

18. SELF-DEFENSE AGAINST MORALLY INNOCENT THREATS

JEFF MCMAHAN*

I. TWO PROPORTIONALITY CONSTRAINTS

Suppose you are unjustifiably attacked by a person you know to be morally innocent and entirely blameless. Let us refer to this person, and to all others who pose a threat to another, and against whom defensive force might be directed, as a *Threat*. Suppose that the threat he poses is nonlethal and that you have several options for defending yourself. If you do nothing, he will break your arm. You could avoid all harm to yourself by breaking both of his arms. Or you could exercise restraint and divide the harm between you—for example, by breaking one of his arms, but allowing yourself to suffer a broken finger.

If he were fully culpable for the threat he poses, you would be morally justified in breaking both his arms to prevent him from causing any harm to you. But given that he is morally innocent, it is arguable that you ought to choose the intermediate option of inflicting the lesser injury on him, thereby accepting a small injury to yourself. If that seems plausible, it suggests that his moral innocence is relevant to the stringency of the proportionality constraint on self-defensive action.

There are, in fact, two proportionality constraints that govern the morality of self-defense. They are well illustrated by the example of Bernard Goetz, who in 1984 shot four men on the New York subway who had crowded around him in a menacing way and demanded that he give them money. His action raised two issues of proportionality. The men clearly meant to be threatening Goetz and were liable to some sort of defensive action. But it seems that the harm he inflicted on them was excessive. This is a judgment of “narrow” proportionality—a judgment about how much harm it can be proportionate to inflict intentionally on a Threat as a means of self-defense. This narrow proportionality judgment is sensitive to the severity of the harm threatened, the probability that the harm will be inflicted in the absence of defensive action, and also, it seems, the degree to which the Threat is culpable. The suggestion that you might be required to suffer a broken finger to avoid breaking both arms of a Threat who is morally innocent is a claim about narrow proportionality.

* Professor of Philosophy, Rutgers University. This core text is based on Jeff McMahan, *The Basis of Moral Liability to Defensive Killing*, 15 *PHIL. ISSUES* 386 (2005).

CRIMINAL LAW CONVERSATIONS

Goetz's action not only intentionally harmed the men who threatened him but also unintentionally endangered the innocent people who were in the enclosed space of the subway car in which he fired his bullets. It seems that the risks to which he exposed those people were also excessive in relation to the threat he faced from the four men. This is a judgment of "wide" proportionality—about side-effects on people other than those who are liable to defensive attack. Because individual self-defense seldom has significant side-effects, discussions of proportionality in self-defense tend to focus on the narrow constraint. Yet in discussions of war the focus is almost exclusively on the wide constraint.

It is important to keep the narrow and wide proportionality restrictions distinct, for the considerations that are relevant to each are different and it is best to know precisely what is being claimed when an act is judged to be proportionate or disproportionate.

Suppose now that the morally innocent person who threatens you in an objectively unjustified way poses a *lethal* threat. And suppose there is no way to divide the threatened harm between the two of you: either he will kill you or you must kill him in self-defense. The commonsense intuition is that you are morally justified in killing him. While his moral innocence may affect the proportionality calculation when the threat he poses is nonlethal, and there are various options for self-defense, in this case it makes no difference at all.

Although this is the commonsense view, it is not immediately obvious how it is to be justified. There is, it seems, a strong moral presumption against intentionally killing another person, so that for killing to be justified there must be a positive justification sufficiently strong to override this presumption. The mere fact that someone threatens your life is insufficient to ground a justification for killing him in self-defense. If, for example, you are morally liable to be killed, you have no right of self-defense. A rampaging murderer who sees that he is about to be killed by a police sniper will be guilty of one more murder if he kills the sniper in self-defense.

II. THE RIGHTS-BASED ACCOUNT

The theory of self-defense that is perhaps most prominent today, which I will call the *Rights-Based Account*, offers a way of distinguishing morally between the police sniper and many other Threats who are also morally innocent but seem to be legitimate targets of defensive action. According to this theory, what makes a Threat a legitimate target is that he threatens another's *rights* and thus he *lacks* a right not to be prevented, by necessary and proportionate means, from violating those rights. Thus, if the only way a police officer can prevent a murderer from killing yet more innocent people is to kill him, the murderer cannot have a right not to be killed, and this explains the permissibility of killing him. Moreover, because the police sniper does not threaten to violate the murderer's rights, he

SELF-DEFENSE AGAINST INNOCENT THREATS

retains his own right not to be killed, and this explains why the murderer has no right of self-defense against him.¹

Yet, unlike the police sniper, other Threats who are morally innocent may threaten other people's rights and thus may be legitimate targets of defensive attack. Here is one example.

The Resident. The identical twin of a notorious mass murderer is driving at night in a remote area when his car breaks down. He is nonculpably unaware that his twin brother has within the past few hours escaped from prison in this area, and that the residents have been warned of the escape. The murderer's notoriety derives from his invariable modus operandi: he breaks into people's homes and kills them instantly. As the twin approaches a house to request to use the telephone, the resident of the house, reasonably believing himself to be defending his family from the murderer, takes aim to shoot him preemptively.

According to the Rights-Based Account, the resident threatens the twin's right not to be killed; therefore the twin is justified in killing the resident in self-defense, despite the resident's moral innocence, and the resident has no right of defense against the twin.

To discuss this and other examples, we need to draw some distinctions. First, I distinguish between permission and justification in a way that may not be familiar. An act is morally permitted when, in the circumstances, it is not wrong to do it. Justification is a species of permission. Not only is a morally justified act permissible, but there is also positive moral reason to do it. Not all acts that are permitted are justified, for there are indefinitely many acts that are not wrong that there is nevertheless no moral reason to do.

Second, there are objective and subjective accounts of both permissibility and justification. An act is objectively permissible or justifiable when what explains its permissibility or justifiability are facts that are independent of the agent's beliefs. An act is subjectively permissible or justified when two conditions are satisfied: first, the agent acts on the basis of beliefs, or perhaps reasonable or justified beliefs, that are false, and, second, the act *would* be objectively permissible or justified if those beliefs were true.

