

NECESSITY, MORAL LIABILITY, AND DEFENSIVE HARM*

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We each possess stringent rights against being seriously harmed or killed by others. Sometimes, however, we can lose these rights. One way a person can lose rights against being seriously harmed or killed is by *forfeiting* them and thereby becoming *liable* to defensive harm. It is widely accepted, for example, that if one person, Albert, culpably threatens the life of another person, Betty, then he may have forfeited his rights against serious harm being imposed on him in Betty's defence. In other words, it may be the case that he has become liable to defensive harm.

Nearly all accounts of liability to defensive harm state that in order for a person to be liable to such harm, he or she must have fulfilled some backward-looking condition such as being morally responsible¹ or culpable for posing an unjust threat to others. The majority of philosophers working

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¹ We follow Jeff McMahan by using 'X is morally responsible for Y' to mean roughly that X intended Y or that Y was a consequence of X's intentional action that X could reasonably have been expected to foresee. This can include the consequences of actions even when there is only a small probability of the consequences occurring. In extreme cases,

on the topic—most notably Jeff McMahan— also endorse a ‘necessity’ condition.² This condition states that one cannot be liable to defensive harm in any way unless the imposition of that harm is necessary to serve some just cause, such as defending an innocent person from a threat. Because the necessity condition ensures that one cannot be liable to harm unless imposing the harm is instrumentally valuable in this way, we call accounts of liability that include a necessity condition *instrumental* (we follow McMahan in using this term).³

Although the instrumental account of liability to defensive harm is widely accepted amongst philosophers who work on war and self-defence, we argue that it ought to be rejected. The instrumental view suffers from two serious problems. First, it rests on either a flawed conception of what it means to forfeit a right against harm, or else a flawed understanding of the term ‘liable’. It assumes that the forfeiture of a right against harm can depend too much on contingent facts that lie outside a person’s sphere of responsibility or control, or else it avoids this error only by implausibly assuming that one can become liable to defensive harm by losing, rather than forfeiting, one’s right against it. Second, the instrumental account yields counterintuitive results in various cases where the imposition of defensive harm is either unnecessary or futile.

however, certain types of excuses (e.g. irresistible duress) may entirely obviate an agent’s moral responsibility. This kind of responsibility is often called ‘agent responsibility’. We stick to McMahan’s usage for the sake of consistency. See Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), 167-68.

² McMahan, *Killing in War*, 8-9. For others who endorse versions of the necessity condition see Cécile Fabre, ‘Interneceine War Killings,’ *Utilitas* (forthcoming); David Rodin, ‘Justifying Harm,’ *Ethics* 122 (2011), 74-110; or Judith Jarvis Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990), 361-362.

³ Note that McMahan allows that people can also become liable to be harmed as a side-effect of instrumentally valuable defensive action provided those people meet the backward-looking condition of liability to defensive harm. See McMahan, *Killing in War*, 157, 219-20.

A noninstrumental account of liability—one where a person’s liability to defensive harm depends *only* on the backward-looking considerations of moral responsibility or culpability for an unjust threat—avoids both these objections, and so might seem to offer the right account of liability. However, the noninstrumental view also faces serious objections. Most importantly, the noninstrumental account has difficulty explaining why, in some cases, imposing defensive harm on a responsible or culpable attacker when this has no instrumental value would constitute a wrong against the attacker. The noninstrumental view also seems insufficiently sensitive to the way in which the stringency of rights should sometimes vary in accordance with how costly it is for others to fulfil the correlated duties.

In light of the difficulties with both the instrumental and noninstrumental views, we propose a *pluralist* account of liability to defensive harm. The pluralist view holds that liability to defensive harm has (at least) two different bases. First, we have some rights in order to give us normative control over our lives. We call these *agency rights*. These rights typically generate duties of non-interference, for example, the duty to refrain from (non-consensually) harming or killing others. Second, there are what we call *humanitarian rights*, which reflect people’s claims to be provided with urgently needed resources or to be protected from serious harms when others can easily provide this aid or protection. We argue that when a person responsibly or culpably poses an unjust threat of harm, he or she becomes partially liable to defensive harm by virtue of forfeiting an agency right against harm. A person only becomes fully liable to defensive harm, however, when he or she also lacks a humanitarian right against having the defensive harm imposed. This pluralist conception of liability is superior to the alternatives: it avoids the objections that the instrumental and

noninstrumental accounts face, and it better coheres with our intuitive judgements in a wide range of cases.⁴

This dispute about the nature of liability to defensive harm has several important implications. First, whether someone or some group is liable to be harmed or killed is one of the most significant considerations that informs our all-things-considered judgements about when it is permissible to harm and kill others in the contexts of war and self-defence, and so if we want to get these normative judgements right, we need to be working with the right account of liability. For example, it is much more difficult to justify the bombing of an enemy target in the conduct of a just war if the people who will be killed by the bombing are non-liable civilians than it is if all the people who will be killed by the bombing are liable to defensive harm (e.g. unjust enemy combatants). Second, if someone is not liable to be harmed or killed, but he is nevertheless harmed or killed, then this person has been wronged. This is significant in and of itself, and furthermore, he or his beneficiaries are likely owed compensation for this wrong. Conceptions of liability may thus, for example, inform our principles of *post bellum* justice and compensation. Third, many of those who work on the morality of self-defence believe that one is not usually entitled to defend oneself against defensive violence to which one is liable. For example, if Betty acts in self-defence against Albert's initial aggression, Albert lacks the right to fight back in "self-defence" because Albert is liable to Betty's defensive harm. Settling on the correct account of liability thus has dramatic implications for

⁴ Note that the pluralist account depends on the idea that rights can conflict. Some philosophers deny that rights can conflict; however, entering into this debate is beyond the scope of the current paper. We also believe the central argument of the paper might be reformulated in a way that avoids relying on the possibility of rights conflicts. For the view that rights cannot conflict see for example Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994) ch. 3. For a defence of the view that rights can conflict see Thomson, *The Realm of Rights*, ch. 3.

determining who may permissibly act in self-defence or counter-defence. Finally, our pluralist account of liability has novel implications for how we should conceptualise moral rights.

Before going any further, a couple of clarifications are in order. First, this paper is about the *morality* of defensive harm, and so all discussions of rights, wrongs, and liability in this paper refer to moral, rather than legal, rights, wrongs, and liability. Second, although we favour a pluralist account of liability, we remain neutral regarding a number of other disputes. We remain neutral, for example, about whether the backward-looking feature of liability to defensive harm should focus only on whether a person is morally responsible for an unjust threat, or whether it would be better to focus on culpability or wrongful intentions, or some other feature altogether. Similarly, we remain neutral as to whether someone can become liable to defensive harm by acting in an objectively wrongful way even if the person is subjectively justified in acting as she does. We also remain neutral on whether an attacker who infringes the rights of an innocent person, but does so with full moral justification (e.g. a bomber in a just war) can be liable to defensive harm. Finally, we also remain neutral regarding the precise way proportionality should be determined in cases of defensive harm.⁵

The paper has the following structure. Section 1 offers more detail on the instrumental account of liability. Section 2 explains why we believe the instrumental account is flawed. Section 3 presents the noninstrumental view, and explains why this account is also inadequate. In section 4 we present and defend our pluralist conception of liability to defensive harm.

