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Causation and Liability to Defensive Harm

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ABSTRACT *An influential view in the ethics of self-defence is that causal responsibility for an unjust threat is a necessary requirement for liability to defensive harm. In this article, I argue against this view by providing intuitive counterexamples and by revealing weaknesses in the arguments offered in its favour. In response, adherents of the causal view have advanced the idea that although causally inefficacious agents are not liable to defensive harm, the fact that they may deserve harm can justify harming them in the course of defending oneself. I argue that this strategy is ad hoc and leads to more problems than it solves. Once we allow normative facts outside our account of liability to affect a person's moral protection against harm, the lieability verdicts cannot tell us whether there is a relevant moral asymmetry between the victim and the target of defence. In conclusion, the causal view is wrong and causal responsibility for an unjust threat is not a necessary requirement for liability to defensive harm.*

1. Introduction

According to many theories of self-defence, one way to justify harming a person in order to avert a threat of unjustified harm (hereafter unjust threat) is to establish that the person is *morally liable* to defensive harm.[1] When a person is liable to harm, she loses her moral protection against being harmed in order to avert a threat, and is not wronged when someone imposes this harm on her. Although it may also be permissible to harm innocent bystanders in the course of averting an unjust threat if enough is at stake, this is standardly considered much harder to justify than harming a liable person. A person who is liable, moreover, is not entitled to compensation for suffering harm to which she is liable, is not permitted to defend herself against such harm, and third parties ought, if they intervene, to intervene on the part of the non-liable party to the detriment of the liable party. Liability is often contrasted with desert. Whereas imposing deserved harm on someone may be an end in itself, standard views of liability reject the idea that being liable provides any positive reasons for harming a person independently of the value of averting an unjust threat.

Most authors on this topic agree that one has to be morally responsible for a wrongful threat of unjust harm in order to become liable. This entails that two requirements have to be fulfilled. The first requirement concerns the moral agency of the agent. The second concerns the agent's causal role. With respect to the moral agency requirement, some authors think agents have to be culpably responsible in order to be liable; others think non-culpable moral responsibility for a wrongful threat is sufficient. The causal requirement can be formulated in the following general manner:

> *Causal requirement for liability to defensive harm*: For an agent to become liable to defensive harm, there must be a causal relationship between that person and an unjust threat.

This article is devoted to whether the causal requirement is in fact a necessary requirement of liability to defensive harm.

I refer to accounts that support the causal requirement as causal accounts of liability to defensive harm (or 'causal accounts' for short). A number of influential philosophers writing on this topic defend causal accounts.[2] Since causal accounts only attribute relevance to moral responsibility *for* causally contributing an unjust threat, such accounts bypass the moral responsibility of causally inefficacious agents.[3] In this article I primarily have in mind two types of non-causal responsibility. The first is omissive responsibility for failing to prevent a threat; the second is responsibility for engaging in a futile attempt at posing a threat.

In Section 2 of this paper, I review cases which elicit intuitive verdicts in conflict with the causal accounts to motivate the challenge to the causal requirement. In this section I consider the arguments offered in favour of causal accounts and argue that they fail. In Section 7, I consider the suggestion that one may inflict harm on causally inefficacious agents to avert a threat by appealing to their desert, even if they remain non-liable to defensive harm. I point out that accepting multiple responsibility-based justifications for non-consensual harming means we can no longer establish a determinate moral asymmetry between a victim and a liable party solely by pointing to the latter's liability. In Section 8, I conclude that objections to the causal requirement for liability to defensive harm are undefeated, and that the causal requirement should be given up altogether. I should stress at the outset that the ambition of the article is mainly negative and that my foremost goal is to undermine the belief in the causal requirement. Once causal accounts look less attractive, the reader may want to know what a non-causal account of liability would look like and, in particular, how such an account can be given a plausible scope. However, providing a positive argument for such an account is not the ambition of this article. Given wide support for the causal requirement, merely rebutting it has significant independent value and opens up a new direction of philosophical inquiry, which hitherto has remained insufficiently underexplored.

2. Defending the Causal Requirement

It is easy to understand why many believe causal responsibility for an unjust threat is a necessary requirement for liability to defensive harm. The innocent bystander is a well-known character from thought experiments in the self-defence literature that appears to provide intuitive support for the causal requirement.[4] Bystanders, according to causal accounts, are agents who do not threaten or causally contribute to a threat to the victim, and who are therefore not liable to harm.[5] It may be natural to assume that the reason a victim may not seriously harm or kill an innocent bystander in order to avert a threat from a culpable aggressor is because the bystander does not causally contribute to the threat. However, because the innocent bystander differs from the culpable aggressor in both causal and moral terms, the intuitive difference between

harming them can potentially be explained by either difference. To focus on the moral relevance of causal responsibility for a threat, we need to compare cases where the bystander and the causally responsible person display comparable moral agency, and where defensively harming either in a similar manner is equally likely to successfully avert the threat. In the following I will provide examples that meet these criteria and assess how intuitions and arguments offered in favour of the causal accounts hold up in light of such cases.

2.1. **The Moral Gamble**

Defenders of causal accounts must explain why agents who act identically can end up on opposite sides of the liability divide entirely as a result of causal factors beyond their control. To see this, it is helpful to review cases involving agents who attempt, but fail, to pose a threat of unjust harm. According to causal accounts, such agents are not liable to defensive harm, whereas agents who behave identically and who succeed in posing a threat are. Consider the following case.

