MORAL LIABILITY TO SELF-DEFENSE: CHALLENGING JEFF
MCMahan’S FACT-RELATIVE ACCOUNT

By

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A thesis submitted to the Department of Philosophy
In conformity with the requirements for
the degree of Master of Arts

Queen’s University
Kingston, Ontario, Canada
(September, 2012)

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Abstract

The focus of this thesis is the normative base of moral liability to defensive harm. Many argue that liability is what makes it morally permissible to seriously injure or kill in self-defense or in the defense of others. Authors such as Jonathan Quong and Jeff McMahan argue that liability not only has important implications for the individual morality of self-defense, but that it plays a major role in the principles of just war conduct. How you determine when someone is liable will have a significant impact on when someone can be harmed. In this paper, I focus on the question of what a person must do to be morally liable to defensive harm. More specifically, I take a close look at Jeff McMahan’s moral responsibility account of liability and argue that it is unsatisfying as an explanation of when and why a person is liable. I then argue that an evidence-based account of liability better captures our moral intuitions surrounding liability. I end by considering an argument put forward by Quong on why we should not support an evidence-based account of liability.
Acknowledgements

I would like to take this opportunity to thank Dr. Rahul Kumar for working with me on this initiative and being patient as I progressed through my thinking. I would also like to thank Dr. Jeff McMahan for his indulgence and responses to the many emails I sent as I pestered him for some further explanation on certain points.
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Chapter 1

Introduction

The focus of this thesis is the normative base of moral liability to defensive harm. Generally speaking, you are liable for defensive harm when you have forfeited your rights against the harm that some other agent threatens to impose. Many argue that liability is what makes it morally permissible to seriously injure or kill in self-defense or in the defense of others. Authors such as Jonathan Quong and Jeff McMahan argue that liability not only has important implications for the individual morality of self-defense, but that it plays a major role in the principles of just war conduct. How you determine when someone is liable will have a significant impact on when someone can be harmed. More specifically, how you define liability will have an impact on:

1. How easy it is to justify imposing harms on people who are considered liable vs. people who are not.
2. Whether or not the agent may engage in counter defense.
3. When third parties may intervene in a violent conflict.
4. When someone ought to be compensated1.

For the purpose of this paper, I will focus on the question of what a person must do to be morally liable to defensive harm. More specifically, I will take a close look at Jeff McMahan’s moral responsibility account of liability and will argue that it is unsatisfying as an explanation of when and why a person is liable. I will then argue that an evidence-based account of liability better captures our moral intuitions surrounding

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1 Paraphrased from pg 46 of Quong’s article “Liability to Defensive Harm”
liability. I will end by considering an argument put forward by Quong on why we should
not support an evidence-based account of liability. The four implications listed above will
play an integral role in determining whether or not a liability account is plausible. For
example, the validity of McMahan’s account of liability could rest, in some cases, on
when it dictates a person is eligible for counter attack. Throughout the course of this
paper, I will take an in-depth look at McMahan’s account and will determine whether the
implications of his account align with our moral intuitions in self-defense.

Chapter two outlines McMahan’s moral responsibility account of liability,
focusing specifically on his use of liability, proportionality, responsibility and the role of
mitigating excuses. In chapter three, I reiterate McMahan’s five cases. These cases are
meant to demonstrate that his account of when a person is liable is plausible because of
the intuitive verdicts that are yielded in the different everyday cases. In chapter four, I
argue that McMahan’s concept of the objective moral standpoint, as grounded in the fact-
relative sense of wrong, is not one that should be endorsed for three reasons. First, it
relegates two important senses of wrong to the morally inferior status of an excuse, thus
missing some important moral intuitions about when and why we are liable. Second, his
account allows luck to play too great a role in deciding liability. Lastly, he asks the moral
agent to do the impossible: to do what is right, rather than to do what they think is right at
that time. In chapter five, I argue that the intuitions surrounding responsibility found in
the risk cases that McMahan offers are not grounded in foreseeability and moral reasons,
but are actually a product of public risks and services. Public risks and services are both
products of available evidence and so cannot be supported by McMahan’s fact-relative account. In chapter six, I take a close look at Quong’s criticism of an evidence-based account and conclude that it is not necessarily the case that someone has to be held liable in order for third party intervention to be possible in certain key situations.
Chapter 2
Self-Defense and the Responsibility Thesis

McMahan argues that at the heart of the problem of participating in unjust wars is the prevailing idea that no one does anything morally wrong, on an individual level, if they fight in a war that turns out to be unjust (3). He denies the notion, supported by both the traditional moral theory of war and international laws of war, that all combatants have an equal right to kill other combatants in war, regardless of the just or unjust state of the war they are fighting in (also known as the moral equality of soldiers). He denies the idea that a soldier does not act wrongly if he kills another combatant while fighting for the side of an unjust cause in war. McMahan’s rejection of the moral equality of combatants is based on the claim that the difference between war and self-defense is merely a difference of degree and not of kind. He argues that there is no such thing as a special moral status in war that makes all things equal between combatants. If there is not a special moral status that makes it morally permissible to kill combatants of other warring parties regardless of their cause, then at least some combatants must be acting morally wrongly when they participate in an unjust war.

McMahan argues that all unjust combatants are morally liable to attack in war because they are engaged in objective wrongdoing (unjust goals by military means) that

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2 I join both Quong and McMahan in assuming that the liability of individual soldiers can be determined in broadly the same way as the liability of individuals in everyday life. This is a contestable assumption but not one I defend in this paper.
is sufficient to make them liable to attack. In order to be liable for attack in war, one must be morally responsible for posing an objectively unjustified threat. For McMahan, an act is justified when it is not only permissible, but one has a positive moral reason to do it. An act is objectively justified when it is explained by facts that are independent of the agent’s belief. An objectively unjustified threat then, is a threat that someone poses without having moral reason to do so and that is not supported by facts outside of the agent’s own beliefs. In order to be morally responsible for an objectively unjustified threat, one has to have agency; one has to be said to have caused or been part of the cause of the threat in order to be in any way morally responsible for it and thus liable to defensive attack.

A good example that demonstrates the clear parallels between states of war and the moral intuitions in self-defense is that of a police officer who has pulled out his gun to stop an armed robbery. In this situation, many would agree that the armed robber is liable for attack because he uses the threat of lethal force to obtain an unjust goal. He is responsible for his action and so is liable for harm. However, we do not think that as soon as the police officer becomes a threat to the robber (by pulling out his gun) that the officer is now liable for attack and that the robber may now attack the officer for being morally responsible for posing a lethal threat. Instead, many would agree, that the officer is not liable for attack because he is objectively justified in using force. That is, though the officer acts with agency and is therefore responsible for posing a lethal threat to the robber, it is uncontroversial to say that he is not liable to harm. It is uncontroversial
because he is working with a just cause. If this claim of liability is correct, then the robber performs a morally reprehensible act in both participating in an unjust goal and by attacking the officer who is not liable for attack. The clear parallel demonstrated by this case is the just and unjust combatant. McMahan argues, “when they [just combatants] oppose the military action of unjust combatants, they do not thereby become legitimate targets of attack but retain their innocence in the generic sense” (14). Here we can see that just combatant cannot be liable for attack simply because they participate in war, just as the police officer cannot be liable for attack simply because he participates in a gunfight. Instead, the cause one has for posing a threat factors into whether he or she is liable for harm or not. So, if a soldier is morally justified in killing a person in war, it is because that person is liable for posing an objectively unjustified threat.

Although all unjust combatants are morally liable, McMahan argues that moral liability can be mitigated by excuses and that these excuses effect the proportionality restrictions on defensive force. In order to be clear on how our moral intuitions in self-defense ought to shape our moral intuitions about war, we must first understand how liability and proportionality work in McMahan’s account. As noted earlier, a person is liable for harm in war when they are morally responsible for the threat he or she poses. McMahan argues that a person is liable when he or she would not be wronged by an attack and would not have a justified complaint about being attacked. He also explains that liability is an assignment of necessity (8-9). At this point, it is important to distinguish when a person is liable from when it is appropriate to impose liability. For
McMahan, a person is liable when they are morally responsible. The liability that is derived from responsibility is one of necessity. It is necessary to harm the threat to serve some just purpose. In this way, the goal is internal to the idea of liability. Coming back to my policeman and armed robber example, the robber is liable because he is morally responsible for the threat he is posing via the cogent decision he makes when he decides to perform and armed robbery. Harming him is necessary to completing a just goal such as stopping the robbery, stopping the lethal threat that the robber poses to civilians, or protecting the policeman’s own life. Here we can see that liability differs from desert because the harm someone is liable for has to serve some other just purpose. The harm itself cannot be the goal. It makes sense to separate desert from liability in McMahan’s account, as the standard of responsibility is not the standard of culpability (I will expand on this later in the paper).

In comparison, it is appropriate to impose liability when someone would not be wronged nor would they have a justified complaint about being attacked. The policeman may impose liability on the robber because the robber is not wronged by his doing so (assuming the harm is proportionate) and so would have no grounds for complaint. The robber is not wronged because he is responsible for engaging in objective wrongdoing. Notice again, that the officer would be wronged if the robber imposed liability on him. The robber might exclaim “but he was pointing a gun at me! It was in defense of my own life!” McMahan’s argument is that we do not accept this type of explanation in defense
of the robber in criminal code or self-defense (assuming the officer was acting proportionately) and so we should not in war either.

Although it is relatively easy to accept that a dangerous armed robber is liable to harm, there is still the question of how much harm. What of an unarmed robber who does not pose any lethal threat but is participating in an objective wrong? It would seem that there is still a matter of proportionality that needs to be clearly articulated. McMahan outlines the parameters of when and the degree to which someone is liable by appealing to the principle that liability can be mitigated by excuses. These excuses effect the proportionality restriction on the use of defensive force. In this particular discussion, proportionality comes in two forms, narrow and wide. Narrow proportionality usually refers to the proportionality of harm intentionally inflicted on those who are potentially liable and wide proportionality often refers to the proportionality of harm inflicted foreseeably but unintentionally on those who are not liable to any harm at all. McMahan claims that the proportionality restrictions in war are parallel to proportionality requirements in individual acts (156). In both cases, it is a constraint on harm or the actions that cause harm. As with liability, the harm has to be instrumental in achieving a specific goal, which can be weighed against relevant factors. If the assessment is favourable, then the harm is said to be proportionate (21).

To illustrate how proportionality works, McMahan uses the example of a man on a busy subway who is approached by an unarmed gang who demands his wallet. In response, the man pulls out a gun and starts to shoot at the gang. The problem in this case
is two-fold. First, is shooting the gang members proportionate to their objective wrongdoing of an unarmed robbery? Most likely the answer is no. The man may have been justified in preventing them from robbing him by some milder form of physical force, but his action of shooting at them and thus endangering their lives is not narrowly proportionate to the harm they are liable for. Secondly, the man’s action clearly fails wide proportionality. By shooting his gun in the crowded subway he foreseeably, albeit unintentionally, puts innocent spectators lives’ at risk. The man’s action, though an act made in defense of his own personal property against those who are engaging in objective wrong doing, fails both the narrow and wide proportionality restrictions. Based on these shortcomings, one would have a good case to argue that morality dictates that he ought to give up his wallet or to at least pursue alternative measures of self-defense. So, if an action is disproportionate in either the narrow or wide sense, it means that the action is not equal to either the harm the individual is liable for based on his responsibility for posing an objectively unjustified threat, or the harm being done to those who are not responsible far exceeds the good that is gained by imposing liability.

McMahan defines several different types of threats that have varying degrees of liability attached to them. These include: culpable threats, partially excused threats, excused and innocent threats, and epistemically justified mistaken threats. Culpable threats are threats of wrongful harm that have neither a justification nor an excuse. The proportionality restrictions on culpable threats are very weak, especially in cases where lives are at risk. The previously discussed armed robber case would count as a culpable
threat. In that case, I stipulated that the robber was fully responsible for the objective wrongdoing they are engaged in. They have no excuse and certainly no justification. Lives are at risk and so the restrictions on what sorts of actions the police officer can take to stop the robber from continuing to pose a threat are very low, if they exist at all.

