Desert and Avoidability in Self-Defense*

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Jeff McMahan rejects the relevance of desert to the morality of self-defense. In *Killing in War* he restates his rejection and adds to his reasons. We argue that the reasons are not decisive and that the rejection calls for further attention, which we provide. Although we end up agreeing with McMahan that the limits of morally acceptable self-defense are not determined by anyone's deserts, we try to show that deserts may have some subsidiary roles in the morality of self-defense. We suggest that recognizing this might help McMahan to answer some unanswered questions to which his own position gives rise.

I. THE PUZZLE OF SELF-DEFENSE

What is it about defenders, or some defenders, that puts them in a stronger moral position than those who act similarly but not defensively? How can the fact that it is defensive ever make or help to make (for example) a killing or maiming or bombing less heinous or reprehensible than it would otherwise be? The question is widely discussed, both in its raw moral context and in various legal and political applications. There is less discussion of the second-order question of whether this is the right first-order question to be asking. Perhaps it is not defensiveness that matters, but something else for which defensiveness is a proxy? We will not discuss this second-order question here. Our initial view is the mainstream one that defensiveness itself does matter, that is, that there are distinct moral norms regulating

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defensive actions as such. We also tend to think that, within the class of moral norms regulating defensive actions as such there are probably some that mark out and regulate self-defensive actions as a special subclass. However, our main aim in what follows is not to bear these thoughts out. We will assume them to be sound. Our main aim is to explore one possible way in which a champion of the view that there are distinct moral norms of self-defense might distinguish the moral position of the self-defender (let's call her D) from that of the person (E) against whom D defends herself.

We have some hesitations and anxieties about our subject matter and, in particular, about the way it is often approached in public and academic debate. Here are three doubts that have an impact on the way our thinking unfolds in this essay. They help to show just how deep our puzzlement goes and why we explore the particular proposal that we do in our search for a solution.

First, we are uneasy about the vaunted status that tends to be conferred on self-defensive actions and those who carry them out. We are not convinced that leaving ample moral space for people to defend themselves should be regarded as one of the nonnegotiable criteria of success in a moral theory or doctrine. Still less are we convinced that self-defensive actions—at any rate those that inflict suffering or deprivation on others—should be publicly supported, welcomed, and encouraged as opposed to merely being tolerated. For many people, it is an affront that self-defenders are arrested and prosecuted even if they are ultimately acquitted of any crime. Surely they should be congratulated? Not yet being sure why they should be acquitted of any crime, however, we are not yet sure why, if at all, they should enjoy other special privileges. Why, for example, should it be thought morally desirable to teach people how to win a fight so long as one does so in a class labeled "self-defense"? And why should such classes attract official support and even subsidy?

Second, when we say we are not yet sure why self-defenders should be acquitted of any crime, we mean that we are not even sure under what heading they should be acquitted. Are self-defensive actions justified or are they excused? Or is it—a third possibility—that they are not forbidden in the first place, so that questions of their justification or excuse do not arise? In philosophical writings the issue is often framed as being about the moral "permissibility" of self-defense or the moral "right" to self-defense. We do not find either term particularly helpful. Types of permissible actions, in morality as well as in law, include those that there is no duty not to perform, as well as those that there is a duty not to perform but which are also covered by a conflicting permissive norm that overrides the duty (thus yielding

a type of justification for its breach).[1] Which kind of permissibility is at stake in self-defense cases? A right to act, meanwhile, may confer a permission of either type but may equally confer no permission at all, merely imposing on others a duty of noninterference in the action in question even though it is impermissible.[2] Which type of right is at stake in self-defense cases? Not only are we not sure which kind of right or which kind of permissibility is at stake; we are not even sure that it will turn out to be only one kind. Perhaps different cases of self-defense fall under different headings, in which case "the moral position of the self-defender" is actually several different moral positions, calling for several partly or wholly divergent explanations.

Finally, it seems to us that many discussions of self-defense are derailed by the premature admission of agent-relative thoughts ("you have to look after number one," "it's every man for himself," etc.). It seems to us that the only general defense of the self-defender worth wanting is an agent-neutral defense. What is needed, in other words, is a distinction between D and E such that not only D, but everyone else as well, has a reason to favor D over E; a distinction such that, all else being equal, we should come to D's rather than E's aid at the time of the fight, convict E rather than D of assault afterward, cry or cheer for D rather than E in the movie adaptation, and so forth. When we say "everyone else," we mean E too. It may be true that in a fight between D and E, D has some reason to favor D while E has some reason to favor E. But that reason, if it exists, does not help to solve the moral puzzle of self-defense that interests us. It does not show why it matters, morally speaking, that one be in the role of D rather than in the role of E. You may suspect that this insistence on agent neutrality is inconsistent with our working assumption that morality distinguishes between self-defense and defense of others. But there is no inconsistency. Perhaps, all else being equal, each of us should want it to be the case, and contribute to its being the case, that D defends herself rather than being defended by others. That being so, there is an agent-neutral distinction between self-defense and other-defense. The hint of agent relativity is in that case superficial.

Jeff McMahan's work on the morality of self-defense, most recently in his book *Killing in War*, brings some comfort to puzzled souls

1. For discussion, see G. H. von Wright, *Norm and Action* (London: Routledge & Kegan Paul, 1963), 85–89, benefiting from refinement by Joseph Raz in his "Permissions and Supererogation," *American Philosophical Quarterly* 12 (1975): 161–68.

2. The two best treatments of this widely treated topic are Jeremy Waldron, "The Right to Do Wrong," *Ethics* 92 (1981): 21–39; and David Enoch, "A Right to Violate One's Duty," *Law and Philosophy* 21 (2002): 355–84.

like ourselves.[3] McMahan's work differs from many of its competitors in its recognition and rigorous observance of the need for an agent-neutral distinction between D and E. And it shows—both by the exacting labors involved and by the avowedly tentative character of its conclusions—just how hard it is to identify such a distinction and to settle precisely its moral implications. McMahan digs deeper than anyone else working on the subject today, yet he realizes and admits that he has still some way to go before he gets to the bottom of the puzzle.

All the same, we tend to think that McMahan has so far been inclined to underestimate—and therefore to sideline too quickly—one particular proposal for distinguishing D agent-neutrally from E. It is a proposal that remains influential in the popular imagination while having fallen out of favor among philosophers. It is that what is done to E by D, unlike what would otherwise be done to D by E, is deserved. For E is the guilty (aka culpable, blameworthy, faulty) wrongdoer, and D is his innocent (aka nonculpable, blameless, faultless) victim.

