

# Rights Forfeiture and Liability to Harm\*

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## I. FORFEITURE THEORIES OF PUNISHMENT AND SELF-DEFENCE

ONE of the most influential ideas invoked in the debate on the morality of harm is that by acting in certain ways we can forfeit some of the rights we possess. It would not be an exaggeration to say that this is the single most important idea employed in the philosophical discussion of the morality of self-defence, and thus, indirectly, in a number of classic debates in moral and political philosophy that, in one way or another, heavily rely on the notion of self-defence (such as the morality of war and the morality of abortion). The most prominent account of self-defence goes something along these lines: we all have rights that protect us from having intentional harm inflicted on us, but these rights are forfeited when we pose a threat to innocent parties, who can only defend themselves by inflicting intentional harm on us.<sup>1</sup> When this is the case, we become liable to defensive harm, which means that we lack a claim against being targeted as part of a defensive attack, and thus we are not wronged by being so targeted.<sup>2</sup>

A similar story is often offered as a justification for liability to punishment. For example, W. D. Ross writes:

the offender, by violating the life or liberty or property of another, has lost his own right to have his life, liberty, or property respected, so that the state has no prima facie duty to spare him, as it has a prima facie duty to spare the innocent.

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<sup>1</sup>For a classic formulation of this view, see Thomson 1990 and 1991. Some require that in addition to posing a threat, we are morally culpable (Ferzan 2005; Rodin 2003; McMahan 1994), or at least morally responsible (McMahan 2009; Fabre 2009; Rodin 2008), for doing so. (We are morally responsible without being culpable for posing a threat if its existence can be traced back to our voluntary agency, in the sense that at the time of our action we could have reasonably foreseen its occurrence—or at least the risk of its occurrence—as a consequence of our action, despite the fact that we did not necessarily intend the threat to occur. See McMahan 2005).

<sup>2</sup>Quong 2012; McMahan 2009; Fabre 2009; Rodin 2008. For the purposes of this article the term “liability” should be understood as denoting *moral* liability, rather than *legal* liability.

It is morally at liberty to injure him as he has injured others, or to inflict any lesser injury on him, or to spare him, exactly as consideration both of the good of the community and of his own good requires. If, on the other hand, a man has respected the rights of others, there is a strong and distinctive objection to the state's inflicting any penalty on him with a view to the good of the community or even to his own good.<sup>3</sup>

Although the idea of forfeiture is not as popular as a justification for liability to punishment as it is as a justification for liability to defensive harm, it has a long tradition that goes back at least to Locke, and it is still considered by some as the only plausible way to justify punishment. Prominent defenders of forfeiture-based accounts of punishment are Alvin Goldman, Christopher Morris, and Christopher Wellman.<sup>4</sup>

Those who criticize the forfeiture view normally focus on a number of specific objections that the view raises in the context of punishment as well as in the context of self-defence. To mention but a few, the view is often criticised for its alleged implication that once the wrongdoers' right not to be killed or not to be punished has been forfeited, we are at liberty to kill them or to punish them for any reason (or even for no reason). The view is also said to have the unpalatable implication that it is permissible to rape the rapists and torture the torturers, both in self-defence and as a form of punishment, given that rapists and torturers seem to have forfeited their rights not to be raped or tortured. Finally, as a justification of punishment, the idea of forfeiture has been criticised for opening the door to vigilantism. For once wrongdoers have forfeited their right not to be punished, anyone seems to be at liberty to punish them.<sup>5</sup>

All of these criticisms presuppose that the forfeiture theory does constitute a plausible candidate for the justification of liability to punishment or self-defence, but criticise the theory by pointing to specific problems that its adoption seems to generate. The aim of this article, by contrast, is to raise a more fundamental objection which gives us reason to doubt that the notion of forfeiture can be used to justify liability to punishment or self-defence, even if we grant (as I will do here) that it can be defended from all of the objections mentioned above.<sup>6</sup> I argue that the main problem with the forfeiture theory is not that the answer it offers to the questions of the justification of punishment and self-defence is inadequate in light of the problems that adopting this view generates; the problem is that the answer offered by the theory to these questions is either incomplete or redundant.

<sup>3</sup>Ross 1930, pp. 60–1.

<sup>4</sup>Goldman 1979; Morris 1991; Wellman 2012. The notion of forfeiture plays a crucial role in a number of other debates, including those on restitution and compensation, as well as those relating to the conditions under which we can be said to lose particular legal privileges. However, in this article I will focus exclusively on its role in justifying liability to punishment and self-defence.

<sup>5</sup>Classic formulations of these objections can be found in Thomson 1986; Quinn 1985; and Martin 1993. Further objections are discussed in Wellman 2013 and 2012; Lang 2014; Boonin 2008, pp. 103–19; Lippke 2001.

<sup>6</sup>For recent attempts to defend the forfeiture view, see Ferzan 2016; Wellman 2013 and 2012; Lang 2014; and Kershnar 2002.

I will suggest that any attempt to justify liability to punishment or self-defence by appealing to forfeiture will give rise to a dilemma. Theories that aim to provide a justification that relies exclusively on the notion of forfeiture are inevitably incomplete. This is because conceptually, this notion does not seem capable of doing significant justificatory work unless we invoke some other normative principle to give substance to it (*Incompleteness Objection*). But once we do employ some other principle to fill it with genuine justificatory content, the notion becomes redundant and can be dispensed with at the level of justification (*Redundancy Objection*).