Partially excused threats are threats of wrongful harm that are excused to some extent, but not fully. The strength of the excuse is determined by the magnitude of the harm in question and the degree of culpability. Staying with our robber example, the robber may be partially excused for his action if he is under some sort of duress, such as having his favourite pet parrot held hostage until he performs the armed robbery. He might also have an epistemic excuse such as not knowing that armed robbery is wrong and so he does not know that he is unjustifiably putting people at risk. Both examples are only partial excuses because the strength of the excuse is not enough to make it an excused threat. Having your favourite pet parrot held hostage does not count as irresistible duress. It is fair to argue that someone of normal fortitude would resist this type of coercion. In the case of not knowing any better, the robber demonstrates an avoidable ignorance. He has clearly been negligent in finding out if his action is permissible and so his excuse can only be partially mitigating. Though both cases are not full excuses, they are partial excuses and so mitigate the amount of harm the robber is liable for. This simply means that, all things being equal, robber in culpable threat is liable for a greater amount of harm than robber in partially excused threat.
The difference between liability in culpable threat and that in partially excused threat, in a situation of all things being equal, is demonstrated in the narrow proportionality constraint. Suppose the police officer is trying to stop the robber and he is faced with two choices: shoot the robber thus stopping him and eliminating the threat or tackle the robber to the ground, stopping him but suffering a broken arm. In the case of culpable threat, it would be proportionate to shoot the robber rather than suffer the broken arm. However, if the policeman knew that the robber had a partial excuse, he may be morally required to suffer the broken arm rather than shooting him. McMahan believes that narrow proportionality restrictions for those that have excuses may require a sharing of the burden. He argues, “yet if you know that he has a partial excuse, it may be wrong for you to kill him—that is, you may be morally required to suffer the broken arm in order to avoid killing him” (161). The reason why you have to share the burden is because of the recognized moral distinction between doing and allowing. That is, given only two opportunities to stop a threat, it is better to suffer the broken arm thus letting the threat live, rather than shooting and killing the threat. In the former case, you are allowing an action to happen and in the latter you are performing an action. This distinction rests on the credibility of the idea that it is morally better to allow an action with a bad consequence to happen rather than to commit an action. As demonstrated by this example, whether policeman is morally obliged to share a burden will depend on the type of threat the robber poses. That is, excuses that mitigate liability will change the proportionality requirements of those imposing liability.
It is important to note that not all partially excused threats are less liable than excused threats. For example, I may be culpable for putting others at risk by riding my bicycle at night without reflectors against traffic. This may make me liable for certain types of harm based on the degree of threat I am posing. It does not, however, automatically make me more liable than the armed bank robber who is putting others at risk by the threat of lethal force because his favourite pet parrot is being held captive. This example demonstrates that a partially excused threat may be more culpable than a culpable threat due to the degree or severity of the threat posed. The degree of the threat posed is a function of many variables and having an excuse versus not having an excuse does not necessitate that one is more liable than the other.³

An excused or innocent threat is posed when someone acts under irresistible duress. For McMahan, irresistible duress is a sanction or harm that would overwhelm the will of anyone with a normal willpower (162). In the case of the robber, irresistible duress could be having his entire family held hostage under the threat of death unless he performs the armed robbery. In this circumstance, the robber would be considered a fully excused threat. It is important to note that fully excused implies not being culpable but does not necessarily imply that they are resolved of all responsibility. A person, in this case the robber, is still responsible for his objectively wrongful action even if he is not blameworthy. Remember that McMahan argues that in order to be morally responsible for an objectively unjustified threat one has to have agency, one has to be said to have

³ Variables that determine the degree of the threat posed include, but are not limited to: intentionality, negligence, recklessness, excuse vs. no excuse, strength of excuse, magnitude of the threatened harm etc.
caused or been part of the cause of the threat in order to be in any way morally responsible for it and thus liable to defensive attack. Even though our robber has been given very good partial reasons to engage in the objectively wrong act, he has not been stripped of his agency. When we talk about “irresistible duress” in this particular liability sense we do not literally mean that they have absolutely no choice. We do not mean that it is both physically and psychologically impossible to do otherwise. We simply mean that most people would find this duress irresistible. If this is the case, then the robber still has his agency and we still have grounds, on McMahan’s account, for holding him liable for defensive action.

We can still impose liability on the robber because McMahan clearly distinguishes between the standard of responsibility and the standard of culpability. The example of the robber who robs to keep his family alive demonstrates a full excuse where the agent is responsible though not culpable. However, though he is not culpable, he is still liable because he is still responsible. As McMahan argues, “the claim that a person is fully excused for an act of objective wrongdoing implies only that the person is not culpable…it does not necessarily imply that the person is absolved of all responsibility” (162). The robber is responsible because he still has his agency and so can still be said to be part of the cause of the threat. Later in this paper, I will consider McMahan’s cases where the agent has a full excuse and is absolved of both responsibility and culpability and so is not liable.
Epistemically justified mistaken threats are those threats made by someone who is justified in holding factual and moral beliefs to kill someone that end up being false. On an objective account this type of threat is fully excused but impermissible. On a subjective account this type of threat is acting permissibly and so does not need an excuse. On a subjective account, the epistemically justified mistaken threat is considered an innocent threat, while on an objective account it might only be considered an excused threat. An example would be a police officer in pursuit of three armed robbers. The officer follows the robbers to a back alley where he corners them. All three of the robbers begin to reach for their weapons. The officer, having already drawn his weapon, shoots and kills all three robbers. What he did not know is that one of the robbers was an undercover police officer and was reaching for his weapon to come to the officer’s defense. Here we can see that the officer was justified in holding his factual belief that all of the robbers were a threat to his life and his moral belief that he was justified in holding them liable for severe harm based on the degree of the objectively unjustified threat they posed. However, because he was incorrect about the undercover officer, the police officer acts impermissibly and poses an excused threat to the undercover officer. This makes him responsible though not culpable for his action. Interestingly, it means that the officer is liable for harm from the undercover officer. On a subjective account, the officer is an innocent threat and acts permissibly. Though he has made a mistake, he is not responsible for his mistake and so is not liable to any form of harm.\(^4\)

\(^4\) McMahan’s use of Innocent Threat departs from other writers such as Judith Thompson, Jonathan Quong
Chapter 3

The Five Cases

In order to illustrate the different types of threats and the intuitions of liability and self-defense that go with them, McMahan presents five cases. Given his view that war and individual acts exist on a continuum rather than being different in kind, he provides cases that could happen in everyday life.

**The Resident:** the identical twin of a notorious mass murderer is driving in the middle of a stormy night in a remote area when his car breaks down. He is non-culpably unaware that his twin brother, the murderer, has within the past few hours escaped from prison in just this area, and that the residents have been warned of the escape. The murderer’s notoriety derives from his invariable modus operandi: he violently breaks into people’s homes and kills them instantly. As the twin whose car has broken down approaches a house to request to use the telephone, the resident of the house takes aim to shoot, preemptively, believing him to be the murderer. (McMahan, 164)

McMahan presents this case as an epistemically justified mistaken threat. The Resident mistakenly kills someone that he thought was liable to be killed but was not. Although the Resident’s beliefs are both permissible and justified, his actions are objectively wrong. His act of shooting the twin brother of the murderer is both intentional and Michael Otsuka who define an innocent threat as “someone who threatens my life even though they have formed no intention to kill me and exercise no intention at all” (Quong, 507). Here we can see that, for McMahan, an innocent threat may act with intention; as long as they are justified in holding their beliefs they are considered an innocent threat.
(he meant to kill him) and foreseeable (he could easily understand and predict the outcome of his actions). The Resident is liable for defensive action because he is responsible for the risk that he takes any time that he performs an action that potentially puts someone else who is not liable at risk, such as shooting a gun.

**The Technician:** A technician is guiding a pilotless drone aircraft toward its landing when it unaccountably veers off course in the direction of a group of houses in which he reasonably believes several families are living. He alters the drone’s course in the only way he can, sending it where he knows it will kill one innocent bystander when it crashes. Although there was no reason for him to know this, all the families in fact moved out the day before, while the technician was still on vacation (164).

Once again, we are presented with a case of a subjectively and epistemically justified action that ends up being objectively wrong. The difference between the Technician and the Resident is that when the Technician chooses to redirect the plane to where he knows it will kill one person, he is acting foreseeably but not intentionally. That is, unlike in the case of **The Resident**, the death of the innocent bystander is not integral or even important to achieving his goal. If given another option, such as redirecting the drone to an empty field, the Technician would gladly exercise that option and still achieve his goal, while the Resident could not. Like the Resident, the Technician is morally responsible for his action and so is deemed to be liable for defensive action.

**The Conscientious Driver:** A person who always keeps her car well maintained and always drives carefully and alertly decides to drive to the cinema. On the
way, a freak event that she could not have anticipated occurs that causes her car to
veer out of control in the direction of the pedestrian (165).

In the case of the Conscientious Driver, her actions are impermissible on an
objective account but since she is not able to know (epistemically) that they are
impermissible, she is an excused threat. On a subjective account she is considered an
innocent threat because she does not intend to harm anyone and she cannot foresee that
she will harm anyone. However, McMahan argues that the small risk driving poses every
time you make the decision to drive moves the action from subjectively justified to
subjectively permissible. The change from justified to permissible is based on the fact
that the driver has no positive moral reason to take the risk of driving and that
objectively, the risk you subject others to every time you drive your car is foreseeable,
though that particular accident may not be foreseeable. I return to this point later in the
paper.

The Ambulance Driver: An emergency Medical Technician is driving an
ambulance to the site of an accident to carry one of the victims to the hospital.
She is driving conscientiously and alertly but a freak event occurs that causes the
ambulance to veer uncontrollably toward the pedestrian (165).

McMahan argues that the Ambulance Driver is similar to the Conscientious
Driver in every relevant way except that the Ambulance Driver has a positive moral
reason to drive (driving the ambulance to the site of an accident). This moral reason gives
the Ambulance Driver subjective justification instead of subjective permission to act in a
way that poses a tiny risk of causing great harm. It is interesting to note that McMahan never says that the act of driving the ambulance is objectively wrong. It follows from his account, however, that it has to be objectively wrong in the same way that the Conscientious Driver is wrong when she decides to drive that day. It may not be the case that it is always wrong to drive, but on McMahan’s account the act of driving has to be considered objectively wrong every time the tiny risk that drivers take of putting innocent people in danger actualizes. It follows then that, while having a moral reason to drive mitigates the Ambulance Driver’s responsibility and with it their proportionality requirements in terms of liability to defensive attack, the Ambulance Driver is still liable.

**The Cell Phone Operator:** A man’s cell phone has, without his knowledge, been reprogrammed so that when he next presses the “send” button, the phone will send a signal that will detonate a bomb that will kill an innocent person (165).

In this case, McMahan argues that it is objectively wrong for the cell phone operator to press send even though he cannot know it. He is epistemically justified in believing that pressing send is harmless. He has subjective permissibility but not subjective justification unless he has a positive moral reason for doing so, which in this version of the story he does not. On an objective account, he is an excused threat and, on a subjective account, an innocent threat. However, unlike the Resident he does not choose to cause harm and unlike the Conscientious Driver and the Ambulance Driver, he does not choose to engage in an activity that has a foreseeable risk of causing serious harm.
Due to these differences, the Cell Phone Operator is the only case that McMahan believes is not liable to defensive action.

All five cases pose an objectively unjustified threat but they all differ in the degree of responsibility for the threat they pose. Most at fault is the Conscientious Driver because she knows that there is a small risk of her veering out of control and hurting an innocent bystander. She also does not have a positive moral reason to be driving. The Resident, the Technician, and the Ambulance Driver all act with subjective moral justification because they each believe that they have a strong moral reason to do what they do. However, although each is considered blameless in their objective mistakes, they are still responsible for their choices and that is enough for liability to defensive action. Even though each is liable to defensive action, McMahan argues that there is a morally relevant difference. The Resident threatens to kill someone intentionally, the Technician threatens to kill a person foreseeably but unintentionally and the Ambulance Driver took a risk of killing someone by deciding to drive and, as a result of bad luck, now threatens to kill some accidentally. If it is true that it is worse to kill someone intentionally than it is to kill someone foreseeably and worse to kill someone foreseeably than it is to kill accidentally, then the Resident has taken the greatest moral risk, the Technician the second greatest and the Ambulance Driver the third. This suggests that those who take greater risks should hold more responsibility and, in turn, should be liable to a greater degree of defensive action.
McMahan argues that the Cell Phone Operator is intuitively the least at fault even though he is acting only subjectively permissibly and has no positive moral reason. This is because he does not intentionally kill, knowingly kill or knowingly impose on others a risk of being killed. His threat is not one he could conceivably foresee. McMahan argues that “what is singular about his case is not that he is nonculpably and invincibly ignorant of some relevant fact—a characteristic he shares with the other four innocent threats; it is, rather, that he is nonculpably and invincibly ignorant that he poses any kind of threat or risk of harm to anyone” (168). This fact absolves him of all the threat he poses and so he is a non-responsible threat: “a person who without justification threatens to harm someone in a way to which she is not liable, but who is in no way morally responsible for doing so” (168). If moral responsibility is the basis for liability to defensive attack, then he cannot be liable for defensive attack.
Chapter 4

Objective Wrong Doing, Luck and Feasibility

When reading McMahan’s account of moral responsibility as the basis of liability for defensive action, one might wonder what exactly he means when he assumes an objective moral standpoint. Throughout *Killing in War*, McMahan assigns responsibility based on an objective moral standpoint. In all five cases, the individuals were said to have done something objectively wrong. In four of the five cases simply missing a morally relevant fact was enough to ground liability to defensive action. Derek Parfit’s discussion of the different moral senses of wrong helps clarify McMahan’s claim about where the divide between objective and subjective falls.\(^5\) Parfit argues that when people assume that wrong only has one moral sense, they are most plausibly assuming that the people whose acts are being considered know all of the morally relevant facts. He calls this using wrong in the *ordinary* sense. However, in the cases where we do not know all of the morally relevant facts, we must differentiate between the different moral senses of wrong or risk talking at cross purposes and missing some important truths.