⁵ For instructive discussions of proportionality and defensive harm see McMahan, *Killing in War*, 19-32; Rodin, 'Justifying Harm'.

1. THE INSTRUMENTAL ACCOUNT OF LIABILITY

To say that a person is liable to suffer defensive harm is to say that she has forfeited her right against it and retains no other rights against it. She would therefore not be wronged (in the sense that her rights would not be violated or infringed) by the harm.⁶ How do we know, according to the instrumental account, when someone is liable in this way? Two main necessary conditions must be met if a person is to be at all liable to defensive harm: a *backward-looking condition* and a *necessity condition*.⁷ The backward-looking condition looks to the past behaviour of the potential target of defensive harm and it states that he or she must be in some sense responsible for a wrongful threat against some other person or persons.⁸ In the remainder of this paper we set aside the issue of whether culpability, moral responsibility (or some other feature) is the correct backward-looking criterion of liability.

The necessity condition states that, in order for someone to be liable to defensive harm, the imposition of the harm must be a necessary means of averting the wrongful threat to the victim. As McMahan says, ‘a person is liable to be harmed only if harming him will serve some further

⁶ It is not clear whether this exactly matches McMahan’s definition, however, we clarify and defend this definition in section 2.1.

⁷ There is also a proportionality condition, but we set that aside here since it has less relevance to our assessment of the instrumental view.

⁸ For McMahan’s view see ‘The Basis of Moral Liability to Defensive Killing’ *Philosophical Issues* 15 (2005): 394-404. Also see *Killing in War*, 175-176. This condition is complicated by the question of excuses and whether excusing conditions can ever render an otherwise liable person non-liable, but these complications are not relevant for this paper.

purpose—for example, if it will prevent him from unjustly harming someone else’.⁹ And McMahan goes on to say that imposing the harm must be necessary to serve that purpose: ‘the assignment of liability is governed by a requirement of necessity. If harming a person is unnecessary for the achievement of a relevant type of goal, that person cannot be liable to be harmed’.¹⁰ We believe that necessity is most plausibly formulated as follows:

Necessity Condition: It is necessary to impose defensive harm on an attacker *only* if doing so has a reasonable prospect of successfully averting the unjust threat posed by the attacker,¹¹ and *only* if there is no alternate way of averting the threat that is suitably low cost (relevant costs include the harms suffered by attackers, victims, and third parties).¹² The presence of alternatives that are too costly—those that would involve heroic acts or significant rights transgressions to third parties—are not sufficient to render the imposition of the defensive harm unnecessary.¹³

⁹ McMahan, *Killing in War*, 8. McMahan goes on to list several other purposes the harm might serve but since these goals do not relate to direct defensive action, they are not relevant to our discussion of liability to defensive harm.

¹⁰ *Ibid.*, 9.

¹¹ We make no attempt here to define exactly what counts as a reasonable prospect of success. The only assumption we make is that if an effort is *certain* to fail, then it has no reasonable chance of success. This allows for the possibility that even impositions of defensive harm with extremely low chances of success may qualify as reasonable on the instrumental account.

¹² Though note that the harms suffered by potentially liable persons need not be accorded equal weight to the harms suffered by non-liable persons when calculating the cost of defensive action.

¹³ This formulation is similar to one provided by David Rodin. According to Rodin, the necessity requirement ‘expresses the requirement that one may only take a harmful measure to protect one’s legitimate right if there is no less costly

So, for example, if Betty can only avert Albert's wrongful lethal attack either by killing him or by doing something that will not harm Albert but will paralyze an innocent bystander, then killing him meets the necessity condition, and Albert is liable to this level of harm. But if Betty could avert Albert's wrongful lethal threat either by killing him or by pinching him on the nose, then killing Albert does not meet the necessity condition, and so Albert cannot be liable to being killed by Betty in self-defence. Finally, if the only harm Betty can impose on Albert stands no chance of successfully averting his threat, then this harm cannot be useful in averting the threat, and Albert cannot be liable to it.

On the face of it, the idea that a person cannot be liable to unnecessary harm seems appealing. There are at least two main reasons for this. First, it often seems wrong to harm people unnecessarily. If it is wrong to inflict harm unnecessarily, then a person who is harmed unnecessarily is surely wronged—in the sense that her rights are infringed or violated—by that harm. And, the argument goes, if someone is wronged by the imposition of a particular harm, this shows that the person is not liable to suffer the harm because what it means to be liable is precisely that one is *not* wronged by the imposition of a particular harm. This line of thought thus appears to support the instrumental account of liability: the imposition of noninstrumentally valuable harm is wrong, and thereby wrongs the harmed person, and this shows that one cannot be liable to suffer noninstrumentally valuable harm.¹⁴

course of action available that would achieve the same result'. See David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2003), 40.

¹⁴ McMahan offers the following remark, which might be interpreted as a version of the argument just sketched: 'a person cannot be liable to attack when attacking him would be wrong because it would be unnecessary or

The second argument in support of the instrumental account appeals to the distinction between desert and liability. According to McMahan, moral ‘desert is noninstrumental. If a person deserves to be harmed, there is a moral reason for harming him that is independent of the further consequences of harming him’.¹⁵ Liability to defensive harm seems clearly different than deserving to be harmed. You might believe, for example, that if Albert culpably threatens Betty’s life, he makes himself liable to defensive killing by Betty. But, unless you subscribe to a severe form of retributivism, you wouldn’t believe that Albert deserves to die even if killing him served no instrumental purpose. Instrumental views of liability seem to correctly reflect the fact that desert and liability are different, since instrumental views hold that a person cannot be liable to defensive harm unless that harm would be useful in averting an unjust threat. Noninstrumental views of liability, however, might appear to wrongly confuse liability with desert by declaring that a person can be liable to defensive harm even when harming the person serves no instrumental purpose (why, unless they deserved it, would someone not be wronged by a harm that serves no purpose?).

Despite its initial appeal, however, the instrumental account suffers from at least two serious flaws and it is to these that we now turn.

disproportionate...This is a corollary of the claim that a person is not wronged by the infliction of harms to which he is liable’. *Killing in War*, 10.

¹⁵ *Ibid.*, 8. We leave open the possibility that there are other, broader types of moral desert that are noninstrumental. That is, types of moral desert that allow for the idea that someone can, in a sense, deserve something without it, in itself, being good that they bear it (e.g. someone might ‘deserve’ the losses of a silly gamble but it would not be bad if someone else stepped in to assist her). Note, however, that if our account of liability cannot distinguish between liability and *this* type of desert, it is not problematic. For a proponent of this form of noninstrumental desert see T.M. Scanlon *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge MA.: Harvard University Press, 2008), 188.

