LIABILITY, RESPONSIBILITY, AND INEFFECTIVE THREATS

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ABSTRACT OF THE DISSERTATION

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To say that a person is morally liable to some harm implies that he would not be wronged by suffering it. The paradigmatic cases of liability are those in which an attacker is harmed to prevent a threat of wrongful harm that he poses. In these standard cases, we say that the unjust attacker, by virtue of his wrongful behavior, i.e. his posing the wrongful threat, makes himself morally liable to defensive harming by his potential victim. He becomes liable to the harm since, by virtue of his wrongful behavior, he forfeits his right against being harmed in this way. And this rights-forfeiture explains why the attacker is not wronged by the harm.

The standard cases are consistent with the following three principles on liability: (1) instrumentality principle—one can be liable only to harm that secures some external good (e.g. the prevention of wrongful harm); (2) responsibility principle—one can be liable to harm to prevent only those threats for which one is sufficiently morally responsible; (3) causality principle—one is sufficiently morally responsible for a threat only if one causally contributes to it.
Despite the plausibility of these principles, support for them has been eroding due to recent arguments in the literature claiming that ineffective threats like apparent threats, culpable attempters, and complicit threats can be liable to harm. This dissertation is comprised of three separate articles, each aimed at refuting arguments for liability of the various types of ineffective threats just mentioned.

In Article 1, “Liability, Instrumentality, and Apparent Threats,” I argue that, although it might seem that apparent threats are liable to harm, the theoretical cost of this position gives us good reason to reconsider this intuition, for if apparent threats are liable, we must reject the instrumentality principle. I then argue that the more plausible position is that apparent threats are not liable to be harmed, and that this position is consistent with their not having the right to defend themselves against the wrongful harm posed by their apparent victims.

In Article 2, “Liability, Responsibility, and Culpable Attempters,” I argue that, although it might be true that culpable attempters would not be wronged by harm to avert a threat for which they are not responsible, this claim is best explained by desert-based reasons for harming. I argue then, that culpable attempter cases give us no good reason to reject the responsibility principle of liability.

In Article 3, “Ineffective Threats, Complicity, and Liability by Omission,” I argue that, although it is plausible that some complicit threats could be liable to serious harm, there
is a better explanation for their liability than their complicity. I argue for an explanation based on responsibility by omission, which, I claim, is better able to handle what I call the *proportionality problem* for complicitous liability. I develop an account of liability by omission to demonstrate this, and I argue that my explanation is also preferable since it can extend to cases involving intuitively liable non-complicit individuals.
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DEDICATION

For Declan and Colin.
ARTICLE 1: LIABILITY, INSTRUMENTALITY, AND APPARENT THREATS.

Introduction.

It is rather uncontroversial that pointlessly harming a person is morally impermissible. We must have some positive moral reason to justify harming a person since, in the normal state of affairs, we all maintain the right against being harmed, whatever the source of that right might be. Thus, circumstances must change such that there exist morally relevant facts that count in favor of harming a person.

Of the various reasons for harming, some seem to be grounded in the principles of distributive justice. These distributive reasons for harming, unlike retributive ones, are inherently instrumental. For example, lesser-evil-based reasons to harm arise only in circumstances in which harming a person, even an underserving one, is necessary to prevent some greater evil, e.g. the harming of a substantially larger number of innocent people. Otherwise, we would have no reason to harm the person, assuming he is undeserving of the harm. Thus, lesser-evil situations are those in which harm befalling some person or persons is unavoidable. The harm is unavoidable in the sense that nothing we do can prevent everyone from being harmed. In these situations we are faced with a forced choice—either we allow the harm to befall some number of innocent people (the greater evil) or we harm a smaller number of innocent people (the lesser evil) to prevent that from happening.
So sometimes the most just way to distribute an unavoidable harm is to have some innocent persons suffer it, even though they are not at fault for the situation. But given that they are not at fault for the situation, i.e. they are not morally responsible for it, they maintain their right against being harmed. Thus, harming them infringes this right. So, although harming them might be all-things-considered permissible due to lesser-evil reasons, they are nevertheless wronged by this harm.

Like lesser-evil reasons for harming, liability-based reasons are inherently instrumental. As with lesser-evil reasons, liability reasons arise only when we are faced with a forced choice regarding how to resolve a situation of unavoidable harm. But while lesser-evil reasons count in favor of harming the innocent, liability reasons speak in favor of harming those who are morally responsible for the situation of unavoidable harm. And when those reasons are decisive, the just distribution of unavoidable harm is for the most responsible party, the morally liable one, to bear it. We can summarize liability’s inherent instrumentality with the following principle:

Instrumentality Principle: An agent, A, is morally liable to a harm, H, only if H is instrumental in securing some external good (e.g. the prevention of wrongful harm), where ‘external good’ is understood as something other than retributive justice.

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1 I borrow this terminology from Jeff McMahan (2009) *Killing in War* (Oxford: OUP): 10. “When one thus permissibly acts against a right, I will say that one infringes that right, whereas when one impermissibly does what another has a right that one not do, one violates that right.” I will use the same distinction between a rights infringement and violation.

2 Future uses of simply ‘liability’ are meant to refer to moral liability unless otherwise stated. The concept of moral liability, which has become commonplace in the literature on the ethics of self-defense and war, was first used extensively in theorizing on defensive harming by Jeff McMahan. See e.g. McMahan (2005) “The Basis of Moral Liability to Defensive Killing,” *Philosophical Issues* 15: 386-405.
To say that a person is liable to some harm implies that he would not be wronged by suffering it, unlike those who are permissibly harmed on lesser-evil grounds. The paradigmatic cases of liability are those in which an attacker is harmed to prevent a threat of wrongful harm that he poses. In these standard cases, we say that the unjust attacker, by virtue of his wrongful behavior, i.e. his posing the wrongful threat, makes himself morally liable to defensive harming by his potential victim. He becomes liable to the harm since, by virtue of his wrongful behavior, he forfeits his right against being harmed in this way. And this rights-forfeiture explains why the attacker is not wronged by the harm. Since he has no right against the relevant harm, he has no justified moral complaint against suffering it. Furthermore, the attacker’s liability provides the moral justification for the victim’s defensive action when there is little or no unintentional harm to innocent bystanders. These are the standard cases.

While the instrumentality principle is intuitively plausible, some have recently begun to argue against it. This is largely the result of consideration of a narrow range of cases that seem to cause some trouble for the instrumentality principle. These are cases involving what we will call apparent threats—those who, despite the justified belief of their apparent victims that they threaten wrongful harm, neither threaten actual harm nor intend to do so. Here is a case of this type:

*Joker:* For no other reason than sick amusement, a practical joker pretends that he is about to kill an innocent victim and the appearance he creates is indistinguishable by the apparent victim from actually being threatened with murder. Based on this, the victim is epistemically justified in believing that unless he kills the joker, he will be
wrongfully killed. As it turns out, the victim has a concealed pistol on him, with which he can kill the Joker.\footnote{This case closely resembles one presented by McMahan (2011) “Who is Morally Liable to be Killed in War?,” \textit{Analysis} 71 (3): 556.}

Some find it compelling that, although Joker poses no real threat, he is nevertheless liable to be killed by Apparent Victim. And perhaps that’s because it seems that Joker would not be \textit{wronged} by the harm—he would have no justified moral complaint against suffering it. Perhaps the most plausible case for this is that, while Joker neither poses nor contributes to a wrongful threat to Apparent Victim (because there is no actual threat), he is nevertheless morally responsible for Apparent Victim’s justified belief that killing him is necessary. Consequently, he has no justified complaint against his Apparent Victim—he has only himself to blame for the unnecessary harm he endures.

