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Self-Defense: Tell Me Moore

Kimberly Kessler Ferzan*

Michael Moore is a master architect in criminal law theory. Each piece of his theorizing neatly and completely coheres with others. Moore's views are often so clear and well argued that if one spends enough time with Moore's work, one can generally predict his answers to any question. Every brick has its place. And there's more. Moore also has a thoroughly worked out shtick for explaining his theories. Moore's writings are replete with citations to movies, songs, and even Sunday comics, including *The Princess Bride*,¹ *Blondie*,² and *The Sound of Music*.³ Indeed, sometimes it seems that reading Moore's work is an exercise in bad popular culture references.

One of the most predictable of Moore's references is when he needs to talk about self-defense. In the movie, *History of the World Part I*, Moses drops one of the tablets, leaving ten instead of fifteen commandments. That third tablet, argues Moore, included exceptions to deontological norms such as the exception for self-defense.⁴ It's Moore's clever way of asserting that even deontology does not really mean "thou shalt not kill" full stop.

Like Moses' third tablet, Moore's work likewise seems to have dropped self-defense. It is almost an afterthought in his theorizing about the relationship between deontology and consequentialism. *Placing Blame* contains a handful of pages.⁵ Self-defense gets two pages in *Causation and Responsibility*.⁶ Even when he discusses targeted killings in *Targeted Killings and the Morality of Hard Choices*, Moore quickly moves beyond a self-defense justification.⁷

Self-defense fascinates me, and I have questions for Moore. I just wish that he would say more about the positions that he holds. More troubling, I worry that the sparse commitments he has may be difficult to square with some of his other criminal law positions. Putting the pieces together of that broken tablet may ultimately yield that Moore's architecture is left askew.

In what follows, I will first give a brief overview of the current theorizing about self-defense. Next, I will set forth Moore's arguments about when self-defense is justified and why. Finally, I will raise

* For comments on this manuscript, I thank Stephen Morse.

¹ For dismissing the distinction between being "almost dead" and "all dead." Moore, 2009d, 66.

² For the point that between causation and accomplice liability, the criminal law is gonna get you "one way or another." Moore, 2009d, 289.

³ To do the work essential to Moore's view on omissions that "nothing comes from nothing." Moore, 2009d, 54-55.

⁴ Despite having heard Moore make this reference at several conferences, I could not find an instance in which he used it in his writing. He alludes to it in Moore, 2012b, 449.

⁵ Moore, 1997b, 711-717.

⁶ Moore, 2009d, 38-40.

⁷ Moore, 2012b.

a series of questions, both about the content of Moore's view and its implications for other positions he holds.

I. *Self-Defense Theorizing: The State of the Art in a Nutshell*

When one endeavors to give an account of "self-defense," the initial question is what one means by "self-defense." As a matter of ordinary language, our use of the term is quite extensive. If a culpable aggressor tries to kill me and I kill him, I will justify my action by claiming "self-defense." The term can also be applied to the killing of an innocent aggressor, that is, a person who lacks culpability but whose act will kill me, such as a child who mistakenly believes a real gun to be a toy. And, we can certainly say that one acts in self-defense when one kills an innocent threat, an individual who does not even voluntarily act but whose body nevertheless threatens me, such as the large man who will fall on me and kill me if I do not disintegrate him immediately.⁸ Indeed, "self-defense" would likewise be an explanation for why I shot a rabid dog that was about to attack me or maybe even why I disintegrated your television set that was about to smash into me during a tornado.

Given that all instances of self-defense are "defensive" in nature, it is tempting to think that there must be a unifying explanation. I think we ought to resist that temptation. Because we can meaningfully employ the term "self-defense" to justify our killing of a culpable aggressor or destroying a neighbor's television, the explanation would likely have to be so broad as to run roughshod over relevant moral nuances. It is thus more fruitful to think of self-defense as a type of defense, where some tokens may be permissible (or justified) and others will not.⁹

One of the most important normative and conceptual moves in the self-defense literature in the last decade or so has been to carve out liability as a distinct route to permissibility.¹⁰ Previously, it seemed that one must opt to either take an "aggressor-centered" approach or a "defender-centered" perspective. The assumption was that we needed to pick which approach should govern self-defense. However, this assumption is false. One may believe that both perspectives are morally relevant. A liability approach focuses on what an aggressor must do to be liable to defensive force, that is, to have forfeited his right against being defensively harmed. A permission-based view focuses on when a defender may harm a person who is, or is perceived to be, an attacker. It is coherent to say that an individual is liable to be killed but it is impermissible for the defender to do so, and it is also coherent to claim that an agent may permissibly kill someone who is not liable to be killed.

As one brief example of this severance, consider the well-known trolley problem. It is generally assumed that one may turn the runaway trolley away from five trapped workers to one trapped worker. Many theorists maintain that the one worker's rights will be infringed, but not violated, because the

⁸ These cases were originally imagined by Robert Nozick. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 34-35.

⁹ As suggested by Victor Tadros, *Criminal Responsibility* (Oxford: Oxford, 2005), 117; Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," 104 *Ethics* 252 (1994), 256.

