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THE ROLE OF FAULT IN DEFENSIVE KILLING

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THE ROLE OF FAULT IN DEFENSIVE KILLING

Adam Betz

This paper deals with the conditions of liability to self-defense. When I use the term *liability*, I mean moral liability. This is different from desert. If I am liable to be killed in self-defense, it does not follow that I deserve to be killed (say, as a means of punishment). In short, desert entails liability but liability does not entail desert.¹ My use of the term in this paper may be stated succinctly as follows: if killing a person will neither wrong him nor violate his rights, he is *morally liable* to be killed. A person poses an *unjust threat* when he threatens harms that are neither justified nor excused. A person is *culpable* for an unjust threat if he intends the threat he poses, is a morally responsible agent, and there are no mitigating circumstances, such as duress, that excuse his actions. A person is at *fault*, but not culpable, for an unjust threat if he is a morally responsible agent, has acted unreflectively, recklessly, though not maliciously, in a way that poses risks to others. Though culpability entails *fault*, fault does not entail culpability; as I will explain later, a person does not have to be culpable in order to be at fault for an unjust threat.²

According to Judith Thomson, culpability is not relevant to determining whether a person is liable to be killed in self-defense. According to Jeff McMahan, culpability and fault are relevant factors in justified self-defense, but neither condition is necessary. On my view, culpability is not a necessary condition for liability, but fault is. In support of this thesis, I will present and criticize both Thomson and McMahan's views of liability to defensive action.

¹ I am here following a distinction made by Jeff McMahan in "The Basis of Moral Liability to Defensive Killing" p. 386.

² For the other definitions of relevant terms, consult the glossary.

Because they state that fault is not necessary for liability, these theories have counterintuitive results. In short, I hope to show that these theories are too liberal and we should therefore embrace fault as a necessary condition of liability.

Before turning to my criticisms of Thomson and McMahan, I will sketch my preferred account of self-defense, which is a version of McMahan's account. It is the *Justice-Based Account* of the right of self-defense, which, quoting McMahan "treats the morality of self-defense as a matter of justice in the distribution of harms."³ For instance, a culpable attacker is liable to defensive action because he voluntarily created a situation in which someone must be harmed. The culpable attacker could have avoided this situation, so it is permissible, as a matter of justice, for him to be forced to suffer the costs of his own actions rather than imposing them on someone who is innocent⁴ (assuming that the defensive action is necessary and proportionate). To put the point in different terms, there is an asymmetry between the Attacker and the Victim deriving from the attacker's culpability; he alone is responsible for the fact that someone must suffer harm, so he is liable to self-defensive action.

The Justice-Based account of self-defense is given strong support by a hypothetical example developed by McMahan. I quote his example at length:

Suppose... that a mine shaft has collapsed, leaving two miners trapped in a small open space. A radio communication has informed them that rescuers will reach them in five hours, but their instruments indicate that, while there is enough oxygen to allow one of them to survive for more than five hours, their oxygen supply will be depleted within three hours if both continue to breathe. Suppose further that one of the miners (call him the "innocent miner") then learns two facts: first, that the other miner (the "culpable miner") deliberately engineered the collapse of the shaft in an effort to kill him and, second, that the culpable miner has a small oxygen tank that will allow him to survive for two hours after the oxygen in the shaft runs out.⁵

³ *The Ethics of Killing* p. 402

⁴ Ibid p. 402 and "Self-Defense and the Innocent Attacker" pp. 256-63

⁵ "Self-Defense the Innocent Attacker" p. 258

Intuitively, it seems permissible for the innocent miner to kill the culpable miner (the *Culpable Cause*) in self-preservation. The culpable miner does not presently pose a threat to the innocent miner, so in that respect he is also a Bystander. However, his culpable past action caused the present situation in which someone must be harmed. The only difference between a culpable attacker and a culpable cause is that the culpable attacker's action lies in the present whereas the culpable miner's action lies in the past. This difference seems to be morally insignificant. The Justice-Based Account implies the permissibility of killing a person in self-preservation whose culpable past action causes a present threat to one's life (once again, subject to the requirements of necessity and proportionality). This is a merit of the account.

