

BOOK REVIEW

JUSTIFYING *KILLING IN SELF-DEFENCE*

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FIONA LEVERICK, *KILLING IN SELF-DEFENCE* (OXFORD UNIVERSITY PRESS 2006). 217 PP.

I. JUSTIFYING *KILLING IN SELF-DEFENCE*¹

Based on first appearances, one might think that self-defense is easy to justify. A bad guy threatens to kill you, so you kill him. Enough said.

However, once one scratches the surface, self-defense becomes far more complicated. Why is it permissible to kill “the bad guy”? If one is a consequentialist, one must account for how the aggressor’s life gets discounted.² And, if the consequentialist seeks to include deterrent values in the mix (such as discouraging all aggression), then the right to self-defense becomes contingent, ultimately depending on how the math works out in any given case.³

A rights-based approach appears more promising but also quickly runs into difficulties. If the defender has a right to life, so too does the aggressor. What happens to the latter’s right? If one thinks that the aggressor “forfeits” his right to life, what explains why the right is

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¹ FIONA LEVERICK, *KILLING IN SELF-DEFENCE* (2006).

² Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 882 (1976) (noting that the rule “contradicts the equality principle that the lives of all persons must be regarded, as lives, of equal value”).

³ *Id.* at 883 (“The argument rests on the contingent fact that justifying deadly force will, in the long run, save more lives by deterring deadly assaults.”).

magically regained once the attack is over?⁴ If one seeks to specify the right to life so that one does not have the right to life if, for example, one is “aggressing,” then one must look for normative considerations external to the right to life to justify the specification.⁵ That is, the aggression must somehow justify the right to self-defense; the right to life, then, has no explanatory power of its own.

What is particularly striking is that only a handful of books attempt to resolve these problems. Myriad articles, mainly in philosophy journals—but some in law reviews—attempt to justify self-defense. But books that probe the depths of the defense are few and far between. Indeed, until 2006, the *only* book solely devoted to the theory of self-defense was Suzanne Uniacke’s *Permissible Killing*.⁶ Thus, the appearance of two books in 2006 on self-defense is significant.⁷ One author, Boaz Sangero, took on a consequentialist approach; the other book’s author, Fiona Leverick, went down the path of rights-based accounts. It is this latter path that we will explore in this review.⁸

In her book *Killing in Self-Defence*, Leverick attempts to provide a normative justification for self-defense within the rights-based tradition.⁹ She takes the right to life to be fundamental, and then accounts for the moral asymmetry between defender and aggressor by embracing forfeiture.

⁴ Judith Jarvis Thomson, *Self-Defense and Rights*, in *RIGHTS, RESTITUTION, & RISK: ESSAYS IN MORAL THEORY* 33 (1986) (arguing that if an aggressor becomes incapable of attacking, then there is no right to self-defense and asking how forfeiture can accommodate these factors).

⁵ See *id.* at 37-39. One can either go the normative route and find normative considerations external to the right to self-defense to justify the forfeiture, or go the factual route and specify the facts under which one does not have the right to life. Factual specification then appears ad hoc, however, as there is no unitary normative principle that binds the facts together. As Thomson explains:

What the friend of factual specification has to do is to figure out when it is permissible to kill, and then tailor, accordingly, his account of what right it is which is the most we have in respect of life. But if that is the only way anyone can have of finding out what right it is we have in respect of life, how can anyone then *explain* its being permissible to kill in such and such circumstances by appeal to the fact that killing in those circumstances does not violate the right which is the most the victim has in respect of life?

Id. at 39.

⁶ SUZANNE UNIACKE, *PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE* (1994). Although George Fletcher wrote *A Crime of Self-Defense* in 1988, we think it is fair to say that his specific study of the Bernhard Goetz case does not qualify as setting forth a general theory of self-defense. See GEORGE P. FLETCHER, *A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* (1988).

⁷ LEVERICK, *supra* note 1; BOAZ SANGERO, *SELF-DEFENCE IN CRIMINAL LAW* (2006).

⁸ Leverick has reviewed Sangero’s book. Fiona Leverick, *Defending Self-Defence*, 27 *OXFORD J. LEGAL STUD.* 563 (2007).

⁹ LEVERICK, *supra* note 1.

Specifically, Leverick claims that one forfeits one's right to life "by virtue of her conduct in becoming an unjust immediate threat to the life of another."¹⁰ After presenting her theory, Leverick applies it to a number of important questions including retreat,¹¹ imminence,¹² self-generated self-defense,¹³ killing to protect property¹⁴ or to prevent rape,¹⁵ and mistake.¹⁶ She also provides a chapter on the compatibility of permitting killing in defense of property and the European Convention on Human Rights' Article 2, which protects an individual's right to life.¹⁷

Leverick's book is the reworking of her earlier doctoral thesis and reads as such.¹⁸ Thus, the book is full of discussions of the work of others as well as Leverick's own views, which is both a blessing and a curse. We would recommend the early chapters of the book to anyone who seeks a fairly succinct and clear background of the competing legal theories about self-defense. Other readers may be impatient to get to the heart of Leverick's arguments, rather than wading through familiar territory. There are also several instances in which Leverick's theory appears to be supported only by her critique of others' accounts rather than by a clear affirmative argument for her own views.

