

KILLING, SELF-DEFENSE, AND BAD LUCK

Richard B. Miller

ABSTRACT

This essay argues on behalf of a hybrid theory for an ethics of self-defense understood as the Forfeiture-Partiality Theory. The theory weds the idea that a malicious attacker forfeits the right to life to the idea that we are permitted to prefer one's life to another's in cases of involuntary harm or threat. The theory is meant to capture our intuitions both about instances in which we can draw a moral asymmetry between attacker and victim and cases in which we cannot. I develop the theory by attending to instances of intentional, villainous harm and instances of involuntary danger—the latter of which are a matter of bad luck. I call some bad luck cases "Interpersonal Lottery Conflicts." These cases refer to potentially lethal conflicts into which parties are thrown as victims of circumstance. Although neither party has a moral advantage over another, that fact does not preclude permissible self-defense.

KEY WORDS: *self-defense, forfeiture, partiality, innocence, luck, objectively unjust threat*

1. Rights and Conflicts

It is a commonplace in ethical theory if not in legal practice and social custom to say that occasions exist in which one person may permissibly kill another in self-defense. Despite that general agreement, *why* we grant any such permission is not obvious. In what follows, I will examine moral foundations that support the intuition that self-defensive killing is sometimes permissible. I will focus on cases and circumstances in which killing is necessary to defend against a potentially lethal threat, and I will do so by focusing on deontic arguments that rely in different ways on the idea that we have a *right* of self-defense.

In the ensuing discussion, I will presume an overlap between religious and philosophical ethics. Philosophers have an interest in the ethics of self-defense given the challenge of aligning two concepts: (1) the equality of human beings, along with their right to life and (2) asymmetries between persons as a basis for discounting one person's interests and thus permitting lethal action against him. Religious ethicists, notably those interested in Western theistic traditions, may have a more difficult time getting an ethics of self-defense off the ground. Some religious traditions hold that God is sovereign over

matters of life and death and that assigning humanity decision-making authority on such matters is to usurp God's providence and dominion over creation. That argument moves the ethics of self-defense to a theological level and has pacifist implications, but it errs by conflating sovereignty and decision-making authority. It has been qualified by the notion that God delegates to humans the moral responsibility of adjudicating conflicts, including lethal conflicts, as an exercise of the created good of human freedom and reason (see Barth 1961).¹ On those terms, then, philosophers and religious ethicists can have an overlapping interest in the ethics of self-defense. One obvious and perhaps the most powerful way to think about self-defense is through the idea of rights insofar as rights include, among other things, self-regarding entitlements or moral claims that justify respect and protection.

However, we can say little else about such rights without giving more careful attention to cases in which exercising the right of self-defense might be necessary. By turning to such cases we learn three things: first, that the ethics of self-defense is fraught with potential quagmires; second, that justified self-defense is premised on viewing some rights as conditional rather than unconditional; and third, that rights do not provide a comprehensive or unified account for addressing the ethics of self-defense.

These insights materialize from questions posed by real and hypothetical cases. One set of questions concerns how to conceive of justified self-defense when an attacker intends no malice or harm as opposed to those cases when she does. If one has a right to defend oneself from violence, we must ask if it matters whether the threat of attack is erroneous, accidental, or intentional. Does a potential victim have fewer (or no) rights against someone who unwittingly poses a threat to her life, a threat that materializes through no fault of the attacker? Suppose as well that an attacker's violence is justified, say in police work or a just war. Does such justification prohibit a potential victim from acting in self-defense? Additional questions bear on the rights that an attacker—even a malicious one—might have in response to his victim's self-protective conduct. Does a malicious attacker have a right of self-defense against the victim's self-defensive action? Typically we condemn the disproportionate use of force used in self-defense. Does a malicious attacker forfeit the right of self-defense against a victim's proportionate self-defensive violence but reacquire that right when the victim's use of force becomes excessive? To think that rights "come and

¹ Roman Catholics may have less difficulty with affirming such an overlap, given their emphasis on reason as a mediating principle in the hierarchy of goods. See, for example, McCormick 1981. For more general discussions of common morality in religious and philosophical ethics, see Outka and Reeder 1993.

go” assigns to them a kind of contingency if not fickleness that principles are supposed to lack. How, more generally, are we to think of the symmetries and asymmetries between assailants and victims in the ethics of self-defense if each person has a right to life that he is permitted or even obligated to protect?

Such questions suggest that the ethics of self-defense framed in terms of rights is, if not a hopeless venture, considerably more complex than we might first imagine. At the very least, these questions point to how the “open-textured” nature of moral rules and principles—their generality and indeterminacy—is exposed when they conflict (Brennan 1977; Porter 1995; and Miller 2005). The right to life points to the value of human equality, whereas justifications of lethal violence allow us to rank one life over another. If the right to life is universal, then it would seem at a *prima facie* level that both a victim and his assailant have an equal right to kill in a situation of lethal conflict. These thoughts pose serious and difficult questions for the ethics of killing and self-defense.

That said, I believe that a rights-based approach to the morality of self-defense is possible and desirable. Such an approach can both express and refine our intuitions about justified homicide. I also believe that a rights-based approach to the ethics of killing and self-defense is incomplete and that a comprehensive approach must be a hybrid theory that weds attention to rights with a permission to prefer oneself to others in cases of stark trade-offs. I will describe such an approach as a Forfeiture-Partiality Theory that is meant to capture our intuitions about instances in which we can draw a moral asymmetry between attacker and victim and cases in which we cannot. I will develop the theory by attending to instances of intentional, villainous harm and instances of involuntary danger—the latter of which are a matter of bad luck. I call some bad luck cases “Interpersonal Lottery Conflicts.”² These cases refer to potentially lethal conflicts into which parties are thrown as victims of circumstance. Although neither party has a moral advantage over the other, that fact does not preclude permissible self-defense. Or so I will argue.

2. Cases: Paradigms and Analogies

With these preliminary points in mind, consider eight cases along with factual features and moral concepts that underlie them. First is

² I call these Interpersonal Lottery Conflicts to distinguish them from other conflicts that are a function of bad luck, for example, Trolley Cases in which an individual is forced to decide between killing one person to save many or killing many persons to save one. These I will call “Intrapersonal Lottery Conflicts”; they require one person to distribute misfortune to others but not with regard to his or her own interests. See Foot 1978; Thomson 1986; and Reeder 1996.

Villainous Aggressor, which I will present as the paradigmatic instance of justified self-defense. Judith Jarvis Thomson presents a hypothetical scenario:

You are standing in a meadow, innocently minding your own business, and a truck suddenly heads toward you. You try to sidestep the truck, but it turns as you turn. Now you can see the driver: he is a man you know has long hated you. What to do? You cannot outrun the truck. Fortunately, this is not pure nightmare: you just happen to have an antitank gun with you, and can blow up the truck. Of course, if you do this you will kill the driver [1991, 283].

You are being forced to choose between your life and Aggressor's life. Note these facts: the aggressor is acting intentionally in ways that will end your life; he is acting with malice toward you; he is acting with unfettered will and knowledge about his actions and their consequences; and you have done nothing to provoke his violent aggression. Villainous Aggressor is culpable for his actions insofar as he is carrying them out with knowledge and will.

Second is *Suicidal Attacker*:

You are sitting on a crowded bus and notice a person walking down the aisle. As she inadvertently brushes past a passenger, her jacket raises up and you see a series of explosives strapped to her mid-section. Knowing that she has been seen, Attacker decides that she must now act. She begins to reach down to pull a trip wire. She does not intend to kill you in particular but to kill random members of the local population in hopes of achieving reprisal in response to political grievances. You have a weapon and have time to use it against Attacker. If you do not kill Suicidal Attacker, she will take your life, her life, and those of everyone on the bus.

Here we have many of the same features as in the paradigmatic case: Suicidal Attacker is acting intentionally in ways that will end your life, and you have done nothing to provoke her actions. However, unlike Villainous Aggressor, she is not, strictly speaking, forcing a choice between her life and your life, as she is willing to lose her life in the destruction she is seeking to cause. Moreover, Suicidal Attacker is not seeking to kill *you*. She is acting from malice toward members of the local population and others like them. You are merely part of a group that she has chosen at random to kill along with herself. Like Villainous Aggressor, Suicidal Attacker is culpable for her actions insofar as she is carrying them out with knowledge and will.