On McMahan's analysis of the Justice-Based Account, other conditions besides culpability can ground the right of self-defense. A person does not necessarily have to be culpable to lower the moral barriers against harming him. On his analysis, which he calls the *Responsibility Account*, culpability is an important factor in justified self-defense, though not a necessary condition for liability. He contrasts this with what he calls the *Culpability Account*. According to the Culpability Account, culpability is a necessary condition for liability to defensive action. My preferred view of the Justice-Based Account departs from McMahan's in that I maintain that a stricter condition of liability is necessary for justified self-defense. I will return to McMahan's conditions of liability later, but for now I turn to Thomson's account, which states that culpability has no bearing on whether a Victim may kill in self-defense.

Thomson offers a rights-based approach to the ethics of killing in self-defense. She distinguishes among three cases: (1) A *Villainous Aggressor* (which is the same as what I call a culpable attacker) who culpably tries to harm you. Thomson's example is a villainous truck driver trying to run you down. (2) An *Innocent Aggressor* (or as I call it, an innocent attacker), is

an attacker who is not a villain but for reasons beyond his control, nonetheless aggresses against you. Thomson's example is a temporarily psychotic truck driver trying to run you down. (3) What Thomson calls an Innocent Threat is the same as the nonresponsible threat defined in the appendix. Thomson's example of a nonresponsible threat is a fat man whose body is blown off a cliff by a gust of wind and hurled at another person with lethal force.⁶ Almost everyone will agree that a Victim may kill the Villainous Aggressor in self-defense. However, by Thomson's own admission, many people are reluctant to conclude that it is permissible to kill nonresponsible threats in self-defense. She argues that this view is mistaken.

Thomson's project is to find a morally relevant property that is held in common among a culpable attacker, an innocent attacker, and a nonresponsible threat—that is, something that is true of each case which makes killing in self-defense permissible. The property she identifies is this: It is true in each case that if you do not kill them, they will kill you. Because you are not morally liable to be killed, these aggressions and threats are, by definition, impermissible. She claims that you therefore have rights against them that they not kill you. “What makes it permissible for you to kill the two drivers and the fat man,” according to Thomson, “is the fact that they will otherwise violate your rights that they not kill you, and therefore lack rights that you not kill them.”⁷ What is important on her account is that the culpable attacker, innocent attacker, and nonresponsible threat, by threatening to kill you unjustly, thereby threaten your right against them that they not kill you and so forfeit their right not to be killed. The fact that these attackers and threats lack a right not to be killed, and the Victim retains such a right, makes self-defense permissible in each case.

⁶ For purposes of clarity I will use the terms ‘culpable attacker,’ ‘innocent attacker,’ and ‘nonresponsible threat’ in place of Thomson's terminology.

⁷ “Self-Defense” p. 302

Thomson believes that culpability is irrelevant to the permissibility of killing in self-defense: culpable attackers, innocent attackers, and nonresponsible threats are morally on a par.⁸ Thomson thinks it is clear “that if the aggressor [or nonresponsible threat] will (certainly) take your life unless you kill him, then his being or not being [culpable] for his aggression is irrelevant to the question whether you may kill him.”⁹ In short, what makes self-defense permissible on Thomson’s account is not the fact that the person is blameworthy or is aggressing against the Victim, but simply the fact that his actions or mere movements or presence qua physical object—morally responsible or not—create a *forced choice among lives* (see glossary).

