THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE

by

SUZANNE UNIACKE

A thesis submitted in fulfilment of the

requirement for the degree of

Doctor of Philosophy

Department of Traditional and Modern Philosophy,

University of Sydney, August, 1991

ABSTRACT

This is an essay in applied philosophy which addresses an important, comparatively neglected issue of applied ethics. The primary aim of the thesis is to set out the principles related to justified self-defensive homicide. Private self-defence is discussed as a moral and legal justification of homicide, and as an exception to, rather than a justified infringement of, a general prohibition of homicide. The nature of genuinely self-defensive force is discussed. The claim that genuinely self-defensive homicide is always unintended killing is rejected. Also, it is argued, the conditions of necessary and proportionate force, together with lack of intention to kill, are insufficient to justify self-preferential killing. The justification of self-preferential killing in the case of self-defence is grounded in the nature of the act: that is, in the fact that the act is defensive, the warding off of a threat. The use of self-defensive force is not essentially a punitive act, nor is it essentially an attempt to bring about optimal results. The right of self-defence is characterized as a right to use necessary and proportionate force in defending oneself against an unjust threat. This right is part of a broader permission to use necessary and proportionate force directly to block the imminent infliction of irreparable unjust harm. The right of self-defence is exceptionless but not absolute. Necessary and proportionate self-defensive force against an unjust threat does not inflict an injustice on a person who him- or herself constitutes the threat. But wider moral considerations can make use of self-defensive force morally unjustified in some circumstances.

I hereby declare that the work presented in this thesis is, to the best of my knowledge and belief, original, except as acknowledged in the text, and that the material has not been submitted, either in whole or in part, for a degree at this or any other university.

[Redaction]

Suzanne Uniacke

ACKNOWLEDGEMENTS

Most of my PhD candidature in the Department of Traditional and Modern Philosophy in the University of Sydney was conducted under the supervision of Associate Professor Keith Campbell, who is now Professor of Philosophy at the University of Maryland. I am grateful to Professor Campbell for his advice and support throughout my candidature. Professor H. J. McCloskey, one of my former teachers at LaTrobe University, generously read material from the thesis. I should like here also to record a more long-standing philosophical debt to him, and to thank him for his advice and encouragement since 1973.

A number of women in philosophy have influenced me by their example. Two who stand out are Dr. Mary A. McCloskey and Mrs Jenny Teichman.

I should also like to thank Dr. Udo Thiel for his invaluable moral support.

TABLE OF CONTENTS

1

THE PROBLEM OF SELF-DEFENSIVE HOMICIDE

'If someone attacks me, isn't it obvious that I can defend myself?'

The above question was the initial response of some people, including several philosophers, on being told that I was writing a philosophical thesis on the self-defence justification of homicide. Perhaps this initial response should have been unsurprising. Self-defence is widely regarded and cited as the paradigm of morally permissible homicide. And this view of individual or private self-defence can have wider application where, as is very often the case, the permissibility of self-defence is held to ground the justification of defence of others and the justification of defensive warfare.[1] In comparison with issues such as the permissibility of abortion and euthanasia, the appropriate treatment of non-human animals, the justification of warfare, and even the nature and extent of our obligations to future people, the justification of self-defensive homicide has received comparatively limited critical attention in the voluminous recent philosophical literature concerned with the morality of killing.

1.1 WHAT ARE THE PHILOSOPHICAL ISSUES?

So, what *is* philosophically interesting or problematic about the justification of self-defensive homicide? Why should the comparative neglect of this topic in applied ethics be remedied? I should hope that this thesis answers these two questions in the context of its primary aim, which is to set out and discuss the principles relevant to

---

[1] See, e.g. Cheyney C. Ryan, 'Self-Defense, Pacifism, and the Possibility of Killing', *Ethics*, vol 93, no 3, 1983, p510.

justified self-defensive homicide. The justification of self-defensive homicide is far more problematic than is frequently supposed in philosophical discussion. For instance, those familiar with recent writing in applied ethics will be well aware of the very widespread emphasis on personhood in philosophical explanations of the possession of the right to life and of the direct wrongness of killing. Yet typically, self-defensive homicide kills an archetypal person: an adult human being who is fully conscious, rational, in good health, and with hopes and ambitions for the future. Furthermore, often this person will also clearly be engaged in human action at the time when he or she is killed.

As those philosophers who have tackled the justification of self-defence in any detail have discovered, the conceptual and evaluative questions raised by a sensitive examination of this issue are both difficult and important. Self-defensive homicide involves self-preferential killing of another person. The self-defending agent kills another person in the act of protecting him- or herself, and this killing is foreseen in many cases of self-defensive homicide. Why is self-preferential killing permissible in the case of self-defence? The answer to this question will partly be shaped by our background moral theory, and also by what type of justification we take self-defence to be. And in my view, in explaining the nature of the self-defence justification of homicide we need to attend to the complex nature of moral justification, and also to the different ways in which conduct can be morally justified. In chapter 2, I provide what I consider to be a sufficiently complex analysis of the nature of justification, and of the relationship between justification and excuse. This analysis is necessary background to the account of the self-defence justification of homicide presented in the thesis; and in subsequent chapters I draw upon this analysis while taking some aspects of it further.

Throughout the thesis the complexity of my account of the justification of self-defence is implicitly contrary to moral monism, i.e. the view that all morally relevant considerations are reducible to a single value. My reason for limiting my discussion of

the justification of self-defence to a particular, non-monistic moral perspective is partly, but not purely a practical one. Within this thesis I cannot, of course, discuss the justification of self-defensive homicide from the background of a series of different, competing theories of moral value without forgoing philosophical depth and much important content. However, in setting out the principles related to justified self-defence from within a moral perspective which regards rights - such as the right to life and the right of self-defence - as constraints and permissions based on considerations of just treatment of individuals, and which regards benevolence as an independent virtue, I hope that I at least indicate why in my view moral monism does not do justice to the complexity of this issue. My somewhat speculative discussion in chapter 5 of the grounding of what I consider to be an appropriate specification of the right to life should also be read with this in mind.

If we are successfully to explain why self-preferential, *self-defensive* killing is justified we must characterize self-defensive homicide. What makes some killings self-defensive? For instance, must someone against whom *self-defensive* force is used be an aggressor or an assailant? Or is self-defence possible against some passive threats? We need then to ask what bearing, if any, the fact that an act is self-defensive has on the justification of self-preferential killing. Is self-defensive homicide morally distinguishable, by virtue of its being self-defensive, from other types of self-preferential killing? And in this connection we need to determine the relevance of factors such as an aggressor's culpability to the permissibility of self-preferential killing in self-defence. Does the fact that someone is culpably attacking me warrant my killing him or her in the act of protecting myself? Or is it permissible that I kill a non-culpable aggressor, e.g. a deranged person or a young child, in self-defence? Can the permissibility of self-defence against culpable and non-culpable aggressors, and against active and (possibly) passive threats, be derived from the same principle? Do individuals have a positive right of *self-defence*, and if so what are the limits of this right? Or does the justification of self-defence flow from the conditions of some wider

permission to inflict necessary and proportionate harm on another person in the act of protecting oneself? Under what conditions, if any, does the permissibility of self-defence extend to the defence of other persons?

The importance of answering these conceptual and moral questions is not confined to the substantive issue of the justification of self-defensive homicide. These questions are also highly relevant to the satisfactory resolution of several more fundamental theoretical concerns. These concerns include the conditions under which as individual persons we possess so-called human rights such as the right to life; the appropriateness of specification of the right to life; and the grounding of an appropriate specification of this right. In chapters 3, 4, and 5, I bring this wider significance to the surface and I explain the way in which the justification of self-defence bears on, and sometimes illuminates, these more fundamental theoretical concerns. But the primary aim of those chapters is to set out the principles related to justified self-defensive homicide and to answer the conceptual and moral questions that I have outlined above. My discussion of the more fundamental theoretical concerns that I have mentioned cannot be comprehensive or definitive within the confines of this thesis.

I should also note here that my discussion of the principles of justified self-defence does not contain an examination of metaphysical problems of the self and personal identity, and the ways in which these problems might bear on the justification of self-defence. For the most part, I assume that the self-defending agent is defending his or her own person. However, in discussing the moral and legal conditions of necessary and proportionate force, I do extend the scope of the self being defended to that of the person engaged in his or her rightful activities. Defence of oneself could also extend to the protection of goods (e.g. liberty and property) on which one's life depends.

Individual or private self-defence is also frequently said to be legally justified homicide. And as I argue in chapter 2, the law in this area reflects the common

assumption that the use of necessary and proportionate self-defensive force is both morally permissible and a positive moral right. But in several noteworthy respects, the law on self-defence is moving beyond the conditions of morally permissible self-defensive homicide. I argue that some recent trends in this area complicate or undermine the 'text-book' characterization of the plea of Self-Defence as a justification of homicide. This fact raises at least one substantive issue of criminal justice ethics that ought be of concern.

This thesis is an essay in applied philosophy, most of which addresses an important issue of applied ethics; and my interest in self-defence as a legal justification of homicide largely stems from this concern. The thesis does not contain a detailed description and critique of the law of self-defence. However, at various points throughout the thesis, and in particular in chapter 2, I apply philosophical analysis to the law of self-defence and related legal defences as pleas to homicide. (My critical discussion here is almost exclusively confined to elements of the common law - both case law and as codified.) Moral and legal justification are not identical, of course; nor should they be. Nevertheless, morality and the criminal law ought not to diverge greatly in the area of homicide. It is important that the law of self-defence and related defences to homicide embody morally defensible principles and distinctions.

1.2 HOW THE THESIS PROCEEDS

Self-defence is typically regarded as justified, rather than excusable, homicide. More strongly, self-defence is thought of as an exception to, rather than a permissible or justified infringement of, the general prohibition of homicide: self-defence is regarded as a positive moral right. This characterization of self-defence is often uncritically assumed, rather than carefully enough explained and defended. However, it is essentially correct, and I explain and defend it throughout this thesis. In chapter 2, I examine what sort of justification self-defence is. Chapters 3 and 4 emphasize and utilize the important contribution of Natural Law discussions of self-defence. I am not

an advocate of Natural Law; nor do I accept the Natural Law-inspired characterization of genuinely self-defensive homicide as always unintended killing. All the same, as I explain in chapters 3 and 4, Natural Law accounts of justified self-defence contain and reveal important moral insights concerning the right of self-defence and the moral limits of justified self-defence. My positive account in chapter 5 of the essential features of the self-defence justification of homicide owes much to these insights.

2

SELF-DEFENCE AS A JUSTIFICATION

The claim that self-defence is justified homicide will strike many people as obviously true. Nevertheless, this claim is contestable, and the details of its defence are more complex than is often supposed. In the first section of this chapter I discuss the nature of justification and excuse, the conditions under which self-defence is a justification of homicide, and the type of justification self-defence is. Self-defence is also commonly taken to be legally permissible homicide and, more specifically, the plea of Self-Defence is usually said to be a justification.[1] However, I argue in the second section of this chapter that although this characterization of self-defence is essentially correct, it is not entirely straightforward and this is partly due to the complexity of the moral background. Towards the end of the chapter I discuss some aspects of the law of self-defence which complicate, and to some extent undermine, the claim that the conditions of the plea of Self-Defence are those of justification.

2.1 SELF-DEFENCE AND THE COMPLEXITY OF JUSTIFICATION AND EXCUSE

In everyday moral evaluation many people use the terminology of justification and excuse loosely without, for instance, differentiating between excusable and justified conduct. And even when we endeavour to be precise there can be legitimate doubt about whether a particular explanation justifies rather than excuses a person's

---

[1]Throughout, except in the case of direct quotation, I use 'Self-Defence' for the name of a legal plea as distinguished from self-defence as a more general defence, and so too with the legal pleas of Duress, Necessity and Provocation.

conduct. J. L. Austin, for example, questions whether provocation is an excuse (the agent having been provoked, was not entirely responsible for what he did) or a justification (the agent was entitled to retaliate in the way he did).[2] The legal plea of Provocation seems to me clearly an excuse.[3] In moral evaluation, however, we might cite provocation in maintaining, for instance, that a person's hostile words were justified rather than simply understandable and excusable in the circumstances.[4]

It is also sometimes held that for some purposes and in some contexts a legal distinction between justification and excuse is irrelevant.[5] However, because the distinction between justified and excusable conduct can be important to careful moral evaluation, it can be important in legal evaluation too, especially where a particular plea (e.g. Duress) is being defined, or the general appropriateness of allowing a particular plea against a particular offence is being determined.[6] The nature of justification and excuse is more complex than even some very helpful discussions of this matter appear to recognise; and the more general points I make in this chapter in explaining how this is so will outline the conditions under which self-defence is a justification, and also what type of justification self-defence is. As I indicated above, the complexity of justification and excuse also has implications for the law of self-defence. Some of the implications which are brought out in the second section of this chapter are taken further in subsequent chapters.

---

[2]J. L. Austin, 'A Plea For Excuses', reprinted in *Philosophy of Action*, edited by Alan White (Oxford University Press, 1968), pp19-42.

[3]See this chapter, text accompanying n11 and n12.

4In n26, this chapter, I mention an example which illustrates the sort of legitimate doubt Austin felt about borderline cases.

[5]See, e.g. A. P. Bates, T. L. Buddin, and D. J. Meure, *The System of Criminal Law* (Sydney: Butterworths, 1980), p500. In numerous publications George Fletcher urges the importance of the theory of justification and excuse to the criminal law. See also Stanley Yeo, *Compulsion in the Criminal Law* (Sydney: The Law Book Company, 1990).

[6]See Suzanne Uniacke, 'Killing Under Duress', *Journal of Applied Philosophy*, vol 6, no 1, 1989, pp53-69.

Justification and Excuse

Numerous philosophers and jurisprudents have written on justification and excuse since J. L. Austin's now famous essay, 'A Plea for Excuses'. Much of what I and others have to say in this area is greatly indebted to this work. I agree with Eric D'Arcy that in the case of acts, justifications and excuses both appeal to morally relevant circumstances which are taken as exculpating, and that 'to say that a decision, belief, practice, rule, or act was justified is usually to imply that one's first reaction was to say that there was something wrong with it, though subsequently (on learning the circumstances, or in the light of the consequences) to decide, agree, or admit that it was right: we say that something is justified only when we think, or expect that someone will think, that it needs justification.'...'The effect of a *justifying* circumstance is to *justum facere* an (otherwise wrongful) act, so that it becomes good, or at least permissible: lawful.'[7]

I also agree with D'Arcy that there are different ways of putting a defence of justification in the case of acts, which reveal different ways in which exculpatory circumstances can justify. One of these ways is when harm is rightly brought about as the lesser evil. D'Arcy does not put this last point in this way; but he points out 'that justification may arise from the urgent personal need of oneself or another. This will often justify, for example, using or damaging another person's property.'[8] Interpreted as the legal recognition of a *permissible or rightful* choice of the lesser evil, the plea of Necessity in this case is a justification.[9]

---

[7]Eric D'Arcy, *Human Acts* (Oxford: Clarendon Press, 1963), p81 (emphasis original).

[8]Ibid., p84. My own description of this type of justification as bringing about the lesser evil does not imply purely consequentialist evaluation of such acts.

[9]George Fletcher, in *Rethinking Criminal Law* (Boston: Little, Brown, 1978), pp856-860, maintains that Necessity, (apparently) so interpreted, is sometimes a justification and sometimes an excuse. Fletcher's reasoning seems to me perhaps not sufficiently to appreciate that justification involves an overall, all-relevant-things-considered judgment, and also that recognised *exceptions* to rules and permissible *infringements* of rules are *both* justifications. *Permissible* infringements of rules are not

More recently Jenny Teichman has expressed the different view that the defence 'I chose the lesser evil' is not a justification but an excuse; whereas 'I chose the greater good' is a justification. Her reasons for this claim are that the explanation ' 'I chose the lesser evil' is of course a confession of having acted wrongly (with or without an excuse)', and that 'in choosing between evils one feels one has to make excuses not only for the wrong decision (i.e., for choosing the greater evil) but also for the right one (i.e., for choosing the lesser evil).'[10] I am not persuaded by this reasoning. However, Teichman's claim is important because it directs our attention to the question of what 'wrongful' means when it is (rightly) said that excusable conduct is wrongful. This question helps to highlight three important features of moral justification which are relevant to distinguishing justification and excuse: justification is an all-relevant-things-considered judgment about the conduct in question; however, there are differing standards, a weaker and a stronger standard of moral justification; and whether some conduct is said to be justified, rather than excusable, can depend on the perspective from which we are evaluating it. I now explain these three features.

Justification: all things considered

To describe an act as the lesser evil is to evaluate it as *undesirable in itself.* Conduct which is undesirable in itself need not be *wrongful*, however: the overall evaluation of doing something undesirable in itself (e.g. causing pain) can include consideration of circumstances and consequences. Of course, we can regard the lesser evil as *morally* undesirable in itself because, say, it involves hurting or deceiving someone, or treating a person unfairly. And for this reason some philosophers maintain that some acts of this type (e.g. breaking a promise or lying) are usefully

---

excuses, rather than justifications, simply because they are *infringements* of rules. I explain these features of justification more fully below.

[10]Jenny Teichman, *Pacifism and the Just War* (Oxford: Basil Blackwell, 1986), p103.

characterized as prima facie wrong. But 'I chose the lesser evil' is not a confession of having acted wrongly all things considered when it is intended to explain that I made the right choice in the circumstances.

Although we can speak of different aspects of someone's conduct as justified or otherwise, to evaluate a particular decision or act as justified is to make an overall judgment that it is permissible or right, all aspects taken to be morally relevant having been considered. I emphasize this feature of justification partly because of the disagreement in recent legal literature about whether the plea of Provocation is a partial excuse or a partial justification. Joshua Dressler, for instance, takes issue with Finbarr McAuley's claim that Provocation functions as a partial justification rather than as a partial excuse of homicide.[11] Dressler is right to defend the usual interpretation of Provocation as a partial excuse. But Dressler's argument concedes too much to the claim that Provocation functions as a partial justification. A *particular act or offence* cannot be partially justified. Some *elements or aspects* of a person's conduct can be justified while other elements or aspects are unjustified. For example, I may be justified in gleaning certain information from you, but not in passing it on to friends; my reacting angrily towards a colleague might be justified, but not my kicking him; I am entitled to repel your unwanted kiss on the cheek, but not by pushing you under a moving train; etc. However, justification in the area of conduct primarily affects acts; and to say that a particular act, or some element or aspect of it, is or was justified is to make an overall evaluation of whatever is said to be justified, all relevant things considered. Justification can be a matter of degree: something can be arguably justified, barely justified, amply justified, etc. But conduct described in a particular way is either justified - permissible or right - or it is not. Thus a particular act (e.g. my telling this lie, my killing this person, my kicking him, my breaking this promise, my

---

[11] Joshua Dressler, 'Provocation; Partial Justification or Partial Excuse?', (1988) 51 *Modern Law Review*, pp467-480.

pushing you under the train) cannot be partially justified; it is either permissible or right that I do *this* act in the circumstances or it is not.

The fact that a successful plea of Provocation results in conviction of an offence (e.g. manslaughter) means that the accused's conduct was legally wrongful. This is sufficient to identify Provocation as an *excuse*. If Provocation is an excuse because the victim of the homicide was partly to blame for the accused's loss of self-control, this does not partially justify that particular loss of self-control. Further, even if the accused in the circumstances was justified in taking some action in response to the provocation (e.g. in resorting to hostile words, or to a degree of force) this does not partially justify *what the accused actually did* if this went beyond what he or she was entitled to do.[12]

So, the first feature of justification noted here is that although justification admits of degrees, justification is a threshold concept which involves an overall judgment about whatever is said to be justified.

Weaker and stronger standards of justification

Secondly, when we ask what relevant considerations are included in a judgment about justification we can recognise a weaker and a stronger standard of justification. 'What I did was permissible in the circumstances' is a justification, not an excuse; and because many permissible acts are discretionary, 'permissible act' implies a weaker all-things-considered justification than does 'right act'. We should also note that in moral evaluation 'permissible act' is sometimes used in a narrower, somewhat legalistic sense, to indicate the existence of a particular permission (e.g. a right to do x, or to have y); and acts said to be permissible in this narrower sense can be the wrong thing to do all things considered. For instance, it may be permissible that I insist on my

---

[12]Excuses, on the other hand, can be partial because they primarily affect our moral assessment of the agent on account of wrongful conduct. Agents can be more or less to blame, and not all excusing circumstances are wholly exculpating.

rights in some circumstances when this is not really the right thing for me to do; I ought, rather, to be more compassionate, not extract my pound of flesh.[13]

Objective and agent-perspectival justification

Thirdly, it is sometimes necessary to speak of justification from a particular perspective. This is because a justified act need not be permissible or right from a fully informed perspective. We can, and we often do, speak of justification from the perspective of the agent in the circumstances; and justification from this perspective is compatible with mistaken belief on the agent's part.[14] A petrol station attendant who hands over money from the till at the point of a very convincing dummy gun can claim 'I was justified in acting as I did. I did the right thing', even though the threat was a bluff and the attendant need not have sacrificed anything. When evaluated from a more informed perspective, such an act is faulty (although the agent is not at fault, not to blame) because based on a mistaken belief.[15]

Although 'justified act' need not imply the act's permissibility or rightness from a fully informed perspective, it may do so. Someone who in the circumstances reasonably believes that his or her act is justified might wonder whether he or she is *really* doing the right thing. And we also speak of justification in this more objective sense when we judge from a more informed, a more objective perspective than that of the agent in the circumstances, that a particular act is or was 'the wrong thing to do'. What we mean by this is that the act is or was untoward, or that it is or was not the best act in the circumstances. (In the strongest sense, 'justified act' means objectively the best act.) Think of a case of putative self-defence, one in which I kill someone in what

---

[13]This point is taken further in 4.3.

[14]Kent Greenawalt makes a similar point in 'The Perplexing Borders of Justification and Excuse', *Columbia Law Review*, vol 84, no 8, 1984, pp1907-1909.

[15]I should point out that in conformity with legal literature 'mistaken belief' in this context simply means 'false belief'. No mistake of reasoning on the agent's part is implied.

I reasonably believe is self-defence against a deadly blow. Sadly, it turns out that the other person's behaviour was entirely innocent. Evaluated from the perspective of the agent in the circumstances, my conduct was justified despite the fact that I killed a harmless person. However, from a more informed perspective I can later acknowledge that I did the wrong thing; and that a third party, for instance, observing the sequence of events and recognising my mistake, could have justifiably intervened to stop me. In retrospect we can, and we sometimes do, evaluate untoward acts based on mistaken beliefs in this way. Further, often when this is so we regret not only the outcomes of such acts, but unlike justified choices of lesser evils, we regret these acts - we wish the agent had acted differently - even though we recognise the inappropriateness of remorse or guilt on the agent's part.

When we explain a faulty act as due to the agent's mistaken belief, we do often cite this belief as *excusing* the agent of having caused needless harm, or of not having brought about the best results in the circumstances, rather than maintain that the agent in the circumstances acted permissibly or rightly. And indeed a *justified* mistaken belief about the circumstances of an act or its likely consequences is probably most commonly regarded as a complete *excuse* of the agent. To excuse an agent implies that his or her conduct was wrongful *by some standard*; and this standard can be derived from a more informed, a more objective perspective than that of the agent in the circumstances. Because this is so, when speaking precisely about a rightful act and justification, and a wrongful act and excuse, we need to distinguish between a rightful act from a fully informed perspective, and what was permissible or right from the perspective of the agent in the circumstances. And in my view this precision provides a sufficiently sensitive resolution of the running dispute between those legal theorists who maintain that 'reasonable mistake' in cases of putative self-defence is an excuse, and those who argue that it is a justification. There is good reason for insisting on both views (although this is not always reflected in the actual arguments presented on either

side).[16] 'Reasonable mistake' can be either an agent-perspectival justification or a complete excuse, depending on the perspective from which the act is evaluated.[17]

So, when speaking precisely about the morally right act and justification we need to distinguish between the objectively permissible or right act (right^{i}) and what is permissible or right from the reasonable perspective of the agent (right^{ii}). Objective justification does not ensure agent-perspectival justification; nor does agent-perspectival justification ensure objective justification. (Not handing over the money is objectively the best act in the petrol station example, but from the agent's perspective it is right that she hand it over.) Right^{ii} act need not be exclusive - in some circumstances alternative acts could each be right^{ii}. In the petrol station example, for instance, it could *also* be right^{ii} for the attendant (say) to scream for help rather than hand over the money, depending on what is reasonably risked in the circumstances. Because right^{i} is an objective moral standard it is unusual, although not impossible, that alternative acts would achieve equally satisfactory results and each be right^{i}. We also need to keep in mind a similar distinction between objective justification (justification^{i}) and what the agent in the circumstances is justified in doing (justification^{ii}).

These remarks about justification contradict those of George Fletcher, who has maintained in numerous publications that positive rightness (not simply permissibility) and objective rightness are necessary features of justification. Hence, Fletcher regards reasonable putative self-defence as, without qualification, an excuse. But an act's permissibility can be a justification without the act being positively the right thing to do.

---

[16]See Dressler's critique of Fletcher, 'New Thoughts About the Concept of Justification in Criminal Law: a critique of Fletcher's Thinking and *Rethinking*', 32 *UCLA Law Review*, pp61-99. Fletcher holds that 'reasonable mistake' is an excuse because he believes that justification necessarily implies objective rightness. On the other side of the dispute, it sometimes seems to be suggested that lack of moral guilt on the agent's part is sufficient to justify the act rather than excuse the agent (see e.g. Yeo, op cit., p32).

[17]I have not found a more felicitous name for this type of justification than Robert Young's suggestion, 'agent-perspectival'. 'Subjective justification' comes most naturally to a philosopher; but I avoid 'subjective' here because it could suggest to legal readers that the relevant belief or judgment need not be reasonable in the circumstances.

And further, we can describe one and the same act as objectively the wrong thing to have done, but excusable because justified[ii]. Some excuses are agent-perspectival justifications, and this can be true in the case of putative self-defence. (I might also remark in passing that Fletcher's concept of justification does not appear to acknowledge the possibility of agent-relative justifications (he maintains that X cannot be justified in defending himself against Y unless a third party would be justified in defending X against Y). Nor does it appear to accept the possibility of an act which I have a right to do not being, all things considered, the right thing for me to do.)[18]

Fletcher is a leading exponent of the jurisprudential theory that closely aligns criminal defences with the moral evaluation of acts and agents. I, too, accept this theory, and I apply it in this thesis.[19] More specifically, I believe, first, that in the case of defences to homicide, legal justifications and excuses ought to have very close moral analogues; secondly, that the legal and non-legal senses of terms like 'provocation','duress', and 'self-defence' are not in general very detached from one another; and thirdly, that legal decision-making about defences to homicide invokes moral assumptions and arguments.[20] Nevertheless, closely related moral and legal concepts and categories are not identical in all respects; and the distinction between objective and agent-perspectival justification reveals two differences between moral and legal justification which should be noted.

First, morally justified conduct requires agent-perspectival justification, whereas legal justification need not. For *an agent's act* to be morally justified, from any perspective, the agent in the circumstances must reasonably judge it to be permissible or right; and further, he or she must do it voluntarily and for the right reason.

---

[18]George Fletcher, 'Rights and Excuses', *Criminal Justice Ethics*, vol 3, no 2, 1984, pp17-20.

[19]See also Suzanne Uniacke, 'What Are Partial Excuses to Murder?', in *Partial Excuses to Murder*, edited by Stanley Yeo, (Sydney: Federation Press, 1991), pp1-18. This paper applies much of the conceptual discussion of section 2.1 of this chapter to the issue of partial legal excuses.

[20]See Suzanne Uniacke, 'Killing Under Duress', op cit.

Someone who accidentally brings about the lesser evil, for instance, while attempting to achieve something else, may in fact do what morality permits or requires, but he or she does not thereby *act* justifiably. And an agent's act is not morally justified if, for example, he or she unwittingly does what he or she reasonably judges in the circumstances to be the right thing. However, it can be sufficient for legal justification that an agent's act merely conform with what the law permits or requires.[21] For example, in marrying for a second time one cannot be guilty of bigamy if one is not currently married, even if one remarries believing oneself still to be married to one's first spouse.[22] If I am legally required to register a baby's birth within 40 days, and believing the period to be 30 days, I register the birth on day 35, legally I do the right thing. Further, to the extent that the so-called '*Dadson* principle' has been abrogated in some jurisdictions, agent-perspectival justification might even be unnecessary for legal permissibility in some cases of intentional homicide. The *Dadson* principle maintains that 'whenever justification or excuse appear in a criminal case, not only must the circumstances of justification or excuse appear but the defendant must have known of, or believed in, those circumstances'.[23] Most American statutes require a subjective belief in justification on the agent's part for the plea of Self-Defence to succeed. But clause 44 (i) of the Law Commission's 1989 Report and Draft *Criminal Code for England and Wales*, for instance, states that if a person's actions are in fact 'necessary and reasonable to prevent his being (say) attacked with a knife, this agent commits no

---

[21] L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987), chapter 3, usefully distinguishes between conformance, compliance, and acceptance in the case of legal rules.

[22] See George Fletcher, 'The Right Deed for the Wrong Reason', *UCLA Law Review*, vol 23, 1975, p295.

[23] *R v Dadson* (1850) 4 Cox. C. C. 358. See B. Hogan's critique of this principle in 'The *Dadson* Principle', (1989) *Criminal Law Review* 679.

offence; it is immaterial that the agent was unaware that he was about to be attacked with a knife.'[24]

Secondly, in the case of a mistaken belief that one's act is objectively justified, moral justification can be agent-perspectival whereas legal justification cannot. Because we can speak of moral justification from different perspectives, an agent's act can be morally justified because based on the agent's reasonable beliefs and evaluations, although this act is not what morality permits or requires from a more informed, a more objective perspective. But an agent's act is not legally justified (lawful) if the agent in the circumstances reasonably but mistakenly believes that it conforms with what the law permits or requires. (This agent's act might be legally excusable, though.)[25]

I have highlighted three important features of moral justification in rejecting Teichman's reasoning that the *right* decision is sometimes excusable, rather than justified, because 'I chose the lesser evil' is an excuse of having acted wrongly. These three features are: that justification involves an all-things-considered evaluation of whatever is said to be justified; that there is a weaker (permissible act) and a stronger (right act) standard of justification; and that justification can be agent-perspectival or objective. As to Teichman's second reason for claiming that 'I chose the lesser evil' is an excuse rather than a justification, I think that when we apologise and make excuses to someone who is wronged, or even simply inconvenienced, by what we do, we sometimes appeal to considerations which really justify our conduct, for example, 'I'm sorry, I cannot come; my child is ill and needs me'. This particular explanation of my non-attendance provides a different morally extenuating consideration from, say, both

---

[24]The Law Commission (Law Com. No. 177), vol 1: Report and Draft Criminal Code Bill (London HMSO, 1989). Henceforth, I refer to this Report and Draft Criminal Code Bill as the Draft *Criminal Code*.

[25]See my discussion of putative self-defence and legal justification and excuse in 2.2.

of the following: 'When I accepted your invitation, I'd forgotten a prior engagement', and 'My car has broken down and I have no other transport'. These latter considerations, if (at least partly) exculpating, are excuses: they do not make my not keeping the engagement with you right, but instead relieve me from (a degree of) blame for not turning up. Even so, the former of these excuses is like the justification 'my child is ill and needs me', in that I urge as part of the explanation for my non-attendance a conflicting obligation which is more stringent in the circumstances and which I rightly choose to fulfill. But it is unlike the justification in that the conflict of obligations is due to faulty behaviour on my part, viz. my forgetting the prior engagement. It might be argued that whereas 'I had forgotten the prior engagement' explains, and is meant to excuse, my predicament of conflicting engagements, my decision to keep the other engagement is *then* permissible or right in the circumstances. However, the fact that the circumstances in which I fail to keep the later engagement are due to my forgetfulness is, I think, a sufficient reason for regarding the whole explanation for my breaking the later engagement as an excuse. Faulty behaviour or inability which may excuse our wrongful conduct need not, of course, be something for which we are culpable (my car's breaking down need not be my fault), and is typically not culpable when we accept the morally extenuating consideration as a complete excuse (e.g. 'I am too ill to attend').[26]

Justification, excuse and responsibility

D'Arcy distinguishes justification and excuse as follows. 'If an act is justified, the agent is responsible for it, but the act is, in the circumstances, not wrong. If it is excused, the act is a wrongful one, but the agent is, because of some special circumstances, not responsible for it, and hence not guilty.'...'An excusing condition,

---

[26]'I am too ill to attend' does seem a case in which excuse and justification meet. Am I saying that I am unable to attend because too ill (excuse), or that because I am ill I do the right thing in staying at home (justification)?

therefore primarily affects the agent; a justifying circumstance primarily affects the act: its species description, or its moral appraisal.'[27] Both parts of the last of these claims seem right to me. However, whereas agent-perspectival justification (justification^{ii}) implies the agent's full responsibility for the act as described from within that perspective, it need not imply the agent's full responsibility for what he or she *actually* did. And this is the reason why an agent-perspectival justification can be a complete excuse of the agent when his or her conduct is judged wrongful from a more objective perspective. Although the agent in the circumstances was justified, for example, in shooting someone who seemed to be an unjust attacker, or in handing over the money from the till at the point of a convincing-looking gun, and she is responsible for *this* conduct so-described and can account for it as permissible or right in the circumstances, the agent is *not responsible for*, and hence is *excused of*, what she *actually* did (needlessly killed someone, handed over the money unnecessarily).

'Responsible' is used in moral evaluation in a number of senses. And as D'Arcy's characterization of justification implies, where we deliberately choose the lesser evil we are responsible for bringing about this evil in the sense that we are morally accountable for what we do. Our having a particular type of acceptable explanation, namely that we acted rightly in the circumstances, means that we are not culpable, not to blame, for having brought about something in itself undesirable. In legal literature 'criminal liability' and 'criminal responsibility' are often used interchangeably, in much the same way that 'responsible' sometimes means 'to blame' in moral appraisal. But in a case of necessity, for instance, we can regard the agent as responsible (answerable) for, say, exceeding the speed limit in order to rush a gravely ill person to hospital, and yet consistently say that because this conduct was

---

[27]D'Arcy, op cit, p85.

permissible or right in the circumstances the agent is not 'criminally responsible' on this account.

D'Arcy distinguishes responsibility and culpability in the case of justification. However, his characterization of excuse follows J. L. Austin in suggesting a conceptual link between all excuses and lack of responsibility, and hence lack of guilt. In my view this characterization of excuse is misleading in two respects. First, it does not allow for partial excuse; but circumstances can be partly exculpating, and excuse need not be all-or-nothing. In the light of certain considerations we speak of less than full responsibility, and of someone's being guilty of a lesser moral or legal offence. For the sake of clarity, some people might reserve the term 'excuse' for a consideration which is entirely exculpating, and refer to 'mitigating circumstances' when an agent's responsibility or culpability is merely lessened. But this is required neither by the concept of moral excuse nor by its legal counterpart.

Secondly, while all successful excuses relieve the agent of some degree of culpability, not all excuses deny the agent's full responsibility for the conduct in question. I have in mind here a particular sort of (what we might call) failed justification; a failed justification being an explanation offered by the agent which we, as moral evaluators, do not accept as a justification. We may, for example, disagree with some of the agent's beliefs or moral priorities, or with what he or she regards as proportionate harm or an acceptable risk. Even so, if we accept that there are morally difficult cases about which reasonable people can disagree, and that in the particular case the agent's own belief or evaluation is both honest and reasonable (although, we believe, wrong), we may believe that he or she is not culpable, or not fully so, for acting (in our view) wrongly. However, in this case the agent is fully responsible for his or her conduct: this agent's acts are fully voluntary and intentional. That considerations such as the agent's own beliefs and evaluations here primarily affect our *moral evaluation of the agent,* and not our assessment of the act, is a good reason for

regarding them as (from our point of view) *excuses*; although to refer to an action based on the agent's conscientious, reasonable beliefs as excusable may seem to demean the agent. (This is probably due to the fact that paradigm excuses of particular conduct, e.g. non-culpable incapacity and ignorance, relieve the agent of responsibility for it.)

Summary and application to self-defence

The common assumption that self-defence is justified homicide usually expresses the view that actual self-defence is justified, i.e. that actual self-defence is permissible or rightful conduct as distinct from wrongful conduct of which the agent is excused of responsibility or blame. Once we take into account the distinction between agent-perspectival and objective justification, we can say that *putative* self-defence, where based on the agent's reasonable beliefs, is agent-perspectivally justified; and from an objective perspective we can also say that putative self-defence is excusable conduct.

'Permissible act' invokes a weaker standard of justification than does 'right act'; and discretionary acts which are permissible all things considered are justified without being positively the right thing to do. So the claim that an act of self-defence is justified homicide can (and indeed most commonly does in my view) express the view that self-defensive homicide is permissible all things considered, and that self-defence is discretionary. *Pace* Fletcher, the claim that self-defence is justified homicide need not express the view that an act of self-defence is positively right all things considered.

'Permissible' can also be used in a narrower sense, to identify the existence of a particular permission the exercise of which can be wrong in some circumstances all things considered. And in chapters 4 and 5, I argue that the *right* of self-defence is in fact such a permission. I argue that there is a positive right of self-defence against an unjust threat which *grounds*, but which does not guarantee, the justification of self-defensive homicide all things considered.

Weaker and stronger justifications

Having outlined some important features of justification which are highlighted by the distinction between justification and excuse, I now draw attention to the fact that conduct can be justified in different ways,[28] with corresponding differences in the source and strength of the permission involved. The contrast between two *types* of objective justification is necessary in order to explain the claim that self-defence is an exception to, rather than a justified or excusable infringement of, the general prohibition of homicide.

Justification arises when an act which is normally wrong, because (say) it infringes someone's rights, is chosen as the lesser evil. Because this act is right in *these* circumstances, it is *thereby* something the agent is entitled to do even though this act *wrongs* its victim as well as injures him or her.[29] D'Arcy's examples of justification arising from the urgent personal need of myself or another are justifications of this type. For example, I may be justified in destroying your car in an emergency, and even in wounding you by steering a runaway vehicle towards you rather than into a crowd of people. But I nevertheless wrong you - I infringe your rights - in doing either of these things. This type of justification is distinguishable from a justification which invokes a more positive right on the part of the agent to act as he or she does, so that someone whose interests are damaged by the act is not thereby wronged. An example of this second type of justification is where I require you to return something that you need, which I have lent you on the understanding that

---

[28]D'Arcy, op cit., pp81-85.

[29]I would prefer to use 'harms' rather than 'injures' here, because 'injury' often suggests physical injury. But I avoid 'harms' whenever I need to emphasize the distinction between injuring people (damaging their interests) and wronging them. Joel Feinberg and others have pointed out that alongside the sense in which to harm someone is to thwart, set back, or defeat his or her interests, there is a sense of 'harming' which means 'wronging'. Feinberg argues that the so-called 'Harm Principle' implies this moral sense. (*Harm To Others* (New York: Oxford University Press, 1984), chapter 1.) Hobbes, of course, used 'injury' to mean 'injustice'. But there are limits to the concessions one can make in deference to the possible moral loading of words which have a perfectly straightforward descriptive sense.

you will return it when I need it. Another example is where I withdraw a gratuitous service to you because I can no longer spare the time. In acting in these ways I cause you hardship and I thwart your interests, but I do not thereby wrong you. Paradigm cases of permissible self-defence, too, are not justified infringements of the unjust aggressor's rights, even when both the conflict and the injury inflicted on the aggressor are regrettable. Individual persons have a positive right to *defend* themselves against unjust aggression, and the injured victim of legitimate self-defensive action is not thereby wronged. (Some writers distinguish between culpable aggressors and morally innocent unjust aggressors (e.g. insane attackers), to the effect that only culpable aggressors are not wronged by the use of self-defensive force. In chapter 5, I argue that this distinction is mistaken.)

D'Arcy maintains that justified acts of both types fulfill the following description. It is true that this act is an instance of X (something which is normally an offence); but given C (a justifying circumstance), this is one of the recognised exceptions to the rule 'X is wrong', and this act is good or at least permissible.[30] I think that whereas killing an unjust aggressor in self-defence *is* a recognised *exception* to the rule 'Killing is wrong', this is *not* because self-defensive force permissibly wrongs an unjust aggressor. Use of genuinely self-defensive force is not within the scope of the rule 'Killing is wrong', because the unjust aggressor is not wronged by self-defensive action even if he or she is killed by it. On the other hand, breaking a promise, and destroying someone else's property without permission in an emergency, both of which infringe the injured person's rights, are *not* recognised *exceptions* (respectively) to the rules, 'Do not break promises', and 'Do not destroy another's property without permission'. They are, rather, recognised *justified infringements* of these rules and the person's rights.

---

[30] D'Arcy, op cit., p85.

Of course, if the relevant rights or rules were held to be absolute - never permissibly infringed - then it would be necessary to exclude justified acts from the scope of the relevant right or rule by appropriate specification. (Thus exponents of the Doctrine of Double Effect typically argue that self-defence is permissible because the absolute moral prohibition is of *intended* killing and genuinely self-defensive homicide is not intended killing.) But we seem to denude the claim that, for example, I have a right that my car not be destroyed without my permission, if I have the relevant right only in so far as no-one is justified in destroying my car without my permission. This is because what makes it (normally) wrong to destroy my car without my permission is (mostly) that I have a right that this not be done. And an important consideration in determining whether your destroying my car without my permission would be justified in certain circumstances is that I have a right that this not be done. Further, if in an emergency you justifiably destroy my car without my permission, I am nevertheless owed an apology and (probably) compensation for the wrong to me and not just for the injury.[31] This seems to me the element of truth in Teichman's claim that we act wrongly in choosing to do the lesser evil, even when this is the right decision.[32]

---

[31]See Thomson, 'Rights and Compensation', reprinted in *Rights, Restitution, and Risk*, op cit., pp66-77. (In general, Thomson distinguishes between infringing a right ('overriding' it justifiably) and violating it ('overriding' it unjustifiably). The substance of her distinction is important. But the distinction between 'infringing' and 'violating' a right is apt to be read as a distinction without a difference unless 'infringed' is re-defined. (See Teichman, op cit., p73-74.) I use 'infringe' and 'violate' interchangeably, and I speak about justified and unjustified infringement/violation of rights.)

[32]Feinberg argues about the relationship between right-invasion and moral indefensibility as follows. 'If Abel invades *any* nonmoribund, nonwicked interest of Baker's *indefensibly*, he has thereby wronged Baker. But suppose the circumstances are such that if Abel does not harm Baker's interest in X, his own interest in Y will itself be harmed. If interests of this type are more important than interests of type X, then Abel may understandably feel morally justified in invading Baker's interest in X, and if he is in fact justified, then he has not acted indefensibly, and Baker has been harmed but not wronged by him. The result is the same if Abel violates Baker's interest in Y in order to protect Charley's more important interest in Z', op cit., p113 (emphases original). Here Feinberg is using 'wrongs' to refer to those harms which people have a *legal right* not to have inflicted upon them, op cit., pp111-113. Even so, I think it is a mistake to conflate wronging someone with indefensibly invading his or her interests where this involves rights-invasion, be the invaded rights moral or legal. One can injure/harm someone (damage her interests) indefensibly without harming/wronging her (invading her rights), and one can wrong someone (invade her rights) justifiably. I return to these issues, and to the problems of rights-specification, in chapters 4 and 5.

Self-Defence as Justified Homicide

Behind the common view that self-defence is justified homicide there is an important qualification and also an important assumption. The qualification is that self-defensive homicide against *unjust* aggression is justified. The assumption is that self-defence is a positive right: that is to say, self-defence against unjust aggression is not a justified infringement of the rule 'Killing is wrong'; rather, it is a recognised exception to that rule. I defend this view of self-defensive homicide in chapter 5, in conjunction with the claim that I have no such positive right to kill an unoffending person (someone who in fact poses no unjust threat) for some good end. I may sometimes be morally justified in killing an unoffending person, e.g. where this is unavoidable in acting to avert some greater evil, and *hence* be entitled so to act. But in so acting I infringe a general rule and the unoffending person's rights. Putative self-defence, where this conduct is reasonable in the circumstances, is justified[ii]. For this reason, from a more objective perspective putative self-defence is an excusable *infringement* of its victim's rights.

2.2 SELF-DEFENCE AND LEGAL JUSTIFICATION

Self-defence is also said to be legally permissible homicide, and the plea of Self-Defence is usually described as a justification. Self-defence has been invoked as a justification of homicide in judicial decision-making, and particularly in the process of distinguishing Self-Defence as an admissible, and a complete defence to murder, from the related pleas of Necessity and Duress.[33] In his recent book, *Compulsion in the Criminal Law*, Stanley Yeo argues that these three related common law defences should continue to be kept separate because they 'do not all share the same underlying

---

[33]See in particular *R v Dudley and Stephens* (1884)14 QBD 273, and *R v Howe* (1987) A.C. 417.

rationale be it of justification or excuse.'[34] Yeo quotes the Canadian Law Reform Commission as putting the matter succinctly as follows:

'Despite their common fundamental nature, duress, self-defence and necessity are kept separate in [the Commission's draft legislation because]...the distinction is based on moral differences between the three defences. In self-defence the accused seeks protection against aggression and in so doing promotes a value supported by the law. In duress, he avoids harm wrongfully threatened to him but does so at the expense of an innocent third party or by controvention of the law and therefore does not promote a value supported by the law. In necessity he may sometimes promote a value supported by the law and contravene the letter of the law to secure some greater good (for example an unlicensed motorist drives an emergency case to hospital to save life); at other times he may fail to promote such a value but may avoid harm to himself at the expense of an innocent person or of controvention of the law (for example a shipwrecked sailor saves himself by repelling another from a plank sufficient only to carry one).'[35]

Western legal systems *permit* private individuals to use self-defensive force against unjust aggression.[36] Where attack is sudden, there is usually no possibility of legal protection, and if we are not legally entitled to defend ourselves then we must either be potential criminals or else at the mercy of those who would unjustly overpower us. Most people would regard this dilemma as morally intolerable, and would urge the individual's *right* to act in self-defence. However, this right of self-defence is not unlimited, permitting use of any means of warding off unjust harm, but is confined to use of necessary force. I am not entitled to aim at an attacker's heart, for

---

[34] Yeo, op cit, p28.

[35] Canadian Law Reform Commission, Working Paper No. 29, *Criminal Law The General Part: Liability and Defences* (1982), pp90-91. (This quotation is from Yeo, op cit., p28.) The Canadian Commission could have chosen a clearer example of so-called 'excusatory necessity'. The sailor's act of *repelling* another might arguably be self-defensive, depending on the particular facts of the case. (See my discussion of these sorts of examples in 3.2.) A better example is where a driver swerves into people on the footpath in order to avoid hitting a boulder on the road.