¹⁰ This suggestion seems to originate in McMahan, "Innocent Attacker." McMahan has continually distinguished these concepts in his work. It was made quite explicit by Helen Frowe, "A Practical Account of Self-Defence," 29 *Law & Phil.* 245 (2010).

action is justified. Notably, the worker has certainly done nothing to lose his right to life. The worker is not liable to be killed. Contrast this with a culpable aggressor where we would say that the attacker's rights are neither infringed nor violated. His own actions have forfeited his moral complaint against being killed defensively.

Allowing liability to serve as a route to permissibility opens up various possibilities. For instance, one may maintain that (1) the moral basis for liability to defensive killing is intending a culpable attack or so appearing; (2) a moral permission to kill another may be based on the agent-relative permission to give one's life greater weight; and that (3) as a matter of the usage of the term, "self-defense," it may be appropriate to call actions under either (1) or (2) (or both), instances of "self-defense." This means that not only do you get to kill bad guys who are trying to kill you for the reason that they have forfeited their rights but you also get to kill an innocent aggressor (at least sometimes) because you are entitled to give your life more weight.

To this point we have seen that the term "self-defense" is quite promiscuous and that different justifications may ground different routes to permissible self-defense. Let us now turn directly to liability accounts. Liability accounts hold that what the aggressor does grounds why he has forfeited his rights against defensive force being employed to stop him. Elsewhere, I have defended the following disjunctive conditions for liability to defensive killing:¹¹

(1a) The aggressor forms an intention to purposefully, knowingly, or recklessly kill the defender, the aggressor lacks a justification or excuse, and the aggressor will kill the defender unless defensive force is used, or

(1b) The aggressor purposefully, knowingly, or recklessly engages in conduct that he is aware may lead the defender to believe that that (1a) is true, and the aggressor lacks a justification or excuse for so doing; AND

(2) Based on his belief that he is subject to attack, the defender acts to repel the perceived attack.

That is, I argue that culpable attackers who will kill their victims are liable to defensive force by the defender. I have defended the position that this (1a) forfeiture is a fitting and appropriate response to a culpable attack by the aggressor. If the aggressor were permitted to attack, thus ignoring the rights of others while maintaining his own rights, it would be fundamentally unfair.¹² The grounding of the forfeiture for (1b) is distinct. For this sort of forfeiture, I maintain that when we insincerely evince the exercise of a normative power or a change in normative relations, that power is exercised or those relations are truly altered, or so I have argued.¹³ This forfeiture by insincere act is fitting and appropriate because the faker would otherwise make the interpreter normatively vulnerable. The

¹¹ Kimberly Kessler Ferzan, "Culpable Aggression: The Basis for Moral Liability to Defensive Killing," 9 *Ohio St. J. Crim. L.* 669 (2012).

¹² Kimberly Kessler Ferzan, "Forfeiture and Self-Defense" in Michael Weber and Christian Coons (eds.), *The Ethics of Self-Defense* (Oxford: Oxford, forthcoming).

¹³ Kimberly Kessler Ferzan, "The Bluff: The Power of Insincere Acts" (manuscript on file with author).

interpreter no longer knows what rights and duties he has. The idea is that if someone points an unloaded gun at you but makes you believe the gun is loaded, you mistakenly believe that he has forfeited his rights. Because he is the one who has culpably created this belief, he forfeits his rights such that he is not wronged by your using the force you believe is necessary to defend yourself.

Other self-defense theorists offer disparate views. To take two other views in the literature, Jeff McMahan grounds forfeiture in moral responsibility, which is best understood as unjustified, foreseeable risk imposition.¹⁴ Jonathan Quong grounds forfeiture in the failure to attribute to someone his full moral status.¹⁵ We can contrast the claims by considering the following three cases.

*Falling Large Man.*¹⁶ Victor falls to the bottom of a well. His arch-enemy, Abe, sees this. When Tony, a very large man, walks by, Abe pushes Tony down the well. If Tony lands on Victor, Victor will die but Tony will live. Victor has in his possession a ray gun with which he can disintegrate Tony.

*Conscientious Driver.*¹⁷ Darla is driving her well maintained car down the road. Suddenly, her car malfunctions such that it veers toward Peter, a pedestrian. If Darla hits Peter, he will die. Peter can throw a grenade at Darla's car such that it will blow up and kill only her.

*The Resident.*¹⁸ An identical twin of a vicious killer is driving down the road when his car malfunctions. He is nonculpably unaware of the fact that his brother has escaped from prison and local news channels have warned residents to be on the lookout. Moreover, his evil twin has a modus operandi of knocking on the door to a home and then immediately killing the occupant. The innocent twin knocks on the Resident's door. She believes he is his evil twin brother; she raises her pistol to shoot him (that she just happens to be holding). The innocent twin sees what the Resident is about to do. (To be clear, in *The Resident*, the question is whether *the Resident* is liable to be killed because she mistakenly believes the innocent twin to be the evil one and acts on that mistaken belief.)

Falling Large Man is commonly viewed as an instance of an innocent threat because the fact that he is threatening Victor with harm is not attributable to a voluntary act.¹⁹ *Conscientious Driver* and *The Resident* are innocent aggressors because they have acted voluntarily but have not culpably chosen to attack.

¹⁴ Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," 15 *Phil. Issues* 386 (2005).