> *Unjust Firing Squad*: Victim is a prisoner of war about to be wrongly executed by six riflemen in an execution squad. Only two of the rifles have real bullets, but none of the riflemen knows which rifles they are. The riflemen are lined up in individual booths, such that they are unable to see how many others are taking part in the squad. Unbeknownst to them, Victim has a gun. Pre-emptively harming any of the riflemen will scare off the rest and give Victim enough time to escape.[6]

Suppose that Victim knows which of the rifles have bullets. By the lights of the causal accounts the causally inefficacious riflemen amount to mere bystanders, whose moral responsibility is irrelevant to the threat Victim is now facing. Consequently, Victim should direct his defence towards the riflemen with the bullets, even if harming any of the riflemen would be equally successful in averting the threat. In fact, according to causal accounts, Victim ought to choose lethally harming the riflemen with bullets, even if inflicting less harm on the riflemen without bullets would equally avert the threat, precisely because they fall on either side of the liability divide. But it seems unfair to hold only the riflemen with the bullets liable, given that all the riflemen act in the same way.[7]

Defenders of causal accounts will nevertheless insist that this is the right verdict, deriving from the brute, yet morally relevant, fact that some riflemen pose an actual threat whereas others do not. One way some authors have attempted to justify this verdict is by invoking the notion of a *gamble*. Consider how Jeff McMahan explains why a conscientious driver, who through no fault of her own veers off the road and threatens to kill a pedestrian, is liable to defensive harm, whereas other drivers who do not pose a similar threat are not so liable.

> What [the driver] lacked control over is comparative: that her car went out of control whereas those of other drivers did not. But the basis of her liability is her choice to impose a risk, and over that she did have control. That she ended up liable to defensive action while the others did not may seem unfair, but it is no more unfair than that some gamblers leave the casino with losses while others leave with winnings.[8]

Michael Otsuka also appeals to the notion of a gamble to justify the role that causal luck is allowed to play in determining a person's liability.[9] Otsuka invokes the luck egalitarian distinction between option luck and brute luck, arguing that moral liability is akin to option luck. Option luck, according to Otsuka, relates to outcomes that are foreseeable, albeit perhaps improbable, consequences of a given voluntary behaviour. Brute luck, on the other hand, is not similarly foreseeable. Since bad option luck is foreseeable and avoidable, whereas bad brute luck is not, having to carry the consequences of the former is not unfair, according to the luck egalitarian reasoning.

From this, Otsuka claims that someone who becomes liable to defensive harm is 'morally unlucky in much the same way that someone who gambles on the stock market and loses is financially unlucky. The upshots of such gambles are not unfair, because they are a matter of bad option luck rather than brute bad luck'.[10] Just like McMahan's driver, each of the riflemen knew, when they voluntarily decided to participate in the firing squad, that there was a risk of ending up as an actual threat to Victim. According to McMahan and Otsuka's reasoning, it is not unfair to regard those with a bullet in their rifle as liable to harm, even though the other riflemen who took the same gamble escape liability.

The analogy between having to carry the loss of an economic gamble and having to accept the loss of moral rights if you impose risks of unjust harm on others is fraught with difficulties. The reasoning behind the claim that it is fair that the casino gambler carries the loss of his gamble is that the gambler voluntarily and knowingly exposed himself to this material risk. When we ask why it is fair that an unlucky gambler may lose his money while lucky gamblers do not, the answer is simply that he knew that this was a possible outcome when he voluntarily chose to take the gamble. A minimal requirement of a fair gamble is precisely that the gambler cannot but know that he is taking a gamble, that he knows what counts as winning and what counts as loosing and roughly what the stakes of the gamble are.

These conditions are not met in the case of risk-imposing behaviour. We cannot say to the riflemen, as we can to casino-gamblers, when we impose defensive harm on a subset of them that they *knew* they were taking a moral gamble, that ending up with a bullet in the rifle counts as losing and that losing amounts to becoming liable to defensive harm. Nevertheless, this is precisely what McMahan seems to assume when he explains the conscientious driver's liability: 'That she is liable and they [other drivers who behave identically] are not is a matter of moral luck. Yet she acted in the knowledge that bad moral luck was a possibility'.[11] The statement is puzzling, since what is clearly known to the driver or anyone who imposes a risk of harm is the possibility of bad *causal* luck – e.g. that the risk of harm she imposes on others may materialise. The *moral* consequence (i.e. to her liability) of the causal difference between the unlucky driver and others who drive identically is not known to her. Indeed, it is precisely *whether moral luck should be allowed to play this particular role* which is up for debate. The gamble analogy therefore cannot explain why causal responsibility should be the mechanism which explains why some agents are morally disadvantaged among several agents engaged in identical behaviour.

To see that the gambling analogy fails, notice how the argument could equally be employed to support the opposite conclusion. Contrary to the causal accounts we could argue that what makes the causally inefficacious riflemen liable is voluntary engaging in a behaviour that they knew risked exposing others to unjust harm,

combined with the bad moral luck *of ending up as the victim's best or only target*. Like Otsuka and McMahan, we could argue that the fact that they end up liable, whereas others who engaged in the same behaviour do not, is a type of option luck which they knowingly exposed themselves to. Thus conceived, 'the gamble' a risk imposer takes is not a gamble of becoming liable if he ends up causing harm, but the gamble of becoming liable if harming him becomes Victim's only or least harmful defensive option. Like McMahan and Otsuka, one could stipulate that this moral consequence is foreseeable to agents who engage in risk-imposing behaviour and therefore a justifiable result of option luck. But what we are looking for is an argument, and not a stipulation.