This is not to say that the language of forfeiture should be banned from the philosophical discourse on the justification of punishment or self-defence. I will suggest that the notion of forfeiture plays two valuable roles within this discourse. First, it performs an important heuristic function, in that it marks the difference between two distinct ways of justifying the infliction of harm. Second, it works as an intermediate conclusion in justificatory arguments that ground liability to harm in suitably fundamental normative principles, thereby facilitating the discussion among those who disagree about how such fundamental normative principles are to be identified. These functions are by no means trivial, but they should not be confused with the justificatory role that is often attributed to forfeiture.

This point is of significant importance not only as a matter of philosophical accuracy, but also practically. It is important to acknowledge that whenever we need to justify inflicting harm on others by way of punishment or self-defence, our argument will ultimately have to rely on some principle other than forfeiture. If we cannot support our claim that someone can be permissibly punished or harmed in self-defence by pointing at some more fundamental principle, we must recognize that we have failed to fully justify the permissibility of inflicting such harm.

This is what defenders of forfeiture often deny. For example, Christopher Wellman, who has developed the most comprehensive forfeiture-based account of punishment,<sup>7</sup> has recently argued that even if there are no underlying principles on which the forfeiture view can be said to rely, this is no problem because:

all arguments have to start somewhere, and given that there is no other considered conviction regarding punishment about which I am more confident . . . [the idea that we forfeit our rights when we act in certain ways] seems like a good place to start. . . . Regarding those who deny that violating the rights of others alters the moral status of the wrongdoers . . ., I must concede that my arguments will have no purchase with them. I am relatively sanguine about this possibility, though, because every argument in this area will require assumptions

<sup>7</sup>Wellman 2009, 2012, 2013.

with which others may potentially disagree, and it strikes me that very few will actually deny this particular premise.<sup>8</sup>

If the arguments of this article are correct, this move is simply not available to defenders of forfeiture. The intuitions invoked by Wellman cannot perform the justificatory role that he suggests.

I will proceed in four steps. The next section spells out the two horns of the dilemma I have described; section III outlines the role that forfeiture can play in the philosophical discussion on the justification of punishment and self-defence; section IV considers and rejects an objection to the argument offered in the article; section V concludes.

## II. A DILEMMA FOR THE FORFEITURE THEORY

We can assess the plausibility of forfeiture theories only once we have a clearer idea of how the notion of forfeiture is supposed to work. So let us start by spelling out what we mean when we say that the right not to be killed or the right not to be punished has been forfeited. For ease of exposition, I will initially consider the notion in the context of self-defence. The results of my analysis will then be extended to criticise the forfeiture view of punishment as well.

Consider the simple case in which Andy wrongfully attacks Beth and Beth can save her life only by killing Andy in self-defence. The challenge for the forfeiture view is to explain why Andy is liable to be killed by Beth in self-defence. The forfeiture view does this by pointing to the fact that, with his attack, Andy has forfeited his right not to be killed. As Judith Thomson puts it, “what makes it permissible for you to kill [wrongful attackers] is that they will otherwise violate your rights that they not kill you, and therefore lack rights that you not kill them.”<sup>9</sup> But what does it mean that by attacking Beth, Andy has forfeited this right?

Before he attacks Beth, Andy has a right not to be killed. This right is what in Hohfeldian terms we would call a *claim right*, that is, a right that correlates to a duty that Beth owes to Andy not to kill him.<sup>10</sup> Thus, to say that Andy has a claim right that Beth does not kill him is to say that Beth has a duty not to kill Andy. What happens when Andy attacks Beth? Thomson writes that in this case Andy “divests himself of a claim against” Beth, and that this is why Beth now has a *privilege* (or *liberty*) to kill Andy.<sup>11</sup> In her words, “it seems to follow from [Andy]’s acting as he does that if [Beth] can defend [herself] against [Andy]’s

<sup>8</sup>Wellman 2012, pp. 376–7.

<sup>9</sup>Thomson 1991, p. 302.

<sup>10</sup>Hohfeld 1919.

<sup>11</sup>When she talks of “claim,” Thomson means “claim right,” so the two expressions will be here used interchangeably. Notice also that Thomson discusses the right to defend others alongside the right of self-defence, and accounts for them along the same lines. For ease of exposition, I will focus only on self-defence, but my arguments also apply to the justification for other-defence.

violation of [her] claim only by causing [Andy] harm, then [Beth] has a privilege as regards [Andy] of doing so.”<sup>12</sup>

But why exactly should we think that Beth’s privilege to kill Andy follows from Andy’s attack? Notice that in Hohfeldian terms, having a privilege to  $\phi$  simply means that we are not under a duty not to  $\phi$ . Thus, saying that Beth has a privilege to kill Andy is simply saying that Beth is not under a duty not to kill Andy. But saying that Beth is not under a duty not to kill Andy is simply saying that Andy is liable to be killed by Beth.<sup>13</sup> It now looks as if we have come full circle to the starting point, for Andy’s liability to be killed by Beth is precisely what we were supposed to justify.<sup>14</sup>

To be sure, the claim that Andy is liable to be killed by Beth because he has forfeited his right not to be killed is informative, because it tells us that Beth’s liberty to kill Andy depends on the fact that Andy has divested himself of his right not to be killed (as opposed to, say, never having had that right). But does this justify Andy’s liability if we do not know *how* he has come to divest himself of the right not to be killed? This seems doubtful. Andy’s liability will be justified only if there is a significant moral relationship between attacking someone and losing the right not to be killed. But nothing so far has been said about the existence of such a relationship. All we are told is that the reason why Andy has divested himself of the right not to be killed has something to do with the fact that he has attacked Beth, but what we need to know in order to assess whether Andy is liable to be killed is precisely what the relationship between his attack and his loss of the right not to be killed is. Absent such a story, no justification has been offered. At the very least, the forfeiture-based account of self-defence is thus seriously incomplete.