Third is *Villainous Cause*. Jeff McMahan writes:

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. The innocent miner therefore has two options: he can do nothing and die of asphyxiation while the culpable miner survives or he can take the culpable miner’s tank by force, thereby killing the culpable miner in self-preservation [1994, 258].

Like Villainous Aggressor, Villainous Cause has acted intentionally in ways that will end a potential victim’s life, and the potential victim has done nothing to provoke the threat. Unlike Villainous Aggressor and Suicidal Attacker, however, the threat posed by Villainous Cause is not immediate. He is not currently engaged in causing harm, nor is he contributing to any immediate danger to the innocent miner. Here we have moved a small step from the paradigmatic case insofar as the cause of danger is less direct or proximate. Villainous Cause’s *past* malicious action has created a *current* threat for which he is morally culpable.

Fourth is *Innocent Attacker*:

You are alone in an elevator with an esteemed colleague who also happens to be an outstandingly strong and gifted athlete. Someone laced his morning coffee with a drug that sends him into psychotic and paranoid fits. He now erroneously imagines you as an escaped serial killer who is about to kill him. Psychotic Esteemed Colleague leaps into action, seeking to strangle you to death with a cord that he happens to have in his tattered tweed jacket. It is not his fault that he is going to kill you if you do not resist him; he is not villainously or maliciously aggressing against the “real” *you*. However, he is attacking you, and he will in fact kill you if you do not act fast to use force—lethal force if necessary—in self-defense.

Innocent Attacker is acting to end your life and you have done nothing to provoke aggression. What is obviously missing in this case is the fault of Innocent Attacker. Morally speaking, he is innocent of any wrongdoing, because he is not acting with true knowledge about you, and he cannot be faulted for lacking true knowledge about you. Here we have moved one significant step from the first three cases, because fault does not pertain to Innocent Attacker’s actions. Whether this difference in culpability is morally significant—whether its absence morally precludes self-defensive conduct, including potentially lethal conduct—is arguable.

Fifth is *Passive Threat*.³ Thomson writes:

You are lying in the sun on your deck. Up in the cliff-top park above your house, a fat man is sitting on a bench, eating a picnic lunch. A villain now pushes the fat man off the cliff down toward you. If you do nothing, the fat man will fall on you, and be safe. But he is *very* fat, so if he falls on you, he will squash you flat and thereby kill you. What alternative do you have? Well, you only have time to shift the position of your awning; if you do this, the fat man will be deflected away from you. But deflecting him away from you will be deflecting him past the edge of the deck down onto the road below [1991, 287].⁴

Passive Threat's fall is forcing a choice between his life and yours, and you did nothing to provoke the threat.⁵ Like Innocent Attacker, Passive Threat lacks fault. Unlike Innocent Attacker, however, Passive Threat lacks agency.⁶ Passive Threat cannot be described as *doing* or *having done* anything to you. Hence we have moved one or two steps away from the cases of Villainous Aggressor, Suicidal Attacker, and Villainous Cause, and perhaps one step from the case of Innocent Attacker. Passive Threat is entirely passive in the danger he poses to Victim. Nonetheless, unless Victim acts, Passive Threat's fall will kill him. Whether Passive Threat's lack of agency is morally significant—whether it precludes justified self-defensive conduct, including potentially lethal conduct—is arguable.

Sixth is *Just Attacker*:

You are a police officer on duty and are alerted to the presence of a convicted criminal who has recently escaped from the state penitentiary. He is in the vicinity where you are walking your beat. As you turn into an alleyway, you encounter Criminal to his surprise. Criminal begins to run, hoping to escape. You pursue Criminal, jump on top of him, and bring him to the ground. Criminal then attempts to resist you with physical force. A vigorous scuffle ensues. You increase your efforts and use your baton briefly and efficiently to subdue him.

Assume that Just Attacker (Police Officer) is not acting with malice and that Just Attacker's use of the baton is proportionate to subduing

³ By "passive" here I mean involuntary, to be distinguished from other usages that imply voluntary actions of omission, for example, "passive euthanasia." Omissions can be voluntary, which would mean that they are passive in an entirely different sense than the one I am using here.

⁴ Thomson's own locution is "Innocent Threat." See also Nozick 1974, 34–35; Davis 1984, 190–92.

⁵ Consider the case of a developing fetus that endangers a woman's life. For a discussion, see Davis 1984.

⁶ Innocent Attacker acts erroneously and thus acts *involuntarily*. Passive Threat's threat is accidental; his "action" is *nonvoluntary*.

Criminal. To Criminal, Just Attacker is posing an immediate physical threat. However, Just Attacker is just insofar as he is acting under the authority of the law to capture someone who has been tried and convicted of breaking the law. Just Attacker is free from blame for his action; those who are injured by it are not wronged even if they are harmed.⁷ Criminal would seem to have no justification for self-defense given his injustice and the justice of his opponent.

Seventh is *Justified Attacker*:

Tactical Bomber is a member of armed forces fighting a just war against a totalitarian regime intent on genocide. She is flying a mission to drop bombs onto a crucially important munitions factory on the remote edge of a densely populated city. Noncombatant is a member of that city and does not support the war effort of his country; he believes that his country's belligerent actions are unjust. Tactical Bomber's bombs threaten to destroy Noncombatant, his family, and his neighborhood because they might miss their target. But Tactical Bomber's mission threatens to do little more to the civilian population or infrastructure; the overall risks are proportionate to the bombing mission. Noncombatant and his neighbors can acquire anti-aircraft weaponry through the black market. If they do not use it, they will leave themselves and their families vulnerable to death or permanent injury. If they do use it they are attacking someone who is acting justifiably [see McMahan 1994, 271].

Facts here complicate those of Just Attacker. Tactical Bomber is justified in her action even though there are potential victims who would appear to be wronged by it. They have done nothing to weaken their moral claims of immunity from harm. Unlike Just Attacker, Justified Attacker is acting in ways that seem simultaneously justified and unjust, all things considered. Whether Noncombatant has a justification for self-defense against Tactical Bomber, including potentially lethal self-defense, is arguable.

Eighth is *Innocent Bystander*:

You are a Vacationer in a foreign city. Walking down a relatively empty street you find yourself fired upon by a local thug who mistakes you for

⁷ Much depends on where and why lines are drawn. If agency *simpliciter* is the morally relevant fact in these first six cases, then one should draw a sharp line between cases four and five (Innocent Attacker and Passive Threat). On the other hand, if *culpability* is the morally relevant fact in these first six cases, then one draws a sharp line between cases three and four (Villainous Cause and Innocent Attacker). However, if the morally relevant fact is that danger to the victim is immediate and undeserved, then we draw the line between the fifth and sixth cases (Passive Threat and Just Attacker), but we might exclude the third case (Villainous Cause), because the relevant cause for producing the threat in that case is not immediate. For an argument that focuses on whether the threat to the victim is immediate and fair, see Uniacke 1994. Crucial to sorting out these differences, moreover, is whether our focus should be agent-based or victim-based, as I will make plain below.

one of his enemies. He is shooting at you from a hidden location, and you lack any means of self-defense. You notice a young boy playing in a side alleyway who happens to be the thug's nephew, and you quickly pull him in front of you. If the thug sees the boy, he may decide to cease shooting. If he decides to shoot, and shoots accurately at you, he will kill the boy but not you. You are defending yourself not by attacking the assailant, but by using the boy as a protective shield.

Here you are creating a potential victim in order to protect yourself. Innocent Bystander has neither acted with willful malice toward you, nor has he posed any kind of inadvertent threat to you. He is subjectively and objectively innocent. For that reason, we can say that Vacationer has put him in danger, undeservedly. I will presume that this example illustrates a paradigmatic case of impermissible self-defense (or self-protection). Our cases thus stand on a line ranging from paradigmatically permissible (Villainous Attacker) to paradigmatically impermissible (Innocent Bystander) self-defense.

