

JUSTIFYING THE RIGHT TO SELF-DEFENSE: A THEORY OF FORCED CONSEQUENCES

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ALTHOUGH the right to self-defense is recognized in all jurisdictions, it has proven difficult to justify. This difficulty arises from the existence of three classes of aggressors who provoke the right to self-defense—intentional aggressors, non-culpable aggressors, and non-agent aggressors—and is further complicated by the treatment of a fourth class, innocent bystanders. A comprehensive justification of the right to self-defense must explain why someone defending against each category of aggressors, including innocent bystanders, is entitled to prefer his own life over that of the aggressor; otherwise, it must identify a pertinent difference between those instances in which the right applies and those in which it does not.

Over the last three decades three main lines of argument have been advanced to justify the right to self-defense. First, the “lesser harmful results” theory argues that allowing a defender to kill his aggressor is, on balance, the lesser harmful outcome, because the aggressor alone is responsible for the situation and hence the weight of his interests ought to be diminished. Second, according to the “forced choice” argument, self-defense is explained as a mixture of a justification and an excuse. It can be considered an excuse because the defender lacks real choice, and so his act is not fully voluntary. As a justification, the forced choice theory builds on the civil-law principle of fault-based selection. The aggressor, as the one who forces the defender to choose between his own life and the life of the aggressor, ought to be the one who pays the price. The third argument is based on a rights theory. This argument retracts the core right not to be killed, and grounds the right to self-

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defense on the prevailing right of the defender over that of the aggressor. This Essay will argue, however, that none of these theories provides a satisfactory justification for the right to self-defense, especially in cases involving non-culpable and non-agent aggressors. After showing why each theory fails to account for important features of the right at issue here, I will develop a new justification based on a theory of forced consequences, and will argue that this justification succeeds where the others necessarily fail.

This Essay will proceed as follows: Part I will define the various types of aggressors. Parts II to IV will critically analyze the three justifications of the right to self-defense mentioned above. In Part V, I will develop a justification based on forced consequences. Finally, Part VI will present some concluding remarks about the scope and applicability of this new justification.

Before proceeding, however, I should add two notes of clarification. First, as I have already indicated, the right to self-defense raises a host of questions, many of which are beyond the scope of this Essay. One such question that has attracted much attention over the years is *when* the right to self-defense is justified. This question is distinct from the central question of this Essay, which is *why* the right is justified. The former question focuses on defining the necessary and sufficient conditions under which the right may be exercised, while the latter involves identifying the moral reasons underlying the right.¹ Nevertheless, the difference between the “why” and the “when” is not always clear-cut. The various theories advanced to answer the latter question at times set different boundaries on the right to self-defense, most notably on the condition of “unjust aggressor/threat.” Accordingly, I will limit discussion of these subjects to the minimum necessary for understanding the various justifications.

Second, it is important to note that although most of the literature on this subject addresses killing in self-defense, the right extends to other responses as well. In most cases, self-defense requires conduct that is far less serious than killing. The discussion in this Essay focuses on the right to kill in self-defense because it is in these most extreme situations that conflicts are brought to their full

¹There are four commonly recognized conditions: the unjust aggressor/threat, necessity, imminence, and (more arguably) proportionality.

intensity. It should be emphasized, however, that the difficulties raised by killing in self-defense are equally applicable to other types of self-defense. As such, while my discussion often refers to killing, it is meant to include less severe defensive reactions as well.

I. TYPES OF AGGRESSORS

In life-threatening situations, a defender's survival often depends on his killing another person. The targets of the defender's response may be divided into four types. First is the category of culpable agents—the typical aggressors who intentionally pose an unjust threat. Consider *A* and *B*, who are long-time enemies. *A* walks into a pub, finds *B* and draws his pistol with the intention of killing *B*—in such a case, *A* is a culpable agent. Second are non-culpable agents, often called “innocent aggressors.”² These include all those who pose an unjust threat through an unintentional aggressive act (being unaware of the threat, or the nature of the threat, that they pose). Consider an attacking sleepwalker, or a five-year-old pointing a loaded gun at me as I enter the room. Each is unaware of the threat his action poses to my life. Third are non-agents, sometimes referred to as “innocent threats.”³ This category includes people who pose an unjust threat, but not through an act of aggression. Rather, non-agents are used as objects to threaten a defender. Consider Robert Nozick's example of a person thrown down a narrow well towards another person who is unable to move to avoid the impact,⁴ or Professor Thomson's example of a fat man pushed against his will off a cliff just above another person.⁵ If he falls on that person he will kill her. Finally, the fourth category is the innocent bystander (or “innocent shield of threat,”⁶ to use Professor Nozick's term). This category includes people who are not the cause of the unjust threat to the defender's life, but can be used by him to avoid harm, as a shield or otherwise, and may be injured or

² The term “innocent aggressors” may be misleading because it is also used as a general term to describe both non-culpable and non-agent aggressors (categories two and three).

³ Judith J. Thomson, *Self-Defense*, 20 *Phil. & Pub. Aff.* 283, 287 (1991).

⁴ Robert Nozick, *Anarchy, State, and Utopia* 34 (1974). See also David Rodin, *War & Self-Defense* 86–87 (2002) (providing a similar illustration of Nozick's example).

⁵ Thomson, *supra* note 3, at 287.

⁶ Nozick, *supra* note 4, at 35.

killed in the process.⁷ A person is not to be considered an aggressor (even in the third category) by his mere existence or presence, even if it would impede the defender's interests.⁸

There is a general consensus that the killing of innocent bystanders is not permitted by the right to self-defense. In many jurisdictions the killing of innocent bystanders is totally prohibited.⁹ Even jurisdictions that do permit the killing of innocent bystanders, such as Israel, recognize the defense only as an excuse, not as a justification.¹⁰ That is, the killing of an innocent bystander is not viewed as morally justified, but given the threatening circumstances, society is willing to refrain from ascribing criminal liability to the defender for his action. Conversely, in all jurisdictions, situations involving culpable aggressors fall within the scope of the right to self-defense. Controversies about the justification of the right to self-defense focus mainly on the inclusion or exclusion of non-culpable aggressors or non-agent aggressors, depending on the specific justification in question.

⁷ This category includes all three types of bystander cases identified by Thomson: substitution-of-a-bystander, use-of-a-bystander and riding-roughshod-over-a-bystander. Thomson, *supra* note 3, at 289–91.

⁸ Consider situations of competition for limited food supplies. It is not until one person actively prevents another from eating that he becomes an aggressor. See, e.g., Suzanne Uniacke, *Permissible killing: The self-defence justification of homicide* 68–69 (1994).

⁹ The Model Penal Code § 3.02 (1985) does not recognize the defense of necessity where there is a similar number of defenders and bystanders, because the harm avoided by the defender(s) is not greater than the harm inflicted on the bystander(s). In such situations the killing of the innocent bystander is prohibited. This is also the general law in the United Kingdom as articulated in *The Queen v. Dudley & Stephens*, 14 Q.B.D. 273 (1884); cf. *R v Howe*, [1987] 1 All E.R. 771 (denying defense of duress by circumstance—which is equivalent to the defense of necessity for all relevant purposes—to a person charged with murder, whether as the actual killer or the aider and abettor). Some exceptions have been recognized in special circumstances. See, e.g., *Re A*, [2000] 4 All E.R. 961, where the court recognized necessity as a special defense for doctors and allowed them to separate conjoined twins despite a high risk that one of the twins would die as a result of the separation. (Notably, the court took the view that one twin was effectively killing the other. *Id.* at 962.)

¹⁰ Israeli Penal Law, 1977, S.H. 226, § 34 (k) (Aryeh Greenfield, trans., 2d ed. 1994). In Israel, necessity is viewed at least partly as an excuse, justified by the lack of real choice and by the reasonable behavior expected of a person in similar situations, rather than by the lesser evil theory. *Id.*

II. THE THEORY OF LESSER HARMFUL RESULTS

Some scholars justify self-defense on modified consequentialist grounds as a choice of lesser harmful results.¹¹ Self-defense, they argue, should be recognized as an exception to the general prohibition on the use of force because it brings about less harm than following the general prohibition. This evaluation is based on a comparison of the interests of the defender and the aggressor, modified by taking into account the aggressor's responsibility for the situation. A pure consequentialist account, which simply compares the interests of the two sides, fails to justify the preference for the defender's life in cases where there is a similar number of aggressors and defenders. This is so because the lives of the aggressor and the defender have equal value. The introduction of a guilt-based modification, however, tips the balance in favor of the defender: the aggressor is morally at fault because he brought about the need to use force. If moral fault is a reason for devaluing the aggressor's interests, the interests of the defender are more worthy of protection than those of the aggressor.

