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Self-Defense and Imminence

This paper argues that there is a significant moral difference between force applied against (imminent) attackers on the one hand and force applied against "threatening" people who are not (imminent) attackers on the other. Given that there is such a difference, one should not blur the lines by using the term "self-defense" (understood as including other-defense) for both uses of force. Rather, only the former is appropriately called self-defense, while for the latter, following German legal terminology, the term "justifying defensive emergency" will be used here. The two justifications are not governed by the same criteria and thus lead to different results.

The paper will proceed by providing first, in section (1), a brief sketch of the contours of the self-defense justification, putting particular emphasis on the necessity criterion. On the account presented here, the necessity criterion of the self-defense justification is particularly harsh on the aggressor (and thus not to be interpreted as literally requiring the employment of "the mildest means") and its applicability is only triggered by an (imminent) attack, not by other kinds of threats. Section (2) will then further explain the differences between self-defense and justifying defensive emergency. A particularly important difference is that people who are subjected to justified self-defense cannot permissibly defend themselves, while people who are subjected to (extremely harmful or even lethal) justified defensive emergency measures can. Thus, in this latter case we have a "moral equality" (of sorts) of the involved parties: they can permissibly use force against each other.[1] Section (3) will list and defend some conditions that a successful argument against the imminence requirement of the self-defense justification has to satisfy. In the light of these conditions, sections (4) to (7) will discuss a number of objections that have been adduced against the imminence requirement as well as proposals that have been made in support of alternative accounts. It will be argued that all these objections and proposals fail. Section (8) will provide a number of thought experiments in support of the claim that the harsh necessity criterion of the self-defense justification is only triggered by imminence while force against non-imminent threats can be justified with the help of the justifying emergency exemption, as well as for the claim that the justifying emergency exemption puts the person using preventive force against non-imminent threats on a shorter leash and makes him liable[2] to counter-measures. Section (9) will explain

[1] This has obvious implications for just war theory: it severely limits the alleged "moral inequality" between individual combatants on the justified and the unjustified side in a war. I will not go further into this issue here, however. Yet, since I am especially interested in the ethics of war, the choice of some of my examples will be guided by this interest.

[2] On the definition used here, a person is liable to some way of being treated, for example liable to attack, if this person would not be *wronged* by this treatment, that is, if the person's

the rationale for tying the applicability of the harsh necessity criterion of the self-defense justification to imminent attacks. Section (10) will discuss some special cases and show why they do *not* undermine the normative validity of this tie.

Before going *in medias res*, a methodological comment on the use that will be made here of law and legal scholarship is indicated. First of all, it is necessary to refer to law when authors implicitly or explicitly use the authority of the law to support their own views, or simply give a certain interpretation of the law, for then it is obviously worth examining whether those interpretations are correct and whether the law really supports the views under discussion. Second, penal law at least in liberal democracies very often reflects our intuitions, since it is shaped by what people actually take to be justified or not. Third, legal scholarship regarding penal law is profoundly philosophical; and the intensity, sophistication, and sheer scale of genuinely philosophical discussions of self-defense in the legal literature of some jurisdictions exceeds the discussion of this topic within academic philosophy by far.[3] This, it seems, does give some authority to the legal scholarship on self-defense. Thus, fourth, the arguments adduced here are no less philosophical for the fact that they are informed or inspired by legal scholarship. Conversely, legal analysis might well benefit from the moral analysis provided here.

1. Self-Defense: A brief sketch

Before proceeding, we first need to at least sketch the contours of the self-defense justification and in particular say a bit more about the so-called "necessity" requirement since it is often argued that the necessity requirement can entirely replace the imminence requirement, either in the sense that the imminence requirement is mistaken, or in the sense that it is redundant since the necessity requirement allegedly entails the imminence requirement anyway. However, such arguments tend to simply assume (*without* argument) what I will call here the "formulaic interpretation" of the necessity requirement. According to

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rights would not be violated or infringed by this treatment. In other words, a person is liable to attack if the person has no right not to be attacked.

[3] In German legal scholarship, for example, turning trolleys, innocent attackers, justified attackers, non-responsible threats, etc., have been discussed long before this was done in Anglo-Saxon philosophy journals. As *pars pro toto*: Philippa Foot introduced the turning of trolleys into the Anglo-Saxon philosophical discussion in 1967; while Hans Welzel introduced it into German legal scholarship in 1951 (it is still intensely discussed). See Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. 5 (1967); Welzel, *Das Notstandsproblem*, 63 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 47 (1951). It should also be noted that one does not need trolleys to discuss the underlying moral and legal issue, namely the necessity or "choice of evils" justification. This issue has been discussed in the legal literature for centuries, for example in form of the "ship problem" at least as early as in 1883: "Suppose a ship so situated that the only possible way of avoiding a collision with another ship, which must probably sink one or both of them is by running down a small boat." J. F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, VOL. II 110 (1883).

this interpretation, a means used in self-defense is necessary if it is *literally the mildest means*.

However, assuming this interpretation of the necessity condition prejudges the case against imminence and misses the very point of the imminence requirement. To wit, I shall argue here that far from necessity implying, let alone replacing, imminence, it is actually the other way around: imminence *triggers* the applicability of a *specific* necessity requirement characteristic of self-defense, namely a requirement that is very lenient towards the defender and very harsh on the target of the defensive measures. In cases where there is no ongoing or imminent attack, however, such leniency towards the threatened person and harshness towards the person who poses the threat is misplaced.

So what is *self-defense*?[4] Samuel Pufendorf, in a classic statement on the topic, defined self-defense as "the warding off of evils which tend to a man's injury, and are threatened by another man."[5] Warding of such evils, namely *attacks*, is *not* the same as warding off the injuries or harms themselves. (This, incidentally, also shows in the fact that it is linguistically awkward at best to say "I defended myself against the harm" while it obviously comes naturally to say "I defended myself against the attack.") Therefore, I would like to make it clear now that I am *not* arguing in this paper that *harm* must be imminent to trigger the applicability of the self-defense justification; rather, it is the *attack* that must be imminent. (An attack can be imminent without the harm caused by the attack being imminent. If someone is right now about to attack you with his painless ray gun which would not kill or otherwise adversely effect you now, but only in ten years time, then the attack is still imminent although the harm threatened by this attack is not.)

Many legal codes, moreover, explicitly state that the attack must be ongoing or *imminent* in order to trigger the availability of the self-defense justification. Furthermore, in German law there is at least an implicit assumption that for an attack to be imminent there has to be a manifestation of the aggressor's intention to attack immediately.[6] I share this assumption.

As regards *necessity*,[7] one must note that the necessity requirement in self-defense law is not to be taken *literally* (that is, as simply meaning that there are *no* other means). To wit, if I can stop a culpable aggressor either by knocking him out or by shooting him dead, my knocking him out would not have been literally necessary: I could have shot him dead, after all. Thus, some authors think that the necessity condition requires the use of the *mildest* means. But why?

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[4] For a more elaborate and detailed analysis, see Uwe Steinhoff, *What Is Self-Defense?*, PUB. AFF. Q., forthcoming.

[5] SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO, VOLUME TWO 264 (182) [II.V.1] (C. H. Oldfather and W. A. Oldfather trans. and ed., 1934).

[6] Volker Erb, *Notwehr*, in MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH, VOL. 1 1249, 1289 (Wolfgang Joecks and Klaus Miebach eds., 2003).

[7] The following paragraphs on necessity draw on material in Uwe Steinhoff, *Self-Defense and the Necessity Condition*, unpublished ms., where I examine the necessity condition in much more detail.

Some jurisdictions do not even mention "necessity" but instead talk of "reasonable force" or use some other qualifier.[8] And even those jurisdictions that do talk of "necessity" in their self-defense statutes seem not to interpret this, in case law, as referring to *literally* the mildest means. German jurisprudence certainly does not: an authoritative statement of the interpretation of the necessity condition in German law emphasizes that necessity refers to the "measures that a reasonable observer would under the circumstances of the self-defense situation consider necessary for a secure defense against the attack."[9] (There has, however, to be an *actual* self-defense situation, that is, the defender has to be *actually* faced with an ongoing or imminent attack – merely putative attacks do not count). And it further clarifies:

> What is meant with this [the necessity condition; *Erforderlichkeit*] is that *among several alternatively available means* that promise a *safe, instant and conclusive defense* (*Abwehr)* against the attack or – if this is not possible under the circumstances – that *each promise in the same way the best possible defensive results* – the defender must choose *the mildest* means.[10]

In other words, according to this formulation, a defender has to consider milder means *only* if they promise to be at least *as effective as* the harsher means.[11] Even if milder means would only minimally heighten the risks for the defender but significantly diminish the harm to the aggressor, the defender still need not choose the milder means. On the formulaic interpretation of the necessity condition ("use the milder means"), in contrast, the defender *must* choose that milder means. (One can distinguish an epistemic version of the formulaic interpretation from an ontic one. The epistemic interpretation refers to the agent's state of mind and would say that the agent has to choose what he *believes* to be the mildest means or what he *reasonably believes* to be the mildest means, while the ontic version states that the agent has to choose what actually *is* the mildest means.)

However, if the defender *wants* to incur a higher risk of being harmed for the benefit of the aggressor (innocent or not), then that is his choice. In others words, the defender is not *obliged* to take on greater risks for himself to benefit the aggressor, but he is nevertheless *free* to do it. Therefore, even the statement in the last quote needs to be still further qualified, for German law only prohibits unnecessarily *harsh* means but certainly not means that are milder than they need be.

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[8] Examples are the self-defense statutes of the British Criminal Law Act 1967, Switzerland, Sweden, and Indiana (IC 35-41-3-2, which mentions necessity only in special circumstances).

[9] Erb, *supra* note 6, at 1296.

[10] *Id*., original emphases changed from bold to italics. The other commentaries concur. As Erb's discussion of the case of the helpless rape victim makes clear (*id*. at 1303-1304), the "best possible defensive result" might sometimes consist in no more than interfering with the attack – even its mitigation might not be possible.

[11] Again, Anglo-Saxon law also rejects the "mildest means" reading of the necessity requirement, although it might not be as harsh on the aggressor than German law. See for example the references to risks and equal effectiveness in PAUL H. ROBINSON, CRIMINAL LAW DEFENSES, VOL. 2 4-5, 77, 79 (1984).

Thus, I propose the following rendering of the necessity condition for justified self-defense:

> *Necessity*: A defender fulfills the necessity requirement of justified self-defense if and only if he chooses a way of defending himself that would in the eyes of a reasonable person under the conditions of the self-defense situation be (one of) the *mildest means* among those means that promise a *safe, instant and conclusive defense* against the attack or – if this is not possible under the circumstances – among those means that *promise the best possible defensive results*. The defender, however, is free (but not required) to forego the *best* defensive results for the purpose of choosing an even milder means even if this heightens his own risk of being harmed.

But, one might ask, is what I call the formulaic interpretation of the necessity condition perhaps preferable to this harsh necessity condition from a moral point of view? Certainly not. Even if one were of the opinion (which I am not) that the German rendering of the necessity condition is *too* lenient towards the defender, the formulaic interpretation of the necessity condition is absurdly lenient towards the *aggressor* and imposes unreasonable and unacceptable burdens upon the defender. This is at least true with reference to a defender facing a *culpable* aggressor, and the reasons for this are *moral* reasons, reasons of fairness: why, after all, should the *innocent* defender incur a higher risk of being harmed *for the benefit of the aggressor*?

This is a question not answered by those who simply declare, as does Seth Lazar, that "such a uniformly absolute discount" of the aggressor's interests as the German model implies "is implausible."[12] Lazar rests content with this statement, providing no explanation as to *why* that is supposed to be "implausible." Such an explanation is needed, however, especially since the idea that a defender defending his life against culpable aggressors *can kill as many of them as necessary* is *not* deemed to be implausible by Lazar.[13] Such a permission also exists in Anglo-Saxon jurisdictions; and it discounts the lives of aggressors obviously no less than the German necessity condition.