One way to approach this line, and the ethics of self-defense more generally, is this: what is at stake is not only whether a case is one, two, or three steps removed from the first paradigmatic case, but *how far* each step takes us from that case.⁸ Put differently, one question is: what difference (if any) does it make that culpability is absent in Innocent Attacker, or that culpability and agency are absent in Passive Threat? These questions are matters of practical judgment, a nonformalized skill. The role that such judgment plays in these kinds of discussions is inescapable. However, judgment should be informed by concepts and moral principles, centrally revealed by paradigmatic cases.

It is not obvious, however, that we need all of the features of the first paradigmatic case to justify self-defensive action in other, non-paradigmatic instances. For that matter, it is not clear whether we should be focusing on the rights of attackers, which may be forfeited, or on the rights of victims, which may be protected regardless of whether an aggressor forfeits his rights.⁹ The former perspective focuses on the subjectivity of the aggressor and what his deliberate choices say about him. Call this an *agent-based approach*. The latter perspective focuses on objective entitlements that potential victims have regardless of the attitude others take toward them, not on an

⁸ These thoughts are informed by discussions of analogy in practical reasoning. See Jonsen and Toulmin 1988; Miller 1996.

⁹ McMahan prefers the language of "agent-centered accounts" and "target-centered accounts," which reverses the terms I am using here. For McMahan, an agent-centered account focuses on the victim, while the target-centered account focuses on the assailant. Because the Fault-Based Forfeiture Argument (see section three below) concentrates on the agency of the assailant, I will refer to it as an agent-based approach. See McMahan 1994, 268.

attacker's subjectivity. Call this a *victim-based approach*. A shift in perspective from agents to victims, from subjective forfeiture to objective entitlements, is crucial, however frequently it is overlooked in ethical discussions of justice, rights, and justifiable self-defense.

Of course, a shift in perspective in the first paradigmatic case makes no difference to our intuitions: whether we say Aggressor forfeits his rights or that Victim has a right not to be unjustly killed or injured, it seems clear that self-defense is justified.¹⁰ That is why the first case is so compelling: self-defense is obviously permissible from either angle. Similarly with the last case: whether we focus on the fact that Innocent Bystander has done nothing to forfeit his rights or that he has an objective right not to be undeservedly killed or injured, using him as a protective shield is obviously unjustified. However, in other cases, a shift in perspective can make a difference in what we might say. If we focus on an agent's forfeiture of rights as a condition of justifying self-defense, then many forms of self-defense that might seem intuitively or at least arguably permissible would be clearly prohibited. Such is the challenge presented by the cases of the Innocent Attacker and Passive Threat. On the other hand, if we focus on the rights of potential victims against objectively unjust aggression, then self-defense would be permissible in those two cases because the question of forfeiture is moot. With these puzzles in mind, let us first determine how conceptions of rights and duties can capture and refine our intuitions in the case of Villainous Aggressor and then proceed to our analogous (and more ambiguous) cases.

3. Fault-Based Forfeiture

One way to consider justified self-defense in the paradigmatic case is to say that the victim has the right to self-defense because Villainous Aggressor forfeits his right to life by intentionally endangering the victim's life. Call this the *Fault-Based Forfeiture Argument*. This argument, defended by David Rodin, is an agent-based approach and crafts a twofold theory of the right of individual self-defense.¹¹ The first part interprets various aspects of the right followed by a fundamental justification for the right. The right is understood as a liberty-right to use necessary and proportionate force in response to "an imminent

¹⁰ I will put aside prohibitions of using lethal force in self-defense that are based on divine command, for example, Matthew 5.

¹¹ See also Donagan 1977, 81–90, 163. Donagan invokes a hybrid theory, joining attention to forfeiture and guilt, on the one hand, with attention to the status of innocent victims, on the other. Donagan's argument is under-theorized, and I will not examine it further here.

attack against life, bodily integrity, or certain basic liberties” (Mapel 2004, 81). The right is justified on the grounds that the aggressor is morally at fault for the stance he has taken toward his victim and thus forfeits his own right to life to the defender. Possessing a right to life on this account is not unconditional; it is contingent upon respecting the rights of others. It is grounded, according to Rodin, in an interpersonal normative relationship:

Rights against being killed are dependent on a relationship of reciprocity: one has the duty not to kill or harm others just so long as they adhere to the same duty toward you. It is the breakdown in this relationship of reciprocal respect constituted by the act of aggression that explains why aggressors fail to have the right not to be killed by their victims, and why defenders possess the right to kill in the course of self-defense [2004, 65].

Rodin understands paradigmatic cases of aggression and self-defense in Kantian terms. We are to look at the aggressor-defender relationship as having certain normative qualities captured by the ideas of autonomy and moral fault. One cannot forfeit a right accidentally, but only by exercising deliberative agency. That is to say, one can only forfeit a right as a subject, as a bearer of duty, not as a thing or object. Rodin writes:

If one is to be justified in inflicting harm in an act of defense, then there must be an appropriate normative connection between the wrongfulness of the threat one is seeking to avert and the person one harms; the threat must derive from him as a moral subject, not just as a physical entity. We might say that the threat we respond to must be *his* threat rather than simply a threat of the world at large which happens to manifest itself through his body [2002, 88].

On this view, an attacker forfeits his rights to life and liberty “only on the basis of what he or she does or is as a moral subject,” not as a thing or object. A potential victim is thereby permitted to use necessary and proportionate force in self-defense against persons whose interests can be discounted owing to the moral implications of their actions as subjects. Violence thus “manifests an appropriate attitude to *him*, and to something he is doing” (Rodin 2002, 88). A moral asymmetry between assailant and victim results from deliberate actions that the assailant takes as an autonomous person toward another person. Forfeiture follows from moral fault.

Rodin sharpens this line of argument by asking us to consider the case of Innocent Bystander (2002, 81–83). To use Innocent Bystander for self-defensive protection would be to treat him as a means only. Rodin then asks us to compare the case of Innocent Bystander with those of Innocent Attacker and Passive Threat. When considering the

latter two cases, the key question is: what about them, if anything, seems to put them closer to the paradigmatic case of justified self-defense (Villainous Aggressor) than to the paradigmatic case of impermissible self-defense (Innocent Bystander)? Or is it better to conceive of them as closer to the paradigmatic case of impermissible self-defense?

One way to address this question is to say that Innocent Attacker and Passive Threat are *causes* of danger in ways that Innocent Bystander is not. Innocent Bystander in no way facilitates danger to a potential victim; Innocent Attacker and Passive Threat stand in some causal nexus, the result of which is life-threatening danger to a victim. That fact would seem to put significant distance between the cases of Innocent Attacker and Passive Threat, on the one hand, and Innocent Bystander, on the other.¹²

For Rodin, however, this line of reasoning fails. On his Kantian account, it is not enough to say that causal responsibility grounds a moral claim of this sort, because we cannot ascribe *moral* agency either to Innocent Aggressor or Passive Threat. Each is “simply a threat of the world at large which happens to manifest itself through his body” (Rodin 2002, 88). For that reason, Innocent Aggressor and Passive Threat do not “act” (if the word is at all appropriate) in ways that justify us in denying them the right to life. Their actions are the result of causal forces over which they have no control; they are more effects than causes themselves. Drawing a moral inference from this kind of “causality” is too thin a reed on which to conclude that they forfeit the right to life. In Innocent Attacker and Passive Threat, Victim is less a victim of moral wrongdoing than bad luck. Rodin concludes that we have rights of self-defense only against Villainous Aggressor (and those like him) and no one else. Like Innocent Bystander, Innocent Attacker and Passive Threat forfeit nothing by their actions since nothing they have “done” has enlisted their deliberate volition vis-à-vis a potential victim. The effect of this argument is to draw a sharp moral line between the first three cases above and all the rest.

