 208.

[91] *Elements* (II.IV.13), 340; *Law of Nature* (VIII.VI.14), 1307.

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> side remitted to me whatever he otherwise could have demanded from me by the law of nature, and has destroyed all the intercourse of right between us: And so he has given me the faculty of waging war against him, that is, of exercising force against him without stint or limit.[92]

People are not obliged to act sociably towards their enemies because that would defeat natural law's ultimate purpose: self-preservation. 'Now the law of sociality intends men's safety; it must therefore be so interpreted as to cause no harm to the safety of individuals.'[93] Hobbes had earlier rendered the duty to practice natural law conditional on the existence of peace. Natural law need not be practiced towards those of hostile intent, he wrote, as one would otherwise 'but make himselfe a prey to others, and procure his own certain ruine, contrary to the ground of all Lawes of Nature, which tend to Natures preservation'.[94] For Hobbes, physical peril and insecurity suspends the duty to practice natural law generally. Pufendorf, by contrast, argued that the natural law precept of sociality, which remains operative throughout, enjoins *Infinite Right*:

> surely life would be most unsocial, if, among those who live in a state of natural liberty, any limit were set on their freedom to resist. For what sort of a life would I lead … if a neighbour could persist in vexing me … by plundering and devastating my fields, and we had no right to kill him in driving him off?[95]

Sociality itself requires that unjust aggressors forfeit their rights wholesale: 'it would be absurd for social life among men to be based upon the necessity of bearing injuries'.[96] While Grotius justified *Infinite Right* on conceptual grounds (perfects rights are, by definition, defendable by force outside the state), Pufendorf thus grounded the doctrine directly in natural law.

By attempting injury, wrongdoers enter a state of war, releasing their victims from any ordinary moral duties of sociality owed to them. The state of war is a morally exceptional condition for Pufendorf. Both 'war' and 'peace' are moral entities. Each state expresses 'the mode in which men mutually transact their business', with distinct moral principles governing them.[97] 'War', he writes, 'is the state of men who are naturally inflicting or repelling injuries or are striving to extort by force what is due to them.'[98] Force and fraud are virtues in war: 'For a state of hostility itself grants one the licence to do another injury without limit.'[99] Not only

[92] *Elements* (II.IV.16), 341–2. See also *Law of Nature* (VIII.VI.7), 1298.
[93] *Duty of Man* (I.V.6), 48.
[94] Hobbes, *Leviathan*, 15.36.
[95] *Law of Nature* (II.V.3), 269–70.
[96] Ibid., (II.V.3), 270.
[97] Ibid. (I.I.8), 9.
[98] Ibid. On 'war' and 'peace' as moral entities, see S. Darwall, 'Pufendorf on Morality, Sociability, and Moral Powers', *Journal of the History of Philosophy*, 50 (2012), 222–3.
[99] *Law of Nature* (VIII.VII.2), 1316.

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temporally and spatially protracted conditions of hostility between states count as 'war'. Outside the state, the condition of war is kindled, too, by individuals engaging in one-off aggression (such as thieves, robbers, punchers). To end all hostility, the unjust aggressor must show repentance (i.e. forswear hostile intentions) and provide securities for the future and compensation for past wrongs. Natural law obligates the unjustly attacked to make peace with repentant enemies: 'For when the other has offered peace, I have no longer left a just cause for fighting against him.'[100]

Pufendorf bolsters *Infinite Right* by defending moral exceptionalism about both war and self-defence: ordinary moral duties of sociality are owed only towards those not maliciously attempting injury—that is, to those with whom one is at peace. He invokes this innovative doctrine to explain why people acquire *jus infinitum* even to protect property 'of little value' (unwise though such armed defence might be):[101]

> to kill a man who undertakes to steal or destroy another's possessions involves no injury, even though such possessions cannot equal the life of a man. For in a natural state whoever threatens any kind of injury with evil intent becomes an enemy, and as such is protected by no right, attached to him [*nullo jure, quod in ipso haereat*], against suffering the extreme consequences.[102]

Justice permits defensively killing thieves to protect non-vital material resources in part because 'I have no guarantee that he will not pass from these to greater injuries.'[103] This seems a stretch. Why regard all pickpocketers as potential murderers? Moral exceptionalism provides the answer. Declared hostile intent suffices to create a state of war in which life, too, is at risk—and the injured party enjoys *jus infinitum*.[104]

5. Natural Law Principles Moderating Infinite Right

Stephen Neff and David Boucher have rightly drawn attention to Pufendorf's alarming doctrine that no moral duties whatsoever are owed to unjust assailants. Yet the conclusion they draw from this is mistaken. Both reckon that Pufendorf jettisons *jus in bello* altogether. 'Pufendorf', Neff writes, 'offered nothing significant in the way of specific rules of war, while also rejecting any notion of limitations