For further illustration, let us define a *Type R* attack as an attack where the defender can be pretty much certain to survive if he uses lethal defense against the culpable aggressor but has only a 99% chance to survive such an attack if he uses a taser, and where he only has these two options of defense. Thus, the prohibition on using lethal force here means that one innocent person will have to die for every 100 *Type R* attacks. Hence the question arises: if an

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[12] Seth Lazar, *Necessity in Self-Defense and War*, 40 PHIL. & PUB. AFF. 12 (2012).

[13] Seth Lazar, *The Responsibility Dilemma for Killing in War: A Review Essay*, 38 PHIL. & PUB. AFF. 205-206 (2010). Elsewhere (*supra* note 12, at 6) Lazar also invokes risks that self-defense may pose on innocent bystanders. However, these risks have nothing to do with the question before us, namely to what degree the interests of the *aggressor* can be discounted. Contrary to the way Lazar frames the issue, the self-defense justification covers harms and risks imposed on aggressors; the harms and risks that may befall bystanders ("collateral damage") are dealt with by other justifications, like necessity. This, at least, is how German law explicitly deals with these issues, and I have found no indication that Anglo-Saxon case law differs. It also seems to be the morally and conceptually appropriate approach.

innocent defender may kill 100 culpable aggressors in defense of his life, why may he not kill one culpable aggressor in order to have a 100% survival chance instead of only a 99% one? Or, to put it still another way: if one and the same aggressor attacks me every day with a *Type R* attack, this means that the injunction to make allowances for the aggressor will leave him occasionally tasered and me dead for good. It seems that it is actually the innocent person's interests, not the aggressor's, that are discounted here, and this indeed *is* implausible. Thus, from a moral point of view as well the German rendering of the necessity condition is correct in the case of culpable aggressors.[14]

Note that Lazar's rendering of the necessity requirement, while more lenient towards the aggressor than the one endorsed here, is different from the formulaic interpretation. However, some of Russell Christopher's arguments (to be discussed below) against the imminence criterion clearly rely on the formulaic interpretation in its ontic form, and so does Philipp Montague's rejection of the imminence requirement.[15] However, the formulaic interpretation is highly counter-intuitive. Consider, for instance, a case where a hired killer, ready to shoot, sneaks up on an innocent cowboy from behind. The cowboy sees the killer at the last moment in a mirror. Let us further assume that any reasonable observer of the scene would have said that the cowboy's only way of successfully defending himself were to twirl around and shoot the attacker. Yet, surprisingly, later it turns out that the killer suffered from a rare condition: whenever somebody said "Boo" to him, he got so frightened that he ran away in panic. Thus, shooting the killer was not literally necessary to avert the harm: it would have been quite sufficient to simply say "Boo."

Thus, if measures taken in self-defense are only justified if the attack could not have been averted in any milder way, then the cowboy's shooting the hired killer was unjustified. This, however, is implausible and seems not to match the way we usually speak about self-defense. There are also problems regarding the implications of deeming the act unjustified. If it was indeed unjustified, then suddenly the killer himself was under unjustified attack by the cowboy and would therefore be allowed to defend himself against him. He could now kill the cowboy justifiably. Or, in case he succumbs to the cowboy's skills, the hitman's family could sue the cowboy for wrongful killing. But these implications seem absurd.

To be sure, one could try to avoid them by making some additional assumptions (something, however, defenders of the ontic formulaic interpretation have so far failed to do), but, in my view, the formulaic interpretation is not tenable in the end. I do not have the space to go further into this here,[16] nor need I: given that the formulaic interpretation is prima facie

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[14] Ironically, Lazar's formulation of his own necessity criterion is, due to its formalism, entirely compatible with the substantive interpretation given here (as well as with other substantive interpretations). There is no need to go into this here, nor can I discuss here the case of the innocent aggressor, but see on both points Uwe Steinhoff, *Self-Defense and the Necessity Requirement*, unpublished ms.

[15] Phillip Montague, *Defending Defensive Targeted Killing*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 285, esp. 287-291 (Claire Finkelstein, Jens David Ohlin, and Andrew Altman eds., 2012).

[16] I do so, however, in Steinhoff, *supra* note 14.

extremely unfair towards the defender, contravenes our linguistic intuitions, and is not reflected in case law, the burden of proof is on those who endorse it. So far no one has met this burden.[17] Christopher, for one, simply assumes the formulaic interpretation without argument (while I just have provided arguments against it).

Thus, there is no reason to accept the formulaic interpretation of the necessity condition, and there are a number of reasons to reject it. At the very least, any criticism of the imminence requirement that relies on the formulaic interpretation of the necessity requirement (and most do[18]) rests on somewhat shaky ground; and non-literal interpretations of the criterion are certainly viable alternatives.

Most jurisdictions also recognize a *proportionality* requirement for self-defense. (There is officially no proportionality requirement in German self-defense law, only a "no-gross-disproportionality" requirement. However, one could say that this in effect does amount to a proportionality requirement, albeit to one that is much harsher on aggressors than the proportionality requirements in some other jurisdictions.) While the necessity requirement says that you are not supposed to kill a thief if you can as safely and effectively stop her by knocking her out, a proportionality requirement answers questions such as whether one might use lethal force against theft at all (whether that force would be necessary or not). In the present context, it is important to simply note that the proportionality requirement of the self-defense justification is considerably more lenient towards those who can legitimately avail themselves of such a justification than is the proportionality requirement of the justifying emergency and necessity justifications.

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[17] Of course, a number of philosophers have argued that the moral "ought" is purely objective (so that it does not involve any reference to mental states). Yet, what one *ought* to do is not the same as what one is *justified* in doing. Moreover, even if one thinks that justification (including legal justification) is purely objective, that by itself does not mean that one needs to embrace the literal interpretation of necessity – one could also embrace an account that relies on objective probabilities. Montague, arguing for an objective moral ought, indeed acknowledges that objectivism *might* take the form of a probabilistic account, but he rejects this possibility. See Phillip Montague, *Blameworthiness, Vice, and the Objectivity of Morals*, 85 *PAC. PHIL. Q.* 68 (2004). One might think, therefore, that his argument might be applicable to the necessity condition. In fact, however, his argument relies heavily on the example of promises. He claims that one can keep a promise only by actually fulfilling it, which in turn is supposed to support an objectivist *and* non-probabilistic ought. However, the logical connection is difficult to see. Promises create rights, and I accept, indeed emphasize, that whether one transgresses against a right is (normally) a purely objective question (there are certain exceptions, but they need not concern us here). Whether one does something *justifiably* (for example infringe a right), however, is not a purely objective matter. At the very least, Montague's promise example is unable to establish otherwise since it seems to overlook this distinction between rights and other kinds of moral obligations, a distinction that is important for the present paper.

[18] Montague, *supra* note 15, is a case in point. So are Rosen and Christopher (to be discussed below).

There is also a *subjective element* (that is, one referring to the agent's state of mind) to the justification of self-defense. While some authors claim that for self-defense to be justified the defender must have the specific *intention* to defend him- or herself or others, that is, that he or she must use force (or other measures) *in order* to defend him- or herself or others, the leading German commentaries on self-defense law explicitly reject this claim and instead affirm that it is sufficient if the defender *knows* that *the objective conditions of justified self-defense are fulfilled.*[19] There are good reasons for incorporating a subjective element into the self-defense justification.[20] Consider this example: Jill always wanted to murder Earl, whose nose she does not like. She sees him sitting in a restaurant, draws her gun, and shoots him dead. Unbeknownst to her, however, Earl, in turn, was just about to murder an innocent business rival who was also in the restaurant. Thus, with her action Jill actually saved the innocent person from an unjust attack. But did she really act in justified other-defense? That seems bizarre. True, she might have satisfied all the justificatory criteria we mentioned above: there was Earl's imminent attack, and shooting Earl was necessary and proportionate under the circumstances. Yet, Jill did not know that her act would pre-empt an unjust attack. She shot Earl simply to murder him and without any awareness of said justifying circumstances. Her act thereby demonstrated a blatant disregard for law and morality that neither law nor morality can accept. Even if one were disinclined to consider her killing of Earl murder (perhaps because one wants to reserve the term "murder" for certain kinds of killing of *innocent* persons), she still *attempted* to commit murder and can and should be blamed and punished for this attempt.[21]

Thus, in summary we can say so far that self-defense is justified if it is a necessary and proportionate defense against an (imminent) attack and the defender reasonably believes this

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[19] As *pars pro toto*, see Erb, *supra* note 6, at 1333. The other German commentaries concur. For an overview of the Anglo-Saxon debate on this issue, see BOAZ SANGERO, SELF-DEFENSE IN CRIMINAL LAW 231-237 (2006).

[20] See also Uwe Steinhoff, *Just Cause and Right Intention*, 13 J. OF MILITARY ETHICS 32, section II (2014).

[21] On "impossible attempts," see Sangero, *supra* note 19, at 235-236. There are authors who reject the idea that there is a subjective element to the justifiability of self-defense (for example Paul H. Robinson, Judith Jarvis Thomson, and, as already noted, Phillip Montague). In my view, they all fail to offer a plausible way of dealing with the case of the impossible attempt. Paul Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in HARM AND CULPABILITY 45, 47-48 for example (A. T. Simester and A. T. H. Smith eds., 1996), rightly concedes that the impossible attempt should result in criminal liability, but it is mysterious how that squares with his supposedly purely objectivist theory of criminality. See on this point Andrew Botterell, *Why We Ought to be (Reasonable) Subjectivists about Justification*, 26 CRIM. JUST. ETHICS 36, 55-56, note 26 (2007), see there also for further references. For a recent criticism of pure objectivism in ethics, see T. M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, AND BLAME 47-52 (2010). It is beyond the scope of this article to deal further with this issue, but I do so in Uwe Steinhoff, *Against the Purely Objectivist Interpretation of Moral Obligation,* work in progress.

to be the case. The attack, as a rights-violation, triggers the attacked person's right to self-defense. That is, the defender, provided he satisfies the necessity and proportionality requirements and the subjective element of the self-defense justification, may now in self-defense commit acts that otherwise would have constituted rights violations themselves.

This is sometimes explained by saying that the unjust attacker, through his attack, has forfeited certain of his rights and consequently now lacks them so that he has become "liable to defensive attack."[22] In this context, and for the benefit of the further discussion below, it is important to note the *difference between justification and rights-forfeiture or liability*: a person's mere *lack* of a right not to be killed provides by itself no *justification* to kill her. For example, a 500-year-old oak tree hardly holds a right against me not to be cut down, but it is difficult to see how that can possibly *justify* me in cutting it down. That same logic also applies to persons. To be sure, on some accounts of liability people can only be liable to defensive harm if there is, so to say, a reason to harm them. For example, Jeff McMahan states: "When people act in certain ways, they can lose their right not be attacked if attacking them is instrumentally necessary to achieve a certain end and the attack is proportionate in relation to that end. When this is true, these people are, as I will say, *liable* to be attacked."[23] This leads McMahan then to talk about "liability-based justifications" or a "liability justification."[24] Yet, even if one accepted McMahan's view that a person can only lack a right against defensive attack if this defensive attack is necessary and proportionate,[25] one should keep in mind that while certain justifications can be based *partly* on liability in this sense, liability is still not sufficient to provide a justification. One reason for this is that justified self-defense requires the satisfaction of the subjective element on the defender's part, which is not yet entailed by the liability of the aggressor. Thus, showing that somebody is *liable* to attack – that is, has no right not to be attacked – is not the same as showing that one can *justifiably* attack her – that is, that such an attack does *not contravene morality* (or law, in the case of legal justification).[26] Not all moral (or legal) constraints against doing something to

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[22] There are different definitions of "forfeiture." On some definitions, to forfeit a right means to lose it through one's own responsible/accountable action. On other definitions, to forfeit a right simply means to lose it. For the purposes of this discussion, I use the former definition.

[23] Jeff McMahan, *The Conditions of Liability to Preventive Attack*, in THE ETHICS OF PREVENTIVE WAR 121, 123-124 (Deen K. Chatterjee ed., 2013).

