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Defensive Liability Without Culpability

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## Chapter 4: Defensive Liability Without Culpability

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### Abstract

A minimally responsible threatener is someone who bears some responsibility for imposing an objectively wrongful threat, but whose responsibility does not rise to the level of culpability. Minimally responsible threateners include those who knowingly commit a wrongful harm under duress, those who are epistemically justified but mistaken in their belief that a morally risky activity will not cause a wrongful harm, and those who commit a harm while suffering from a cognitive impairment which makes it prohibitively difficult to recognize and act on what is morally required of them. The chapter argues that minimally responsible threateners can indeed be morally liable for the harms they impose. Put differently, culpability is not a necessary basis for liability.

### 1. Introduction

Suppose you are considering whether to undertake an act that benefits you, but which imposes a nontrivial chance of harming an innocent—that is, someone who has not forfeited or waived her right against being harmed. This is a *morally risky* act. But suppose that given all the available evidence, undertaking this risk is morally justified; the expected value of undertaking it

is sufficiently higher than that of refraining from doing so. So you commit the morally risky act. Unfortunately, you—or more aptly, your innocent victim—is unlucky. The possible harm that makes the act morally risky manifests: you pose a threat to the innocent. Are you morally liable to be defensively harmed in such a case if doing so is necessary to avert the threat you pose? I will call someone in your position a “minimally responsible threatener” (MRT). Here are two canonical examples of minimally responsible threateners:

*The Conscientious Driver*<sup>1</sup>

A careful and conscientious driver is on her way to the cinema in a well-maintained car. Through no fault of her own, she hits a patch of black ice causing her to lose control of her car. She strikes and kills a pedestrian.

The pedestrian in this example has done nothing to lose her right not to be harmed. The act of driving in this case is wrongful in the fact-relative sense since it is morally impermissible to drive on an occasion in which doing so will unjustly kill an innocent.<sup>2</sup> Clearly, though, the driver is not to blame; she was engaging in a permissible type of activity, and (ex hypothesi) was doing so in as safe a manner as morality can reasonably demand of her. But she was in a position to recognize that even safe driving carries a small but substantial risk of imposing a wrongful harm on a pedestrian.

Whereas the conscientious driver imposes a harm unintentionally, some MRTs do so intentionally:

*The Mistaken Resident*<sup>3</sup>

A serial killer is on a murder spree in a small town. Unbeknownst to anyone, she has an identical twin (who is herself unaware that the killer is her twin). One night the twin stops at a random house for assistance in jump-starting her car. The resident answers the door armed, because she knows the killer is on the loose. Seeing what appears to be the killer, the resident immediately shoots the twin in what she reasonably believes to be necessary and proportionate self-defense.

Killing the twin is impermissible in the fact-relative sense; the twin has done nothing to forfeit or waive her right not to be killed, and killing her does not

achieve any good. Yet the mistaken resident is not to blame since she was epistemically justified (though mistaken) in her belief that the twin posed a lethal threat.

Are these MRTs morally liable to be killed in self-defense? To answer this, we have to take a closer look at *liability*. There are two broad conditions for moral liability (as I understand it). First, a person is morally liable to a harm only if imposing that harm on her is necessary to achieve a particular good.<sup>4</sup> For example, a person is liable to be harmed only if doing so will compensate someone she has wronged (in which case the person is liable to a *compensatory harm*), or if it will prevent the liable person from wrongfully committing a harm (in which case the person is liable to a *defensive harm*). Second, a person is liable to be harmed only if she has done something to forfeit her right not to be harmed. Consequently, the liable person would have no permission—not even an agent-relative one—to prevent the harm from being imposed on her, and no justified complaint against the harmer. These necessary conditions combine to form jointly necessary and sufficient conditions for liability: a person is morally liable to a harm just in case (1) imposing that harm on her is necessary to achieve a particular good, and (2) she has forfeited her right not to be harmed in that way.<sup>5</sup>

So to ask whether an MRT is morally liable to be harmed is to ask whether she has forfeited her right not to be harmed in furtherance of the achievement of some particular good. But to determine whether an MRT is liable to defensive or compensatory harms, we need a theory of liability. Various theories of liability have been developed over the past two decades. This includes Judith Jarvis Thomson's *right-based* account of liability,<sup>6</sup> Michael Otsuka's *responsibility-based* account<sup>7</sup> (further developed and refined by Jeff McMahan<sup>8</sup>), Kimberly Ferzan's *culpability-based* account,<sup>9</sup> and Jonathan Quong's *status-based* account.<sup>10</sup>

Each of these accounts has been variously criticized; I won't rehearse their problems here. Instead, I will address a particular challenge that proponents of the responsibility-based account must answer. According to that account, anyone who bears *any* degree of responsibility for a wrongful harm can be liable. Consequently, MRTs are liable to defensive harm. But how can acting scrupulously in accordance with the evidence-relative demands of morality result in a forfeiture of a right not to be harmed?