The three moral senses of wrong are defined as follows:

Wrong in the *fact-relative sense* just when this act would be wrong in the ordinary sense if we knew all of the morally relevant facts (150).

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\(^5\) Parfit’s discussion of the different moral senses of wrong are found in his chapter entitled “Moral Concepts” in the first book in his work *On What Matters*. 
Wrong in the **belief-relative sense** just when this act would be wrong in the ordinary sense if our beliefs about these facts were true (150).

Wrong in the **evidence-relative sense** just when this act would be wrong in the ordinary sense if we believed what the available evidence gives us decisive reasons to believe, and these beliefs were true (151).

For Parfit, acts are right or morally permitted in these varying senses when they are not wrong and they are what we ought morally to do when all of their alternatives would be wrong in the aforementioned senses (150-151).

In McMahan’s case, he touches on all three senses of the concept of wrong but only the fact-relative sense grounds the objective moral standpoint and therefore liability. As McMahan explains:

> In a sense, both responsibility (of the sort that is relevant to liability) and liability depend on objective wrongdoing, or action that is impermissible in the fact-relative sense. What a person is responsible for depends on what he causes, which is objective. In general, a person is not liable to be harmed (defensively, or as punishment, or through being compelled to provide compensation) unless he has caused or will otherwise cause harm.⁶

Take for instance *The Resident* Case. In this case, the shooter is epistemically justified in holding his belief that he is shooting a murderer in defense of his own life. As well, all of the evidence points to the man being the murderer. That is, he acts in a way that he has decisive reason to act. However, The Resident is wrong in the fact-relative sense. He is

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⁶ Correspondence with Jeff McMahan 03/08/2012
wrong about the fact that the man is the murderer. If he knew all of the morally relevant facts, then he would know that the man was not the murderer and so is not liable. When McMahan grounds liability to defensive action in an objective moral standpoint, he is grounding it in the wrong that is committed when someone acts against a morally relevant fact (shooting the murderer’s twin in the case of the Resident)\textsuperscript{7}.

For the sake of clarity, I will refrain from talking about objective/subjective when referring to the different senses of wrong, as all three can arguably fall on either side of the divide. I will instead refer to facts, evidence and beliefs. More specifically, I will often only refer to facts and evidence. For the purpose of this paper, talk about belief falls away simply because one is justified in their beliefs if they believe what the evidence gives them decisive reason to believe. In this way, the evidence will be what is most important. By sticking to the three senses of wrong the argument for liability can be made clearer and will avoid the trap of giving up the objective vs. subjective categorization that McMahan imposes. I will also drop much of the talk about responsibility. I will assume that in every case discussed, there is an action or event being caused by someone who has agency. By pairing back the technical terms, I hope to focus on the issue of when

\textsuperscript{7} At this point, someone may want to point out that the case of the Cell Phone operator is an example of someone missing a fact but still not being held responsible. If this is true, then my argument that McMahan only relies on the fact-relative sense for the objective moral standpoint is wrong. While this is true, it should be noted that the act is still considered objectively wrong because the Operator misses a morally relevant fact about his phone being rigged to detonate a bomb. While McMahan does not say that the act is objectively justified, he does say that the Operator is not responsible. His argument is based on the idea that the threat posed by the Cell Phone Operator is not foreseeable. I argue later in this paper that McMahan’s account cannot support foreseeability.
someone is liable and which sense of wrong is doing the work in terms of why that person is liable.

It is worth considering why McMahan would choose to adopt the fact-relative sense of wrong as the standpoint from which liability is assessed. That is, why does he argue that liability should be generated by the fact-relative sense rather than the evidence-relative sense? One reason McMahan may make this argument is because he is thinking about the context of war. Presumably, McMahan wants to set the standard for permissibility to kill in war very high so that he can support his argument that there are moral standards in war that dictate different outcomes for just and unjust combatants. This is at the center of his dismissal of the moral equality of combatants. If the standard for permissibly killing in war is as low as being epistemically justified in thinking you are killing someone who is liable, then both just and unjust combatants could feasibly kill each other permissibly. This is something that McMahan wants to avoid in order to clearly demarcate when you are liable for harm in war and when you are not. With this in mind, it becomes probable that his choice to ground liability in the fact-relative sense is influenced by his subject matter. The question is whether the distinctions he has made can be carried by the cases he presents. If the goal is to demonstrate how moral intuitions surrounding self-defense are relevant to situations of war, then the stringent permissibility requirement that McMahan wants to use for war must be supported by the self-defense and other daily cases that he puts forward. Throughout this paper, I attempt to demonstrate that the cases he presents do not support so stringent a definition of liability.
If the fact-relative sense is what really matters in terms of creating liability, what roles do the other senses of wrong play? In the five cases presented, any epistemically based concept of wrong has been labeled an “excuse” and so cannot generate liability. Though the evidence-relative and belief-relative senses can mitigate liability, it cannot be said to produce it. I argue that the evidence-relative sense of wrong not only mitigates liability, but can produce it as well. If so, McMahan is not recognizing the full role that the evidence-relative sense of wrong plays in liability. He is putting all of the focus on the fact-relative sense of wrong in a way that does not properly capture the intuition of why a certain person is liable.

To demonstrate why relying solely on the fact-relative sense misses some key intuitions concerning why someone is liable, consider two cases:

*Cure:* I give you a vial of clear liquid that, as I justifiably believe, is almost certain to save your life, but which in fact kills you.\(^8\)

*Poison:* I give you a vial of clear liquid that, as I justifiably believe, will almost certainly kill you, but which in fact saves your life

In *Cure*, it does not seem enough to claim that I acted wrongly based solely on the fact that I killed you. It seems morally important that I acted rightly in the belief-relative and evidence-relative sense and that I justifiably believed that my act was almost certainly going to save your life. In *Poison*, it seems that it is not enough to claim that I

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\(^8\) I am indebted to Derek Parfit for the direction of the following objections. These cases in particular are modeled on Derek Parfit’s cases found on pg. 153 in his chapter on “Moral Concepts” in his work *On What Matters.*
acted rightly because I saved your life. It should also be mentioned that you acted wrongly in the belief-relative and the evidence-relative sense. As Parfit notes, “attempted murderers should at least be mentioned” (153). It would be odd to think that one could be in the right as far as liability is concerned simply because they saved someone’s life by accident, instead of killing them as they believed themselves to be doing.

At this point, McMahan may say ‘of course people can be held responsible for their intentions. We can think badly of them and blame them, but I am talking about the responsibility that justifies liability and this is something very different from culpability or blameworthiness’. From this line of response, it is clear that in order for my argument to gain traction, I have to show that people can be held liable not just for the effects they cause, but for what they understand themselves to be doing. What a person can understand himself or herself to be doing depends on what facts are available or what they could reasonably know. What facts are available depends on the available evidence. The available evidence will determine the best way to describe what a person can be said to be doing. In short, I have to demonstrate that liability can be created based on the best description of what a person can be said to be doing as per the available evidence. For the following cases, it is important that the person does not simply intend harm but acts earnestly towards causing harm, though never with a chance of success.

To demonstrate how liability can be created from evidence, consider the following case:

**Inept Poisoner:** I give you a vial of clear liquid that, as I justifiably believe, will almost certainly kill you, but would in fact only give you a pleasant tingling
sensation in your toes. However, you see me put the vial into your drink. You know that I have been plotting to poison you and you know that tonight is the night that I would try. You also know that the only way to escape the room without drinking the vial is to shoot me, the Poisoner.

In this case, I am assuming that the person about to be poisoned is justified in evidence-relative sense when they think that the only way to avoid drinking the vial is to shoot me, the Poisoner. On McMahan’s account, not only would I, the Poisoner, not be liable for defensive action but once the person I am trying to unsuccessfully poison threatens my life by pulling out his gun, I could in fact pull out my own gun and shoot them as they have unjustifiably, from a fact-relative sense, put me at risk. They have missed the morally relevant fact that I would have been unsuccessful at poisoning them and so they were never at risk. If they were never at risk, then I cannot be held liable for the threat. This seems incorrect.

On a Kantian view, all attempts to kill are equally blameworthy, whether or not they succeed. It is equally blameworthy to give someone a vial of poison that kills them, give someone a vial of poison that makes their toes tingle, or to stick pins into a voodoo doll in an irrational attempt to kill them. As Parfit argues, we cannot deserve less blame merely because we are less successful (157). Though I believe that Parfit is correct in that we cannot deserve less blame based on our success, blame is not the standard of liability. The question still remains: can someone be liable based on the best way to understand or describe what he or she is doing as per the available evidence? When we consider the
case of the *Inept Poisoner* there seems to be two competing intuitions on who should be considered liable.

1) The man who shoots the Poisoner has missed a morally relevant fact and is not really at risk. It is a risky business pointing a gun at someone and so anytime you miss a fact you are responsible for that mistake and so are liable for defensive action.

2) The man who is attempting to poison his adversary is liable for harm because he is acting in a way that would (via available evidence) lead anyone to justifiably believe that he poses an objectively unjustified threat.

Both competing intuitions are appealing. I would argue that the fact that both are appealing intuitions suggests that the evidence-relative sense of wrong is doing more work in bolstering an important moral intuition about generating liability than McMahan recognizes. Furthermore, I believe that the intuition in this case is that I, the Poisoner, am liable to some form of defensive action. I am earnestly trying to end your life. All of the evidence suggests that I will be successful in ending your life. If an impartial viewer were to ask me what I was doing, I would be able to tell them, based on the available evidence that I am going to end your life. If this is the case, then the best description of what I am doing is poisoning you. If the best description of what I am doing is poisoning you, then I am liable. It is important to note that you, the person shooting me to avoid drinking the vial, could not have done anything different that would change the outcome. There is not some action you could have done or fact you could have reasonably known that would condemn your act. It seems reasonable then to ascribe liability to the Inept Poisoner
based on the available evidence, rather than to impose it on the person who reasonably believes they are about to be poisoned.

Given the two competing intuitions, it seems to me that the first puts too heavy a burden of responsibility on the defender. When one considers who should bear the brunt of responsibility and thus liability in a situation such as *Inept Poisoner*, it seems as though the man who justifiably believes he is about to poison based on all of the available evidence ought to bear the burden. Even though the man who pulls out the gun takes a risk and is responsible for that risk, the responsibility that the aggressor has for acting in a way that would lead anyone to justifiably believe that he is an unjustified threat seems to supersede the risk the man takes when he uses his gun. Notice that allowing evidence to generate liability in the way I propose stops the odd conclusion on McMahan’s account that I, the Poisoner, can pull out my gun and shoot the person I am trying to poison as soon as they try to defend themselves.

To further outline my criticism consider a third case:

*Back Alley:* A man bent on murder buys a knife from a pawnshop in order to kill a man he has quarreled with. He waits for the man in a back alley and when he sees him entering the alley he runs towards him with the knife extended intending to stab him. The man who just entered the alley sees the knife, sees his enemy running towards him and pulls out his gun to shoot the would be assassin. Neither the attempted murderer nor the man shooting the gun could reasonably know that the assassin actually bought a prop knife and that the blade would not have done any damage had he been successful in his attempted stabbing.
In this case, as in the case of the *Inept Poisoner* and *Cure*, both the attempted murderer and the person being threatened are missing a morally relevant fact. Similarly, in this case, as well as in the others, McMahan would hold that, not only is the attempted murderer not liable for harm, the man who justifiably believes that he is defending himself is liable, since he is responsible for posing an objectively unjustified threat.

