

Causation, Culpability and Liability

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VERY ROUGH DRAFT

One important element in the justification of harming a person to avert a threat is that the person harmed is liable to be harmed to avert that threat. If she is liable to be harmed to avert the threat, harming her for that purpose does not wrong her. Liability has taken centre stage in the philosophy of self-defence.

Liability is not the be all and end all of permissible harming, as is now well-established.¹ It is sometimes wrong to harm a liable person – it may not wrong *that* person to harm her, but it may wrong other people. For example, it may wrong those who are harmed as a side-effect of the harming of the liable person. Or it may be wrong to harm a liable person even if no one is wronged. It may be wrong because doing so violates some self-regarding duty that the person doing the harming has, for example, or some duty grounded in impersonal value.

Furthermore, it is sometimes permissible to harm non-liable people – for example as a side-effect of an act which prevents a great deal of harm. Non-liable people, in these cases, retain their rights not to be harmed, and hence if they are harmed they are also wronged. Yet harming them may be permitted all things considered because the rights of others override their rights.

Nevertheless, establishing that a person is liable to be harmed is an important step in an overall argument for the permissibility of harming a person. It also may have implications for secondary duties that arise once the person has been harmed – for example, the duty to compensate a person for the harm that she has suffered.²

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¹ See, for example, J McMahan ‘Self-Defense and the Problem of the Innocent Attacker’ (1994) 104 *Ethics* 252; H Frowe ‘A Practical Account of Self-Defence’ (2010) 29 *Law and Philosophy* 245; K K Ferzan ‘Culpable Aggression: The Basis for Moral Liability to Defensive Killing’ (2011-2) 9 *Ohio St J Crim L* 669.

² It is sometimes supposed that it necessarily follows from the fact that a person is liable to defensive harm that they lack a right to seek compensation from the person

Work on liability in the context of self-defence has generally focused on establishing the conditions of liability. Here are five proposals:

Culpable Responsibility: X is liable to be harmed to avert a threat *t* to V, iff, it is fact-relative wrong³ to impose *t* on V, X is culpable for causing *t*, and it is necessary to harm X to avert the threat.

Culpable Responsibility 2: X is liable to be harmed to avert a threat *t* to V or a perceived threat of *t* to V, iff X is a) culpable for causing *t* and it is necessary to harm X to avert the threat, or b) X is culpable for causing the perception that a) is true.⁴

Implying No Rights: X is liable to be harmed to avert a threat *t*, iff it is fact-relative wrong to impose *t* on V, X has caused *t*, and X has wrongly or mistakenly treated V as though he lacks rights, or as though his rights lack the importance that they have, and it is necessary to harm X to avert the threat.⁵

Moral Responsibility: X is liable to be harmed to avert a threat *t*, iff it is fact-relative wrong to impose *t* on V and X is morally responsible for creating *t*. X

who harms her. See, for example, J Quong ‘Liability to Defensive Harm’ (2012) 40 *Philosophy and Public Affairs* 45, 46 (though Quong states the view cautiously); K K Ferzan ‘Culpable Aggression’, 673. I doubt that the relationship between liability and compensation is simple, though I agree that it is important.

³ The language of fact-relative, evidence-relative, and belief-relative wrongdoing is becoming common currency in recent literature on self-defence. It is drawn from D Parfit *On What Matters* vol.1 (Oxford: OUP, 2011) 150-1.

⁴ Ferzan ‘Culpable Aggression’ – I have reformulated Ferzan’s proposal, but I hope that this is an accurate description of her view. Her own proposal sets out what she believes are necessary conditions of culpability, which excludes negligence. I doubt that Ferzan is right that negligence is non-culpable, but I leave discussion of that issue to another occasion.

⁵ Quong ‘Liability to Defensive Harm’ – again I have slightly reformulated Quong’s view, but I hope that this accurately describes it.

is morally responsible for creating t if X takes a non-trivial risk that he will impose t on V and it is necessary to harm X to avert the threat.⁶

Causal Responsibility: X is liable to be harmed to avert a threat t , iff it would be fact-relative wrong to impose t on V and X is causally responsible for creating t .⁷

These proposals have two dimensions: a causal dimension and an agency dimension.

The causal dimension refers to the causal contribution that the person makes to the threat. Four of the five proposals make causation of a threat that it is fact-relative wrong to impose a necessary for liability. The other, *Culpable Responsibility 2*, makes causation or the perception of causation necessary for liability. *Culpable Responsibility 2* raises an interesting and tricky issue. Suppose that X attempts to kill V . X cannot succeed as his gun is not loaded, but V reasonably believes that it is. If V harms X , does V wrong X ? Kim Ferzan implies that he does not. I think that X wrongs V in the fact-relative sense, but does not wrong him in the evidence-relative sense. Beyond these very brief remarks, I will leave this issue aside. I will restrict my attention to cases where the person harming X makes no mistakes.

The agency dimension refers to the relationship, if any, between the threat and her agency. Did she choose to pose it, or risk posing it? Did her choice reflect her *qua* agent? Did she have any excuses for choosing to pose it? Was she negligent in posing it? Or was the threat disconnected from her as an agent, either because any choice that

⁶ J McMahan 'The Basis of Moral Liability to Defensive Killing' (2005) 15 *Philosophical Issues* 386; J McMahan *Killing in War* (Oxford: OUP, 2009). McMahan has since qualified his view to exclude some cases where X acts in order to protect V . See 'The Just Distribution of Harm Between Combatants and Noncombatants' (2010) 38 *Philosophy and Public Affairs* 342. I approve. See V Tadros *The Ends of Harm: the Moral Foundations of Criminal Law* (Oxford: OUP, 2011) ch.10.

⁷ Though it is not completely clear, something like this seems the upshot of J J Thomson 'Self-Defense' (1991) 20 *Philosophy and Public Affairs* 283 given her expansive account of what it means to violate a right.

she made did not result in the threat being issued, or because although she was causally involved in the threat occurring her agency was negated or bypassed?