This is the challenge I address here. My strategy in doing so is to show that if we deny that MRTs are liable to defensive harms, then we have to deny that those who act in accordance with what is known in the law as the “defense of private necessity” owe compensation to those whose rights they have justifiably infringed.<sup>11</sup> But first, I will outline in greater detail a particular responsibility-based account of the liability of MRTs.

## 2. The Complex Account of Liability

The fact that an MRT has voluntarily undertaken a course of action that has a nontrivial risk of resulting in a wrongful harm makes her somewhat responsible for that harm should it manifest. This responsibility grounds liability to defensive violence: should violence be necessary to avert the harm that the MRT poses, then she might be liable to such violence. This is despite the fact that it was morally permissible, in the evidence-relative sense, for the MRT to undertake the risk in question. She has, in effect, undertaken a moral gamble; should she (or more aptly, her victim) lose, the MRT will bear liability, since she, and not her victim, undertook the risk-imposing a gamble. The conscientious driver and the mistaken resident, for instance, are liable since they rather than their victims chose to impose a risk on others for their own benefit.

But what is the severity of the harm to which an MRT is liable? On what I call the “*Simple Account* of liability to defensive harms,” the party that is more morally responsible for a fact-relative wrongful threat is liable to suffer that degree of harm if necessary to prevent it from being imposed on her victim. On the “*Complex Account* of liability to defensive harms,” the degree of harm to which an individual is liable is concomitant with the degree of responsibility that she bears for the threat she poses.<sup>12</sup> The less responsible an individual is for a lethal harm she imposes on an innocent, the less the degree of harm to which the responsible individual is potentially liable. Obviously, this simple description of a positive relation between degrees of responsibility and degrees of liability is compatible with a host of responsibility-to-liability functions, some of them only trivially differ from the Simple Account. I present a more precise specification of the Complex Account elsewhere.<sup>13</sup>

So though an MRT such as the conscientious driver or the mistaken resident has forfeited her right not to suffer the proportionate harms necessary to prevent the harms for which she is responsible, she has not forfeited her right not to be *killed*, even though she is posing a lethal threat. And this is because such MRTs conduct themselves in accordance with the demands of morality in that what they do is morally permissible in the evidence-relative sense. Consequently the degree of responsibility that they bear is not high enough to make them liable to be killed. So *kill*ing an MRT is a disproportionate means to or side effect of preventing the harms that she wrongfully poses. (That is, it violates the constraint of *narrow* proportionality.)<sup>14</sup>

The Complex Account is, then, more restrictive than the Simple Account of liability. On the latter, any MRT is morally liable to be defensively killed if the threat she is posing is lethal. Michael Otsuka, a proponent of the Simple Account, writes that the mistaken resident is morally liable to be killed even though what she does is morally permissible in the evidence-relative sense: “[w]hen one is in possession of rational control over such a dangerous activity as the shooting of a gun at somebody, it is not unfair that if the person one endangers happens to be innocent, one is by virtue of engaging in such dangerous activity stripped of one’s moral immunity from being killed.”<sup>15</sup> Alternatively, on the Complex Account, there is a limit to the degree of harm to which an MRT can be liable. And this limit is determined in a principled way: by advertent to the degree of responsibility she bears for the harm in question.

It is important to note that the Complex Account tells us only the *maximum* amount of harm to which an MRT is liable. This is because the constraint of necessity is internal to liability (as I have construed it)—an individual is liable to a harm only if imposing that harm on her averts, lessens, or redresses the harm for which she is responsible. So if merely painfully *pinching* an MRT such as the conscientious driver or the mistaken resident will avert the harm she will otherwise impose, then she is liable to no more than that painful pinch. But suppose, alternatively, nothing short of *kill*ing the MRT will avert the harm she is imposing; in this case, on the Complex Account, she is not liable to be killed, since that harm exceeds the maximum amount of harm to which she is liable.

It is also important to note that the conscientious driver and the mistaken resident are not necessarily equally responsible for the threats they pose. The

resident, unlike the driver, *chooses* to kill a person intentionally. And this is a much greater moral risk than the one associated with driving. If moral responsibility for a fact-relative unjust harm is the basis of liability to defensive harm, and if the severity of the harm to which a wrongdoer is liable varies with her responsibility, then the mistaken resident is liable to more severe defensive action than the conscientious driver.

