

# Responsibility, Risk, and Killing in Self-Defense\*

*Seth Lazar*

## I. INTRODUCTION

Combatants in war inflict untold devastation. They lay waste to the environment, destroy cultural heritage, wound, maim, and kill. Most importantly, they kill. These are deeds that would normally be morally abhorrent. People have, as a matter of justice, a duty to respect others' rights to life. To kill, in almost any other context besides war, is to breach that duty. If a country is at war, and a concerned citizen is deciding whether or not to fight, it is killing that must first be justified.<sup>1</sup>

There are two ways to justify acts that would, ordinarily, breach our duties of justice. The first is to maintain that in the relevant situation the duty does not in fact obtain, so there is no corresponding breach. The second is to argue that, while these acts are indeed unjust, there is some other, more compelling moral consideration, which justifies these breaches of duty. For example, it may be impossible to avoid

\* I have received a great deal of help while writing this essay. Financial support came from St. Peter's College, the Department of Politics, and the Vice-Chancellors' Fund at the University of Oxford, as well as the AHRC. I presented the essay at the Uehiro Applied Ethics Graduate Discussion Group, Oxford; at the Keele Political Theory workshop; and at the Oxford Institute for Ethics, Law, and Armed Conflict; as well as at the 2008 meetings of the Society for Applied Philosophy, and the American Philosophical Association (Eastern Division). For valuable comments at and after these presentations, thanks to Tony Coady, Tom Douglas, Helen Frowe, John Horton, Rahul Kumar, Steve Lee, Monica Mookherjee, Glen Newey, Mike Otsuka, Jon Quong, David Rodin, Klem Ryan, Julian Savulescu, Ben Saunders, Guy Sela, Zofia Stemplowska, and Jennifer Welsh. Thanks in particular to the members of Henry Shue's War Workshop—Zahler Bryan, Janina Dill, and especially Per Ilsaas—whose ideas, criticism, and support were crucial to the development of this article and of my research generally. The reviewers and editor for this journal helped me avoid numerous pitfalls, providing an arrestingly insightful commentary that has greatly benefited my work. Finally, I owe my greatest academic debts to Henry Shue and to Jeff McMahan, who have both provided abundant inspiration, encouragement, and criticism throughout my research.

1. First, but not only. The other wrongs that combatants do are also extremely important.

*Ethics* 119 (July 2009): 699–728

© 2009 by The University of Chicago. All rights reserved. 0014-1704/2009/11904-0005\$10.00

breaching either this set of duties or some other, more important set, such that even killing unjustly is the lesser of two evils.

The present essay focuses on the first possibility,<sup>2</sup> asking what reasons might persuade a potential combatant that he will not breach duties of justice to those he kills in war. Unless war is morally *sui generis*, with its own set of rights and duties, the most promising argument to this conclusion will appeal to principles of self-defense.<sup>3</sup> These are the only principles in ordinary morality—with the possible exception of those grounding capital punishment—which seem capable of eliminating the whole wrong involved in killing a person. Principles of self-defense state that, when one person attacks another, under certain conditions that first person can be liable to defensive harm, such that no wrong is done in harming him. He loses his claim right to life, and the defender therefore has no duty not to kill him. If combatants in wartime are to kill without injustice, there must be some explanation of how the best principles of self-defense vitiate the rights to life of their victims. We need an account of how the people they kill are liable to that fate.

The conventional view of the ethics of war, as espoused most famously by Michael Walzer, states that one can be liable to be killed simply by virtue of being the direct agent of a lethal threat to another person. By posing a threat to others' lives, combatants forfeit, or weaken, their right to life.<sup>4</sup> This grounded Walzer's twin commitments, to the moral equality of combatants—also called the “symmetry thesis,” according to which combatants on either side of a conflict may kill one another with equal right<sup>5</sup>—and to the principle of discrimination, which denies them the right ever to launch deliberate attacks on noncombatants.

This conventional view has been much criticized. Some philosophers argue that one's right to life cannot be lost by acting justifiably and therefore propose that we distinguish between combatants on the justified and the unjustified side—usually by identifying which side met the traditional criteria for the justified resort to war (the *jus ad bellum*).

2. I discuss the second possibility in Seth Lazar, “War and Associative Duties” (D.Phil. diss., University of Oxford, 2009).

3. Henry Shue and Michael Walzer have suggested that we should distinguish more radically between the morality of war and that of ordinary life. Henry Shue, “Do We Need a Morality of War?” in *Just and Unjust Warriors: The Moral and Legal Status of Soldiers*, ed. David Rodin and Henry Shue (Oxford: Oxford University Press, 2008), 87–111; Michael Walzer, “Response to McMahan's Paper,” *Philosophia* 34 (2006): 43–45.

4. See, e.g., Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic, 2006), 144.

5. David Rodin and Henry Shue, “Introduction,” in Rodin and Shue, *Just and Unjust Warriors*; Adam Roberts, “The Principle of Equal Application of the Laws of War,” in Rodin and Shue, *Just and Unjust Warriors*, 226–54.

Combatants fighting for the side that satisfied the principles of *jus ad bellum* are justified combatants, and they have a right to kill their enemies, because the latter pose an unjustified threat to their life, which grounds their liability to lethal defensive harm.<sup>6</sup> On this, the unjustified-threat view of liability in war, we should reject the symmetry thesis but retain the principle of discrimination.

Others believe even this is inadequate: they think that the only plausible basis for liability to lethal defensive harm is blameworthy moral responsibility—that is, culpability—for an unjustified threat.<sup>7</sup> In the absence of some degree of culpability, even unjustified combatants are morally innocent, and so retain their standard rights to life, and cannot be killed without wrong. The symmetry thesis must certainly go, on the culpability view, but the principle of discrimination may also go with it, since noncombatants can be morally responsible for an unjustified threat, even if they do not pose it themselves.

At the level of moral theory, the culpability view is probably a more plausible basis for liability than either the conventional view or the unjustified-threat view. The right to life is uniquely important, and arguments for its diminishment or loss should meet a heavy burden of proof. In particular, they should be able to tie that diminishment or loss to something distinctive about us as moral subjects—something beyond mere bad luck. What culpability gains in theory, however, it loses in application: many unjustified combatants are morally innocent of the threats that they pose, excused either by duress or because they reasonably believe their cause to be justified, in conditions of uncertainty and high risk.<sup>8</sup> Moreover, in the radically information-poor context of war, there is no way for justified combatants to discriminate between innocent enemies and those who are indeed culpable for fighting. Until a new “revolution in military affairs” complements laser-guided weaponry with guilt-seeking missiles, the culpability view of war threatens to make just killing impossible.<sup>9</sup>

Caught between the valid insights of the culpability view and the

6. See, e.g., G. E. M. Anscombe, “War and Murder,” in *Moral Problems: A Collection of Philosophical Essays*, ed. James Rachels (New York: Harper & Row, 1979), 393–407; Judith Jarvis Thomson, “Self-Defense,” *Philosophy & Public Affairs* 20 (1991): 283–310. It is important to remember that the concept of liability is being used in a strictly moral, not legal, sense to connote that the liable party can be killed without wronging him.

7. See, e.g., Jeff McMahan, “Innocence, Self-Defense and Killing in War,” *Journal of Political Philosophy* 2 (1994): 193–221; Michael Otsuka, “Killing the Innocent in Self-Defense,” *Philosophy & Public Affairs* 23 (1994): 74–94; Gerhard Overland, “Killing Soldiers,” *Ethics and International Affairs* 20 (2006): 455–75, and “Killing Civilians,” *European Journal of Philosophy* 13 (2005): 345–63.

8. I argue this point in Lazar, *War and Associative Duties*.

9. Lawrence Freedman, *The Revolution in Strategic Affairs* (London: Oxford University Press, 1998).

justified complaint that it fails in application, a number of philosophers, in particular Jeff McMahan, Tony Coady, and David Rodin, have proposed a new criterion of liability to defensive killing, based on a more minimalist conception of responsibility.<sup>10</sup> Instead of focusing on moral responsibility, with its requirement of blameworthiness, they emphasize agent responsibility, where one is agent-responsible for doing *x* if one voluntarily chose to *x*, and, when choosing, one met the (appropriately specified) minimum standards of responsible agency.<sup>11</sup> Even if one's conduct is fully excused, on this account, one can still be liable to be killed. If successful, the agency view of liability would allow us to have our cake and eat it: the radical expansion of liability would mean almost all unjustified combatants would be liable to be killed, while we could retain the insight that grounds liability in responsibility.