¹⁵ Jonathan Quong, "Liability to Defensive Harm," 40 *Phil. & Public Aff.* 45 (2012).

¹⁶ Nozick, *Anarchy, State, and Utopia*, 34-35.

¹⁷ McMahan, "Basis of Moral Liability," 393-94.

¹⁸ McMahan, "Basis of Moral Liability," 387.

¹⁹ For some doubts about deeming the innocent threat as distinguishable from the innocent aggressor, see Kimberly Kessler Ferzan, "Jeffrie Murphy's 'Involuntary Acts and Criminal Liability' Revisited" forthcoming *Ethics*; Ferzan, "Culpable Aggression," 682; Michael Otsuka, "Killing the Innocent in Self-Defense," 23 *Phil. & Public Aff.* 81 (1994).

I have defended the claim that none of these actors is liable to be killed as none of them are culpable.²⁰ (I do maintain that with respect to non-culpable attackers, it is plausible that one has an agent-relative permission to give one's own life greater weight vis-à-vis innocent aggressors.²¹) In contrast, Jeff McMahan claims that anyone who (1) will in fact cause an unjustified harm (as is true in each of these cases because in each case, from an omniscient point of view, none of these actors is behaving justifiably) and (2) has engaged in foreseeable nonreciprocal risk imposition (as is true in the latter two cases because in those two cases the innocent aggressors know they are engaging in behavior that creates a risk of harming an innocent – the driver chooses to drive and the resident chooses to shoot) is liable because the aggressor is morally responsible.²² Jonathan Quong argues that only the Resident is liable because she makes a mistake as to the twin's liability (she believes he is attacking her and has forfeited a right when in fact he has not) and it is the failure to accord someone his full moral status that makes the aggressor liable.²³ In contrast, according to Quong, because the Conscientious Driver's risk calculation already takes into account the value of both his life and that of the pedestrian (the determination that it is safe to drive conscientiously already includes in the calculation, and gives due value to, the possibility of harming a pedestrian), the driver is not liable. Neither Quong nor McMahan maintains that the Falling Large Man is liable as he has not chosen to impose any risk at all.

Beyond liability itself, theorists must address proportionality and necessity. Consider proportionality first. Most theorists agree that the harm employed defensively must be in proportion to the harm threatened.²⁴ One way to understand this is that the aggressor only forfeits rights against a certain amount of force. Anything beyond that amount is a harm that would violate his rights. Proportionality then is typically seen as internal to liability.²⁵

There is more significant debate over the question of necessity. Jeff McMahan, for example, crafts liability in such a way that it entails necessity. An aggressor is only liable to harm if it is necessary to harm him to protect oneself.²⁶ The reason that one acts, then, is built into the liability/forfeiture condition. In contrast, one might claim that the loss of a right is independent of the reason to harm the aggressor. The attack forfeits rights, and the attack provides a reason to harm the aggressor, but these

²⁰ Ferzan, "Culpable Aggression."

²¹ Larry Alexander and Kimberly Kessler Ferzan, with Stephen J. Morse, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge, 2009), 136-41.

²² McMahan, "Basis of Moral Liability."

²³ Quong, "Liability to Defensive Harm." For doubts about Quong's view, see Larry Alexander, "Recipe for a Theory of Self-Defense: The Ingredients, and Some Cooking Suggestions" in Michael Weber and Christian Coons (eds.), *The Ethics of Self-Defense* (Oxford: Oxford, forthcoming).

²⁴ But see Peter Vallentyne, "Defense of Self and Others against Culpable Rights-Violators," in Michael Weber and Christian Coons (eds.), *The Ethics of Self-Defense* (Oxford: Oxford, forthcoming).

²⁵ This sort of proportionality is called "narrow proportionality," a requirement that the harm to the aggressor be in proportion to what he has threatened. In contrast, if the defender will also injure bystanders, this brings in questions of "wide proportionality." This sort of proportionality is not internal to liability. It is the restriction that even if the aggressor has no rights against you harming him, the two innocent actors beside him, who will be killed as well, do have such rights and thereby restrict what you may do.

²⁶ Jeff McMahan, "The Limits of Self-Defense," in Michael Weber and Christian Coons (eds.), *The Ethics of Self-Defense* (Oxford: Oxford, forthcoming).

two can come apart: if, for example, the culpable attacker is only bluffing – his attack forfeits his right without providing a reason to harm him.²⁷ Both views still require that the defender *believe* force is necessary, either because the intention is relevant to permissibility or because the rights forfeiture is nuanced so that rights are only forfeited vis-à-vis actors who believe the harm they are inflicting will prevent the attack.²⁸

A final consideration for liability accounts is the possibility of more than one aggressor or threat. What if, instead of a large man, Abe goes to the nearby hospital, takes 50 newborn babies, ties them together with twine, and hurls the bawl of babies at Victor? What if, instead of one Conscientious Driver, Peter, the pedestrian, must kill fifteen individuals who have chosen to drive their cars?

I suspect that most people would think that it is wrong to kill the fifty babies or fifteen nonculpable drivers. This gives us reason to reject the view that these threats/aggressors are liable to be killed. This intuition is likely even stronger when we appeal to the question of what third parties should do. Why would a third party have to pick Victor over fifty babies? What is the argument for that?