All five proposals are false. All proposals remotely like these will fail. They will fail because a very wide range of considerations impact on liability. These include, but are not restricted to, various kinds of responsibility and causation.⁸ This should not surprise us, I will argue, for there is a close relationship between what a person is liable to and the duties that she has. Any simple account of what duties we have of the kind proposed above would seem absurdly simplistic. There are many considerations that are relevant to determining a person's duties. In consequence, there are many considerations that are relevant to determining a person's liabilities. This is the broad claim that I will aim to support.

To support it, I pursue a narrower aim: to show that causation and culpability are independently significant in assessing liability. I do not claim, and I do not believe, that these are the only factors relevant to a complete assessment of liability to defensive harm. Establishing the more modest claim, though, will be sufficient to demonstrate the falsity of all of the proposals outlined above, and I hope to support the broader claim.

I. Liability to be Harmed

Liability to be harmed to avert threats is commonly, and I think best, understood as follows:

Liability: A person, X, is liable to be harmed to some degree, n , to avert a threat, t , iff intentionally or knowingly harming X to degree n to avert t without her consent does not wrong her.⁹

⁸ There might be liability without either culpability or causation – if liability is vicarious. See, further, V Tadros 'Orwell's Battle With Britain: Vicarious Liability in War' (unpublished ms.). All of the proposals under consideration deny that there could ever be vicarious liability, which surely must count against them.

⁹ This account is more or less drawn from the influential discussion in J McMahan *Killing in War* (Oxford: OUP, 2009).

Harming a liable person fails to wrong her only if she is harmed for specific reasons – to avert *t*. That she is liable to be harmed to avert *t* does not imply that she is liable to be harmed for other reasons.

As I noted above, liability is neither necessary nor sufficient condition for an overall permission to harm a person. The fact that liability is neither necessary nor sufficient for the permissibility has methodological implications for a theory of liability. How do we demonstrate that a person is or is not liable to be harmed? Not by demonstrating either that harming her is permitted, or that it is wrong.

What is required is a particular explanation why harming a person is permitted or wrong. For example, Jeff McMahan rightly notes that it is plausibly permissible to kill a non-negligent driver to avert a lethal threat that she poses to a pedestrian in virtue of the fact that she is responsible for posing a risk to others.¹⁰ He offers this case to support liability for those who are responsible but non-culpable. But the plausibility of McMahan's verdict about permissibility does not, on its own, support his judgement about liability. An alternative explanation is that the driver retains her right against being harmed or killed, but these rights may be overridden by the right of the victim to protect herself.¹¹

A further explanation is needed. Here is one. There is a stringent prohibition on killing. Killing is permitted only if the harm averted is much more significant than the harm caused. We need an explanation why the stringent prohibition on killing does not apply in this case. The liability of the driver might be explain why the prohibition on killing does not apply in this case. Critics of McMahan might either reject McMahan's intuition about non-negligent drivers, or might offer an alternative explanation of the verdict. For example, Jon Quong agrees with McMahan's verdict but offers an agent-relative explanation of the permission to kill the non-negligent driver.¹²

¹⁰ See 'The Basis of Moral Liability to Defensive Killing', 394-

¹¹ Some, here, may defend the view that it is permissible for the pedestrian to kill the driver, but not *vice versa*. Others may defend the view that the driver and the pedestrian may attack each other. For the latter view, see K K Ferzan 'Culpable Aggression' 682-3.

¹² See Quong 'Liability to Defensive Harm', 58. Quong outlines his agent-relative explanation in more depth in 'Killing in Self-Defense' (2009) 119 *Ethics* 507. I am

Suppose that McMahan's explanation is better than Quong's. I think that it is. Even so, this helps to establish only that the non-negligent driver is liable to be harmed to some degree to avert the threat that she poses – to a sufficient degree that the prohibition on harming is defeated. It does not establish that killing her does not wrong her, and that is what McMahan claims.¹³ The right conclusion, I think, is that she is liable only to suffer some degree of harm, not death, to avert the threat. The remainder of the harm imposed on her might be justified on the basis of a lesser evils justification.¹⁴ This more complex explanation seems superior – the idea that the non-negligent driver is not wronged at all when she is killed, even though it was extremely unlikely that she would impose a threat of this kind on others, seems unpalatable.¹⁵

But even if this is right, we still haven't provided very deep explanation of liability. We have provided evidence that liability is doing the work in grounding the permissibility of killing without explaining how.

What might provide the right kind of explanation? Not forfeiture. Those who write about liability sometimes claim that those who are liable to avert a threat have forfeited their rights against being harmed to avert that threat. As a description, this is fine, but it is no explanation. If a person has forfeited her right to be harmed to avert a threat, by definition harming her without her consent to avert the threat does not wrong her. Hence, the claim that a person has forfeited her right against being harmed to avert a threat is simply another way of describing her as liable to be harmed to avert a threat. No explanatory progress has been made.

skeptical about this view for reasons outlined in Tadros *The Ends of Harm*, chs.9 and 11.

¹³ 'The Basis of Moral Liability for Defensive Killing' 394.

¹⁴ For an argument of this kind in the context of non-responsible threats, see V Tadros *The Ends of Harm* ch.11. McMahan acknowledges the possibility of combined justifications of this kind – he offered such a justification to explain some cases in his paper at San Diego.

¹⁵ Here I agree with Quong about this implication of McMahan's view. See 'Liability to Defensive Harm' 59, though the conclusion Quong draws – that the non-negligent driver is not liable to be harmed at all – strikes me as equally implausible.

This brings me to one virtue of the idea that I have pressed elsewhere:¹⁶ that there is an important relationship between liability and duty. One central way of explaining how a person can become liable to be harmed to avert a threat is to show that she has incurred an enforceable duty to avert that threat, even if she will be harmed. This idea helps to provide the explanation we seek. It is admittedly itself only a later step in a full explanation, for we need to outline the considerations ground duties. But the question of how we incur duties is both more familiar and more tractable than the question about liability, and hence we have made progress.