This article offers a critique of the agency view.<sup>12</sup> Since Jeff McMahan has done more than anyone else to explicate its foundations, I focus on his work. His core argument is that, where A's voluntary conduct—however blameless—imposes risks on B, A should lose his right not to bear the costs when those risks eventuate in B being forced to choose between their lives. Against McMahan, I argue that agent responsibility for the imposition of risks does not adequately differentiate between A and B; in most cases, B will also be agent-responsible for this forced-choice situation arising. In the absence of any asymmetry between

10. The first mention I have found of this view—albeit without the application to war—is a brief discussion in Otsuka, "Killing the Innocent in Self-Defense." It has recently been mooted by Tony Coady in "Terrorism and Innocence," *Journal of Ethics* 8 (2004): 37–58, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008), and "The Status of Combatants," in Rodin and Shue, *Just and Unjust Warriors*, 153–75. David Rodin has also proposed it in "The Moral Inequality of Soldiers: Why Jus in Bello Asymmetry Is Half Right," in Rodin and Shue, *Just and Unjust Warriors*, 44–68. By far the most sustained discussions, however, can be found in Jeff McMahan's work, in particular: *The Ethics of Killing: Problems at the Margins of Life* (Oxford: Oxford University Press, 2002), "The Ethics of Killing in War," *Ethics* 114 (2004): 693–732, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15 (2005): 386–405, "Just Cause for War," *Ethics and International Affairs* 19 (2005): 1–21, "On the Moral Equality of Combatants," *Journal of Political Philosophy* 14 (2006): 377–93, "The Morality of War and the Law of War," in Rodin and Shue, *Just and Unjust Warriors*, 19–43, and *Killing in War* (Oxford: Oxford University Press, 2009).

11. McMahan does not use the term 'agent responsibility,' preferring to call this an 'eccentric' conception of moral responsibility (McMahan, "The Ethics of Killing in War," 723). I think it better to keep these two concepts terminologically separate—especially since McMahan's critics sometimes overlook his shift from moral to agent responsibility.

12. Elsewhere I criticize the conventional, unjustified-threat, and culpability views, and add other, more practical objections to the agency view, concluding that there is no adequate theory of self-defense that can render killing in war just—see Lazar, *War and Associative Duties*, chaps. 2–5.

A and B, there are no grounds for either losing his right not to be killed by the other.

The agency view has been criticized for implausibly restricting the right to kill in self-defense.<sup>13</sup> I disagree with this criticism and will argue that the agency view is not too restrictive; it is too permissive. I accept the original critiques of both the conventional view of liability and the unjustified-threat view. Moral responsibility for an unjustified threat is, I think, required for liability to defensive killing.<sup>14</sup> This leads me to conclude that combatants on both sides of most wars are indeed symmetrically situated, but not in the way Walzer imagined: rather than killing with equal right, most of the killing they do breaches fundamental duties. Moreover, the principle of discrimination cannot be grounded in facts about combatant liability, because many combatants, like non-combatants, retain their rights to life.<sup>15</sup>

The shift to agent responsibility is, in my view, a retrograde step: the potential combatant should not imagine that he can destroy, maim, and kill without violating rights. If warfare is ever to be justified—and pacifism is a serious possibility here—some other reasons must override the rights of the slaughtered. Since even the best wars will be massively duty-breaching endeavors, we should be considerably more cautious about warfare than we currently are.

## II. THE AGENCY VIEW OF DEFENSIVE KILLING

For combatants whose side has met the criteria of *jus ad bellum*—call them justified combatants—to have a liberty right to kill combatants whose side did not meet those criteria—unjustified combatants—it must be true that the justified combatants have no duty not to do so. If they have no duty not to kill unjustified combatants, then the latter have no claim right not to be killed by them: in the circumstances, this means they have lost their right to life. A theory of self-defense, therefore, ordinarily comprises two basic elements: first, an explanatory structure to show how this radical diminishment of one's right to life is possible; second, a criterion of liability to trigger that diminishment. Each is crucial, though the debate often proceeds as though all we need to do

13. Yitzhak Benbaji, "The Responsibility of Soldiers and the Ethics of Killing in War," *Philosophical Quarterly* 57 (2007): 558–72, and "A Defense of the Traditional War Convention," *Ethics* 118 (2008): 464–95; Whitley Kaufman, "Torture and the 'Distributive Justice' Theory of Self-Defense," *Ethics and International Affairs* 22 (2008): 93–115; Uwe Steinhoff, "Debate: Jeff McMahan on the Moral Inequality of Combatants," *Journal of Political Philosophy* 16 (2008): 220–26.

14. This is a point I do not attempt to substantiate in this essay.

15. There are undoubtedly still strong grounds for the principle of discrimination; however, they must be positive grounds, focused on the distinctive vulnerability of non-combatants, rather than negative grounds derived from the liability of combatants.

is identify a criterion of liability.<sup>16</sup> The different advocates of the agency view presuppose different underlying structures for self-defense, though they concur on the criterion of liability; for present purposes, I concentrate on McMahan's approach.<sup>17</sup>

*A. The Forced-Choice Model of Self-Defense*

McMahan's explanatory structure is based on the following scenario. Defender is about to suffer a serious and unjustified harm—the harm must be serious, to make defensive killing proportionate; it must be unjustified, since McMahan thinks justification defeats liability (one cannot be liable to be killed if one fights justifiably). This is one distinction, recall, between his position and the conventional view of traditional just war theory, according to which even unjustified combatants could be at liberty to kill. Defender can save himself only by harming someone else: that is, he is forced to choose between suffering and inflicting harm.<sup>18</sup> He could inflict the harm on three types of victim: Bystander, who is causally unconnected to the threat; Attacker, who is its direct agent; and Cause, who played a causal role in bringing the threatened harm about but is not its direct agent. Defensive killing is justified when there is some moral asymmetry between these parties which can ground one (or more) of them being liable to the impending harm.<sup>19</sup> Principles of defensive justice are principles for the distribution of unavoidable harms in situations of forced choice.<sup>20</sup> One party can lose his right to life because, on this theory, somebody has to.

A criterion of liability, then, identifies an asymmetry between the potential bearers of the unavoidable harm, which can justify visiting the harm on one among them. McMahan joins a number of other scholars

16. For example, in Benbaji, "The Responsibility of Soldiers," and "A Defense of the Traditional War Convention"; Coady, "The Status of Combatants"; McMahan, *Killing in War*; Rodin, "The Moral Inequality of Soldiers."

17. Rodin originally advocated a model grounded in the principle of reciprocity; Coady does not explore the explanatory model underlying self-defense. David Rodin, *War and Self-Defense* (Oxford: Clarendon, 2002); Coady, *Morality and Political Violence*.

18. McMahan, *The Ethics of Killing*, 403. There is an alternative version of the forced-choice argument, according to which it is not a justification for killing, it simply shifts responsibility for the killing onto the party that forced the choice. See, e.g., Cheyney C. Ryan, "Self-Defense, Pacifism, and the Possibility of Killing," *Ethics* 93 (1983): 508–24.

19. McMahan, "The Basis of Moral Liability to Defensive Killing," 386. See also David Wasserman, "Justifying Self-Defense," *Philosophy & Public Affairs* 16 (1987): 356–78, 356; Brian Orend, *War and International Justice: A Kantian Perspective* (Waterloo: Wilfrid Laurier University Press, 2000), 157.

20. This framework is consistently maintained throughout McMahan's work. See, e.g., "Innocence, Self-Defense and Killing in War," 204, *The Ethics of Killing*, 402, "The Basis of Moral Liability to Defensive Killing," 386, and "Just Cause for War," 8. It owes much to Phillip Montague, "Self-Defense and Choosing between Lives," *Philosophical Studies* 40 (1981): 207–19, esp. 215.

in thinking that this asymmetry should have sturdy foundations in some facts about the liable party.<sup>21</sup> We ordinarily have a claim right to life, which grounds very strong duties not to kill us. This right to life is partly constitutive of our moral status: for another person to have no duty not to kill me, to do no wrong in killing me, is for me to have lost my capacity to make any significant claims against him at all. Almost any claim I have can be denied in the simple act of ending my life. The burden of proof to justify an individual's losing the protection afforded by this right should be high.

McMahan, along with Coady and Rodin, argues that what matters here is responsibility: one party in the forced-choice situation can be liable to be killed, if he is in some sense responsible for the forced-choice situation coming about (and the others are not). Responsibility, however, is a complex concept. For the purposes of this essay, we can roughly distinguish between at least three different dimensions: causation, agency, and blame.<sup>22</sup>

### *B. Three Dimensions of Responsibility*

Causal responsibility is standardly predicated of states of affairs, such that I am causally responsible for state of affairs *y*, when my conduct *x* plays a causal role in bringing *y* about. Causal responsibility varies depending on how proximate a cause *x* is to *y*. Sometimes my conduct constitutes the state of affairs: by swinging my arm toward your face, I have created the state of affairs where you are about to be hit. Sometimes the connection is more indirect—for example, by voting for a government, I help to bring it into power, which enables it to launch a war in the future. I (stipulatively) call these direct and indirect responsibility.<sup>23</sup> A is indirectly causally responsible for state of affairs *y* when A is responsible for act *x*, which created a risk of *y* coming about. He is directly responsible for *y* when his act *x* makes certain that state of affairs *y* comes about (for example, by constituting that state of affairs). Throughout, when I refer to direct responsibility for a state of affairs, I mean responsibility for making that state of affairs certain; indirect responsibility for a state of affairs is responsibility for creating the risk that the state of affairs would come about. This is the difference between a Cause, who knifes Defender's life jacket before they set out on stormy

21. See, e.g., Judith Lichtenberg, "How to Judge Soldiers Whose Cause Is Unjust," in Rodin and Shue, *Just and Unjust Warriors*, 112–31; Thomas Nagel, "War and Massacre," *Philosophy & Public Affairs* 1 (1972): 123–44; Otsuka, "Killing the Innocent in Self-Defense."