While it is tempting to conclude that apparent threats like Joker can be liable to harm, this conclusion come at a high theoretical cost. For if apparent threats can be liable, the instrumentality principle is false—one could be liable to a harm that serves no instrumental good. Given the heavy theoretical cost of this position, we have good reason to question it and consider an explanation of the case that preserves the instrumentality of liability. I attempt to do that in what follows.

In this essay, I defend the instrumentality principle by arguing that cases like \textit{Joker} give us no good reason to reject it. I argue that, while it might seem that apparent threats are not wronged by the lethal harm of their apparent victims, this claim is false. I then argue that, although Joker would be wronged by Apparent Victim’s harm, Joker lacks the right
to defend himself against this harm. I offer a plausible explanation for how these two seemingly inconsistent positions are in fact compatible.

This essay is organized as follows. In section 1, I discuss two of the core aspects of the concept of liability—proportionality and comparative responsibility. In section 2, I consider an often-used intuitive test for liability—the counter-defense test. These two sections will lay the groundwork for my arguments against Joker’s liability in section 3.

1. Two Core Aspects of The Concept of Liability.

1.1. Proportionality.

Proportionality in the ethics of defensive harming is, generally speaking, a matter of comparing the severity of a wrongful harm to be prevented with the harm that would result from its prevention. If the latter is deemed excessive in relation to the former, the defensive action is typically impermissible. But there are two ways in which defensive harm might be excessive in relation to the wrongful harm to be prevented, i.e. there are two different ways in which defensive harming might be disproportionate.

1.1.1. Narrow and Wide Proportionality.

Most claims about proportionality, particularly those made in the context of war, are claims about whether a particular action causes excessive harm, usually as an

\[\text{4} \text{ One exception would be an action justified on lesser-evil grounds. E.g. It could be permissible to inflict disproportionate harm on an individual in order to prevent some great calamity.}\]

\[\text{5} \text{ Jeff McMahan was the first to articulate this distinction between narrow and wide proportionality. Most of my discussion in this section echoes McMahan (2009): 20-21.}\]
unintentional side-effect, to innocent persons. For example, if an attacker threatens me with wrongful lethal harm, under usual circumstances I am morally permitted to kill him in self-defense, assuming that killing him is necessary to prevent my own wrongful killing. But suppose that I could kill him in self-defense only by blowing up a bridge on which ten innocent bystanders are also standing. In this case, my defensive action would very likely be impermissible given the excessive harm, albeit unintentional, my action causes. Although preventing my own wrongful death under usual circumstances is sufficient to render killing my attacker in self-defense permissible, excessive harm to innocent individuals far would far outweigh this good consequence. This would make my action impermissible due to considerations of wide proportionality.

But there is also a limit to the amount of defensive harm that we can inflict on potentially liable, i.e. non-innocent, individuals, beyond which any further harm would be deemed excessive in relation to the wrongful harm to be prevented, independent of any considerations of wide proportionality. Following McMahan, we can call this the narrow proportionality constraint on defensive harming. Throughout the rest of this essay, I will be focused primarily on narrow proportionality, and unless otherwise stated, all future uses of ‘proportionality’ will be used to refer to it.

Most accounts of liability agree that proportionality is internal to the concept. Although we might often say that one is liable without qualification, this is really shorthand for
saying that one is liable to a particular amount of harm. This is the proportionality constraint on liability—one can only be liable to proportionate harm. If one is harmed with disproportionate harm, i.e. harm to which one is not liable, then one is wronged by that harm.

While most agree that proportionality is internal to liability, the more controversial matter is what determines whether a given harm is proportionate. We now turn to this question.

1.1.2. That Proportionality is Partly a Function of the Wrongful Harm to Be Prevented.

As with wide proportionality, narrow proportionality is partly a function of the severity of the wrongful harm to be prevented. The following case is compelling intuitive support for this claim:

*Culpable Pincher*: A is about to pinch V for no good reason. He simply wants to inflict a bit of pain on V against V’s will. V can prevent A from doing this only by killing him.

Although A wrongfully threatens V with a pinch and V’s killing A is the only way to prevent this wrong, it seems pretty clear that it would be impermissible for V to do so. Moreover, it seems that V’s killing A would wrong A, as A’s threatening to pinch V doesn’t seem serious enough to cause the forfeiture of A’s right not to be killed. If all

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6 Helen Frowe (2014) makes a similar point in *Defensive Killing* (Oxford: OUP): 118. “…it seems that proportionality must be internal to liability, because one cannot simply ‘be liable’, but must rather be liable *to something*—namely, to suffer a certain amount of harm. Stipulating the amount of harm one is liable to seems to be the work of the proportionality requirement.”

7 This is a slightly different version of a case offered by McMahan (personal conversation).
this is true, then A is not liable to be killed. A is not liable to be killed since this harm would be disproportionate to the harm to be prevented—a pinch.

Of course, A would likely be liable to some lesser harm if that would prevent V from being wrongfully pinched. If V’s pinching A preemptively, or perhaps even punching him, would prevent A from wrongfully pinching V, then it might be permissible for V to do this. Moreover, it would seem that V’s preemptively harming A in this way would not wrong A. Thus, it seems that A would be liable to this lesser harm to prevent V from being wrongfully pinched.

In short, an agent is not liable to any amount of harm in order to prevent a threat of wrongful harm. The amount of defensive harm to which he is potentially liable is limited by the amount of wrongful harm that would be prevented by harming him.

1.1.3. That Proportionality is also a Function of One’s Moral Responsibility for the Wrongful Harm to Be Prevented.

But there are quite plausibly other variables that determine whether defensive harm is proportionate. Following McMahan, it seems that proportionality is also a function of the degree of one’s responsibility for the wrongful harm to be prevented. McMahan makes this point here:

[Moral] [r]esponsibility for an unjust threat can vary in degree, and liability varies concomitantly. A person’s liability is therefore greater when his action is culpable, and the degree of his liability varies with the degree of his culpability. The degree of
a person’s liability is manifest in the severity of what may be done to him without wronging him—that is, in the stringency of the proportionality requirement.\(^8\)

And as we discussed in the previous sub-section, the level of one’s responsibility for a wrongful threat (i.e. the total harm to be prevented) is a function of the size of one’s contribution to the total harm (i.e. one’s degree of causal contribution) and one’s responsibility for that contribution (i.e. whether there are any excusing conditions relevant to the contribution).

Here’s a case that supports the claim that responsibility affects the proportionality constraint on defensive harming:

*Fully Culpable Pincher*: A is about to pinch V because he wants to kill him and, for whatever reason, he falsely believes that pinching V will do the trick. V knows all this and can prevent A from pinching him only by breaking his arm.

In *Culpable Pincher*, A threatens to pinch V because he intends to inflict a small amount of pain on V. In *Fully Culpable Pincher*, A threatens to pinch V in order to *kill* him.

This difference accounts for the fact that A is more culpable (i.e. more responsible) for pinching V in *Fully Culpable Pincher* than he is in *Culpable Pincher*. And this fact seems to support the intuition that A is liable to a broken arm when he is fully culpable, and that he would not be liable to it in the first case, even if breaking his arm were necessary to prevent V from being pinched.