Although the resident's belief about the twin is false, it is epistemically justified in the circumstances. If it were true, his action would be objectively justified. He is therefore blameless. According to a subjective account of permissibility, his action is justified, though according to an objective account, it is impermissible. I will refer to those who, like the resident, pose an objectively wrongful threat on the basis of epistemically justified but false beliefs as *Innocent Threats*. (Note that this is different from the way the term is usually used in the literature,

1. The classic defense of this view is Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283–310 (1991).

CRIMINAL LAW CONVERSATIONS

where it tends to refer to all those who pose objectively wrongful threats but are nonetheless morally innocent.)

Even though an objective account of permissibility judges that the resident acts wrongly, it acknowledges that he is blameless and thus fully excused. There are other excusing conditions, such as duress, that can also absolve a person who poses an objectively wrongful threat of all culpability. If you kill an innocent person because someone has put a gun to your head and credibly threatened to kill you if you do not, both subjective and objective accounts of permissibility coincide in judging that you act impermissibly. But both may also agree that you acted blamelessly and are fully excused. I will refer to those who pose an objectively wrongful threat but are nonetheless morally innocent because they are fully excused as *Excused Threats*. The categories of Innocent and Excused Threats obviously overlap. The resident, for example, is an Excused Threat according to an objective account of permissibility but an Innocent Threat according to a subjective account.

A further and more problematic category is exemplified in the following case, taken from Judith Thomson.

The Falling Man. A fat man is enjoying a picnic on a cliff directly above the deck on which you are lying with your leg in traction. Suddenly a villain pushes him off the cliff. If he lands on you he will kill you, but he will survive because you will cushion his fall. You cannot move aside but can save yourself by hoisting your sun umbrella and impaling him on it.²

Thomson, the leading exponent of the Rights-Based Account, claims that it is permissible to kill the falling man because he will otherwise violate your right not to be killed. Because most people agree that you may permissibly kill him, this is a welcome conclusion. Yet it is not clear that it is actually an implication of the theory. According to Thomson, a right “that X has against Y . . . just is a moral fact equivalent to Y’s behavior’s being constrained” in a certain way.³ Yet a person cannot be morally constrained from being involuntarily acted upon by physical forces. So no one can have a right against a person that he not be hurled or fall through the air; therefore the falling man does not threaten to violate your right, even though he will kill you if he falls on you. The falling man is what I call a *Nonresponsible Threat*—that is, a person who without justification threatens to harm someone in a way to which she is not liable, but who is in no way morally responsible for doing so.

2. *Id.* at 287. In the story as she tells it, you can use your awning to deflect him past the edge of the deck onto the road below. Since there are accounts of the distinction between killing and letting die that would classify deflecting him as allowing him to die rather than killing him, I have altered the example in a way that makes your act uncontroversially an instance of killing.

3. Judith Jarvis Thomson, *THE REALM OF RIGHTS* 77 (1990).

SELF-DEFENSE AGAINST INNOCENT THREATS

I noted earlier that the commonsense view is that it is permissible to kill any person who, without objective justification, will otherwise kill you, even if he is morally innocent. Nonresponsible Threats challenge that view. For there seems to be no morally significant difference between a Nonresponsible Threat and an innocent bystander, and most of us believe that it is impermissible to kill an innocent bystander as a means of self-preservation, even if that is the only way to save one's life. The only difference between a Nonresponsible Threat and an innocent bystander is that a Nonresponsible Threat is causally implicated in the threat one faces. But by itself that is just a fact about his position in the local causal architecture and is no more a ground of *liability* than the parallel fact about an innocent bystander that her position in the causal nexus makes killing her the only means of saving one's life.

If this is right, what Nonresponsible Threats show is that it matters to the permissibility of killing a morally innocent person in self-defense why, or on what grounds, he is morally innocent. Some reasons why a person who poses an unjustified threat is morally innocent are compatible with his being liable to be killed. This is true in the case of the resident. By contrast, the reason why the falling man is innocent is also a reason why he cannot be liable to be killed in self-defense.

That the Rights-Based Account does not provide a justification for killing the falling man is not an objection to the theory. It merely makes it less appealing intuitively than it would be if it could justify the commonsense intuition. But there is another case that does ground a strong objection to the theory. It is familiar from discussions of the Doctrine of Double Effect.

The Tactical Bomber. A bomber fighting in a just war has been ordered to destroy a military facility located on the border of the enemy country. He knows that if he bombs this facility, the explosion will kill innocent civilians living just across the border in a neutral country. But this would be a proportionate side-effect in relation to the contribution the act would make to the achievement of the just cause. The civilians cannot flee but do have access to an anti-aircraft gun.

The traditional question is how the tactical bomber can be justified in bombing the facility when it would not be justifiable for a terror bomber to drop a bomb in the same spot, producing the same effects, with the *intention* of killing the civilians. My question is different. Assuming that the tactical bomber would be objectively morally justified in dropping his bomb, are the civilians permitted to shoot him down in self-defense?

To explain why this case challenges the Rights-Based Account, I need to distinguish two ways of acting against a right. When one impermissibly does what another has a right that one not do, one *violates* her right. When one permissibly does what another has a right that one not do, one *infringes* her right.⁴ Defenders

4. I draw this distinction differently from the way Thomson does. *See id.* at 122.

CRIMINAL LAW CONVERSATIONS

of the Rights-Based Account have failed to provide guidance in cases involving infringement rather than violation. For example, in her exposition of the Rights-Based Account, Thomson does not discuss whether a person loses his right not to be attacked when he threatens to infringe the rights of another. Yet it is reasonable to suppose that when a person threatens to infringe rights through action that is objectively *justified*, the justification exempts the agent from liability to defensive action. In criminal law, one who acts with justification is exempt from liability to punishment and in tort law one who acts with justification but causes a loss to another is exempt from liability to pay compensation except in a limited range of cases governed by a standard of strict liability. It seems that a justification should similarly exempt a person from liability to defensive action.

The tactical bomber is what I call a *Justified Threat*: someone whose objectively justified act nevertheless threatens to harm someone who is not liable to be harmed and who will thus be wronged by the action. Because the tactical bomber acts with justification, he will merely infringe the civilians' rights. If it is correct that liability to defensive action is defeasible by a justification, he retains his right not to be killed. According to the Rights-Based Account, therefore, the civilians may not kill him in self-defense.

