



Shooting to Kill: The Ethics of Police and Military Use of Lethal Force

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Killing in Self-Defense

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Abstract and Keywords

In this chapter the main contemporary theories of justifiable killing in self-defense are criticized and an alternative account elaborated: the fault-based internalist suspendable-rights theory (FIST). FIST is a partialist account. The rights not to be killed are such that when one member of the set of rights is suspended, the other rights remain in force. Thus, if A's right not to be killed by B is suspended, then B no longer has an obligation not to kill A. However, A still has a right not to be killed by C, and thus C's obligation not to kill A remains in force. In addition, on FIST, a culpable attacker suspends his or her right not to be killed by a defender even in cases in which it is not necessary (necessity condition) for the defender to kill the attacker to save his or her own life.

Keywords: killing in self-defense, FIST, partialist theories, self-defense, necessity condition, fault-based theories

CHAPTER 1 YIELDED a taxonomy of the morally permissible uses of lethal force by noninstitutional actors engaged in both individual and joint action. This chapter¹ provides a more detailed analysis of the moral permissibility of noninstitutional actors' use of lethal force in defense of their own lives (self-defense). To provide such an analysis is both important in its own right and a necessary preliminary to the moral analysis of the (in part) institutionally based use of lethal force by police officers and military combatants. For according to my favored conception, the morally permissible use of lethal force by institutional actors, such as police officers and military combatants, both presupposes the *natural* moral right to self-defense (and the natural right to defend others) and yet is somewhat different from it by virtue of the larger

institutional purposes served by these actors. This point is illustrated and elaborated in Chapters 3, 4, and 6, in particular.

Under what conditions, if any, is it morally permissible or morally justified for one person to kill another person? This question is asked in a variety of contexts, and it receives a variety of answers. *Prima facie*, the central cases in which a person is entitled to kill another person are of two sorts. First, there is the standard self-defense situation.² Second, **(p.45)** there is the case where some third person kills the attacker; this is killing in defense of another. Killing in self-defense is my focus in this chapter, albeit my account has implications for killing in defense of others. I note that, in respect of both categories, there are instances in which life is not being threatened, but nevertheless the wrong done, or about to be done, warrants a life-threatening response.³ For example, arguably, I am morally justified in killing an attacker who, while not seeking to kill me, is nevertheless seeking to do me grievous bodily harm (i.e., my selfhood is at high risk—see Chapter 1, section 1.1.1).

2.1 The Simple Right to Life Theory

Most of the available accounts of the justification of killing in self-defense have come under attack.⁴ The most obvious theory is the simple right to life account. This view posits a basic right to life or right not to be killed. On this view, I am entitled to kill in self-defense in virtue of my having a right to life, coupled with the fact that my life is under threat, and I will be killed unless I intervene by killing my attacker. The general problem here is that the attacker himself has a right to life (or right not to be killed), and it is not clear how it is not being violated by the person killing the attacker in self-defense.⁵

There are three obvious permutations of the simple right to life view. First, there is the possibility that the right to life is an absolute right; second, this is a right that can be forfeited; and third, it is a right that is neither absolute nor able to be forfeited, but one that can be overridden.

(p.46) The view that the right to life posited by the simple right to life theory is an absolute right has untoward consequences.⁶ If everyone has an absolute right to life, then attackers have an absolute right to life. But if attackers have an absolute right to life, then there are no circumstances in which defenders are justified in killing their attackers in self-defense. The notion of an absolute right to life is too robust. It has the effect of ruling out the possibility of justified killing in self-defense. We need a less robust notion of the right to life.

On the forfeiture account, any agent's right not to be killed is forfeited if that agent tries to kill another agent, and will kill her unless the defending agent intervenes to defend himself. However, this account also has untoward consequences. Consider a man who tries to kill someone, and would have killed that person if the person had not intervened. The defender saves her own life, but his defensive action is such as to cause the attacker to lose an arm and a leg

(albeit, the attacker does not lose his life). Assume that this attacker is arrested, convicted of attempted murder, and serves a thirty-year sentence. Assume also that he feels remorse for his action and that while in jail he undergoes a process of moral regeneration. This causes him to spend all the money he earns in jail on educating the children of the man he tried to murder. On the theory under consideration (the forfeiture account), such a would-be murderer does not have any right not to be killed. His right was forfeited by virtue of his attempt on someone else's life. Accordingly, he has no right to self-defense.

Now suppose that shortly after completion of his jail sentence he is attacked by three robbers who will kill him if he does not kill all of them. *Ex hypothesi*, he—even though now a defender—has no right to life or right not to be killed, and he has no right to defend himself. So, arguably, his attackers do not forfeit their rights to life or rights not to be killed by virtue of their attack, for the defender has no right to life or right not to be killed. Accordingly, the defender is obligated to allow the attackers to kill him on pain of violating their rights not to be killed. Moreover, even if his three attackers do forfeit their rights not to be killed, say, by virtue of attacking someone who is not attacking them, the defender is, nevertheless, not permitted to kill these attackers. In this situation, neither the attackers nor the defenders has any rights to self-defense; however, other things being equal, it is better that one life be lost than three. So, presumably, the defender is morally obligated to allow them to kill him.

(p.47) The version of the simple right to life theory in terms of forfeiture is highly problematic. Unlike the notion of an absolute right, the notion of a right that is able to be forfeited is not robust enough. We thus need a more robust notion of the right to life. As we saw above, the notion of an absolute right to life has the consequence that a person cannot justifiably kill an attacker in self-defense. While the notion of a right to life that can be forfeited enables justified killing in self-defense, it does so at too high a cost. The cost is that unsuccessful attackers lose their own right to self-defense forever, and consequently are not morally entitled to defend themselves against any future unjustified attacks. Accordingly, we need a different notion: one that permits killing in self-defense but does not entirely extinguish the right to self-defense of attackers. The obvious candidate is a right to life (or right not to be killed) that cannot be forfeited but can be overridden.

On this account, while neither the attacker nor the defender has an absolute right to life, both the attacker and the defender maintain their right to life (or right not to be killed). Accordingly, in the standard self-defense case, there is a choice to be made between two persons, both of whom have an (overridable) right not to be killed. So we need to find a moral consideration that overrides the attacker's right not to be killed, but not the defender's right not to be killed. This moral consideration cannot be merely that the attacker is a deadly threat to the defender, or that the attacker intends to kill the defender—or both of these

considerations. For in our standard self-defense case, the defender, in defending him or herself, will constitute a deadly threat to the attacker and intends to kill the attacker.⁷

Perhaps the difference between the attacker and the defender is that the attacker, but not the defender, intends to kill the defender without having any reasonable justification for doing so: the attacker intends to kill the defender because (say) the defender is an irritating person. By contrast, the defender has a moral justification for killing the attacker; the defender kills to preserve his or her life. So the moral difference between **(p.48)** the attacker and the defender consists in the difference between the reasons each has for intending to kill the other.

On the view under consideration, we have the following justification for killing in self-defense. In the self-defense scenarios in question, someone's right not to be killed will be infringed; the only question is whether it will be the right not to be killed of the defender or that of the attacker. It is morally preferable to infringe the right not to be killed of a person who intends to kill without a moral justification than it is to infringe the right not to be killed of a person who intends to kill in order to save his or her life. Accordingly, it is morally permissible for the defender to kill the attacker in self-defense.

Evidently, this account accommodates cases involving one attacker and one defender. But what of cases in which a single defender confronts a number of attackers engaged in a single joint attack? Assume that it is a joint attack by five men in which the actions of the attackers are jointly sufficient to kill the defender, but no single action on its own is sufficient. Assume further that the actions of three of the attackers (any three) are necessary (and sufficient) to kill the defender. In this scenario it will not be sufficient for the defender to kill one of the attackers; if the defender is not to be killed, he or she will have to kill at least three of the attackers.

The question that now needs to be asked of this version of the simple right to life theory is as follows: How does the fact that the attackers' attempt to kill the defender had no moral justification override the competing consideration based on the number of lives lost? After all, if the defender kills in self-defense, then *three* persons—each with a right not to be killed—will be killed, whereas if the defender does not kill in self-defense, then only one person will be killed (and there will be only one infringement of the right not to be killed). That is, how can three infringements of the right not to be killed—albeit a set of infringements committed in order to save a (single) life—be morally preferable to one infringement of the right not to be killed—albeit an infringement without any justification whatsoever?

The general problem with this version of the simple right to life theory is that the notion of an overridable right not to be killed, while less robust than the corresponding absolute right and more robust than the corresponding forfeitable right, is nevertheless inadequate; it still does not get the correct balance between the right to life of the attacker and the right to self-defense. Specifically, the right to self-defense is a right that one is entitled to exercise whether an attack is perpetrated by one or by many. So **(p.49)** while the right to life it posits is less robust than an absolutist account it is, nevertheless, excessively robust.