Of the various obvious objections to this vulgar proposal (as we will call it),[4] the most obvious is that it is hopelessly conclusory. In explaining what makes D morally innocent in her self-defensive actions against E, we plainly can't invoke her moral innocence. She is morally innocent in respect of her self-defensive actions only if the morality of self-defense makes her morally innocent in respect of her self-defensive actions, and why and when it might do so is the very question under discussion. One might try to stand up for the vulgar proposal on this score by saying that what counts, for its purposes, is D's being otherwise morally innocent. To be an innocent self-defender she must be innocent of some other, presumably prior, wrong. We will not pursue this idea here. Instead we will focus on what the vulgar proposal says about E. Even if one cannot rely on D's innocence in establishing D's innocence, one can still rely on E's guilt in establishing D's innocence. That is, one can replace the comparative version of the vulgar proposal—which compares D's innocence with E's guilt and hence leads one to think of the two as independent of each other—with a noncomparative version by which D's innocence qua defender, her innocence in the relevant respect, depends on E's

3. Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009).

4. We mean "vulgar" in its older sense of "lay-popular" rather than in its contemporary sense of "coarse." Our choice of label is affected, however, by the fact that desert-thinking is often seen by modern writers as rather déclassé. Perhaps unwittingly, John Rawls's remarks in *A Theory of Justice* (Cambridge, MA: Bellknap Press, 1971), 310–15, banished deserts to below the stairs for a generation.

guilt, or more exactly on the fact that her self-defensive action gives E no worse than he deserves in the circumstances.[5]

This is the version of the vulgar proposal that we will be exploring here. Our discussion proceeds as follows. In Section II we seek to make this version of the vulgar proposal more precise. In Section III we set out McMahan's objection to it. In Sections IV and V we set out two responses to the McMahan objection, the second of which helps to show where, in the morality of self-defense, the vulgar proposal might have its proper role. The only possible role we find for it, we should say at the outset, is a subsidiary one. It is no rival to McMahan's headline proposals for distinguishing D from E. Nevertheless we wonder whether McMahan still has a possible need for it. In particular, his views about the determination of proportionality in self-defense seem to be poorly served by the rationale he gives for them and may ultimately be better explained, we think, by the vulgar proposal that officially he rejects. We explain why in Section VI.

II. THE VULGAR PROPOSAL ELABORATED

The vulgar proposal, in common with his own proposal for distinguishing D from E, is what McMahan calls a "Justice-based Account of the right to self-defense."[6] We have two quibbles with this characterization. We already mentioned our worry about framing the issue as an issue about rights. Although the fact that she has a moral right can bear on the moral position of the right-holder, it need not do so. It need only bear on the moral position of others, by imposing a duty on them.[7] D may have, for example, a right to self-defense that, in at least some cases, yields a duty on E not to neutralize or resist D's self-defensive actions. But the question of whether E has such a duty lies further down the line. So does the question of whether any of the rest of us have duties not to obstruct D, or not to punish D, or to help D prevail against E, and so forth. One needs to consider D's

5. On comparative vs. noncomparative desert, see Serena Olsaretti, ed., *Desert and Justice* (Oxford: Oxford Unversity Press, 2003), especially the essays by Miller, Hurka, and Kagan.

6. Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker," *Ethics* 104 (1994): 252–90, 259. See also *Killing in War*, e.g., 207.

7. We are being more accommodating here than we would want to be in a fuller discussion. What we say in the text allows that some rights might ground only a permission while others ground only a duty. Our actual position is that nothing is a right unless it grounds a duty, never mind whether it also grounds a permission. There are no rights that only ground permissions. In the unhappy but familiar Hohfeldian terms, "liberty-rights" are not rights unless they are also "claim-rights." For one good argument to this effect (among many), see James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 102–4.

moral position before considering its implications for others' actions. Premature talk of the right to self-defense distracts one from this task. To avoid the distraction, we will speak of the moral permissibility of self-defense (temporarily suppressing our worry, mentioned already, that even this improved terminology invites confusion between very different ideas).

Our second quibble with McMahan's characterization is this. It is not helpful to regard the vulgar proposal as giving anything so grand as an account of the moral permissibility of self-defense. It gives an explanation of one aspect of the moral situation of self-defender D, namely, the existence of a moral asymmetry between her and E. There is a lot more that it does not explain. It does not explain why, for example, D's act has to be necessary for her self-defense, or why D has to act for self-defensive reasons, both of which we believe, and here assume, to be necessary conditions of morally permissible self-defense. McMahan's own justice-based idea for replacing the vulgar proposal may be more ambitious.[8] But the vulgar proposal is only meant to explain how E can be a morally suitable target for D's self-defensive actions, assuming that they meet the other conditions for the moral permissibility of self-defense. If it explains this aspect of the situation, then it also explains (by further application of the same principle) why D is not a morally suitable target for E's ensuing self-defense against D's self-defensive actions. Having given E no more than what he deserved through her self-defensive actions, D does not deserve what E does to her by way of self-defensive response. Therein lies the moral asymmetry. This reveals a way in which the moral position of E is unavoidably affected by D's moral position. At this point it becomes a bit less distracting to talk of D's right to self-defense. For the very doctrine that renders D's self-defensive actions against E innocent then denies, by a second application, the same innocence to E when E acts in similar self-defense against D's ex hypothesi innocent self-defensive actions.

These, as we said, are quibbles. They should not be allowed to eclipse McMahan's insight that the vulgar proposal, in common with his own alternative proposal for distinguishing D from E, adds a justice-based element to the morality of self-defense. You may wonder what is insightful about this observation. Surely every possible view of the morality of self-defense, by its very nature, includes proposed norms that regulate the allocation of goods and ills as between at

8. For example, McMahan regards his own replacement Justice-based account as coming with the "internal" restriction that E "cannot be liable to attack when attacking him would be wrong because it would be unnecessary or disproportionate." McMahan, *Killing in War*, 9.

least two people? And surely such a norm is without further ado a norm of (comparative, distributive) justice? So surely the question "Who gets to defend herself and when?" cannot be answered without designating certain actions as just and unjust? True enough. However, as McMahan notices, it does not follow that every possible answer to the question "Who gets to defend herself and when?" is a justice-based answer. Not every possible answer relies on some further and independent norm of justice to give shape to the norms of justice that specifically regulate self-defense. The vulgar proposal, however, does so. It relies on what is claimed to be an independent norm of noncomparative justice together with a scoping rule that determines the application of that norm.