This modification attracts two objections. First, it contradicts the widely-held Anglo-American principle that all lives have equal value regardless of their moral worth. Second, the argument depends on the collateral consequences of self-defense. If we accept that moral worth may change the value of people's lives, then there is no reason why the general moral worth of both aggressors and defenders should not be taken into account. For example, a defender may be a known violent criminal and his aggressor a brilliant scientist on the verge of curing HIV. Similarly, if the aggressor's life retains any value, then the balance between the aggressor and the defender depends on the number of aggressors and defenders. Yet our common understanding is that these factors—the

¹¹ See, e.g., George P. Fletcher, *Rethinking Criminal Law* 857–58 (1978); Paul H. Robinson, *A Theory of Justification: Societal Harm As A Prerequisite For Criminal Liability*, 23 *UCLA L. Rev.* 266, 272–73 (1975). But cf. Rodin, *supra* note 4, at 51 (discussing the lesser evil rationale without endorsing it); David Wasserman, *Justifying Self-Defense*, 16 *Phil. & Pub. Aff.* 356, 357–59 (1987) (same). Professors Fletcher, Rodin, and Wasserman refer to this as an account of “lesser evil” or “choice of evil.” I prefer the term “lesser harmful results” because “lesser evil” fails to capture the type of evil that is being considered—the harmful result—and can also be consistent with guilt-based evil or any other kind of injustice.

number and the identities of aggressors and defenders—ought not affect the right of self-defense. The law is indifferent to the specific consequences of self-defense.¹²

To address these objections, some theorists adopt a position that tracks the shift from *act* utilitarianism to *rule* utilitarianism. Instead of focusing on the consequences of specific acts of self-defense, they focus on the overall beneficial consequences of recognizing the right to self-defense. According to this approach, the defender's right to self-defense can be justified by "the anxiety and insecurity that would result if one's life could be taken at any time, and for any reason, and also because of the deterrence it provides against aggressive acts."¹³ But even this approach is subject to significant criticism for being both too strong and too weak. As Professor Wasserman explains, the account is too strong because taking deterrence seriously may permit defenders to use force in self-defense beyond the commonly recognized limits of necessity and proportionality. At the same time, the argument is too weak because the defender's right depends on the marginal gain achieved by granting this right. Permitting the use of defensive force because of a moral justification based on its contribution to general deterrence would exclude situations in which the defensive response does not actually contribute to the deterrence of others. For example, if no one will ever know about the act, permitting the use of defensive force will not contribute to general deterrence. This ra-

¹² See Wasserman, *supra* note 11, at 359.

¹³ Nicholas Fotion & Gerard Elfstrom, *Military Ethics* (1986), *quoted in* Rodin, *supra* note 4, at 54. See also Fletcher, *supra* note 11, at 859–60; Wasserman, *supra* note 11, at 360; Glanville Williams, *The Theory of Excuses*, *Crim. L. Rev.* 732, 739 (1982). It is worth mentioning that this justification is similar to Lawrence C. Baker's argument that social harm serves as the basis for any criminalization. *Criminal Attempt and the Theory of the Law of Crimes*, 3 *Phil. & Pub. Aff.* 262, 269–70 (1974). As such, self-defense does not involve any special justification and is but one aspect of the general principle of criminalization. Its distinction comes from the type of situations it deals with, which can be characterized as instances in which general institutions are unable to help the defender. However, this may blur the pertinent difference between punishment and self-defense as an act of resisting an unjust attack. Unfortunately, I will not be able to go into this discussion in this Essay.

tionale may even require withholding permission if it would bring about further harm (a blood-feud, for example).¹⁴

III. A THEORY OF FORCED CHOICE

According to the theory of forced choice, self-defense is permitted because the defender is uniquely placed in a situation in which he is forced to choose between his own life and the life of the aggressor. This theory offers two distinct explanations of the right to self-defense. These explanations have usually been mixed in the accounts advanced—a fact gone unnoticed because both stem from the idea of forced choice.

The first line of explanation uses forced choice to *justify* a particular distribution of harm rooted in considerations of justice.¹⁵ Two reasons have been advanced to support this theory. Professor Montague argues that self-defense is only one implication of the general principle of fault-based selection, long recognized in tort law. According to this principle, harm should fall on the person whose fault it is that someone will be harmed. This justification of self-defense focuses not on the aggression per se, but on the aggressor's *moral* responsibility for forcing the defender to make a choice between lives; this permits the defender to direct harm against the aggressor.¹⁶

In contrast, Wasserman justifies self-defense under the forced choice theory by focusing on the need initiated by *present aggression*, which creates a moral asymmetry.¹⁷ At the point of being attacked or threatened, only the defender is forced to choose between lives. The aggressor, on the other hand, “never faces that choice—he can withdraw at any time before he or the victim is killed.”¹⁸ Wasserman stresses that the aggressor “forc[es] a choice between lives at the moment” the defender makes the decision;

¹⁴ Wasserman, *supra* note 11, at 360–61. See also Rodin, *supra* note 4, at 54–55; Frank De Roose, *Self-defence and National Defence*, 7 *J. Applied Phil.* 159, 161 (1990).

¹⁵ This is similar to the rule account of lesser harmful results, though that account justifies harm distribution as rooted in utilitarian considerations.

¹⁶ Phillip Montague, *Self-Defense and Choosing Between Lives*, 40 *Phil. Stud.* 207, 211, 216 (1981).

¹⁷ Wasserman, *supra* note 11, at 371. Cf. Fletcher, *supra* note 11, at 33 (discussing the origins of need as a justification for self-defense).

¹⁸ Wasserman, *supra* note 11, at 371.

hence, the aggressor “cannot dissociate himself from his actions without eliminating the threat.”¹⁹ Wasserman emphasizes that if self-defense can ever be justified “it is not because [the aggressor] has accepted the legal consequences, but only because his actions create a high risk of death.”²⁰

The difference between these two approaches lies in the contradictory answers they give to the comparisons between culpable aggressors and others equally at fault for forcing a defender to make a choice between lives.²¹ Unfortunately, a detailed discussion of these differences is beyond the scope of this Essay.

In the second line of explanation for the right to self-defense, forced choice is used as an excuse. Self-defense, it is argued, is permitted as a necessary response where there is no “real choice” but to use defensive force. When a person is backed up against a wall the instinctive human response is to use force in self-defense. In these situations the defender acts involuntarily, having no real choice to avoid the use of force.²² Self-preference is not justified as the “right thing to do,” but is considered an excuse instead. Professor Ryan develops this argument with a two-stage analysis. The first stage is an interesting variation on the idea of self-defense as an excuse that is based on a comparison of self-defense to duress. He uses the example of the occupying Nazi forces in Greece who

¹⁹ *Id.* at 372.

²⁰ *Id.* at 377.

²¹ These include past aggressors who have already caused irreparable damage but are no longer actively causing harm. Consider a doctor who swallows the only available pacemaker for his patient. Without it the patient will die. The only way for the patient to save his own life is to kill the doctor in order to retrieve the pacemaker. This example is given by Montague, *supra* note 16, at 217. According to the principle laid out by Montague, the defender (in this case, the patient) is justified in killing the aggressor (the doctor) to save himself. According to Wasserman, by contrast, since no aggression is present at the time the defender has to make his choice between lives, and the aggressor can disassociate himself from the aggression (the doctor might regret swallowing the pacemaker), there is no longer a moral asymmetry between the two sides. The defender is therefore prohibited from killing the aggressor in order to save his own life. Wasserman, *supra* note 11, at 371. In such a case, Wasserman argues, the aggressor “is no longer causing the harm and has lost the opportunity to undo it. His sacrifice has a retributive character that is only confirmed by our conviction that he richly deserves it.” *Id.* at 372.

²² See, e.g., Fletcher, *supra* note 11, at 856–57; Larry Alexander, A Unified Excuse of Preemptive Self-Protection, 74 *Notre Dame L. Rev.* 1475 (1999) (extending the excuse of duress to include most cases of self-defense and leaving a very limited independent right (that is, justification) to self-defense).

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forced a mayor to select five members of the resistance and execute them. If he refused, all the members of the resistance would be killed. Ryan argues that:

[W]hile he pulled the trigger, the mayor is certainly not to blame for the fact that a resistance fighter was killed, for the Germans, not the mayor, are the ones truly responsible. (We might say: it was not his decision to *kill* that person, though it was his decision to kill *that* person.) An appeal to the circumstances in this case would not show that the mayor was “justified” in his act of killing, it would rather show that it was not *his* act of killing.²³

Self-defense, Ryan posits, should be treated the same way. In the case of self-defense, the responsibility for the choice made by the defender lies in the hands of the aggressor, because it was the aggressor who forced the defender into a position in which he has to choose between lives. Even if the defender prefers his own life to the life of the aggressor with no justification for making this choice, he is not to be held responsible for killing the aggressor, for that responsibility lies with the aggressor.²⁴ The obvious objection to Ryan’s account is that it is counterintuitive, for self-defense is commonly understood as the justified act of a person in his full capacity. This objection applies to the general line of reasoning that validates self-defense as an excuse.²⁵ However, the objection has even greater weight when self-defense is compared to duress because of the defender’s attempt to transfer the responsibility for the killing to another person—the aggressor—even though the defender has to know that, in some sense, he did something wrong, since killing is never a “good thing.” The defender made a con-

²³ Cheyney C. Ryan, *Self-Defense, Pacifism, and the Possibility of Killing*, 93 *Ethics* 508, 515 (1983).

²⁴ See *id.* at 516. Ryan implicitly admits that this reasoning is an excuse and not a justification when he writes that “it is a mistake on this view to speak of a *right* to self-defense.” *Id.*

²⁵ This line of reasoning usually compares self-defense to the defense of necessity, which is viewed in many jurisdictions, such as the United Kingdom, Israel, and Australia, as an excuse rather than a justification. In these jurisdictions the defense of necessity is based on the lack of real choice and the reasonable behavior expected of a person in such circumstances. See, e.g., *supra* note 10 and accompanying text.

scious decision and must take full responsibility for all aspects of his actions.²⁶

At the second stage Ryan argues that, based on the torts principle of “causer pays,” the defender is right in preferring his life over that of the aggressor.²⁷ This principle obviously supports the killing of the culpable aggressor; Ryan claims, however, without any discussion, that this torts principle is solely concerned with causal responsibility, having nothing to do with questions of moral responsibility. Thus, it extends to allow the killing of non-culpable and non-agent aggressors—who are causally responsible for forcing a choice on the defender—as well. He concedes, however, that it would be “difficult to imagine what *positive* grounds could be given for this principle.”²⁸ In any case, according to Ryan, this principle is only an excuse and not a justification (which was ruled out at stage one).