The same objection can be raised against the forfeiture theory of punishment. Here the thought is that while we normally have a right not to be subjected to the hard treatment typical of punishment (which, depending on the circumstances, will cash out in terms of interference with our right to liberty, our right to property, or our right to life), we can forfeit this right by wrongfully harming others.<sup>15</sup> As Warren Quinn puts it, the “conditionality [on which forfeiture relies] can be seen as a basic feature of the operation of natural moral law that provides an independently intelligible ‘clearing of the way’ for retribution.”<sup>16</sup> Unfortunately, this suggestion is subject to the same sort of problem afflicting the forfeiture account of self-defence.

<sup>12</sup>Thomson 1990, pp. 361–2. The only changes made to the quote are the names of the characters in the example.

<sup>13</sup>The language of liability is potentially confusing in this paragraph because while within the Hohfeldian framework “liability” denotes the susceptibility to having one’s normative status changed, within the philosophical debates on the morality of harm, “liability” denotes the lack of a claim against being harmed (what Hohfeld would call a “no claim”). As I have mentioned above, for the purposes of this article I will use “liability” in the second sense, since this is how the expression is regularly employed in the debates on the justification of punishment and self-defence.

<sup>14</sup>Gerald Lang also notices this problem (Lang 2014, pp. 51–5). I discuss his solution below.

<sup>15</sup>Goldman 1979; Morris 1991; Wellman 2012.

<sup>16</sup>Quinn 1985, p. 332.

Suppose that Andy successfully kills Beth. The question we are interested in here is: “Why is Andy liable to be punished?” The answer offered by the forfeiture theory to this question is: “Because Andy has forfeited his right not to be punished.” But, how can saying that “Andy has forfeited his right not to be punished” provide a justification for his liability to being punished, if it is ultimately tantamount to saying that Andy now lacks a claim against being punished? Isn’t the fact that Andy lacks such claim precisely what we were trying to justify? Surely what we need to say in order to justify Andy’s criminal liability is why he lacks such a claim.

Thomson seems aware that the idea of forfeiture is not sufficient to justify the right to act in self-defence, for she writes:

for the aggression to make ... [self-defense] permissible, the aggression has to make the aggressor lack claims, and we stand in need of an account of why it does. I think it an attractive idea that the answer is simply this: if the aggressor is not stopped he will violate a claim of the victim’s. ... The fact that the aggressor will violate a claim of the victim’s if not stopped makes him lack a claim against the victim.<sup>17</sup>

But notice that saying that “the fact that the aggressor will violate a claim of the victim’s if not stopped makes him lack a claim against the victim” does not yet explain *why* the fact that the aggressor is about to violate a claim of the victim makes him lack a claim not to be killed. And unless an explanation of this sort is offered, the notion of forfeiture will look irremediably mysterious.

Philosophers working on punishment have paid more attention to this problem, and some of them have offered accounts of why wrongdoers lose their claim not to be treated in certain ways because of their conduct.<sup>18</sup> For example, John Simmons suggests that the reason why wrongdoers lack a claim not to be punished is that it would be unfair to guarantee the same level of protection against interference to those who break the rules and to those who don’t.<sup>19</sup> Christopher Morris, on the other hand, appeals to the idea that we are all bound by a set of norms that would emerge from the hypothetical bargain of suitably idealized rational agents, and that this bargain makes the enjoyment of our rights conditional on our being ready to respect the same rights in others. Thus, according to Morris, the notion of forfeiture has a contractualist foundation: the reason why wrongdoers lose their right not to be punished when they violate others’ rights is that this is part of a hypothetical agreement that they are bound by qua rational agents.<sup>20</sup>

<sup>17</sup>Thomson 1990, p. 369. The same answer is offered by Thomson in her later paper “Self-defence” (Thomson 1991), despite the many revisions made in relation to other aspects of her theory. (For an interesting discussion of Thomson’s view, see Lang 2014, pp. 52–5.)

<sup>18</sup>For a recent attempt to explain why the right not to be killed is forfeited in cases of self-defence, see Rodin 2011 and 2014.

<sup>19</sup>Simmons 1991.

<sup>20</sup>Morris 1991.

Notice that although these accounts appeal to different notions, they have a similar structure. They both employ some independent normative principles to provide an explanation of why wrongdoers lose certain rights when they act in certain ways (as opposed to merely stating that wrongdoers lose these rights when they act in those ways). This is precisely what is needed in order to avoid the objection I have raised against Thomson. But while these accounts do successfully avoid the *Incompleteness Objection*, it is doubtful that they can rescue the forfeiture view. For once we invoke the idea of fairness or the idea of a hypothetical contract to explain why wrongdoers make themselves liable to punishment by violating the rights of their victims, the notion of forfeiture seems to become redundant. Forfeiture adds nothing to the justification of punishment or self-defence, because the justificatory work is now being done by these other notions.