I expect that many will find the Complex Account more plausible than the Simple Account. Though the Simple Account purports to leave theoretical space for responsibility to determine the severity of the harm to which an MRT is liable, it turns out on that account that anyone who is *at all* responsible for posing a lethal threat will be liable *to be killed* if that is the only way to stop her (provided, of course, that the lethal threat is unjust in the fact-relative sense). In my view this account is draconian—it effectively allows us to ignore the degree to which a threat is responsible (provided she bears *some* responsibility) when the only way to stop the aggressor is to kill her.

But proponents of the Simple Account might allege that the Complex Account has an unpalatable consequence. Suppose that the *only* way that the identical twin can avert the threat that the lethal mistaken resident poses is by killing her. Or suppose that the only way the pedestrian can avert the threat that the driver poses is by killing him. It might seem that on the Simple Account the potential victims of the MRTs have no agent-neutral justification for defending themselves in these ways, since the MRTs are liable only to sublethal harms.

But the Complex Account is compatible with an agent-neutral justification for the potential victims of the MRTs to defend themselves using lethal force if necessary. Imposing any necessary harm on an MRT above the amount to which she is liable might still be justifiable *as the lesser evil*, relative to the alternative of allowing the harm that the MRT is posing to befall her victim. This means that killing an MRT will be permissible when that is the only way to stop her, since it is better to kill someone who is liable to substantial but sublethal harms than it is to let her kill someone who is liable to nothing at all.<sup>16</sup> This is a case where a person who is not liable to be killed can nonetheless be permissibly killed.

But some will criticize the Complex Account from the other direction. They will say that MRTs are not liable to any harms *at all*. (Defenders of the culpability-based account, for example, will make such a claim.) I will consider and respond to two such arguments tailored specifically to the sorts of MRTs under consideration before moving to a third, more general argument in the next section.

In regard to the conscientious driver, one might argue that a pedestrian knowingly engages in a morally risky activity by having chosen to traverse near a street. So if a faultless accident occurs in which a harm has to befall either the pedestrian or the driver, the pedestrian will share some responsibility for this forced choice.

But we need only change the example so that an individual's risk of being struck by a car is much smaller than the driver's risk of striking someone. Suppose the driver is in a third-world country, passing through a very poor village in which cars rarely appear. In this case, the risk of striking *some* pedestrian, though small, is much greater than the risk that any given pedestrian will have of being struck. This is because, in the example, there are far more "pedestrians" (i.e., villagers) than cars. We can stipulate both that (1) the risk imposed by the driver crosses the threshold at which the driver becomes liable to defensive attack should the risk materialize, and that (2) the risk assumed by any given villager does *not* cross the threshold at which the villager can be liable for the harm of being struck by a car. The propensity to being struck by a car while taking a walk in the village is so low that she cannot be said to have engaged in an activity that has a foreseeable risk of resulting in serious harm. As a result, she bears no responsibility for the accident. The responsibility and thus the liability are solely with the driver, who did indeed choose to engage in a risk-imposing activity.

In regard to the example of mistaken resident, Ferzan rejects the argument that the resident and those like her have undertaken a gamble which places their "moral immunity on the line." "After all," Ferzan writes, "they are likewise taking a gamble if they do not defend themselves, and they are gambling with their lives."<sup>17</sup> She concludes from this that since morality does not demand that she err on the side of risking her own life, we should not hold her liable if it turns out that acting in apparent self-defense ends up imposing a fact-relative impermissible harm on an innocent.

It is true that if the resident chooses not to shoot she is gambling with her own life. So whether or not she shoots, she is taking a considerable risk. But there is a moral difference between gambling with one's own life and gambling with the lives of others. If the resident chooses to shoot, she is risking the life of someone who might turn out to be an innocent. She is, in effect, gambling with the life of a possibly innocent person for self-interested reasons. To choose this gamble is to shift a risk away from herself and onto a possibly innocent person. If it turns out that this person is indeed innocent, then it is only fair that the aggressor—who took the gamble—bear some cost for harm that follows.

### 3. The Argument from Unfairness

Some cast doubt on the claim that those who impose harms justifiably in the evidence-relative sense can be liable to *any* defensive harm. On this view, for an MRT to act in a way that, given the evidence, she was morally permitted to act, insulates her from liability for any wrongful harms that result from what she does. After all, the possibility of these harms was already factored into the determination of whether the agent was conducting herself in a permissible way. To claim, *ex post*, that the agent is liable for harms resulting from a risk that was imposed justifiably *ex ante* seems to treat her unfairly.