So far, we have considered a case in which the cost of complying with the causal requirement entails killing the causally effective riflemen rather than non-lethally harming his causally inefficacious counterparts. In this case, if we accept the verdict of the causal account, the good moral luck of the riflemen without bullets comes at a cost to the riflemen with bullets. Complying with the causal requirement can be costly in other ways too. We can imagine a scenario in which Victim does not have any chance of hitting any of the riflemen who have bullets, leaving her with the options of either targeting one of the riflemen without bullets, or being killed. By the lights of causal accounts, the riflemen without bullets are merely bystanders, committing its proponents to embrace the latter option: Victim must let himself be shot, rather than kill a causally inefficacious rifleman. In this case, the cost of adhering to the causal requirement is transferred to Victim, rather than to the causally effective riflemen.

This version of the case illustrates another shortcoming of the gambling analogy. The analogy, if successful, would at most show that letting lucky gamblers entirely off the hook is not unfair vis-à-vis unlucky gamblers who become liable to defensive harm even when all of them have behaved identically. But the worry in this last version of the *Unjust Firing Squad* is not the fairness in the internal distribution of harm *amongst the riflemen*. The worry is that the good moral luck that the causal accounts grants the 'lucky' riflemen (those without a bullet) comes at a high cost for the Victim when he is unable to direct the defensive harm to the riflemen with the bullet. Once Victim has to pay for the moral luck of the causally inefficacious riflemen with his life, accepting the verdict that causal accounts dictate becomes significantly harder.

In response to the above argument against Otsuka and McMahan, defenders of causal accounts may choose either of two approaches. Either they may offer alternative and more successful ways of justifying the role of causal responsibility in defensive harming. Alternatively, they can argue that one may harm causally inefficacious agents to avert a threat by appealing to other justifications than liability, such as desert. We turn to each strategy in turn.

2.2. The Argument from Doing and Allowing

Consider the following case offered by Victor Tadros.

> *Unread Letter*: Veronica and Wilma each wish to kill Dan. Independently, each sends a letter to Kev, a hit man. Each letter instructs Kev to kill Dan with a pistol at noon. Kev receives Veronica's letter. Wilma's letter gets lost in the mail. Kev immediately acts on Veronica's instructions, finds Dan, and

> attempts to kill him at noon. Veronica, Wilma, and Irene, an innocent, are standing by. Had Dan received Wilma's letter rather than Veronica's, he would have acted in exactly the same way.[12]

Tadros describes a scenario where Dan can save his life only by forcing either Veronica or Wilma to prevent Kev from killing him. According to Tadros, the verdict that Dan ought to select Veronica rather than Wilma is supported by the fact that Veronica is causally responsible for the threat to Dan, whereas Wilma is not.[13] Tadros does not rely on the notion of a moral gamble to distinguish between Veronica and Wilma. Instead Tadros argues that rejecting his verdict about the difference between Wilma and Veronica would require us to reject the doctrine of doing and allowing, according to which it is worse to kill than to let die.[14] Here is Tadros' explanation: 'suppose that Kev kills Dan. Either Veronica or Wilma could have prevented this by jumping in front of the bullet that Kev fires at Dan. Veronica has killed Dan. Wilma has let Dan die. Veronica has more stringent duty to protect Dan than Wilma, for she has more stringent duty not to kill than not to let die, and if she does not jump in front of Dan, she, unlike Wilma, will have killed rather than let die'.[15] Tadros concludes from this that distinguishing between Veronica's and Wilma's liability to be harmed to avert the threat to Dan is an implication of the doctrine of doing and allowing (DDA).

Tadros' argument invites objections. Irene, the innocent bystander, is equally responsible for allowing Dan to die as Wilma (assuming both are aware of the threat to Dan). In contrast to Irene, Wilma can plausibly be said to commit two moral wrongs: letting Dan die *and* culpably attempting to kill Dan. To say that these *two* wrongs *combined* makes Wilma as liable as Veronica, who is 'merely' responsible for the single wrong of killing does not contravene the DDA. The DDA is standardly understood with an all else equal clause: all else equal, it is more seriously wrong to allow harm than do harm. But all else is not equal between Wilma and Veronica if Wilma, in addition to letting Dan die, also commits the separate wrong of trying to kill Dan.[16] If DDA is correct, then the mere fact that that Veronica will kill Dan whereas Wilma will only let Dan die will be *a* reason to use Veronica as a shield instead of Wilma. But there is a further moral reason that may weigh against the DDA-derived asymmetry, namely that Wilma *also* culpably tried to kill Dan.[17]

If we want to assess the comparative moral relevance of futile attempts versus successful attempts, we should isolate these wrongs, not mix the former or both with an additional wrong (that of letting die). To achieve this, we should consider a version of *Unread Letter* where Wilma and Veronica are present when Kev arrives at the scene, but where both are unaware what Kev looks like and that the murder is about to take place. In this case, neither Wilma nor Veronica are 'letting Dan die' in a morally relevant sense of the term, any more than other random bystanders who are equally unaware and unable to prevent the fatal events about to unfold. In this cleaner version of the case we can isolate and compare the moral responsibility of Veronica and Wilma since neither are responsible for additional wrongs vis-à-vis Dan. Once the case is cleaned up this way, we see that we cannot explain the putative moral asymmetry between Wilma and Veronica by invoking the DDA. Contrary to Tadros' argument, the DDA does not imply that we have to distinguish between failed attempters and successful threateners since 'allowing harm' is not a precise moral description of the moral agency of the former.