For example, if we accept Morris' view, the reason why Andy is liable to being punished is that this is part of a hypothetical agreement that binds him qua rational agent—an agreement that, among other things, states that those who violate others' rights may be subjected to certain kinds of hard treatment. Similarly, if we take Simmons' view, the reason why Andy lacks a claim not to be punished is that granting the existence of such a claim would be unfair toward those who refrain from breaking the rules. Saying that Andy has forfeited his right not to be punished does not seem to add anything to either of the stories in terms of justificatory power. Indeed, as the brief formulations of Morris' and Simmons' views offered in this paragraph suggest, their theories could be formulated equally well without mentioning the idea of forfeiture at all.

Thus, defenders of the forfeiture view are caught in a dilemma. If the notion of forfeiture is supposed to do independent normative work in justifying liability to punishment or self-defence, they end up with an argument that is inevitably incomplete. If, on the other hand, fairness or some other normative principle is invoked to give substance to the idea of forfeiture in the way suggested by Simmons or Morris, the notion of forfeiture becomes redundant. For the justificatory work the notion is supposed to do will ultimately be done by the underlying normative principle used to give substance to it. Either way, the notion of forfeiture plays no role, or at least no significant role, in providing an answer to the justification of punishment or self-defence.<sup>21</sup>

Defenders of the forfeiture view might be tempted to reply that all I have done is highlight a feature of their view that they already acknowledge, namely that their view cannot provide a self-standing justification for punishment or self-defence. After all, most defenders of forfeiture agree that having forfeited our right not to be punished or our right to not to be killed provides a necessary, but

<sup>21</sup>As it will become clear, there are two ways in which the *Incompleteness Objection* might be interpreted: a weaker interpretation, which grants limited justificatory power to the notion of forfeiture, and a stronger one, which denies that the notion has any such power. In section III, I discuss these two interpretations and argue in favour of the latter.

not sufficient, condition for punishment or self-defensive killing being justified.<sup>22</sup> We may not be permissibly punished or killed in self-defence unless we have forfeited these rights, but the mere fact that we have forfeited them does not automatically give others positive reasons to inflict harm on us by way of punishment or self-defence.<sup>23</sup> Separate principles will have to be invoked to provide these reasons, such as deterrence or retribution in the case of punishment, or the fact that innocent lives will be saved in the case of self-defence.<sup>24</sup>

This reply however, would miss the mark as my objection is not that the notion of forfeiture cannot by itself justify the infliction of punishment or self-defensive harm. Rather, the objection is that forfeiture by itself cannot justify *liability to harm* by way of punishment or self-defence. In other words, I'm happy to concede that saying that forfeiture justifies the permissibility of punishing or acting in self-defence against Andy (since Andy lacks a claim against being punished or killed in self-defence) is not yet saying that we are justified in punishing or acting in self-defence against Andy, as we might lack positive reasons to do what would be permissible for us to do. But it is precisely the claim that forfeiture can justify the permissibility of inflicting harm on Andy by way of punishment or self-defence that is called into question by my objection.

What about the reply that forfeiture is already understood, at least by some, as providing a necessary, but not sufficient, condition for liability to punishment or self-defensive killing? For example, while so called "externalists" about liability to defensive harm hold the view that one can be liable to defensive harm even if the infliction of that harm would be unnecessary (whether someone is liable for externalists only depends on whether the relevant right has been forfeited),<sup>25</sup> "internalists" claim that we can only be liable to harm that is necessary to avert a threat.<sup>26</sup> Thus, for internalists, the fact that Andy has acted in whichever way is required to forfeit his right against being killed (say, he has wrongfully attacked Beth) is not sufficient to justify his liability to harm. Is my claim that forfeiture cannot provide a self-standing justification of self-defence simply a way of highlighting a feature of forfeiture that internalists already take for granted?

It is not. Acknowledging that the forfeiture view only provides necessary, but not sufficient, conditions for liability to punishment or self-defence does nothing to neutralize my argument, because either way the *Redundancy Objection* applies. This is because the problem raised by the *Redundancy Objection* is not that the forfeiture view will have to work in tandem with a separate theory to

<sup>22</sup>Morris 1991, p. 68; Goldman 1979, pp. 44, 48; Uniacke 1994, pp. 190–1.

<sup>23</sup>It is worth noticing that not all defenders of the forfeiture view agree. Kit Wellman (2012, pp. 374–6) and David Rodin (2003, pp. 71–7) argue that forfeiture should be understood as providing both a necessary and a sufficient condition for the justification of the permissibility of punishment and self-defensive killing respectively.

<sup>24</sup>This seems to be the strategy employed by Lang to neutralize the first horn of the dilemma (Lang 2014, pp. 54–5).

<sup>25</sup>For a defense of this view, see Quong and Firth 2012.

<sup>26</sup>See, for example, McMahan 2009, p. 9. For an illuminating discussion of the distinction between internalism and externalism, see Frowe 2014, ch. 4.



provide a complete justification for liability to punishment or self-defence. Rather, the problem is that whatever justificatory work the notion of forfeiture is supposed to be doing, be that providing necessary or necessary and sufficient conditions, will be ultimately done by the underlying principles which are employed to give substance to this notion (for example, fairness or the idea of moral contract).

### III. THE ROLES OF FORFEITURE

I have argued that any account that aims to justify liability to punishment or self-defence by relying exclusively on the notion of forfeiture will be incomplete. This problem can be avoided by invoking some other theory to fill the notion of forfeiture with genuine justificatory content, that is, to explain *why* wrongdoers lose certain rights when they act in certain ways, as opposed to merely stating that they lose these rights as a consequence of acting in those ways. But once we amend the account in this way, and we employ a supplementary theory to answer the justificatory questions we are interested in, the notion of forfeiture seems to become redundant at the level of justification.