[36] Although they diverge in their rationale for limiting the scope of the plea of Self-Defence and defence of others. See George Fletcher, 'Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory', (1973) 8 *Israel Law Review*, pp367-390.

example, if I can shoot him in the leg and this is sufficient for self-defence in the circumstances. Nor is there a general right of necessary self-defence which always overrides all other considerations; and sometimes the seriousness of the consequences of self-defence can make the use of self-defensive force morally impermissible. For instance, it is not morally permissible that I push someone off a tall building even if this really is the only way I can prevent her stepping on my toe.

Necessity and Proportionality

These limits of morally permissible self-defence are reflected in two essential elements of the common law plea: necessity and proportionality. These requirements are sometimes described as different aspects of one general principle: that the accused must have acted within the necessity of the occasion.[37] This can be a useful general characterization, provided we remember that when speaking of justification in the case of self-defence we are making evaluative judgments about reasonableness and proportionality. The sense of 'necessity' relevant to Self-Defence, and also to the related plea of (justificatory) Necessity, is indispensibilty or unavoidability, not inevitability or compulsion. This former sense, unlike the latter, is in this context hypothetical: in explaining why a particular degree of force is necessary we refer to some aim, purpose, or end for which, or in the achievement of which, this force is indispensible or unavoidable.[38] (For this reason I am uncomfortable with use of the term 'excusatory necessity' in excusing an agent for wrongfully succumbing to the pressures of the occasion.)[39]

---

[37]See Norval Morris and Colin Howard, *Studies in Criminal Law* (Oxford: Clarendon Press, 1964), ch. 4, p120; *Russell on Crime*, 12th ed. (1964), vol 1, p680: 'The use of force is lawful; for the necessary defence of self or others or of property; but the justification is limited to the necessity of the occasion'; and A. P. Bates, et al, op cit., pp500-502.

[38]I discuss this more fully in 3.2 and 4.2.

[39]Yeo, op cit., p46, refers to 'justificatory' and 'excusatory' necessity.

When the amount of force used has not been excessive, an acquittal is appropriate if the foreseeable injury the self-defending agent has inflicted on the aggressor was proportionate to the harm the force was intended to prevent. The Criminal Code Bill Commission of 1879 contains an exemplary statement of these two conditions of Self-Defence, and it also very clearly characterizes the common law plea as a justification:

'We take one great principle of the common law to be, that though it *sanctions* the defence of a man's person, liberty, and property against illegal violence, and *permits* the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that *the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from, the force used is not disproportioned to the injury or mischief which it is inflicted to prevent.*'[40]

Traditionally the standard in judging these matters has been the legal 'objective test': that is, the standard of what was reasonable in the circumstances. The accused must reasonably have believed that the degree of force used was necessary to avoid the threatened harm; and the circumstances must have been such that a reasonable person in the position of the accused would not have considered that the injury foreseeably inflicted in avoiding the threatened harm was disproportionate.[41]

These two limitations of permissible self-defence - necessity and proportionality - are conceptually and morally distinct, and they can raise separate problems.

---

[40] Quoted by Smith J, in *R v McKay* (1957) *VR* 560 (emphases added). (I owe this reference to A. P. Bates, et al, *The System of Criminal Law* (Sydney: Butterworths 1979), p506.) A. J. Ashworth also clearly distinguishes necessity and proportionality. ('Self-Defence and the Right to Life', *Cambridge Law Journal*, 34 (2), 1975, pp296-297.) Ashworth quotes the Royal Commission of 1879 as observing that a law whose only requirement was necessity 'would justify every weak lad whose hair was about to be pulled by a stronger one, in shooting the bully if he could not otherwise prevent the assault.'

[41] The 'objective test' can be stated with varying degrees of objectivity, and jurisdictions differ on this matter. There is an arguable difference between the standard of what the accused reasonably believed in the circumstances, and what a reasonable person in the position of the accused would or could have believed. However, this is not important here.

Unfortunately, these two requirements are not always distinguished carefully enough. Conceptual imprecision which can lead to their confusion mars some legal judgments about so-called excessive defence (e.g. where a farmer shoots and kills an escaping chicken thief), some recommended codification of the law in this area, and also some philosophical discussions of self-defence.[42] An example of the latter occurs in *Fundamentals of Ethics*, where John Finnis isolates what he regards as a genuine 'principle of proportionality' in Aquinas' claim that an act done with a good intention can be rendered morally bad by being disproportionate to its end. Thus Finnis claims, 'if stunning one's assailant will suffice for self-defence, one must not shoot him through the heart; that would not be proportionate'. We can speak of use of disproportionate force here, provided we recognise that killing is impermissible in this case because it is *unnecessary*; as Finnis says, it inflicts needless harm.[43] Whether killing one's assailant would also inflict disproportionate harm depends on the nature of the harm against which one is defending oneself. For instance, if it really were necessary that I push someone off a cliff in order to prevent her stepping on my toe, use of this defensive force would be impermissible because disproportionate to the interest being protected.

Self-Defence: Legally Justified or Excusable Homicide?

In his *Commentaries on the Laws of England*, William Blackstone classified homicide '*se defendo* ' as excusable rather than justified: a private individual has no

---

[42]The chicken thief example alludes to *R v McKay* (1957) *VR* 560. However, the conceptual imprecision about which I remark here is not a feature of the leading judgment in that case (in which the distinction between the conditions of necessity and proportionality is clearly drawn by Smith J), but of *R v Howe* (1958) 100 *CLR* 448. The Draft *Criminal Code* refers to 'such force as, in the circumstances which exist or which (the accused) believes to exist, is immediately necessary and reasonable', op cit., Clause 44 (1).

[43]John Finnis, *Fundamentals of Ethics* (Oxford: Clarendon Press, 1983), p85. Kent Greenawalt also conflates the distinguishable conditions of necessity and proportionality in his discussion of the justification of Necessity. (*Conflicts of Law and Morality* (Oxford University Press, 1989), p292.)

duty to kill in self-defence, but acts out of necessity or compulsion.[44] To our minds, there are a number of confusions in this early thinking. First, justified acts can be both morally and legally optional: they can be permissible acts without being acts we are morally or legally obliged to perform. Secondly, Blackstone regarded self-defence as a special case of necessity, and we now recognise necessity as a type of justification. Thirdly, to explain that a person acted '*under* compulsion' is to offer an excuse of his or her (wrongful) conduct: an act done under compulsion is done without, or against, the person's will. However, there is a sense in which 'compulsion' can express a justification rather than an excuse. In cases of necessary choice of evils, agents sometimes say that in choosing the lesser evil they were 'compelled to an alternative'. And such acts are justified: they are permissible or the right thing to do in the circumstances. Further, even if Blackstone meant that some self-defending agents act '*under* compulsion', this would not necessarily preclude self-defence being objectively justified conduct. Someone acting under compulsion is not directly responsible for what he or she does. Nevertheless, this agent can do what is objectively permissible or right in the circumstances. If self-defence is permissible conduct, the *excuse* of compulsion is inappropriate even if an agent did in fact act under compulsion.

Although our concepts of justification and excuse are more refined than were Blackstone's, the current law of self-defence does not necessarily represent a finely-tuned set of moral requirements and distinctions. All the same, Self-Defence is now very widely regarded as a justification; and some legal theorists, for instance Kent Greenawalt, also explicitly recognise 'the right to use otherwise illegal force in self-defense' as a specific exception to the relevant rule, rather than a justified infringement of that rule.[45] This characterization of actual self-defence is essentially correct in my view. Nevertheless, in legal discussion self-defence is occasionally described as an

---

[44] Hugo Bedau, 'The Right to Life', *The Monist*, vol 52, 1968, p559.

[45] Greenawalt, *Conflicts of Law and Morality*, op cit., p286.

excuse of homicide. This description might simply reveal a lack of appreciation of the difference between justification and excuse; or it might flow from a denial of the practical importance of a legal distinction between justification and excuse because the plea of Self-Defence is a complete defence. But where it is seriously maintained that the law does not regard self-defence as justified homicide, two related objections might be urged against the contrary view. The first of these objections is the claim that because the criminal law must be realistic, and must recognise the limitations of ordinary persons, in accepting self-defence as entirely exculpating the law assumes nothing about justification but simply recognises the futility of trying to deter people from defending themselves. The second objection claims that the law of self-defence rests on a view about how a person under attack can reasonably be expected to behave.

These related objections to the claim that self-defence is legally permissible homicide are unpersuasive. And they are unpersuasive even if self-defending agents often act out of fear, and even if the desire to defend one's own life against direct attack is a very basic desire which would not be much influenced in practice by the unavailability of a complete legal defence. A very important reason why these objections are unpersuasive is that a successful plea of Self-Defence requires the accused to have been, or (where the plea also covers putative self-defence) to have believed that he or she was, the victim of an *unjust* threat.[46] For instance, a hijacker holding hostages at gunpoint as human shields who picks off a police sharp-shooter about to fire at him, may act out of fear and may have a very strong - even an irresistable - desire to defend his life, but he cannot plead Self-Defence. (In *Leviathan*, of course, Hobbes held that individuals always retain the (liberty) *right* of nature to defend their own lives, even against just punishment.[47] Most people now would not

---

[46]This does not mean that the original aggressor could never plead Self-Defence. The rights and wrongs of a conflict can change. See Yeo's discussion of the law on this matter, op cit., pp167-173.

[47]Thomas Hobbes, *Leviathan* (Harmondsworth: Penguin Books, 1974), p 199. (All further references are to this edition.)

accept the view that there is an unqualified right of self-defence. Nor, I believe, would most people accept Jenny Teichman's view that an individual retains the right of self-defence irrespective of the rights and wrongs of the original quarrel.[48] And the law accepts neither view.[49])

The law does regard actual self-defence as justified, and as a specific exception to the general prohibition of homicide. However, before arguing further for this claim it is important that I discuss two developments of the law of self-defence, the first of which complicates, and the second of which undermines, the claim that *the conditions of the plea of Self-Defence* are those of justification. The first development is the extension of the plea of Self-Defence to putative self-defence, and the second is a move away from an objective test of one of the elements of the defence.

Wrongful threat and putative self-defence

The Victorian Law Reform Commission has recommended that the common law condition of *unlawful* attack no longer be required for Self-Defence.[50] This recommendation, and similar suggested reform elsewhere, is motivated by examples such as the following. (In the particular example described in the Victorian Law Reform Commission's Discussion Paper, the victim's conduct is positively lawful - not simply innocent - although it is believed by the defendant to be an unlawful attack.)

'...a person is threatened with a gun and told to turn around by an under-cover police officer. If the defendant reasonably believed the response was necessary because, for example, of a mistaken belief that he or she was about to be shot in cold

---

[48]Teichman, op cit., pp80-82.

[49]Self-Defence is not legally permissible against the necessary and proportionate self-defence of the victim of one's culpable attack. See, e.g. Peter W. Low, *Criminal Law*, St. Paul, Minn.: West Publishing Co., 1990, p166, and W. LaFave and A. Scott, *Criminal Law*, St. Paul, Minn.: West Publishing Co., 1986, pp455-459.

[50]Victorian Law Reform Commission, Discussion Paper, *Homicide* (1988).

blood, then [under the proposed change] self-defence would be available despite the fact that the victim's actions were lawful.'

Presumably in this example the defendant believed that the victim's actions (threatening the defendant with a gun and telling the defendant to turn around) were unlawful, and on the basis of this the defendant believed that he or she was about to be shot in cold blood. This example collapses two issues: one is the problem that Self-Defence is unavailable to the defendant if that plea requires the victim's conduct to have been unlawful; the other is the issue of putative self-defence, because although the defendant was treated in an alarming manner, he or she was not actually under attack.

In order to cover *both* these issues, the recommendation would best be expressed as not requiring the defendant to have been under wrongful attack. This is because, first, use of the term 'attack' is inappropriate in some cases of self-defence, either because there is no actual threat (putative self-defence), or because there is an actual threat which is not an attack (e.g. someone assaulting me unwittingly or involuntarily). Secondly, 'unlawful' is commonly defined as 'not criminal or tortious';[51] and conduct which is not an unlawful attack might be either positively lawful (e.g. the apprehension of a criminal) or not an offence. Self-Defence is *already* an available defence in cases where the attack on the accused was not an offence (e.g. because the attacker was insane, a very young child, or suffering from automatism). In these cases, the relevant consideration is that the attack on the accused was wrongful, although it was not an offence: someone can wrongfully attack another person and this attacker's conduct be completely excusable.[52] (Admittedly, 'wrongful' as an alternative to 'unlawful' can seem strained in some cases. Glanville Williams comments, for instance, that to say

---

[51] See, e.g. W. LaFave and A. Scott, op cit., p455, and Peter W. Low, op cit., p165.

[52] The Draft *Criminal Code*, op cit., pp61-62, specifies that for the purposes of the relevant section (44) 'an act is "unlawful" although a person charged with an offence in respect of it would be aquitted on the ground only that - (a) he was under ten years of age; or (b) he lacked the fault required for the offence or believed that an exempting circumstance existed; or (c) he acted in persuance of a reasonable suspicion; or (d) he acted under duress, whether by threats or of circumstances; or (e) he was in a state of automatism or suffering from severe mental illness or severe mental handicap.'

'that a person who falls or is pushed against me without any negligence on his part commits a wrong seems strange'.[53] But it is not strange to say that I can be wrongfully injured by the impact of the other person in these circumstances.)[54]

One consequence of removing the requirement of unlawful attack, in response to sympathetic examples such as the above, is that the plea of Self-Defence could then be available where an accused, X, has killed another person,Y, in circumstances in which Y was engaged in self-defence against X and in which Y could have pleaded Self-Defence had he or she killed X. And this implication seems paradoxical because self-defence is usually regarded as positively lawful, something the law *permits*: an exception to the legal prohibition of private homicide, rather than a justified infringement of that prohibition. Say, as in the Victorian Commission's example, the undercover police officer, Ferret, lawfully holds a gun at (the defendant) D's back, etc. D believes that he is about to be shot in cold blood, and he uses force on Ferret. Under the recommendation D could plead Self-Defence. But *then*, Ferret defends himself against D's violent response, killing D. Ferret could plead Self-Defence. And Ferret could plead Self-Defence even if Ferret realised, but was unable to rectify in time, that D was acting on the mistaken belief that he was about to be shot, and Ferret knew that D could plead Self-Defence. If the plea of Self-Defence always implies legally permissible force, both Ferret and D are acting lawfully.

It seems undesirable that the law allow one and the same act (e.g. D's violent response) to be both lawful private homicide and at the same time objectively an unjustified threat to someone who may lawfully defend him- or herself. In the extended example of Ferret and D, surely only Ferret's response to D (provided it is necessary and proportionate) is lawful self-defence. D's conduct in fact threatens

---

[53]Glanville Williams, 'The Theory of Excuses', (1982) *Criminal Law Review*, p735.

[54]'Wrongful' means 'characterized by unfairness or injustice; contrary to law; (of person) not entitled to position etc. occupied' (*The Consise Oxford Dictionary*).

Ferret with imminent, irreparable injustice; whereas Ferret's conduct is not in fact a wrongful threat to D, even though D honestly and reasonably believes otherwise.[55]

The law can, if it so wishes, explicitly *permit* putative self-defence even though putative self-defence is objectively unjustified. Because of the special status of police it is, of course, possible for the action of a police officer to be both lawful and, because based on a mistaken belief, objectively a wrongful threat to someone. But the scope of the plea of Self-Defence would extend beyond the corresponding moral right of private self-defence were putative self-defence to be positively lawful homicide, rather than legally excusable homicide. This is because only *actual* self-defence is an exception to the moral prohibition of homicide. The right of self-defence against unjust aggression does not *itself* include the right to engage in what one wrongly, even if reasonably, believes is self-defence. In this respect the moral right of self-defence is unlike, say, the right to liberty, which *itself* permits one to act in ways which one reasonably believes will enhance one's freedom, even if they in fact thwart or destroy it. The dissimilarity betwen these two rights is due to the fact that in a case of self-defence, the permissibility of *self-preference* requires *the positive right to inflict harm on someone else in protecting one's own proportionate interest*; and this positive right, in turn, depends on the abrogation of the moral status of an unjust aggressor in comparison with that of an unoffending person. (I explain and defend these claims in chapters 4 and 5.) Putative self-defence, however reasonable this conduct might be from the perspective of the agent in the circumstances, is not part of the exercise of the right of self-defence.

---

[55] I note in passing that the Victorian Law Reform Commission's Discussion Paper is insufficiently clear on whether the accused's mistaken belief about the circumstances (that she is about to be shot in cold blood) must be held on reasonable grounds. The statement that the accused reasonably believes a certain response is necessary, because she believes that she is about to be shot in cold blood, is insufficient to settle the reasonableness of the prior belief.

Putative self-defence both wrongs its victim and is objectively unjustified. Because this is so, the law would be better to regard putative self-defence as excusable rather than lawful homicide where, in recognition of the fact that putative self-defence can be agent-perspectivally justified, the plea of Self-Defence is extended to putative self-defenders. The plea of Self-Defence, so extended, could be either a justification (in the case of actual self-defence) or a complete excuse (in the case of putative self-defence). However, where one and the same plea covers both actual and putative self-defence, in principle it seems preferable that some more general term or description be used, rather than the common law term 'self-defence'. This is because 'self-defence' very strongly suggests lawful homicide. (In covering both actual and putative self-defence, the Draft *Criminal Code* omits the common law term 'self-defence' from the relevant recommendation. But with codification, use of the name of the common law defence will probably continue in the absence of a broader term to cover both actual and putative self-defence.)

Justification and reasonable beliefs

The second respect in which the conditions of the plea of Self-Defence may not be those of justification arises from moves away from an objective test of one of the elements of the defence.

In the case of *actual* self-defence the accused need not believe that she is under unlawful attack: the accused may defend herself against a wrongful attack which she knows is not an offence because, for example, the attacker is obviously a young child or insane. However, for actual or putative self-defence to be justified^{ii}, the agent must believe on reasonable grounds that he or she is the victim of an *objectively wrongful* threat. (Ferret might realise that D's response is justified^{ii}; but for Ferret's self-defence then to be justified^{ii}, Ferret must justifiably^{ii} believe that D's response is not justified^{i}.) There are clear examples, perhaps the clearest being where a culpable unjust aggressor

defends him- or herself against the victim's legitimate self-defence, in which a self-defending agent will know that the threat to him or her is not wrongful.

If the plea of Self-Defence is to represent an agent-perspectival *justification* in the case of *putative* self-defence, then the standard of belief required of the accused on each of three counts cannot, in my view, be more subjective than that of belief which is justified[ii]. These three counts are: the agent's belief about the existing circumstances (e.g. that he or she is about to be shot in cold blood); the agent's belief that his or her action is necessary to ward off the threat (necessity); and the agent's belief that what is necessary for self-defence is not disproportionate to the threat (proportionality). Another way of expressing this standard is to say that the agent in the circumstances must have held these three beliefs on good or reasonable grounds. This accords with the present law of self-defence in Australia which invokes a standard of reasonableness on all three counts, whilst allowing for the exigency of the situation.[56] However, Australian and English law differ on this matter, the latter having now adopted the requirement of honest belief in respect of the accused's belief about the nature of the existing circumstances. (Some American commentators claim that honest belief on this count is sufficient for the defence; others say that this belief must be reasonable in the circumstances.)[57] A very influential element in the English adoption of this subjective standard in the case of self-defence is the view that an accused's honest belief that he or

---

[56]*Zedevic v DPP* (1987) 162 C.L.R. 645. See also Yeo's discussion, op cit., pp208-210. Nevertheless, Australian courts tend to collapse the second and third counts (necessity and proportionality) by referring to a single test of whether the force used by the accused was 'reasonably proportionate' to the danger which the accused believed he or she faced. Further, while it is very important to allow for the exigency of the circumstances in determining whether the defendant had reasonable grounds for a belief, to over-emphasize factors such as duress, or the defendant's confusion or fear as the grounds of exculpation, is to make self-defence seem like an excuse rather than a justification. Paul H. Robinson comments on the inappropriate, not uncommon 'commixture of justification and excuse' in self-defence provisions of American law. (*Criminal Law Defenses* (St. Paul, Minn.: West Publishing Co., 1984), vol 1, p110.) For a philosophical instance of this commixture, see Nancy Davis, 'Abortion and Self-Defense', *Philosophy and Public Affairs*, vol 13, no 3, 1984, p186.

[57]See, e.g. F. Lee Bailey and Henry B. Rothblatt, *Crimes of Violence* (vol 1): *Homicide and Assault* (New York: The Lawyers Cooperative Publishing Co., 1973), p485; Low, op cit., p168; and LaFave and Scott, op cit., pp457-8.

she is acting lawfully is sufficient to negate the mental element of crimes of violence including murder.[58] It is not part of my concern to provide a critique of the development of English common law on this matter. However, I will digress to comment that in my view Self-Defence is a *defence* to murder which denies neither the act of homicide nor the intention to kill or inflict grievous bodily harm. Rather, in pleading Self-Defence the accused maintains that his or her conduct (including the act and the intention to kill) was justified in the circumstances. One Canadian commentator argues, rightly in my view, that if the circumstances of self-defence negate the offence elements of murder - either the *mens rea* or the *actus reus* - then the defence is not Self-Defence but lack of *mens rea* or *actus reus*, as the case may be. And in this case the accused is not advancing the justification of self-defence and need not comply with the requirements of the defence.[59]

Superficially, the question of whether the plea of Self-Defence is always a justification, or is sometimes an excuse, is avoided in the Draft *Criminal Code,* which does not give a name to the proposed codified defence. As noted earlier, the Draft Bill simply states that : 'A person does not commit an offence by using such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable.....(c) to protect himself or another from unlawful force or unlawful personal harm..'

However, alongside its abrogation of the *Dadson* principle, this provision also represents the prevailing trend in English common law in undermining Self-Defence as a justificatory defence. And in so doing it raises a substantive issue of concern. Whatever the merits of the argument that, because the accused's actual belief in the

---

[58]The Draft *Criminal Code*, Part 7, 7.3 (i), op cit., p185. See Yeo's careful critique of the development of English common law on this issue, op cit., pp198-208.

[59]A. W. Mewett, 'Murder and Intent: self-defence and provocation', (1984) 27 *Criminal Law Quarterly* 433. I owe this reference to Yeo, op cit., p205, n22.

lawful nature of his or her conduct defeats a definitional element of crimes of violence, a mistaken belief need not be a reasonable belief in order to afford a defence, it is one thing to maintain that a person, X, is not guilty of murder if X kills Y because X foolishly believes Y is attacking him, and another thing to hold that in these circumstances X is not guilty of any offence. The Draft *Criminal Code* does regard the reasonableness of the accused's belief in the nature of the existing circumstances as relevant to the defence in an evidentiary way: it requires courts and juries to consider whether the accused had reasonable grounds for this belief in coming to a view about whether the accused in fact honestly held this belief.[60] But honest, unreasonable beliefs about circumstances are possible; and further, we know that some people (e.g. the paranoid, and those who jump to conclusions) do hold such beliefs. Of course, an honest, unreasonable belief can sometimes *excuse* a person's conduct, either partly or entirely. But whether or not an unreasonable belief constitutes an excuse of wrongful conduct depends on the degree to which the agent is responsible and culpable for holding this belief and for acting on it. The *mere* fact that an agent's act, in this case a homicide, is explained by the fact that the accused believed that he was being attacked is not a justification of the act, nor unquestionably an excuse of the agent.

Further, the Draft *Criminal Code* requires *reasonable* belief on the agent's part about the necessity and proportionality of his or her conduct; and it recommends the plea of *excessive* defence (as a defence to murder) where the accused has honestly but unreasonably believed that his or her conduct was necessary and reasonable in the circumstances. If, for argument's sake, we accept the claim that an accused's honest belief that he or she was acting lawfully defeats a definitional element of murder, this does not justify the moral implications of the adoption of these different standards: the subjective standard in the case of the accused's belief in the existing circumstances, and

---

[60]Draft *Criminal Code*, op cit., p50, Clause 14.

the objective standard in the case of necessity and proportionality. And the conditions of the plea of Self-Defence, or its codified counterpart, do not correspond to the background theory of justification and excuse where these conditions allow that an accused's unreasonable belief about the existing circumstances is always a complete defence to murder, whereas his or her unreasonable belief about either necessity or proportionality is only a partial excuse.[61]

Defence of Others and Pleas Related to Self-Defence

The extension of Self-Defence to putative self-defence complicates, and the adoption of a subjective test of one of the elements of the defence undermines, the claim that the conditions of the plea of Self-Defence are always those of justification. However, other aspects of Self-Defence as a defence to murder, together with a comparison between Self-Defence and the pleas of Necessity, Duress, and also Provocation, strongly reinforce the claim that the law regards necessary and proportionate actual self-defence as justified homicide. First, although we usually speak of self-defence in a strict sense in which *self*-defence is distinguishable from defence of another person, in legal contexts 'Self-Defence' is sometimes used more widely and extends to defence of others.[62] Self-defence and defence of others have also been regarded as *morally* on a par by George Fletcher, who claims that the moral right to repel an aggressive attack lends itself to universalization, and this being so, any third person should be able to intervene on behalf of the victim. Fletcher also asserts that western legal systems now recognise the right of third party intervention as a matter of course.[63]

---

[61]See Yeo's detailed critique of the differences between English and Australian law on this and related issues, op cit., pp198-226.

[62]Some writers recommend the less misleading term 'private defence' to cover both. See, e.g. Glanville Williams, op cit., p738.

[63]George Fletcher, 'The Right to Life', *The Monist*, vol 63, 1980, p140.

Fletcher's particular equation of self-defence and third party intervention (or defence of others) characterizes self-defence as a justification according to the stronger standard of justification (right act). Even within this standard, I think that Fletcher oversimplifies both the moral and legal positions. In some respects the justification of defence of others can be morally more complicated than that of self-defence. Most people will disagree with Hobbes, and will believe that individuals have a right but not an absolute duty to preserve themselves; and a *discretionary* right of self-defence might not extend to third party intervention where the victim decides against exercising this right.[64] Further, those directly involved in a conflict are often in a better position to judge the facts, including the rights and wrongs of the conflict, than are third parties: what to an outsider might seem obviously wrongful aggression by one party towards another may not be such. Greenawalt mentions the case of *People v Young*, in which a man came upon two middle-aged men beating and struggling with a youth. Reasonably believing the youth was being unlawfully assaulted, Young intervened violently. The two men turned out to be plain clothes policemen trying to arrest the youth.[65] A third, more fundamental concern with Fletcher's equation of self-defence and third party intervention is the possibility that there is not a general right of self-defence which is universalizable in the way that Fletcher claims it is. For instance, some writers argue that self-defence against a morally innocent aggressor, and the foreseen killing of an aggressor in defence of an interest other than one's life, are agent-relative permissions confined to the person who is being attacked.[66] Phillip

---

[64] I owe this point to Hugh LaFollette. (I refine this point in chapter 5.) Further, the so-called 'alter ego rule' (see Low, op cit., p169, and LaFave and Scott, op cit., p462) - that a third party is privileged to defend another only when this other person is priviliged to make a defence - does not entail that a third party is privileged to defend another whenever the other person is privileged to make a defence. LaFave and Scott, op cit., p464, wrongly say that this rule holds that the right to defend another is 'coextensive' with the right of the other to defend himself.

[65] Kent Greenawalt, 'The Perplexing Borders of Justification and Excuse', op cit., p1919, n65.

[66] In 'Innumerate Ethics', *Philosophy and Public Affairs*, vol 7, no 4, 1978, Derek Parfit describes one person's killing another in order to save *his own* arm as an agent-relative permission.

Montague argues, in the opposite direction to that persued by Fletcher, that the right of self-defence against a culpable unjust aggressor is unproblematic because it follows from the obligation of third party intervention on behalf of the innocent victim.[67] This argument also leaves open the question of whether in some cases of self-defence the permission is agent-relative. (At various points in chapters 3, 4, and 5, I discuss the possibility that the right of self-defence is sometimes an agent-relative permission.)

The Draft *Criminal Code* groups self-defence, in the strict sense, and defence of others.[68] However, English case law has tended to avoid explicit recognition of a private right to intervene in defence of others, instead sanctioning intervention which would receive the whole-hearted moral approval of most people in terms of the very general private right to act in prevention of a felony.[69] This rationale could be either useless or fictional in a situation in which a third person intervenes against an aggressor who does not even seem to be committing any offence (e.g. a very young child or someone suffering from automatism). Nevertheless, the law does permit third party intervention, and with the exception of defence of someone very close to the accused, the explanation is clearly *not* that the accused's intervention is excusable because it was an inevitable natural response.[70] Third party intervention in defence of the victim is legally *permissible*, not legally excusable, homicide.

The fact that the scope of Self-Defence can also extend to defence of interests other than life also supports the claim that the law regards actual self-defence as justified homicide. And this same extension of the *moral* right of self-defence is also

---

[67]Phillip Montague, 'Self Defense and Choosing Between Lives', *Philosophical Studies*, 40, 1981, p216.

[68]The Draft *Criminal Code*, op cit., p. 61, Clause 44, 1, (c).

[69]See *R v Duffy* (1967) 1 Q.B. 63. Glanville Williams, op cit., p738, comments on the 'reluctance of modern judges to say that one can lawfully act in defence of a stranger'.

[70]The often cited case of Kitty Genovese establishes that defence of others is not an inevitable response.

often assumed. George Fletcher, for example, claims that threatened rape is a relatively non-controversial case of aggression generating a right of self-defence which includes use of deadly force.[71] There is, of course, often the grave risk that a victim of rape will be seriously injured or killed; and this can also be true of the victims of assault, kidnap, and even of some property offences. However, the legal permissibility of using deadly force against 'the most extreme intrusions on freedom of the person (e.g., kidnapping and rape)', which do not immediately threaten life, need not depend on this risk.[72] People are likely to disagree about proportionality in the case of defensive homicide against (say) rape where the victim is clearly not at risk of being killed or physically injured. And this being so, it is very difficult to maintain that the law simply condones the use of lethal force in the protection of some interests other than life because the use of such force is inevitable, and so any attempt to deter it would be pointless.

Further, lack of a complete defence to murder *is unlikely* to deter killing in some circumstances of provocation, necessity and duress. And another important consideration in characterizing actual self-defence as legally permissible homicide is a comparison of the plea of Self-Defence with the related pleas of Necessity, Duress and Provocation. In some jurisdictions Provocation reduces murder to manslaughter only if it is accepted that a reasonable person in the circumstances of the accused would have lost self-control sufficiently to form an intention to kill. This standard is so strong that Provocation so-defined ought to be a complete defence: where this standard is met it is unreasonable to expect the accused not to have lost self-control in this way. However, suitably defined, Provocation is a paradigm mitigating circumstance. Provocation is a

---

[71]Fletcher, 'The Right to Life', op cit., p139.

[72]LaFave and Scott, op cit., p456. It is doubtful that Self-Defence is admissible where the accused has used lethal force to prevent interference with property (say to prevent invasion of a dwelling house) unless the particular circumstances of the property offence made it reasonable for the accused to believe that the invader intended to commit a felony. See again LaFave and Scott, p465.

partial excuse of murder. It is an excuse which recognises that although the accused's conduct was wrongful and culpable, it was due to a loss of self-control on the part of the accused which in the circumstances was sufficiently humanly understandable to make it appropriate to convict him or her of a lesser offence than murder. (In jurisdictions where 'murder' is reserved for the most serious homicide offence, Provocation is appropriate as a partial excuse which reduces murder to manslaughter. In jurisdictions which recognise degrees of murder, Provocation could excuse of murder to a degree.)

As a partial excuse, the plea of Provocation is better captured by the weaker standard contained in some codes, and increasingly emphasized by the courts. According to this standard Provocation requires there to have been conduct which could have caused an ordinary person of reasonable firmness and with the characteristics of the accused to lose self-control sufficiently to form an intention to kill.[73] And yet even on this weaker standard of loss of self-control, lack of a complete legal defence would probably be at least as feeble a deterrent to someone *really* so affected as to someone who is being attacked. Even so, Provocation is a *partial* excuse of murder. Self-Defence is a complete defence.

The law clearly *permits* self-help and 'an individual's right to life to override the social duty not to use force' only in cases of sudden attack or (where putative defence is deemed permissible) believed sudden attack. But the orthodox legal rationale for this stand does not sharply distinguish the plea of Self-Defence from the related pleas of Necessity and Duress. For it may also be arguable on the facts in cases where (were they admissible) Necessity and Duress could be urged, that 'the protection of society and its laws is no longer effective', the individual alone being 'left to protect his right to life and physical security'. But in these other circumstances we are faced with either

---

73 See *R v Stingel* (1990) 65 ALJR 141, at 147.

breaking the criminal law or else being at the mercy of those forces which would overpower us. We can be legally expected to forgo even vital interests rather than protect them by intentionally killing unoffending persons.[74]

The status of both Necessity and Duress as admissible defences to murder is very dubious. Where Duress has been admitted by the courts as a defence to murder it has been restricted to aiders and abetters (those who have not participated in the actual killing) and has been only a partial excuse, reducing murder to manslaughter.[75] The present direction of English common law seems to be away from admitting Duress as any defence to murder. *R v Howe* (1987) affirmed that Duress is not a defence to murder.[76] In that landmark case, some of the Lords expressed the view that if Duress were to be recognised as a defence to murder the proper means to effect such a reform is parliamentary. But others rejected Duress outright as a defence to murder on the basis of authority and by appealing to the necessary connection of law and morality in the matter of protecting the lives of innocent persons. The recognition of both Necessity and Duress as defences to murder has been raised more openly, but nevertheless tremulously, in English and Australian reports which aim at codification of the law of homicide. For example, the Victorian Law Reform Commission's Discussion Paper *Homicide* (1988), merely raises and leaves open the possibility of

---

[74]The quotations in this paragraph are from A. J. Ashworth, op cit., pp282-283. The conditions under which self-defensive killing is lawful - necessity and proportionality - might sometimes be arguable in cases of so-called necessity, for instance in the famous leading case of *Dudley and Stephens*, where after twenty days adrift in an open dinghy two shipwrecked sailors killed and ate the cabin boy so that they and a third man might survive. Dudley and Stephens were convicted of murder, even though the jury accepted that 'if the three men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued', and also 'that the boy being in a much weaker condition was likely to have died before them'. (Later, such considerations served to mitigate the sentence.) In cases of duress there is the additional, important argument for leniency: that the will of the accused was overborne.

[75]*DPP for Northern Ireland v Lynch* (1975) A.C. 653, and *Abbott v The Queen* (1977) A.C. 755; *R v McConnell, McFarland and Holland* (1977) 1 NSWLR 714; *R v Harding* (1976) VR 129; *R v Evans and Gardiner* (no 1) (1976) VR 517. See also Stanley Yeo, op cit., pp144, n165, for details of Australian and Canadian common law on this matter.

[76]*R v Howe* (1987) A. C. 417.

Duress and Necessity as defences to murder. There is no recommendation on this point. Despite considerable academic criticism of *Howe* (1987), and the fact that the English Law Commission had in its Report prior to *Howe* recommended that Duress should be a defence to all crimes, the Draft *Criminal Code* explicitly excludes both duress by threats (Duress) and duress of circumstances (Necessity) as defences to murder or attempted murder.[77] However, these exclusions are contained in square brackets, with the comment that this is in order to indicate that the earlier recommendation has not been abandoned!

It might be claimed that the legal permissibility of self-defence does not represent the judgment that self-defensive homicide is morally justified, whereas the intentional killing of unoffending persons in circumstances of necessity and duress is always morally wrong. Rather, it might be argued, the law permits private individuals the use of lethal force against unjust aggressors simply in order to deter unjust aggression. In contrast, Duress and Necessity are unavailable defences to murder because the law seeks to deter people from killing unoffending persons under duress and in circumstances of necessity. Some judicial decisions and legal commentaries certainly suggest this alternative, more utilitarian explanation of the law in this area. For instance, the predicted dire social consequences of allowing Duress and Necessity as defences to murder were clearly never far from the minds of some of the judges in *Howe* (1987). Nevertheless they, together with some others who urge this consideration, also believe that there is an obvious, very weighty moral justification for the legal distinction between self-defensive homicide and killing in cases of necessity and duress.[78] Although alternative explanations are possible, the reasoning behind the

---

[77] Draft *Criminal Code* , op cit., pp60-61, and p229.

[78] Echoing Lord Coleridge's judgment in *Dudley and Stephens* about Necessity as a defence to murder, Lord Hailsham argued in *Howe* (1987) that to allow Duress as a defence to murder would be to divorce law and morality on this matter. See also, e.g. Anthony Kenny, 'Duress *Per Minas* as a Defence to Crime II', (1982) *Law and Philosophy* 1, pp197-205.

distinction between these related defences most often appeals to the different moral status of the person killed in self-defence. The person killed in self-defence was an unjust aggressor; whereas someone killed under duress or in circumstances of necessity was not him- or herself an unjust threat to the accused. To kill an unoffending person intentionally in order to protect one's own interests violates a principle widely accepted as morally fundamental, and accepted by some as as a moral absolute or near-absolute. And the fundamental principle of the 'inviolability of innocent human life' is in fact explicitly invoked in judicial rejections of both Necessity and Duress as defences to murder.[79] Necessity was not admitted as a defence to murder in *Dudley and Stephens* because the plea of Necessity was interpreted as a justification, and the deliberate killing of an 'innocent and unoffending' boy was held to have been wrongful. Unlike self-defensive homicide, the killing of the cabin boy was held *not* to have been *justified self-preference* on the part of Dudley and Stephens in the circumstances. In rejecting Duress as a defence to murder, judicial concern has been about Duress as an excuse of *deliberate wrongdoing* of this type, and about the wider social consequences of allowing Duress - *as an excuse of deliberate wrongful homicide* - to be a defence to murder.

A number of prominent philosophers and jurisprudents who invoke the principle of the inviolability of innocent human life seek to distinguish self-defence as justified homicide in terms of one or other of two general lines of argument. These two general lines of argument are probably the most commonly exploited in philosophical thinking about the justification of self-defensive homicide, and they will be examined in detail in chapters 4 and 5. I also argue in 4.3 that there is an important, sometimes suppressed, connection between these two lines of argument. I have maintained in this present chapter that actual self-defensive homicide is widely regarded as morally justified and a

---

[79] *R v Dudley and Stephens* (1884) 14 Q.B.D. 273. The ruling in this case, far from now being anachronstic, was reaffirmed by the House of Lords in *Howe* (1987).

positive right, and that the law in this area reflects this view. However the claim that self-defence is morally justified and a positive right describes not one, but a range of views with possible variations at points within that range. I identify and discuss these variations in the next chapter, in the context of an examination of probably the most explicit and influential philosophical explanation of the justification of self-defence, that of Natural Law.

3

SELF-DEFENCE AND NATURAL LAW

The moral permissibility of self-defensive homicide has been widely held to be derivable from Natural Law. Natural Law has directly and indirectly shaped much philosophical thinking about the principles of justified self-defence; and indeed two major strands of thought about justified self-defence are to be found in Natural Law accounts. The first of these two strands emphasizes the claimed moral importance of the self-defending agent's intention to the permissibility of genuinely self-defensive homicide; the second claims that the permissibility of self-preference in a case of self-defence derives from the abrogated moral status of an unjust aggressor compared with that of the unoffending victim. I discuss these two general lines of argument in detail in chapters 4 and 5. In this present chapter, I examine a number of influential Natural Law accounts of self-defence, and I draw from these accounts the two strands I have just mentioned. I also identify in Natural Law discussions of self-defence a number of issues which are important elements of any adequate account of justified self-defence. These elements are discussed in this chapter and are taken further in subsequent chapters.

Philosophers who argue from Natural Law emphasize various grounds and conditions of permissible self-defence; and their accounts leave open possible, and sometimes reveal actual, differences in the scope and strength of the permission of self-defence. These differences expose important issues which are not, and should not be, confined to Natural Law accounts of justified self-defence. Not all Natural Law accounts address all or even most of the issues that I am about to list, nor where they discuss or allude to some do they necessarily do so in the terms which I use. But

the answers which these accounts do, or could, give on each of these issues will be necessary to any full account of justified self-defence. The more important possibilities can overlap in scope, and even within the groupings listed immediately below are not always mutually exclusive.

3.1 POSSIBLE DIFFERENCES IN SCOPE AND STRENGTH

The Strength of the Moral Permission [(i)]

(a) Self-defence might be an agent-relative permission, its permissibility deriving from the legitimate desire for self-preservation and a view about the type and amount of self-sacrifice that is unreasonably required of people. This permission to defend oneself in certain ways against particular threats would not itself imply that one may similarly defend other people (except perhaps one's close relatives) in circumstances where these others may defend themselves; (b) Individuals might be thought to have a more full-bodied right of self-defence, which itself implies the legitimacy of assistance by others (even strangers), as well as the legitimacy of assisting others, in the exercise of this right; (c) Individuals might be thought not morally obliged not to act in self-defence; however it might be held that it is sometimes, even mostly, morally better that they do not do so; (d) Self-defence might be thought not only permissible or a right in the full-bodied sense, but also mostly, even always, a duty. (This right of self-defence is not discretionary.) This duty the individual has to him or herself (or even to God) independently of any duty (say) to dependants or to society, and the duty might, although it need not, be absolute. One might, for instance, have a duty to defend oneself except at very great cost to others or at the expense of something which one rightly values more than one's own life or limb.

Some Natural Law theorists discuss self-defence in terms of rights, duties and justification, whereas others (including Aquinas) maintain that self-defence is morally permissible.

The Relevance of Fault and Guilt [(ii)]

(a) Self-defence might be thought permissible only against culpable unjust aggressors or those (reasonably) believed so; (b) Self-defence might be thought permissible against non-culpable unjust aggressors (e.g. young children, the psychotic, unwitting threats, etc.); (c) Non-aggressors (e.g. bystanders, hostages) might or might not be thought permissibly harmed in the course of self-defence; (d) Self-defence might or might not be thought sometimes permissible against just violence, or against force which from the perspective of the aggressor appears not to be unjust, or to be permissible at some stage irrespective of the rights and wrongs of the original conflict.[1]

The Relevance of Proportionality [(iii)]

(a) Proportionality might or might not be thought necessary for permissible self-defence. As explained in chapter 2, the condition of proportionality is distinguishable from the requirement that the degree of force used in self-defence not exceed what is necessary in the circumstances to avoid the infliction of a particular harm. Use of necessary force can inflict disproportionate harm, for example, my warding off a slap on the arm might push the offender off a tall building; (b) Considerations such as an aggressor's culpability and the victim's innocence, the number of aggressors foreseeably injured in self-defence, and also the interests of third parties who are either threatened by the aggression or foreseeably directly or indirectly harmed by defensive action, might or might not be thought relevant to the permissibility of self-defence. (These possibilities, together with those in (ii)(a)-(c), suggest mixed views on two of the issues grouped under (i); for instance, the view that killing a non-culpable unjust aggressor is only an agent-relative permission, whereas the right (or duty) to kill a culpable unjust aggressor implies the legitimacy of assistance from others.)

---

[1]Again see Teichman on Hobbes, op cit., pp82-83.

What Proportionality Requires [(iv)]

Self-defence which foreseeably kills or grievously injures the aggressor might or might not be thought permissible only against the threat of the same type of harm. The requirement of proportionality can leave open whether prevention of a particular harm (e.g. sexual assault or theft) could ever itself warrant killing or grievously injuring someone. Where one's life is threatened it might be thought permissible to kill if necessary; but if one kills in order to avoid, for example, loss of a limb or sexual assault, this might be thought permissible or, alternatively, wrong but excusable. (This suggests possible mixed views on some of the issues grouped under (i) and (ii); for instance, the view that individuals have a right to defend their own lives by killing if necessary, and that this implies the legitimacy of assistance from others, but that killing in defence of (say) a limb is an agent-relative permission, or the view that the aggressor's culpability affects proportionality, making killing in self-defence a right in the more full-bodied sense, rather than, as in the case of a non-culpable unjust aggressor, an agent-relative permission.)

The Relevance of Intention [(v)]

Self-defensive homicide might or might not be thought permissible only where the death of the aggressor (and possibly others who will be killed) is unintended.

3.2 A RANGE OF VIEWS

The Nature and Strength of the Permission

From the above possibilities we can describe an extreme view, one which few would accept, and one which might seem the antithesis of any possible position derived from Natural Law. This is the view that we have an absolute natural right and duty to defend ourselves by any means necessary, at whatever cost to others, irrespective of the nature of the threat to us.

This is not an unfair description of what Hobbes says in *Leviathan* about

Natural Law and self-preservation in the State of Nature. Although Hobbes maintains that natural rights are liberties, the essence of a right for him being that its exercise is discretionary, it follows from what Hobbes says about self-preservation (namely, that self-preservation is a Law of Nature, and that we cannot act other than for this end) that self-defence can be a dictate of Natural Law, and will be what Natural Law mostly requires. To use terminology that Hobbes explicitly rejects as conceptually and morally confused, self-preservation, which can imply self-defence, would seem to be for Hobbes both a natural right and a natural obligation.[2]

An important reason for the differences between Hobbes and others who derive conditions of permissible self-defence from claims about Natural Law is that Natural Law is typically said to include non-instrumental moral obligations towards other people, making it necessary to justify self-defence. The onus is reversed in Hobbes. He maintains a powerful, pivotal natural right of self-preservation, limited only by necessity. This means that if I must kill many others to preserve myself, I act within my rights. (Self-preservation is obviously wider than self-defence.[3] Further, self-preservation need not always require defence of one's physical life, and could even be consistent with sacrificing one's life in the achievement of some goal with which one

---

[2]At the start of chapter 14, Hobbes defines 'The Right of Nature', 'Liberty', and 'A Law of Nature' as follows. 'The Right of Nature *Jus Naturale*, is the Liberty each man hath, to use his power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own life; and consequently, of doing any thing, which in his own Judgement, and reason, hee shall conceive to be the aptest means thereunto. By Liberty, is understood, according to the proper signification of the word, the absence of externall Impediments: which Impediments, may oft take away part of a mans power to do what he would; but cannot hinder him from using the power left him, according to his own judgement, and reason shall dictate to him. A Law of Nature, (*Lex Naturalis*,) is a Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that,which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved.' Hobbes' definition of 'Liberty' above - as an actual power to do as one will, in the absence of external impediments - is consistent with the Right of Nature (defined as a Liberty) also being a Law of Nature. But Hobbes' use of 'Liberty' in defining 'Right' suggests not an actual power, but another sense familiar to us: a permission to do or to refrain. This latter sense is inconsistent with the Right's also being a Law. And it is this latter sense which Hobbes emphasizes in distinguishing a Right and a Law: 'Right, consisteth in liberty to do or to forbeare; Whereas Law, determineth, and bindeth to one of them: so that Law and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent.' (See also David Gauthier's discussion, *The Logic of the Leviathan* (Oxford: Clarendon Press, 1969), pp29-47.)

[3]See Teichman's discussion, op cit., p86.

identifies and which one values more than one's own physical life.[4] Nevertheless, self-defence in the face of a threat to one's life will mostly be required for self-preservation.)