Here are our formulations of the claimed norm (NCJ1) and its scoping rule (NCJ2):

> (NCJ1) It is morally permissible intentionally to inflict suffering or deprivation (we will say "harm" for short)[9] only on those who deserve such an infliction and only to the extent that they deserve it.
>
> (NCJ2) Those who deserve such an infliction are all and only guilty wrongdoers, to the extent and only to the extent that the infliction is proportionate to their guilty wrongs.[10]

These formulations help to confirm that the version of the vulgar proposal we are interested in really is noncomparative. Although NCJ1 and NCJ2 have implications for the comparative positions of D and E this is an accidental consequence of their application to cases of self-defense, in which they are applied iteratively to the actions of two or more parties to the same conflict. NCJ1 and NCJ2 are clearly not comparative as they stand.

Several other aspects of NCJ1 and NCJ2 call for clarification or amplification before their merits can be assessed. Notice, first, that NCJ1 does not bear on the whole range of self-defensive, let alone the whole range of defensive, actions. It says nothing, for example, about most self-defensive steps taken by the defendant during a civil or crim-

9. But only for short: one may suffer or be deprived, in the sense relevant to NCJ1, without strictly speaking being harmed, and vice versa. See Matthew Hanser, "The Metaphysics of Harm," *Philosophy and Phenomenological Research* 77 (2008): 421–50, on what is often known as the "prospective" aspect of harm.

10. Throughout we use the words "guilty" and "innocent" where others, including McMahan, prefer "culpable" and "nonculpable." Nothing turns on this. McMahan avoids "guilty" and "innocent" mainly because these words have assumed a highly technical meaning in so-called just war theory, an ideology of which *Killing in War* is a critique. See McMahan, *Killing in War*, 32–35.

inal trial. It is also silent about such straightforward self-defensive measures as running away at the first sign of trouble or pretending to be dead. The moral puzzle we started with—"how can the fact that it is (self-) defensive ever to make or help to make an action less heinous or reprehensible than it would otherwise be?"—also arises in connection with these actions. They are often morally troubling. They merit more philosophical attention than they get.[11] NCJ1, however, has nothing to say about them unless they are in some way harmful. And even if they are, NCJ1 has nothing to say about them unless the harm is inflicted (as opposed to merely caused, occasioned, left unprevented, etc.) by the self-defender and unless its infliction is intended by its inflictor.

This last restriction on the scope of NCJ1 is particularly important. There are, of course, moral restrictions on the infliction of harm as a side effect of self-defensive measures. Perhaps D's self-defensive plan only involves crushing E's hand in the elevator mechanism (depriving him of his hand); but D knows it is highly likely that in the process E will be crushed to death (depriving him of his life). Clearly, neither this likelihood nor D's knowledge of it is irrelevant to the morality of D's actions. Yet NCJ1 has nothing to say about either of them. Nor, a fortiori, does it have anything to say about the many cases in which D's self-defensive strategy is merely to restrain, obstruct, trap, deceive, confuse, escape from, or distract E, such that any consequent harms to E or anyone else, however surely foreseen by D, are surplus to D's self-defensive plan. Once again we see the limited contribution that the vulgar proposal aims to make to the morality of self-defense. It does not concern itself with the harmful side effects of self-defensive actions, even though (on any plausible view) self-defensive actions can sometimes be rendered impermissible by their harmful side effects, and even though self-defensive actions may indeed be entirely harmless actions when considered apart from their harmful side effects.[12]

In these ways NCJ1 is strikingly narrow. But notice—our second

11. There is a newly burgeoning literature on defense/prosecution moral asymmetries in the criminal trial. A particularly vast contribution is Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros, eds., *The Trial on Trial*, 3 vols. (Oxford: Hart, 2004–7). The oddity remains, however, that these asymmetries are not usually treated as raising issues in the morality of self-defense. A rare and shining exception: Alice Ristroph, "Respect and Resistance in Punishment Theory," *California Law Review* 97 (2009): 601–32.

12. We join McMahan in rejecting the view that intention cannot be, or normally isn't, relevant to moral permissibility. The best attempts to defend the view that we reject are T. M. Scanlon, "Intention and Permissibility," *Proceedings of the Aristotelian Society Supplementary Volume* 74 (2000): 301–17; and F. M. Kamm, *Intricate Ethics* (Oxford: Oxford University Press, 2007), chaps. 3–5. Some of McMahan's comments on the point are in *Killing in War*, e.g., 113–14 and 171–72.

alert—that in other ways it is strikingly broad. It does not concern itself only with self-defensive actions. It is not about self-defense as such. It states a wider (we said "further and independent") norm of justice which, if sound, regulates intentional inflictions of harm in general. It regulates them equally, for example, when they are punitive. One familiar worry about NCJ1 is that, if one accepts it, it commits one to admitting at least one continuity between the morality of self-defense and the morality of punishment. Many want the two topics to be kept apart.[13] But it is not clear how, morally speaking, they can be kept entirely segregated. One of the features of punitive action that makes it morally troubling is that, if the person punished goes unharmed, the punitive plan fails qua punitive. Harming him is, in that respect, welcome. If that is a troubling feature of punishment, why is it not equally a troubling feature of at least some (and some typical) actions in self-defense? As we said in the previous paragraph, a self-defensive plan often (not always) fails qua self-defensive if the person defended against manages to avoid harm. D needs E's hand to be crushed if her plan is to work. Harm to E is, in that respect and to that extent, welcome to D. If we find that fact less troubling in the self-defense case than in the punishment case, as probably most people do, NCJ1 challenges us to say why.

Notice, third, that whereas NCJ1 draws a distinction between the permissible and the impermissible, NCJ2 draws a distinction between the guilty and the not-guilty (or innocent). To be not guilty in the sense that matters for NCJ2 it is not necessary to act permissibly. One may act impermissibly and yet still act with a good excuse, extinguishing any guilt. Suppose D defends herself excessively by the light of NCJ1 but does so in a reasonable misapprehension of what E is about to do to her. The reasonableness of her misapprehension would make her not guilty for the purposes of NCJ2, and that would rule out E's having a permissible self-defensive response under NCJ1 to D's excessive self-defense. But suppose E does fight back all the same. In establishing E's moral innocence for the purpose of further applications to him of NCJ2, and hence for the purpose of determining what further self-defensive measures by D against E would be permissible under NCJ1, E in turn would be protected by any excuses of his own that he had at his disposal. This paves the way for complex cases in which the moral positions of D and E do not stay quite as straightforwardly

13. Or at any rate allow them to be assimilated only on condition that punishment is understood on a defensive model rather than the other way round. See, notably, Warren Quinn, "The Right to Threaten and the Right to Punish," *Philosophy and Public Affairs* 14 (1985): 327–73; and Daniel Farrell, "The Justification of Deterrent Violence," *Ethics* 100 (1990): 301–17.

asymmetrical throughout the conflict as our first rough statements of the vulgar proposal may have led one to expect. NCJ1 and NCJ2 do not add up to say that anyone whose actions are not rendered permissible by them is by that token alone fair game to be on the receiving end of self-defensive actions that are rendered permissible by them. They do not, in other words, entail the moral counterpart of a zero-sum game.