But this is hard to believe—unless, perhaps, his mission is so important that they are morally required to sacrifice themselves for the sake of its success (in which case it is not necessarily his right that morally constrains them: he might be liable to attack and yet it would still be wrong to attack him). Can the Rights-Based Account accommodate the intuition that the civilians may kill the tactical bomber in self-defense? It cannot be claimed that his right is overridden by morally weightier considerations; for the stipulation that his act would be proportionate entails that the failure of his mission, which would be a consequence of their killing him, would be worse from an impartial perspective than their being killed.

Perhaps, then, contrary to the common assumption, one may lose rights by threatening to infringe rights, even with justification. If so, the fact that the tactical bomber will otherwise infringe the civilians' right not to be killed means that he lacks a right not to be killed by them—that is, he makes himself liable to be killed by them. But this too is hard to believe. For if he has lost his right not to be killed by them, it seems that he can have no right of self-defense against them. Yet intuitively it seems that, just as it is permissible for the civilians to kill the tactical bomber in self-defense, so it is also permissible for the tactical bomber to kill the civilians in self-defense. This apparent symmetry is, however, incompatible with the implications of the Rights-Based Account.

III. THE CULPABILITY ACCOUNT

The case of the tactical bomber challenges other theories of permissible defense as well. According to one theory, which I will call the *Culpability Account*,

SELF-DEFENSE AGAINST INNOCENT THREATS

culpability for causing an objectively unjustified threat is both necessary and sufficient for moral liability to defensive action. The tactical bomber acts with justification and is in no way culpable; therefore he is not liable to attack on this account. The innocent civilians, it seems, have no right of self-defense against him.

Despite its harsh implications for the civilians, the Culpability Account has considerable intuitive appeal because of the strong link between culpability and liability. When a person is both causally responsible and culpable for an objectively unjustified threat, it is intuitively uncontroversial that he is liable to necessary and proportionate defensive action. Many people's intuitions suggest that culpability may in certain cases be sufficient for liability even in the absence of causal responsibility for a threat. This is true in some cases of wrongful attempts. Here is an example.

The Culpable Attempter. Aware that a villain plans to kill you, you begin to carry a gun. On one occasion you have the opportunity to empty the bullets from his gun and you do so. Immediately thereafter, he confronts you in an alley and tries to fire. As he continues to pull the trigger in frustration, you see that a second villain is preparing to shoot you from behind a narrow basement window (it is a tough neighborhood). Unable to flee in time and also unable to fire with accuracy through the tiny window, you can save yourself only by shooting the first villain, causing him to slump in front of the window, thereby blocking the second villain's line of fire.

Many people accept that it is permissible to kill the first villain to save yourself from the second, despite the fact that he has no causal role in the threat to you. His culpable attempt is sufficient for liability. The problem with this suggestion, however, is that if we reject the requirement of causation, there seems to be no principled point at which culpability of any sort ceases to be a basis of liability to harm in the service of saving the lives of the innocent. Suppose, for example, that the first villain was just strolling peaceably through the alley but had made a culpable attempt on your life ten years ago. Would it be permissible to kill him now to preserve your life? Would it be permissible to kill someone who is making a futile but culpable attempt on your life as a means of securing his organs for transplantation?

A further problem with the Culpability Account is that it implies that Excused Threats and Innocent Threats, such as the resident, are not liable to defensive attack. This is intuitively implausible. And there is a theoretical basis for holding the resident liable, despite the fact that he acts reasonably in the light of his epistemically justified beliefs. For he voluntarily chooses to try to kill someone, knowing that there is a possibility of mistake (for example, it might be that the perceived murderer is wounded or seriously ill and poses no threat, or, as is in fact the case in the example, that the person is not the murderer at all). When one chooses to kill another person, one renders oneself vulnerable to the possibility of mistake, and if one is in fact mistaken, even if only through bad luck, one is liable to suffer the bad consequences of one's choice.

CRIMINAL LAW CONVERSATIONS

There is, indeed, a basis for liability even in cases in which an Innocent Threat (in the sense stipulated above) does not choose to harm or kill but merely engages in an activity that is known to have a very small risk of causing serious harm.

The Conscientious Driver. A person who always keeps her car well maintained and always drives carefully and alertly decides to drive to the cinema. On the way, a freak event that she could not have anticipated occurs that causes her car to veer out of control in the direction of a pedestrian.

If it were possible for the pedestrian to defend his own life by killing the driver, it would be permissible for him to do so. His justification would be that the driver had made herself liable by choosing to set a couple of tons of steel in motion as a means of pursuing her ends, knowing that this would involve a very small risk of killing an innocent person. Again, a voluntary choice with a foreseeable risk (of error in the case of the resident, mishap in the case of the driver) is the basis of liability to defensive action. The basis for liability is in fact stronger in the case of the driver, since she acts with only subjective permission, whereas the resident acts with subjective justification.

Some will claim that this view makes the driver's liability depend on moral luck, and thus on factors over which she has no control. There were countless other drivers who acted no differently from the way she did but whose cars did not go out of control. Why should she alone be liable?

This objection would have more force if the issue were who should compensate the pedestrian *ex post*. That burden could in principle be divided among all those who impose risks through driving. But this is a case of defense, and the issue is whether it is permissible to kill the driver or whether the pedestrian must be allowed to be killed. In this choice, it is not unfair to hold the driver liable. What she lacked control over is comparative: that her car when out of control whereas those of other drivers did not. But the basis of her liability is her choice to impose a risk, and over *that* she did have control. That she ended up liable to defensive action while the others did not may seem unfair, but it is no more unfair than that some gamblers leave the casino with losses while others leave with winnings.

IV. THE RESPONSIBILITY ACCOUNT

The examples and arguments reviewed thus far suggest a different criterion of liability to defensive action. According to what I will call the *Responsibility Account* of permissible defense, the basis of moral liability to defensive action is moral responsibility for an objectively unjustified threat of harm.

