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Justifying Defense against Non-Responsible Threats and Justified Aggressors: The Liability vs. the Rights-Infringement Account

Abstract

Even among those who find lethal defense against non-responsible threats, innocent aggressors, or justified aggressors justified even in one to one cases, there is a debate as to what the best explanation of this permissibility is. The contenders in this debate are the liability account, which holds that the non-responsible or justified human targets of the defensive measures are liable to attack (that is, they do not have a right not to be attacked), and the justified infringement account, which claims that the targets retain their right not to be attacked but may be attacked anyway, even in one to one situations. Given that we normally think that rights are trumps, this latter claim is counter-intuitive and rather surprising, and therefore in need of justification and explanation. So far only Jonathan Quong has actually tried to provide an explanation; however, I will argue that his explanation fails and that Quong's own account of liability is misguided. I then address Helen Frowe's critique of the liability account. She makes the important concession that the tactical bomber (a justified aggressor) has to compensate his victims, but she tries to block the conclusion that he must therefore be liable. I will demonstrate that her attempt to explain away liability fails once that concession is made.

Key words:

Frowe, Helen; justified attackers; liability; non-responsible threats; Quong, Jonathan; rights infringement; self-preference; symmetrical self-defense; tactical bomber

Introduction

There has been some debate over the question of whether so-called non-responsible threats, that is, persons who without fault and without agency pose a threat to others, and so-called innocent aggressors, that is, persons who act aggressively but innocently, can be justifiably killed in one to one situations. An example of a non-responsible threat would be Robert Nozick's famous falling man, who is pushed by someone down a well against his will in order to kill you (and you are innocent and did not pose a threat to anybody when the man was pushed). You are at the bottom of the well and will indeed be killed unless you disintegrate the falling man with your ray gun.¹ An example of an innocent aggressor would be a person who has been drugged against his will and now suffers from paranoid delusions that compel him to kill others because he deems this necessary to save his life from their imagined unjust attack. Such an innocent aggressor is *also* non-responsible for his aggression although not due to a lack of agency but rather on the basis of a full excuse.

Justified aggressors, on the other hand, are responsible agents, but they have a moral

¹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 34-35.

justification for posing a threat to innocent and initially non-threatening persons. (Justified aggressors are usually called “innocent aggressors.” I reject this terminology, but will not go into this here.²) A standard example of a justified aggressor, in a one to one situation, would be the tactical bomber who is about to destroy an ammunition factory in a proportionate, justified military attack, full well knowing that an innocent bystander will also be killed by his attack (“collateral damage”).

While some philosophers argue that non-responsible threats must not be killed (in one to one situations and perhaps certain exceptional circumstances aside), most philosophers and the law in most Western jurisdictions deem lethal measures against non-responsible (lethal) threats justified. Moreover, even philosophers who claim that, all else being equal, non-responsible threats must not be killed, usually find it hard to deny that justified aggressors, all else being equal, may be killed by the innocent persons they threaten.³

In this article, however, I will not be so much concerned with the debate between those who think that non-responsible threats and justified attackers can be killed in one to one situations and those who deny this,⁴ but rather focus on a debate entirely within the former camp. This debate concerns the question as to *why* they can be killed: are they *liable* to lethal attack, that is, do they *lack a right not to be attacked* in this situation, or is it for some other reason?⁵

² For reasons to reject this terminology, see Uwe Steinhoff, “Rights, Liability, and the Moral Equality of Combatants,” *The Journal of Ethics* 13 (2012), pp. 339-366, at 340-41 and 349-50.

³ McMahan once considered it “hard to believe” that the innocent civilians in his tactical bomber example may not defend themselves against the justified tactical bomber who is about to foreseeably (although not intentionally) kill them (if the numbers of the bombers and civilians are equal). However, he now embraces this implausible position. For McMahan’s original position, see his “Self-Defense and the Problem of the Innocent Attacker,” *Ethics* 104 (1994), pp. 252-90, at 275, and “The Basis of Moral Liability to Defensive Killing,” *Philosophical Issues* 15 (2005), pp. 386-405, at 388-89. For his new stance, see his “Self-Defense Against Justified Threateners” (Draft of Feb. 2013), unpublished ms., on file with author, and available at jeffersonmcmahan.com. McMahan does not really back up this shift by sufficient argument, however. For a criticism of McMahan’s change of mind and his new position, see Uwe Steinhoff, “McMahan, Symmetrical Defense and the Moral Equality of Combatants,” unpublished ms., available at <http://philpapers.org/s/Uwe%20Steinhoff>.

⁴ For such a discussion, see Uwe Steinhoff, *On the Ethics of War and Terrorism* (Oxford: Oxford University Press, 2007), pp. 80-94; “Why We Shouldn’t Reject Conflicts: A Critique of Tadros,” unpublished ms.; and “Shalom on the Impermissibility of Self-Defense against the Tactical Bomber,” unpublished ms.

⁵ For some authors, notably Jonathan Quong, “liability to attack” means more than a person’s mere lack of a right against attack; instead, the person once must have had a right against attack and then somehow “forfeited” it by his own responsible action (I will come back to this below). See Joanna Mary Firth and Jonathan Quong, “Necessity, Moral Liability, and Defensive Harm,” *Law and Philosophy* 31: 673-701, at 674-675. This is not how I use the term, not least since such a use of the term prejudges the debate between specification theory and forfeiture theory. For a comparison of the two theories, see

I will proceed as follows. I first briefly sketch a liability account of the justified killing of non-responsible threats, innocent aggressors, and justified aggressors (Sect. 1). This account acknowledges that some such situations can give rise to symmetrical self-defense (the non-responsible threat is permitted to fight back against the potentially lethal counter-measures of the threatened person) and explains this in terms of the liability of at least one of the involved parties. In the following sections I shall then argue that the explanation in terms of liability is indeed the only plausible explanation available so far. The alternative “justified infringement” account favored by Jonathan Quong (Sect. 2), among others, seems to be unfounded. Quong adduces a single example in defense of the self-preference account; this example, however, differs in morally relevant ways from the symmetrical defense cases at issue. By considering pertinent examples, in contrast, it can be shown that the self-preference account is mistaken. Additionally, I will argue that Quong’s own account of liability is unwarranted and mistaken. Helen Frowe (Sect. 3) also tries to provide an alternative to the liability account. Discussing the tactical bomber case, she makes the important concession that the tactical bomber has to compensate his victims, but she tries to block the conclusion that therefore he must be liable. I will demonstrate that her attempt to explain away liability fails once that concession is made.