Further, individuals retain this right of self-preservation in civil society. Not only would it be self-defeating for them to give up this right, but they cannot agree to give it up. Such a covenant would be void since, according to Hobbes, individuals are psychologically incapable of performance.[5] And whereas there is no right of group resistance in civil society, nor a right to resist in defence of others (guilty or innocent),[6] individuals can exercise their natural right of self-preservation in extreme circumstances. Capital punishment at the judgment of the Sovereign is not unjust according to Hobbes.[7] Nevertheless, even guilty individuals have the right to resist it if they can.[8] Hobbes' view also implies that an aggressor has the right to resist the victim's self-defence. If we are psychologically constituted so as always to be motivated by self-preservation, when we realise what is necessary for this end we cannot reasonably be expected to act otherwise.

For Hobbes, all obligations properly so-called are created by voluntary acts. Some argue that this, taken with the fact that for Hobbes even the individual's most basic 'right of nature' does not itself imply a moral presumption of non-interference by others, means that Hobbes is a moral contractarian rather than someone presenting an unusual version of Natural Law. Nevertheless, Hobbes' account of self-preservation is an instructive comparison, because he shares with those who, unlike him, hold that so-called Natural Laws are moral laws in terms of which we can wrong

---

[4]Helen Pringle and Robert Lawton argue this in 'A Life Well Lost? Hobbes and Self Preservation' (unpublished manuscript).

[5]Hobbes, op cit., pp198-199.

[6]Ibid., pp270-271.

[7]Ibid., pp264-265.

[8]Ibid., pp264-265 and pp270-271.

others, the view that the permissibility of self-defence stems from the legitimate natural desire for, and natural right of, self-preservation. Despite this common ground between Hobbes and others, the emphasis in most Natural Law discussions is not the positive individual right of self-preservation, but rather the presumption (sometimes prohibition) against private homicide and the specification of the conditions under which self-defence is exempt. A sharp contrast with Hobbes is Aquinas' much earlier discussion of self-defence, although the accounts of some others more centrally within the Natural Law tradition than is Hobbes (e.g. Grotius, Pufendorf and Locke) more closely resemble Hobbes' emphasis.

Aquinas concentrates on distinguishing genuinely self-defensive homicide from intentional killing.[9] This distinction is usually taken to be the source of the subsequent Thomistic Doctrine of Double Effect, which says that although private persons are prohibited from engaging in intentional killing, under specified conditions they can permissibly act for some good end foreseeing that someone's death will result, provided this effect is unintended. Self-defensive homicide is said to have two foreseen effects - one good (saving myself) and the other bad (the aggressor dies). Where I intend to do only what is necessary to save myself (itself a legitimate intention), the foreseen bad effect is said to be unintended. Some Natural Law theorists ground permissible self-defensive killing on this distinction (as do some others who believe that private intentional killing is impermissible). The 20th century Natural Law philosophers, G. E. M. Anscombe, Germain Grisez, and John Finnis, invoke Double Effect in justifying self-defence; they characterize the aggressor's death as a side-effect, reflecting Aquinas' classification of it as incidental to the self-defensive act.[10] However, in deriving permissible self-defence from Natural Law

---

[9]Aquinas, *Summa Theologiae*, 2a 2ae 64, especially article 7. All references are to the Blackfriars edition (London: Eyre and Spottiswoode Ltd., 1966).

[10]G. E. M. Anscombe, 'War and Murder', reprinted in Anscombe, *Collected Philosophical Papers* (Oxford: Basil Blackwell, 1981); Germain Grisez, 'Toward a Consistent Natural Law Ethics of Killing', 15 *American Journal of Jurisprudence*, (1970), pp64-96; John Finnis, *Fundamentals of Ethics*, op cit. Garrett Barden, in 'Defending Self-Defence', *Irish Philosophical Journal*, vol 1, no 2, 1984, pp25-35, distinguishes Aquinas' classification of self-defensive homicide from the central

some prominent 17th century philosophers (e.g. Pufendorf and Locke) do not mention the agent's intention. This strongly suggests that they regard lack of an intention to kill as unnecessary to the permissibility of self-defence. Grotius endorses the Thomistic claim that a person killed in self-defence is not killed by intention, but he does not say that in his view lack of intention is necessary to permissible self-defence.[11]

Like Hobbes, Grotius grounds the permissibility of self-defence in the natural right of self-preservation, the basic natural right which he says gives rise to all the rest. But while self-preservation can be more than merely sustaining life and avoiding serious injury, Grotius does not really set the limit of legitimate defence at what is necessary for self-preservation, unless the notion of self-preservation is extremely, and implausibly, wide. Instead he makes the extraordinary claim that 'although a buffet and death are very unequal, he who is about to do me an injury, thereby gives me a Right, that is a moral claim against him, *in infinitum*, so far as I cannot otherwise repel the evil. And even benevolence *per se* does not appear to bind us to the advantage of him who does us wrong.' A morally innocent person (e.g. a sleepwalker) can do us a wrong, and for Grotius this makes no moral difference to the legitimacy of self-defence. Grotius explains self-defence as an extremely strong Natural Law permission, overridden by the natural obligation of benevolence only where non-aggressors (e.g. bystanders) will be killed by self-defensive action, and by Gospel law in the case of killing to avoid minor harms. But Grotius also comments that although it is lawful to defend one's life by killing, it is more laudable *to be killed* rather than to kill. So self-defence is permissible, self-sacrifice is a higher, non-

---

distinction of the Doctrine of Double Effect. I shall not pursue this matter here. Philip Devine, *The Ethics of Homicide* (London: Cornell University Press, 1978), is sympathetic to Natural Law but rejects self-defence as a case of Double Effect.

[11]Hugo Grotius, *The Rights of War and Peace*, an abridged translation by William Whewell (Cambridge University Press, 1853), pp 61-68. All further references to Grotius are to these pages.

obligatory moral goal, and we have no general moral duty to defend our lives. In this last respect, Grotius does not even except 'those whose lives concern other persons' (presumably those with family, special obligations to others, positions of responsibility, etc.), but only those who have a special duty to protect others from force (e.g. 'companies on the road' engaged in protecting others, and rulers).

Grotius holds that where I am threatened with bodily harm, self-sacrifice is mostly (what we call) supererogatory: that which 'benevolence often counsels'. However, he also says that the interests of unoffending third parties who will be harmed *indirectly* by self-defence are relevant to the permissibility of my killing an aggressor whose life is 'useful to many'. Here (surprisingly) self-sacrifice is obligatory: benevolence *commands* that I not prefer my own sole good. The required benevolence, said here to 'bind us' not defend ourselves, is held to be *part of* Natural Law. (Grotius does not comment that, although foreseen and wrong in his view, my indirectly harming these other people would be neither homicide nor intended.) Where others will be harmed because the aggressor's life is useful to them, large numbers must make the difference for Grotius; but he does not say how large.

Pufendorf discusses self-defensive killing and maiming as a moral problem arising out of the apparent conflict of two requirements of Natural Law: self-preservation - a most sensitive instinct which reason commends to man - and the precept of sociability.[12] Self-defence appears to violate sociability because I must 'destroy an image of myself, with whom I am bound to maintain the social life', and further, 'a violent defence seems to cause a greater disturbance than if I either take to flight, or yield my body submissively to my assailant'. Pufendorf suggests that sociability may seem inevitably undermined simply by the occasion of having to choose either self-defence or self-sacrifice, because 'the human race seems to suffer

---

[12]Samuel von Pufendorf, *De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo*, vol 2, chapter v, the translation by Frank Gardner Moore (New York: Oxford University Press, 1927), pp 3-36. All references to Pufendorf are to these pages.

an equal loss, whether my assailant is killed, or I myself perish.' Nevertheless, he maintains that sociability is not really violated by self-defence, and so self-defence is permissible in accordance with the natural right of self-preservation.

Pufendorf seeks 'to explain how far self-defence is to be tempered by restraint'. One restraint is necessity: killing is an extreme last resort when my safety cannot otherwise be secured. He qualifies this though, saying that I am not required to flee imminent danger where this would expose me to attack from behind; nor am I required to retreat rather than stand and fight, because to do so might weaken the position from which I can defend myself. Further, the condition of necessary force does not require that I never expose myself to danger by simply going about my business. But it does mean that if I *impermissibly* court risk to my life by, for example, accepting the challenge of a duel, I cannot plead self-defence when it comes to the point where I must kill to save myself.

Pufendorf says one should 'practice patience in the case of a slight injury'. His reason - that retaliation might cause one greater harm - might suggest that this prescription arises from the condition of necessity. Retaliation for a slight injury could escalate the force necessary for self-defence, 'especially where the thing attacked is one which can easily be repaired or made good.' However, unlike Grotius who believes that benevolence requires non-retaliation for minor harms which do not really risk one's safety, Pufendorf regards non-retaliation here as a matter of waiving one's rights in the interests of one's own safety: it is 'the part of prudence'.

The bounds of what Pufendorf regards as blameless defence all appear to be requirements of Natural Law. Nevertheless, he distinguishes permissible acts of defence in the state of natural freedom (where I am 'not subject to any mortal') from what Natural Law permits where I am responsible to civil authority. In the state of natural liberty the primary concern is security, and I am allowed to take any necessary measures against an aggressor to secure my own life. These extend, for reasons similar to those Locke gives, to my killing to prevent myself being wounded, and

even to prevent theft. I may also pursue an assailant who shows no signs of genuine repentance 'until I have secured myself against him for the future'. But in civil society the circumstances in which self-defensive force is permissible are far more restrictive because security can often be sought from the common ruler, both when attack is anticipated and when the attacker is repelled or has withdrawn.

Pufendorf claims that, if necessary, it is permissible to expose an unoffending person (e.g. someone who happens to be in the way of my escape) 'indirectly to the danger of death or serious injury...it being no purpose of ours to harm him.' Part of the obvious disagreement with Grotius here might concern the issue of whether such a person is harmed intentionally. But harm to another is not permissible provided only that it is unintended; and Pufendorf recognises that proportionality is also relevant here. Pufendorf also remarks that although the right of self-defence belongs to the non-aggressor, an 'aggressor can rightly defend himself' if after he has desisted and offered reparation and future security, 'the injured man in a harsh spirit rejects his offer and endeavours to avenge himself with his own hand.'

The Significance of Innocence

The Natural Law prohibition against intentional killing can be stated narrowly or more broadly; and this seems the likely source of one apparent difference in the claimed grounds of permissible self-defence.

Locke, for instance, in maintaining that it is 'reasonable and just that I should have a Right to destroy that which threatens me with destruction', stresses the natural right of self-preservation and urges the individual's duty to preserve *innocent* life. (This strongly suggests that for Locke self-defence is not simply a permission.) He adds that a person's 'Power' to kill another in defence of his own life extends to 'any one who joyns...in his Defence, and espouses his Quarrel: it being reasonable and just I should have a Right to destroy that which threatens me with destruction.' Here Locke assumes that the threatened person is innocent. He also seems to take the right

of self-defence to include assistance from others; but perhaps not, if he is simply pointing out that the quarrel can extend beyond the initial protagonists. Even so, if there has been no design on their own lives and they are not themselves endangered by the attack on me, others need a justification for joining my cause, and this must be something more than *my* right to defend *myself*. Where I am the innocent victim, liable to be killed, and the aggressor is culpable, this justification may be the duty Locke says we all have to preserve innocent life. Arguably Locke also allows a right to assist others as part of the natural right he says we have to punish an attacker. But if so, we would need to be confident in the circumstances that a particular party to a conflict is culpable as well as in the wrong.

My remarks on Locke's views on self-defence are derived from chapter III of the second of his *Two Treatises of Government* in which he discusses the State of War.[13] The State of War is a relationship which can exist between people who are fellow subjects under a Superior on Earth, and it is introduced there when one person declares 'by Word or Action, not a passionate and hasty, but a sedate and settled Design, upon another man's life'.[14] Locke distinguishes the State of Nature, which (properly so-called) is one in which men 'live together according to reason, without a common Superior on Earth, with Authority to judge between them', from the State of War, which is 'force, or a declared design of force upon the Person of another, where there is no common Superior on earth to appeal to for relief'. And he says that it is the want of an appeal to a common Superior which can give me the Right of War even

---

[13]John Locke, *The Second Treatise of Government*, revised edition by Peter Laslett (Mentor Books, 1963), pp 308-334. All further references to Locke are to these pages.

[14]Presumably this requirement emphasizes that a State of War exists only where there is a serious declaration and intention to act. A hasty expression of extreme anger and frustration, 'I'll kill you for this', which is not literally meant, does not introduce the State of War. However, we may want to reply to Locke that some passionate and hasty designs can be very serious, and also that sometimes where there is room for doubt about the intention behind another's hasty words or actions it may nevertheless be reasonable to act on the assumption that one is in immediate danger. If Locke's requirement that the design be sedate and settled really excludes the case where someone suddenly rushes at me in a fit of anger wielding a knife, then many cases of self-defensive homicide cannot plausibly be defended by what is permissible in the State of War. This seems a very unlikely intended implication of Locke's requirement, even though the examples which he goes on to discuss all suggest pre-meditation as well as intention.

against an aggressor who is a fellow subject: 'the Law, which was made for my Preservation, where it cannot interpose to secure my Life from present force, which if lost, is capable of no reparation, permits me my own Defence.' This is not a general right to act against another in preserving myself whenever there is obvious, imminent and irreparable danger, but a right of *self-defence*; and so in addition to the lack of legal protection, Locke must say why I have a Right of War against an *aggressor*. His most basic (insufficient) reason is the 'Fundamental Law of Nature, Man being to be preserved'. Locke then focuses, rightly, on the need for a justification of *self-preference* 'when all cannot be preserved', and he claims not only that the 'safety of the Innocent is to be preferred', but that by his own actions the aggressor has 'exposed his life to the others Power to be taken away from him' to the extent that he may be treated as are dangerous 'Beasts of Prey'.

Dangerous beasts are blameless, and Locke does not seem to think that a human aggressor's design on another's life must be culpable as well as apparent and fixed for self-defence to be legitimate. But perhaps, in addition to establishing a real intention to kill, Locke's requirement that the design be 'sedate and settled' also implies that this is something for which the aggressor is responsible and culpable. At first this position might seem morally implied by Locke's claim that the aggressor by his own actions confers on the victim the 'Power' to take his life away, and hence that the victim's self-preference is not only reasonable but just. But Aquinas, for instance, does not say that the permissibility of self-defence derives partly from the aggressor's culpability, Grotius explicitly denies that it does, and Locke might not believe that it must. However, given his own views, Locke should regard killing a human aggressor as morally more complex than killing a dangerous beast.

Locke's comparison of an assailant and a wild beast is reminiscent of Aquinas' justification of capital punishment. In this discussion Aquinas explicitly relies on the

claimed inferior moral status of the person who transgresses Natural Law.[15] Aquinas holds that capital punishment by public authority is justified for the good of all, because by deviating from the rational order and so losing 'his human dignity in so far as man is naturally free and an end unto himself', the sinner 'lapses into the subjection of the beasts and their exploitation by others'. Because, for Aquinas, the judgment that warrants intentional killing belongs only to public authorities, he must defend private self-defence as unintended killing. But Locke, on the other hand, maintains that a private individual has authority to judge another in the State of Nature (and the right to punish), and that a private individual also has authority to judge who is innocent and who may be treated like a beast of prey in the State of War. In Locke's State of War those with a design on the lives of others may be killed intentionally; it is intentional killing of innocent persons in the State of Nature that is impermissible.

So, it might be held (narrowly) that a private individual is not permitted to kill an innocent person intentionally. (Grotius says this.) self-defence against the non-innocent is then outside the scope of the prohibition, and could be permissible intentional killing. Aquinas certainly accepts that it is always impermissible intentionally to kill an innocent person, because he maintains a wider, more restrictive prohibition that includes the narrower one: namely, that it is never permissible for a private person to kill anyone intentionally. Aquinas does not say that the permissibility of self-defence derives (even partly) from the culpability of the unjust aggressor. Thus, provided the aggressor's death is not intended, there is no immediate reason to think that Aquinas considers the permissibility of killing non-culpable unjust aggressors to be morally more difficult than killing culpable ones. However, within this view, the characterization of self-defensive killing as unintended killing would provide only a necessary condition for its permissibility: it would establish that self-defensive killing is not *absolutely* prohibited. In addition, the force used must be

---

[15] *Summa Theologiae*, op cit., 2a 2ae. 64, article 2.

necessary for self-defence, and *self-preference* must be legitimate. Thus, for self-defensive killing *per se* to be clearly justified as a case of Double Effect, the self-defending agent must legitimately weigh the protection of his or her own life more heavily than the comparable interest of the aggressor.[16] This is explicitly maintained by Grotius and Pufendorf, where it is arguably part of a view that Aquinas rejects: namely, that intentional killing in self-defence is permissible.

The innocent and the unoffending

Whether all cases of self-defence against unjust aggression escape the narrower prohibition - that the innocent must not be killed intentionally - depends partly on what 'innocent' means. It could mean 'morally innocent'. If it does, then the prohibition forbids the intentional killing of non-culpable unjust aggressors such as young children and the insane. Alternatively, 'innocent' might, as Grotius maintains, mean 'unoffending', and refer only to those who do not threaten or cause unjust injury. The genuinely innocent for Grotius are those who do not themselves 'make the danger'. If 'innocent' means 'unoffending', then self-defensive action against offending persons could be permissible intended killing.

Grotius explicitly denies that the legitimacy of self-defence depends in any way upon 'the injustice or fault of another who makes the danger': I have a right to kill blameless unjust aggressors in self-defence. But his characterization of *unjust* aggression is not detailed enough to allow us to say, for instance, whether someone using force against me under a reasonable, mistaken belief that I am attacking him is an unjust aggressor. While I do not deserve the injury this person will inflict, if the use of force is held to be objectively permissible on the basis of the agent's reasonable

---

[16]Some writers implicitly deny this in maintaining that the proportionality condition of Double Effect only ever requires that the good and bad effect be comparable in order of magnitude. (See, e.g. Robert Campbell and Diane Collinson, *Ending Lives* (Oxford: Basil Blackwell, 1988), p156.) But, given fulfilment of the Doctrine's other conditions, this would be insufficient to make it morally permissible that I (say) deflect a threat to my life in the direction of some *unoffending* person who will then certainly be killed. I discuss this claim in 4.3.

beliefs, this person is acting within his rights. Grotius does consider whether those who are simply in the way of my 'defence or flight without which death cannot be avoided' may be cut down or trampled down. He concedes that some authorities (even Divines) think it lawful that the genuinely innocent be killed in these circumstances, and he agrees that this view is reasonable if we confine ourselves to the dictates of Natural Law which (where there is a conflict) 'cares much less for ties of society, than for the defence of the individual'. Nevertheless, he urges that the 'law of love which commands us to regard another as ourselves, plainly does not permit this.' Thus Grotius believes, as noted above, that where the only available means of self-defence will kill an unoffending person, the right of self-defence is overridden by the obligation of benevolence. (We may well ask why the law of love does not also bind us not to kill the unfortunate sleepwalker about to buffet us.) A more basic issue, certainly not confined to Grotius' account, is the assumption that the notion of *aggression,* which Grotius describes as 'present force', is clear enough to sustain the moral significance accorded the fact of unjust aggression. A culpable design on my life is not necessary for the force which threatens me to be aggression. But is a design (even such as a sleepwalker might have) to do me an injury necessary for aggression on Grotius' view? Or is someone unwittingly acting in a way which endangers me an aggressor? Does 'making the danger', in the sense which makes an act of self-protection an act of *self-defence*, require an act at all (even such as a sleepwalker might perform)? Or can it also include someone being thrown on me, or someone with a highly contagious disease? Does someone who is simply competing with me for air, or for a very limited food supply, 'make the danger' in the relevant sense? Or is such a person on a par with someone who merely happens to be in the way of my defence?

Pufendorf maintains that self-defensive killing is consistent with sociability. His reasons appeal to *fault* on the part of the unjust aggressor, in terms which imply

the aggressor's culpability.[17] Even so, Pufendorf echoes Grotius' denial that permissible self-defence depends on the aggressor's culpability. He says that it is permissible to kill an insane person in self-defence, and also to kill one who mistakes me for another with whom he has a quarrel: 'it is enough that the other have no right to attack or kill me, and there be on my side no obligation to die in vain.' Again, this seems to leave doubtful the permissibility of self-defence against someone acting under a reasonable, mistaken belief that I am attacking him or her. Although Pufendorf describes the aggressor as the one 'who first conceived the will to injure', and he confines permissible self-defence to those 'who are assaulted by others without provocation', he says that allowances must be made for the excitement and urgency of the situation in determining how careful our judgment about the immediacy of the danger must be in order for anticipation to be permissible.

Aggression and self-defence

Those who equate the innocent and the unoffending in justifying self-defence should, I think, explain the difference they see between offending and unoffending persons in terms of a distinction between unjust aggressors and others - more precisely (I shall say why shortly), in terms of a distinction between someone who him- or herself poses an unjust threat, and someone who does not - rather than conflate 'unoffending' and 'innocent'. 'Innocent' should not refer only to those who are unoffending, who pose no unjust threat. It is possible, for instance, for unprovoked attacks to be perpetrated by non-culpable agents (e.g. the insane); and we need to refer to such agents as (morally) innocent unjust aggressors. (Further, we should note that despite the fact that aggression is usually an unprovoked attack - the act of beginning a quarrel or war - 'unjust aggressor' and 'unjust assailant' are not pleonasms. It is possible that some aggressive acts and some attacks, one (say) by A

---

[17]E.g. 'there is no law which commands me to betray my own safety, that another's malice may attack me with impunity. And whoever in such a case is hurt or killed, has reason to blame his own perversity, which put upon me that necessity', and 'the good would be exposed as a ready prey to the bad, if they must never offer them violence.'

on B in defence of C who is helpless and being persecuted by B, are just.)[18]

'Aggression' in this context needs to be used broadly enough to allow that an aggressor need not be an attacker or an assailant. This is because hostile behaviour can be aggression before there is an assault or an attack. Grotius says that the threatened injury which we repel must be a 'present danger', 'imminent in point of time'; but this condition does not require an attempted injury, and may be fulfilled where there is manifest intention to kill on the part of someone who takes up weapons. Sometimes the deed may be anticipated; but Grotius warns that although a certain latitude of judgment is inevitable, mere fear does not give a right of killing for prevention, because where the danger is uncertain, or can be otherwise averted, there can be recourse to other means of avoidance (e.g. leaving the scene) or legal remedies. Grotius and Locke share the general condition that self-defensive killing is legitimate only where necessary to avoid a threatened injury which will be an irretrievable loss.

Aggression on the part of one party towards another is typically unprovoked by the other: 'aggressor' usually refers to the instigator of the conflict. (This is consistent with an aggressor using an agent, who will also be an aggressor, to inflict the injury.) However, as Pufendorf's discussion suggests, the designation 'aggressor' can shift during the course of a conflict from the instigator of the conflict to the other party, if the instigator publicly and sincerely attempts to withdraw, or to introduce peaceful negotiations aimed at settlement, and the victim then *unreasonably* continues the hostility. Further, someone can become an aggressor by unreasonably escalating a conflict instigated by the other party, e.g. by moving from a verbal hostility to physical violence. We can say that someone spoke aggressively; but aggression in the sense necessary for force on the part of the victim to be self-defence, requires an actual threat beyond the mere expression of an intention to harm. And a person who intends to launch an unprovoked attack on another is only a potential aggressor: he or

---

[18]See also Teichman, op cit., p80.

she is not an actual aggressor until the point at which she acts on the intention.

'Aggression' is broader in another respect than are the terms 'attacker' and 'assailant'. An attacker or an assailant is typically someone who seeks to hurt or defeat another. This seeking to hurt need not be unjust, and where it is unjust it need not be culpable. And someone can attack or assault a *particular* person unintentionally when, for example, he or she is acting under a mistaken belief about the object of the attack (I mistake you for my enemy), and even in sleep (I attack you, dreaming about my enemy). However, someone whose acts in fact threaten to hurt or defeat another, but who does not seek to hurt or defeat anyone, could properly be called an aggressor, although probably not an attacker or an assailant. 'Attack' usually implies a particular mental element which 'aggression' does not: an attacker seeks to hurt or defeat. Although a bus driver whose brakes fail on a hill, and who steers towards one man rather than into a crowd, is an aggressor towards that man, the bus driver is not attacking him. Nevertheless, it is puzzling that 'attack' can mean 'act harmfully or destructively on', and thus not necessarily imply this particular mental element, whereas 'assault' is usually defined as 'hostile attack', thus seeming to imply a beligerent motive. And yet in the example of the bus driver just mentioned, and also where I strike you not realising what I am doing, it seems right to deny that there is an attack, although not wrong to say that there is an assault. Sometimes to assault can be simply to hit or strike; and where this is so an unprovoked assault need not be an attack.[19] Further, whether or not an act is an attack can depend on the actor's perception of what he or she is doing, in a way in which its being an assault does not. Say I hit you, mistakenly believing that I am *defending* myself against you. In answer to the question 'What is she doing?', it is wrong to say of me 'She is attacking him'. I am not attacking you, although this is probably how it seems from your point of view. I am assaulting you, however.

---

[19] This is not the legal notion of assault, which is an unlawful personal attack even if only menacing words.

An unprovoked attack or assault is sufficient for aggression even where the attacker or assailant acts involuntarily (e.g. in sleep), or where he or she acts voluntarily but non-culpably (e.g. the driver who steers towards one man instead of into a crowd). But because neither an attack nor an assault is necessary for aggression, it is important further to clarify the sense of 'aggression' - more precisely, the relevant sense of 'threat' - against which an agent can be said to be engaged in self-defence. (Later I discuss the corresponding sense of being offending, posing an unjust threat.)

Strictly speaking 'aggression', like 'attack' and 'assault', always implies an act (voluntary or involuntary) - something about which the agent can say 'I did it': 'I dropped the plate; hit the girl; struck out; broke the window; spluttered it out; coughed it up; jumped in; etc'. (Omissions, too, are properly described as things we do.) Here I draw upon Eric D'Arcy's characterization of act and his distinction between an act and an action: 'As a general rule, an action is called an act only when it can be described in a proposition with a personal subject....Every act, then (whether voluntary or involuntary), is an action; but not every action is an act. The sense of the term 'action' which applies to bodily movements which are not acts is rather akin to the sense of the term 'action' in which it is used in the language of processes.' In isolating those actions which are acts, D'Arcy draws on Wittgenstein's distinction between things that simply happen to us, such as the subsidence of a violent thudding of the heart, and things that we do, such as raising an arm.[20] This is a useful way of making the point; but we need to emphasize that according to this distinction involuntary acts, such as tripping over, flailing about while having a fit, and coughing, are things that we do - not things that happen to us.

An involuntary act can constitute aggression. A clear case is where I assault someone involuntarily when I am asleep and dreaming that I am defending myself

---

[20]D'Arcy, op cit., pp 6-7.

against a lion. And the driver who steers his car wildly into pedestrians because he is being attacked by bees is an aggressor towards those pedestrians. (Animals can be aggressors. Of course an animal cannot say of itself 'I did it'. But we can say of an animal 'It did it' (it ate the man; it clawed him to death; it chased him; etc); and we distinguish this, as with our own acts, from 'It happened to it' (its heart stopped).)

But someone who threatens harm only as an object (as a stone might), and not as an agent, is not strictly an aggressor. Robert Nozick points out that a person can be a threat, and innocent, without being an aggressor: 'If someone picks up a third party and throws him at you down at the bottom of a deep well, the third party is innocent and a threat.' Further, the third party can be an unjust threat. Nozick thinks that this third party would be an aggressor, however, had he chosen to launch himself at you in that trajectory.[21] This is certainly right, although (for the reasons given above) I would not restrict aggression to voluntary acts.

Pufendorf says that I may regard some of those killed out of necessity in the same way as I would an aggressor who threatens my life; for instance I may regard in this way someone who 'insolently and inhumanly' blocks my flight. But surely this person is an aggressor, because he or she is (maliciously) assisting an attack on me; and my acting against this person would be self-defence. And someone who, in struggling to save him- or herself, acts in a way which will kill me (who, for example, clings to me in a way which will drown me, or who struggles onto a plank to which I am already clinging for life when our combined weight will sink it), can be an aggressor. Pufendorf says that in the case of shipwreck where more persons are in a lifeboat than the boat will carry, it is right to draw lots to see who 'shall be thrown overboard. And if anyone shall refuse the hazard of the lot, he can be thrown into the water, without casting his lot, as one who seeks the destruction of all.'[22]

---

[21]Robert Nozick, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), pp34-35.

[22]Pufendorf does not say whether he regards death in any of these cases as unintended; but those who invoke Double Effect in allowing self-defensive killing may well maintain that in these cases death is

Presumably, the characterization of those who refuse the lot as attackers is thought necessary to make it permissible to cast them off against their wills for the good of the others.

An *aggressor* must be identifiable as the *source* of the particular threat (this can be more than one person), as distinct from someone whose existence, presence, or conduct is a threat only in a weaker sense. If, for instance, an assailant is pursuing me and someone in a doorway is blocking my escape, the latter person is not an aggressor towards me unless her standing there constitutes hostile behaviour towards me. Her standing there might have nothing to do with me. Taken by itself, this is insufficient reason for denying that what she does is aggression towards me. Behaviour can be aggression when it is, even if innocent or well motivated, either an unprovoked assault (as with the driver who steers towards the one person rather than into the crowd), or when it is a voluntary or an involuntary attack. If, as Pufendorf elaborates, the person knows the danger to me and remains standing in the doorway deliberately and inhumanly in order to block my path, then she has become a party to the attack and an aggressor because under these conditions her blocking my exit is hostile behaviour. This is so even if she is simply indifferent to my welfare and blocks my escape because she is curious about the outcome of the impending conflict. (Here is a good example of an aggressor who is not an assailant.) But where the person in the doorway is unaware of my predicament and does not seek to defeat or impede my escape, or where she remains there solely in order to protect herself or someone else from the assailant, then I think the reason why she is not an aggressor is that we do not identify her behaviour as the *source* of the danger to me. This is not simply because she does not wish me harm in standing where she does. Behaviour not motivated by a wish to harm or defeat another can be aggression when it

---

not intended.

constitutes an assault. But behaviour which causally contributes to an attack on a person from some *other* source is *aggression* towards that person only if it is hostile. (Nevertheless, this area can be murky. Say someone threatens unwittingly to give away my hiding place to the secret police, or to reveal our hideout by coughing (she cannot help this). This person's conduct is a source of imminent danger to me (the secret police will shoot on sight). Some people might describe this person as an aggressor on this basis alone. But what she does is neither an assault nor an attack, even though her behaviour exposes me to an attack.)

Natural Law discussions are mostly confined to the justification of self-defence against imminent and actual unjust assailants, attackers, and those reasonably believed to be such. And these accounts typically hold that the fact that the other person is offending - an unjust threat - is the basic, necessary condition of permissible self-defence. However, accounts of justified self-defensive homicide which posit a morally important distinction between killing an unjust aggressor, and killing an unoffending person, need to address the issue of self-defence against morally innocent unjust threats who are aggressors only in a stretched sense, such as the man thrown down the well who does not act but who (to vary Nozick's test) would be an assailant had he jumped. These accounts must also deal with cases of threats which are neither assaults nor attacks, e.g. the conduct of the involuntary cougher.

It is also important that those persons against whom *self-defensive* force is used are distinguished from those who are acted against but *not* in self-defence. In my view, it is whether or not a particular person him- or herself constitutes the threat to me which makes the difference in deciding whether my using force against that person can be *self-defence*. Just and unjust aggressors, assailants and attackers are clearly themselves threats. However, there are cases in which the threat someone poses is not an act, or is a contingent threat. My warding off the man hurtling down the well is self-defence if he has jumped (even involuntarily), because his conduct is an assault on me. If he has been thrown down, the man is not an assailant or an attacker; but he

is the immediate source of the threat and my warding him off is self-defence: I can *defend* myself against threats posed by dangerous inanimate objects, as well as those posed by agents.

What about my using force against the person about to cough, or against the one innocently standing in the doorway? Would this be an act of self-defence? These two people pose contingent threats; but I do act defensively in putting my hand over the cougher's mouth, or in pushing the doorblocker out of the way. Where I act against someone who is a threat to me only because of the extremely predictable acts of others, provided these acts will immediately follow leaving me no room for escape, it seems reasonable to call it self-defence. All the same, the use of force against a contingent threat seems to me to be on a boundary between acting *in self-defence* and acting *in the course of self-defence.*

Pufendorf discusses the overloaded lifeboat example as a case of necessity. This classification highlights the fact that a person must be identifiable as a *threat* to me before my using self-protective force against this person can be *self-defence.* And, in turn, a person who is him- or herself a threat to me must be identifiable as the source of the danger before my use of force against this person can be self-defence. Those who *overload* a lifeboat pose a threat to others; and if those already on board know that the lifeboat is full, it can be self-defence for them to prevent those who would overload the boat from getting in. But in Pufendorf's example no *particular* people overload the lifeboat. Say I am among twenty people already aboard a lifeboat which can carry only ten. Which, if any, of the others pose the threat to me? We should say, with Pufendorf, that in these circumstances all on board are endangered.[23] All things being equal, lots are cast to select those to be off-loaded.

In another case, say one in which I and another person are trapped in a confined

---

[23]Conversations with Susan Dodds and David Braddon-Mitchell helped shape my thoughts on this issue.

space and using up the limited air supply, each of two persons might be said to pose a threat to the other. In the limited air case, would the use of force by one of us against the other be an act of self-defence? This sort of example brings out two difficulties. One of these difficulties is part of the more general problem of identifying something as the cause of danger, and hence as a threat. Something which poses a threat to me will, if unchecked, cause me to be worse-off than I would otherwise be. But something is not a threat to me provided only that its presence or conduct thwarts my interests. Some of the considerations which determine the *status quo* for the purpose of determining that something is a threat can be normative. For instance, I have a legitimate claim to parts of my living body, my property, my position in a queue, etc.; and so someone competing with me for these things is a threat to me, and not I to him. But the considerations which determine the *status quo* are not necessarily normative (the police sharp-shooter is a threat to the hijacker holding hostages), and they can even be a matter of luck (those who get to the lifeboat first are threatened by those arriving later, and not vice versa). The second difficulty is that although a person competing with me for limited air can be said to pose a threat to me, a *defensive* act typically involves warding off a threat posed by the (voluntary or involuntary) initiative of its object. And my using force against the person competing with me for air seems insufficiently one of *resisting* its object to be an act of self-defence. (This latter problem would be lessened in a case where, e.g. someone's breathing is a threat to me because we are in a confined space and she has a highly contagious, fatal disease.)

In the light of the above difficulties, we should, I think, adopt the following specification of the sense of 'threat' relevant to self-defence:

Provided someone himself constitutes the danger to me, he is a threat such that my acting against him is clearly *in self-defence* if he is either an assailant, or an attacker, or is someone who would be an assailant were the threat he poses to be an act on his part, or is someone who would be attacking me were the threat he poses to

be intended to harm or defeat its object.

Persons who are themselves threats are distinguishable from, for example, bystanders and innocent shields who might be harmed *in the course of self-defence*.[24] Nevertheless, there are certainly borderline cases (including some of those mentioned above) between using self-defensive force against someone, and using force against someone in the course of self-defence or, even more broadly, in the course of self-preservation.

Someone against whom I use force in self-defence will usually be the immediate source of the threat. But in some cases he or she could be someone (e.g. the gang leader or the instigator of a contract killing) for whom the immediate source of the threat (the subordinate under orders) is acting as an agent, so that the indirect perpetrator's being 'put out of action' will probably eliminate the immediate threat. Earlier I noted the important question of how imminent the threat must be in order for killing to be genuinely self-defensive. Someone might be planning to do me harm, but not yet be an actual threat. Pre-emptive action can be self-defence provided there is actual danger sufficient to warrant it: self-defence does not require that one be struck first. But precautionary killing is not self-defence. Nevertheless, actual danger does not require that the threat be unconditional: one can defend oneself against a conditional threat, such as that posed by duress. For example, if I use force against someone who threatens to kill me then and there unless I participate in a killing or betray an innocent person's whereabouts, then I act *in self-defence*, and not simply in order to protect someone or something else. (I comment further on the relevance of this below.)

---

[24]The phrase 'innocent shields of threats' comes from Nozick, op cit., p35. Innocent persons strapped to the front of the tanks of aggressors so that the tanks cannot be hit without also hitting them are said to be innocent shields of threats. Nozick defines 'innocent shields of threats' as 'those innocent persons who are so situated that they will be damaged by the only means available for stopping the aggressor'. The term 'innocent shield' as used by Nozick seems too narrow, as his definition includes those who are not *shields* of threats but who are merely bystanders or otherwise (not by the aggressor's design) unfortunately situated so that they will be killed by defensive action aimed at the aggressor.

I should stress that because the considerations which identify something or somebody as a threat in the relevant sense are not necessarily normative, the conceptual points I have made about acting *in self-defence* do not settle the moral issue of the conditions under which self-defence is justified. 'It was an act of self-defence' is often cited as a justification, of course; and those who characterize acts of self-defence in a strongly normative way - as being the legitimate warding off of unjust aggression - are citing a permission. Natural Law accounts often suggest that unjust aggression is both conceptually and morally crucial to self-defence: that a particular act *is* self-defence because it wards off an unjust threat, and that this distinguishing feature of self-defence grounds its permissibility. But in my view it is important to identify what is necessary for an act to be self-defensive, and to recognise that self-defence is possible against a just or rightful threat; and then to decide as a further, morally evaluative question the conditions under which self-defence is justified.[25] This means that the fact that a homicide was *in self-defence* does not by itself warrant the presumption that it was permissible. However, this does not mean that the fact that a homicide was self-defensive is irrelevant to its moral appraisal.

Innocent as unoffending

If 'an innocent person' in the Natural Law prohibition of private intentional homicide refers to someone who is unoffending, then appeal to Double Effect is not essential to the permissibility of self-defence. This is because under the prohibition it is not necessarily impermissible intentionally to kill an unjust aggressor; and the prohibition probably also excepts killing an unjust threat who is not strictly an aggressor. However, there needs to be an independent reason for adopting 'unoffending person' as limiting necessarily impermissible intentional killing - a reason other than the assumption that because unjust aggressors and unjust threats are permissibly killed in self-defence they are outside the scope of the prohibition. This is

---

[25]See also David G. Ritchie, *Natural Rights* (London: George Allen & Unwin Ltd.) 4th edition, 1924, p120.

necessary if we are to *explain* why self-defence is permissible.[26]

We also need to know what counts as *unjust* aggression or threat, and why the morally crucial distinction should be drawn between offending and unoffending persons. Those who maintain that being unoffending requires causal innocence, and that the causally innocent are those who are doing no unjust harm,[27] usually do not say whether an *act* is necessary, so that those who are doing no unjust harm are strictly non-aggressors, or whether it is sufficient for causal non-innocence simply that one pose an immediate unjust threat (such as the person thrown down the well). If threats who are not aggressors *are* held to be non-offending because they are *doing* no harm, then we need to know the moral significance of *act* here, given that aggression can be involuntary and some aggressors are certainly as blameless as non-aggressors. If, on the other hand, an unjust threat is someone who is offending, then we need to know on what basis someone is reasonably classified as an unjust threat. We also need to know why the criterion of someone's posing an unjust threat is the morally significant factor, because some people who pose unjust threats (e.g. the man thrown down the well) are certainly as morally innocent as those who are not threats at all (e.g. bystanders and innocent shields).

I have argued above that we should not use 'innocent' to mean 'unoffending', and also that I kill someone *in self-defence* only if that person him- or herself constitutes the threat to me. Those people who maintain that it is always impermissible intentionally to kill unoffending persons, and those who believe that the fact that someone is unoffending is relevant to determining the moral permissibility of killing him or her intentionally, will need to appeal to something like the Doctrine of Double Effect in deciding whether bystanders and shields are permissibly killed in the course of self-defence. However, if 'innocent' in the prohibition means non-culpable,

---

[26]I owe this point to Thomson, 'Self-Defense and Rights', op cit., p39.

[27]For instance, Devine, op cit., p152.

then two separate justifications of *self-defensive* killing could arise: one appealing to Double Effect and the other not, depending on whether or not the person posing the threat is morally innocent. And some writers suggest that killing a non-culpable unjust threat in self-defence is morally more complex than killing a culpable one, and that the former is an act for which we need a separate, or at least an additional, justification.

But this last claim will strike others as plainly wrong. They will think that what justifies my acting in self-defence is my danger and the fact that the other person poses an unjust threat, and that it does not matter whether or not the unjust threat is culpable. The attraction of the Double Effect approach on *this* view might be the promise of a single justification for all permissible self-defensive homicide, and a justification which will strike many as making precisely the required point: namely, that what I am doing intentionally in defending myself is simply repelling an unjust threat, something which, if the defence is not disproportionate, I am morally entitled to do.

Necessity and Proportionality

Aquinas explicitly maintains that 'somebody who uses more violence than is necessary to defend himself will be doing something wrong'. This is described as a condition of proportionality: an 'act that is properly motivated may, nevertheless, become vitiated if it is not proportionate to the end intended.' As I remarked in chapter 2, Finnis accepts this as a genuine 'principle of proportionality', although what Aquinas has in mind is, strictly speaking, the condition of necessary force.

Necessary force is a general moral and legal condition of permissible self-defence. But this condition cannot be interpreted absolutely literally: it must sometimes involve an evaluation of relative costs, and the reasonableness of alternative courses of action. It may be, for example, that instead of using deadly force against an aggressor I could avoid being killed myself by complying with the aggressor's demands, (say) by participating in a murder or by revealing the whereabouts of someone who will then be endangered. Here the use of deadly force

is not unnecessary simply because there is another way of achieving the specific aim of saving myself, one which would cause less immediate or less certain injury. Although necessity and proportionality are distinguishable conditions of permissible self-defence, considerations of proportionality (such as that an alternative means would involve an unacceptable risk or cost) must sometimes form part of the normative background against which necessity is judged. The agent must believe that the force used is necessary for self-defence in the circumstances. But necessary force allows that an agent may regard a degree of force as indispensable even though there are apparent alternative means of self-defence. There are values, and interests of our own and of others, which we are entitled, and sometimes obliged to protect, and these too form part of the normative background against which judgments are made about necessary force. These values and interests include, for instance, our not giving in to some forms of duress and, as Pufendorf points out, our engaging in our rightful activities. If I am attacked while going for a walk, self-defensive force on this occasion is not unnecessary simply because I could have avoided muggers by staying at home. Nevertheless, our judgment about the permissibility of self-defence in this and similar cases can be influenced by, for example, my recklessly exposing myself to danger knowing that I am a likely target, or by my simply taking unnecessary risks when the incidence of mugging in the area is high. Although the mugger is entirely in the wrong, it can make a difference to the normative background that I do things such as court the risk which I then act to ward off, or go 'looking for trouble'. Here Pufendorf is right and Hobbes is wrong: in the case of someone holding hostages who kills in self-defence in a shoot-out with police, it very clearly makes a difference to the normative background that I foreseeably and *wrongfully* create the circumstances in which I am endangered.[28]

What counts as genuinely proportionate harm - that is, injury inflicted in self-

---

[28]The example of the police sharp-shooter, the rightful attacker, comes from Teichman, op cit., p80.

defence that is proportionate to the harm prevented - can be problematic. Aquinas' discussion of self-defence seems to assume that the agent is defending his or her own life. However, 17th century Natural Law accounts are not silent on the question of proportionality where killing is necessary in order to prevent sexual assault or theft. Although Grotius and Pufendorf wrote prior to, and influenced Locke, Locke is in some respects less forthcoming on proportionality than are they.

Locke discusses whether the Right of War extends to my killing someone who threatens to enslave or to steal from me. He concludes that it does, where the threat is to my *liberty*, which Locke says is vital to my *security*. I may kill where there is a close connection between the attempt to inflict other harms on me and a threat to my *preservation*. Locke does not claim that killing is permissible because harms such as slavery and theft are themselves equivalent to death. For Locke, the connection between slavery and a threat to my life is a very close one; but this is not necessarily so with theft. Once enslaved I have no 'security of my Preservation', and it 'must necessarily be supposed' that someone who attempts to take away my freedom has a design to take away everything else. Locke thinks much the same reason makes it lawful for me to kill a thief who tries *to get me into his power* in order to steal from me, even in the absence of any declared design on my life. Whatever the thief's pretence, 'I have no reason to suppose that he, who would take away my Liberty, would not when he had me in his Power, take away everything else.' The Right of War, whereby I may kill an attacker in civil society, extends only to defence of my life where the law is powerless to protect it, the reason being that I am innocent, and the harm done me will be irreparable. I may not kill a thief because he is in the process of stealing 'all I am worth', because I have recourse to the Law to recover my goods. But I may kill the thief who sets on me to rob me of no more than my horse and coat, not because the threatened loss of these goods warrants killing someone, but because my life is at risk.

Grotius says that as far as killing an aggressor is concerned, Natural Law

requires *only* necessity where one is in physical danger: 'If the body be menaced by present force with danger of life not otherwise evitable, war is lawful, even to the slaying of the aggressor'. Later he appeals to what at first looks like a consideration of proportionality in discussing whether killing is permissible where necessary to avoid injuries, even bodily ones, which cannot seriously be regarded as themselves on a par with death, which will not lead to death, and by which 'our true estimation is not damaged'. However, the command which Grotius says makes it unlawful to kill the aggressor in these cases is not a dictate of Natural Law, but a Gospel improvement on Natural Law in the direction of reinforcing benevolence.

Grotius regards as straightforward the legitimacy of killing to avoid the loss or mutilation of a limb, or in defence of chastity. In both cases, Grotius claims, the threatened injury is *itself* as bad as death. Moreover, in the case of mutilation, he says that 'it can hardly be known whether it do not bring in its train loss of life'. Presumably death is a possible consequence of mutilation not only because, as Locke would argue, one's power to defend one's life is abrogated and one might reasonably surmise that there is also a design on one's life, but because as a result of serious injury one might bleed to death. Grotius regards this last consideration - that death might flow from the injury - as sufficient to warrant slaying the aggressor if the loss of limb cannot be otherwise avoided. And those who accept this view might also urge Locke's reason in the case of killing to avoid rape, whether or not they are impressed by Grotius' claim that loss of chastity is itself on a par with death. (Later Grotius mentions that chastity, like life and unlike most property, once lost cannot be recovered. This is true of virginity; but a blameless victim of rape, whether or not previously a virgin, is surely not unchaste in the sense of morally impure.)

Grotius at first concedes that Natural Law alone permits killing if necessary to preserve our goods. Life and goods are unequal, but he says that the difference is 'compensated by the preference to be given to the innocent and the condemnation incurred by the robber'. So in the case of property, unlike attack on the person, the

permissibility of defence in Natural Law depends partly on culpability (if it is to incur condemnation) on the side of the thief. Here it is *not* sufficient that I am not bound to suffer what he attempts to inflict. (Grotius does not comment on this difference.) Again, the benevolence required by Natural Law seems concerned only with the interests of unoffending persons, and does not oppose defence against the aggressor unless the 'thing stolen be a trifle'.