[100] *Elements* (II.IV.19), 347. See also *Law of Nature* (II.V.3), 270–1.
[101] *Law of Nature* (II.V.16), 290. Cf. *Duty of Man* (I.V.16), 52.
[102] *Law of Nature* (II.V.16), 288 (translation modified).
[103] *Duty of Man* (I.V.8), 49.
[104] Ibid., 52. A similar argument is found in Locke, *Two Treatises* (II) §18. In a companion paper, I argue that Locke's much-debated natural right to kill in defence of property jettisons considerations of narrow proportionality by following Pufendorf's conception of *Infinite Right*.

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based on the general concepts of necessity and proportionality.'[105] Boucher concurs: 'Pufendorf's view is that excesses in war are justifiable. In other words, there is no *jus in bello*.'[106] For 'once war has begun, the injured party may resort to any means to bring about its conclusion, which is peace'.[107] This section disproves their reading. While victims acquire infinite rights of war against their unjust enemies, other moral norms—not owed to those enemies—continue to govern the permissible use of armed force.

For a start, Pufendorf insists that agreements made with declared enemies must be kept, even within war: 'one has equal right to use fraud and deceit against an enemy, provided one does not violate one's pledged faith. Hence one may deceive an enemy by false statements or fictitious stories, but never by promises or agreements.'[108] More generally, he is adamant that natural law governs the permissible use of armed force within war—notwithstanding his thesis that just belligerents cannot wrong their aggressors. To reconcile these two positions, Pufendorf makes a key distinction: 'the licence to be used against an enemy is one thing, as it arises from a simple state of hostility, and another, as the mercifulness of natural law orders control and temperance in its indulgence'.[109] Elaborating, 'what an enemy may suffer without wrong and what we ourselves may inflict without loss of humanity' are distinct moral questions.

> When a man has declared himself my enemy, he has by that fact made known his intention to inflict the last degree of suffering on me, and by that same fact he grants me, so far as he can, an unlimited right against himself. Humanity however requires that so far as the momentum of warfare permits, we should inflict no more suffering on an enemy than defence or vindication of our right and its future assurance requires.[110]

Like Grotius before him, Pufendorf develops a multilayered just war theory which provides logical space to a paradoxical but coherent possibility: just belligerents can be morally obliged to refrain from doing what justice permits them to do. Sometimes prudence counsels victims to abstain from fully exercising their infinite rights of war. A moderate response may prevent dangerous escalation.[111]

[105] S. Neff, *War and the Law of Nations: A General History* (Cambridge, 2005), 149.
[106] D. Boucher, 'The Just War Tradition and Its Modern Legacy: *Jus ad Bellum* and *Jus in Bello*', *European Journal of Political Theory*, 11 (2011), 100.
[107] Ibid., 98.
[108] *Duty of Man* (II.XVI.5), 169. See also *Law of Nature* (VIII.VI.6), 1297. *Elements* (I.XII.22), 138–40 adds that the only obligatory agreements with enemies are truces and pacts to end hostilities. Whether unjust enemies are wronged by breaking pacts with them is unclear. On the natural law prohibiting deception, see P. Schröder, *Trust in Early Modern International Political Thought, 1598–1713* (Cambridge, 2017), 123–4.
[109] *Law of Nature* (VIII.VI.7), 1298. Darwall, 'Pufendorf on Morality', 226–8 spots this distinction yet misconstrues it slightly.
[110] *Duty of Man* (II.XVI.6), 169.
[111] See e.g. *Law of Nature* (II.V.3), 267; *Duty of Man* (I.V.7), 48–9.

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Morality itself, too, may 'forbid the injured person going to any extreme', via principles of wide proportionality and mercy.[112] Neither moral principle affects the rights and liabilities of unjust enemies.

Pufendorf consistently endorses *in bello* and *ad bellum* principles of wide proportionality: 'good sense and humanity counsel us not to resort to arms when more evil than good is likely to overtake us and ours by the prosecution of our wrongs'.[113] While Grotius subsumed considerations of narrow and wide proportionality under charity (both biblical and natural), both proportionality and necessity fall under the natural law of humanity for Pufendorf. Humanity requires the injured party to compare the evils that initiating war will foreseeably cause for innocents with the good it will do, and to avoid war if expected overall harms on non-liable persons outbalance the expected good: 'although he who has injured me gives me by that act the fullest power to find recourse against him in war, yet I should consider how much good or evil such a course will probably contain for me, or for others who have not injured me'.[114] The duties imposed by the natural law of humanity are imperfect ones. Innocent third parties have no *right* that the unjustly attacked abstain from engaging in violent self-defence, however much harm war will bring them. Although unenforceable, imperfect duties are, nevertheless, moral duties proper: natural law renders their violation morally wrong.[115]