1. *The Liability Account*

Suppose you really are permitted to use your ray gun against Nozick’s falling man in order to vaporize him – how could that possibly be explained? The explanation that suggests itself is that the falling man, by unjustly posing a lethal threat, has lost his right to life and accordingly has no right any more not to be attacked: in other words, he has become *liable* to attack. Thus, the person threatened by him can now kill him *without* thereby violating his rights, and in light of this the lethal measures he must use against him to save his own life are justified.

On the rights-based account of liability to attack favored here, people have a general right to use necessary and proportionate force against unjust threats of all sorts (an *unjust threat* being one that does not have a right to pose the threat and has not been set in motion by someone who had a right to do so). That is, this right refers to *all* threats, including to those posed by inanimate objects like rocks.

While a rock does not have any rights, the falling man has. He has a right to life and a right to self-defense. He has no right to crush innocent people, however, and therefore he poses an unjust threat. But if the rights of the two persons are not compatible in this situation – that is, if the innocent person below can only defend himself and save his life by vaporizing the unjust threat above with his ray gun – then the claim-rights in their collision can no longer be upheld as claim-rights (for as claim-rights they are not compatible) but instead become mere liberty-rights. While a *right*, understood as a claim right, implies that the person I hold the right against cannot interfere in my exercise of it

Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge: Cambridge University Press, 1996), ch. 6. This difference between my terminology and the terminology of two of the authors I discuss below is irrelevant for the purposes of this article although I will briefly come back to it below.

without wronging me, a *liberty*-right held against a certain person only implies that I am not duty-bound towards that person not to exercise this liberty and thus implies that by exercising it I would not wrong her. It does *not* imply that the other person would wrong *me* if she tried to keep me from exercising my liberty. Thus, both parties have lost their *claim*-rights to life *and* to self-defense but *retained* their *liberty*-rights to life and self-defense.

Thus, the situation of the innocent threat and the (potential) innocent victim is a symmetrical defense case in which both parties are liable to attack. The fact that the falling man is morally innocent, even the fact that his falling is not an exercise of agency, is not sufficient for him to retain his specific right to life in this situation: innocent people posing a threat to someone who is not responsible for initiating a threat to another innocent and non-threatening person do not have a right to life (at least not if killing them is the only way to stop them). Even though it seems too strong to say that the falling man is *violating* the right of the other person (perhaps precisely because we associate violations with agency), he is nevertheless posing an unjust threat.⁶ People, however, have a duty towards others not to pose unjust threats to them, and while ought implies can, so that it cannot be the case that one ought to do what one cannot do, duty does *not* imply ability: there is nothing paradoxical or incoherent about saying things like: “This soldier cannot fulfill his duty anymore.” Thus, since the falling man is not discharging his duties towards the man standing below, on grounds of reciprocity the latter is released from the relevant duties towards the former. And hence the innocent man below may try to vaporize the falling innocent man, but the falling innocent man may also try to prevent this by killing the innocent man below.⁷

What about the confrontation between the tactical bomber and the innocent civilians? Intuitively, the civilians are justified in defending their lives against the tactical bomber. The account of liability just referred to explains why: the civilians have a right not to be attacked by him, he attacks them anyway, and so he becomes liable to attack. Conversely, however, the civilians do *not* become liable to attack. I said in the paragraph before the last that if the rights of two persons are not compatible in a situation then they can no longer be upheld as claim-rights but instead become mere liberties. This is *ex hypothesi* the situation in the case of Nozick’s falling man and yourself: in this situation, one can only survive by killing the other. In particular, the falling man cannot simply reverse his trajectory and float up like a balloon. The tactical bomber, however, can simply change course and abort the attack.⁸ Unlike the falling man, he has forced the choice “My life, or

⁶ Thus, an objection that is often advanced against Judith Jarvis Thomson’s account, namely that the falling man cannot reasonably be considered as violating the other man’s rights and hence cannot be liable to attack in the light of Thomson’s own premise that one can forfeit one’s rights only by one’s own violation of the right(s) of others, does not work against the account presented here since this account simply does not share said premise.

⁷ See also *On the Ethics of War and Terrorism*, pp. 85-86 and 88-89.

⁸ This is one of the reasons why I will not discuss Gerhard Øverland’s interesting “asymmetrical fair share procedure” of dividing harm between innocent persons. See Øverland, “Dividing Harm,” *Journal of Moral Philosophy* 8 (2011), pp. 547-566. All the examples Øverland discusses are examples where the aggressor *cannot* simply abort the

his” upon the civilians by his own action; the civilians have not forced this choice on him. That makes *him* liable, not them. Thus, in one sense this is not a symmetrical self-defense situation: there is no symmetrical liability. In another sense, it is: the tactical bomber *may still defend himself* against the civilians (and they may defend themselves against his defense). But the reason for this is simply that his attack on the ammunition factory was justified anyway, even taking into account the foreseen death of the civilians. It was justified by a *necessity* or *lesser evil* justification: *ex hypothesi*, the attack brings about sufficiently *more* good than harm.

I submit that the only plausible explanation for the permissibility of your killing Nozick’s falling man and of the civilians’ killing the tactical bomber is some such explanation in terms of liability as just considered. As we will see in what follows, alternative explanations, as well as critical attacks on the liability account, fail.

If, by the way, this argument here in favor of the liability account should be regarded as “merely negative,” in that it precisely tries to refute alternatives and thus to remain the last theory standing, as it were, than this would not be a disadvantage in comparison to the arguments for the rights infringement account: as we will see, those arguments are definitely merely negative in that they – unsuccessfully – try to explain why the liability account cannot be accepted, hence likewise offering the rights-infringement account as only viable alternative. (The only seemingly positive arguments fail since they are, as we will see, either question-begging or also available to the liability account: thus, they cannot make a difference.) Thus my argument here is: *if* the (potentially lethal) justified attacker and the (potentially lethal) non-responsible threat may be permissibly killed (which only a tiny minority of philosophers denies⁹), then this can only be explained by the liability account,¹⁰ again, alternative explanations simply fail.