Nevertheless, Grotius himself is clearly of the view that it *is* impermissible to slay a thief for the sake of recovering property, and he says that slaying a thief can be permissible only when there is a threat to life. The circumstances of danger to life which he thinks permit killing are far less restrictive than Locke describes (where a thief tries to overpower me so as to steal from me), and include my coming into danger in trying to defend or to recover my goods, because I have a right to act in these ways. (As noted above, Pufendorf too extends the sense of self I may defend from the person to the person engaged in his or her rightful activity.)[29] If I kill a thief when there is no danger to my life, Grotius says that I am guilty of homicide. (Grotius not only takes 'innocent' to mean 'unoffending' when he says that homicide is the intentional killing of innocent persons, but further, he implies that to be offending one must be a direct or indirect threat *to the person*.) Killing in order to protect property is also permissible on Grotius' view when the theft will deprive us of something on which our life depends, which cannot be recovered at law (or if it can, presumably not before it is too late for our life to be satisfactorily protected). Grotius assures his readers that even if civil law allows us to kill a thief with impunity for the sake of mere goods, this only removes the punishment; it does not give us the (presumably moral) right. Thus, the impermissibility of killing a thief for the sake of property is not like the impermissibility of killing an aggressor in order to avoid a buffet. The latter we have a natural right to do, although a higher obligation overrules it; the former,

---

[29]Keith Campbell drew my attention to this, and to its significance.

apparently, we have no right to do. (Grotius does not go into the question of how to reconcile this with what he has at first said Natural Law permits in defence of property.)

Pufendorf's comments on the permissibility of killing in defence of limbs, and of chastity, are similar to those of Grotius; although Pufendorf takes them further, remarking that in addition to the wrong of very great insult and loss of esteem, violation of chastity may reduce a woman to the necessity of 'rearing her offspring for a public enemy'. In the state of natural liberty it can be permissible to kill in defence of property if need be. But Pufendorf's reasons are confined to the connection between some attempted thefts and a threat to life. There is no suggestion that defence of property itself warrants killing. In civil society, killing in defence of property is not regularly permitted, the exception being where the thief cannot be brought to court.

The claim that Natural Law permits killing an unjust aggressor to avoid a slap on the face or the loss of property requires the assumption that the unjust aggressor's moral standing is very considerably abrogated in comparison with that of the victim. This seems very harsh, and harsher still without any reference to the aggressor's culpability. Not surprisingly, reasons (where given) for discounting the rights or interests of the aggressor to such an extent mostly suggest culpability on the aggressor's part unless the context is self-defensive homicide against the threat of death or serious injury.

3.3 IMPORTANT SIMILARITIES AND DIFFERENCES, AND TWO LINES OF JUSTIFICATION

A universal feature of Natural Law justifications of self-defence is the condition that the force used be necessary in the circumstances. Further, where the threat is to my life, or to something on which my life depends, the fact that the threat to me is unjust aggression is usually then taken to justify self-defensive homicide. Further, unintended unjust aggression is possible. However, some accounts may assume that

the aggressor's culpability is necessary for justified self-defence. It is also uncertain what some accounts would say about self-defence against a threat who is not an aggressor (e.g. the man thrown down the well).

Some Natural Law accounts explicitly hold that I have a *right* to use self-defensive force when I have the reasonable belief that there is imminent unjust aggression. But unjust aggression is not carefully enough explained to allow us to say whether or not, on this view, a putative self-defender acting on a reasonable mistaken belief is an unjust aggressor to the other person. Either answer will yield awkward results if this putative self-defender is permissibly killed in self-defence. If this putative self-defender is an unjust aggressor to the other person, then on this view one and the same act is permissible (putative) self-defence and also at the same time an act of unjust aggression. If this putative self-defender is not an unjust aggressor to the other person, and the other person can permissibly defend him- or herself, then unjust aggression is not necessary for permissible self-defence after all.

Despite the apparent contradiction it contains, the former alternative can be accepted provided we distinguish between just and unjust aggression, and justification; and we then speak of justification from different perspectives. Objectively, the force used by the putative self-defender is unjust aggression in that, although not malicious, it is directed at an unoffending person: it is unprovoked and objectively undeserved by the intended recipient. It is not unwarranted, however, and the putative self-defender is justified^{ii} in acting as he or she does in the circumstances.

Either option seems to leave us with a puzzling conclusion: that there can be cases in which both parties can justifiably act in self-defence or putative self-defence. In my view, we can, and should, avoid this conclusion by saying that the force used by the putative self-defender is not justified^{i}, although in the circumstances putative self-defence is justified^{ii}. However, this answer is unsatisfactory if a person's justified^{ii} belief that attack is imminent is held sufficient to establish a positive *right* to use force against the other person. (As indicated in chapter 2, although putative self-

defence can be justified[ii], I reject the view that the right of self-defence includes a positive right of putative self-defence.)

The Natural Law accounts I have discussed in this present chapter are not sufficiently detailed or carefully enough defended to answer the important questions they raise. Their interest is in the fact that they raise questions which must be addressed in setting out the principles of justified self-defence, and also in the important lines of argument they suggest.

The two suggested lines of argument about justified self-defence, which correspond to the two strands I mentioned in the first paragraph of this chapter, both arise from a moral principle which is both commonly and legally taken to distinguish self-defence from impermissible private homicide. This is the principle that a private person must not intentionally kill an innocent person. (Some who accept that this principle distinguishes self-defensive homicide from (say) killing under duress would add qualifications such as 'without the genuine, informed consent of the person killed', in order to allow for the permissibility of voluntary euthanasia.) The Thomistic strand emphasizes the importance of the self-defending agent's intention, and it distinguishes and grounds permissible self-defence in something like the Doctrine of Double Effect. The Double Effect justification of self-defence now extends beyond Natural Law, and I discuss it in detail in chapter 4. The other strand, pursued by writers like Grotius, Pufendorf and Locke, emphasizes the relevance of innocence in the prohibition against taking human life. Here 'innocent' mostly means 'unoffending'; and an unoffending person is someone who is not him or herself an unjust threat. To be offending one need not be culpable, nor need one intend to harm, nor (possibly) need one even be acting. Those who justify self-defensive homicide along these lines need to say what the conditions of being an unjust threat are, and also how, if this concept can be satisfactorily explained, it legitimizes self-preference. The legitimacy of self-preferential killing needs to be defended on *both* views; and this requirement has given rise, more widely, to the view that self-preference is legitimate

in the case of self-defence because an unjust aggressor forfeits certain rights.

Of the issues raised by Natural Law discussions of self-defence, the most important in my view are: the conditions under which someone is a threat such that force used against this person is *self-defensive*; and the conditions under which such a threat is *unjust*. In this chapter, I have suggested what I consider to be a defensible account of the relevant sense of threat. But this suggested specification cannot be definitive. There are certainly borderline cases between killing in self-defence, killing in the course of self-defence, and killing for broader reasons of self-preservation. As to the second issue, the fact that one is *unjustly* threatened (in the relevant sense of threat) is in my view crucial to the positive right of self-defence. I return to these two issues in chapter 5; and in that chapter, I maintain that the important moral insight of Natural Law is that the justification of self-defence is grounded in the fact that the act wards off an unjust threat. However, it is no easy task to define the conditions under which one person is offending, an unjust threat, to another. At this stage we can at least say that culpability is not a necessary condition: someone can innocently pose an unjust threat to another person. However, in my view a comprehensive account of the conditions under which someone is an *unjust* threat to another person would need to be derived from a satisfactory account of the specification and grounding of rights such as the right to life. Although within the confines of this thesis I cannot give a comprehensive account of such rights, I outline in chapter 5 what I consider to be essential features of an appropriate specification and grounding of the right to life, and hence of the right of self-defence.

4

THE DOUBLE EFFECT JUSTIFICATION OF SELF-DEFENCE

Self-defensive homicide has been characterized as unintended killing, and said to be justified under the conditions of the Doctrine of Double Effect. Those who appeal to this doctrine distinguish an effect of an act which the agent intends from an effect which the agent merely foresees. Traditionally, those who have sought to justify self-defensive homicide in terms of Double Effect have typically maintained that although as a private person I must not engage in intentional killing, it can be permissible for me to act foreseeing that my act will kill someone, provided I do not intend this effect. On the Double Effect view, because intentional killing is prohibited, the agent's intention is crucial to the permissibility of self-defence when the aggressor's death is foreseen as a certain or highly probable effect of the self-defensive act.[1] Foreseen killing in self-defence poses both the most difficult case of self-defence for the Double Effect justification, and the case of self-defence for which, on this view, the Double Effect justification is crucial. And here it is held that provided the self-defending agent intends only to use necessary force to protect him- or herself, the aggressor's death is not intended.[2] As explained so far, there seems in principle no reason why, if

---

[1]I argued in chapter 3 that someone killed in self-defence need not, strictly speaking, be an aggressor. But sometimes I conveniently refer to such a person as an aggressor when this description is not misleading.

[2]The foreseen bad effect of an act of double effect is sometimes said not to be *directly* intended, rather than to be unintended.

applicable to self-defensive homicide, Double Effect could not also permit killing in defence of others.[3]

4.1 THE RELEVANCE OF DOUBLE EFFECT

Numerous general philosophical discussions of the Doctrine of Double Effect have focused, rightly, on whether its distinction between an intended and a foreseen effect of an agent's act is defensible and morally important in problem cases.[4] Direct consequentialists usually dismiss this distinction as confused or morally irrelevant. Also, many who hold that factors such as an act's being of a particular type (e.g. an injustice), and the agent's intention, enter independently into the moral evaluation of acts nevertheless reject Double Effect. Those in this latter group are often concerned to reject the general, exceptionless moral prohibitions which gave rise to the Doctrine, rather than to argue that the Doctrine's central distinction is never morally relevant. Some advocates and numerous critics also misunderstand the Doctrine's purpose in its Thomistic context, which is to rule on the permissibility of acts with foreseen effects of a type that, according to adherents, one must not intend. The Doctrine does not maintain, implausibly, that we are not responsible for the foreseen bad effects of our voluntary acts provided these effects are unintended. I have argued in detail for these interpretive points elsewhere,[5] and others have also argued similarly; nevertheless, these misunderstandings of Double Effect persist.[6]

---

[3]However in n69 this chapter and accompanying text, I question this extension of the Double Effect justification of self-defence.

[4]See, e.g. Jonathan Bennett, 'Whatever the Consequences', reprinted in *Killing and Letting Die*, edited by Bonnie Steinbock (Englewood Cliffs, New Jersey: Prentice-Hall, 1980); G. E. M. Anscombe, 'Modern Moral Philosophy', and 'War And Murder', both reprinted in Anscombe, *Collected Philosophical Papers*, vol 3, op cit.; H. L. A. Hart, 'Intention and Responsibility', reprinted in Hart, *Punishment and Responsibility* (Oxford University Press, 1968); Philippa Foot, 'The Problem of Abortion and the Doctrine of Double Effect', reprinted in Foot, *Virtues and Vices* (Oxford: Basil Blackwell, 1978); Jonathan Glover, *Causing Death and Saving Lives* (Harmondsworth: Penguin Books, 1977), ch. 6.

[5]Uniacke, 'The Doctrine of Double Effect', *The Thomist*, vol 48, no 2, 1984, pp188-218.

[6]See, e.g. Campbell and Collinson, *Ending Lives*, op cit., p153.

The claim that self-defensive homicide is justified as a case of Double Effect is an influential, important strand of Natural Law. This seems to me a sufficient reason for carefully assessing this view. But the Doctrine's possible relevance to the morality of self-defence is not confined to Natural Law. A number of writers have argued that utilitarian considerations can warrant adopting as a 'practical absolute' the moral prohibition of the intentional killing of innocent persons.[7] I do not find this particular argument persuasive.[8] But those who accept some form of indirect consequentialism may regard the Doctrine's central distinction as important to the morality of self-defence against morally innocent threats, as well as to the morality of foreseen killing of non-threats in the course of self-defence, and as possibly more widely relevant. Recently a number of philosophers not institutionally committed to either the Doctrine of Double Effect or exceptionless moral rules have urged the general relevance to the moral evaluation of acts, and to the specification of the limits of moral obligation, of a distinction between what we aim at and what we foresee will result from what we do.[9] Their arguments are important, and provide an additional reason for deciding whether foreseen killing in self-defence is always plausibly characterized as unintended killing. Further, many people regard the intentional killing of innocent persons as intrinsically wrong, and as normally very seriously wrong; and they view the agent's intention to inflict such injustices, and not simply the infliction of them, as an important part of the moral evaluation of any such act. It could be relevant to those who hold this view whether or not self-defensive homicide, at least in some circumstances, is unintended killing.

---

[7]For example, Philip E. Devine, 'The Principle of Double Effect', *American Journal of Jurisprudence*, vol 19, 1975. Richard Brandt has also maintained that absolutism about compliance with rules governing warfare can follow from rule-utilitarianism. ('Utilitarianism and the Rules of War', reprinted in *War and Moral Responsibility*, edited by Marshall Cohen, Thomas Nagel, and Thomas Scanlon (Princeton: Princeton University Press, 1974).)

[8]See Uniacke, 'The Doctrine of Double Effect', op cit., p208, n38.

[9]See, e.g. R. A. Duff, 'Intention, Responsibility and Double Effect', *Philosophical Quarterly*, vol 32, no 126, 1982, pp12-13; Philippa Foot, 'Morality, Action and Outcome', in *Morality and Objectivity: a Tribute to J. L. Mackie*, edited by Ted Honderich, (London: Routledge and Kegan Paul, 1985); Thomas Nagel, *The View From Nowhere* (Oxford University Press, 1986), p179.

I say in some circumstances, because where the agent's intention is held to be relevant to the morality of foreseen killing, what is now most commonly said to be morally offensive is the intentional killing of an *innocent* person. And the Natural Law prohibition is now also frequently expressed in this way. As I noted in chapter 3, Aquinas maintained that a private individual must never kill anyone intentionally; hence the need to appeal to 'double effect' as a justification for private self-defensive homicide. But if the moral prohibition or (more weakly) constraint, is restricted to the intentional killing of innocent persons, whether the agent's intention is crucial to the permissibility of genuinely self-defensive homicide depends on how 'innocent' is explained.

Some exponents of Double Effect, such as Anscombe, maintain that the relevant sense of 'innocent' is 'currently harmless', and that 'innocent' is opposed not to 'guilty' but to 'doing harm'.[10] 'Currently harmless' seems to me too broad to mark the desired *moral* boundary between those who are thought impermissibly killed intentionally and those who are not considered immune in this way. As I pointed out in chapter 3, a person against whom I use force *in self-defence* is him- or herself a threat to me: he or she is not currently harmless. Thus, *all* self-defensive homicide, irrespective of the rights and wrongs of the conflict, would seem to fall outside the scope of Anscombe's interpretation of the prohibition of intentional killing. Consider a case in which A who is conducting an unjust attack on B, then defends herself against B's self-defensive blow. Some people would excuse A's self-defence here or even (like Hobbes) permit it. But those who believe that it is wrong to kill the innocent

---

[10]Anscombe, 'Mr. Truman's Degree', and 'Modern Moral Philosophy', both reprinted in Anscombe, *Collected Philosophical Papers*, op cit. See also Philip E. Devine, *The Ethics of Homicide* (Cornell University Press, 1978), p152, and Thomas Nagel, 'War and Massacre', op cit., p19. Here Nagel urges the moral relevance of a distinction between what one (deliberately) does to people and what merely happens to them as a result of what one does, pp9-11. This distinction seems to straddle two distinctions discussed by Shelly Kagan in his critique of 'ordinary morality': the distinction between doing and allowing and that between intending and foreseeing. (*The Limits of Morality* (Oxford University Press, 1989), chapters 3 and 4.) In discussing self-defence as seriously problematic for the constraint against intending harm, Kagan himself appears to take 'not innocent' to mean 'culpable', pp134-135.

intentionally should, I think, be very uncomfortable with the implication that in these circumstances A is freed of the constraint not to kill B intentionally simply because B is not currently harmless to A.

The relevant sense of 'innocent' in the moral prohibition or constraint needs, I think, to be more explicitly and strongly normative than is 'currently harmless'. 'Blameless' is too narrow. 'Unoffending' - i.e., not an unjust threat - marks a more defensible moral boundary. (As I said in chapter 3, because there can be blameless unjust threats, I really think it is better not to use 'innocent' to mean 'unoffending'. But use of clearer terminology does not settle the substantive question about the moral significance of a distinction between between offending and unoffending persons.) In chapter 3, I remarked on the difficulty in some cases of identifying someone as a threat, and also on the additional difficulty of specifying the conditions under which someone is offending, an unjust threat. A prohibition of the intentional killing of unoffending persons creates harder cases than one based on the broader distinction between those who are, and those who are not, currently harmless. Nevertheless, unless the scope of the prohibition or constraint is meant to exclude *all* self-defensive homicide, irrespective of the rights and wrongs of the conflict, the more difficult of these two distinctions needs to be maintained. The less difficult distinction - that between those who are currently harmless and those who are not - is too descriptive to mark a boundary of such professed intrinsic moral significance. Further, to reiterate another point from chapter 3, the importance of defending a distinction between the offending and the unoffending is not confined to Natural Law. Something like this distinction is crucial to any satisfactory justification of *self-preference* in self-defensive homicide. In the final section of this present chapter, I highlight the importance of the

justification of self-preference to self-defensive homicide. And in chapter 5, I explain what I consider to be the necessary terms of this issue's resolution.[11]

The more modest points that I wish to emphasize at this stage of the discussion can be summarized as follows. If 'innocent person' in the prohibition of intentional homicide refers to someone who is currently harmless, then appeal to Double Effect is irrelevant to the justification of self-defensive homicide. (However, on this view, Double Effect will be crucial to the permissibility of killing non-threats in the course of self-defence, and also to the permissibility of foreseen killing in cases of necessity.) Alan Donagan claims that the Doctrine is superfluous to the justification of self-defence if we accept (as he does) that someone 'who uses violence upon others forfeits his own immunity to violence to whatever extent may be necessary in order to protect them.'[12] Donagan takes this claim about forfeiture to be akin to Aquinas' view on the matter. However, Aquinas' remarks about the moral implications of the forfeiture of human dignity refer to cases of sinning, and are made in the context of his discussion of capital punishment. Aquinas invokes the notion of double effect in the case of private self-defence because he holds that it is impermissible for a private person to kill *anyone* intentionally. If, alternatively, 'innocent' in the prohibition is supposed to mean 'not guilty' (blameless), then Double Effect will be important to the justification of self-defence against morally innocent aggressors, as well as to the permissibility of killing in the course of self-defence and in cases of necessity.

More plausibly, 'innocent' in the prohibition might refer to those who are unoffending. In this case, Double Effect could be relevant to the morality of self-defence against those who are not clearly unjust threats, and also to the permissibility of self-defence against some just threats. But if 'innocent' does mean 'unoffending',

---

[11]Despite the often assumed clear moral permissibility of self-defensive homicide, the justification of self-preference here, and in a number of other contexts, is one of the most difficult questions of applied ethics. It is not surprising that its difficulty is often suppressed.

[12]Alan Donagan, *The Theory of Morality* (Chicago: University of Chicago Press, 1977), p163.

then Double Effect is not essential to the justification of self-defence against an unjust threat.

I argue in chapter 5 that the justification of self-defensive homicide is grounded in the fact that the act wards off an unjust threat. All the same, for a number of reasons it is important that I discuss the Double Effect justification of self-defence in some detail. First, many accept the Natural Law claim that the aggressor's death is an unintended effect of all genuinely self-defensive homicide, and they believe that this bears on the permissibility of self-defence. The description of the aggressor's death as a 'side-effect' of self-defence now extends well beyond Natural Law.[13] In 4.2, I discuss the characterization of self-defence as unintended killing. Secondly, as I explain in 4.3, discussion of foreseen killing under the Double Effect conditions brings out the significance of the fact that a homicide is *self-defensive* to the justification of self-preferetial killing in the case of self-defence.

4.2 IS SELF-DEFENCE UNINTENDED KILLING?

Traditional statements of the Doctrine of Double Effect outline four conditions under which it is said to be morally permissible for a person voluntarily to bring about a foreseen bad effect of a type never permissibly intended. These conditions are:

'(1)The act itself must be morally good or at least indifferent; (2)The agent may not positively will the bad effect but may permit it. If he could attain the good effect without the bad effect he should do so. The bad effect is sometimes said to be indirectly voluntary; (3)The good effect must flow from the action at least as immediately (in the order of causality, though not necessarily in the order of time) as the bad effect. In other words the good effect must be produced directly by the action, not by the bad effect. Otherwise the agent would be using a bad means to a good end, which is never allowed; (4)The good effect must be sufficiently desirable to compensate for the allowing of the bad effect. In forming this decision many factors must be weighed and compared, with care and prudence proportionate to the

---

[13]For instance, the legal theorist George Fletcher says that the aggressor's death is a side-effect of self-defence.('The Right to Life', op cit., p139.)

importance of the case. Thus, an effect that benefits or harms society generally has more weight than one that affects only the individual, and an effect sure to occur deserves greater consideration than one that is only probable; an effect of a moral nature as greater importance than one that deals only with material things....'[14]

Condition 1

In general to seek to preserve one's own life is a morally legitimate end. Some people also regard it as a duty. But unless one holds that self-preservation, and more particularly self-defence, is always one's overriding obligation, whether a particular act for this end is justified will depend on factors such as the nature of the threat to one's life (e.g. that it is unjust, imminent, and cannot otherwise be avoided without unreasonable cost), the means used to defend oneself (that they are necessary for defence, and that they do not impermissibly infringe someone else's rights), and the foreseeable consequences of self-defence (that the harm done is proportionate to that prevented). Conditions 2, 3, and 4 of the Doctrine are meant to guide decision on matters such as these, and also on the crucial issue of intention.

Condition 2, Necessity and Intention

It is certainly wrong to assume that an agent can avoid intending a foreseen bad effect of his or her act simply by directing his or her *attention* away from it at the time of acting.[15] The Doctrine's sense of 'intention' is outlined in conditions 2 and 3: an agent is said to intend *that which he or she positively wills as his or her chosen end* (condition 2) *or as a means to that end* (condition 3).

Before I discuss the applicability of this notion of intention to self-defensive homicide, it is worth pointing out that deliberation under condition 2 illustrates something important about the more general requirement of necessity to which I drew attention in chapter 3. The second condition states: 'The agent may not positively will

---

[14]*New Catholic Encyclopedia*, vol 4 (New York: McGraw-Hill, 1967), pp1020-1022.

[15]Anscombe, 'War and Murder', op cit., p58-59.

the bad effect but may permit it. If he could attain the good effect without the bad effect he should do so.' The second sentence of this condition seems meant to illuminate the first to some extent; and indeed the fact that particular harm is caused where it could have been avoided, and the stated end still achieved, can be a strong indication that this harm too was intended, part of the agent's aim. For instance, if I am physically very strong and I know that I could easily and harmlessly restrain a particular aggressor with my bare hands, but I choose instead to pick up a gun and shoot him, then it is implausible to claim that it was no part of my intention, my aim, to injure him.

The suggestion of a strong link between an agent's voluntarily causing unnecessary harm and his or her intending that harm arises from the stipulation that the agent not do unnecessary harm. This stipulation is an important moral and legal condition of justified self-defence. But as with this more general requirement of necessity, the Doctrine's requirement that, if possible, the agent obtain the good effect without the bad, to be reasonable, cannot be interpreted absolutely literally: it must itself sometimes involve an evaluation of relative costs and the reasonableness of alternative courses of action. The agent must believe that the act which will cause the foreseen harm is necessary in the circumstances; and this condition must allow that an agent can reasonably regard the act which will cause this particular harm as indispensible even though there are alternative means available for achieving the desired end which will not cause *this* harm.

If condition 2 were to require that the act with the foreseen bad effect be the agent's sole available means of achieving the good effect, then the Doctrine would be extremely limited as a possible guide to moral decision. And this very restrictive interpretation would mostly confine the Doctrine's use to cases which are not really morally perplexing. This cannot be what is meant. Rather, condition 2 places the onus on the person who would cause harm in the achievement of some good end, to

consider less harmful alternatives and to justify the harm caused as unintended and reasonably judged necessary in the circumstances.

I now come more directly to the issue of intention. Given what I argue below, it is important that I say clearly at the outset that sometimes it is perfectly appropriate to call a foreseen bad effect a side-effect or an unavoidable concomitant of an act or activity aimed at something else. People who undergo chemotherapy for cancer suffer nausea and hair loss which, although foreseen bad effects of the treatment, are no part of its aim. Similarly, weight gain is often a foreseen side-effect of some oral contraceptives, fluid retention is a foreseen side-effect of immuno-suppressant drugs, and thinning of the skin and puffiness are foreseen side-effects of the use of anti-inflammatory steroids. More relevantly, there are cases in which a foreseen death can be either a side-effect of an act aimed at something else (e.g. a civilian death which occurs when a bomb is dropped on a military target located near a house), or an unintended effect foreseeably brought about (e.g. where a doctor operates, say by transplanting organs, as the only hope of saving someone's life, realising that the surgery or its effects will probably kill the patient).

Nevertheless, it is important to specify the conditions under which an effect of an act or activity is a *side-effect* or a *concomitant*, because the very common use of these terms to describe the bad effect in cases of double effect can mislead us about that feature of a foreseen bad effect which conditions 2 and 3 take to be morally crucial. And this in my view also unnecessarily restricts the Doctrine's possible useful application. Both 'side-effect' and 'concomitant' are terms of everyday discourse and may be somewhat imprecise; but obviously each can be used appropriately or inappropriately. The Oxford Dictionary describes a side-effect of an act as a secondary (usually undesirable) effect. Secondary effects are sometimes indirect effects, but an act or activity can have direct side-effects. The hair loss which results from chemotherapy and the fluid retention caused by immuno-suppressant drugs are paradigm side-effects. Side-effects are often, but are not necessarily, unwelcome. If I

take on a manual job in order to earn extra money, a side-effect of this might be that I become much more physically fit, something about which I should be very pleased. The important consideration in describing the fitness as a side-effect is not that it is unwelcome, but rather that it was not my reason, nor part of my reason, for doing this work. (If the increased fitness is a reason for taking the manual job, with the extra money being the primary reason, then fitness is a secondary or subordinate motive, not a side-effect.) Also, most often when we describe an effect as a *side*-effect, another effect (the aim with which the act was done) has been achieved, at least to some extent; and this is necessarily so with 'concomitant' which means accompanying thing. If the person for whom I am doing the manual work goes broke and I am not paid, I might console myself with the thought that at least I got fit as a result of the work. And if I undergo chemotherapy and this has no short or long-term therapeutic effect, then I am likely to complain that all the treatment did was cause nausea and make my hair fall out. The fitness and the hair loss in these examples could still be described as side-effects, bearing in mind what the activities which caused them were intended to achieve alongside these effects; but neither is a concomitant of the intended effect. Lastly, an act or an effect of an act which in the circumstances contributes to the achievement of the aim - that is, something by means of which the aim is brought about - is not a side-effect, nor merely an unavoidable concomitant. Side-effects and unavoidable concomitants are not essential, either as part of the aim or the means to its achievement in the circumstances, even when the agent believes they will certainly occur. Undoubtedly this is the reason for the common use of the terms 'side-effect' and 'unavoidable concomitant' to describe the bad effect of actions said to be of double effect.

The above discussion identifies that feature of side-effects and unavoidable concomitants which conditions 2 and 3 require of the foreseen bad effect. This requirement is that the bad effect be *incidental*: it must not be either part of the what the agent aims to do or bring about, nor part of the means of achieving the agent's aim in

the circumstances. And this condition can be fulfilled where the bad effect is not, because of other features of these two concepts, appropriately described as an unavoidable concomitant or a side-effect. Consider the above example of the surgeon who operates in a desperate attempt to save someone's life, knowing that the surgery will probably kill the patient. Predictably in the circumstances, the patient dies. Here, the patient's death is neither an unavoidable concomitant nor a side-effect of the surgery. This is not because it is a direct result of the surgery. (Death may have been due to tissue rejection or infection; and even if the surgery itself has killed the patient, side-effects can be direct effects.) Rather, it is because the patient's death is entirely incompatible with the aim of the surgery, and hence cannot accompany the aim (be a concomitant) or be caused alongside the aim (be a side-effect). Nevertheless, the doctor's action fulfils conditions 2 and 3, and seems permissible under the Doctrine's other conditions. In other cases too, Double Effect would appear to allow acts which will probably themselves directly kill someone - and indeed to identify the reasons why these acts are cases of justified risk taking - when it is nonsense to describe the death as a concomitant or a side-effect.[16] One such case is where a parent throws her child out of a burning building as the child's only hope of not being burnt to death, hoping to save the child's life but realising that the fall may well kill it.[17]

---

[16]Some time after writing this paragraph I read a similar point in R. A. Duff, *Intention, Agency and Criminal Liability* (Oxford: Basil Blackwell, 1990), pp97-98. Duff makes the milder comment that '*pure* side-effects' are those effects 'whose occurrence is *wholly* irrelevant to the success or failure of the action' (emphasis original). I don't think that a foreseen effect the occurence of which is wholly incompatible with the agent's aim, is an *impure* side-effect: such an effect is *incidental* to the agent's aim, but it cannot be a side-effect.

[17]This example, and the risky surgery case, are cited in the Victorian Law Reform Commission's Discussion Paper, op cit., in connection with the question of allowing the defence of Necessity to murder in cases of justified risk taking. Such examples bring out that some foreseen effects of an agent's act are not intended because they are wholly incompatible with the agent's aim. Where this is so, one way of allowing the accused a defence to murder could be to recognise this distinction in the legal notion of intention in murder. (See also R. A. Duff, *Intention, Agency and Criminal Liability*, op cit., pp97-98.) The required distinction is clear enough; and I think it would need to be drawn anyway in pleading Necessity to murder in a case of risk taking. Ought Necessity be admissible as a defence to murder in cases in which the foreseen death *is compatible with* the achievement of the agent's aim? Here is a case where 'justificatory Necessity', if admissible, would be strongly arguable: a driver whose brakes fail swerves into a pedestrian on the footpath, killing him, rather than running into a group of people on a level crossing. Here is a case where so-called 'excusatory Necessity', if admissible, would be strongly arguable: a driver whose brakes fail runs into a pedestrian crossing the road, killing him, rather than steering into a steep embankment. To allow Necessity as a defence to

So, although 'double effect' implies, and is mostly taken to refer to, two *actual* effects, one intended and the other not, the descriptions 'side-effect' and 'unavoidable concomitant' are too restrictive as characterizations of what conditions 2 and 3 require and allow. Side-effects and unavoidable concomitants are incidental both to the aim of an act or activity and to the means of its achievement in the circumstances. But some incidental effects of acts and activities which are aimed at some good purpose are neither side-effects nor unavoidable concomitants. Thus, the terms 'side-effect' and 'unavoidable concomitant' can be misleading, and their use in some cases can make what is arguably an important moral consideration seem very implausible. It is far better in assessing the applicability of the distinction between what is intended and what is merely foreseen - to self-defensive homicide, and in general - to specify that the foreseen bad effect be *incidental.* The foreseen bad effect must not be necessary, either as part of the agent's aim or the means of achieving that aim in the circumstances.

Intention and self-defensive homicide

This particular distinction between what is intended and what is merely foreseen can be clearly stated. Further, sometimes this distinction can be drawn with some point. But can foreseen killing in self-defence always plausibly be characterized as unintended?

It can always rightly be claimed about genuinely self-defensive homicide that the aggressor's death is not *strictly required*, provided this means only that it would be sufficient for self-defence if the aggressor could be, or were to be, warded off or stopped without being killed. But the self-defending agent *intends to use necessary*

---

murder might seem a practical way of avoiding the difficulty of satisfactorily incorporating a more general 'double effect' distinction in the legal notion of intention. However, this difficulty would still have to be faced at some point if 'justificatory' and 'excusatory' Necessity in the examples just given are to be distinguished from (say) a surgeon's killing one person in order to use his body parts to save another or others. To disallow Necessity altogether as a defence to murder, and to rely instead on the good judgment of prosecutors to ensure that people are not unfairly or inappropriately charged in cases of risk taking, is a way of avoiding the difficulties of the double effect distinction. But it is not a wise solution in my view.

force against the threat, and it is most important that we not equate what is strictly required for self-defence (this will always be only that the aggressor be warded off or stopped) with *necessary force in the circumstances*. Necessary force is not determined simply by what is strictly required in the above sense. Necessary force is, rather, *the degree of force that it is necessary for a particular agent in a particular set of circumstances to use in order to stop the threat*. Necessary force in a particular set of circumstances depends not only on the nature of the threat, but also on the capabilities of the self-defending agent and what defensive measures are available at the time. If someone is shooting at me, for example, it is strictly required for self-defence only that I stop the shots hitting me. It is not strictly required that I kill the gunman, nor even that I hurt him. (If available, far less violent measures, e.g. the use of a shield, might be perfectly adequate to stop the shots hitting me until help arrives.) Nevertheless, it could be necessary in some circumstances that I use force on a gunman in self-defence, and sometimes the degree of necessary force will be lethal (e.g. explosives thrown at someone in a bunker).

The standard of what is strictly required for the achievement of the agent's aim is sometimes invoked by proponents of Double Effect as sufficient to determine whether a foreseen bad effect is part of the agent's intention. The answer to the question, 'Would the agent's end or aim in any way be thwarted if the bad effect did not occur?' identifies what is strictly required; and thus the answer to this question sometimes marks an important difference between what the agent aims at and what he or she merely foresees (e.g. in the chemotherapy case). But this question is far too narrow as it stands to mark the outer limit of intention where the agent's aim is specified as 'the good effect' (whatever it might be). This test would classify as unintended cases of killing in which the death of the person killed is *perceived by the agent as necessary in the circumstances*, although not strictly required, for the achievement of the good effect. Here is one such example: A terminally ill patient requests direct euthanasia because he is suffering unbearable, seemingly unrelievable pain, and the doctor

complies by giving this person what is normally a lethal dose of a drug. Inexplicably and against all expectation the patient survives the dose and the drug eliminates the pain.[18] It is not then necessary for the doctor to achieve *her aim of ending this patient's suffering* (good effect) by ensuring that the patient dies some other way. Here, in giving the patient the drug the doctor intended to kill him (the doctor gave the patient what she believed was a lethal dose in order to bring death about); and proponents of the Doctrine typically, and rightly, maintain that this is so.[19]

However, at least one prominent 20th century Natural Law philosopher, Germain Grisez, employs the criterion of what is strictly required for the agent's aim in determining the agent's intention under condition 2. Thus, Grisez maintains that the aggressor's death is not the agent's intention in any case of genuine self-defence because it contributes nothing directly to the agent's objective (to stop the threat), but is only a contingent fact.[20] Numerous other moralists, including many sympathetic to Double Effect, have (rightly in my opinion) objected to what they regard as the sometimes sophistical manoeuvre whereby the agent's intention is specified under the description of what is strictly required for the achievement of the agent's aim (e.g. the termination of pregnancy in the first trimester by the removal of the fetus from the womb) and not under another description (killing the fetus). But in order to resist this sort of distinction as a distortion of the Doctrine, they need to appeal to something like Philippa Foot's suggested 'criterion of 'closeness'.. (whereby) anything very close to what we are literally aiming at counts as if part of our aim'.[21] Philip Devine argues

---

[18]This example is a variation of one suggested to me by Peter Singer.

[19]See also Duff, *Intention, Agency and Criminal Liability*, op cit., pp62-63. Duff makes the point that 'the test of failure' ('Would the agent's intention be thwarted?') must be applied in light of the agent's beliefs at the time of action. Duff argues that this test then does distinguish an action's (paradigm) *intended* effects (those which the agent acts in order to bring about) from its foreseen side-effects (some of which he thinks can be said to be done *intentionally*). But I doubt that Duff accepts that the aggressor's death is always a foreseen side-effect of self-defence on this test, pp89-91. See also his 'Intentionally Killing the Innocent', *Analysis*, vol 34, 1973, pp16-19.

[20]Grisez, op cit., p76.

[21]Foot, 'The Problem of Abortion', op cit.,p22.

that we should be able to refer to a 'non-fantastic scenario' in which the good effect is achieved without the bad.[22] Foot's suggestion (which she does not develop) is important, and I take it up below. But Devine's requirement is too restrictive, because under conditions 2 and 3 an agent can be said not to intend an effect of his act which is certain to occur. (And this seems right, for instance with the side-effects of some drugs.)[23]

Condition 2 should, it seems to me, yield the following position on self-defensive homicide:

(i) In all cases of genuine self-defence the agent's aim is to stop the threat. The *death* of the person posing the threat is not strictly required for the achievement of this aim; that is to say, the aim of *stopping the threat* is logically distinguishable, and may be practically distinguishable under different circumstances, from killing the person who is the source of the threat: it is logically possible, and may in other circumstances be practically possible, that this aim be achieved without this death. (Grisez argues, more generally, that a 'performance may be *divisible by thought* or divisible in the sense that *under some other conditions it could be divided*, yet *remain practically indivisible* for a given agent here and now.'[24])

(ii) The *logical* distinguishability, or practical divisibility under *other* conditions, of what is strictly required for the achievement of the agent's aim, from an effect of the agent's act which the agent perceives as necessary in the circumstances for the achievement of his or her aim, cannot confine intention to what is strictly required. *An agent intends those effects of his or her act which he or she believes are necessary in the circumstances for the achievement of his or her aim.* And some effects of an act are too close to what the agent is literally aiming to achieve not to count as part of the

---

[22]Devine, 'The Principle of Double Effect', op cit.

[23]I discuss these points in Uniacke, 'The Doctrine of Double Effect', op cit., pp208-209.

[24]Grisez, op cit., p 88 (my emphasis).

agent's intention. (*Pace* Grisez, I cannot say, 'I did not intend to kill this fetus, but only to terminate the pregnancy in the first trimester by removing it from the womb by suction.')

(iii) Self-defensive force is *directed at* the threat; and the *degree of force* that the agent believes *necessary in the circumstances* to stop the threat is *not incidental* to the agent's intention. Given this, we can maintain that the aggressor's death is not intended by the self-defending agent only if the degree of force intended as necessary in the circumstances to stop the threat is, from the self-defending agent's point of view, not expected to kill the aggressor. For example, although it is foreseeable that a person could die if I shoot her in the leg, or if I push her down an embankment, or if I attempt to shoot near her to frighten her and accidentally hit her, my stopping the threat in any of these ways, if in fact I kill in self-defence, need not be intentional killing.

In other, admittedly more difficult cases, an aggressor's death may be an *expected* effect of the self-defending agent's use of the necessary degree of force, and yet be *incidental to the degree of force necessary in the circumstances* to stop the threat. Here I think of the following example. Say you and I are alone on top of a tall building admiring the view. Suddenly you rush at me obviously intending to push me off the building. You catch me off guard and are almost on top of me, but I am much stronger than you and provided I can ward off the very immediate threat, either by stepping out of your path or by pushing you a very short distance away, I will be out of danger. In the circumstances it is necessary for my defence only that I step sideways, or that I avoid your full impact by pushing you just a very short distance away; and I can easily do either of these things. Unfortunately for you, however, the circumstances are such that if I step sideways, or push you away, you will go off the edge of the building. Now, were it to be necessary in the circumstances for me to defend myself *by pushing you off the building*, it would be strongly arguable that in intending to save myself in this way I would intend to inflict lethal force. But this is not so in this example. Rather, the degree of force necessary for my defence in these circumstances is only *my*

stepping sideways or my pushing you away; and in this case it is incidental to the necessary degree of force that it will cause you to go off the building.

Condition 2, it seems to me, is met in this last case, and in similar cases in which there is a plausible distinction between the degree of force necessary for self-defence in the circumstances (the infliction of which the agent intends), and a foreseen, unavoidable effect which is incidental to that degree of force. How can we say in a particular case that this distinction can plausibly be drawn? Above I rejected the question, 'Would the agent's end or aim (confined to that which is strictly required) be thwarted if the bad effect did not occur?' as too narrow to determine that the agent did not intend the bad effect. But of course a variation of this test uncontroversially (because trivially) identifies something (e.g. a degree of force) as intended by the agent as necessary in the circumstances to achieve what is strictly required. For instance, if I intend only to step out of your way or to push you away, either of *these* intentions will be thwarted if I don't manage to step out of your way or to push you away. But neither of these intentions will be thwarted if I do not, in stepping sideways or in pushing you away, cause you to go off the building. However, if I aim to eliminate you as a threat by pushing you off the building, *this* intention is thwarted if you do not go off the building. Similarly, if I try to stop you shooting at me by blowing you up, *this* intention is thwarted if you do not get blown up; if I intend to terminate a pregnancy by removing the fetus from the womb by suction, *this* intention is thwarted if the suction does not remove the fetus; and if I intend to give someone a lethal dose, *this* intention is thwarted if the person doesn't die. Foot's criterion of closeness then determines whether I must be said to intend to kill the one whom I in fact kill in acting on the following intentions: to push you off the building, to blow the gunman up, to remove the fetus from the womb by suction, and to give the patient a lethal dose. (Of these I think that only the first intention of necessary force is arguably not an intention to kill. In the example, I know how tall the building is, and that there is nothing to break your fall, etc., and necessary force in these circumstances is my *pushing you*

off, because I am otherwise defenceless. Nevertheless, closeness is a matter of degree; and necessary force in these circumstances need not be as close to my killing you as it would be in circumstances in which necessary force is my blowing you up, because *the very same degree of force* (my pushing you off the building so that I am out of range) would be all that is necessary were there to be something (e.g. a ledge) below to break your fall.)

Whenever my honest characterization of my intentional act of *directing at this threat the degree of force I believe to be necessary in the circumstances to stop it* is a description of a foreseen killing (e.g. 'I am stopping her by blowing her up', or 'I am stopping him by pushing him off the top of the tall building'), then I think I cannot maintain that I did not intend to kill.

Condition 3, Means and Ends

Some who accept, as I do not, that genuine self-defence always meets condition 2, nevertheless argue that some self-defensive killing does not comply with condition 3. Grisez notes that heavy criticism has focused on condition 3, because if a chosen means is as intended as one's objective, then this 'seems to exclude killing in self-defence because the force used as a means of self-defense is effective to that end only in virtue of the fact that it first harms the attacker. If the required form and level of defensive force will be in fact deadly, then the one defending himself is safe only when the attacker has suffered a death-dealing counterattack. Reasoning thus, many who hold the principle of double effect do not apply it to the case of killing in self-defense. Instead they say that in such cases the intentional killing of an unjust assailant is justified.'[25]

Condition 3 requires that the good effect be produced directly by the act, not by the bad effect. In discussions of whether the Doctrine permits some cases of abortion,

---

[25]Ibid., p 79.

for instance, advocates often say that there is a difference in intention between the act of removing a fetus (thereby killing it) in order to save a woman's life, *where the fetus itself constitutes the danger* (impermissible), and removing a cancerous womb (thereby killing the fetus it contains) in order to save the woman's life, *where the cancer constitutes the danger* (permissible). The woman's life in the second case is saved by the removal of a cancerous womb, the presence of the fetus and its removal from the woman's body being irrelevant (incidental) to this aim and to the means of achieving it.

This distinction between a good effect produced directly by the act, and a good effect produced through the foreseen bad effect, can be clearly drawn. (Although many, including myself, would reject it as morally decisive in the above cases, and I doubt very much that it can consistently be applied to all abortions now usually said to be permissible under the Doctrine's conditions, e.g. terminations of ectopic pregnancies.)[26] Further, this distinction, like that between what is aimed at and what is incidential to the agent's aim, seems inapplicable to some very straightforward examples of self-defensive homicide. Something like Foot's 'criterion of closeness' must be important not only to the interpretation of condition 2, but also in determining whether or not the bad effect is a means to the agent's aim. For example, where my only available means of stopping an aggressor is to blow him up, then *this act of blowing the aggressor up* is in the circumstances *the way in which I stop him.* I stop him *by* blowing him up; and *this* is too close to killing the aggressor for his death not to be intended as a means. As Foot says in discusing another example, one cannot maintain that one did not intend the death of a man, but rather just to blow him to pieces.[27]

If some advocates of Double Effect maintain that even in such a case the aggressor's death is unintended, or is (very implausibly) a side-effect, then the

---

[26]See Uniacke, 'The Doctrine of Double Effect', op cit., p209-211.

[27]Foot, 'The Problem of Abortion', op cit., p21.

Doctrine's notion of intention seems indefensible, and so narrow that it admits a great deal more killing as unintended than exponents usually want to allow.[28] Traditionally, where the removal of a fetus from the womb in order to terminate a pregnancy is what is strictly required, and the fetus is so premature that its chance of survival outside the womb is as remote as that of someone directly hit by dynamite, or where, more to the point here, the chosen *method of removal kills it*, exponents of Double Effect have held that the fetus' death is intended.

Grisez maintains otherwise, and in evaluating his sophisticated interpretation of condition 3 it is important to note that his argument goes well beyond his initial use of the somewhat vague phrase 'happens to involve', where he says that 'the death of the attacker is not the means of self-defense; rather, the *means* of self-defense happens to involve the attacker's death.'[29] He urges that this distinction is not vacuous because the aggressor's death does not contribute anything directly to the objective of self-defence. In maintaining this, Grisez appeals to what would need to be done to achieve the agent's aim where, contrary to expectation, the attacker is put out of action without being killed.[30] (Above I rejected this sort of question as invariably a satisfactory test of lack of intention.)

As I understand Grisez's argument, the essential parts of which I now explain in words very close to his own, he maintains: (i) that we must distinguish between a unified performance, one which is practically indivisible for a given agent here and now, and a performance which is divisible by the agent, and (ii) that a performance may be divisible by thought, or divisible in the sense that under some other conditions it could be divided, yet remain practically indivisible for a given agent here and now.

---

[28]See Uniacke, 'The Doctrine of Double Effect', op cit., p208.

[29]Grisez, op cit, p76 (my emphasis). Also, Grisez maintains that abortion which doesn't strictly require the death of the fetus is unintended killing. He argues (unsuccessfully in my view) that abortion is mostly impermissible under condition 4. His argument for this explicitly assumes that the same rules must apply to the killing of fetuses as to 'any other persons'.

[30]Ibid., pp 76-77.

My lighting a cigarette with a match is a performance which is practically divisible by me: I could ignite the match without lighting the cigarette, and I could light the cigarette a number of different ways. (So, lighting the match is my chosen means to lighting the cigarette.) But the fact that one can distinguish by thought, or because under some other conditions they could be divided, 'between moving one's fingers and a match's igniting *does not necessitate* the restriction of the human act, which is a means, to the movement of one's fingers. The reason is that one *cannot choose* to move one's fingers in that way without also choosing the igniting of the match.'[31]

We should, it seems to me, say the following about Grisez's match example. Provided I am holding a match in a certain way in my fingers, and I am holding the match very near and at a certain angle to the igniting side of a match box, and I am presently aware of how matches work and know that if I move my fingers in this way the match will ignite, then I cannot choose to move my fingers in this way without also choosing the igniting of the match. Under all these conditions, we do not restrict the human act, which is a means, to choosing to move my fingers in this way, because my choosing to move my fingers in this way is also my choosing to ignite the match. All the same, I can say that I ignite the match *by* moving my fingers in this way (rather than in some other way, and even if there is no other way). Further, under these conditions, even if I choose to move my fingers in this way for some reason which has nothing to do with the ignition of the match, in choosing so to act I choose to ignite the match. Similarly, if I know that I am in a gas-filled room, and I know what will happen if I ignite a match, then I cannot choose to ignite a match (for whatever reason) without choosing to blow myself up. Here, in choosing to ignite the match I choose to blow myself up. Nevertheless, you can say that I blew myself up *by* igniting the match (rather than in some other way, and even if there was no other way).