The scope, focus, and writing of this book are quite good. Although Leverick draws on Suzanne Uniacke's theory,¹⁹ the two books could not be more different. Uniacke spends the vast majority of her work arguing about double effect, discussing early philosophers, and only then sets forth a normative theory. Leverick, on the other hand, quickly moves to the normative discussion, setting forth her thesis early on, and then endeavors to apply her theory to criminal law questions. The book therefore has tremendous potential. But does it meet that potential?

Unfortunately, our answer is no. The critical problem with Leverick's argument is her failure to justify forfeiture, the backbone of her theory. Although Leverick offers many interesting insights along the way, we do not believe that she offers an account sufficient to justify killing in self-defense.

¹⁰ *Id.* at 45.

¹¹ *Id.* at 69-86.

¹² *Id.* at 87-108.

¹³ *Id.* at 109-30.

¹⁴ *Id.* at 131-42.

¹⁵ *Id.* at 143-58.

¹⁶ *Id.* at 159-76.

¹⁷ *Id.* at 177-96.

¹⁸ *Id.* at 3.

¹⁹ UNIACKE, *supra* note 6.

The number of topics covered in this book makes it difficult for an in-depth discussion of each; thus, this review will focus on Leverick's central forfeiture claim and her theory's applicability outside the context of killing to prevent killings. Part II sets the stage by discussing the quest for the holy grail—the justification for self-defense. Part III summarizes Leverick's reasoning and proposes that there are two significant flaws with her forfeiture argument. First, Leverick's conditional forfeiture argument appears to be ad hoc. She simply constructs the right to self-defense around her intuitions without setting forth a principled argument for doing so. Second, Leverick cannot explain why innocent aggressors and threats, her own defined test cases, forfeit their rights. Part IV discusses the limits of Leverick's exploration of the use of deadly force for self-defense, noting both that Leverick's treatment of defensive force by battered women is inconsistent with her treatment of killing to prevent rape and that Leverick's reliance on the right to life as foundational limits her ability to explain why one may use non-deadly force against a non-deadly aggressor. We conclude that Leverick's theory is not successful. She attempts to justify the killing of those whom she should not—innocent aggressors and passive threats—without offering a persuasive argument for so doing, and she fails to present a theory capable of including those whom she must—non-deadly defenders. Leverick's theories of forfeiture and the right to life ultimately do not justify self-defense.

II. THE QUEST TO JUSTIFY SELF-DEFENSE

Before discussing Leverick's view, it is necessary to defend why the obvious is not actually so obvious. That is, why is the justification for self-defense seen as a puzzle?

A. CONSEQUENTIALIST ACCOUNTS

One potential way to explain the right to self-defense is to argue that it is the lesser evil. It is better that the defender kill the aggressor than vice versa. Within this rubric, self-defense may not even appear to be a hard case. Unfortunately, there are a number of problems with this position. First, one must still give an account of why the culpable aggressor's life is discounted.²⁰ After all, why isn't the balance between the aggressor and the defender simply a draw? Indeed, how do we balance these lives if, in all other respects, the culpable aggressor has more value for society (a doctor

²⁰ Kadish, *supra* note 2, at 882 (noting that the rule contradicts the equality principle); David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFF. 356, 358 (1987) ("Unfortunately, the analogy begs the critical question of *why* it is a lesser evil to kill the aggressor.").

working on the cure for cancer) than his innocent victim (a criminal law theorist)?²¹ Second, the consequentialist view seems to indicate that if *many* culpable aggressors attacked a lone innocent defender, there would be a point at which the balance would tip in favor of the aggressors.²² But that simply cannot be right. You get to kill as many bad guys as threaten you.²³

Moreover, consequentialist accounts are problematic even if we include the value of having a more general rule of self-defense. First, such a rule seems too narrow. If we simply want to deter violence, we might prefer a far broader rule, allowing for retaliation or other punitive acts.²⁴ Second, and more importantly, the approach obscures the importance of the relationship between the defender and the aggressor. The defender's act is not justified because the aggressor aims to harm her, but because of some greater societal value. This view also leads to the conclusion that a given defender is not justified in a case in which the action would not deter others' aggression. But we think most people would agree that a culpable aggressor may still be killed in these instances.

To put this point another way, to view self-defense as serving some broader societal goal is to make it *contingent*.²⁵ Because the law will not be in a position to calculate in every instance, we will have a broad rule prohibiting aggression. However, in any individual case, it may be that that rule is overinclusive and the defender should not have the right to self-defense. It strikes us that this cannot be so: it cannot be that a criminal law theorist cannot defend against a culpable attack by a philanthropic scientist while they are (briefly) stranded on a desert island. It cannot be that the right to defend crucially depends on society getting sufficient bang for the self-defense buck.

²¹ Wasserman, *supra* note 20, at 359 ("The law permits the aggressor's life to be taken even if his survival is linked to other, innocent lives: a victim is entitled to kill an aggressor even if his killing is sure to provoke widespread bloodshed, or even if the aggressor is on the brink of discovering a cure for cancer or a solution to African famine.").

²² *Id.*

²³ Kadish, *supra* note 2, at 882 ("For surely the rule allows one attacked to kill all his attackers no matter how numerous they may be."). The consequentialist cannot eliminate this problem by suggesting pair-wise comparisons, that is, to compare each aggressor to the innocent defender. Imagine a case in which all the aggressors are in a plane and shooting at the defender, and the defender can blow up the plane and kill them all. The defender must know whether this one action will be the lesser evil.

²⁴ *Id.* at 883 (noting that deterrence would support retaliation); Wasserman, *supra* note 20, at 360 (noting that deterrence cannot explain retreat or proportionality).