The failure of the simple right to life theory, whether it is presented in terms of a right to life that is absolute, able to be forfeited, or able to be overridden, suggests that we ought to look to the notion of a suspended right. A suspended right is akin to a forfeited right in that it is a non-absolute right. However, a right that is suspended under certain conditions is not necessarily forfeited. On the other hand, a suspended right is not simply a right that is overridden; unlike a right that is overridden, in the case of a suspended right there is a period of time—the period of suspension—in which, in effect, one does not have the right. The notion of a suspended right not to be killed is taken up in section 2.6.

The failure of the simple right to life theory also suggests that we need to look at theories that either abandon or significantly complicate the notion of a right to life. I will now look at three influential theories, each of which does one or another of these things.

2.2 Forcing the Choice

Philip Montague provides the first of these accounts.⁸ Another who follows him is Jeff McMahan.⁹ Montague's is a fault-based account of justified killing in self-defense—whether or not one agent is entitled to kill another in self-defense is partly a matter of whether the attacker was at fault in constituting a threat to her life. However, there is a difference between Montague's theory and standard fault-based accounts, in that Montague construes justified killing in self-defense as a species of forced choosing between lives. That is, the attacker is forcing the choice between two lives, his own and the defender's.

On the forced-choice conception, attacker B forces a choice on defender A between two lives, namely A's life and B's life. A has to choose between allowing herself to be killed by B, on the one hand, and killing B (and thereby saving herself), on the other. But, so the argument goes, that A confronts this choice is the fault of B—B forced this choice on A. So A, in choosing between her own life and B's life, can take B's fault into **(p.50)** consideration. The relevant difference between the two options facing A is that it is B's fault that the choice between these lives has to be made. Therefore A is morally entitled to kill B.

I have three objections to this account. First, it simply fails to justify killing in self-defense. The basic problem for any theory seeking to justify killing in self-defense is that the defender, in trying to save her own life, intentionally kills another person (the attacker). Accordingly, the defender apparently commits a very serious wrongdoing, and one that is as bad, or nearly as bad, as that of the attacker. On one way of taking the forced-choice account it works by trying to undercut our normal assumption that the defender is responsible for killing her attacker.¹⁰ The idea here would be that the attacker, by forcing the choice on the defender, is somehow, albeit indirectly, responsible for his own death. If this is not the case, then it remains unclear how the theory justifies the act of killing in self-defense. Rather, we are simply left with the defender being fully morally responsible for killing the attacker, and the attacker morally responsible only for attempting to kill the defender. But in that case we are back to where we started from; we have apparently made no progress in the attempt to justify killing in self-defense. It seems that the forced-choice conception interpreted in this manner fails to relieve the defender of full moral responsibility for the death of the attacker, and therefore fails to show why killing in self-defense is morally justifiable.

It is not the case that in our (above described) standard self-defense situation the attacker is forcing a choice between lives, in any sense of forcing the choice that would enable the attacker to be held fully morally responsible for his own death. B does not intend to bring about a situation in which A faces a choice between killing B and allowing A to die. Nor does B typically have any knowledge that his actions will bring about this situation. Indeed, if the attacker, B, has any intention or belief with respect to bringing about a situation of choice for the defender, A, it is the intention that A not have, or the belief that A will not have, such a choice. Therefore, B does not negligently or recklessly bring about the situation in **(p.51)** which A faces a choice between killing B and allowing A to die. Consider, for example, a scenario in which B ambushes A with the intention not only to kill A, but also to ensure that A has no opportunity to defend herself. Accordingly, let us assume that the attacker does not believe, let alone intend, that the defender will have an opportunity to defend herself but, nevertheless, this opportunity does arise and the defender takes it and kills the attacker in self-defense. Presumably, in this scenario it cannot be the attacker, but must rather be the defender, who is fully morally responsible for the killing of the attacker. But in that case, we have not yet been provided with a reason for thinking that the defender is morally entitled to kill the attacker. We are left with a situation in which the defender, A, is responsible for killing the attacker, B, and B is responsible only for attempting to kill A. So, to reiterate, we are back to our starting place.

It might be argued, however, that we are not quite back to where we started from. For we have isolated an additional morally relevant element; namely, the element of forced choice in a narrow causal sense. The fact that the attacker, B,

unintentionally and unknowingly brought about a set of circumstances in which the defender, A, had to choose between her own life and that of B, is morally relevant. The attacker, B, has (unintentionally, and unknowingly, let us assume) structured the choice options of the defender, A. In short, B is causally responsible for the choice situation A now finds herself in. This is undoubtedly true. However, the question now arises as to whether B is culpable for bringing about these circumstances, especially since he did so unintentionally and unknowingly. Perhaps it was foreseeable that A *might* face this choice if attacked by B, and thus avoidable. However, there are many relevant cases in which this choice outcome does not eventuate. These are of two main types: (1) cases in which there is no possibility of A even contemplating self-defense (e.g., an ambush scenario in which A is asleep or unconscious and B comes upon him and shoots him dead), and (2) cases in which A has a third option (e.g., to disable B without killing him or to flee to safety).

In type 1 cases the attacker does not structure the defender's choice options; defender does not have any choices to make, e.g. she is simply killed in her sleep. Therefore, these are not instances of forcing the choice. Nor, of course, are they cases of self-defense. Nevertheless, these cases raise a question about the moral significance of forcing the choice. For there does not seem to be any relevant moral difference between an attacker who culpably and unjustly kills someone in her sleep, and an attacker who culpably and unjustly kills someone who wakes up in time **(p.52)** to try to defend herself by killing the attacker but who is unsuccessful (and is, therefore, killed by her attacker). In the former case, the attacker did not force any choice on the victim, whereas in the latter case he did. So whether or not the attacker forced the choice on the defender does not seem to make any difference to the culpability or, moral fault of the attacker.

In type 2 cases the attacker does structure the defender's choice options. However, the defender's option set is wider than merely killing the attacker or allowing herself to be killed. Nevertheless, again there does not seem to be any relevant moral difference between an attacker who culpably and unjustly kills someone in her sleep, and an attacker who culpably and unjustly kills someone who unsuccessfully tries either to flee or to defend herself. In the former case, the attacker did not force any choice on the victim, whereas in the latter case he did. So, again whether or not the attacker forced the choice does not seem to make any difference to the culpability or, moral fault of the attacker.

In all this it is crucial that we distinguish between forcing the choice in its narrow causal sense and being culpable or otherwise at fault for forcing the choice. A drug-crazed attacker might be forcing the choice but might not be morally responsible for doing so, and therefore is nonculpably doing so. Let us

try to get clearer on the notion of culpable or, at least, fault-based forcing the choice.

Consider the following scenario. Agent X puts a gun at agent Y's head and orders Y to kill Z or be killed herself. Here X is forcing a choice on Y. But notice two differences between this case and the standard self-defense case. First, X does not simply intend to kill Y in the sense that killing Y is the content of X's intention (i.e. X intends [X kill Y]). Rather, at most X has an intention with the following conditional content: X kill Y if Y does not kill Z (i.e., X intends [X kill Y if Y does not kill Z]). Second, X's act of forcing a choice consists in more than the fact that X will (intentionally) kill Y unless Y intervenes by killing someone (in this case, Z). For X intentionally creates a situation in which Y has to make a choice between lives (i.e., X intends [Y has to choose between killing Z and being killed by X]). The X/Y/Z example serves to highlight the existence of a thick and a thin sense of forcing the choice between lives. In the thick sense—the sense involved in the X/Y/Z example—forcing the choice is intentionally creating a situation which consists in someone having to make a choice between lives, i.e. the choice between lives is *intentionally* created. In the thin sense—the sense involved in the standard self-defense case—forcing **(p.53)** the choice between lives is simply our above notion of (unintentionally and unknowingly) causing a situation in which there are two choices facing the defender (either kill the attacker or allow oneself to be killed by the attacker). This thin causal condition is not the simple causal condition of being a deadly threat, for that latter condition is intended by the attacker. But now we can see that describing the standard self-defense case as a forced-choice situation is false, if we mean forced choice in the thick sense. What of the notion of forced choice in the thin sense? We saw above that the fact that the attacker is forcing the choice in the thin sense does not relieve the defender of moral responsibility for killing the attacker, supposing she does kill him. Thus we are left with the matter of the moral justification for the defender's killing of the attacker. Here one thing is clear: the moral justification for killing in self-defense cannot consist merely in the fact that the attacker is forcing the choice in the narrow causal sense. This brings me to my second objection to the forced choice conception.