[24] *Id*. at 123-124, and McMahan, *Targeted Killing: Murder, Combat, or Law Enforcement*, in TARGETED KILLINGS 135, 138 (*supra* note 15).

[25] I do not, nor do some others. See Joanna Mary Firth and Jonathan Quong, *Necessity, Moral Liability, and Defensive Harm*, 31 L. & PHIL. 673 (2012); Helen Frowe, *Self-Defence and the Principle of Non-Combatant Immunity*, 8 J. OF MORAL PHIL. 530, 545, note 31 (2011); Uwe Steinhoff, "Self-Defense and the Necessity Requirement," unpublished ms. See also *infra* note 86.

[26] Kimberly Kessler Ferzan, *Culpable Aggression: The Basis for Moral Liability to Defensive Killing*, 9 OHIO ST. J. OF CRIM. L. 669, 671, note 5 (2011-2012). states that the "distinction … between liability and permissibility" (and thus between liability and justification, one may assume) has been suggested by Jeff McMahan. However, the fact that McMahan talks, as we

someone (for example attacking her) lie in that person's rights.

I thus see the basis of the self-defense justification not negatively in rights forfeiture (alone) but (also) in a positive right to self-defense (which is pretty much the traditional view).[27] This right has limitations, and these limitations are precisely spelled out by the conditions mentioned in this section.

After thus having sketched the contours of the self-defense justification and emphasized the important distinction between justification and liability, we can now turn to the no less important distinction between self-defense and justifying emergency.

2. Self-Defense vs. Justifying Emergency

Even philosophers who are determined to stretch the moral concept of self-defense beyond imminent attacks sometimes acknowledge that "[i]n the law, while a threat of imminent attack may justify an individual's resort to force in self-defence, there is no right to use force to prevent attacks that are not imminent."[28] That is, on the account of self-defense found in law – and defended here – one cannot avail oneself of the self-defense justification in just any case in which one is using (necessary and proportionate) force against an "unjust threat" but rather only in cases in which this "unjust threat" comes in the form of an *ongoing or imminent attack*.[29]

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just saw, of "liability justifications" suggests that he often runs these two things together. Not surprisingly, then, McMahan rarely talks about justified self-defense; instead he prefers to talk about "liability to defensive attack." For the record, it should be noted that said distinction is already there in Kant, although with a different terminology, and implicit, in my view, in a large part of traditional just war theory. It is also made quite explicitly by JOEL FEINBERG, DOING AND DESERVING 45 (1970), and by George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 320 (1975/76): "It might be *just* for a would-be murderer to be killed by his intended victim …, but it does not follow that the act of killing is *justified*."

[27] For a defense of such an account of self-defense, see UWE STEINHOFF, ON THE ETHICS OF WAR AND TERRORISM esp. 45-50 (2007). For an overview of the tradition, see Peter Haggenmacher, *Self-Defence as a General Principle of Law and its Relation to War*, in SELF-DEFENCE AS A FUNDAMENTAL PRINCIPLE 3 (Arthur Eyffinger, Alan Stephens, and Sam Muller eds., 2009). Uniacke also rejects the idea that rights-forfeiture can ground the justification of homicide and bases her account on a *right* to self-defense. See Suzanne Uniacke, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE ch. 5, esp. 191 (1996). The same is true of Sanford Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV 871, esp. 883-888 (1976).

[28] Jeff McMahan, *Preventive War and the Killing of the Innocent*, in THE ETHICS OF WAR: SHARED PROBLEMS IN DIFFERENT TRADITIONS 169, 172 (Richard Sorabji and David Rodin eds., 2006). Of course, a small number of legal scholars have also attempted to stretch the concept beyond imminent attacks. Some of them are discussed in this paper.

[29] This means that one cannot act in self-defense against Nozick's falling man. In Nozick's example, a villain pushes an innocent person into a well. The falling man would crush the

Of course, there are sometimes kinds of threats that do not come in the form of ongoing or imminent attacks but against which violent counter-measures might seem to be justified. But the point is that they cannot be justified under an appeal to self-defense. Yet, since Anglo-Saxon law does not have the justifying emergency exemption found in German law, not only Anglo-Saxon philosophers but also some Anglo-Saxon lawyers, judges, or juries are tempted to justify counter-measures against severe threats that do not come in the form of imminent or ongoing attacks by stretching the concept of self-defense beyond its proper limits, for example by conveniently overlooking the fact that, for instance, US self-defense statutes require self-defense to be directed *against the actual or at least imminent (or "immediate") use of force*, and not against things that will (or even only might) *lead up to* the imminent or actual use of force tomorrow, let alone in two weeks. But while there might be pre-emptive self-defense, there exists no such thing as preventive self-defense: we cannot simply jettison the imminence requirement, or we will be talking about a *different* kind of justification.[30]

This different kind of justification I have in mind here is the moral equivalent to the German legal justifying emergency statute.[31] The German legal concept of justifying emergency does *not* coincide with the Anglo-Saxon concept of necessity. Necessity justifies harms inflicted on *innocent bystanders* and *only* on innocent bystanders.[32] Justifying emergency, in contrast, can justify harming the innocent (in which case it is called "justifying aggressive emergency"), but it also includes, under the label "justifying *defensive* emergency," the special case of harming the not-so-innocent.[33] The *difference* between self-defense and justifying defensive emergency is that self-defense is exclusively directed against imminent or ongoing *attacks* – and this, again, is also how self-defense is understood in Anglo-Saxon law – while measures taken in justifying defensive emergency are directed against *other* threats stemming from humans (or their property) and hence, for example, against a potential aggressor whose (potential) attack is neither ongoing nor imminent.[34] The

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other innocent person standing at the bottom of the well who could only save himself by disintegrating the falling man with his ray gun. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 34-35 (1974). The view that force used against such a non-responsible threat would not constitute self-defense is also taken by Erb, *supra* note 6, at 1270. For Suzanne Uniacke, *Proportionality and Self-Defense*, 30 L. & PHIL. 253, 265, note 26 (2011), "conceptually speaking, the use of force against passive threats lies on a borderline of self-defense and necessity: it is akin to self-defense insofar as the threat is fended off; it is akin to necessity in that the source of the threat is not the agency of the person against whom force is used."

[30] See for example Kimberley Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213 (2004).

[31] I have elsewhere used this justification to justify the killing of the sleeping soldier and of other soldiers who are not (imminent) attackers. See Uwe Steinhoff, *supra* 26, at 98-101.

[32] It can also justify violating a law (for the greater good), but this need not concern us her.

[33] It can also refer, simply put, to damaging dangerous property. This case need not concern us here.

[34] The Anglo-Saxon law of conspiracy and the law of attempt cannot emulate the function of justifying defensive emergency since they both refer to punishment, not to prevention

difference is *important* because the two legal and moral defenses are not subject to the same conditions of justification.[35] To wit, the self-defense situation triggers a) a "necessity" criterion that is very harsh on the aggressor (and thus cannot be simply interpreted as requiring "the mildest means"), b) a *no-gross-disproportionality criterion* (the so-called social-ethical limitations of self-defense: German self-defense law does not officially recognize a proportionality criterion), which, again, is very harsh on the aggressor, and c) the *asymmetry* between defender and aggressor (there is no justified self- or other-defense against justified self- or other-defense). In contrast, the justifying emergency situation triggers a) the inapplicability of the harsh necessity requirement of the self-defense justification, and b) a proportionality requirement that is significantly more lenient (towards the aggressor) than the no-gross-disproportionality requirement of the self-defense justification.[36] Moreover, c) in my view, the moral justifying emergency justification is compatible with the *symmetry* of the opponents, so that they may use force against each other.[37]

Of course, some authors (and politicians) talk of "preventive defense" anyway. However, from the legal perspective this seems to be an abuse of language.[38] Moreover, and most importantly, this abuse of language also leads us morally astray: putting defense against imminent or ongoing attacks in the same bag as counter-measures against non-imminent or inchoate threats suggests that measures against these two kinds of dangers are governed by

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(leaving the generalized preventive function of deterrence aside, which is not an issue here). Preventive detention can play a small role, but it does certainly not allow preventive killing. It should also be pointed out that national preventive self-defense (let alone individual self-defense) against a non-imminent or even merely potential threat is not recognized in international law either. See on this latter point Ferzan, *supra* note 30, esp. at 224-227.

[35] See Volker Erb, *Rechtfertigender Notstand*, in MÜNCHENER KOMMENTAR (*supra* note 6) 1346, 1337-1416.

[36] *Id*. at 1404-1405.

[37] Here I part company with the commentaries on the German justifying emergency statute. However, there are German legal scholars who claim that some emergency situations create a "lawless space" (*rechtsfreier Raum*) in which people have permission to defend themselves against *permissible* acts of others. See INGO BOTT, IN DUBIO PRO STRAFFREIHEIT? UNTERSUCHUNGEN ZUM LEBENSNOTSTAND esp. 128-131 (2011). Erb's claim that allowing the use of force against permissible action would lead into a "self-contradiction of the legal order" (*supra* note 35, at 1389) is simply wrong if he means to refer to a logical contradiction; or else it is question-begging: it *presupposes* that such symmetrical situations are not a legal possibility. Yet, they are *both* a legal and a moral possibility. See on this Uwe Steinhoff, *Rights, Liability, and the Moral Equality of Combatants*, 13 J. OF ETHICS 339, esp. sections 4.3-4.4 (2012).

[38] Uniacke is particularly clear on this: "The term 'preventive self-defense' currently canvassed by some advocates of preventive war is nonsense." See Suzanne Uniacke, *On Getting One's Retaliation in First*, in PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION 69, 86, note 34 (Henry Shue and David Rodin eds., 2010).

the same moral or legal criteria, which they are not.[39]

3. What counter-arguments would have to show

Many, no doubt, will object to this last assertion. But how? There are in principle three kinds of possible counter-arguments against the claim that the self-defense justification must be reserved to counter-measures against imminent attacks. The first kind proceeds *negatively* by trying to show that the imminence requirement *contradicts* plausible principles or leads to counter-intuitive results or into logical puzzles or contradictions. (Some of the criticisms leveled by Russell Christopher against the imminence requirement fall into this category. We will deal with them below.)

The other two kinds of arguments proceed *positively* by directly trying to establish that the self-defense justification indeed covers counter-measures against non-imminent threats. The first of these two kinds of arguments attempts to *derive* the permissibility of self-defense in such cases from some allegedly plausible *principles*; and the second tries to *provide examples* for the justified defensive harming of non-imminent threats (obviously, I use the term "threat" here, following philosophical convention, to also refer to the persons from which the threats emanate).

The arguments pertaining to these latter two kinds of arguments have to satisfy certain common conditions in order to be successful, and it is worthwhile to spell these conditions out. For starters, obviously, it does not suffice to show that killing non-imminent threats can be justified. One would have to show that it can be justified by the *self-defense* justification. Remember that what makes the distinction between self-defense and justifying emergency necessary is that these justifications are governed by different standards. The standards of self-defense are much harsher on the attacker than the standards of justifying emergency are on the person posing an unjust threat. (The imminence of the attack is precisely one of the necessary elements triggering the applicability of the harsher self-defense justification.) Thus, first, a counter-argument would have to show (not just claim) that, all else being equal, a non-imminent threat may be reacted to in the same way and countered with the same amount of force as an imminent threat.

Moreover, in law there cannot be justified self-defense against justified-self-defense:[40]

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[39] Compare *id*. at 88: "The ethical significance of the distinction between aggressive [by which she means "preventive"], as opposed to defensive force is not merely conceptual. … the use of aggressive force is subject to different, more stringent ethical norms than is the use of retaliatory force in self-defense." Ferzan, *supra* note 30, rightly argues that the self-defense justification does not apply to inchoate threats, but she never considers the possibility that there might be other justifications available to legitimize force against such threats.