²⁵ Kadish, *supra* note 2, at 883 (noting that the "argument rests on the contingent fact that justifying deadly defensive force will, in the long run, save more lives by deterring deadly assaults").

B. RIGHTS-BASED VIEWS

Rights-based views start from a different premise. Typically, they begin with the very strong claim that we have a right to life, or a right not to be killed. Second, because self-defense is necessary to protect this right, we must allow defenders to use force to prevent their own extinction.

Although rights-based accounts appear promising, there are significant difficulties here. Most problematic is the need to account for the asymmetry between the defender and the aggressor; if the defender has a right to life, so too does the aggressor. Indeed, the central question in self-defense is why one is allowed to take a life to preserve a life. At this point, theorists begin to talk of forfeiting the right to life, specifying the right to life (one has the right except . . .), or overriding the right to life (one may be killed if . . .).²⁶

The first move available to the rights theorist is to claim that the aggressor, by virtue of his aggression, forfeits his right to life. The problems with this view are well known. First, forfeiture cannot explain how the aggressor regains his right to life. Yet, if the aggressor stops the attack, the defender can no longer kill him, either then or the following week. Somehow the right to life is magically regained.²⁷ Second, forfeiture does not impose any limitation on what anyone can do to the aggressor, that is, it seems to justify conduct that goes far beyond defensive force. Third, this view stands in stark contrast to the rest of the law, where individuals may not consent to be killed.²⁸

Another approach is to say that the aggressor's right to life may be overridden, or the right to life is specified such that one does not have a right to life when one presents an unjust immediate threat to others. Notably, once one looks to overriding or specifying the right, all of the work of the argument is done not by the right to life itself, but by some consideration external to the right that allows us to specify or override it. In other words, an account of self-defense must provide a *principled* explanation for why and how the right to life may be overridden or specified.²⁹

²⁶ See generally Thomson, *supra* note 4 (critiquing these moves in favor of the infringing-violating distinction). Thomson has since adopted a forfeiture view. Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 302 (1991) ("I suggest that what makes it permissible for you to kill [a culpable aggressor, an innocent aggressor, and an innocent threat] is the fact that they will otherwise violate your rights that they not kill you, and therefore lack rights that you not kill them.").

²⁷ Thomson, *supra* note 4, at 34-35.

²⁸ Kadish, *supra* note 2, at 884.

²⁹ See DAVID RODIN, *WAR & SELF-DEFENSE* (2002) (discussing these problems with specification theories). Notably, some rights-theorists will not disagree with this claim. For

C. THE CENTRALITY OF INNOCENT AGGRESSORS AND THREATS

The question of self-defense is further complicated by the appearance of innocent aggressors and threats. An innocent aggressor is someone who would not be deemed legally responsible for his act of aggression.³⁰ A child or a mentally insane person who aggresses against another would be considered an innocent aggressor. A passive (or innocent) threat, on the other hand, does not aggress, but nevertheless poses a direct threat to the life of the defender through other means.³¹ In Robert Nozick's famous example, one person is stuck in the bottom of a well, and another man is hurled down the well. The defender must either shoot the falling man with his disintegrate gun (philosophers may live in ivory towers, but they employ some extraordinary weapons) or be crushed.³² The falling man is a passive threat.

The critical divide within the self-defense literature is at the point of these innocents. Some theorists maintain that a legitimate theory of self-defense must render permissible the killing of an innocent aggressor or threat.³³ Theorists then attempt to offer an account of self-defense that includes these aggressors. Other theorists, who do not share these intuitions, often reject that self-defense justifies the killing of these innocents.³⁴

instance, John Oberdiek, who adopts a specification view of rights in general, claims that we argue *to* rights, not *from* them. Rights are the conclusions of moral argument. Then, as we argue above, we need other principles to explain the limits and values that override or specify the right. See John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD J. LEGAL STUD. 127 (2008).

³⁰ LEVERICK, *supra* note 1, at 5.

³¹ *Id.*

³² ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 34 (1974).

³³ See, e.g., UNIACKE, *supra* note 6, at 177 ("The positive right to use lethal force in self-defence . . . does not derive from culpability on the part of the aggressor . . ."); Claire Oakes Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens*, 147 U. PA. L. REV. 1361, 1385 (1999) ("It . . . seems odd to think that the strength of the right varies with the characteristics of the attacker, rather than with the magnitude of the threat to the relevant interest."); Kadish, *supra* note 2, at 882 (critiquing the lesser evil view of self-defense for failing to account for the killing of innocent threats); Thomson, *supra* note 26, at 286 ("What I think is clear in any event is that if the aggressor will (certainly) take your life unless you kill him, then his being or not being at fault for his aggression is irrelevant to the question [of] whether you may kill him."); Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 1009-10 (2005) ("Drawing [a] line between culpable and nonculpable aggressors is counterintuitive.").