Rodin’s attention to the moral importance of fault, and its connection to forfeiture, captures a basic intuition: we may distinguish

¹² Davis produces an argument close to this, claiming that Innocent Attacker is, by virtue of his or her causality, technically guilty of causing a threat. She writes: “What matters is what has been termed *causal* or *technical innocence*; attackers are not technically innocent when their actions, behavior, or (in some instances) mere movements *qua* physical objects, or mere presence constitutes a threat to another’s life.” Passive Threat, on her argument, cannot be said to be acting causally. Whether one agrees with Davis about drawing a line between Innocent Attacker (guilty) and Passive Threat (innocent), Rodin would argue that Davis’s account of technical causality omits attention to the defining question of moral agency. See Davis 1984, 188–92.

morally between Villainous Aggressor and Victim—we may draw a moral asymmetry between them—because we think that there is something about villains that deny them the immunities that typically surround persons. The language of forfeiture provides an idiom, perhaps a useful fiction, for interpreting villainous aggressors in such moral terms. One’s maliciousness allows us to discount one’s interests.¹³

The language of fault and forfeiture seems sufficient for explaining justified self-defense. The obvious question posed by Innocent Aggressor and Passive Threat is whether the concepts of fault and forfeiture are necessary for the ethics of self-defense. Put differently, the question is whether the terms of an agent-based approach to the first paradigmatic case are too restrictive, especially if they lead us to draw Rodin’s conclusion that violence against innocent attackers—attackers without fault—is unjustified. If Rodin is correct, much of the killing in war, for example, is unjustified insofar as it involves killing individuals who are attacking not villainously but under duress or as victims of propaganda or other forms of coercion. That is to say, what appear to be unjust aggressors in war may in fact be innocent threats, the killing of whom is unjustified on his account. Rodin’s restrictions may have pacifist implications in that they seem to rule out many forms of killing that we ordinarily deem acceptable in war.¹⁴

Consider concrete examples from international affairs. If Rodin is correct, self-defensive action against some terrorists may be unjustified. Imagine that the hijackers on 9/11 entirely misconstrued their victims as agents of danger and evil, and suppose that they acted either under duress or as guileless victims of militant Islamic propaganda. Suppose that they, like Psychotic Esteemed Colleague, were objectively wrong about the persons they were attacking. Suppose, further, that their religious training was akin to brainwashing.¹⁵ The Fault-Based Forfeiture Argument, focusing on culpable wrongdoing, would appear to prohibit acting in self-defense against hijackers whose actions resemble Innocent Attacker more so than Villainous Aggressor or Suicidal Attacker. At a minimum, it would involve the impossible task of determining in advance whether the hijackers are morally culpable or innocent before acting in self-defense.

Similarly, the attacks on 9/11 bear some resemblance to Passive Threat. Suppose that Flight 93 had not been commandeered by its civilian passengers and piloted to Pennsylvania—that it was

¹³ The phrasing is from Wasserman 1987, 358.

¹⁴ Rodin avoids these implications by providing a justification of war as a form of law enforcement in 2002, 163–88.

¹⁵ Consider the case of Patty Hearst.

proceeding on target to land either on the White House or the Capitol. The potential destruction would have been caused by a moving projectile. Imagine as well that armed forces intelligence picked up the flight on radar and had the capacity to destroy the plane before it landed, thereby saving hundreds of lives and governmental infrastructure. Unlike the case of Suicidal Attacker, here it would not be possible to kill only an agent of destruction; it would be necessary to kill others as well in order to save a group under attack. On Rodin's account, such action would appear to be unwarranted because it would have meant deliberately killing innocent people.¹⁶

4. Double Effect and Objectively Unjust Threat

In my view, the potentially restrictive implications of Rodin's argument can and should be resisted. The concepts of fault and forfeiture produce a premise that is stronger than necessary to justify self-defensive violence. What then can we say about cases in which such concepts are not relevant?

One way to approach this question is to shift attention from rights that an agent forfeits to rights that a victim is permitted to protect, and how those rights might be undeservedly violated by someone else. Whether or not a threat or attack is malicious, we may justifiably draw a distinction between one's own life and another's given the objective right not to be killed, an entitlement that is more stringent, all else being equal, than the duty to save or benefit another.¹⁷ Under carefully defined conditions, it would seem permissible to use force in self-defense regardless of whether the danger posed by another is deliberate, accidental, or erroneous.

Aquinas produces an argument along such lines, one that has been adopted by several contemporary natural law theorists.¹⁸ Aquinas asks whether it is permissible for a private person to kill in self-defense, and

¹⁶ This case may be easier to address than double-effect arguments might suggest. One could argue that intentionally destroying the airplane is justified on the view that the passengers' lives would be lost anyway. This "nothing is lost" argument is premised on the idea that it is better to sacrifice fewer than more rights to life when a choice between them is forced. For a discussion, see Reeder 1996, 58–63. The argument need not presume necessity or situations of forced choice. For an application of the "nothing is lost" argument outside of such conditions, see Outka 2002. These cases exemplify what I call *Intrapersonal Lottery Conflicts* as opposed to *Interpersonal Lottery Conflicts*.

¹⁷ On these two duties—their interpretation, specification, and application to cases of killing and letting die—see Reeder 1996.

¹⁸ The literature is vast. Modern writers who develop Aquinas's line of reasoning include Anscombe 1981; Finnis 1983; and Finnis et al. 1987, 309–19. I will not pursue the specifics of their arguments here. For fuller discussions of double effect, see Woodward 2001; Reeder 1996, 106–53; and McIntyre 2001.

he answers in the affirmative on the condition that force is proportionate and the agent's intention is to preserve himself. Aquinas appeals not to Forfeiture but to the idea that a potential victim is justified in defending the objective good of human life, as it is bestowed upon him by God. However, Aquinas's claims are complicated. Drawing a distinction that provides the seeds for the Doctrine of Double Effect, he writes,

A single act may have two effects, of which one alone is intended, whilst the other is incidental to that intention. But the way a moral act is to be classified depends on what is intended, not on what goes beyond such an intention, since this is merely incidental thereto. . . . In light of this distinction we can see that an act of self-defense may have two effects: the saving of one's own life, and the killing of the attacker. Now such an act of self-defense is not illegitimate just because the agent intends to save his own life, because it is natural for anything to want to preserve itself in being as far as it can [ST II-II, Q. 64, A. 7].¹⁹

Supporting Aquinas's position is his idea that we are justified in ranking the care of self over that of another. On that view, we may identify an asymmetry between one's own life and another's on the basis of certain duties to the self. Aquinas writes: "It is not necessary for salvation that a man omit the act of moderate self-defense in order to avoid killing the other man, since one is bound to take more care of one's own life than of another's" (ST II-II, Q. 64, A. 7; see also ST II-II, Q. 26, A. 5, *ad 3*).

The idea that "one is bound to take more care of one's own life than of another's" reflects Aquinas's order of charity, according to which self-love has priority over neighbor-love (ST II-II, Q. 26). This ranking is premised on the view that "it is natural for anything to want to preserve itself in being as far as it can." Accordingly, one's duties to others should not, all else being equal, entail considerable sacrifices to the self.²⁰ It also suggests the idea that existence is experienced in a first-person or agent-relative manner that allows for a certain hierarchy of value, enabling us to rank our own lives and interests over those of another, all else being equal, in conflict situations. To be sure, putting this idea in existential terms would likely seem strange to

¹⁹ Donagan misreads Aquinas by conflating Aquinas's justification of killing in self-defense with his justification of capital punishment. The latter is premised on the idea that an individual forfeits certain rights owing to sin. Killing in that instance is justified along the lines of a fault-based argument. But Aquinas's treatment of justified homicide prescind from the question of whether an assailant is sinning. Aquinas does not invoke considerations of culpable wrongdoing and forfeiture in such cases. See Donagan 1977, 163.

²⁰ Exactly what level of sacrifice or benefit would depend on the strength of the duty of aid, as Reeder discusses more generally in 1996.

Aquinas. However, his natural law idea that we are duty-bound to ourselves prior to others goes a long way toward articulating this same idea. Many would consider that an intuitive sort of claim, and below I will develop it as a supplement to the Fault-Based Forfeiture Argument.