Some theorists, who are sympathetic to the claim that innocent aggressors can be liable to defensive force, have offered alternative accounts for what to do when these “minimally responsible threats” are aggregated. McMahan and Saba Bazargan advocate hybrid justifications that contain elements of liability and elements of a lesser-evils justification.²⁹ The idea is that a conscientious driver may be partially liable. The reason it is permissible to kill him, then, is because he counts as less of a person when weighed against the pedestrian. Because this is a lesser-evils balancing, continuing to increase the number of conscientious drivers ultimately leads to a point at which the pedestrian may no longer kill the conscientious drivers because their deaths are no longer the lesser evil. To be sure, increasing the number of aggressors raises puzzles for those who take innocent aggressors to be liable.

Although these are clearly divergent views and this is a superficial overview, even now, we can see that these views share certain core assumptions. The first is that individuals can forfeit rights by what they do, and that one can provide a principled account of why the individual is responsible in such a way that it is fitting and appropriate for his rights to be forfeited. The second is that this forfeiture can be nuanced. It is not an assumption that we get to boil aggressors in oil for kicks. It is an assumption that for so long as you are a threat, you cannot complain if someone stops you. Thus, though self-defense theorists might quibble over the grounds for rights-forfeiture, we share certain assumptions about what such a theory needs and what such a theory does.

²⁷ Ferzan, “The Bluff.”

²⁸ I endorse the latter position in “Forfeiture and Self-Defense.”

²⁹ Saba Bazaragan, “The Liability of Minimally Responsible Threats,” forthcoming *Ethics*; Jeff McMahan, “Liability, Proportionality, and the Number of Aggressors,” in Saba Bazaragan and Samuel Rickless, (eds.), *The Ethics of War* (New York: Oxford, forthcoming).

I cannot possibly do justice to the complexity of the arguments in the self-defense scholarship. If anyone could master the mechanics, it would be Michael Moore. Any subject matter is the better for Moore's engagement with it. Where, then, should we situate Moore's views on defensive force?

II. *Moore on Self-Defense*

Moore typically substantially and thoroughly analyzes topics within criminal law. Unfortunately, he has spent less of his career grappling with self-defense. If I had to diagnose the cause of this lack of attention, it would not be that Moore is reluctant to confront a challenge. Quite the contrary. I suspect he thinks self-defense is easy. Hopefully, I can convince him that this is not so.

Moore's most recent articulation of his position is in *Targeted Killings and the Morality of Hard Choices*.³⁰ He begins with the claim that we have a "strong permission" to engage in self-defense such that we are permitted to defend ourselves even if the consequentialist balance tips otherwise.³¹ Following Phillip Montague, he takes self-defense to be an instance of a "general moral principle": "he who culpably causes the necessity of some harm being visited on somebody, is himself the right person to be made to suffer such harm."³² This principle is supported by "robust intuitions of fairness and appropriateness."³³ There is a "divine justice" when the bad guy gets the harm he had intended for the innocent victim.³⁴

Moore then turns to innocent aggressors and threats. In 2009, in *Causation and Responsibility*, Moore was tentative about his conclusion that one is justified in killing two innocent threats.³⁵ In *Targeted Killings*, Moore no longer finds the question hard. He admits the question is "a close one" but concludes that one is justified in killing innocent aggressors and threats, seemingly no matter how numerous.³⁶ Ball o' babies beware!

Moore rejects victim-based accounts that culpable actors may forfeit their rights, thus creating a weak permission that is then open to consequentialist balancing.³⁷ He thus reaffirms a position he set forth in *Placing Blame*. In his earlier discussion, Moore maintains that forfeiture accounts cannot supply a reason why innocent aggressors forfeit their rights nor can they provide an explanation for why when an attack is over, the aggressor regains his rights.³⁸

In sum, Moore offers a distributive justice account of self-defense, wherein harm ought to fall upon its culpable cause. He maintains this account is a strong permission, immune to consequentialist

³⁰ Moore, 2012b.

³¹ Moore, 2012b, 457.

³² Moore, 2012b, 457.

³³ Moore, 2012b, 457.

³⁴ Moore, 2012b, 457.

³⁵ Moore, 2009d, 40.

³⁶ Moore, 2012b, 458.

³⁷ Moore, 2012b, 464.

³⁸ Moore, 1997b, 713.

balancing. He believes this permission also applies to *Falling Large Man*, *Conscientious Driver*, and *The Resident*, and he maintains that this position holds even when the innocent aggressors outnumber the defenders. Finally, he rejects forfeiture accounts as implausible.

In what follows, I wish to question these claims. First, it is unclear what grounds Moore's extension from the redistribution of harm to its culpable cause, to the redistribution of harm to its innocent cause. Moreover, I am unsure why a causal account would necessarily yield that defenders get to kill innocent threats; I would think that for Moore this would be empirically contingent on the degree of causal contribution. Second, I worry that self-defense is not best understood as a mechanism of distributive justice as it ignores the aggressor's ability to stop attacking thereby preventing the need for anyone to be harmed. Third, I query whether Moore's dismissal of forfeiture is warranted, both because forfeiture views rely on changes of normative relations, which in other contexts Moore takes to be quite possible, and because the sort of underlying moral justification at work in Moore's theory seems in harmony with the claims made by forfeiture theorists. Finally, I question whether Moore's theory of self-defense might justify a deterrence-based criminal law. Indeed, I wonder whether he might be committed to punishing the innocent.