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\(^8\) McMahan (2005): 395.
Of course, one might debate the specifics of these cases, in particular, whether a broken arm is in fact proportionate in *Fully Culpable Pincher*. Or perhaps one might believe that a broken harm would be proportionate in both cases if that were necessary to prevent the pinching. Perhaps that’s right. But my point is simply that *whatever* the amount of harm to which A is potentially liable in *Culpable Pincher*, he is potentially liable to more harm in *Fully Culpable Pincher*. And if that’s the case, then responsibility, along with the wrongful harm that would be prevented, affects the proportionality constraint.

Not all are convinced that responsibility is relevant to proportionality, and hence liability, in the way I have described. Helen Frowe explicitly rejects this idea:

I find the idea that proportionality is sensitive to moral responsibility quite puzzling, especially in light of what McMahan says about the permissibility of killing even fully excused threats in self-defence. For example, McMahan thinks it permissible to kill Resident in *Breakdown*:

*Breakdown*: Victim’s car breaks down in a remote area. He knocks on the door of an isolated farm to ask to use the phone. Unbeknown to him, there’s been a series of gruesome murders in the local area. Warnings have been issued to local residents to be wary of strangers. When Resident opens the door, she thinks Victim is the violent murderer come to kill her and tries to shoot him.\(^9\)

Frowe rightly points out that on McMahan’s view, Resident is liable to be killed in self-defense even though she is fully excused for her wrongful threat to Victim. And this, Frowe argues, seems inconsistent with the claim that proportionality is sensitive to moral responsibility since, given that Resident is *fully* excused for posing the wrongful threat,

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she “has only a low degree of moral responsibility for the threat she poses.”\textsuperscript{10} So how, one might ask, could it be proportionate to \textit{kill} her?

Frowe then suggests that on McMahan’s account, what’s really doing the work regarding degrees of liability is one’s \textit{causal} (not moral) responsibility for a threat. She cites McMahan’s argument for the claim that most non-combatants are not liable to killing in war (while most unjust combatants are) as evidence of his conflating the two concepts:

The defence of the claim that non-combatants lack sufficient moral responsibility focuses not, for example, on their excusable ignorance with respect to what they do, but rather on the causal triviality of what they do. What makes killing non-combatants disproportionate, then, is not that proportionality is sensitive to moral responsibility, but rather that it is sensitive to causal contributions.\textsuperscript{11}

Frowe is correct that McMahan focuses on the “causal triviality” of what typical non-combatants contribute to war in order to argue that most are not liable to be killed. But to do this is not to conflate moral and causal responsibility. Rather, it is to recognize that, as we saw earlier, one’s degree of moral responsibility for a threat is a function not only of any excusing conditions for one’s contribution to the threat, but also the \textit{significance} of one’s contribution to the threat. So if McMahan is right that non-combatants typically contribute substantially less to the total threat of war than do combatants, it follows that, other things being equal, they are typically less \textit{morally} responsible for the threat of war. And conversely, even if unjust combatants are just as excused for their contributions as are non-combatants, the former are likely to be more morally responsible for the total

\textsuperscript{10} Frowe (2014): 173.

\textsuperscript{11} Ibid.: 174.
threat of war given that they are more causally responsible for it than are non-combatants.

The above rationale is also what underlies McMahan’s claims about the liability of non-culpable threats like the Resident. Even though Resident is fully excused for her wrongful threat, it does not follow, as Frowe claims, that she is minimally morally responsible for the total threat to Victim. And that is because Resident is fully causally responsible for the total threat—she poses it. This would plausibly raise her level of moral responsibility for the threat, even while being fully excused for her contribution, to a non-negligible level, a level perhaps sufficient for liability to lethal harm.12

Frowe then goes on to argue, contra McMahan and Cecile Fabre, that proportionality is not sensitive to the degree of one’s causal contribution either. More specifically, she criticizes the view that “any kind of liability-based account of defensive killing must look at what non-combatants do as individuals, not merely invoke the results of group endeavors.”13 Frowe then presents the following case to refute this view:

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12 McMahan refers to fully excused threats like the Resident as “minimally [morally] responsible threats.” This terminology is a bit misleading given that the minimally responsible threats McMahan discusses pose the total wrongful threat. Thus, they are fully causally responsible for the total threat, which, together with their minimal moral responsibility for that contribution, entails that they have a non-negligible degree of moral responsibility for the total threat, despite the fact that they are fully excused for it. It would be more accurate to refer to those who contribute minimal amounts to a total harm and are fully excused for this contribution (e.g. some non-combatants) as minimally responsible threats.

Hit: Mafia Boss wants to take Victim out, but he cannot afford to hire Assassin, who is extremely skilled and thus extremely expensive. Mafia Boss has a whip-round amongst all the members of his mob, none of whom really like Victim. Everyone coughs up a few extra pounds for the assassination fund.\textsuperscript{14}

Frowe’s argues that on the view described above, none of the members of the mob would be potentially liable to be killed as a means of saving the victim. And this is because, as Frowe points out, each of the members’ contributions is very small, and very likely too small to make killing any of them proportionate if proportionality is sensitive to the degree of one’s causal contribution as McMahan and Fabre believe. It might seem that on their view, perhaps only the assassin and the mob leader would be potentially liable, given that each of their contributions are much more substantial. But, Frowe suggests, whatever the responsibility threshold is for liability to lethal harm, it seems doubtful that individual members reach it. She concludes in the following way:

Fabre is right that an individual’s liability to defensive harm is determined by her individual contribution to an unjust threat. But she is wrong to focus on the extent to which an individual contributes to the threat rather than on the magnitude of the threat to which she contributes. We do not care, for the purposes of liability, how much money each member of the mob gives in Hit—about the extent of their contribution to the assassination fund. All we care about is the fact that they gave money to fund a lethal threat. And because they funded a lethal threat, they are liable to lethal defence. Proportionality is about the harm one helps bring about—the threat that faces a victim partly as a result of one’s behaviour.\textsuperscript{15}

So on Frowe’s view, the size of one’s contribution to a wrongful threat is irrelevant to questions about proportionality and liability. All that matters is the size of the threat to which one contributes. This is the lesson we are supposed to draw from Hit. In Hit, all that matters is that each of the members contributes to a lethal threat. This is what makes

\textsuperscript{14} Ibid.

\textsuperscript{15} Ibid.: 177.
them potentially liable to lethal harm despite the fact that each of them contributes very little to this total threat.

Most, including McMahan and Fabre, would certainly agree with Frowe that proportionality, and hence liability, is sensitive to the size of the total threat. After all, as we said earlier, proportionality is (partly) a function of the wrongful harm to be prevented. There is no disagreement here. The disagreement is over whether the size of one’s contribution to the total threat is relevant. And there are two reasons why I think Frowe’s *Hit* case is not successful in establishing the irrelevance of that.

First, while I agree with Frowe that each of the members is potentially liable to lethal harm, I’m not convinced that McMahan’s or Fabre’s view implies otherwise. And that’s because in *Hit*, while each of the members’ contributions are small in size, they are nevertheless *significant* since the assassination’s taking place is counterfactually dependent on each of them. Of course, this is not explicit in *Hit*, but it does seem to be implied in the case. And I suspect that this is one source of the intuition that each of the members is potentially liable to lethal harm.

Second, even if we concede that the size of each of the members’ contribution would not be significant enough to make killing any of them proportionate were they *non-culpable* for their contribution, it seems pretty clear that each of the members in *Hit* is *culpable* for contributing to the fund. Recall that the members are described as not particularly fond of Victim, and there is no suggestion of duress or non-culpable ignorance on the part of
any of the members. Indeed, each of them seems fully culpable for their contribution to the fund. And this, quite plausibly, renders each of them sufficiently responsible for the lethal threat to Victim (so that killing them would be proportionate) despite, per our current concession, their insignificant causal responsibility for it. Thus, a proponent of McMahan’s view can account for the strong intuition that killing any one of the members of the mob would be proportionate.