2.3. **Exploitative Harm**

So far, I've argued that neither the gamble analogy nor the argument from DDA has established why we, for purposes of liability to defensive harm, should differentiate between those who succeed in posing a threat, and those who attempt, but fail. There remain other theoretical avenues for adherents of causal accounts who wish to defend the causal constraint, however. Helen Frowe suggests an alternative avenue which focuses on what she argues is a difference in the attitude involved in harming agents who contribute causally to a threat and the attitude involved in harming those who do not. Frowe starts out by defining a bystander as 'a person who does not make Victim worse off by her actions, movements, or presence'.[18] Frowe terms harming bystanders to avert a threat *exploitative*, since the victim would thereby derive a benefit from the bystander's presence.[19] Killing bystanders to avert a threat will, according to Frowe, 'necessarily be aimed at exploiting them: at treating the bystander as a tool to be used for profit. *This* is what makes it wrong to kill bystanders: that such killings exhibit a particularly morally abhorrent attitude towards the person one kills'.[20] Since Irene in *Unread Letter* does not make Victim worse off by her actions, movements or presence, she counts as a bystander, by Frowe's lights. Harming her to avert the threat to Dan therefore counts as exploitative.

Frowe contrasts the attitude involved in exploitative harming of bystanders with that involved in the harming of agents like Veronica. Grabbing Veronica to use her as a shield against Kev does not entail taking advantage of her, since it merely aims at thwarting a threat Veronica herself has set in motion. Contrasting the non-exploitative killing of agents like Veronica who meet the causal requirement with exploitative killing of bystanders Frowe writes: 'such killings lack the feature that typically makes them so objectionable – namely, that one is using the person to make oneself better off. The exploitative aspect of these killings doesn't seem to obtain when one uses her only to prevent her earlier actions from making one worse off'.[21]

On closer inspection, however, it seems clear that the distinction Frowe draws between exploitative and non-exploitative killing loses force whenever we control for the moral agency of the person harmed. While killing Irene in order to prevent Kev from killing Dan may indeed seem abhorrent, it does not seem similarly *abhorrent* to kill Wilma, who by Frowe's lights is also a mere bystander who 'does not make Victim worse off by her actions, movements, or presence' to prevent Kev from killing Dan. Yet Frowe's notion of exploitative harm puts harming Wilma and Irene into the same category. Our intuitive resistance to this categorisation suggests that what is pulling us towards the 'abhorrence verdict' is Irene's moral innocence, not her causal position (which she shares with Wilma).

Locating the badness of defensively harming bystanders by the exploitative nature of such harm also makes it difficult to explain the intuitive permissibility of exploitatively harming in other cases. Consider the following case.

> *Grenade and Rifle:* Grenade-thrower hurls a grenade at Victim. Victim is trapped in a ditch and will not be able to escape before the grenade kills him. Sniper, who is unaware of Grenade-thrower, is about to shoot Victim before the grenade explodes. Being killed by a single shot is significantly less painful than being killed by a grenade. Victim can shoot Sniper in a way that will

> make Sniper's body fall between Victim and the grenade, shielding Victim from the blast.

Being painlessly killed slightly before one would otherwise have died a painful death from the grenade explosion would not make Victim worse off, since depriving Victim of a period of life not worth living (a drawn out period of agonising pain) is most plausibly considered a benefit.[22] Killing Sniper in this case would therefore be exploitative, yet it does not seem harder to justify than non-exploitatively killing Sniper in a scenario where the Grenade Thrower is absent.

Indeed, this case challenges all causal accounts that ground liability in moral and causal responsibility for a threat of unjust harm because Sniper's action, although intended as a threat of harm, in fact provides a benefit to victim. To see that painless killing does not represent a threat of harm when it pre-empts a painful death, consider a structurally identical case where the first killer acts out of mercy. In a recent scene in the TV series *Game of Thrones*, Jon Snow kills Mance Rayder, as he is about to be burned alive, by shooting Rayder with an arrow. Snow acts out of mercy, objecting to the cruel method of executing Rayder. The causal story here is the same as in *Grenade and Rifle*. Neither Snow nor Sniper causes a threat of harm, since both make their victims better off. Yet treating Snow and Sniper on par for liability purposes fails to capture our intuitions that Sniper clearly seems liable to defensive harm, whereas Snow is surely not (even if harming Snow could somehow save Rayder). This suggest that what is morally relevant is not their place in the causal architecture, which they share, but rather the fact that Sniper culpably attempts to harm his target, whereas Snow does not.

2.4. **Causation by Omission**

One type of case that challenges causal accounts is that in which an agent is able to save a victim at little or no cost to himself or others, but culpably refrains from doing so. These cases challenge the causal accounts because culpable omitters, as I will refer to them, do not seem to meet the causal requirement.[23] Consider the following case.

> *High Ranking Officer*: Junior Officer is about to wrongfully execute Victim, a prisoner of war. Unbeknownst to the Junior Officer, Senior Officer observes the episode, but culpably refrains from intervening to stop the execution. Military code stipulates that an order issued by the highest-ranking officer must always be followed. Unbeknownst to them, the Victim has a gun. He knows that if he shoots Senior Officer the rest of the group will be sufficiently stunned for him to make his escape.[24]

If Victim's only way of escaping is to lethally harm the Senior Officer, it seems intuitive that Victim would be permitted to do so. The only way adherents of causal liability accounts could deliver this verdict, would be if they adopt a counterfactual view of causation, claiming that Senior Officer's failure to save Victim is an instance of causing or causally contributing to the threat to Victim.