As it stands, Aquinas's double-effect justification for some forms of killing asks too much of persons acting in self-defense. Aquinas allows for self-defense so long as a person is not intending to harm her assailant, and that expectation, psychologically speaking, appears unduly demanding. Conceptually, the problem lies in relying on a firm distinction between intending and foreseeing harm. As John C. Ford, Philippa Foot, and Suzanne Uniacke argue, holding to this distinction cannot plausibly cover all cases of killing or using force in self-defense. Ford asks:

When is it possible, psychologically and honestly, for one to avoid the direct willing of an evil effect immediately consequent upon one's action; or to put it another way, when can an action, estimated morally, be considered really twofold in its immediate efficiency? Secondly, when is the evil effect to be considered only incidental to the main result, and not a means made use of implicitly or explicitly to produce it? To arrive at a sound moral estimate in these matters, it is often helpful to consider the physical proximity of the good and evil effects [1944, 290].

Similarly, Foot proffers the "criterion of closeness" for querying Aquinas's distinction between intended and foreseen effects. On that criterion, "anything very close to what we are literally aiming at counts as if part of our aim" (1978, 22). This criterion does not undermine all uses of the distinction between intended and foreseen effects of an act, but it does complicate some act-descriptions. Uniacke gets at the issue this way: "The intended degree of force . . . and the result (killing) are the same event; the degree of force intended as necessary in the circumstances and the foreseen killing are not distinguishable effects of the same act" (1994, 109). She elaborates:

There are examples in which it is simply sophistical to deny that an agent's intention to use necessary force is an intention to kill. Whenever my honest characterization of my intentional act of *directing at this threat the degree of force I believe to be necessary in the circumstances to stop it* is a description of an act that is itself a foreseen killing (e.g. "I am stopping her by blowing her up"), then I cannot plausibly maintain that I did not intend to kill [1994, 112; emphasis in original].

The effect of scrupling the intended-foreseen distinction is to allow for a more permissive psychological stance in the ethics of homicide. That is to say, there are times when we say that taking another's life is

directly intended and that such an action is justified. As Uniacke states, "Homicide in self-defense is sometimes intentional killing" (1994, 112).

An alternative rendering, also focusing on the entitlements of a potential victim, argues that we should approach the ethics of homicide in terms of an objectively unjust threat. Such a view is defended in different ways by Thomson (1991), Reeder (1996), and Uniacke (1994). Call this the *Objectively Unjust Threat Argument*. An objectively unjust threat is one who puts a victim at risk for undeserved reasons. The modifier "objectively" is necessary to distinguish such threats from subjectively unjust threats, such as those posed by Villainous Aggressor, Suicidal Attacker, or Villainous Cause. On this line of argument, Victim in the cases of Innocent Attacker or Passive Threat has the right of self-defense whereas Criminal in the case of Just Attacker does not. Criminal has no rights against a police officer using proportionate force, because the police officer does not pose an objectively unjust threat to him. The Victims in Innocent Attacker or Passive Threat do have such rights: their lives are being undeservedly jeopardized, respectively, by our Psychotic Esteemed Colleague and Falling Fat Man.

These hypothetical cases have genuine implications for thinking about actual events. Consider, again, 9/11. According to the Objectively Unjust Threat Argument, using force against Muslim militants who hijacked the American Airlines jets and flew them into the World Trade Center would be justified. Using force to destroy Flight 93 would be justified as well. In both cases, the question is not whether the agents of aggression forfeited their rights but whether potential victims have the right to protect themselves (or be protected) from undeserved threats.

The Objectively Unjust Threat Argument has the advantage of impartially representing the interests of potential victims in cases of lethal conflict. It implies that we have certain entitlements vis-à-vis states of affairs and not only malicious persons. Not infrequently, we experience infringements of rights in this way. Pedestrians who routinely cut across a neighbor's lawn to ensure a safe passage of their children to school violate a right even if they do not mean to harm that neighbor's property.

However, the problem of the Objectively Unjust Threat Argument is that it permits too much. It justifies self-defensive action against Passive Threat on terms that are counterintuitive. Although Passive Threat may indeed pose an undeserved danger to Victim, we can hardly say that he *does* anything to deserve being harmed or injured. If we cannot say that he *does* anything, then we can hardly say that he violates a duty, such as a duty to respect Victim's rights. (A similar

concern haunts the case of Innocent Attacker.) This point is sharpened by the connection between duties and rights. One has duties to respect rights on the assumption that one can voluntarily exercise such duties. The concepts of “duty to act or abstain from acting” and “the involuntary/nonvoluntary” reside in different conceptual spheres. Put more precisely, it makes no sense to say that we have duties to abstain from nonvoluntary or involuntary actions. (We do not have the duty to abstain from hiccupping, for example.) If we have no such duty to abstain from nonvoluntary or involuntary action, then we cannot plausibly say that we have failed to honor the duty to respect someone’s right by failing to abstain from such an action. Accordingly, we cannot say that Innocent Attacker and Passive Threat violate Victim’s rights, since in each case the action in question is not voluntary. Rodin puts the point this way: Innocent Attacker and Passive Threat “are not voluntary actors and since no one can be under a duty to abstain from involuntary actions, you cannot have a claim against them that they not involuntarily kill you. Therefore it makes no sense to speak of them involuntarily violating your right to life” (2002, 86–87). The effect of this argument is to remove the harm in question from “the sphere of obligation and from the realm of evaluation in terms of rights and duties” (2002, 87).

To see this point from another angle, consider reversing perspectives in Passive Threat. Call this the case of *Self-Defensive Passive Threat*:

As he descends to the ground, Fat Man sees his Victim drawing an awning in order to divert his fall in a way that will lead to his death. Fat Man now seems to be a victim no less than the person drawing the awning. Imagine that Fat Man has a gun and can shoot Victim before Victim draws his awning. That will allow Fat Man to land on Victim and preserve his life. In order to prevent Victim from drawing the awning, Fat Man shoots Victim.

Is such an act of self-defensive homicide permissible? Assume, as I think plausible, that Fat Man has rights to self-defense in ways that Villainous Aggressor or Criminal do not. He is an innocent victim of Victim’s self-defensive actions; Villain and Criminal are harmed, but they are not wronged. Or, suppose that instead of drawing an awning, Victim could loosen the awning such that it might soften Fat Man’s fall rather than send him over the edge. Nonetheless, Victim decides to draw the awning so as to send Fat Man over the edge. With either decision, Victim can act to save himself, but surely we would distinguish the morality of one decision from the other. These facts tell us something about the difference between the two cases, and they point to the basic flaw in the Objectively Unjust Threat Argument: it fails to provide concepts that enable us properly to distinguish these cases

from each other. The most important distinction is between the cases of villainous aggression and accidental threat. Even if victims have rights in both cases, more distinctions are necessary.

McMahan captures the point in this way: “That the two cases [of villainous aggression and innocent threats] are relevantly different is revealed by the fact that they are governed by different restrictions” (1994, 265). For example, there is no strict duty to retreat from a confrontation with Villainous Aggressor (although one may have non-moral grounds for doing so on the basis of expedience). Put more generally, we would likely not fault Victim for resisting rather than retreating from Villainous Aggressor. However, there is arguably a duty to retreat from a confrontation or encounter with an innocent attacker or passive threat when such retreat offers a reasonable hope for safety. Clearly Victim of Passive Threat has a duty to draw the awning to soften Fat Man’s fall rather than send him over the edge. The latter duty is a function of the fact that the attacker has not forfeited anything, in contrast to Villainous Aggressor. Such restrictions on Victim’s conduct are less plausible when dealing with Villain.²¹

In short, we distinguish between cases of villainous aggression and accidental threats, even if we justify self-defensive action in both cases. The Objectively Unjust Threat Argument will not do, as it fails to provide a way to draw such a distinction. Thus, the problem of clarifying the justification of force against Innocent Aggressor and Passive Threat remains. For that matter, so does the problem of justifying self-defense against Tactical Bomber in the case of Justified Attacker. I believe that self-defensive actions are justifiable in these cases of accidental threat but not in terms provided by a theory that focuses on rights that subjectively unjust agents forfeit or on rights that victims have against objectively unjust dangers. Rather, we need a hybrid theory that joins an attention to culpability and forfeiture on the one hand, with attention to justified self-preference on the other. Such a hybrid enables us to justify killing in cases in which forfeiture is and is not relevant. It also enables us to see how such cases differ in morally important ways. Not every view of justified self-defensive homicide must be connected to the idea of rights.²²

5. Partiality and Interpersonal Lottery Conflicts

Consider Innocent Attacker and Passive Threat once again, and imagine Victim as having some means of lethal self-defense. Does Victim have the right of self-defense against innocent or passive

²¹ On this point, I follow McMahan 1994, 265–66; see also Davis 1984, 183 n. 17.