2. PROBLEMS WITH THE INSTRUMENTAL ACCOUNT

2.1 *Liability and Rights Forfeiture*

The instrumental account makes a person's liability to harm contingent on whether the imposition of defensive harm can meet the necessity condition. To determine whether this necessity condition is met, various questions must be answered: what alternatives (rather than imposing defensive harm) are available? How costly are the alternatives? How stringent are the rights at stake in the alternatives to defensive harm? The answers to these questions will often be a matter of brute luck from the point of view of the individual who may be liable to harm. The instrumental account thus assumes that liability to defensive harm should be sensitive to a particular kind of luck, but we believe this assumption is a serious mistake. In this section we argue that liability to defensive harm depends on the forfeiture of one's rights, and not merely the loss of one's rights. In the next section we argue that the forfeiture of one's rights should not be influenced by the sort of luck to which the instrumental account is sensitive.

Philosophers sometimes define liability by saying 'X is liable to a harm if she *lacks* a right against it,' rather than 'X is liable to a harm if she has *forfeited* her right against it'.¹⁶ However, the latter definition fits much better with our linguistic intuitions than the former. Consider the following example:

'Brian Thomas and his wife, both frequent sleepwalkers, were on a caravanning holiday

¹⁶ McMahan's definition of liability is ambiguous. He often formulates liability by saying a person is liable to attack if attacking her will neither wrong her nor violate her rights. See for example, 'The Moral Basis of Liability,' 386. In *Killing In War*, however, he defines liability more precisely: a 'person's being liable to attack *just is* his having *forfeited* his right not to be attacked' 10 (emphasis McMahan's).

in 2008 when a group of youths made them feel uncomfortable. They decided to move and park somewhere else for the night. While sleeping, Mr. Thomas believed that the youths had broken into his caravan. He thought he was fighting them off when in fact he was strangling his wife.¹⁷

In this case it wouldn't be right to say that Mrs. Thomas was liable to the harm. But she cannot be said to possess a claim right against the attack either. Claim rights are rights over another person's voluntary actions (or inactions): they usually grant the right-holder a limited degree of normative control over the agency of the duty-bearer. Claim rights cannot, therefore, pertain to events that do not arise out of anyone's voluntary agency. We cannot, for example, have claim rights against the wind blowing leaves at us or against cats pouncing on us since these events are not the results of anyone's voluntary agency. Thus, in the example above, Mrs. Thomas lacks a right against the harm her husband imposes since this harm doesn't arise as a result of his voluntary agency, but rather occurs while he is unconscious.¹⁸ However, it also isn't correct to say that Mrs. Thomas has forfeited any rights—at no point did she do or say anything that could constitute a forfeiture of

¹⁷ This example is taken from Lucy Adam 'The Science of Defending Sleepwalkers that Kill' 25th March 2010 *BBC News Online* <http://news.bbc.co.uk/1/hi/health/8583408.stm>

¹⁸ Those who believe that we can only have rights against people acting in their capacity as agents include, for example, McMahan 'Self-Defense and the Problem of the Innocent Attacker' *Ethics* 104 (1994), 277; Michael Otsuka, 'Killing the Innocent in Self-Defense', *Philosophy & Public Affairs* 23 (1994), 80; or Rodin, *War and Self-Defense*, 85-6. Even Thomson, whose views on self-defence appear inconsistent with this view of rights, declares that claim rights are moral facts that specify behavioural constraints for individuals. See Thomson, *Realm of Rights*, 77.

rights.¹⁹ This seems to indicate that a person is liable to a harm only if she forfeits her right against it, rather than simply if she lacks a right against it.

Consider another example: a woman is no longer permitted to drive after an unforeseeable accident renders her blind. Here it is correct to say that the woman has lost her right to drive. But it would be intuitively incorrect to say she *forfeited* this right, and it is implausible to say that she is liable to suffer any disadvantages that arise as a result of her not being able to drive. This example provides further support for our claim that liability should be understood as a particular sub-set of the more general category of cases where a person loses a right as a result of voluntary actions or choices.²⁰

Suppose someone were to object to all this by pointing out that if a person sees a child drowning, it does not sound wrong to say that she is liable to rescue the child if she can do so at little cost to herself, even though this situation does not arise as a result of her agency. We suspect that this is because the word ‘liable’ is being used in a different sense here to the way it is used when we consider cases of defensive harm. The phrase ‘X is liable’ is sometimes used to indicate that X has acquired a special duty (or lost a liberty right) rather than to indicate that she has forfeited a claim right. Of course, the woman has, in gaining the duty to save the child, also lost some claim rights, but the loss of these claim rights is secondary or derivative—the primary change in her normative situation is the new duty she is under. In cases of defensive harm, however, the primary

¹⁹ She hasn’t forfeited her more general right against being harmed: if someone else had deliberately started strangling her this would obviously have been a violation of her rights. Note that on the view we advocate, it is also not correct to say that Mrs. Thomas was wronged by Mr. Thomas’s attack. This is because one can only be wronged as a result of someone’s agency.

²⁰ We remain open to the possibility that a person may render herself liable to defensive harm by waiving certain rights or consenting to certain actions being performed.

event that has occurred is the forfeiture of a claim right held against others. We thus believe that clarity requires differentiating between cases that are primarily distinguished by the forfeiture of a claim right and cases that are primarily distinguished by the acquisition of a duty, and in this paper we reserve the phrase ‘liable to harm’ to refer only to the former category.²¹

2.2 Rights Forfeiture and Luck

Having argued that liability to defensive harm involves the forfeiture of rights, in this section we argue that rights forfeiture should not depend on luck in the way presupposed by the instrumental account. The instrumental account, as we’ve seen, states that whether a person is liable to defensive harm will depend on whether the imposition of defensive harm meets the necessity condition. But whether the imposition of defensive harm meets the necessity condition is often a matter of luck. When Albert threatens harm against Betty, it will usually be a matter of luck, from Albert’s point of view, as to whether Betty has alternative ways of averting his threat which render the imposition of defensive harm unnecessary. But whether Albert forfeits his rights against the imposition of defensive harm should not be sensitive to luck in this way—moral luck does not have this kind of role in determining liability to defensive harm.

Our objection to the role of moral luck in the instrumental account might seem misplaced. After all, all major accounts of liability to defensive harm agree that a person can only become liable to defensive harm when that person is in some way responsible (causally, morally, culpably) for an unjust threat of harm to others. But whether a person’s action results in a threat of unjust harm is often a matter of brute luck. For example, if Albert wrongfully drives while drunk, it will be a matter

²¹ For this reason, among others, we disagree with Victor Tadros’s view that liability to defensive harm can be explained in terms of duties the liable person owes to others. See Tadros, ‘Duty and Liability,’ *Utilitas* (forthcoming).

of brute luck whether this action results in a threat of unjust harm to someone. He may be ‘lucky’ and avoid threatening anyone because the road home is empty, but he may be ‘unlucky’ and threaten unjust harm should the road turn out to be populated with pedestrians or other drivers. And of course Albert cannot be liable to defensive harm unless he threatens unjust harm against others. From this set of observations, a proponent of the instrumental account might offer the following

*Argument from Moral Luck:*²²

1. Threatening unjust harm against others is a necessary condition for liability to defensive harm.

2. Whether one actually ends up threatening unjust harm against others can be a matter of luck.

Therefore,

3. Luck can play a decisive role in whether one is liable to defensive harm.

Therefore,

4. It is no objection to the instrumental account of liability to defensive harm that it allows a person’s liability to depend decisively on the contingent question of whether the imposition of defensive harm turns out to meet the necessity condition.