My second objection to the forced-choice conception is that it fails to invoke a consideration that surely must be invoked, if killing in self-defense is to be shown to be morally justifiable. Speaking loosely, there are two things the attacker might be said to have done in the standard self-defense scenario. He might be said to have (unintentionally and unknowingly) brought about a situation in which the defender had to choose between two lives. The attacker forced a choice between lives in the thin sense of forcing a choice. Secondly, the attacker intended to kill the defender. Now the attacker's second "doing" constitutes a morally relevant consideration in the defender's decision as to whether or not to kill the attacker. To see this, consider the possibility of a deaf, dumb, blind, and radioactive man who—unaware that he is radioactive—tries to

put his arms around a woman in an expression of friendliness. She is aware that he is radioactive, and that his action is threatening her life. But she is also aware that she cannot communicate this to him. Moreover, she knows that she cannot escape his clutches other than by spraying him with a substance that she knows will prevent him from getting too close for too long, but will do so by killing him. He is unintentionally and unknowingly forcing a choice between lives. But it is by no means clear that she is entitled to kill him. Certainly the moral grounds for killing him are much weaker than in the standard self-defense case. So, in the standard self-defense case, the fact that the attacker is performing the “action” of intending to kill the defender is a morally relevant consideration. Since, **(p. 54)** on the thin forced-choice conception, this other “doing” of the attacker is not morally relevant, that account is defective. Of course, Montague’s forced choice conception is not merely the thin forced choice conception; rather it is the latter supplemented by the notion of fault, e.g. an intention to do what is wrong. However, as we saw above the intention in question on the forced choice conception must be an intention with respect to the act of forcing the choice (thin sense). But even supposing this intention exists – and we have seen that it typically does not – this is the wrong intention. The intention that is relevant to the moral fault of the attacker is his intention to kill the defender, not an intention to bring about a situation in which the defender must choose between the attacker’s life and her own. Further, the intention to kill is an intention with respect to the causal condition that consists in being a deadly threat to the defender. Accordingly, it is this causal condition (being a deadly threat) that provides (part of) the justification for the defender’s lethal response rather than the causal condition that consists in forcing the choice.

My third objection is that the forced-choice conception has the effect of obliterating a morally important distinction. It seems clear that in our standard case of killing in self-defense, (1) the defender, A, has a right but not an obligation to kill the attacker, B; and (2) a third party, C, has an obligation to kill B, if that is the only way to prevent B from killing A (and C can kill B without harming C or any D). In other words, the defender is entitled not to exercise her right to self-defense, if he or she wishes. But matters are different for the third party, C. The third party ought to intervene on behalf of the defender. (And the only form of successful intervention in the type of case in question consists in the killing of the attacker.) The third party does not have a right that he or she can choose not to exercise; the third party is not entitled to allow the defender to be killed, even though the defender is entitled to allow herself to be killed by not exercising her right to self-defense. (I note that the right to self-defense is not identical with the right to life or the right not to be killed. Arguably, these latter rights are inalienable or, at least, the defender is not entitled to waive them in the face of a culpable attacker.)

However, on the forced-choice conception, the situation of the defender (morally speaking) is precisely the same as that of the third party. Each is confronting a choice between two lives, and each must invoke the same morally relevant consideration in making that choice. This consideration is the fact that the attacker is forcing the choice (and at fault in doing so). Accordingly, both defenders and third parties are under obligations **(p.55)** to choose in favor of the life of the person who is not forcing the choice in this sense. But, as we have just seen, the defender is not under any such obligation; the defender has a right, but not an obligation, to kill the attacker. In assimilating the moral situation of the defender to that of a third party, the forced-choice conception obliterates a morally significant difference between these situations or, at the very least, needs to help itself to some further moral consideration it has not yet countenanced.

2.3 The Hobbesian Rights-Based Approach

The second theory is a new version of the Hobbesian rights-based account. This account gives a priority to self-defense over other moral requirements. The emphasis here is on the importance to an individual of his or her own life, and the special responsibility an individual has for preserving his or her own life. This account makes a significant adjustment to the basic right to life account by positing an absolute but agent-centred right to self-defense.¹¹

It is a strength of Teichman's quasi-Hobbesian account that this morally significant distinction is preserved. On her account, in the standard self-defense case a defender has a right of self-defense, but a third party has a duty and not a right to preserve the life of that defender. Moreover, Teichman's recourse to Hobbes's notion of a basic and absolute right to self-defense enables many of the familiar objections to rights-based accounts of self-defense to be met.¹² However, as we shall see, the account is problematic in other ways.

The Hobbesian rights-based approach has a weak and a strong form. In the strong form, I have an absolute right to self-defense, even if the threat to my life is innocent—e.g the (so-called) attacker does not intend to kill me. Now such cases do not seem to be cases of self-defense, rather they seem to be cases of self-preservation. But this makes little difference here. In such cases is there a right to preserve one's life by killing the innocent? This is disputable. Firstly, *it is surely the case that, other things being equal, an intentional killing is a greater evil than an unintentional killing.*¹³ **(p.56)** But in that case, arguably, it is better to allow oneself to be killed unintentionally than intentionally to kill the innocent person threatening one.

A stronger objection to this view is that it fails to take into account the possibility that the defender is in some way culpable. Consider a person, B, who dislikes another person, A, and wants to kill A. B puts a bomb in A's lunch box. However, A, rather than going off to lunch in the park, confronts B in the office.

A has been told by C that B has switched sandwiches on him. B rushes down the stairs to get away from A, but A threatens to throw the lunch box down at him. With time running out, and A dismissing B's claims about a bomb, and insisting on throwing the lunch box down to him, B turns around and shoots A dead. Presumably B is not entitled to kill A, notwithstanding the fact that he does so *in self-defense*. The relevant moral consideration is the fact that B culpably placed the bomb in A's lunch box. This consideration overrides any right to self-defense B may have had.

On the weaker Hobbesian view, there is an absolute right to self-defense, if the threat to one's life is intended. But once again this fails to take into account relevant moral considerations. The defender may have culpably brought it about that the attacker is trying to kill him. Or the defender may in some other way have provided the attacker with a morally justifiable reason to kill him. Or both of these conditions may obtain.

An example of the first possibility would be one in which B attempts to murder A by shooting him. Assume that A grabs the gun, and that each is now trying to kill the other; each is thus trying to kill the other in self-defense. But surely the fact that B initially attempted to murder A defeats B's right to self-defense.

An example of the second possibility would be the case of the prisoner in a concentration camp who tries to kill one of the guards. The guard is not threatening her life, but he has murdered all her family, and continues to murder others. Surely the guard is responsible for so much *evil*, and will be responsible for so much more evil, that he has provided the prisoner with a morally justifiable reason for killing him. Moreover, this reason overrides any right to self-defense the guard may have.

(p.57) An example of the third possibility is even more convincing. Suppose an SS guard in a concentration camp wants to be attacked by one of the prisoners so he can kill the prisoner. The SS guard shoots the prisoner's family in front of the prisoner and then offers a knife to the prisoner. The prisoner then attacks the SS guard, who pulls out his gun and shoots the prisoner dead. The SS guard has intentionally, indeed culpably, brought it about that the prisoner will try to kill him. He has forced the prisoner's choice in the thick sense (see section 2.2). Moreover, he has also provided the prisoner with an adequate moral justification for killing him. In this case, any right to self-defense the SS guard may have is clearly overridden.¹⁴

2.4 The No-Fault Rights-Based Theory

The third theory is the no-fault rights-based theory. On this account, whether or not an attacker is at fault in constituting a deadly threat to some defender is irrelevant to the question of the justifiability of killing in self-defense. It is the fact that the attacker is a deadly threat—coupled with the fact that the defender cannot disarm the attacker—that is critical. This account focuses on the attacker

qua deadly threat. In her paper “Self-Defense,” Judith Jarvis Thomson argues that considerations of fault are irrelevant to the justification of killing in self-defense.¹⁵ In place of fault-based theories of self-defense, she puts forward her own account. In this section I will attempt to demonstrate the inadequacy of Thomson’s account.

Under what conditions is it permissible for agent A to kill agent B in self-defense? According to Thomson, other things being equal, every agent has a right not to be killed by any other agent.¹⁶ What make other things unequal? Thomson provides one condition that does *not* make things unequal; namely, the fact of being a bystander. If C is a bystander, then C has a right not to be killed. On Thomson’s account, C is a bystander **(p.58)** if C is not causally involved in the situation that consists in the agent, A, being at risk of death.¹⁷

On the other hand, things are not equal—which is to say attacker B does *not* have a right not to be killed by defender A—if B is a deadly threat to A, and indeed B will kill A unless A intervenes and kills B.¹⁸ Thomson construes the concept of killing quite narrowly.¹⁹ Agency is not required in order for someone to kill someone else. So if a fat man is pushed off a cliff and lands on a person below, crushing the person to death, then the fat man killed the person.

It is important to stress here that, on Thomson’s account whether or not B intends to kill A, or is otherwise at fault in constituting a threat to the life of A, is not necessary for B not to have a right not to be killed by A. Fault, she says, is irrelevant to determining the justifiability of killing in self-defense.²⁰

A final feature of Thomson’s account is that, morally speaking, an agent stands to her would-be killer as a third party stands to that killer.²¹ Thus, if it is permissible for A to kill B in self-defense, then it is permissible for some third party, C, to kill B, given that A is unable to defend herself. So if B does not have a right not to be killed by A, B does not have a right not to be killed by C, or D, and so on.