There are various noteworthy features of this view. Notice, first, that one may be morally responsible for a threat without *posing* the threat. One may be responsible through action done in the past for a threat that has arisen only now.

SELF-DEFENSE AGAINST INNOCENT THREATS

Suppose, for example, that I tampered with the brakes of your car last week. If, as a result, the brakes have now failed and your car is about to go off a cliff, you may permissibly steer the car into me if that is the only way to save yourself. Even though stopping the car by running it into me is not literally defensive, because at this point I am no part of the threat to you, I am nonetheless liable to be harmed in this way by virtue of my moral responsibility for your present predicament.

Second, because moral responsibility for a threat is a matter of degree, so too is liability to defensive action. It may, however, be hard to see how that could be so. Either one is liable or one is not. How could one be more or less liable? The answer is that variations in the degree of a Threat's liability are manifest in the stringency of the narrow proportionality restriction, as I indicated earlier in the opening paragraphs. The greater the degree to which a Threat is liable, the more harm it may be proportionate to cause him through necessary defensive action.

Third, on this view, culpability is not a condition of liability; hence Excused Threats and Innocent Threats, such as the resident and the driver, may be liable to defensive attack. Yet some other Threats who are morally innocent are not liable. The falling man is one example. Because he is in no way responsible for the threat he poses, he cannot be liable to defensive action according to the Responsibility Account. This is of course counterintuitive, but I think it is correct. Liability arises from what we choose to do as morally responsible agents; it cannot arise solely from what happens to us (though of course *duties* can). There may be a justification for killing the falling man in self-defense, but it cannot be that he is morally liable to attack.

In some cases there may be uncertainty about moral responsibility. Here is an example.

The Cell Phone Operator. A man's cell phone has, without his knowledge, been reprogrammed so that when he presses the "send" button, the phone will transmit a signal that will detonate a bomb, killing an innocent person.

According to an objective account of permissibility, this man acts impermissibly but is fully excused—that is, he is an Excused Threat. According to a subjective account, he acts permissibly and is thus an Innocent Threat. Suppose the only way to prevent him from detonating the bomb is to kill him. Is he liable to be killed in defense of the person who will otherwise be killed by the bomb? According to the Responsibility Account, this depends on whether he is morally responsible for the threat he poses.

The cell phone operator is relevantly different from the resident and the conscientious driver. Although all three act in "invincible ignorance" of relevant facts (that the phone is a detonator, that the approaching figure is the murderer's twin, that there is an undetectable problem that will cause the car to go out of control), only the cell phone operator makes no choice to inflict a harm or to

CRIMINAL LAW CONVERSATIONS

impose a risk of harm. Although his act does impose a risk, it is unforeseeable that it will cause harm in this way, or indeed in any way at all. What is singular about him is not that he is nonculpably and invincibly ignorant of some relevant fact—a characteristic he shares with the resident and the driver; it is, rather, that he is nonculpably and invincibly ignorant that he poses any kind of threat or risk of harm to anyone. And this, I think, absolves him of all responsibility for the threat he poses. He is an Innocent Threat who is also a Nonresponsible Threat. The cell phone operator, like the falling man, is not liable to defensive attack.

Finally, like the Rights-Based and Culpability Accounts, the Responsibility Account implies that the tactical bomber is not liable to defensive attack. He is of course responsible for the threat he poses, but because his action is objectively justified, there is no basis for liability.

Intuitively, the Responsibility Account gives the wrong answers in the cases of the falling man, the cell phone operator, and the tactical bomber. Yet in the case of Nonresponsible Threats, it is our intuitions that are mistaken, not the theory. They are overgeneralizations of our intuitions about standard cases of self-defense. But the case of the tactical bomber is different. He knowingly threatens the lives of innocent people. If these people would not be required to sacrifice themselves for the sake of his mission, they seem entitled to defend their lives.

One possibility is that innocent people are permitted to defend their rights not only against violation but also against justified infringement—that is, they may defend them even when they are overridden. In this view, the civilians are permitted to attack the tactical bomber in self-defense, even though he is not liable to attack. Because he is not liable, their defensive action, if successful, will infringe his rights; therefore he retains his right of self-defense and is permitted to attack them preemptively. In short, each party to the conflict is permitted to attack the other.

There are, however, various problems with this suggestion. I will mention only one, which is that defensive action by the civilians would seem to be disproportionate in the wide sense. Because the action of the tactical bomber is by hypothesis justified, it is proportionate—that is, the harm to the civilians is outweighed by the importance of achieving his mission. Self-defense by the civilians would therefore involve the intentional killing of an innocent person for the sake of the lesser good, impartially considered.

The problem of Justified Threats, exemplified by the case of the tactical bomber, therefore continues to pose a vexing challenge to all theories of permissible defense.

COMMENTS

RIGHTS AND LIABILITIES AT WAR

ADIL AHMAD HAQUE*

Jeff McMahan's "Responsibility Account" of liability to defensive force seems to entail that civilians may not defend themselves from being killed by a military attack conducted using just means in the service of a just cause. McMahan struggles to resist this result, which he admits is highly counterintuitive. I would like to suggest that the case of the tactical bomber exposes a deeper problem with McMahan's approach to the topic of defensive force, namely that, for McMahan, the permissibility of defensive force turns on the attacker's innocence rather than on the defender's innocence. McMahan believes that an attacker's responsibility for an unjust threat makes her liable to defensive force. On the contrary, a defender's responsibility for an unjust threat deprives her of the right to use defensive force. The right to use defensive force can be lost through the unjustified acts of the defender, but it cannot be taken away by the justified acts of the attacker. In this sense the very language of "liability to defensive killing" is misleading.

As I read McMahan's example, neither the civilians nor the tactical bomber are responsible for an unjust threat: the threat posed by the tactical bomber to the civilians is justified as a necessary and proportionate side-effect of an attack on a legitimate military target; the civilians pose no threat to the tactical bomber and are not responsible for the unjust threat posed by their government. In McMahan's view this means that neither the tactical bomber nor the civilians are liable to defensive force. In fact this means that both sides retain their right to use defensive force. McMahan reasons that (1) neither the bomber nor the civilians are liable to defensive force; (2) the killing of the civilians is justified by the balance of moral reasons while the killing of the bomber is not; and therefore (3) the bomber may kill the civilians but the civilians may not kill the bomber. On the contrary, (1) both sides retain their right to use defensive force; (2) both sides are permitted to exercise that right (whether or not doing so is "justified" in McMahan's sense); and therefore (3) the civilians may defend themselves from the bomber and the bomber may resist any defensive force from the civilians.