The same natural law of humanity enjoins just belligerents to be merciful to their enemies. Being 'a generous victor' requires, surprisingly, bringing defensive action in line with *narrow* proportionality as much as possible. Insofar as their 'defence and future security' permits this, just belligerents must 'suit the evils inflicted upon an enemy to the process usually observed by a civil court in meting out justice in offences and other quarrels'.[116] Mercy commands fitting armed defence to the crime if safety permits this. Mercy and humanity being imperfect duties, neither duty of moderation is owed to the unjust aggressor:

> But the injured party does owe such restraint not so much to the one who does the injury, since the latter, so far as he was able, has broken off all relations of humanity with him, as to his own security and peace of mind. And so, when any one, stung with wrath or pain, has exceeded these limits, he does no injury to the aggressor, but is held only to have acted to excess and unwisely.[117]

[112] *Law of Nature* (II.V.3), 269.
[113] *Duty of Man* (II.XVI.1), 168.
[114] *Law of Nature* (VIII.VI.2), 1294. See also *Elements* (II.IV.15), 341.
[115] While Pufendorf's account of *jus in bello* is more lenient than that of Grotius, his account of *jus ad bellum* is more strict. By downgrading natural rights to commerce, passage and hospitality to imperfect rights, Pufendorf ensures that their violation is no longer a just cause of war. R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 1999), 140–66; L. Glanville, 'Samuel Pufendorf (1632–1694)' in D.R. Brunstetter and Cian O'Driscoll (eds), *Just War Thinkers: From Cicero to the 21st Century* (Abingdon, 2018), 144–55.
[116] *Law of Nature* (VIII.VI.7), 1298. See also *Elements* (II.IV.17), 344.
[117] *Law of Nature* (II.V.3), 269.

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Boucher's claim that, for Pufendorf, 'proportionality does not apply in war' hence must be dismissed.[118] The principle of wide proportionality does govern the permissible use of armed force. But this principle is external to liability. Defensive actions that violate wide proportionality are morally wrong without being wrong *to* the unjust aggressor. Unjust aggressors have no right that their victims abstain from using defensive actions that fall short of wide proportionality. Ditto for gratuitous and needlessly cruel defensive violence. While Boucher overlooks how the natural law of humanity informs *jus in bello*, Neff misconstrues it. Neff rightly observes that humanitarian ideals 'temper' *Infinite Right*. Yet, on his reading, humanitarian considerations dictating 'that the constraints of necessity and proportionality be observed' lack any binding force, having been placed 'on a moral rather than a legal plane'.[119] This misdescribes Pufendorf's moral theory. Natural law obliges agents to perform imperfect duties all the same, despite their not correlating in enforceable rights in others. The scholarly tendency to equate 'perfect duties' with 'legal duties', and 'imperfect duties' with 'moral' ones, has no philosophical or textual basis.[120]

6. Conclusion

This chapter has analysed a curious feature of early modern just war theory: the widespread dismissal of narrow proportionality as a necessary condition for just personal and collective defence (i.e. for defensive action that does not wrong unjust aggressors). According to *Infinite Right*, those attempting injury of whatever kind *ipso facto* forfeit their right not to be defensively killed by their victims. The prevalence of *Infinite Right* indicates that early modern just war theories were, first and foremost, theories of *rights* of war—rights the unjustly attacked have vis-à-vis their liable aggressors. Rights of war were foregrounded by theorizing other just war requirements (including wide proportionality and necessity) as morally regulating the due exercise of rights to defensive action. The early modern centrality of questions of justice—of what belligerents *owe* to each other, their mutual rights and liabilities—constituted a departure from scholastics' charity-centred theories. Those theories had centred on the question 'when is making war compatible with the Christian duty to love others as ourselves?' It also differs from prevailing theorizations today. Few ethicists of war nowadays talk of the unjustly attacked having moral rights of war that morality dictates they should refrain from acting on.

118 Boucher, 'The Just War Tradition', 100.
119 Neff, *War and the Law of Nations*, 150.
120 Iurlaro's rival interpretation must likewise be rejected. She maintains that the *in bello* principles of humanity and moderation are not laws of nature but 'customary, non-binding rules', consensually introduced by states out of honour. F. Iurlaro, *The Invention of Custom: Natural Law and the Law of Nations, ca. 1550–1750* (Oxford, 2021), 156–61. The natural law of humanity and international customary norms are, in fact, categorically distinct; and the former restricts permissible warfare much more than the latter: *Elements* (II.IV.18), 346.

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