Again, there is a question of where the liability ought to fall. McMahan argues that taking out your gun is to assume a risk and you ought to be liable if you get the facts wrong. This is a fair assessment. However, if it is appropriate to impose liability when someone would not be wronged or when he or she would not have a justified complaint about being attacked, then it seems as though the man with the gun has properly imposed liability. At first glance, it seems that the man with the knife could have a justified complaint about being held liable. He might say, ‘how can you shoot me in good conscience when the knife is a fake!’ However, the man does not know that the knife is a fake and he fully believes that he is posing the threat that he thinks he is posing. If the man with the knife were asked in mid flight to describe what he understands himself to be doing, he would describe himself as attempting to stab his foe. This is not only a description of his intention but also a proper description of his action based on all of the available facts and evidence. With this in mind, it seems that he cannot have a justified complaint about being held liable.

Here McMahan might want to argue that, while the knife man may not have a complaint, he is being wronged, as he does not actually pose a threat in the fact-relative
sense. However, it seems as though the man is not being wronged because he is acting in a way where all of the available facts suggest that he is posing an unjustified threat. If the best description of what he is doing (based on the available evidence) is lunging at an innocent man with a knife, then the evidence-relative sense of wrong is enough to ground liability. Although the knife-wielding man may not actually be posing the threat that both he and the gunman justifiably believe he is posing, he is liable for acting in a way that justifiably makes him and the gunman believe in that threat. He is liable for acting in such a way that all of the available facts and evidence provide both he and the gunman decisive reason to believe in the threat that he is trying to pose in the fact-relative sense. His decision to act in this way is enough to ground liability. In the second chapter, I discussed a set of robbery cases. If the bank robbers in those cases had accidentally bought fake guns they would still be liable based on the evidence that best describes what they are doing, rather than not being liable because they do not actually pose the threat they mean to pose in the fact-relative sense.

Through my discussion of *Cure, Inept Poisoner* and *Back Alley*, I have tried to show that you can be liable based on the best description of the action you are engaging in. If all of the available facts and evidence lead me to the justified belief that you are posing a fact-relative threat, then you are liable even if you do not actually pose that fact-relative threat. I have also argued that evidence-based liability supersedes the liability one has for missing a morally relevant fact in certain cases. In each case, all of the morally relevant facts are not accessible to the agent who believes they are defending themselves.
The facts that are available lead to a justified belief that they are being threatened. It seems unfair to hold the person with the justified belief liable for defensive action. There is nothing that he did wrong or failed to do that he ought to have done that justifies his being liable, nor has he done anything that would count as assuming risk. I agree that the epistemic burden on a person goes up when they engage in risky activities such as carrying a gun. But even then, there is no clear indication of what the individual could have reasonably done that would have put them in a better position to know the relevant facts. If anyone is liable, it ought to be the person carrying the knife or attempting to poison. Even if they will not be successful, nobody is in a position to readily, or even with some effort, know that fact. The aggressor is the one who is taking the risk by engaging in what looks like an impermissible activity, so he is the one who should be held accountable in terms of liability to defensive action.\(^9\)

I believe that I have put forth an argument that strongly recommends the idea that available facts and evidence that lead to a justified belief can make one responsible for some sort of liability. If this is true, then the evidence-relative sense of wrong must be given enough moral authority to generate Inept Poisoner’s liability to some sort of proportionate defensive action. Instead of understanding the evidence-relative sense of wrong as an excuse, I argue that we should consider it to be another way that one might be liable. In this way, we can better capture the intuition that liability takes into account

\(^9\) I am indebted to Dr. Rahul Kumar for the crystallization of my thoughts on this particular comment on risk assumption.
the justification for the beliefs and reasons why we act, instead of only the facts about the outcomes of our actions.

My proposal is that the evidence-relative sense of wrong is relevant for determining whether a person is justifiably liable to defensive action. I am not claiming that it always plays a leading role when it comes to liability, but rather that in some cases (and I might be so bold as to say most cases) it does. I think that this is enough to remove the restriction McMahan imposes on the evidence-relative sense of wrong creating, rather than mitigating, liability.

Someone might want to argue that my proposal is just an ad hoc way of making sense of particular intuitions. That what I have proposed does not explain why, in some cases, the fact-relative sense determines liability and why, in some cases, it is the evidence-relative sense. To answer this possible rebuttal, we should first consider whether the wrong that McMahan endorses based on his version of the fact-relative sense, is the best candidate for the standard of liability.

By privileging the fact-relative sense over the other two senses of wrong, McMahan is using a sense of wrong that is not intuitively aligned with how we usually think of wrong when considering liability. Talk of liability often starts from what a person can be said to be doing. In the case of the Conscientious Driver, she can best be described as engaging in a generally permissible activity with all the needed precaution and care. On an evidence-relative account, the Conscientious Driver acts morally permissibly given the evidence available to her. Looking at liability from this perspective
reflects the common-sense intuition that it is unfair to hold people liable when they do exactly what any rational person would do given the available evidence. Inversely, McMahan starts from the consequences of a decision and traces it back to a person’s voluntary action. In the case of the Conscientious Driver, he might say that an innocent person has been put at risk by an objectively unjustified threat. The person who can be described as posing this threat is the Conscientious Driver and so we may hold her liable. At the heart of this approach is an appeal to distributive fairness. If someone engages in an activity that they can reasonably foresee would harm others and that possibility eventuates, then it is the person who poses the threat that ought to bear the burden of liability.

Approaching liability in the second sense leads to some counterintuitive results in certain cases. Considering again the Conscientious Driver, McMahan concludes that she is liable because she is responsible for an unjust threat of harm against a pedestrian. If it has to be either the pedestrian or the Conscientious Driver, then it seems fair that the Conscientious Driver be held liable. This argument rests on the powerful intuition that pedestrian has the right to defend himself. However, the verdict is still counterintuitive because the Conscientious Driver acts with all due care and in a way that all of the available evidence would suggest that any rational person act. If this is the case, then it is hard to see how the Conscientious Driver can be said to have given up her right not to be harmed. There is nothing that she has done or could have done, ignored or could have reasonably known, that would suggest she has lost her right. I agree with Quong when he
argues “it is more plausible to see these cases [the Conscientious Driver] as instances of symmetrical defensive harm, where two innocent people are tragically locked in a lethal conflict, and where each one has an agent-relative permission of self-defense” (58). It is more plausible to think that neither is liable but that both may permissibly defend themselves.

If we accept McMahan’s verdict on the Conscientious Driver, then it is hard to see how a third person intervening to save the pedestrian is different than a third person intervening to save the pedestrian from a culpable murderer. The fact that both share an equal burden of liability seems to point to an oversight in the fact-relative responsibility account. The suggestion here is that the difference between the case of a culpable murderer and the Conscientious Driver is a difference of kind and not degree, as McMahan’s account suggests. The difference of kind can be captured by an evidence-relative approach. While a third party may intervene by imposing harm on the behalf of pedestrian in any culpable murderer case, they cannot intervene by imposing harm in a Conscientious Driver case as both the driver and the pedestrian are not liable. If neither is liable, then the distinction between doing and allowing does not let a third party interfere to save one innocent person by killing another.10

The difference between the evidence-relative and fact-relative approaches is a difference in the treatment of facts. There is a way we talk about facts which refers to available facts that can be used to describe what a person is doing. This is what is being

10 A version of this argument can be found in Jonathan Qoung’s paper “Liability to Defensive Harm” pg 54-59.
employed in the first description of the Conscientious Driver. There are facts about the state of her car, facts about the state of the road, facts about the risks of driving, and facts surrounding her decision to drive. What is important about these facts is that they are accessible to the driver. They are reasonably knowable or available facts that lead to justified beliefs and to the best way to describe what she is doing both from her point of view and from an impartial point of view. There is also a way of talking about facts that refers to facts about effects. This is what is being employed in the second description of the Conscientious Driver. The difference between the first case and the second case is that the second case includes the result of the drive, the unfortunate accident. This fact is not available to the driver. When we talk about facts in this sense, we are talking about facts relevant to effects, knowable or otherwise. McMahan assumes that any time we talk about facts that ground liability, we are talking about facts in the second sense. That is, when he concludes that the Conscientious Driver is liable because of the facts, his argument relies on the premise that the facts that matter in determining liability are all of the facts (the second sense) and not just the reasonably knowable facts. This seems to be questions begging. McMahan is arguing that all morally relevant facts (facts about outcomes, evidence and beliefs), including facts that the agent at the time of acting could not have, or could not reasonably have, known matter when it comes to liability. However, he argues that the Conscientious Driver is liable because she is responsible for all of the facts. His reason for why the Conscientious Driver is liable seems to assume his original argument. It seems to assume that all morally relevant facts matter. We may
agree that all facts and not just knowable facts can be morally relevant, but it is not necessarily the case that it is relevant for liability. I have tried to demonstrate this with the example of the Conscientious Driver. Even if it does turn out that they are always relevant for liability, then it is not necessarily the case that they are always decisive.

Even if we ignore the possible question begging of McMahan’s treatment of facts, starting from the effects of voluntary actions instead of from the best available description of an act leads to varying assignments of liability that do not align with moral intuitions. Consider again the case of The Resident where the Resident impermissibly shoots a man he believes to be a murderer. In that case, the Resident acts in a way that the evidence gives him decisive reason to act. McMahan argues that the action of shooting the gun is still impermissible. It is wrong in the fact-relative sense in the same way that Cure is wrong, Poison is right and Inept Poisoner can shoot his victim once he attempts defensive action. His argument is again based on his belief that liability is determined by all of the relevant facts pertaining to the cause of an event. However, in the Resident’s case there are no relevant facts available that would have suggested he do otherwise. There is nothing that he reasonably failed to know or reasonably failed to do that would entail his liability. Like the Conscientious Driver, there is nothing that he has done or could have done differently that would entail him giving up his moral right not to be harmed. If you agree with the intuition that the Resident should only be liable if he could have done or known otherwise, then you agree that knowable facts (and not all facts) are what are important when we assign liability. Available or knowable facts are evidence. If
knowable facts are evidence, then the evidence-relative sense and not the fact-relative sense is what does the work in determining liability.

The reason that the verdict is implausible in *The Resident* is because the fact-relative sense is doing the work. Once you shift from all of the facts to the reasonably knowable facts, you realize that the evidence is what is doing the work and talk about facts simply fall away. In cases where the verdict is plausible, it is again because the evidence-relative and not the fact-relative sense is doing the work. Consider,

**Foolish Driver:** A person who always keeps her car well maintained and always drives carefully and alertly decides to drive to the cinema. Before going to the cinema she reads an article that states that the dealership that sold her a car just yesterday is recalling her exact make and model because it has been discovered that they have a tendency of spiraling out of control for no discernable reason. On the way to the cinema, a freak event occurs that causes her car to veer out of control in the direction of the pedestrian.

When I considered the two different senses of facts through the case of the Conscientious Driver, I concluded that the fact-relative sense incorrectly condemned her action, holding her liable, while the evidence-relative sense did not. On McMahan’s account, she is liable because she misses the morally relevant fact that she is going to have an unfortunate accident. However, the more plausible explanation of why she is liable is not that she failed to know the outcome, but rather that the available evidence dictates that she acts in a way that any reasonable person would be expected to act and so is not liable. In the case of the Foolish Driver, it easy to discern that she is liable.

However, it seems much more plausible to surmise that she is liable because the available evidence dictates that she ought to have known not to drive her car under those particular
circumstances, rather than being liable because she missed the morally relevant fact about the consequence of her decision. Again, the work here is being done by the available evidence or reasonably knowable facts. Talk about the fact-relative sense falls away when you really look at what is doing the work in determining liability in each case. If it is true that talk about facts fall away, then my proposal is not an ad hoc way of answering certain intuitions, but a better way of understanding what we mean when we talk about wrong determining liability. 11

Another reason why privileging the fact-relative sense leads to a use of wrong that does not capture our ordinary use, is that it moves liability away from being under our control. Consider:

**Cure:** I give you a vial of clear liquid that, as I justifiably believe, is almost certain to save your life, but which in fact kills you.