Ryan is mistaken in arguing that the “causer pays” principle is concerned with causal responsibility. Traditionally it is taken as a fault-based criterion (requiring the combined conditions of causal and moral responsibility). Consequently, it cannot support the killing of non-culpable and non-agent aggressors. Yet, his emphasis on causal responsibility as the basis for self-defense, even if unexplained, is interesting, and I will return to it when I develop the forced consequences justification.

As I mentioned earlier, accounts of forced choice tend to combine elements of the justification and excuse lines of reasoning. Montague uses forced choice both as a *justification* for self-defense against the culpable aggressor, and as an *excuse* in cases of self-defense against non-culpable aggressors and non-agent aggressors.²⁹ Because they function as at least partial justifications, Mon-

²⁶ See also Rodin, *supra* note 4, at 57–61. Rodin’s main argument is similar, although I do not agree with some of his detailed arguments (such as his example of the hitman, which does not seem to me to resemble the example of the Greek mayor discussed by Ryan) or with his further conclusions on page 63 onwards.

²⁷ Ryan, *supra* note 23, at 516–17.

²⁸ *Id.* at 517. Even if there is no valid reason for preferring his life over that of the non-culpable or non-agent aggressor, the defender will be excused (for reasons of self-defense) for so choosing because he is never morally responsible for it.

²⁹ Montague, *supra* note 16, at 209–11. He does not argue this expressly, but it is the only way I can understand his account coherently. He contends that in cases of forced choice that are not brought about by an aggressor—that is, cases of necessity—the defender is also at liberty (*ceteris paribus*) to save himself at the expense of another per-

tague's and Wasserman's versions of the theory of forced choice are more appealing. But even these versions are subject to criticism. Both strands provide only a limited explanation, drawing a line between culpable and non-culpable aggressors. The fault-based selection principle advanced by Montague explicitly addresses only culpable aggressors because it demands moral fault on the part of the aggressor. This doctrine cannot justify the killing of non-culpable and non-agent aggressors. Their deaths can only be excused in terms similar to the killing of bystanders and victims.³⁰ Wasserman's version, which emphasizes "present aggression," draws a similar distinction. Only the culpable aggressor can withdraw in order to refrain from imposing a choice on the defender. The non-culpable aggressor is unaware of the threat he poses and is therefore mentally unable to withdraw—consider a five-year-old child pointing a loaded gun at the defender as he enters a room. Likewise, though the non-agent aggressor might be aware of the threat that he unintentionally poses, he is physically unable to withdraw. In Nozick's example, the person who is thrown down a narrow well is simply unable to break his fall. Though it is not argued expressly, the implication of this distinction of "present aggression" is that non-culpable and non-agent aggressors should be treated as bystanders.³¹ Drawing this line between culpable and

son. *Id.* at 209. He then goes on to compare this with cases of innocent aggressors (which he defines to include non-culpable and non-agent aggressors) and cases in which innocent bystanders are also killed, arguing that in these latter situations the defender has similar permission (*ceteris paribus*) to use defensive force. *Id.* at 210–11. He does not explain why the defender is permitted to kill in cases involving non-culpable aggressors, non-agent aggressors, and innocent bystanders; in fact, he admits as much. *Id.* However, he distinguishes innocent aggressor and innocent bystander cases from cases of self-defense against culpable aggressors, which are explained by reference to forced choice as a justification. Thus, the only way to understand the permission (*ceteris paribus*) for self-defense against innocent aggressors and the killing of bystanders is by reference to forced choice as an excuse, limited by various conditions such as the number of lives at stake. This could also explain his position on the obligation of third parties to intervene in favor of the defender against an intentional aggressor, in contrast to the liberty to intervene and help either side in the case of an innocent aggressor—again subject to some conditions, such as the number of lives at stake. *Id.* at 211.

³⁰ Montague argues that the killing of innocent bystanders should be excused. Montague, *supra* note 16, at 209–11.

³¹ Wasserman supports the similar treatment, and his account of "present aggression" answers another worry he has with the fault-based selection account. He claims that Montague's account allows for self-defense in situations in which the

non-culpable aggressors is counterintuitive. Like other contemporary theorists, I think that the killing of an innocent aggressor is a permissible reaction.³²

Moreover, even the combined explanation that justifies the killing of the culpable aggressor and excuses the killing of non-culpable and non-agent aggressors is not free from difficulties. The excuse for killing non-culpable and non-agent aggressors is based, explicitly in Montague's account and implicitly in Wasserman's, on a comparison to the killing of innocent bystanders. This explanation therefore fails to distinguish between non-culpable and non-agent aggressors on the one hand and innocent bystanders on the other. This is contrary to both common intuition and existing law, especially in those jurisdictions—including the United States—that allow for self-defense against non-culpable and non-agent aggressors, but do not recognize a defense for the killing of innocent bystanders. These jurisdictions do not recognize necessity as a defense to any act of killing. Where this is the law, comparing the treatment of non-culpable and non-agent aggressors to that of innocent bystanders should lead to the conclusion that neither type of killing is excusable or justifiable.

It might be argued then that a combination of *justified* self-defense against the culpable aggressor and *excused* self-defense against the non-culpable and non-agent aggressors fails to provide a coherent and well-defined rationale for this right. The mistake, however, is not the failure to distinguish between the treatment given to non-culpable and non-agent aggressors on the one hand and innocent bystanders on the other; rather, it is in assuming that the right to self-defense is triggered by non-culpable and non-agent

aggressor placed the defender's life at risk but at the time of self-defense the aggressive act is already over—and the aggressor might even repent his actions but is unable to undo them. The example given is of a doctor who carelessly swallows his patient's pacemaker, which can be restored in time to save the patient only by surgery fatal to the doctor. Wasserman contends that once the pacemaker is swallowed and there is no longer present aggression, the patient—the defender—is no longer permitted to act in self-defense against the doctor. See Wasserman, *supra* note 11, at 366.

³² See, e.g., Nozick, *supra* note 4, at 34; Uniacke, *supra* note 8, at 207–09; Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 Cal. L. Rev. 871, 876 (1976); Susan Levine, *The Moral Permissibility of Killing a 'Material Aggressor' in Self-Defense*, 45 Phil. Stud. 69 (1984); Ryan, *supra* note 23, at 511; Thomson, *supra* note 3, at 284–85.

aggressors to begin with. This understanding assumes that the right to self-defense applies only against culpable aggressors. That is, the right to self-defense does not turn upon the unjust threat or unjust act of aggression (which is common to culpable, non-culpable, and non-agent aggressors and singles them out from innocent bystanders). Instead, the right hinges on the moral culpability of the aggressor. The justification version of forced choice theory draws the line where it should be drawn—between the permissible killing of culpable aggressors and the prohibited killing of non-culpable and non-agent aggressors.

Arguing along these lines, Rodin rejects the common proposition that an unjust *threat*³³ is a necessary condition of valid self-defense. Instead, he would restrict the proper use of self-defense to situations of unjust *aggressors*—that is, an act of unjust aggression by an intentionally, recklessly, or negligently culpable person.³⁴ He argues that only the requirement of an unjust *aggressor* is consistent with a justification for the right to self-defense, because it alone establishes a sufficiently substantive normative connection between the unjustified threat and the person against whom one uses defensive force. That is, it ensures that the aggressor is treated as a subject.³⁵ Accepting the idea of a right to self-defense that turns upon an “unjust threat” requires an explanation for the different treatment of non-culpable and non-agent aggressors, who trigger the right of self-defense, and the treatment of innocent bystanders, who do not. Any such explanation, however, is bound to fail. One way to explain the difference is by appealing to the causal responsibility of the non-culpable and non-agent aggressors. Rodin contends that causal responsibility is important because it is one constituent of moral culpability. In the cases of non-culpable and non-agent aggressors, however, “culpability has been ruled out *ex hypothesi*.”³⁶ Thus, it cannot have any significance in explaining the different treatment given to non-culpable and non-agent aggressors on the one hand and innocent bystanders on the other.

³³ Also referred to as unjust aggression.

³⁴ For a discussion of negligent versus purposeful actions and specific levels of culpability, see Rodin, *supra* note 4, at 77–83; Robert F. Schopp, *Justification Defenses and Just Convictions* 33–34 (1998).

³⁵ Rodin, *supra* note 4, at 79–83.

³⁶ *Id.* at 82.

Conversely, causal responsibility reflects the important fact that the defender was wronged through no fault of his own, even if the aggressor's moral responsibility was diminished.³⁷ If the non-culpable and non-agent aggressors are not privileged, or at liberty, to kill the defender, then the defender has a claim against the aggressor not to be killed. But Rodin dismisses this argument. Using Nozick's example of the man thrown down a well, he compares the non-agent aggressor to a falling stone, which is obviously not subject to any moral duties. Likewise, *qua* posing a threat, the non-agent aggressor is an object, which is not subject to any moral duty not to violate the defender's rights. Hence, the aggressor's threat does not violate or infringe on the defender's rights.³⁸

While the stone is not subject to any duties, neither does it have any rights. It makes no claim on others to prevent them from "harming" it in an attempt to avoid its impact. The stone obviously has no right to prevent someone from blasting it to pieces. Yet Rodin argues that in the case of the non-agent aggressor, at the time of the act of aggression, the non-agent is both an object not subject to any duties and a person in possession of a right not to be killed. If the non-agent aggressor is an object, then she should be treated this way: a person cannot be an object without duties to others and simultaneously be a subject to whom others owe duties.³⁹ Furthermore, Rodin's theory suggests that the defender (*A*) can never be justified in resisting the violation of her rights by any non-agent aggressor (*B*). If *A*'s resistance infringed any of *B*'s rights, *B* would be under no obligation towards *A* to refrain from violating *A*'s rights. Note that when we talk about the right to self-defense we are talking about resisting, repelling, or warding off potential harm, and not about possible compensation for damage that has already occurred. For example, suppose Dan is coming into a

³⁷ A similar idea has been developed in the literature addressing justification and excuse, according to which "justification" means that *A* was right to act as she did and her action did not wrong *B*, while "excuse" means that *A*'s actions have wronged *B* but for some reason they cannot be attributed to her. Fletcher argues that "[w]hether a wrongful actor is excused does not affect the rights of other persons to resist or to assist the wrongful actor. But claims of justification do." Fletcher, *supra* note 11, at 760; see also Rodin, *supra* note 4, at 84–85.