This is not to say that forfeiture has no role to play in the philosophical debates on the justification of punishment and self-defence. In this section, I outline two related ways in which this notion is helpful in structuring these debates. To begin with, the notion performs an important heuristic function, in that it marks the difference between two distinct ways of justifying the permissibility of inflicting harm on others. The difference in question is the one between cases where we are permitted to harm someone *despite the fact* that she retains a right against being harmed and cases where we are permitted to harm someone *in virtue of the fact* that she has lost her right against being harmed.

Consider the classic trolley case in which a trolley that is about to kill five people is diverted onto a side-track in which only one person will be killed. There is an important difference between the moral status of this person—call her Carla—and the moral status of someone like Andy, who is liable to be killed by Beth in self-defence. Carla retains a right not to be killed, but can be permissibly killed nonetheless because that right is justifiably overridden (as a lesser evil).<sup>27</sup> Andy, by contrast, no longer has a right not to be killed and this is why it is permissible for Beth to kill him in self-defence. The reason why Andy may be killed is that he does not have the sort of normative protection that Carla has (and that he also had before attacking Beth).

A valuable function performed by the notion of forfeiture is to mark the difference between Carla's and Andy's moral status. This difference matters greatly. Since Carla retains a right not to be killed, we should conclude that she is

<sup>27</sup>Most people seem to agree that the trolley can be turned in this case, but nothing hangs on this specific example. Those who disagree can replace it with any other scenario in which someone's right not to be killed can be justifiably overridden by some other moral considerations.

wronged even if killing her is permissible. And since she is wronged, some sort of apology or compensation might be owed to her family or her loved ones. Moreover, we would be required to bear greater costs to avoid her death, if we could, than we would in order to avoid Andy's death. By contrast, since Andy lacks the right not to be killed, he is not wronged when he is killed. Thus, we are under no duty to apologise or provide compensation for his death (though we should certainly regret its occurrence), and we would be required to bear less costs to avoid his death, if we could do so, than we would to avoid Carla's death. In other words, engaging in permissible wrongful killing (that is, the permissible killing of someone who is wronged by that killing) generates obligations that are not generated by permissible non-wrongful killing.<sup>28</sup>

This confirms that, as we have seen already, forfeiture-based accounts of punishment and self-defence are genuinely informative. Saying that Andy has forfeited his right not to be killed does tell us something important about why we can permissibly act in self-defence against him. We should be clear, however, about what it tells us and what it doesn't. Defenders of the forfeiture view might be tempted to argue that to the extent that their theory performs the function I have just described, it does after all have some justificatory role to play. In other words, they might be happy to acknowledge the *Incompleteness Objection*, but point out that although forfeiture does not provide a full justification for liability to punishment or self-defence, it nonetheless provides a partial one.

According to this view, saying that someone has forfeited her right not to be punished or killed, does go some way toward justifying her liability to being punished or killed in self-defence. Whilst a full justification will have to include an account of how wrongdoers divest themselves of the right not to be killed or the right not to be punished, knowing that wrongdoers have divested themselves of such rights is nonetheless a first step down the justificatory road.

However, there is reason to doubt this approach. For saying that the notion of forfeiture plays a heuristic role in marking the difference between the two aforementioned ways to justify liability to harm is not saying that the notion plays a justificatory role in explaining this difference. The latter claim seems implausible because, once again, the justificatory work in explaining the difference at hand will ultimately be done by whichever principle we choose to give substance to the notion of forfeiture.

For example, we might argue that the reason why Andy lacks a right not to be killed in self-defence by Beth is that since he is morally responsible for posing a threat of unjust harm, he rather than Beth should be the one who suffers the consequences of the harm he has caused;<sup>29</sup> or we might argue that by virtue of his wrongdoing, Andy has incurred an enforceable duty to protect Beth's life at the

<sup>28</sup>This view is standardly accepted among philosophers working on the morality of defensive harm. See for example: Frowe 2014; Bazargan 2014; Tadros 2012; Lazar 2012; McMahan 2009; Fabre 2009; Rodin 2003.

<sup>29</sup>McMahan 2009.

cost of his<sup>30</sup>; or that Andy and Beth are under a duty of reciprocity not to attack each other only insofar as they are not attacked.<sup>31</sup> If we want to explain why the justification for harming Andy is different from the justification for harming Carla, we'll have to tell one of these (or other similar) stories, and once we do, the notion of forfeiture will not add much to the picture in terms of justification. The notion of forfeiture rather works like a placeholder, whose main function is to signal that one of these justifications is available.

To clarify this point, consider the way in which the related notion of waiver is used in discussions about the morality of harm. We normally say, for example, that boxers waive their rights not to be harmed in certain ways (or, more precisely, the right not to be exposed to the risk of being harmed in certain ways) by accepting to fight a match. In this case, however, it is obvious that the notion of waiver does no real work in justifying the permissibility for boxers to harm each other. This justificatory work is rather done by the notion of consent.

Ali can permissibly punch Joe because Joe consented to it. Saying that Joe has waived his right not to be punched does not add anything to this justification. What it does is simply point at the fact that the reason why Ali can permissibly punch Joe is of a certain type, that is, that his permission to punch Joe has something to do with the fact that Joe has given up his right not to be punched, as opposed to, say, Ali being permitted to punch Joe despite Joe retaining a right against being punched or to Joe not having that right to begin with. What explains the fact that Joe has given up this right is consent.