[40] This is an established principle in criminal law, see for example Brien Hallet, *Just War Criteria*, in ENCYCLOPEDIA OF VIOLENCE, PEACE, AND CONFLICT, VOL. 2 283, 291 (Lester R. Kurtz and Jennifer E. Turpin eds. 1999). The reason for this principle is precisely that there is a "moral asymmetry" between aggressor and defender, so that the former forfeits his right to life if killing him is necessary and proportionate under the circumstances. This view has a long tradition in natural law thinking and the just war tradition. For a clear and early

thus, self-defense is asymmetric, there is no "moral equality" of defender and attacker. On the account presented here, however, there can be symmetrical situations when a justifying emergency is involved, that is, both sides in a conflict can have a justification to fight each other: and one should certainly not equate a justification that implies asymmetry with one that enables symmetry. Consequently, second, a counter-argument to the view that there is *no* justified self-defense against *non*-imminent threats would have to show that the non-imminent threats, in turn, must not defend themselves against the force directed at them in alleged "self-defense."

Third, obviously examples trying to show that non-imminent threats can be justifiably harmed or even killed in self-defense must indeed be examples involving justified harming or killing. That is, examples are useless for the purpose in question if they are not actually examples of the *justified* harming or killing of non-imminent threats.

Fourth, again obviously, examples trying to show that non-imminent threats can be justifiably harmed or even killed in self-defense are useless for the purpose in question if they are not actually examples of harming or killing *non-imminent threats*.

With these conditions for a successful argument in mind, let us have a look at some arguments for the claim that the self-defense justification applies to non-imminent threats. I will argue that they all fail.

4. The Home Invasion and "Kill You Tomorrow" Argument

This argument violates the fourth condition. While a prominent early formulation of it has been given by Paul Robinson,[41] I will (since I am particularly interested in the ethics of war) consider Jeff McMahan's home invasion example. Trying to understand "war as self-defense," McMahan argues against David Rodin, who has voiced doubts about this possibility,[42] as follows:

> A soldier sleeping in invaded territory has already attacked and is engaged in attacking in the same way that I am engaged in writing this essay even while I pause to make a cup of tea. The appropriate analogy in civil life is with a gang of villains who invade one's home, lock oneself and one's family in, and plan to kill everyone the next day. If the only way—or perhaps just the best way—to prevent these killings is to kill the gang members in their sleep, that is certainly permissible.[43]

Yet, Rodin's point is precisely that analogies are not quite good enough. Thus, the question is not whether sleeping invader soldiers in the context of war are doing something that is *analogical* to some activity that in the domestic context creates the conditions of legitimate self-defense against those who engage in that activity; rather, the question is whether the sleeping invader soldiers are engaged in an activity (if sleep can count as such)

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statement, see Pufendorf, *supra* note 5, at 323 (219) [III.I.7].

[41] Robinson, *supra* note 11, at 78.

[42] DAVID RODIN, WAR AND SELF-DEFENSE esp. ch. 6 and 7 (2002). Such doubts have been expressed before Rodin by RICHARD NORMAN, ETHICS, KILLING AND WAR 134-135 (1995); and David Carroll Cochran, *War-Pacifism*, *22* SOC. THEORY & PRAC. 161 (1996).

[43] Jeff McMahan, *War as Self-Defense*, 18 ETHICS & INT'L AFF 75, 76 (2004).

that *actually is* creating the conditions of legitimate self-defense against them.

Now, in the case of the gang of villains, the self-defense justification does apply, but the reason it applies is not that the villains will kill the whole family *tomorrow* but because they have locked them in *now*.[44] Under German and British law, false imprisonment clearly constitutes an *ongoing attack*, and under US statutes arguably so.[45] It most certainly constitutes an ongoing attack from a moral perspective.

McMahan's counter-argument that (brief) "captivity alone is insufficient to justify killing" and that therefore "the non-imminent threat to … life contributes to the justification"[46] of the act of killing misses this conceptual point I have just stressed, namely that false imprisonment, by itself, constitutes an attack, while a non-imminent threat to life by itself does not. Moreover, that the severity of an attack is partly determined by the harm the attack threatens (in this case, not only captivity itself but also loss of life) is entirely uncontroversial and does not show – although it is this that McMahan would have to show – that the same expected harm would justify exactly the same counter-measures if it came *detached* from an ongoing attack instead of being integrated into it, as is the case here. Thus, McMahan's invocation of false imprisonment cases is useless if it is supposed to demonstrate that you can justifiably kill (whether in self-defense or not) non-imminent threats, since the persons killed in such examples are ongoing attackers, not non-imminent threats.

Another interpretation of McMahan's argumentative move with this example would be that instead of trying to show that you are allowed to kill non-imminent threats in self-defense, the example is actually supposed to demonstrate that sleeping soldiers, since they are allegedly "analogous" to the home-invaders, are *not* non-imminent threats but attackers (and the example certainly cannot achieve both). The reply to such an interpretation is simply that, McMahan's claim to the contrary notwithstanding, the soldiers are most certainly *not* analogous to the home-invaders. The soldier sleeping 30 km away from you and your house is not imprisoning you at all, and he is also not attacking you, even if he is determined to shoot you *tomorrow*. While German, British and US self-defense laws are flexible enough to allow self-defense against someone who is engaged in attacking you in the same way McMahan is engaged in writing an essay even while he pauses to make a cup of tea – the gangsters having surrounded your house might also have a cup of tea between volleys, but you can still legally shoot them in self-defense – German, British and US self-defense law does *not* allow you to kill somebody who is engaged in attacking you in the same way McMahan is engaged in writing an article even while he is soundly asleep in a forest 30 km away from his laptop.

An appeal to "scale" or "complexity" along the following lines, for that matter, does not help either:

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[44] This is overlooked, for example, by HELEN FROWE, THE ETHICS OF WAR AND PEACE: AN INTRODUCTION 37 (2011). Her rendering the killing of the hostage takers in her example as "pre-emptive" is thus mistaken. The killing is justified as a defense against an *ongoing* attack. Compare on this also Ferzan, *supra* note 30, at 253.

[45] See Uwe Steinhoff, *Legalizing Defensive Torture*, 26 PUB. AFF. Q. 19, 19-20 (2012).

[46] Jeff McMahan, *supra* note 28, at 180.

> The aggression of a state is not composed of a single threat, posed by a single attacker. It is a complex array of threats posed by thousands of combatants engaged in hundreds of separate offensives. … Any attempt to understand defensive killing in war by thinking about self-defense must therefore take into account the scale and complexity of the threat involved in war.[47]

However, a non-imminent attack does not become imminent by gaining in scale and complexity. One combatant shooting at you right now is attacking you. One combatant sleeping 30 km away in a forest is not. Thousands of combatants shooting at you right now are attacking you. Thousands of combatants sleeping 30 km away from you are not. One soldier operating a super-complex weapon and firing it at you is attacking you. Sleeping 30 km away he is not. Thousands of soldiers right now co-coordinating their movements, machine-gun fire, air-support, etc. in order to kill you are attacking you. Sleeping 30 km away from you they are not.[48]

5. The "Imminence Is a Proxy for Necessity" Argument

It is often stated that the imminence requirement is at best a "proxy" for or "translator" of the necessity requirement, and that in cases of conflict necessity trumps imminence.[49] Richard A. Rosen gives a representative rendering of this view:

> In self-defense, the concept of imminence has no significance independent of the notion of necessity. It is, in other words, a "translator" of the underlying principle of necessity, not the principle itself. … Because imminence serves only to further the necessity principle, if there is a conflict between imminence and necessity, necessity must prevail.[50]

This is the claim. But why should we accept it? What is the *argument*? Rosen explains:

> Society does not require that the evil avoided [by force] be an imminent evil because it believes that an imminent evil is the only type of evil that should be avoided, nor because an imminent threatened harm is necessarily worse than a non-imminent one. [While Rosen talks of "harms" in this quote, he also denies that *attacks* must be imminent to trigger the self-defense justification.[51]] Rather, imminence is required because, and only because, of the fear that without imminence there is no assurance that

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[47] Frowe, *supra* note 44, at 36.

[48] An exception is the case of the soldier who fires a missile that needs an hour to reach you and whose mission to kill you could be aborted via the auto-destruct button. The soldier is attacking you as long as he does not press the button, whether he goes to sleep during the flight of the missile or not. For an explanation of this, see UWE STEINHOFF, ON THE ETHICS OF TORTURE 105 (2013).

[49] See, for example, Robinson, *supra* note 11, at 76-79; Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Women*, 81 N.C. L. REV. 211, 279-281 (2002-2003); Rodin, *supra* note 42, at 41.

[50] Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Beat Their Batterers*, 71 N.C. L. REV. 371, 380 (1992-1993).

[51] See for example *id*. at 376 and 394. The authors mentioned in note 49 clearly agree.

> the defensive action is necessary to avoid the harm. … The legislature, or in common-law jurisdictions, the appellate courts, have made an *a priori* decision that a killing to prevent a non-imminent threatened harm cannot in any case be a necessary killing … If action is *really* necessary to avert a threatened harm, society should allow the action, or at least not punish it, even if the harm is not imminent.[52]

In the light of our previous discussion of what an argument against the independent validity of the imminence requirement would actually have to show, this is not a satisfactory argument. To wit, even if it were true that society should allow the use of force to remove non-imminent threats (and even if it were true that that such use of force is morally justifiable, whether society allows it or not), this does not yet show that it should allow it under the heading of a *self-defense* justification (or that it is morally justified under such a heading). Rosen would have to show that the *same* standards that govern the self-defense justification also govern the justified use of force against non-imminent threats. He does not even try to show that, however – nor, for that matter, do other authors. (As already argued above in section 3, providing examples in which one may in self-defense avert non-imminent *harms* that are threatened by *imminent or ongoing attacks* simply misses the point.)

Thus, that imminence is merely a proxy for necessity as far as the self-defense justification is concerned cannot really count as an argument at all. It appears to be a mere claim, and moreover one that seems to simply beg the question.

6. Christopher's Puzzles

Christopher claims that imminence, in our "current law of self-defense …, is signaled by reaching for and drawing one's gun,"[53] and concludes: "The imminence requirement bars an effective right to self-defense."[54] Why? Because it is a fiction of Hollywood Westerns that the good guy will be fast enough to beat the bad guy even if the bad guy draws first.[55]

I severely doubt that Christopher paints an accurate picture of the "current law" in Anglo-Saxon jurisdictions here – he certainly does not provide any reference to substantiate his claim. Moreover, as far as German law is concerned, his claim would be wrong. In German law, the bad guy need not first reach for his gun to present an imminent threat. For example, "threateningly approaching the defender in a way that aims at the immediate use of violence" would be quite sufficient.[56] If the fast bad guy makes threats or behaves in such a way that the slower good guy is lead to reasonably believe that the bad guy is about to draw his gun, the good guy may draw first. A right to effective self-defense remains.

Thus, for an attack to be imminent there has to be a manifestation of the aggressor's intention to attack immediately. (On German law this threat need not be physical, it can be verbal.) Christopher thinks that there are severe problems with an imminence requirement

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[52] Rosen, *supra* note 50, at 380.
[53] Russell Christopher, *Imminence in Justified Targeted Killing*, in TARGETED KILLINGS 253, 259 (*supra* note 15)
[54] *Id*. at 260.
[55] *Id*. at 257-260.
[56] Erb, *supra* note 6, at 1289.

that has, like this one, both temporal and action components.[57] He states: "In addition to being arbitrary, overinclusive, and underinclusive, and restricting and distorting the right of self-defense, an imminence requirement including an action component incurs a minor paradox."[58] I will not discuss the "minor paradox" and some further problems related to it, since Christopher himself correctly notes that they arise "when the aggressor first satisfies the action component and then subsequently satisfies the temporal component."[59] The idea is that somebody manifests his aggressive impulses at some time *t* when the attack is not yet temporally imminent: the attack will only become imminent later. However, this dissociation between action component and temporal component is impossible on the account defended here: to repeat again, for an attack to be imminent there has to be a manifestation of the aggressor's intention to attack *immediately*. Thus, manifestations of aggressive impulses only count as satisfying the imminence requirement if the attack indeed is temporally imminent. Any satisfaction of the relevant action component *is* a satisfaction of the temporal component – and thus no paradoxes or puzzles arise.