Furthermore, we have made progress in explaining the intuition that we have about some cases that a person who is harmed without her consent is not wronged. To see this consider:

The Argument from Enforceable Duty to Liability

- 1) If X has an enforceable duty to v even though v ing will harm X, and Y has standing to enforce X's duty to v , under some conditions Y does not wrong X in forcing X to v even though X will be harmed.
- 2) Therefore X is liable to be forced by Y to v even though X will be harmed.
- 3) If Y forces X to v , Y harms X but does not wrong X.
- 4) Therefore if X has an enforceable duty to v even though v ing will harm X, and Y has the standing to enforce X's duty to v , X is liable to be harmed by Y.

This argument needs to be spelled out and defended in more detail. In 1), the conditions need to be spelled out. I include this qualification due to the defeasible obligation to seek authorization, even where harming the person may be permitted if authorization is not forthcoming, that may exist in some circumstances.¹⁷ I should emphasise, also, that it is only an argument that under certain conditions having an enforceable duty to act in a certain way that will cause oneself harm is a sufficient condition of liability. It leaves open the possibility that there might be other explanations of liability.

¹⁶ See V Tadros 'Duty and Liability' *Utilitas*.

¹⁷ See, further, below.

Considering liability to pay compensation helps to support this argument. Suppose that X has a duty to compensate V for some injury that X has caused V. A court official, Y, has standing to enforce X's duty. This implies that X is liable to compensate Y. As compensating V may harm X, X is also liable to be harmed by Y. If Y harms X by forcing him to compensate V, X does not wrong V.

The compensation example is just a specific illustration of the more general idea that harming a person does not wrong her when doing so amounts to enforcing a duty that she has. Furthermore, there are strong reasons to suppose that if the argument is valid for compensation, it will also be valid for preventive duties. This follows from the fact that there is a powerful relationship between primary duties, such as the duty not to harm others, and secondary duties such as the duty to negate potential harm or to compensate harm.¹⁸

Quong thinks that liability to pay damages may have a very different normative basis to liability to preventive harm.¹⁹ I find this difficult to believe. Why should the permission to harm a person to prevent a threat being realized be grounded in very different considerations to the permission to harm a person to ensure that the person harmed is compensated? Given the close relationship between negating a harm and compensating a person for a harm, it would be surprising if very different considerations determined these two realms of the ethics of harm.²⁰

It may be objected that in standard self-defence cases, unlike cases of compensation, the person who is harmed is not forced to do anything. There is, I agree, much more to say about whether this idea can be extended to cases where X

¹⁸ See, further, J Raz 'Personal Practical Conflicts' in P Bauman and M Betzler *Practical Conflicts* (Cambridge, CUP, 2004), J Gardner 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 *Law and Philosophy* 1 and A Slavny 'Negating and Counterbalancing: A Fundamental Distinction in the Concept of a Corrective Duty', *Law and Philosophy* (forthcoming).

¹⁹ See 'Liability to Defensive Harm', 45.

²⁰ McMahan, I think, agrees that there is a powerful relationship between liability to defensive killing and liability to pay compensation. See 'The Basis of Moral Liability to Defensive Killing' 394-5.

cannot be forced to v , but can only be used as a means to achieve the goal that would ground his duty to v . I believe that we can extend the argument to these cases.²¹

But making the case for that is not necessary for my basic argument: that if a person has an enforceable duty to do something that harms them, they are liable to be harmed. It will be sufficient to focus on cases where the person is harmed by forcing them to avert the threat that they have caused. That will already demonstrate the falsity of all of the proposals outlined above, and support my broader argument that no simple account of liability to defensive harm is to be expected. At least in cases where a person is forced to act in order to avert a threat, enforceable duties underpin liability. As enforceable duties have a wide range of sources, no simple account of liability to be harmed to avert a threat will be successful.

In evaluating various considerations that might ground liability, I will explore the following case and variations on it:

Unread Letter: Veronica and Wilma each wish to kill Dan. Independently, they each send a letter to Kev, a hit man. Each letter instructs Kev to kill Dan using a pistol at noon. Dan receives Veronica's letter. Wilma's letter gets lost in the post. Kev immediately acts on Veronica's instructions, finds Dan and, just before noon, attempts to kill him. Had he received Wilma's letter and not Veronica's, he would have acted in exactly the same way. When Kev finds Dan, Veronica, Wilma and Irene, an innocent bystander, are standing by.

My aim is to compare the liability of Veronica, Wilma and Irene. Veronica and Wilma are each highly culpable. They each intend that Kev will kill Dan. They each aim to execute that intention by sending the letter. The only difference between them is that Veronica causes Kev to threaten Dan whereas Wilma does not. Irene, in contrast, is neither culpable nor causally involved in the threat posed to Dan. This case will be useful in helping us to consider the significance of culpability alone and in conjunction with causation. It will also help us to evaluate how we should understand the liability of innocent bystanders.

II. The Liability of Innocent Bystanders

²¹ See, further, *The Ends of Harm* ch.6

All will agree that Veronica is liable to be harmed to avert the threat that she culpably poses, through Kev, to Dan. If the only way for Dan to avert the threat that he poses is to force Veronica to disarm Kev (*Guilty Variation*), he may do this, and he will not wrong Veronica if he does. None of the accounts above holds Wilma liable to be harmed, and none holds Irene liable to be harmed. I begin with my most controversial claim – that Irene is liable to be harmed.

In supporting this view, the first thing to note is that it is not wrong for Dan to force Irene to avert the threat that Kev poses to him under some conditions.²² Suppose that the only way for Dan to avert the threat that he faces is to force Irene to prevent Kev from killing him. If she does this she will be harmed to a small degree (*Innocent Variation*). It is permissible for him to do this.