A challenge for a view of causation that considers omissions to be causes, is to provide a criterion by which we can identify which omissions count as causes and which do not. Without such a criterion, all omissions would count as causes, in which case causation

would be 'all around', for every outcome counterfactually depends on innumerable omissions. In response to this worry, Seth Lazar suggests that we consider omissions as causally effective only 'when they contravene a norm either in the morally neutral sense that they are out of the ordinary or in the morally freighted sense that they, for example, constitute a breach of duty'.[25] Lazar provides the following example as intuitive support of this claim: 'When a doctor culpably refuses life-saving treatment to a patient, she is responsible for her patient's death in virtue of having culpably caused it'.[26] While it may be perfectly sensible to say that the doctor is responsible for the patient's death, I suspect intuitions about whether this is so in virtue of having *caused the* patient's death rather than failed to prevent it are not uniformly on Lazar's side. To say that Senior Officer *causes* Victim's death by failing to prevent Junior Officer from putting a bullet through Victim's heart, is not very intuitive. In the face of conflicting intuitions, it is not clear what motivates Lazar to adopt a causal notion that is unable to distinguish between culpably failing to prevent a person's death and the initiation of a sequence that kills the victim (except perhaps the hope of saving the causal account). This view also leads to the puzzling conclusion that the causal relationship between Senior Officer's inaction and Victim's death depends on Senior Officer's mental state. If, for instance, Senior Officer was justifiably convinced that intervening to save Victim would trigger a massacre of innocent prisoners of war, her non-intervention would not constitute a violation of a moral norm, and hence would not count as causally effective.[27]

Even if we were to accept this normative notion of causation, it seems explanatorily redundant to our account of liability. The crucial work needed to explain the liability of the Senior Officer is done by the formulation of the relevant moral norm and not by independent causal facts about omissions, since there are no causal facts about omissions that hold independently of norms. We can infer straight from the fact that a person is culpably in breach of her duty to rescue a victim to the conclusion that he is morally responsible for the victim's death. To infer from the very same premise that he is also causally responsible for the victim's death adds nothing new to our inquiry.[28]

Granting that omissions can be causes does not help causal accounts in cases where an unjust threat does not counterfactually depend on a culpable omission. This can be illustrated if we slightly amend *High Ranking Official* by adding to the example Top Ranking Officer, with a higher rank than the Senior Officer, who is poised to reverse any command the Senior Officer might make to save the prisoner. In this case, the omission of the Senior Officer makes no difference to the saving of the prisoner, since whatever she does, the Top Ranking Officer would reverse the command. At this point it becomes highly implausible to insist that the Senior Officer still *causes* Victim's death, since the shooting of Victim does not counterfactually depend on anything Senior Officer does or refrains from doing.[29] Yet it does not sound plausible that the Senior Officer's liability to defensive harm is cancelled by the Top Ranking Officer's inclination to overrule Senior Officer, merely because the execution of Victim no longer counterfactually depends on Senior Officer's omission.[30]

3. Desert and Liability

One response to the above counterexamples is to grant that they point to limitations of causal accounts and concede that these accounts fails to provide a unified account of the justifications for inflicting defensive harm. One may, for instance, claim that while the causally inefficacious agents discussed in *Unjust Firing Squad*, *High Ranking Officer*, *Unread Letter* and *Grenade and Rifle* are not liable to defensive harm because they do not meet the causal requirement, they nevertheless *deserve* to be harmed. Faced with futile attempters or culpable omitters, one could argue that victims may appeal to such agents' desert to justify harming them in order to avert a threat.

The standard way of distinguishing between liability and desert seems open to this possibility. Adherents of causal accounts routinely draw this distinction by pointing out that imposing deserved harm is a valuable end in itself, whereas harms to which one is liable are only instrumentally valuable insofar as they succeed in averting a threat.[31] Drawing the distinction this way nevertheless opens up the possibility that one can rely on a desert-based justification to impose defensive harm in order to avert a threat. The fact that one may impose deserved harm on someone *without* it serving a further instrumental purpose does not entail that one may not impose deserved harm when it *also* serves an instrumental purpose.[32] Both Kimberly Ferzan and Jeff McMahan have defended the possibility of combined justification along these lines.[33] Ferzan explicitly accepts that one may punitively kill culpable futile attempters' agents in accordance with their desert in order to thwart attacks by other agents.[34]

This argument leads to serious problems, however. One problem is that once we allow considerations of desert to interact with a theory of liability, the fact that a person is liable to be harmed would not provide us with a definite answer to the question of whether a victim may permissibly harm a liable person in the course of defending himself. After all, if negative desert can make it justifiable to harm an otherwise non-liable person for defensive purposes, then presumably positive desert (praiseworthiness) could make it unjustifiable to harm an otherwise liable person for defensive purposes. It has long been recognised that self-defence may be all-things-considered impermissible even if the aggressor is liable, but only if it violates the rights of others (or possibly the victim's self-regarding duties). The idea that it could be impermissible to harm a person who is liable to defensive harm because of other morally relevant features *about the* liable person would severely deflate the importance of our liability account. Once we allow normative facts outside our account of liability to affect a person's moral protection against harm, a liability verdict cannot by itself establish the permissibility of harming a person in order to defend oneself.