I think there is a fatal flaw in Thomson’s view since she dismisses culpability as a relevant factor in justified self-defense. I will return to this worry later. For now I will address Thomson’s claim that nonresponsible threats violate a Victim’s right not to be killed. I argue that this claim is false. It is true of nonresponsible threats that they will kill the Victim if she does not kill them. But it does not follow that nonresponsible threats violate any right of the Victim’s. Rights are constraints against the actions of *morally responsible* agents. Thomson agrees. Thomson has claimed elsewhere that for a person to have a right against me is for me to be under a behavioral constraint—or, alternatively, for me to have a duty not to behave a certain way toward that person.¹⁰ It would be ludicrous to say, for instance, that a falling boulder violates your right not to be killed. Nonresponsible threats are, by definition, not morally responsible for the threat they pose. However, in her article “Self-Defense,” Thomson explicitly denies that responsible agency is necessary for the violation of a right. Thus she says, “I think

⁸ Thomson’s use of the term ‘fault’ is synonymous with my use of the term ‘culpability.’ I use the term fault in a way that does not imply culpability. Again, for purposes of clarity, I will use the term culpability where Thomson uses the term fault.

⁹ Ibid p. 286

¹⁰ Thomson, *The Realm of Rights* p. 77.

there are good reasons in general to say that agency is no more required for violating a right than fault is.”¹¹ Hence, Thomson’s account of self-defense is inconsistent with her theory of rights.

Suppose we accept the thread of Thomson’s view that claims that agency is not necessary for rights violations. If we are willing to say that agency is not necessary for rights violations, we will spill into some absurd implications. Surely we do not want to say, and Thomson does not want to say, that things that are incapable of any agency are potential violators of rights. A plummeting boulder is not an agent, but it will surely kill you if it lands on you. It is ridiculous to suppose that the boulder therefore violates your right not to be killed. But the falling fat man is in the same position *qua* physical object as a falling boulder. There are undoubtedly great differences between the two—namely, that it would be of moral consequence to kill the former and innocuous to destroy the latter, other things being equal. But can it seriously be thought that a falling boulder, because it will kill you, therefore violates your right not to be killed? Does it even make sense to say that you’ve got rights against boulders that they not fall on you? This is quite a stretch. But in terms of the threat posed to your life, it is difficult to see why a falling fat man but not a boulder could be a potential rights-violator.¹² If we are in agreement about this point, we ought to acknowledge that responsible agency is necessary for a rights violation. And as already indicated, Thomson has endorsed this view elsewhere.

Frances Kamm has attempted to address this objection by showing that there is a difference between a falling boulder, on the one hand, and a Nonresponsible Threat like Thomson’s fat man, on the other. The fat man unlike the boulder “is in a position where [he]

¹¹ “Self-Defense” p. 302

¹² I arrived at these points independently, but they are further elucidated in McMahan’s “Self-Defense and the Innocent Attacker” pp. 275-6, and Otsuka’s “Killing the Innocent in Self-Defense” p. 80

should not be first.”¹³ In other words, contrary to what I have said, the fat man is at least *to some degree* responsible for the threat he poses. According to Kamm,

The position of this [threat] is different from that of a natural object... because [he] is not a stone but, rather, a person who should not be in an inappropriate position relative to others. One person’s inappropriate location vis-à-vis another raises moral questions no matter how it comes about, whereas the unfortunate location of objects does not.¹⁴

This response is counterintuitive. It is unclear why the position of the Nonresponsible Threat, unlike a natural object, raises the moral questions Kamm supposes. From what I can tell, Kamm’s passage is an ad hoc stipulation. For if the fat man lacks responsible agency for the threat he poses, then it is difficult to see how his position relative to another person is morally inappropriate. Michael Otsuka interprets Kamm to mean that people, unlike natural objects, are able to take precautions to prevent themselves from becoming Threats, and that is how the body of a Threat can be in an inappropriate location vis-à-vis another.¹⁵ If this is the case, then on Thomson’s view, the fat man is a potential rights-violator, but a falling boulder is not.