³⁸ Rodin, *supra* note 4, at 85–86.

³⁹ Rodin himself contends that the defender, acting in self-defense, treats the aggressor as a moral subject. *Id.* at 88.

room holding a cup of coffee. He stumbles over a book that was left on the floor by Alex. John, who is sitting near the entrance working on his computer, can prevent the coffee from spilling on the computer only by hitting Dan's hand and making him drop his cup. According to Rodin's account, John has no right to break Dan's cup because Dan *qua* falling is an object and thus does not owe John a duty to refrain from damaging his computer, whereas John is under a duty to refrain from damaging Dan's property.

Additionally, as Rodin acknowledges, even if one accepts the aggressor-as-object explanation, it is limited to non-agent aggressors and does not apply to non-culpable aggressors. These latter aggressors can hardly be regarded as removed from the realm of obligations altogether in the same way that stones and other inanimate objects are considered. Rodin argues that where there is an excuse for the aggressor's action (that is, where the aggressor is non-culpable) there is an insufficient normative connection between the unjustified threat and the aggressor against whom the defensive force is to be used. Hence, to use force against him would not be treating him as a moral subject but only as a physical entity.⁴⁰

Rodin acknowledges that in the case of non-culpable aggressors there is a "wrong"—namely, a violation of the defender's right.⁴¹ This means that the defender has a moral claim against the aggressor, even though the aggressor is excused for not living up to his obligations. The recognition that the defender has been wronged is itself recognition of the aggressor as a moral subject who has obligations. This is further reflected in the two conditions of self-defense: necessity and proportionality. It is important to remember that in self-defense we are not dealing with punishment or with what the aggressor "deserves," but only with resisting or warding off an attack.⁴² The use of force in self-defense is justified only be-

⁴⁰ Rodin, *supra* note 4, at 88–89.

⁴¹ *Id.* at 87.

⁴² In a different context, Rodin acknowledges that there are different conditions for just punishment and just defense. *Id.* at 96. An emphasis on the aggressor's culpability, however, means that the blameworthiness of the aggressor is connected with self-defense and that, in turn, suggests that self-defense has some role to play in punishment. Unfortunately, a discussion of the roles of self-defense and punishment is beyond the scope of the current Essay. For a more in-depth analysis, see, for example,

cause it is aimed at preventing harm, not because of any attribution of blame.⁴³ It is also important to note that Rodin provides examples that reflect his intuition that self-defense does not apply in situations of non-culpable and non-agent aggressors. For instance, in the case of a child who accidentally shoots a gun at someone, Rodin claims that the younger the child, the less inclined he is to say that the person has a right to shoot the child.⁴⁴ He builds his argument on this intuition, assuming that our intuition is consistent with his, and draws the conclusion that his argument is therefore consistent with our intuitions too. Yet Rodin's intuition in this situation would be counterintuitive to most. In the case of the threatening child, I believe that I have a right to shoot the child even if he is an infant, and I would not "wrong" the child in that situation. I might think that this is not the "right" thing to do, but I am permitted, as part of my entitlement, to go ahead and shoot the infant.⁴⁵

George P. Fletcher, *A Crime of Self-Defense* 18–38 (1988); Nozick, *supra* note 4, at 62–63; George P. Fletcher, *Punishment and Self-Defense*, 8 *Law & Phil.* 201 (1989).

⁴³ I leave open the possibility of a person who uses defensive force for multiple reasons, only one of which is self-defense, as well as the person who acts for reasons other than self-defense, when in fact, whether he is aware of them or not, circumstances would allow him to act in self-defense and to justify his actions *ex post* by appealing to the right to self-defense. Personally, I would allow this defense for the former defender (who acts on multiple reasons), but not for the latter (who acts for other reasons). Even so, this stance requires fuller arguments than I can give here and it is unnecessary for my current discussion.

⁴⁴ Rodin, *supra* note 4, at 93.

⁴⁵ A right is a title given with regard to a class of actions. Thus, it permits the holder to act unjustifiably, even in a manner that can be criticized. In other words, the title-holder has a right to do wrong. If I have the right to vote, I may vote for a fascist party; if I have a right to freedom of expression I may say very offensive things to you; having a right to do whatever I want with my money (a right to property) means I can gamble all of it instead of contributing to charity organizations. As can be seen from these examples, the permissive aspect is closely connected to the idea of choice. It protects the choice, whether good or bad, to engage in a specific class of actions. See, e.g., Ronald Dworkin, *Taking Rights Seriously* 188 (1978); Joseph Raz, *The Authority of Law: Essays on Law and Morality* 266–67 (1979); William A. Galston, *On the Alleged Right to Do Wrong: A Response to Waldron*, 93 *Ethics* 320 (1983); Jeremy Waldron, *Galston on Rights*, 93 *Ethics* 325 (1983); Jeremy Waldron, *A Right to Do Wrong*, 92 *Ethics* 21 (1981). But see J.L. Mackie, *Can There Be A Right-Based Moral Theory?*, 3 *Midwest Stud. in Phil.* 350 (1978). Due to space limitations I will refrain from discussing the reasons for the willingness to accept the "right to do wrong." I will simply note that there are three common reasons for this stance: institutional, epistemological, and reasons based on the virtues of even an abuse of the right.

I hold that the killing of non-culpable and non-agent aggressors is permissible. If this is so, then it is essential for any theory to distinguish between non-culpable and non-agent aggressors on the one hand and innocent bystanders on the other. This distinction is obvious in those jurisdictions that prohibit the killing of innocent bystanders, but it is also obvious where the killing of innocent bystanders is excused. This is because the killing of non-culpable and non-agent aggressors is not only an excuse but rather the right prospective guidance—it is a justification. Hence the forced choice theory fails to provide a comprehensive justification for the right to self-defense. As we have already seen, the justification version of forced choice theory, on its own, is limited only to culpable aggressors. The combination of the forced choice theory, which justifies self-defense against culpable aggressors and excuses it against non-culpable and non-agent aggressors, fails because it only excuses the killing of the latter.

IV. THE RIGHTS THEORY

The rights theory essentially holds that self-defense is justified because a defender's core right not to be killed prevails over that of the aggressor. The various accounts of the rights theory are based on the correlation between one's rights and the duties these rights impose on others. Thus, if an aggressor does not have an active right not to be killed or harmed, a defender is at liberty to kill or harm him.⁴⁶ Various versions of the rights theory provide different explanations as to how this asymmetry between the rights of aggressors and defenders comes about. One obvious account of the rights theory, advanced by natural law theorists, relies on a version of forfeiture.⁴⁷ The idea is that through acts of aggression, aggres-

⁴⁶ But see Ryan, *supra* note 23, at 512. He argues that even the loss of the aggressor's right not to be killed does not necessarily imply that the defender has a right to kill him. This argument is wrong for the reasons I presented in the main text. See also my discussion in Part II, *supra* notes 24–26 and accompanying text.

⁴⁷ Pufendorf expresses the idea of forfeiture as: “[H]e who professes himself an enemy is no longer protected by any right which would prevent me from repelling him by any means whatsoever.” Samuel Pufendorf, 1 *On The Duty of Man and Citizen According to Natural Law* 49 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673). Locke's terminology is even harsher: By his own actions the aggressor “expose[s] his Life to the others Power to be taken away by him, . . . one may destroy a Man who makes War upon him, . . . for the same Reason, that

sors forfeit their right to life, thus allowing defenders to harm and possibly kill them in self-defense.

The idea of forfeiting one's right to life in the context of self-defense attracts two objections. First, if all people have an unconditional and unspecified right not to be killed, it is difficult to see how one could forfeit that right by virtue of one's actions. Second, forfeiture is inconsistent with the notion of a right *in rem* not to be killed.⁴⁸ The concept of forfeiture usually means a permanent forfeiture.⁴⁹ If we accept the concept of forfeiture, and unless we are willing to recognize an idea of temporary forfeiture, then once a person acts in a way that forfeits his right not to be killed, he cannot regain his right when he stops acting in a threatening manner. This conclusion is contrary to our understanding that a person who does not pose a threat should not be killed, even if his death would be useful for some other purpose.⁵⁰ Furthermore, a right may be forfeited even without the knowledge of its owner, and it may be forfeited with respect to the entire world. In self-defense, by contrast, a third party who does not know of an aggressor's attack—and thus does not know that the aggressor has forfeited his right

he may kill a *Wolf* or a *Lyon*; because such Men are not under the ties of the Common Law of Reason, . . . and so may be treated as Beasts of Prey," John Locke, *Two Treatises of Government* 279 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Grotius does not address this question directly, but when justifying self-defense against non-culpable men or women, he compares the defender's right not to be harmed by them to the defender's right not to be harmed by wild beasts. Hugo Grotius, *Grotius On The Rights of War and Peace* 62 (William Whewell ed., Cambridge Univ. Press 1853). This might suggest that the action taken by the aggressor makes him like a beast.