I have three objections to Thomson’s account. My first objection makes use of Thomson’s example of the drug-crazed truck-driver (agent B). Thomson claims that it would be morally permissible for agent A to kill the driver to save himself even though (since drug crazed) B is not at fault.²² We have seen that Thomson claims that one cannot use bystanders **(p.59)** to save oneself. But let us complicate her example. Assume that A could throw bystander C in front of the truck, and thereby save himself. Now the difference between the truck driver and the bystander, on Thomson’s account, is that the truck driver, but not the bystander, is the threat. Therefore, A is not entitled to throw the bystander, C, in front of the truck. So far, so good. But now let us assume that the bystander *is* in fact the person who injected the truck-driver with the drug in order to get the truck-driver to kill A. On Thomson’s account, this makes no difference; it would

still be wrong for A to throw C in front of the truck. For the only morally relevant consideration is that C is a bystander; the fact that C is at fault is morally irrelevant. But surely the defender, A, would be entitled to throw the bystander, C, in front of the truck to save himself, and for the reason that C was at fault in injecting the drugs into the truck driver. This example demonstrates that at least one sort of fault is relevant to killing in self-defense. The sort of fault in question is (roughly) that of intentionally setting in train a causal process that will result in a person being killed, and doing so for the purpose of achieving that result. Indeed, the example is sufficient to show that in at least some cases one ought to kill the person at fault rather than the person who constitutes a threat to one's life.

It might be argued that the bystander is the threat to one's life in that he caused the truck driver to go berserk. Certainly persons at fault—in the sense of fault at issue here—are causally involved. But on Thomson's account, agent C being a threat to A's life means C's action of injecting drugs into B is in part constitutive of the situation that consists in A being at risk. Thomson does not think being causally involved is sufficient for being in part constitutive of the situation that consists in someone being a risk.²³ Instead she says that the presence or absence of the initiating villain—the one who injected the truck driver—makes no difference to A's right to kill B.²⁴ In the truck-driver case, the bystander, C, is not about to bring about the death of A, and thus C is not the threat to A's life; rather, B is the threat. Accordingly, by Thomson's lights, A has a right to kill B but not C. This is strongly counter-intuitive.

However, let us consider a revised version of Thomson's account in which being causally involved, even indirectly, is sufficient for being in part constitutive of the situation. Here we can imagine a similar case **(p.60)** in which C had unknowingly (and without fault) injected the drug into the truck driver. On the assumption that C (although without fault) is the ultimate cause of the threat to A's life, Thomson (on this more permissive cause-based account) would have to hold that it is permissible for A to kill C. But under these circumstances, it would surely not be permissible for A to throw C in front of the truck. The reason is simply that C is not at fault.

We have seen that Thomson's no-fault account is problematic. So it might now be accepted that, contra Thomson, fault is indeed relevant to determining the permissibility of an agent's act of killing in self-defense. Contra Thomson, A is entitled to kill bystander C, rather than attacker B, given that C is at fault and B is not. Nevertheless, it might be claimed that Thomson has provided a sufficient condition for extinguishment of an agent B's right not to be killed, namely, that B is a deadly threat to A, and B will kill A unless A kills B.

Moreover, in the light of the admission that fault can be relevant to determining the permissibility of an agent's act of killing in self-defense, let us now allow that if an agent, C, is at fault by virtue of intentionally, albeit indirectly, causing a threat to another agent, A, then C no longer has a right not to be killed.

Accordingly, in the drug-crazed driver scenario, neither attacker B nor bystander C have a right not to be killed, or at least neither would have a right not to be killed, absent the other. So if C was not present, it would be permissible for A to kill B. And if B leapt out of the truck, leaving A with the option only of throwing C in front of the truck, then it would be permissible for A to so kill C.

So on this revised conception, it is permissible for A to kill either B or C, but there is no substantive moral consideration by means of which to make a choice between them should the need arise. Rather, there are simply two sets of sufficient conditions for losing one's right not to be killed: (1) B is a deadly causally *direct* threat to agent A, and B will kill A unless A kills B; (2) C is a *culpable* deadly *indirect* threat to A, and C will indirectly cause A's death unless A kills C. This alleged moral equivalence of the two conditions is counterintuitive. Surely we have a strong moral preference in favor of killing C and sparing B, rather than killing B and sparing C.²⁵

(p.61) Moreover, there is a readily available explanation for the existence of this strong moral preference. In cases where there is no choice to be made, since only C can be killed, it is permissible for A to kill C. In cases where a choice can be made between either killing C or killing B, it is impermissible for A to kill B. In cases where there is no choice to be made and it is only possible to kill B, then it is at best only excusable for A to kill B. If this explanation is accepted—and I believe it should be—then the weaker Thomson thesis is false. Thomson has not provided a sufficient condition for extinguishment of an agent B's right not to be killed. The fact that B is a deadly threat to A, and that B will kill A unless A kills B, is not sufficient to extinguish B's right not to be killed.

I conclude that the drug-crazed truck driver example (in its various versions) demonstrates that Thomson's account of self-defense is inadequate in two important respects. First, Thomson is wrong to maintain that fault is irrelevant to determining the permissibility of an agent's act of killing in self-defense.²⁶ Second, it is not the case that a sufficient condition for extinguishment of an agent B's right not to be killed is that B is a deadly threat to A, and B will kill A unless A intervenes and kills B.

A second problem with Thomson's account concerns the grounds for an agent *not* having a right not to be killed. Here it is important to note three things. First, the right not to be killed is, by definition, a negative right, unlike the related right to life. Second, the right not to be killed is an individual natural right, as opposed to an institutional or collective right. Third, (and more controversially) the right not to be killed is an intrinsic, as opposed to a derived,

right. The right not to be killed does not derive from some other right, or rights, such as a right to autonomy.²⁷

According to Thomson, B being a deadly threat to A is not sufficient for B losing his right to not to be killed. Yet she rejects the possibility that a further necessary condition is that B is in some way at fault. Rather, **(p.62)** Thomson believes that the further necessary condition is (roughly) that the defender cannot preserve his life other than by killing the attacker. I take it that the intuition guiding Thomson's account at this point is that one ought not to kill one's attacker unless one really has to. If one can disarm one's attacker, then one ought to disarm him. I do not dispute the validity of this intuition. I do, however, dispute that the basis of this intuition is that the attacker retains his *right not to be killed* if the defender can disarm him. So I am distinguishing between conditions under which an attacker loses the right not to be killed by a defender, on the one hand, and conditions under which it would be morally permissible for an attacker to be killed by a defender, on the other. Accordingly, an attacker might not have a right not to be killed by a defender, but it might nevertheless be morally impermissible for the defender to kill the attacker. At any rate, I will argue against Thomson's claim that a necessary condition for an attacker losing the right not to be killed is that the defender cannot disarm the attacker.²⁸

Suppose there is a not insignificant possibility that a defender will be killed if he chooses the option of disarming, rather than killing, his attacker. Now, on the rendering of Thomson's account under consideration, the defender would nevertheless be under a strong moral obligation to try to disarm the attacker. For the attacker has a right not to be killed if the defender can disarm the attacker. But surely, in this kind of case, the defender is not obliged to put his life at risk to preserve the life of someone who is culpably and unjustifiably trying to kill him. So the condition needs to be weakened to accommodate this kind of counter-example. It should read: the defender cannot disarm the attacker without putting the defender's life at risk.

But it might be the case that the defender's life is not at risk, but that he will lose an arm and a leg in the process of trying to disarm the attacker. Presumably, the condition needs to be further weakened to: the defender cannot disarm the attacker without either putting his own life at risk or incurring serious harm to himself.

But what if the attacker has tried to kill the defender in the past and will try to kill the defender in the future (and neither the police nor anyone else is able to provide adequate protection for the defender)? Presumably, the defender is entitled to kill to prevent an otherwise unavoidable and **(p.63)** certain future deadly threat of this sort.²⁹ We now have a double-barreled condition of the form: (a) the defender cannot disarm the attacker without putting his own life at

risk or incurring serious harm himself, or (b) the defender's disarming of the attacker will not remove an unavoidable and certain (probable?) future threat posed by the attacker to the life of the defender.