I remain dubious as to the prospects of the Rights-Based Account, even with Kamm’s revision. Strictly speaking, there is always a remote possibility that I will be swept away by a gust of wind, and then hurled at another person. How is this possibility grounds for liability to defensive action? Let me try to flesh out what I think is the most plausible way a proponent of Kamm’s view might answer this question. Kamm might say that the fat man knew when he decided to leave the house that there was a possibility—albeit a slim one—that he would be transformed into a lethal human projectile. Since the fat man could foresee this possibility, he assumes some degree of moral responsibility when he goes for his picnic by the cliff. Engaging in normal activities that nonetheless carry a remote possibility of threatening others would be, on

¹³ Kamm, *Creation and Abortion* p. 47

¹⁴ Ibid, p. 47

¹⁵ “Killing the Innocent in Self-Defense” p. 81

the argument I am attributing to Kamm, adequate grounds for moral responsibility and therefore for liability to defensive action.

But even this line of argument is extraordinarily implausible. It is difficult to believe that I assume a tacit liability to defensive action when I engage in the normal activities of everyday life, such as simply leaving the house. In addition, it does not seem that the fat man's failure to fend off a cyclone makes him liable to attack when he is hurled at a Bystander. Many of our normal, everyday activities have the potential to cause harm to others. Indeed, there is a remote possibility that if I leave the house I will be kidnapped, knocked unconscious, and hurled at a Bystander with lethal force.

I will nonetheless grant Kamm's (liberal) conditions of moral responsibility for the sake of argument. If seemingly innocuous activities like enjoying a picnic lunch near a precipice can ground moral responsibility and therefore liability, let us suppose instead that the fat man is an extremely cautious recluse who avoids the (allegedly) risk-imposing activities of everyday life. He keeps his house locked up at all hours and never leaves for fear that his body might be transformed into a human projectile. Despite the fat man's obsessive precautions, a villain manages to break into the fat man's house, knock him unconscious, and hurl him off the cliff toward a Bystander. In this case, the fat man took every precaution possible to prevent himself from becoming a lethal human projectile. So no conditions of moral responsibility seem to apply to him for his status as a threat. In terms of the threat he poses, the plummeting fat man is like the falling boulder. He does not violate the Victim's right just because he falls on her, for responsible agency is a necessary condition for rights-violations. Kamm's theory does not draw a principled distinction between the boulder and the fat man in this case, and it is difficult to see

how one might be drawn. Thus, from the fact that a passive threat like Thomson's fat man will kill you unjustly, it does not follow that he will violate any right of yours not to be killed.

In addition to these problems, Thomson's view is not equipped to deal with the case of the culpable cause discussed earlier.¹⁶ Thomson might say that the culpable miner's *past action* will cause the violation of the innocent miner's right not to be killed. However, since Thomson holds that culpability is irrelevant to permissibility, her account has extreme implications. For instance, suppose that the miner who causes the collapse is not culpable for that action. Perhaps he inadvertently engineered the collapse while attempting to save the lives of other miners, making him a *Justified Cause*. According to Thomson's view, the justified past actions of the Justified Cause will violate the rights of the innocent miner, so the innocent miner may kill the Justified Cause in self-preservation. But since the Justified Cause is a Bystander, Thomson's account implies that killing Bystanders is permissible in certain cases—an implication which offends against her own theory,¹⁷ and is incongruent with common-sense morality. Though Thomson's account is an account of self-defense, I think the fact that it fails to satisfactorily accommodate cases in which killing in self-preservation seems clearly permissible, we have further grounds for doubting the cogency of the rights-based approach. Moreover, the case of the culpable cause shows that culpability must play a vital part in any viable account of self-defense; that Thomson treats culpability as irrelevant I think constitutes a decisive reason to reject the Rights-Based Account.

Thomson is perhaps the most sophisticated exponent of the view that culpability has no bearing on the permissibility of self-defense. We have seen, however, that the view that

¹⁶ The subsequent analysis relies heavily on McMahan's argument in "Self-Defense and the Innocent Attacker" pp. 280-81