The question is how to explain this verdict. I believe not only that it is permissible for Kev to force Irene to avert the threat that he faces, but that under some conditions he does not wrong her if he does so. Defenders of the different views of liability outlined above will doubt this - it is more plausible that Dan wrongs Irene *pro tanto*, even if he does not act wrongly all things considered, they may claim. Who is right?

Here is why I think Irene is liable. Dan's permission to force Irene to avert the threat that he faces depends on her duty to act in this way. Irene's duty to rescue Dan from Kev, a duty which given its importance is enforceable, explains why Dan is permitted to force her to rescue him. This will be true on the basis of the mostly true principle that it is permissible to force a person to do something only if they have a duty to do that thing. Furthermore, forcing a person to do something that they have a duty to do, assuming that they lack a right to do wrong, does not wrong them. Hence, if Dan forces Irene to rescue him from Kev, he does not wrong her.

It may be true that he does not wrong her only on the condition that he has first attempted to persuade, rather than force, her to do her duty.²³ And, if this is feasible and not too costly, perhaps he does not wrong her only on condition that he

²² I rely on the anti-libertarian assumption, here that there are modest enforceable duties to rescue. That assumption is widely, though not universally shared.

Libertarians, are invited to shut their ears at this point.

²³ See, further, Tadros *The Ends of Harm* 133-4.

intends to compensate her for the harm that she suffers. But suppose that he attempts to persuade her and fails, and he knows that there will be no way to compensate her for the harm that she suffers. If he then forces her, forcing her to do her duty does not wrong her even though she will be harmed to some degree.

On the analysis that it is *pro tanto* wrong for Dan to force Irene to do her duty, we must conclude that forcing a person to do what they have an enforceable duty to do may also infringe their rights. This seems incoherent. So we are better to conclude that Irene's rights are not infringed, and hence that Irene is not wronged *pro tanto*. Given *Liability*, it follows that Irene is liable to be harmed to some modest degree to save Dan from Kev. If this is right, I have already demonstrated that all accounts of liability outlined at the beginning are false.

III. The Difference that Causation Makes

So far, we have considered the liability of Veronica and Irene in circumstances where they and they alone could be forced to avert the threat that Kev poses to Dan. My focus in this section is on whether causation makes a difference to liability. To consider this question, compare the liability of Veronica and Wilma. Veronica and Wilma are identically culpable. The only difference between them is that Veronica culpably causes the threat that Dan faces whereas Wilma does not.

To evaluate whether causation enhances liability, suppose that Dan can save his life only by forcing either Veronica or Wilma to prevent Kev from killing him. Whoever is forced to do this will be harmed to degree n (*Guilty Selection Variation*). Let us suppose that n is sufficiently small that Veronica would be liable to be harmed to this degree in *Guilty Variation*. This will be so even if n is very large. If Dan ought to use Veronica rather than Wilma, we have good reason to believe that Veronica's liability to be harmed is greater than Wilma's. The permissibility of harming Veronica rather than Wilma will surely rest on the fact that Veronica's liability to be harmed is greater than Wilma's.

The verdict that Dan ought to select Veronica rather than Wilma to be used is intuitive, and all of the accounts of liability above reject it. Some will resist this rejection. They may endorse:

The Irrelevance of Outcomes: If two agents perform the same actions with the same intentions they are equally liable to be harmed to avert any threats that arise.²⁴

According to *The Irrelevance of Outcomes* Veronica and Wilma are equally liable to be harmed to avert the threat that Kev poses to Dan. They will conclude that in *Guilty Selection Variation* Dan ought to flip a coin to decide whether to force Veronica or Wilma to avert the threat posed to him.

The Irrelevance of Outcomes treats causing a threat as morally irrelevant to a person's liability to be harmed to avert that threat. It is an attractive view for the following reason: it is simply a matter of luck that Veronica rather than Wilma is causally responsible for the threat that Kev poses to Dan. *The Irrelevance of Outcomes* denies moral outcome luck, and in that way may seem fair. Nevertheless, I think it should be rejected.

Here is one way to challenge *The Irrelevance of Outcomes*. Let us suppose that we have much stronger reasons not to kill than we have not to let die – we endorse the *The Doctrine of Doing and Allowing* (DDA). Now 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 a much stronger reason to protect Dan than Wilma, for she has a stronger reason not to kill than not to let die, and if she does not jump in front of Dan, she will have killed rather than let die. Wilma, in contrast, will only have let die.

Now consider things from Dan's perspective. If Dan uses Veronica he forces her to do something that she has a stringent duty to do. If Dan uses Wilma, he does to

²⁴ It is not uncommon to accept the irrelevance of outcomes for liability to pay compensation or to be punished. It is, then, somewhat surprising to see it roundly rejected in the case of self-defence. Ferzan holds inconsistent views on these issues – her principles of self-defence restrict liability to attacks or perceptions of attacks that the attacker causes, but her views about compensation and punishment seem to treat this factor as irrelevant (on which, see L Alexander and K K Ferzan, with S Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: CUP, 2009) and L Alexander and K K Ferzan 'Confused Culpability, Contrived Causation, and the Collapse of Tort Theory' (unpublished ms.)).

her something that she has less stringent duty to do. This consideration militates powerfully in favour of Dan forcing Veronica rather than Wilma to avert the threat.

This argument suggests that *The Irrelevance of Outcomes* conflicts with the DDA. Of course, for some that will not be a decisive argument against *The Irrelevance of Outcomes*. Some reject the DDA. The DDA, though, rests on the powerful idea that we are especially responsible for the things that we do, and less responsible for the things that others do. Whilst I cannot defend the DDA here, I doubt that we should reject it. Therefore I doubt that we should accept *The Irrelevance of Outcomes*. Hence, I think that Dan should force Veronica to prevent Kev from killing him rather than Wilma.