**Cure 2:** I give you a vial of clear liquid that, as I justifiably believe, is almost certain to save your life and does in fact save your life

On McMahan’s account, **Cure** is wrong in the fact-relative sense while **Cure 2** is right in the fact-relative sense. However, the difference between the two looks to be strictly a

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11 Here someone might argue that my version of McMahan’s account is unfair. They might argue that when he holds the Conscientious Driver liable it is not because she fails to predict the outcome, but because she poses an objectively unjustifiable risk. This risk is foreseeable and so we can hold her liable for the outcome she produces. While this argument makes sense, I do not think McMahan can help himself to it. Both risk and foreseeability are functions of available facts and evidence. I cannot be said to be taking a risk if I know all of the morally relevant facts and I cannot be said to not be able to foresee certain events if what I am concerned about are all of the facts surrounding a specific outcome. Both risk and foreseeability depend on what we determine someone could reasonably be expected to know based on the available evidence. When McMahan uses this line of argument to both generate and mitigate liability, he is slipping from the first sense of the use of facts that he builds his account on, into the second that I argue for. Please see my chapter on Risk and Foreseeability for further details.
matter of luck. I could not have known that one act would kill you while the other would save you. This implies that whether we are liable, based on the fact-relative sense, is out of our control as the outcome of the action is not foreseeable.

Consider again the case *The Resident*. I have already argued that the verdict in that particular case is wrong because there is nothing that the Resident could have reasonably known or done differently that would have changed the outcome. If you hold the Resident liable, as McMahan does, then you argue that the outcome and not what someone could possibly know is what is important in liability. If the outcome is what is important, then it seems like whether someone is liable is a matter of luck. To demonstrate what I mean, consider the following case:

**Resident 2:** Imagine that, unbeknownst to the Resident and the murderer’s twin brother, the actual murderer who has recently broken out of prison, is approaching a house right next door. The Resident’s neighbour has received the same warning about the murderer’s escape, his modus operandi, general whereabouts, and appearance. When Resident 2 sees the murderer approaching the house he takes aim and shoots.

What is important to note about *The Resident* and **Resident 2** is that each agent doing the firing has access to the exact same information. Each can be expected to know or foresee the exact same thing. The difference of outcome, one shooting the actual murderer while the other shoots his twin brother, is simply a matter of luck. There is nothing that either the Resident or Resident 2 did or could have done that put them in a better position than the other to foresee the outcome. If there is nothing that one did that the other did not, that would or could have changed the outcome, then the difference is a matter of luck.
The very idea of being responsible suggests that we have some part in determining whether or not we are liable, rather than having it come down to luck. By adopting my proposed treatment of the different senses of wrong, we have significant control over whether or not we are liable. We can actively seek to have justified beliefs by doing what the evidence gives us most reason to do. Whether we are liable will depend on whether or not we have acted in accordance with the available evidence. My proposal retains the ability to hold people liable based on their decisions. In the case of the Foolish Driver, she is liable because the evidence suggests that she reasonably ought to have known that she was taking a risk that could turn into an unjustified threat. In the case of the Resident, he is not liable because he could not have reasonably known that the man walking up his driveway to use his phone was not the murderer. Again, my proposal reduces the role luck plays in liability by moving the emphasis onto the evidence-relative sense of wrong. While this may mean that people who are the direct cause of bad fact-relative effects are not held liable, it better aligns with the intuition that we have an active part in determining our liability.

While my account may hold that some people who cause bad fact-relative effects are not liable, it also removes the role that luck plays in the fact-relative sense that forces us to treat intuitively different cases as similar. For example, on McMahan’s account Cure 2 and Inept Poisoner are treated similarly in terms of liability. Since I failed to pose a fact-relative risk while trying to poison you in Inept Poisoner, I am in no way liable. In Cure 2, I gave you a cure that I justifiably believed would save your life and it did, so I
am in no way liable. These two cases are very different in the belief-relative and evidence-relative sense but are treated the exact same in terms of liability. Similar to previous comparison of the Conscientious Driver and the culpable murderer, I argue that the moral intuition is that they ought to be treated in a way that clearly captures why *Inept Poisoner* is liable and *Cure 2* is not. While in *Cure 2* the agent is justified in the fact, evidence and belief-relative senses, *Inept Poisoner* is not justified in the evidence-relative or belief-relative sense. If we asked the Inept Poisoner to describe what he understood himself to be doing based on the evidence, he would describe himself as poisoning. It is simply a matter of luck that he is not doing what he believes he is doing based on the evidence. Just as it was a matter of bad luck for the Resident that he was posing an unjustified fact-relative threat and so was liable, it is a matter of good luck for the Inept Poisoner that he does not pose a fact-relative threat and so is not liable. In both cases of luck the verdicts do not seem plausible. It does not seem like luck can play such a prevalent role in determining liability, especially when it counters our common-sense intuition that we ought to have a greater amount of control over whether or not we are liable. If we recognize that the evidence-relative sense of wrong does much of the heavy lifting when it comes to liability, we can avoid treating clearly dissimilar cases as similar.

Finally, basing the objective moral standpoint on the fact-relative sense alone leads to an odd expectation in terms of what one ought to try to do in order not to be liable. The expectation seems to be that we ought to do what someone with all of the morally relevant facts would do. This is impossible. We cannot try to do what is right in
the fact-relative sense rather than the belief-relative sense. That is, I cannot try to base my decisions on facts that I do not believe to be the facts at the current time. If whether we are liable depends on the fact-relative sense of wrong, then it seems as though McMahan’s account asks us to try to do what is really right, rather than what we believe to be right at the time based on available evidence. This looks to be both impossible and an improbable way of getting fact-relative justified acts. We can strive to know all of the facts and to have the correct moral beliefs but this action would still entail doing what we believe, and what the evidence gives us reason to believe, the right thing to do.

On the surface, McMahan’s belief that we should do what is really right, rather than what we believe to be right, seems plausible. However, it only works if you assume that the agent knows all of the morally relevant facts. There is a sense in which we talk about right and wrong that assumes a consensus about the definition of those terms. Parfit calls this the ordinary sense and says that this is often used when you assume that everyone knows all of the morally relevant facts. He also points out that when people talk about right and wrong in the ordinary sense, they are often talking about very different things. When McMahan talks about right and wrong he specifically means it in the fact-relative sense. If you do not agree that the fact-relative sense is the determining factor of right and wrong as far as liability is concerned, then you are talking at cross-purposes. If you accept my arguments about the fact-relative sense falling away in cases where the verdict is plausible, then what you mean by the right thing to do is what the evidence gives you most reason to do. This means something very different than what McMahan
claims it means. I would argue that talk about doing the right or wrong thing is premature when you have yet to come to an agreement of what exactly is meant by the use of the terms.

It is important on McMahan’s account that the agent be evidence-relative justified as it can help to mitigate liability. However, treating the evidence-relative sense of wrong merely as a mitigating excuse seems to miss some important moral intuitions that make up more of the liability picture. If we consider the fact-relative sense as the foundation of liability, then we fail to properly account for how a person best understands what they are doing. As I have argued, if I create a situation where all the evidence points towards my poisoning someone, then I am responsible for that someone’s justified belief that they are being threatened and I am liable. Leaning too heavily on the fact-relative sense allows luck to play too great of a role in determining liability and also makes it hard to clearly demarcate dissimilar cases that warrant separate considerations, such as Cure and Inept Poisoner. Cases such as The Resident show us that there is a morally significant area that resides between objective moral justification in the fact-relative sense and the mitigating excuses in the evidence-relative sense as put forth in McMahan’s account. I propose that treating the evidence-relative sense of wrong as an important indicator of liability better captures what that difference is, creating a more robust sense of what we mean when we use the term wrong and assign liability.
Chapter 5
Risk, Foreseeability and Moral Reasons

In each of the five cases, some aspect of liability depends on the risk involved in the act and the foreseeability of that risk. Focusing on the risk, moral reasons and foreseeability, McMahan’s view can be summarized as follows: “it is permissible to kill X because just. It is just to kill X because X is responsible for an unjust threat to your life. X is responsible for that threat because he engaged in an activity that foreseeably put your life at risk and that risk eventuated” (Doggett, 4). Defining McMahan’s argument this way makes it obvious that it is important that we understand what risks count in making you liable, how foreseeability functions in a fact-relative account of wrong, and how moral reasons mitigate liability.

McMahan argues that the reason that the Resident, the Technician, the Ambulance Driver and the Conscientious Driver are liable is because of the fact-relative threat that they pose and because that threat is foreseeable. To start, I would like to outline what is meant by foreseeable. When McMahan argues that the Conscientious Driver is liable because she poses a foreseeable risk, he does not mean that she could have or ought to have known that, at that specific time, her car was going to veer out of control. If this was true, then her act would not only be objectively wrong but she would not be epistemically justified and would be culpable as well. I will refer to this type of foreseeability as actual
foreseeability. Instead, he means that she is able to foresee the broader possibility of causing harm to someone when driving. This is simply to say that she is expected to know that driving can be a dangerous endeavor and that veering out of control by no fault of her own is a possibility and so she must be held liable for that risk when it actualizes and puts others in danger. I will call this General foreseeability. The same can be said about the Resident. Shooting a gun is a risky decision and so when the Resident pulls the trigger he must be held liable for his decision because of the actualized possibility of pointing the gun at the wrong person, even if he is epistemically justified. Notice that in both cases what is important is not knowing that disaster would strike in that particular time (actual foreseeability) but that there is a general possibility of unjustified risk that we are expected to be aware of and so we must be held liable when that possibility materializes (general foreseeability).

It seems then that what is important to McMahan when assigning liability is the general foreseeability of posing a threat when that threat actualizes. However, this is not the conclusion he draws in the case of The Cell Phone Operator. McMahan’s argument is that the Cell Phone Operator is invincibly ignorant of the risk that he poses because he could not have known that he was posing a risk at all. That is, he could not have actually or generally foreseen that he was posing a threat. One might ask why it is the case that the Conscientious Driver is expected to foresee and thus is liable for posing a risk, while

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12 A good example of actual foreseeability is in the Technician case. In that case, the Technician reroutes the drone plane to save the people he thinks are in the buildings and he intentionally directs the plan to where one innocent bystander is standing. That is, he knowingly redirects the plane and so the outcome does not surprise him in any way. Actual foreseeability then is actions that someone can be reasonably expected to foresee happening in a certain instance.
the Cell Phone Operator is not. If general foreseeability is the litmus test for assigning liability, then it seems as though the Cell Phone Operator could have known that he was posing a risk even if all he could have known is that it was a general possibility. He could have known that it was a general possibility that his phone was rigged to detonate a bomb when he pressed the send button even if he could not reasonably know or foresee that it was going to happen that particular time. In the case of the Conscientious Driver, the driver is expected to know about the general possibility of harming another when they drive in the same sense as the Cell Phone Operator, but could not be said to have known that that particular time would have ended in catastrophe or the act would not even be permissible. In this sense (the general possibility sense) the two seem to be very similar. If I could know that there is a general possibility of crashing my car, then in the same sense, I could know that there is a general possibility of my phone being rigged to blow up a bomb. This would suggest that in both cases I ought to be liable to defensive action.

At this point McMahan would (and does) argue that taking foreseeability to its limits would make people liable for just about anything. If such an insignificant action as pressing send on my cell phone has the general possibility of putting people at risk and if this is what makes one liable for defensive action, then it seems that we would all be liable for defensive action for anything we do that could put someone at risk and we could generally know about it. As McMahan says “your book could be rigged to detonate a bomb when you turn the next page” (166). What McMahan wants to resist is making moral responsibility trivially true. His remarks suggest that he wants to make an
argument about which actions are reasonably foreseeable or foreseeable enough to ground liability and which are not. He needs some argument to distinguish why the Conscientious Driver is expected to foresee her risk, thus making her liable, while the Cell Phone Operator is not. This could be something along the lines of the probability a risk has of actualizes or the frequency with which it has occurred in the past.