This argument relies on an inference from premise 2 to 3:

²² Our analysis of this argument is indebted to Thomas Porter’s unpublished discussion of Derek Parfit’s critique of the semi-Kantian view of blameworthiness.

If moral luck is unproblematic with regard to the issue of whether one threatens unjust harm, moral luck must be similarly unproblematic when we consider any other condition that is alleged to be relevant to liability to defensive harm.

This inference, however, is false and so the *Argument from Moral Luck* fails. It might be the case that one variable, *A*, is sufficiently central to answering some moral question that even if *A*'s existence is a matter of luck, we maintain our belief that *A*'s existence can play a decisive role in answering the question. But that does not show that the same is true for some other variable, *B*, which might also appear to bear on the question. For example, suppose we are considering the question of what makes a person liable to suffer punishment (as opposed to defensive harm). Here are three cases:

Case 1: You deliberately decide to drive while drunk. You have several drinks, get drunk, and then while driving, harm a pedestrian.

Case 2: You deliberately decide to drive while drunk. You have several drinks, but unbeknownst to you, they have been secretly replaced by non-alcoholic drinks. You drive (sober, though believing yourself to be drunk) but do not harm anyone.

Case 3: You deliberately decide to drive while drunk. You have several drinks, get drunk, but then while driving drunk, luckily do not harm anyone.

A proponent of the *Argument from Moral Luck* might look at these cases and reason as follows. You are clearly liable to punishment in *Case 1*. It also seems clear that you are not liable to

punishment in *Case 2*. But the difference between these cases from your point of view is just a matter of luck. Luck can thus clearly play a decisive role in determining whether you are liable to punishment. Thus, in *Case 3*, you can also avoid liability to any punishment as a result of the lucky fact that you do not harm any pedestrians.²³

But this inference is a mistake: you are liable to punishment in *Case 3* (though perhaps not as much punishment as in *Case 1*). It's true that the difference between *Case 1* and *3* is a matter of luck, but it is luck applied to a different variable. In *Case 2*, it is just a matter of luck that you do not drive drunk despite your intention to do. In *Case 3* it is just a matter of luck that you do not harm anyone. Because luck operates on different variables in the two cases, we cannot infer that because luck plays a decisive role in justifying the difference between *Case 1* and *2*, luck can play a similarly decisive role in justifying the difference between *Case 1* and *3*. Instead, we ought to conclude that what matters in determining liability to punishment for drunk driving are roughly two things: (a) the deliberate or negligent decision to drink too much alcohol and then drive, and (b) the subsequent fact of being drunk while driving. What seems irrelevant is whether (c) one actually injures anyone (though, of course, this may be relevant to the *degree* of one's punishment). This is why it's false to infer from the fact that luck plays a role in distinguishing *Case 1* from *2* that it can also play a role in distinguishing *Case 1* from *3*.

Something very similar applies in the forfeiture of rights against defensive harm. In our view what matters is whether a person: (1) fulfils the backward-looking condition (however that condition is specified by one's broader account of liability) for (2) posing an unjust threat of harm to others. It's true that luck can affect whether, for example, your malicious effort to harm someone else in

²³ Note that even those who reject moral luck entirely, and thus might reject some of the claims made above, can accept the pluralist account of liability to defensive harm that we defend in section 4.

fact poses any threat of harm, and thus there is a sense in which luck can affect whether you are liable to defensive harm. But this does not mean that we should include further conditions, such as the necessity condition, which can also be affected by luck. We have already argued that liability to defensive harm involves a forfeiture of one's rights. Rights forfeitures may be affected by luck in various ways, but one way they cannot be affected by luck is by considering whether the person to whom one forfeits the right happens to find this right useful or valuable. Consider:

Lunch: Albert promises to meet Betty for lunch at 1pm. Albert shows up at the appointed time, but Betty has negligently forgotten about their date, and fails to turn up. Albert tries to call her but gets no response. It's now 1:30pm.

In this case Betty used to have a claim against Albert—a claim that he be at the appointed place until, say, 2:30pm. But by negligently failing to turn up, we should assume she forfeits this claim against Albert: she no longer has any standing to demand that Albert stays and waits for her. It would be bizarre to insist that whether Betty has in fact forfeited her claim—whether Albert has regained his liberty to spend the rest of his lunch hour how he wishes—depends on whether it would be useful to Albert to have this liberty. It doesn't matter whether Albert is happy to stay and continue to wait for Betty, or whether he has other things he would like to do—either way Betty has lost her claim. An instrumental account of rights forfeiture seems very implausible in a case like this, and we believe it is similarly implausible in cases involving defensive harm. One of the reasons it is implausible, we believe, is that it makes liability to defensive harm sensitive to luck in a way that it should not be.

There may be no decisive argument that can establish that liability to defensive harm should not depend on luck in the way that the instrumental account implies, but there are examples which provide intuitive support. Consider:

Murder 1: Albert is about to kill Betty in order to inherit her fortune. Though there are various moderate harms Betty could instinctively inflict on Albert in self-defence (e.g. a broken wrist) there is nothing Betty can do that will successfully avert Albert's threat.

Murder 2: Albert is about to kill Betty in order to inherit her fortune. In this case, however, Betty just happens to be carrying a gun and shooting and killing Albert (and only this) will successfully avert his threat.

The instrumental account of liability tells us that these cases are very different. Although Albert is threatening to commit exactly the same unjust harm in both cases for exactly the same reason, in the former case he is not liable to any defensive harm since none of the harms Betty could impose on him will successfully avert his threat. But in the latter case, where Betty just happens to be carrying a gun, Albert is now liable to be killed. We believe this pair of examples illustrate why the necessity condition should not be included in an account of what it means for a person to forfeit his right against the imposition of defensive harm. Whether Albert forfeits his right not to be killed in the examples above should not depend on whether Betty happens to be carrying a gun.

2.3 Counterintuitive Results

As well as relying on a flawed conception of rights forfeiture, the instrumental account gets the 'wrong' intuitive results in several types of cases. We don't claim these counterintuitive results

provide decisive grounds to reject the instrumental view, but we do believe they provide further evidence that the instrumental account is flawed. To begin, consider the following pair of examples:

Well 1: Betty is lying at the bottom of a well. Albert intentionally jumps down the well in order to kill Betty by landing on her. Betty can avert the threat by vaporising Albert with her ray gun, or she can roll into a cranny at the side of the well where Albert will only break her foot when he lands on her. Albert will survive if Betty rolls into the cranny, and won't pose any further threat to Betty. Betty shoots and kills Albert.

Well 2: Carl is lying at the bottom of a well. Debbie is pushed down the well by a gust of wind. If Debbie lands on Carl, she will kill him. Carl can avert the threat by vaporising Debbie with his ray gun, or he can roll into a cranny at the side of the well where Debbie will only break his foot when she lands on him. Debbie will survive if Carl rolls into the cranny, and won't pose any further threat to Carl. Carl shoots and kills Debbie.