2. Quong on Self-Preference, Justified Rights-Infringement, and Liability

Jonathan Quong considers the case of the tactical bomber and the civilian as a case where

attack, so the relevance of Øverland’s account for the justified bomber is dubious and there is no reason to speculate about it here. In addition, his account is explicitly not intended to deal with non-responsible threats (see *ibid.*, p. 549). Moreover, while he clearly dislikes liability talk, I do not see that his asymmetrical fair share procedure is an alternative to the liability account; rather, his procedure seems to be one of *determining liability to certain amounts of harm*. There is simply no “justified rights-infringement” in Øverland’s approach.

⁹ Namely, apart from McMahan, only, as far as I can see, Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), pp. 202-213; and Stephen R. Shalom, “Killing in War and Moral Equality,” *Journal of Moral Philosophy* 8 (2011), pp. 495-512. For criticism of their accounts, see the relevant texts mentioned in n. 4.

¹⁰ In fact, only by a liability account that can successfully evade the above mentioned objection against Thomson’s account (see note 6). The account presented here can. Thus, it is not only preferable to the rights-infringement account, but also to Thomson’s account.

there is no liability; instead “each party has ... an agent-relative permission to infringe the rights of the other in self-defense if necessary.”¹¹ On his view, “the permission to act in self-defense is justified by appeal to the agent-relative value that each person’s life has for them.”¹² He also applies this account to cases of non-responsible threats.¹³ Yet, he then argues that we may still not kill an innocent *bystander* if thereby we could save our own life. Why? Because “when we act in self-defense, we still face certain moral constraints. Your life may have great agent-relative value to you, but this does not mean that morality permits you to do *anything* necessary in order to stay alive.”¹⁴

Quong acknowledges a severe problem for the justified infringement or self-preference account: while we might think that it can sometimes be justified (namely on grounds of a necessity justification) to infringe one innocent person’s right to life in order to save many other innocent persons, it would seem, as he admits, that “saving a single life [and defending a single person’s right to life], even if it is your own, is not sufficiently important to justify infringing a person’s right not to be killed.”¹⁵

Quong tries to tackle this problem and adduces the following example to undermine our intuitions regarding “rights-infringement.” It is also the *only* example he adduces for this purpose, and thus it bears a heavy, if not the whole, argumentative burden:

Man on the Track: There is a runaway trolley whose brakes have failed headed down a track where your child is trapped and will be killed by the trolley.

Fortunately there is a side track onto which the trolley can be diverted, but there is one man trapped on this side track, and he will be killed if you divert the trolley.¹⁶

Quong thinks, and I agree with him, that you are permitted to divert the trolley (although you seem to thereby violate or “infringe” the trapped man’s right to life). But while this shows that Quong is quite right in claiming that “the narrow thesis,” namely the thesis that it is *always* impermissible to kill (and to violate or “infringe” the right to life of) innocent people in one to one situations,¹⁷ is wrong, it is insufficient to support Quong’s account of self-defense against non-responsible threats and innocent or justified aggressors.

Why is that? First of all, this act of yours is, contrary to what Quong suggests, not justified under an appeal to the value that you attach to your child. It simply does not matter what value you attach to the child. Rather, the important point here is that you have a *special obligation*, in fact, a *special obligation of protection*, towards your child.¹⁸

¹¹ Jonathan Quong, “Liability to Defensive Harm,” *Philosophy and Public Affairs* 40(1) (2012), pp. 45-77, at 71.

¹² Jonathan Quong, “Killing in Self-Defense,” *Ethics* 119 (2009), pp. 507-537, at 516.

¹³ He calls them “Innocent Threats,” see *ibid.*, esp. pp. 507-509.

¹⁴ *Ibid.*, p. 523.

¹⁵ *Ibid.*, p. 511.

¹⁶ *Ibid.*, p. 512.

¹⁷ *Ibid.*, p. 511.

¹⁸ In the German legal literature, examples like Quong’s *Man on the Track* are widely discussed. But regardless which conclusion the author in question draws, these examples are always – quite appropriately – discussed under the heading of a *collision of duties*, and not under the heading of *preferences overriding duties*. For an overview, see Ingo

You would still have this obligation if you secretly wished your child dead (and thus do not attach any value to the child's life) because you want to get your hand on the funds your late spouse left behind. You do not, however, have such an obligation towards yourself. For instance, you can waive your right to life, but you cannot waive your child's right to life. This is a first disanalogy between this case and the case of literal *self*-defense against an innocent attacker.

Secondly, the kind of self-defense Quong wants to justify includes vaporizing an innocent threat with your ray gun.¹⁹ That, however, is a case of *creating a completely new threat*, not of diverting *an already existing threat* (the trolley). This is the second difference.

Thus, given the actual features of the literal self-defense case and given also that Quong admits that there are side-constraints even when it comes to self-defense, he would have to show that there is no side-constraint like this: "You must not kill an innocent person by the creation of a completely new threat only to save a second innocent person towards whom you have absolutely no special obligations." However, he does not show that. Therefore, his claim that "the permission to act in self-defense is justified by appeal to the agent-relative value that each person's life has for them"²⁰ remains a stipulation.

The following case,²¹ in contrast, *is* relevant:

Tiger: You are a big fan of rock star Albert. You never met him, you are not related, you just saw him on TV. However, you would give your own life in order to save his. Thus, you attach a higher value to his life than to your own. One day you see that Albert and innocent Bernie are being chased by a tiger. There is a boat, which, however, can only bring one of the two to safety. Bernie is faster, and will escape, which means that Albert will be eaten. There is a wall, which covers the tiger, but Albert and Bernie's heads are visible. You shoot Bernie in the head with your sniper rifle, thus saving Albert.²²

Bott, *In dubio pro Straffreiheit? Untersuchungen zum Lebensnotstand* (Heidelberg: C.F. Müller, 2011), pp. 110-118.

¹⁹ Quong, "Killing in Self-Defense," p. 507.

²⁰ *Ibid.*, p. 516.