Of course, as we have already seen, Frowe denies that proportionality is sensitive to the level of one’s moral responsibility for one’s contribution, and so she would deny that each member’s being fully culpable for his contribution is doing any of the work regarding their liability to lethal harm. But if that’s correct, then we should judge all the members in the following case no differently than we judge those in Hit:¹⁶

Hit 2: Mafia Boss wants to take Victim out, but he cannot afford to hire Assassin, who is extremely skilled and thus extremely expensive. Mafia Boss tells the members of his mob to each cough up a few dollars for a “special” fund. The older members of the group all know from experience that they will be contributing to Victim’s assassination, and they are happy to do so. However the newer members of the group, although they have good reason to believe that their money will contribute to some illicit activity, do not know it is for an assassination. Furthermore, they know that if they start asking questions, they will be killed. Everyone coughs up a few dollars for the fund.

If proportionality is not sensitive to one’s level of moral responsibility as Frowe argues, we would have no good reason to kill one of the older members of the group instead of one of the newer ones in order to save Victim. That the newer members are more culpable for their contributions by virtue of their knowledge and willingness to contribute

would be morally irrelevant in deciding whom we should kill to save Victim. All of that seems very implausible. Perhaps, despite their excusing conditions, the new members would be liable to lethal harm if this were necessary to save Victim, but surely we have more reason to harm the older members if killing an older or newer member would be equally effective. If that’s correct, then proportionality must be sensitive to the level of responsibility for one’s contribution.

Ultimately then, *Hit* is unsuccessful as a counterexample to McMahan and Fabre’s view. Despite the small size of each member’s contribution to the fund, it still seems that each of their contributions is significant. That seems to matter with regard to their potential liability. And even if we concede that their contributions are not very significant, their level of culpability for their contributions does seem to affect their potential liability. We can see this pretty clearly when we contrast the potential liability of the newer and older members in *Hit 2*.

Let us conclude with one final case that demonstrates that proportionality, and hence liability, is sensitive to both the significance of one’s contribution to a threat and one’s level of moral responsibility for that contribution:

*Bullies:* Tim has suffered cruel mental and physical bullying attacks from several of his classmates over the past six months. As a result of these uncoordinated attacks, Tim has reached his breaking point. The next attack, however slight, will cause him to commit suicide. Bob, who has never bullied Tim before and knows nothing about the previous attacks on Tim nor of his mental state, decides to tease Tim about the shoes he is wearing that day just for a laugh. Tim, pushed over the edge by this final attack, kills himself later that night. Tim’s death could have been prevented only by killing Bob before he teased Tim.
It seems clear to me that Bob is not liable to be killed to save Tim. Perhaps he would be liable to a broken arm if that would save Tim, but killing Bob to save Tim is intuitively disproportionate. Of course, killing Bob would prevent a seriously wrongful harm; that part of the proportionality equation seems satisfied. But Bob does not seem sufficiently morally responsible for that total harm. And the best explanation for this is that Bob’s contribution to the total threat is not substantial enough to make him sufficiently responsible for it. And all this seems true despite the fact that he is culpable for his contribution.

This is not to say that Bob’s contribution would not render him liable under different circumstances. Although Bob is culpable for his contribution, we can imagine circumstances under which he would be even more culpable, so much so that he would perhaps be liable to lethal harm. For example, suppose that Bob knew about all the previous attacks and as a result had a pretty good idea that his teasing Tim could send him over the edge. In this case, it seems plausible that Bob would be liable to lethal harm, or at least harm more serious than a broken arm. This again supports the claim that proportionality is sensitive to the level of one’s culpability for one’s contribution to a threat, not just the significance of one’s contribution.

1.2. *The Comparative Dimension of Liability.*

Comparative moral responsibility for a threat can be used to explain liability in straightforward cases of self-defense. If attacker A threatens victim V with wrongful lethal harm and V can prevent A from doing so only by killing him, then A is liable to be
killed. Here is a plausible comparative explanation for this fact: Given that there is unavoidable harm, either A will kill V or V will kill A in self-defense, we might determine who is liable by considering their respective levels of moral responsibility for the situation of unavoidable harm. In this case, A is more morally responsible than V for the situation (after all, V bears no responsibility for the situation), and so it is just that A bear the harm, i.e. A is liable to be killed. But while A is indeed liable to be killed, the comparative explanation is a bit misleading. To see this, let us consider a critique of McMahan’s position on the liability of threats like Resident. First though, let us examine McMahan’s rationale on the case.

McMahan refers to threats like Resident as minimally responsible threats, and as noted earlier, he argues that these minimally responsible threats are potentially liable to be killed. It also seems clear that McMahan recognizes a comparative dimension of liability: “According to the Responsibility Account, whether and to what a person is liable are functions of, inter alia, the following elements…(5) Whether there are others who are more responsible for the harm and if so by how much…” And elsewhere he says this regarding a threat like Resident:

This [comparative] dimension of liability can best be explained by reference to a case involving only two individuals. Suppose that some great harm is unavoidable. It will befall one or the other of two people; it cannot be divided between them. For example, one person will kill another unless the other kills him in self-defence [e.g. Resident and Victim]. Suppose that there are no relevant differences between the two except that the threatener bears a very slight degree of responsibility for the fact that one of them must die…In these circumstances, the [minimally responsible threat—e.g. Resident] is liable to be killed.18


18 Ibid.: 551.
In his critique of McMahan, Saba Bazargan seems to think that this comparative dimension is McMahan’s *full* explanation of Resident’s liability. He attributes to McMahan the following account:

*The Simple Responsibility-Based Account of Liability:* 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; this is because it is fairer to impose that harm on the more responsible party than it is to allow her to impose that harm on the less responsible party.\(^\text{19}\)

According to the simple responsibility-based account of liability, it does not matter *how* morally responsible the Resident is for the threat to Victim in order to render her liable to be killed. All that matters is that Resident bears *more* responsibility than Victim for the situation of unavoidable harm. So given that Resident is clearly more responsible than Victim, she is liable despite the fact that her responsibility is minimal. In short, we can say that the simple responsibility-based account of liability sees *comparative fairness* as decisive, or sufficient, for rendering one liable to harm.

Seth Lazar makes a similar criticism of McMahan by arguing that McMahan’s account yields unsavory implications for the following case:

*Gunsmith:* A has been sacked from his job, and blames his former boss B. To take his revenge, he buys a weapon from C, a gunsmith. C does not know A’s intentions, and sells him the gun legally. A initiates his attack on B. B cannot defend himself by

harming A. The only way that he can save himself is to use C as a shield, which would kill C.  

Lazar argues that McMahan’s account “yields the counterintuitive implication” that C would be liable to be killed. Indeed, the simple responsibility-based account of liability implies this. In Gunsmith, there is unavoidable harm that either B or C must bear. And again, according to the simple responsibility-based account, all that matters is that C is more responsible than B for this situation. It does not matter how responsible C is for the situation. C is minimally morally responsible for the situation, while B is not responsible at all for it. Thus, according to the simple responsibility-based account, C is liable to be killed since this is the comparatively fair distribution of harm.