---

[31] Ibid., p 88 (emphasis original).

Grisez's own explanation of condition 3 is both very dense and, in some respects, lacking in the sort of detail which would be helpful in applying the more theoretical discussion to the cases of self-defence in question. Grisez does not say, for instance, exactly what he takes my intended act to be in those cases of self-defence in which it is necessary that I use lethal force. Is it my stopping the aggressor, which in the circumstances I cannot practically divide from my killing the aggressor? or is it, rather, my using *this* degree of force (lethal) on the aggressor in order to stop him, which is practically indivisible from my killing him? I take Grisez to mean the latter, because condition 3 raises the problem of means to ends in cases of self-defence in which it is necessary for me to use lethal force on the aggressor (i.e., to kill him) in order to stop him. (Here Grisez is not arguing that I cannot stop the aggressor without killing him (although this needs to be so for Double Effect to apply); but rather, that if I stop the aggressor by killing him, my killing him (bad effect) *need not be a means* to my stopping him, thereby saving myself (good effect).)

The need to work through these details of Grisez's argument brings out something important, and that is that discussions of Double Effect too often take for granted that the agent's act or activity, and the good and bad effects of this, are clearly identifiable and distinguishable. In some cases this assumption is perfectly reasonable. For example, where the activity is a course of chemotherapy, the foreseen effects are both therapeutic (desired effects) and hair loss and nausea (unwanted effects). And in the risky surgery case the surgery (activity) may have the desired effect (patient's life is saved) or the undesired effect (patient dies). But we do also, as Grisez recognises, often engage in elision when speaking about human acts and their effects, and we describe what is either an effect of an agent's more basic act, or a further act, as itself the agent's act. In the previous paragraph I mentioned a number of examples - some unified performances and some not - in which such elision is appropriate: I move my fingers in this way (act) and the match ignites (effect), or I ignite the match (act); I ignite the match in this gas-filled room (act) and I get blown up (effect), or I blow

myself up (act); I ignite the match (act) and then I light the cigarette (further act), or I light the cigarette (act). Sometimes the elision of more basic acts is inappropriate.[32] But we should note for future reference that the appropriateness of the elision of more basic acts in the case of a unified performance does not depend on the agent's having strictly required the effect. I can ignite the match, and blow myself up, unintentionally (even in Grisez's narrow sense of what I strictly require).

When we speak of means and ends we often, probably most often, have in mind a non-unified performance, a sequence of causally related acts rather than a unified performance in which a number of acts supervene on a common more basic act. Grisez gives the example of one's igniting a match (act) as a means to lighting the cigarette (further act). Other examples are where I boil the kettle in order to make a cup of tea, and where I study regularly in order to pass my exams. Nevertheless, we can speak of means and ends in a perfectly straightforward way in the case of unified performance. I can say that I ignite the match *by* moving my fingers in this way (rather than in some other way and even if there is no other way), and you can say that I blew myself up *by* igniting the match (rather than in some other way, and even if there was no other way). To describe an act, X, as having been a means to an effect, Y, is to answer 'X' to the question, 'How was Y achieved or brought about?' When we describe an act, X, as having been a means to an effect, Y, we do often also imply that the agent did X *in order to* achieve Y. But this implication is not necessary: Y can be brought about *by means of* X even where the agent does not do X in order to achieve Y. For instance, I can become physically fit by means of doing manual work, even though I do this work solely in order to earn extra money.

Further, condition 3 requires that the bad effect not be essential for the achievement of the good effect. This requirement is stated in the *New Catholic Encyclopedia* in (imprecise) causal terms: the good effect must 'flow from' (in 'the

---

[32]See D'Arcy, op cit., p18-19.

order of causality') the action as immediately as the bad effect. The good effect must be 'produced by' the action and not by the bad effect. We may think that it is more appropriate to speak of supervenience rather than causation in the case of a unified performance. Even so, the stipulation of condition 3 is clear: it is that the bad effect must not mediate between the more basic act and the good effect. The bad effect must not be essential; it must be incidental both to the aim (condition 2) and to the way in which the aim is achieved in the performance (condition 3). In the unified performance in which I blow myself up by igniting a match in a gas-filled room, my igniting the match (act) and my blowing myself up (act) both arise from the more basic act of my moving my fingers in a particular way. But my act of blowing myself up supervenes on my act of igniting the match. The occurrence of the latter *explains how* the former occurred. In contrast, where in igniting a match I illuminate the area around the candle (act), and singe a hovering mosquito (act), both acts supervene on a common more basic act, and the occurrence of one is not part of the explanation of *how* the other was achieved.

The important point here is that in unified performances of double effect, in which a description of the agent's *act* can include the bad effect (e.g. she killed the aggressor), the bad effect must be a distinct supervenient act. The bad effect must be distinguishable, in a defensible way, not only from the good effect, but also *as an effect* of a more basic act on which the good effect supervenes independently of the bad effect. If the latter distinction cannot plausibly be maintained, then the good effect will arise through the bad effect, which is illegitimate under condition 3. To make the point more broadly, in *any* case of double effect where the agent's act has two effects which can both be described as what the agent did, in order to comply with condition 3 we must be able to describe the agent as having performed two distinct acts based on the one more basic act, with one of these two acts having been intended and the other not. Further, although in the circumstances the intended act will have been the agent's

reason for doing the unintended one, the unintended act must not explain why or how the intended act was done.

The last, negative condition arguably needs refinement in some cases. For example, if I need to penetrate the innocent shield of a threat in defending myself, my shooting through the shield is part of the explanation of how in the circumstances I stop the threat. Harm to the shield, then, seems to be a means to my end. However, in discussing the permissibility of harming shields, Shelly Kagan distinguishes (as possibly helpful to a non-consequentialist constraint he is criticising) between what he calls stronger and weaker means to ends.[33] Where my shooting *through* the shield is necessary in the circumstances to accomplishing the end of stopping the threat, the harm to the shield is a means to an end which I would have been able to achieve even were it not for the existence/state of the shield (weak means). This is different from a case in which I harm the shield as a means of stopping the threat and where without the shield I would have been incapable of stopping the threat (strong means). (For example, I save myself by firing at a human shield and splattering the shield's blood all over the aggressor's bullet-proof windscreen.) Some might take Kagan's distinction further, and argue that a case of weak means (my shooting *through* the shield of a threat, as distinct from, say, my using someone as a shield against an threat) need not violate condition 3. In a case of weak means, harm to the shield can be incidental to necessary force in the circumstances provided the shield is purely a *moral* shield, i.e., one whose purpose is to deter defence on moral grounds. (For example, I have an anti-tank gun which I can use on the aggressor, but there is a hostage strapped to the front of the aggressor's tank.) However, given my available means of defence, if the shield functions in any degree as a physical protection of the threat, one which I must penetrate as a means to success (e.g. the aggressor is on foot and holds the shield

---

[33]Kagan, op cit., pp140-144.

infront of him in order to stop my bullets), then harm to the shield is not incidental to necessary force in the circumstances.[34]

The conditions outlined in the paragraph before last are fulfilled in those acts most plausibly said to be permissible under condition 3. Very clear cases are those in which 'double effect' might describe two possible, incompatible effects. For instance, even though when the patient undergoing the highly risky surgery dies we can say (truly if harshly) that the surgeon killed the patient (act), surgery (act) could have produced recovery (good effect), although surgery (act) in fact worsened the patient's condition (bad effect). One or other outcome would have produced a different act on the part of the surgeon (the surgeon's having saved the patient, or the surgeon's having killed him); and so the bad effect, even though it can be included in a description of what the surgeon did, is clearly distinct from, and not a means to, the achievement of the intended good effect.

---

[34]The moral rationale for Kagan's distinction could be that with strong means I use a person in an offensive way - I harm him as a means to improving the position of myself or others - whereas with weak means I do not. Kagan argues that, although problematic, a modified constraint that forbids only use of strong means might be defensible. It can allow me to shoot through the shield, and it also allows self-defence because harm done to an aggressor in self-defence is typically a *weak* means: self-defensive force does not put the agent in a better position than had the threat never come along in the first place. Kagan argues, however, that unless the modified constraint can be analysed *differently* it admits too much; for instance, it admits the pushing of a bystander off a cliff, enabling me to stand in safety where the bystander is currently standing.

Unlike some writers, I do not assume that it is clearly permissible that I shoot through the shield of a threat. Why is self-preferential killing permissible in this case? In chapter 5, I return to some of these issues. But I should like to make two points here. First, if a constraint against harm as a strong means can be satisfactorily explained and defended, it does not follow that harm is permissible provided it is a weak means. (Kagan notes this, op cit., p152.) Secondly, it is necessary in my view that any distinction between strong and weak means be analysed normatively, against a *status quo* which distinguishes between persons who unjustly threaten harm and persons who are unoffending. Use of *defensive* force against the offending would then be a weak means; whereas use of force as a means against a non-threat or against a clearly just threat would be a strong means. The moral offensiveness would consist in the use of strong means: as many have urged, it would consist in the intentional harming of unoffending persons. I think this moral offensiveness extends to intended harm to shields of threats, and clearly includes intended harm to the bystander who is pushed off the cliff so that I can stand in safety. One problem, though, in deciding how we should regard the shield is that, although not himself the source of the threat, the shield is being used as part of a threat. The bystander on the cliff is arguably a passive threat (standing between me and safety); but in standing where she does she is not offending, she is not an unjust threat. There will be other difficult cases, of course: it is not always easy to say whether or not someone is a threat or an unjust threat.

The same can be said about cases of double effect in which the agent expects both the good and the bad effect, and can be said to have 'done' both. For example, the bombardier can be said to have killed the civilian in the house next to the military target (act); but harm to the civilian (bad effect) does not bring about the achievement of the good effect (destruction of the munitions base). Thus, the bombadier in dropping the bomb (more basic act) both destroyed the munitions base (supervenient act, includes good effect) and killed a civilian (supervenient act, includes bad effect); the surgeon by removing the uterus (more basic act) both removed the cancer (supervenient act, includes good effect) and killed a fetus (supervenient act, includes bad effect); and the doctor both saved the patient with the better prognosis (supervenient act, includes good effect) by giving her the scarce drug (more basic act), and let the weaker patient die (supervenient act, includes bad effect).

On the other hand, in the case of self-defence the good effect (stopping the threat, thereby saving my life) arises from the intentional use of the necessary degree of force on the person posing the threat. Where the necessary degree of force is foreseen as lethal, the act on which the good effect supervenes is too close to a description of the bad effect (killing the person) not to *be* the so-called bad effect. *This* is Grisez's problem with the means: Condition 3 requires that the act produce the good effect directly, and not through the bad effect. But where it is necessary to use lethal force to stop a threat, the act (that which produces the good effect) *is* the so-called bad effect, *unless* it is somehow possible to distinguish this bad effect from the agent's act. Grisez's proposed solution maintains that practically indivisible performances can be divided as acts by reference to the agent's intention. (Grisez quotes Aquinas as holding that 'moral actions are characterized by what is intended.'[35] But Thomists typically interpret this as meaning that in cases of double effect the agent's intention determines the *moral quality* of the agent's act (e.g. whether or not a homicide is

---

[35]Grisez, op cit., p71.

murder), and not, as Grisez maintains in the case of practically indivisible acts, the description of the act itself (whether an act of self-defence is homicide).[36])

Alongside unity of performance, Grisez identifies the agent's intention as the other source of unity of action, although he in fact emphasizes the 'divisive effect of intention'. (' "Intention" here refers not merely to intention of the end' (in Grisez's narrow sense of what is strictly required), 'but also the meaning one understands his act to have when he chooses it as a means to an intended end.'[37]) First , as Aquinas says, the same act in the order of nature can belong to two different *moral* categories,[38] regardless of its unity of performance, depending on the agent's intention. Grisez does not give an example here, but my igniting a match could be intended simply to illuminate the area where I stand so that I can locate the light-switch (morally innocent), even though in igniting the match I unintentionally blow myself up because the room is filled with odorless gas. Alternatively, where I know about the gas, my igniting the match may be intended as a way of killing myself (for Aquinas, morally culpable). Secondly, where a performance is known by the agent to be divisible, he may be reponsible for an omission if he fails to divide it, even though he does not choose the elements of the complex separately. A person may choose only to do X, which will cause preventable harm to others, and be reponsible for that harm if he (negligently) fails to prevent it. Grisez claims that here there are two *moral* acts (my emphasis), one determined by the choice to do X and the other determined by the negligent omission; and similarly, 'although a performance may be actually indivisible, a duality of action may arise from the fact that an alternative performance could have been chosen that would have served one's purpose without the foreseen harm.' Thus, a doctor who negligently prescribes a drug which may have a dangerous side-effect instead of an equally effective, safe drug, 'would both prescribe medication and negligently omit due

---

[36]See, e.g. Joseph Rickaby, *Moral Philosophy* (London: Longman's Green & Co. Ltd., 1929), p202.

[37]Grisez, op cit., p88.

[38]Ibid., p89 (my emphasis).

care in treating the patient.' (Condition 2 disallows unnecessary harm, as explained above.)

However, Grisez argues, if 'in fact, the agent has only a single intention...and if there is not a related omission, then the act will be a single unit so far as the unity is determined by intention.' And 'an act that is both one from the point of view of intention and from the point of view of the performance is one absolutely. *What specific action it is*, will be determined by the scope of intention, not by parts of the performance that remains a whole indivisible by the agent.'[39]

We should remind ourselves that according to Grisez a foreseen effect is not within the scope of my intention if it contributes 'nothing to my objective or to the process of its realization.'[40] I have argued above that the divisibility by thought, or by appeal to what might be practically divisible under other conditions, is an inadequate criterion for distinguishing intended effects from those which are really incidental in the circumstances to the agent's aim. Grisez concludes that 'a good effect which in the order of nature is *preceded in the performance* by an evil effect need not be regarded as a good end achieved by an evil means, provided that the act is a unity and only the good is within the scope of intention... *From the ethical point of view*, all of the events in the indivisible performance of a unitary human act are equally immediate to the agent; *none is prior (a means) to another.*'[41]

Grisez believes that killing in self-defence, as Aquinas explains it, complies with condition 3 as Grisez interprets it. He also maintains that according to his interpretation, 'a woman might interpose herself between her child and an attacking animal, since the unitary act would save the child as well as unintentionally damage the agent.' But 'she could not commit adultery to obtain the release of her child, because

---

[39]Ibid., p89 (my emphasis).

[40]Ibid., p77.

[41]Ibid., p90 (my emphases).

the good effect would be through a distinct human act, and she would have to consent to an adulterous act as a means to the good end...Again, a starving party of explorers might divide available food among the stronger members, allowing the weaker to die, since the same act would benefit the one group and harm the others. But if the stronger killed one of the weaker to cannibalize him, the killing would be a bad means, chosen in a distinct act, since killing and eating are divisible and the act is therefore not unitary.'[42]

I am unpersuaded by Grisez's attempt to include as a case of double effect an act of stopping an aggressor which in the circumstances *requires* deadly force to be used against the aggressor. Remember, the objection Grisez is addressing is that in this case the bad effect is *a means to* achieving the good effect, and thus impermisible under condition 3. The question which Grisez poses to focus this objection is: 'if an *effect* in the order of nature *contributes to the fulfillment of a human purpose*, must the natural *cause* of that effect be viewed as a means in the order of human action?'(my emphases). I take this question to be asking the following about self-defence: If an effect in the order of nature (stopping the aggressor, putting him out of action) contributes to the fulfilment of a human purpose (saving my life), must the natural cause of that effect (use of lethal force, aggressor's being killed) be viewed as a means in the order of human action? Grisez says that usually condition 3 is 'interpreted in a way that assumes an affirmative answer to this question', and he adds that sometimes, indeed, the requirement states '*..provided that the evil effect does not first arise and from it the good effect*'.[43] His overall argument is intended to show that this interpretation of the requirement is mistaken.

But which interpretation is this? The one which assumes the affirmative answer to the question about whether the natural cause of an effect which contributes to the

---

[42]Ibid., p90.

[43]Ibid., p87. Grisez quotes Henry Davis, *Moral and Pastoral Theology*, 5th ed. (London: 1946) vol 1, p14 (Grisez's emphasis).

fulfilment of a human purpose is a means? Or the interpretation which says that the evil effect must not arise first and from it the good effect? The *New Catholic Encyclopedia* carefully excludes the latter interpretation of condition 3 in stating: 'the good effect *must flow from the action at least as immediately (in the order of causality, though not necessarily in the order of time) as the bad effect.* In other words *the good effect must be produced directly by the action, not by the bad effect* '(my emphases). Whether or not the bad effect occurs prior to, simultaneously with, or after the good effect, is irrelevant if the good effect arises *directly from a common more basic action* (permissible) rather than *by means of the bad effect* (impermissible). Thus it is a distraction for Grisez to say that 'a good effect which in the order of nature is *preceded in the performance* by an evil effect need not be regarded as a good end achieved by an evil means, provided that the act is a unity and only the good is within the scope of intention...whether the good or evil effect is prior in the order of nature is morally irrelevant...all of the events in the indivisible performance of a unitary human act are equally immediate to the agent; none is *prior* (*a means*) to another'(my emphases). The relevant question is: 'if an effect in the order of nature *contributes to the fulfillment of a human purpose,* must the natural *cause* of that effect be viewed as a means in the order of human action?'(my emphases).

Grisez says that we must distinguish between cause and effect in the order of nature, on the one hand, and on the other, means and end in the order of human action.[44] His argument appears to be that where I stop the aggressor by killing him, my killing the aggressor is not a means to stopping him if, (i) in the circumstances I cannot stop him without killing him, and (ii) my intention is (only) to stop him. But surely, a means to an end in the sense required by condition 3 is the act *by which the end is brought about.* And where I believe that a certain degree of force is *necessary* to stop a threat, then in self-defence I intend to stop the aggressor by directing that

---

[44]Ibid., p 87.

particular degree force at him. If the act of stopping (which is aimed at inflicting the necessary degree of force on the aggressor) is itself a foreseen killing, then I intend to stop the aggressor *by killing him.*

The statement of condition 3 in the *New Catholic Encyclopedia* disallows in a perfectly straightforward way Grisez's example of the woman's adulterous act to save her child, and also the act of killing and cannibalism, and it admits in a perfectly straightforward way the division of food among the stronger members of the stranded explorers. The act of the mother who interposes herself between her child and an attacking animal seems as straightforward a case of means (interposition) to end (saving the child) as one could find. For this mother *uses* her interposition, she makes herself into a shield, *as a way of* saving her child. Yet I think that condition 3 arguably allows the woman to interpose herself between her child and the attacking animal. To be sure, the woman puts herself at very great risk in order to deflect harm from the child. But she does not suicide in order to save the child; and her interposition, not her death, explains how the child is saved. Appeal to condition 3 can create a very fine line in some cases. But such a line can sometimes be viable, for instance in the case that I discussed in connection with condition 2, in which you are attacking me on top of a tall building and I need in my own defence only to push you a short distance away so that I avoid your full impact. In these circumstances, my intended action *of pushing you a short distance away* itself provides the degree of force necessary for self-defence. And my foreseeably killing you in this case, where you go off the building because I push you, does not violate condition 3. Here, my more basic act of pushing you a short distance away, so that I avoid your full impact, both saves my life and, independently, sends you off the building to your death, provided that only my pushing you a short distance away, and not my pushing you off the building, is what I intend as necessary to defend myself in the circumstances. Thus, this case is also distinguishable in terms of condition 3 from one in which *my pushing you off the tall building* (or my blowing

you up, etc.) is in the circumstances what I need to do in order to eliminate the threat you pose.

However, as it becomes increasingly difficult to distinguish the bad effect of an agent's act as a distinct act produced by a more basic act which also produces the good effect independently of the bad effect, so the applicability of condition 3 becomes increasingly doubtful. One's own death may be necessary in order to save someone else, and intended as such (e.g. the woman who interposes herself between her child an an attacking animal might not be shielding the child, but rather offering herself as a meal to the animal who would otherwise eat the child); and we should not shirk cases in which a description of a person's voluntary act of self-sacrifice is itself a description of a foreseen killing of him- or herself (e.g. she threw herself directly infront of the high-speed train). In these latter cases, it seems to me that death *is* intended, whether or not death itself is strictly required for the achievement of the agent's aim, and consistency requires that such acts be disallowed by a moral theory which forbids the intentional killing of an innocent person, including oneself.

All the same, there is a difference between acts of self-sacrifice such as that Grisez describes and the type of self-defence cases which seem to violate condition 3. Say the woman's more basic act is to shield her child, by interposing herself between the attacking animal and her child. This act is divisible in thought, and under some circumstances practically divisible (someone shoots the animal before it reaches the woman), but not practically divisible for this agent *from the effect* of her being grievously harmed by the animal. If the woman knows these things, she cannot choose to interpose herself without also choosing to be grievously, even fatally, wounded by the animal. Nevertheless if she dies, the more basic act of interposition has both caused her own death (bad effect) and, if her aim succeeds, saved the child (good effect). But in the cases of self-defence at issue, it is necessary in the circumstances for me to use lethal force on the aggressor (my intended more basic act)

in order to stop him (effect). So it is not that a common more basic act *both* kills the aggressor (bad effect) and, independently of the act of killing, stops him (good effect).

Grisez emphasizes that where acts done for a good end, which also have a bad effect, are practically indivisible by the agent, it makes a difference to ends and means that *the very same act* (e.g. feeding the stronger) produces both the good effect (those who are fed live) and the bad effect (those not fed die).[45] In my view, this is so when 'the very same act' is some more basic act which produces both the good and bad effects as distinct acts. For instance, although my more basic act of (say) feeding the stronger both saves the stronger and lets the weaker die, it is not the deaths of the weaker, nor even my not feeding them, which saves the stronger. The stronger are saved by my act of feeding them. And if I give another snake bite victim all my supply of antivenene in order to save her life, and die myself as a result, it is not my letting myself die which saves this other person (I could have let myself die by pouring the antivenene down the sink or by giving it to a third person). She is saved by my my act of giving her the antivenene.

But what is 'the very same act' in a case of self-defence in which stopping the aggressor requires the use of lethal force? It seems to me that the act which produces the good effect (whether this effect be described as stopping the aggressor or, more broadly, as saving my life) in these circumstances is *the use of lethal force against this person,* and this *is* killing the aggressor, the so-called bad effect. Where the act of stopping the aggressor in this way is not practically divisible by the self-defending agent from killing the aggressor, Grisez's argument relies on my action not being 'I killed him', but rather 'I stopped him', and this in turn depends on (i) my intention being determined by what is strictly required, and (ii) the description of my *act* being determined by intention in the case of a unified performance. However, neither (i) nor (ii) is right. What I intend to bring about includes what I aim at as necessary in the

---

[45] Ibid., p90.

circumstances for the achievement of my aim. Intention cannot be confined to what is strictly required for the achievement of my aim. And the description of my act (what I do), in cases of double effect and in general, extends beyond what I intend in Grisez's narrow sense (i.e., what I strictly require). In cases of double effect, and especially in the case of a unified performance, what I can be said to have *done* certainly also includes the bad effect where this is either a foreseen direct effect of what I voluntarily do (my more basic act) in order to bring about what I strictly require (good effect), or a foreseen direct effect of the strictly required good effect. I can voluntarily and foreseeably *kill* someone, or *allow him to die*, even though I do not strictly require his death either as an end or a means; and here I am responsible for killing him, or for allowing him to die, in the sense that I am morally answerable for what I have done.[46]

Some self-defensive homicide is intentional killing. Such killing, if necessary and proportionate, can be permissible all the same. The intrinsic moral offensiveness of self-preferential intentional killing is, in my view, confined to the killing of unoffending persons - those who pose no unjust threat.

4.3 SELF-PREFERENTIAL KILLING AND DOUBLE EFFECT

The Doctrine of Double Effect and plausible variations of it do not maintain that a good intention is sufficient to permit foreseen killing. The application of Double Effect to self-defensive homicide implies that the foreseen killing of the aggressor is not irrelevant to the act's moral permissibility: the aggressor's being killed is held to be a foreseen bad effect, which must be evaluated under a separate proportionality condition (something like the traditional Doctrine's condition 4).[47] Those who appeal to Double

---

[46]See Uniacke, 'The Doctrine of Double Effect', op cit., pp211-218. For another critical discussion of Grisez's interpretation of Double Effect as applicable to all genuinely self-defensive homicide see Donagan, op cit., pp160-163. Finnis also rejects Grisez's interpretation of intention. ('The Rights and Wrongs of Abortion', reprinted in *The Philosophy of Law*, edited by R. M. Dworkin (Oxford University Press, 1977), p144.)

[47]Duff, 'Intention, Responsibility and Double Effect', op cit., pp3-16, argues that the Doctrine has two different applications: cases in which a foreseen bad effect enters into the agent's moral deliberation as a reason against doing the act, and cases in which the agent regards the foreseen bad effect as morally irrelevant to what he or she is permitted or obliged to do. Exponents of the Double

Effect as justifying self-defensive homicide *per se*, must hold that self-preference is justified. And the explanation of why, in using lethal force, I can be justified in giving my own life priority over that of the aggressor needs to refer to a moral asymmetry between myself and someone who him- or herself poses an unjust threat.[48] This moral asymmetry arises from the fact that the other person is an unjust threat.

Condition 4, Proportionality

The claim that the Double Effect justification of self-defence relies on a moral asymmetry between the self-defending agent and the unjust aggressor certainly needs detailed explanation and defence (which I provide below), because the *combined* conditions of the Doctrine purport to rule on the moral permissibility (allowability) of an act with a foreseen bad effect of a type not permissibly intended; they do not say that an act which meets these conditions is morally justified in the stronger sense (right).[49] Thus, as I noted in chapter 3, some explications of the Doctrine maintain that the fourth, proportionality condition - that the good effect be sufficiently desirable to compensate for the bad effect - does not require an asymmetry, that it does not require that the foreseen bad effect be outweighed by the intended good effect, but only ever that the good and bad effects be comparable in order of magnitude.[50] I shall refer to this claim as the 'never-more-than-comparable-magnitude' interpretation of condition

---

Effect justification of self-defensive homicide should regard this as a case of the former application, given the nature of the bad effect. The Double Effect view is typically combined with the belief that there is a general duty to preserve life: self-defence is neither permissible nor obligatory irrespective of the consequences for others. I think Duff's distinction is important. However, his category of acts for which consideration of the foreseen bad effect is believed irrelevant to the act's moral permissibility or obligatoriness does not, presumably, require condition 4.

[48]Depending on what is considered proportionate, self-defensive homicide which complies with condition 4 could be restricted to warding off someone who threatens death, or it could also include defending oneself against serious bodily injury, sexual assault, loss of liberty, and even loss of property in some circumstances.

[49]According to the Doctrine, an act which fails to meet *each* of the four conditions is *impermissible*. Helga Kuhse, *The Sanctity-of-Life Doctrine in Medicine* (Oxford University Press, 1987), chapter 3, p120, misconstrues the Doctrine's first three conditions as sufficient to establish the permissibility of an act of double effect and fulfilment of condition 4 as determining that such an act is justified (right).

[50]See, e.g. Campbell and Collinson, op cit., p156.

4. In chapter 3, I claimed that given fulfilment of the Doctrine's other conditions, the never-more-than-comparable-magnitude interpretation is too weak to establish the permissibility of my foreseeably killing a bystander in the course of self-preservation (e.g. swerving my car into a child in order to avoid hitting a boulder on the road). A more complex interpretation of condition 4 is necessary, as I now explain.

The first point to make in rejecting the never-more-than-comparable-magnitude interpretation of proportionality is that the Doctrine, thus interpreted, would set an inadequate standard of moral permissibility were it always to require only comparable *types* of effects: that is, were it only ever to require that the bad effect be of the same *order* of magnitude as the good effect, without ever taking into account the comparative numbers of people who will suffer and benefit as a result of an act of double effect. Philippa Foot's much discussed example of the choice faced by the driver of a runaway tram[51] is useful in explaining that sometimes it would be unacceptable if deliberation under condition 4 ignored the numbers of people affected for better or worse by an act of double effect. This is because in Foot's example relative numbers determine comparable harm. In the example the driver cannot stop the tram, but he can steer it either onto track A, foreseeably killing one man working on track A, or else onto track B, foreseeably killing five men working on track B. (So as not to complicate matters unnecessarily here, I assume that all the men on the two tracks are strangers to the driver.) The Double Effect conditions permit the driver to steer onto track A. Moreover, this act would be the better choice; and indeed most people would hold that in these circumstances the driver *ought* to avoid killing as many people as possible. Nevertheless, we can ask whether the Doctrine's conditions also permit the driver to steer onto track B rather than onto track A. If condition 4 only ever requires that the agent compare *types* of harm (in this case, causing death and avoiding death), then the answer to this question is yes. The comparative numbers of people whom the driver

---

[51] Foot, 'The Problem of Abortion and the Doctrine of Double Effect', op cit., p23.

must choose between in this example would not make his steering onto track B impermissible under condition 4 *thus interpreted.* (Condition 2 does require that where possible the agent obtain the good effect (saving one person) without the bad (killing five), and *this* the driver can do by steering onto track A. But in the circumstances the driver cannot save one *particular* person - the man on track A - without killing those on track B.) In this example, as with some other acts of double effect, the driver foreseeably infringes the equal right to life of whomever he kills in the act of saving another or others. And in general it is impermissible that an agent foreseeably infringe someone's rights (especially very weighty rights such as the right to life) in the act of saving or benefiting another or others, without a morally sufficient reason. However, it might be argued, a morally sufficient reason can be given for the driver's infringing the right to life of *each* of the men on track B. It can be said of each of these men, '*His* right to life was not infringed impermissibly: it was infringed in preventing comparable harm to someone else, namely the man on track A.' No individual man trapped on track B can rightly complain, as the tram hurtles towards him, that in infringing *his* right to life the driver is not also preventing harm of comparable magnitude to someone else.[52]

---

[52]This suggested response is based on Anscombe, 'Who is Wronged?', *The Oxford Review* 5, 1967, pp16-17. (I do not know that Anscombe herself would argue in this way about *killing* the five in the act of saving the one.) In my view, I do *wrong* (because I infringe the right to life of) any unoffending person whom I kill in the act of saving another or others. But if I am Foot's tramdriver, I do so *justifiably* in the circumstances if I steer onto track B. In another example of Foot's, to which Anscombe is replying, a person is faced with distributing a scarce drug. Say there are six persons who need the drug to survive; five of these people will be saved if they each get one-fifth of the available supply of this drug, and the sixth person's life will be saved only if he receives all of the available supply. Anscombe's point is that if it is up to me to distribute the drug, I do not *wrong* any of the five if I choose to give the drug to the one. This may well be so: none of the five need have a stronger right to the drug than the one, or any right at all to it. All the same, in these circumstances I can *act wrongly* in giving the drug to the one. Anscombe is wrong to suggest that I could not act wrongly in giving the drug to the one provided no one was wronged.

For my purposes, Foot's tram example both has the advantageous feature that the rights of anyone working on the track onto which the driver steers are infringed, and at the same time, the possible disadvantage that, because the tram is runaway, some will feel that any death caused is not clearly an effect of the driver's act. The scarce drug case eliminates this disadvantage, and could be elaborated so as to make clear that I *do* wrong any of the six to whom I do not give an adequate supply of the drug (e.g. each of the six might have taken out health insurance to secure a quantity of the drug adequate to save his or her life in an emergency, and an inadequate supply for each of the six turns up). Nagel remarks that in the scarce drug case *I do not kill* those who die because I give the drug to others. ('War and Massacre', op cit., p11.) But it does not follow from this that Double Effect is superfluous

Surely this last piece of reasoning misses the fact that the Doctrine purports to give an *overall* ruling on the permissibility of acts of double effect. And in Foot's example the foreseen effects to be considered and compared under the Double Effect conditions are the killing of the one man on track A and the killing of five men on track B. A defensible interpretation of condition 4 must take numbers into account in a case such as this. While none of the men on track B may be able to appeal to the presence of the other four as a reason why it is impermissible that his own right to life be infringed in these circumstances in the act of saving another person, morally speaking there is a sense in which there can be safety in numbers. If the driver steers onto track B, anyone can rightly complain that in this case the driver foreseeably brought about a bad effect without bringing about a good effect sufficiently desirable to compensate for it. For in saving the man on track A the driver killed five others on track B, each of whom had an equal right not to be killed.[53]

Secondly, the never-more-than-comparable-magnitude interpretation doesn't follow if we accept that the standard of no-more-than-comparable-magnitude satisfies condition 4 in *some* cases of double effect, most obviously in those cases where the effects of alternative acts are, from the agent's perspective, morally indistinguishable. For example, I might face a choice between act A which will both avoid my killing one person, Y, and kill another person, X, and act B which will both avoid my killing X

---

in this case. Clearly one can bring death about intentionally by omission (e.g. by deliberately failing to warn someone of imminent danger, *in order to bring his death about*), and surely the prohibition includes such acts.

[53]I emphasize unavoidable rights-violation in this case, because I am not suggesting that greater numbers are always decisive in cases of double effect, nor that in such cases one is morally required always to save as many people as possible. In making the particular point I want to make here, Foot's example is not complicated by the driver *shifting or deflecting* harm from someone onto another or others. Shifting or deflecting harm to a smaller number can be permissible. (See, e.g. Nancy Davis' variation of Foot's example, where the driver *diverts* a runaway tram onto another track in order to avoid killing as many people as possible. ('The Priority of Avoiding Harm', *Killing and Letting Die*, edited by Bonnie Steinbock, op cit., p193.)) However, if as a result of driving at high speed, I and a passenger in my car can avoid being hit by a truck only by my swerving the car into a child playing on the footpath, who will then be killed, comparative numbers do not morally require that I do this. Further, my swerving into the child, although it may be an excusable act in the circumstances, is not even morally permissible in my view. I discuss similar cases below.

and kill Y. Either act will avoid my killing one person and also kill someone else who has an equal claim not to be killed by me, and *nothing* is known to me which would be a morally defensible basis on which to distinguish in either X or Y's favour.[54] Even so, where different people will be harmed and saved or benefited by a particular act of double effect (say act A), comparable types of effects and comparable numbers will still be insufficient to establish the moral permissibility of this particular act unless a morally defensible selection procedure is used to choose those to be saved or benefited and those to be harmed. (This need not be the same procedure in all such cases. Where, as in the example just given, either act unavoidably involves rights-violation and I know nothing about X and Y which morally distinguishes the alternative acts, a random procedure is morally appropriate. But in another case, where something morally relevant is known, it might be appropriate to select on the basis of personal circumstances, e.g. the fact that one person has dependants and the other does not.) In the case of X and Y, the good effect of my doing either act A, or act B, is sufficient to compensate for the bad, without the bad effect having to count as less weighty than the good effect. And in this case, either A (with the intention of saving Y) or B (with the intention of saving X) is permissible all things considered, provided the procedure for choosing which person to save at the other's expense is morally defensible. Given equal numbers, and harms of comparable magnitude to X and Y, it is not *then* morally permissible for me to save Y at X's expense (or vice versa) on some morally irrelevant, unfair, or otherwise morally indefensible basis, such as that Y is better looking than X, or that my acting to save X would involve my chipping a fingernail, or the fact that I owe X money.[55]

---

[54]This could be a variation of Foot's tramdriver example (say, one person on each track), or a variation of the diabolic machine example discussed by Michael Tooley in *Abortion and Infanticide* (Oxford University Press, 1983), p189.

[55]Anscombe, 'Who is Wronged?', op cit., p17, makes the point that I act wrongly if my 'preference signalizes some ignoble contempt'.

The never-more-than-comparable-magnitude interpretation of condition 4 perhaps seems reasonable at first because acts with foreseen bad effects are *impermissible* where the foreseen bad effect is *disproportionate* to the intended good effect. For example, it is morally impermissible that I dump highly toxic chemicals into a river in order to avoid paying for their safe disposal, and it is morally impermissible that I maim someone in the act of protecting some trivial interest of mine. But it does not follow, of course, that it is always morally *permissible* to bring about any foreseen, unintended bad effect provided it is *not disproportionate* to the intended good effect. And whenever (as in the case of self-defence) an act of double effect foreseeably injures someone other than the person(s) whom it saves or benefits, it is unacceptable that condition 4 require only that the good and bad effects not be disproportionate (given comparable numbers of people saved or benefited and injured).

I argue further for this last claim below. But let me say here that if condition 4 *were* always to require only that the foreseen good and bad effects not be disproportionate, then when an act of double effect injures and saves or benefits different people the Doctrine would establish only the very minimal ruling that the act is not *necessarily* impermissible. That is to say, against the background prohibition, the Doctrine's conditions would establish that the act is not morally out of the question in the circumstances. In the absence of a morally defensible selection criterion, or an additional, morally relevant reason on the side of saving someone at the expense of another, the Doctrine is not only too weak to establish that it is the morally right that an agent save someone by an act which foreseeably kills another, but even too weak to establish that such an act is morally permissible.

Moral permissibility and moral justification

Before I add more detail to the claim that we should reject the never-more-than-comparable-magnitude interpretation of proportionality where (as in the case of self-defence) acts of double effect injure and save or benefit different people, some conceptual reminders and some more general further remarks about moral justification

and permissibility are necessary. In chapter 2, I distinguished a justified act (permissible or right) from an excusable act (wrongful, but the agent is not blameworthy or not fully so). I also distinguished an act's being morally permissible or right from the perspective of the agent in the circumstances (justified^{ii}) from that act's being morally permissible or right from an objective perspective (justified^{i}). An agent's act can be justified^{ii} without being justified^{i} (mistaken beliefs are compatible with an act's being justified^{ii}). But justification^{ii} is necessary to the justification^{i} of an agent's act. (If an act is not morally justified from the agent's perspective, then the agent does not *act* justifiably even if from a more objective perspective the agent does the right thing.) I also said that although permissibility is a justification and not an excuse, there is a weaker (permissible act) and a stronger (right act) standard of justification. If an act is permissible it is allowable; if an act is justified in the stronger sense it is right in the circumstances. Because this is so, permissible acts need not be morally justified in the stronger sense, that is, they need not be positively the right thing to do. These distinctions form the background of the necessarily more complex account of moral permissibility and justification that I now give.

'Permissible' and 'justified' are frequently not distinguished in moral assessment, and sometimes they need not be. Certainly, if an act is morally justified in the stronger sense then it is morally permissible. But very many acts (e.g. the exercise of liberties such as the right to marry, to paint one's house, to undertake a higher degree, to dine out, etc.) are optional and morally permissible, and can be justified in *this* sense without being morally the right thing to do. With the exercise of many liberties what is required for the moral justification of a particular act need not go beyond the fact that it was permissible; and where this is so the act's permissibility is sufficient to establish that it is, if not positively the right thing to do, justified in the sense of *not being wrong*. In this (weaker) sense, I might justify my actions in reply to the accusatory question 'What were you doing driving her car?', by establishing that it was permissible for me to have I acted as I did: by saying 'She lent me her car for the

evening'. In the stronger sense, I might justify those same actions by replying 'I borrowed her car to take a dangerously ill person to hospital; it was an emergency.' So there are at least four senses in which we can speak about moral justification, because alongside the distinction between justification^{i} and justification^{ii} there is a (weaker) sense in which to say that an act is morally justified is simply to say that it is not wrong, and a (stronger) sense in which to say that an act is morally justified means that it is positively the right thing for the agent to do.

A morally *permissible* act can fail to be, as the agent judges it to be, justified in the stronger sense of objectively the right thing to do. This is conceptually and morally unproblematic, because justification^{ii} establishes agent-perspectival permissibility. As I argued in chapter 2, it can be morally permissible for someone to act in a particular way (e.g. to hand over money from the till) on the basis of her justified belief that this is the right thing to do, even though from a more informed perspective this act is not the right thing to do (the threat is a bluff). A morally permissible act can also fail to be, as the agent judges it to be, justified^{i} in the weaker sense of not wrong. Say, for example, a woman reasonably believes that her having another child would be morally permissible and optional, and she decides to go ahead. Although prior medical tests reveal no problems, the pregnancy causes the woman to have a stroke which kills both her and the fetus, and so leaves her other children motherless, etc. Given the woman's reasonable beliefs at the time of deciding to conceive, it was morally permissible for her to act as she did. But her decision was wrong^{i}, wrong from a more informed perspective; and were she to have had good reason at that time to expect the the actual outcome of her pregnancy, her decision to conceive would not have been a morally defensible option, it would also have been wrong^{ii}.

As I have said, some permissible acts are morally optional, and hence need not be justified in the stronger sense of being positively the right thing to do. But could a particular act be permissible and yet the wrong^{ii} thing for the agent to do in the circumstances? We might at first think that the answer is obviously no. It seems

inconsistent to say of a particular agent's act that although it was permissible it was wrong^{ii}, wrong from the perspective of the agent in the circumstances. (And as I have said, sometimes the justification of a particular act need go no further than what was permissible in the circumstances.) However, we need to remember that although permissibility is a justification, and *justification* is always an all-relevant-things-considered evaluation of whatever is said to be justified, sometimes the ground on which a particular act is said to be permissible is narrower than those considerations which its justification^{ii} should take into account. And this can be true of justification^{ii} not only in the stronger sense of 'the right thing to do', but also in the weaker sense of 'not wrong'. Someone may have a particular permission, e.g. a right, to do something that it is wrong^{ii} for him or her to do all things considered. We can fail to notice this because in the everyday moral defence of acts it is commonly, wrongly assumed that the existence of a particular permission is sufficient to show that the act in question was permissible all things considered. For instance, in reponse to a criticism such as 'You ought to have let her keep the piano when you parted. It meant a great deal to her, she can't afford to buy another one, and you never use it', 'But it's mine' is a familiar sort of reply. The obvious rejoinder, however, is: 'Yes; given it's yours, it was permissible for you to take it. All the same, you were wrong not to have left it with her.' The following four examples, I believe, also illustrate that acts which can be said to be permissible in this narrower, somewhat legalistic, sense can be the wrong^{ii} thing to do in the circumstances all things considered. (No doubt not everyone will agree that each of the examples shows this, but I think most will accept that at least one of them does.)[56]

(i) I greatly admire a rare book of yours that you treasure. Because of your feelings for me you give me the book saying 'Here; I'd like you to have it.' I accept your very generous gift, knowing that even though you want me to have the book, you

---

[56]Thomson points out that some acts which do not inflict injustice can involve quite serious moral wrong. ('A Defence of Abortion', reprinted in *The Philosophy of Law*, op cit., pp122-127.)

are forgoing something you treasure and would otherwise keep. Later someone you hardly know (say my brother), whom I want to please more than I want to keep the book, greatly admires it. I am very tempted to give it to him. It would be permissible for me to give the book to my brother: you gave it to me unconditionally and I am free to give it away. But this is not all that is relevant in the circumstances in deciding whether or not it would be wrong for me to give my brother the book. And in coming to the view that it would be wrong, I weigh very heavily the fact that you treasured the book, but gave it to me because I admired it and you wanted *me* to have it.

(ii) On the last day of a hike it would be permissible for me to eat all my adequate (because carefully managed) rations myself, rather than relieving your moderate hunger pangs by sharing my food with you, if you have, knowing what was to come, irresponsibly fed much of your food to birds early on. But this is probably in the circumstances a very nasty thing to do.

(iii) You and I survive a bad fall while walking in a remote area. You are hurt and could not look after yourself adequately without my help. You might not survive if left alone, and your chances of survival will be very greatly enhanced by my staying and looking after you. However, my best chance of survival is to set out immediately on my own, rather than staying with you in the hope that help will arrive soon. If I stay with you for a day or so, I do somewhat (although not dramatically) increase the risk of not surviving myself. In these circumstances, although it is permissible for me to set out on my own, it would be wrong not to stay with you.

(iv) I lend you a computer that I rarely use and you promise to return it as soon as I ask to have it back. Months pass. Use of the computer becomes extremely important to you in writing your thesis and you could not replace it if I asked you to return it. I don't really need the computer, although I would now prefer to have it back because it would help me entertain a child who will be in my care for a few weeks. Although it is permissible for me to ask you to return my computer now, it would be wrong for me to do so in the circumstances given the cost to you.

'Permissible' represents a standard which is often, but not always, sufficient for an act's not being wrong[ii] all things considered. In the examples just outlined, it is of course also permissible for you to leave your ex-partner the piano, and permissible that I, (i) not give your generous gift to my brother, (ii) share my remaining rations with you, (iii) stay and look after you for some time, and (iv) not ask you to return my computer. *These* permissible acts are the right thing to do in the circumstances, and the opposite acts can be said to be permissible but wrong all things considered. When an act is said to be permissible according to a narrower set of considerations than those that are relevant to judging that the act is not wrong[ii] all things considered, permissibility is insufficient to establish that the act is justified[ii] in even the weaker sense. The fact that a particular act is wrong[ii] all things considered can be consistent with its being permissible on some narrower basis.

The Doctrine's conditions purport to establish the permissibility of some acts of double effect, and the application of the distinctions I have just drawn gives us three possible positions to consider in the case of self-defensive homicide. (What holds for (weaker and stronger) justification[ii] will also hold for (weaker and stronger) justification[i], of course, provided the circumstances are as the self-defending agent believes them to be.) First, the four conditions might be held jointly to establish that self-defence *per se* is justified in the (stronger) sense of being positively the right thing to do. If this is so, the self-defending agent must justifiably regard the good effect of saving him- or herself as outweighing the bad effect of harming the aggressor, because *self-preferential killing needs to be positively right.* (Depending on the reason why self-preference is regarded as right, this position might imply that *not* to defend oneself would, other than in exceptional circumstances, be wrong.)

Secondly, the Doctrine's conditions might be held to establish that self-defence is justified in the (weaker) sense of permissible all things considered, i.e., not wrong. If this is so, self-defensive homicide might *also* be positively right where there are considerations on the side of saving oneself *additional* to those required for the

judgment that self-defence is permissible all things considered. But on this second view, self-defence is permissible and morally optional all things considered in the absence of such additional considerations. I argue below that this weaker position on self-defence would also be insufficiently supported if condition 4 were to require only foreseen good and bad effects of comparable magnitude.

The third possibility is that the Doctrine's four conditions merely establish a narrow permission, one not based on an overall judgment that self-defence is permissible or right. Whether the Doctrine (within its own terms) establishes a narrow permission - such as the minimal ruling that self-defensive homicide is not morally out of the question - does depend on what condition 4 requires. However, a permission of this type, one compatible with self-defence being wrong all things considered *despite* its meeting the Doctrine's conditions, is not what advocates of Double Effect intend. On the contrary, they believe that acts of double effect which meet the Doctrine's conditions are permissible all things considered. For this reason we should reject interpretations of condition 4 which could yield only the third, weakest ruling.[57]

I now argue that in order for the Doctrine clearly to establish even the weaker of the other two positions (namely, that self-defence *per se* is not wrong) condition 4 must require more than foreseen good and bad effects of comparable magnitude.