¹⁷ Killing the Justified Miner in self-preservation constitutes a *use-of-a-bystander* case, which Thomson argues is impermissible. See *Self-Defense* pp. 290-92

culpability is irrelevant is implausible. On McMahan's account, other conditions besides culpability can ground the right of self-defense. A person does not necessarily have to be culpable to lower the moral barriers against harming him. On his analysis, which he calls the *Responsibility Account*, culpability is a vital factor in justified self-defense, though not a necessary condition for liability. Other theorists have claimed that culpability is a necessary condition for liability; this is what McMahan calls the *Culpability Account*. In contrast to both of these accounts, I endorse the view that, while culpability is not necessary for liability, some degree of fault is. My view is intermediate between the Responsibility Account and the Culpability Account. I have two tasks relevant to establishing this intermediate view. First, I will show that there is a less stringent condition of fault that does not entail culpability, thereby showing that culpability is not a necessary condition of liability to defensive action. Second, I will show that this non-culpable version of fault is itself a necessary condition of liability to defensive action.

Before turning to these considerations, I will again address why culpability is not a *sufficient* condition of liability to defensive action.¹⁸ Consider a paradigm case of justified self-defense. If an attacker is culpably trying to kill you, a Bystander, it may seem that that is sufficient to ground objective justification for killing him in self-defense. It is possible, however, that the culpable attacker's action will not succeed. He may change his mind before he can carry out his devious intentions. Perhaps his gun is, unbeknownst to him, unloaded. We can imagine an even more contrived case in which the culpable attacker has a computer chip lodged in his brain which will inhibit his actions before he is able to harm his potential Victim. His actions, though culpable, will prove unsuccessful. He will not in fact harm the Victim at all. Given what it is reasonable for the potential victim to believe at the time of the attack, we will

¹⁸ Thomson and McMahan both allude to this issue. I hope to put the question to rest.

excuse her if she kills the culpable attacker. But her lack of morally relevant knowledge does not provide *justification* for her act of killing.¹⁹ Because the attacker does not, as a matter of fact, pose a threat, the Victim's actions fail to meet the requirement of necessity and so are not objectively justified. (Necessity is, crudely put, the condition that killing in self-defense is the last resort.) These possibilities show that culpability is not a sufficient condition of liability to self-defense.

Thus, we must determine instead if culpability is a *necessary* condition of liability. As indicated above, I will try to show that a condition other than culpability can ground liability to defensive action and, moreover, that this condition is indeed a necessary condition for liability.

McMahan's Responsibility Account states that liability is a matter of degree. I agree. His conditions of liability, in descending order of stringency, are as follows:

- 1) *Culpability* ("the creation of a forced choice among lives in a way that is neither justified nor excused").
- 2) *Fault without culpability* ("the creation of a forced choice among lives by a responsible individual in a way that is unjustified but excused").
- 3) *Responsibility without culpability or fault* ("the creation of a forced choice among lives by a responsible individual who has not acted impermissibly").²⁰

According to the Responsibility Account, culpability provides the strongest basis for liability to defensive action. It is not, however, a necessary condition of liability. Since I think it is plausible to accept McMahan's second condition as grounds for liability, it follows that culpability is not a necessary condition of liability to defensive action. Hence the account's claim that liability is a matter of degree. Since I reject the Culpability Account's claim that culpability is necessary for liability, I turn to the plausibility of the third condition of McMahan's Responsibility Account and show that it is too liberal a condition to ground liability.

¹⁹ McMahan "The Basis of Moral Liability to Defensive Killing" p. 391

²⁰ *The Ethics of Killing* p. 403

McMahan's example of condition 3 is paraphrased as follows:

Case 1, The Conscientious Driver: This driver is a cautious driver who takes meticulous care to maintain the safety of his vehicle. There is nonetheless an inadvertent brake and steering failure that causes his car to careen off the road toward a Bystander.