The problem with these objections is that the simple responsibility-based account of liability is not McMahan’s view, or at least, it need not be. The account does imply that minimally responsible threats like Resident and Gunsmith are liable to be killed because of comparative fairness, and perhaps this does seem counterintuitive in the case of the Gunsmith, and perhaps even the Resident. The problem with the simple responsibility-based account, though, is that it renders the concept of proportionality irrelevant to questions of liability. Or at best, it reduces the concept of proportionality simply to a matter of comparative fairness in the distribution of harm. In other words, one might claim that the simple responsibility-based account is consistent with the claim that proportionality is internal to liability in that harm that is fairly distributed is de facto

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proportionate. But to do this would be to ignore the core features of the concept of proportionality. As explained earlier, proportionality is a function of the wrongful threat to be prevented and one’s degree of moral responsibility for that threat. And the latter is a function of the significance of one’s contribution to the threat and one’s moral responsibility for that contribution. And to claim that an agent’s degree of moral responsibility for a threat makes killing him proportionate simply because he has more responsibility for it than his victim doesn’t sound anything like a claim about proportionality. It is simply a claim about comparative fairness. The infliction of harm H on an agent A is proportionate if, and only if, the threat to be prevented T is comparable to H and A is sufficiently morally responsible for T.

We can summarize the preceding points in the following way. While the concept of liability does seem to be inherently comparative, comparative fairness is not the full story. One must first be non-comparatively liable to H in order to be full-stop liable to H. And one is non-comparatively liable to H to prevent T only if H is proportionate, where proportionality is a function of the magnitude of T and one’s moral responsibility for it. If one is not sufficiently morally responsible for T, say because one is non-culpable for one’s contribution to T or because one’s contribution to T is insignificant, then H would be disproportionate harm.

Let us conclude this chapter by reconsidering Breakdown, where intuitions on liability are much more divided. There is no disagreement in this case as to who is more

21 I borrow this terminology from Tadros (manuscript) “Causation, Culpability and Liability.”
responsible for the wrongful threat to Victim. Clearly, the Resident is more responsible for this threat. So comparative responsibility is not the source of the debate. The source of the debate, I argue, is whether Resident is non-comparatively liable to lethal harm.

Would the Victim’s killing the Resident in self-defense be proportionate? The answer to that question is orthogonal to whether Resident is more responsible for the threat than Victim. The answer to the proportionality question hinges solely on whether the Resident is sufficiently morally responsible for the lethal threat. But of course, that’s a very difficult question to answer—hence, the divided intuitions on liability in the case.

Nevertheless, there is a plausible case to be made for liability, one that does not rely on the rationale of the simple responsibility-based account. One might plausibly argue that lethal defensive harm to the Resident would be proportionate in that the Resident is sufficiently morally responsible for the wrongful lethal threat. And the reason for that, as I suggested earlier, is that, although the Resident is non-culpable for her contribution to the threat, her contribution is quite significant—she poses the threat! And so it might be that even minimal moral responsibility for a very significant contribution to a threat can make one sufficiently morally responsible for the threat to make harming one proportionate.22

2. The Counter-Defense Test—An Intuitive Test for Liability.

One intuitive test for liability has us consider the rights, or lack thereof, of the potentially liable person. More specifically, we can ask of a potentially liable individual whether it

22 In contrast, consider Gunsmith. Let us assume that the Gunsmith and the Resident are equally morally responsible for their respective contributions. We can argue that, unlike the Resident, the Gunsmith is not liable since his contribution to the threat is not sufficiently significant.
would be permissible for him to harm in self-defense. If it would be permissible for him
to harm in self-defense, then it must be because he has a right against suffering the
defensive harm from his victim. But if he has a right against suffering this defensive
harm, which presumably grounds his permission for counter-defense, he cannot be liable
to defensive harm. And this is because, by definition, liable individuals lack the right
against defensive harm. So then how could his counter-defensive harming be
permissible? So a positive test result (that counter-defense would be permissible) would
indicate that one is not liable to defensive harm, while a negative result (that counter-
defense would be impermissible) would indicate liability to defensive harm.

But it need not be the case that the lack of a right to counter-defense is grounded in the
lack of a right against defensive harm. We can see this most clearly when we consider
cases in which individuals clearly retain their right against harm, yet it is impermissible
for them to inflict defensive harm on their liable attackers due to the unintentional harm it
would cause to innocent people. This consideration is easily ruled out, though, in our
cases. Nevertheless, it remains an open question whether there might be some other
reason, i.e. one other than liability and considerations of wide proportionality, for the lack
of a right to counter-defense. I will offer one such explanation in the following section.

Let us know turn to the case for liability of apparent threats.
3. The Liability of Apparent Threats.

3.1. The Case that Joker is Liable.

First, let’s review the case:

Joker: For no other reason than sick amusement, a practical joker pretends that he is about to kill an innocent victim and the appearance he creates is indistinguishable by the apparent victim from actually being threatened with murder. Based on this, the victim is epistemically justified in believing that unless he kills the joker, he will be wrongfully killed. As it turns out, the victim has a concealed pistol on him, with which he can kill the Joker.\(^{23}\)

The most compelling case that Joker is liable to Apparent Victim’s lethal harming and that he would not be wronged by it is something like the following.\(^{24}\) While it is true that Joker merely appears to pose a wrongful lethal threat to Apparent Victim, it is Joker who is culpable for this wrong. If Apparent Victim were to kill him, Joker would have nobody to blame but himself. After all, Joker is the culpable cause of Apparent Victim’s wrongful threat to Joker. Indeed, Apparent Victim’s threatening Joker is counterfactually dependent on Joker’s wrongful action. Were it not for Joker’s appearing to be a wrongful threat, Apparent Victim would not threaten to kill him. Moreover, given that Apparent Victim is epistemically justified in believing that Joker will wrongfully kill him unless he takes “defensive action,” Apparent Victim would be blameless for killing Joker. Given all this, it seems that Joker would have no justified complaint against Apparent Victim for killing him. This all suggests that Joker is liable to Apparent Victim’s lethal harming, that he would not be wronged by it.

\(^{23}\) This case closely resembles one presented by McMahan (2011): 556.

\(^{24}\) Ferzan (2011) defends a view like this in “Culpable Aggression: The Basis for Moral Liability to Defensive Killing,” *Ohio State Journal of Criminal Law* (9): 669.
While I agree with many of the supporting claims in the above explanation, I don’t believe it follows from them that Joker is liable. In the following section, I argue that Joker is not liable to lethal harm and that he would be wronged by it.

3.2. Why Joker is not Liable.

As I see it, the main problem with the claim that Joker is liable to Apparent Victim’s lethal harming is that this would entail that Apparent Victim’s killing him would be morally permissible. This is not because it is always permissible to harm one who is liable to that harm. As we saw earlier, considerations of wide proportionality sometimes make harming liable individuals impermissible. But these considerations are easily ruled out in Joker. Apparent Victim’s killing Joker would not harm any innocent bystanders; it would only harm Joker. And if he’s liable to that harm, it’s difficult to see why killing him would be impermissible.

Of course, those who argue for Joker’s liability might take the hardline position that Apparent Victim’s killing Joker would be permissible. After all, Apparent Victim would be doing that which is justified by all of his epistemically justified beliefs. And perhaps that’s the best we can ask of him. The problem with this rationale is that it conflates subjective and objective permissibility. The former is a function of the agent’s morally relevant epistemically justified beliefs—the action would be permissible just in case these beliefs are true. And this is true of Apparent Victim. But of course, not all of these beliefs are true. Furthermore, as McMahan notes, “it would…clearly be unjustified for [Apparent Victim] to kill [Joker] if [he] knew that this gun was unloaded, and it is not
clear how [Apparent Victim’s] lack of morally relevant knowledge can establish a justification where otherwise there would be none.\textsuperscript{25} Thus, although Apparent Victim’s killing Joker would be subjectively permissible, it would not be objectively permissible.