Permissible and Impermissible Self-preference

Most people would consider foreseen killing in self-defence to be very clearly morally permissible in the following case. An aggressor threatens my life, and so the foreseen bad effect of my self-defensive act (the aggressor's death) is uncontroversially of the same order of magnitude as the good effect. I do not go beyond necessary force

---

[57]Nancy Davis accepts this third interpretation of the Doctrine. She states condition 4 as requiring only (ever) that the good and bad effects not be 'morally disproportionate', and she sees the Doctrine as intended to determine whether or not an act of double effect violates the relevant deontological constraint (e.g. that the innocent must not be killed intentionally). ('The Doctrine of Double Effect: Problems of Interpretation', *Pacific Philosophical Quarterly*, vol 65, 1984, pp108-110.) Davis' interpretation is too weak because fulfilment of the Doctrine's first three conditions is sufficient to establish that an act of double effect does not violate the relevant deontological constraint.

in defending myself. There is only one aggressor; and the aggression is, and is reasonably believed by me to be, unjust and culpable. The aggressor alone will suffer direct injury from my self-defensive action; and in the circumstances the proportionality comparison can reasonably be confined to the two immediate, very specific direct effects of self-defence (i.e., to the killing of the aggressor and the saving of my life): it does not include foreseen indirect effects (such as the effect of either my death, or the aggressor's, on others), and there are no other known complicating factors (such as that I am bound to be killed in some other way even if I succeed in stopping the aggressor,[58] or that I am, or the aggressor is, terminally ill, etc.). Even in *this* case, the proportionality condition would be insufficient to establish the moral permissibility of self-defensive homicide were it to require only that the intended good effect and the foreseen bad effect be comparable in order of magnitude. The reason is, as I have indicated above, that in *any* case of Double Effect it must be legitimate, all things considered, for the agent to protect or promote one interest at the expense of another. And in any circumstances, including those of self-defence, in which an interest of my own which I protect is uncontroversially of the same order of magnitude as a foreseeable injury which my act directly inflicts on someone else, it is permissible that I inflict this foreseeable injury on someone else only if *self-preference* is permissible in the circumstances.

Most people would take for granted the clear permissibility of *self-preference* in the example just outlined. The reason is, I think, the assumption that *given* foreseen good and bad effects of comparable magnitude, the injury I do the aggressor is morally outweighed in these circumstances by my preventing the harm he or she would otherwise wrongfully do me. It may be that the assumed very clear permissibility of self-preference in this case relies not simply on the other person's being technically 'in the wrong' - an unjust threat - but on his or her being actively or culpably so. (George

---

[58]That self-defence is unjustified if futile is noted by Devine, *The Ethics of Homicide*, op cit., p165.

Fletcher, for instance, maintains that 'the factor which skews the balance of evils in favor of the [victim] is the aggressor's culpability in starting the fight.')[59] In chapter 5, I discuss the moral significance to self-defence of unjust aggression, and of the aggressor's culpability. The important point here is that a moral asymmetry between the parties must be explained and defended by advocates of the Double Effect justification, in order that even this 'model' case of permissible *self-defensive homicide* be morally distinguished from examples of morally impermissible and dubiously permissible *self-preferential killing*, such as those I shall outline shortly. These examples of morally impermissible and dubiously permissible self-preferential killing are meant to show that I (as the agent) cannot simply assume the permissibility of self-preference provided the following conditions are met: (i) the act has a good intention (self-preservation); (ii) the good effect cannot be achieved without the bad, and the bad effect is neither my aim nor a means to the achievement of my aim in the circumstances; and (iii) the injury I inflict and the good I achieve are uncontroversially of comparable magnitude. In each of the examples, if I do what is necessary in the circumstances to preserve my own life one other person will die, and (as in the self-defence case) I will foreseeably *kill* this other person in acting to save myself. (As my point here concerns what permissible self-preferential killing requires *given* (i)-(iii), I simply grant for the sake of argument that each of the examples meets (ii), i.e., the Doctrine's conditions 2 and 3.) My central claim is that where I can save my own life only by an act that will kill an *unoffending* person, self-preference is not morally permissible on the basis of (i)-(iii) alone.

Without a justification of self-preference, conditions (i)-(iii) are insufficient to establish the permissibility of my killing an unoffending person in the course of self-defence or in the course of self-preservation. Say someone, Adam, fires a missile at me and my only available means of self-defence is to use a device which will deflect

---

[59]Fletcher, *Rethinking Criminal Law*, op cit., p859.

Adam's missile. I know that, unfortunately, if I use this device Adam's missile will unavoidably be deflected to Brian, a bystander, who will then be killed. Here Adam unjustly threatens my life; but then Brian's life will be unjustly threatened if I deflect the missile to Brian. In the absence of a justification for saving myself at Brian's expense, my deflecting the missile to Brian is not morally permissible. Further, in my view the justification of self-preference needs to be stronger where I foreseeably *kill* some unoffending person in saving myself, than it needs to be in a case in which I foresee that an unoffending person will be *protected* from harm issuing from some other source only if I do not act to save myself. Say I could save myself simply by moving out of the trajectory of Adam's missile; but if I do this the missile will hit Colin who is standing behind me. If I *deflect* Adam's missile, I kill Brian; whereas if I *duck* Adam's missile, I do not kill Colin. If Brian acts against me, to thwart my deflecting Adam's missile to him, Brian acts *in self-defence* against me, an unjust threat. In the varied example where I am between Colin and the danger (Adam's missile), although my ducking Adam's missile can be said to threaten Colin, Colin's acting to prevent my ducking (so using me as a shield) is not self-defence against me, but rather a case of Colin's harming me in the course of self-defence against Adam. No doubt act-consequentialists will regard my ducking Adam's missile knowing that it will then hit Colin, and my deflecting Adam's missile to Brian, as morally indistinguishable. They will argue that if my ducking the missile is permissible, then so *equally* is my deflecting it: that if in saving myself I can choose either to deflect the missile to Brian, or else to duck it knowing that it will hit Colin, it is morally irrelevant whether I deflect or duck. However, I do not consider these acts to be morally indistinguishable. I am under a moral constraint not to inflict unjust harm on Brian, an unoffending person. This constraint might or might not be outweighed by the cost to me of not deflecting Adam's missile. But if Adam fires a missile at me and in the direction of Colin, I am not obliged shield Colin, I am not obliged to protect Colin from Adam's missile, given the cost to me.

In evaluating such cases, I think Nancy Davis' comment - that the relevant moral distinction is between killing and allowing to be killed - takes us along the right lines.[60] (This is so despite the argument of Christopher Boorse and Roy A. Sorensen that *some* duckings are killings.)[61] However, not all impermissible deflections are, strictly speaking, killings. Boorse and Sorensen discuss an example in which, being trapped and knowing that someone is looking to kill me, I surreptitously swap my identification papers with those of the person sitting next to me, with the result that the person sitting next to me is killed instead of me. Here I am partly responsible for this person's death, but I do not kill her. This is also true when I use an innocent person as a shield against an aggressor, and the shield is killed by the aggressor.[62]

Similarly, on the basis of (i)-(iii) alone, it is not permissible that I steer my car into someone's front garden, foreseeably killing a person who is gardening there, in order to avoid being hit by an oncoming boulder on the road. Consider another example, in which I am driving a heavy truck down the Bulli Pass near Wollongong. For much of this very steep, narrow mountain road there is a sheer drop on one side and a cliff face on the other. The brakes fail, and the truck quickly accelerates. Unless I steer off the road I'll almost certainly run over a cyclist travelling in the same direction

---

[60]Davis, 'The Priority of Avoiding Harm', op cit.

[61]Christopher Boorse and Roy A. Sorensen, 'Ducking Harm', *Journal of Philosophy*, vol LXXXV, no 3, 1988, pp115-134.

[62]This discussion is by no means exhaustive. The justification of these distinctions in terms of a theory of obligation and agent-responsibility is difficult and very important. But it has to remain unfinished business as far as this thesis is concerned. The distinction critically discussed by Boorse and Sorensen is that between my ducking harm to another and my using another as a shield of harm. (In my view, my using Brian as a shield violates the Doctrine's condition (ii), whereas my *deflecting* harm to Brian need not.) Boorse and Sorensen also argue that 'on standard accounts of homicide' the one who ducks harm seems to have no defence to murder or manslaughter, p117. This is doubtful in my view, given the general principle concerning *novus actus interveniens* expressed in *Pagett* [1983] 75 Cr.App.R. 279: 'A reasonable act performed for the purpose of self-preservation, including a reasonable act of self-defence, does not operate as a *novus actus interveniens*...' Further, *Pagett* suggests that in my example I am not *legally* causally responsible for Brian's death if I *deflect* Adam's missile to Brian. (See also, generally, Eric Colvin, 'Causation in Criminal Law', (1989) 1 *Bond Law Review*, pp265-270.) However, on ordinary principles of agent causation I do cause Brian's death if I deflect Adam's missile to Brian, as long as this *deflection to Brian* is an act on my part, even an 'instinctive or reflex' one. (Attribution of causation would be different if Adam's missile hit my protective armour and so was deflected to Brian.)

infront of me. The cyclist cannot get out of my way in time; and I cannot avoid running over the cyclist other than by steering over the sheer drop or into the cliff face at great speed. Either way of avoiding the cyclist would almost certainly kill me; but if I manage to keep the truck on the road, I'll be able to stop it once I reach a safety ramp some way ahead. I can see that there is no-one but the cyclist between me and the ramp. Given fulfilment of conditions (i)-(iii), my running over the cyclist is not thereby permissible self-preference if the brake failure is my fault. And even where the brake failure is not my fault, given only conditions (i)-(iii) my running over the cyclist is not clearly morally permissible self-preferential killing. (It might be argued that the cyclist in this example *is* a threat - albeit a passive, morally innocent one, akin to the person in the doorway discussed in chapter 3 - in that he comes between me and safety. But my killing the cyclist would not be in self-defence. The cyclist does not create or force the conflict (I do so, even if blamelessly); he or she is not identifiable as the source of the danger to me; and my running over the cyclist in keeping on the road is insufficiently a case of warding off a threat to be a case of self-defensive killing, rather than one of causing death in the course of self-preservation. If the cyclist is arguably a passive threat, he or she is certainly not offending, not an unjust threat.)[63]

Conditions (i)-(iii) can be fulfiled across a spectrum of examples in which I foreseeably kill one other person in acting to save my own life. The particular spectrum I have in mind ranges from a starting point at which I kill someone who is clearly a non-threat (e.g. a bystander), and progresses through examples in which my killing someone else is only arguably self-defensive (e.g. I remove someone who

---

[63]Some writers would take self-preference to be clearly morally permissible in the above examples. Montague, for instance, asserts that it is 'quite clear' that I am 'at liberty' to save myself by diverting a trolley onto a siding where it will run over a child sitting on the tracks. ('Self-Defense and Choosing Between Lives', op cit., p209.) But the permissibility of self-preference here is not at all clear, given that I would infringe the equal rights of the child in acting in this way. It is by way of uncritically assuming the clear permissibility of self-preferential killing in this kind of case that Montague goes on to claim that self-defence and self-preservation cases involving innocent (i.e. blameless) victims are all 'in very much the same moral boat' (equally permissible- but why?), and that the right to use force in self-defence derives from the aggressor's culpability, pp211-218.

stands in the way of my escape), towards examples in which my killing the other person is uncontroversially in self-defence (e.g. I ward off an attacker). As we move through this spectrum in this direction, the claim that self-preferential killing is morally permissible in any particular example strengthens as it becomes increasing plausible to regard the other person as *offending*, as an unjust threat killed in self-defence. Consider a version of the 'sinking plank' case, a familiar example in discussions of necessity. The details of this example could place it in the middle of the spectrum, on the boundary of self-defence and necessity. Say I and another shipwrecked person happen to reach a plank and cling to it at the same time, each of us needing the plank in order not to drown. Unfortunately, the plank cannot hold our combined weight. Is it permissible that I simply go ahead and push the other person off the plank, given only that, (i) self-preservation is a laudable aim, (ii) the other person's death is not strictly a means to saving myself, and (iii) the good effect (I am saved) is of the same order of magnitude as the foreseen bad effect (the other person dies)? If neither of us acts, both will drown; and it seems reasonable to save someone rather than no one. But these considerations alone do not warrant self-preference rather than self-sacrifice. Further, although the other person's clinging to the plank endangers me, my presence equally endangers her; and the situation in which we are both endangered results from legitimate acts on both our parts. In the absence of either a fair selection procedure or some additional, morally sufficient reason on the side of saving myself, my saving myself by pushing the other person off the plank is not morally permissible. Interestingly, given only conditions (i) - (iii), if the sinking plank example is changed in just one respect, so that the other person's clinging to the plank is clearly *not* an unjust threat to me but, rather, I am an unjust threat to her (she reached the plank well before me), my pushing her off in order to save myself is more clearly impermissible self-preference. Alternatively, we move in the direction of permissible self-preference if I am clinging to the plank first, and in order to save myself I push the other person away as she attempts to cling to it too.

An example mentioned in 3.2, where more survivors climb into a lifeboat than the boat will carry, is similar to my first version of the sinking plank example. But in this lifeboat case there is time to require that those involved engage in *a morally defensible selection procedure* before the casting out of *particular* people is morally permissible as necessary for the good of the others. The urgency of many situations similar to those outlined in the previous two paragraphs would probably mostly prompt 'automatic' acts of self-preference. Thus, it might be claimed that self-preference in such circumstances is 'instinctive'. And something similar might also be said about an analogous case in which I save someone I love by doing something that kills a stranger. (The latter case could be viewed as an extension of self-preference. Nevertheless, we should recognise that *self*-preference on the basis of (i) - (iii) alone is more likely to seem *impermissible* to us where the person who endangers us on the plank is someone we know.)

Appeal to considerations like instinct, fear, and urgency in the examples I have been discussing are certainly relevant to the question of whether self-preferential killing would be excusable in these circumstances. But we should be generally suspicious of ready access in the moral evaluation of acts to the claim that some act is morally legitimate because instinctive. As others have rightly pointed out, morality can sometimes require that we curb some of our instincts, if instincts they be.[64] Claimed instincts aside, it is undoubtedly true that we usually *care* much more about our own life and about the lives of those close to us than we care about the lives of others, especially strangers. This *preferential valuing* of ourselves and those with whom we have close personal ties seems essential to important relationships, such as love and friendship, which we have with particular people and which (with rare exceptions) we

---

[64]In discussing what sense there is in calling the natural (animal) instinct of self-preservation a right, Ritchie remarks that natural instinct can be furthered by reflection, and it may come to be thought a duty to preserve life. On the other hand, natural instinct may be overcome by reflection, and it may come to be thought a duty not to preserve life, or only a secondary duty, subordinate to others. Apart from reflection, the instinct to preserve life often gives way to other instincts, e.g. the desire to preserve offspring or even the desire to gratify passion. (*Natural Rights*, op cit., pp119-120.)

regard as a necessary part of living a worthwhile human life. If we acknowledge that from an impersonal perspective the lives of strangers can be as important, as worthy, *as valuable*, as our own and the lives of those close to us, it remains true that from the perspective of the individual persons we are, living particular lives and involved in particular relationships, typically we do not *value* these other lives equally with our own life and the lives of those close to us.[65] The moral difficulty here lies in the specification of the grounds on which, and the limits within which, it is morally legitimate that we act on this preferential valuing.[66]

In the absence of an impersonal justification of self-preference, it might be argued that *within moral limits* (for instance, given conditions (i)-(iii)), a universalizable, agent-relative permission warrants self-preference in the above examples and also in the case of self-defence.[67] But, of course, agent-relative permissibility cannot simply be invoked *ad hoc*: the basis of such a permission would need to be explained and defended. Grisez, for instance, draws attention to the importance in Aquinas' justification of self-defence of the *general* background claim that as individuals we are naturally inclined towards self-preservation. As Grisez notes, the existence of this natural inclination would be insufficient by itself to justify self-preference. And in fact Aquinas maintains something stronger: he says that each person is more strongly *bound* to safeguard his own life than that of another. Grisez

---

[65]See also Susan Levine, 'The Moral Permissibility of Killing a 'Material Aggressor' in Self-Defense', *Philosophical Studies*, vol 45, 1984, p73.

[66]Some suggested *impersonal* justifications of acts of self-preference, such as the claim that our judgments about our own welfare and that of our 'nearest and dearest' are likely to be much more accurate than our judgments about the interests of strangers, are unpersuasive in cases such as I have been discussing. These cases involve *inflicting serious harm* on others. (And in other contexts, as a defence of (say) preferring to devote our time and resources to those with whom we have close personal ties, such arguments often seem to me a fairly transparent impersonal gloss on an independently motivated, essential part of a subjectively worthwhile human life.) In *Reasons and Persons*, op cit., pp31-40, Parfit discusses consequentialist evaluation, consequentialist-inspired motives, and cases of what he calls 'blameless wrongdoing' (e.g. saving one's own child rather than several strangers). However, his examples do not suggest that one is (say) saving one's own child by killing the (otherwise unthreatened) strangers, but rather that one is saving one's child instead of the (similarly threatened) strangers. Parfit discusses self-preferential harming, however, in 'Innumerate Ethics', op cit.

[67]Universalizable in that each person is permitted to save him- or herself.

remarks that the claim that individuals have a paramount obligation to take care of themselves is crucial to Aquinas' account of self-defence: 'if there were no moral responsibility for oneself, an inclination to preserve one's life by using force deadly to another could never be justified.'[68]

Surely this supposed stronger obligation to ourselves must be held to operate within moral limits. Aquinas is discussing self-defence against unprovoked attack; and it is reasonable to assume that this context is important to the justification of self-preference where this involves *killing* another person. A more general obligation to prefer ourselves would be too strong. It would permit self-defence, but it would also include an obligation to defend or protect ourselves at another person's expense. Aquinas, unlike some later Natural Law theorists, may have considered us obliged to defend ourselves, especially against culpable aggression. But surely he did not intend his claim that individuals have a paramount obligation to take care of themselves to imply that one has an obligation foreseeably to kill, if necessary, an *unoffending* person (e.g. the cyclist) in saving oneself. It is one thing to maintain that if *your* life is already in peril through no doing of mine, and I am more strongly bound to safeguard my own life than I am to safeguard yours, that I am not obliged to sacrifice or to risk my life in order to save you. (This is the claim that I am not obliged, e.g. to deflect to myself a missile aimed at you, or that I am not obliged to give you my heart, or even one of my kidneys, even if you cannot survive unless I do.) But it is another thing to claim that I have an obligation to deflect existing danger (Adam's missile, or the failed brakes) from myself to you - an unoffending person - where this is necessary for my defence. (This is the claim that if my life is in peril, and this is not your doing, then I am obliged foreseeably to kill you if necessary, in the act of saving myself.) One very important difference between these two claims is this: in the former cases, in not

---

[68]Grisez, op cit., p75. See also Finnis, 'The Rights and Wrongs of Abortion', op cit., p146. If this particular normative background is necessary to the Double Effect justification of *self*-defence against unjust aggression, then this justification does not extend to defence of others.

sacrificing myself (not deflecting the missile to myself, not giving you my heart), I do not thereby *wrong* you; whereas in the latter cases (deflecting A's missile to you, running over you if you are the cyclist) I do. If you defend your life against me in the latter cases it will be self-defence on your part against my unjust threat to you; whereas I am not a threat to you, unjust or otherwise, in the former cases.

Conditions (i)-(iii) are met if I run over the cyclist, if I swerve my car into the gardener, or if I deflect Adam's missile to Brian. If Aquinas' background justification of self-defence - that we have a stronger obligation to safeguard our own lives than we do to safeguard the lives of others - *requires* that I act on the basis of self-preference in *these* examples, then I do not accept that we have this obligation. (I expect that many, including most advocates of Double Effect, would agree.) To be plausible, a justification of self-preference must be consistent with its also being permissible that in these examples I *not* save myself at the expense of an unoffending person (even a stranger). Further, the permissibility of my not deflecting Adam's missile to Brian, or of my not running over the cyclist, or of my hitting the boulder rather than swerving into the gardener, is clearer than is the permissibility of self-preferential killing in these examples.

An alternative, more defensible interpretation of Aquinas' background justification of self-preference might be this. Although self-sacrifice is permissible where self-preservation would involve killing an unoffending person, given conditions (i) - (iii) it is also permissible that I save myself on the basis of natural inclination, simply because I do not have a stronger obligation to safeguard the life of another person than I have to safeguard my own life. But even this weaker piece of justificatory reasoning is insufficient to establish that, as in the above examples, self-preferetial killing which *wrongs* another person is permissible given conditions (i)-(iii). Another interpretation of the background justification of self-preference is that, given (i) - (iii), self-preference is permissible at the expense of an unoffending person simply because it would be *unreasonable* to expect me to act otherwise; and unreasonable not

because I cannot act otherwise, but because this would require of me too great a sacrifice. This permission of self-preference, too, would need to be defended (why is it too great a sacrifice?); and although this permission is universalizable, it is necessarily agent-relative.

The important points of this section can be summarized as follows. Conditions (i) - (iii) do not themselves establish the permissibility of my violating the equal rights of an unoffending person in saving myself. Where the good I achieve in saving myself is not disproportionate to the injury I foreseeably inflict on someone else, the Double Effect conditions can permit saving myself only if I can legitimately weigh my own interests more heavily. The grounds of legitimate self-preference need not be the same in all cases of Double Effect. Sometimes the permissibility of self-preference can derive from what is likely to do the most good; sometimes it can depend on whether or not in protecting myself I am violating someone else's equal rights. Self-preference might be legitimate, for example, if the other person in need of the limited supply of antivenene is in weaker condition than myself and less likely to survive; self-preference may be permissible in Pufendorf's lifeboat example because others have waived their rights by agreeing to the casting of lots. And self-defence is, I argue in chapter 5, legitimate self-preference because the person against whom force is used is an unjust threat.

A very important, often suppressed element of the Double Effect justification of self-defence - the legitimacy of self-preferential killing - connects with, and possibly depends upon, something akin to the distinguishable type of justification which I discuss in chapter 5: that is the view that in so far as the right to life entails the right not to be killed, a person who unjustly threatens my life does not have a right to life against me equal to that of a non-offending person.

5

SELF-DEFENCE AND THE RIGHT TO LIFE

In this chapter I explain the right of self-defence as a right to use necessary and proportionate force directly to block an unjust threat to oneself. I argue that the justification of the use of self-defensive force is grounded in the fact that an act of self-defence directly blocks the infliction of unjust harm. I also maintain that the permissibility of self-preference in the case of self-defensive homicide requires a particular specification of the right to life as entailing the right not to be killed.

The justification of self-defensive homicide requires that self-preferential killing be justified. In 4.3, I argued that lack of intention to kill (where plausibly invoked), together with the requirements of necessary and proportionate force, are insufficient to justify preserving my life by an act that foreseeably kills another person. The conditions of necessary and proportionate force - and, according to some, lack of intention to kill - are moral limitations of self-defensive homicide: they cannot *ground* a positive right of self-defence. This is because, as John Finnis stresses, the use of self-defensive force involves an act which would normally be a grave *injustice* to its victim.[1] In my view, such an injustice is inflicted even in circumstances in which an unoffending person is *justifiably* foreseeably killed as the *lesser* evil, such as in the example in which the driver of a runaway tram steers into one man rather than five. Even where such foreseen killing complies with the conditions of the Doctrine of Double Effect, it nonetheless wrongs its unoffending victim by violating his or her right to life.

---

[1]Finnis, 'The Rights and Wrongs of Abortion', op cit, p149.

However, the use of necessary and proportionate *self-defensive* force against an unjust threat does not wrong its victim. Because this is so, the justification of self-preference in the case of self-defence distinguishes self-defensive homicide as an exception to, rather than as a justified infringement of, the prohibition of killing. The justification of self-preference in the case of self-*defensive* homicide is based on the use of necessary and proportionate force against an unjust threat not being an injustice to its victim. Genuinely self-defensive homicide against an unjust threat to life does not violate its victim's right to life.

In the paradigm case of justified self-defensive homicide that I described in 4.3 the unjust aggressor is culpable. As others have commented, an unjust aggressor's culpability is an agent-neutral ground of discrimination by the victim in his or her own favour: one which can, in principle, extend to a justification of defence of the victim by a third party. The fact that an unjust aggressor is dangerous to more than one person would be an additional, and in the absence of culpability on the aggressor's part (e.g. a madman firing a gun indiscriminately), an alternative agent-neutral ground on which to defend oneself or someone else.[2] Although the aggressor's culpability, and his or her danger to others, obviously strengthen the justification of self-preference, neither of these grounds of discrimination is necessary to the positive right of self-defence. It does not follow from this, however, that the right of self-defence against an unjust aggressor who is neither culpable nor dangerous to others is an agent-relative permission - confined to the person who is him- or herself threatened - and that the right to defend another person depends on the above sorts of agent-neutral grounds.

In 5.1, I explain the right of self-defence as a right to use force against an unjust threat. I argue in 5.2 that the positive right of self-defence is best characterized and defended as part of a more general permission to use necessary and proportionate force directly to block the imminent infliction of an irreparable injustice: namely, in the case

---

[2]See Nancy Davis, 'Abortion and Self-Defense', op cit., p191.

of self-defensive homicide, the violation of the victim's right not to be killed.[3] In 5.1 and 5.2, I argue that the permissibility of acting directly to block the infliction of unjust harm does not derive from, or depend upon, culpability on the part of the unjust aggressor; nor does the permissibility of acting directly to block the infliction of unjust harm to a particular person depend on other people also being endangered. Further, this permission is not, of itself, agent-relative. Its scope includes defence of others; and indeed in some circumstances it can amount to an obligation to assist or defend others. 5.3 contains a critical discussion of the common claim that self-preferential killing in self-defence is justified because an unjust aggressor *forfeits* the right to life. In that section I also give reasons for preferring an appropriate *specification* of the right to life to a 'theory of forfeiture' as part of the justification of self-defensive homicide. I maintain in 5.4 that self-defensive homicide does not violate its victim's right not to be killed because, as individuals, we possesses this right only in so far as we are unoffending - not an unjust threat to life. The grounding of my specification of the right to life - as unconditionally possessed by unoffending persons - is discussed in 5.5.

5.1 THE RIGHT OF SELF-DEFENCE

The right of self-defence is a right to use defensive force against an *unjust* threat. In this present section I take further the discussion of chapter 3 of the conditions under which someone is offending - an unjust threat to another person. In 5.2, I go on to explain the right of self-defence as a positive right of defence.

Self-Defensive Force Against a Threat

Where force is used against someone *in self-defence*, the person against whom the force is used him- or herself *constitutes* the threat or part of the threat.[4] In an

---

[3]In discussing self-defensive homicide in this chapter I assume that the victim's life or proportionate interest is at stake.

[4]I note a possible deviant sense in 5.2.

important, detailed discussion of coercion Robert Nozick argues that in classifying what someone says to another person as a threat *rather than an offer*, we sometimes take as the *status quo* the morally expected course of events.[5] In chapter 3, I pointed out that we sometimes classify someone's conduct as a threat to another person against a normative background. However, the conditions under which someone is a threat *such that force used against him or her would be self-defensive,* are not strongly normative. In this context we do not judge that A poses a threat to B against a background of the morally expected course of events. For example, as I noted in chapter 3, the police sharp-shooter about to pick off the hijacker holding hostages is a threat to the hijacker, even though the police sharp-shooter has a right to act as he does and the hijacker is entirely in the wrong. And if the hijacker were to shoot the police sharp-shooter, the hijacker would be acting *in self-defence.*

The fact that the hijacker would be acting in self-defence suggests that for the purposes of describing the use of force against someone as *self-defensive* we can regard someone as a threat to another if his or her conduct *constitutes* the danger. This is essentially right in my view. However, there are examples of conduct, e.g. some cases of ducking harm, which can be said to *put* someone else's life at risk without the person whose conduct it is being a threat to the other person in the relevant sense: his or her conduct does not constitute the danger. My ducking Adam's missile might be said to threaten Colin who is protected because he is standing behind me. But in ducking Adam's missile I am not the threat to Colin. In ducking, I am not assaulting or attacking Colin (whereas I would be assaulting him were I to deflect Adam's missile to him). Further, Colin's thwarting my ducking would not be an act of self-defence against me. Rather, Colin would be using me as a shield against the threat, which is Adam's missile. Similarly, we cannot simply regard as a threat in the relevant sense

---

[5]Nozick, 'Coercion', reprinted in *Philosophy, Science and Method: Essays in Honor of Ernest Nagel,* edited by S. Morgenbesser, P. Suppes and M. White, (New York: St. Martin's Press, 1969), pp440-472.

anyone whose conduct *contributes* to the danger to another person's life, or to the circumstances in which another's life is endangered. As explained in my discussion in chapter 3, someone whose breathing contributes to using up our limited air supply, or someone who happens to be in the way of my escape, does not straightforwardly constitute the danger such that my using force against this person would be an act of self-defence.

I suggested in chapter 3 that for someone who is him- or herself the danger to be a threat such that force used against this person is clearly *self-defensive*, he must be either an assailant, or an attacker, or someone who would be an assailant were the threat he poses to be an act on his part, or someone who would be attacking me were the threat he poses to be intended to harm or defeat its object. As this specification implies, paradigm acts of self-defence against persons are acts which ward off *conduct*, voluntary or involuntary, which itself constitutes the danger. However, this specification of the relevant sense of threat also means that I can act in self-defence against some persons who are passive threats, i.e. threats on account of something that happens to them rather than in virtue of anything they voluntarily or involuntarily do. I can clearly act *in self-defence* against some passive threats provided my using force on this person is sufficiently *defensive*. And this requirement of defensiveness means that the passive threat must sufficiently resemble conduct which would be an assault or an attack were it to be an act on the part of the person who poses the threat. The person in Nozick's example who is thrown down a well at me is a passive threat; and my warding him off is *in self-defence* because he would be assaulting me were the threat he poses to be an act on his part. But the use of self-protective force on someone whose mere existence or presence constitutes a threat (e.g. the other person using the limited air supply or the one located between me and safety) is not clearly self-*defensive* force against this person. Some such cases are at best on a borderline of self-defence and necessity in my view.

I explicitly note above that the relevant sense of threat includes some passive threats partly because some writers suggest that, although I have a right of self-defence against a non-culpable unjust threat, the permissibility of self-defensive homicide against a passive threat is agent-relative. Nancy Davis, for instance, maintains that the fact that one party is an *active* unjust threat to another provides an agent-neutral reason for defence of the victim by a third party.[6] And Davis' explanation of why (even involuntary) agency makes the difference between agent-neutral and agent-relative permissibility is that an active threat is 'hostile, dangerous'. But, in the absence of any *wider* hostility or danger, it is appropriate to ask whether the fact that a non-culpable aggressor is hostile or dangerous to *this* victim can provide an agent-neutral reason for a third person's defence of the victim. My answer to this question is yes. Davis may well agree; but her examples suggest wider danger: a baby with a handgrenade, a psychotic out of control.

Passive threats, of course, can pose wider danger; for example, there might be another person with me at the bottom of Nozick's well who will also be killed by the impact of the person who has been thrown. However, interpreted sympathetically, the claim that the permissibility of self-defence against a passive threat is agent-relative assumes that in the absence of wider danger a third party has no moral reason for defending the victim at the expense of the threat.[7] But it seems to me that a third party can have exactly the same moral reason for defending the victim of a passive *unjust* threat as she has for defending the victim of an active *unjust* threat: namely, the reason of directly blocking the infliction of serious, irreparable unjust harm. And if this reason can be sufficient to ground necessary and proportionate defence of the victim of a blameless active threat, then it can also be sufficient in the case of a blameless passive threat. Consider the following example of a passive unjust threat, in which *assistance*

---

[6]Davis, 'Abortion and Self-Defense', op cit., p191.

[7]John Harris claims this in *The Value of Life: An Introduction to Medical Ethics* (London: Routledge and Kegan Paul, 1985), pp70-71.

by a third party is permissible. Mick becomes a human missile and hurtles towards the immobile Nora. Nora pleads with you to help her. Say you can save Nora's life by simply moving her out of Mick's trajectory. If you move Nora, Mick will hit the ground at full speed and die. If you leave Nora where she is and she bears Mick's full impact, Nora will be killed but her body will cushion Mick's fall sufficiently for Mick to survive. Surely it would be permissible for you to *assist* Nora by moving her out of danger. Now, say you can't move Nora away in time, but you can save her life by deflecting Mick so that he lands next to Nora instead of on top of her. If you deflect Mick he will hit the ground at full speed and die. Is your deflecting Mick from Nora morally distinguishable from your assisting Nora by moving her? If you assist Nora by moving her out of danger you don't kill Mick, even though he dies as a result of what you do; whereas (arguably) you do kill Mick if you defend Nora by deflecting Mick. However, in deciding whether *this distinction* indicates that your *defence* of Nora is impermissible in these circumstances, the relevant question is whether you would do Mick an injustice - whether you would violate his right to life - by deflecting him. According to the specification of the right to life that I give in 5.4, you would not do so.[8] You would violate Nora's right to life, however, if in slightly different circumstances in which Mick's trajectory will land him next to Nora, you were to *deflect* Mick *to* Nora, killing her, in order to save Mick's life.

Provided a passive threat would be an assault were it to be an act on the part of the person posing the threat, the *mere* fact that the threat is passive does not make the permissibility of self-defence agent-relative. Nevertheless, legitimate doubt about the

---

[8]The permissibility of one's deflecting a number of blameless threats, *whether active or passive*, could arguably depend on these threats being sequential. If it is permissible that I deflect a number of blameless threats sequentially, it does not follow that I can permissibly deflect a threat that itself incorporates several blameless people. In the sequential case, no one self-defensive act inflicts disproportionate harm, whereas in the non-sequential case one self-defensive act might. It would take me too far afield to explore possible puzzles generated by this distinction, but this is not to deny their importance. Nora's self-defence would probably be excusable in the non-sequential case even if we do not regard it as justified: self-defence can require a snap decision, and someone faced with a threat to her life will often be very affected by panic or fear. However, this excusability may not extend to defence of Nora by a third party in the non-sequential case.

permissibility of third party defence against *some* passive threats can arise from the fact that force used against such threats by those who are threatened would not clearly be *self-defensive*. This is because many passive threats do not sufficiently resemble assaults or attacks.

Examples of people trapped in a threat (e.g. passengers in a runaway tram) also test the conditions under which harm inflicted on someone is self-defensive. These cases can be conceptually and morally 'grey' in my view. The infliction of harm on someone whose presence in a threat is strictly incidental to the threat is distinguishable from the use of self-defensive force against the threat itself. According to the specification of the right to life that I provide below, persons who are themselves unoffending have a right not to be killed. Nevertheless, someone might be so inextricably bound to the threat itself that he or she seems to be part of the threat. Further, the infliction of harm on someone trapped in a threat is certainly closer to the use of self-defensive force against *this person* than would be (say) one's deflecting a lethal threat to oneself to a bystander.

Self-Defence Against an Unjust Threat

Although there are clear cases in which the use of force against a threat is self-defensive, there are also unclear cases of threat in the relevant sense. This is also true of *unjust* threat. Across many cases we can distinguish an unjust threat (e.g. the hijacker holding hostages), from both a just threat (e.g. the police sharp-shooter) and a threat which is not unjust (e.g. the other person struggling to grasp the lifebuoy at the same time as oneself). Clear cases of unjust threat to life are not restricted to cases of culpable threat; for example, blameless putative self-defenders unjustly threaten the lives of their victims, and the attacking sleepwalker, and the madman with the gun, involuntarily do so. Non-problematic cases of unjust threat to life include voluntary or involuntary assaults on unoffending persons. However, as I have said, the conditions under which someone can be said to pose an unjust threat to another person's life can be difficult, sometimes very difficult. Some of these difficulties have been raised in

previous chapters. They include conflicts which arise from mistake of fact, from the victim's conduct having occasioned the threat, and from disagreements about proportionate harm. Further, people will disagree about whether some passive threats are unjust threats. Some philosophical disputes about abortion illustrate this last point. Is a fetus which threatens a woman's life by growing, or in the process of being born, an *unjust* threat to the woman? Are the circumstances of the fetus' conception relevant to answering this question?[9] Disagreement can also arise as to whether some active threats are unjust. Think of the example (from 3.2) of the contingent threat posed by the involuntary cougher. This person's conduct jeopardizes my life by *exposing* me to danger. But does her coughing as she does infringe any right I have against her?

Within the scope of this thesis I cannot provide a definitive account of the boundaries of the right to life and other important rights which would allow me neatly to classify contentious cases of unjust threat. Further, just as some cases of threat lie on a borderline of self-defence and necessity, I think that the distinction between an unjust threat and one that is not unjust is not clear-cut in all cases. Inevitably there will be arguable borderline cases, cases in which not all the relevant facts are known, and cases about which reasonable people can disagree. In this chapter, I set out the principle which grounds the right of self-defence, and I describe the specification of the right to life which is necessary to permissible self-preference in the case of self-defensive homicide. In so doing, I appeal where necessary to what I take to be reasonably clear examples of unjust threat, and also sometimes to 'test' cases. But perhaps I should note once again that self-defence and self-preservation can be excusable conduct in circumstances in which we might disagree about justification.

---

[9]See Thomson, 'A Defense of Abortion', op cit., p117-118; and Finnis, 'The Rights and Wrongs of Abortion', op cit., p145-150. Further, although abortion to save the woman's life has been discussed in terms of the right of self-defence and defence of another, we can also question whether a fetus is a *threat* to the woman in the *relevant* sense. (See Davis, 'Abortion and Self-Defense', op cit., pp185-190.) Abortion in these circumstances might also be on a borderline of self-defence and necessity, rather than a clear case of the use of *defensive* force.

5.2 A POSITIVE RIGHT OF DEFENCE

In this section, I explain the right of self-defence as part of a more general positive right of to use necessary and proportionate *defensive* force against an unjust threat. The permissibility of self-defensive homicide against an unjust threat is *grounded* in the fact that the act is defensive. The *positive* right to use lethal force in self-defence, and in defence of others, does not derive from culpability on the part of the aggressor, nor from the fact that an unjust aggressor can be said to have forfeited the right to life.

A Right of *Defence*

Self-defence has such prominence as a moral and legal justification of homicide that some writers, and probably many other people, understandably take the right of self-defence to be the more basic moral permission, and take the right to intervene in defence of another person to be a (more limited) corollary of the victim's right of self-defence. Judith Jarvis Thomson remarks, for instance, that where an unjust threat is *innocent* (blameless), bystanders may feel that they cannot intervene but the threatened person can defend herself.[10] However, as I have maintained above, in the absence of wider danger, the fact that one party clearly poses an *unjust* threat to another's life can be sufficient to *ground* the permissibility of third party intervention on behalf of the victim.[11] (And to the extent to which the threat one person poses another's life is not clearly unjust, the permissibility of *self*-defensive homicide is dubious.)

The view that the right of self-defence is the more basic permission can be an easy, mistaken inference from the fact that the right to defend another person is derived from the victim's right not to be killed. My right of self-defence against an unjust

---

[10]Thomson, ibid., p117. Unfortunately in Thomson's illustrative example the blameless threat is not clearly unjust: someone is trapped in a room in which she will be crushed to death by another, rapidly growing person. Is the growing person an intruder? Does she have a right to grow in the room as she does? Is the threatened person an intruder? etc.

[11]And Thomson takes this view of some interventions, viz. abortions to save the woman's life, ibid., p126.

threat derives directly from my right not to be killed. And the right of a third party to defend me also derives directly from my right not to be killed; it is not merely an implication of my right of self-defence. A right of *defence* against an unjust threat to life - defence of oneself or of another person - is a corollary of the victim's right, as an unoffending person, not to be killed.[12] The fact that the right of self-defence and the right to defend another person are both derived from the *victim's* right not to be killed partly accounts for the assumption that the right of self-defence is the more basic right.

The assumption that the right to intervene in defence of the victim is a more limited corollary of the victim's right of self-defence is also sometimes a mistaken inference from the fact that self-defence can be permissible in circumstances in which third party intervention is impermissible. However, neither of these rights - the right of self-defence and the right to defend another person - is a corollary of the other. Rather, these two rights derive from the same source, and the permissibility of self-defence and defence by a third party need not coincide in all circumstances. That the circumstances of permissible self-defence do not always warrant third party intervention is explained by the fact that my right of self-defence is not derived from another person's right to defend me.[13]

My account of the relationship between these two rights is consistent with the sorts of considerations which can make third party intervention impermissible when self-defence is permissible. Further, my account is supported by the fact that defence of another person's life can sometimes be morally permissible, and even required, when the victim's self-defence is impermissible; whereas this fact seems inconsistent with the view that the right to defend another person is merely a more limited corollary of the right of self-defence. In chapter 2, I noted two circumstances in which third party intervention could be impermissible when self-defence is permissible. First, if I

---

[12]Onora Nell is essentially right on this point. ('Lifeboat Earth', *Philosophy and Public Affairs*, vol 4, no 3, 1975, p274.)

[13]Montague argues that the positive right of self-defence *is* so derived, op cit., p 216.

decide against exercising my right of self-defence, someone's intervention on my behalf may well be improper. The impropriety of third party intervention here depends on my inaction being a voluntary decision on my part, rather than (say) the result of my being paralysed or badly confused by panic or fear. (Someone intervening in my defence could be mistaken about my state of mind, of course. Nonetheless, where this is so intervention in my defence could be justified[ii].) And the permissibility of third party intervention can depend on what a third party would need to do to defend me. For example, I might not want to defend myself simply because my only available weapon would kill the aggressor or a bystander. In this case my decision not to defend myself clearly allows intervention by a third party who can stop the aggressor by (say) stunning him, without killing the bystander.[14] There might also be cases in which my decision not to inflict necessary force in self-defence does not morally preclude a third party's inflicting an equivalent degree of force in my defence. Say, again, I decide against self-defence because I don't want to kill the aggressor. Here I waive my right of self-defence. But in so doing I have not, with respect to the aggressor, waived my right not to be killed. (The aggressor is not about to kill me with my permission.) Whether it would be permissible in this case that another person use lethal force in my defence can depend on the reason why I decide against self-defence. Maybe I want to be defended but just can't bring myself to shoot someone. In that case third party intervention could be permissible. Where I don't want to be defended, it seems to me that although my wishes in the matter are obviously highly relevant to the permissibility of third party intervention, and may be decisive, they are not necessarily overriding.

---

[14]Where it is obvious to me that a third party *can and will* defend me by using much less force than would be necessary for my self-defence, it seems improper that I defend myself. Further, third party intervention in my defence seems morally required in the above case. However, people disagree about the extent to which my right to life itself entails obligations of assistance on the part of others, and this will extend to cases in which defending me would require that a third party harm someone else. Thomson, e.g. maintains that one has a *right* to refuse to lay hands on another person, even where it is just and fair to do so. ('A Defense of Abortion', op cit., p117.) If I have such a right, it seems wrong all things considered that I exercise it in some circumstances, for instance where I could save a helpless person's life by stunning an aggressor.

Where (say) my life is very important to many people, third party intervention in my defence could be permissible.[15]

The second reason why self-defence can be permissible where defence by a third party is not, is that a third party might not be as well placed as is the victim to know that there is an unjust threat and how serious this threat is. On the other hand, third parties might sometimes be in a much better position than is the victim to judge the facts, including the degree of force necessary for the victim's self-defence in the circumstances.

Other considerations might make defence of another person impermissible where the person threatened may defend him- or herself. In 5.1, I rejected the claim that third party defence of another person's life is permissible only against an active threat, together with the classification of self-defensive homicide against a passive threat as always an agent-relative permission. However, it may be that the permissibility of self-defensive homicide against some threats is, of itself, agent-relative. Some writers take the view that it is permissible that I kill a blameless attacker in order to save one of my limbs (presumably where my life is not in immediate danger), but impermissible that a third party defend one of my limbs at the expense of a blameless person's life. Again, this view does not entail that the right to defend another person's life is merely a (more limited) corollary of the victim's right of self-defence. Rather, this view assumes that agent-relative values can affect proportionality.[16]

---

[15]The fact that my wishes in the matter are relevant to the permissibility of intervention in my defence does not mean that another person's right to defend me is simply an extension of my right of self-defence. However, there are cases in which a person who defends another can be seen as exercising the victim's right of self-defence on his or her behalf. One such case is when one person defends someone in his or her care, on behalf of whom he or she has an obligation to act as moral agent, e.g. a parent defends his or her own baby.

[16]To allow that proportionality can include agent-relative values is not to construe proportionality purely subjectively. For self-defence to be morally *permissible*, my judgment that it is not dispropotionate that I kill an unjust aggressor in order to avoid *my* suffering a particular harm, e.g. loss of a limb, must be an evaluation which can be endorsed from an impersonal point of view as reasonable on my part in the circumstances.

Limits of the Positive Right

The view of self-defence that I have outlined is sympathetic to those Natural Law accounts which hold that the positive right of self-defence *derives from* my danger, more specifically from the fact that my life is *unjustly* threatened, and not from considerations such as the aggressor's culpability or the (claimed) greater general good of my surviving rather than the aggressor. *Pace* Hobbes, self-defence against a *just* threat is not an abiding agent-relative permission arising from each individual's absolute right to preserve him- or herself. Necessary and proportionate self-defence against a just threat is a violation of the right to life of its victim. Self-defensive homicide against a just threat would need to be justified on agent-neutral grounds as the lesser evil. Rarely would such grounds be strongly arguable.

The use of unnecessary force against an unjust threat can also violate the right to life of its victim. Someone who unjustly threatens another person's life has a qualified right not to be killed. If I unjustly threaten your life, I do not have a right against you that you not use necessary and proportionate *defensive* force. And if the required degree of force is lethal, I do not have a right against you that you do not kill me. However, if you go beyond the limits of genuine self-defence, then I am wronged by the infliction of unnecessary harm. Thus, you violate my right to life if you can ward me off by stunning me, but instead you shoot me in the heart.

My view also agrees with some Natural Law accounts in regarding the right of self-defence as (what I call) a particular permission: that is, a positive right (a right to do or to refrain) the exercise of which can be wrong in some circumstances all things considered. This view accords with those Natural Law accounts which hold that the the right to use necessary force in self-defence is limited by the condition of proportionate force. This condition of proportionality compares the injury foreseeably inflicted on the *aggressor* with the threatened harm to the victim: I have no positive right to kill even a culpable aggressor in order to protect some trivial interest of my own.