What about Christopher's other charges? The arbitrariness charge is rather peculiar. Christopher imagines two persons who each have reason to fear that the other might pose an unlawful threat of aggression. In the first scenario, person *A* has an old gun that cannot be operated quickly, while in the second scenario he has a gun that can be operated extremely quickly. Therefore he draws first in the first scenario, while in the second scenario he does not deem this necessary, and here the second person, *SD*, draws first. However, *SD* draws his own gun in both scenarios at the same time (let's say high noon sharp). Christopher claims that "*SD*'s conduct was the same in both cases" and complains: "which party is identified as aggressor or defender depends exclusively on which party has the faster gun."[60]

The obvious reply to this arbitrariness charge is that *SD*'s conduct was not the same in both cases: in the first case he initiated the aggression, in the second case he did not. Moreover, which party is identified as aggressor does not of course exclusively depend on which party has the faster gun, but (in part) on which party manifests its aggression first. To be sure, Christopher thinks that A only manifested his aggression first in the first case because he had the slower gun. That might be true, but so what? If, for instance, both Frank and Hank would murder their respective aunt for her inheritance if they had a rich aunt, and Frank, unlike Hank, indeed has one, murders her, and gets punished, it is a gross distortion of the facts to claim that which party becomes a murderer depends exclusively on the financial situation of their aunts. It actually depended on their acts: Hank is punished for the murder of his aunt, not for the fact that his aunt was rich. Hank's character might be as bad as Frank's, but to become a murderer you have to murder somebody: having a murderous character is not enough. Likewise, to become an aggressor you have to manifest your aggression. Having aggressive impulses or intentions is not enough.

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[57] Of course, he also thinks that a merely temporal imminence requirement is problematic. See Christopher, *supra* note 53, at 271-272. This need not concern us here.
[58] *Id*. at 276-277.
[59] *Id*. at 276.
[60] *Id*. at 274.

But, somebody might object, what if *SD* not only feared A, but actually had the intention to kill him and was pleasantly surprised that A's drawing his gun first would give him, *SD*, the opportunity to make it (look like?) self-defense? Is he not then still a murderer or his act at least unjustified?

It might indeed well be that it is unjustified; this is why I said "(in part)" twice two paragraphs ago. After all, I do accept, indeed insist, that the self-defense justification has a subjective (that is, mental) element. Christopher claims that "defenders of the imminence requirement touted the imminence requirement, and not the wrongfulness requirement, as that which determines which party is the aggressor and which is the defender,"[61] but in fact there is no reason why defenders of the imminence requirement should have it do all the work and reject the importance of an actor's state of mind.[62] German self-defense law, for example, reckons with two kinds of threats: one comes in the form of attacks, the other in certain forms of posing non-imminent threats. Imminence distinguishes the former from the latter.

Thus, Christopher's arbitrariness charge is unfounded. His next charge is "overinclusiveness." He considers a person *A* who manifests an imminent threat to kill *SD*. *SD* reacts by using force against *A*. However, had *SD* waited a moment longer, *A* would have changed his mind and not used force. Christopher concludes from this example that "the imminence requirement is overinclusive in allowing *SD*'s force to be eligible to be justified as self-defense, despite it not being necessary."[63] Obviously, however, this overinclusiveness charge rests on the literal or formulaic interpretation of the necessity requirement – for which Christopher provides no further defense. If the harsh interpretation, for which I argued above, is accepted, the charge collapses.

Regarding *under*inclusiveness, Christopher invites us to assume that "*SD* knows" (how he knows this, Christopher does not explain) that *A* is about to attack *SD*. However, *A* has not manifested his aggression yet, and once he does, it will be too late for *SD* to successfully defend himself. Christopher concludes from this example that the imminence requirement absurdly grants only one or the other option here: effective but non-justified self-defense or ineffective but justified self-defense. This is true. However, given that on the account presented here *SD* need not rely on the self-defense justification alone but could also avail himself of the justifying emergency justification, this is not really a problem: *SD* might be able to justifiably save his life with help of the justifying emergency justification.

Finally, there is Christopher's accusation that the action component distorts the balance of interests between aggressor or defender. This seems to be merely a variation on the underinclusiveness charge. To wit, Christopher claims that "by opting to wait to manifest her aggression until just prior to the actual aggression" the aggressor can succeed in "virtually eliminating a self-defender's right to effective self-defense."[64] But, again, the innocent person

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[61] *Id*. at 282.

[62] Nor, for that matter, does Christopher reject its importance; in fact, he elsewhere emphasizes it. See Russell Christopher, *Self-Defense and Defense of Others*, 27 PHIL. & PUB. AFF. 123 (2006).

[63] Christopher, *supra* note 53, at 275.

[64] *Id*. at 276.

might be able to justifiably save his life with help of the justifying emergency justification long before the threat becomes imminent. To be sure, if the aggressor opts to never give anybody reason for the slightest suspicion that she will unjustifiably attack somebody (not even before the aggression: she shoots her victim in the back), then she will have successfully reduced her victim's capacity to justifiably defend himself against her to zero. This, however, has nothing to do with the imminence requirement and everything to do with the subjective element of justification: a justified defender must have reason to believe that he is under attack. Getting rid of this requirement is not an attractive option, as shown by the example of someone who randomly shoots at theatergoers for the fun of it and by pure accident hits (only) "the right one" (let's say a hitman about to kill an innocent person). We need the requirement to discourage people from imposing unreasonable risks on others. Thus, the fact that it might well be that at some point the good guys run out of valid justifications and have no means left with which they could successfully counter the force of the bad guys is no proof of the necessity of coming up with additional justifications to fill the gaps: some gaps might be there for good moral reasons.

In this context it should be noted that when Christopher claims that the imminence requirement is "claimed to reflect a careful balance between the defender's interest in protection from aggression and the potential aggressor's interest in not being the victim of unnecessary defensive force,"[65] he might indeed be correctly reporting the claims of *some* defenders of the imminence requirement. However, in my view the rationale for the German legal (as well as for the moral) distinction between the self-defense justification and the justifying defensive emergency justification and for reserving the imminence requirement for the former has less to do with the interests of aggressors than with the interests of innocent people. It is foremost an attempt to strike a balance between the interests of innocent people who are confronted with what they perceive to be threats of aggression on the one hand and the interests of *other innocent people* who the former might *mis*perceive as aggressors on the other.

I will return to this below. For now let me just conclude that Christopher's attack on the imminence requirement might well be successful against *some* accounts of self-defense that incorporate it – for example against those accounts that interpret the necessity criterion just as he does and which do not allow the self-defense justification to be complemented with a separate justification of force against non-imminent threats. However, it is not successful against the account presented here.

7. McMahan's liability argument

Jeff McMahan provides what I will call here a liability argument for the applicability of the self-defense justification for the use of self-defensive force against people posing non-imminent threats. While McMahan in the following quote does not explicitly talk about self-defense, it is clear from the context of his article that the liability he is talking about is liability to self- or other-defensive attack.[66] His argument, meant in particular to provide a

[65] *Id*. at 275.

[66] He states that the "liability-based justification" provides what he thinks is "the best

justification for killing soldiers preventively in a preventive war, runs as follows:

> Even the mere formation of an intention to kill a person next week, or when the opportunity arises, can make a person liable to be killed. For the formation of that intention … significantly increases the potential victim's objective risk of being killed. If the intended killing would be wrong and the only way to prevent it is to kill the potential murderer *now*, that person is liable to be killed and would not be wronged by being killed. Subjective and objective conditions sufficient for liability are both present: a blameworthy intention and an increase in the objective probability of a person's being wrongly killed. … By forming that intention, the potential murderer has wrongfully created a situation in which, by hypothesis, either he must be killed or his potential victim must be exposed to a high risk of being murdered. Justice requires that the one who is morally responsible for this situation bear the cost.[67]

Let us have a closer look at some of the assumptions McMahan makes here:

> 1. The formation of an intention to kill someone increases the potential victim's objective risk of being killed.
>
> 2. Increasing someone's objective risk of being killed is wrongful if the killing would be wrong.

There is an ambiguity in the next assumption. Given McMahan's formulations here and elsewhere it is not quite clear whether he makes assumption 3a or 3b (in fact, he seems to oscillate between them):

> 3a. By wrongfully increasing someone's objective risk of being unjustifiably killed one becomes liable to defensive killing if this killing is necessary to remove the *risk*.
>
> 3b. By wrongfully increasing someone's objective risk of being unjustifiably killed one becomes liable to defensive killing if this killing is necessary to prevent the *wrongful killing*.

This liability argument is, it seems, simply an exercise in begging the question: assumptions 3a and 3b presuppose exactly what would have to be proven in the first place, namely that people posing non-imminent threats (wrongfully or not) can be liable to attack (and, moreover, liable to *defensive* attack instead of only to an attack that is covered by the justifying *emergency* justification). McMahan cannot simply assume that they do; he would have to argue for it. Perhaps McMahan feels that he can simply rely here on his previous attempts to provide a defense of the responsibility account of liability to defensive attack[68] – as the last sentence of the indented quote indeed suggests he does. However, McMahan has not presented a *viable* defense of his account, he has never overcome its counter-intuitive implications, of which, in fact, he is well aware. He provides the following example himself:

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explanation of the permissibility of killing in self-defense and in defense of others." McMahan, *supra* note 23, at 123. Compare also McMahan, *supra* note 28, esp. 171-174.

[67] McMahan, *supra* note 23, at 125-126.

[68] "[T]he criterion of liability to defensive killing is moral responsibility, through action that lacks objective justification, for a threat of unjust harm to others, where a harm is unjust if it is one to which the victim is not liable and to which she has not consented." Jeff McMahan, *The Basis of Moral Liability to Defensive Killing*, 15 PHIL. ISSUES 386, 394 (2005).

> Suppose that the only way you can prevent yourself from being killed by a culpable attacker is to kill his mother. If you do kill her, can you then claim that she was liable to be killed because, as a morally responsible agent, she voluntarily chose to engage in an activity (having a child) that had a tiny probability of resulting in an unjust threat and that this made her responsible for the threat you faced from her son? Obviously not. But it is less obvious what the right explanation is of why the mother is not liable.[69]

This example is flatly a refutation of McMahan's account of liability to defensive attack. His assurance that the "causal connections" are not "of the right sort for the transmission of moral responsibility"[70] cannot count as an answer to the request for an explanation. Thus, it seems to be simply incorrect that voluntarily increasing someone's objective risk of being killed is wrongful if the killing would be wrong, let alone that increasing such an objective risk makes one liable to attack, let alone liable to *self-defensive* attack (instead of defensive emergency attack).[71]

Consider, as a further example, martial arts training. Such training, and probably a lot of other sports too, increases one's capacity of killing others (even if only by increasing one's general fitness), and thereby also increases the risk that one might kill others wrongfully. It seems, however, to be quite a stretch to conclude from this that martial arts training is wrongful. Even creating a *high* risk of wrongfully killing others is not necessarily wrongful by itself. Suppose, for instance, that Bob has a very short fuse and therefore has so far never carried a gun, fearing, quite rightly, that if sufficiently provoked he might wrongfully kill a person. However, he recently got credible death threats and therefore decides to carry a gun for self-protection, thus significantly increasing other people's risk of being wrongfully killed by him. Is increasing this risk by carrying the gun wrongful? Certainly not if the risks Bob shoulders by not carrying a gun outweigh the risks others are burdened with if he is carrying one. (In fact, if the stakes are high enough people might even be *obliged* to increase other people's risk of being killed by them.)