We have presented NCJ1 as formulating a norm of justice. But notice, fourth, that whether what is formulated in NCJ1 is strictly speaking a norm at all depends on the meaning of "permissible." We already mentioned the two possible meanings. If what is formulated in NCJ1 is capable of justifying breaches of duty then it is a norm. If NCJ1 merely reports that in certain cases there is no duty, it does not strictly speaking formulate a norm. It formulates what we could call a norm-absence, that is, whatever is left unregulated by a norm, in this case a duty-imposing norm.

Notice, finally, that what NCJ2 formulates is neither a norm nor a norm-absence. It does not grant any permissions or impose any duties, but neither does it entail that anything is unregulated by a duty or permission. It is just a scoping rule, one that determines the scope of the permission in NCJ1.[14] However, it does not follow, as you might think at first, that NCJ2 can simply be collapsed into NCJ1 to save words. In the collapsing one would abandon all reference to desert. One would end up with

> (NCJ′) It is morally permissible intentionally to inflict harm only on the guilty and only in proportion to their guilt.

Although NCJ′ would provide a moral permission of the same scope as that provided by NCJ1 and NCJ2 together, it would not be the same moral permission. The references to desert in NCJ1 and NCJ2 are not just placeholder references. As we will see, they have moral implications. These implications, which he finds alien to the morality of self-defense, are the focus of McMahan's argument against the vulgar proposal. McMahan would not pick the same argument with NCJ′. What he principally objects to in the vulgar proposal is not that the vulgar proposal provides D with a moral permission of the wrong scope (one that is available in defending herself only against a guilty E), but that it does so on the wrong ground (namely, on the ground that E deserves what he gets). NCJ′, unlike NCJ1 and NCJ2, is indifferent regarding the ground of its permission and evades McMahan's objection.

14. On non-norm rules such as scoping rules, see Tony Honoré, "Real Laws," in *Law, Morality, and Society*, ed. P. M. S. Hacker and J. Raz (Oxford: Clarendon, 1977).

III. MCMAHAN'S AVOIDABILITY ARGUMENT

We have just hinted at an argument that McMahan does not make against the vulgar proposal, even though he might have been expected to make it by someone casually acquainted with his views on the morality of self-defense. McMahan is one of those who thinks that it is at least sometimes morally permissible to defend oneself against people who do not deserve what one intentionally does to them by way of self-defense.[15] Yet he does not think that the moral permissibility of self-defense against the nonguilty, by itself, throws up an objection to the vulgar proposal. In dealing with the vulgar proposal he tries to remain open to the possibility, which indeed he embraced in earlier work on the subject, that the moral basis of self-defense against the guilty may be different from the moral basis of self-defense against the innocent. They may be governed by different norms of self-defense, and those norms may be based, in turn, on different norms of justice, or on a norm of justice in one case and a norm not of justice in the other.[16]

So McMahan's objection is not that the vulgar proposal provides D with a moral permission of the wrong scope, but rather that it does so on the wrong ground. To get his objection clear, consider a simple case—call it *Kill or Be Killed*—in which the only way for D to avoid being intentionally killed by E is for her to kill E first. D knows this and therefore makes killing E her self-defensive aim. So the situation is: either D intentionally kills E or E intentionally kills D. If D could defend herself by doing anything short of intentionally killing E then, on any plausible view, D's intentionally killing E would not be morally permitted. So, for example, if D could escape by knocking E out (even if she knew that he would die as a side effect), she would not be morally permitted to kill E intentionally. A fortiori if she could escape by knocking D over without knocking him out. And so on. These facts sit ill, claims McMahan, with the vulgar proposal. "The claim that someone deserves to be killed," he writes, "implies that there is a

15. For his latest remarks, see *Killing in War*, at 162ff. His classic treatment, on which we place some emphasis here, is McMahan, "Self-Defense and the Problem of the Innocent Attacker."

16. McMahan, "Self-Defense and the Problem of the Innocent Attacker," 256. More precisely, he says, "the correct justification for self-defense in certain cases is incapable of supporting it in other cases in which I believe it to be permissible" (ibid., 256). He goes on to say that a "Justice-based account" (although not of course the one captured in our vulgar proposal) "provides a compelling—indeed in my view the best—explanation of the permissibility of self-defense against a [guilty attacker]" even though it does not provide "a complete account of the foundations of the right to self-defense," for that right also covers self-defense against nonguilty attackers (ibid., 263).

reason to kill her even if it is possible for no one to be killed."[17] Why—challenges McMahan—would D's permission to self-defend limit her to reallocating an unavoidable harm from D to E, when what is deserved by D or by E is unaffected by any question of its avoidability? Hence McMahan's view that NCJ1 cannot provide even part of the explanation for the moral permission to self-defend against the guilty.

To give this avoidability argument its initial appeal, it has to be read as concerned with what we will call "moral avoidability." Suppose we modify Kill or Be Killed so that D has a third way. In *Kill or Be Killed or Else*, D could avoid both her intentionally killing E and E's intentionally killing her, but only by breaking her solemn vow (to F's dying mother) to protect seven-year-old F as if F were D's own child. One need not assume that this third way would involve F's being killed (by E or by anyone) in order to conclude that this could be a situation of unavoidable killing. Possibly, given D's vow, exposing F to certain other harms or even dangers of harm will suffice to rule out the third way and, hence, to make the killing of either D or E unavoidable in the relevant sense. We tried to foreshadow this point in the previous paragraph by talking about an action "short of" intentionally killing, but "short of" tends to understate the complexity of determining which options are eligible. It would be impossible to explore this complexity in any detail here. But it is also impossible to ignore it. McMahan is presumably not interested in an explanation of the permissibility of self-defense that appeals only to those for whom there could never be an option worse than either killing or being killed, or such that one could never permissibly defend oneself if one had such an option in addition to those of killing or being killed. We will read McMahan as setting a moral avoidability condition, complete with whatever complexity it involves, while reserving our position on whether his conceptualization of the morality of self-defense in terms of avoidability can survive the exposure of the complexity.[18]

17. Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Perspectives* 15 (2005): 386–405, 386.

18. By labeling the extra issue in Kill or Be Killed or Else as one of "moral avoidability," we do not mean to suggest that the issue of avoidability in the simpler Kill or Be Killed case has no moral aspects. Of course it does. On any plausible view the ranking of harms for the purpose of determining proportionality has to factor in various moral evaluations, and McMahan does this unhesitatingly (e.g., *Killing in War*, 156). The vulgar proposal to factor in desert evaluations is in this respect nothing special and no different from McMahan's own proposals. See further Sec. VI below.