McMahan suggests that the civilians are not permitted to resist the tactical bomber because such resistance would involve "the intentional killing of an innocent person for the sake of the lesser good, impartially considered," and would therefore be "disproportionate in the wide sense."¹ Now, the killing of an attacker need only be proportionate in the narrow sense that one may only

AU: Please
update

* Assistant Professor of Law, Rutgers School of Law–Newark.

1. McMahan core text at [?].

CRIMINAL LAW CONVERSATIONS

defensively kill an attacker to prevent a comparable harm to oneself. It is only if the use of defensive force against an attacker would also harm innocent bystanders that we must ask whether the harm to the bystanders is proportionate in the wide sense. But McMahan does not state that the use of defensive force against the tactical bomber would harm innocent bystanders, only that the tactical bomber's mission is supported by the overall balance of moral reasons. True, civilians cannot use defensive force if doing so would kill a disproportionate number of equally innocent bystanders. But civilians may use defensive force even if doing so would delay or prevent the triumph of a just cause. The moral prerogative to act contrary to the balance of moral reasons (though not contrary to the rights of others) forms part of the very essence of liberty-rights such as the right to self-defense, and it is this prerogative that makes us ends in ourselves rather than mere means to the achievement of the greater good.²

Criminal law scholars in particular should recognize the overgeneralization implicit in McMahan's seemingly familiar position that justified attackers may not be resisted. It is true that, under domestic criminal law, aggressors can be resisted by defenders but defenders cannot be resisted by aggressors. In McMahan's view this is because aggressors are unjustified and therefore liable to defensive force while defenders are justified and therefore not liable. In fact this is because aggressors have lost their right to use defensive force whereas defenders have not. These two accounts generate very different implications for innocent bystanders. In McMahan's view, justified actors are not liable to defensive force either by wrongful aggressors or by innocent bystanders. In fact wrongful aggressors forfeit, but innocent bystanders retain, their right to use defensive force. Conflicts between rights are rarely confronted by domestic criminal law, but the potential for such conflicts is an inevitable feature of war.

2. See F.M. Kamm, 2 *MORALITY, MORTALITY* 229 (1996).

WHY CAUSAL RESPONSIBILITY MATTERS

SHLOMIT WALLERSTEIN*

Jeff McMahan draws the line between nonculpable aggressors (*Innocent and Excused Threats*), who can be killed in self-defense, and nonagent aggressors (*Nonresponsible Threats*),¹ who, together with innocent bystanders, cannot be. In my view, McMahan draws the line in the wrong place. Contrary to McMahan,

* University Lecturer, Fellow, and Tutor in Law, St. Peter's College and Faculty of Law, Oxford University.

1. I prefer to use the term *nonagent* aggressor over the term *nonresponsible* threat because the latter does not distinguish between moral and causal responsibility.

SELF-DEFENSE AGAINST INNOCENT THREATS

nonculpable and nonagent aggressors may be killed in self-defense, but innocent bystanders may not.

Talking about aggression that lacks human agency (the *Falling Man* example), McMahan argues that “no one can have a right against a person that he not be hurled or fall through the air; therefore the falling man does not threaten to violate the defender’s right.”² This position is based on the fact that the nonagent aggressor is similar to an object and as such not subject to duties. Indeed, we do not talk of rights with regards to objects and natural events. Thus, we do not think of a rock as “violating” a person’s right to life, but neither do we talk of the Rock as “infringing” that right. We also do not talk of a rock as being “permitted” (nor “justified”) to injure a person. Moral concepts and the terminology of rights have no application with regard to objects and natural events, but that also means that such a threat to the defender’s life cannot be *justified*, so as to prevent him from defending himself. Note that the requirement for self-defense is commonly referred to as the “unjust” threat and *not* as the “wrongful” threat. Thus, unless the threat is positively justified (!) the defender should be permitted to use self-defense, whether the threat is not justified because it is wrongful, or because moral assessment of the threat is inapplicable.

McMahan argues that this position is untenable. The fact that a person is causally responsible is irrelevant because “by itself that is just a fact about his position in the local causal architecture, and is no more a ground of *liability* than the parallel fact about an innocent bystander that her position in the causal nexus makes killing her the only means of saving one’s life.”³ Indeed, causal connection is only a fact about the nonagent aggressor’s position in the local architecture but that fact is significant.

Situations involving nonagent aggressors (and nonculpable aggressors) are situations in which due to some “bad luck” the aggressor becomes the locus of an unjust threat to the defender’s life and inevitably either the aggressor or the defender will have to bear the costs. Fairness requires that the aggressor not transfer his “bad luck” in becoming an *unjust* threat to another person and not demand that the defender (or another) be the one to suffer the consequences.⁴ Self-defense is about repelling the threat and preventing the aggressor from transferring the consequences of his “bad luck” to another. If, while falling, the falling man becomes able to shift himself so that he will not hit the defender, no doubt he has an obligation to do so. For him, to use the defender to avoid his own death amounts to using an innocent bystander and that is wrong—even according to McMahan’s position (transforming into an innocent threat).

AU: Please
update

2. McMahan core text at [?].

3. See McMahan core text at [?].

4. For further examples in support of this position see Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences* 91 VA. L. REV. 999, 1029–30 (2005).

CRIMINAL LAW CONVERSATIONS

But McMahan says that the defender has “no right not to be hurled” by the falling man. Why should that change just because mid-fall, the falling man becomes able to shift himself? The falling man’s obligation can only make sense if we recognize the existence of other pertinent considerations that do not originate out of culpability or McMahan’s responsibility.