III. *What Grounds Killing Innocent Aggressors?*

The first puzzle is how Moore grounds the extension of "divine justice" from culpable aggressors to innocent threats. He asserts that for culpable aggressors, the reason why it is justifiable to kill them is that (1) culpable actors who (2) cause (3) the need for someone to be harmed are the ones who should therefore be harmed. This is grounded in robust intuitions of fairness that bad guys get their due. He then goes on to say that defenders can kill innocent threats as well.

I don't get it. Nothing about the fittingness and appropriateness of culpable actors being harmed defensively seems to commit us to any particular view of innocent actors. With respect to innocent aggressors, Moore abandons requirement (1). He never fully articulates an argument for why it is permissible to kill *Falling Large Man*, *Conscientious Driver*, or *The Resident*.

Without culpability, Moore is left with only causation and necessity. Perhaps Moore thinks that is enough.³⁹ However, as Coase has shown, causation is reciprocal.⁴⁰ The only reason the large man falling down the well is a threat to the defender at the bottom is because the defender found himself at the bottom of a well. Aren't they both causes?

Indeed, Moore believes that causation is scalar. Is it not possible then that there will be cases in which the defender is more of the cause than the innocent threat? After all, we imagine in these cases that Victor, the person at the bottom of the well, is somehow motivating Abe, the pusher, to try to kill him. When Abe grabs the large man (who may just be on his way to the post office), why should we

³⁹ He suggests as much in Moore, 1997b, 714.

⁴⁰ R.H. Coase, "The Problem of Social Cost," 3 *J. L. & Econ.* 1 (1960).

assume that the large man is more of a cause of the predicament than the defender? Causation does not seem to be able to discriminate between innocent aggressor and defender as Moore would have it.

If not culpability (or causation), then what makes this fitting? It is hard to see this account as an account of distributive justice. Should it not matter what the probability of being victim and defender are? If we are interested in “fairness and appropriateness,” it seems the calculation should be sensitive to whether one is more likely to be victim or defender. As Larry Alexander has argued, if it is much less likely that you will kill someone as an innocent aggressor than that you will become an innocent aggressor and be killed, perhaps we should not so easily decide that killing innocent aggressors is permissible.⁴¹

There does not seem to be a moral principle that can be added to do the normative work. Besides the fact that, as Jimbo on South Park would say,⁴² “they’re coming right for us!” there does not seem to be any normative grounding that would undergird killing for such a reason. At one point, Moore seems to indicate that “he’s coming right for us” is a moral ownership. It is about “risk ownership.” However, Moore has the ownership of the risk argument exactly backwards. Consider what Moore says about innocent shields. He imagines the following case:

Consider the situation in which a terrorist (‘T’) takes an innocent bystander (‘V’) as a shield to use as T seeks to kill another (‘D’). If D’s only way to defend himself against T is to shoot through V, it is common to suppose, morally and legally, that he may do so. The reason for this, I would think, lies in the ‘ownership’ of the risk (of T’s violence) that V, through no fault of his own, has acquired. T’s taking V as a shield was V’s misfortune; V did nothing to deserve it but it’s his nonetheless, like disease or natural catastrophe. D is entitled to resist the shifting of that risk from V to himself, not because V caused the risk, but because it’s his risk nonetheless.⁴³

Why can it not be equally maintained that the person stuck owning the risk is D? As it stands, V’s being strapped to T creates no risk to V whatsoever. The unlucky person is D. So why is it that D gets to shift the risk to V? And why isn’t T entitled to resist the shifting of the risk? If “shit happens”⁴⁴ to the innocent who are then stuck with their misfortunes, it isn’t remotely clear why the person who is stuck is V and not D.

Compare Jeff McMahan’s dismissal of this kind of reasoning in the falling man cases:

It is, however, not the falling man who has bad luck. If no one does anything, he will not be harmed, for there is a cushion below him. It is that cushion, an immobilized person, who has bad luck. May he transfer that bad luck to an innocent person, the falling man, by killing him?

⁴¹ Larry Alexander, “Self-Defense, Justification and Excuse,” 22 *Phil. & Public Aff.* 53 (1993).

⁴² I’ve got my bad popular culture references too. There is a great episode of South Park where Jimbo, a hunter, is told he may only kill animals who are attacking him. The episode proceeds with innocent animals frolicking in the woods and Jimbo continuously asserting that “they’re coming right for us” so that he may shoot them.

⁴³ Moore, 1997b, 714.

⁴⁴ “[A]s a popular 90s bumper sticker had it.” Moore, 2009d, 290.