The notion of forfeiture works in the same way. We can plausibly use it only to the extent that there is some other normative principle that plays the same role played by consent in the example just discussed. In saying that someone has forfeited her right not to be punished or not to be killed in self-defence, we are pointing out that the permission to punish or kill this person in self-defence is of a certain type, that is, that it depends on the fact that she lacks a complaint against our doing so. We are not explaining *why* the person we are acting against lacks such a complaint. If this is correct, the *Incompleteness Objection* is to be interpreted more radically, as suggesting that the notion of forfeiture fails to perform even a limited justificatory role. The notion rather performs the different function of marking the fact that a justification of a certain type is present.

The heuristic function performed by the notion of forfeiture is related to a second important role that the notion plays in the philosophical discussion on the justification of punishment and self-defence: forfeiture works as an intermediate conclusion in justificatory arguments that ground the permissibility of inflicting harm in suitably fundamental normative principles. It summarizes the result of a

<sup>30</sup>Tadros 2012.

<sup>31</sup>Rodin 2014.

host of justificatory arguments that appeal to considerations such as fairness, reciprocity, or responsibility in order to show why some people lack a complaint against being harmed in certain ways.

If so, we might be tempted to conclude that the notion is superfluous and can be dispensed with, but this would be a mistake. The reason forfeiture is so pervasive in the debates we are considering is precisely that it is capable of functioning as an intermediate conclusion of this sort. By employing this notion we can discuss a number of important issues concerning the morality of punishment or self-defence, despite our disagreement about the more fundamental question of what justifies liability to punishment or defensive force. And we can do this insofar as the notion works as a placeholder that summarizes the result of a number of underlying moral arguments.

For example, we can discuss the difference between the treatments that should be reserved to Andy and to Carla in virtue of the fact that the former but not the latter lacks a right not to be killed in self-defence; and we can do this despite the fact that we disagree about the question of why Andy lacks such a right. Different accounts of self-defence offer different explanations of the fact that Andy is liable to be killed, but these explanations will converge on the claim that Andy lacks a right not to be killed (and on the fact that this is why his situation is relevantly different from Carla's). Being able to converge on this intermediate conclusion, without necessarily having to resort to more fundamental justificatory questions is important because it enables us to make progress in the discussion in the face of disagreement about such fundamental questions.

#### IV. AN OBJECTION

An objection could be levelled against the view I am suggesting. The objection is that the sort of dilemma I have raised against forfeiture can be raised against a host of other moral notions which clearly do have justificatory force.<sup>32</sup> Promising is an example. What is it that justifies the creation of promissory obligations? Faced with this question we could either appeal to one of the many principles offered in the literature, say the value of creating certain expectations,<sup>33</sup> or the interest we have in forming intimate relations with others<sup>34</sup> or in having practical authority over others<sup>35</sup>; or, alternatively, we might treat promissory obligations as basic features of morality and, like Hume, be puzzled by “one of the most mysterious and incomprehensible operations that can possibly be imagined, and may even be compared to transubstantiation or holy orders, where a certain form of words, along with a certain intention, changes entirely the nature of an external object, and even of a human creature.”<sup>36</sup> Either way, we will continue to

<sup>32</sup>Thanks to David Rodin and Kit Wellman for pressing this objection.

<sup>33</sup>The most prominent account of this kind is Scanlon's “principle of fidelity” (Scanlon 1998).

<sup>34</sup>Shiffrin 2008.

<sup>35</sup>Owens 2012.

<sup>36</sup>Hume [1739–40] 1967, 3.2.5–14/15–524; emphasis in the original.

believe (and rightly so) that when we promise to do *X*, what justifies our newly created duty to do *X* is the fact that we promised to do so. This conclusion is undermined neither by the thought that the justificatory force of promises can in turn be explained by appealing to some more fundamental normative principle, nor by the thought that promising is a basic principle with which we hit rock bottom in the justificatory process.

The same holds for consent, a notion I have myself invoked as one that clearly does justificatory work.<sup>37</sup> Whether we think that consent is a basic moral principle or that it is grounded in some more fundamental principle (such as the interest we have in acting as autonomous moral agents or in having control over what happens to our body and our property), we will agree that when *T* consents to *X* (where *X* falls within the scope of what *T* can permissibly consent to), others (those to whom *T* gave consent) acquire a liberty to *X* and *T* loses her claim that others do not *X*. This conclusion is undermined neither by the thought that the justificatory force of consent can in turn be explained by appealing to further normative principles nor by the thought that consent is a basic normative principle. But if so, why worry about forfeiture? If the sort of dilemma I have considered does not undermine our belief that promises and consent do play a genuine justificatory role, why should it do so when raised against forfeiture?

The answer is that notions such as promise and consent are very different from notions such as forfeiture and waiver. Indeed, not only do their structure and their modus operandi differ but, as I will explain, they operate at different levels within moral arguments. This is why noticing that the sort of dilemma I have presented does not threaten notions such as promise and consent is not enough to undermine the claim that the same dilemma is a problem for forfeiture.

Promising and consenting are exercises of “normative powers,” by which we create or remove reasons for action that apply to us through an exercise of our will. While philosophers disagree as to what justifies the existence of these normative powers, it is generally recognized that their exercise does change our normative status by generating new obligations (in the case of promises) or by removing claim rights we possess (in the case of consent).<sup>38</sup>

Consider now the notion of waiver. Waiving a right does not constitute the exercise of normative power. Rather, it is a way of describing how someone’s normative status changes when the agent exercises his or her normative power. This is why we can converge on the claim that someone has waived a certain right, even if we disagree about what justifies the waiving of the right. You might believe (correctly) that Elaine can permissibly drive Jerry’s car because Jerry has consented, whereas I might believe (mistakenly) that it is because Jerry has

<sup>37</sup>See section III.