22. The following section attempts to pin down these three dimensions for the purposes of this article; it is not an attempt at an exhaustive analysis of responsibility.

23. An associate editor has observed that this construal of direct and indirect responsibility as varying along the axis of probability is idiosyncratic—an alternative usage focuses on the absence or presence of intervening causes.

seas, and an Attacker, who comes at Defender with a knife aimed at his throat. If noncombatants are causally responsible for a forced choice, or an unjustified threat, they will probably be indirectly causally responsible. Combatants are more likely to be directly causally responsible.

Second, agent responsibility: this is standardly predicated of actions and omissions, not states of affairs.<sup>24</sup> A is agent-responsible for his action or omission  $x$  when he voluntarily chose to  $x$ , and he met the criteria of rational agency when choosing to  $x$ . These criteria are undoubtedly complex, but they are likely to include minimal rationality, physical self-control, and nonmanipulation.<sup>25</sup> If A is not a minimally competent rational agent, then he cannot be agent-responsible for his conduct; likewise if he is not in control of his body—perhaps because he has been used as a projectile by another person; and likewise if he is out of control of himself because of “deep hypnosis or mind control.”<sup>26</sup> To say that A is agent-responsible for  $x$ -ing is to say that this instance of  $x$ -ing can be attributed to him: it was his action, and nobody else’s. Agent responsibility is a low standard: most people are probably agent-responsible for almost all their actions; in particular, combatants in wartime will almost always be agent-responsible for their conduct.<sup>27</sup>

Moral responsibility, like agent responsibility, is normally predicated of actions and omissions. It presupposes agent responsibility, but adds to it the element of being a proper object of praise or blame. A is morally responsible for his action or omission  $x$ , when he is agent-responsible for  $x$ , and he can appropriately be praised or blamed for  $x$ -ing. A will sometimes be agent-responsible for an unjustified threat  $x$ , but will be excused of blame for that threat, hence not culpable. Suppose Attacker attacks Defender, under the mistaken but reasonable belief that Defender poses an unjustified threat to Bystander. The fact that he acted on a reasonable belief may be sufficient to excuse him of blame, but it should not mean that his conduct was any less unjustified than if he had not had that belief. The principal excuses discussed by McMahan are nonculpable ignorance and irresistible duress. Combat-

24. I am assuming that we can distinguish between the action that brings about a state of affairs, and the state of affairs that it brings about. An action  $x$  can be more or less fully described—for example, the same  $x$  could be pulling a trigger or shooting a man dead. Under the latter description,  $x$  makes the state of affairs certain; under the former, it does not. In general, I focus on more minimalist action descriptions, but this is contested terrain, as Sec. III.D shows. Thanks to two associate editors for drawing my attention to this problem.

25. McMahan, *The Ethics of Killing*, 401.

26. *Ibid.*

27. Exceptions might include drug-addled child soldiers, though McMahan is ambivalent on this. Jeff McMahan, “Killing in War: A Reply to Walzer,” *Philosophia* 34 (2006): 47–51, 47.

ants will at least sometimes, and perhaps often, be excused on these grounds for their part in an unjustified war.<sup>28</sup>

If agent responsibility and moral responsibility are predicated of actions and omissions, while causal responsibility identifies the relationship between actions or omissions and states of affairs, it follows that agent responsibility and moral responsibility can combine with causal responsibility. Where A's conduct  $x$  is causally responsible for state of affairs  $y$ , and A is agent-responsible for  $x$ , we can say that A is agent-responsible for  $y$ . Where  $x$  is indirectly causally responsible for  $y$ , we can say that A is indirectly agent-responsible for  $y$ . This means that he is responsible for an act that created a risk of  $y$  coming about. Where  $x$  is directly causally responsible for  $y$ , we can say A is directly agent-responsible for  $y$ . This means that he is agent-responsible for an act which created a certainty of  $y$  arising (or itself constituted  $y$ ). The same goes for moral responsibility: we can talk of direct and indirect moral responsibility for a given state of affairs, when we mean by this respectively that one is morally responsible for an action that created that state of affairs or that one is morally responsible for an action that created the risk of the state of affairs arising.

### C. *The Justice Argument*

McMahan's earlier work on self-defense and war assumed that liability could be attributed only if one party was blameworthy morally responsible—whether directly or indirectly—for bringing about the forced choice between lives. The simple underlying principle stated that, since the interests of the innocent have priority as a matter of justice, the culpable party should bear the costs of his faulty conduct.<sup>29</sup> As he did at the time, we can call this the Justice Argument for liability to defensive harm. At that time, he believed that agent and causal responsibility alone could not ground liability.<sup>30</sup> David Rodin followed the same path, advocating a culpability-based view of self-defense in *War and Self-Defense*.<sup>31</sup> The problem with the culpability argument, of course, is that many combatants on the unjustified side may well be excused for their part in the war, on grounds either of nonculpable ignorance or of duress. Moreover, there is no way to differentiate between those combatants

28. Lazar, *War and Associative Duties*, chap. 4.

29. Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104 (1994): 252–90, and "Innocence, Self-Defense and Killing in War."

30. In 1994, he rejected "the view that absence of agency in the causation of harm defeats responsibility and therefore liability in a way that absence of culpability cannot" (McMahan, "Self-Defense and the Problem of the Innocent Attacker," 265 n. 22).

31. Rodin, *War and Self-Defense*, 81. For the recent change in emphasis, see Rodin, "The Moral Inequality of Soldiers."

who are liable and those who are not. If responsibility is to be relevant to killing in war, a thinner conception is required.

#### *D. The Responsibility Argument*

McMahan's new argument, first introduced in *The Ethics of Killing: Problems at the Margins of Life*, is based on a different principle. There is an interesting analogy between the shift from the Justice Argument to what I call the Responsibility Argument,<sup>32</sup> and that from desert-based to luck egalitarian theories of distributive justice.<sup>33</sup> Desert-based theories of distributive justice state that burdens should be distributed according to moral worth; luck egalitarian theories state that where a burden emerges because of my own voluntary action—whatever its moral worth—other things equal I should be the one to bear it, because I had the opportunity to avoid it, whereas, by hypothesis, others did not.<sup>34</sup>

In the same way, the Justice Argument focused on distributing the impending, unavoidable harm to the person who was most at fault for it coming about. It was a localized, restricted, desert-based principle of distribution. By contrast, the Responsibility Argument focuses solely on attributing direct responsibility for bringing about the forced choice, irrespective of blame- or praiseworthiness.

There is a further contrast between the underlying principles that ground the Responsibility and Justice arguments. If Attacker is agent-responsible for conduct that forces Defender to choose between killing and being killed, then Attacker has externalized the cost of his voluntary actions: had he acted otherwise, nobody need have died, so he should be the one to bear the unavoidable harm, whether or not he should be blamed for his actions. This means the argument can apply to attackers who are morally innocent of the threat that they pose. If successful, therefore, it would render protestations about the moral innocence of unjustified combatants irrelevant to the ethics of killing in war. Insofar as they voluntarily create forced choices between their lives

32. McMahan is a little inconsistent in his own terminology, so I have coined new names for his various arguments. For example, the argument grounding liability in culpability was called the Justice Argument in "Self-Defense and the Problem of the Innocent Attacker" in 1994 and the Culpability Argument in "The Basis of Moral Liability to Defensive Killing" in 2005; what I call the Responsibility Argument is called the Justice Argument in *The Ethics of Killing* in 2002; and what I call the Risk Argument is called the Responsibility Argument in "The Basis of Moral Liability to Defensive Killing" in 2005, though McMahan clearly distinguishes between it and the different Responsibility Argument he develops in *The Ethics of Killing*.

33. For example, contrast W. D. Ross, *The Right and the Good* (Oxford: Clarendon, 2002), 58ff., with G. A. Cohen, "On the Currency of Egalitarian Justice," *Ethics* 99 (1989): 906–44.