To override the presumption against killing, there must be a basis of liability. That basis is lacking in this case, just as it is when a person can save himself only by killing an innocent bystander.⁴⁵

It seems that Moore has yet to come up with an argument that would decisively yield that defenders may kill innocent threats.⁴⁶

I wonder what Moore believes he would lose by abandoning the strong permission approach in favor of an agent-relative permission to kill innocent aggressors. Moore's view on innocent aggressors is not in accord with that of Phillip Montague, upon whom Moore claims to be relying. In *Self-Defence and Innocence: Aggressors and Active Threats*, Montague distinguishes between culpable and innocent aggressors.⁴⁷ Montague does not maintain that we have a claim right to kill innocent aggressors, holding instead that one has a liberty with which third parties may interfere. This claim is in stark contrast with Moore's robust position that self-defense against innocent aggressors is a strong permission.

Moore has been sympathetic to agent-relative obligations in other work. He notes, for example, that if an evil threatener threatens to kill a parent's child unless the parent produces some *greater* evil, the parent is *justified* because the parent has an agent-relative obligation to safeguard her child.⁴⁸ As mentioned earlier, some theorists do maintain that one has an agent-relative *permission* to give one's own life greater weight. Moore goes farther in other work, arguing that one has an agent-relative *obligation* to safeguard one's child. I wonder why Moore resists the agent-relative route. There must be something more at work for Moore that allows defenders to kill many innocent people. I wish he would, as the Pink Ladies and the T-Birds request, "tell me more."

IV. *Is It Most Perspicuous to See Self-defense as Mechanism for the Distribution of Inevitable Harm?*

More generally, I doubt that seeing self-defense as a mechanism for the distribution of inevitable harm is the most perspicuous way to see it.⁴⁹ As David Wasserman points out, unlike true distributive questions (in which someone's gotta die), in self-defense cases, no one has to die.⁵⁰ The

⁴⁵ Jeff McMahan, "Reply," in Paul H. Robinson, Stephen P. Garvey, and Kimberly Kessler Ferzan (eds.), *Criminal Law Conversations* (New York: Oxford, 2009), 404-405.

⁴⁶ The most famous defender of the permissibility of killing the falling large man is Judith Thomson. Judith Jarvis Thomson, "Self-Defense," 20 *Phil. & Public Aff.* 283 (1991). For critiques, see Alexander, "Self-Defense, Justification and Excuse"; McMahan, "Basis of Moral Liability"; Ferzan, "Culpable Aggression."

⁴⁷ 12 *Utilitas* 62 (2000).

⁴⁸ Moore, 2014d. He also mentions the possibility of "skewing" in Moore, 2012b, 463.

⁴⁹ Admittedly, I was tempted by this view in earlier work. See Kimberly Kessler Ferzan, "Justifying Self-Defense," 24 *Law & Phil.* 711 (2005). But I have come to see that the grounding of the forfeiture is what does the heavy lifting.

⁵⁰ David Wasserman, "Justifying Self-Defense," 16 *Phil. & Public Aff.* 356 (1987).

culpable aggressor could just change his mind, and he certainly has it within his power to eliminate the existence of any distributive problem.

Indeed, Montague's solution to this problem is one Moore would most certainly reject. Montague makes the necessity dependent on the agent's perspective. After assuming that Alice is attacking Al, and Arliss is a third party who can intervene, Montague says of Al and Arliss: "They are respectively permitted and required to do so as a matter of justice in the distribution of harms that are unavoidable *from their standpoints*."⁵¹ To Moore, justice isn't a matter of perspective. Moore would thus need to take the position that because it is necessary in fact (because the culpable aggressor will pull the trigger), the defender may act now to distribute a harm. But taking this approach seemingly ignores that self-defense is preemptive and there is something important about the fact that the culpable aggressor can still prevent the creation of any harm.

Moreover, as Wasserman also notes, once the harm is already out there and we are truly distributing it (for instance, the culpable aggressor has already sunk the ship and everyone is scrambling for planks), then lots of factors may count.⁵² Provocateurs nicely raise this. Assume that Iago provokes Othello into trying to kill Desdemona, but this is a modern version where Othello sets up a machine gun to fire where Desdemona is sleeping. Iago and Othello are both waiting in the wings. All that you, a third party, can do is to push either Iago or Othello into the line of fire. Who gets the bullet? And, now, add another character in the wings -- Claudius, who, from another play, is already responsible for at least one death. He is a bad guy who has not gotten the punishment he deserves. How do we factor him into the mix if we are distributing this harm? There are degrees of culpability, degrees of causal responsibility, and degrees of moral desert and who takes the bullet might just be complicated.⁵³ I certainly do not disagree that in this sort of case, one must distribute the certain harm. I merely think that such distributions are complex beyond Moore's simple justice. At most it seems that a distributive

⁵¹ Phillip Montague, "Self-Defense, Culpability, and Distributive Justice," 29 *Law and Phil.* 75 (2009), 84 (emphasis added).

⁵² Phillip Montague, "Self-Defense and Choosing Between Lives," 40 *Phil. Studies* 207, 211 (1981) (arguing that in forced choice situations, "special moral significance" does attach to the situation's being caused by someone's culpable behavior); David Wasserman, "Justifying Self-Defense," (rejecting Montague's theory and arguing "that greater fault is not a sufficient condition for choosing one life over another").