³⁴ See, e.g., SANGERO, *supra* note 7, at 48 ("[T]he case of the innocent aggressor does not in any way refute the theory that focuses on the aggressor's culpability, and for the simple reason that this case does not fall within the bounds of private defence at all."); Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 LAW & PHIL. 711, 734 (2005) ("[O]ne may not

In some respects these are rather strange test cases around which to build one's theory. It is not an everyday occurrence to be attacked by a small child with a gun or trapped in an elevator with a psychotic aggressor,³⁵ and even more unlikely that you would find yourself at the bottom of a well, only to have your enemy push some man on top of you. Now, perhaps the recent attacks at Virginia Tech reveal that we do need a theory governing when one may kill a psychotic aggressor,³⁶ but it is important to note that we need not use self-defense for that theory. If killing one psychotic aggressor will save many innocent people, it may be that this killing is justified by the doctrine of necessity, and not self-defense.³⁷ The only other likely use of "innocent" force is by a person acting as a result of some mistake. However, these attacks are also complicated by the fact that those using this sort of mistaken deadly force may be law enforcement officers, and we may want a different rule for law enforcement than for other mistaken attackers.

In summary, despite the intuitive plausibility of a right to self-defense, theorists find it extraordinarily difficult to justify. Moreover, one critical question is what this right covers. Must one have a theory that justifies defense against innocents as well as the culpable? These are the puzzles that Leverick seeks to resolve.

III. FAILING TO JUSTIFY SELF-DEFENSE

A. LEVERICK'S ARGUMENT: FORFEITING THE RIGHT TO LIFE

After beginning with the premise that self-defense is a justification, and adopting John Gardner's view of justification,³⁸ Leverick surveys the

rightly kill [innocent aggressors] because they did not intentionally create the situation that forced the choice by the defender."); Wasserman, *supra* note 20, at 364 ("If self-defense is a right against an aggressor, it is a right against *culpable* aggressors only.").

³⁵ The elevator scenario was famously imagined by George Fletcher. George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 *ISR. L. REV.* 367, 371 (1973).

³⁶ See Brigid Schulte & Chris L. Jenkins, *Cho Didn't Get Court-Ordered Treatment*, May 7, 2007, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/06/AR2007050601403.html>.

³⁷ SANGERO, *supra* note 7, at 60 ("[T]he correct place for repelling the innocent aggressor is the 'necessity' exception . . .").

³⁸ Leverick argues that self-defense is an archetypal justification. LEVERICK, *supra* note 1, at 2. She then claims that an actor has a justification if, all things considered, the conduct is "acceptable." *Id.* at 21. Finally, she argues that to have a justification, the actor must not only engage in conduct that is objectively justified, but also act for that (explanatory) reason. *Id.* at 26. Although we disagree with much of this analysis, one of us has adopted a dual-requirement view, albeit for very different reasons. See Ferzan, *supra* note 34 (arguing that self-defense consists of an actual, culpable attack coupled with a subjective belief that

common ground described above as well as other theories such as personal partiality and the doctrine of double effect.³⁹ Leverick ultimately finds promise within the right-based tradition and forfeiture, specifically.

Leverick sets out her theory, stating that the value of human life outweighs any other value.⁴⁰ She argues that the right to life is a fundamental right unlike any other right because (1) this right is necessary for the enjoyment of all other rights and (2) its violation is irreparable.⁴¹ The permissibility of killing in self-defense is based on the fact that the source of the threat compromises the defender's right to life, thereby forfeiting the aggressor's right to life and allowing the defender to kill him. She states that in self-defense the defender acts against someone who poses a direct threat to her life or physical integrity.⁴² This encompasses aggressors and passive threats, but does not permit the killing of bystanders.⁴³

Leverick argues that "[t]he reason why it is permissible to kill the aggressor is that the aggressor forfeits her right to life by virtue of her conduct in becoming an unjust immediate threat to the life of another."⁴⁴ Thus, Leverick takes the position that culpability of the aggressor is not a necessary element in establishing the permissibility of using self-defensive force.⁴⁵ Her argument, she admits, draws heavily on the work of other theorists, mainly Uniacke and Thomson.⁴⁶ Leverick reiterates Uniacke's position that forfeiture is not based on the wrongdoing of the aggressor or the passive threat.⁴⁷ She argues that forfeiture, although typically associated with wrongdoing or punishment for behavior, is not intended to be used in that sense in her theory.⁴⁸ Specifically, Leverick states

defensive force is necessary to repel it). Given that the "conditions of justification" debate is flourishing elsewhere, we will not attend to it here.

³⁹ LEVERICK, *supra* note 1, at 50-54. Leverick dismisses personal partiality as a theory of self-defense. *Id.* at 52 ("It is difficult to see why it is permissible for someone to favour her own life over that of another simply *because* it is her own life and therefore of value to her."). She rejects the doctrine of double effect as too fine a distinction. *Id.* at 54. ("The moral distinction between intending to kill an aggressor in self-defence and using lethal force in self-defence but merely foreseeing (but not intending) that the death of the aggressor would result is too fine to be meaningful.").

⁴⁰ *Id.* at 3.

⁴¹ *Id.* at 58.

⁴² *Id.* at 6.

⁴³ *Id.*

⁴⁴ *Id.* at 45.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.* at 45.

⁴⁷ *Id.* at 67.