34. McMahan, *The Ethics of Killing*, 401. See also McMahan, "The Basis of Moral Liability to Defensive Killing," 394.

and those of justified combatants, it does not matter that they reasonably believe themselves to be justified or even that they are subject to irresistible duress. Consider this example (by Michael Otsuka): “Imagine that you [call “you” Guest] extend your hand to shake the hand of some foreign dignitary at a reception. Unbeknown to you, a third party projects a stunningly realistic holographic image of a pistol onto your hand. The dignitary, who is accustomed to threats on her life, sees the hologram, forms the justified belief that you are about to assassinate her, and coolly draws a pistol in order to shoot you down in self-defense.”<sup>35</sup> If we believe that ignorance can excuse unjustified conduct, then Dignitary must certainly be excused in this case. Nonetheless, since her belief is in fact false, she has voluntarily created a situation where Guest is threatened with an unjustified, serious harm, which he can avert only by killing her. McMahan would agree with Otsuka’s intuition that Guest has a right to kill Dignitary in self-defense, and would suggest that the Responsibility Argument explains why: since Dignitary acted voluntarily in bringing about the forced choice, she had the opportunity to avoid it, but Guest did not. She, then, should bear the impending costs, since “it was [her] own voluntary action that has made it inevitable that one of them must die.”<sup>36</sup>

#### *E. The Risk Argument*

Since first developing the Responsibility Argument, McMahan has sought to extend it to cover situations where we cannot unequivocally attribute responsibility for the forced-choice situation to one party or the other. He has developed what I call the Risk Argument, to justify killing people who are indirectly responsible for a forced choice, that is, responsible for creating the risk that a forced-choice situation would arise, though not directly responsible for the forced-choice situation itself.

This is especially useful in the context of war, since as well as defending themselves against unjustified combatants who immediately threaten their lives, justified combatants must normally attack enemy combatants who have not actually made it inevitable that someone must die. As has been noted before, these will include reservists and unmobilized troops.<sup>37</sup> Besides those, however, many combatants play only a supporting role on the battlefield and do not directly threaten anyone’s life, while many others, either from principle, fear, or incompet-

35. Otsuka, “Killing the Innocent in Self-Defense,” 91.

36. McMahan, *The Ethics of Killing*, 402.

37. Benbaji, “The Responsibility of Soldiers.”

ence, actually pose no threat, though they are supposed to do so.<sup>38</sup> The inflammatory research of Colonel S. L. A. Marshall proposed that between 15% and 25% of Allied soldiers in the Second World War who could have fired their weapons, did not.<sup>39</sup> Marshall's research methods have been criticized,<sup>40</sup> but his basic findings have been corroborated by other researchers who have argued that most soldiers have an understandable aversion to killing, which can be overcome only through intensive psychological training.<sup>41</sup> Firing rates are therefore likely to be higher in the militaries of the advanced liberal democracies than they would be in less professionalized forces, and especially more so than in conscript forces. Nonetheless, even for more professionalized armies there will always be a large number of soldiers who, because of principle, fear, or incompetence, or because that is not their role in the unit, pose no direct threat to their enemies.<sup>42</sup> The instinctive response of most people to great danger is either to posture, flee, or submit.<sup>43</sup> It takes considerable training to deploy lethal force. Thus, many combatants on the unjustified side will pose no immediate threat to their enemies. According to the Responsibility Argument, they are not liable to be killed. The Risk Argument is introduced to expand liability, so that all combatants—even those who pose no immediate threat—can be judged liable to lethal defensive force. “The Risk Argument is developed by appealing to the following example: A person [call him Driver] keeps

38. Colonel S. L. A. Marshall, *Men against Fire: The Problem of Battle Command in Future War* (Gloucester: Peter Smith, 1978).

39. *Ibid.*

40. See, especially, Joanna Bourke, *An Intimate History of Killing: Face-to-Face Killing in Twentieth-Century Warfare* (London: Granta, 1999). Bourke, however, clearly has her own (pacifist) agenda, and her own research on killing in war—based on selections from soldiers' diaries and correspondence from the major Western wars of the twentieth century—is also polemical and selective.

41. David Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (London: Back Bay, 1995); David Lee, *Up Close and Personal: The Reality of Close-Quarters Fighting in World War II* (London: Greenhill, 2006).

42. In Lee's detailed study of a series of actions during the Second World War, numerous examples emerge both of Allied troops laying down minimal fire and of their enemies being killed when they posed no threat, for example, while trying to surrender (*Up Close and Personal*, 16, 31–32, 58, 65, 108, 201). See also Erich Maria Remarque, *All Quiet on the Western Front*, trans. Brian Murdoch (London: Vintage, 1996), 51, 80–81, 90, 189; Tim O'Brien, *The Things They Carried* (London: Flamingo, 1991), 123ff. Even in the contemporary British army, for all its professionalism, the pressures of combat cause some soldiers to become ineffective; see Mark Nicol, *Condor Blues: British Soldiers at War* (Edinburgh: Mainstream, 2007), 53–55. More anecdotally, Denis Barnham, in his account of the battle of Malta, offers a fine story of how the Italian fighter pilots against whom he was opposed would occasionally withhold fire, forgoing a sure kill (*One Man's Window* [London: New English Library, 1975], 144).

43. Grossman, *On Killing*.

his car well maintained and always drives cautiously and alertly. On one occasion, however, freak circumstances cause the car to go out of control. It has veered in the direction of a pedestrian [call him Pedestrian] whom it will kill unless he blows it up by using one of the explosive devices with which pedestrians in philosophical examples are typically equipped.”<sup>44</sup> McMahan thinks Pedestrian has the right to kill Driver in self-defense. Now, Driver is evidently blameless for his conduct, since he could not have known that driving that day would lead to the forced choice arising.<sup>45</sup> There is no way to explain his liability by appeal to culpability and the Justice Argument for self-defense. As it stands, however, the Responsibility Argument is equally inapplicable, since Pedestrian is also agent-responsible for creating the forced-choice situation, since, as McMahan concedes, he “could have avoided it as well by simply staying at home.”<sup>46</sup> McMahan therefore introduces the Risk Argument, which situates the relevant moral asymmetry as follows: “As a morally responsible agent, he [Driver] voluntarily chose to set a couple of tons of steel rolling as a means of pursuing his ends, knowing that this would involve a tiny risk that he would lose control of this dangerous object that he had set in motion, thereby imperilling the lives of the innocent . . . the driver is liable because he voluntarily engaged in a risk-imposing activity and is responsible for the consequences when the risks he imposed eventuate in harms.”<sup>47</sup> Driver has voluntarily imposed a risk of the forced-choice situation arising on Pedestrian; meanwhile, Pedestrian “imposes no comparable risk on [Driver].”<sup>48</sup> The morally relevant asymmetry, then, is nonreciprocal risk imposition. McMahan concedes that this asymmetry is of “comparative moral insignificance,”<sup>49</sup> but this is where the structure of forced choice becomes so important: since there is no alternative to somebody suffering an intolerable harm, even a small difference can make all the difference.<sup>50</sup>

In the ethics of war, the Risk Argument can make nonfirers and

44. McMahan, “The Basis of Moral Liability to Defensive Killing,” 393.

45. *Ibid.*, 395.

46. *Ibid.*, 394.

47. *Ibid.*

48. *Ibid.*, 403.

49. *Ibid.*, 394. See also McMahan, *The Ethics of Killing*, 405.

50. This recalls Zohar’s argument that small differences can make all the difference when it is a case of “life versus life.” Although note that Zohar is using a version of the justice argument and looking for evidence of minimal guilt: “What is at stake is not an attribution of guilt such that would justify a death penalty (if such a penalty can be justified), for self-defence is not the administration of punishment; its legitimate goal is—to reiterate—saving the (prospective) victim’s life. The relevance of (the aggressor’s) guilt is only in that it tips the otherwise balanced scales of ‘life versus life’” (“Collective War and Individualistic Ethics: Against the Conscriptio of ‘Self-Defense,’” *Political Theory* 2 [1993]: 606–22, 610–11).

reservists on the unjustified side liable to be killed: by choosing to become militarily active (whether under duress or willingly), all unjustified combatants have imposed on others the risk that they will be used as instruments in an unjustified war.<sup>51</sup> This is enough to make them liable to be killed, even when they are neither culpable nor pose an immediate threat.

When he first presented this view, McMahan argued that the mere objective fact that Attacker's conduct actually eventuates in a forced choice between lives is sufficient to make him liable to be killed.<sup>52</sup> More recently, however, he has modified this position by introducing two qualifications to the risk argument. The first is a criterion of foreseeability. It must be at least possible for Attacker to know that his conduct will lead to the situation of forced choice arising: he must be engaged in a recognizably 'risk-imposing activity.' The second is that the link between the risk imposer and the forced-choice situation must be 'of the right causal type.' A mother's voluntary decision to have a child, for example, cannot make her even indirectly responsible for the state of affairs where that child, now matured, has murdered an innocent victim.

The relationship between the Risk and Responsibility Arguments in McMahan's work is ambiguous. It is unclear whether the Risk Argument is supposed to improve on and replace the Responsibility Argument, or whether they are supposed to run alongside one another, and indeed the Justice Argument, in a multitrack theory of defensive justice. Certainly there is a difference between the Risk and Responsibility Arguments. The latter simply states that, where my voluntary conduct eventuates in an unavoidable cost, it should fall upon me. The former emphasizes the importance of nonreciprocal risk imposition: where I impose risks on you, but you do not impose risks on me, then when those risks eventuate in an unavoidable cost, it should fall upon me.