III. Culpability Without Causal Responsibility

If we reject *The Irrelevance of Outcomes*, we may nevertheless accept that culpability makes a difference to liability independently of causation. The fact that causation makes a difference to liability when culpability is held fixed obviously does not imply that in the absence of causation, culpability makes no difference to liability.²⁵

i) Proposals that Reject the Significance of Culpability Alone

The five proposals for liability outlined at the beginning all imply that there is no difference in the liability of Wilma and Irene to avert the threat that Kev poses to Dan. Neither Wilma nor Irene is at all liable to be harmed to avert the threat. Wilma may be more blameworthy than Irene, but that may not impact on her liability. This might be defended on the basis that blameworthiness is irrelevant to liability. As Quong puts it:

Blame and moral entitlements...come apart in many contexts. Individuals can be blameworthy for acting on bad motives, but so long as they do not violate anyone's rights, their moral rights are unaffected.²⁶

²⁵ See, further, *The Ends of Harm: the Moral Foundations of Criminal Law* (Oxford: OUP, 2011) ch.8.

²⁶ 'Liability to Defensive Harm', 54.

The verdict that Wilma and Irene are equally liable to be harmed conflicts powerfully with our intuitions though. Hence, I think that although the first sentence in the quote is true, the second sentence is false.

Compare the liability of Wilma and Irene. If Wilma is liable to be harmed to a greater degree to avert the threat posed to Dan by Kev than Irene, we can conclude that culpability is relevant to liability independently of causation. In the light of this, suppose that Dan cannot force Veronica to avert the threat posed by Kev. He can only force Wilma or Irene to do this. Whoever is forced will be harmed to degree n (*Noncausal Selection Variation*).

Before evaluating the comparative liability of Wilma and Irene, recall that if n is sufficiently small, Irene would not be wronged were she forced to avert the threat in *Innocent Variation* - where Wilma is not present. To evaluate whether there is a difference between the liability of Wilma and Irene, suppose that n is sufficiently small. If there is a reason for Dan to select Wilma rather than Irene to avert the threat posed to him, we have at least some good reason to believe that Wilma is more liable to avert the threat posed by Kev than Irene.

To see this, first consider the following plausible idea:

Selection: if it is permissible for D to harm one of X or Y to avert a threat, and X's liability to avert that threat is significantly greater than Y's, other things equal D ought to select X rather than Y.

There are some circumstances where one of two people, X and Y, can be harmed to avert a threat. Were X alone to be available to avert the threat, X would not be wronged were he harmed to avert the threat. Were Y alone to be available to avert the threat, Y would not be wronged were he harmed to avert the threat. *Selection* plausibly suggests that if X is more liable to avert the threat than Y, X ought to be harmed rather than Y. If Y is selected, in this case, Y is wronged.

The verdict that Dan ought to select Wilma, rather than tossing a coin to give Wilma and Irene equal chances of being harmed, is extremely compelling. *Selection* provides a plausible explanation this verdict. It rests on the idea that Wilma is more liable than Irene. And here is an explanation of that idea. Wilma has tried to pose the very same kind of threat to the very same person at the very same time as Veronica in

fact posed. That she has not in fact posed a threat to Dan is simply a matter of luck. She owes a response to Dan in virtue of this decision to wrong Dan. A mere apology seems insufficient, even though she has not in fact posed a threat to Dan. Something greater is required. Averting the threat that Dan now faces is the natural response. Is her duty to execute this response enforceable? I think that it is. Her complaint – that she is forced to avert a threat that she is not responsible for – is in part met in virtue of the intention that she executed to do just this.

The five views of liability outlined at the beginning cannot explain the intuitive verdict in *Noncausal Selection Variation*. But if it is not to be explained in virtue of the fact that Wilma has greater liability to avert the threat than Irene, what else explains it? One possibility, one that we will return to, is that it is to be explained by desert. Before exploring this possibility, let us extend our analysis to cases where n is too large to render it permissible for Dan to use Irene in *Innocent Variation*. Those who think that culpability alone does not generate liability will conclude that Dan would necessarily also wrong Wilma were she in Irene's place. But this verdict is not very plausible – surely the fact that Wilma has attempted to kill Dan in exactly this way makes *some* difference to the costs that may be imposed on Wilma to avert the threat posed by Kev.

ii) *The Irrelevance of Desert*

Those, such as Ferzan, Quong and McMahan, who reject the idea that Wilma's culpability increases her liability to be harmed to avert the threat posed by Kev to Dan, may point to other differences between Wilma and Irene that explain the intuitive verdict in *Noncausal Selection Variation*. The most obvious suggestion is:

Desert: It is impersonally valuable that wrongdoers are harmed.

Desert might explain the two intuitive verdicts that I described above without referring to liability. Friends of desert may claim that the reason why there is reason for Dan to select Wilma rather than Irene in *Variation 2* is that not that Wilma is liable to be harmed, but that she deserves to be harmed.

I doubt that this explanation is attractive. One reason is that *Desert* is barbaric.²⁷ A second is that *Desert* would not differentiate Wilma from any other person who executes bad intentions. It would not take seriously the fact that Wilma has attempted to kill Dan in particular. If *Desert* is true, any wrongful attempter deserves to suffer. We could use any other attempter in Wilma's place, and attempters who are more deserving ought to be used rather than Wilma. That fails to note one of the intuitively important considerations in *Unopened Letter* – Wilma aims to do exactly what Veronica does.

A third reason is that *if* desert is an attractive explanation of the two verdicts we have decisive reason to reject all of the accounts of liability outlined above anyway. To see this, suppose that it is true that for some value of n , Wilma may be used as a means to avert the threat Kev poses to Dan even if this will harm her to degree n . Suppose that this is true in virtue of the fact that Wilma deserves to be harmed to degree n . It follows not only that it is permissible for Dan to harm Wilma, but also that Dan does not wrong Wilma by harming her. For if *Desert* is true, and it is permissible to give people what they deserve, it is also surely true that giving them what they deserve does not wrong them.