While I agree that making some sort of distinction between reasonably foreseeable and unreasonably foreseeable risks looks like a promising approach, I argue that making this sort of threshold argument may be harder than it seems on McMahan’s account. Remember that on McMahan’s account, liability is determined by the fact-relative sense of wrong. The facts that made four of the five risk cases liable were facts about the outcomes or effects and not the available facts. In the last chapter, I argued that we were not able to capture our moral intuitions about where liability ought to lie in *Cure, Poison, Inept Poisoner* and *Back Alley* because the evidence-relative sense of wrong was not given any weight in determining whether someone is liable. While it can mitigate the amount of liability, it has been essentially taken out of the equation in terms of grounding liability. The question then becomes, how is it that you can now use the evidence-relative sense of wrong to determine whether or not a risk is foreseeable enough to make one liable? If McMahan argues that the difference between the two cases is that the Conscientious Driver ought reasonably to know she is putting someone at risk while the Cell Phone Operator ought not to be expected to know that he is putting someone at risk, then he is relying on the evidence-relative sense of wrong. What someone ought to know
or not know is an issue of evidence; it is a distinction that cannot be supported by the type
of facts that McMahan employs. Both the Cell Phone Operator and the Conscientious
Driver pose a fact-relative risk. Whether they should have reasonably known that they
were posing a risk is a question for the evidence-relative sense of wrong. If that is the
case, then it seems as though McMahan is really relying on the available facts to
differentiate between the two cases and to ground liability. This seems inconsistent with
his ruling on earlier cases.

McMahan’s argument is that the Conscientious Driver is liable because she can
reasonably know (general foreseeability) that she is putting someone at risk every time
she gets behind the wheel, while the Cell Phone Operator cannot. To talk about risk only
makes sense when we talk about subjective knowing. The Conscientious Driver took a
risk when she decided to drive because she knew that there was a possibility of a freak
accident occurring. Objective knowing, in McMahan’s sense, loses all possibility of risk
because you know in the fact-relative sense. If the Conscientious Driver knew in the fact-
relative sense, she would know that there was going to be a freak accident that day and so
there is no risk involved in the decision. Similarly, when we talk about foreseeability, we
are talking about what one could reasonably know and so are talking about the evidence-
relative sense of justification. It only makes sense to say it is foreseeable in terms of
epistemic justification. If it only makes sense to speak of foreseeability in terms of
epistemic justification, and we agree with McMahan that foreseeability ought to ground
liability in risk cases, then we have a very good reason to question why epistemic senses
of wrong are only considered excuses. As I stated earlier, the evidence-relative sense of
wrong must be doing more work in assigning liability than McMahan is willing to allow.
While McMahan may argue that what is really happening in cases where you rely on the
evidence to decide liability is that there is a complete mitigation of the liability inherited
from the fact-relative risk, I argue that it is simpler and better in line with our common-
sense intuitions to think that there is not a fact-relative liability but rather a liability that is
determined by what the agent is reasonably expected to know. As I argued in the last
chapter, relying solely on the fact-relative sense leads to odd verdicts where agents give
up their moral rights without doing or failing to do, and knowing or failing to know,
anything that would suggest that they have lost those rights.

Assume for a moment that we do insist that there is a morally important difference
between certain types of risk, such as driving a car or pressing send on your cell phone.
How coherent would an account of responsibility be? McMahan’s account suggests that
you are responsible for any fact-relative risk as long as it is evidence-relative foreseeable.
Putting the tension between facts about effects and available facts aside, one might ask
what criteria is used for deciding which risk is foreseeable and which is not. It is worth
noting that the five risk cases that McMahan presents rely heavily on actions that are
universally accepted as being risky. Driving, shooting a gun, and flying a drone plane are
all activities that entail a socially recognized risk and so are considered foreseeable. Since
they are foreseeable, the agents in the cases were deemed liable. In contrast, pressing
send on one’s cell phone is not considered a socially recognized risk. Since it is not a
socially recognized risk, it is not deemed foreseeable and so the Cell Phone Operator is not considered liable. It seems then that whether a risk is foreseeable or not, greatly depends on the public knowledge surrounding the risk. More specifically, the expectation of what someone ought reasonably to know about risks seems to depend on the standards of public knowledge.

If what is really doing the work in foreseeability is public knowledge, then we seem to end up with some very odd conclusions surrounding when one is liable for McMahan’s fact-relative account. Consider the following cases:

**Cell Phone Operator:** A man’s cell phone has, without his knowledge, been reprogrammed so that when he next presses the “send” button, the phone will send a signal that will detonate a bomb that will kill an innocent person. This is the first and only time that this has happened.

**Cell Phone Operator 2:** All of the same details occur except that this incident has now happened several times in the past few months as part of a concentrated terrorist attack. The method of the attacks have been highly televised and so it is reasonable to believe that informed individuals should know about it and we can even add that the attacks have been in the same area as our Operator.

McMahan has already argued that in the first case, the Cell Phone Operator is not liable. However, it seems that in the second case McMahan would have to conclude that the Operator is liable. He is no longer invincibly ignorant of the fact that he could be posing a risk. This demonstrates why liability derived from general foreseeability is really public knowledge. Can the difference between the first and second case be enough
to ground liability? It seems a very odd conclusion to say that what is actually morally important, what really determines our liability, is a risk becoming recognized publicly as a risk. Consider that the third and fourth time that someone pressed send and detonated a bomb they were not liable, while the fifth time they were. McMahan would have to argue that at some particular point a risk becomes generally foreseeable and so someone can be liable for it, an argument that is conspicuously missing and a hard argument to make without giving the evidence-relative sense of wrong too much moral authority in generating liability.

To better understand why drawing a liability line between the two Cell Phone Operator cases is hard to do on McMahan’s account, consider two ways my public knowledge foreseeability argument can be understood. One way to understand my public knowledge foreseeability argument is to think that social recognition is enough to make one liable. This would be tantamount to saying that one’s moral responsibilities vary from society to society, region to region. Consider two neighbouring societies. One adamantly believes that jaywalking is a very risky affair while the other does not. One even goes so far as to rate jaywalking as number one on their foreseeable risks list and for the other it does not even make the list. If the foreseeability of the risk is determined by public knowledge or the standard public norm surrounding that action, then our liabilities would be subject to change from one location to another. While this may be an acceptable answer to some, it is not the type of answer that McMahan wants to endorse while arguing for a universal code of moral conduct in war. His fact-relative account of liability
cannot include a contextual factor in determining liability and be applicable in all cases of
self-defense and just war conduct.

A second and more promising way to understand my public knowledge foreseeability
argument is to say that what really matters is what there is evidence to support. In the
case of the two Cell Phone Operators, we could argue that after a certain amount of cell
phone bomb explosions there is enough evidence to support the claim that an agent ought
reasonably to know about the risk they are posing. If they ought to be able to generally
foresee the risk, then they can be held liable. Under this interpretation, we might still run
into some slight variations in liability assignment. We can imagine a neighbouring
society, which has been isolated, and whose residents do not have the available evidence
to impose liability on the Cell Phone Operators once the terrorist group moves to their
region. However, the method for determining liability is not subject to the whims of the
society, rather is a product of the available facts and evidence. In this way, people are
liable to be based in what they can be reasonably expected to know via the available
evidence. Public knowledge is comprised of past experiences that are derived from past
evidence but that does not make up the whole story. It may be public knowledge that the
sky is falling but, upon further inspection, it becomes clear that it was really just an
acorn. Your liability in this case will depend on what you could have reasonably been
expected to know as per the available evidence and not just what passes as public
knowledge.
While the evidence-relative approach to public knowledge holds better implications for the universality that McMahan is striving for in both day-to-day self-defense cases and just war conduct, it is not an answer that McMahan can endorse. If we accept that the real defining factor for determining whether a risk is foreseeable or not is public knowledge and public knowledge really ought to rely on evidence, then it seems as though the evidence-relative sense of wrong is once again doing the bulk of the work when it comes to determining liability. Why wouldn’t the talk about liability from a fact-relative threat fall away if being held liable depends on the available evidence? It seems simpler to say that the liability itself and not just whether or not we can impose liability comes from the evidence-relative sense.

My argument so far has been that, in order to rely on foreseeability to determine liability, McMahan has to allow the evidence-relative sense of wrong to do more than mitigate. He has to allow it to be the deciding factor in determining liability. One might ask what McMahan’s account would look like if he stood by the fact-relative sense in determining liability? I believe that the most coherent rendering of McMahan’s account holds people liable for any outcome they can be said to have caused or be part of the cause. This avoids the shifting of the burden of work to the evidence-relative sense that comes with relying on actual foreseeability and general foreseeability. You are simply liable if you will or have caused an unjustified fact-relative effect. In all of the cases presented, excluding the Cell Phone Operator case, the arguments conclude that if someone has to pay the cost, it ought to be the person responsible for the risk and not
innocent bystanders. Dismissing any talk about foreseeability and risk simply extends that intuition to the Cell Phone Operator case.

In the first four of the five cases, the Resident, the Technician, the Conscientious Driver and the Ambulance Driver miss a morally relevant fact that makes them liable. The Cell Phone Operator also misses a morally relevant fact. McMahan claims that we can overlook this point because the risk they pose is not foreseeable. However, McMahan cannot help himself to this type of argument because the fact-relative sense cannot define a distinction between a foreseeable and non-foreseeable risk. Since he has opted not to include epistemic considerations in his version of liability, he cannot help himself to evidence to differentiate between the first four risk cases and the Cell Phone Operator case. The most coherent account of his work would hold everyone responsible who has missed a morally relevant fact. So, if the only way to stop Cell Phone Operator from pressing the send button and killing an innocent person is to shoot them, then we are morally justified in doing so because they are liable for the threat that they pose. While this may be regrettable, it is consistent with the intuitions that governed the outcomes in the other cases.

The question of public recognition extends from foreseeability to moral reasons. McMahan argues that having a moral reason to do some act (driving, firing a gun, flying a drone pane) mitigates liability. In the case of the Conscientious Driver versus the Ambulance Driver, the Ambulance Driver is less liable because he is driving to the scene of an accident (a moral reason to drive), while the Conscientious Driver is simply driving
to the movies (not a moral reason to drive). This is meant to demonstrate that one is less liable for posing a fact-relative threat when they pose that threat for moral reasons. However, similar to the case of foreseeability, it seems that the actual mitigation of liability is being done by the performance of a public good, instead of the moral reason. Consider the following two cases:

**Ambulance Driver:** An emergency Medical Technician is driving an ambulance to the site of an accident to carry one of the victims to the hospital. She is driving conscientiously and alertly but a freak event occurs that causes the ambulance to veer uncontrollably toward the pedestrian (165).

**Conscientious Promise Keeper:** A person who always keeps her car well maintained and always drives carefully and alertly decides to drive to the lake to carry out the dying wish of a beloved family member. On the way, a freak event that she could not have anticipated occurs that causes her car to veer out of control in the direction of the pedestrian.

The first case is simply the Ambulance Driver case that we are familiar with. The Ambulance Driver is driving with a moral reason and so our intuition is to hold her less liable for the freak accident that occurs. McMahan argues that we hold her less liable because she has a moral reason to be driving. In the second case, I have presented a version of the Conscientious Driver but have instead given her a moral reason to be driving, keeping a promise. I believe that most moral theories agree that promise keeping is generally a good thing and that doing something in order to keep a promise would be acting with a moral reason. If this is true, then our intuition should be that the
Conscientious Promise Keeper ought to be less liable in the same way as the Ambulance Driver. At the very least, she should be less liable than the Conscientious Driver and so morality should dictate that we impose proportionately less defensive action. However, when we compare the two cases it seems as though the intuition is still to argue that the Ambulance Driver has a legitimate mitigating excuse while the Conscientious Promise Keeper does not. I would even go so far as to say that the Conscientious Promise Keeper is on par with the Conscientious Driver. That is, I do not think there is a morally relevant difference between the two cases. If we agree that both the Ambulance Driver and the Conscientious Promise Keeper act for moral reasons but that the Conscientious Promise Keeper’s act has less appeal in terms of mitigation, then moral reasons are not behind our intuition that the Ambulance Driver should not be held as liable as the Conscientious Driver.

The structure of the cases presented compares two acts, both with moral reasons, and demonstrates that the mitigation of liability does not rely on moral reasons. If moral reasons are not doing the work of mitigating liability but we still have the intuition that Ambulance Driver ought to be less liable than Conscientious Driver, then there must be a difference between the two cases that accounts for this intuition. That difference is an act in the service of the public good, vs. an act that is not. When the Ambulance Driver is held less liable for the fact-relative risk that she poses, it is because she performs a public service while the Conscientious Promise Keeper does not. When we agree that the Ambulance Driver is less liable for posing a fact-relative threat, we are recognizing the
fact that the Ambulance Driver performs an important function for society that entails certain leniencies. While the Conscientious Promise Keeper is acting for a moral reason, we would not argue that she is morally allowed to turn on a siren and drive faster than the speed limit in order to get to the lake quicker, putting others at a greater risk.