My own view is this: the Risk Argument is both a logical extension of the Responsibility Argument and an expression of its underlying moral structure. McMahan has followed his intuitions about cases like that of Guest and Dignitary through to their logical conclusions, taking the debate further than the sometimes simplistic deployment of the Responsibility Argument in other writing on war. Unfortunately for the agency view, however, I think the Risk Argument is also a *reductio ad absurdum* of the Responsibility Argument—by rendering the latter ar-

51. In *War and Associative Duties*, I argue that this radical expansion of the scope of liability would have serious, and pernicious, implications for the principle of discrimination between combatants and noncombatants.

52. McMahan, *The Ethics of Killing*, 405.

gument more precise, it enables us to pinpoint the decisive flaws of both arguments for the agency view. This conclusion must be positively argued for, however—it is not immediately self-evident that one argument underlies the other.<sup>53</sup> If my objections to the Risk Argument are to have purchase against the Responsibility Argument, I must show that the latter indeed collapses into the former. I do this in Section III.E.

### III. CRITIQUE

Although the agency view of self-defense has been influential within the ethics of war and self-defense, it has recently been criticized by advocates of weaker standards for liability to defensive harm. For example, Yitzhak Benbaji and Whitley Kaufman object that McMahan ignores the commonsense intuition that defenders have a right to kill attackers and threats who are not responsible, in any way, for the threat that they pose.<sup>54</sup> This line of attack is a little unfair, however: in his earlier work, McMahan explored all the extant theories of self-defense that might justify killing such threats, and showed them to be wanting.<sup>55</sup> His theory does not accommodate the intuition that nonresponsible threats can be killed in self-defense, because he does not believe the intuition has plausible theoretical foundations. Insisting on the intuition does little to advance the debate—to criticize McMahan from this more permissive perspective, one needs to present an alternative theory of self-defense, which can explain how nonresponsible threats can suffer such a fatal weakening of their rights to life, without falling to the objections he previously developed against this view.

In general terms, my approach contrasts with that of these other critics in that I do not hold McMahan and the other advocates of the agency view to an external standard, which they have each devoted some time to refuting. I hold them to the standards they set for themselves when rejecting the view that simply posing an unjustified threat was sufficient to ground liability.<sup>56</sup> Rather than accusing their theory of not being permissive enough, I show that it has become too permissive, that it removes the right to life, and assigns a right to kill, on the basis of inadequate reasons. I show that these philosophers have still not explained why morally innocent people can be killed in self-defense.

53. In contrast, for example, with Benbaji, who collapses McMahan's arguments into one (Benbaji, "The Responsibility of Soldiers").

54. Ibid.; Benbaji, "A Defense of the Traditional War Convention"; Kaufman, "The 'Distributive Justice' Theory of Self-Defense."

55. McMahan, "Self-Defense and the Problem of the Innocent Attacker." His negative arguments were complemented by brilliant critiques by Michael Otsuka and Noam Zohar, among others: Otsuka, "Killing the Innocent in Self-Defense"; Zohar, "Collective War and Individualistic Ethics."

56. Rodin, *War and Self-Defense*.

My critique proceeds in three stages. The first (Sec. III.A) identifies some general worries about the forced-choice model of self-defense; the second (Sec. III.A–D) shows that the Risk Argument fails to identify an asymmetry between Driver and Pedestrian; the third (Sec. III.E) shows that the Responsibility Argument, as suggested above, does indeed collapse into the Risk Argument, such that the asymmetry between Guest and Dignitary vanishes as well.

*A. Agent Responsibility and Forced Choice*

Developing an explanatory model for self-defense is no easy task. Our right to life is our most important right (see Sec. II.A), and it is inordinately difficult to explain how it can be temporarily vitiated, such that some other person or persons can acquire a liberty right to kill. We should weigh our objections to the forced-choice model carefully, therefore—it is not enough simply to presuppose certain baseline intuitions about self-defense, and then test the model against those intuitions, unless we have some alternative theory through which they can be adequately synthesized.<sup>57</sup>

It makes sense, therefore, to pursue internal objections to the forced-choice model of self-defense, which show it to be incoherent, inconclusive, or irrelevant, rather than to propose that it is based on mistaken intuitions. Accordingly, my objection takes the form of a dilemma: the forced-choice model, I think, is unable conclusively to explain how a morally insignificant asymmetry can justify one person losing the claim right to life, and another gaining the liberty right to kill, unless it presents such a radically circumscribed choice situation that it becomes irrelevant to the ethics of war.

When he originally developed the Justice Argument, McMahan acknowledged that it is worse to kill than to allow oneself or others to be killed, and worse to kill deliberately than to do so by accident, or as a side effect of achieving some other relevant and sufficiently worthy good.<sup>58</sup> This reflects the generally held views that, other things equal, it is worse to harm another than to suffer a harm, and it is worse intentionally to harm someone than to do so unintentionally.<sup>59</sup> When the Justice Argument was in play, this was not a problem, since considerations of moral innocence and guilt are weighty and can readily “nullify” the differences between doing and suffering harm, and between harming intentionally and unintentionally.<sup>60</sup> The Risk and Responsibility Ar-

57. This strikes me as a key flaw in Whitley Kaufman’s excoriating critique of this model (“The ‘Distributive Justice’ Theory of Self-Defense”).

58. He still believes these things.

59. Although they are generally held, these intuitions are of course far from universal.

60. McMahan, “Innocence, Self-Defense and Killing in War,” 204.

guments, by contrast, seem much worse placed: if agent responsibility is of “comparative moral insignificance,” how can it play this nullifying role?<sup>61</sup>

Consider, for example, Driver and Pedestrian. Driver is liable on grounds that he, like millions of other people, got in his car and drove that day. He had no idea what would end up happening, and he took all reasonable measures to forestall accidents. Nothing he has done could play the decisive role of culpability in nullifying the differences between, on the one hand, doing and suffering harm, and on the other, intention and its counterpart. If Pedestrian takes his chances and lets Driver hit him, he will be allowing himself to suffer an unintentional harm, whereas if he kills Driver with a well-thrown grenade, it will be a positive act of intentional killing (barring an implausibly narrow account of his intentions). The Risk and Responsibility Arguments are ill equipped to trump the presumption against such acts.

McMahan solves this problem by emphasizing the circumscribed nature of the forced-choice model: we know that the harm to be inflicted is disproportionate to the responsibility or guilt of the liable party, but because the harm is unavoidable and indivisible, this appearance of disproportionality should not trouble us. Since somebody must necessarily bear the whole burden of the harm, small differences can plausibly make all the difference. However, this presentation of the forced-choice model is misleading, because even if we can neither avoid nor divide the impending harm, we can split the odds of being the one to bear it.<sup>62</sup> If the asymmetry between the parties is genuinely so small, then rather than allowing it to be so definitive, we should attempt a fair distribution of risk, proportionate to this small difference. The ideal solution would be to attempt a form of weighted coin toss, but this is not the only way to redistribute risks between the potential bearers of an impending harm. For example, suppose that Pedestrian could take some measure, short of killing Driver, which had a strong but not certain chance of saving his own life: he has a gun, instead of a grenade, and he is a crack shot; his two options are to shoot the engine, ensuring the car blows up well short of him, but certainly killing Driver, or to shoot out the tires, leading it to skid, probably miss him, and perhaps save Driver. In this case, we could reflect the slight asymmetry between the two by enjoining Pedestrian to take the latter course of action.

Even if the harm is not divisible, therefore, the odds may be so. It follows that the agency-based version of the forced-choice model can only ground the circumscription of one’s right to life when both the

61. McMahan, “The Basis of Moral Liability to Defensive Killing,” 394.

62. In his new book, McMahan concedes this point (*Killing in War*, 180).

impending inevitable harm and the risks of suffering it are indivisible.<sup>63</sup> This, however, is not at all the case with war (as McMahan acknowledges elsewhere).<sup>64</sup> At least at the beginning of a conflict, there are almost always other options besides contributing to further bloodshed. Combatants can retreat, and their leaders can appease. Imminent harms can be postponed, and indivisible harms can be shared out by apportioning the risks of combat differently—for example, flying bomber missions against high-value targets at lower altitudes, taking greater risks to ensure greater accuracy, and fewer enemy deaths.<sup>65</sup> If the right to kill is solely a product of the radically straitened circumstances in examples like Driver and Pedestrian, then it is probably irrelevant to the ethics of war.

In *Killing in War*, McMahan responds to this objection by arguing that the threat to be averted by killing unjustified combatants is their achievement of their unjust cause, and this will always tip the balance in favor of holding them liable, even when there is an apparently small difference between them and their justified opponents.<sup>66</sup> This is an extremely problematic maneuver, however, for two reasons. First, if we can invoke the great urgency of achieving the just cause in any given forced choice between parties on one side and on the other, then the scope of noncombatant liability is likely to be radically increased beyond what can plausibly be accepted. Noncombatants who are indirectly agent-responsible for their country fighting an unjustified war (for example, by having voted for the government that initiated the war) could permissibly be killed in large numbers—the fact that they are only minimally responsible would be irrelevant, because the importance of averting the unjust victory of their armies would weigh decisively in the balance. Second, the responsibility view of self-defense is supposed to base liability on what individuals are actually responsible for, but we cannot hold each individual combatant responsible for his side's achievement of an unjustified victory—each is surely responsible only for his own contribution to that achievement, which, as I have argued

63. It is also worth noting that we can do more than just split the odds here: we could also divide the moral burden of inflicting the harm. In the Driver case, for example, we could argue that the difference between the two parties is sufficient to make Pedestrian's breaching his duty not to harm Driver the lesser evil, though not to give him a right to kill in self-defense (or to vitiate Driver's right to life). Losing one's right to life is a serious thing, as is acquiring a right to kill: why not just say that, in cases such as these, nobody has a right to kill, and nobody loses his right to life, but it is impartially better for the person who is minimally responsible to be the one whose right is violated?