As McMahan notes, the idea that V is liable to be harmed to degree n for X does not imply that V deserves to be harmed to degree n . However, whilst McMahan is right about this, this is also surely true: if V deserves to be harmed to degree n , and in virtue of this fact V may permissibly be harmed to degree n , V is liable to be harmed to degree n for X. This is true simply in virtue of the fact that harming V to degree n does not wrong V in this case. On McMahan's own account of liability, where desert grounds a permission to harm a person, desert is sufficient for liability. And that is intuitively attractive in other contexts – if anyone deserves to be punished, and punishment may be imposed on them for this reason, they are also liable to be punished.

Furthermore, even if desert does not imply liability as a *conceptual* matter, it is surely true that all of those who deserve to be harmed are also liable to be harmed in fact. Suppose that retributivists are right that wrongdoers deserve to suffer, and that

²⁷ For further defence of this insult, see V Tadros *The Ends of Harm: the Moral Foundations of Criminal Law* (Oxford: OUP, 2011) ch.4 and 'Responses' *Law and Philosophy*, forthcoming.

the state is permitted to harm them in virtue of this fact. It follows that they are liable to be punished for reasons of deterrence. The explanation for this is that as there are sufficient desert-based reasons to punish them, they are not wronged if they are punished. And if they are not wronged if they are punished for reasons of desert, they can hardly object to being punished for other good reasons, such as reasons of deterrence, as well.

Perhaps some might doubt this on the grounds that aiming at other goods in punishing offenders is wrong, for to do so would use offenders as a means. One would have to endorse a *very* strict reading of the *means principle* to hold this view. This view is very hard to accept. Hence, if it is true that Dan ought to select Wilma in *Variation 2* on grounds of desert, he also ought to select her in that case on grounds of liability.

Fourthly, the desert-based argument is harder to defend than the liability argument. Typically, if desert can be defended, so can liability. Compare:

Wilma's Liability: Wilma is liable to be harmed to some degree n for the sake of protecting Dan from the threat posed to him by Kev, and therefore harming her to degree n does not wrong her.

and

Wilma's Desert: Wilma deserves to be harmed to some degree n . Therefore harming her to degree n does not wrong her. Therefore she may be harmed as a means to prevent Kev from killing Dan.

Wilma's Desert is much harder to defend than *Wilma's Liability* in virtue of the fact that *Wilma's Desert*, in contrast to *Wilma's Liability*, does not make it a condition of harming Wilma that someone else will benefit. It is generally much easier to defend harming a person in virtue of the fact that doing so will prevent harm to others than it is to defend harming a person where no one else will benefit. Hence, it seems very difficult to believe that *Wilma's Desert* is true but *Wilma's Liability* is false.

The intuitive verdicts in *Unopened Letter* are better explained without appealing to desert. Even if *Desert* is valid (heaven forbid), it is a fifth wheel in the explanation of our verdicts in these cases. I believe that Wilma is more liable to be

harmed to avert the threat faced by Dan than Irene, and that *Desert* is false. But even if *Desert* is true, it is irrelevant. Anything that *Desert* can do, *Liability* can do better.

IV. Causation Without Agency

So far, we have seen that it is highly plausible that culpability without causation is sufficient to generate liability for defensive harm. I now consider whether causation without culpability is sufficient to generate liability for defensive harm.

i) *Non-Responsible Threats*

Elsewhere, I have defended the view that certain kinds of causal involvement are sufficient to generate liability to defensive harm in the absence of agency.²⁸ Here I will summarize and then extend that analysis. Let us begin with a variation on Robert Nozick's non-responsible threat case:

Well Variation: X has been blown down a well by a tornado. Y is at the bottom of the well with a ray-gun. If Y does nothing, X's body will kill him. Had Y not been there, X would have been unharmed as Y is standing on a mattress that would have broken X's fall. Y can prevent himself from being killed only by doing one of two things. He can force X to divert his body away, or he can force an innocent bystander, V, to divert X's body away. If Y forces X to divert his body, X will be harmed to degree *n*. If Y forces V to do this, V will be harmed to degree *n*.

I have added a five of features to Nozick's case. First, the tornado ensures that no one would bear responsibility for Y's death (other than perhaps Y) if Y does nothing. Secondly, the mattress ensures that if Y does nothing, Y is not used as a means to save X's life. Thirdly, the way in which the threat is to be averted is by forcing a person to act rather than simply evaporating that person. Fourthly, Y can select either the non-responsible threat or an innocent bystander to avert the threat. Fifthly I have not indicated how much harm X or V will suffer if they are forced to act, only that

²⁸ *The Ends of Harm* ch.11.

they will suffer to some degree. That helps to direct our attention to our question – whether a person is liable to be harmed to some greater degree as a result of causal involvement rather than whether a person is liable to be killed in virtue of this fact.

Of the five views of liability outlined above, only *Causal Responsibility* holds that there is a difference in the liability of X and V in *Well Variation*.²⁹ But it is compelling that there is such a difference. It is not completely implausible, only fairly implausible, that it is wrong for D to kill V in Nozick's original case. The verdict that there is no difference in liability between X and V, though, strikes me as completely implausible. It implies that the degree of harm that may be imposed on V to avert the threat that his body poses is no greater than the degree of harm than may be imposed on a bystander for the same purpose. This is very hard to believe.

Surely X has a more stringent enforceable duty to avert the threat that his own body poses than V. If V could save Y's life at a cost of a finger, perhaps he is required to do so, and perhaps he may be forced to do so. He would not be required to do so at the cost of a leg, or so I believe. But now suppose that X could divert himself away from Y at the cost of a leg, saving Y's life. The view that X is not required to do this strikes me as clearly false.