Even if we assume that both are cases of morally impermissible harming, the harming in the second case seems, intuitively, to be a greater wrong than in the first. An instrumental view of liability will find it very hard explain this difference, since in both cases the person who is vaporized is not liable to be killed on the instrumental account as the killings do not meet the necessity condition, and therefore both acts must constitute equal wrongs on this view.

A critic might try and defend the instrumental account with regard to this pair of cases in two ways. First, the instrumental account could be revised such that the relevant threat could be expanded to include all intrusions against the body and not just the threat of death, in which case vaporizing both threats appears to meet the necessity condition. This is true, but it does not touch

the point we are making with this pair of examples, namely, that there is an intuitive difference between the two cases that the instrumental account has difficulty explaining.

Second, a proponent of the instrumental view might insist that we can make the degree of a person's liability sensitive to the degree of that person's moral responsibility or culpability, and this would then inform our judgement about how the necessity condition applies to each *Well* case, generating a different result in the two cases. But it will only be able to capture the intuitive difference between the two cases with regards to liability if we assume that moral responsibility (or culpability) is so important in the formulation of the necessity condition that it can be 'necessary' to kill a culpable attacker in order to avoid a broken foot, but not necessary when the attacker is non-responsible. This way of distinguishing the two cases from the instrumental point of view is possible, but it strikes us as normatively and linguistically implausible, and placing such great weight on the attacker's responsibility or culpability in formulating the necessity condition risks collapsing the instrumental account into the noninstrumental account (i.e. if one can kill a culpable attacker in order to avoid a small injury, in what sense is necessity any longer constraining the instrumental account of liability?).²⁴

Next, consider what the instrumental account says about the following case:

²⁴ A proponent of the instrumental view might also appeal to the impersonal badness of harming a non-culpable person as opposed to a culpable person (whom there might be desert-based reasons to harm) to explain the intuitive difference between these cases. But this reply does not address the original objection, namely, that the instrumental account appears committed to the thesis that both Albert and Debbie are equally non-liable to defensive harm (that *they* would be equally wronged by it). This conclusion is counterintuitive regardless of whether the difference between the cases can be explained in some other way.

Unjust Aggression: Carla is preparing to unjustly attack Dan in order to steal some of his property. She draws up two possible plans of attack. Under the first plan, she will wait until the next time he invites her over, slip a sedative into his coffee, and steal the goods. Under this plan, Dan will be left relatively unharmed (except for the stolen property). But there is a reasonable chance that he will be able to successfully thwart her since she can't get hold of a very strong sedative, and he might notice her slipping the sedative into the coffee. Under the second plan, Carla will break into Dan's house while he is watching TV, kill him using a gun, and steal the goods. Under this second plan, Carla is certain to succeed and kill Dan.

The instrumental account of liability tells us that if Carla proceeds under the first plan, she may be liable to defensive harm at the hands of Dan since his defensive efforts stand a reasonable chance of success. But if Carla proceeds with the second plan—the plan which is objectively far more harmful and unjust—then she cannot be liable to defensive harm since any attempts at self-defence by Dan are certain to be instrumentally ineffective. The instrumental view thus yields the very odd result that Carla can ensure moral immunity from defensive harm by choosing to act in a far more harmful and unjust manner.

Finally, consider another example where the instrumental view yields counterintuitive results:

Rape: Eric is in the midst of culpably raping Fran. Eric is much bigger and stronger than Fran, and consequently there is nothing she can do to stop him from continuing to rape her. While being raped, Fran instinctively struggles and in doing so threatens to break Eric's wrist, though this will do nothing to stop the rape from occurring. The only way Eric can stop Fran breaking his wrist is to quickly break her wrist first.

A number of philosophers claim that if someone is not liable to a particular harm, then he has the right to engage in proportionate self-defence when the harm is threatened. Conversely, if someone is liable to a particular harm, then in almost all cases he lacks the right to engage in self-defence.²⁵ This way of conceptualizing the right to engage in self-defence is very plausible for several reasons, perhaps most importantly, it seems necessary in order to explain why a villainous aggressor who initiates an unjust threat against an innocent victim lacks the right to engage in “self-defence” when the innocent victim defends herself from the initial aggression. The innocent victim has a right to engage in proportionate self-defence because she is not liable to the aggressor’s threatened harm, but the villainous aggressor is liable to defensive harm, and so also loses the right to act in self-defence. Determining liability is therefore essential, on this view, to determining who has the right to engage in defensive action.

If the right to engage in defensive action depends on liability in this way (and we believe it does, though we do not argue for this view here) this provides another reason to reject the instrumental account of liability to defensive harm. The instrumental view of liability tells us that because the broken wrist that Fran could impose on Eric stands no chance of averting the rape, he is not liable to suffer it. And since a person who is not liable to suffer a threatened harm has the right to act in proportionate self-defence in order to avert it, the instrumental view of liability apparently grants Eric the right to use significant force to act in “self-defence” against Fran. But this conclusion is very counterintuitive.

²⁵ Philosophers who accept some variant of this view include McMahan, *Killing in War*, sect. 2.1; Jonathan Quong, ‘Killing in Self-Defense,’ *Ethics* 119 (2009), 518-523; Rodin, *War and Self-Defense*, ch. 4; Judith Jarvis Thomson, ‘Self-Defense,’ *Philosophy & Public Affairs* 20 (1991), 283-310.

Some might insist that Eric, although not liable to defensive harm, is liable to punishment on grounds of desert, and this is why Fran has the right to impose the harm in question, and why Eric lacks a right to defend himself. Others might try and explain examples such as *Rape* by incorporating the defence of dignity or honour into an account of successful self-defence.²⁶ We lack the space to engage with these arguments here, but we do not believe either argument, or a conjunction of the two, can adequately address the problem for the instrumental account posed by *Rape*. Our objection is not that it is impossible for proponents of the instrumental account to find other moral arguments which might explain the permissibility of the harm that Fran imposes on Eric. Rather, our objection is that the correct account of liability to defensive harm should not require appealing to external moral considerations in order to avoid this result.²⁷

We believe it is the notion of liability to defensive harm, and not just other considerations, which plays an important role in explaining why the instrumental account's explanation of *Rape* is counterintuitive. There is something deeply troubling about the proposal that an innocent person under threat has no liberty whatsoever to *defend* herself. Even if a person's attempt to defend herself is predetermined to fail there is, we think, a nonconsequentialist sense in which a prohibition on futile defensive action denies the victim an important moral liberty: there is something problematic about the view that morality can render an innocent person *defenceless*. The fact that defencelessness is morally problematic shows that there are *defence*-based—rather than (or as well as) punitive or

²⁶ See for example, Jeff McMahan, 'Just War,' in *A Companion to Contemporary Political Philosophy: Second Edition*, Robert Goodin, Philip Pettit, and Thomas Pogge eds. (Oxford: Blackwell, 2007), p. 675; or Daniel Statman, 'On the Success Condition for Legitimate Self-Defense,' *Ethics* 118 (2008), 659-686.

²⁷ Note that neither McMahan nor Statman appeal to the concepts of honour or dignity in defence of the instrumental account of *liability*: they appeal to these ideas to explain the *permissibility* of defensive action in hopeless cases.

honour-based —reasons that speak in favour of the permissibility of the victim inflicting violence on her attacker.