It seems, therefore, that people can often permissibly increase the objective risk of others of being wrongfully killed by them. They might have an agent-relative permission and a right to do certain things – carrying guns, at least in the face of serious death threats, exercising their self-ownership by making their body into a more effective weapon – even if they thereby impose risks of wrongful harm on others. Moreover, people own not only their bodies but also their minds, and it therefore seems that they may consider, imagine, and intend what they want, as long as they do not *act* on certain considerations, fantasies, or

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[69] *Id.* at 396.
[70] *Id*.
[71] For further discussions of the indiscriminateness of McMahan's account see Steinhoff, *supra* note 37, at 354-356, and "Expanded Accounts of Self-Defense and the Problem of Discriminating between Combatants and Non-Combatants," unpublished ms., section 5. Other critics of McMahan's responsibility account include Seth Lazar, *Responsibility, Risk, and Killing in Self-Defense*, 119 ETHICS 699 (2009); and Ferzan, *supra* note 26, esp. at 676-683.

intentions.[72]

Thus, McMahan fails to establish that intentions to wrongfully kill someone are wrongful in themselves because they increase the risk of other people getting wrongfully harmed. He fails to do this because, as we just saw, he fails to establish the correctness of assumption (2), namely that increasing someone's objective risk of being killed is wrongful if the killing would be wrong.

In addition, he also fails to establish the correctness of assumption (1), namely that forming the intention to wrongfully kill someone does indeed increase someone's risk (in the relevant sense) of being wrongfully harmed. To wit, it is not quite clear what McMahan means, for instance, by a "ten per cent risk."[73] What, exactly, is his interpretation of probabilities? Consider it were an objective and well-know but purely statistical, coincidental fact that 1 out of 10 people who wear a "I love Mogadishu" shirt commit murder. Thus, on a version of a frequentist account of probability,[74] a tourist would pose a ten per cent risk to the survival of another person if on his visit to Mogadishu he would don this shirt. May he therefore be killed if he actually dons it, or does he become liable to attack? Obviously not: that 1 out of 10 people who have ever donned such a shirt commit murder does not mean that *the tourist* would *ever* commit murder (remember, it is a purely statistical fact), however often he dons such a shirt. Making him liable to attack here would mean making him liable for a statistical fact about a group to which he happens to belong, not making him liable for some important fact about himself (his deeds, character, dispositions, or causal efficacy). Since McMahan in fact claims that even someone's position "in the local causal architecture … cannot cause him to forfeit his right not to be killed,"[75] it is difficult to see how then a mere statistical fact should make one liable to attack. Thus, probabilities in this frequentist sense are irrelevant.

A more reasonable interpretation that suggests itself is therefore a propensity account of probability.[76] Thus, suppose the Mogadishu shirts have some well-known weird psychological effect on certain people, let's say tall ones (however you define "tall"), so that it is true for *every* tall person that if *such a person* dons the Mogadishu shirt, 1 out of 10 times he or she will commit an unjustified homicide more than ten years after having donned the shirt. (That is, if a person dons the shirt ten times in her life, she will have committed one unjustified murder more than 10 years after one of the occasions she donned such a shirt – this is entirely different from the previous account of probabilities). Thus, here we are talking about a propensity of certain persons, about a fact about themselves.

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[72] As Luban puts it: "[F]orming an intention is a mental event, and mental events do not make us morally liable to violence." See David Luban, "Preventive War and Human Rights," in PREEMPTION 171, 191 (*supra* note 38).

[73] McMahan, *supra* note 23, at 126.

[74] See Alan Hájek, *Interpretations of Probability*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter 2012 Edition) (Edward N. Zalta ed., 2012), http://plato.stanford.edu/archives/win2012/entries/probability-interpret.

[75] JEFF MCMAHAN, KILLING IN WAR 169 (2009).

[76] See Hájek, *supra* note 74.

However, granted the propensity account of probabilities, assumption (1) is not correct. To be sure, *some* people might have a psychological structure that makes them more likely, in the propensity sense, to kill someone if they form the intention to kill someone. But others might have such a psychological structure that they will, perhaps out of weakness of the will or for whatever other reasons or causes, hardly ever act on such an intention. In fact, it is even conceivable that a particular person's forming the intention to kill somebody might *decrease* the likelihood of her killing somebody: deeply shocked by her own dark side she might seriously consider committing suicide, thereby, on McMahan's understanding of serious consideration,[77] decreasing the likelihood of her own survival. And dead people are, on every interpretation of probability, unlikely to kill anybody.

I conclude that McMahan's liability argument for the applicability of the self-defense justification to the harming or even killing of non-imminent threats fails too: it relies on unwarranted, indeed mistaken, assumptions and begs the question.

8. Changing direction: imminence triggers the self-defense justification and its harsh (on the aggressor) necessity criterion

As already said in section 5, it is often stated that the imminence requirement is at best a "proxy" for, or "translator" of, the necessity requirement. In contrast, again, I argue that imminence *triggers* the applicability of the necessity requirement characteristic of self-defense,[78] a requirement that is very lenient towards the defender and very harsh on the target of the defensive measures. In cases where there is no ongoing or imminent attack, however, such leniency towards the threatened person and harshness towards the person who poses the threat is misplaced.

Consider the following example:

> *Russian Roulette*:
> Albert plays Russian roulette with you unjustly and against your will to enable his survival (if he doesn't play Russian roulette, a villain will kill him). He aims his ten-shooter, with only one loaded chamber, at your head (he won't miss) and is about to pull the trigger. You know for a fact that he will pull the trigger only once (that is a condition of the villain). Thus, there is a 1 in 10 chance (obviously also in the propensity sense) that you will die if he pulls the trigger. Your only chance to prevent his attack is to kill him.

It seems quite clear that one can justifiably kill Albert in self-defense here to prevent his imminent attack. Now, however, consider this example:

> *Microchip*:

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[77] McMahan, *supra* note 23, at 126.

[78] Robinson, *supra* note 11, at 75, admits that in many statutes "the word 'imminent' appears to modify the nature of the triggering conditions," but thinks that it is "more properly viewed as a modification of the necessity requirement." This is precisely what I deny: again, imminence triggers the harsh necessity requirement of self-defense in the first place. Robinson also seems to think that the meaning of "necessary" is stable; I would submit, in contrast, that "necessary" means different things in the context of different justifications.

> Benjamin intentionally got a microchip, a "neuro-pacemaker," implanted in his brain that enables his survival. However, the chip has, as Benjamin and you know, a severe side-effect: there is a 1 in 10 probability (again in the propensity sense) that if he ever intends, however briefly, to murder somebody (the chip beeps when this happens), the chip will cause him to indeed unjustifiably kill somebody after a few weeks unless interfered with. The chip beeps, and the only way of stopping Benjamin from posing a 10 per cent non-imminent death threat to others is for Carl to kill him right now.

On 3a, by wrongfully increasing someone's objective risk of being unjustifiably killed one becomes liable to defensive killing if this killing is necessary to remove the risk. Thus, Benjamin would be liable to be killed here (since on McMahan's account the mere forming of the intention to murder someone is already wrongful), and since McMahan believes in "liability justifications,"[79] it is safe to assume that this is to mean also that Benjamin could be killed justifiably. Yet, this is, I submit, counter-intuitive. It seems the killing would be both unjustified *and* a rights-violation (which means that Benjamin cannot be liable), and there is certainly no asymmetry: if Benjamin can prevent you from killing him by knocking you down he is allowed to do that; indeed, it seems that he is even allowed to kill you. *You* are the attacker in this example, not him. (To be sure, there might always be people who do not share my intuition here. For those who do, however – and I suppose this will be quite a few people, probably including almost all judges in Western jurisdictions – 3a is certainly not an attractive principle.)

What about 3b: by wrongfully increasing someone's objective risk to be unjustifiably killed one becomes liable to defensive killing if this killing is necessary to prevent the wrongful killing (not merely the risk of wrongful killing)? The question is what "necessary" means here. McMahan nowhere provides an analysis of the term, but it seems that he is using it in what I called the formulaic sense (there is *no milder* means). However, on the account presented here, a defensive measure already meets the necessity condition of self-defense if there is *no milder means that promises an equally safe and effective defense*. In other words, even if it were true that by wrongfully increasing someone's objective risk of being unjustifiably killed one becomes *liable to killing* if this killing is, in the literal or formulaic senses of the term, necessary to prevent the wrongful killing, this would not yet show that one thereby becomes liable to *defensive* killing. One becomes liable to *defensive* killing only if one would not be wronged by being killed even though the defender had a considerably less harmful (although for him also slightly less safe) alternative of averting the attack at hand and only if one would not be justified in forcibly resisting the other's attempt to kill one. (Remember the first and the second condition for a successful argument against the imminence requirement.)[80]

In the light of this, let us slightly revise the two previous examples. In the revised versions, Albert and Benjamin actually *will* wrongfully kill you or someone else unless forcibly stopped by you. And in the revised version you can either kill Albert and Benjamin or try to taser them (you cannot try one option after the other.) However, there is a 10 per cent chance

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[79] McMahan, *supra* note 24, at 138.

[80] The argument of this paragraph also further undermines 3a.

that your attempt to stop Albert or Benjamin by tasering will fail, while it is practically certain that your attempt to kill them will be successful in averting the threat and the wrongful killing.

Intuitively (at least these are my intuitions), you are most certainly *not* under an obligation to desist from using lethal force here against Albert, who intentionally puts the gun to your head and intends to do something (pulling the trigger) that subjects you to a 10 per cent (propensity) risk of death. In contrast, Benjamin does not *intentionally* subject others to such a risk. (By having the chip implanted he only foreseeably subjected the others to the *risk of such a risk* – after all, the *10 per cent* risk only arises *after* having formed the intention to kill someone.) Yes, his "forming" the intention to kill someone creates a risk (as in the previous example pulling the trigger creates a risk), but the "forming" of an intention is not itself an intentional act. Even if "forming" the intention would be wrongful here, as McMahan thinks, it is not nearly as wrongful as Albert's putting his gun to your head and pulling the trigger. Moreover, 3a and 3b (and McMahan) do not even require that Benjamin *continues* to have the deadly intention. This is accordingly reflected in my example: the 10 per cent risk is created "however briefly" Benjamin has the intention to kill somebody. That is, he would continue to pose a 10 per cent death threat even if he abandoned all deadly intentions and embraced a spirit of altruism. (Albert, however, would not continue to pose a 10 per cent death threat if he abandoned his intention to pull the trigger.) It seems that these considerations should play a role in deciding what to do with Benjamin: one should taser him, not shoot him, *although* there is a 10 per cent chance that tasering him will not remove the risk he poses to others.

But, one might object, if Benjamin would actually kill someone, is he not indeed liable? I do not think that he is under the circumstances, but let me just sidestep the issue of liability here and focus on the question of justification. Note, as said before, that there is a subjective element to justified self-defense. But your subjective situation in the revised Benjamin example has not changed as compared to the original one. All you know in either case (whether Benjamin will *actually* kill someone or not) is that there is a 10 per cent probability that Benjamin will unjustifiably kill someone in a few weeks if you do not kill him right now. This, however, seems to be too thin a basis for *justifiably* killing him,[81] *especially* if there is a 90 per cent chance that tasering him will in fact remove the 10 per cent risk Benjamin is posing to others.

Moreover, as far as asymmetry and symmetry is concerned, it seems that Albert cannot justifiably defend himself against the deadly force you employ in order to prevent him from

[81] For what it is worth: the reason why I am of the opinion that Benjamin is also not *liable* to attack is that I think that innocent people have a right not to be attacked on such a flimsy epistemic basis. (Innocent people, however, do not always have a right not to be attacked: Nozick's falling man and the notorious psychotic aggressor do *not* have a right not to be attacked.) And on my account, he still is innocent: the mere having of the intention does not make him non-innocent; he at least has to manifest his aggressive impulses first; and even then it should be noted that guilt comes in degrees so that proportionate responses have to be adjusted accordingly.

pulling the trigger. In contrast, it would appear that Benjamin is allowed to use deadly force in reaction to your attempt of shooting him dead.

One reason for this is that the fact that Albert intentionally puts a gun at your head and intends to do something (pulling the trigger) that is really very bad, while Benjamin intends to do something very bad while he *simultaneously knows* that the likelihood that he will actually do it is only 10 per cent (and after a moment might not even intend the bad thing anymore anyway) dramatically alters what one can *reasonably expect* from Albert and Benjamin, respectively. (I am talking here about normative expectations, not merely about psychological ones.) Albert, after all, has no reason to doubt that he will actually do something very bad, namely pull the trigger. Benjamin, however, has every reason to doubt that he will actually do something that seriously bad. Therefore, it seems, Benjamin, unlike Albert, cannot really be reasonably expected to keep still when you try to kill him.