Further and more serious problems arise if we examine the implications of a combined justification of defensive harm that appeals both to the agent's liability and to his negative desert. Here is a case both McMahan and Ferzan discuss:

> Suppose that [A] is liable only to X amount of defensive harm but that successful defence requires that X+N amount of harm be inflicted on him. If [A] earlier committed a wrong for which he deserves to suffer N amount of harm,

> that can make it permissible to inflict X+N amount of harm on him, with the effect of successfully defending his potential victim.[35]

Although McMahan and Ferzan think that it is better to institutionalise the infliction of deserved harms, both hold that A would not be wronged by an unauthorised individual who inflicted on him the harm he deserves (assuming he has not already been punished according to his desert by a legal authority).

To see the complications this suggestion invites, consider the following implication of the view. The cases invoked by Ferzan and McMahan are ones in which the wrongdoer deserves to be harmed for a *prior* offense, yet this cannot be a necessary feature of the combined justification view. If desert and liability are distinct and independently legitimate justifications for harm imposition, culpable responsibility for the *same* wrongful threat should make it permissible for a victim to impose X amount of liability-based harm and N amount of desert-based harm on the same aggressor for the same offense. This would mean that culpable responsibility for the same wrongful act would count twice over: first to trigger or increase liability to defensive harm and secondly to justify the additional infliction of deserved harm. Since culpability is *desert-entailing* on standard views of desert, the combined amount of harm that would be overall proportionate to inflict on a culpable aggressor in order to avert a threat will necessarily exceed the amount which would be proportionate solely on account of his liability to defensive harm. Consequently, a causal account would never be able to deliver determinate answers to how much defensive harm it would be overall proportionate to impose on culpable aggressors in order to deter their attack.[36]

4. Conclusion

This article has shown that adherents of causal accounts of liability to defensive harm fail to provide convincing arguments for the causal requirement and that such accounts are vulnerable to powerful counterexamples. Moreover, the intuitive counterexamples do not identify mere gaps in the causal accounts which can be complemented by appealing to desert. Rather they suggest that the basic flaw with causal accounts is precisely the causal requirement. In absence of convincing theoretical arguments in support of the requirement, we ought to give it up all together.

This negative conclusion is of considerable theoretical significance. In particular, the challenge to the causal requirement suggests that liability to defensive harm may look more like criminal liability were retributivist and non-retributivist alike routinely to hold agents liable to punishment even when they have not harmed anyone or posed an actual threat. It may also improve our understanding of why members of a group may be equally liable to defensive harm when they display equally culpable agency, occupy equal roles, but differ in whether they actually contribute causally to a group's wrongful project. I must, however, leave the exploration of these theoretical avenues for another occasion.

No doubt, giving up the causal requirement invites a range of challenges concerning how we limit the scope of an account of liability to defensive harm without a causal requirement. If the argument of this article is right, however, we need to confront

these challenges rather than obscuring them by insisting on a causal requirement in the face of robust objections and persuasive counterexamples.[37]

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NOTES

1 By 'defensive harm', I mean harm which is instrumental in averting a threat. For reasons of terminological simplicity, I follow Helen Frowe *Defensive Killing: An Essay on War and Self-Defence* (Oxford: Oxford University Press, 2014), p. 197; Jonathan Quong 'Liability to defensive harm', *Philosophy and Public Affairs* 40 (2012):67–68; and Victor Tadros, 'Causation, culpability, and liability' in C. Coons & M. Weber (eds) *The Ethics of Self-Defense* (New York: Oxford University Press 2016), p. 114, in extending the term to cover harm which is instrumental in averting a threat irrespective of whether it is directed at the person who poses the threat or someone else that can be harmed as a way of averting the threat. The term 'defensive harm', as I use it, also does not turn on whether the target of the harm is causally responsible for the threat averted. If it did, one could not coherently formulate the normative question of whether causal responsibility for an unjust threat is a necessary requirement for liability to defensive harm, because the question would already be answered by the definition of the term 'defensive harm'. Those who find my use of the term 'defensive harm' unattractive are welcome to replace it with the expression 'harm which is instrumental in averting a threat'.

2 The causal accounts that the criticism in this article is directed against are defended by Jeff McMahan, Helen Frowe, Michael Otsuka, Kimberly Ferzan and Judith Jarvis Thomson. Their support for the causal requirement can be extrapolated, respectively, from Frowe op. cit., pp. 26–43 and pp. 72–88; McMahan, 'The basis of moral liability to defensive killing', *Philosophical Issues* 15 (2005): 395–404, and *Killing in War* (Oxford, Clarendon Press, 2009), ch. 4; Judith Jarvis Thomson 'Self-defense', *Philosophy and Public Affairs* 20 (1991): 283–310; Michael Otsuka, 'The moral responsibility account of liability to defensive killing' in C. Coons & M. Weber (eds) *The Ethics of Self-Defense* (New York: Oxford University Press, 2016), pp. 51–69, and 'Killing the innocent in self-defense', *Philosophy and Public Affairs* 23 (1994), p. 75; and Kimberly Kessler Ferzan 'Justifying self-defense', *Law and Philosophy*, 24 (2005): 711–749, and 'Culpable aggression: The basis for moral liability to defensive killing', *Ohio State Journal of Criminal Law* 9 (2011): 669–697. On Ferzan's account, culpably causing the belief that one is threatening to kill an innocent victim is enough to meet the causal requirement. Thomson's account differs from the others in that she, for the most part, seems to accept that a threatener may lack a right against harm even without having displayed any agency (Thomson describes the aggressors as 'lacking rights' rather than being liable). For the purpose of this article, we can ignore these features of Thomson's and Ferzan's accounts. For the minority view which rejects that there is a causal requirement on liability to defensive harm, see Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), ch. 8; and Kai Draper, *War and Individual Rights: The Foundations of Just War Theory* (New York: Oxford University Press, 2015), pp 50–60.