⁴⁸ I do not refer to the more narrow distinction between rights *in rem* and rights *in personam* in the context of personal jurisdiction, but to the more general distinction that is commonly recognized in the literature. This distinction is based on the correlation between one's rights and the corresponding duties they impose on others. In general, a right *in personam* is one which imposes an obligation on a definite person. A right *in rem* is one which imposes an obligation on persons generally, either on all the world or on all the world except certain determinate persons. *Black's Law Dictionary* 809 (8th ed. 2004).

⁴⁹ This is because the idea of forfeiture relates to material possessions and incorporeal goods of a kind that can be transferred, such as citizenship and copyright interests. See Uniacke, *supra* note 8, at 199; George P. Fletcher, *The Right to Life*, 63 *The Monist* 135, 142–43 (1980).

⁵⁰ See Judith J. Thomson, *Self-Defense and Rights, in Rights, Restitution, and Risk* 33, 34 (1986).

not to be killed—is not permitted to attack the aggressor for his own reasons.⁵¹

These two objections correspond to two aspects of the core right not to be killed. The former objection refers to what the right is, while the latter objection refers to who has it. Both draw on the idea that the right not to be killed is a natural, unconditional, and unspecified right *in rem*. Addressing the second objection, Uniacke offers two replies. First, she argues that the fact that *A* forfeits his right (or interest) does not mean that the intentions and knowledge of *B*, who is seeking for his own reasons to deprive *A* of that right, are irrelevant. The intention may be relevant for some other general concerns. Thus, the fact that the claim of self-defense is denied to a person who acted against the aggressor for his own reasons, unaware that the aggressor forfeited his right not to be killed (or who attempts to kill the aggressor after the aggression is over because his death would be useful for some other purpose) is not necessarily grounded in the ongoing existence of the aggressor's right not to be killed. Instead, it could be grounded in other considerations, such as the general interest which all persons have in not being disturbed without good reason.⁵²

Second, Uniacke argues that a broad concept of forfeiture, which is the basis for the objection, is not the only possible concept of forfeiture. She contends that the notion of forfeiting a right in the realm of self-defense is in fact consistent with a narrow concept of forfeiture. This narrow concept of forfeiture “refers to a right lost . . . due to some crime or fault, breach . . . or neglect of contract or rules on the part of the person who forfeits,” and allows for the idea of temporary forfeiture.⁵³ Rodin explains this further: Bearing in mind that the idea of rights is a normative relationship between the aggressor and the defender rather than simply a status of the aggressor, “forfeiture of a right should be viewed as a fact about the normative relationship between two specific parties. In which case there is every reason to believe that the forfeiture of a right

⁵¹ See Fletcher, *supra* note 49, at 143–44. Fletcher's first description of the character of forfeiture—as against the whole world—entails the assumption that the right is a right *in rem*.

⁵² Uniacke, *supra* note 8, at 200.

⁵³ *Id.* at 201. It should be stressed that Uniacke argues that one's forfeiture of a right does not necessarily depend on one's culpability. *Id.* at 206.

will turn upon facts about the status, condition, actions, and intentions of both the parties.”⁵⁴ If we accept this, he argues, then there is nothing incoherent about forfeiting the right to life with regard to one person but not to another, and such a forfeiture would be dependent on facts related to both the defender and the aggressor.⁵⁵

As a comprehensive explanation, Uniacke’s two responses to the problem of forfeiture are inconsistent.⁵⁶ In her first response, Uniacke accepts the presumption that the right not to be killed is a right *in rem*. Hence, if it is forfeited, it is forfeited with respect to everyone, including third persons. Alternatively, if the second response is to overcome the problem of regaining the forfeited right once the aggression is over, then it must be understood to suggest an alternative reading of the right not to be killed as a right *in personam*; otherwise, the argument has fundamental flaws. Rodin argues that since rights are a normative relationship between two people and forfeiture is a fact about this normative relationship, then it necessarily follows that forfeiture depends on the actions of the parties.⁵⁷ But that does not strictly follow: A normative relationship can be, and indeed often is, decided by some undertaking to respect the equivalent right of another, but there are other ways to create (or to justify) this relationship. Natural rights, for example—including the right not to be killed, if it is to be viewed as a right *in rem*—are created (or justified) by external ideas. Similarly, the ways in which one can forfeit one’s right need not revolve around one’s actions and intentions. It all depends on the sources of the right. As Professor Bedau explains:

[A] person could lose rights to life, liberty or property by some act which violates those rights in another “only in so far as these rested on an explicit or implicit undertaking to respect the corresponding right in others” But natural or human rights do not “rest” on mutual respect, any more than they originate out of contractual, quasi-contractual, status-relational, or other contin-

⁵⁴ Rodin, *supra* note 4, at 76.

⁵⁵ *Id.*

⁵⁶ To do justice to Uniacke and Rodin, I should stress that neither offers these solutions as a complete explanation to the problem of forfeiture, but rather as one component of the more complete theories discussed *infra*.

⁵⁷ Rodin, *supra* note 4, at 76.

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gent and variable circumstances after the manner of so-called “special” rights. Only in regard to such rights is the notion of forfeiture intelligible. To be sure, violation of another’s rights may justify (or excuse) others in interfering with the rights of the violator. But this is by no means equivalent to saying that the violator’s right to *x* is necessarily forfeited, or deserves to be forfeited, whenever by some act of his he violates another’s right to *x*.⁵⁸

Alternatively, if the right not to be killed is a right *in personam*, then stringent conditions do not necessarily apply, and consequently, fault and action may be relevant factors. This interpretation is supported by Rodin’s own claim that the right not to be killed can be viewed as “the normative relationship between two specific parties.”⁵⁹

I think both solutions to the problem of forfeiture are flawed. The problem with Uniacke’s first solution—that there are other reasons to deny the defense to a person who killed for reasons other than self-defense—is that it conceives of forfeiture as *permanent*. If we accept the concept of permanent forfeiture, then this solution may leave the aggressor in a more vulnerable position for the rest of his life. At the moment of any unjust aggression the aggressor loses his right not to be killed, a right he never regains. From that point on, the protection of his life relies only on the existence of other considerations, and these “other considerations” might be rescinded in the face of the rights or considerations of some other person, since they are probably not as stringent as a right not to be killed. It will also result in creating two categories of people: those who are protected by a right not to be killed, and those who are protected by “other considerations” because of something they have done in the past. Therefore, the only way to give meaningful content to this solution seems to depend on the acceptance of an idea of *temporary* forfeiture. If the forfeiture of the right is only temporary, there is no reason to refer to “other

⁵⁸ Hugo Bedau, *The Right to Life*, 52 *The Monist* 550, 568–69 (1968). He further points out that the idea of forfeiture of the right to life “involves a bizarre corollary of *lex talionis* (the *right* to life for the *right* to life, etc.), which no one really accepts as a general principle.” *Id.* at 568.

⁵⁹ Rodin, *supra* note 4, at 76.

considerations” since there is no problem of regaining the right once the aggression is over.

As for the second solution of temporary forfeiture of a right *in personam*, I do not think that the right not to be killed can be regarded as a right *in personam*. The right not to be killed is a natural right. Like other natural rights, it is a right *in rem*. Constructing the right not to be killed as an indefinite number of rights *in personam*—directed against each person separately—seems artificial. The notion of a right *in rem* is that it is the same kind of obligation, directed to indefinite and unidentified numbers of people. The right not to be killed is similar to all other basic rights, which are *in rem*, such as freedom of speech and freedom of religion. The construction of the right not to be killed and the derivative right to self-defense is a familiar one: a right *in rem* not to be killed which, if infringed by a specific individual, gives rise to a right *in personam* to self-defense.⁶⁰

But are these the only two options available? Is there a third way that retains the features of the right not to be killed as a right *in rem* and also responds to the difficulty of regaining the right after it has been forfeited?⁶¹ Indeed, a third position of this sort is plausible. Such a position would have to reject the assumption made by the first objection to the concept of forfeiture, that is, the notion that the right not to be killed is an unconditional and unspecified right. The idea of an absolute right must be abandoned. Instead, an account of a conditional right to life, which would limit the right to exclude instances of aggression, should be embraced. The idea of a conditional right can be achieved in two ways: either by recognizing the conditional possession of an unspecified non-absolute right which depends on the actions (or other circumstances) of its owner, or by recognizing an absolute right of limited scope. The limitation can be defined by moral or factual specifications. Using the former

⁶⁰ Raz differentiates between “core rights” and “derivative rights.” The protected class of actions in core rights is valuable or good in itself, whereas in derivative rights, the protected class of actions may have no intrinsic value. Defensive violent acts, which are protected by the right to self-defense, are actions of the second kind. Violent responses are not good in themselves, but only as a means to protect a more fundamental right not to be killed, which is also referred to as a right to life. Joseph Raz, *On the Nature of Rights*, 93 *Mind* 194, 197–99 (1984).

⁶¹ Such a formulation would make Uniacke’s two responses consistent with each other.

method, the *possession* of the right is conditional; using the latter, the *scope* of the right is conditional.