²² I take this thought from Mapel 2004, 83 n. 5.

threats? If the answer is yes, then do Attacker and Threat also have such rights against Victim as I propose in Self-Defensive Passive Threat? Note that Innocent Attacker, Passive Threat, and Victim are *all* innocent insofar as none intends malice. I will call these Interpersonal Lottery Conflicts (see n. 2 above). These refer to conflicts into which parties are thrown as victims of circumstance and within which they can act self-defensively. However, no party has a moral advantage over another insofar as all are innocent of wrongdoing. Establishing a basis for drawing a moral asymmetry is gnarled by this fact.

If we adopt the Fault-Based Forfeiture Argument, then we must say that no one in an Interpersonal Lottery Conflict has a justification for killing: Victim has done nothing to forfeit his right to life against Innocent Attacker or Passive Threat, and (equally important) Innocent Attacker and Passive Threat have done nothing to forfeit their rights against Victim. The Forfeiture Argument leaves us with no direction for action or adjudication in such cases except to say that any self-defensive killing is unjustified. Among other things, that fact leaves us with the odd conclusion that in Interpersonal Lottery Cases, no one acting self-defensively is in the right. None of the relevant parties has done anything to relinquish his or her moral immunities to injury or death. We are thus unable to draw a moral asymmetry between the relevant parties.

On the other hand, if we adopt the Objectively Unjust Threat Argument, we must say that everyone in an Interpersonal Lottery Conflict has a justification for killing: each person (Innocent Attacker or Passive Threat, and Victim) poses an undeserved threat to the other. Once again, for different reasons, we have no direction for action or adjudication, except to say that each person's self-defensive killing is equally justified. That fact would leave us with the odd conclusion that no one killing in self-defense is in the wrong. Here too, we are unable to draw a moral asymmetry between the relevant parties.

Both arguments, then, are such that rights are impotent to resolve Interpersonal Lottery Conflicts. That is to say, in these cases, rights cannot function conclusively as "trumps" (Dworkin 1984). They are not working to curb collective goals or utilitarian interests in their usual capacity as trumps; rather, they are in direct conflict. We cannot introduce them to resolve the conflicts between Innocent Attacker or Passive Threat and Victim according to the Fault-Based Forfeiture Argument. They cancel each other out if we introduce them along the lines of the Objectively Unjust Threat Argument. The end result is to arrive at an impasse of rights-based thinking for adjudicating bad luck conflicts of these kinds.

How, then, to proceed beyond this impasse? One path would have us claim that in some cases, we may prefer our interests to those of others.

Call this a *Partial Preference Account*, which generates a permission to prefer one's own life over another's in Interpersonal Lottery Conflicts. This idea appeals to the merits of an agent's preference for his or her own life, the natural law version of which I mentioned above.²³ Such a permission does not cite a value, such as a right, from some impartial point of view. Rather, as Nancy Davis writes, it calls "for other peoples' recognition . . . that (by my lights) my life has the greater value to me. . . . Because of the greater value that each of us understandably attaches to the continuation of his or her own life, we are (in certain circumstances) permitted to kill another person to preserve our own life, even though we acknowledge that the other person's claim to life is not weaker than our own" (1984, 192–93).

On this account, a victim may be permitted to give priority to the preservation of his own life in conflict situations simply because he values it more.²⁴ Underscoring the first-person aspect of the idea, Davis calls this an "agent-relative permission" (1984, 192). The core notion is that "a person's life is of special value to the person whose life it is" as opposed to a value more generally (1984, 193). With regard to certain choices, people are entitled to assign priority to their own interests and values over those of other people. McMahan remarks: "Virtually all of us accept some view of this sort. We do not believe that we are always morally required to give the interests of all other people the same weight that we give our own" (1994, 268).

Combining a Fault-Based Forfeiture Argument with a Partial Preference Account produces a comprehensive, hybrid approach to justified self-defense. The former guides us in Interpersonal Conflicts absent lottery conditions; it enables us to draw asymmetries based on a fact about the moral quality of an aggressive agent. The latter guides us in Interpersonal Lottery Conflicts; it enables us to draw asymmetries

²³ Recall Aquinas's argument on behalf of justified homicide from ST II-II, Q. 64, A. 7, where he states that "it is natural for anything to want to preserve itself in being as far as it can."

²⁴ The idea might be defended on Kantian grounds in this way: Victim in the cases of Innocent Attacker and Passive Threat is at risk of being reduced to an object by someone else. It makes no difference to Victim that the threat is involuntary. He is vulnerable to being reduced to a thing. That fact justifies Victim acting in ways to protect her moral status as subject, as an autonomous person. Victim has the duty to respect the humanity in herself, and that duty justifies using lethal self-defense when necessary. At stake, then, is the objective value of human dignity. This is a victim-centered formulation Kantian in spirit, one that Rodin fails to consider. As it bears on my argument, this Kantian line of thought suffers from excessive abstraction. The idea of preferring oneself out of respect for the objective value of human dignity seems counterintuitive in this sense: it is too impersonal a basis on which to articulate what is at stake in self-defense in circumstances of bad luck: *my* self. Thanks to Sandy Shapshay for pressing me on this point.

when moral advantages do not exist. Moreover, it makes for a hybrid theory that is lexically ordered. We invoke considerations of partiality in instances when rights are impotent and we must break a tie between the lives of persons involved in otherwise insoluble conflicts that are a function of the natural or social lottery. That is to say, reference to Partial Preference occurs as a second step in the application of this hybrid account. If considerations of culpability and forfeiture are sufficient, then appeals to partiality are unnecessary.

6. Objections to Partial Preference

Among possible objections to the idea of partiality, two are especially important. First, as McMahan argues, the restrictions that the Partial Preference (Partiality) Account imposes on self-defense against Innocent Attacker seem excessively strict. Partiality seems to limit harm to an attacker to the expected harm that one hopes to avert. With that in mind, McMahan writes that “the probability that the IA’s [Innocent Attacker] attack will otherwise prove lethal must pass a certain threshold in order for self-defensive killing to be justified; and there is also a limit to the number of IAs that one may kill in self-defense” (1994, 270). That is to say, justified killing must meet the test of proportionality. McMahan queries whether the proportionality limit on self-defense coincides with the level of force permitted by Partiality. He writes, “Suppose . . . that one must kill ten IAs to prevent oneself from being killed. Most people appear to believe that it would be permissible to kill all ten; but it is not clear that partiality permits one to value one’s own life at more than ten times the value of each IA’s life” (1994, 270).