⁴⁸ *Id.*

“[f]orfeiture is associated here with *conduct alone*.”⁴⁹ She concedes that one of the definitions of *forfeit* is “to lose by misconduct,” but she argues that the definition of the word she seeks to use in her theory is the one that does not suggest misconduct but, simply is “‘to lose; to lose the right to’ . . . ‘to lose or give up’.”⁵⁰

Leverick seeks to avoid the traditional criticisms associated with forfeiture by defining a very narrow time-frame during which the right is forfeited. She claims that the right to life is only forfeited by the threat during the time he is a threat *and* only if there are no other ways in which the victim can save his own life without harming the threat.⁵¹ In her defense of forfeiture, Leverick argues that the reason a victim is permitted to kill the threat is not because he deserves to die, but because the threat’s conduct made him an unjust immediate threat to the victim.⁵² Leverick explains “[t]he reason the victim is permitted to kill the aggressor, but the aggressor is not permitted to kill the victim, is that the aggressor, by virtue of her conduct in becoming an unjust immediate threat to the life of the victim that cannot be avoided by any less harmful means, forfeits her right to life.”⁵³

To summarize, Leverick’s forfeiture theory does not depend on any misconduct or culpability. Rather, all that is required is that a person constitute a threat to another’s right to life. This forfeiture, however, is limited. The threat’s right to life is forfeited only for so long as she is a threat. Moreover, this forfeiture is also restricted by the defender’s ability to use less deadly means—if the defender does not need to kill the threat, then the aggressor’s life is not forfeited.

There are two problems with Leverick’s account of forfeiture. First, her “temporary forfeiture only while necessary” theory is unprincipled and ad hoc. Second, she fails to justify how innocent aggressors and passive threats can forfeit their right to life.

B. FAILING TO JUSTIFY FORFEITURE

How can one temporarily forfeit his right to life? Because the permanent forfeiture argument has the potential for creating different classes of people—those with a reduced level of protection because of past acts and those with a regular level of protection⁵⁴—Leverick attempts to

⁴⁹ *Id.*

⁵⁰ *Id.* (referencing the Oxford English Dictionary online).

⁵¹ *Id.* at 66.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Wallerstein, *supra* note 33, at 1019.

sidestep the question of classification by saying that forfeiture is temporary.⁵⁵ This move, however, seems contrived and inconsistent with any understanding of what forfeiture entails.⁵⁶

At one level, our complaint is semantic. Leverick goes to great lengths to chastise Uniacke for not using the language of forfeiture, but the language of forfeiture seems profoundly misplaced.⁵⁷ To forfeit one's right is not to give it up temporarily. It is to give it up.

But our complaint goes beyond the semantic.⁵⁸ Leverick's temporary forfeiture language stands as a placeholder for any actual argument for why it is morally permissible to kill the threat for that limited time. Compare the argument offered by the moral philosopher Jeff McMahan.⁵⁹ McMahan argues that it is permissible to kill someone when he is *responsible* for being a threat to another, and McMahan advances some rather complex views about how one can be responsible.⁶⁰ Notice, then, that the responsibility condition can be severed from the threat condition. That a defender can only defend against a threat—the necessity limitation—is not itself part of the responsibility condition. In other words, if McMahan says that negligent risking renders one liable to defensive force such that a defender can use deadly force when there is a threat of harm, the temporal condition is not part of the reason why the aggressor has, in Leverick's terms, "forfeited" his right to life. But this means that neither the forfeiture label nor the temporal necessity limitation can do the work of explaining why some can be killed and not others. Or, to put the point another way,

⁵⁵ LEVERICK, *supra* note 1, at 64 ("The reason why it is not permissible to kill an aggressor once she ceases her attack is that *the aggressor is no longer an unjust immediate threat*.").

⁵⁶ Wallerstein, *supra* note 33, at 1020 ("Constructing the right not to be killed as an indefinite number of rights *in personam*—directed against each person separately—seems artificial.").

⁵⁷ LEVERICK, *supra* note 1, at 62 ("Uniacke might explicitly reject the terminology of forfeiture but forfeiture is effectively what she is describing.").

⁵⁸ Leverick is willing to forego the language of forfeiture for the language of specification. *Id.* at 67; *see also* RODIN, *supra* note 29, at 74 ("Whether we choose to describe the right to life as limited in scope or as subject to forfeiture, seems, from a theoretical point of view, immaterial.").

⁵⁹ Jeff McMahan, *The Basis of Moral Liability to Defensive Killing*, 15 PHIL. ISSUES 386 (2005).

⁶⁰ *Id.* at 397 ("I will assume that it is a condition of responsibility for an unjust threat that the action that gave rise to the threat either was of a risk-imposing type or was such that in the circumstances the agent ought to have foreseen that it carried a non-negligible risk of causing a significant unjust harm.").

the triggering conditions should not be part of the limitations on the defense.⁶¹ But Leverick's analysis conflates the two.

This conflation is most evident when one considers instances in which retreat is possible. Leverick claims that if the defender can retreat, she should.⁶² But this seems odd: if the aggressor has forfeited his right to life, the defender would not wrong him by killing him. Leverick's answer is that forfeiture only applies when killing is the only way that the defender can prevent harm to herself.⁶³ But this strikes us as extraordinarily contrived. It is one thing for one to forfeit one's rights through some action or intention; it is quite another for that forfeiture to occur only if the other person needs the right to be forfeited. That is, although we do not dispute that self-defense may be bilateral—dealing with the relationship between aggressor and defender—we do dispute that forfeiture can be bilateral.