Furthermore, as most would agree, Joker is liable to be killed only if killing him would be proportionate. And as we said, proportionality is partly a function of the wrongful harm to be prevented. More precisely, the wrongful harm to be prevented must be sufficiently serious for Joker to be liable to lethal defensive harm. But of course, there is no threat to Apparent Victim to be prevented. So killing Joker cannot be proportionate, and therefore, he cannot be liable to this harm.

Admittedly though, there is still something counter-intuitive about my claim that Joker is not liable to be killed by Apparent Victim. This claim commits me to the further one that Apparent Victim would wrong Joker by killing him. And perhaps it follows from this that Joker would have a justified complaint against Apparent Victim, which might provide grounds for Apparent Victim’s owing some compensation to Joker or his family, say e.g. paying his funeral expenses.\textsuperscript{26} All of this might seem a bit difficult to accept.

But I don’t find the idea that Apparent Victim might be obligated to provide some compensation to Joker or his family, say e.g. paying his funeral expenses, all that implausible. For despite the fact that he is blameless for his wrongful action, he is still

\textsuperscript{25} McMahan (2005): 391.

\textsuperscript{26} Thanks to David Black for suggesting this.
mora... responsible for it. He is responsible, however minimally, for violating the
Joker’s right against lethal harming. And although, as I will argue in the following
section, this minimal responsibility does not make Apparent Victim liable to lethal
preventive harm, it seems plausible that it would make him liable to some compensation
as a matter of corrective justice, or perhaps even some lesser preventive harm if that
would save Joker. This last point brings us to the next intuitive test for liability—the
counter-defense test.

3.3. Why Joker Lacks the Right to Defend Himself with Lethal Harm.

I argue that, although Joker is not liable to Apparent Victim’s lethal harm given that he
retains his right not to be killed, he nevertheless lacks the right to lethally harm Apparent
Victim in his own defense. This is perhaps the most counter-intuitive aspect of my view.

For if Joker is not liable to Apparent Victim’s lethal harm, why would he lack the right to
defend himself—i.e. why would Apparent Victim not be liable to Joker’s lethal defensive
harm? Furthermore, it seems that on my view Joker’s killing Apparent Victim would be
proportionate. Joker faces a very serious wrongful threat, and it is a threat for which
Apparent Victim is morally responsible, however minimal his responsibility might be.
And on my view, like McMahan’s, this could be sufficient moral responsibility to make
him liable to lethal harm. In short, I argue that, although Apparent Victim is potentially
liable to lethal defensive harm, he is not full-stop liable to it due to considerations of
comparative responsibility for the wrongful harm to be prevented. Even though Apparent
Victim is potentially liable to defensive killing, he is not liable to this harm given that
Joker is more responsible for the threat. Thus, since Apparent Victim retains his right not to be killed, Joker lacks the right to defend himself.

Let me begin by supporting this perhaps more controversial claim, that Apparent Victim is potentially liable to lethal harm—i.e. that he would be liable to lethal harm were it not for Joker’s being more responsible for the wrongful threat to himself.

3.3.1. The Case for Potential Liability of Apparent Victim.

Many might resist the claim that Apparent Victim is even potentially liable to lethal defensive harm by the Joker. After all, Apparent Victim is not to blame for the situation. So even if it were true that no one was more responsible than Apparent Victim for the situation, it might seem hard to believe that the Joker’s defensively killing the Apparent Victim would not wrong him. But I don’t find this too difficult to believe. First, while Apparent Victim would be non-culpable for killing the Joker, it does not follow that he would not be morally responsible for it. And following McMahan, it does seem plausible that minimal moral responsibility for a lethal threat, i.e. responsibility absent culpability, could be sufficient to ground liability to lethal defensive harm. To see this, let us reconsider the following case:

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27 My explanation for why Joker lacks the right to kill Apparent Victim (i.e. that his responsibility for the lethal threat to himself is greater) closely resembles McMahan’s (2011): 556. However, he goes further and suggests that comparative responsibility might also imply that Joker is liable to be killed, since, as McMahan argues, “[i]f the joker were wounded rather than killed in apparent self-defence, it does not seem that he would have a justified complaint” (ibid.). Thus he believes that Joker would not be wronged by being killed. I believe that McMahan is mistaken here for the reasons given at the end of the previous section.
**Breakdown**: Victim’s car breaks down in a remote area. He knocks on the door of an isolated farm to ask to use the phone. Unbeknown to him, there’s been a series of gruesome murders in the local area. Warnings have been issued to local residents to be wary of strangers. When Resident opens the door, she thinks Victim is the violent murderer coming to kill her and tries to shoot him.\(^{28}\)

Although not initially presented as one, *Breakdown* is an apparent threat case. Although Resident is justified in believing that killing Victim is necessary to save her own life, Victim, of course, poses no actual threat. Killing Victim would be pointless, and hence, impermissible. Victim, having done nothing wrong, retains his right against being harmed by Resident. Furthermore, although Resident is non-culpable for her contribution to the wrongful threat, she is minimally morally responsible for it, and this, along with the significance of her contribution to the threat (she poses it!), might make her sufficiently responsible for the threat such that she’s liable to lethal harm to prevent it. And all of this is supported by the strong intuition that Resident would be liable to lethal defensive harm by the Victim or some third party.

Now consider this alternative version of *Breakdown*:

**Breakdown 2**: Victim is driving in a remote area when he hears on the radio that there’s been a series of gruesome murders in the local area and that warnings have been issued to local residents to be wary of any stranger posing as a stranded driver asking to use the phone (the killer’s *modus operandi*). He figures he can get a good laugh by scaring one of the residents in the area, so he decides to pull over at one house and ask to use the phone. When Resident opens the door, she thinks Victim is the violent murderer coming to kill her and tries to shoot him.

As in the original version, Resident’s killing Victim would be pointless, and hence, impermissible. But while Resident is *potentially* liable to lethal defensive harm by

Victim (as supported by her being liable in *Breakdown*), she does not seem *full-stop* liable in *Breakdown 2*. And this, I argue, is due to the fact that Victim is *more* responsible than Resident for the lethal threat to himself. This is not the case in *Breakdown*, in which Resident is more responsible than Victim. And this difference explains the differing intuitions between the two cases. All of this supports my claim that Apparent Victim is *potentially* liable to lethal defensive harm by the Joker, even though he is not *full-stop* liable to the harm.

3.3.2. *The Case for Joker’s Being More Morally Responsible than Apparent Victim for the Lethal Threat to Himself.*

I have argued that Joker retains his right against being lethally harmed by Apparent Victim. Apparent Victim’s killing Joker would violate this right, and thus, it would wrong him. This is why Apparent Victim’s killing Joker would be impermissible. Nevertheless, I argued that Joker *lacks* the right to inflict lethal defensive harm in his own defense. And this, I claimed, is due to the fact that Joker is more morally responsible than Apparent Victim for the wrongful threat to himself. But how is it that the joker is more responsible for the threat than Apparent Victim? After all, it is Apparent Victim who would wrongfully kill the Joker. And that’s clearly a significant contribution to the lethal threat. Furthermore, although Apparent Victim would be non-culpable for his contribution, he’s still morally responsible for it. As for Joker, although he is culpable for his contribution to the threat to himself, this contribution seems to pale in comparison to that of Apparent Victim, such that it seems unlikely that his moral responsibility for
the threat exceeds that of Apparent Victim. After all, while it would seem apt to say that Apparent Victim killed Joker, it would seem rather odd to say that Joker killed himself.