I have maintained in previous chapters that my having a positive right (e.g. to speak my mind, to withdraw a gratuitous service, to recoup my debts, and to defend myself against an unjust threat) means that *I am wronged* (treated unjustly) by being deprived of the relevant interest without my consent. But my having a positive right is consistent with my acting wrongly, all things considered, in exercising or insisting on this right in some circumstances. And this can be so with the right of self-defence. Self-defence might inflict harm on the aggressor which, although proportionate to the threat, is wrongly inflicted given the very limited benefit to me, for example, where the actions of a young child immediately threaten my life and I am about to die from some other cause anyway. Further, in some circumstances an act of self-defence against an unjust aggressor might also directly inflict harm on unoffending people (e.g. on a group of bystanders who will unavoidably be killed). Contrary to what *some* Natural Law accounts appear to maintain, in some circumstances morality can require that I allow myself to be killed by an unjust threat.[17]

The existence of a positive right of self-defence against an unjust aggressor can be consistent with the permissibility of another person's preventing my self-defence. Say I am about to defend myself by deflecting a missile aimed at me in the direction of a bystander who will then certainly be killed. Because in defending myself in these circumstances I become an unjust threat to this bystander, she has a right to use necessary and proportionate force in self-defence against me, and she can be justified in thwarting my deflecting the missile to her if she is able to do so.

---

[17]I think foreseeable harm *directly* inflicted *in the course of self-defence* must always be considered. But I am unsure about foreseeable harm *indirectly* inflicted. For instance, is self-defence impermissible all things considered if I am quite elderly and my life is threatened by someone whom I know has dependant children, or who is a highly skilled brain surgeon? It seems to me that sometimes whether or not the aggressor is culpable can affect our view about whether *indirect* harm to unoffending persons is relevant to the permissibility of self-defence. For instance, in the example just given the aggressor's being *non*-culpable might make it seem more appropriate that I take into account indirect harm to her dependant children, or serious loss to the community. The probability, the extent, and the seriousness of the indirect harm to others, and the possibility of its being mitigated in time (whereas loss of my life is irretrievable), are highly relevant of course.

In my view, the justification of self-defence as an exception to the general prohibition of homicide depends on the specification of the right to life that I give in 5.4. It follows from this specification of the right to life that I have no positive right to kill an unoffending person (e.g. a bystander) in the course of self-defence or defence of another, nor in other circumstances of self-preservation or preservation of another.[18] The foreseen killing of an unoffending person in saving oneself or another person must be justified as the lesser evil.[19]

The Significance of the *Positive* Right

What is the moral significance of our having a positive *right* to use self-defensive force against an unjust aggressor if it can be wrong in some circumstances that we defend ourselves, and if in some circumstances other people can have a right to prevent our self-defence? I should hope that the discussion in 4.3, and what I have already said in this chapter, have indicated a reasonably clear answer to this question. In order that necessary and proportionate self-*defensive* homicide be distinguished as permissible self-preferential killing and, moreover, as an exception to the prohibition of homicide, we need to invoke the moral significance of the fact that the person killed in self-defence is an unjust threat. Self-defensive homicide is an assault on the body of the aggressor. But a self-*defensive* assault on someone who is an unjust threat to my life is morally distinguishable from my killing an unoffending person in the course of self-defence or in other circumstances of self-preservation. Further, as I now argue, the former, self-defensive assault is something I have a postive right to do.

---

[18]Onora Nell is also right about this, op cit., p275. Thomson holds that 'there are drastic limits to the right of self-defence'. ('A Defense of Abortion', op cit., pp116-7.) But the example Thomson gives in support of this claim - that of one's torturing an *unoffending* person to death under duress from a third party - is not *self-defensive* homicide.

[19]And in the event that I will kill an unoffending person whatever I do, all morally relevant factors being equal, a random selection procedure is appropriate.

The Significance of *Defensiveness*

Charles Fried argues that self-defensive homicide is distinguishable from impermissible self-preferential killing in virtue of the 'special relationship' between the victim and the person who is the immediate and sufficient source of danger. Provided the threat is *unjust*, this reasoning is along the right lines in grounding both the positive right of self-defence and also the right to defend others. The special relationship which grounds the positive right of defence is the fact that one party is an unjust threat to the life of the other. However, 'special relationship' as defined by Fried is too loose to make the required point that *defensive* homicide blocks an unjust threat to life. For example, a 'special relationship' as defined by Fried might exist between me and someone using up a limited air supply, or someone with a highly contagious disease. But for the reasons I have already given, in the particular circumstances these persons might not be unjust threats to me such that my killing them, if necessary to save myself, would be permissible self-defence.[20]

Philosophical discussions of self-defence mostly seek to establish the permissibility of self-defensive homicide along one of two lines. Both these general lines of argument can be found in Natural Law. The first characterizes self-defensive homicide as unintended killing and follows the reasoning of the Doctrine of Double Effect. The second (which I critically discuss in 5.3) explicitly focuses on the moral asymmetry between the conflicting parties in a case of self-defence. In response to the first line of argument, I argued in chapter 4 that genuinely self-defensive homicide is not always unintended killing. Although lack of intention to kill can plausibly be invoked in some cases of self-defensive homicide, in some other, very straightforward cases, killing the aggressor is not incidental to the degree of force intended by the agent as necessary for self-defence in the circumstances. My discussion of the proportionality

---

[20]*Castell v Bambridge* (1729) 2 Strange 854, involved an alleged attempt to kill someone by means of deliberate exposure to disease.

condition of the Doctrine of Double Effect revealed that the Double Effect justification of self-defensive homicide, like any other proposed justification, must justify self-preferential killing. And the (often implicit) assumption in the claim that self-defensive homicide is clearly permissible as a case of double effect is that, given proportionate good and bad effects, self-preferential killing is permissible because the act is defensive: it is an act of warding off an unjust threat.

In my view, genuinely self-defensive homicide can be permissible intentional killing. Nevertheless, the Doctrine's focus on the agent's intention in all cases of self-defence represents the crucial insight that the moral permissibility of self-defence is *grounded* in the fact that the act is essentially *defensive*. The use of defensive force against an aggressor is the act of warding off or stopping a threat. An act of self-defence is not, essentially, a punitive act, nor is it a piece of social engineering which penalises the guilty, nor is it an attempt to achieve optimal results. When the threat is unjust, an act of self-defence directly blocks the infliction of an injustice; and the permissibility of self-defence, and of defence of another person, derive from this fact. Within moral limits a private person has a positive right, and sometimes an obligation, directly to block the infliction of an injustice to him- or herself or to another person. (An act which directly blocks an injustice is not merely a case of preventing harm; although within moral limits it is also permissible, and can be morally required, that we prevent harm.)

The positive right directly to block the infliction of an injustice does *not depend* on the aggressor's culpability: it is a right of defence against an unjust threat, and thus includes defence against some blameless threats. The positive right to kill a culpable threat does *not derive* from the aggressor's culpability; it derives from the fact that he or she is an unjust threat. The fact that someone has culpably endangered another person's life does not give me a positive right to sacrifice the culpable party, if necessary, as a

means of saving the victim.[21] For example, I have no right to take out a criminal's heart or kidneys on the grounds that I can put these organs to good use in saving someone else. This is so even if the criminal has through a prior culpable attack caused the intended recipient to require a transplant.[22] (I should note here that in *other* circumstances, where (say) two people are endangered and both cannot be saved, the fact that one party has culpably endangered the other can be a legitimate ground on which to discriminate against the culpable party. For example, if a culpable attacker and his innocent victim are both critically injured in the ensuing conflict, and I can assist only one of them, the attacker's culpability is a legitimate ground on which to select the victim. Further, provided a presently unoffending person is not killed as a means of saving someone else, the (very much lesser) comparative moral worth of someone who is in no way responsible for the present danger could in some circumstances be a legitimate ground on which to injure or kill this person rather than someone else. For example, where I am the driver of Foot's runaway tram and I am faced with steering either into a child who has wandered onto track A, or into a convicted, unrepentant serial killer working on track B, it seems permissible to take comparative moral worth into account in choosing to steer onto track B. Under a slightly different set of conditions, this sort of consideration might also legitimise my deflecting the tram from track A onto track B in order to save the child, although deflection is morally more dubious on these grounds in my view.)[23]

---

[21]See David Wasserman's discussion. ('Justifying Self-Defense', *Philosophy and Public Affairs*, vol 16, no 4, 1987, pp356-378.)

[22]However, in some weird examples it might be arguable that the culpable party is a continuing threat to the victim. For instance, prior to his accident the criminal may forcibly have taken the other person's one good kidney and had it transplanted in himself; the victim's other kidney fails totally and dialysis is unavailable; the criminal arrives in casualty, and the doctor can now save the kidney-owner's life by restoring to him his own kidney; etc.

[23]These extreme, fairly simple examples are *not* meant to imply that a judgment about comparative moral worth is in general an acceptable ground on which to discriminate between lives, especially at the level of social policy (e.g. in the allocation of medical resources).

In a very useful article, David Wasserman rightly emphasizes the importance to the permissibility of self-defensive homicide of the fact that the act is *defensive*.[24] Wasserman also claims that this requires that the person killed be *presently* the threat. I accept this requirement, because in my view the positive right of self-defence is grounded in the fact that force is used directly to block the infliction of an injustice: self-defensive force is directed at stopping someone who him- or herself poses the unjust threat. However, Wasserman's own speculative reasoning (in terms of agent-responsibility and our past and present selves) as to why it is permissible to use force against a *present* threat, is both unsatisfactory within its own terms and on the wrong track as an account of why it is impermissible that I kill someone who has culpably already inflicted an injustice, as a means of remedying that injustice. Wasserman's claim that as the person I presently am, I am more closely identified with my present than with my past acts, does not explain why it is permissible that you kill me, a present threat, in self-defence, whereas it is impermissible that you rectify an injury I have already inflicted by killing me and using my organs to patch yourself up.

First, our responsibility as agents for our past conduct and its effects can increase with time. Consider acts done accidentally, impulsively, under provocation, or by reason of mistake of fact, which later, on reflection, I endorse or fail to rectify. For example, in a rage I might stab someone after being told that he has murdered my closest friend. Having regained my self-control I might decide to let him bleed to death rather than take him to a hospital. I might accidentally shoot someone, or shoot her under the mistaken belief that she is about to kill me. Realising what I have done (excusably in the circumstances), I might then leave this person for dead out of sheer indifference. Secondly, we need not always identify conduct warded off in self-defence with the *person* presently engaged in that conduct. For example, this person

---

[24]Wasserman, op cit.

might be deluded or temporarily insane and hence not responsible for what he or she does.

The permissibility of the use of self-defensive force against someone who is him- or herself an unjust threat is grounded in the fact that this is an act of *defence*: it is not a punitive or a retaliatory act against the person whose conduct is offending. However, to remedy an injustice already inflicted by means of selecting the culpable offender to be sacrificed for this end *is* punitive or retaliatory.[25]

Having endorsed Wasserman's distinction between an act of self-defence against a *present* threat, and an act of penalising someone in order to remedy an injustice *already inflicted*, I must acknowledge the possible objection that not all self-defensive force fits neatly into the category of force used against someone whose present conduct constitutes the threat. Consider a case in which I am exposed to a grenade about to go off, which you have triggered. The grenade is no longer under your control; but I push you on top of it to save myself. Here I am defending myself against the grenade about to go off. But is my pushing you onto the grenade in these circumstances nonetheless an act of self-defence against you? I think that some people would probably think that it is an act of self-defence against you, because the act is defensive and because the present threat (the grenade about to go off) is a direct and immediate effect of your conduct. But even on this view, my pushing you onto the grenade in order to defend myself *against the grenade* must be a deviant case of self-defence against *you*. And if you have (say) informed gangsters of my whereabouts and they come looking to kill me, it is clearly not an act of self-defence against *you* that I forcibly use you as a shield against these gangsters' bullets.

My own view is that my pushing you onto the grenade after you have triggered it is not an act of self-defence against you. Certainly you are not unoffending with

---

[25] I use 'punitive' in cases where someone who is not a present threat is selected to suffer comparative disadvantage on account of prior culpable conduct. There is, of course, the stricter sense in which a *penalty* can only be inflicted by an appropriate authority.

respect to the existence of the threat (you triggered it). But in pushing you onto the grenade I am not blocking you, a present threat. I am, rather, using your body to block the threat in order to avoid being blown up myself. Further, here the permissibility of my using force against you *as a means of* defence against the threat may well depend on your degree of culpability in having triggered the grenade. For instance, it seems permissible that I push you onto the grenade if necessary to save myself if you deliberately triggered it in order to kill me, less so if you triggered it through carelessness, and impermissible if, having taken due care, you triggered it accidentally. But the permissibility of a self-defensive act against someone who him- or herself constitutes the present threat does not depend on culpability. If, having taken due care, you trip and lunge towards my chest with an unsheathed knife, it is permissible that I use necessary and proportionate force to ward you off.

In justifying self-defensive homicide we should look to what is morally distinctive about the use of self-defensive force against an unjust threat. Self-defensive force is directed at the threat itself, and it directly blocks the infliction of a serious, otherwise irreparable injustice. However, the permissibility of blocking an unjust threat - either to oneself or to another person - has moral limits. Hence, as I now explain, something like a 'theory of forfeiture' of the unjust aggressor's rights is necessary to the justification of self-defensive homicide.

The Relevance of a 'Theory of Forfeiture'

According to the second general line of justification of self-defence mentioned above, the fact that lethal force is used to ward off someone who is an unjust threat to one's life is crucial to the justification of self-prererential killing in a case of self-defence. Some moral absolutists who do not rely on the Double Effect justification of self-defence hold that it is permissible to *defend* one's life at the expense of someone who unjustly endangers it; whereas, they argue, it is morally impermissible to weigh the life of an unoffending person against one's own and then bring about death intentionally in the direction indicated by necessity and proportionality (e.g. as did

Dudley and Stephens). Charles Fried, for instance, says that killing the innocent (unoffending) as a means to an end of one's own offends against the principle of equal respect for persons. But he claims that self-defence against an unjust aggressor involves no unwarranted assertion of one's own moral priority.[26] This reasoning is traceable to Natural Law; but it is now invoked much more widely and extends well beyond moral absolutism. In another form, this general justification is very familiar, it being a common view that an unjust aggressor forfeits or abrogates his or her own right to life.

Some 'theory of forfeiture' in respect of an unjust aggressor's rights is often wrongly assumed to *justify* self-defence. The role that a 'theory of forfeiture' plays in the justification of self-defensive homicide is often misunderstood. Sanford Kadish almost makes this point when he remarks that even if we can provide an account of how an unjust aggressor forfeits the right to life, this will not give us a theory of justified self-defensive homicide.[27] The justification of defensive homicide cannot be *grounded* in a theory whereby an unjust aggressor forfeits the right to life. The fact that someone does not have a right to life does not itself give me a positive right to kill him or her. As I have said above, what is morally distinctive about genuinely self-defensive homicide is that my act of killing the aggressor is itself the use of necessary and proportionate force directly to block an unjust threat to my life.[28] An act of defence against an unjust threat to life is an instance of acting directly prevent a serious, otherwise irreparable injustice; and the permissibility of self-defensive homicide derives from the distinguishing feature of this act.

A 'theory of forfeiture' is necessary to the justification of self-defence because, as I have said, the permissibility of one's directly blocking an injustice, even a grave

---

[26]Charles Fried, *Right and Wrong* (Harvard University Press, 1978), p44.

[27]Sanford Kadish, 'Respect For Life and Regard for Rights in the Criminal Law', *California Law Review*, vol 64, no 4, 1976, p884.

[28]Grisez, op cit., rightly emphasizes this, even though (as I argued in 4.2) his argument about the divisibility of intention fails.

injustice such as an unjust killing, has moral limits.[29] The two conditions of necessary and proportionate force do not exhaust these moral limits. The rights, and especially the equal rights, of other people are a third type of moral constraint to my acting directly to block an injustice. For instance, it is not permissible self-preference that I defend myself by forcibly using an unoffending person as a shield against attack, or by diverting a threat aimed at me to a bystander who will then be killed.[30] The relevance of a 'theory of forfeiture' to the permissibility of self-defence is in addressing and eliminating this third type of moral constraint in respect of someone who is him- or herself an unjust threat.

A successful 'theory of forfeiture' would establish that self-defence against an unjust threat does not contravene a very important moral constraint against inflicting injury. In insisting that the use of necessary and proportionate self-defensive force does not *wrong* an unjust aggressor, a 'theory of forfeiture' morally distinguishes between the use of self-defensive force on an unjust threat, and the use of force on unoffending persons. And by underpinning the common assumption that self-defensive homicide does not wrong the unjust aggressor, a 'theory of forfeiture' characterizes self-defence as an exception to, rather than a justified infringement of, the general prohibition of homicide.

In explaining the relevance of a 'theory of forfeiture' to the justification of self-defence, we should also note that even if a successful 'theory of forfeiture' is possible, such a theory will not show that self-defensive homicide against an unjust threat is always right all things considered. Kadish comments that we do not have a theory

---

[29]And in civil society there are good reasons for *legally* restricting the extent to which private persons are permitted directly to block the infliction of injustice. Nevertheless, sometimes a private person is legally permitted so to act where the injustice is immanent, very serious, and irretrievable - self-defence being the paradigm case.

[30]It can, of course, be permissible in some circumstances that I prevent a greater injustice to one person by means of committing a smaller one against someone else (e.g. by using your antique vase as a weapon against an aggressor), or even that I prevent an injustice to one person by risking an equal injustice to another (e.g. by deflecting a missile which will certainly kill you in a direction in which it is very much less likely to hit someone else).

which successfully establishes that self-defence is always justified: (he means) positively right. And we do not have such a theory, in my view, because self-defence against an unjust threat is sometimes not justified in this sense. General justifications of self-defensive homicide are overstated if they purport to establish otherwise. This is so even if we confine ourselves to agent-perspectival justification.

My own account of the principles relevant to the self-defence justification of homicide has two elements. First, I have claimed that the positive right of self-defence is grounded in the fact that the self-defensive act directly blocks the infliction of an injustice. Secondly, I argue below that the justification of self-preference in a case of self-defensive homicide requires a particular specification of the right to life. It does not follow from the fulfilment of these two essential elements of the justification of self-defensive homicide that self-defence against an unjust threat to life is, all things considered, positively right in all circumstances.

5.3 FORFEITURE OF THE RIGHT TO LIFE

This section furthers the second element of my account of the justification of self-defensive homicide, by means of a critique of the commonly under-argued 'theory of forfeiture'. The notion of forfeiture of human rights, such as the right to life and the right to liberty, is also often invoked in other contexts, most notably in theories of the justification of punishment. Strictly speaking, a forfeit is a penalty; and as I argue below, the imposition of a penalty by way of a forfeited right need not imply culpability on the part of the one who forfeits. However, reference to *forfeiture* of one or more of the unjust aggressor's rights as part of the justification of self-defence can suggest that self-defence is justified as a punitive act. (This suggestion seems to have lead some writers to assume that only culpable aggressors can be said to forfeit the right to life, and that self-defence against a morally innocent unjust aggressor requires a separate justification.) For this reason, in setting out the principles of justified self-defensive homicide, I prefer to *specify* the scope of the right to life as possessed unconditionally

by unoffending persons, rather than to maintain that an offending person forfeits the right to life. The scope of *other* human rights is limited; and this is so in the case of rights which we can *also* be said to forfeit under certain conditions. For example, I can forfeit particular liberty or privacy rights by engaging in dangerous or criminal conduct. But the *scope* of the rights to liberty and privacy - *where these rights are possessed* - does not include my (say) engaging in intimate contact with others while concealing the fact that I have a highly contagious fatal disease.

Can One Forfeit the Right To Life?

The right to life is typically said to be an unconditional, human right. The characterization of the right to life as *unconditional* creates an immediate, insurmountable difficulty for a 'theory of forfeiture' in respect of this right: an unconditional right cannot, by definition, be *forfeited.* (An unconditional right can be *lost*, however, if one ceases to have the status in virtue of which the unconditional right is possessed.) If a person possesses a right to life which, in so far as this is a right not to be killed, he or she forfeits on becoming an unjust threat to the life of another, then this right is not unconditional. Further, outside the Natural Law tradition persons are now most commonly said to possess human rights simply *qua* humans or persons.[31] And if persons possess the right to life simply *qua* humans or persons, then they cannot forfeit the right to life by becoming unjust aggressors.

Something akin to a 'theory of forfeiture' is necessary to the required moral asymmetry between the parties in the case of self-defence: it is necessary to the

---

[31]See, e.g. Alan Gewirth, 'The Epistemology of Human Rights', *Social Philosophy and Policy*, vol 1, no 2, 1984, p1: 'Human rights are rights which all persons equally have simply in so far as they are human.' Joel Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life', *Philosophy and Public Affairs*, vol 7, (1978), p97, remarks that human rights are a class of moral rights that belong *equally and unconditionally* to all human beings, *simply in virtue of being human* (my emphases). Nancy Davis, 'Abortion and Self-Defense', op cit, p 183, n18, also represents a very strong recent trend in in describing as 'attractive and natural' the 'view that we can explain a being's possession of rights by appealing to the sort of being it is (the individual's properties, or the essential properties of the class to which it is a member).' Davis does remark that this view is problematic in a number of ways, but nevertheless she later claims: 'if a fetus has a right to life, then it has it in virtue of being the sort of entity that it is', p183.

justification of self-preferential killing. But a 'theory of *forfeiture*' entails that the right to life is not an unconditional right. As an alternative to forfeiture, we could retain the view that the right to life is an unconditional right and limit the *scope* of this right to unoffending persons. If we adopt this particular specification of the right to life (as I do in 5.4), then we cannot hold that this right is possessed equally by each person simply *qua* human or person.

A number of recent writers, some explicitly critical of Natural Law, hold versions of the view that an unjust aggressor forfeits the right not to be killed. For instance, Nancy Davis maintains that *aggressors* and *assailants* 'have in some sense done something that has weakened, forfeited or undermined their prior claims to full moral parity with the persons who are now their victims.'[32] And in taking there to be a separate issue of establishing the permissibility of self-defence against a blameless unjust aggressor, Susan Levine assumes that an unjust aggressor's *culpability* abrogates his or her moral standing in comparison with that of the victim.[33]

However, some other recent writers have questioned or criticised appeal to an unjust aggressor's forfeited right to life as part of the justification of self-defensive homicide. In a thought-provoking article Judith Jarvis Thomson explores what she takes to be the odd implications of the view that an unjust aggressor forfeits the right to life.[34] And George Fletcher argues that the notion of forfeiture is totally inappropriate to the justification of self-defence.[35] In my view, neither Thomson nor Fletcher succeeds in undermining the significance of a 'theory of forfeiture' to the justification of self-defensive homicide. The relevance of their discussions lies in the fact that their criticisms of forfeiture indicate important features of the nature of human rights, and of

---

[32]Davis, ibid., p202.

[33]Susan Levine, 'The Moral Permissibility of Killing a 'Material Aggressor' in Self-Defense', *Philosophical Studies*, vol 45, 1984, p69.

[34]Thomson, 'Self Defense and Rights', op cit.

[35]Fletcher, 'The Right to Life', *The Monist*, op cit.

the basis on which we possess rights such as the right to life; and these features of human rights are important to a satisfactory account of justified self-defensive homicide. These features I shall now expose in the context of a critical discussion of Thomson's and Fletcher's arguments about forfeiture.[36]

Thomson's criticism of forfeiture is centred on her example of a homicidal tank driver who is said to forfeit his right to life as he drives his tank at me, only to re-acquire this right when the tank stalls and he breaks both ankles jumping out to investigate the problem. Thomson highlights the apparently fortuitous way in which an aggressor's forfeited right to life is regained. This tank driver forfeits his right to life by unjustly threatening my life. But even if his malice remains, I would violate his right to life by killing him once his accident renders him harmless. As Thomson argues, we can appeal to utilitarian considerations in explaining why it is wrong that I kill the disabled tank driver. Killing him is now unnecessary, and would mean the loss of a life, whereas not killing him would mean no loss at all. But such considerations will not invariably rule out my killing the disabled tank driver if he has really forfeited his right to life by attacking me. For example, it might be possible for me to save the lives of five other people by using parts of his body. But it is impermissible that I kill him to acquire his organs for these other people. And, significantly, my killing him for this reason seems equally a violation of his right to life as would be my killing anyone else for his or her organs. The tank driver's forfeited right to life is restored once he ceases to be a threat.

Thomson discusses what she takes to be the obvious alternative to forfeiture. This is the view that human rights are not absolute (so as either possessed and overriding, or else forfeited), but prima facie (i.e., capable of being overridden in some circumstances by more weighty moral considerations such as the more stringent rights

---

[36]For convenience I shall use 'human rights' to refer to those moral rights that we are typically said to possess by virtue of the types of beings we are. This use is conventional; however, I note that it may be considered misleading by those who to think that the basis on which we possess rights such as the right to life is not (biological) humanness.

of others). Self-defence is permissible on this alternative view because the aggressor's right to life conflicts with, and is overridden by, the more stringent right to life of the victim. However, as Thomson argues, a satisfactory justification along these lines needs at least to explain *why* the victim's right to life is the more stringent. And it seems to me that any explanation will come down to something like a forfeiture view. For the aggressor has lost or sacrificed something morally very weighty in virtue of his attack. And if he has not forfeited the right to life itself, then he has forfeited moral parity in respect of this right with his victim to the extent that his victim does not wrong him by killing him. We must also address here the apparently fortuitous way in which the right to life's forfeited stringency can be re-acquired. This is because once the tank driver is harmless, it is just as morally offensive that I kill him as a means of self-preservation (say, to use his body for food, or to acquire his heart and kidneys for use in a transplant) as would be my killing anyone else for this reason.

Thomson identifies two related difficulties involved in appeal to forfeiture as part of the justification of self-defence. The first is a general problem with the claim that we can forfeit or abrogate our human rights while we continue to possess in full strength those characteristics (e.g. humanness, personhood, autonomy) in virtue of which we are typically said to possess these rights. (Despite familiar disagreements in recent applied ethics about which characteristic or set of characteristics gives rise to a right to life, those outside the Natural Law tradition typically regard their favoured criterion as a descriptive feature of the beings that possess this characteristic: a descriptive feature which has normative implications.)[37] Thomson sees the lack of a two-way necessary connection between the aggressor's forfeiture of the right to life and his or her malice as a second difficulty for forfeiture. She assumes that (only) *culpable* aggressors forfeit the right to life. But culpable aggressors regain the right to life when, by accident, they are rendered *harmless*.

---

[37]See, e.g. Davis, 'Abortion and Self-Defense', op cit., pp183-184, n18.

Thomson's difficulties with forfeiture can be overcome by recognising that our possession of the right to life depends partly on our conduct. Both difficulties disappear if we accept that as individuals we possess the right to life by virtue of the kinds of beings we are *and* in so far as we are unoffending.

Fletcher attempts to provide a definitive explanation of what he takes to be the irrelevance of forfeiture to the justification of self-defensive homicide. He points out that the legal idea of forfeit relates to material possessions and also incorporeal goods of a kind that can be transferred, such as citizenship and copyright interests. Legal rights can be forfeited voluntarily or involuntarily, and are forfeited even with regard to persons unaware of the forfeiture. If your legal right to something has been forfeited, this simply means that you are no longer the owner of the particular interest; and thus, the knowledge or ignorance, and the intentions of anyone depriving you of that interest are irrelevant to the legality of the deed: putative violators of your (now non-existent) right act with impunity. The original conception of the outlaw was of someone who had forfeited the right to life. Outlaw status could be conferred by the crown on someone who had done no wrong; and as someone who lived at the mercy of others, the outlaw could not complain of being hunted down even by those unaware of his status. But there is not, Fletcher argues, a plausible analogy between aggressors and outlaws. In modern western legal systems self-defence must be justified, and this requires a proper intention, with knowledge of the circumstances which would justify the conduct. If the aggressor really has forfeited the right to life, such justification would be irrelevant.[38]

Surely it is not always true that where a person does not in fact have a legal right to a particular interest (e.g. the right to reside in a particular place), the knowledge and intentions of someone seeking to deprive him or her of that interest are irrelevant to the legality of the deed. In requiring justification before a person may legally be evicted,

---

[38]I closely paraphrase Fletcher's argument in this paragraph.

detained, searched, arrested, or imprisoned, the law protects a more general interest which all persons have in not being interferred with in the absence of good reason.[39] This notwithstanding, Fletcher's claim that in modern western legal systems self-defence requires both a proper intention and knowledge of the circumstances which would justify the conduct is probably now an overstatement in two respects. The first respect highlights a possible difference between legal and moral justification on which I remarked in chapter 2.[40] The second respect concerns putative self-defence. Fletcher holds that justified acts must be objectively and positively right, and that putative self-defence is not a justification but an excuse. In chapter 2, I set out a more complex account of justification and excuse. However, if we accept Fletcher's more restrictive view that only actual self-defence which is objectively and positively right is justified, we cannot then agree with Fletcher that all modern western legal systems require that self-defence be justified.[41]

More important here is the fact that Fletcher's argument draws on a very wide concept of legal forfeiture that includes forfeiture by decree. But these days if, for example, a person ceased to have citizenship through no conduct of her own, but merely as the result of a change in the laws of the land, we would say that the relevant legal and political rights she once possessed have been abolished or that she has been deprived of them. It would be very misleading to say that *she has forfeited* them. 'Forfeit' usually refers to a right lost or a penalty paid due to some crime or fault, breach (which need not be voluntary) or neglect of contract or rules on the part of the

---

[39] I owe this point to Hugh LaFollette.

[40] See chapter 2, text accompanying n20 and n22.

[41] Fletcher's claim that self-defence requires a subjective belief in justification for the defence to succeed is true of most American statutes (Greenawalt, 'The Perplexing Borders', op cit., p1905). But Fletcher remarks elsewhere that the Model Penal Code in the United States 'assimilates putative to actual self-defense, referring [wrongly in Fletcher's view] to both as claims of justification.' ('Rights and Excuses', *Criminal Justice Ethics*, vol 3, no 2, 1984, p17.) In 'The Right Deed for the Wrong Reason', op cit., pp293-321, Fletcher critically discusses the view that justification defences should be available irrespective of the intent of the actor. See also Paul H. Robinson's reply, op cit., pp13-19 and pp21-29.

person who forfeits. Appeal to the forfeited human right to life of an unjust aggressor is clearly intended as analogous to this narrower concept of forfeiture. And this concept of forfeiture can coherently be extended to the right to life provided this right is sufficiently similar in the relevant respect(s) to forfeitable institutional, political and legal rights.

Provided we acknowledge that our possession of the right to life is conditional on our conduct, there is no conceptual difficulty in saying that an unjust aggressor forfeits the right not to be killed. We readily assume that our possession of other important human rights, e.g. liberty and privacy rights, is conditional on our conduct. And again, if our conduct can result in our forfeiting the right to life, then as individuals we do not possess this right simply by virtue of the kinds of beings we are.

Human Rights and Forfeiture

Many recent writers appear oblivious to the contradiction in their acceptance of both of the following: the view that simply *qua* humans or persons we possess the right to life equally and unconditionally, and the view that this right can be forfeited or suspended when we act immorally or dangerously.[42] However, some Natural Law theorists have been conscious of the need to reconcile their own talk of forfeitable or defeasible *natural* rights with their claim that we possess such rights by virtue of our human nature. There are serious problems associated with the Natural Law derivation of rights which I do not wish to minimize.[43] Nevertheless, attempts within the Natural Law tradition to reconcile the possession of natural rights with forfeiture, and also with apparent clashes of these rights, bring to the surface that our possession of such rights depends partly on our conduct.

---

[42]Joel Feinberg draws on Locke and Blackstone in distinguishing an inalienable right and a non-forfeitable right. ('Voluntary Euthanasia', op cit., p111.) But this distinction doesn't reconcile the forfeitability of human rights with the claim that we possess these rights unconditionally simply in virtue of the types of beings we are.

[43]See. e.g. L. W. Sumner, *The Moral Foundation of Rights* (Oxford University Press, 1987), ch. 4.

Earlier this century the Natural Law theorist Jacques Maritain argued that natural rights must be inalienable (he meant by this 'non-forfeitable'), 'since they are grounded in the very nature of man, which of course no man can lose.'[44] Maritain held that *this* (descriptive) conception of the basis on which we possess natural rights could be reconciled with his appeal to forfeiture in justifying capital punishment. Maritain's attempted reconciliation distinguishes between the possession of an inalienable right and the right to exercise that right. By sinning, Maritain argues, persons can forfeit the right to exercise an inalienable right. However, these persons continue to possess the right itself by virtue of their human nature. According to Maritain, although we possess the natural right to life simply by virtue of being human, our possession of a distinguishable right - viz. the right to exercise the right to life - is conditional on our not transgressing in particular ways.[45]

The possession and the exercise of natural or human rights are distinguishable, and for the reasons Maritain gives. People can possess human rights which oppressive regimes do not allow them to exercise. And where resources are scarce it can be wrong that a person exercise a particular human right (e.g. the right to procreate, or some property right). But Maritain needs to make sense of the claim that a person can continue to possess the right to life when he or she has forfeited the *right* to exercise that right. And this distinction is vacuous if both of these purported rights are moral rights. The distinction between a right, and the right to exercise that right, makes sense only in terms of the further distinction that Maritain erroneously uses in this context: that between legal or political rights and moral rights. For example, if one lived under a political regime in which the legal right to exercise the right to life was conditional on (say) one's buying a license (a legal entitlement to grow or obtain food, to defend

---

[44]Jacques Maritain, *Man and the State* (London: Hollis and Carter, 1954), p 92.

[45]On this view only serious transgressions could result in forfeiture of the right to life. Further, these would need to be transgressions which endanger others in a way which makes killing the sinner morally appropriate. See Grisez, op cit., pp66-72, on these aspects of Aquinas on capital punishment.

oneself, etc.), then to let one's license lapse would be to forfeit the legal right to exercise the right to life. Nevertheless, in this case we would say that one continued to possess the *moral* right to life, and we would also say that one continued to possess the moral right to exercise that right. However, to forfeit the *moral* right to exercise the right to life would be to forfeit the moral right itself.

Unfortunately Maritain does not explain how capital punishment is supposedly justified in terms of his distinction between the right to life itself and the right to exercise that right. If I have no right to exercise my right to life, then I have no right to resist the public executioner. But my forfeiting the right to exercise my right to life does not establish a positive right on the part of public authority to kill me. The mistaken assumption that a 'theory of forfeiture' could ground the justification of capital punishment is analogous to the mistake of assuming that appeal to the aggressor's forfeited right to life grounds the positive right of self-defence.

In support of his appeal to forfeiture as part of the justification of capital punishment, Maritain needed to maintain something closer to Aquinas' position: he needed to say that possession of the right not to be killed is conditional on our conduct. I noted in chapter 3 that Aquinas invoked an extreme forfeit view (not expressed in terms of rights) as part of the justification of capital punishment by public authority.[46] Aquinas realised that his claim that capital punishment was justified *for the common good* required him to maintain that the sinner who deserves capital punishment no longer has that quality which makes it wrong to kill someone for the good of others. This quality is free-will, which for Aquinas makes a man master of himself, and hence impermissibly subordinated to another's good. Aquinas argued that by deviating from the rational order and so losing 'his human dignity in so far as man is naturally free and an end unto himself', to that extent the sinner 'lapses into the subjection of the beasts and their exploitation by others'. Nevertheless, free-will is exercised in sinning, and

---

[46]See again Grisez's critical discussion of Aquinas' justification of capital punishment. Other Natural Law theorists, e.g. Locke, also held a 'forfeiture' justification of capital punishment.

Aquinas held that public judgment is necessary to justified capital punishment because he recognised that the sinner remains a man.[47]

The apparent tension within Aquinas' position is partly resolved by the fact that his concept of human dignity is strongly normative. For Aquinas, our having human dignity requires that we obey the 'rational order': we do not possess human dignity simply in virtue of the fact that we are human beings with free-will. Thus, a person can forfeit human dignity by morally inappropriate conduct. All the same, the fact that this person remains a human being continues to have moral implications. John Finnis expresses a normative conception of the basis on which we possess human *rights*. Finnis holds that we have rights as human beings, and that our continued possession of these rights depends on our compliance with rules governing just interaction between persons.[48] He argues that capital punishment can be justified because the guilty person forfeits the right that basic goods be respected in his person. According to Finnis, the guilty person forfeits this right by violating a system of rights which ensures the order of fairness in the community.

A normative conception of the possession of rights associated with a particular descriptive status is also familiar in recent thinking outside Natural Law. For example, biological or social parenthood is commonly viewed as necessary but insufficient to secure parental rights: a parent must also perform satisfactorily *as a parent*.[49]

Forfeiture or Specification of the Right to Life?

Finnis maintains that natural or human rights where possessed are absolute. He tackles the problem of the apparent conflict of rights such as the right to life and the right to liberty, by claiming that the form in which human rights are absolute is one in which they are already subject to specification, limitation and demarcation. He

---

[47]Aquinas, *Summa Theologiae*, op cit., 2a, 2ae, 64, 2.

[48]Finnis, *Fundamentals of Ethics*, op cit., p128.

[49]I owe the useful analogy with parental rights to Francis Snare.

comments as follows on the specification of rights as solving apparent conflicts of rights. 'There is no alternative but to hold in one's mind's eye some pattern, or range of patterns of human character, conduct, and interaction in community, and then to choose such specification of rights as tends to favour that pattern, or range of patterns.'[50] According to Finnis we possess absolute human rights already qualified in terms of considerations such as the equivalent human rights of others; and at certain points our human rights simply cease. For example, he isolates as an exceptionless or absolute human claim-right the right not to have one's life taken directly as a means to any further end. Here specification is built into the right to life by reference to *intentional* killing. For Finnis, self-defensive homicide does not violate the aggressor's right to life and is justified as a case of double effect.[51]

Finnis' particular specification of the right to life cannot be part of the justification of self-defensive homicide in my view. I argued in chapter 4 that some self-defensive homicide is intentional killing, and also that lack of intention to kill is insufficient to establish the permissibility of self-preferential killing in cases of double effect. However, Finnis is right that specification of the right to life is necessary to the justification of self-defensive homicide, and he is right that an appropriate limitation of the aggressor's right to life in the case of self-defence will not depend on the aggressor's being culpable.

Partly because (I assume) Finnis believes that *forfeiture* of a human right requires culpability on the part of the one who forfeits, Finnis opts for specification of the right to life as part of the general justification of self-defensive homicide. However, culpability is neither conceptually nor morally necessary to forfeiture: blameless conduct, and even involuntary conduct, can result in the forfeiture of rights. For example, under the regulations of some theatres my entitlement as a ticket holder to

---

[50]Finnis, *Natural Law and Natural Rights*, op cit., p219.

[51]Also see Finnis, *Fundamentals of Ethics*, op cit., p132.

attend the first part of a performance is forfeited simply by my arriving after that performance has commenced. It is irrelevant that my late arrival is entirely blameless (it might even be commendable, e.g. I stopped along the way to help out at an accident), or that it is involuntary (e.g. someone delayed me by driving into the back of my car).

Some writers may assume that because the right to life is such an important human right, the conditions of its forfeiture must include culpability. But as typically applied, a distinction between culpable and blameless aggressors in respect of forfeiture has no substantive implication for self-defence. Culpable aggressors are said to forfeit the right to life; the right to life of a blameless unjust aggressor is said to be justifiably infringed.[52] Further, some writers may distinguish between the forfeiture and the infringement of an unjust aggressor's right to life in order to emphasize that the moral asymmetry between a culpable aggressor and the victim is greater than the moral asymmetry between a blameless unjust aggressor and the victim. But if it is important to register this moral difference, it can, and should, be acknowledged without resorting to two justifications of *self-defence*, one claiming that a culpable aggressor forfeits the right to life, and the other maintaining that a blameless aggressor's right to life is justifiably infringed. The permissibility of self-defensive homicide either derives from an unjust aggressor's culpability or it does not. Most who invoke the distinction between forfeiture and infringement in the case of self-defence assume that necessary and proportionate self-defence against blameless unjust aggressors is permissible. And in that case, it is inappropriate and distracting to posit separate justifications of self-defence based on a distinction between culpable and blameless aggressors.

A distinction between the *forfeiture* of a culpable aggressor's right to life, and the justified *infringement* of a blameless unjust aggressor's right, might also arise from the claim that, in the absence of wider danger, self-defence against a blameless unjust aggressor is an agent-relative permission. We should reject this view. In the absence

---

[52]And some who distinguish between forfeiture and infringement of an aggressor's right to life, e.g. Thomson, also uncritically assume that killing an innocent shield of a threat is obviously permissible.

of wider danger, surely it can be permissible that I defend a helpless person's life against a maniac's attack, by using lethal force if necessary. This can be so, in my view, even when the maniac will come to his senses if not killed. Consider this example: You, Barney, Fred, and I are workmates. Barney arranges to kill you by slipping a drug into Fred's drink which will take effect in half an hour, making the physically very powerful Fred temporarily homicidal. During the next half-hour Barney locks you and Fred together in a room. Barney leaves the scene. The drug takes effect, and Fred ties you up and is about to strangle you. But in the meantime I have stumbled across the details of Barney's plan, and through a skylight I see Fred attacking you. You see me and plead with me to help you. I know both that Fred is blameless, and that provided I do not release Fred from the locked room before the drug wears off, the danger is confined to you. I also foresee that in defending your life I would probably kill Fred. Is it *permissible* that I defend your life in these circumstances? Yes. Here Nozick is right: the principle that prohibits physical *aggression* does not prohibit the use of force *in defence* against another party who is a threat, even though he is innocent and deserves no retribution.[53] Provided 'threat' means 'unjust threat', this is so whether one is defending oneself or another person.

There is no reason in principle against developing a theory of *forfeiture* of the right to life as part of the justification of self-defence against an unjust threat. Culpability is neither conceptually nor morally necessary to the conditions of forfeiture of a right; and there need be no substantive difference between our saying that an unjust aggressor forfeits the conditional right to life and, alternatively, our adopting an appropriate specification of the unconditional right to life.[54] However, 'forfeiture' can strongly suggest penalty - indeed this seems to be its central sense. And this punitive connotation, together with the fact that a 'theory of forfeiture' based on culpability is

---

[53]Nozick, *Anarchy, State and Utopia*, op cit., p34 (my emphases).

[54]James W. Nickel comments that the conditions for alienating a right can also be specified in its conditions of possession. ('Are Human Rights Utopian?', *Philosophy and Public Affairs*, vol 11, no 3, 1982, p248.)

commonly invoked in justifications of punishment, are practical reasons for preferring specification of the right to life as part of the justification of self-defensive homicide. Self-defence is not essentially a punitive act.

5.4 SPECIFICATION OF THE RIGHT TO LIFE

In this section I explain some of the reasons why appropriate specification of the right to life is often overlooked or rejected. I go on to outline an appropriate specification of the right to life, as entailing the right not to be killed, and to clarify some of the more important implications of this specification.

The problems of racism, political oppression, poverty and starvation, discrimination, abortion, euthanasia, the treatment of non-human animals, our obligations to future people, etc., have focused much of our conceptual thinking about rights in the latter half of this century on the issue of those entities who can be said to possess (equal) human rights. This focus is morally very important. But it has often given rise to a lop-sided account of the basis on which as individuals we possess human rights. A number of the moral problems I have just mentioned do raise questions about the scope of individual human rights. This is because these problems require that we determine the extent to which an individual's possession of the relevant rights entails obligations of assistance on the part of others. Nevertheless, in discussing whether the right to life implies positive obigations of assistance on the part of others, and if so how far these obligations extend, or in defending or denying the existence of the right to life in some context (e.g. abortion), it is easy to lose sight of an important element of the older concept of *natural* rights. Natural rights are conditional rights: their continued possession, by those said to possess these rights by virtue of their nature, is conditional on conduct.[55]

---

[55]H. L. A. Hart remarks that natural rights are rights we have *qua* men; but he is careful to note that this is consistent with *specification* of such rights in a way that makes their possession conditional. ('Are There Any Natural Rights?', reprinted in *Political Philosophy*, edited by Anthony Quinton (Oxford University Press, 1967), p53.)

Attending to the principles relevant to justified self-defence homicide can correct the prevalent recent tendency in applied ethics to regard a characteristic or capacity (e.g. personhood or autonomy) as a sufficient condition of the possession of an *unconditional* right to life. Alongside this prevalent recent tendency is the common, incompatible, invocation of 'forfeiture' in the justification of self-defence.[56] However, if the right to life *is* unconditional, then the permissibility of self-defensive homicide requires that the scope of this right be *specified* by reference to our conduct.

For the purposes of distinguishing self-defence as an exception to the general prohibition of homicide, an appropriate specification of the right to life might be explicitly rejected, rather than neglected, on the assumption that it would require what Thomson effectively criticises as 'the moral specification of rights'.[57] Thomson accuses what she calls 'the moral specification' of human rights of circularity. She points out that if the possession and content of the right to life and other human rights is determined by a prior view about what is and what is not morally permissible, it is then circular to explain the permissibility of particular acts, such as self-defence, in terms of the non-violation of these rights. Thomson suggests that if this circularity cannot be eliminated it calls into serious doubt the relevance in moral argument of appeal to rights as independent permissions and constraints.

The moral specification of human rights can avoid Thomson's criticism of circularity, provided the scope of such rights is specified in terms of what is just or fair treatment of the particular individual persons who possess these rights.[58] Indeed the scope of such rights should be specified in these terms, because the point of appeal to rights in moral evaluation is to invoke considerations of *just* treatment of individuals *as*

---

[56]Feinberg notes that one must qualify for a *forfeitable* right by meeting certain standards of conduct. ('Voluntary Euthanasia', op cit., p112.) Feinberg thinks that aggressors can forfeit the right to life, but he does not reconcile this with his view that we possess human rights equally and unconditionally simply in virtue of being human.

[57]Thomson, 'Self-Defense and Rights', op cit.

[58]In specifying the right to life in order to except self-defensive homicide, 'just treatment' is not used in the retributive sense.

individual persons.[59] In a case like that of Foot's runaway tram, the fact that a fair selection procedure is used in choosing between lives does not mean that an injustice is not done to an *unoffending* person killed in the act of saving another or others. And further, as Thomson herself accepts, appeal to rights does not itself determine whether or not a particular act is morally justified all things considered.

In criticising Thomson's rejection of the moral specification of rights, W. A. Parent specifies the right to life as the right not to be killed unjustly.[60] However, Parent does not distinguish clearly enough between acts that are unjust, and acts that are unjustified. When specifying the right to life for the purposes of excepting self-defence from the general prohibition of homicide, we need to invoke the distinction between killings that do not inflict unjust harm on those who are killed, and killings which inflict unjust harm on those killed but which, nonetheless, can be justified in the circumstances.[61] For example, I do not inflict unjust harm on a crazed attacker if I push him off a building in using necessary force to stop him pushing me off. This person does not have a right against me that I not use necessary and proportionate force against his unjust attack. But say my car's brakes fail on a hill and I deliberately steer towards one person on the footpath, killing her, rather than steering into a group of children on a pedestrian crossing. In this latter case I not only kill the person on the footpath, I also wrong her - I infringe her right to life - although justifiably in the circumstances. Killings which violate the victim's right to life are unjust; but they are not necessarily unjustified all things considered. Self-defensive killing, which does not violate the victim's right to life, is not unjust; but it is not necessarily justified all things considered.

---

[59]Foot is right about this. See, e.g. 'Euthanasia', and 'The Problem of Abortion', both reprinted in *Virtues and Vices*, op cit.