As was the case with the public knowledge argument for foreseeability, there are two ways one could understand the public service argument. The first is to argue that what is really behind our intuition of mitigating liability is the performance of a recognized public service. At first glance, McMahan’s account seems to support this reading. The Technician, the Ambulance Driver and the Resident are all performing actions that are publicly recognized as goods and their liability is mitigated on that bases. The Technician is flying a drone plane in the service of the army, the Ambulance Driver is racing to the scene of an accident and the Resident is protecting his family. Compared to the Conscientious Driver, all three cases have the advantage of performing an act recognized as a public good.

In the case of the Technician, McMahan asks us to assume that the drone pilot has a positive moral reason to fly the drone plane. This is tantamount to asking us to agree that every time the Technician goes to work and drives the plane he has a moral reason to do so. While it might be true that simply flying a drone plane in the service of the army is enough to provide a moral reason, it is more likely true that the specific purpose for which the drone plane is being flown will have an effect on the status of the moral reason. We do not think that someone driving an ambulance to the gas station is acting with a
moral reason. If we argue that the Technician is less liable simply because he is flying a drone plane in service of the army, it makes more sense to think that he is less liable because every time he flies the plane, he is performing a recognized public service. Acts done for recognized public services are given certain special considerations that private acts are not and so agents performing those acts are less liable.

Similarly, if the Cell Phone Operator were pressing send on his phone to call 911 in regards to an accident he just witnessed, we would be more inclined to hold him less liable because he is performing a recognized public service. This is supported by the fact that all cell phones, even those whose service has been cut off for not paying the bill, have the ability to call 911. If, however, the Cell Phone Operator was pressing send to call someone that he promised to call, we would not be inclined to hold him less liable, even though he has the moral reason of keeping his promise.

If it is the case that services in the act of a recognized public good mitigate liability in some way, then, just as with foreseeability, the mitigation will vary with what certain societies deem an appropriate public service. For example, one society might think that clipping the overhead tree branches in public parks during peak hours is a viable public service while another does not. If this is the case, then one would be less liable in this society for posing a risk while clipping the overhead branches then in another society. Again, the argument is that the mitigation of liability is not being done by a moral reason, but by a leniency societies have for recognized public goods. If this leniency is what is doing the work in the mitigation of liability, then how liability will be
mitigated will vary from society to society. This again is a context-based account of liability that does not fit with McMahan’s account. It does not fit with McMahan’s account because he is attempting to put forward an explanation of liability that applies in all situations of day-to-day self-defense and just war conduct. If the mitigation of liability depends on the public recognition of services, then it does not reach the level of universality that he is aiming for. It would not matter what the fact-relative consequence is, but rather what fact-relative consequences certain societies take interest in.

A second and more promising approach is to understand service to a public good as an act that everyone benefits from, albeit indirectly in many cases, rather than recognized public services. This removes the contextual aspect of recognized public goods and instead focuses on permissibility of certain activities whose permissibility is something that everyone benefits from. What matters is not whether the act is recognized as a public good, but whether there really is a public good being served. Approaching the service of a public good this way looks to be much more promising for McMahan’s account. In the case of the Ambulance Driver and the Technician, we allow mitigation because their actions benefit all of society in direct and indirect ways. Everyone benefits when they live in a society that has people come to your aid when you are injured or ill or who come to your defense when you are under attack. Framed in this way, McMahan could say that the distinction between moral reasons and service of a public good is not an important one for his account, all that really matters is that they act with a fact-relative good outcome in mind.
We can now understand service to a public good in the second sense, as a service to the public that is permissible because it benefits others directly and indirectly and does not need to be publicly recognized. The question now becomes whether facts or evidence are what is really important in determining the mitigation of liability. In the case of the Resident, McMahan argues that he is less liable than the Conscientious Driver because he is acting with the subjectively justified moral reason of protecting his family (166-167). However, the mitigation of liability seems to hinge on subjective justification rather than any moral reason. That is, the mitigation of liability seems to hinge on the fact that the Resident is acting in accordance to the available evidence rather than on his having a moral reason. If the Resident believed that in order to protect his family he had to shoot every person who walked up his driveway in-between the hours of 8pm and 10pm on a Tuesday, we would not hold him less liable than someone who did the exact same thing but without the misplaced reason of protecting his family. The fact that he is protecting his family only seems relevant because he is evidence-justified in his action.

The same can be said about the service of a public good. If the Ambulance Driver drove around the busy city streets as fast as he could on every other Wednesday because he believed that is how he could best save lives, we would not hold him less liable because his action was done in the service of the public good. What is important is the subjective justification that the Ambulance Driver has when he acts for the public good. If this is true, then McMahan’s ability to switch between moral reasons and the service of a public good, understood in the second sense, does not matter. What his account fails to
realize is that the real work for mitigation is being done by subjective justification or by acting in accordance to the evidence. Moral reasons fall away to the service of a public good and the service of a public good only matter, in terms of liability, insofar as the agent is following the available evidence.

A large portion of McMahan’s scheme of risk, foreseeability and mitigation rests on concepts of public service. I have argued that the best reading of McMahan’s account considers risks foreseeable when they are publicly acknowledged or, even more coherently, when there is evidence enough that you ought to have known about them. The problem is that McMahan cannot rely on foreseeability without giving up the fact-relative sense as the generator of liability. I have also argued that McMahan’s account of moral reasons as mitigating liability really boils down to performing a service for public good. Though the service of a public good, understood in the second sense, may be a viable factor when it comes to the mitigation of liability, the real mitigation was being done by the subjective justification that the agent was acting with. Neither moral reasons nor public service seem to matter in a liability picture unless it is tied to available evidence. This is a shift that McMahan’s account must resist in order to keep the fact-relative sense as the sense that bears the most on liability. The five cases are meant to demonstrate that the fact-relative sense of wrong can give a robust account of when and why someone is liable in both day-to-day situations and in just war conduct. As it turns out, McMahan’s account cannot makes sense of its own verdicts or support its own methods of mitigation without relying heavily on the evidence-relative sense of wrong. This suggests that his
moral responsibility account is not a good candidate for the universal standard he suggests.
Chapter 6

Quong’s Third Person Intervention Rebuttal

Thus far, I have argued that the fact-relative responsibility account is implausible partly because it gives counterintuitive verdicts on who should bear the burden of liability in many cases. I have also argued that it gives luck too great a role, asks us to do the impossible, and cannot support risk, foreseeability and moral reasons in the way that it proposes. In order to avoid all of these counterintuitive implications and to maintain the intuition that people ought not to be liable when they act in a way that any rational person would act given the available evidence, my suggestion has been to instead adopt a version of an evidence-relative account. On an evidence-relative account, someone is liable when they act with agency, act against what the available evidence gives you most reason to do, and imposes an unjustified threat in either the fact or evidence-relative sense. However, Quong argues that, while it may be tempting to support an evidence-relative view, it must in the end fail as a satisfactory answer to the liability question. Quong’s criticisms rely on one of the criteria for judging the plausibility of a liability account that I introduced at the outset of this paper. That criterion is the plausibility of when third parties may intervene in a violent conflict. Quong argues that the evidence-relative account cannot account for the fact that individuals who are blamelessly ignorant can still at times be liable to defensive harm.

To support his argument, Quong puts forth two cases. The first case is:
**Police Intervention**: The identical twin brother of a notorious mass murderer is driving during a stormy night in a remote area when his car breaks down. Unaware that his brother has recently escaped from prison and is known to be hiding in this same area, he knocks on the door of the nearest house, seeking to phone for help. On opening the door, Resident justifiably believes the harmless twin is the murderer and lunges at him with a knife (Resident has been warned by the authorities that the mass murderer is almost certain to attack anyone he meets on sight). Just at that moment, a police officer arrives on the scene that knows the person being attacked by Resident is the murderer’s innocent twin. The police officer realizes the mistake that Resident has made, and now sees that the only way to save the twin from being killed is to shoot and kill the Resident first. Alternatively, the police officer could let Resident kill the twin (60-61).

Using a version of the Resident case, Quong argues that it is clear that the police officer may intervene on behalf of the innocent twin brother. That is, he is morally permitted to shoot the Resident to save the murderer’s twin. He argues that if this correct, then the Resident must be liable to some form of defensive action even though he is evidence justified. If he were not liable, the officer would not be morally permitted to shoot him. On evidence based accounts the police officer would have no grounds to intervene because the Resident acts in a way that any reasonable person would act given the available evidence. He has not done or failed to do anything that would entail him losing his right not to be harmed. If this is the case, then the evidence-relative account must hold that the police officer cannot intervene. This is supported by the generally accepted belief that someone may not intervene on behalf of one innocent person to the harm another.
innocent person, unless they have agent-relative reasons\textsuperscript{13}. Quong argues that it is counterintuitive to suppose that both the pedestrian and the Resident are equally nonliable.

To demonstrate why it is counterintuitive, he changes the cases slightly and asks us to suppose that, instead of having to kill the Resident, the officer can end the altercation by either imposing a moderate level of harm on the twin or a more serious, though non-fatal, level of harm on the Resident. Quong argues that it is clear that the officer should impose the greater amount of harm on the Resident instead of the twin brother. Like McMahan, Quong seems to be appealing to the powerful distributive fairness intuition that suggests that if someone ought to bear the burden, it should be the person who poses the unjustified threat, rather than the one who does not. If this intuition is correct, then the officer can only be justified if the Resident bears some liability. He can only be justified in posing a greater harm if the Resident is in some way liable for defensive action.

To further demonstrate this point he presents, 

\textbf{Duped Soldiers}: A group of young soldiers are successfully fooled by a totalitarian regime into believing that the regime is good and just, and is under repeated attacks from their evil neighbours, the Gloops. The regime’s misinformation campaign is subtle and absolutely convincing: the soldiers are

\textsuperscript{13} Agent relative reasons are partial reasons to intervene where general impartial reasons do not give you the ability to do so. Agent-relative reasons can include claims of close ties such as close family members or friendship that might provide a decisive reason to intervene on someone’s behalf even if the two are symmetrical in terms of liability. These reasons are often discussed in trolley cases where some argue that you can divert the train from one innocent to another if you have agent relative reasons (he is my son) to value the life of one innocent over the other.
justified in believing what they are told by the regime. Once the misinformation campaign is complete, these Duped Soldiers are given orders to attack and destroy a Gloop village on the border which, they are told, is really a Gloop terrorist camp plotting a major attack. In fact, everything the regime has said is a lie, and the Gloop village contains only innocent civilians. The Duped Soldiers prepare to shell the village and are about to (unknowingly) kill all the innocent civilians in it. A peacekeeping force from a neutral third country patrols the border and could avert the attack, but only by killing the Duped Soldiers (62-63).

From this case, Quong convincingly argues that it is very implausible to hold that the Duped Soldiers and the Gloops are equally non liable to attack. If they are equally non liable to attack based on their symmetrical non-liability, then the peacekeepers have no grounds to attack the Duped Soldiers. This example assumes that the numbers between the Duped Soldiers and the Gloops are the same so that the distinction between doing and allowing in conjunction with an evidence-relative view requires that the peacekeepers let the Duped Soldiers kill the Gloops. If we believe that the peacekeepers ought to intervene to save the Gloops, then the Duped Soldiers must be liable in some sense. If they are liable in some sense, then we have good reason to reject the evidence-relative account as it clearly gets the wrong answer on this very important third party intervention case.

Although Quong’s arguments are rather convincing, it is important to remember that my argument has been that the evidence-relative sense of wrong most often does the work when it comes to liability. Though I have argued strongly in favour of the evidence-relative account, I have intentionally not dismissed the fact-relative sense outright. It may
be the case that in situations such as *Police Intervention* and *Duped Soldiers* that the relevant difference between the liable party and the non-liable party is who poses the unjustified threat in the fact-relative sense. My account has not dismissed this possibility even if it has argued that the fact-relative sense is not what does the bulk of the work in assigning liability and that it often falls away when evidence is considered.