Referring to the former method, Thomson examines the possibility of treating the aggressor's right not to be killed as "overridden" by the more stringent right of the defender. The defender's right becomes more stringent when the aggressor wrongly attacks the defender. Yet, this requires the right of the aggressor to be diminished indefinitely, because the defender's right may override any number of aggressors' rights. Thus, it takes us back to the criticisms of forfeiture.⁶²

The second method, on the other hand, responds better to the problems of forfeiture. The specification limits the scope of the right so as to exclude altogether those situations in which, presumably, the right is forfeited. A satisfactory specification ought to be able to exclude only these situations, and thus avoid the need to explain how one can regain a forfeited right: A person never had a right not to be killed in the situation outside the scope of the specified right, but at the same time, he never lost the right not to be killed for other reasons (organ donation, for example). It also allows for humanity to be the only precondition of a right, independent of any human conduct.⁶³ Yet this method has other difficulties. Thomson argues that a *moral* specification of the scope of the right to life is bound to be circular. She claims that the concept of a right is supposed to provide an independent answer to the questions of why and when is it justified to kill the aggressor—that is, when the aggression violates the right. However, a morally specified right, which simply states that "there is a right not to be killed *unjustly*" would fail to provide such an answer, because it depends on a prior view of what is and what is not morally permissible.⁶⁴ *Factual* specification is likewise rejected both because it is impossible to set a satisfactory definition and because it is circular. The advantage of

⁶² Thomson, *supra* note 50, at 42–46; Wasserman, *supra* note 11, at 362.

⁶³ But see Uniacke, *supra* note 8, at 208. Uniacke's stance is that there is no normative difference between the two methods. She does provide some practical reasons for preferring to speak in terms of specification of the scope of the right to life. *Id.*

⁶⁴ Thomson, *supra* note 50, at 37–38. It should be noted that when distinguishing between the attack of the aggressor and that of the defender this line of justification does avoid another kind of circularity, that of having two similar rights to self-defense held by the defender and the aggressor, each triggered by the other person's violent act.

the rights theory is that it provides an independent justification for the defensive response. Any factual specification, however, would inevitably define the right according to a prior view of the factual circumstances in which it is permissible to use defensive force. Therefore, it too is ultimately circular. As Thomson explains:

What the friend of factual specification has to do is to figure out when it is permissible to kill, and then tailor, accordingly, his account of what right it is which is the most we have in respect of life. But if that is the only way anyone can have of finding out what right it is we have in respect of life, how can anyone then *explain* its being permissible to kill in such and such circumstances by appeal to the fact that killing in those circumstances does not violate the right which is the most the [aggressor] has in respect of life?⁶⁵

Two different strands of justifications that attempt to overcome the problem of circularity have been advanced: the account developed by Thomson and Uniacke (independently) and the account developed by Rodin. Both are based on the idea of a limited specified right not to be killed (a “right to life”),⁶⁶ and both argue that it is possible to provide a moral specification that will independently reflect what individual treatment is just and what is unjust with respect to this right. That moral specification is the basis for the asymmetry between the defender, who possesses the specified right, and the aggressor, who does not. They differ in the elements that limit the right, and, consequently, in the situations that create

⁶⁵ Id. at 39.

⁶⁶ Though following her position that there is no substantial difference between a non-absolute unqualified right and an absolute right of limited scope, Uniacke is not careful in the terminology she uses and often refers to the latter in terms of the former. For example, she states that “[n]atural rights are grounded in our nature and are conditional rights: their continued possession, by those who possess these rights in virtue of their nature, is conditional on conduct.” Uniacke, *supra* note 8, at 210. This is not an accurate description of natural rights. Natural rights are rights that we possess by virtue of being human, but their scope can be limited. See also H.L.A. Hart, *Are There Any Natural Rights?*, in *Political Philosophy* 53, 54 (Anthony Quinton ed., 1967). As for Thomson, she does not expressly state that she prefers the second method to the former. However, she provides elsewhere a specification of the right and refers to instances which fall within the specified conditions as elements in which the aggressor “lacks” the right even if he does not forfeit it. Thomson, *supra* note 3, at 301. Hence, I understand her to argue in favor of an absolute but limited right.

the asymmetry. Aiming to find a “unitary theory” for permissible killing (that is, “all things considered”), Uniacke holds that the justification is based on the threat’s status as both immediate and unjust. The moral specification is based on an objective fact: the causal responsibility of the aggressor for the immediate unjust threat.⁶⁷ In such circumstances, the aggressor has no right not to be killed.⁶⁸ This specification avoids circularity: the defender is justified in preferring his life and in using force in self-defense because he has been subjected to an immediate unjust threat by the aggressor,⁶⁹ and the stance of whether an attack lacks any *justifying* circumstances does not depend on any prior view of what acts of self-defense are permissible.

Rodin develops a closely related account in which the right not to be killed is morally specified in a way that integrates the aggressor’s fault. In this account, the limitation, and consequently the asymmetry, are based on the fault of the person who created the unjust threat, namely, the “unjust aggressor.”⁷⁰ To explain the asymmetry, he defines his account in the following way:

⁶⁷ Uniacke, *supra* note 8, at 213. More accurately, Uniacke differentiates between the “less stringent version” of having an unqualified right to life and a conditional right not to be killed and the “more stringent version” which entails the right to life itself being conditional. According to her, an “excused” attack—one by a non-culpable or non-agent aggressor—is considered unjust because an excuse means that the defender was wronged by the aggressor but there is some reason not to attribute this wrong to the aggressor. See also Fletcher, *supra* note 11, at 759–62.

⁶⁸ Thus, the right not to be killed is defined as follows: One has a right not to be killed, except when one poses an *unjust immediate threat* to the life of another, leaving the other with no way to preserve his life but for killing the aggressor.

⁶⁹ The same idea is advanced by Thomson, who justifies self-defense against a person who would otherwise kill you in such a way that would violate your right to life. See Thomson, *supra* note 3, at 298–303. This idea avoids circularity in the following way: The defender has a (specified) right not to be killed. Therefore, if an aggressor makes an unjust immediate attack on the defender’s life he wrongs her. Because the defender is innocent and the aggressor is causally responsible for the attack, the aggressor does not have a (specified) right not to be killed—as the specification excludes these circumstances. In that situation, the defender has a right to kill him. Therefore, when the defender attacks the aggressor to defend herself, she does not violate his right not to be killed, and hence she does not wrong him. Because she does not wrong him, she continues to possess her right not to be killed.

⁷⁰ Thus there are two elements to be proved: the *actus reus*—that the act of the aggressor created the immediate threat—and the *mens rea*—that the aggressor is at fault.

I have the right to life. Therefore, if an aggressor makes an attack upon my life, in the absence of any special justifying circumstances, he wrongs me. Because I am innocent and he is at fault for the aggression, his claim against me that I not use necessary and proportionate lethal force against him becomes forfeited (or fails to be entailed by his right to life). Therefore I have a right (liberty) to kill him. Therefore when I attack him to defend myself, I do not violate his right to life, and hence I do not wrong him. Because I do not wrong him, I do not forfeit (or fail to possess) my right to life.⁷¹

This specification also avoids circularity: the defender is justified in preferring his life and using force in self-defense because an unjust aggressor has subjected him to an immediate unjust threat, and the view of whether an aggressor is unjust does not depend on any prior view of what acts of self-defense are permissible.

I do not wish to comment on the choice of the moral specification.⁷² I do, however, oppose the underlying assumption in both accounts that the right not to be killed has a limited scope. Although I accept the general claim that absolute (natural) rights may be specified, I believe that the right not to be killed is what Uniacke calls an “unqualified” right (that is, an unspecified right), and maybe the only one there is. I believe humanity is a precondition of the right, but also the only specification of it. I find it hard to accept that in some situations a person can be said not to have a right to exist. The main weakness of my objection is that although the existence of an unspecified right is at the basis of the objection to the rights theory, it cannot be proven and goes to the roots of my moral belief.

Two aspects of the right to self-defense support this claim. First, the requirement of proportionality for a specified absolute right not to be killed has awkward implications. The requirement of proportionality is one of the commonly recognized requirements that limit the right to self-defense. In general, proportionality limits permission to use defensive force to only that amount which would be proportionate to the potential harm the aggressor would inflict

⁷¹ Rodin, *supra* note 4, at 79.

⁷² But see *supra* Part II, where I discuss the forced choice theory and reject a model based on the aggressor's fault.

on the defender. This requirement is accepted by almost all theorists, including Uniacke, Thomson, and Rodin.⁷³ Yet, this correlation is irreconcilable with the idea of a specified right. In practice, most instances of self-defense involve a threat of non-fatal injury, so the permitted defensive response is not killing, but only the infliction of lesser and proportionate harm. There are two ways of explaining this phenomenon in terms of the specified right not to be killed. The first is that the specification is more complex and instances which involve only the threat of injury are excluded from the right not to be injured but are still within the scope of the right not to be killed. But then the specification becomes difficult and may ultimately be impossible. A second way to resolve the problem is to hold that such instances fall within the specified category that limits the right not to be killed—that is, these instances are excluded from the right not to be killed. However, the defender is not permitted to kill the aggressor due to other considerations.⁷⁴ Yet all the considerations I can think of go back to the value of life, and where one's life is not protected, it is not valued—at least not to the extent that it should impose a burden on another to suffer injury.

The second support for my claim is found in the way we perceive a person who uses force against the aggressor for his own reasons, unaware that the aggressor was about to attack him and that he has a right of self-defense.⁷⁵ Legal theorists disagree about the way in which these defenders should be treated. The details of this argument are beyond the scope of this Essay.⁷⁶ However, one common

⁷³ But see Larry Alexander, *Self-Defense, Punishment, and Proportionality*, 10 *Law & Phil.* 323 (1991) (arguing to the contrary).

⁷⁴ See Uniacke, *supra* note 8, at 200, for the author's first response to the problem of forfeiture.