²¹ Kimberly Kessler Ferzan, "Self-Defense, Permissions, and the Means Principle: A Reply to Quong," *Ohio State Journal of Criminal Law* 8(2) (2011), pp. 503-513; and Jason Hanna, "The Moral Status of Nonresponsible Threats," *Journal of Applied Philosophy* 29(1) (2012), pp. 19-32, esp. Sects. 2-3, provide cases that are intended to show that the side-constraint Quong proposes is still too permissive (or sometimes not permissive enough). My argument here, on the other hand, is that the very starting point of Quong's account is implausible to begin with.

²² Note that the killing of Bernie is in no way "opportunistic," it does not use Bernie as a means in Quong's sense since "there is no sense in which the acting agent takes advantage of, or exploits the presence of," Bernie (Quong, "Killing in Self-Defense," p. 525-526). The example is not one where Bernie is killed to distract the tiger from Albert. If Bernie (or the space he occupies or his property) weren't there at all, Albert would escape to safety. I have also come across the somewhat cryptic remark here that this case is affected by our intuitions about doing and allowing and perhaps by the doctrine of

This act is both legally and morally murder or manslaughter. It is impermissible. Thus, the general conclusions Quong draws from the very special case of his *Man on the Track* example do not follow.

A further problem of Quong's self-preference account of permissible infringement of other people's rights is that there is no principled reason to restrain it only to acts of killing; rather, it can be generalized, and Quong indeed does generalize it. He formulates the following "final version of the infringing principle."

You can permissibly infringe someone else's rights when this is necessary to defend something that belongs to you provided (a) the infringement is proportionate and (b) you would be able to keep what belongs to you if the other person and all their property were not present.²³

Condition (b) is supposed to express the side-constraint Quong emphasizes: you are not allowed to use other persons as mere means (at least not in one to one situations involving the same stakes on both sides).²⁴ However, it seems not really to be capable of doing that. To wit, if the only way unjust Brian can kill me is by using Robert's revolver, then it would still seem that I am using Robert as a means to defend myself if I grab him and use him as a shield, although condition (b) is satisfied.

But let us set this aside. There are further problems with Quong's infringement principle. Consider the following case.

Boat: A thief grabs Beatrice's quite heavy statue and is about to throw it into innocent Christine's boat, which he is also about to steal and which, of course, he would have to leave behind when he continues his escape on the other side of the river. Statue and boat are equally expensive. Without the boat – Christine's property – the thief has no chance of escaping with Beatrice's heavy statue; but he will still be able to escape by foot into the woods. Beatrice, a special effects expert, has accidentally forgotten her explosive device on Christine's boat, but now remembers it and activates it via remote control. Christine's boat explodes and the thief escapes, without the statue.²⁵

According to Quong's principle, Beatrice justifiably infringed the property right of Christine. This, I submit, is counter-intuitive (and it is definitely rejected by law).

But could one not simply claim that the destruction of a life is a proportionate means of defending life, while the destruction of property is not a proportionate means of defending property of equal worth? Yes, one could claim that, but such a claim would clearly be *ad hoc*, idiosyncratic (it seems not to correspond to what people usually mean

double effect. Since, however, the same is true of Quong's vaporizing example, this remark can hardly count as an objection to my example. Quong's self-defender does not "allow" the non-responsible threat to die, he *kills* him; and the self-defender's vaporizing the non-responsible threat is not a side-effect, but rather the *means* of saving himself.

²³ Quong, "Killing in Self-Defense," p. 530.

²⁴ Ibid., pp. 503, 523, 526, 530, 532.

²⁵ Since – surprisingly! – I got the objection that this would be "manipulative agency" in Quong's sense, let me emphasize that it most certainly is not. Beatrice is not "manipulating" Christine's property, the boat, here, but obviously *eliminating* it. The presence of Beatrice's boat does not confer any advantage upon Christine; thus, she is not exploiting it but simply destroying it.

by “proportionate” in these contexts), and question-begging. Moreover, it is natural to assume that proportionality restrictions would rather be *stricter* with regard to life and bodily integrity than with regard to property. Be that as it may, let us, to be sure, consider two further examples, where the issue again is life, not mere property (a third example can be arrived at by varying *Tiger*: arm Albert and have him shoot Bernie in the back):

Oxygen: A thief grabs Benita’s quite heavy oxygen tank, which Benita, due to a medical condition, needs for her survival. A taxi is approaching which the thief would take to escape for good. Without the taxi, he would have to leave the oxygen tank behind. Benita, already having difficulty breathing, cannot shoot the thief, who is farther away than the taxi, but she can stop the taxi driver with a shot in the head before he reaches the thief, and only with a shot in the head. She draws her gun and shoots the innocent taxi driver in the head.

Vial: Benita and unconscious Carl are in a hospital and each need to be injected with the rare drug x the next day in order to survive. Benita had bought a vial of x (sufficient for only one person) the day before and gave it to a member of the hospital for safekeeping in the fridge. The staff member dies from a heart attack, and due to some mistake people now think that the vial belongs to Carl. They don’t believe Benita’s assurances to the contrary. Benita knows that if Carl dies in time, the doctors will give her the drug. At night, she suffocates Carl with a cushion.

Again, according to Quong’s principle, Benita *justifiably* (not only excusably) infringed the right to life of the taxi driver and of unconscious Carl. And again this is utterly counter-intuitive (and rejected by law).

Thus, Quong’s claim that (as long as we abide by the “infringing principle”) we can infringe another person’s *right* not to be killed only because we give higher value to someone else’s life – and be it our own – is unwarranted. In fact, given that rights are considered to be of particularly grave weight in moral considerations, it seems almost conceptually incoherent to assume that somebody’s right to life (or property, for that matter) can be justifiably infringed because one gives more value to one’s own life (or property).

The account defended here, on the other hand, is able to avoid such problems. In the case of the falling man and his potential victim, both the falling man and the potential victim trying to vaporize him are liable to attack. There are simply no “rights-infringements” involved in such a symmetrical self-defense situation.