For example, because the driver, in Ferzan's words, "behaves in a cautious and admirable way," it seems *unfair* to claim that she is liable to defensive harm.<sup>18</sup> David Rodin similarly argues that he is "intuitively uncomfortable" with the view that the driver is liable, since the "risk of injury which the driver imposes was not proscribed given that he had fulfilled all his obligations to minimize the risk."<sup>19</sup> The implicit claim here is:

(1) Fulfilling all of one's evidence-relative moral obligations precludes liability.

Holding such a person liable seems to treat her unfairly. Accordingly, I will call this:

#### *The Argument from Unfairness*

It is unfair to hold an MRT liable.

If 1 is correct, MRTs are not liable at all, which means that the Complex Account (as well as the Simple Account) is mistaken. But I will attempt to show that the argument from unfairness fails on the grounds that it is incompatible with accepted standards of corrective justice. These standards permit us to force a wrongdoer to compensate victims even when she has imposed a harm that was *permissible* in both the evidence-relative *and* the fact-relative sense. If a forced compensation is a deprivation, and if imposing an unwanted deprivation is a harm, then the claim that evidence-relative impermissibility is a necessary condition of liability is incompatible with accepted standards of corrective justice.

In common law, if a defendant has damaged or destroyed another's property as a necessary means of preventing a much greater harm from befalling herself (as opposed to others or to the plaintiff) she can be legally liable to compensate the owner for the cost of the damaged incurred to the property. This is known as the "private-necessity defense."<sup>20</sup> The individual who is responsible for the harm imposed on the innocent would be liable to certain deprivations as a means of redressing the harms incurred, even though she did everything that morality could fairly ask of her. I will call this:

*The Compatibility Principle*

Liability to compensatory harms is compatible with the private-necessity defense.

To use a canonical example, suppose that while out for a walk in a remote area, I am unforeseeably injured through no fault of my own. Loosing blood rapidly, I knock at the only cabin nearby—no one is home. So I break into the cabin to bandage my wounds and call for help. The illegal entry and theft are morally justified, since imposing a slight harm on the cabin owner (in the form of property damage) is the only way to prevent a much worse harm from befalling me. Consequently, infringing the cabin owner's property rights is permissible. Though the illegal entry and the theft are morally justified, I am legally and morally liable for the cost of compensating the owner for the window I shattered and for the costs of the medical supplies I used. (One might argue that the costs should be imposed on the *community*. But we can suppose that I and the cabin owner reside in a failed or barely functioning state).

The compatibility principle, then, shows that we can be liable to certain deprivations *even in cases where we act permissibly*. Is it unfair to claim that though I acted in precisely the way that morality permitted me, I have lost my right not to be fined in compensation? Perhaps it is. But it would be more unfair to force the proper owner of the medical supplies to bear the cost of my forced entry and the loss of her bandages. We ought, then, to reject 1.

A proponent of the argument from unfairness might try to accommodate the compatibility principle (and thereby salvage 1) by drawing a distinction between preventive and compensatory liability in the following way. Though the owner of the cabin is owed compensation for the deprivations I impose upon him by breaking into his cabin and pilfering his medical supplies, the owner cannot permissibly prevent me from doing so. Specifically, he cannot permissibly prevent me from doing what I have an all-things-considered agent-neutral reason to do—which is to save a life (namely, mine) at the cost of illicitly appropriating another’s medical supplies. He cannot prevent me from doing so, since (we can assume) he has a moral duty to allow me to use his supplies, on the grounds that the cost to him of doing so is minimal and the cost to me of his refusing to do so would be great. So the proponent of the argument from unfairness might replace 1 with:

(2) One cannot be liable to *preventive* harm for a harm imposed permissibly.

It should be noted that this claim concedes significant ground to the Complex Account of liability. If 2 is correct, then, an MRT is not liable to *defensive* violence, though she *is* liable to compensatory deprivations *ex post*.

But even this concessionary response fails. The reason why I am liable to compensatory deprivations after I break into the cabin, but not to preventive violence beforehand, is that the agent-neutral justification that I have for pilfering the medical supplies is compatible with an *ex post* agent-neutral duty to compensate the cabin owner. After all, *ex hypothesi*, imposing compensatory deprivations on me does not come at the cost of my life, whereas imposing preventive harms on me would. Consequently, liability to preventive harm would indeed interfere with what I have a decisive agent-neutral reason to do.