3 For an explicit statement of this point, see Frowe who argues that it is a *conceptual* mistake to talk about morally responsible bystanders: 'the idea of a responsible bystander is not only unattractive, but conceptually incoherent', op. cit., p. 28. Agreeing to this conceptual claim would make it impossible to ask the normative question whether bystanders could ever be morally responsible in a way that makes them liable.

4 McMahan occasionally points out that he invokes the term 'innocent bystander', *not* as implying morally innocent, but merely materially innocent, where this means that the person poses no threat. As McMahan himself points out, this makes the term 'innocent bystander' redundant, since the term bystander also expresses 'not involved in the threat to the victim' (see Jeff McMahan 'Self-defense and culpability', *Law and Philosophy* 24 (2005): 751–774, at p. 758). No matter, my suggestion that the intuitive support for the idea that *innocent* bystanders are non-liable comes from our inclination to read this in a non-redundant conventional way as implying that the bystander is morally innocent.

5 There is some disagreement between adherents of causal accounts on whether agents who limit a victim's defensive options should be considered as causally contributing to the threat to victim or not. For a

discussion of this point, see Frowe op. cit., pp. 26–31. However, none of the adherents of the causal accounts mentioned in footnote 2 has suggested excluding agents who are causally inefficacious from the category of bystanders.

6 Because the riflemen in the *Unjust Firing Squad* are unaware of how many other riflemen there are, they are unaffected by the behaviour of each other.

7 A relevantly similar case is offered by McMahan 2005 op. cit., p. 757, and discussed by Frowe op. cit., p. 189 and Ferzan 2005 op. cit., p. 694. All three conclude that a futile attempter is not liable to harm.

8 Jeff McMahan, 'Self-defense against morally innocent threats' in P.H. Robinson *et al.* (ed.) *Criminal Law Conversation* (New York: Oxford University Press, 2009), p. 392.

9 Otsuka 2016 op. cit. pp. 63–64.

10 Op. cit., p. 63.

11 McMahan 2009 op. cit., p. 177.

12 Tadros 2016 op. cit., p. 216.

13 Tadros does not invoke his argument to show that causal responsibility is necessary for liability to defensive harm. Tadros endorses a pluralist account of liability, according to which merely deciding to wrongfully harm another person may serve as an alternative, but weaker, basis of liability to defensive harm (op. cit., p. 123).

14 Op. cit., p. 121.

15 Op. cit., p. 121.

16 We could perhaps argue that Veronica is *also* responsible for two wrongs, that of killing Dan and attempting to kill Dan. We can see this would be a mistake by distinguishing between successful and failed attempts. In *Unread Letter* Veronica is not responsible for any (previous) failed attempts at killing Dan, only Kev's successful attempt. To say that Veronica is responsible of a successful attempt at murdering Dan *and* murdering Dan is awkward, when these are merely two descriptions of the same event. Consider the case in terms of criminal liability. To charge Veronica for murder and for the successful attempt at murder would clearly be misguided. I am grateful to an anonymous reviewer for pressing me on this point.

17 To be clear, this is not a positive argument for the moral symmetry between Wilma and Veronica. The arguments only aim to undercut Tadros' claim that appealing to DDA is sufficient to establish an asymmetry between them. I am grateful to an anonymous reviewer for pressing me to clarify this point.

18 Frowe op. cit., p. 28.

19 Op. cit., p. 8.

20 Op. cit., p. 53.

21 Op. cit., p. 193.

22 For a discussion of similar cases of simultaneous threateners, see McMahan 'The limits of self-defense' in C. Coons & M. Weber (eds) *The Ethics of Self-Defense* (New York: Oxford University Press, 2016), p. 206; and Frowe op. cit., p. 189.

23 Frowe explicitly points out that failing to save a victim from drowning at low or little cost does not amount to causally contributing to a victim's drowning, (op. cit., p. 29). Frowe refers to the person who fails to save the child as a bystander, of whom it makes 'no sense' to ask whether they can be responsible for the threat (p. 45). That McMahan does not find omissions to be causally effective, can be seen in his discussion of parents' failure to feed their child, which he, in contrast to Lazar, sees as a case of letting die rather than killing, in *The Ethics of Killing: Problems at the Margins of Life* (Oxford: Oxford University Press, 2002), pp. 236–237. Ferzan also considers omissions as causally inert in 'Self-defense, permissions, and the means principle: A reply to Quong', *Ohio State Journal of Criminal Law* 8 (2010): 503 footnote 5; and Larry Alexander, Kimberly Kessler Ferzan & Stephen J. Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009), p. 235. Thomson and Otsuka do not discuss the possibility of omissive liability, but their accounts do not suggest that agents count as causing unjust harm through omissions. Given that neither Thomson nor Otsuka require that agents act culpably in order to become liable, their accounts would be extremely permissive if one became liable by causing unjust harm through non-culpable omissions.

24 This case is inspired by a similar case in Matthew Braham & Martin van Hees, 'Degrees of causation', *Erkenntnis* 71 (2009): 341–342.