⁷⁵ For example, *A* knows that his enemy *B* goes to a particular pub at the same time every day. *A* decides to go to the pub tonight, intending to shoot *B*. Unaware of *A*'s plan, *B* decides to kill *A*. He finds out that *A* is at the pub. He takes his rifle with him; when he enters the pub, he shoots *A* and kills him, unaware that *A* was holding his own gun and was about to kill him. *B* acted because he was angry with *A*. He was unaware of the threat from *A* which would have afforded him a right to shoot *A* in self-defense.

⁷⁶ But see, e.g., George P. Fletcher, *The Right Deed For The Wrong Reason: A Reply to Mr. Robinson*, 23 *UCLA L. Rev.* 293 (1975) (arguing that self-defense requires subjective belief in the justification); Robinson, *A Theory of Justification*, *supra* note 11, at 284–91 (arguing that objective existence of the justifying circumstances is suffi-

stance to note, reflected in English law and supported by Uniacke,⁷⁷ is that these defenders are not acting in self-defense, because they did not act *on* that right. Therefore, they did not *intend* to act in self-defense at all. Rather, they intended to violate a right of someone they thought was an innocent person.

This position ignores the possibility that the aggressor did not have a right to life. If in fact, according to the specified-right account, the aggressor in the situation did not have a right not to die, then there is nothing wrong with killing him—the criminal law does not treat bad intentions the same as ordinary offenses (by punishing them, at most, only as attempts and not as successful completed offenses), even if the agent acts on them. Consider a situation where *X* wants to steal *Y*'s handbag, and *X* and *Y* have identical handbags. If *X* acts on her intentions and takes the bag next to *Y*'s chair, only to find out that it is really her bag (that is, *X*'s bag), which she forgot about, *X* does not commit any crime, even though she intended to commit a crime and acted on this intention.

Another way to overcome the difficulties of forfeiture is to distinguish between the possession of a right and the exercise of a right. This stance accepts that the right to life is an absolute unlimited natural right—that is, a right which law does not create and cannot eliminate. Governments therefore have a duty to recognize and protect this right.⁷⁸ The suggestion is to distinguish between the *possession* of the right, which is absolute, and the *exercise* of it, which is not. This can be conditional and dependent on the aggressor's actions and intentions. The only way to make sense of this claim, however, is by appealing to the distinction between moral and legal rights: One has an absolute moral right to both possess and exercise a right, but a conditional legal right to exercise it.

cient); Paul H. Robinson, *Causing The Conditions of One's Own Defense: A Study in The Limits of Theory In Criminal Law Doctrine*, 71 Va. L. Rev. 1 (1985) (same).

⁷⁷ Uniacke, *supra* note 8, at 200. Thomson and Rodin do not refer to this possibility directly in their writings, but judging from their stance with respect to other questions, they would presumably support this position too.

⁷⁸ This line of explanation is attributed to Bedau in his interpretation of Blackstone's theory on the right to life. See Bedau, *supra* note 58, at 553–58. It should be noted that there is a two-way relationship between moral and legal rights. While some moral rights precede legal rights (that is, they are not created by, nor can they be eliminated by, law), other moral rights are founded on legal rights, and hence can be eliminated by the law. Natural rights, and respectively the right to life, are moral rights of the former kind.

Even then, in these circumstances, to forfeit the moral right to exercise a right to self-defense is equivalent to forfeiting the right itself.⁷⁹ The question of self-preference is a question about the moral right (rather than the legal right) and thus we are back to square one.⁸⁰

V. A THEORY OF FORCED CONSEQUENCES

I wish to offer a different account for justifying self-defense. I have already explained that I believe that the right not to be killed is an absolute and unqualified right. Thus, I make the claim that permission for a defender to take the life of an aggressor is not based on some balancing between two rival rights, but instead on other considerations—namely, considerations of forced consequences. These considerations, I argue, establish a right to self-defense triggered by the unjust threat posed by the aggressor.

At the outset of this discussion I wish to stress that the law of self-defense is found in criminal law only because it provides an exemption to the general rule that prohibits the killing of another. Justification for this exemption, however, does not have to be based on the underlying principles of criminal law. Instead, it can be founded on principles that are commonly recognized in civil law, and especially in the law of tort. After all, self-defense is about repelling or warding off an attack, not punishment.⁸¹ In this sense, it may be compared to the reliance of criminal law on other rights that are established by civil principles, such as the law of theft, which is based on the concept of ownership, a concept determined by civil law. The account I wish to advance distinguishes between the moral appraisal of the aggressor and the permissibility of the defensive response.

Starting from the premise of an absolute unqualified right not to be killed, it follows that self-defense, as a derivative right, must be an absolute natural right as well. This is so because without an ab-

⁷⁹ Uniacke, *supra* note 8, at 203–04.

⁸⁰ Bedau suggests a third line of justification of self-preference based on the distinction between “right” and “the right thing to do,” Bedau, *supra* note 58, at 569, but I do not find any meaningful difference between this suggestion and the one discussed in the main text.

⁸¹ I will refrain from a detailed discussion on this distinction. For some of the available positions, see *supra* note 42.

solute right to self-defense the right not to be killed can hardly be regarded as a right, as it provides its owner no effective tools to protect it. Self-defense plays a major role in resisting the direct imminent unjust threat posed by an aggressor. It also has an additional role in the defense against an indirect threat to autonomy, a threat that is generated by the fear and instability that the lack of such a right would bring about. It constitutes one of the basic conditions that allow people to live together in society. One of the reasons we value life is because it is a necessary precondition to the possibility of autonomy, of pursuing various personal and communal goals. Thus, the right to self-defense can be partly explained by reason of its implications for autonomy. No matter how comprehensive the rules of a given society are, there will always be situations where one is unable to turn to the community for help. Unless the possibility to defend oneself is recognized in these situations, the risks associated with living in a society would increase. Many people would devote their lives to creating conditions that would ensure their survival instead of promoting their autonomy in other ways. Given that life is a precondition of (or at any rate, closely connected to) autonomy, the protection of these two interests is inseparable; even if we justify the right of self-defense in terms of defending one's life from an imminent unjust threat, the defense of life is, *inter alia*, a defense of autonomy. That is to say, defending one's life is defending one's autonomy.

The account I offer accepts much of the account of forced choice, but also extends it. In the core situations of culpable aggressors, the permission to use defensive force is based, I argue, on the commonly accepted fault-based selection principle as modified by Wasserman to the "present aggression"—a modification which does not allow the aggressor to disassociate him or herself from his actions.⁸² The idea that the person who is morally responsible for a situation ought to be the one to bear the burdens of the situation accords with our general intuitions of fairness. Hence, an aggressor who culpably brings about a situation in which the defender is forced to choose between his life and the life of the aggressor ought "to pay the price" for his actions.

⁸² See Wasserman, *supra* note 11, at 365–78.

As mentioned earlier, the difficulty with this reasoning is that it draws the line between culpable and innocent (non-culpable and non-agent) aggressors, justifying the former and excusing the latter. It also fails to distinguish between the innocent aggressor and the bystander. To extend the right of self-defense to include responses to non-culpable and non-agent aggressors, and to make a distinction between them and bystanders, it is necessary to abandon any justification that is based on a moral appraisal of the aggressor.

Whichever form the acts of innocent aggressors may take, it might be said that the aggressor had “bad luck” in becoming an aggressor—due to some bad luck, he threatens the life of the defender, thus creating a situation in which either the aggressor or the defender will have to pay the costs.

Now consider the following situation: *A* and *B* are the last two people to have appointments with a particular doctor on a Friday evening. *A* has an appointment from 6:50-6:55 and *B* has an appointment from 6:55-7:00. Both cases are urgent (let us assume that both *A* and *B* suffer from the same disease, and as it is Friday evening, both would suffer a lot of, and the same, discomfort until Monday when they will next be able see the doctor). Each case requires at least five minutes of the doctor’s time and the doctor must leave the surgery at exactly 7:00. Although *A* left home in time she was held back due to an unexpected traffic jam, and arrives at the surgery at 6:55 together with *B*, who is just about to go in. Assuming that only one of them can see the doctor and that there are no general arbitrary regulations to cover such cases, who should it be? I think it should be *B*. Although *A* is not at fault, for it was only due to bad luck that she was put in this position, given that either *A* or *B* has to pay the costs, *A* should be the one to pay. This situation is not similar to that of self-defense because *A* does not pose a threat to *B*’s life. However, the principle that can be abstracted from it is also applicable to situations which trigger the right to self-defense.

Let us consider another situation: *C*, a customer in a store, has an epileptic fit for the first time in her life during which she breaks a very expensive china plate. The question is whether *C* should pay for the broken plate, or whether *D*, the shop owner, should suffer the damages. I think that *C* should have to pay for the damaged

plate even though she broke the plate through no fault of her own. The principle is the same: Since it is either *C* or *D* who has to pay for the damaged plate, it is *C* who should pay for her “bad” luck. Once again, the situation differs from the self-defense scenario because in self-defense we are dealing with resisting an oncoming attack, whereas in this example we are interested in compensation. Yet the principle that can be abstracted from this example is applicable to situations that trigger the right to self-defense.

Finally, consider the mirror image of self-defense from the non-culpable or non-agent aggressor’s point of view. Imagine the following situation: *A* (the aggressor) is drugged without his knowledge with a substance that causes him to lose control for about 10 minutes. He enters a car and starts driving. The drug kicks in, he loses control, and the car heads towards *B* (the defender), who has nowhere to run. A few seconds before *A* hits *B* the effect of the drug wears off. The only way for *A* to avoid hitting *B* is to turn his car, but in doing so, he will fall off a cliff and die. *A* is required to do everything in his power to eliminate this unjust threat, even at the expense of his own life, and even if he got into this situation innocently. The aggressor is found in a situation of necessity. In such situations, it is agreed, the aggressor is not *justified* in killing another person who does not, in himself, pose the threat.⁸³ This demand on the aggressor to do everything to avoid harming the defender is founded, I argue, on the premise that one is not allowed to make another person pay for the consequences of one’s own actions even if one is not morally responsible for them. This rule, which applies to an aggressor with respect to his own actions, should allow any other person to act in the same manner.