<sup>38</sup>On the notion of normative powers, see Raz 1986; Watson 2009; Owens 2012.

promised Elaine to lend her his car. Irrespective of who is right,<sup>39</sup> we are both correct in saying that Jerry has waived his right. We are both correct in saying that, even if only one of us is correct about what ultimately justifies the change in Jerry's normative status, precisely because when we say that Jerry has waived his right over his car we are not providing a justification for such a change. Rather, we are describing how Jerry's normative status has changed as a consequence of the fact that he has exercised his normative power in a certain way. If the claim that Jerry has waived his right over his car played a justificatory role, we could not agree on that claim while disagreeing at the same time about what justifies his change in normative status.<sup>40</sup>

The notion of forfeiture clearly is closer to the notion of waiver than to notions such as promising or consenting. I will not try here to articulate the exact difference between forfeiture and waiver, as this task is more complex than we might think at first. This is partly because their usage is not as uniform as one might hope.<sup>41</sup> Typically, waiving a right is taken to be something that we do intentionally (we intend to bring about the relevant change in our normative status), whereas forfeiting a right is something that we normally do unintentionally (the change in our normative status is an unintended, though sometimes foreseen, consequence of our action). However, this is not always the case. We can imagine cases in which someone acts with the intention to forfeit certain rights (pressured to marry my boss' daughter, I might decide to commit a crime with the intention of temporarily losing my right to liberty, so that I will be unable to marry her); and in criminal procedure, we can waive the right to avail ourselves to certain defenses by failing to comply with certain regulations, even if our failing to do so was not intentional.

What matters for our purposes here is that whatever the correct way to exactly characterize the difference between forfeiture and waiver is, they clearly seem to operate in the same way. More precisely, they operate at the same level within our justificatory arguments. To see what I mean, let me identify four levels of

<sup>39</sup>It might sound strange to say that you and I disagree when we claim that Elaine's right to drive Jerry's car is grounded in Jerry having consented or in Jerry having promised respectively. This is because colloquially the two notions are often used interchangeably. However, as we have seen, the logic of promises is different from the logic of consent: promises generate obligations for the promisor (and claim rights for the promisee), whereas consent removes one or more claim rights possessed by the promisor (and creates new liberties for the promisees) (Raz 1986, pp. 82–6; Hurd 1996; Owens 2012, pp. 164–72). Thus, although it is true that in consenting to dental treatment we normally also intend to commit to cooperate with the dentist, strictly speaking this does not have to be the case. After having consented you might leave town, thereby making it impossible for the dentist to treat you. In so doing, you do not wrong the dentist. However, you would have wronged the dentist if you had promised to let her treat you and then left. This is because consent involves no obligation to ensure that the person you consent to will be able to take advantage of your consent. (I borrow this example from Owens 2012, pp. 165–6.)

<sup>40</sup>In this example, Jerry's normative status has changed as a consequence of the fact that he has consented to Elaine using his car, but the same change would have been effected if Jerry had promised Elaine to let her drive his car. This is why you and I are both correct in claiming that Jerry has waived his right, despite the fact that I am mistaken about what justifies the loss of the right.

<sup>41</sup>For example, Kershnar (2002) unconventionally treats waiver as the broader category of which forfeiture is a species.

discourse involved in the justification of claims such as “Elaine can permissibly drive Jerry’s car,” “Andy is liable to be killed by Beth in self-defence,” or “Andy is liable to punishment.”

Call the level at which we make these claims Level (4). Level (2) is the level where we find notions that do genuine justificatory work. Here we appeal to ideas such as consent or promises to explain why Elaine may drive Jerry’s car, or to notions such as fairness or moral contract to explain why Andy is liable to being punished. Level (1) is where we justify the principles operating at Level (2). Here we provide reasons to accept, for example, the claim that promises create new obligations for the promisors, or the claim that there is a moral contract requiring, among other things, that wrongdoers be liable to certain kinds of hard treatment. Level (3) is where we find notions such as waiver and forfeiture. These notions, as we have seen, do not add anything to the justificatory process. Rather, they are placeholders that summarize the result of the justificatory arguments operating at Level (2). Their main function is to signal that the normative status of an agent has changed in a particular way as a consequence of the fact that a justificatory story of a certain kind is available.

The four levels could be thus represented as in table 1 or in table 2.

Table 1. *Waiver*

Level 4	<i>“Elaine may permissibly drive Jerry’s car.”</i>		The claim to be justified.
		↓	
Level 3	<i>“Jerry has waived his right over the car.”</i>		Intermediate conclusion in the argument that grounds the claim at Level (4) on the justification provided at Level (2).
		↓	
Level 2	<i>“Jerry has promised Elaine to let her drive his car.”</i>		Justificatory argument for the claim at Level (4).
		↓	
Level 1	<i>Principles such as Scanlon’s “principle of fidelity” or Owens’ “authority interest.”</i>		Principles that explain why the justificatory argument at Level (2) has moral force.