64. McMahan, "Just Cause for War," 11, "The Basis of Moral Liability to Defensive Killing," 394–95, *The Ethics of Killing*, 403–5, and "The Ethics of Killing in War," 724.

65. McMahan, "The Ethics of Killing in War," 727, "The Basis of Moral Liability to Defensive Killing," 395, "Just Cause for War," 11, and *The Ethics of Killing*, 412.

66. McMahan, *Killing in War*, chap. 4.

already, may be minimal indeed. Relaxing this condition, moreover, would bring still more noncombatants into the scope of liability.

*B. Asymmetry and Risk (i)*

Even if we bracket our skepticism about the forced-choice model of self-defense, there are good reasons to doubt the Risk and Responsibility Arguments. This and the following two sections contend that the Risk Argument fails to identify a genuine asymmetry between Driver and Pedestrian. I first show that Pedestrian also imposes the risk of the forced-choice situation arising on Driver, so nonreciprocal risk imposition, of this sort, cannot be the asymmetry between them. I then, in Section III.C, consider the counterargument that what matters is not that Driver has imposed the risk of the forced-choice situation arising, but that he has imposed a risk of unjustified harm on Pedestrian.<sup>67</sup> In Section III.D, I address the objection that we can distinguish between them provided we appeal to an objectivist theory of justification.

What does it mean to impose on another person the risk of a forced-choice situation coming about? Deliberately creating the conditions for the forced-choice situation would clearly amount to imposing that risk on the other parties to it, but we have already established that Driver does not deliberately put Pedestrian's life in danger—if he did, he would be culpable, not merely agent-responsible.

Alternatively, we might say that to make any causal contribution to a forced choice coming about is to have imposed the risk of that forced choice arising on others. After all, if A's conduct *x* helped bring *y* about, then, objectively speaking, A contributed to the risk of *y* occurring. We would then need to differentiate between creating a risk and imposing one. On a straightforward interpretation of this difference, A imposes a risk of *y* on B if A does *x*, which contributes to *y* coming about, whereas B's actions do not causally contribute to *y*. A has imposed the risk, then, because he contributed to it, when B did not. This is clearly not the case with Pedestrian and Driver, however: Pedestrian's voluntary choices also contribute to the forced choice between their lives coming about. Pedestrian's choice to walk along that street, on that day, at that time, was a necessary condition of the forced-choice situation between his life and Driver's life arising. Had he acted differently, the forced choice would not have had to be made. We cannot say that Driver created a risk but Pedestrian did not. If this is what risk imposition means, then it does not differentiate between them.

Perhaps what is at stake here is foreseeability: A imposes a risk of *y* on B if A does *x*, and it is foreseeable that *x* will lead to *y*, whereas B does nothing that could foreseeably lead to the forced-choice situation.

67. A response to the previous argument suggested by McMahan in *Killing in War*.

This foreseeability criterion, however, does not distinguish between Driver and Pedestrian either. We know, when walking by the side of the road, that it is risky to do so. There is a chance that we might slip into the road, and a chance that cars might come careering off it.

Both Driver and Pedestrian voluntarily act in ways that foreseeably lead to the forced choice between their lives. Neither deliberately creates the forced choice, nor does one of them do all the causal work. There is no asymmetry here.

### C. *Asymmetry and Risk (ii)*

It is possible, however, that McMahan's concern is no longer with responsibility for the forced-choice situation arising—as it was in *The Ethics of Killing*—but, more narrowly, with responsibility for the impending unjustified harm.<sup>68</sup> On this account, what matters is that Driver chose to do something that could ultimately end up unjustifiably killing Pedestrian, whereas Pedestrian, by merely choosing to walk along the side of the road, did not do the same. This adaptation of the Risk Argument remains vulnerable to three objections.

My first concern is that it makes no sense to ascribe moral weight only to the imposition of risks: if it is morally significant that I have acted in a way that exposes others to a risk of harm, it should also matter that they have acted in ways that risk bringing harm on themselves. Consider a modification of the Driver/Pedestrian example, where we replace Pedestrian with Sleepy, who decides to go to sleep on the hard shoulder of the motorway and wakes up to see Driver spinning out of control toward him, in an eighteen-wheeled truck. The other details are the same. Sleepy has assumed a considerable risk by sleeping on the side of the motorway. While crazy, however, according to the Risk Argument, this act does not impose risks of harm on Driver, because he is in a massive truck, and Sleepy would be no more than a bump in the road to him. On the other hand, if Driver in the Driver/Pedestrian case imposes a risk of unjustified harm on Pedestrian, then the same must be true of Driver in the Sleepy case. So if Pedestrian has a right to kill Driver in self-defense, and if the unreciprocated imposition of a risk of unjustified harm were sufficient for liability, then Driver should be equally liable in both cases, since he imposes risks on both Pedestrian and Sleepy, and neither imposes a risk on him.<sup>69</sup> However, even those who share McMahan's intuition in the case of Pedestrian surely would

68. This view is more apparent in McMahan, "The Basis of Moral Liability to Defensive Killing," and *Killing in War*.

69. In fact, I will argue that Pedestrian (and Sleepy) do impose risks of unjustified harm on Driver; however, the present objection is internal to the Risk Argument and accepts its assumption that they do not do so.

not believe that Sleepy could justifiably kill Driver in self-defense. By sleeping on the side of the motorway, he has clearly assumed a significant risk of being harmed—intuition surely suggests that this assumption of risk is sufficient to deny Sleepy the right to kill in self-defense.<sup>70</sup> It should, however, be clear that Pedestrian is not that different from Sleepy—walking alongside roads undoubtedly exposes one to the risk of being harmed by passing traffic. Just as Driver has imposed a risk of harm on Pedestrian, so Pedestrian has assumed a risk of being harmed. The Sleepy case shows that this could be enough to deny him the right to kill in self-defense.

My second concern is that this modification to the Risk Argument, without further elaboration, looks circular. Clearly, Pedestrian imposes the risk of some harm on Driver, since by hypothesis Pedestrian is going to defend himself with his grenade. The activity of walking by the side of the road, carrying a grenade, is a risky one. Each party therefore imposes a risk of harm on the other, so this alone does not constitute an asymmetry. For there to be an asymmetry, we would have to show that the risk imposed by Pedestrian is of a justified harm, while the harm risked by Driver is unjustified. For the advocates of the view that killing in war is justified by appeal to principles of self-defense, however, what counts as an unjustified harm is specified by those principles.<sup>71</sup> In other words: to determine which party is liable we need to first identify who has imposed on the other the risk of suffering unjustified harm, but to determine which harm is unjustified we first need to know which party is liable. This circular reasoning can be avoided only by a further modification of the Risk Argument, considered below.

Moreover, and third: I think that Pedestrian has in fact imposed a risk of unjustified harm on Driver, unless we construe the example to make it irrelevant to the ethics of killing in war. Pedestrian has chosen to walk by the road, equipped with a grenade to protect himself. Should a car veer toward him, he will blow it to pieces. There is always a risk, when carrying firepower of this sort, that one will use it accidentally or unnecessarily. This is one good reason why it is illegal in most liberal democracies to carry deadly weapons in public, even for the supposed purposes of self-defense.<sup>72</sup> Perhaps we could modify the example to minimize, even eliminate, this risk—we could postulate that Pedestrian is extremely cool under pressure, that he comes across the grenade

70. As an associate editor has pointed out, the term “assumption of risks” has a specific meaning in law; here it is being used generically.

71. This is especially clear in McMahan’s “Just Cause for War,” where he emphasizes that the traditional *jus ad bellum* criterion of just cause should be derived from principles of self-defense.

72. The United States being the obvious exception—though perhaps the privilege of carrying concealed weapons will be rolled back during the present administration.

immediately prior to the impending collision, that he has excellent judgment and reflexes.<sup>73</sup> Unfortunately, this move would render the Risk Argument virtually irrelevant to the ethics of war. Justified combatants do not happen upon their weapons while wandering along by the battlefield; while some of them may have both infallible judgment and a calm disposition, most do not. Moreover, when they decide to fight, they can rarely be certain about the justification of their cause: in general, they must place their trust in their political leaders. Simply by training to become soldiers, they impose on others the risk of suffering unjustified harms at their hands; by taking up arms in a specific conflict, they do so still more proximately. The appropriate analogy, then, is more likely to be with a Pedestrian who wanders along the side of the road spinning his grenade around his finger, with his finger in the pin, than with the expert self-defender posited in this modification of the example.