The explanation suggested above is also the basis for the distinction between the nonagent aggressor and the innocent bystander. Since the innocent bystander is not the locus of the threat the defender cannot use him to avoid the threat to his life. Killing the innocent bystander to save himself would not serve to prevent innocent bystander from transferring “bad luck” to the defender. On the contrary, if the defender kills the bystander he would be transferring to the innocent bystander his own “bad luck” in getting into a situation in which his life is threatened—something that he is not allowed to do. Our intuition about the availability of self-defense where human agency is lacking is not due to overgeneralization of core situations of self-defense. It results from our attitude toward the distribution and transfer of consequences forced on a person.

CAN’T SUE; CAN KILL

KIMBERLY KESSLER FERZAN*

Jeff McMahan advances a “Responsibility Account” of self-defense. What is perhaps most unique about McMahan’s view is that he believes he can draw a principled distinction between different types of innocent aggressors and threats. Unlike psychotic aggressors, children, and human projectiles, the Innocent Threat can be responsible for the threat he poses, and therefore liable to defensive killing. An Innocent Threat is responsible for the threat he poses if and because he engages in risk-imposing activity, provided his conduct *foreseeably* imposes a risk of harm.

Unfortunately, both the “risk-imposing activity” and foreseeability criteria are problematic. First, McMahan’s example of a driver against a pedestrian conceals difficult questions inherent in the idea of a “risk-imposing activity.”¹ What would McMahan say about a driver who is not swerving at a pedestrian but another driver? They have both run the very same risks, so can one kill the other? McMahan has two options. A more fine-grained analysis, such that an out-of-control Civic

* Associate Dean for Academic Affairs and Professor of Law, Rutgers School of Law-Camden.

1. Cf. Heidi M. Hurd, *Nonreciprocal Risk Imposition, Unjust Enrichment, and the Foundations of Tort Law: A Critical Celebration of George Fletcher’s Theory of Tort Law*, 78 NOTRE DAME L. REV. 711 (2003).

SELF-DEFENSE AGAINST INNOCENT THREATS

would not be liable to a defender Hummer, or a coarse-grained option, where among reciprocal risk-takers there is no liability.

But even once the conceptual boundaries are clear, how can this sort of conduct ground McMahan's claim that merely engaging in such conduct is sufficient to render one "liable" to being killed? McMahan's risk-imposition condition is a form of strict liability that extends to activities beyond those recognized even in tort law. But how can it be permissible to kill someone whom we can't even sue in tort, let alone punish? The actor who, going through a life that always imposes risks, behaves in a cautious and admirable way hardly seems to have somehow assumed a risk of being killed defensively more than an actor who is insane, or is a child, or is involuntarily thrown down a well. What distinguishes the sudden onset of a psychotic breakdown from the inexplicable malfunctioning of a perfectly maintained car? How is one responsible for one risk more than the other when functioning in this society could bring about either breakdown?

The other problem for McMahan is that many activities do risk (and will cause) harm whether we know it or not. To address this problem McMahan adds a restriction: foreseeability, as illustrated by the case of the cell phone bomb. But the problem for McMahan is that foreseeability, properly applied, will likely slide him back to a negligence standard. Foreseeability will always be a matter of (1) the selection of the description of the harm and (2) the selection of the information available to the assessor. (All harms that occur are foreseen by the omniscient, even the cell phone.) It is true that driving seems risky (people die in car accidents), but it isn't true that we would say that safe driving with a well-maintained vehicle is risky vis-à-vis a mechanical malfunction. Which description governs?

Moreover, does McMahan require that the harm be foreseen by the actor? Would it matter if Fearless Fred never thinks that any harm can come from driving his car? Conversely, what if Nervous Nellie reads the literature on self-defense and becomes convinced that we are in the midst of an epidemic of Innocent Projectiles? Will her mere appearance in public now be a risk-imposing activity because she believes it is? Conversely, if the governing perspective is not the actor's then how does McMahan justify importing some artificial, epistemically limited perspective into his objective test? And importantly, how can morality speak through a construct that mirrors neither the actor's perspective nor the omniscient's?²

One renders oneself liable to defensive killing through one's choices, and specifically through one's culpable choices, which create a moral asymmetry between the aggressor and the defender. In my view, by causing the victim to fear attack, the attacker renders himself liable to be killed *defensively* vis-à-vis the

2. See *id.* at 722–23.

CRIMINAL LAW CONVERSATIONS

perceived threat that the Culpable Attempter poses.³ The value of the Culpability Account is that it provides a principled explanation as to who is liable to defensive killing and who is not.

McMahan correctly notes that Innocent Projectile cannot be said to have created a moral asymmetry between the projectile and the defender such that killing the projectile may be justified. But the same can be said of all nonculpable threats. McMahan's Responsibility Account is just a line in the sand between innocents.

3. I cannot defend the Culpability Account here, though I will say that the question of whether one may appropriate the Culpable Attempter for one's use rests on a far broader principle of moral forfeiture than the Culpability Account requires.

CAN "MORAL RESPONSIBILITY" EXPLAIN SELF-DEFENSE?

WHITLEY R.P. KAUFMAN*

Jeff McMahan provides us with a thought-provoking examination of the problem of self-defense. His critique of the Rights Account and the Culpability Account seem to me quite correct. McMahan's suggested alternative is the Responsibility Account, according to which liability to defensive force is based on "moral responsibility for an objectively unjustified threat of harm."

But the problem is to explain how one can lack culpability and yet have sufficient moral responsibility to be liable to being killed. A good example of this problem is the Conscientious Driver, who has taken every conceivable precaution to avoid harming pedestrians, but who through a "freak event" becomes a danger to a pedestrian; the pedestrian is (McMahan argues) permitted to shoot the driver. Saying that every driver knowingly accepts a risk of harming others seems unconvincing, especially given that this extremely low-probability event was totally unforeseeable. Suppose, for example, that the probability of this freak event was equivalent to or even smaller than that in the cell-phone case. Does that change the conclusion? What if the cell-phone user had some inkling of the potential danger but ignored it?

As to the Tactical Bomber, McMahan thinks that his theory prohibits the civilians from using defensive force against Tactical Bomber. But if the Conscientious Driver is liable to defensive force given that driving involves a foreseeable risk of harming innocents, then why isn't the Tactical Bomber liable to defensive force

* Associate Professor, Department of Philosophy, University of Massachusetts-Lowell.