Here is an explanation: X has responsibility to ensure that his body does not pose threats to others, and must bear significant costs to do so. V lacks this duty with respect to X's body. The fact that V has a stringent duty to avert the threat that he poses, even that he non-responsibly poses, makes a difference to what it is permissible for Y to do to X. Just as a person is entitled to be the prime beneficiary of his body, so he must bear greater costs that emanate from his body.

Here is another way to see this. If Y is not permitted to kill X, X's presence makes Y much worse off than he would have been had X not been present. An increase in Y's liability limits the circumstances in which V's presence renders X worse off. In contrast, an increase in a bystander's liability expands the circumstances in which Y's presence renders X better off than he would have been had Y not been

²⁹ Even more implausible is Ferzan's view that negligently causing a threat makes no difference to liability. See 'Culpable Aggression' 685. Ferzan rightly claims that negligent failures are insufficient for a person to forfeit their right not to be killed. But that does not imply that negligence is insufficient for *any* degree of liability to defensive harm, and that is what is at issue.

present. If Y harms X, X does not exploit an opportunity that exists in virtue of Y. Harming V, in contrast, does exploit an opportunity that V's presence gives rise to.³⁰

ii) *Causal Contributions*

I have argued that posing a threat, even non-responsibly, makes a difference to a person's liability to be harmed to avert the threat. If non-responsibly posing a threat increases one's liability to be harmed to avert the threat, does it also follow that non-responsibly causing a threat makes a difference to a person's liability to be harmed to avert the threat? McMahan doubts it. He thinks that the difference between causing a threat and posing a threat is a matter of timing, and that liability cannot depend on timing in this way.³¹

I am not sure whether timing is irrelevant. There may be a difference between harming a person before their causal contribution to a threat is complete and harming a person after their causal contribution is complete. Suppose that the tornado blows W towards X in a way that will knock him down the well in *Well Variation*. Is the stringency of his duty to avert the threat the same prior to his collision with X and after his collision with X? I am not sure.

But it may not be timing that we aim to pick out in distinguishing between non-responsible threats and non-responsible causes. Another possibility is that we pick out D's position in the causal chain leading to harm. There is a difference between posing a threat, as X does in *Well Variation* and causing a threat to be posed. Causal proximity may be morally significant even if timing is not. This view has

³⁰ This kind of argument has been used to provide an alternative to the *means principle* in A Walen 'Transcending the Means Principle' *Law and Philosophy*, forthcoming [and apparently also G Overland 'Moral Obstacles: an alternative to the Doctrine of Double Effect']. I doubt that we should abandon the *means principle* in the light of it, but I nevertheless think the considerations that Walen adverts to are morally significant. See, further V Tadros 'Responses'.

³¹ *The Ethics of Killing: Problems at the Margins of Life* (Oxford: OUP, 2002) 406. McMahan, there, is focused on a slightly different issue – the relationship between eliminative and manipulative harming. For criticism in that context, see V Tadros *The Ends of Harm* 245.

some intuitive force – compare liability doctrines in tort law, which, as Michael Moore puts it, ‘presuppose that causation is the kind of relation that can ‘peter out’’.³²

Some might reject this view on the basis of cases of the following kind:

Dominos: There is a line of cryogenically frozen fat people (A-Z). A tornado is about to blow into A, who will then topple into B. This will begin a domino effect, leading each member in the line to fall into the next member until Z topples down a well. Z will then fall on Victim, killing her. Hero can shoot any one of (A-Z), harming that person to degree n , to break the chain. This is the only way to save Victim’s life.

Let us suppose that each domino has equal culpability for being cryogenically frozen and placed in this position. As some doubt that simple causal contribution is sufficient for liability, it will be helpful to suppose that each is negligent. A is at the beginning of the causal chain that will lead to a threat being posed to Victim if nothing is done. Z is at the end of that causal chain. It is Z’s body that will directly harm Victim.

It seems plausible that if anyone is to be harmed to avert the threat posed to Victim it ought to be Z. But perhaps this is simply in virtue of the fact that Z’s body will directly harm Victim if nothing is done. Whilst it seems plausible to pick out Z rather than any other member of the chain, it seems much less intuitive that there is a reason to shoot Y rather than A. Suppose that Z cannot be shot. In that case, it seems much more plausible that the other members of the chain are equally liable to be shot to avert the threat.

Some might argue that it follows that one’s position in the causal chain makes no difference to liability. But this does not follow. Perhaps what is special about *Non-Responsible Dominos* is that there is a series of events of the same kind that lead to the result.³³ Were there a series of different events, things might be different.

Those attacking the view that one’s position in the causal chain makes a difference to liability might complain that the implications of this view are absurdly arbitrary. It is simply a matter of luck whether one’s contribution is nearer the

³² M Moore *Causation and the Law: An Essay in Law, Morals and Metaphysics* (Oxford: OUP, 2009) 118-123.

³³ See Moore, *Causation in the Law* 122, fn.50.

beginning or nearer the end of a causal chain ending in a threat of harm. That, they may claim, is what *Non-Responsible Dominos* brings out. But this objection proves too much, since whether one is a cause at all is a matter of luck, as we saw when discussing *Guilty Selection Variation* earlier.

Another complaint can be illustrated as follows.

Beelzebub. If Beelzebub flips a switch a very long chain of diverse events, each of which will cause the next will begin. V's death is the last event in the chain. Beelzebub knows that V's death will result from flipping the switch and flips it.

The view that causal chains peter out seems to imply that if the causal chain is long enough, Beelzebub does not kill V. This is hard to believe.