Let us now consider two further examples:

Attack

Carl intends to murder you, approaches you shouting "Die, pig!", and seven steps away from you draws his gun and points it at you. You draw your own gun and shoot him dead.

Murder Plan

Dave intends to murder you in two weeks, buys, as you have been credibly and correctly informed, a gun for this express purpose (namely "to kill the pig"), and goes to bed. You enter his house and kill him in his sleep.

It seems that in the *Attack* case you are clearly justified in shooting the attacker dead. In the *Murder Plan* case, however, this does not seem that clear at all, especially not if there is an alternative preventive option that while significantly diminishing the harm done to the potential aggressor does not much increase the risk for the potential victim. A reply would be that the latter case is underdescribed, leaving too many doubts as to whether Dave will actually go through with his plan or not and what alternative means to stop him there are. However, a response to this reply is that this dearth of information corresponds to reality. One artificial thing about the *Russian Roulette* and the *Microchip* case was that everybody was nicely informed about the respective probabilities involved. In real life, however, there is no teleprompter that informs defenders and aggressors about the exact pertinent probabilities. We often do not have much more information to go on than the information given in the two latest examples. And this, as I will further argue below, is precisely what motivates the distinction between self-defense and justifying emergency justifications: the distinction takes into account that situations like *Attack* are normally much more dangerous and leave less options than situations like *Murder Plan.* Therefore, the former situations should trigger justifications for counter-measures that are much harsher on the aggressor or threatening person than the justifications triggered by the latter situations.

Since this distinction is based on what is *normally* the case and not on what is always the case, it is not undermined by the fact that there are exceptional cases (more on this below). Consequently, the morally relevant distinction between *Attack* and *Murder Plan* seems to actually remain even if we do add information about the respective probabilities of stopping the attack and equalize them:

Attack with probabilities

Carl intends to murder you, approaches you shouting "Die, pig!", and seven steps away from you draws his gun and points it at you. Under the circumstances, any reasonable observer would agree that shooting him dead will stop his attack with almost 100 per cent certainty, while trying the only other option, namely to merely taser him, will only have a 90 per cent chance of stopping his attack.

Murder Plan with probabilities

Dave intends to murder you in two weeks, buys, as you have been credibly and correctly informed, a gun for this express purpose (namely "to kill the pig"), and goes to bed. Under the circumstances, any reasonable observer would agree that shooting him dead this night in his sleep will prevent his future attack with almost 100 per cent certainty, while trying the only other option, namely to merely imprison him until the authorities arrive, will only have a 90 per cent chance of stopping his attack.

It seems to me that intuitively you would still have to shoulder a higher risk in *Murder Plan* than in attack. Perhaps you think that a 10 per cent difference in the effectiveness and safety of the two measures is too much, but perhaps 5 per cent or 2 per cent would be acceptable. In contrast, it seems that in *Attack with Probabilities* one need not make *any* concession to the aggressor.

Moreover, it further seems that if you shoot back at Carl in self-defense, Carl is still prohibited from shooting back at you in turn. However, must Dave really hold still when he suddenly wakes up, seeing you stand over him with your gun pointed at his head, about to pull the trigger? Is he not justified in grabbing his own gun from under the pillow and in defending himself against your preventive attack?[82] It seems to me he is. It seems unreasonable to expect him to hold still under these circumstances.[83]

However, in *Murder Plan with Probabilities* and in *Attack with Probabilities* I have explicitly only equalized the probabilities of *stopping* the attack (through the defender's action). I have not talked about what happens if even the probabilities of Carl pulling the trigger and of Dave going through with his plan are equalized. Before tackling this issue I have to introduce what I take to be the rationale of the imminence requirement.

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[82] Joshua Dressler, *Battered Women, Sleeping Abusers, and Criminal Responsibility*," 2 CHI. POL'Y REV. 1, 11 (1997), asks the same question about a similar case. Like mine, his question is clearly rhetorical.

[83] McMahan, *supra* note 75, at 14, claims that a murderer who "is in the process of killing a number of innocent people" must not defend himself against the police officer who takes aim to shoot him. He acknowledges that Hobbes saw this differently but claims that "relatively few people would accept his view." However, the murderer is engaged in an ongoing attack while Dave is not. It is not so clear that only "relatively few people" would think that Dave is permitted to defend himself. See also the previous note. Note also that I am appealing to reasonable expectations here to explain that Carl forfeits his liberty to defend himself while Dave does not. This is different to a mere appeal to "time." However, what we can reasonably expect might – in fact, will – also depend on empirical facts. This is, of course, a central contention of this paper. See section 9.

9. The rationale of the imminence requirement

Some of the arguments above appealed to intuitions, and some people might not share those intuitions. Others might. Once fundamental intuitions are opposed to each other it would be nice if one could refute the opponent by showing that his views lead to contradictions or if one could support one's own views with more than just intuitions. However, I have shown above that the negative arguments *against* the imminence requirement as well as positive arguments *for* simply replacing the imminence requirement with the necessity requirement fail. In fact, these replacement arguments *miss the point* of the account defended here and found in German case law and legal scholarship (as well as, in my view, in Anglo-Saxon law, at least implicitly and in rudimentary form). The point is that the necessity requirement found in the self-defense justification is particularly harsh on the aggressor and *not* to be confused with necessity requirements found in other kinds of justification. Moreover, this harsh necessity requirement is triggered precisely by imminence.

Furthermore, defenders of the replacement doctrine have also not provided a *rationale* for such a replacement: they have not explained what the *moral advantage* of such a replacement is supposed to be. Rosen's explanation at best shows that it is morally advantageous to complement the self-defense justification with a justifying emergency justification, but neither he nor any other author has demonstrated or even as much as attempted to demonstrate, for that matter, that it is morally advantageous to have the harsh German necessity requirement of the self-defense justification be triggered by all kinds of threats instead of only by imminent attacks, nor have they shown that it is morally advantageous to dismiss the harsh German necessity requirement and instead apply a more lenient one to all kinds of threats, including to imminent attacks.

In contrast, I will argue here that the imminence requirement does have an underlying moral rationale: it tries to prevent people from "jumping the gun" (and it thus also tries to avoid the well-known vicious and violent circle of the prevention of the prevention[84]) and to reduce the occurrence of violence against innocent people (and of excessive violence against perhaps not so innocent people).

This cannot be sufficiently appreciated if one concentrates only on the "liability" of aggressors to the use of force instead of also keeping an eye on the *justification* (or lack thereof) of *defenders* to use force. McMahan, for example, asks: "If the *only* opportunity for intervention is *now,* why should a wholly innocent person have to bear a 10 per cent risk of being murdered in order that the person who has wrongfully created that risk should be spared?"[85] However, that a person is liable to attack does not mean that he can be attacked justifiably (even if we exclude countervailing necessity considerations – whose force McMahan accepts – like, for instance: if you attack the liable person X, the extraterrestrials will destroy the planet). Accordingly, my counter-question to McMahan's question is: why should one assume that the only reason why a threatened innocent person ought to bear a

[84] See on this problem, in an international context, David Luban, "Preventive War," 32 PHIL. & PUB. AFF. 207 (2004).

[85] McMahan, *supra* note 23, at 126.

certain risk of being killed should lie in the protection of people who have created the risk? Why could it not (also) lie in the protection of *other innocent people*?

I adduced above the example of someone who for the fun of it randomly shoots at theatergoers and by pure accident hits (only) "the right one," namely a hitman about to murder somebody. This act of random shooting is unjustifiable not because it wrongs the hitman – for it does not – but because it imposes unreasonable risks on innocent people, on the other theatergoers. Thus, the rationale for the subjective element of the self-defense justification is the protection of *innocent* people, not of guilty ones. In my view, this is also the rationale, or at least one rationale, for the necessity requirement. If it were true, as Kant believed, that you do not owe a culpable lethal aggressor anything and therefore could kill him without wronging him even if you know that you could as safely and effectively stop him by knocking him out, this would still not make the act of killing him justified.[86] Why not? Because there is a risk that you misinterpret the situation and the allegedly culpable lethal aggressor is not culpable at all, but innocent (maybe he had a psychotic break). Thus, abiding by the necessity criterion reduces the morally responsible agent's risk of harming *innocent* people unnecessarily.[87] There is hence a justification of the necessity requirement that is based on a principle of precaution, and this justification need not attribute to culpable would-be murderers the right not to be unnecessarily harmed. The rights of the guilty have nothing to do with it; instead it is all about the protection of the innocent.

One might be tempted to object against this rationale of the necessity condition that surely sometimes one can be fairly certain that one is indeed dealing with a culpable aggressor – and why not use unnecessary force in such a case? But the answer to this question remains the same: because even if one can be fairly certain, one cannot be *absolutely* certain. Absolute certainty is unattainable for human beings (at the very least with regard to empirical matters). Thus, even if one is "fairly" certain that one is dealing with a culpable aggressor – by using unnecessary force one would *still* run the *risk* of inflicting unnecessary harm on an innocent person.

But can one not sometimes be permitted to run this risk? Yes, one can, but not for the mere fun of it. Rather, one needs a very good reason to do so, one needs a *justification* for

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[86] See IMMANUEL KANT, THE METAPHYSICS OF MORALS 28 (Mary Gregor trans. and ed., 1996). Seumas Miller, *Killing in Self-Defense*, 7 PUB. AFF. Q. 325, esp. 332-338 (1993), also argues that killing a lethal aggressor to save one's own life (or other sufficiently valuable goods) need not be necessary for the aggressor to forfeit his right to life. I agree with Kant and Miller.

[87] Compare also Fletcher, *supra* note 26, esp. at 301. However, Fletcher's hint to the concern about possible *future* victims of *dangerous persons* misses the *agent-relative* concern morally responsible people should have about their *own* dangerous *acts*. ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 83-87 (1998), relies on the idea of an "error preference" to justify the *proportionality* requirement in *law* – while he does not explicitly state it, the idea here is of course that one should try one's best to avoid errors that victimize innocent people. He does not apply this idea, though, to the *necessity* requirement (neither in law nor in morality).

running this risk. Note that the justification cannot lie in self-defense itself. The necessity criterion adopted here is one that requires the use of the mildest means among *the most effective* ones, that is, it does not ask the defender to shoulder additional risks for the benefit of a culpable attacker (and a defender can justifiably believe to be confronted with a culpable attacker without having to be certain). Thus, given how the necessity criterion is formulated here, it is an analytical truth (like "Circles are round") that using unnecessary force will not improve on the defense as compared to the use of necessary force.

So what other justifications could there be? Punishment would be one possibility. If the defender has sufficiently strong reasons to believe that a culpable aggressor would get away without receiving proportionate punishment if he does not already inflict this punishment on the aggressor right now, then this might provide a justification to inflict harms on him that are not necessary by the standards of the self-defense justification.[88]Another possible justification would, of course, be precisely the justifying emergency justification. For example, if the defender has sufficiently strong reasons to believe that the attacker would, after the defender has stopped his attack with necessary force, quickly recover in order to kill another innocent person, without anybody able to intervene and stop him, then this could provide a justifying emergency justification to kill or otherwise incapacitate him with an amount of force that was not necessary by the standards of self-defense.

In other words, the fact that there can be extreme cases where one may inflict more force on an aggressor than was necessary according to the standards of the self-defense justification does not show that these standards are not valid. It rather shows that in extreme cases there might be *another* justification available, a justification to *override* the limits set by the self-defense justification. (Speed limits, for instance, are no less valid for the fact that under special circumstances – for example when one needs to rush someone to the hospital – they may be justifiably infringed on the basis of a necessity justification.)