Contrast this with the harms imposed by MRTs. Since the harm an MRT is imposing is permissible in only the evidence-relative sense and not the fact-

relative sense, defensive violence against the MRT does *not* prevent her from doing what she has a fact-relative permission to do, simply because she has no such permission. Preventing me from breaking into the cabin prevents me from doing what I have a fact-relative permission to do, whereas preventing the conscientious driver or the mistaken resident from imposing their harms does *not* prevent them from doing what they have a fact-relative permission to do.

The upshot is that the reasons to treat preventive harms differently from compensatory harms only apply to harms imposed in response to fact-relative permissible harms, such as those imposed in accordance with the private necessity defense. It does not apply to harms imposed in response to fact-relative *impermissible* harms, such as those that MRTs impose. So 2 should be replaced with:

(3) One cannot be liable to preventive harms for a harm imposed permissibly in the fact-relative sense.

But 3 does not threaten the Complex Account, since that account concerns harms imposed *impermissibly* in the fact-relative sense.

So where does this leave us? The proponent of the argument from unfairness tried to circumvent the apparent inconsistency between the compatibility principle and the claim that evidence-relative permissibility precludes liability, by arguing that only liability to *compensatory* harms is compatible with the defense of private necessity, and that liability to *defensive* harms is not—in which case there is room for the claim that MRTs are not liable to be defensively harmed. I responded to this by pointing out that the reasons for thinking that the defense of private necessity precludes liability to defensive harms does not apply to MRTs who pose fact-relative impermissible harms. So the proponent of the argument from unfairness is back where she started: the claim that it is wrong to hold the MRT liable for acting in an evidence-relative way is inconsistent with the compatibility principle, which says that liability is compatible with the defense of private necessity.

Still, a proponent of the argument from unfairness might be on the right track in arguing that liability to preventive harms should be treated differently from liability to compensatory harms. Specifically, some might

argue that in addition to wrongdoing, *blame* is a necessary condition for a preventive harm. Ferzan adopts this view when she says “it seems that the only time that we may say a defender does the right thing is when he acts against a culpable aggressor.”<sup>21</sup> On this account, the criterion of liability to defensive force is the wrongdoer’s *culpable* attempt to impose an unjust threat. This is the only sort of case in which a person can be defensively attacked without infringing or violating her rights (unless, of course, the attacker has consented to such an attack). Ferzan, then, is claiming:

(4) One is liable to preventive harm only for a wrong imposed *culpably*. But culpability is *not* necessary for liability to compensatory harm.

On this view, violence directed against those who are not at all culpable (which includes the conscientious driver or the mistaken resident, who do not even act negligently) is unjust, even when the nonculpable party is responsible for posing what is ultimately a fact-relative impermissible lethal threat.

Contrary to initial appearances, 4 and 1 do not make the same sort of claim; the claim that one is not liable to preventive violence for a harm imposed nonculpably is *not* the same as the claim that one is not liable to preventive violence for a harm imposed permissibly in the evidence-relative sense. One can impose an evidence-relative impermissible risk nonculpably if one has a fully mitigating excuse, (such as duress or nonculpable ignorance). In this case, 4 would rule out liability, should the risk manifest. But 1 leaves open the possibility of liability.

One can also impose an evidence-relative permissible risk culpably by doing so with the wrong intentions or for the wrong reasons. Suppose J is dying of disease which only a particular herb might cure. It has a 50 percent of doing so, and a 50 percent of causing an agonizing death. All things considered, it makes sense to administer the herb to her. But a villainous druggist does so, hoping that it causes the agonizing death. Suppose it does. The villain would be liable to compensatory harm (perhaps toward the victim’s estate) if 4 is correct, but not if 1 is correct. This is despite the fact that what the villain does is evidence-relative permissible, and despite the fact that a doctor with good intentions (or at least without bad ones) would not be similarly liable even if events unfolded in the same way.

So 4 is worth considering independently of 1.<sup>22</sup> If 4, is correct, MRTs are not liable to defensive violence. Even though they impose harms impermissibly in the fact-relative sense, that they do so nonculpably immunizes them from defensive violence.

But why is culpability required for preventive harms but not compensatory harms? Recall that in the aforementioned example I am liable for the cost of the medical supplies I pilfered and the damages I caused when I permissibly infringed the cabin owner's property rights. Perhaps culpability is necessary for defensive and not compensatory harms because harms inflicted defensively are usually violent bodily harms, whereas compensatory harms usually take the form of financial deprivations. Because bodily harms are generally harder to justify than financial harms, it stands to reason that the conditions for permissibly imposing bodily harms are harder to satisfy. And one way to make the conditions harder to satisfy is by requiring culpability as a condition for liability to defensive harm.