25 Seth Lazar 'Complicity, collectives, and killing in war', *Law and Philosophy* 35 (2016): 365–389, at p. 381. Lazar is in the minority among theorists of self-defence to invoke a counterfactual dependence theory of causation. Although Quong claims in passing that one may become liable to defensive harm for

omissions, it is not clear how his account can deliver this verdict because it only attributes liability for what we choose to do, not what we choose to allow (Quong op. cit., p. 67). Quong does not indicate whether he finds omissions causally effective or not. Draper argues that one may by become liable to defensive harm if one's omission infringes on a victim's positive rights, though he rejects the view that omissions are causally effective (Draper op. cit., pp. 50–60).

26 Lazar op. cit., p. 381.

27 It is tempting to ask how a normative notion of causation treats paradigm cases of causation through physical connection (e.g. Victim shooting and killing Attacker). Are we supposed to apply the same normative filter in such cases to sort out which instances count as causing and which do not, such that Victim shooting Attacker in self-defence only counts as causing Attacker's death if Victim by so doing breaches a norm? Or does Lazar mean to adopt a hybrid causal approach, relying on a normative notion of causation for omissions and non-normative notion for causation through physical connection? I lack the space to pursue this question here. See Helen Beebee, Stephen Mumford, Phil Dowe & Michael Moore 'Legal responsibility and scalar causation', *Jurisprudence* 4 (2013): 102–137, for a comprehensive discussion on these (and related) issues.

28 For a similar argument against the lack of explanatory value of moralised notions of causation to tort liability, see Jules L. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992), p. 274, footnote 8.

29 For an argument that one may in special cases be morally responsible for an outcome even when one is not physically connected to the outcome and the outcome does not counterfactually depend on one's act or omission, see Carolina Sartori, 'How to be responsible for something without causing it', *Philosophical Perspectives* 18 (2004): 315–336. Note that Sartori specifically argue that this is a type of non-causal outcome responsibility.

30 For a structurally similar case and more generally the verdict that one can be morally responsible for a harm even if it was not in one's power to prevent it , see Gideon Rosen, 'Causation, counterfactual dependence and culpability: Moral philosophy in Michael Moore's causation and responsibility,' *Rutgers Law Journal* 42 (2010): 405–434, at p. 425. In the last version of *High Ranking Officer*, it may seem intuitive that the Top Ranking Officer is more liable than the Senior Officer. This may be because higher ranking officers have more available courses of actions and are subject to less duress than their subordinates. As such, it does not bear directly on the issue of causation, but rather on the issues of moral responsibility. I am grateful to a reviewer for pressing me on this point.

31 See McMahan 2009 op. cit., pp. 8–9.

32 Some may insist that only desert or liability can serve as justification for imposing harm at any given time. Insofar as liability and desert really are separate bases for justification of harm imposition, this suggestion seems ad hoc. Authors who recognise lesser evil and liability as different justifications for imposing harm, typically think they can be combined (see Saba Bazargan, 'Killing minimally responsible threats', *Ethics* 125 (2014): 114–36; and Jeff McMahan 'Liability, proportionality, and the number of aggressors' in S. Bazargan-Forward & S.C. Rickless (eds) *The Ethics of War: Essays* (Oxford: Oxford University Press, 2017), pp. 3–27). If liability to defensive harm can be combined with a lesser-evil justification, I cannot see why we should accept the claim that liability cannot be combined with desert (assuming that we accept a notion of desert to begin with) without a further argument. Compare also justifications for benefitting. Consider a case where a justification for granting a benefit to a given person is that it increases her family's welfare. If, in addition, that person positively deserves this benefit, this provides an additional non-instrumental reason for giving the person the benefit. In a case where we must decide which of two people to give the benefit to, it seems coherent to combine the two justifications to reach the verdict that we ought to give the benefit to the person we have both instrumental and non-instrumental reasons to give it to. I am grateful to an anonymous reviewer for alerting me to this objection.

33 Jeff McMahan, 'Response', in *Ethics Discussions at PEA Soup: John Gardner and François Tanguay-Renaud's 'Desert and Avoidability in Self-Defense' and Jeff McMahan's 'Response,' with Commentary by Victor Tadros* (PEA Soup blog, 2012). Accessible at http://peasoup.typepad.com/peasoup/2012/01/ethics-discussions-at-pea-soup-john-gardner-and-fran%C3%A7ois-tanguay-renauds-desert-and-avoidability-in-.html

34 K.K. Ferzan, 'Defense and desert: When reasons don't share', *San Diego Law Review* 55 (2018): 275, footnote 35. See also Larry Alexander, 'Recipe for a theory of self-defense: The ingredients, and some cooking suggestions' in C. Coons and M. Weber (eds) *The Ethics of Self-Defense* (New York: Oxford University Press 2016), p. 24, for a similar position.

35 Ferzan 2018 op. cit., p. 271.

36 To be clear, my objection to the combined justification does not amount to an objection against appealing to desert in order to justify defensive harm. It may be, contrary to the dominant view, that the best way of justifying defensive harm appeals to the desert of the aggressor, for instance along the lines suggested by John Gardner & François Tanguay-Renaud in 'Desert and avoidability in self-defense', *Ethics* 122,1 (2011):111–134. What I am questioning is the implication of the combined justification that a victim may appeal to the aggressor's culpable responsibility twice over to justify harm imposed during the course of defense (first to jusitfy the amount of harm aggressor is liable to and secondly the amount he deserves).

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