What Follows from Defensive Non-Liability?

1. Why Liability?

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(1) In cases of self-defence, the Attacker loses normative powers, while the Defender gains them. Why is that? How does it happen?

(2) One popular answer: the Attacker is liable to be attacked by the Defender.

(3) Such ‘liability justifications’ have certain prima facie advantages. They avoid the ‘Over-Generation Problem’, and the ‘Symmetry Problem’.

(4) Liability justifications may have different criteria for defensive liability, and hold different explanatory pictures, e.g. rights-violation vs. distributive solutions.

2. Falling Men and Rolling Stones

1. The vivid normative asymmetry between Attacker and Defender in Culpable Attacker is considerably weakened in:

   *Falling Man:* Victoria is standing at the bottom of a well, with no escape options, and will be crushed to death by an entirely innocent, unconscious falling man, Victor, unless she vaporizes him with her ray gun. Victor, by contrast, will be saved if he falls on Victoria, who will cushion his fall. (Cf. Nozick 1974, p. 37)

   *Falling Man* is the most extreme instance of a Non-Responsible Threat.

(2) Thomson thinks that Victoria can kill Victor. Non-Responsible Threats, Innocent Attackers and Culpable Attackers are all liable:

   [T]he villainous driver in Villainous Aggressor has no right to kill you, and surely it is also true of the fault-free driver in Innocent Aggressor that he has no right to kill you. In Hohfeldian terms, neither of the two drivers has a privilege of killing you. For them to lack the privilege of killing you, however, is for you to have rights (Hohfeldian claims) that they not do so, rights they will infringe if they succeed in killing you. (Thomson 1991, pp. 300-1)

(3) Without rights violations, we run into the Over-Generation Problem. If Victoria may kill Victor, then Jules may kill Innocent Bystanders, such as Catherine in Bridge:

   *Bridge:* Jules is fleeing from Jim’s culpable attack on him. His only hope of escape is to cross a rickety rope bridge, which will bear the weight of only one person. Catherine occupies the bridge. If Jules shakes it, Catherine will fall to her death, and Jules can make good on his escape. If Jules refrains from that, he will be killed by Jim.
But that’s the wrong result.

(4) Some deny the permissibility of defence against Non-Responsible Threats. Consider:

*Rolling Stone:* A stone is rolling slowly towards Sly, who can avoid being crushed by it only by destroying it with his bazooka.

(5) According to the *Stone Objection*, the claim that Victor can violate Victoria’s rights in *Falling Man* is no more plausible than the claim that the stone can violate Sly’s rights in *Rolling Stone* (cf. Otsuka 1994, p. 80; McMahan 1994, p. 276; Rodin 2002, pp. 85-7).

(6) *Rolling Stone* may bolster the view that Victor is an unintelligible subject of duties, and that the threat he poses ‘is neither permissible nor impermissible’ (McMahan 2009, p. 169).

3. Stones and Privileges

(1) For Thomson, the Threat lacks the right to kill the Defender, and thus threatens the Defender’s right. But even if the Threat doesn’t violate the Defender’s right, he still lacks the right to kill the Defender.

(2) This is a non-embarassing truth, applying to both *Rolling Stone* and *Falling Man*. In the following trio of claims, (i) doesn’t support (ii), and (i) and (iii) are consistent:

- The stone lacks the right to kill Sly.
- If the stone kills Sly, then Sly’s rights are violated.
- Stones cannot violate or infringe rights.

(3) But we risk an unwise expansion of commitments if (i) is taken to license (iv) and (v):

- Sly is not liable to be killed by the stone.
- Sly is wronged by being killed by the stone.

4. Non-Responsible Threats and Normative Gaps

(1) On McMahan’s view, the *permissibility* of Victoria’s defence can’t be traced to the *impermissibility* of Victor’s attack. That ends the argument.

(2) But nor can the *impermissibility* of Victoria’s defence be traced to the *permissibility* of Victor’s attack. McMahan has less to say about this. We have a normative gap here, which need to be settled.

(3) Some further moves: (a) ‘Victor’s threat is not impermissible.’ ——— Fine, but look at *Rolling Stone*. (b) ‘Victor, unlike the stone, has moral status.’ ——— Yes, but so does Victoria. (c) ‘Victoria should allow herself to be killed, rather
than killing Victor.’ ——No, since it would be a killing which Victoria would thereby permit. We’re stuck. Unless...