Although this should be sufficient to undermine the Risk Argument as applied to the ethics of war, I think a stronger criticism may be possible: this redescription of the hypothetical case may not even work outside the context of war. I think that Pedestrian imposes a risk of unjustifiable harm on Driver, even in the case where he has excellent judgment and reflexes and happens upon the grenade just before the collision. Self-defense is always a risky activity. Consider Pedestrian's thoughts immediately prior to pulling the pin: if he does not know, for certain, that Driver is liable to be killed in self-defense, then by throwing the grenade he risks the possibility that he might harm Driver unjustifiably. And how could he know this for certain? Obviously, this is more of a problem if we are unsure about what count as adequate criteria for liability, but we can set that worry aside. More pressingly, Driver is liable to be killed only if there is actually a forced choice between his and Pedestrian's life. If Pedestrian could survive without killing Driver, then he ought to do so. And how can even a wise Pedestrian know that he would not survive the impending crash, that he could not jump out of Driver's way, or that by throwing the grenade near but not directly at Driver's car, he could not divert it away from himself without killing Driver? Perhaps further modification of the example could resolve these problems, but the more convoluted and constrained we make it, the less likely it is to offer guidance in actual cases of self-defense. A theory of permissible defensive killing should be predicated on at least possible scenarios. Ordinary people are not perfect judges of either morality or consequences, and in real life, self-defense is always a risky activity. When ordinary people commit to using lethal defensive force, they are imposing on those around them, and in particular their victims, the risk

73. Thanks to Rahul Kumar for suggesting this response.

of suffering an unjustifiable harm. That their victim has done the same to them, therefore, cannot ground an asymmetry between them.

Perhaps the Risk Argument could be saved from this and the preceding circularity objection by emphasizing that Pedestrian's introduction of a risk of unjustified harm follows on from, and responds to, Driver's risk imposition. What matters, then, is not that only one party imposes a risk of unjustified harm on the other; rather, the key fact is that one of the two parties first imposed that risk of unjustified harm. Since Pedestrian risks unjustifiably harming Driver only in response to the latter's prior imposition on him, there is a relevant asymmetry between them. This would constitute a modification of the Risk Argument, but one that its advocates would probably favor.<sup>74</sup> The need to establish "who started it" would undoubtedly cause serious problems when applied to war—since most conflicts result either from an escalating sequence of incursions by each side or from historical differences, the origins of which are opaque at best—nonetheless, this could be a promising theoretical solution. It remains, however, vulnerable to the first objection raised in this section, that the assumption of risk is also morally important. Moreover, I think a further objection can be raised—albeit somewhat more tentatively—even to this modified version of the Risk Argument. In the original example, it is assumed that Driver would have survived had Pedestrian not been in his way—we can suppose that Pedestrian is on a pavement, behind which there is a large, open field, into which Driver's car would, were Pedestrian absent, have skidded harmlessly. Pedestrian has therefore chosen to walk in a space that Driver (and the other drivers on the road) needs to be empty, should he have a freak accident. By choosing to occupy that space, which would be empty were he to choose otherwise, Pedestrian creates a risk to Driver that was not there before he made that decision—the risk that, instead of harmlessly skidding off into a field should he have a freak accident, he may be killed by Pedestrian's efforts at self-defense, which, as we have seen, may be unjustified. Moreover, Pedestrian's decision to walk alongside the road was plainly not a response to Driver's prior act of risk imposition—just like Driver's decision to drive that day, Pedestrian has chosen to walk alongside the road in the pursuit of his own interests, independently of anyone else's voluntary choices. We cannot appeal, therefore, to the sequence of events to ensure Driver's liability, or argue that Pedestrian's imposition of risk is purely reactive.

There is, it must be conceded, one set of cases in which there is a genuine asymmetry between Pedestrian and Driver: where Pedestrian is in fact unable to defend himself against Driver's truck, the risk im-

74. McMahan has suggested something along these lines in discussion, as has a reviewer.

position is genuinely nonreciprocal.<sup>75</sup> In these cases, subject to the point about the assumption of risk, and the objections in Section III.A, I concede that the Risk Argument might go through. However, since the justification of the right to kill in self-defense would depend on its bearer being unable to exercise it, this would significantly limit the argument's scope of application, as well as produce the peculiar result that one might be permitted to defend others in cases where (because of one's capacity to use risky lethal force) one would not be permitted to defend oneself. If nonreciprocal imposition of the risk of unjustified harm is the basis of liability, and if individuals equipped to use lethal force to defend themselves almost always impose a risk of unjustified harm, then we get the paradoxical result that the people best placed to defend themselves are least entitled to do so. This is not a *reductio ad absurdum* of the Risk Argument, since it may still have important implications for the defense of those who cannot defend themselves, but it does, combined with the foregoing objections, further reduce its relevance.

*D. Asymmetry and Risk (iii)*

Advocates of the Risk Argument may have one last resort.<sup>76</sup> They might concede that each party has imposed a risk of unjustified harm on the other, but note that, as a matter of objective fact, only Driver's risk will eventuate in an unjustified harm; as it happens, Pedestrian will in fact use force justifiably. Irrespective of whether wandering down the street with a grenade in your pocket is in general a risky thing to do, according to the risk argument, Pedestrian does not, in this particular instance of grenade carrying, impose a risk of unjustifiable harm on this particular Driver. The basis of liability, then, is not merely nonreciprocal risk imposition, but the fact that the specific risks imposed by Driver do in fact eventuate in an unjustifiable, unavoidable, indivisible threat to Pedestrian, while those imposed by Pedestrian do not.<sup>77</sup>

There are two potential lines of response. First, this approach gives luck too great a role in determining liability. Driver and Pedestrian are symmetrically situated with respect to the imposition of the risk of the forced-choice situation arising; they also each impose a risk on the other of being the victim of unjustifiable harm. Because of factors that are beyond his control, the risk of unjustified harm imposed by Driver will

75. I owe this point to a reviewer.

76. This objectivist approach plays a significant role in "The Basis of Moral Liability to Defensive Killing" and *The Ethics of Killing* but has been scaled back in *Killing in War*.

77. An alternative, but related, approach would be to challenge the scope of the action description assumed in McMahan's original formulation of the Risk Argument (see n. 24). Perhaps the action description is too narrow, and the argument would be more compelling should it be expanded. Although this is fertile territory, it takes me beyond the scope of the present essay.

be realized, if Pedestrian does not act in self-defense. As far as their agent responsibility is concerned, they are symmetrically situated; the only difference between them is a matter of luck. This is a strange place for a responsibility-based conception of self-defense to end up: if luck can determine liability in this way, and if the two parties are symmetrical with respect to responsibility, then why talk of responsibility at all?

In the context of war, this means eliminating the gap between the agency view and the unjustified-threat view (according to which one is liable if one poses an unjustified threat, irrespective of responsibility). In a conflict where combatants on both sides fight in the reasonable belief that their cause is justified, each side imposes on the other serious risks of being victims of unjustifiable harms. The only difference between them is that, owing to factors that they do not control, the justified combatants happen to be on the justified side. Their respective responsibilities cancel one another out, and all that is left is the mere fact that one side is putatively justified, the other not. The asymmetry between them is grounded not in facts about responsibility, but in mere luck.

The second response goes deeper still. We can plausibly question whether principles of self-defense admit of an objectivist interpretation, given that, if he acts on them, Defender breaks the causal sequence that would have eventuated in an unjustified harm.<sup>78</sup> Once Pedestrian tosses the grenade and saves himself, it is no longer true that Driver's risk-taking has eventuated in an unjustifiable harm to Pedestrian. If Pedestrian is justified in acting to defend himself before Driver actually harms him, then it must be the risk itself, not the unjustified harm in which it has eventuated, which plays the crucial justificatory role. And since Pedestrian also imposes a risk of unjustified harm on Driver, this cannot, on its own, ground the asymmetry between them supposed to render Driver liable.

I conclude that the Risk Argument fails to ground liability to defensive killing in agent responsibility, except in a range of cases too narrow to have much relevance in either the ethics of self-defense generally, or, more specifically, in its application to war. In most cases where Pedestrian is able to defend himself, both he and Driver will be agent-responsible for imposing on one another the risk that the forced-choice situation will arise; moreover, each also imposes on the other the risk of suffering unjustifiable harm. There is no asymmetry between them and therefore no basis for one party losing, in the relevant sense, his right to life.