In fact, at one point Quong comes very close to the position defended here, stating that certain people are “invited, in cases involving Innocent Threats and Aggressors, to assume that each party loses their claim-right against the other and retains only the liberty-right to act in self-defense.”²⁶ However, if this is not the position he wants to embrace himself, thus insisting on the “justified infringement” account, he would have to give an *argument* why his own position is supposed to be superior. Of course, he tries to rule out Thomson’s account with the usual objection that there can be no rights violation without agency, but, as already pointed out, this does not work against the account

²⁶ Quong, “Killing in Self-Defense,” p. 521.

presented here.²⁷

One form such an argument could take would be an appeal to compensation. Quong affirms, after all, that rights-infringements call for compensation.²⁸ So he could try to show that in the justified aggressor and non-responsible threat cases the successful party owes the less successful one or his or her descendants compensation. But while he *states* that this is indeed the case, he makes no attempt to justify this statement.²⁹ This is not surprising, for in all Western jurisdictions (as far as I can see), people who kill innocent aggressors in necessary and proportionate self-defense owe the descendants absolutely no compensation. Moreover, if in a fight between the falling man and the person below one of them hurts the other with his ray gun, a claim to compensation would fail in the light of a reciprocity argument: “Come on, yes, I hurt your arm when I tried to vaporize you to save me, but you tried to vaporize me too. You are hardly in position to complain.” But if the “loser” cannot justly complain here, he has not been wronged: his rights have not been violated or “infringed.”

Even more, if both have hurt the other’s arm in the same way, and if this would amount to a rights-infringement, both would owe the other one the same compensation: but that means that they owe the other one no compensation at all. Thus, again, there is no “rights-infringement.” (I have come across the objection here that they do owe each other compensations, but that these debts are “balanced out” in this rare symmetrical case. I must admit that I do not understand what that is supposed to mean. It sounds like saying: “Oh yes, they owe each other something, but in this case this something is zero. Thus, they owe each other nothing, but that does not mean that they do not owe each other something.” My reply would be: if you allegedly *do* owe somebody *nothing*, you actually *don’t* owe him anything.)

Thus, I conclude that Quong’s claim that we may infringe (as long as we abide by his “infringement principle”) another person’s right not to be killed because we attach higher value to our own life is unwarranted and mistaken.

In addition, his own recent “*moral status account* of liability” seems also to be mistaken. Quong formulates it as follows:

A person is liable to defensive harm for choosing to do X when that choice results in a threat of harm to innocent people if and only if: (a) choosing X meets the minimum conditions of moral responsibility, and (b) the evidence-relative permissibility of choosing X depends either on the assumption that those who are harmed (or might foreseeably be harmed) by choosing X are liable to the harm, or else on false moral beliefs.³⁰

Given how Quong understands “liability,” namely as something that requires rights “forfeiture” by responsible action,³¹ this account of “liability” is entirely compatible with an account that claims that, for example, Nozick’s falling man *loses* his right not to be

²⁷ See n. 6 above. He does not consider the reasoning I have already provided a while ago in support of a rights-based account of liability that suitably modifies Thomson’s approach. See Steinhoff, *On the Ethics of War and Terrorism*, pp. 80-94.

²⁸ Quong, “Killing in Self-Defense,” p. 513.

²⁹ Ibid., p. 522-3.

³⁰ Quong, “Liability to Defensive Harm,” pp. 67-68.

³¹ See n. 5. I also see no reason to restrict the term “forfeiture” to responsible action.

attacked and thus becomes liable in the sense I am using the term here: someone is liable to attack if he has no right not to be attacked. It is compatible because Quong's account, as it is formulated, is an account of rights forfeiture through responsible action, not of losing rights in other ways. So it is not entirely clear whether Quong's account is supposed to exclude the liability (in my sense) of the falling man or not. (I suppose it is – but then it would have to be formulated in a different way).

A further restriction of Quong's account is that it is not even an account of liability in Quong's own sense of the term, but an account of "liability to defensive harm for choosing to do X when that choice results in a threat of harm to innocent people." Quong should have formulated his account starting with "A person is liable to defensive harm if and only if," and *then* he should have given the conditions. He would then also have to explain why people can only be liable for attacks on *innocent* people. He nowhere provides such an explanation. Why, for example, should somebody who in the *mistaken* belief that someone is not liable to attack attacks him anyway (out of bloodlust, for instance) *not* become liable to attack? After all, Quong himself says that "[l]iability to defensive harm should depend on whether, in imposing a threat of harm on others, we treat those others as having fewer rights, or less stringent rights, than people normally possess."³² This attacker does treat the other as having fewer rights. Of course, in this case the other did have fewer rights, but the attacker did not know that *and attacked him anyway*. Can he now really *complain* if others do to him what he was so very willing to do to others (Quong himself, after all, rests his view on an "idea of reciprocity"³³)? If not, it would seem that he has forfeited some rights.

But let us set all this aside. Quong's argument proceeds for the most part negatively: he criticizes, at length, the culpability account, the moral responsibility account, and the evidence-relative account of liability all for having counter-intuitive implications.³⁴ I do not criticize him for this method, and I in fact agree with him on much of what he says about these other accounts, but his criticism still leaves an alternative, namely the account presented here.

His positive arguments, in contrast, are extremely short and sketchy. His first positive arguments appeals to reciprocity and fairness:

The risk-imposing agent [like a person who reasonably but mistakenly takes someone for an unjust, potentially lethal aggressor and shoots at him in putative self-defense] does not treat everyone with the concern and respect they are normally due: she acts as if some people are liable to harm and thus have fewer rights (or less stringent rights) or moral claims relative to others. Since the risk-imposing agent has made this choice, it does not seem unfair to say that she is liable to some defensive harm should her assumption about the liability of others turn out to be mistaken. This rationale appeals to an idea of *reciprocity*: that our standing to press claims against others depends in part on how we treat those others.³⁵

This is all good and fine, but it does not give Quong's account any advantage over the account presented here. After all, there is also nothing unfair about not fulfilling my part

³² Quong, "Liability to Defensive Harm," p. 67.

³³ Ibid., p. 65.

³⁴ Ibid., pp. 49-62.

³⁵ Ibid., p. 65.

of a contract if the other side does not fulfill hers. It does not matter in this respect whether she *chooses* not to fulfill hers or whether she has *lost the ability* to fulfill hers. If I grant a publisher the exclusive right to publish my work, the publisher loses this right if he is not able to publish my work anymore (perhaps because of bankruptcy or insanity). He need not make a *choice* not to publish my work anymore. Thus, rights can be lost not only by “forfeiting” them in Quong’s sense: parents can lose their rights to parenting if they go insane, drivers can lose their right to drive if they go blind, people can lose their right not to be manhandled if they go unconscious and block emergency exits, formerly healthy persons can lose their right to free movement if they become by no fault of their own carriers of highly infectious diseases. As noted before, people have *duties* to one another. And thus, if a person does not fulfill her duty towards others not to pose an unjust threat to them, it seems to be only fair if they reciprocate if this is necessary to avert the threat.