The car now poses a lethal threat to the Bystander. According to McMahan, the reason the conscientious driver is liable to defensive action from the Bystander is that he is morally responsible for an unjust threat. The driver "satisfies [condition 3] because he is a morally responsible agent who has acted voluntarily in a way that *foreseeably* imposed risks on others and now threatens the pedestrian with unjust harm" (emphasis mine).²¹

According to McMahan, any defensive action aimed at a person who is neither culpable nor at fault is subject to even more stringent requirements of necessity and proportionality than those that hold for parties who are culpable or at fault. In addition, the Victim may be required to retreat from the scene or divide the burden with the driver, if possible. But if killing is necessary and proportionate, then the Victim may kill the conscientious driver in self-defense. It seems counterintuitive that the conscientious driver is liable to self-defense, but McMahan offers an explanation. The point is that the driver chose to go out driving in several tons of potentially life-threatening steel. Fatal car accidents are a foreseeable consequence of driving. Though driving around is generally an innocuous activity, the conscientious driver loses his full moral immunity for two reasons. For one, he lacks sufficient positive moral reasons for driving. Presumably, he is driving for one of the typical self-interested reasons for which most people drive. Second, though the driver could not know that his driving would cause a forced choice among lives given his epistemic limitations, because his act of driving is the direct cause of a lethal threat to a Bystander, his act is unjustified. Since the driver chose to engage in this risk-imposing activity, according to McMahan it is reasonable, as a matter of justice, for him to

²¹ "The Basis of Moral Liability to Defensive Killing," p. 394.

assume the costs of his foreseeably dangerous action rather than imposing those costs on the Bystander. The conscientious driver does not voluntarily or intentionally pose the threat. Rather, he foresaw that some action of his might impose risks on others.

If I am interpreting McMahan correctly, the conscientious driver meets the following two requirements presupposed by condition 3 of the Responsibility Account: 1) the foreseeability condition and 2) causal responsibility for an unjust threat. I will support my claim that fault is necessary for liability by showing that McMahan's third condition of liability—that is, responsibility-without-fault—is too liberal.

There is reason, based on McMahan's own analysis of self-defense against nonresponsible threats, to doubt the cogency of his third condition of liability. For if people who are not in any way at fault can be liable to self-defense just for engaging in the normal activities of everyday life, the Responsibility Account seems vulnerable to the same objections I earlier leveled at Kamm. McMahan acknowledges this problem. He notes that it is difficult to draw a principled line between the conscientious driver and, say, an asymptomatic carrier of a flu virus that is potentially fatal to young children and the elderly. By hypothesis, many of our commonplace activities are potentially risk-imposing, and it seems an overly-stringent demand on people that they assume a tacit liability to self-defense just for going about their daily lives. As we have seen, eating a picnic lunch by a cliff is potentially risk-imposing. Pushing a shopping cart in a crowded parking lot is potentially risk-imposing (I leave the reasons why to the imagination of the reader!). Even going for a walk in a crowded area is potentially risk-imposing.

Consider the following variation of Thomson's fat man case:

Case 2, The Cautious Fat man: This fat man takes the same route to work everyday via a heavily populated area. Today, there is some construction work going on. Unhappily,

the fat man—who usually walks cautiously—bumps into a fellow pedestrian, trips over the curb, and takes a tumble into a (rather wide) open manhole near the construction site. He plummets in the direction of a worker inside the tunnel.

This fat man is all too acutely aware that his body mass could prove potentially lethal to others—especially when it is inserted into these contrived philosophical examples. Yet he nonetheless chooses to walk to work in a densely populated area, near a construction site, hauling several hundred pounds of potentially harmful body mass. His transformation to a lethal human projectile is a foreseen consequence of his everyday, seemingly benign activity. Moreover, the fat man is the direct cause of the threat now facing the tunnel worker. For while the fat man is not at fault for bumping into a pedestrian and being veered off course, the fat man *is* relevantly causally involved in bringing about the forced choice among lives. The fat man meets the two underlying requirements of McMahan's third condition of liability, foreseeability and causation. The fat man is presumably responsible for being fat, responsible for walking in the populated area, and is to some extent responsible for bumping into the pedestrian.

Just as the conscientious driver's car is foreseeably dangerous to others, so is simply walking around with an abundance of body mass. In addition, the fat man lacks positive moral reasons for walking in the crowded neighborhood. Presumably, he is walking around for the typical self-interested reasons for which most people walk around. He could have stayed at home and thereby avoided these allegedly risk-imposing activities. Moreover, because the fat man's act of walking around has caused a forced choice among lives, his act of walking around is objectively unjustified. Or so the Responsibility Account implies.