Unfortunately, even this heavily qualified and complicated condition is inadequate. Imagine a defender who also happens to be an agent-centered pacifist. Assume that this defender will have to either severely wound or kill his attacker if he is to preserve his own life. The pacifist has a threefold choice: (1) allow himself to be killed, (2) kill his attacker, or (3) severely wound his attacker by severing the attacker's weapon-using right arm. The pacifist chooses to allow himself to be killed, and is killed. In this scenario, the option of disarming rather than killing the attacker is available to the pacifist defender. Therefore, on Thomson's account, the attacker retains his right not to be killed. But in this pacifist scenario, this seems incorrect; surely the attacker does not have a right not to be killed. To see this, imagine that there is a nonpacifist bystander with a gun who is unable to disarm attacker, but who could kill the attacker and, thereby, preserve the pacifist defender's life. It is clearly morally permissible for the bystander to kill the attacker, and indeed the agent-centered pacifist defender may thank him for doing so. However, by Thomson's lights, the attacker has a right not to be killed since the pacifist defender could have disarmed the attacker. Therefore, it would be morally wrong for the bystander to kill the attacker. So much the worse for Thomson's account. The example shows that yet another modification of the necessary condition for losing one's right not to be killed is called for.

We have now arrived at the following proposition: A necessary condition for an attacker losing his right not to be killed is: (a) the defender cannot disarm the attacker without either putting his own life at risk or incurring serious harm to himself, and/or (b) the defender's disarming of the attacker will not remove an unavoidable and certain future threat posed by the attacker to the life of the defender, and/or (c) the defender chooses not to disarm the attacker, even though the defender knows that if he so chooses the attacker will kill him.

(p.64) Even this host of qualifications is incomplete. For example, what of future threats to the lives of the defender's family? Surely the attacker does not have a right not to be killed by the defender if the defender knows that if he spares the attacker the attacker will, at some future date, kill the members of the defender's family.

What is the upshot of this discussion of Thomson's second necessary condition for a defender losing his right not to be killed? The first point to be made is that the condition cannot be the simple and straightforward one that she has provided. Rather, if it exists—and this is far from self-evident—this necessary

condition is an enormously complicated and heavily qualified version of the condition she has provided.

The second point is that, contra Thomson, this putative condition, even if it can be precisely specified, is in all probability not a necessary condition for someone having a right not to be killed. It needs to be stressed that the required condition is not a condition under which the right not to be killed is overridden, or under which a defender might be excused for killing in self-defense. Rather, it is a central and necessary condition for the possession by an agent of the right not to be killed.

It is implausible that such a contingent, complex, and changing set of facts about other agents could ground a basic, negative, individual human right, such as the right not to be killed. Perhaps positive rights, institutional rights, and derived rights may go in and out of existence, depending on various contingent, complex, and changing circumstances that are external to the bearers of those rights. And any right, including the right not to be killed, might be overridden, or its violator excused, on the basis of various, contingent, and external circumstances. But what is in question is whether the *existence* of a basic, negative, individual natural right could depend on such contingent, complex, and changing circumstances that are external to the rights bearer. Surely such a natural right is only dependent on natural properties possessed by the rights-bearer qua human being. At any rate, I have argued that the required recourse to a wide variety of contingent, external circumstances for the existence of this natural right renders Thomson's account of the right not to be killed implausible.

The upshot of this discussion is as follows: Thomson has claimed that a necessary condition for an attacker losing the right not to be killed is that the defender cannot preserve his or her own life other than by killing the attacker. But this condition is unacceptable as it stands. It needs to be replaced by some notional condition that describes a complex, changing, **(p.65)** and contingent set of facts external to the attacker—facts such as the ability or willingness of the defender to defend him or herself. Thomson has not provided an adequate specification of such a condition. More important, the view that any such condition grounds a basic, negative, individual natural right, such as the right not to be killed, seems inherently implausible.

My third objection concerns Thomson's claim that if it is permissible for you to intervene by killing your attacker, then it must be permissible for a third party to intervene on your behalf (given that you are unable to intervene on your own behalf.) My argument here is directed against Thomson's claim that such a third party is in the same moral predicament as the (self) defender.

Let us consider a variation on Thomson's fat man example. Assume that the man at the bottom of the cliff has no means to prevent the fat man landing on him

and killing him. Assume further that there is a third party with a bazooka who could fire this weapon and, thereby, cause the disintegration in midair of the fat man. (Note that, other things being equal, the fat man will survive the fall. He will die only if someone kills him by, for example, shooting him with a bazooka.) Now, on Thomson's account, the fat man has no right not to be killed by the third party, and the man at the bottom of the cliff has a right not to be killed by the fat man. Therefore, she ought to conclude, it is permissible for the third party to kill the fat man, just as it would have been permissible for the person at risk to kill the fat man if he had been able to.

According to Thomson, the man at the bottom of the cliff has a right not to be killed and the fat man has no such right. But *if* this is so, then it is not simply permissible for the third party to kill the fat man. Rather, it is morally obligatory for the third party to kill the fat man in order to save the man at the bottom of the cliff. The third party is under an *obligation* to remove the deadly threat, to kill the fat man. For the third party confronts a choice between killing a person who does not have a right not to be killed (in order to save the life of a person who has a right not to be killed) and allowing a person with a right not to be killed to be killed (by a person who does not have a right not to be killed).³⁰ (If the reader is unhappy as I am **(p.66)** with Thomson's claim that it is in fact permissible for the person at risk to kill an innocent fat man, no matter. Simply assume that the fat man is guilty; assume that he was not pushed but rather jumped intending to kill the person below.) But now we can see how the logic of Thomson's position works against her impartialist claim that the third party is in the same moral predicament as the defender. For that logic leads to the partialist conclusion that she wants to resist, namely, that there is a disanalogy between the moral predicament of the third party and that of the person at risk. For the person at risk—if he was able to defend himself, and could do so only by killing the fat man—would not be under an obligation to kill the fat man, as is the case with the third party; rather, at most it would be *permissible* for the person at risk to kill the fat man. The man at the bottom of the cliff is presumably entitled—if he so chooses—not to exercise his right to self-defense.

2.5 The Responsibility Account

The failure of Thomson's no-fault theory suggests a variation on it: an impartialist account that strengthens the conditions under which an agent does not have a right not to be killed. Here there are a number of possibilities, but perhaps the most salient is that provided by Jeff McMahan.³¹ On McMahan's account, agent A does not have a right not to be killed (or, to use McMahan's terminology, A is liable to be killed) if A is a deadly threat to agent B; A is responsible for being a deadly threat, and it is necessary for B to kill A to remove the threat.

Notice that McMahan endorses the necessity condition,³² and is therefore open to the objections to that condition made above (section 2.4) in respect of Thomson's account. However, in this section I focus on other aspects of McMahan's account that differentiate it from Thomson's—in particular, on his invocation of a notion of responsibility. Consider McMahan's case of the conscientious car driver, B, who is an accidental (but non-negligent and non-reckless) deadly threat to a pedestrian **(p.67)** A. A can prevent A being killed by B, but only by killing B. Here B is responsible for being a deadly threat to A, since B is intentionally driving his car knowing that in so doing there is some small risk to the lives of pedestrians. Accordingly, in these circumstances the car driver does not have a right not to be killed, and so the pedestrian is justified in killing the car driver in self-defense.³³ Moreover, since the car driver, B, does not have a right not to be killed and the pedestrian, A, retains her right not to be killed, then some bystander, C, would also be morally entitled (indeed, perhaps morally obliged) to kill B in order to save A. This putative right or obligation of bystander, C, to intervene by killing B seems counter-intuitive. I return to this point shortly.

In McMahan's conscientious car driving scenario we need to distinguish between B not having a right not to be killed and B having a right to be killed that is, nevertheless, overridden by other moral considerations. I suggest that while the latter may well be true, the former is not. Accordingly, and contra McMahan, the example ought to be understood as follows: The pedestrian retains her right not to be killed, as does the conscientious car driver. However, in the circumstances in question, the pedestrian's right to self-defense overrides the right of the driver not to be killed.

To see this, consider another version of this scenario, in which the principles of proportionality and impartiality play a decisive role. In this version, the conscientious car driver is actually five drivers who jointly drive (let us say) a goods train, and the only way to prevent the train from accidentally running off the track and killing the single pedestrian now in the path of the train is for a third party, C, to fire a rocket at the train which will kill all five drivers. As was the case with the conscientious car driver, the train drivers are conscientious; they are an accidental (but non-negligent and non-reckless) deadly threat to the pedestrian. Surely C would not be morally justified in firing the rocket. For, on the one hand, C (unlike, I suggest, the pedestrian in both McMahan's car-driving example and in the train-driving scenario) must act impartially, and, on the other hand, killing five innocents to save one is a disproportionate response. Yet on McMahan's account, C would be morally justified in firing the rocket, since, unlike the pedestrian, none of the drivers has a right not to be killed (i.e., each of the drivers is liable to be killed). They are each liable, since they jointly cause the accident (or rather will cause it absent **(p.68)** C's intervention). Their joint action is as follows, let us assume: Driver B1 shovels the coal to keep the engine running, B2 monitors the speed of the train, B3 scans the track ahead, and so

on. So each driver makes a causal contribution to the accident in the course of performing their joint action of driving the train. Moreover, while each is conscientious in his or her role, each knows that there is a small risk of a derailment in which an innocent pedestrian may be killed; indeed, this is a matter of mutual knowledge.³⁴

Like the no-fault theory, McMahan's responsibility account is an impartialist theory of the morality of killing in self-defense, and this makes it vulnerable to further objections. Consider McMahan's rendering of the tactical bomber scenario, in which a tactical bomber foreseeably, but unintentionally, kills a small number of innocent civilians in the course of bombing a strategically important munitions factory. His action is morally justified because he does not intentionally kill the civilians, and because the bombing saves the lives of a considerably larger number of other innocent civilians. According to McMahan, the tactical bomber is not liable to defensive killing—he retains his right not to be killed—because his action was morally justified.³⁵ However, since the innocent civilians about to be bombed have not wronged anyone or violated anyone's rights, they are not liable to be killed either; they also have a right not to be killed. Thus the innocent civilians would be morally justified in shooting down the tactical bomber in self-defense, just as he is morally justified in unintentionally but foreseeably killing them. So far, so good; this accords with our intuitions.