SELF-DEFENSE AGAINST INNOCENT THREATS

on the same grounds, since dropping bombs involves a far greater risk of harming innocents than does merely driving? Indeed, in the Tactical Bomber case it is stipulated that the harm to innocents is not merely foreseeable but actually foreseen. Even more troubling, it is in fact problematic whether Tactical Bomber is justified in his bombing mission at all under McMahan's Responsibility Account: Because the civilians have no responsibility at all, pose no threat, and are not causally implicated in any harm, it would seem that harming them is simply impermissible. We cannot of course simply assume that the Tactical Bomber is "objectively justified"; the question at issue is whether and why such a mission is permissible given the foreseeable harm to innocent civilians, in contrast with the Terror Bomber who deliberately harms the same number of civilians. If the Terror Bombing is wrong, why is the Tactical Bomber's equally harmful action permissible? In both cases, the civilians are equally not morally responsible and hence not liable to harm on this theory.

One might also wonder how the Responsibility Account is to distinguish between Innocent Aggressors and Innocent Threats (e.g., the Falling Man). For McMahan, the Falling Man is not liable to defensive force because he has no responsibility. But how does this case differ from the Psychotic Aggressor, who is caused to harm you by organic changes in his brain chemistry? He would seem to be no more responsible than Falling Man, yet intuitively it is permissible to kill the Psychotic Aggressor. The same holds for all Innocent Aggressors: Why should the fact that they are "acting" make a moral difference, if they are equally morally blameless and equally causally responsible as the Innocent Threat? Again, it does not seem that the unspecified concept of "moral responsibility" can provide much guidance here. Indeed, one might say that the very problem of self-defense is determining what constitutes sufficient moral responsibility to be liable to defensive force—or for that matter, whether moral responsibility is required at all, as in the case of Innocent Aggressors.

More fundamentally, what is it that determines if one is morally responsible, especially given that culpability is not required? Presumably responsibility requires *causal* responsibility for a given harm, but just why is that, especially given that the criminal law does not require causal responsibility (e.g., attempted murder)? Further, we are told that causal responsibility is not sufficient, but why does causal responsibility plus nonnegligent activity (e.g., driving a car) render one liable to be killed? This sort of synergistic effect needs to be explained, given that neither alone renders one liable to being harmed.

Ultimately, the notion of "moral responsibility" seems too vague to be very helpful, since each person might have a different sense of who is morally responsible. Suppose, for example, that it seems to me that the Conscientious Driver is *not* morally responsible in any meaningful sense. How would the theory help us resolve this dispute? (Or suppose someone thinks that only *culpable* actors are sufficiently morally responsible to be liable to defensive force: then the account collapses into culpability.) We will have to await a fuller explication of the idea of

CRIMINAL LAW CONVERSATIONS

“moral responsibility” before being able to evaluate McMahan’s Responsibility Account.

DOUBTS ABOUT THE RESPONSIBILITY PRINCIPLE

VICTOR TADROS*

Jeff McMahan refines what I will call the *responsibility principle* in the following ways:

- 1) A person becomes liable to have force used against them as protection from a threat only if she caused that threat.
- 2) The threat that the person causes must have been foreseeable.
- 3) The person who caused the threat must have acted voluntarily in bringing it about.
- 4) The person creating the threat need not have been culpable.
- 5) If the threat that the person poses is objectively justified, she is not liable to be harmed.

I claim that the responsibility principle is both too permissive and too restrictive. First, consider how it is too permissive:

Lifesaver. Harry is walking by a lake and sees a boy drowning. He is the only person who can save him. He jumps in a motorboat, at some risk to himself, and races out into the lake. He gets the boy into the boat, but through exertion falls unconscious. He falls against the accelerator and the boat heads for Jake, threatening his life. The only way for Jake to save himself is to shoot Harry in the head, knocking him off the accelerator.

According to the responsibility principle Jake is permitted to shoot Harry. That is counterintuitive. What might explain the intuition? Perhaps this: unlike in the driving cases that McMahan considers, Harry had no *moral* choice but to get in the boat, with all the risks involved. Getting in the boat was *required* rather than merely permissible or justified. He takes on a risk to do his moral duty, and that risk should not be exacerbated by making him liable to be killed in self-defense by people in Jake’s position.

The same might be true in some cases not involving doing one’s moral duty. McMahan’s account has plausible results in the case of the out-of-control car. But if we slightly alter the scenario, the account looks less attractive. Consider:

Runaway Racing Car. You are a racing driver and lose control of your car completely accidentally on a difficult bend. Your head is jammed against the

* Professor, School of Law, University of Warwick.

SELF-DEFENSE AGAINST INNOCENT THREATS

steering wheel and the only way to divert the car away from me, and thus to save my life, is to shoot you in the head. I would not have faced this threat had I not jumped over a safety barrier to keep spectators away from the race track.

The responsibility principle indicates that it is permissible for me to shoot you in the head. But that seems wrong, even though driving a racing car is merely permissible. For in this case, I had adequate opportunity to avoid the threat. McMahan may reply that I am responsible for being threatened. True enough. But now we need a richer account of the principles underlying responsibility than McMahan provides.

The responsibility account is also too restrictive. Consider:

Double Hit Man. Barry hires a hit man to kill Yolanda. Cynthia has also hired a hit man to kill Yolanda. Cynthia's hit man arrives first. Yolanda uses Barry as a shield to protect herself against Cynthia's hit man.

and

Double Hit Man 2. Evelyn hires a hit man to kill Wayne. Fred has also hired a hit man to kill Wayne. Both hit men arrive at the same time. Because of where they are standing, Wayne can only use Fred as a shield against Evelyn's hit man and Evelyn as a shield against Fred's hit man. He manages to do that, causing the deaths of Evelyn and Fred.

Surely Wayne doesn't have to allow himself to be killed in *Double Hit Man 2*. That would be an extreme consequence of the responsibility principle. If that is true, Yolanda is permitted to use Barry as a shield in *Double Hit Man*.

Does this lead to the permissive consequences of the culpability account that concern McMahan? Consider:

Transplant. Ursula points a pistol at Larry and pulls the trigger, falsely believing the pistol to be loaded. Larry is dying of heart failure. Larry forcibly transplants Ursula's heart into himself, killing her.