⁵³ For the argument that it is Iago, see Kimberly Kessler Ferzan, "Provocateurs," 7 *Crim. L. and Phil.* 597 (2013). For the argument that it is Othello, see Daniel M. Farrell, "What Should We Say about Contrived 'Self-Defense' Defenses?" 7 *Crim. L. and Phil.* 571 (2013). David Rodin might also opt for Othello. See David Rodin, "Justifying Harm," 122 *Ethics* 74 (2011), 91 ("where two or more persons share responsibility for unjust threatened harm, defensive force should be presumptively directed at the agent whose intervening action is most proximate to the threat."). For the argument that Claudius ought to be considered, see Alexander, "Recipe." As for Montague's distributive claim, Montague notes, "the distribution thesis makes no mention of comparative fault, and is therefore inapplicable to cases in which the victims of aggression are to some extent blameworthy for their predicaments." Phillip Montague, "The Morality of Self-Defense: A Reply to Wasserman," 18 *Phil. & Public Aff.* 81 (1989), 86.

justice account may explain some instances of self-defense some of the time.⁵⁴ That's fine in the sense that we need not have only one account. However, Moore must then concede that more work must be done to cover other cases.

V. *Why Isn't Moore a Fan of Forfeiture?*

Moore dismisses forfeiture theories as implausible. I demur. Moore needs forfeiture.

It may be that Moore dismisses the "full surrender" robust forfeiture that we think of with respect to some legal rights. Here, he is surely right. If you give something up for ever and ever, well, then you don't get it back just by lowering your gun. I take the real objection here to be, not that these things are restored, but rather, whether this "now you have it, now you don't, now you have it again" process is best viewed as one of forfeiture. As Richard Lippke argues in the punishment context, "Offenders might be understood to suffer other losses with regard to their rights besides forfeiture. Specifically, their rights might be curtailed or suspended, instead of forfeited. Forfeiture theorists need to show forfeiture, rather than curtailment or suspension, is the best characterization of the losses that are justifiably imposed on offenders."⁵⁵

Elsewhere I have speculated that because forfeiture seems so final, the literature has gravitated toward "liability." However, because "liability" in the self-defense literature is neither legal liability nor Hohfeldian liability, I am skeptical that this terminological shift was actually for the better. Nevertheless, even if the objection goes beyond nomenclature to a claim that there is something deeper at stake with respect to getting the shift in normative relations right, that still does not mean that offhanded dismissal of forfeiture is warranted. Rather, what liability theorists claim is that there is a shift in the aggressor's rights.

Certainly, there is nothing odd about thinking that we can shift our rights and others' duties. I can change my moral relationship with you by giving you permission to drive my car. I can obligate myself through making a promise. I can give you a new reason for acting by making a request. Why isn't it plausible that self-defense likewise involves such a shifting of moral relations?

Indeed, as a retributivist, Moore certainly needs an account of how it becomes the case that it is permissible to harm someone because she deserves it. Either our rights are specified such that they are not infringed when we are given deserved punishment,⁵⁶ or we forfeit our rights in such cases.⁵⁷ Indeed, Moore allows of such a possibility, noting that we can punish offenders because no non-forfeited right stands in the state's way, "since [offenders] forfeit such rights precisely by the culpable wrongdoing that

⁵⁴ This is Montague's position. He claims that his distributive justice account "does yield an explanation of permissible self-defense against culpable attackers, but it implies nothing about self-defense against innocent attackers." Phillip Montague, "Self-Defense, Culpability, and Distributive Justice," 88.

⁵⁵ Richard L. Lippke, "Criminal Offenders and Right Forfeiture," 32 *J. Soc. Phil.* 79 (2001), 84.

⁵⁶ Mitchell N. Berman, "Punishment and Justification," 118 *Ethics* 258 (2008).

⁵⁷ Christopher Heath Wellman, "The Rights Forfeiture Theory of Punishment," 122 *Ethics* 371 (2012).

constitute desert.”⁵⁸ If Moore does not deny that defendants may be permissibly punished—that is harmed without their rights standing in the punisher’s way—then why does he deny that rights may shift in self-defense cases?⁵⁹

Finally, one wonders whether Moore implicitly brings to bear the very same moral facts, just in a different package. If self-defense is about distributing harm, there is a reason why the bad guy gets that harm and the good guy does not.⁶⁰ That reason, that alteration in moral standing vis-à-vis others, looks quite like what liability theorists are after. Perhaps Moore has good arguments for why these accounts are importantly different. I wish he would tell us what those are.

VI. *A Deterrence Theorist After All?*

To this point I have offered concerns about Moore’s commitments within self-defense theory, but if Moore is right, I wonder whether his theory of self-defense leads to a very different justification for punishment. Notably, I share with Moore a commitment to retributivism. I just wonder whether he is actually a back door deterrence theorist. Here is how the argument runs.

The concern with deterrence theories of punishment is that they countenance punishing the innocent, and in particular, using the innocent as a means. A pure utilitarian theory would allow good consequences to justify scapegoating someone wholly unconnected with the crime.⁶¹ Because utilitarian theories condone the punishment of the undeserving, and because mixed theories seem to exempt the punishment of the deserving where no further good is accomplished, Moore declares that the last theory standing is retributivism. This is what he calls retributivism by the back door.⁶²

The question, though, is whether Moore’s commitments to a distributive justice view of self-defense can go some distance toward establishing a distinct justification for punishment. Maybe there is more than one back door to the house.