Ultimately, Leverick still needs a moral argument for why there is such forfeiture. The fact that she lacks such an argument is apparent when we examine her own test cases—innocent aggressors and passive threats.⁶⁴ First, we note that Leverick requires that a theory justify the killing of the innocent based on her intuitions. She disposes of forfeiture-based theories that justify the killing of aggressors on the basis of the aggressor's culpability, by stating that “instinctively this seems wrong.”⁶⁵ She continues by stating that “[k]illing a life-threatening aggressor, innocent or otherwise, feels intuitively like a permissible action.”⁶⁶

But once we get beyond Leverick's intuitions, she offers no principled reason why her forfeiture theory should apply to innocent aggressors or passive threats. Leverick simply fails to explain why the innocent aggressor or a passive threat forfeits his life by his conduct if his conduct is not voluntary.⁶⁷ Further, Leverick fails to address how people can avoid losing their right to life if involuntary acts lead to forfeiture. In her scheme of justified killing, anyone who is walking around can, at any time, forfeit his right to life by virtue of being used as a weapon against another or by

⁶¹ “Justifications . . . all have the following internal structure: *Triggering conditions* permit a *necessary* and *proportional* response.” PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 98 (1997).

⁶² LEVERICK, *supra* note 1, ch. 4.

⁶³ *Id.* at 66.

⁶⁴ *Id.* at 44 (“[I]t is the aim of this chapter to put forward an account of the permissibility of self-defensive killing that explains why it is permissible to kill a culpable aggressor, an innocent aggressor, and a passive threat, but why it is not permissible to kill an innocent bystander.”).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 67 (“Forfeiture is associated here with conduct alone.” (emphasis omitted)).

sheer bad luck. If the right to life is as fundamental and important as Leverick claims, we fail to see how she can justify this implication.

Indeed, we sincerely doubt that a theory of self-defense can justify the killing of innocents. Uniacke, a scholar upon whom Leverick draws, has defended fault-free forfeiture by arguing that there are certain situations in which people face forfeiture despite the fact that they did nothing wrong.⁶⁸ As an example, Uniacke argues that a ticket holder can blamelessly forfeit a right.⁶⁹ But consider that case. Suppose Tom purchases a plane ticket and he arrives at the airport late due to a traffic accident that was not his fault. Tom, by virtue of missing the flight, might be said to have forfeited his right to be on the flight, as the flight has already departed. Further, depending on the airline, Tom may not be permitted to get on another flight unless he pays a certain fee to the airline for changing his flight. This type of forfeiture, however, is entirely contractual. For a higher price, Tom could have purchased a refundable fare which would have protected him in the event of such an occurrence, and he would not have forfeited his right to fly without a penalty. Further, it is entirely possible, although expensive, for Tom to contract out of forfeiture entirely by chartering a plane, which guarantees the flight will not depart without him. Again, this situation involves the buying of goods or services, and in the initial scenario Tom's ticket price, which makes it affordable for most to fly, is lower because the plane flies a number of people beyond Tom. It would be inefficient and disruptive to others to force the plane to wait until he arrived.

It is much more difficult to defend a situation in which a person forfeits his right to life due to no action or fault of his own. Unlike the forfeiture in the above example, which involves the consideration of other people's contractual or property rights and is exercised to ensure that one purchaser does not inconvenience others as a result of his failure to appear at the agreed-upon location and time, Leverick's examples juxtapose the threat's life against the victim's life. Furthermore, contractual forfeiture involves the forfeiture of goods or services, both of which can be replaced. Leverick's entire argument is premised on the right to life being fundamental precisely because it is necessary for the enjoyment of other rights *and* because it is not replaceable.⁷⁰ Yet, while Tom has the option to contract out of forfeiture for a price, in Leverick's scenario there is nothing

⁶⁸ See, e.g., *id.* at 62 (“A forfeit is a penalty and . . . the imposition of a penalty by way of a forfeited right constitutes a disadvantage which need not imply the culpability or punishment of the one who forfeits.” (citing UNIACKE, *supra* note 6, at 195)); see also UNIACKE, *supra* note 6, at 206 (providing an example of a ticket holder to a show forfeiting her right to see it, due to no fault of her own).

⁶⁹ UNIACKE, *supra* note 6, at 206.

⁷⁰ LEVERICK, *supra* note 1, at 58.

a threat could do to avoid forfeiting his right to life when his conduct is not voluntary.

Other theorists who have tried justifying the killing of innocent aggressors and passive threats have run into similar problems. For example, Wallerstein,⁷¹ who justifies the killing of culpable aggressors on the basis of forcing the morally blameworthy party “to pay the price” for his actions, simply says that non-culpable aggressors and threats must suffer the consequences of their bad luck.⁷² This argument is similar to Leverick’s in that it presumes that the threat is the only one having the bad luck and that causality can be easily determined. Ultimately the problem with a theory holding that one forfeits his life by virtue of becoming an unjust immediate threat is that it assigns the responsibility to the threat alone, but causation is itself insufficient for this assignment.

Consider Abe, who is walking along a sidewalk and by virtue of bad luck falls into an uncovered manhole. Calvin, his archenemy, takes this opportunity to push Bob down the manhole to kill Abe by landing on him. Abe and Bob can both be said to have had the bad luck of being in a situation that now requires a choice between their lives. Further, it could be argued that both are the cause of the predicament in which they find themselves. After all, if Abe had not fallen into the manhole then presumably Calvin would not have had a reason to throw Bob into the manhole. Moreover, if Bob would have survived the fall if Abe had not been there (because he would not need anyone to break his fall and no one would be threatening his life), then how do we establish whose bad luck necessitates that he suffer the consequences?