Thus, conceiving of the necessity requirement of the self-defense justification as a precautionary rule for the protection of the innocent makes good sense. However, in protecting the innocent certain trade-offs have to be made. After all, the defender, or at least those he or she defends, are *ex hypothesi* also innocent; and therefore there must be limits to the concessions one makes to avoid harming innocent people by one's actions. And precisely

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[88] Some might be tempted to object that private punishment (at least in the form of severe punishment of adults) or "vigilantism" can "never" be justified. However, this absolutist position, like to many absolutist positions, is deeply implausible. For a criticism of absolutism, see UWE STEINHOFF, ON THE ETHICS OF TORTURE 149-150 (2013). For defenses of some forms of private punishment and "vigilantism," see Travis Dumsday, *On Cheering Charles Bronson: The Ethics of Vigilantism*," 47 S. J. OF PHIL. 49 (2009); Kelly D. Hine, *Vigilantism Revisited: An Economic Analysis of the Law of Extra-Judicial Self-Help or Why Can't Dick Shoot Henry for Stealing Jane's Truck*, 47 AM. U. L. REV. esp. 1252-1253 (there the author argues for a "justified vigilantism defense") (1998); Elizabeth Ayyildiz, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. OF GENDER, SOC. POL'Y & THE L. 141 (1995); Uwe Steinhoff, *Does the State have an Exclusive Right to Punish?*, unpublished ms.

here lies the connection between imminence and the harsh (on the aggressor) necessity requirement of the self-defense justification. To wit, experience shows that the likelihood that someone who intentionally acts so as to pose an imminent threat (someone, for instance, who draws his gun now with the intention to shoot you dead) will suddenly abort the intention and not go through with the intended attack is low. The likelihood that someone starting to plan to murder someone else in a few weeks will abandon his plan due to second thoughts is many times higher. This is partly so for the obvious reason that in the latter case there is much more time and opportunity to change one's mind. Moreover, the imminence of the act one intends to commit changes one's thought processes.[89] Empirical psychological research shows that the initiation of action is often bound to "implementation intentions" and that these intentions have the effect of connecting action in such a way to triggering conditions (like propitious opportunities) that the act becomes almost automatized and hence the capacity of canceling it extremely diminished (so that the action control in the final implementation phase resembles the extremely diminished action control of patients with frontal lobe lesion).[90] Even intuitively it should be obvious that one will *concentrate* on the task at hand: the person drawing the gun will hardly let his mind wander when he is about to shoot you (and maybe about to face your violent counter-measures). The person in the planning phase days or even weeks before, however, *cannot avoid* letting his mind wander to other things: he still needs to eat, pay his bills, go to work, talk to colleagues, to family members – he will still be busy with the thousand tasks of daily life.

Conversely, the imminence of the attack also dramatically changes the situation for the defender. There is simply no time and peace of mind to now engage in the fine-grained computations that for instance Lazar's rendering of the necessity condition requires of him: "Defensive harm H is necessary to avert unjustified threat T if and only if a reasonable agent with access to the evidence available to Defender would judge that there is no less harmful alternative, such that the marginal risk of morally weighted harm in H compared with that in the alternative is not justified by a countervailing marginal reduction in risked harm to the prospective victims of T."[91] A self-defense situation is not a mathematics workshop. It also does not help to *excuse* the defender but to insist that objectively speaking he is not justified.[92] I agree with the *Münchener Kommentar* that once there actually is a self-defense

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[89] I thank the action psychologist Prof. Julius Kuhl for sharing his insights on this topic with me and steering me to the right literature.

[90] Angelika Lengfelder and Peter M. Gollwitzer, *Reflective and reflexive action control in patients with frontal brain lesions*, 15 NEUROPSYCHOLOGY 80 (2001).

[91] Lazar, *supra* note 12, at 13.

[92] A defender is merely excused if he *cannot be blamed* for his act. A psychotic aggressor, who is hallucinating an attack and by "defending" himself against the hallucinated attack becomes an aggressor himself, cannot be *blamed* for this act. Yet, that does not mean that his act is justified and thus *right*. This difference will often (but not always) have implications for third party action: a police officer, for example, may interfere with a person's merely excused act, but not with his justified act. The person may still not be punished for the excused act, however.

situation (that is, once the defender in fact faces an ongoing or imminent attack), "then the legal order owes it to the defender, as in every case of issuing normative directions for action, to provide a behavioral norm that gives him (not necessarily on the basis of his individual capacities but on grounds of objective criteria) a *realistic chance*, one that is not tied to superhuman capacities, to not only accidentally, but *purposefully* (*gezielt*: in a targeted manner) *behave in compliance with the law.*"[93] The same is true of morality. Norms for action, whether in law or morality, that nobody can realistically hope to comply with (or only by pure blind luck) are unreasonable, unfair, and useless as far as action-guidance is concerned.

A further consideration in support of connecting imminence with the harsh (on the aggressor) necessity criterion of the self-defense justification is that usually the means for averting a planned attack need be less harsh at the inception of the plan or in any case before it becomes imminent than once the attack does become imminent. Before the attack becomes imminent oneself or third parties might still be able to talk or threaten the potential aggressor out of it; or the police might simply arrest him and charge him for conspiracy to commit murder, for instance. In contrast, it is unlikely – because of the sheer lack of time and the psychological mechanisms already mentioned – that the attacker drawing the gun to shoot you can now still be talked out of it. And there will also normally be no police around to help (the attacker will of course try to avoid situations where they are present). Therefore, the defender needs a "longer leash."

Thus, the connection between imminence and the harsh necessity criterion is grounded in the fact that in the vast majority of threats of imminent attack, preventing or stopping the attack without unduly endangering the potential victim of the attack will not be possible without using harsher means than would be required in the vast majority of threats of non-imminent harm; moreover, given the time-constraints and the pressure the defender is consequently facing, he cannot be reasonably expected to engage in fine-grained deliberations when choosing his defensive means. All this, I submit, suggests the harsh necessity criterion for cases of imminent attack, that is, a criterion that allows the defender – provided proportionality constraints are satisfied – to employ even the harshest means as long as there is no milder means that is *equally safe and effective*.

In the last paragraphs, describing the differences between threats of imminent attack and other kinds of threats, I used terms like "vast majority" and "likelihood," that is, I appealed to probabilities. This concept of probability used here is basically frequentist. (Although, of course, the percentage of threats that are also in the propensity sense more likely to cause harm if not interfered with will be far higher among the threats of imminent attacks than among other threats.) Above, when discussing "liability," however, I pointed out (remember the first Mogadishu shirt example) that a person's being more likely, in the frequentist sense, of causing harm can hardly ground *liability* to defensive attack. Therefore, it is important to note here that rejecting the claim that a particular person can be morally liable to a particular harmful act simply on grounds of statistical facts about the class of people she belongs to is entirely compatible with endorsing the claim that what *rule* we apply to a *class* of cases can

[93] Erb, *supra* note 6, at 1297.

be dependent on statistical facts about that class. For example, if you know that it is a fact that 99 per cent of all insurance agents who are taller than 2 meters sell fraudulent insurance policies, then this does indeed not yet mean that that the 2.1 meter insurance agent who tries to sell you insurance is liable to punishment. It certainly does mean, however, that the rule "Do not buy insurance policies from insurance agents who are taller than 2 meters" is a rule one is, all else being equal, well advised to abide by.

Thus, my argument for binding the harsh necessity criterion to imminence and to forestall its application in the case of non-imminent threats is, to repeat, an argument based on a principle of fair precaution: abiding by a rule that combines the harsh necessity criterion with the imminence requirement fairly reduces the agent's likelihood of violating the rights of innocent people.

10. Exceptional Cases and Different Justifications

At the end of section 8 I had noted that in the examples *Murder Plan with Probabilities* and *Attack with Probabilities* I had only equalized the probabilities of *stopping* the attack (through the defender's action). I had not talked about what happens if even the probabilities of Carl pulling the trigger and of Dave going through with his plan were equalized. In section 9, however, I argued that the fact that the likelihood that attacks are carried through is significantly higher than the likelihood that mere plans to attack people at some point are carried through is, precisely, an important factor motivating the imminence requirement. So the question arises what happens if even these latter probabilities are equalized. Would this then also equalize the morally relevant features of the two modified examples, so that in both examples the same reactions would be justified? In other words, would this blur or eradicate the moral distinction between self-defense against imminent attacks on the one hand and preventive measures against non-imminent threats on the other?

The answer is simply that there is no way that in the real world these probabilities are equalized. As I said before, murder plans and attacks do not come with teleprompters conveniently and reliably informing the involved parties about the morally relevant probabilities. Note, incidentally, that not only would the defender/preventer have to be so informed – the subjective requirement of the justification requires him to be aware of the objective justifying circumstances – but arguably at least the potential attacker, Dave, as well. As I explained above, the reason why Dave may fight back in the example is that one cannot reasonably expect him not to. But what one can reasonably expect from him depends partly also on what he himself can know or should know. However, if he has no reason to think that the likelihood of his going through with his attack is uncharacteristically high in his case, than his justification of fighting back against a preventive lethal attack will not be undermined.

But, one might argue, even if the involved parties might not be presented with the precise morally relevant probabilities attached to their case, there certainly can be exceptional cases where an attack can only be averted in its early planning stages, or where averting it then requires means that are as harsh as, or even harsher than, those that would be required if one waited until the attack became imminent. Would this not undermine the distinction between the self-defense justification and the justifying emergency justification?

The answer is no. That there can be exceptional cases where an attack can only be averted in its early planning stages, or where averting it then requires means that are as harsh as, or even harsher than, those that would be required if one waited until the attack became imminent does not, given the distinction between the self-defense justification and the justifying emergency justification, undermine the validity of a rule that combines the harsh necessity criterion with the imminence requirement *precisely as a rule applying to self-defense*. German law acknowledges that there can be a "self-defense-like situation" (*notwehrähnliche Lage*) where in the face of a non-imminent threat one is permitted to use force against the source of this threat. However, the acts of force one can justifiably use in such a situation are justified according to a different logic than the one applicable in an actual self-defense situation. According to the logic of the self-defense justification, a potential victim faced with an imminent attack can justify a defensive means in the following way: "I face an imminent threat. Imminence triggers the harsh necessity criterion and the harsh no-gross disproportionality criterion. Means x is necessary according to the harsh necessity criterion and not ruled out by the harsh no-gross-disproportionality criterion. Therefore, I can justifiably employ means x." In contrast, a person who wants to justify the use of preventive force against a non-imminent threat has to use the justifying emergency justification. This justification is intellectually (the actor has to think harder) more demanding than the self-defense justification: it asks the actor to consider *further* means than only the most effective and safe ones and engage in more fine-grained proportionality considerations – which implies that he might have to choose a milder means even if it is not equally safe and effective as other available means. Under most circumstances, he will indeed have to choose such milder mains, thus making this justification under those conditions also materially more demanding, excluding many means as disproportionate that the harsh no-gross-disproportionality requirement of the self-defense justification would have let passed, and requiring the actor to shoulder more risks. On rare occasions, under some extreme circumstances, however, this will not be required. Yet, that the justifying emergency justification will in rare cases allow people to employ means which the self-defense justification would also have allowed – if it had been applicable to these cases – does not blur the line between these two justifications, nor does it in any way help to loosen the tie between the necessity requirement and the imminence requirement as far as the self-defense justification is concerned. This tie is a firm one.

Conclusion

Most arguments against the imminence requirement of the self-defense justification assume that this requirement makes effective self-help against a large array of non-imminent threats unjustifiable and leaves the target of the threat therefore with no legitimate remedy. In the light of the availability of the justifying emergency exemption, however, these arguments collapse. Conversely, attempts to make all kinds of non-imminent threats "liable to defensive attack" are both intuitively implausible and theoretically unsound. Dealing with such threats in the light of the justifying emergency exemption appears therefore to be more promising.

Moreover, many arguments against the imminence requirement rely on the formulaic interpretation of the necessity condition. Since this interpretation is counter-intuitive and remains undefended, it has no traction against an account of self-defense that combines a

harsh necessity criterion with the imminence requirement. In fact, this combination makes good moral sense since it fairly provides for the protection of the innocent.[94]

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