Accordingly, on this view, what grounds the claim that liability to defensive harms requires culpability is not that they are preventive rather than compensatory, but rather that they are bodily rather than financial harms. If this is correct, then we have a reason for thinking that MRTs are not liable to defensive violence: they are not liable because they are not culpable, and culpability is necessary for liability to bodily harms.

This argument has some intuitive merit, in that liability to financial deprivations and liability to bodily violence seem to be different not merely in degree but in kind. But upon further inspection, this distinction cannot provide grounds for 4; that is, it cannot provide grounds for thinking that culpability is required for liability to preventive but not compensatory harms.

Suppose I act negligently in a way that imposes a harm on both me and an innocent. We both suffer major injuries requiring a series of costly surgeries—without them we will suffer significant and permanent bodily harm. Suppose that I have the funds to finance my own surgeries, whereas the innocent does not. As a matter of civil law, it is not implausible to suppose that I can be sued successfully for the cost of the innocent's surgeries—even if this means that I will not be able to afford my own surgeries. In this example, compensatory liability *ex post* does indeed result

in significant bodily harm of a nonculpable but responsible wrongdoer, as a side effect of preventing bodily harm from being inflicted on an innocent victim.

If we are willing to say that nonculpable wrongdoers are liable to compensatory financial deprivations necessary to prevent a victim from suffering significant bodily harm, even if the wrongdoer will suffer such harms as a foreseeable side effect, then I do not see why we cannot say that nonculpable wrongdoers are liable to *preventive* defensive bodily harms.

A proponent of 4—that is, of the view that only defensive harms and not compensatory harms require culpability—might respond by claiming that only *intentional* bodily harms require culpability. This is why the bodily harm resulting as a foreseen side effect of compensatory liability does not require culpability. But then the proponent of 4 would be left with the view that culpability is not necessary for liability to bodily harms that result as a *side effect* of engaging in defensive action. Returning to the example of the conscientious driver, suppose that the only way for us to save the pedestrian is by erecting a barrier into which the car will crash. If we think that culpability is necessary for liability to intentional defensive harm but not to merely foreseeable defensive harm, then we are forced into the conclusion that the driver is liable to harms caused by erecting the barrier (up to the maximum specified by the Complex Account). I suspect that proponents of the argument from unfairness would maintain that it is unfair to hold the conscientious driver morally liable to such harm—again, because the driver has conducted herself in accordance with the evidence-relative demands of morality.

The upshot is that we cannot advert to the severity or type of defensive harms to support the view that defensive but not compensatory liability requires culpability—at least not without undermining the argument from unfairness. A proponent of 4 might respond in the following way: if a Complex Account is correct, then wouldn't this mean that tort law should permit bodily harm as a means of compensatory liability? So, for example, if my argument against 4 is correct, doesn't this mean that we have to allow a plaintiff to sue for ownership of a defendant's kidney if the defendant caused wrongful and irreparable damage to the plaintiff's kidney?

This is not so. The restrictions against harming *manipulatively* are significantly more stringent than those against harming *eliminatively*. For example, destroying a wrongful aggressor's liver (perhaps by poisoning him) as a necessary means of preventing him from wrongfully killing an innocent might be permissible, even if it is impermissible to surgically transplant his liver into his victim as a means of preventing the victim's death from the injuries caused by the aggressor's wrongful attack. So even when a deprivation consisting of bodily harm has compensatory value, imposing such a harm can be impermissible, even if the same harm committed eliminatively would have been permissible *ex ante*. This is not because culpability is necessary for liability to bodily harm, but rather because harming manipulatively is significantly worse than harming eliminatively.

The upshot is that there are indeed reasons why the restrictions on compensatory harms are more stringent than the restrictions on preventive harms—but none of them have to do with the culpability of the wrongdoer.

As David Rodin points out, there are undoubtedly reasons why defensive and redress rights should be treated differently.<sup>23</sup> He points out that self-defense is a morally risky activity, since those who are in a position to defend against wrongful harms are typically interested parties who have to act quickly, with little time to reflect on the moral complexities of liability, and with incomplete information about the apparent threat. Consequently, the decision to inflict defensive harm involves a substantial risk of wrongdoing. There are reasons of justice, then, to defer exercising defensive rights in favor of redress rights; *ex post*, we have the opportunity to properly determine whether and to what degree the apparent wrongdoer is liable. Still, one cannot be required to defer rights vindication to *ex post* redress when the rights infringed cannot be adequately compensated; the paradigm example of this sort of nonfungible good is one's life itself—which is why we still allow liability to *defensive* violence.