The reciprocity argument, however, is not Quong’s only argument. According to him, there are “three main reasons to accept the moral status conception of liability to defensive harm.” The first reason is that, allegedly, “the conception does not yield any obviously counterintuitive results in the relevant range of examples.”³⁶ Yet, the fact that his account of liability excludes liability in symmetrical defense cases *is* counter-intuitive. It would only then not be counter-intuitive if there were another explanation as to why the two persons in symmetrical defense situations may attack each other besides the liability of at least one of the two parties. But, as I argued, there are no other such explanations; Quong’s own explanation fails. Moreover, already the very claim that the preference for one’s own life is capable of overriding another person’s right to life is counter-intuitive (as Quong himself initially acknowledges), and Quong’s *Man on the Track* example does nothing to dissolve this counter-intuitiveness since it is simply not pertinent, as we saw.

The second reason Quong adduces is:

To treat others as if they lack moral rights against having harm imposed is a grave matter, and so it is plausible to suppose that when we act in this way, we must accept a certain substantive responsibility for our actions. If we treat others as if they are liable to harm, it seems only fair to suppose that we may become liable to defensive harm should that judgment be mistaken.³⁷

This second reason seems to be simply a version of the fairness and reciprocity argument. We already saw, however, that considerations of fairness and reciprocity work for the liability account as well. Moreover, it would seem that to “infringe” other people’s right to life simply because in a conflict of their life and one’s own one prefers one’s own is also a “grave matter” – grave enough, one might think, to entail liability to defensive killing. Nothing Quong says refutes this assessment.

Third, says Quong,

the moral status conception of liability can explain why, as Jeff McMahan plausibly claims, moral justification ought to defeat otherwise valid instances of liability to defensive harm.³⁸

³⁶ Quong, “Liability to Defensive Harm,” p. 68.

³⁷ *Ibid.*, p. 69.

³⁸ *Ibid.*

However, the claim that justification (always) defeats liability to defensive harm is not plausible at all but rather a stipulation of McMahan's. Quong himself provides no argument for the claim.

In fact, as I have argued at length elsewhere, a justification for killing innocents defeats liability to defensive harm neither in law nor in morality.³⁹ By this, of course, I do not mean – nor have I ever claimed – that justification *always* defeats liability; rather, my claim is that there is no general principle – neither in law nor in morality – “Justification defeats liability.” McMahan now admits this, but states:

So even if the general claim that justification excludes all forms of liability is false, it may still be true that justification excludes liability to defensive harm, and that is all that is necessary to rule out the claim that the bombers are liable to defensive action either by the villagers or by third parties.⁴⁰

However, I have also not claimed that justification *never* excludes liability to defensive harm (it sometimes does, both in law and morality); rather, my claim was and is that a justification *to kill and maim innocent people* does not exclude liability to defensive harm, and I have provided, at length, positive moral and legal arguments *for that precise claim*. McMahan, in contrast, only envisions an example where someone steals insulin from another person (but does not kill or maim that person) in order to save an innocent bystander, claims that the thief would not be liable to defensive force (nor, allegedly, even to pay compensation), and then asserts that this, “in turn, supports the more general claim that justification excludes liability.”⁴¹ But it does not. It should be noted that for my argument it is quite sufficient to demonstrate that a justification to kill and maim innocent people does not exclude liability to defensive harm, while for McMahan's argument it is certainly not sufficient, but rather beside the point, to show that a non-killing, non-maiming thief's justification to steal insulin defeats liability to defensive harm. As far as a justified aggressor's liability to defensive harm is concerned, there is no sliding scale, as it were, between minor harms and harms to life and bodily integrity, but rather a moral threshold. Denying such a threshold, it seems, does not take the “separateness of persons,” to use Rawls's term, seriously enough. German law, for example, holds that innocent people cannot reasonably be expected to sacrifice their own lives or bodily integrity for the survival of strangers, and therefore denies a necessity defense when it comes to killing or maiming innocent people.⁴² However, while I think that the first part is absolutely correct, the conclusion does not follow. If the stakes are high enough, killing innocent people can be justified, but given that they cannot reasonably be expected to sacrifice themselves for strangers, they cannot reasonably be expected not to fight back. This, incidentally, seems to be precisely the position taken by those US states that have adopted the Model Penal Code's account of the necessity

³⁹ See Steinhoff, “Rights, Liability, and the Moral Equality of Combatants,” Sect. 4.4.

⁴⁰ McMahan, “Self-Defense Against Justified Threateners,” p. 15.

⁴¹ Ibid.

⁴² Volker Erb, “Rechtfertigender Notstand,” in Wolfgang Joecks and Klaus Mießbach (eds.), *Münchener Kommentar zum Strafgesetzbuch, Vol. 1* (München: C. H. Beck, 2003), pp. 1346-1416, at 1350-1 and 1387.

justification. It is, I submit, a quite reasonable position,⁴³ and neither Quong nor McMahan have provided any arguments that properly address, let alone undermine it.

Moreover, in support of the alleged plausibility of McMahan's claim, Quong adduces the former's example of the justified bomber. Yet, it would seem that the bomber owes the civilians he harms compensation, and according to Quong himself, such a duty to compensate indicates liability.⁴⁴ Quong ignores this problem.⁴⁵

Therefore, there is no reason to accept Quong's account of liability, nor any reason to accept his way of dealing with symmetrical defense cases.

4. Frowe on the Tactical Bomber and Compensation without Liability

Helen Frowe, like Quong, envisages symmetrical self-defense cases without liability. While Quong, as we just saw, notices the obstacle to such an account – it is implausible to think that I can “infringe” another person's *right* to life in a self-defense situation only because I attach more value to my own life than to his – and tries to overcome it, Frowe seems to be oblivious of this problem.⁴⁶ (Unlike Quong, however, she addresses the problem that the bombers in the tactical bomber case owe their civilian victims compensation.)