However, it is not clear that this view of the matter can be consistently adhered to by an impartialist such as McMahan. For partialism intrudes; specifically, in respect of the right to self-defense. Let us assume that it is not the innocent civilians that are in a position to shoot down the tactical bomber, but rather some third party. From an impartialist standpoint the third party is confronted with the same two options that confront the innocent civilians contemplating shooting down the tactical bomber; morally speaking, the third party and the civilians are in the same predicament. The first option is to shoot down the tactical bomber and, thereby, save the small number of innocent civilians from being (unintentionally) killed (p.69) by the tactical bomber, but at the expense of the much larger number of innocent civilians who would be saved by the tactical bomber's action. The second option is not to shoot and, thereby, allow the small number of civilians to be killed but preserve the lives of the much larger group of civilians. For the third party the principle of proportionality is surely decisive; the third party does not have a partialist right of self-defense in play, as do the innocent civilians about to be killed by the tactical bomber. Accordingly, the third party applies the test of proportionality and, as a result, correctly decides not to shoot down the tactical bomber on the grounds that the death of the small number of innocent civilians killed by the tactical bomber is outweighed by the larger number of lives saved by his destruction of the munitions factory. That is, given the principle of proportionality, it is morally impermissible for the third party to shoot down the tactical bomber. This also

seems correct. But if impartialism is correct, how can it be morally permissible for the innocent civilians to kill the tactical bomber but impermissible for the third party to do so? It is agreed on all hands that both the tactical bomber and the innocent civilians retain their right not to be killed. However, the principle of proportionality requires that the innocent civilians, rather than the tactical bomber, be killed. Specifically, if impartialism is correct, then there can be no decisive moral difference between the justification available to the innocent civilians for killing or not killing the tactical bomber and that of the third party. Accordingly, consistent with his impartialism, McMahan ought to hold that it is not morally permissible for the innocent civilians to kill the tactical bomber. However, it is surely morally permissible for the innocent civilians to kill the tactical bomber (on grounds of self-defense), notwithstanding the requirements of the proportionality principle. So much the worse for impartialism—and therefore so much the worse for McMahan in so far as his account is to be understood as impartialist.³⁶

2.6 The Fault-Based Internalist Suspendable Rights-Based Theory (FIST)

All the theories we have considered are inadequate. However, their failure points to a number of criteria of adequacy for any account of justifiable **(p.70)** killing in self-defense. First, the justification of killing in self-defense is not simply that there is a deadly threat or that there is a deadly threat that can only be removed by killing the person who constitutes the deadly threat. Fault is involved in the justification of self-defense. The objection to the no-fault theory brings this point out. Second, any right to life, or right not to be killed, that an individual might have is dependent on, or in some way linked to, that individual discharging his or her obligation not to kill others. In other words, the moral value of an agent's life is partly dependent on the value that agent puts on the lives of others. The objections to the Hobbesian account bring this out. Third, the linkage has to be such that the right not to be killed is suspended, and not canceled or overridden. The objections to the simple right to life theories seem to justify this claim. I note that suspension of a right is consistent with the right in question being inalienable; at a deep level one retains and cannot transfer one's suspended right even though it is not in effect. Fourth, the linkage has to be relativized, to some extent, to the defender and the attacker. The defender is not obligated to respond to the life-threatening attack in the way that a third person is obligated to respond. One's legitimate interest in one's own life, and the responsibility for it, is different from another person's legitimate interest in, or responsibility for, one's life. The third objection to the force-choice theory evidences this consideration. Moreover, whatever force the Hobbesian account has—and it has some force—rests on this intuition. Fifth, the attacker's reason for attacking is a morally relevant consideration. The objections to the Hobbesian view brings this out. Sixth, whether or not the attacker forced the choice (thick sense) can be a morally relevant consideration in some scenarios.

Whatever appeal the forced-choice theory has—and it has some appeal—rests on this thought.

Given these criteria of adequacy, I suggest the following fault-based internalist suspendable-rights theory (FIST).³⁷ You have a right not to be killed by me, and I have a concomitant obligation not to kill you.³⁸ However you suspend your own right not to be killed by me if you come to have all the following properties: **(p. 71)**

1. You are a deadly threat to me.
2. You intend to kill me and are responsible for having this intention to kill me.
3. You do not have a good and decisive moral justification for killing me, and you do not reasonably believe that you have a good and decisive moral justification for killing me.

Accordingly, each person, X, has a set of suspendable rights not to be killed: X has a right not to be killed by Y, and a right not to be killed by Z, and so on. X also has a set of suspendable obligations not to kill: X has an obligation not to kill Y, and an obligation not to kill Z, and so on. Here my right not to be killed generates an obligation on your part not to kill me.

There are three conditions on the suspension corresponding to three features of the attacker, it being understood that the attacker himself suspends his right in virtue of possessing these three features. Condition 1 simply states what being an attacker consists in—namely, being a deadly threat. Condition 2 expresses the requirement that the attacker must be morally responsible for the fact that he is a deadly threat. Finally, condition 3 signals the relevance to justified killing in self-defense of the attacker's justification for his attack. This justification is neither objectively sufficient nor reasonably believed to be sufficient.

Note that the above definition provides a set of necessary conditions that are jointly sufficient but not jointly necessary for the suspension of the right not to be killed. One reason for this is that there may well be closely related sets of conditions that are jointly sufficient (e.g., that the attacker seeks to torture me for the rest of my life or cause severe brain damage of a kind that disables my intellectual faculties, although I remain alive and conscious).

These rights are such that when one member of the set of rights is suspended, the other rights (and concomitant obligations) remain in force. Thus, if B's right not to be killed by A is suspended, then A no longer has an obligation not to kill B (based on that right). However, B still has a right not to be killed by C, and thus C's obligation not to kill B remains in force. Accordingly, this is not an impartialist account, as are those of, for example, Thomson and McMahan.

It must also be noted that these rights not to be killed are not only able to be suspended, they can also be overridden. So while B might still have a right not to be killed by, say, C, it might be the case that it is morally **(p.72)** permissible for C to kill B. This would be the case if B's right not to be killed by C was overridden (but not suspended).

Moreover, B might still have a right not to be killed by A in circumstances in which B intentionally tries to kill A because B wrongly, but reasonably, believes he has a good and decisive justification. Suppose, for example, A is the twin brother of a mass murderer and A knocks on B's door seeking assistance with a broken-down car. Person B wrongly but reasonably believes A is the mass murderer and tries to kill A. A responds by killing B in self-defense. Here B's right not to be killed is not suspended. Rather, B's right not to be killed is overridden by A's right not to be killed, given B wrongly, but excusably, is trying to kill A. Notice that A would not be justified in killing B unless it was necessary to do so.

According to FIST, that a person stands to his attacker in a different way from the way in which a third person stands to that attacker makes a crucial difference to the kind of moral justification available to the third person for killing the attacker.³⁹ If she can decisively intervene to save the defender's life, but only by killing the attacker, the third person confronts a choice between two lives, one guilty and one innocent. From the point of view of the third person, both the defender and the attacker have a right not to be killed, and consequently the third person has a stringent obligation not to kill the attacker (or the defender). However, the third person confronts a choice between killing a would-be murderer and allowing an innocent person to be killed. In that case, she ought to choose to preserve the life of the innocent person. Here the third person's obligation not to kill the attacker remains, but it is overridden. The duty of the third person to preserve an innocent life, coupled with the fact that the attacker is the guilty party, is sufficient to override the attacker's right not to be killed by the third person.

Moreover, even in cases where an attacker's right not to be killed by a defender is not suspended, there are moral differences between the defender and a third party due to the partialist nature of the right to self-defense. For in cases in which the rights of both defenders and attackers not to be killed have not been suspended, it is morally permissible, other things being equal, for a defender to give greater weight to his or her own life than to the life of a defender, whereas this is not so for a third party; other things being equal, third parties have to act impartially. This **(p.73)** moral difference is evident in my versions of McMahan's conscientious car driver and tactical bomber scenarios discussed above. In these scenarios the third party ought to act impartially, whereas it is excusable for the defender to act partially in his or her own favor. Accordingly, it is morally excusable for the defenders (the pedestrians and the innocent

civilians, respectively) to kill their attackers (the car driver, the joint train-drivers, and the bomber, respectively) but not for the third party to do so.