Notice that the first chink in the armor, as Victor Tadros has shown, is that the prohibition on punishing, or using, the innocent, requires a deontological account of why harming this particular person is not using him.⁶³ Retributivism furnishes such a reason, but Tadros has argued that if the wrongdoer has a duty to suffer then he is not being used. If I push you into the lake, I have a duty to rescue you. If Alex points a gun at me to enforce that duty, he is not using me as I am already required to rescue you from drowning. The duty provides all the justification we need for why I am not being used as a means when Alex forces me to save you. Now, one need not agree with Tadros about his duty

⁵⁸ Moore, 1993b, 36.

⁵⁹ Moore can’t, at this level of analysis, avail himself of the fact that punishment is state imposed. Moore believes that desert can justify targeted killings and does not rely on the fact that punishment is public state action in his justification. Moral desert does all the work. See Moore, 2012b, 458-59. Thanks to Stephen Morse for suggesting this potential rejoinder by Moore.

⁶⁰ I owe this observation to a paper I anonymously refereed. The journal was unwilling to allow me to waive anonymity in exchange for learning the author’s identity to properly cite the author.

⁶¹ Moore, 1997b, 94-97.

⁶² Moore, 1997b, 103.

⁶³ Victor Tadros, *The Ends of Harm: The Moral Foundations of the Criminal Law* (Oxford: Oxford, 2011).

view for the criminal law (I doubt Moore does, and I don't) to see the force of the argument, which is that a deontological account need not be a retributive account. One just needs an account of why the person does not have a right that stands in the way.

Now consider Moore's commitments to self-defense as a form of distributive justice. If one is culpable in forcing a choice, then one ought to be the one to suffer the harm. The culpable cause of the peril is the person who should suffer the harm. Here, too, we have a deontological account of when it is permissible to harm others.

In reaching this theory, Moore endorses Philip Montague's work. Let us consider another Montague fan. Daniel Farrell also endorses Montague's views, but for an entirely different end. He employs Montague's theory to justify specific and general deterrence.⁶⁴

Farrell's brief for specific deterrence is a rather clear case. If someone hurts you, and by virtue of that attack, she makes it more likely that you will not be able to resist subsequent attacks from her, then she is the culpable cause of your peril. If harming her abates these potential injuries, then on Montague's theory, claims Farrell, one is justified in harming the attacker.⁶⁵

Consider also his claim for general deterrence. "[S]omeone might attack me, in the state of nature, and someone else, observing this attack, and observing as well that it goes unpunished, might be inspired by what she sees to attack me subsequently herself, even though she would not have dared to do this if my original attacker had been punished for his attack."⁶⁶ Now, admittedly, there are some steps required to get from this point to a system of general deterrence. Farrell endorses the view that one is harmed when one is faced with an "increased probability of being harmed sometime in the future."⁶⁷ Moore would never go for that. He does not take risks to be harms. Still, Moore cannot avoid the point that given his endorsement of Montague's theory, on self-defense and defense of others grounds, we may be justified in harming someone if he makes an attack by others inevitable.

It may be that such a theory is too convoluted for application in the real world. It may simply be impossible to determine how much harm may be visited on a defendant for the peril he creates in the future.⁶⁸ Perhaps, via this reasoning, deterrence may be theoretically justified but not practically implemented.

Still, I am somewhat curious what would happen in the (nearby?) possible world where Moore pursues these questions with the same sort of ruthless resolve with which he has subjected action theory or causal metaphysics. Would Moore endorse the position that his distributive justice commitments yield an entirely different justification for punishment?

⁶⁴ Daniel M. Farrell, "Punishment without the State," 22 *Noûs* 437 (1988); Daniel M. Farrell, "The Justification of General Deterrence," 94 *Phil. Rev.* 367 (1985).

⁶⁵ Farrell, "Justification of General Deterrence," 370.

⁶⁶ Farrell, "Punishment without the State," 444.

⁶⁷ Farrell, "Punishment without the State," 444.

⁶⁸ For questions of this sort about Tadros' theory, see Vera Bergelson, "The Duty to Protect the Victim – or the Duty to Suffer Punishment?" 32 *Law & Phil.* 199 (2013).

Indeed, consider what the content of our criminal law would look like if Moore took his theory of self-defense *and maintained his view that it applies to innocent threats*. Consider cases of undeserving actors in the retributive sense. Sometimes utilitarian arguments are made that an excuse should not be recognized because recognition will open up the floodgates to abuse by others. Mistake of law, duress, and insanity are classic instances where such a claim arises. This sort of argument is antithetical to retributivism, but it isn't to Moore's distributive justice account of self-defense. If your innocent mistake makes me vulnerable to ploys by nonmistaken actors, you have made me worse off, and thus, you ought to be the one to suffer the harm. Punishment of the (morally) innocent is justified after all. I suppose that in Moore's book, they just own that risk they've done nothing to deserve.

Conclusion

Michael Moore does not just engage topics. He conquers them. I have learned more from him than any other theorist. I am grateful to have had him as a teacher. I am grateful to call him my friend. But most importantly, I am grateful that such a brilliant mind has done such tremendous work in a field I love, and that I get to engage with his ideas. Now, Michael, please come and conquer self-defense.