These concerns, however, are misplaced. It is by no means obvious that Partiality shoulders a heavier burden of proof than any other account when it comes to determining whether a threat to one’s life is probabilistically lethal. All that Partiality provides is a basis for breaking a tie between values when consideration of rights produces an impasse. It provides a basis for ranking values, not a decision-procedure in the heat of conflict. Moreover, and second, McMahan’s representation of the proportionality limit on self-defense is mistaken. Proportionality is a principle designed to limit excessive uses of force in order to achieve an end. Killing ten attackers is not disproportionate if such killing is necessary in self-defense. The question that proportionality raises is whether one uses excessive force in mounting such a defense. Calculating risks and benefits in a strictly quantitative way regarding lives at stake is not how we are to settle matters of proportionality in these sorts of conflicts. Finally, McMahan’s way of putting the point, even if we restrict it to quantitative measures, misstates the problem. It is not that when attacked by ten assailants, one needs to

ask whether one is permitted by Partiality to value one's life "at more than ten times the value of each IA's life," but whether one is permitted by Partiality to value one's life more than the value of any one threat or assailant, regardless of the number. Partiality, in other words, would be applicable however many times one finds oneself in an Interpersonal Lottery Conflict. To suggest that Partiality would be permissible only once, or only against one threat or assailant given the value of one assigned to a person's life, is to aggregate threats rather than to properly individualize them.²⁵

McMahan's stronger objection is that Partiality, rather than being potentially too restrictive, is potentially too lax. He writes, "It is unclear how it [Partiality] can justify killing an IA in self-defense without also justify killing an IB [Innocent Bystander] in self-preservation. . . . Partiality itself provides no ground for distinguishing between the two cases" (1994, 270). However, in my view, we are to see Partiality as part of a hybrid theory, mobilized to address Interpersonal Lottery Conflicts where rights are impotent. In the case of the Innocent Bystander, rights are not impotent. The Fault-Based Forfeiture Argument would claim that using an Innocent Bystander is impermissible for reasons I provide above. No "tie" between an aggressor and victim needs to be broken in that case. Hence the problem of laxity does not arise.

Against this line of thinking, McMahan argues that if we use a hybrid account to address the cases of Innocent Attacker and Innocent Bystander, the Forfeiture piece of the argument would rule out acting in self-defense or self-preservation, thereby rendering moot any appeal to Partiality. That fact would appear to undermine appeals to Partiality even when lexically ordered in a hybrid theory. McMahan writes, "It is no use claiming that considerations of justice would simply override partiality in the case of an IB, for then they would do so in the case of an IA as well" (1994, 270). However, Forfeiture (or justice) does not "override" Partiality in the case of the Innocent Bystander. Appeals to Partiality are not admissible in that case, because the Innocent Bystander poses no threat to Victim's rights or welfare. The Fault-Based Forfeiture Argument would indeed prohibit using an Innocent Bystander in self-defense. In the case of Innocent Attacker, however, rights on the Fault-Based Forfeiture Argument are impotent to adjudicate conflicting claims between Attacker and Victim. Partiality may therefore be invoked to break the impasse and allow for lethal action to defend against the attack.²⁶

²⁵ For discussions, see Johnstone 1985; Kaczor 1998.

²⁶ One might say that in the case of Innocent Attacker, Attacker and Victim are thrown together into circumstances of bad luck. That is not the situation in the case of Innocent Bystander.

Perhaps a more precise way of posing McMahan's second objection is to consider a case of *Innocent* (or *Accidental*) *Cause*. Let us change the case of the miners:

Suppose that a mine shaft has accidentally 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 "innocent miner Jack") then learns that the other miner ("innocent miner Flash") has a small oxygen tank that will allow him to survive for two hours after the oxygen in the shaft runs out. Jack therefore has two options: he can do nothing and die of asphyxiation while Flash survives or he can take Flash's tank by force, thereby killing Flash in self-preservation.

Here Flash's breathing contributes to the loss of oxygen that will kill Jack (and vice versa). Jack is forced to choose between his life and Flash's in a situation in which both have equal claims to life and in which each is contributing inadvertently to the other's demise. Like Victim in *Innocent Attacker and Passive Threat*, Jack finds himself in a situation of bad luck. What would a hybrid account say to Jack about his moral options?

Like *Innocent Attacker and Passive Threat*, Flash is putting another person's life at risk. However, because his actions are not intentional, he is doing nothing to forfeit his right to life. Neither has Jack done anything to forfeit his right to life. Both Jack and Flash, then, are innocent from the *Forfeiture* point of view. It is also the case that both miners are acting in ways that put the other's life at risk.

Partiality might suggest that Jack may try to take Flash's oxygen tank, as he has grounds for preferring his life to Flash's. That conclusion would support McMahan's worry that *Partiality* might be too lax. However, that conclusion is unsound. Flash has something that Jack would benefit from using, something to which Jack is not entitled. Jack finds himself in a situation of bad luck, but Flash does not. Jack's stealing Flash's oxygen tank would be on par with *Vacationer* using *Innocent Bystander*. Jack would be using someone else (or, more precisely, his property) to his advantage, unfairly. Were Jack to attempt to steal Flash's tank, Flash would be justified in using force—lethal force if necessary—in self-defense. His rights trump Jack's putative claim to *Partial Preference*.

7. *Forfeiture-Partiality Hybrid*

At this juncture, it is important to see what a hybrid theory permits and what it excludes. On the grounds of *Forfeiture*, it permits

self-defensive killing in cases of Villainous Aggressor, Suicidal Attacker, and Villainous Cause. It prohibits Criminal from self-defensive killing in Just Attacker, prohibits using persons in Innocent Bystander, and prohibits disadvantaging potential victims in Innocent (or Accidental) Cause. However, there are Interpersonal Lottery Conflicts in which rights are impotent or, more accurately, lead to a stalemate: Innocent Attacker and Passive Threat. A lexically ordered, hybrid ethics of self-defensive homicide would allow potential victims to act if retreat were not possible.

What, then, of the conflict between Tactical Bomber and Noncombatant in Justified Attacker? Unlike our other cases, this one requires us to combine attention to particular actions and an overall state of affairs. Assuming standard just war criteria, Tactical Bomber's actions are justified insofar as (a) they seek to discriminate between legitimate and illegitimate targets, and (b) the prospective damage of her mission is proportionate to its overall aims. All things considered, her actions are justified. We can say that Tactical Bomber is not acting villainously. Nevertheless, these facts should mean little to Noncombatant, who has done nothing to bring violence upon himself and his family. Noncombatant, like the victims in Innocent Attacker, Passive Threat, and Innocent Bystander, finds himself undeservedly at risk.

Once again, appeals to rights produce an impasse. Rights are impotent to resolve this conflict insofar as both Tactical Bomber and Noncombatant are acting justifiably in their respective uses of force. What can we say to Noncombatant? Here, as in analogous cases, we should appeal to Partial Preference to justify his self-defensive actions in the likely event that retreat would pose unreasonable risks to his life. By the same token, we may justify Tactical Bomber's self-defensive actions against Noncombatant's use of anti-aircraft weaponry should evasive measures be unavailable to her.

A hybrid theory would combine a Fault-Based Forfeiture Argument with a Partial Preference Account to justify drawing asymmetries between threats and victims, and to identify how and on what terms we restrict actions available to potential victims. Call this hybrid the *Forfeiture-Partiality Theory*. Such a theory is meant to capture our sensibility that a villain's maliciousness is morally relevant to what we permit in response to his actions. It also captures our sensibility that it is legitimate to prefer one's life to another's in Interpersonal Lottery Conflicts, when rights provide no means to adjudicate competing claims. Forfeiture-Partiality thus justifies self-defensive action by victims in all of the cases above with the exception of Criminal in Just Attacker and Vacationer in Innocent Bystander. Accordingly, it justifies intentional killing in war to defend against agents who may be attacking not villainously, but erroneously or under one or another form of

coercion. This permission would obviously extend to killing terrorists who may put others' lives in danger in error or under duress. Moreover, it justifies using force not only against immediate threats, but against more remote causes of threats: those who help prepare or plan to use lethal force. Intentionally using force against such persons, all else being equal, is justified.

8. Benefit of the Doubt Amendment

Earlier, I remarked that Rodin's account is hampered by the problem of requiring us to determine in advance whether an assailant is morally culpable or innocent before acting in self-defense. Without that knowledge, one might end up killing an innocent attacker, which is forbidden by his account. At one level, such a requirement seems intuitively appealing. Using high levels of force against, say, the SS in World War II or against the Iraqi Republican Guard in the first Gulf War could be premised on the idea that these soldiers, being more allied with the purposes of a despotic regime, forfeited their rights owing to their villainy. Fewer restrictions or precautions about limiting force against them would be required, because they have clearly relinquished their moral immunity from harm. The difficulty with this idea, of course, is that it is not always easy to identify the character of assailants in the heat of conflict—not all opponents are as transparently villainous as the SS or the Iraqi Republican Guard. This problem of identifying villainy likewise afflicts a hybrid account, given that it is more permissive about using force in Forfeiture cases than in Partiality cases. In the hybrid account, it would seem necessary to determine in advance whether an assailant is villainous or innocent in the calibration of self-defensive force.²⁷ In many situations of conflict, this task of discernment and calibration would seem impossible.