An important feature of FIST is that the attacker suspends his right not to be killed in cases in which the defender does not have to kill the attacker to save his life.⁴⁰ In this respect, FIST is different from most contemporary accounts, including those of Montague, Thomson and McMahan. There are two general background intuitions here. First, whether or not a person has such a fundamental right as the right not to be killed must depend on properties of that person. It cannot depend on whether someone else, such as the defender, has or does not have a capacity to defend himself. Second, if a person deliberately kills other people without any justification whatsoever, then that person has called into question their very entitlement to live; a person's right to live is not something that exists independently of the respect that that person has for the right to life of others. However FIST focuses, in particular, on the absence of any right of the attacker that he be spared by the defender—the one the attacker sought to kill. When the defender disarms the attacker, everything is not as it was before the attack. Before the attack, the presumption is that the attacker-to-be recognizes the defender's right not to be killed. The attack reverses this presumption. The presumption must now be that the attacker does not recognize the existence of his obligation not to kill the defender.

Notwithstanding my commitment to FIST, an account in terms of an attacker's suspension of his right not to be killed, I am still able to maintain, and do maintain, that the defender has, or might have, a moral obligation (of a different kind) not to kill the attacker in cases in which it is not necessary to kill the attacker to preserve her own life. If so, this obligation is not the obligation generated by the right that each agent has not to be killed. Rather it would be one of a number of obligations. Some of these are generated by features of the attacker. For example, there is the obligation not to destroy what has moral value, and the life of the attacker still has, or may well have, moral value. And there is the related obligation **(p.74)** to be merciful to those who have wronged you. Other obligations involve considerations that are external to the attacker. For example, there may be dire consequences for the attacker's family if you kill him. Importantly, there will be dire consequences for the community if defenders generally kill their attackers. Hence the existence of laws to the effect that one must not kill in self-defense unless one has to. So my account is able to accommodate the intuition that one ought not to kill in self-defense unless one has to.

In FIST the right not to be killed is relativized to single agents. Nevertheless, FIST can accommodate killers who seek not to kill victims qua individuals, but qua members of some group. Suppose some person has a policy of killing people who belong to a certain category, such as a certain racial group, or persons with a price on their head. Suppose also that I am a member of this category and

have reason to believe that, unbeknown to the killer, I am the next person belonging to that category that he will try to kill. Perhaps my name is on the latest hit list the killer is about to receive. In this kind of case, the killer has an intention to kill someone belonging to the category to which I belong, and as a result will kill me unless I intervene. In such cases, although the killer only has an intention to kill me qua member of some category—it is not personal, so to speak—his right not to be killed by me is nevertheless suspended. Potentially, at least, this has implications for military combatants fighting wars, as we shall see in Chapter 6.

2.7 Objections to FIST

Having outlined my favored account of the justifiable killing in self-defense, namely FIST, I will now deal with a number of objections to it. First, it might be objected that the intuition that one ought not to kill one's attacker, unless one really has to, is not sufficiently catered for by FIST. In particular, it might be claimed that the right of the attacker not to be killed by me is not suspended if I can defend myself without killing my attacker. On this view, the fact that the attacker is a deadly threat who intends to kill the defender without good reason is not sufficient for it to be the case that the attacker's right not to be killed is suspended. The further condition required is that it is not the case that the defender can disarm the attacker. Let us term this alternative conception to FIST the fault-based externalist suspended rights-based theory, or FEST. However, I have already argued (p.75) above in relation to Thomson's account that it is not a necessary condition of the attacker's right not to be killed by the defender being forfeited or suspended that the defender can defend himself without killing the attacker.

To recap: The argument revealed that a necessary condition for an attacker's right not to be killed being suspended is (a) the defender cannot disarm the attacker without either putting her own life at risk or incurring serious harm to herself, and/or (b) the defender's disarming of the attacker will not remove an unavoidable and certain future threat posed by the attacker to the life of the defender, and/or (c) the defender chooses not to disarm the attacker, even though the defender knows that in this event the attacker will kill her. However, as we saw, even this host of qualifications is incomplete.

There are two relevant points to be made concerning FEST. First, it is gradually moving away from its original position, and closer to FIST. Eventually, the positions will become more or less indistinguishable. FEST becomes weak FEST becomes very weak FEST . . . becomes FIST. At that point, FEST will have surrendered to FIST; FIST has remained unchanged through the objector's process of transformation.

Second, as argued above in relation to Thomson's account, FEST is committed to the *existence* of the natural right not to be killed being dependent on a variety of

contingent, complex, and changing circumstances that are external to the rights bearer. Surely such a natural right is only dependent on natural properties possessed by the rights-bearer qua human being. More specifically, FEST requires that the possession or not of the natural right of the attacker not to be killed depends on facts about the ability or willingness of the defender to defend herself. Surely, whether or not an agent has such a basic right cannot be located in facts about another agent. For these reasons, FIST ought to be preferred to FEST.

A second objection to FIST is as follows: Whereas this conception of a suspended right not to be killed has some plausibility when we consider the moment of the attack, it becomes implausible when we consider later times. Surely the former attacker has a right not to be killed by his former defender when they meet ten years later. Yet according to FIST, there would be no such right.

On FIST, the presumption is that the former attacker does not recognize any obligation not to kill the former defender, and is therefore a **(p.76)** deadly threat to the former defender. However, presumptions can be overridden. So the matter turns on whether or not the former attacker has—in virtue of his actions in the ten year period—overturned the presumption.

If it is not the case that there is strong evidence that the former attacker now accepts the right of the (former) defender not to be killed, and is therefore no longer a standing deadly threat, then the presumption has not been overridden. Such evidence might consist of such things as remorse on the part of the former attacker that he once tried to kill the former defender, and a sustained attempt on the part of the former attacker to reform his character.

Moreover, even if the presumption against the attacker has not been overturned there are various other moral barriers to the former defender killing the former attacker. For there are obligations to preserve what has moral value, to obey the law, to take into account consequences, and so on. The passage of time has possibly strengthened some of these. For example, if the former attacker has completed a prison sentence, and this has had a deterrent effect on him, then there might now be strong consequentialist grounds for leaving him be.

A third objection is as follows: By the lights of FIST in the case of justified lethal intervention by a third party, the right of the attacker not to be killed remains but is overridden. However, it might be argued that if that is the case then the attacker (or, at least, the attacker's family or some such) is owed compensation by the third party for infringing this right. But surely the attacker is not owed compensation. At this point we need to distinguish between (1) suspending a right, (2) violating a right, and (3) justifiably infringing a right. In the case where the right of the attacker is suspended, obviously there is no entitlement to compensation. By contrast, in the case where a right is violated, compensation is

called for. What of the case of justifiable infringement? This is the kind of case of interest to us. Here there are multiple possibilities; sometimes compensation is warranted, sometimes not. In the standard scenarios of justified killing in defense of others no compensation is warranted, since the attacker culpably brought about the circumstances in which (a) the third party is morally obliged to intervene, and (b) the third party has no option but to intervene if this obligation is to be discharged.

(p.77) 2.8 Conclusion

In this chapter I have elaborated and criticized the main contemporary theories of justifiable killing in self-defense, and also elaborated my own alternative account, namely, the fault-based internalist suspendable-rights theory (FIST).⁴¹ As the name indicates, FIST is a fault- and rights-based account, and to this extent it is familiar. However, it has two distinctive features. First, it is a partialist account in the following respect:⁴² The rights not to be killed are such that when one member of the set of rights is suspended, the other rights (and concomitant obligations) remain in force. Thus if A's right not to be killed by B is suspended, then (other things being equal) B no longer has an obligation not to kill A. However, A still has a right not to be killed by C, and thus C's obligation not to kill A remains in force. This condition is conservative in that it has the effect of curtailing the putative right of third parties to kill in defense of the lives of others. Nevertheless, it is morally permissible for third parties to intervene when the moral considerations for doing so override the right not to be killed of culpable attackers.

The second distinctive feature pertains to the necessity condition. According to FIST, a culpable attacker suspends his right not to be killed by a defender even in cases in which it is not necessary for the defender to kill the attacker to save her own life. This feature of FIST is permissive in that it has the effect of strengthening the right to self-defense. Nevertheless, the defender typically has a moral obligation not to kill the attacker in cases in which it is not necessary to kill the attacker to preserve her own life. This moral obligation is based in large part on the dire consequences for the members of a community if defenders are generally allowed to kill their attackers. For such a practice, if it goes unchecked, it will almost certainly lead to interpersonal and communal violence spiraling out of control.

Notes:

(1.) An earlier version of much of the material in this chapter appeared in Miller, "Killing in Self-Defence."