Considerations of justice might explain, then, why we ought to be conservative or cautious about the sort of harms to which rights-infringers are liable *ex ante*. But these reasons do not show that liability to such harms requires culpability. I conclude, then, that 4 is mistaken, on the grounds that it wrongly treats preventive harms differently from compensatory harms. If

culpability is a necessary basis for preventive harms, then it should be a necessary basis for compensatory harms as well. This would suggest:

(5) One is liable only for harms imposed *culpably*.

The problem with this view is that, like 1, it is inconsistent with the compatibility principle. That is, 5 denies that the defense of private necessity can serve as a basis for liability, except in cases where the defender acts culpably. Suppose the only way for me to save my own life which is wrongfully threatened by a thrown spear is to grab your arm and use it as a shield, causing you some superficial lacerations. There are agent-neutral consequentialist reasons for me to use you in this way, and you have an enforceable duty to allow yourself to be so used. I would be liable to compensate you for the harms I caused by infringing your rights (assuming the wrongful spear-thrower has escaped). But if 5 is correct, then I am liable to compensatory deprivations only if I use you culpably—either by using you in a context where I had no justification, or by using you in the case as described but with the malevolent intention to cause you to suffer. Though I certainly owe you compensation in these cases, the standard of corrective justice is that I *also* owe you in cases where I do *not* act culpably. This suggests that 5 is mistaken.

To sum up: I have countered arguments against the Complex Account of liability by responding to the argument from unfairness. Recall that this argument said that MRTs cannot be liable for the harms they impose because they are acting in accordance with what morality fairly asks of them. I countered this argument by pointing out that it is incompatible with the accepted standards of corrective justice. Specifically, the defense of private necessity is compatible with liability to compensatory deprivations. I then considered the claim that one cannot be liable to *defensive* harms imposed permissibly. But this claim is correct only on a fact-relative reading of permissibility; MRTs impose harms permissibly only in the evidence-relative, and not the fact-relative sense. Finally, I considered the possibility that one cannot be liable to defensive harms unless one has acted *culpably*. But this, I argued, is ad hoc—either both preventive and compensatory harms require culpability or neither does. Only the former option, rather than the latter, grounds the argument from unfairness—and the former option requires rejecting the compatibility principle.

I conclude, then, that the argument from unfairness is mistaken: one cannot argue against the Complex Account by claiming that it would be unfair to hold the MRT liable for what she does. None of this shows, however, that MRTs such as the conscientious driver or the mistaken resident are morally liable to defensive harms. Indeed, in Anglo-American tort law, the conscientious driver (for instance) would not be legally liable even to *compensate* the pedestrian for any injuries she caused.<sup>24</sup> But I think this is almost certainly for reasons having to do with the economic and social role that driving plays in first-world countries. It is regarded (correctly or not) as a socially and economically useful activity—one for which we are *all* generally better off, including nondrivers. Because the pedestrian benefits from this activity-type, the costs of the activity (conducted conscientiously) should not be borne by the driver. The perceived social utility of driving, then, rather than any implicit commitment to the nonliability of MRTs, explains why the conscientious driver would not be legally liable to compensate the pedestrian for any injuries she caused. To see this, we need but replace the example so that the MRT is engaged in an activity of a type that's permissible, but not socially useful.

Suppose I set off legal fireworks in my backyard. I take all reasonable precautions; but through no fault of my own, an errant rocket strikes a pedestrian in the eye. It is not obvious that I cannot be sued for the cost of the harm I have incurred. If we treated conscientious driving as an inherently risky activity, which is how we treat certain recreational sports (such as hunting), certain business activities (such as transporting volatile material), and ownership of certain exotic pets (such as venomous snakes), then conscientious drivers would indeed be liable for the harms they cause. In all these cases, should an accident occur harming an innocent victim, that victim would be owed compensation by the individual who engaged in the risky activity, *even if she had taken all reasonable precautions*. That is to say, the individual who is at least minimally responsible for the threat imposed on the innocent victim would be liable to certain deprivations as a means of redressing the harms incurred, even though she did everything that morality could fairly ask of her in the course of engaging in the activity in question.

It is apparent, then, that a defense of the Complex Account of liability for MRTs amounts to a defense of the moral analogue of strict liability. I do not take myself to have provided a comprehensive defense of this here. Rather, I

have countered some arguments against it. Specifically, if what I have argued is correct, then we cannot deny that MRTs are liable simply by claiming that the activity in question was conducted nonculpably or evidence-relative permissibly. This is because the compatibility of liability with the defense of private necessity shows that neither evidence-relative impermissibility nor culpability is a necessary condition for liability. Any account of liability insisting that a person must deserve to be harmed or must engage in evidence-relative impermissible activity in order for the threatener to be liable is excessively restrictive—not because it rules out strict liability, but because it rules out compensatory liability in cases of private necessity. Perhaps this is all the worse for the supposed compatibility of compensatory liability with the defense of private necessity. But denying the compatibility principle would be a sizeable bullet to bite.<sup>25</sup>

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<sup>1</sup> This is based on an example by Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), 165.