3. A NONINSTRUMENTAL ACCOUNT OF LIABILITY?

As we've already noted, a noninstrumental account of liability states that whether a person is liable to defensive harm is determined entirely by appeal to backward-looking considerations such as moral responsibility or culpability for an unjust threat, and does not incorporate any reference to the instrumental usefulness of the harm. By focusing purely on backward-looking considerations, the noninstrumental view can avoid the two objections described in the previous section, and is thus superior, in these respects, to the instrumental account. However, the noninstrumental account is also problematic, and this section explains why.

The primary problem facing the noninstrumental account is to explain why it can sometimes be wrong to inflict unnecessary defensive harm on a morally responsible or culpable attacker. If Albert is responsible in the relevant sense for threatening Betty's life, and she can save herself either by killing him or by pinching him on the nose, it's clear that it would be wrong for Betty to kill Albert. However, since the noninstrumental view tells us that Albert is liable to be killed simply by virtue of his responsible attack, it appears, at first glance, that it can't explain why Betty's unnecessary killing of Albert would be wrong at all.

There is, however, a reply available to the proponent of the noninstrumental account. Consider what McMahan says: 'in...contrast with deserved harms, harms to which people are liable are bad not only for those who suffer them but also from an impersonal point of view'.²⁸ Thus,

²⁸ McMahan, *Killing in War*, 8.

assuming that the fact that an act is impersonally bad can sometimes be sufficient to make it wrong all-things-considered, then imposing unnecessary defensive harm on a person who is liable to the harm may be impermissible because harming that person is impersonally bad. The noninstrumental account can thus answer the question of how an unnecessary harm can be wrong despite the fact that the recipient is liable to it—that is, it can explain how an act of unnecessary harming can be wrong all-things-considered *without wronging* the target of the harm.

Nonetheless, this explanation does not salvage the noninstrumental account. Even if we accept that the impersonal badness of harming undeserving people does contribute to the wrongness of unnecessary harming, the idea that this is the whole explanation is unsatisfying. It is unsatisfying because it does not acknowledge that the recipient of unnecessary harm is sometimes also wronged. After all, if the attacker is harmed unnecessarily, it's the value of *his* life that has been wrongly disregarded, and so it is counterintuitive to say that this does not wrong the attacker. The unsatisfying nature of the noninstrumental account is especially obvious in cases, like the one above, where the person who imposes defensive harm has an almost costless alternative which can avert the threatened harm. If Betty can save herself either by killing Albert or by pinching him on the nose, it's deeply implausible to insist—as the noninstrumental view must do—that Albert is in no way wronged if Betty chooses to kill him. Betty's act here is not merely wrong for impersonal reasons—her act is wrong, at least in part, because she has violated a claim that Albert can plausibly be said to possess against being subject to serious and entirely avoidable harms.

There is another (related) problem with the noninstrumental account. Requiring someone to refrain from killing you when it would cost little to do so is much less demanding than asking the person to refrain when refraining would impose a very high cost. The demandingness of an alleged claim and its correlated duties is surely sometimes relevant to our overall assessment of whether the alleged claim is in fact valid, and if so, under what conditions. But the noninstrumental account

ignores this. Since liability to defensive harm and its opposite—immunity from being harmed—are about what one is entitled to demand (or claim) from others, an account of liability must pay some attention to the size of the demands in question. Even people who act wrongly, and forfeit a number of rights as a consequence, retain some moral status and therefore retain some claims against others when those claims are easy to fulfill.²⁹ To assert that Albert's wrongfully attacking Betty means that Albert cannot make even small moral claims on Betty (e.g. that Betty should refrain from killing him when it's very easy for her to do so) seems inconsistent with the sort of moral status we think Albert retains.

4. A PLURALIST ACCOUNT OF LIABILITY

Neither the instrumental nor the noninstrumental account of liability to defensive harm is successful. In this section we propose an alternative account of liability that avoids the objections to which these other conceptions are vulnerable. Our suggestion is that, in fulfilling the relevant backward-looking condition of posing an unjust threat to others, an attacker renders herself at least partially liable to defensive harm. That is, we think that while the attacker has forfeited one type of right against defensive harm, she has not forfeited another type of right against it. The attacker retains, we suggest, a humanitarian right to reasonable aid and protection, and this explains why the attacker can be both liable to defensive harm, and yet also be wronged by defensive harm that is unnecessary. We call this the pluralist account of liability.

²⁹ It is widely believed, for example, that even those convicted of the most malicious crimes are still entitled to certain forms of respect and treatment.

Our suggestion might, at first, seem mysterious. How can one person simultaneously possess and lack a right against being killed or seriously harmed by another person? The mystery, however, is only superficial. It is in fact not so unusual to possess different kinds of rights with regard to the same action. Suppose there is an affluent society that presents all its citizens with roughly equal opportunities. A foolish citizen in this society, Carl, has lost all his money on parties and gambling, and is now at the point of starvation. Should the other members of that society ensure that Carl has enough food to subsist (assuming the society is sufficiently affluent that doing so doesn't threaten anyone else's subsistence)? It seems very plausible to suppose that they should. Does Carl have a right to this subsistence aid? We believe he does because we believe persons have a *humanitarian right* to be provided with urgently needed resources or to be protected from serious harms when this assistance or protection can be provided at reasonably low cost. It seems unacceptably harsh to say that, just because he has been very foolish, Carl now has no moral standing to claim even subsistence-level aid, particularly since providing this aid will not be costly for others. It is important to note, however, that Carl has no fairness-based claim to aid: he was provided with the same resources as other citizens but foolishly squandered them. But Carl still has a humanitarian claim to assistance, a claim grounded in his urgent need and not by appeal to his responsible choices. This example illustrates how individuals can have claims grounded in different values referring to the same action.

We propose that something analogous occurs in cases involving defensive harm. We have some rights in order to give us normative control over our lives. We call these agency rights. We suggest that when Albert culpably threatens Betty with lethal harm, he forfeits a claim right of this type. This is the agency right not to be non-consensually killed by Betty. The agency right not to be non-consensually killed by others affords each person an essential degree of normative control over his or her own life. It's the sort of right that is so important that we doubt its existence is ever

contingent on how costly it is for others to observe the right; even if it is exceptionally costly for others to observe, this does not mean a person lacks the right.³⁰ But because the right affords each person an important degree of normative control over his or her own life, it is the sort of right that one can lose or forfeit via one's voluntary choices. By culpably threatening Betty's life, Albert has taken one of a small number of voluntary actions which entail that he has ceded normative control over his right not to be killed non-consensually. If he did not want to cede this normative control over his right, he should not have attacked Betty.

But, like foolish Carl in our previous example, this does not mean Albert has no claims left to press on Betty. He may have forfeited his agency-based right not to be killed—a right whose existence does not depend on its costs to others—but he may retain other claims that do depend for their existence on how costly they are for others to fulfil. We believe that Albert, like Carl, retains a humanitarian claim against others to be provided with urgently needed resources or to be protected from serious harms when this can be done at reasonably low cost. The point of this right is to help people in dire need, and not (primarily) to give individuals normative control over important aspects of their lives. In Carl's case the humanitarian right means that other members of society are duty-bound to provide him with subsistence-level aid despite his foolishness. In Albert's case the humanitarian right means that Betty is duty-bound not to impose serious and avoidable harms on Carl when she can do so at little cost to herself.