It should now be clear why noticing that the notions employed at Level (2) are not mere placeholders for the notions employed at Level (1) is not sufficient to conclude that the notions employed at Level (3) are not mere placeholders for the notions employed at Level (2). This is because the relationship between the different levels is not the same. The justificatory arguments at Level (2) explain why the normative status of the agent changes; but they can do so only because there is an underlying principle that, in turn, explains why the justificatory arguments offered at Level (2) are sound. Thus, the notions invoked at Level (2)

Table 2. *Forfeiture*

Level 4	<i>“Andy is liable to be punished.”</i>		The claim to be justified.
		↓	
Level 3	<i>“Andy has forfeited his right not to be punished.”</i>		Intermediate conclusion in the argument that grounds the claim at Level (4) on the justification provided at Level (2).
		↓	
Level 2	<i>“Andy is bound by a hypothetical contract that renders wrongdoers liable to certain kinds of hard treatment.”</i>		Justificatory argument for the claim at Level (4).
		↓	
Level 1	<i>Justification of moral contractualism as instrumental to the promotion of individual self-interest, as required by the need to justify ourselves to others, or on some other grounds.<sup>42</sup></i>		Principles that explain why the justificatory argument at Level (2) has moral force.

and the notions invoked at Level (1) both perform justificatory tasks, although different ones: the former justifies the claims made at Level (4), the latter justifies the principles invoked at Level (2). The same relationship does not exist between the notions employed at Level (3) and the notions operating at Level (2).<sup>43</sup> If the arguments presented so far are convincing, the relationship between these two levels is different in kind from the one existing between the notions operating at Level (2) and those operating at Level (1).<sup>44</sup>

## V. CONCLUSION

The language of forfeiture plays a crucial role in the philosophical discussion on the morality of harm, and particularly in debates on the justification of punishment and self-defence. The aim of this article has been to clarify what this role is. I have suggested that forfeiture cannot provide a justification for liability to punishment or self-defence unless some other normative principle is invoked to explain why by acting in certain ways we alter our normative status and divest

<sup>42</sup>See Gauthier 1986; Scanlon 1998.

<sup>43</sup>Shortly after this article was accepted for publication, Kim Ferzan published an interesting paper defending the claim that forfeiture and waiver constitute normative powers (Ferzan 2016). I cannot consider her arguments here, but I believe that they trade on a conflation between these two levels.

<sup>44</sup>Raz argues that assertions of rights are “typically intermediate conclusions in arguments from ultimate values to duties” (Raz 1986, p. 181). Despite the similarity in our formulations, however, I do not take him to be claiming that the notion of rights operates as a mere placeholder at Level (3) for justificatory arguments to be found at Level (2). (If he is, I disagree, since I understand the notion of rights as one operating at Level (2), but I cannot address this issue here.)



ourselves of certain moral rights. Thus, to the extent that forfeiture can be said to have any justificatory role, this role will be only derivative: saying that Andy has forfeited his right not to be punished or not to be killed can provide a justification for our liberty to punish or kill him only insofar as there is some underlying theory that appeals to substantive normative principles such as fairness, reciprocity, or contractualism.

But once the relevant underlying principle is brought into the picture, we have reason to doubt that forfeiture can play even a limited justificatory role. For once we justify the right to punish or to inflict defensive harm on someone by appealing to the said principle, there seems to be no genuine justificatory role left to be played by the notion of forfeiture. In the same way in which once we know that Joe has consented to the risk of being punched by Ali, saying that he has waived his right not to be exposed to this risk adds nothing to the justification we have already provided, saying that Andy has forfeited his right not to be killed in self-defence by Beth adds nothing to the justification we provide when we appeal to the fact that he is under an enforceable duty to protect Beth's life, or to the fact that Beth is under a duty of reciprocity not to attack Andy only insofar as he does not attack her.

I have suggested that the notion of forfeiture performs two related functions that pertain to the justification of punishment and self-defence, but are not themselves justificatory. First, the notion plays a heuristic role in marking the difference between two ways in which the permissibility of inflicting harm can be justified: cases where we are permitted to harm someone *despite the fact that* she has a right against being so harmed and cases where we are permitted to harm someone *in virtue of the fact that* she has lost such a right. When we say that Andy has forfeited his right not to be killed in self-defence by Beth, we are pointing at the fact that the justification available to Beth for killing Andy is of the latter kind. This is important because, although killing might be permissible both in cases where the victim has forfeited her right not to be killed and in cases in which she hasn't, in the latter cases (but not in the former) we are required to bear greater costs to avoid her death, and special compensatory duties as well as duties to apologize are generated by the fact that the victim has been permissibly killed.

The second role performed by forfeiture is closely connected to the first one. To the extent that the notion of forfeiture works like a placeholder, whose function is to signal that a justificatory story of a certain kind is available, it has an important pragmatic function: it allows us to discuss a number of issues concerning the morality of punishment or self-defence, without having to agree on the more fundamental question of what justifies liability to punishment or defensive force.

The notion of forfeiture works as an intermediate step in justificatory arguments that ground the permissibility of inflicting harm by way of punishment or self-defence in considerations of fairness, reciprocity, or responsibility. It summarizes the result of such arguments by spelling out an intermediate conclusion on which they all agree, namely that those who engage in wrongful

conduct divest themselves of particular rights, and therefore lack a complaint against being harmed in certain ways.

Being able to converge on this intermediate conclusion is of crucial importance because it enables us to discuss a number of important questions while bracketing any disagreement about the underlying justificatory arguments. If this is correct, the role of forfeiture, far from being that of justifying punishment or self-defence, is ultimately to avoid talking about controversial aspects of their justification.

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