For that reason, we must amend the Forfeiture-Partiality Theory with a principle that assigns the benefit of the doubt to victims to permit some uses of force in self-defense. Call this the *Benefit of the Doubt Amendment*. This amendment is connected to the following idea: whereas we might be uncertain about whether a threat is malicious or innocent, we can readily recognize when a potential victim is clearly at risk (regardless of the attacker's character).²⁸ We favor the victim's interests, in other words, given the obviousness of her perilous

²⁷ Thanks to Aaron Stalnaker and Mark Wilson for suggesting the need to address this issue.

²⁸ This is, without doubt, one appeal of the Objectively Unjust Threat Argument: it does not require that we ascertain the moral quality of a threat's (subjective) motives. It focuses on the objectivity of the danger to the potential victim.

condition and the difficulty of making discriminating moral judgments about assailants in situations of lethal danger. A victim must calibrate her self-defensive violence when facts about an assailant are reasonably clear, but in situations of uncertainty, the benefit of the doubt falls to a victim acting in self-defense.

As a practical matter, a Forfeiture-Partiality Theory enables us to understand why soldiers have a right to use force against others in battle, even against soldiers who may be fighting not with malice but under duress or ignorance. Soldiers acting in self-defense against such threats are justified in choosing their lives over others' on the premise that they cannot ascertain the moral quality of their opponents' volition. Partiality, amended by the Benefit of the Doubt, enables us to make sense of this permission.²⁹ That said, we cannot fully address the ethics of killing in situations such as war without first coming to terms with bases for using force to defend collectives. It is one thing to argue that individuals have the right of self-defense, yet quite another to argue that states have such rights. It is tempting to assume that a justification for killing in individual self-defense translates easily into a justification for the state's use of force. However, that temptation should be resisted until we understand how to mediate between individual and political morality. Unfortunately, little discussion in the ethics of war has addressed this difficult matter, which I will leave for another day.³⁰

REFERENCES

- Anscombe, G. E. M.
 1981 *Collected Philosophical Papers*. 3 Vols. Minneapolis, Minn.: University of Minnesota Press.
- Aquinas, Thomas
 1975 *Summa Theologiae*. 1256–72. Blackfriars edition. New York: McGraw-Hill.
- Barth, Karl
 1961 *Church Dogmatics*. Vol. III.4, *The Doctrine of Creation*. Edinburgh: T. & T. Clark.

²⁹ The ethics of combatant–combatant killing is under-theorized in just war doctrine, and my comments here are deliberately brief. For discussions, see Reeder 1996; Mapel 1998; Walzer 2000; Palmer-Fernandez 2000; Rodin 2002; and McMahan 2006.

³⁰ Thanks to John P. Reeder Jr., Sandy Shapshay, Emily Crouch, Glenda Murray, the editors and reviewers of the *JRE*, and members of the Ethics, Philosophy, and Politics Workshop in Religious Studies at Indiana University for comments and criticisms on an earlier draft: Byron Bangert, Jae Chung, Cheryl Cottine, Robert Crouch, Constance Furey, Nancy Levene, Sara O'Donnell, Lisa Sideris, Aaron Stalnaker, and Mark Wilson.

- Brennan, J. M.
1977 *The Open Texture of Moral Concepts*. New York: Barnes and Noble.
- Davis, Nancy
1984 "Abortion and Self-Defense." *Philosophy and Public Affairs* 13.3 (Summer): 175–207.
- Donagan, Alan
1977 *The Theory of Morality*. Chicago: University of Chicago Press.
- Dworkin, Ronald
1984 "Rights As Trumps." In *Theories of Rights*, edited by Jeremy Waldron, 153–67. Oxford: Oxford University Press.
- Finnis, John, Joseph Boyle, and Germain Grisez
1987 *Nuclear Deterrence, Morality, and Realism*. Oxford: Clarendon Press.
- Finnis, John
1983 *Fundamentals of Ethics*. Oxford: Clarendon Press.
- Foot, Philippa
1978 "The Problem of Abortion and the Doctrine of Double Effect." In *Virtues and Vices*, 19–32. Oxford: Basil Blackwell.
- Ford, John C., S.J.
1944 "The Morality of Obliteration Bombing." *Theological Studies* 5 (September): 261–309.
- Johnstone, Brian
1985 "The Meaning of Proportionate Reasoning in Contemporary Catholic Moral Theology." *Thomist* 49.2 (April): 223–47.
- Jonsen, Albert R., and Stephen Toulmin
1988 *The Abuse of Casuistry: A History of Moral Reasoning*. Berkeley, Calif.: University of California Press.
- Kaczor, Christopher
1998 "Double-Effect Reasoning from Gury to Knauer." *Theological Studies* 59.2 (June): 297–316.
- McCormick, Richard J.
1981 *How Brave a New World? Dilemmas in Bioethics*. Garden City, N.J.: Doubleday.
- McIntyre, Alison
2001 "Doing Away with Double Effect." *Ethics* 111.2 (January): 219–55.
- McMahan, Jeff
1994 "Self-Defense and the Problem of the Innocent Attacker." *Ethics* 104.2 (January): 252–90.
2006 "On the Moral Equality of Combatants." *Journal of Political Philosophy* 14.4 (December): 377–93.
- Mapel, David R.
1998 "Coerced Moral Agents? Individual Responsibility for Military Service." *Journal of Political Philosophy* 6.2 (December): 171–89.
2004 "Innocent Attackers and Rights of Self-Defense." *Ethics and International Affairs* 18.1 (March): 81–86.

Miller, Richard B.

1996 *Casualty and Modern Ethics: A Poetics of Practical Reasoning*. Chicago: University of Chicago Press.

2005 "Rules." In *The Oxford Handbook of Theological Ethics*, edited by Gilbert Meilaender and William Werpehowski, 220–36. New York: Oxford University Press.

Nozick, Robert

1974 *Anarchy, State, and Utopia*. New York: Basic Books.

Outka, Gene

2002 "The Ethics of Stem Cell Research." <http://www.bioethics.gov/background/outkapaper/html> (accessed November 2002).

Outka, Gene, and John P. Reeder Jr.

1993 *Prospects for a Common Morality*. Princeton, N.J.: Princeton University Press.

Palmer-Fernandez, Gabriel

2000 "Innocence in War." *International Journal of Applied Philosophy* 14.2 (Fall): 161–74.

Porter, Jean

1995 *Moral Action and Christian Ethics*. Cambridge: Cambridge University Press.

Reeder, John P.

1996 *Killing and Saving: Abortion, Hunger, and War*. State Park, Pa.: Pennsylvania State University Press.

Rodin, David

2002 *War and Self-Defense*. Oxford: Clarendon Press.

2004 "War and Self-Defense." *Ethics and International Affairs* 18.1 (March): 63–68.

Thomson, Judith Jarvis

1986 *Rights, Restitution and Risk*. Edited by William Parent. Cambridge, Mass.: Harvard University Press.

1991 "Self-Defense." *Ethics* 20 (Autumn): 283–310.

Uniacke, Suzanne

1994 *Permissible Killing: The Self-Defense Justification of Homicide*. Cambridge: Cambridge University Press.

Walzer, Michael

2000 *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. 1977. 3rd ed. New York: Basic Books.

Wasserman, David

1987 "Justifying Self-Defense." *Philosophy and Public Affairs* 16 (Autumn): 356–78.

Woodward, P. A., ed.

2001 *The Doctrine of Double Effect: Philosophers Debate a Controversial Moral Principle*. Notre Dame, Ind.: University of Notre Dame Press.