While Frowe herself fails to offer an account of how symmetrical defense in one to one situations is possible, she nevertheless rejects my approach to McMahan's tactical bomber case, which is in one sense a “symmetrical” self-defense case (namely in the sense that both parties may shoot at each other). My point, to repeat, is that without assuming that the bomber is indeed liable, it is impossible to explain – for reasons we already discussed in the context of Quong – why a civilian may shoot him down if this civilian is the only one threatened by the bomber. However, I not only claim that the bomber is liable, but also that the civilians are *not* liable (so that this is not a symmetrical defense case in this sense). My argument for this was and is an intuitively plausible difference in compensation rights: it is reasonable to assume and intuitively plausible that the relatives of the civilians killed by the bomber can demand compensation from the bomber or his government, while a demand for compensation by the relatives of the pilot or by his government in case the civilians managed to shoot him down seems outrageous. The adequate rejoinder to such a counter-claim would be: ‘But *you* attacked *us*, you *initiated* the unjust attack. *We* simply *defended* ourselves and other people who would have been killed by you against your attack.’ There is a moral asymmetry between those who initiate an unjust (albeit justified) attack on the one hand and those who react

⁴³ See on this Steinhoff, “Rights, Liability, and the Moral Equality of Combatants,” Sect. 4.4.

⁴⁴ Quong, “Liability to Defensive Harm,” p. 46.

⁴⁵ Quong acknowledges my criticism of McMahan and agrees with me at least in one point, but then simply states without further elaboration or argument that he does “not agree with some of Steinhoff's other objections.” Ibid., p. 70, n. 41.

⁴⁶ Helen Frowe, “The Justified Infliction of Unjust Harm,” *Proceedings of the Aristotelian Society* 109, pp. 346-51; “Self-Defence and the Principle of Non-Combatant Immunity,” *Journal of Moral Philosophy* 8 (2011), pp. 530-546, at 538-9.

defensively to it on the other. This difference is the reason why the former are liable to attack, while the latter are not.⁴⁷

Frowe tries to refute my claim that the bomber is liable, but two of her objections miss the argument I just summarized, while her third objection is on target but mistaken. Her first objection is “that even if we agree that third parties may defend the civilians, it seems no less plausible that the pilots’ comrades may come to *their* aid. ... But if third parties may intervene on both sides, we do not have an asymmetry that shows that the pilots are liable to harm whereas the civilians are not.”⁴⁸ In reply, let me note that I do not claim that there is *such* an asymmetry. Of course the pilots’ comrades may help the pilots to achieve their mission – for which purpose it is necessary to keep the civilians from shooting the bomber down. In other words, that the comrades may help the pilots simply follows from the very assumptions of the tactical bomber case: namely that the tactical bomber’s aim to blow up the factory is, even in light of the foreseen civilian casualties, justified and proportionate. Thus, the fact that his comrades may help him in achieving this aim implies nothing about the liability of the civilians nor about the liability of the bomber.

Second, Frowe claims that “there are lots of cases in which it is intuitively attractive that a parent may defend their child in which it is nonetheless implausible to think the target of defence *liable to be killed*. ... The argument becomes only less compelling, I think, as we move from parents to friends to compatriots. Whatever moral weight these relationships have, they cannot confer liability to defensive killing on those who act with objective justification.”⁴⁹ However, I did not claim that such relationships *confer* liability on anyone.⁵⁰ In fact, Frowe is running two *different* arguments of mine together. My reference to the people who have special relationships to others (for example to their

⁴⁷ Steinhoff, “Jeff McMahan on the Moral Inequality of Combatants,” p. 224. Note further that the merely justified bombers do *not* act “at the behest of morality” (McMahan, “Justification and Liability in War,” *Journal of Political Philosophy* 16 (2008), pp. 227–244, at 243), that is, they are not morally *required* to act as they do. In fact, there might have been alternative actions that would have saved even *more* lives without *killing* people while doing so. Thus, the justified combatants should indeed compensate others for the burdens they inflict on them by their own choice. See on this Steinhoff, “Right, Liability, and the Moral Equality of Combatants,” p. 362.

⁴⁸ Helen Frowe, *The Ethics of War and Peace: An Introduction* (Oxon and New York: Routledge, 2011), p. 136.

⁴⁹ *Ibid.*

⁵⁰ Nor, for that matter, do I make a claim that McMahan mistakenly attributes to me: namely that agent-neutral liability implies agent-neutral justification. See his “Self-Defense against Justified Threateners,” p. 10. I find McMahan’s talk about “liability justifications” confused and myself explicitly distinguish between liability on the one hand and justification or even permissibility on the other. See “Rights, Liability, and the Moral Equality of Combatants,” Sec. 5. Thus, for the “unjust combatants” to be justified in shooting down the justified bombers it is simply not sufficient that the latter are liable to attack; rather, the fact, for instance, that the unjust combatants are defending people they have special relations to, like family members, friends, and their compatriots more generally, can provide them (sometimes) with a justification.

children or their compatriots) was meant to show that, in light of McMahan's own tactical bomber example, the moral equality of combatants would hold *even if* one assumes that the bomber is *not* liable.⁵¹

Only with her third objection does Frowe finally address (a part of) my actual argument for the liability of the bomber. She actually admits that I seem "to be right that only the civilians are entitled to claim compensation for losses that they suffer."⁵² However, she claims that this asymmetry in entitlement to compensation does not show that the pilots are liable. Why not? She adduces the example of a group of pilots who, after having justifiably and without casualties destroyed a military target, get caught in a violent storm on their way home. "Their planes hurtle towards a group of civilians, who will be killed unless they blow up the planes with their anti-aircraft gun."⁵³ Frowe admits again that the civilians do not owe the pilot's government compensation, but does "not think that the reason for this is that the pilots were liable to be killed. The pilots were not morally responsible for unjustly threatening the civilians, even if we agree that they did unjustly threaten them."⁵⁴

Let me note three points in reply. First, it is irrelevant whether the pilots were morally responsible for unjustly threatening the civilians. McMahan and Frowe might think that you can only become liable to attack if you are morally responsible for posing an unjust threat, but this is a view I do not share (as my way of dealing with non-responsible threats clearly shows), and invoking it against my position would be question-begging. Moreover, according to Frowe's *own* definition of liability, "[t]o say that a person is liable to defensive killing is to say that killing them does not wrong them and does not violate their rights."⁵⁵ So the question here is whether the civilians *violate the rights* of the bombers by shooting them down in self-defense. Intuitively, however, they clearly do not, which is confirmed by the fact that the civilians do not owe any compensation to the pilots' relatives or government. To claim that they have been *wronged*, but that this does not put the civilians under a duty to compensate, seems to be conceptually incoherent.