5. **Broad Non-Liability**

(1) We should change the normative focus from the Attacker to the Defender. The Defender has rights, the protection of which we need to take seriously.

(2) Here’s an initial interpretation of how we might take the Defender’s rights seriously:

**BROAD NON-LIABILITY:**
If $D$ is broadly non liable to be attacked by $T$, then it is either the case that (i) $D$ is not wronged by $T$, but is permitted to defend herself by taking the necessary steps to neutralize the threat posed by $T$, or it is the case that (ii) $D$ is wronged by $T$, and is permitted to defend herself by taking the necessary steps to neutralize the threat posed by $T$.

(3) Stones fall under (i), and Culpable Attackers fall under (ii). Still, BROAD NON-LIABILITY is just a schema. It doesn’t contain an argument for why every Threat should be assigned to either (i) or (ii). So what about Victor?

(4) Perhaps we can’t be confident that Victor wrongs Victoria. But perhaps we needn’t agonize over this issue. All we need to establish is that Victor’s threat isn’t permissible.

(5) That strategy will exempt us from having to explain why the hybrid category of *not-permissible-but-not-impermissible* should take one form when applied to Non-Responsible Threats and another form when applied to stones.

6. **From Broad Non-Liability to Broad Liability**

(1) If Victor is an appropriate object of defensive force, then it may seem difficult to deny that he is, after all, defensively liable. But if he’s defensively liable, then hasn’t he wronged Victoria?

(2) We should agree that Victor is liable to Victoria’s defence, in the sense of liability captured by the following schema, which accompanies BROAD NON-LIABILITY:

**BROAD LIABILITY:**
If $T$ is broadly liable to be attacked by $D$, then it is either the case that (iii) $T$ poses a threat to $D$ where $D$ is broadly non liable in sense (i) of BROAD NON-LIABILITY, or it is the case that (iv) $T$ poses a threat to $D$ where $D$ is broadly non liable in sense (ii) of BROAD NON-LIABILITY.

Stones fall under (iii), and Culpable Attackers fall under (iv).

(3) BROAD NON-LIABILITY is the primitive, and BROAD LIABILITY is the correlate of it: that is the essence of the Non-Liability First Account.

(4) The application of BROAD LIABILITY suggests that Victor is broadly liable under either (iii) or (iv). We needn’t commit to which one of them it is. Victor’s instantiation of broad liability is simply the correlate of the relevant sense of broad non-liability possessed by Victoria.
7. Two Challenges

Challenge #1 to BROAD LIABILITY:
The stone, which falls under (iii), is broadly liable. Ridiculous!

Reply: No, it isn’t. Sly is permitted to destroy it, and so the stone is broadly liable to be destroyed by him. No one is saying that the stone wrongs Sly.

Challenge #2 to BROAD LIABILITY:
A dilemma. First horn: why is it Victor, rather than an Innocent Bystander, who is selected to bear the costs of defence? Second horn: if it is appropriate to select Victor, then the fact that Victor threatens Victoria and lacks the right to do so is being given a tacit significance which suggests that Victor is wronging Victoria.

Reply to the first horn: The distinction between being broadly liable and not being broadly liable is morally significant.

Reply to the second horn: Wrongdoing isn’t required for broad liability to be significant. It is Victoria’s broad non-liability which makes Victor’s broad liability morally significant.

8. Putting Non-Liability First
(1) Why should the Non-Liability First Account do any interesting work in non-penumbral cases such as Culpable Attacker?
(2) Even here, the real work is done by the Defender’s non-liability. Consider:

What makes it permissible for you to kill [Attackers and Non-Responsible Threats] is the fact that they will otherwise violate your rights that they not kill you, and therefore lack rights that you not kill them. (Thomson 1991, p. 302)

If A will otherwise violate B’s right, he loses his own right not to be attacked; thus, if B attacks him in self-defense, B does not violate any right of A’s; therefore B retains his right not to be attacked; therefore A is not permitted to attack B in self-defense. On this theory, if one party to a conflict is justified, the opposing party cannot be. The same is true on the other major theories of self-defense. (McMahan 2009, pp. 46-7)

(3) Though there must be provision for the liability role, these arguments risk being non sequiturs if they’re meant to establish that liability makes a potent contribution to the explanation.

(4) Liability is a normative place-holder. We must invoke the Defender’s non-liability to explain the Attacker’s liability. Non-liability comes first.

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REFERENCES