What does this pluralist account entail regarding Albert's liability to defensive harm? Because Albert has forfeited one type of right—the agency right not to be killed by Betty—we believe Albert has made himself partially liable to defensive harm. He has forfeited one type of claim against Betty, and so *with regard to that claim*, Betty cannot be said to wrong Albert if she inflicts defensive harm on

³⁰ See Rodin's similar remark in *War and Self-Defence*, 88.

him. However, whether Albert is fully liable to defensive harm depends on whether he still has the second right he might hold against Betty: the right to humanitarian treatment. This right requires that Betty avoid imposing serious harms on Albert when she can do so at a reasonably low cost. Because this right is contingent on how costly it is for Betty to observe it, whether or not Albert possesses a right against Betty imposing serious defensive harm on him will depend on the contingent facts which determine how costly it is for Betty to avoid harming Albert. If she does have a low cost alternative to harming Albert, then he would only be partially liable to the harm and Betty would wrong him by harming him because she would be failing to observe his humanitarian right. If there is no low cost alternative to imposing defensive harm, then Albert would be fully liable to the harm and would not be wronged by it because he has forfeited his agency right against it and retains no other (humanitarian) right against it.

The right to humanitarian aid and protection only generates duties when the fulfilment of these duties does not impose substantial costs on the alleged duty-bearer. This right is grounded in the moral importance of meeting individuals' urgent needs to avoid suffering or harm. The very fact that the humanitarian right imposes relatively low-cost duties on others means it should be more difficult for a person to forfeit the moral status that permits him to press this claim. Even egregious violators of human rights, for example, are widely believed to retain certain minimal rights to humanitarian treatment.³¹ To forfeit even relatively weak moral claims on others would be to have

³¹ Some might object that it is counterintuitive to suppose that we have duties to aid those who have culpably attacked us, for example, it might seem odd to suppose that we are duty-bound to call an ambulance or provide CPR to an attacker who has recently culpably attacked us. We believe, however, that such cases may only appear counterintuitive when there is some assumption that the victim of the attack may still be at risk—it does seem counterintuitive to suppose that the victim of a culpable attack must put herself at further serious risk to aid her attacker. But of course that is not what the humanitarian right entails—it only requires that aid be provided when it can be done at suitably low cost.

almost no moral standing at all. It may be possible to forfeit one's moral standing entirely in this way (we remain neutral on this issue here): we only insist that doing so would require different types of wrongful acts, or acts whose wrongfulness is of a different magnitude, than those acts involved in the forfeiture of agency rights *simpliciter*.³²

We have said that the humanitarian right consists in a claim to be provided with aid or protection from urgent or serious harms when others can fulfil these duties at reasonably low cost. A critic may protest that such a right only grounds duties to provide aid or support, but that this does not translate into duties to refrain from imposing harm. This objection, however, is misguided. First, we do not say that the duty to provide aid is equivalent to a duty to refrain from imposing harm, nor do we say that the former duty somehow translates into the latter. Rather, we believe that both duties can be derived from the more general humanitarian considerations which generate the right, namely, the moral importance of ensuring that fellow human beings do not suffer serious harms (whatever their cause) when this can be avoided at reasonably low cost. Second, if there is a duty to provide aid at reasonably low cost, then it seems difficult to resist the idea there is also a duty to refrain from harming a person when this would be similarly costly since, other things being equal, most nonconsequentialists accept the view that doing harm is worse than allowing it.

We should now consider an obvious objection. According to the Hohfeldian analysis of rights, if Y has a liberty right to do P with respect to X, then X has no claim right (a 'no-claim') that

But when we imagine cases where the victim can save her attacker's life without any risk to herself, for example when all she has to do is call an ambulance to save her attacker's life without any risk to herself, we maintain that the victim is duty-bound to do so.

³² Of course, this is entirely compatible with the idea that a person may be required to incur greater costs in fulfilling a humanitarian duty at t2 if the duty arises because the person previously failed to fulfill the duty at t1, when it would have been less costly to do so.

Y not do P.³³ So, according to our account, Betty both possesses and does not possess a liberty right. With respect to Albert's agency right she possesses a liberty right: she 'acquired' it when Albert forfeited his agency right. But she does not possess a liberty right with regard to his humanitarian right, as he retains this right. But doesn't this threaten conceptual incoherence?

The idea that a defender can possess a liberty to perform an action and yet have no liberty to perform the action might seem confused. However, if a third party is added to the equation, one can see that it is coherent. Consider a married couple who agreed that if A is unfaithful to B, B can take ownership of their shared house without payment to A. A is unfaithful to B and so B gains the liberty right to take the house. However, if he uses this liberty right, A will not be left with much money but B will be wealthy. A's poverty would be very distressing for A and B's teenage children. Let's suppose that the children have a claim right that B not let them experience this distress.³⁴ Given these facts, B has a liberty right *with regard to A* to take control of the house: he is under no duty to A not to do this. However, B's liberty right with regard to A is constrained by the duties he has to his children: he cannot use the liberty right that he otherwise possesses to take the house because doing this will violate a claim that they have against him.³⁵

³³ For presentations of Hohfeld's view adapted to apply to moral rights and not only legal rights see for example Thomson, *The Realm of Rights*, ch. 1; or Hillel Steiner, *An Essay on Rights*, ch. 3.

³⁴ We assume, for the sake of argument, that the children have this claim right. We note, however, that questions concerning what parents owe their children, and whether children can be rights-holders, are complex and disputed.

³⁵ Liberty rights are thus person-relative. One may have a liberty right to perform an action with regard to one person, but not with regard to another. One has a full liberty right to perform some action just in case one is at liberty to perform that action with regard to everyone. Having a full liberty right still does not, of course, entail the action is morally permissible all-things-considered, since there may be moral considerations apart from claim rights which bear on its performance.

Of course, in our previous example of defensive harm, Betty has a liberty right to perform an action and a duty not to perform it with respect to the same person: Albert. But this does not threaten conceptual incoherence because, as the previous example illustrates, it's possible for one person both to possess a liberty right to perform an action, and yet also be restricted in the way she can use that liberty right due to a separate claim right. So long as we bear in mind that each liberty right is correlated to the absence of a particular claim right (as in our pre-nuptial case above), then we can see how Betty can possess a liberty right to harm Albert in self-defence with regard to the absence of Albert's agency right, but simultaneously be constrained in the exercise of this liberty right by a *different* claim right. If one believes (as we do) that Albert really has forfeited a claim right by attacking Betty, then one must accept that Betty really has gained a liberty right as a result of this.