The extra issue in Kill or Be Killed or Else is only this: how does the third possibility of letting F down get factored into the assessment of proportionality, given that killing is ex hypothesi only necessary once letting F down has been ruled out? The problem is compounded by the fact that McMahan's emphasis on avoidability, moral or not, en-

In *Killing in War* the avoidability argument is burdened, we think unnecessarily and distractingly, with another complication. McMahan is no longer content to claim that, if anyone deserves anything, then we have reason to give him or her the deserved thing even when it is possible to avoid doing so. He now claims that if anyone deserves anything, then there is intrinsic value in giving him or her the deserved thing.[19] Perhaps McMahan takes this to be the same claim expressed differently, or a necessary implication of it. But it is neither. It is an extra claim about deserts which, if it is taken to be an assumption of the avoidability argument, will merely lead adherents of the vulgar proposal to be less troubled by the avoidability argument than they should be. For the extra claim is false. John Rawls and H. L. A. Hart each showed, in their different ways, that it is possible to find a constitutive role for reasons of desert in a practice that has nothing but instrumental value.[20] There may be question marks over the usefulness of this Rawls-Hart position for those trying to stand up for NCJ1 in its application to self-defense. But the question marks do not come of any weakness in the Rawls-Hart position. That someone deserves something does not mean that there is intrinsic value in giving it to him or her. But surely it does entail that there is a reason to give it to him or her even if doing so is avoidable? In which case surely NCJ1 cannot play the advertised role in the morality of self-defense? These are the only thoughts that McMahan needs in order to give the avoidability argument its persuasive traction.

IV. FIRST RESPONSE: A PERMISSION IS NOT A REASON

A first response to the avoidability argument is that, if it were sound, it would tell equally against a familiar and attractive way of integrating

courages the folding together of questions of proportionality and of necessity, even though McMahan insists on the difference between them (ibid., 23). One may be led to think that something is exaggerated, or lost, in McMahan's whole emphasis on avoidability. This may open up a more radical critique of his approach.

19. McMahan, *Killing in War*, 8. Indeed, McMahan goes further and claims that if there are any reasons of desert then giving people what they deserve is "an end in itself." Not everything intrinsically valuable is an end in itself, i.e., unconditionally valuable, so this is a further upping of the ante.

20. John Rawls, "Two Concepts of Rules," *Philosophical Review* 64 (1955): 3–32; H. L. A. Hart, "Prolegomenon to the Principles of Punishment," *Proceedings of the Aristotelian Society* 60 (1959): 1–26. By the same route Rawls and Hart also established that a norm's being a norm of justice does not entail that the case for it need be anything other than instrumental. Some think that what Rawls and Hart are talking about are not "real" deserts. But they are real enough for our purposes, since (to the extent that they show or assume reasons to give people what they deserve) they are caught in the net of McMahan's avoidability argument.

desert into the norms that regulate punishment.[21] The fact that B deserves to be punished is often thought to be a necessary but not a sufficient condition of someone's being morally permitted to punish B. According to one family of views about the defensibility of punishment—often called "mixed" or "pluralistic" views—deserved punishment must also yield a further (desert-independent) good before anyone is morally permitted to inflict it. Among the stricter of these pluralistic views are those according to which the harm intended by the punisher needs to be morally unavoidable as well as deserved. It needs to be such that the harm intentionally inflicted on those who deserve it displaces (by incapacitation, deterrence, pacification, rehabilitation, etc.) a no-lesser totality of harm than would otherwise be intentionally inflicted later, whether by the person punished or by others, and whether upon the person punished or upon others. And there has to be no alternative way to do the displacing that is not morally worse.

Should we reject this kind of pluralism about punishment on the McMahan-like ground that there remains a reason to inflict the harm—namely, that it is deserved—even when the unavoidability condition is not met? No, we should not. Let's accept that there is a moral reason to inflict deserved harm—namely, the fact that it is deserved—even when harm is avoidable. We can accept this without conceding that this reason makes the avoidable infliction of the deserved harm morally permissible. What we have a moral reason to do is one question; what we are morally permitted to do is another. The pluralist about punishment who says that permissible punishment must always be unavoidable as well as deserved need not deny that there is a moral reason to punish even when punishment is avoidable. All that she needs to deny is that it is ever morally permissible to carry out such a punishment, and hence (regretfully) we must leave some people unpunished in spite of the fact that they deserve punishment.

You may object: if the fact that punishment is deserved is a moral reason to punish, there must be conceivable cases in which that reason suffices to make punishment morally permissible even when it does no other good. Here "permissible" takes on a third and somewhat misleading sense, which we will otherwise ignore. It simply means "justifiable." An action is justifiable if and only if there is an undefeated reason for performing it. There need not be any norms, permissive or otherwise, in play. The thought, then, is this: there is no such thing as a reason that always needs reinforcement by other reasons before it is capable of prevailing in conflict with countervail-

21. McMahan mentions but does not discuss this way of thinking about punishment. See McMahan, "Self-Defense and the Problem of the Innocent Attacker," 260.

ing reasons. Or is there? There are several sources of doubt. Here is one that is local to the morality of desert. It is plausible to think that the greater the infliction of harm one deserves, the more forceful the reasons of justice for inflicting it upon one qua deserved. But it is also plausible to think that the greater the infliction of harm, deserved or otherwise, the more forceful the reasons of humanity against inflicting it qua harmful.[22] Some who believe that punishment calls for a mixed or pluralistic defense may be moved by this combination of thoughts. They may think that the reasons of justice in favor of punitive action and the reasons of humanity against that same action track each other, so that the force of the reasons of justice is systematically counteracted by the force of the reasons of humanity.[23] It would follow that the reasons of justice in favor of punishment are always defeated when they alone militate in favor of punishment. It always takes a further independent reason (e.g., that greater harm can be averted only by inflicting harm) to overcome the inhumanity objection and make an infliction of deserved punishment justified.