It is this same idea that justifies the defensive response. Through “bad” luck, the non-culpable and non-agent aggressor wrongs the defender, violating his right not to be killed. He is posing an unjust threat to the defender, creating a situation in which either the defender or the aggressor will have to pay the costs. In these circumstances, I think it is wrong for the aggressor to transfer the burden to the defender and demand that the defender be the one to suffer

⁸³ Even in those jurisdictions that recognize a defense in this scenario, it is considered only an excuse and not a justification. That is, it is not considered the *right* thing to do.

the consequences. Hence, it is the causal responsibility of the aggressor for the unjust threat that spawns the right to self-defense. Also note that as self-defense is not about punishment but about resisting, repelling or warding off an attack, we are no longer confined to the concept of moral responsibility.⁸⁴ The causal responsibility of the aggressor creates the asymmetry between the aggressor and the defender in the following way: The defender has a right to life. Therefore, if the aggressor makes an attack upon the defender's life, in the absence of any special justifying circumstances, he wrongs him. Because the aggressor had "bad" luck and is causally responsible for the aggression that created a situation in which either he or the defender will have to suffer the consequences, the defender has a right to use necessary and proportionate force against him. Therefore, when the defender attacks his aggressor to defend himself, he has justifying circumstances and does not violate the aggressor's right to life and does not wrong him. Because the defender does not wrong the aggressor, the aggressor does not have a right to defend himself from the defender's threat.

It is important to note that the starting point for the above description can only be with the aggressor. For one thing, the defender cannot be considered the one posing the threat to the life of the non-culpable or non-agent aggressors because it is commonly agreed that the mere existence of the defender is not considered a source of threat. From the aggressor's point of view, the defender is an innocent bystander, and he (the aggressor) is in a situation of necessity. Second, from an objective "cause and effect" point of view, the initial threat that triggers the whole sequence is the aggressor's act.

This account draws a clear line between permission to use defensive force against an aggressor who poses an unjust threat and the impermissibility of using force against a bystander, who does not

⁸⁴ Thus, this view is even consistent with the position that moral luck ought not to play a role in the attribution of blame. For further discussion about the relationship between moral luck and responsibility, see, e.g., Bernard Williams, *Moral Luck*, in *Moral Luck* 20 (1981); Judith Andre, Nagel, Williams, and *Moral Luck*, 43 *Analysis* 202 (1983); Brynmor Browne, *A Solution to the Problem of Moral Luck*, 42 *Phil. Q.* 345 (1992); Henning Jensen, *Morality and Luck*, 59 *Phil.* 323 (1984); Thomas Nagel, *Moral Luck*, *L. Aristotelian Soc'y Supp.* 137 (1976); Brian Rosebury, *Moral Responsibility and "Moral Luck,"* 104 *Phil. Rev.* 499 (1995); Steven Sverdlik, *Crime and Moral Luck*, 25 *Am. Phil. Q.* 79 (1988).

pose an unjust threat. The bystander does not do anything. He has neither “good” nor “bad” luck and hence the permission to use defensive force against the aggressor is not available. On the contrary, in such situations it is the defender who suffers “bad” luck, and should not make another person—the bystander—suffer the consequences of that luck.

At this point I should offer two notes of clarification. First, I maintain a mixed justification of forced choice in the case of culpable aggressors, and the consequences of luck in the case of innocent aggressors, because it would be incorrect and misleading to talk about the aggressive actions of the culpable aggressor in terms of “luck.” These actions are intentional and planned.

The second clarification is the distinction between the argument of forced choice and the argument of the consequences of luck. In the former, the claim is that the defender is solely forced into a position in which he has to make a choice between lives. In the latter, the emphasis is not on the forced choice that the defender is compelled to make, since *ex hypothesi* the aggressor cannot bring this state of affairs to an end—either he is unaware of it, or he is not in control of his actions. The emphasis of the consequences-of-luck justification is on causal responsibility, which is the basis of the aggressor’s luck.

This account does not suffer from the problems of forfeiture that have plagued rights theories. It explains why an aggressor may not be killed once he ceases to pose an unjust threat: because once the attack ceases, there is no longer a need for anyone to pay the costs, whether intentional or innocent.⁸⁵

CONCLUSION

The right to self-defense is a derivative right that originates from the core right not to be killed; the purpose of self-defense is to defend this core right. In this Essay I have attempted to find the moral foundations for this right. I have referred to three contemporary theories. Some theorists hold that the moral foundation of self-defense is found in the lesser harmful results of the defensive response. This position entails balancing the interests of the ag-

⁸⁵ Though the intentional aggressor might deserve punishment, but that is a separate issue.

gressor with those of the defender, taking into consideration the fault of the aggressor as the one who created the threat. In response to criticism, there has been a shift away from showing that in any specific case the killing of the aggressor is a lesser harmful result, and towards referring to the overall beneficial consequences of recognizing the right to self-defense—most importantly, the reassurance to society and the deterrence it provides against aggressive acts. But this modification still leaves the lesser harmful results theory both too strong and too weak—too strong because if it is taken seriously it ought to permit the use of force even when it is unnecessary or disproportionate, and too weak because it is still dependent on the marginal gains achieved by a recognition of the right.

Other theorists justify self-preference by reference to forced choice. One strand of this school of thought uses forced choice as the basis for a *justification* of a particular distribution of harm rooted in considerations of justice. One consideration is the general fault-based selection principle: The aggressor is alone responsible for forcing the defender into a position in which he must make a choice between lives. A second consideration is present aggression, which creates a moral asymmetry: Because the aggressor can retreat, but the defender cannot, the aggressor cannot disassociate himself from his actions. The second strand of this school of thought advances the idea of forced choice as an *excuse*. Self-defense is permitted as a necessary response where there is no “real choice” but to use defensive force. Ryan develops a variation of this view by comparing self-defense to duress.

Both strands are subject to criticism: the second for counter-intuitively explaining self-defense only as an excuse rather than a justification, and the first for giving a limited justification which permits, on its own, only the killing of culpable aggressors. Even when combined with the second strand of excuse, forced choice as a justification fails to distinguish between the justified killing of innocent aggressors and the unjustified killing of innocent bystanders.

A third position—the most common among contemporary theorists—bases the justification for self-defense on some variation of a rights theory. They trace the right to self-defense back to a core right not to be killed, and ground self-defense in the prevailing

core right of the defender over that of the aggressor. The various accounts are based on the relationship between one's rights and the duties these rights impose on others. These theories, however, face a substantial difficulty: they need to overcome the problem of forfeiture that they necessarily entail, while providing a justification that does not depend on a prior stance or belief as to whether self-defense is justified under the circumstances (and thus become circular). Instead, a comprehensive and non-circular theory should serve as a guide to deciding which situations are covered by the right to self-defense.

I have examined two possible responses to this problem. The first recognizes a non-absolute right that is dependent on the actions of its owner. The second is to recognize an absolute right of limited scope, the limitation being either factual or moral. The advantage of the second method is its response to the problems of forfeiture. A proper specification would limit the scope of the right so as to exclude all (and only) those situations in which presumably the right is forfeited. It also allows for humanity to be the only precondition of a right, which should not depend on human conduct. Indeed, the first method is rejected for not overcoming the problem of self-preference.

Using the second method, theorists try to develop a careful moral specification that would avoid circularity and set the basis for the asymmetry between the aggressor and the defender. Uniacke suggests that a moral specification is founded on an objective fact, namely, the causal responsibility of the unjust immediate threat. Meanwhile, Rodin holds that the basis for moral specification is the aggressor's fault. I reject the underlying assumption of both justifications, which is that the right not to be killed has a limited scope. Instead, I find support for my position in two consequences of any limited-scope justification. First, in cases of self-defense, a limited-scope justification provides an awkward explanation for the existence of a requirement of proportionality to a threat of injury that does not involve killing. Second, such a justification offers an insufficient explanation for the situations of defenders who use force against their aggressors for reasons other than self-defense.

Given the difficulties found in the various theories, I suggested a different justification based on forced consequences. Consistent

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with my position that both sides have an absolute unconditional and unqualified right not to be killed, I argued that the right to self-defense is based on other considerations. The justification combines two separate explanations that respond to two distinct situations. In cases of intentional aggressors I adopted the justification strand advanced by the forced choice theory, finding that the side at fault should pay. However, as this justification by itself cannot explain why innocent aggressors also trigger the right to self-defense and why they should be distinguished from bystanders, I offered a distinct justification for the right to self-defense in instances involving innocent aggressors. Given that it is either the aggressor or the defender who would have to pay the costs of the aggressor's bad luck, the aggressor must be the one to pay it. This justification is by definition limited to the latter situation only, and distinguishes between non-culpable and non-agent aggressors on the one hand and bystanders on the other.

The talk of a *right* to self-defense does not have to limit our inquiry to rights theories alone. On the contrary, rights theories would bring us to a dead-end if the right not to be killed is indeed, as I have argued, an absolute right. The justification for the right to self-defense has to be found elsewhere, in other moral principles that we employ in various fields of life. I hold that an appeal to what I call "forced consequences" provides a coherent justification of the right to self-defense. I have left untouched many perplexing issues that the right to self-defense raises. Further exploration is needed to untangle this right, and the forced consequences justification is, I hold, the correct tool for this mission.