While it’s true that Joker would not be the one to pull the trigger, this certainly does not entail that his contribution to the threat would be insignificant. Indeed, as we said earlier, the wrongful threat posed by Apparent Victim is *counterfactually dependent* on Joker’s contribution—causing Apparent Victim to believe that killing Joker is necessary to avert a wrongful threat. Were it not for the joker’s contribution, then Apparent Victim would not pose the lethal threat. As for the claim that it seems odd to say that the Joker killed himself, yet appropriate to say that Apparent Victim killed him, that is probably true given our common way of speaking about such things. But this, I argue, is due to the fact that it is *typically* the trigger-puller who is most responsible for a resulting killing. In these more typical cases, e.g. *Gunsmith*, it does seem apt to say that the shooter killed the victim, yet odd to say that a much less responsible party killed him. And even in cases like *Joker*, in which it is less clear who is more morally responsible for a lethal threat, it might sound a bit odd to say of one who does not pull the trigger that he did the killing, especially when he is the victim!

But consider:

*Suicide-by-Cop*: Victim wants to kill himself, and determines that the best way to do this is to pretend to grab for a nearby police officer’s gun. He has no intention of actually grabbing the officer’s gun and shooting him; he simply wants the officer to believe this, and thus believe that killing Victim is necessary to prevent the wrongful (apparent) threat to his own life.\(^{29}\)

\(^{29}\)Thanks to David Black for suggesting a case of this type.
In this case, it does not seem the least bit odd to say that Victim kills himself, hence the apt description ‘suicide-by-cop’. And this, I argue is due to the fact that Victim is largely responsible for the wrongful threat to himself, and that his responsibility for this threat far exceeds that of the police officer.

Of course, Joker does not seem as responsible for the lethal threat he faces as Victim does for his in *Suicide-by-Cop*. Victim in the latter case intends to bring about the wrongful harm to himself, while Joker merely has the wrongful intention of scaring Apparent Victim. Nevertheless, given the significance of Joker’s contribution and his being culpable to some degree for it, it’s quite plausible that his responsibility for the threat to himself exceeds that of Apparent Victim. While Apparent Victim’s contribution to the threat is also significant, he is non-culpable for it.

3.3.3. Revisiting Joker’s Liability.

Suppose I’m correct that Joker lacks the right to defend himself against Apparent Victim’s killing him, and that the reason for this is that Joker is more responsible than Apparent Victim for the lethal threat. If that’s true and it’s also true that Apparent Victim is potentially liable to defensive killing, then why isn’t Joker liable to lethal harm? If one individual is *more responsible* than another who is *potentially liable*, then why wouldn’t the more responsible party be liable?
Again, I believe that Joker’s being more responsible for the threat to himself does make it the case that he is not permitted to harm Apparent Victim in his own defense, but it does not make him liable to be killed, for although Joker is more responsible than Apparent Victim for the threat, he is not even potentially liable to it. And the reason for this is that Apparent Victim’s killing Joker would be disproportionate harm—there is no wrongful threat to be prevented that would outweigh the harm to Joker.

Conclusion.

Although it is plausible to hold that apparent threats like Joker are liable, I have argued that the theoretical cost of this position gives us good reason to reconsider this intuition. For if apparent threats like Joker are liable, then we must reject the instrumentality principle. I argued that the more plausible position is that Joker is not liable to be harmed, but that this claim is consistent with his not having the right to harm Apparent Victim. And this, I argued, is because he is more responsible than Apparent Victim for the lethal threat to himself. So although Apparent Victim is potentially liable to Joker’s defensive harm, he is not liable due to considerations of comparative responsibility.
ARTICLE 2: LIABILITY, RESPONSIBILITY, AND CULPABLE ATTEMPTERS.

Introduction.

We can distinguish between different types of moral reasons to harm. Retributive reasons to harm are most often invoked to justify punishment. If a person deserves to be punished with some harm, say because he has wrongfully harming someone, there is a positive reason to harm him regardless of any instrumental good that might result from the punishment, e.g. the prevention or deterrence of future crimes.

Other reasons for harming, however, seem to be grounded in the principles of distributive justice. These distributive reasons for harming, unlike retributive ones, are inherently instrumental. For example, lesser-evil-based reasons to harm arise only in circumstances in which harming a person, even an undeserving one, is necessary to prevent some greater evil, e.g. the harming of a substantially larger number of innocent people. Otherwise, we would have no reason to harm the person, assuming he is undeserving of the harm. Thus, lesser-evil situations are those in which harm befalling some person or persons is unavoidable. The harm is unavoidable in the sense that nothing we do can prevent everyone from being harmed. In these situations we are faced with a forced choice—either we allow the harm to befall some number of innocent people (the greater evil) or we harm a smaller number of innocent people (the lesser evil) to prevent that from happening.
So sometimes the most just way to distribute an unavoidable harm is to have some innocent persons suffer it, even though they are not at fault for the situation. But given that they are not at fault for the situation, i.e. they are not morally responsible for it, they maintain their right against being harmed. Thus, harming them infringes this right. So, although harming them might be all-things-considered permissible due to lesser-evil reasons, they are nevertheless wronged by this harm.

Like lesser-evil reasons for harming, liability-based reasons are inherently instrumental. As with lesser-evil reasons, liability reasons arise only when we are faced with a forced choice regarding how to resolve a situation of unavoidable harm. But while lesser-evil reasons count in favor of harming the innocent, liability reasons speak in favor of harming those who are morally responsible for the situation of unavoidable harm. And when those reasons are decisive, the just distribution of unavoidable harm is for the most responsible party, the liable one, to bear it.

To say that a person is morally liable to some harm implies that he would not be wronged by suffering it, unlike those who are permissibly harmed on lesser-evil grounds. The paradigmatic cases of liability are those in which an attacker is harmed to prevent a threat of wrongful harm that he poses. In these standard cases, we say that the unjust attacker, by virtue of his wrongful behavior, i.e. his posing the wrongful threat, makes himself

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1 I borrow this terminology from Jeff McMahan (2009) *Killing in War* (Oxford: OUP): 10. “When one thus permissibly acts against a right, I will say that one infringes that right, whereas when one impermissibly does what another has a right that one not do, one violates that right.” I will use the same distinction between a rights infringement and violation.
morally liable to defensive harming by his potential victim. He becomes liable to the harm since, by virtue of his wrongful behavior, he forfeits his right against being harmed in this way. And this rights-forfeit explains why the attacker is not wronged by the harm. Since he has no right against the relevant harm, he has no justified moral complaint against suffering it. Furthermore, the attacker’s liability provides the moral justification for the victim’s defensive action when there is little or no unintentional harm to innocent bystanders. These are the standard cases.

In standard cases like the above, wrongdoers become liable to defensive harm by causing a threat of wrongful harm. They cause the threat either by posing it themselves or by contributing to a threat posed by another. And their causing the wrongful threat makes them sufficiently morally responsible for the threat, such that they become liable to defensive harm to prevent it. Thus, the standard cases are consistent with the following plausible principle on liability to defensive harm:

**Responsibility Principle:** An agent, A, is morally liable to a harm, H, to prevent some wrongful threat, T, only if P is sufficiently morally responsible for T.