If this is an implication of the view that causal chains peter out, it seems to me a *reductio ad absurdum* of that view. But perhaps it is not an implication of the view. Perhaps whether D caused V is a contextual matter – we pick out some fact as causally relevant in virtue of the context. That idea is familiar from counterfactual accounts of causation – there are many possible counterfactuals, and only some of these are relevant to causation.³⁴ Perhaps the mental states of agents can play a role in picking out which counterfactuals are relevant.³⁵ And if that is so, perhaps this idea can also be extended to the causal power of events earlier in causal chains. In all of this discussion, it must be remembered that a prominent view in the philosophy of

³⁴ See, for example, C Hitchcock 'Counterfactual Availability and Causal Judgement' and P Menzies 'The Role of Counterfactual Dependence in Causal Judgement' both in C Hoerl, T McCormack and S R Beck *Understanding Counterfactuals, Understanding Causation: Issues in Philosophy and Psychology* (Oxford: OUP, 2011).

³⁵ See, further, V Tadros *Criminal Responsibility* (Oxford: OUP, 2005) 175-81. This account is not available to Moore, though, who robustly rejects the relevance of mental states to causation. See 'Causation and Responsibility' in E F Paul, F D Miller and J Paul *Responsibility* (Cambridge: CUP, 1999).

causation is that causal verdicts are shaped by human needs for explanation and intervention.³⁶

We can reinforce the idea that one's position in the causal chain makes a difference to liability by comparing the way in which people ought to respond to harm that they have non-responsibly caused. Such an investigation reveals the intuitive force of the idea that our duties to respond to some event that we are causally involved in bringing about depend on the distance between our causal involvement and the event in the causal chain.

Consider:

Baby-squisher: D reverses out of his drive. Unbeknownst to him, D's neighbour, who is the baby's father, has left his baby under D's wheel. The baby is squished.

Assuming that D has no reason to believe that his neighbour might leave the baby under his wheel, D is not morally responsible, only causally responsible, for squishing the baby. The chance of this happening is tiny, and D has no reason to check under his wheel to see if there is a baby there.³⁷

Nevertheless, D has some reason to respond to the squishing of the baby – even if doing so is to some extent burdensome. He would have a powerful reason to apologize to the mother for squishing the baby, even if doing so would impose a significant cost on him. He ought to do so, for example, even if doing so would involve missing an important job interview.

³⁶ The issues here are complex, and beyond my expertise, but see, for evidence that this view is a strong contender in the field, P Menzies and H Price 'Causation as a Secondary Quality' (1993) 44 *Brit J Phil Sci.* 187, J Woodward *Making Things Happen: A Theory of Causal Explanation* (Oxford: OUP, 2003) and the essays in H Price and R Corry *Causation, Physics, and the Constitution of Reality: Russell's Republic Revisited* (Oxford: OUP, 2007).

³⁷ Here I agree with McMahan, in 'The Basis of Moral Liability for Defensive Killing' 397, that imposing trivial risks does not normally render one responsible for outcomes when the risks are realized.

Now compare those earlier in the causal chain. Suppose that D was reversing out of his drive because his wife asked him to go for eggs. Her act is also in the causal chain leading to the squishing of the baby. But she surely has less reason to offer the kinds of responses that D must offer for the squishing. And now consider those even earlier in the causal chain, such as the TV chef whose programme the wife was watching, and whose recipe called for eggs. Had this person chosen a different recipe, D's wife would not have asked D to go for eggs. But the TV chef surely has very little reason to respond to the squishing of the baby. And we can go back to the TV chef's great grandparents, whose decision to have sex when they did was also in the chain. They surely lack a reason to respond at all.

The acts of all of these people are part of the causal chain leading to the squishing of the baby. If any of them had known what would happen as a result of their actions, they would have had decisive reasons to refrain from acting in this way (Imagine, for example, that the TV chef's grandparents were Mr and Mrs Beelzebub, who had sex when they did in order that the baby would be squished – they surely act wrongly). But D has a much stronger obligation to respond to the squishing of the baby than the TV chef. The act of the TV chef is too remote to ground any obligation to respond to the squishing. That is not true of D's act.

Any view that takes causation seriously as a factor in determining the extent of a person's liability to be harmed to avert the threat, as I do and all other proposals that I am aware of do, must distinguish between remote and non-remote causes.³⁸ And given that, those who take causation seriously as a ground of liability can hardly object to the idea that we should distinguish between remote and non-remote causes in non-responsible threat cases. They may, of course, have other objections to the idea that posing a threat non-responsibly is a ground of liability. But if those other objections can be met, we should endorse the view that one's place in the causal chain makes a difference to liability in non-responsible threat cases.

I admit, like others, that I lack a theory of remoteness. The idea that the location of an event in a causal chain makes a difference if that chain includes different kinds of event, but not if it includes similar kinds of event, seems troubling. But at the same time, it is very difficult to give up on the idea that remoteness is morally significant.

³⁸ See, also, McMahan 'The Basis of Moral Liability for Defensive Killing' 396.

Conclusions

Causation and culpability are two important grounds of liability. Those with the highest level of liability are those who culpably cause threats to come about. But causation and culpability can each ground some level of liability in the absence of each other. To establish this, all that we need to demonstrate is that causation and culpability make some difference to the duties that people have to avert threats. And that view is highly plausible.

As a conclusion, let me provide a diagnosis of the unpopularity of this view. The diagnosis comes from the fact that those focusing on liability to be harmed have typically focused on cases involving deaths and threats of death. Whilst authors write about liability to be harmed, thinking about liability to be killed distracts them. When considering the extent of a person's liability to be harmed, we are best to compare our candidates with those whose level of liability is very low – mere bystanders. Our question should be whether those who are culpable or who make a causal contribution to a threat are liable to bear any greater cost than these bystanders to avert threats.

Those defending restrictive views of liability need to demonstrate that those who are excluded from their account of liability have no more liability than mere bystanders. This, I think, is very hard to defend. It is hard to defend because there are often modest differences between us, due to relatively modest considerations, that make a difference to the costs that we can be expected to bear to secure certain goals. We should expect no more simplicity in our account of liability than we should expect in the account of these expectations. For this reason, I suspect that all accounts of liability that have been offered so far are false.