Others might prefer to explain the same point by emphasizing the fact that liberty rights are liberty rights to action types not tokens. Betty possesses a liberty right to harm Albert (an action type) and a duty to provide needed help (an action type). In a given choice situation, it may be that no feasible action token that is of the first type is also of the second type. This is just like your liberty right to use your baseball bat and your duty not to strike someone else. It may be that, under some conditions, no feasible token involving your use of the bat will also be a token 'not striking someone else'.³⁶

A critic might insist that so long as Albert retains at least one claim right against Betty performing the action, we cannot say that Betty is under no duty to Albert not to perform that action, and thus there is no sense in which Betty has a liberty to perform that action with regard to Albert. To have a liberty to do X, on this view, is to be under no duty not to do X *with regard to some person*, and not simply a way of saying that one of the previous duties not to do X no longer exists.

³⁶ We owe this formulation to Peter Vallentyne.

This objection does not threaten the pluralist account. Even if one accepts the conceptual thesis that to have a liberty to do X is to be under no duty not to do X with regard to some person, this does not change the fact that Albert has fewer claim rights against Betty than he would have had he not forfeited his agency right. It thus remains the case that, whatever terminology we use, Betty's harming of Albert must constitute *less of a wrong* to Albert than it would if he held both claim rights.

How does our account fare with respect to the counterintuitive examples we pressed against the instrumental account in section 2? Our account provides the right intuitive answer in the *Well* cases. Unlike the instrumental account, the pluralist account can explain why it is more wrong to unnecessarily harm someone who has fulfilled the backward-looking criterion of liability than someone who has not. If Betty were to impose serious but avoidable harm on Albert, she would not wrong him to the same extent as she would if Albert were wholly non-labile. If Albert were wholly non-labile then, by unnecessarily harming him, Betty would violate both his humanitarian and agency rights. But, since Albert is not wholly non-labile, Betty would only violate his humanitarian right if she harmed him unnecessarily.

Our account may not yield perfectly intuitive results in *Rape* and *Unjust Aggression*, but it is clearly superior to the instrumental account. If the humanitarian right is only a right to be protected against *serious* harms, it will not cover Eric against the imposition of less than serious harms by Fran. So, *if* a broken wrist doesn't count as a serious harm,³⁷ Eric will have no humanitarian right against its imposition (even though imposing it may still be wrong for impersonal reasons). But he would have a right against, and would be wronged by, the infliction of unnecessary and more serious harm, such as the harm of being killed. We believe this explanation provides an intuitively satisfying account of examples like *Rape*, whilst also being able to account for the thought that culpable

³⁷ We wish to set aside the difficult issue of defining what counts as a serious harm.

aggressors do retain some rights and are wronged by serious harms. A similar line of reasoning will apply to cases such as *Unjust Aggression*. On our account an attacker cannot make herself immune to defensive harm by choosing to unjustly attack others in a manner that is certain to succeed. On the pluralist account, whether an attacker is fully liable to defensive harm in cases like *Unjust Aggression* depends on whether the attacker retains her humanitarian right, and this is determined by the cost to the defensive agent of refraining from harm, and not by the probability of the defensive harm being successful.

There is another reason why the pluralist account may provide a better intuitive result in cases like *Rape*. As we have noted, the agency right against being killed is a cost-insensitive right, that is, we can expect people to bear great costs in order to uphold it. The humanitarian right, by contrast, is cost-sensitive. We can only expect people to bear a small cost to meet it. It strikes us that the amount of force one renders oneself liable to when one breaches a duty relates to the costliness that the duty itself imposes. That is, it strikes us that by breaching a low-cost duty such as the humanitarian duty, one becomes liable to only a low degree of force because this duty is only a duty to bear a low degree of cost. But when one breaches a cost-insensitive duty, one becomes liable to a much greater degree of force because this duty can demand that one bear a great degree of cost. Therefore, according to our account, although Eric *may* be permitted to use some force to defend his arm in *Rape*, he is not permitted to use as great a degree of force as the instrumental account would permit.

Finally, recall the second of Carla's two plans in *Unjust Aggression*. Under this plan, Carla will break in to Dan's house while he is watching TV, kill him using a gun, and steal the goods. Under this plan, Carla is certain to succeed and kill Dan. If Carla proceeds with this plan, then Dan is *effectively* defenceless—there is nothing he can do to avoid being killed. The instrumental account compounds this problem by declaring that because Dan is effectively defenceless, Carla is morally

immune from any defensive harm he might impose; the instrumental view declares that Dan is morally defenceless as well as effectively defenceless. The pluralist account avoids this counterintuitive result. Even though Dan is effectively defenceless, it remains true that Carla is, as a matter of morality, liable to his defensive efforts. We think this difference, even if it makes no practical difference, nevertheless has real moral significance. Unlike consequentialism, nonconsequentialist morality is concerned with what it is *permissible* to do to us, and what it is permissible for us to do, and is not simply concerned with what *happens* to us.³⁸ (In addition, as argued above, Dan is also permitted to inflict non-serious harm on the pluralist account).

5. CONCLUSION

To summarise: the pluralist account of liability incorporates two distinct claim rights relevant to the imposition of defensive harm. One right is an agency right each person possesses not to be seriously harmed or killed without consent. This right grants each of us an essential degree of normative control over our own lives. The second right is a humanitarian right to be provided with urgently needed aid, or to be protected from serious harms when others can do so at reasonably low cost. This right is grounded in the moral importance of meeting people's urgent needs. On the pluralist account, if an attacker meets the backward-looking condition of liability (moral responsibility or culpability for an unjust attack on others) then he becomes partly liable to defensive harm since he has forfeited his agency right against the imposition of defensive harm. But, because the attacker retains his humanitarian right, whether the attacker is fully liable to defensive harm depends on

³⁸ F.M. Kamm, 'Non-consequentialism, the Person as an End-in-Itself, and the Significance of Status,' *Philosophy & Public Affairs* 21 (1992), 382-386.

whether refraining from the imposition of defensive harm is too costly for others. When it is too costly to refrain, then the attacker is fully liable because he has forfeited a right against the harm and retains no other rights against it. When the cost of refraining from imposing harm is low, however, the attacker has a humanitarian claim against the imposition of the harm, and thus he is not fully liable to defensive harm since such harm would wrong him by violating his humanitarian claim.

This pluralist account avoids the objections that proved problematic for both the instrumental and noninstrumental accounts of liability. The instrumental account, recall, depends either on an implausibly unfair view of the forfeiture of the right against harm, or else an implausible conception of liability. The instrumental account allows the forfeiture of important rights (like the right not to be killed) to be decisively determined by contingent facts that lie outside a person's voluntary choices. The pluralist account, on the other hand, declares that whether a person forfeits a right depends only on her voluntary choices, and not on further contingent facts. The instrumental account also delivers counterintuitive results in cases of futile defensive harm such as *Rape*, and struggles to explain why it is more wrong to impose unnecessary defensive harm on a non-responsible attacker as opposed to a morally responsible or culpable attacker. The pluralist account can provide a better explanation of these cases, since it allows for the idea that a person can be partially liable to defensive harm. Finally, the noninstrumental account of liability cannot explain why unnecessary defensive harm may constitute a rights violation against a person who has fulfilled the backward-looking condition of liability. The pluralist account does not face this objection: the notion of partial liability easily explains why Betty might be wronging Albert by imposing unnecessary defensive harm on him, even if he is a culpable unjust attacker. We therefore believe the pluralist account of liability provides a superior framework for thinking about liability to defensive harm.