78. Compare Kimberly Ferzan, "Justifying Self-Defense," *Law and Philosophy* 24 (2005): 711–49.

*E. Risk and Responsibility*

If the Risk Argument fails, then unless some other argument can be provided, many combatants who must be killed to win any war cannot be killed without violating their rights. Combatants who do not directly contribute to unjustified harms—nonfirers, support troops, reserves, and unmobilized forces—are impermissible targets. This on its own is a significant conclusion, congenial to my view that a rights-respecting war is practically impossible. It is not enough, however, to refute the notion that agent responsibility can be the basis of liability to defensive killing in war. Many unjustified combatants do pose immediate threats to justified combatants' lives, for which they are agent-responsible, though they may not be blameworthy. Each of Rodin, Coady, and Otsuka defends versions of the Responsibility Argument, without ever commenting on the Risk Argument. Definitively to discredit the agency view of self-defense, I need to show that the Responsibility Argument does indeed collapse into the Risk Argument. This means showing that Guest and Dignitary, from the example above, are both agent-responsible for the forced-choice situation between their lives, and that each is responsible for imposing on the other the risk of suffering an unjustified harm.

First, then, I should show that both Guest and Dignitary are agent-responsible for the forced choice between their lives arising. This should be easy to see: had Guest not chosen to greet Dignitary, or even to come to the reception, then Dignitary could not have ended up reasonably believing him to be a threat. Obviously, Guest could not be expected to know that a hologram of a gun would be projected into his hand, so he is plainly blameless. Neither, however, could Dignitary be expected to know the exact same fact—since we are not attempting to establish culpability, whether or not the two parties knew that their conduct would lead to the forced-choice situation is irrelevant (Driver clearly did not know his driving the car that day would lead to such a tragic outcome). If Guest had known that Dignitary would interpret his greeting as a threat, it would have been wrong for him to greet Dignitary, however innocuous greetings normally are. We can see this more clearly, if we modify the example somewhat:

Guest is replaced by Joker. Joker wants to give Dignitary a playful scare. He pulls out a toy gun, realistic enough for Dignitary to reasonably believe that he is threatening her life. If she draws on Joker, can he pull his real gun out from his other pocket and shoot her in self-defense?

Surely not.<sup>79</sup> Objectively speaking, Guest's voluntary action causes the

79. If that does not persuade, consider a prank suicide bomber in the sights of a police sharpshooter.

forced choice, just as Dignitary's action does. If Guest had not acted at all, then Dignitary would not have drawn her gun in self-defense. In the absence of any causal contribution at all by Guest, Dignitary's belief that Guest poses a threat must be either unjustified (therefore her attack culpable) or the product of a manipulated or unsound mind. If Dignitary is a responsible agent, then it is not possible that she should reasonably believe Guest poses a threat to her life, without Guest having voluntarily acted in some way, giving rise to that belief. Both parties, therefore, are blamelessly responsible for the forced-choice situation arising.

As we saw in Section III.C, however, advocates of the agency view might insist that their concern is not with responsibility for the forced-choice situation, but with responsibility for a threat of unjustified harm. Are Guest and Dignitary symmetrically situated in this respect too? As with Pedestrian, on a naturalistic interpretation of the example, Guest has clearly imposed on Dignitary the risk of suffering an unjustifiable harm, by attending the reception armed and dangerous. As with Pedestrian, going out with this sort of weaponry on one's person is a seriously risk-imposing activity. Suppose, however, that we alter the example, such that Guest did not go armed to the reception, but, when Dignitary draws on him, sees a gun sticking out of a security guard's belt, pulls it out, and fires? First, he would still have imposed a risk on others, insofar as he is the sort of person who is equipped to do something like that.<sup>80</sup> Second, this is quite different from wars, in which the justified combatants who are the putative equivalents of Guest are armed from the outset. Third, even with these modifications, Guest still imposes a risk of unjustifiable harm on Dignitary, because, like Pedestrian, he cannot be sure when he attacks that he is doing so justifiably. It is possible that Dignitary is not in fact unjustifiably attacking him (perhaps her gun is also only a hologram); moreover, as with Pedestrian, Guest cannot know that it is in fact necessary to use lethal force. It could be true either that he will not die if he takes the bullet or that he could sufficiently distract Dignitary to save his own life, without ending hers.

Closer analysis of Dignitary's position shows even more clearly how the Responsibility Argument collapses into the Risk Argument. When she pulls her gun, prior to Guest shooting her, Dignitary is agent-responsible only for imposing on Guest the risk of suffering an unjustified harm. She is not yet responsible for an existent cost, because the cost has not yet eventuated (or been distributed). This is for two reasons:

80. In many countries (South Korea, for example), advanced practitioners of martial arts are held to stricter standards of criminal liability than the untrained, when charged with the unjustified use of force. Their hands being deadly weapons, they are considered always armed and dangerous.

first, Dignitary has imposed only the risk of Guest being harmed, because the harm has not yet happened, and when Guest fires in self-defense, we will never know whether or not Dignitary's bullet would have struck its target, and if it would have proved lethal. A number of intervening factors could have forestalled this outcome.

Second, Dignitary has imposed on Guest only a risk of being *unjustifiably* harmed: she did not voluntarily choose to inflict an unjustified harm, because if she had, she would be culpable for her action, not merely agent-responsible. Instead, she chooses to try to inflict a harm that she reasonably believes to be justified. Of course, she runs the risk of making a mistake, but from the perspective of her voluntary agency, it is exactly that, a risk. As such, she has chosen to create the risk of a harm, and the risk that the harm will be unjustified. Just like Guest, Dignitary therefore is in the same position as Driver. Driver did not choose to drive his car into Pedestrian; he chose to turn a corner around which was an oil slick, and something that he could not have foreseen led to him posing an unjustifiable threat to Pedestrian's life. Dignitary did not choose to pose an unjustifiable threat to Guest, she chose to defend herself because of good reasons, and something that she could not have foreseen—the fact that the threat to her life was only apparent, not real—meant that her own attack was unjustifiable.

The Responsibility Argument is just a less refined version of the Risk Argument; it gropes at a principle that the Risk Argument properly specifies. Guest and Dignitary are both agent-responsible for the forced-choice situation between their lives arising. This alone cannot distinguish between them. Neither party, meanwhile, is responsible for an unjustified harm, since the harm in question has yet to occur. The Responsibility Argument is predicated on the assumption that a cost has already been created, and it must be shifted to one party or another (hence its affinity with luck egalitarian theories of distributive justice). It is inherently unsuited to the context of self-defense, which is about impending, unavoidable harms. And if the harm has not yet occurred, then risk is all we have. Guest and Dignitary are each responsible for imposing on one another the risk of suffering an unjustifiable harm. The Responsibility Argument collapses into the Risk Argument, and on neither account can we identify a morally relevant asymmetry between Guest and Dignitary.

When applied to the context of war, this conclusion makes good sense. In at least some wars—how many is a matter for empirical inquiry—combatants on each side fight with a reasonable belief that they are justified and are therefore excused of blame for fighting.<sup>81</sup> When

81. Obviously, this will not be true of all wars. Moreover, in most wars, at least some combatants who fight without justification will do so culpably.

this is the case, these combatants know there is a chance that they are wrong—perhaps, for example, they could have achieved their goals without fighting; perhaps their cause is less just than they believe. They thereby impose on their opponents the risk of dying an unjustified death—but this risk imposition is wholly symmetrical. The only asymmetry between them is that the combatants on one side turn out to be justified; from the perspective of these individuals, however, this is a matter of sheer luck—and we should not lose the protection of our right to life because of bad luck.

One might wonder, at this point, why this symmetry should not make both sides liable to be killed, rather than neither.<sup>82</sup> There are two reasons to reject this possibility. First, as I argued in Section III.A, agent responsibility for imposing the risk of an unjustified harm is a feeble foundation for losing the protection grounded in one's right to life. It can ground that loss only in extremely circumscribed forced-choice situations, where such small differences can make all the difference. In wartime, as I have already noted, our options are not so circumscribed, and symmetrically situated combatants have many alternatives to killing one another.

Second, if the justification of killing in war depends on principles of self-defense, and if, as McMahan and others argue, one only has a right to kill those who are responsible for threatening one with unjustified harm, then it is difficult to see how combatants on both sides can be liable to be killed, even if their options are indeed sufficiently circumscribed to make agent responsibility for the imposition of risks a decisive factor. If my opponents are liable, then the harm with which I threaten them is justified, and therefore I cannot be liable to be killed by them; likewise, if I am liable, then the threat they pose against me is justified, and they are not liable to be killed by me. If justification defeats liability, and the justification of killing in war is determined by principles of self-defense, then it is not possible for both sides to be liable to be killed.

#### IV. CONCLUSION: LIABILITY AND KILLING IN WAR

I have tried to show that agent responsibility is an inadequate basis for the attribution of liability, by discrediting the Risk Argument and showing how the Responsibility Argument in fact collapses into the Risk Argument. I have concentrated on undermining these as philosophical theories of self-defense, although I have at times noted that our theory of self-defense should not be predicated on assumptions that are inapplicable to the context of war. The potential combatant, I conclude, should not look to the agency view to ease his conscience about the

82. Thanks to Jon Quong for raising this objection.

killing he will do in war. If he is to fight without violating rights, then he will need a different theory of self-defense; if there are no more defensible theories, then he must either accept pacifism—which I think is a live possibility—or seek to identify stronger countervailing reasons, which can override the great force of his victims' rights to life.