<sup>2</sup> According to Parfit, an act “would be wrong in the fact-relative sense just when this act would be wrong in the ordinary sense if we knew all of the morally relevant facts.” And an act would be “wrong in the evidence-relative sense just when this act would be wrong in the ordinary sense if we believed what the available evidence gives us decisive reasons to believe, and these beliefs were true”; Derek Parfit, *On What Matters*, vol. 1 (Oxford: Oxford University Press, 2011), 150.

<sup>3</sup> This is based loosely on an example by Michael Otsuka, “Killing the Innocent in Self-Defense,” *Philosophy and Public Affairs* 23 (1994): 91.

<sup>4</sup> The harm that an individual is liable *to* refers to the harm we are imposing on that person. The harm that an individual is liable *for* refers to the harm for which that individual is responsible and which justifies imposing a harm on that individual.

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<sup>5</sup> Victor Tadros, "Duty and Liability," *Utilitas* 24 (2012): 259–77, has argued that an agent is morally liable to a harm just in case she has not consented to that harm and imposing it on her does not wrong her. On this broader view of liability, an individual can be liable to a harm even if she has not forfeited a right against suffering that harm. For instance, an unconscious man flung by a tornado onto someone else can be liable to some defensive force because this innocent threat would have a duty to avert the harm his body is causing, at the cost of some harm to himself if necessary. My focus in this paper is on liability *as rights-forfeiture*, rather than liability *as an enforceable duty*.

<sup>6</sup> Judith Jarvis Thomson, "Self-Defense," *Philosophy and Public Affairs* 20 (1991): 283–310.

<sup>7</sup> Otsuka, "Killing the Innocent."

<sup>8</sup> McMahan, *Killing in War*.

<sup>9</sup> Kimberly Kessler Ferzan, "Justifying Self-Defense," *Law and Philosophy* 24 (2005): 711–49; Ferzan, "Culpable Aggression: The Basis for Moral Liability to Defensive Killing," *Ohio State Journal of Criminal Law* 9 (2012): 669–97.

<sup>10</sup> Jonathan Quong, "Liability to Defensive Harm," *Philosophy and Public Affairs* 40 (2012).

<sup>11</sup> A right is infringed rather than violated when there is an all-things-considered moral justification for wronging the victim. For example, by switching a trolley track away from fifty and toward a single innocent, we infringe but do not violate the rights of the single innocent.

<sup>12</sup> I argue for this view in Saba Bazargan, "Killing Minimally Responsible Threats," *Ethics* 125 (2014): 114–36.

<sup>13</sup> Specifically, I claim that: if a person P is at least minimally responsible for an objectively unjust harm which she will impose on an innocent Q unless we preemptively harm P, then P is liable for no more than n percent of the unjust harm for which she is responsible, where n is equal to the percent moral responsibility she bears for that unjust harm; Bazargan, "Killing Minimally Responsible Threats".

<sup>14</sup> See McMahan, *Killing in War*, 20–21.

<sup>15</sup> Otsuka, "Killing the Innocent," 91.

<sup>16</sup> I defend this view in Bazargan, "Killing Minimally Responsible Threats."

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<sup>17</sup> Ferzan, “Culpable Aggression,” 12.

<sup>18</sup> Kimberly Kessler Ferzan, “Can’t Sue; Can Kill,” in *Criminal Law Conversations*, ed. Paul H. Robinson, Stephen P. Garvey, and Kimberly Kessler Ferzan (Oxford: Oxford University Press, 2009), 399.

<sup>19</sup> David Rodin, “Justifying Harm,” *Ethics* 122 (2012): 85.

<sup>20</sup> In American civil law, the case most often cited to explain the defense of private necessity is *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 123 N.W. 221 (Minn. 1910).

<sup>21</sup> Ferzan, “Justifying Self-Defense,” 738.

<sup>22</sup> One could also hold both 3.1 *and* 3.4, which would say that an individual is liable for a harm only if she imposed it culpably *and* unjustifiably. On this view, excused wrong-doers would not be liable; neither would the villainous druggist.

<sup>23</sup> See Rodin, “Justifying Harm.”

<sup>24</sup> Ferzan points this out in Ferzan, “Can’t Sue; Can Kill”.

<sup>25</sup> I owe thanks to Kimberly Ferzan for helpful comments on an earlier draft.