Applying Leverick’s theory, it is still unclear why Bob forfeits his right to life by virtue of his conduct—if being pushed can even qualify as conduct—when Abe and Bob simultaneously are posing a threat to each other’s lives and if both would have survived had it not been for the other’s presence. Ronald Coase identified the reciprocal nature of this problem.⁷³ Wallerstein takes the position that the defender can never be considered a source of threat by virtue of being present, but she also supposes that the aggressor’s act triggers the threat.⁷⁴ However, in the hypothetical above, it was Abe’s bad luck that triggered Bob’s fall, which is seen as the threat.

⁷¹ Wallerstein, *supra* note 33, at 1028.

⁷² *Id.* at 1030-32.

⁷³ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (noting that the correct answer to the question about whether a confectioner who uses machinery which disrupts a doctor can be prevented from operating such machinery considers the potential harms of such a decision to both the confectioner and the doctor, as opposed to considering only the harm caused to the doctor).

⁷⁴ Wallerstein, *supra* note 33, at 1031.

Ultimately, the causation/threat approach is a theoretical dead end. Yes, the threat will kill the defender, but the defender is going to kill the threat. One person will live; one will die. Causal responsibility cannot distinguish threat from defender, as the “forced choice” is a result of both people’s actions. Ultimately, we have two innocent actors. We have a tragedy. We may wish to excuse the defender, but there is no basis on which to justify his or her choice to prefer his or her own life to that of another innocent.

Indeed, we strongly suspect that many people’s intuitions here about the problem of innocent aggressors are subject to framing bias.⁷⁵ The hypotheticals are presented in such a way that one imagines that one is at the bottom of the well or stuck in the elevator with the psychotic aggressor. But if we truly want to imagine the innocence and lack of conduct on the threat’s part, then we must ask the question from the perspective of the threat as well. Should the defender shoot you as you plummet toward him? And, even if you would understand and excuse such conduct, is the defender justified in killing you? Would that justification carry the (typical) implications that others are justified in aiding him in killing you? That you may not justifiably defend yourself?

Leverick and other theorists trying to justify the killing of innocent aggressors and passive threats fail to adequately explain precisely why it is permissible to distribute the harm to the threat when faced with a choice between two innocent lives. Forfeiture typically implies some type of wrongdoing, or at least some sort of *doing*. Simply redefining it in a counterintuitive way to accommodate her intuitions will not rescue the underlying lack of principle inherent within Leverick’s theory.⁷⁶

⁷⁵ See generally Daniel Kahneman & Amos Tversky, *Rational Choice and the Framing of Decisions*, in CHOICES, VALUES, & FRAMES 209 (2000) (discussing how the manner in which a question is posed or “framed” will affect the answer).

⁷⁶ Ultimately, David Rodin’s summary of the problem with factual specification arguments applies to Leverick’s theory in full force:

The properly specified right to life would proceed something like this: ‘persons only have the right not to be killed when not engaged in an aggressive attack, but they retain the right in cases where their victim can escape without using lethal force, and/or where the victim’s use of force would be disproportionate, and/or where the threat presented is not imminent, and/or where the victim’s use of force does not arise from an intention to act in self defense and so on’ The problem is that in thus specifying the scope of the right to life we have simply inserted all our pre-existing intuitions about the permissible circumstances of self-defense. In doing so we sap the notion of explanatory power, for if our conception of the right to life simply reflects our prior intuitions on the permissible circumstances of self-defense, then we can hardly point to the possession or absence of the right to explain our intuitions. The rights-centered account would then become empty as an explanatory tool.

RODIN, *supra* note 29, at 72.

IV. THE LIMITS OF THE EXPLANATION

Our final concern is the narrowness of Leverick's theory. Leverick claims that her position—starting with when one is justified in killing another—is the appropriate starting point because it is the hardest case.⁷⁷ But her focus on the right to life and the right to kill to protect it creates problems for extending the application of her theory beyond killings to prevent killings.

In the first instance, Leverick's claim of a right to *kill* grounded in the right to *life* is not itself well argued. Leverick claims the victim has a right to life and therefore has a right to use lethal force to defend it.⁷⁸ Of course, this does not necessarily follow. Sally might have a right to a book, but she may not be able to use force to defend that book, much less deadly force to defend the book. Leverick is not entitled to assume that a right to something entails that one has the right to use as much force as is necessary to prevent the violation of that right. She needs to argue for it.

Leverick, however, does not provide an argument. Even after Leverick asserts that the right to life is the most fundamental human right because it is a prerequisite to everything else and because its violation cannot be remedied,⁷⁹ she still fails to take the additional step of arguing *from* this right to life *to* the right to use deadly force. Indeed, Leverick's conflation of the two rights is most apparent when she claims that the right to life is a Hohfeldian claim right.⁸⁰ It may be that the right to life is such a claim right, with which others owe a duty of noninterference, but this is not to say that the right to defend one's life is also a claim right. We question whether the core right to kill to prevent being killed is itself fully developed.

Leverick then runs into immediate difficulty when she attempts to extend the right to kill in self-defense to prevent harms other than death. As just one instance of this more general problem, consider the inconsistency at work with Leverick's approach to battered women killing in non-confrontational settings and her position on killing to prevent rape. In the case of battered women she notes that in even the worst cases, the abuse (prior to the use of defensive force) did not amount to an actual threat of death, thus she seeks to limit the use of self-defensive force.⁸¹ Yet, in cases

⁷⁷ LEVERICK, *supra* note 1, at 4.

⁷⁸ *Id.* at 59 (“On its simplest level, the argument runs that an aggressor, by virtue of attacking her victim, threatens to violate the victim’s right to life. The victim is therefore justified in using lethal defensive force to repel the threat because, in doing so, the victim is simply protecting her right to life.”).