The issue, however, is irrelevant to the fate of NCJ1. NCJ1 does not say that one has a reason intentionally to inflict harm. It says (or rather allows without needing to say) that if one has such a reason, and the reason is otherwise undefeated, then it is permissible to inflict the harm for that reason, so long as the infliction is deserved. The reason need not be a reason of desert. In the present context, indeed, it cannot be a reason of desert. It must be a reason of self-defense, for our topic is the application of NCJ1 to self-defensive actions, meaning actions taken for reasons of self-defense. Recall that NCJ1 is not offered as an explanation of the permissibility of self-defense. It is both narrower and broader than that. It is broader in that it also applies to punitive actions and numerous other actions that are neither punitive nor self-defensive. To all of these actions it applies the same condition of permissibility. Being permissive, it does not supply any reason to take any of them. It certainly does not supply the same

22. Antony Duff objected, in conversation, that the same action can't be both good and bad in the same aspect, and that the apparently twin aspects picked out here (qua deserved and qua harmful) are actually the same aspect, for the harm is the very thing that is deserved. We doubt whether Duff's major premise is true. On the possibility of the very same fact about or property of an action qualifying as a reason both for and against its performance, see Michael Slote, *Good and Virtues* (Oxford: Oxford University Press, 1983), chap. 1, and, more in tune with our thinking, Michael Stocker, *Plural and Conflicting Values* (Oxford: Oxford University Press, 1990), chap. 2.

23. We say "counteracted" rather than "neutralized" because of course the reason of desert is still there throughout and is capable of being an undefeated reason for punishing once it is reinforced by other reasons.

reason to take all of them. For they are distinguished precisely by being taken for different reasons.

Interesting questions are raised by the possibility of mixed motives, of actions performed partly for self-defensive reasons and partly for punitive reasons. Are such hybrid actions ever permissible? For the most part, that problem belongs to a different discussion. But notice that even if such actions are never permissible, that is not because NCJ1 does not permit them. NCJ1 draws no distinction at all between self-defensive and punitive actions, so it could hardly disapply itself from hybrids of the two. However, it does not follow from the fact that NCJ1 does not draw the distinction between self-defensive and punitive actions that it actually obliterates the distinction. It would do so if it gave reasons of desert in favor of self-defensive actions. For then, at least sometimes, reasons of desert would be available for the self-defender to follow in her actions, and a basic distinction between punishment and self-defense would be lost.[24] But NCJ1 does not give such reasons. That is because it does not give any reasons to do anything. To repeat, it is purely permissive.

Confusion creeps in here because arguably, in the course of stating a supposed permission, NCJ1 mentions a reason to do the very thing that the permission permits. Arguably, as soon as one mentions deserts, one mentions reasons for acting; arguably it is built into the very concept of desert that K's deserving something is a reason for someone to give that something to K. If that is so, then not only NCJ1 but also NCJ2 mentions a reason. NCJ2 implies that there is a reason of desert in favor of intentionally inflicting harm on the guilty. Let there be such a reason and let NCJ2 mention it. It does not follow that the rule in NCJ2 gives anyone that reason. NCJ2 mentions a reason of desert but also states, quite separately, a scoping rule for NCJ1, a role to which the reason that it mentions is irrelevant.

Or is it? We interpreted NCJ1 to mean that if one has a reason intentionally to inflict harm, and if the reason is otherwise undefeated, then it is permissible to inflict the harm for that reason, so long as the infliction is deserved. Now we are allowing *arguendo* that NCJ2 mentions a reason that one sometimes has intentionally to inflict

24. We are not assuming that punitive steps are necessarily taken for reasons of desert (the famous "definitional stop" of Anthony Quinton's "On Punishment," *Analysis* 14 [1954]: 133–42). Our assumption is only that punitive steps, unlike self-defensive ones, are capable of being taken for reasons of desert. But we are relying here (and elsewhere in this section) on the thought that nothing is a reason to ϕ unless in at least some imaginable cases it would be possible to ϕ for that reason. For explanation and defense, see John Gardner and Timothy Macklem, "Reasons," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford: Oxford University Press, 2002).

harm. It is a reason of desert. Doesn't it follow that, under NCJ1, it is permissible to inflict harm intentionally for a reason of desert, so long as that reason is otherwise undefeated? Yes it does follow. Which suggests that, in cases of permissible self-defense, the applicable reasons of desert are not otherwise undefeated. And that strikes us as a plausible view. Probably there are moral norms of self-defense which distinguish the moral position of the self-defender from that of the punisher by excluding reasons of desert from the deliberations of the former and, hence, rendering those reasons as defeated.[25] Possibly these moral norms exist for division-of-labor reasons, to keep moral functions apart when their confusion might be a recipe for further injustice. Or maybe the difference runs deeper. But be that as it may, NCJ1 does not formulate one of these moral norms. Nor does it formulate an exception or proviso to one. It formulates a moral norm or norm-absence bearing on the intentional infliction of harm. This norm or norm-absence must be joined by moral norms specifically regulating self-defensive actions before we have in place even the rudiments of a morality of self-defense.

V. SECOND RESPONSE: UNDESERT AS A REASON

You may think there is a shorter and more decisive answer to McMahan's avoidability argument. The reason of desert we have been discussing up to now, following McMahan's lead, is a reason in favor of inflicting harm, namely, the fact that the infliction is deserved. But there also exists a parallel reason against inflicting harm, namely, the fact that the infliction is undeserved. At any rate there is a moral reason of undesert (we will call it "the undesert reason") if there is a moral reason of desert ("the desert reason"). It seems likely that the undesert reason plays a major role in the moral case for NCJ1, in a way that the desert reason does not. Remember that under NCJ1, what is permitted is the intentional infliction of harm only on those who deserve it. The desert reason would presumably support an "all," not an "only." The fact that it is an "only" suggests that NCJ1 exists to protect the innocent or, in other words, to serve the cause of the undesert reason as opposed to the desert reason.[26]

25. For the explanation of how excluding works as a way of defeating, see Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975), chap. 1, sec. 2.

26. In correspondence, Jeff McMahan raised the following objection to the existence of the undesert reason. If it exists, he said, it is presumably not only a reason not to harm people beyond what they deserve, but also a reason not to benefit people beyond what they deserve. But that, said McMahan, would rule out the permissibility of generosity. Surely we don't want to do that? True, we don't. But it's one thing to rule out its permissibility and another to recognize, as we do, that there's a reason against it, namely (if nothing else) the cost to the generous person. If there were no reason against generosity,

It is crucial to grasp that the desert reason and the undesert reason are two different reasons. They are often mistaken for one. Where an innocent person is punished in place of a guilty person there are (apart from any comparative objections that may arise) two separate noncomparative objections that depend on an assignment of desert: first, that a person who deserved to be punished was not punished; second, that a person who did not deserve to be punished was punished.[27] McMahan's avoidability argument tells us that the first of these objections has no parallel in the morality of self-defense. For the sake of argument, suppose that to be true. How about the second objection? That is surely a different matter. If someone is killed in self-defense, friends of the deceased may object that the killing was avoidable. But they may also object that the deceased didn't deserve to be killed. Surely they are not thereby committed to saying that if the deceased had indeed deserved to be killed, that would have been a reason for the self-defender to kill him. They may be interpreted as saying that. They may be interpreted as saying that there is a general reason not to kill, which conflicts with a reason to kill people who deserve to be killed (the desert reason). But they may also be interpreted as saying that the general reason not to kill people is positively augmented here by the fact that the killing was undeserved (the undesert reason).