Foreseeing that one's body could cause a risk to others when one simply goes about the activity of everyday life seems a flimsy basis for liability; so does faultlessly driving a car. But

if we accept the Responsibility Account, and its conditions of foreseeability and causation, it seems we must accept that the fat man is liable to defensive action as a matter of justice.

My intuition is that he is not liable. This is consistent with the fact that he is not all that different from the fat man in Thomson's example. But the fat man in Thomson's example is a nonresponsible threat. And according to McMahan's own account, there is no right to kill nonresponsible threats in self-defense.²² I agree. However, it is difficult to see what makes the fat man in Thomson's example a nonresponsible threat who is not liable, but the fat man in my case and the conscientious driver responsible threats who are liable.

According to McMahan's Responsibility Account, the cautious fat man and the conscientious driver, unlike Thomson's fat man, meet condition 3's requirements of foreseeability and causation. But unless we know how much foreseeability is necessary, we cannot claim that Thomson's fat man is not responsible for a risk-imposing activity. How potentially risk-imposing must a person's activities be to ground liability? Thomson's fat man could have simply stayed at home behind locked doors in fear that a villain or a tornado would turn him into a human projectile. Surely this is unreasonable. Many of our everyday activities impose foreseeable risks on others. Given condition 3, where can we draw the line between liable and not-liable on the spectrum of cases? I can think of no such principled line.

In order to avoid these counterintuitive implications, I suggest that fault should be a necessary condition of liability. A person who poses an unjust threat must depart in certain ways from normal moral and social life (i.e., he is culpable or malicious, he acts voluntarily in causing the forced choice among lives, his actions are negligent, and so on). As already noted, however, culpability is not the only sort of fault. My view of justified self-defense also treats liability as a

²² *The Ethics of Killing* pp. 401-411. See also Michael Otsuka "Killing the Innocent in Self-Defense" and Nancy Davis "Abortion and Self-Defense."

matter of degree, though it is not as liberal as McMahan's Responsibility Account. A person can be at fault for posing a threat without being culpable, as condition 2 of the Responsibility Account states. The distinction in the literature I have read between conditions 2 and 3 of the Responsibility Account is unclear. As I understand it, a person is at fault (though not culpable) for an attack if he acts voluntarily, unreflectively, and recklessly in a way that poses certain or probable risks to innocent persons. Consider the following example:

Case 3, The Negligent Driver: This driver tends to be forgetful about maintaining the safety of his vehicle, which is itself a junk heap. Unhappily, unbeknownst to him, his car has some brake and steering problems. While he is out driving, the brakes and steering fail and his car is veered off course in the direction of a pedestrian.

The negligent driver does not drive with any malicious intent to harm others, so he is not culpable for the threat he poses to the pedestrian. But it seems intuitively obvious that he is at fault for not taking the reasonable precautions to maintain the safety of his vehicle. He ought to be aware, given his negligence in maintaining the safety of his vehicle, that there was a greater possibility of his act of driving imposing risks on others. The driver is liable to self-defense because he should have known, or could have known had he reflected, that since his vehicle was not well-maintained, he was engaging in a foreseeably dangerous activity. Because he is at fault for driving his poorly-maintained vehicle, there is I think a moral asymmetry between them that favors the pedestrian's life over the driver's. The driver has departed in a specific way from the norms of ordinary moral and social life: he assumes the responsibility of taking any reasonable precautions to maintain the safety of his vehicle, but since he did not, it is permissible, as a matter of justice, for the pedestrian to make the negligent driver suffer the costs of his voluntary and wrongful action rather than suffering those costs herself. In short, the negligent driver assumes moral liability for the risk he voluntarily creates. It seems to me that this lesser degree

of fault is enough to ground liability to self-defense, even though the driver is not culpable. In addition, if I am right that the third condition of the Responsibility Account is too liberal, I think there is good reason to conclude that the second condition of McMahan's account is a necessary condition of liability.