⁷⁹ *Id.* at 58-59.

⁸⁰ *Id.* at 58-60.

⁸¹ *Id.* at 92.

of rape, Leverick dismisses limiting the use of self-defensive force only to cases in which there is a threat of death or injury⁸² because rape, itself, is a denial of humanity that is equivalent to the deprivation of life.⁸³ Leverick posits that the reason rape is a denial of humanity is because “the rapist uses the victim as an object through the act of sexual penetration, an act that has been given a particular significance by society, and, in doing so, denies the victim’s humanity.”⁸⁴

Although Leverick aims to distinguish other offenses that may also contain the element of “sheer use” by stating that rape is different due to the act of sexual penetration, this differentiation is unconvincing and appears simply too narrow.⁸⁵ Denial of humanity implies more than the act of rape. For instance, few would argue that the treatment of Judy Norman would not qualify as a denial of humanity. Norman, who shot her husband while he was sleeping, was consistently subjected to degradations ranging from being forced to sleep on the floor and bark like a dog, to being compelled to work as a prostitute to earn the family’s only income.⁸⁶ Denial of humanity is broader than the act of sexual penetration alone. If killing to prevent rape is different than killing to prevent being used as an object, then it cannot simply be that one is a denial of humanity and the other is not. There must be a theory that explains why killing in one situation is more morally permissible than killing in the other situation.

Finally, according to Leverick’s own theory, battered women have a stronger case for the use of self-defensive force than potential rape victims do. Leverick’s right to life account is based on the right to life being fundamental because (1) the right to life is necessary for the enjoyment of all other rights and (2) the violation of the right to life is irreparable.⁸⁷ In at least some cases the danger is so significant that arguably the abused woman’s right to life is threatened in the first sense, because she is unable to enjoy any other rights due to the constraints placed on her by her abuser. While Leverick consistently adheres to her mantra of the right to life being a fundamental right in need of protection, she fails to address the violation of that right in cases of battered women.

These difficulties, however, are just the tip of the iceberg. The question is whether Leverick’s theory can extend beyond the deadly force cases. Can it explain why Bob may push Andy to prevent Andy from

⁸² *Id.* at 150-51.

⁸³ *Id.* at 157-58.

⁸⁴ *Id.*

⁸⁵ *Id.* at 157.

⁸⁶ *State v. Norman*, 378 S.E.2d 8, 10 (N.C. 1989); *State v. Norman*, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988).

⁸⁷ LEVERICK, *supra* note 1, at 58-59.

punching Bob? Because Leverick's project focuses solely on the right to *life*, she offers no guidance as to how one can justify using force against non-deadly threats.

Moreover, if we extrapolate from her theory to the question of non-deadly threats (and force), we see the further problems inherent in Leverick's theory. To tackle the question of non-deadly force, Leverick could take one of three problematic positions. First, Leverick could claim that the defender has a right to autonomy—a general no interference right. Second, Leverick could claim that the defender has a right to bodily autonomy—a specific right that no one touch him. Finally, Leverick might simply say that the defender has a right not to be hit. From any of these rights, however, we would still need a principle as to why the appropriate reaction is for the defender to prevent the attack. After all, because these rights are not fundamental and noncompensable, the defender could always sue the aggressor. So the first question we might ask is, how can these cases be remotely like the cases that Leverick discusses?

Alternatively, unifying non-deadly and deadly force cases also spells trouble for Leverick. She has explained why Celia may kill Dana to prevent Celia's death. But compare the case of Bob using force to prevent Andy's non-deadly attack. If Bob has a right to autonomy, so, too, does Celia. If Bob has a right to bodily integrity, so, too, does Celia. And if Bob has a right not to be hit, Celia also has a right not to be killed. In other words, once we explain the Bob cases, the right to life moves from centrality to utter irrelevance. If the Bob cases can be explained without reference to the right to life, so, too, can the Celia cases.

A theory of self-defense should have explanatory power beyond killing to prevent being killed.⁸⁸ Leverick's does not. In the first instance, Leverick twists her theory into contortions simply to justify killing to prevent rape, a justification that is ultimately at war with the theory she stakes out on imminence. Secondly, because Leverick never explains how one derives a right to kill from the right to life, it is difficult to extrapolate her theory to non-deadly force cases. Leverick's theory presumably justifies the killing of a passive threat but cannot justify grabbing a wrist to prevent a punch. It is wildly implausible that one would need a different theory for *not* killing in self-defense than one needs for killing in self-defense.

⁸⁸ See Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 483-84 (2006) ("It is important to note that the restriction of the discussion of private defense to homicide offenses alone, so prevalent in the literature, is both mistaken and misleading—mistaken because private defense applies also to other offenses, such as simple assault, and misleading because concentrating solely on situations of 'a life for a life' distorts the picture . . .").

V. CONCLUSION

Leverick provides a broad discussion about a number of important issues in the theory of self-defense. Her book offers readers a good background of legal theories surrounding the justifiability of self-defensive killing and seeks to provide her own take on how self-defensive killing could be grounded in morality.

The background portions of the text are quite helpful, but the overall theory is quite unpersuasive. The book fails to explain what the author claims she will successfully answer in the text. Leverick's theory of forfeiture is constructed to accommodate her intuitions, but otherwise fails to offer a principled explanation for why we may kill in self-defense.