(2.) See, for example, G. P. Fletcher, "Right to Life," *The Monist* 63 (1980): 135–155; Montague, "Self-Defense and Choosing between Lives"; Paul H. Robinson, "Causing the Conditions of One's Own Defense," *Virginia Law Review* 71, no. 1 (1985): 1–63; Cheyney C. Ryan, "Self-Defense, Pacifism and the Possibility of

Killing," *Ethics* 93, no. 3 (1983): 508–524; Judith Jarvis Thomson, "Self-Defense and Rights," in W. Parent (ed.), *Rights, Restitution, and Risk* (Cambridge, Mass.: Harvard University Press, 1986), 33–48; David Wasserman, "Justifying Self-Defense," *Philosophy and Public Affairs* 16, no. 4 (1987): 356–378; Jenny Teichman, "Self-Defence," in *Pacifism and the Just War* (Oxford: Blackwell, 1986), Chapter 8; J. J. Thomson, "Self-Defense"; Seumas Miller, "Self-Defense and Forcing the Choice between Lives," *Journal of Applied Philosophy* 9 (1992): 239–243; Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15 (2005): 386–405.

(3.) See, for example, Kai Nielsen, "On Justifying Violence," *Inquiry* 24, no. 1 (1981): 21–57; C. A. J. Coady, "The Morality of Terrorism," *Philosophy* 60 (1985): 47–69; Miller, "On the Morality of Waging War against the State"; Miller, "Just War Theory."

(4.) See especially Thomson, "Self-Defense and Rights"; Thomson, "Self-Defense"; and Wasserman, "Justifying Self-Defense." On Thomson's positive account, see Teichman, "Self-Defence." See also Miller, "Self-Defense and Forcing the Choice between Lives."

(5.) See Ryan, "Self-Defense, Pacifism and the Possibility of Killing"; and Thomson, "Self-Defense and Rights," 5. This point is made by a number of commentators. See, for example, Thomson, "Self-Defense and Rights," 35. For general attacks on the notion of forfeiture, see Ryan, "Self-Defense, Pacifism and the Possibility of Killing," 511.

(6.) This point is made by Wasserman, "Justifying Self-Defense," 359.

(7.) There are some cases in which the defender does not intend to kill her attacker but, nevertheless, the attacker is killed in the course of the defensive actions. However, there are many other cases in which the defender cannot avoid *intentionally* killing her attacker if she is to survive his attack, e.g. if her only means of defense is to fire her anti-tank gun at him. For my purposes the theoretically interesting cases are the latter ones and I will focus on these. Unless otherwise indicated, I assume that the intentions in question are under the agent's control, i.e. in my terminology the intention to kill is deliberate.

(8.) See Montague, "Self-Defense and Choosing between Lives." I discuss the forced-choice theory in Miller, "Self-Defense and Forcing the Choice between Lives."

(9.) McMahan, "The Basis of Moral Liability to Defensive Killing."

(10.) Montague states in his reply to earlier criticisms of mine (Miller "Self-Defense and Forcing the Choice between Lives") that defenders are responsible for the deaths of the attackers that they kill but, nevertheless, he apparently

maintains that attackers are responsible (in some sense) for the situation in which defenders have to choose between allowing themselves to be killed and killing their attackers. Certainly, attackers are causally responsible for this situation. See Phillip Montague "Forced Choices and Self-Defense" *Journal of Applied Philosophy* 12:1 1995 90.

(11.) Since it is the right to self-defense, rather than the right to life, that is absolute, and since this right is agent-centered, the Hobbesian account differs from the absolutist right to life account discussed above.

(12.) Unless pacifism is true. In that case, no one is ever entitled or obligated to kill.

(13.) See Frances Kamm, *Ethics for Enemies: Terror, Torture and War* (Oxford: Oxford University Press, 2011), 78. Kamm makes the normative theoretical claim that when an act is otherwise morally permissible (notwithstanding the harm it produces), intending the harm need not affect the permissibility of the act; however, her argument for this seems to me not to work. For in her examples of morally permissible actions involving bad intentions, these bad intentions are constrained by good second-order intentions with respect to the bad first-order intentions. See my review of *Ethics for Enemies* in *Notre Dame Philosophical Reviews* (2012). See also Chapter 7.2.2.

(14.) See Teichman, "Self-Defence."

(15.) Thomson, "Self-Defense." Thomson does not think that considerations of fault are always irrelevant to the justification of killing in self-defense. They can be relevant in some cases of self-defense in which the defender does not have to choose between his or her own life and the life of the attacker. See Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge: Cambridge University Press, 1994).

(16.) Thomson, "Self-Defense," 299–300, 303–305.

(17.) Thomson, "Self-Defense," 288.

(18.) Thomson, "Self-Defense," 289, 300–301, 303–305. In fact, as we will see, there is some confusion as to Thomson's precise position.

(19.) Thomson, "Self-Defense," 299.

(20.) Thomson, "Self-Defense," 285, 294–295. At times (e.g., p. 301), Thomson seems to think that there is some distinction to be made between her theory of self-defense and her commitment to the irrelevance of fault in the justification of killing in self-defense. But this distinction makes little difference to her commitments. For she commits herself to the theory taken independently of the irrelevance of fault thesis—the theory that B does not have a right not to be

killed by A, if (1) B is a deadly threat to A and (2) B will kill A if A does not kill B—and she commits herself to the irrelevance of fault thesis.

(21.) Thomson, “Self-Defense,” 306. McMahan’s liability theory shares this feature (McMahan, “The Basis of Moral Liability to Defensive Killing”).

(22.) Thomson, “Self-Defense,” 284.

(23.) Thomson, “Self-Defense,” 298–299.

(24.) Thomson, “Self-Defense,” 305.

(25.) It might be thought that neither A nor C has lost their right not to be killed. If so, then the objection to the sufficiency of Thomson’s conditions still stands. Moreover, this thought is consistent with there being a moral difference between killing A and killing C, but it would not be the moral difference between justified and excusable killing.

(26.) To suggest that fault is relevant to determining whether or not one has lost one’s right to life is not to suggest that fault provides a sufficient condition for losing one’s right to life. Certainly fault, in the sense of intention to kill, is not a sufficient condition. But we have been speaking of fault as involving not only simply intentions and the like, but also causal involvement.

(27.) Perhaps the right not to be killed derives from the right to life. At any rate, some have argued that the right to life itself is derived. For discussion, see Jonathan Glover, *Causing Death and Saving Lives* (London: Penguin, 1977), Chapter 3. Glover argues against the influential view of the sanctity of life (i.e., that killing is intrinsically wrong, since life has value in itself). He argues that killing someone is *directly* wrong even in the absence of harmful side effects, but that it is *not intrinsically* wrong.

(28.) I argued for this in my 1993 paper, “Killing in Self-Defense”. Since then others have done so, e.g. Uwe Steinhoff in his “Self-Defense and the Necessity Condition” (unpublished).

(29.) On this issue, see Miller, “Shootings by Police in Victoria,” and Miller and Blackler, *Ethical Issues in Policing*, Chapter 3.

(30.) It might be suggested that whereas some third parties, such as police officers, might have this obligation to kill, by virtue of their institutional role to intervene in life-threatening situations involving others, most third parties do not have any obligations to intervene by killing. So if the third party was a police officer, he or she would be under an obligation, but not if the third party was an ordinary citizen. I do not agree with this, but even if it is accepted, my basic

point against Thomson holds; to see this, simply assume that the third party is in fact a police officer or like official.

(31.) McMahan, "The Basis of Moral Liability to Defensive Killing."

(32.) McMahan, "The Basis of Moral Liability to Defensive Killing." See also McMahan, *Killing in War*, 9.

(33.) McMahan, "The Basis of Moral Liability to Defensive Killing," 394.

(34.) Each knew, and each knew that all the others knew, etc.

(35.) McMahan, "The Basis of Moral Liability to Defensive Killing," 399.

(36.) From an institutionalist perspective, it might be argued that whereas the tactical bomber, as a military role occupant, is morally obliged to apply the proportionality principle, innocent civilians are not thus obliged. I return to this issue in Chapters 6 and 7.

(37.) See John Locke, *Second Treatise on Government*, Chapter 3. Montague (in "Self-Defense and Choosing Between Lives," 214) discusses this matter in relation to Locke.

(38.) So the right in question is a so-called claim right.

(39.) Ryan (in "Self-Defense, Pacifism and the Possibility of Killing," 519) makes this kind of point in his discussion of "negative bonds."

(40.) See Ryan, "Self-Defense, Pacifism and the Possibility of Killing," 512.

(41.) I first elaborated FIST in 1993 in my article "Killing in Self-Defense". Recently, other theorists have proffered accounts that are similar in some respects, e.g. Uwe Steinhoff "Self-Defense and the Necessity Condition (unpublished).

(42.) It is also partialist in the manner of Hobbesian accounts, but this is not a distinctive feature of FIST.

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