Second, on McMahan's account the pilots of Frowe's example actually *are* morally responsible for posing an unjust threat. After all, McMahan offers the example of the *conscientious driver*:

A person keeps his car well maintained and always drives cautiously and alertly. On one occasion, however, freak circumstances cause the car to go out of control. It has veered in the direction of a pedestrian whom it will kill unless she blows it up by using one of the explosive devices with which pedestrians in philosophical examples are typically equipped. ...⁵⁶

What makes him liable is that, as a morally responsible agent, he voluntarily chose to set a couple of tons of steel rolling as a means of pursuing his ends, knowing that

⁵¹ Steinhoff, "Jeff McMahan on the Moral Inequality of Combatants," p. 223. I develop this argument in much more detail in Steinhoff, "McMahan, Symmetrical Defense and the Moral Equality of Combatants," unpublished ms.

⁵² Frowe, *The Ethics of War and Peace*, p. 136.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, p. 19; see also p. 125.

⁵⁶ Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," p. 393.

this would involve a tiny risk that he would lose control of this dangerous object that he had set in motion, thereby imperiling the lives of the innocent.⁵⁷

There is no relevant difference between this driver and the bombers of Frowe's example. True, they might have been justified *in bombing the factory*, but if, as McMahan states, it "is impermissible to drive, or to continue to drive, when one will lose control of the car and threaten the life of an innocent person,"⁵⁸ then one should assume that it is for the bombers also impermissible to fly back on a certain route to their home base after having completed their military mission if on that flight back they will lose control of their planes and threaten the lives of innocent persons without this contributing to any greater good. Thus, if McMahan's conscientious driver is morally responsible for posing an unjust threat, so are Frowe's bombers.⁵⁹

Third, Frowe's attempt to "explain the asymmetry in compensation rights" *without* appealing to "a difference in liability to defensive harm"⁶⁰ seems implausible.⁶¹ It is necessary to quote her at length here:

Well, we should remember that the pilot's government had decided to sacrifice the civilians in order to secure a greater benefit for themselves. It seems plausible that the civilians would have been owed compensation even if they had had no means of defence, and thus the pilots had not intentionally tried to kill them in self-defence, but rather had only killed them incidentally whilst bombing the factory. That they owed the civilians compensation from the outset could explain why they still owe them compensation after intentionally killing them to prevent them from shooting the planes down. On this account, the asymmetry in compensation rights does not come from the fact that the pilots initiated the threat and that the civilians merely reacted defensively to it. It comes from the fact that the pilot's government owed the civilians compensation for deciding that their lives were to be sacrificed for the greater good.⁶²

I agree with the second sentence of this quote. However, the last one is clearly wrong: the pilots' government did not owe the civilians compensation for *deciding* or *intending*

⁵⁷ Ibid., p. 394.

⁵⁸ Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), p. 165.

⁵⁹ Incidentally, even if the bombers were justified (which, for the reasons given, they are not): this would, first, be irrelevant for the question whether the bombers are morally *responsible* or not (justification does not defeat responsibility), and second, whether justification defeats liability or not is precisely the contentious issue here. My argument about compensation is supposed to show that justification does not defeat liability. For further arguments against the claim that justification defeats liability, see "Rights, Liability, and the Moral Equality of Combatants," esp. Sect. 4.4. Last but not least, as stated in the main text, the bombers are *not* justified in crashing into the civilians on their way back.

⁶⁰ Frowe, *The Ethics of War and Peace*, p. 137.

⁶¹ On my account, the reason why McMahan's attacking and Frowe's crashing bombers owe the civilians compensation is the same in both cases (and well-known from tort law): their not discharging their duties towards the civilians has caused harm to the civilians. Thus, in both cases the bombers owe compensation for the unjust harm they caused.

⁶² Frowe, *The Ethics of War and Peace*, p. 137.

to harm them, but for *actually* harming them. If the pilots learn about the decision of the government but do not carry it out, then neither they nor the government owe the unharmed civilians anything. Thus, if the pilots owe the civilians (or their relatives) compensation in the case where they “killed them incidentally whilst bombing the factory,” they owe them compensation precisely for *that*. And if they owe them (or their relatives) compensation in the case where they kill them in self-defense, then, again, they owe them compensation precisely for *that*.

Thus, Frowe’s objections for the most part miss my argument;⁶³ and she offers no viable alternative to the liability account. If the bomber in the tactical bomber example can be killed by the civilians even in a one to one situation and is moreover under a duty to compensate, then this can only be explained by the bomber’s liability to attack.

Conclusion

It seems counter-intuitive to claim that the innocent civilians in the tactical bomber example are prohibited from defending themselves against the tactical bomber. It is also counter-intuitive that non-responsible lethal threats, like Nozick’s falling man, must not be killed by those innocent people they threaten. That this is counter-intuitive is often even admitted by those who affirm the impermissibility of such an attack. Still, even among those who find self-defense in (one of) these cases permissible, there is a debate as to what the best explanation of this permissibility is. The contenders in this debate are the liability account, which holds that the non-responsible or justified human targets of the defensive measures are liable to attack, and the justified infringement account, which claims that the targets retain their right not to be attacked but may be attacked anyway (at least in the case of the responsible justified attacker), even in one to one situations. Given that we normally think that rights are trumps, this latter claim is implausible and rather surprising and therefore in need of justification and explanation. We have seen that the justifications and explanations provided so far fail. Therefore, the liability account prevails.⁶⁴

⁶³ The same is true of McMahan’s objections against my position in “Self-Defense Against Justified Threateners,” esp. pp. 10-12. Since this text is an unpublished ms. and for reasons of space, I will not address McMahan’s objections here. I do so elsewhere, however, see Uwe Steinhoff, “The Tactical Bomber’s Liability: A Very Brief Reply to McMahan,” unpublished ms.

⁶⁴ I thank Jeff McMahan, James Pattison, Jonathan Quong, and Stephen R. Shalom for helpful written comments on a first draft of this paper.