I have argued that a person must be at fault in order to be liable to defensive action. My argument was twofold. First, I showed that Thomson and Kamm's view that fault is irrelevant to the permissibility of self-defense is untenable. Second, I endeavored to show that the third condition of McMahan's Responsibility Account is too liberal; by divorcing liability from fault, it treats the normal activities of everyday social life as bases for liability. This is implausible. Like McMahan's account, my revised view treats liability as a matter of degree. A person does not have to be culpable in order to be liable to defensive action. My view treats liability as a matter of degree by treating fault as a matter of degree. In short, liability to defensive action entails fault for an unjust threat.

Glossary of Terms

Attacker: An individual who initiates a threat against another person through his action.

Culpable Attacker: An attacker who creates “a forced choice among lives in a way that is neither justified nor excused”²³ The culpable attacker intends the threat he poses, is a morally responsible agent, and there are no mitigating circumstances, such as duress, that excuse his actions.

Division of the Burden: In some instances, it may be possible for the Victim to “take up the slack” or share the burden with her assailant (i.e., the Victim may suffer a broken arm and the Attacker a broken leg, rather than one or the other suffering death). The Victim is not normally required to take up the slack if the attacker is culpable, but may be required to do so in the case of an Innocent Attacker or Threat. This is one way to avoid having to make a choice among lives.

Forced Choice Among Lives: a person creates a situation in which someone must suffer a harm (i.e., death).

Forfeiture: Sometimes the Victim’s right of defense is strong enough that her Attacker loses his right to counterattack against her.²⁴

Innocent Attacker: This attacker poses an unjust threat to the Victim. However, because this attack is not the result of the attacker’s responsible agency, his actions are excused. (An example of an Innocent Threat is a person whose coffee has been drugged, rendering him temporarily violently psychotic.)

Innocent Bystander: Bystanders are not causally involved in the threat posed to another person’s life. There is a strong presumption against killing Bystanders as a means of self-preservation.

Necessity: Killing in self-defense is the last resort; there is no comparably effective way to avert the harm to oneself other than killing in self-defense.

Nonresponsible Threat: Also referred to as a *passive* or *technical* threat, this is a threat “whose mere movements *qua* physical object or mere presence constitutes a threat to one’s life.”²⁵ As the name suggests, nonresponsible threats are not morally responsible for the fact that they threaten the life of another.

²³ McMahan, *The Ethics of Killing* p. 403

²⁴ The foregoing terminology is ubiquitous in the literature on self-defense. My discussion draws largely on Kamm’s *Creation and Abortion* pp. 45-55, and McMahan’s *The Ethics of Killing* pp. 401-4.

²⁵ Davis, p. 190

Other-Defense: A third party defends the victim against an Attacker or nonresponsible threat. It is usually permissible for a third-party to kill a culpable attacker in defense of the Victim. Third-parties may also be permitted to help the Victim *share the burden* with the culpable attacker, the innocent attacker, or the nonresponsible threat, though the status of other-defense against innocent attackers and nonresponsible threats is controversial.²⁶

Proportionality: the harm one inflicts in self-defense is proportionate to the harm one thereby averts. Every case of self-defense is subject to both the requirements of Proportionality and Necessity. (Proportionality and Necessity are also recognized as the *Jus ad Bellum* requirements in just war theory.)

Retreat: the Victim may be required to flee or back down from a confrontation if she can emerge relatively unscathed; this is another way to avoid making a choice among lives.

Self-Defense: A person commits an act of self-defense when she directs harm at someone who threatens to harm her. She may do so by redirecting the harm that threatens her, or by creating a distinct harm and directing it at the person who poses the threat.²⁷

Victim: the person who is threatened by an Attacker or Nonresponsible Threat.

²⁶ See Davis "Abortion and Self-Defense"

²⁷ McMahan, *Self-Defense and the Innocent Attacker* p. 255

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