However, we can distinguish this case from the *Double Hit Man* cases. If everyone did their moral duty, Larry would die of his heart condition. If he were permitted forcibly to transplant Ursula's heart into himself, he would be a beneficiary of her unjust attack. But now consider:

Transplant 2. The same as *Transplant* except Larry's condition is a consequence of a moral wrong.

Is Larry now entitled to perform the transplant? I'm not sure. We need arguments to restrain the scope of self-defense, but the responsibility principle is surely too constraining in the *Double Hit Man* cases.

CRIMINAL LAW CONVERSATIONS

REPLY

JEFF MCMAHAN

I find it reassuring that Haque and Wallerstein find my account of self-defense too restrictive, Ferzan and Kaufman find it too permissive, and Tadros thinks it is both. It would be more discouraging had they all agreed in their criticisms.

For Haque, the claim that each person has a right of self-defense unless she forfeits it is morally foundational. Yet he does not discuss the relation between the right of self-defense and the right against attack. As his discussion of the tactical bomber shows, it does not follow from a person's having a right of self-defense that it is wrong to attack her. Suppose that my life is threatened by a Nonresponsible Threat and that I have not forfeited my right of self-defense. In Haque's account, I may kill the Nonresponsible Threat. But does the Nonresponsible Threat retain her right of self-defense? Do I retain a right against defensive attack? Haque's account seems silent.

Suppose that to preserve my life, I must kill an innocent bystander. According to Haque, the bystander retains her right of self-defense. But do I retain mine? Or do I forfeit my right of defense when I attack an innocent bystander in self-preservation, though not, as most people think, when I attack a Nonresponsible Threat in self-defense? If so, what explains the difference? Haque's account gives no answer. We require an independent theory of forfeiture—that is, of liability. The Responsibility Account provides that, but an account that appeals only to the rights of self-defense of innocent victims does not.

Haque is right about proportionality. How a bad side-effect is caused may matter to how it affects proportionality. If a defender's means of self-defense also kills an innocent bystander, that death counts differently from that of an innocent person whom the attacker would later have saved had he not been killed by the defender.

Wallerstein's view is closely related to Haque's, though she offers a criterion of liability to defensive attack. The reason it is permissible to kill a Nonresponsible Threat in self-defense but not to kill an innocent bystander in self-preservation is, on her view, that the former but not the latter is liable by virtue of being causally responsible for an unjust threat. Causal responsibility is relevant because it is connected with the ownership of bad luck. Just as a person under lethal threat may not transfer his bad luck to an innocent bystander by killing the bystander in self-preservation, so a person who has the misfortune to threaten the life of another without being responsible for posing that threat must bear the costs of her own bad luck.

It is, however, not the falling man who has bad luck. If no one does anything, he will not be harmed, for there is a cushion below him. It is that cushion, an immobilized person, who has bad luck. May he transfer that bad luck to an innocent person, the falling man, by killing him? To override the presumption against

SELF-DEFENSE AGAINST INNOCENT THREATS

killing, there must be a basis of liability. That basis is lacking in this case, just as it is when a person can save himself only by killing an innocent bystander. Of course, the person beneath the falling man is not liable either; thus, if the falling man can shift himself in midair, he must do so to avoid killing. But if he has that power and does not exercise it, he is no longer a Nonresponsible Threat.

Ferzan and Kaufman challenge not only the Responsibility Account's distinctions among morally innocent Threats but also its distinction between those who innocently pose a threat and those who engage in the same activities but have better luck and do not pose a threat. In the case of the latter, I accept an option Ferzan does not mention: that among reciprocal risk-imposers, moral luck can determine liability. Among morally innocent Threats, I do attempt to distinguish those who are responsible from those who are not, and to distinguish degrees of responsibility and liability among the former.

But Ferzan and Kaufman are right that the distinctions are difficult to draw with precision and sometimes seem to have only slight moral significance. They are also right that there is no identifiable threshold above which acts foreseeably impose a significant risk but below which they do not. There is also no precise line separating acts that culpably impose a significant risk from those that do not. Yet Ferzan and Kaufman seem to accept that a culpability criterion of liability is coherent nonetheless. One function of courts is to adjudicate difficult cases in the areas of indeterminacy within which vague thresholds for responsibility, culpability, and foreseeable risk seem to lie.

In the well-known hypothetical example in which a hiker in a snowstorm breaks into a cabin and burns some furniture, the hiker is not liable to defensive force but is liable to pay compensation. There may also, contrary to Ferzan's suggestion, be cases in which a person is liable to defensive force but would not be liable to pay compensation—for example, when it is unavoidable that one of two persons must die, one bears a slight degree of responsibility for this while the other bears none, and all other things are equal. Because tort law must be formulated to satisfy requirements other than those of corrective justice, liability in tort law may diverge from liability to defensive action.

Like Ferzan and Kaufman, Tadros argues that the Responsibility Account is too permissive. Yet the conclusion it implies in his Lifesaver example, which he says is counterintuitive, is the commonsense conclusion. While Harry acts admirably, he does not act with *objective* justification when he poses a threat to Jake; for it is not permissible to save the boy if that involves killing Jake. Tadros is right that his second case requires a richer account of responsibility than I have provided. But it can be given. It would have to take account of the contributory negligence of the spectators and the assumption of risk by the person under threat.

In my discussion of the Culpable Attempter, I questioned the Responsibility Account's assumption that causation is necessary for liability. Tadros's Double Hit Man 2 brilliantly strengthens that challenge. Intuitively, the Responsibility Account seems too restrictive here. This case may be morally distinguishable

CRIMINAL LAW CONVERSATIONS

from the Transplant cases because the instigators are culpably responsible for a continuing unjust threat, while the culpable agent in the Transplant cases in fact poses no threat at all. But there are other cases in which the Responsibility Account becomes excessively permissive in its implications in the absence of the causal requirement. Notice, though, that Double Hit Man 2 challenges *all* accounts of self-defense. Any account that relaxes the causal requirement in that case must identify an alternative constraint on permissible killing in self-preservation