[60]W. A. Parent, 'Judith Thomson and the Logic of Rights', *Philosophical Studies*, vol 37, 1980, pp405-418.

[61]My awareness of the importance of this distinction in fact owes much to Thomson's 'Rights and Compensation', op cit.

Further, the specification of human rights in terms of what is just would not eliminate conflicts of rights. This is because sometimes the infliction of unjust harm can be justified all things considered. (In order to eliminate conflicts of rights, specification *would* need to be circular in the way Thomson says it is.)[62] However, an appropriate specification of the right to life as reflecting just treatment of individuals would overcome the difficulties revealed by Thomson's discussion of forfeiture. The circularity to which Thomson draws attention highlights the daunting task of providing an independent defence of the specification of human rights as reflecting what is *just* treatment of the particular individuals who possess these rights.

An Appropriate Specification

The unconditional right to life can be specified as in the following way. An *unoffending* person possesses an unconditional right to life: a person possesses an unconditional right not to be killed only in so far as he or she is not violating the equal right of someone else. In order that self-defensive homicide be permissible self-preference, and an exception to the general prohibition of homicide, the outer limit of the unconditional right not to be killed must be set at the point at which a person unjustly threatens another person's life or proportionate interest. No doubt this specification will strike some people as unduly hard on blameless unjust aggressors. But we need to accept this view if we are to maintain that necessary and proportionate self-defence against a blameless unjust aggressor is permissible self-preferential killing, and that, as self-defensive homicide, it is morally distinguishable from, e.g. one's deflecting a lethal threat to oneself onto an innocent bystander or one's using an unoffending person as a shield against attack.

---

[62] Finnis specifies the right to life as the right not to be killed intentionally: for Finnis, *impermissibly*. (*Natural Law and Natural Rights*, op cit., p225.) In his view, the tram driver's killing the one man would not violate that man's absolute right to life, because that man's life is not 'taken directly as a means to any further end'. One problem with Finnis' position is that this is *also* true of each of the five men on the tram track if the driver steers into them instead of into the one man. Surely, in killing the one person on the footpath I wrong this person, even if I do so justifiably in the circumstances. In this case I commit a lesser injustice in order to avoid a greater one (running into the children on the crossing): it is the lesser evil.

Implications of this specification

It is important that I bring out the following implications of this specification of the right not to be killed, as a right held unconditionally by unoffending persons, i.e. by those persons who do not unjustly threaten the lives of others. This will clarify the essential features of this specification, and it will also provide a useful framework upon which to restate the central points of the thesis. I now bring out these implications by way of four examples. Say,

(i) Alex (a psychopath) and Bernard are on top of a tall building. Alex is about to stab Bernard to death. Bernard being unaware of this, pushes Alex over the edge to his death as part of a plan to inherit Alex's money. In fact Bernard's act is necessary to save himself from Alex's attack. If Bernard's pushing Alex over the edge is wrongful, this is not because it infringes a right that Alex has in these circumstances that Bernard not inflict this harm on him. Further, had Alex got in first, and had his stabbing Bernard been necessary to stop Bernard pushing him over the edge, Alex would not have infringed a right of Bernard's that Alex not inflict this harm on him.

(ii) Conall is about to shoot Donal dead. Donal, realising this, shoots Conall, killing him. Donal knows that his act is necessary for self-defence; but Donal's motive is not self-defence. (Donal is generally indifferent to his own death, and in slightly different circumstances he would even prefer to let himself be killed.) Rather, Donal opportunistically shoots Conall in order to prevent Conall exposing Donal's best friend as an embezzler. Again, if Donal's killing Conall is wrongful, this is not because it infringes a right Conall has in these circumstances that Donal not inflict this harm on him.

I should note a possible denial of implication (ii). Someone might claim that in the example Donal *does* violate Conall's right to life because Conall was not an unjust threat to Donal in these circumstances. It might be argued that if Donal does not mind

being killed by Conall, then with respect to Conall, Donal has waived his right not to be killed.[63] This argument is faulty. Certainly, someone (say Donal) does not infringe Conall's right that Donal not do *x* if this right is discretionary and, with respect to Donal, Conall has waived it. And Donal's doing *x* does not violate Conall's right if Donal does *x* with Conall's permission. Conall might waive a right against Donal by action or inaction, in one of the following ways: by entering into a particular relationship with him (e.g. a partnership or an agreement), by letting a particular relationship lapse, by explicitly consenting to Donal's doing *x*, or simply by publicly abandoning something (e.g. if Conall puts some old chairs out for the garbage collection, Donal does not infringe Conall's property rights by taking these chairs for his weekender). But Donal's being indifferent to, or even pleased about, Conall's attempt to kill him does not entail that Conall does not violate Donal's right to life because, with respect to Conall, Donal has waived this right; nor does it entail that Conall is acting with Donal's permission. One example will suffice to illustrate this point. Eric is trying to diet. Someone gives him a large box of his favourite chocolates. Eric resolves to keep these chocolates for guests, knowing full-well that if the chocolates are in the house he'll be hopelessly weak and eat them himself. A babysitter who is minding Eric's children raids the cupboard and eats the chocolates. Eric is fairly easy-going, and when he comes home and discovers the chocolates being eaten, or (later) returns home and discovers the chocolates gone, he is pleased on balance that the temptation has been removed. And the babysitter's action has benefited Eric: he stays on the diet. Does it follow that the babysitter acted with Eric's

---

63 I mention this possible objection because (in another context) Derek Parfit appears, puzzlingly, to claim that an adult person's being pleased about the effect for him of his mother having conceived (him) when she did, and the fact that his mother's act benefited him, means that in conceiving when she did his mother did not infringe his (possible) rights in this regard because he has waived these rights. (*Reasons And Persons* (Oxford University Press, 1984), p364.)

permission? Does it follow that in acting as he did the babysitter did not infringe Eric's right to the chocolates? It does not.[64]

(iii) Felix is about to kill Gerald. Gerald can defend his life by using a weapon against Felix which will kill Felix and also two unoffending persons, Herbert (a bystander) and Imogen (Felix's hostage). If Gerald uses this weapon and kills Herbert and Imogen in the course of self-defence against Felix, Gerald infringes both Herbert's and Imogen's right to life. If it is permissible that Gerald fire this weapon, this is in spite of the fact that in so acting he violates both Herbert's and Imogen's right not to be killed. If, on the other hand, Gerald's firing the weapon is impermissible, this is in spite of the fact that his act does not infringe Felix's right to life.

(iv) Joan mistakenly believes Kevin is about to shoot her in cold blood. Her belief is justified^{ii}; and Joan takes what she justifiably^{ii} believes to be necessary and proportionate action in self-defence against Kevin, killing him. Joan's act is justified^{ii}; this is in spite of the fact that her act violates Kevin's right to life.

All these examples emphasize that we have an unconditional right not to be killed if and only if we are unoffending. Examples (i) and (iv) also make clear that our having a right not to be killed is an objective matter, not one which is determined on the basis of the judgment of the agent in the circumstances. Putative murderers need not violate the right to life of their victims [(i)], and putative self-defenders can do so [(iv)]. Example (iii) restates the point that my having a right of self-defence against an unjust threat is insufficient to establish the permissibility of self-defence all things considered. In making the point that someone who unjustly threatens another's life does not have a right not to be killed, examples (i) and (ii) point to the relevance of the agent's motive to the justification^{ii} of a particular *agent's act* of self-defence. The right of self-defence is grounded in the fact that the act is *defensive*: it is the direct blocking of an imminent,

---

[64]Gregory S. Kavka comments that one can promote a person's interests, on balance, but violate his rights, e.g. to autonomy or to be told the truth. ('The Paradox of Future Generations', *Philosophy and Public Affairs*, vol 1, no 2, 1982, pp96-97.)

unjust threat to life. The permissibility of self-preference in the case of self-defensive homicide requires a particular specification of the right to life as entailing the right not to be killed. However, the fact that an act actually directly blocks an injustice, together with the fact that the act does not actually violate the aggressor's right not to be killed, are insufficient for moral justification of *an agent's act.* In distinguishing moral and legal justification in chapter 2, I commented that moral justification of an agent's act requires agent-perspectival justification, and also that the act be done for the right reason. A killing which does not violate the victim's right to life can be morally wrongful on other grounds. For example, it can involve a vicious or morally offensive motive [(i) and (ii)]; it might violate other rights, of the victim or of other people [(i) - (iii)]; and it can inflict disproportionate harm on unoffending persons [(iii)].

5.5 GROUNDING AN APPROPRIATE SPECIFICATION

In setting out the principles of justified self-defensive homicide, I have confined the unconditional right to life to unoffending persons - to those who are not unjust threats to the lives or proportionate interests of others. This specification of the right to life avoids circularity. The right to life is specified in terms of what is, an what is not, unjust treatment of individuals - its specification does not represent a view about what acts are justified or unjustified all things considered. Justified violations of an unoffending person's right to life are possible. If an unoffending person is killed (say) in the course of self-defence or in circumstances of necessity, he is treated unjustly: his right to life is violated. And, as an unoffending person's right not to be killed is equal to my own, self-preferential killing of *unoffending* persons must be justified on agent-neutral grounds as the lesser evil. Further, in some circumstances *self-defensive* homicide is unjustified all things considered, even though it does not violate the right to life of the aggressor.

In my view, this specification of the right to life is necessary to a sufficiently complex account of the justification of self-defensive homicide and of the broader

considerations relevant to justified self-defensive action. Further, this specification represents self-defence as an exception to the general prohibition of homicide *for the right reason* - that reason being that genuinely self-defensive homicide does not inflict unjust harm on its victim. Shelly Kagan remarks that any exception to the right not to be harmed - in order to allow for the permissibility of self-defence - must be implied by the account offered of how and why persons have a right not to be harmed in the first place.[65] Kagan is right about this. And although the above specification of the right to life has considerable intuitive plausibility as reflecting what is, and what is not, unjust self-preferential killing, a complete justification of self-defensive homicide in accordance with the principles of justified self-defence that I have set out in this thesis would need to defend this specification of the right to life in the right terms.

A defence of the above specification as derived from a view about why persons have a right not to be killed in the first place, is something that I cannot realistically attempt within the confines of this thesis.[66] Kagan suggests that two types of indirect moral theories, the two-level approach and the contract approach, might yield the desired argument: 'the promulgation of rules permitting self-defense might well be optimal; parties to an agreement might well insist that specific protections under the contract are to be conditional on conformity to that contract.'[67] Both these indirect moral theories have noteable contemporary advocates; and *prima facie* both will seem to many to be plausible candidates for generating the required exception to the relevant moral constraint in the case of self-defence. However, both these theories seem unlikely to me to ground the right of self-defence, and the corresponding appropriate specification of the right to life, *in the right terms*: that is to say, they seem unlikely to ground the right of self-defence in what is morally distinctive about self-defensive homicide. My discussion of this point in this section makes no pretence to be

---

[65]Kagan, op cit., p135.

[66]See also chapter 4, n34 and n62 for closely related unfinished business.

[67]Kagan, op cit., p135.

comprehensive or decisive. It is intended to emphasize the argument of this chapter that the justification of self-defensive homicide derives from what is morally distinctive about self-defence: that is, that self-defensive force directly blocks the infliction of an injustice, and that the infliction of necessary and proportionate self-defensive force does not inflict unjust harm on the person posing the unjust threat. A right of self-defence as *derived from* a moral contract, or from a two-level theory of optimality, would seem (perhaps necessarily) to miss this central point. In indicating why this seems so, I draw upon standard criticisms of both these indirect moral theories.

Specification by contract

At first, a contract approach looks the more promising of the two indirect moral theories as generating an appropriate exception to the constraint against inflicting harm in the case of self-defensive homicide. However, in order to except all genuinely self-defensive force against unjust threats to life, the standard of each person's conformity with the constraints of the contract would need to be one of strict, or near-strict, liability for breaches of the contractual conditions. Conduct sufficient to put a person outside the contractual protections would need to include blameless attacks and assaults, even involuntarily assaults, on unoffending persons. Furthermore, breaches would need to include some passive threats (e.g. Nozick's man thrown down the well), which are not strictly *conduct* on the part of the person who poses the threat.

Perhaps contracting parties would accept a standard of strict, or near-strict, liability for breaches of the relevant contractual constraint. But on what grounds would they accept it? If their acceptance of a very strong standard of conformity were to stem from their recognition that use of genuinely *self-defensive* force against a transgressor - even a blameless, involuntary, or passive transgressor - does not infliction unjust harm on this person, then the right of self-defence is recognised in, not generated by, the

moral contract.[68] If a very strong standard of conformity were to be accepted by contracting parties on other grounds, (say) sophisticated self-interested ones, then the right of self-defence would not be derived from the morally distinctive feature of the use of self-defensive force, but from what is believed to be individually optimal on balance.[69]

Contracting parties could, of course, confine conduct sufficient to put someone outside the relevant contractual protection to culpable breaches of the contract. But if breaches must be culpable before the contractual protection is void, how culpable must they be? Deliberate or reckless breaches would no doubt be deemed sufficiently culpable to put someone outside the contractual protection. But what about negligent breaches? There are degrees of negligence, including cases of very minor forgetfulness or inadvertence which, due to very bad luck, could result in someone's becoming a threat to an unoffending person's life. And if only culpable breaches put someone outside the relevant contractual protection, then the use of lethal self-defensive force against a temporarily insane person wielding an axe, an unwitting assailant, or someone who reasonably believes that in using force against me he is defending himself, is either an impermissible assault on the transgressor, or else a permissible *violation* of the transgressor's moral protection under the contract. In the absence of wider danger, within a contract theory it is very hard to say how self-preferential killing could be a *permissible* violation of the non-culpable transgressor's contractual protection in such cases if the transgressor's rights are equal to those of any unoffending person, including oneself.

---

[68] This is part of a more general criticism of the contractarian derivation of rights. A contract approach to the grounding of rights is subject to fatal objections in my view. See L. W. Sumner, op cit., chapter 5.

[69] Perhaps I should note that a contractarian *derivation* of rights is distinguishable from a theory which derives rights from the claim that particular permissions and constraints would be endorsed from a suitably objective moral perspective. The latter is a possible approach to grounding an appropriate specification of the right to life in my view.

The claim that *culpable* breaches put a person outside the contractual protections would also make heavy weather of the problems Thomson raises for a 'theory of forfeiture' of the right to life. It must be said that a contract theory *can* very plausibly maintain that the tank driver forfeits his right to life by attacking me. Indeed, because a forfeit is a penalty, the claim that protections under the contract are *conditional* on conformity with that contract, and the claim that by our culpable conduct we can forfeit the right to life, seem a natural part of a contract theory. However, the problem for a 'theory of forfeiture' derived from culpable transgression is that when Thomson's unrepentant tank driver breaks both ankles, he completely *fortuitously* manages to come once again within the relevant contractual protection. Within a contract theory, how can this be? (If this is not so, then I do the tank driver no *direct* wrong by killing him and using his organs to save the lives of five other people.) The restoration of the protection of the contract on the basis of fortuitous conformity by culpable transgressors (e.g. the tank driver) might be agreed upon by contracting parties on the basis of (say) sophisticated self-interest. But again, the morally distinctive feature of the use of *self-defensive* force seems to be missed. My killing the culpable aggressor ceases to be permissible self-preferential killing once he is disabled, because in killing him I am no longer warding off an unjust threat: it is not an act of self-*defence*. This morally distinguishing feature of self-defensive homicide is not captured by the claim that my killing a now harmless, former unjust aggressor is impermissible because it is ultimately in the interests of individual contracting parties to agree that a culpable transgressor re-aquires protection once he is disabled.

A related contractarian approach to excepting self-defence from the prohibition of homicide regards the private right of self-defence as a right against the state. Here it is claimed that the state permits self-help in situations of immediate unjust threat, because the state is itself powerless to perform one of its central functions - the protection the individual's right to life. Parties to a social contract may well agree to a right of *self-help* that lapses at the point at which a transgressor ceases to be an immediate threat and

can be dealt with by the state. And this would mean that in so far as the right of self-help is a civil right, I cannot permissibly kill the tank-driver once he is disabled. The characterization of the right of self-defence as a right of self-help against the state has some noteable advocates,[70] and it seems an unobjectionable view in so far as the right of self-defence is a civil right. But the right of self-defence is not *simply* a civil right.

Specification on a two-level theory of optimality

Can a two-level theory which aims at optimality generate an appropriate specification of the right to life which would endorse a corresponding right of self-defence? Would promulgation of these corresponding rights be optimal?

There are circumstances in which self-defensive homicide is not *actually* optimal. Further, it might be apparent to me as a self-defending agent that self-defence will kill one or more non-offending persons and be of very little benefit to me; or it might be apparent to me that self-defence will inflict harm on bystanders which, if I am morally bound to achieve optimal results, cannot be justified by the benefit to me and to others of my survival; or it might be apparent to me that self-defence will cause indirect harm which is not outweighed by the good effects of my survival. Given that an agent can know that self-defence is not optimal, why would promulgation of *rules* permitting self-defence nevertheless be optimal?[71]

The claim that promulgation of rules permitting self-defence would be optimal needs to address the familiar dilemma of indirect utilitarianism. A two-level moral theorist can either promulgate an exceptionless rule permitting self-defence (effective even on occasions when it is apparent that self-defence is not actually optimal), or the rule permitting self-defence can be said to admit of exceptions where self-defence is clearly not optimal. If the rule does not permit self-defence on an occasion when self-

---

[70]Locke, for instance, and recently Kadish, op cit., p884-5.

[71]In the following discussion I simply assume that these would be rules permitting *necessary and proportionate* self-defence against an *unjust* threat, although these important qualifications might not in fact always be optimal.

defence is clearly not optimal, the background moral theory is a complex form of direct consequentialism. And in this case, the permissibility of self-defence derives from the contingent fact that the use of self-defensive force is optimal, and not from what is morally distinctive about the use of self-defensive force. On this view, there is no *intrinsic* moral difference between my foreseeably using lethal self-defensive force against an unjust threat, and my deflecting an unjust threat to myself onto a bystander and so foreseeably killing her.

The alternative view is that the rule permitting self-defence is exceptionless. Can an exceptionless rule permitting self-defence be promulgated *as optimal*, and yet it be conceded (as it surely must) that in some circumstances self-defence is not actually optimal? Drawing upon recent two-level defences of particular moral *constraints* as optimal, we can anticipate that, in outline, a two-level defence of an exceptionless permission of self-defence would argue something like the following case. Promulgation of the permissibility of self-defence deters unjust aggression. Further, the consequences of promulgation of rules permitting self-defence, although undoubtedly mixed, are on balance optimal.

An important strength of such an argument is that it can meet Kagan's requirement: that is, that the exemption of self-defensive homicide from the general prohibition against killing be implied by the account offered of how and why persons have a right not to be harmed in the first place. The reasons now frequently claimed to make it *im*permissible to kill *unoffending* persons in order to benefit oneself or others are reversed in the case of self-defence. Two-level moral theorists argue that the killing of non-offending persons as a means of benefiting oneself or others is not optimal. In maintaining this, they usually concede that in some circumstances it might seem optimal that an unoffending person be killed for the good of oneself or others; for example, a crude utilitarian doctor might decide that it would be morally right secretly to withdraw treatment from a derelict after a traffic accident, and then use this person's organs to save one, or even five, vastly more worthwhile lives. However, consideration of

indirect effects is said morally to preclude such acts. Compliance with constraints on such behaviour is, it is claimed, most likely to be optimal.

This two-level reasoning in defence of a constraint against the deliberate killing of unoffending persons as a means to benefiting others is now reasonably familiar in applied ethics. Preference utilitarians stress the direct wrongness of killing a person who wants to go on living. And in arguing that this wrongness will not be outweighed by the benefit to others of this person's death, two-level theorists also invoke the general insecurity, fear, and lack of trust, which would exist amongst people (especially in their dealings with the medical profession, the police force, the judiciary, etc.) were constraints against killing the unoffending as a means to benefiting others not promulgated. Moreover, consequentialist reasoning predicts the hardening of the agent's own moral sensibilities by certain sorts of acts, so that he or she then becomes more likely to (say) kill an unoffending person in order to benefit someone else in circumstances in which this is not reasonably believed optimal. And our imperfect knowledge about some of the effects of our actions is also sometimes said to make it best to comply with rules which in general yield optimal results.[72]

I am unimpressed by the latter two reasons as grounds for adopting exceptionless moral constraints. As very *general* precepts, exceptionless constraints imply the sort of unreasonable moral rigidity of which J. J. C. Smart rightly accused rule-utilitarianism decades ago.[73] This criticism carries over to appeal to such considerations as justifying *as optimal* the promulgation of exceptionless *rules* permitting certain acts such as self-defence.

An appeal to the adverse effects of insecurity, fear, lack of trust, etc., has become prominent in recent years in the responses of two-level theorists to cases like that of the

---

[72]Presumably, if this two-level view about constraints is to allow that, e.g. Foot's tram-driver acts permissibly in killing the one unoffending man to save five, the promulgated rule against killing the unoffending needs to incorporate *as optimal* something like the Double Effect distinction.

[73]See J. J. C. Smart, 'An Outline of a System of Utilitarian Ethics', in J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge University Press, 1973), p10.

crude utilitarian doctor. In rejecting the extension of this two-level reasoning as *grounding* an appropriate rule permitting self-defence, I cannot improve here on J. S. Mill's maxim that there is *no parity* between the desire of a *thief* to take a purse, and the desire of the *right owner* to keep it.[74] Lack of parity between these two desires does not derive from their relative *strengths*; it stems from the fact that one party's desire for the purse is for what is legitimate his, whereas the other's is not. There is no parity between the owner's legitimate, and a thief's illegitimate, desire for the purse, no matter how strong the thief's desire for the purse, and (I would add here) no matter how many thieves want the purse. Mill distinguishes *in kind* between desires (and other feelings) that stem from a person's legitimate claims, and those which do not. And as he insists, the mere fact that someone has a desire, even a very strong desire, for something, or that something be done or not done, is not itself a morally compelling reason for the fulfilment of that desire. Nor is the fact that someone will be offended, frustrated, or made fearful by an act itself a morally compelling reason to protect this person against such offence, frustration or fear. Certainly, feelings of fear, anxiety, and resentment, and also unfulfilled desires and frustrated preferences, do not make for contented lives. But this fact is not itself a morally compelling reason for protecting people from such feelings and frustrations. However, the fact that a person's feelings anf frustrations derive from his or her *legitimate* claims is a morally compelling reason.

The claim that promulgation of a rule permitting self-defence would be optimal because in the absence of this rule people would be insecure, fearful, anxious, resentful, and so on, is morally significant in so far as these insecurities, fears, resentments, etc., reflect the possible thwarting of people's legitimate claims by those who have no right to thwart them. And I doubt that the *legitimacy* of these claims, and

---

[74]John Stuart Mill, 'On Liberty', in *Utilitarianism*, edited by Mary Warnock (London: Fontana, 1965), p215 (my emphases).

the injustice of their being thwarted, can satisfactorily be explained in terms of a purely *aggregative* account of optimality, no matter how many-levelled this theory.[75]

The positive right to use self-defensive force is not appropriately derived from the contingent fact (if it is a fact) that an exception to the prohibition of homicide in the case of self-defence is on balance optimal, either for individual persons or in general. Self-defensive killing is not always optimal, and self-defence is sometimes unjustified all things considered. Furthermore, killing an *unoffending* person in the act of saving others inflicts an injustice on its victim, even when this victim is selected by a fair proceedure and his or her being killed can be justified in the circumstances as optimal.

5.6 CONCLUDING REMARKS

In order to *except* self-defence from the general prohibition of homicide, the appropriate specification of the right to life needs to reflect what is, and what is not, unjust interference with individual persons. And this aspect of the specification of the right to life needs to be defended not simply in terms of the protection of the interests of the individual persons who possess this right, but in terms of the legitimate claims of these persons to non-interference in respect of their interests. (The fact that it is in the hijacker's interests that the police sharp-shooter not fire does not entail that the hijacker has a legitimate claim that the sharp-shooter not fire. And suppose it is in your interests, and also optimal, that you now have one of my kidneys. This does not give you a legitimate claim to one of my kidneys such that I would *wrong you* in not agreeing to a kidney donation.) The justification of self-preferential killing in the case of self-defensive homicide needs to be grounded in the fact that the use of necessary and proportionate force against an unjust threat does not inflict unjust harm on its

---

[75]On this and the above points I have benefited especially from J. L. Mackie, 'Can There Be A Right-Based Moral Theory?', reprinted in his *Persons and Values* (Oxford University Press, 1985), and also from Thomas Nagel, *The View From Nowhere*, op cit., pp166-175.

victim. Self-defensive homicide is not unjust interference because the self-defending agent is blocking an unjust threat to life.

The central point of this chapter has been that the justification of the use of necessary and proportionate self-defensive force is derived from what is morally distinctive about an act of self-defence against an unjust threat: namely, that it directly blocks the infliction of an otherwise irreparable injustice and does not inflict unjust harm on its victim. The more fundamental task of grounding the appropriate specification of the right to life within a more general theory of the nature and role of rights in moral assessment is a future research topic which will be shaped in very important respects by the principles of justified self-defence that I have set out in this thesis.

6

CONCLUSION

The primary aim of this thesis has been to set out the principles of justified self-defensive homicide. Self-defence is widely regarded not simply as a moral and legal justification of homicide, but more strongly, as a positive right: an exception to, rather than a justified infringement of, the general prohibition of homicide. The characterization of self-defence in these terms has necessitated my detailed discussion of a number of matters which are important in their own right. These include the complex nature of justification and the relationship between justification and excuse, the similarities and differences between moral and legal justification, the specification of the sense of 'threat' relevant to self-defence and the characterization of force as self-defensive, the moral and legal requirements of necessary and proportionate force, the conditions under which we can be said to possess unconditional human rights, and the appropriate specification of the right to life in so far as this right entails a right not to be killed.

I have rejected the Double Effect approach to the justification of self-defensive homicide, and I have argued in detail that the intentional use of necessary force in self-defence is sometimes an intention to kill. However, my positive account of the right of self-defence is sympathetic to the Natural Law insight that justification of an act of self-defence against an unjust threat arises from the fact that the act is defensive. I have argued that the right of self-defence is grounded in the morally distinctive feature of the use of defensive force against an unjust threat - and this is the fact that the act directly

blocks the infliction of an injustice. Self-defence is not essentially a punitive act, nor is it essentially an attempt to bring about optimal results. It is the act of stopping a threat. Where the threat is unjust, self-defence directly blocks the infliction of an imminent, irreparable injustice. And within moral limits, a private person has a positive right, and sometimes a duty, directly to block the infliction of an injustice to him- or herself or to another person.

The conditions of necessary and proportionate harm morally limit the right of self-defence. They do not give one a positive right to inflict harm on someone in the act of protecting oneself or a third person. Nor does lack of intention to kill, even where plausibly invoked, give one such a right. Justified self-defensive homicide, like other cases of foreseen self-preferential killing, requires that self-preference be justified. Where foreseen killing is not *defensive*, the conditions of necessary and proportionate harm, together with lack of intention to kill, are insufficient to permit self-preferential killing. Self-preferential killing of unoffending persons must be justified as the *lesser* evil.

However, in the case of self-defence against an unjust threat, the person against whom force is used him- or herself constitutes the unjust threat. The justification of self-preferential killing in the case of self-defence is based on the moral asymmetry between the parties. This requires the specification of the right to life as a right possessed unconditionally only by unoffending persons - by those who are not unjust threats to the lives or proportionate interests of others. There are many uncontentious cases in which the threat one person poses another is unjust. Someone's being an unjust threat does not require that his or her conduct be culpable, nor even that it be voluntarily. Putative self-defenders, very young children, deranged persons, and sleepwalkers can constitute unjust threats to the lives of others. However, there are also cases about which reasonable people are likely to disagree that someone is a threat

or an unjust threat to another person. The most likely cases of such disagreement involve passive threats. The view I have defended in this thesis is that someone who is a passive threat is *a threat such that force used against him or her would be self-defensive*, provided the threat he or she poses sufficiently resembles an assault (e.g. Nozick's man thrown down the well). Further, I think that passive threats can be unjust threats provided they sufficiently resemble assaults on unoffending persons; and that self-defence and defence of another person against such a passive threat can be permissible.

The positive right of self-defence is part of a broader permission directly to block the imminent infliction of an irreparable injustice. The positive right of necessary and proportionate self-defence against an unjust threat is exceptionless. To say that this right is exceptionless means that the use of necessary and proportionate self-*defensive* force against an unjust threat does not inflict an injustice on its victim. It does not follow from this, however, that self-defence is always morally justified all things considered. Sometimes it can be wrong to protect, to insist upon, or to exercise one's rights. And in some circumstances this can be true of even very weighty rights such as the right to life. Broader considerations which are relevant to the moral justification of self-defence include benevolence and the equal rights of other unoffending persons who will be adversely affected by the act. If, for example, self-defence is of very limited benefit to me, or if I foresee that my self-defensive act will wipe out five unoffending persons along with the aggressor, self-preferential killing can be impermissible. No doubt some people will claim that it is unrealistic, and for this reason morally unreasonable, to expect a self-defending agent to take these sorts of broader moral considerations into account. I do not accept this claim. Certainly, someone whose life is in immediate danger will usually be very affected by fear and by the desire not to die, and he or she will often have to make a snap decision about what

to do. The urgency of the situation must bear on what standard of judgment is reasonably expected of ordinary people on matters such as necessary and proportionate force. But the fact that someone is very affected by fear, or the fact that he or she must make a snap decision, does not itself *justify* his or her (say) foreseeably killing an unoffending person in the course of self-defence or for other reasons of self-preservation. Considerations like extreme fear might make self-preferential killing excusable in some cases in which such killing is not justified.

In this thesis I have focused on the self-defence *justification* of homicide, given the prominence self-defence is accorded as the paradigm of justified homicide. I have argued that the justification of self-defensive homicide is grounded in the fact that self-defence directly blocks the infliction of an injustice, and I have characterized the positive right of necessary and proportionate self-defence against an unjust threat as exceptionless. However, the positive right of self-defence is not absolute. Appeal to rights in the moral evaluation of human conduct reflects considerations of just and unjust treatment of individual persons - it does not necessarily represent those acts which are justified all things considered.

BIBLIOGRAPHY

BOOKS AND OFFICIAL REPORTS

Aquinas, St. Thomas, *Summa Theologiæ*, vol 38, Blackfriars edition, London: Eyre and Spottiswood Ltd., 1966.

Anscombe, G. E. M., *Intention*, Oxford: Basil Blackwell, 1958.

Aristotle, *Nicomachean Ethics*, translated by Sir David Ross, London: Oxford University Press, 1969.

Bailey, F. Lee, and Henry B. Rothblatt, *Crimes of Violence* : (vol 1) *Homicide and Assault*, New York: The Lawyers Cooperative Publishing Co., 1973.

Bates, A. P., T. L. Buddin and D. J. Meure, *The System of Criminal Law*, Sydney: Butterworths, 1979.

Campbell, Robert, and Diané Collinson, *Ending Lives*, Oxford: Basil Blackwell, 1988.

D'Arcy, Eric, *Human Acts*, Oxford: Clarendon Press, 1963.

Davis, Henry, *Moral and Pastoral Theology*, 5th edition, London, 1946.

Devine, Philip, *The Ethics of Homicide*, London: Cornell University Press, 1978.

Donagan, Alan, *The Theory of Morality*, Chicago: University of Chicago Press, 1977.

Duff, R. A., *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law*, Oxford: Basil Blackwell, 1990.

Feinberg, Joel, *Harm to Others*, New York: Oxford University Press, 1984.

Fletcher, George, *Rethinking Criminal Law*, Boston: Little, Brown, 1978.

Finnis, John, *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1980.

Finnis, John, *Fundamentals of Ethics*, Oxford: Clarendon Press, 1983.

Frey, R. G., *Rights, Killing and Suffering*, Oxford: Basil Blackwell, 1983.

Fried, Charles, *Right and Wrong*, Harvard University Press, 1978.

Gauthier, David, *The Logic of the Leviathan*, Oxford University Press, 1969.

Glover, Jonathan, *Causing Death and Saving Lives*, Harmondsworth: Penguin Books, 1977.

Greenawalt, Kent, *Conflicts of Law and Morality*, Oxford University Press, 1989.

Griffin, James, *Well Being*, Oxford University Press, 1986.

Grotius, Hugo, *The Rights of War and Peace*, an abridged translation by William Whewell, Cambridge University Press, 1853.

Harris, John, *The Value of Life: An Introduction to Medical Ethics*, London, Routledge and Kegan Paul, 1985.

Hobbes, Thomas, *Leviathan*, edited by C. B. Macpherson, Harmondsworth: Penguin Books, 1974.

Kadish, Sanford, Stephen J. Schulhofer, and Monrad G. Paulson, *Criminal Law and Its Processess: Cases and Materials*, 4th edition, Boston and Toronto: Little Brown & Co., 1983.

Kagan, Shelly, *The Limits of Morality*, Oxford University Press, 1989.

Kenny, C. S., *Outlines of Criminal Law*, 12th edition, Cambridge University Press, 1926.

Kuhse, Helga, *The Sanctity-of-Life Doctrine in Medicine*, Oxford University Press, 1987.

LaFave, Wayne R., and Austin W. Scott, Jr., *Criminal Law*, St. Paul, Minn.: West Publishing Co., 1986.

Law Commission (Law Com. No. 177), *Criminal Law: A Criminal Code for England and Wales*, London: HMSO, 1989, vols 1 and 2.

Locke, John, *The Second Treatise of Government* , revised edition, edited by Peter Laslett, Mentor Books, 1963.

Low, Peter W., *Criminal Law*, revised 1st edition, St. Paul, Minn.: West Publishing Co., 1990.

Maritain, Jacques, *Man and the State*, London: Hollis and Carter, 1954.

Melden, A. I., *Rights and Persons*, Oxford: Basil Blackwell, 1977.

Morris, Norval, and Colin Howard, *Studies in Criminal Law*, Oxford: Clarendon Press, 1964.

Nagel, Thomas, *The View From Nowhere*, New York: Oxford University Press, 1986.

New Catholic Encyclopedia, vol 4, New York: McGraw-Hill, 1967.

Nozick, Robert, *Anarchy, State and Utopia*, Oxford: Basil Blackwell, 1984.

Parfit, Derek, *Reasons and Persons*, Oxford University Press, 1984.

von Pufendorf, Samuel, *De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo*, vol 2, the translation by Frank Gardner Moore, Oxford University Press, 1927.

Rickaby, Joseph, *Moral Philosophy*, London: Longman's Green & Co. Ltd., 1929.

Ritchie, David G. , *Natural Rights*, London: George Allen and Unwin Ltd., 4th edition, 1924.

Robinson, Paul H., *Criminal Law Defenses*, vols 1 & 2, St. Paul, Minn.: West Publishing Co., 1984.

Simpson, A. W. B., *Cannibalism in the Common Law*, Chicago: Chicago University Press, 1984.

Singer, Peter, *Practical Ethics*, Cambridge University Press, 1979.

Stephen, Sir James Fitzjames, *A History of the Criminal Law of England*, London: Macmillan and Co., 1883, vol. 3.

Sumner, L.W., *The Moral Foundation of Rights*, Oxford: Clarendon Press, 1987.

Teichman, Jenny, *Pacifism and the Just War*, Oxford: Basil Blackwell, 1986.

Tooley, Michael, *Abortion and Infanticide*, Oxford: Clarendon Press, 1983.

Victorian Law Reform Commission, Discussion Paper No. 13, *Homicide*, 1988.

White, Alan, *Rights*, Oxford: Clarendon Press, 1984.

Yeo, Stanley, *Compulsion in the Criminal Law*, Sydney: The Law Book Company, 1990.

ESSAYS AND ARTICLES

Alexander, Lawrence A., 'Self-Defense and the Killing of Noncombatants: a Reply to Fullinwinder', *Philosophy and Public Affairs*, vol 5, no 4, 1976, pp408-415.

Anscombe, G. E. M., 'Who is Wronged?', *The Oxford Review* 5, 1967, pp16-17.

Anscombe, G. E. M., 'Mr Truman's Degree', reprinted in Anscombe, *Collected Philosophical Papers*, Oxford: Basil Blackwell, vol III, 1981.

Anscombe, G. E. M., 'Modern Moral Philosophy', reprinted in Anscombe, *Collected Philosophical Papers* , Oxford: Basil Blackwell, vol III, 1981.

Anscombe, G. E. M., 'War and Murder', reprinted in Anscombe, *Collected Philosophical Papers* , Oxford: Basil Blackwell, vol III, 1981.

Ashworth, A., 'Self-Defence and the Right to Life', *Cambridge Law Journal* 34 (2), 1975, pp282-307.

Austin, J. L., 'A Plea for Excuses', reprinted in *Philosophy of Action*, edited by Alan White, Oxford University Press, 1968.

Barden, Garrett, 'Defending Self-Defence', *Irish Philosophical Journal*, vol 1, no 2, 1984, pp25-35.

Bedau, Hugo, 'The Right to Life', *The Monist*, vol 52, no 4, 1968, pp550-572.

Bennett, Jonathan, 'Whatever the Consequences', reprinted in *Killing and Letting Die*, edited by Bonnie Steinbock, Englewood Cliffs, New Jersey: Prentice-Hall, 1980.

Boorse, Christopher, and Roy A. Sorensen, 'Ducking Harm', *Journal of Philosophy*, vol LXXXV, no 3, 1988, pp115-134.

Brandt, Richard, 'Utilitarianism and the Rules of War', reprinted in *War and Moral Responsibility*, edited by Marshall Cohen, Thomas Nagel and Thomas Scanlon, Princeton: Princeton University Press, 1974.

Chandler, John, 'Killing and Letting Die: Putting the Debate in Context', *Australasian Journal of Philosophy*, vol 68, no 4, 1990, pp420-431.

Clarke, R. F., 'The "Mignonette" Case as a Question of Moral Theology', *The Month*, 1885, pp17-28.

Colvin, Eric, 'Causation in Criminal Law', *Bond Law Review*, vol 1, 1989, pp253-271.

Davis, Michael, 'The Right to Continued Aid', *Philosophical Quarterly*, vol 33, 1983, pp259-278.

Davis, Nancy, 'On the Priority of Avoiding Harm', in *Killing and Letting Die* , edited by Bonnie Steinbock, Englewood Cliffs, New Jersey: Prentice-Hall, 1980.

Davis, Nancy, 'The Doctrine of Double Effect: Problems of Interpretation', *Pacific Philosophical Quarterly*, vol 65, 1984, pp107-123.

Davis, Nancy, 'Abortion and Self-Defense', *Philosophy and Public Affairs* , 1984, pp175-207.

Devine, Philip E., 'The Principle of Double Effect', *American Journal of Jurisprudence*, vol 19, 1974, pp44-60.

Dressler, Joshua, 'New Thoughts About the Concept of Justification in Criminal Law: a Critique of Fletcher's Thinking and *Rethinking*', *UCLA Law Review*, vol 32, pp61-99.

Dressler, Joshua, 'Provocation; Partial Justification or Partial Excuse?', *Modern Law Review*, vol 51, 1988, pp467-480.

Duff, R. A., 'Intentionally Killing the Innocent', *Analysis*, vol 34, 1973, pp16-19.

Duff, R. A., 'Intention, Responsibility and Double Effect', *Philosophical Quarterly,* vol 32, no 126, 1982, pp1-16.

Feinberg, Joel, 'Voluntary Euthanasia and the Inalienable Right to Life', *Philosophy and Public Affairs*, vol 7, no 2, 1978, pp93-123.

Finnis, John, 'The Rights and Wrongs of Abortion', reprinted in *The Philosophy of Law,* edited by R. M. Dworkin, Oxford University Press, 1977.

Fletcher, George, 'Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory', *Israel Law Review,* vol 8, 1973, pp367-390.

Fletcher, George, 'The Right Deed for the Wrong Reason', *UCLA Law Review*, vol 23, 1975, pp293-321.

Fletcher, George, 'Rights and Excuses', *Criminal Justice Ethics*, vol 3, no 2, 1984, pp17-27.

Fletcher, George, 'The Right to Life', *The Monist*, vol 63, 1980, pp135-155.

Fletcher, George, 'Punishment and Self-Defense', *Law and Philosophy*, vol 8, 1989, pp201-215.

Foot, Philippa, 'The Problem of Abortion and the Doctrine of Double Effect', reprinted in Foot, *Virtues and Vices*, Oxford: Basil Blackwell, 1978.

Foot, Philippa, 'Euthanasia', reprinted in Foot, *Virtues and Vices*, Oxford: Basil Blackwell, 1978.

Foot, Philippa, 'Morality, Action and Outcome', in *Morality and Objectivity: Essays in Honour of J. L. Mackie*, edited by Ted Honderich, London: Routledge and Kegan Paul, 1985.

Frey, R. G., 'Some Aspects to the Doctrine of Double Effect', *Canadian Journal of Philosophy*, vol 5, no 2, 1975, pp259-283.

Gewirth, Alan, 'The Epistemology of Human Rights', *Social Philosophy and Policy*, vol 1, no 2, 1984, pp1-24.

Gray, John, 'Indirect Utility and Fundamental Rights', *Social Philosophy and Policy*, vol 1, no 2, 1984, pp73-91.

Greenawalt, Kent, 'The Perplexing Borders of Justification and Excuse', *Columbia Law Review*, vol 84, no 8, 1984, pp1897-1927.

Grisez, Germain, 'Toward a Consistent Natural Law Ethics of Killing', *American Journal of Jurisprudence*, vol 15, 1970, pp64-96.

Hart, H.L.A., 'Are There Any Natural Rights?', reprinted in *Political Philosophy*, edited by Anthony Quinton, Oxford University Press, 1967.

Hart, H.L.A., 'Intention and Responsibility', reprinted in Hart,*Punishment and Responsibility*, Oxford University Press, 1968.

Held, Virginia, 'Justification: Legal and Political', *Ethics*, vol 86, 1975-6, pp1-16.

Hogan, Brian, 'The *Dadson* Principle', *Criminal Law Review*, 1989, pp679-686.

Kadish, Sanford H., 'Respect for Life and Regard for Rights in the Criminal Law', *California Law Review*, vol 64, no 4, 1976, pp871-901.

Kamm, Frances Myrna, 'The Insanity Defense, Innocent Threats, and Limited Alternatives', *Criminal Justice Ethics*, vol 6, no 1, 1987, pp61-79.

Kavka, Gregory S., 'The Paradox of Future Generations, *Philosophy and Public Affairs*, vol 1, no 2, 1982, pp93-112.

Kenny, Anthony, 'Duress Per Minas as a Defence to Crime II', *Law and Philosophy*, vol 1, 1982, pp197-205.

Kleinig, John, 'Human Rights, Legal Rights and Social Change', in *Human Rights*, edited by Eugene Kamenka and Alice Erh-Soon Tay, Australia: Edward Arnold, 1978.

Levine, Susan, 'The Moral Permissibility of Killing a 'Material Aggressor' in Self-Defense', *Philosophical Studies*, vol 45, 1984, pp69-78.

Locke, Don, 'The Choice Between Lives, *Philosophy* , vol 57, no 222, October 1982, pp453-475.

Lomasky, Loren, 'Personal Projects as the Foundation for Basic Rights', *Social Philosophy and Policy*, vol 1, no 2, 1984, pp35-55.

Mackie, J. L., 'Can There be a Right-Based Moral Theory?', reprinted in Mackie, *Persons and Values*, Oxford: Clarendon Press, 1985.

Mill, John Stuart, 'On Liberty', reprinted in *Utilitarianism*, edited by Mary Warnock, London: Fontana, 1965.

Montague, Phillip, 'Self Defense and Choosing Between Lives', *Philosophical Studies*, vol 40, 1981, pp207-219.

Nagel, Thomas, 'War and Massacre', reprinted in *War and Moral Responsibility*, edited by Marshall Cohen, Thomas Nagel and Thomas Scanlon, Princeton: Princeton University Press, 1974.

Nell, Onora, 'Lifeboat Ethics', *Philosophy and Public Affairs*, vol 4, no 3, 1975, pp273-292.

Nickel, James W., 'Are Human Rights Utopian?', *Philosophy and Public Affairs*, vol 11, no 3, 1982, pp246-264.

Nozick, Robert, 'Coercion', reprinted in *Philosophy, Science and Method: Essays in Honor of Ernest Nagel*, edited by S. Morgenbesser, P. Suppes and M. White, New York: St. Martin's Press, 1969.

Parent, W. A., 'Judith Thomson and the Logic of Rights', *Philosophical Studies*, vol 37, 1980, pp405-418.

Parfit, Derek, 'Innumerate Ethics', *Philosophy and Public Affairs*, vol 7, no 4, 1978, pp285-301.

Pringle, Helen, and Robert Lawton, 'A Life Well Lost? Hobbes and Self Preservation', (unpublished paper) read to Hobbes 1588-1988 Symposium, University of New South Wales, July 9-10, 1988.

Robinson, Paul H., 'Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law', *Virginia Law Review*, vol 71, no 1, 1985, pp1-63.

Ryan, Cheyney C., 'The Normative Concept of Coercion', *Mind*, 1980, pp481-498.

Ryan, Cheyney C., 'Self-Defense, Pacifism, and the Possibility of Killing', *Ethics*, vol 93, no 3, 1983, pp508-524.

Sen, Amartya, 'Rights and Agency', *Philosophy and Public Affairs*, vol 11, no 1, 1982, pp3-39.

Snare, Frank, 'Dissolving the Moral Contract', *Philosophy* , vol 52, 1977, pp301-312..

Taurek, John M., 'Should the Numbers Count?', *Philosophy and Public Affairs*, vol 6, no 4, 1977, pp293-316.

Thomson, Judith Jarvis, 'A Defense of Abortion', reprinted in *Philosophy of Law*, edited by R. M. Dworkin, Oxford University Press, 1977.

Thomson, Judith Jarvis, 'Self-Defense and Rights', reprinted in Thomson, *Rights, Restitution and Risk*, edited by William Parent, Camb. Mass.: Harvard University Press, 1986.

Thomson, Judith Jarvis, 'Rights and Compensation', reprinted in Thomson, *Rights, Restitution and Risk*, edited by William Parent, Camb. Mass.: Harvard University Press, 1986.

Uniacke, Suzanne, 'The Doctrine of Double Effect', *The Thomist*, vol 48, no 2, 1984, pp188-218.

Uniacke, Suzanne, 'Killing Under Duress', *Journal of Applied Philosophy* , vol 6, no 1, 1989, pp53-69.

Uniacke, Suzanne, 'What are Partial Excuses to Murder?', in *Partial Excuses to Murder*, edited by Stanley Yeo, Sydney: Federation Press, 1991.

Uniacke, Suzanne, 'Self-Defense and Natural Law', *American Journal of Jurisprudence* , (forthcoming) December 1991.

Wasserman, David, 'Justifying Self-Defense', *Philosophy and Public Affairs*, vol 16, no 4, 1987, pp356-378.

Williams, Glanville, 'The Theory of Excuses', (1982) *Criminal Law Review*, pp732-742.