Or maybe they cannot avoid implicitly invoking the desert reason too. Recall what we said in Section IV: arguably it is built into the very concept of desert that K's deserving something is a reason for someone to give it to K. If that is true then one cannot assert the existence of the undesert reason, even in self-defense cases, without implicitly asserting the existence of the desert reason too. And then we are returning to the question discussed in Section IV. If the desert reason exists why are there cases in which it is excluded from consideration? Why, to put it another way, is there a morality of self-defense as distinct from the morality of punishment? As you know we are not answering that question here. But the fact that we have come back round to it shows that this second response to McMahan is not, after all, "shorter and more decisive" than our first.

We tend to think that the second response, like the first, can negotiate these challenges. But there is an additional and more severe challenge to the second response. Return to the friends of E who complain that D's killing of E was avoidable, or that it was more than E deserved. The "or" makes the two complaints sound independent

indeed, it's hard to see why it would normally be regarded as supererogatory to engage in it. McMahan thought we would be ruling out supererogation in such matters but in fact we are showing how it is possible.

27. See Hart, "Prolegomenon."

of each other. But really they cannot be. In complaining that killing was more than E deserved, his friends are saying that there was an undesert reason for D to have inflicted less harm on E than she did. But if the totality of harm in the situation was really unavoidable, then it cannot be lessened overall by D's inflicting less harm on E. For by hypothesis it cannot be lessened at all. The consequence of less harm being inflicted on E would be more harm inflicted on D (or on someone else). Agent-neutrally conceived, then, giving E only what he deserved could only have been a futile act of self-sacrifice by D. So McMahan's avoidability argument anticipates and survives our second response to it. Where the issue is what is to be done about unavoidable harm—as in the ordinary run of self-defense cases—reasons of desert and reasons of undesert alike have no role to play. As soon as they do play a role there must be some avoidable harm in the picture: either it is proposed to add avoidable harm to E because it is deserved or it is proposed to subtract avoidable harm from E because it is undeserved.

Our point is not, we hasten to add, that it would have been morally indefensible for D to make a futile self-sacrifice. We are assuming here that, barring special cases, defending oneself is not one's moral duty; it is no more than morally permissible. The question we are discussing is whether reasons of undesert can be relevant to determining the limits of the moral permission in a way that, admittedly, reasons of desert cannot. The answer given by the avoidability argument—still assuming that "avoidability" means "moral avoidability"—is "no." True, if there are relevant moral reasons of undesert we have to factor these in when we are deciding what harms are worth inflicting for the avoidance of others. But that is no problem for the avoidability argument. Yes, the killing of E by D was more than E deserved; but so, by hypothesis, would have been the killing of D by E, presumably all the more so. Not only is the harm unavoidable, in other words. The undeserved harm is unavoidable too. So moralizing our assessment of the harm that is unavoidable will not get us where we need to be in the face of McMahan's objection.

The time is now ripe to concede that NCJ1 (whether scoped by NCJ2 or otherwise) cannot determine the outer limits of justified actions in self-defense. It cannot do so because in the type of self-defensive situations that we are discussing harm is, as McMahan says, unavoidable. And when harm is unavoidable, there inevitably lurks a question of how it should be distributed between two or more people if the amount of harm that they severally or jointly deserve to have inflicted on them does not exhaust the unavoidable harm that is up for distribution. That is a question of local comparative justice to which NCJ1, being noncomparative, cannot supply a pertinent answer.

It can supply a pertinent answer to various other questions, as we will see in a moment, but not to this one.

This concession is not as startling as it may seem. We already made the concession, in effect, in Section IV. We pointed out that there are justifications other than those provided by permissive norms. So our question was only ever whether NCJ1, conceived as a permissive norm, is relevant to the justification of actions in self-defense, meaning that it provides one route by which they could be justified. And even that was not our only question. There was also the question of whether NCJ1 might be relevant to self-defense in quite another way than by conferring a justification on it. Perhaps, as we said, it states not a permissive norm but rather the mere absence of a duty-imposing norm. When one falls under NCJ1, on this interpretation, the only implication is that a duty one would otherwise have had not to inflict harm intentionally is absent, and so there is no question of justifying, or even excusing, one's breach of that duty.

Some may wonder why we would care about NCJ1 if its relevance to self-defense were not to draw the one and only line between its being morally defensible and its not being morally defensible for D to defend herself against E. To that the answer is that there is no such one and only line. There are various kinds of defensibility divided by correspondingly many lines. Which does D cross? Does she breach a moral duty? If she does, is she justified in doing so thanks to a conflicting permissive norm? If not, is she nevertheless justified by some other route? And if none of this, we might add, is she nevertheless excused? Many recognize that the line between justification and excuse is worth drawing. Few care equally about the other lines.

Yet they should. All are morally significant. The line between being justified under a permissive norm and being justified in some other way is relevant to whether one acts supererogatorily. If NCJ1 formulates a permissive norm then it is relevant to whether D should be lauded or rewarded when she declines to take advantage of it and allows a guilty E to prevail over her by turning the other cheek. Or consider, more promisingly, a rival possibility. Possibly, as we said before, what NCJ1 formulates is not strictly speaking a permissive norm. Possibly it is a norm-absence. D has a duty not to inflict harm intentionally on E beyond what E deserves; but even when D goes beyond what E deserves in inflicting harm on E, the infliction may still be justified by other norms and reasons, including but not limited to norms and reasons of comparative justice.[28] This is the main role of NCJ1, it seems to us, in the morality of punishment. It is not the case,

28. Recall that the relevant norms of comparative justice might include norms of comparative desert: see n. 5 above.

as some suppose, that we are never justified in punishing those who do not deserve it, or never justified in punishing those who do deserve it more than they deserve. It is only the case that when we do punish these people we breach a duty to them and so, ceteris paribus, we owe them an apology as well as compensation (assuming it is not too late to repair some of the harm we did to them).[29] These seem to be the same implications that hold in at least some cases of self-defense, where E—otherwise a morally suitable target for D's self-defensive measures—is harmed more than he deserves to be by D. In at least some such cases D should apologize to E, and mitigate what she did to E, if possible, by compensating him. Although justified, she did breach a duty toward E; or as some put it, perhaps more cryptically than they need to, she wronged him rightly. If this much is true then the moralities of punishment and self-defense have something else in common beyond their shared focus on intended inflictions of harm. They have in common an important role for the contrast between guilt and innocence, and they have a role for that contrast under the heading of desert. That being so, the vulgar proposal as we formulated it is not so wide of the mark after all.