Though my story may leave the necessary space for accounting for these particular third person intervention intuitions via the fact-relative sense, it is worth questioning whether calling someone non-liable based on an evidence account is the same as putting them on par with an innocent pedestrian such as the murderers twin brother in *Police Intervention*. In each of Quong’s cases he assumes that being non-liable due to evidence-relative justification is the same as being an innocent. In *Police Intervention* he concludes that, on an evidence-based account, the police officer cannot intervene because the two are symmetrical in terms of liability. In *Duped Soldiers* he argues that evidence-relative account must dictate that the Soldiers be left to kill the Gloops because of their symmetrical non-liability. Earlier in this paper, I argued that the fact-relative account has difficulty differentiating between a culpable murderer and someone who is posing a risk as a product of bad luck, such as the Conscientious Driver. This is not the case in an evidence-based account because the agent posing the threat is not determined liable based on the fact of whether they pose a threat or not but instead on whether their action is epistemically justified via the available evidence. I have argued that this might create odd symmetrical cases of self-defense where each has an agent-
relative right to defend themselves even though neither is liable. Though it may be the case that the competing parties in each of Quong’s cases are symmetrical in terms of not being liable on an evidence-relative account, it may not necessarily be the case that this condemns a third party not to intervene.

My belief is that there is a classification in-between the non-liable and the innocent that Quong is ignoring. It does not seem to be the case that being non-liable automatically makes you symmetrical to an innocent in every morally relevant aspect that bears on third party intervention. It may be the case that, just as agent-relative rights enable individuals to permissibly impose liability on those who are not liable in symmetrical cases, considerations of distributive fairness or service of a public good may enable a third party to intervene in cases of symmetrical non-liability. Remember that distributive fairness is the idea that, all things being equal, it ought to be the person who poses the risk that ought to bear the burden. Also remember that I have defined the service of a public good as an act that everyone benefits from, albeit indirectly. For the service of a public good, permissibility is based on the benefits to everyone. I believe that in cases of symmetrical non-liability considerations of distributive fairness and service of a public good can morally enable a third party to intervene.

To demonstrate my point, consider the Conscientious Driver. In that case, both Quong and I agree that the driver is not liable because she has not done anything or failed to do anything that would entail her losing her right not to be harmed. If this is true, then the situation she finds herself in where she is spiraling out of control towards the
pedestrian is one of symmetrical non-liability. The pedestrian is able to defend himself via agent-relative rights and the driver is allowed to do the same. However, it seems as though we could construct a very similar case to Police Intervention where an officer shows up just in time with the ability to stop the spiraling car by killing the Conscientious Driver. We can even modify the case so that the officer can stop the altercation by imposing a moderate level of pain on the pedestrian or a slightly more severe level of pain on the Driver. I believe that the intuition in this case is the same as in Police Intervention; the officer ought to be able to intervene on behalf of the pedestrian.

However, Quong has already agreed that the Conscientious Driver ought not be held liable, “this conclusion—that Driver has forfeited his right against the imposition of defensive harm—strikes many people as counter intuitive. After all, Driver has acted with all due care and precaution, and is engaged in an activity that is generally permitted” (57). If she ought not to be held liable, then the police officer ought not to be allowed to intervene. Both the intuition that the Conscientious Driver ought not be held liable and the intuition that the officer ought to be able to intervene are very plausible. If this is the case, then it seems as though the question of whether a third party may intervene in situations that I have called ‘symmetrical non-liability’ is not a question of liability at all.

If we agree that the pedestrian and Conscientious Driver are symmetrical in terms of not being liable, then it seems that our intuition that the police officer can intervene may have more to do with distributive fairness or service of a public good, rather than liability. In this particular case, it seems as though it would be distributive fairness doing
the work. That is, since the Conscientious Driver is posing the risk, she ought to bear the burden. However, in both this case and the *Police Intervention* case, there seems to be a question of whether the officer can kill in order to save the innocent. Though it is very plausible that the officer may impose a burden on the Conscientious Driver in order to save both her and the pedestrian, it becomes less clear if he can impose a fatal burden. It seems intuitively fair that the person imposing the threat be given the bigger burden. However, if that person is evidence justified in posing that risk, then it becomes less clear that the burden they ought to have imposed on them can be fatal. I believe that this is a benefit of the evidence-relative account, as it can clearly distinguish between cases such as the Conscientious Driver and culpable murderer. In any case, the difference in the plausibility of imposing various degrees of burden brings to the foreground the work that distributive fairness is doing in considerations of third party intervention in symmetrical non-liability cases. If there is a variation in the burden that we believe ought to be imposed and we also agree that both parties are non LIABLE, then it seems as though considerations of distributive fairness are working to determine the moral parameters of third party intervention that depend on the morally relevant difference between the non-LIABLE and the innocent.

Consider a trolley case where a man with no malicious intent has stepped onto the tracks in order to retrieve something he has dropped. Unbeknownst to him, the act of stepping onto the track both latches him to the track so that he cannot move and starts the trolley heading off in the other direction. Far down the line on the other side of the track,
another individual is trapped, again by sheer coincidence, with no hope of escape. The trapped man’s bad luck is going to be fatal. However, on the bridge halfway between the two men is a control tower. Inside the control tower is an operator who can either leave the train on its present course, thereby condemning the trapped man to death, or he can press a button to turn the train around inevitably killing the man who jumped onto the track. There is a case that can be made for pressing the button. Considerations of distributive fairness would indicate that, all things being equal, the person who unjustifiably poses the threat ought to bear the burden. Whether or not this is a fair distribution is beside the point. The interesting question is whether the man whose actions started the train off in the other direction is liable. Though it is plausible that a case may be made for pressing the button and shifting the burden back to the first man, it is not plausible that he be considered liable. He has not done or failed to do something that would constitute his becoming liable. If the operator is morally justified in pressing the button to turn the train, it is simply a case of distributive fairness and not of liability. How distributive fairness shakes out is of no concern for my present point. The mere fact that third party intervention seems like a viable option on a symmetrical non-liability case underscores the idea that there is a morally relevant categorization between non-liable an innocent that Quong ignores.

I believe that this distinction holds true for *Duped Soldiers* as well. We can agree both that the Soldiers are not liable and that the peacekeepers are morally permitted to intervene in the altercation. This again can appeal to consideration of distributive fairness
and service of a public good. In the case of the peacekeepers, it is in everyone’s best interest if they defend the innocent from attackers. This would also be true if the Gloops raised a misinformed army and went to attack the Duped Soldiers in their homes. The general principal of protecting the innocent benefits everyone directly or indirectly. Furthermore, it seems relevant that the Duped Soldiers would want to be stopped from performing a fact-relative unjustified harmful action against others. Though they are not liable, stopping them from what they are epistemically justified in doing is in their interest as their goal in obtaining epistemic justification is to perform fact-relative justified acts. This is the same for the case of the Conscientious Driver and the Resident. If intervention is in the best interest of all those involved, then we do not need an asymmetry of liability in order to enable someone to intervene. Again, this points to a morally relevant category between the non-liable and the innocent that bears on third party intervention.

Quong argues that an evidence-based account eliminates the possibility of people with blameless ignorance being held accountable. I have argued that this is not necessarily the case. By looking at what is doing the work to morally permit third parties to intervene in the cases he presents, it seems that in certain situations people with blameless ignorance can be held accountable even if they are not liable. In situations of all things being equal in terms of epistemic or subjective considerations of threats, the person who poses the unjustified risk in the fact-relative sense can be stopped by a third party by an appeal to distributive fairness. In cases where soldiers are duped into
pursuing an objectively unjust act, they can be stopped by an appeal to the service of a public good. In such a case, the third parties intervention is permissible because it benefits all involved. In both cases of intervention, liability is not necessary. If liability is not necessary for intervention, then there seems to be no reason to believe that there must be some form of asymmetrical liability in order to end up with the correct verdict in the discussed cases. Instead, we can continue to believe that people are not liable when they have not done anything that would constitute giving up their right not to be harmed.

Considerations of distributive fairness or service of a public good make it so that third parties may intervene in symmetrical non-liability cases. There seems to exist a morally relevant space between non-liable agents and innocents that can ground the type of intervention that, as Quong correctly points out, is necessary.
Chapter 7

Conclusion

At the outset of this paper, I stated that I would focus on the question of what a person must do in order to be morally liable to defensive harm. My approach has been to first take an in-depth look at Jeff McMahan’s fact-relative moral responsibility account of liability. McMahan’s goal in putting his account forward is to find an all-encompassing theory of liability that is true for both day-to-day self-defense cases and for just war cases. Like Quong and I, McMahan works under the assumption that the difference between self-defense and just war theory is a difference of degree and not of kind. The question is whether the distinctions he has made can be carried by the cases he presents. If the goal is to demonstrate how moral intuitions surrounding self-defense are relevant to situations of war, then the stringent permissibility requirement that McMahan wants to use for war must be supported by the self-defense and other daily cases that he puts forward.

Throughout this paper, I attempted to demonstrate that the cases McMahan presents do not support so stringent a definition of liability. My main arguments in chapter four have been centered on the difficulties that arise when you relegate the evidence-relative sense of wrong to a strictly liability mitigating role, rather than a liability generating role. Through my discussion of *Cure, Inept Poisoner* and *Back Alley*, I have tried to show that you can be liable based on the best description of the action you
are engaging in. If all of the available facts and evidence lead me to the justified belief that you are posing a fact-relative threat, then considerations of fairness seems to dictate that you are liable even if you do not actually pose that fact-relative threat. Through my discussion of *The Resident* and *The Conscientious Driver*, I drew out the argument that available or reasonably knowable facts are playing a greater role in generating liability than all of the morally relevant facts (consequences included) that McMahan privileges. If you agree with the intuition that the Resident or the Conscientious Driver should only be liable if they could have done or known otherwise, then you agree that knowable facts and not all facts are what are important when we assign liability. Available or knowable facts are evidence. If knowable facts are evidence, then the evidence-relative sense and not the fact-relative sense is what is really doing the work in determining liability.

I then presented a set of analogous luck cases such as *Cure*, *Cure 2* and *The Resident, The Resident 2* that demonstrate how a fact-relative account relies too heavily on luck in the assignment of liability. The very idea of being responsible suggests that we have some part in determining whether or not we are liable, rather than having it come down to luck. By adopting an evidence-relative account, we have significant control over whether or not we are liable. We can actively seek to have justified beliefs by doing what the evidence gives us most reason to do. Whether or not we are liable will depend on whether or not we have acted in accordance with the available evidence and not on the brute luck of being fact-relative justified.
In chapter five I argue that, in order to rely on foreseeability to determine liability, McMahan has to allow the evidence-relative sense of wrong to do more than mitigate. He has to allow it to be the deciding factor in determining liability. If we accept that the real defining factor for determining whether a risk is foreseeable or not is public knowledge and public knowledge really ought to rely on evidence, then it seems as though the evidence-relative sense of wrong is once again doing the bulk of the work when it comes to determining liability. This leads one to question why talk about liability from a fact-relative threat wouldn’t fall away if being held liable depends on the available evidence. I argue that it is simpler to say that the liability itself and not just whether or not we can impose liability comes from the evidence-relative sense. McMahon’s fact-relative account is not able to support the distinction between reasonably foreseeable and unreasonably foreseeable without shifting the burden of the work of generating liability onto the evidence relative account.

I then argue that McMahan’s argument that moral reasons mitigate liability actually rests on the performance of a service for public good. While an interesting shift, this looks to be something that McMahon’s account can accommodate. However, though the service of a public good, understood as something that benefits everyone either directly or indirectly, may be a viable factor when it comes to the mitigation of liability, the real mitigation is being done by the subjective justification that the agent acts with. Neither moral reasons nor public service seem to matter in a liability picture unless it is
tied to available evidence. This is a shift that McMahan’s account must resist in order to keep the fact-relative sense as the sense that bears the most on liability.

In chapter six, I address a criticism put forth by Jonathan Quong. Quong argues that, though tempting, we must reject the evidence-based account on the grounds that it is not able to hold some people who are non-liable on the evidence account accountable in terms of third party intervention. I argue that Quong seems to ignore the morally relevant fact that third party intervention does not need liability in order to be morally permissible. In cases where there are symmetrical non-liability claims, third parties may base their intervention on considerations of distributive fairness or on the service of a public good. In this way, much in the same way that agent-relative considerations enable those in Conscientious Driver to defend themselves, we do not need to give up the idea that those who have not done, or have not failed to do something are not liable.

In summation, I have found that the evidence-based account to be the best account of when and why a person is liable. I believe that it could prove a robust liability account for both the day-to-day self-defense cases and in cases of just war. A further project would benefit from building out my arguments into a positive account for an evidence-based account, as well as considering how this new account of liability would affect the non-responsible threat cases that are popularly discussed by authors such as Judith Thompson, Michael Otsuka, Jonathan Quong and Jeff McMahan.
Works Cited