VI. A PROBLEM WITH PROPORTIONALITY

For McMahan, recall, E's guilt is not a necessary condition of D's permissible self-defense against E. In earlier work, however, McMahan suggested that the moral basis of self-defense against the guilty is different from the moral basis of self-defense against the innocent. The two cases, he suggested, are governed by different norms of self-defense, and those norms may be based, in turn, on different norms of justice, or on a norm of justice in one case and a norm that is not a norm of justice in the other. "I think it likely," wrote McMahan then, "that the right of self-defense does indeed have multiple independent foundations."[30] In *Killing in War*, however, McMahan seems to retreat from this view. He now presents self-defense against the innocent and self-defense against the guilty as sharing one and the same moral basis: "all are responsible to one degree or another for posing an objectively wrongful threat of harm to others."[31]

What is the difference between E's being responsible for a wrongful threat (which is required according to McMahan for D to be permitted to resort to self-defense) and E's being guilty in respect of it (which is not required)? McMahan answers that E's being responsible,

29. Hart, "Prolegomenon," 11–12.

30. McMahan, "Self-Defense and the Problem of the Innocent Attacker," 256. See n. 16 above for more extensive citation.

31. McMahan, *Killing in War*, 189.

unlike E's being guilty, is consistent with E's being excused. When E's actions are wholly excused, his guilt is extinguished and with it goes his liability to punishment. Yet the same E's "liability to defensive violence" is only "diminished" by his excuse. A partial excuse diminishes E's liability less than a complete excuse, ceteris paribus, but even a complete excuse leaves E open to permissible self-defensive measures.[32]

Why would this be? If E's liability is diminished by partial excuses, why not extinguished by complete excuses? More to the point, if not extinguished by complete excuses, why diminished by any excuses at all? McMahan's explanation is unsatisfying. He says that, even though one may be responsible when one is excused, the unexcused are more responsible than the excused, and the partly excused more so than the wholly excused.[33]

Some doubt whether responsibility for what one does, in any sense that makes responsibility distinct from guilt, varies by degrees.[34] But even if it does, we may doubt whether the degree of one's responsibility, in any relevant sense, varies with the relative completeness of one's excuse. It is plausible to think that one needs to be responsible, in the relevant sense, before one can even have an excuse. Aren't excuses, like justifications, among the responses (intelligible rational explanations for one's action) that are available to one only qua responsible agent?[35] It is hard to reconcile this thought with the thesis that the more complete one's excuse, the less one's responsibility. Perhaps there is some equivocation or dispute here about the relevant sense of "responsibility." Be that as it may, E's guilt makes a surprising and underexplained reappearance in McMahan's account of self-defense when we reach the question of whether D's self-defensive measures against E were proportionate, having been denied any role in determining whether D is permitted to take any self-defensive measures against E at all.

We have offered a possible explanation. Perhaps McMahan is collapsing two distinct metrics of proportionality, each applicable to a different class of self-defense cases. There is self-defense by D that is permissible in the sense that it breaches no duty to E. It breaches no duty because E only gets as much as he deserves. The proportionality of D's self-defensive reaction then depends on how much E deserves. But that still leaves open the possibility that D would sometimes be

32. Ibid., 155–56.

33. Ibid., 158.

34. See Anthony Kenny, "Can Responsibility be Diminished?" in *Liability and Responsibility*, ed. R. G. Frey and Christopher Morris (New York: Cambridge University Press, 1991).

35. For extended discussion of these issues, see John Gardner, *Offences and Defences* (Oxford: Oxford University Press, 2007), esp. chaps. 6 and 9.

justified in breaching her duty to E by going beyond what E deserves, or indeed in self-defending against E when E, being innocent, deserves none of what he gets in the process. Perhaps there is even a permissive norm to that effect that conflicts with D's duty not to harm E more than E deserves. And if there is a proportionality restriction in that norm, as seems likely, then what E deserves is not its metric, nor a plausible candidate to be part of its metric. D's self-defensive steps in such a case need to be proportionate to something else. To what? We are not sure. Nor need we make our minds up here. Our point, for now, is only that McMahan strikes us as having been closer to the truth in earlier work, when he favored the view that the morality of self-defense against the guilty has a different basis, and so incorporates a different metric of proportionality, from the morality of self-defense against the innocent. His attempt to bring the two moralities together in *Killing in War* strikes us as an unfortunate turn.

VII. CONCLUSION

In *Killing in War*, McMahan says that "no one supposes that the justification for killing enemy combatants is ever that they deserve to die; hence I will say nothing more about desert as a justification for killing."[36] We are not entirely sure that no one supposes this. We might even suppose it ourselves. It all depends on what McMahan means by "justification." What he says about justification is this: "Justification is a species of permission. A morally justified act is one that is not only permissible but that there is also positive moral reason to do."[37] This explanation passes the buck to his account of permission, which goes like this: "An act is morally permitted when, in the circumstances, it is not wrong to do it (even if it is of a *type* that is generally wrong)."[38] These last remarks leave much uncertainty about what a permission is for McMahan, because "wrong" is even harder to pin down than "permission" or "justification." So we are just not sure whether we suppose that, in the sense that McMahan has in mind, the justification for killing enemy combatants is ever that they deserve to die. We can certainly imagine that soldiers hope that those they kill in combat deserve to die. For even though this is not necessary to justify their actions (in the ordinary sense of "justify" that we have in mind) it does offer them an imaginable route to absolution: under NCJ1, plausibly interpreted as a norm-absence, no duty is breached, all else being equal, when the person killed deserved to be

36. McMahan, *Killing in War*, 157.
37. Ibid., 43.
38. Ibid.

killed.[39] In other cases a duty was breached and justification—again, in our sense rather than McMahan's—is needed. What can be offered by way of justification? We think that McMahan is right that some kind of local distributive justice must be invoked to do the work, and that this can also explain the scope, in the morality of self-defense, for D sometimes to self-defend even against an innocent E. We hope to pursue the idea further in later work. Meanwhile, our discussion here gave roundabout and perhaps surprising support to McMahan's most recent thinking on the subject, by showing that noncomparative justice could do some but not all the work that is needed to determine the justice of self-defense. A kind of comparative justice is needed to do the rest.

39. This would vindicate, regarding some but not all cases of self-defense, Hart's remark ("Prolegomenon," 13) that "killing in self-defense is an exception to the general rule." Hart's remark came in for severe criticism in Gardner, *Offences and Defences*, 79, but as we show here it need not be associated with the mistake with which it was associated there. (On a separate note: what we say in the text above should not be read as conceding that anyone ever deserves to be killed.)