But what counts as being sufficiently morally responsible for T? In the standard cases, wrongdoers are sufficiently morally responsible for T given that they are culpable, or blameworthy, for T. Indeed, some argue that culpability for T is required in order to have sufficient moral responsibility to render one liable to defensive harm. Others like

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2 I will use the moral terms ‘culpable’ and ‘blameworthy’ synonymously.

Jeff McMahan, however, argue that one need not be culpable for T to have sufficient moral responsibility. According to McMahan, one who has just minimal moral responsibility for T, i.e. non-culpable moral responsibility, is potentially liable to H.\textsuperscript{4} Despite this disagreement, both accounts treat the responsibility principle as bedrock—A cannot be liable to H to prevent T unless A is sufficiently morally responsible for T, whatever the required minimum level of moral responsibility for T might be.

While the responsibility principle is intuitively plausible, some now argue that we should reject it. This is due mostly to consideration of cases involving what we will call culpable attempters—those who intend and attempt to inflict wrongful harm on their victim, but nevertheless fail, due to reasons independent of their responsible agency, to do so. Here is one such case:

\textit{Basement Window:} Aware that a First Villain plans to kill you, you begin to carry a gun. On one occasion you have the opportunity to empty the bullets from his gun and you do so. Immediately thereafter, he confronts you in an alley and tries to fire. As he continues to pull the trigger in frustration, you see that a Second Villain is preparing to shoot you from behind a narrow basement window (it is a tough neighborhood). Unable to flee in time and also unable to fire with accuracy through the tiny window, you can save yourself only by shooting First Villain, causing him to slump in front of the window, thereby blocking Second Villain’s line of fire.\textsuperscript{5}

Some find it compelling that, although First Villain is not responsible for the wrongful threat posed by Second Villain, First Villain is nevertheless liable to be killed to prevent

\textsuperscript{4} See McMahan (2009): 162-7. I will give a more thorough treatment of the argument for the liability of minimally responsible threats later.

it. And perhaps that’s because it seems that he would not be *wronged* by the harm—he would have no justified moral complaint against suffering it. And while the source of the current threat is from someone other than the culpable attempter, he seems liable to defensive harm to prevent it perhaps because, by virtue of his culpable attempt, he is sufficiently responsible for a morally comparable wrong. And perhaps this wrong makes him liable to defensive harm to prevent the wrongful threat of another.

While it is tempting to conclude that culpable attempters like First Villain can be liable to harm, this conclusion comes at a high theoretical cost. For if First Villain can be liable to harm, then it seems we must reject the responsibility principle. This is because, while First Villain *is* responsible for his culpable attempt, he is not responsible for the effective threat posed by Second Villain.

In this essay, I defend the responsibility principle primarily by arguing that cases like *Basement Window* give us no good reason to reject it. I argue that, while it might seem that First Villain would not be wronged by Victim’s harm, this claim, to the extent that it is true, is best explained by desert-based reasons for harming.

Before we begin, I would like to make one final point of clarification. Although liability and lesser-evil reasons can be decisive in the just distribution of unavoidable harm, as I said earlier, the main difference between the two is this: one who is liable to a harm is not wronged by it, while one who is permissibly harmed by virtue of lesser-evil reasons *is* wronged by the harm. Again, this is because a liable individual, by virtue of his wrongful
behavior, has forfeited his right against the relevant harm, while the non-liable individual maintains this right. Thus we might define ‘liability’ as the just distribution of unavoidable harm, where the harm does not wrong a person, i.e. where the person has forfeited his right against the relevant harm.

But this might not be quite right either. An individual who deserves some harm, H, is also not wronged by H. And while desert is most often used to justify punishment retributively, it’s quite plausible that it also has implications for distributive justice, or more specifically, the just distribution of unavoidable harm. For if a person who is deserving of a morally comparable harm, C, to H, finds himself in a situation where someone must be harmed by H, the just distribution of H might very well be for him to suffer it, even if he is in no way responsible for the situation of unavoidable harm.

Given this, one might define ‘liability’ in a way that allows that merely deserving individuals, i.e. those who bear no responsibility for a situation of unavoidable harm, can be liable. In other words, we might simply say that liable individuals are those who forfeit the right against some unavoidable harm being imposed on them, whatever the reason for this forfeiture. If this is right, then responsibility for the situation of

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7 One might even say that liable individuals are those who simply lack the right against unavoidable harm. This might allow that individuals who consent to being harmed, even when they neither deserve the harm nor are responsible for the situation, are liable to be harmed. Or perhaps we might simply define liability as the just distribution of unavoidable harm, where those who are permissibly harmed on lesser-evil grounds would be liable as well. In any case, these various terminological choices are not so important.
unavoidable harm is not required for liability—the responsibility principle would be false.

But we need not get bogged down in this terminological debate. Even if we accept the broader definition of ‘liability,’ it remains an important project to distinguish responsibility-based reasons for harming from desert-based ones in forced-choice situations of unavoidable harm. Avoiding conflation of responsibility and desert is important for at least one reason. The concept of retributive justice is quite controversial. Indeed, some simply deny that individuals can ever deserve harm, or at least significant (e.g. lethal) harm. They might argue that harm can only be justified on instrumental grounds. So if there is no such thing as desert-based reasons for harming, we had better get clear on the extent to which our intuitions on liability are grounded in potentially false, yet pervasive, beliefs regarding desert.

In any case, I will not be arguing for or against the claim that individuals can be deserving of significant harm. My arguments regarding liability, or liability absent desert-based reasons for harming if one prefers, rely only on the claim that our intuitions on the liability of culpable attempters are heavily influenced by our beliefs about desert, however erroneous the latter might be. In any case, in order to avoid the terminological debate and for ease of expression, I will simply assume that desert-based reasons for harming, even if they do exist, do not contribute to making one liable.

What is important is that we distinguish desert, responsibility, and lesser-evil-based reasons for harming.
This essay is organized as follows. In section 1, I discuss the concept of proportionality as an inherent feature of liability. In section 2, I consider an often-used intuitive test for liability—the *wronging test*. In section 3, I explain the potential theoretical cost of rejecting the responsibility principle. These three sections will lay the groundwork for my arguments against First Villain’s liability in section 4.

1. Proportionality and Liability.

Proportionality in the ethics of defensive harming is, generally speaking, a matter of comparing the severity of a wrongful harm to be prevented with the harm that would result from its prevention. If the latter is deemed excessive in relation to the former, the defensive action is typically impermissible. But there are two ways in which defensive harm might be excessive in relation to the wrongful harm to be prevented, i.e. there are two different ways in which defensive harming might be disproportionate.

1.1. Narrow and Wide Proportionality.

Most claims about proportionality, particularly those made in the context of war, are claims about whether a particular action causes excessive harm, usually as an unintentional side-effect, to innocent persons. For example, if an attacker threatens me with wrongful lethal harm, under usual circumstances I am morally permitted to kill him in self-defense, assuming that killing him is necessary to prevent my own wrongful

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8 One exception would be an action justified on lesser-evil grounds. E.g. It could be permissible to inflict disproportionate harm on an individual in order to prevent some great calamity.

9 Jeff McMahan was the first to articulate this distinction between narrow and wide proportionality. Most of my discussion in this section echoes McMahan (2009): 20-21.
killing. But suppose that I could kill him in self-defense only by blowing up a bridge on which ten innocent bystanders are also standing. In this case, my defensive action would very likely be impermissible given the excessive harm, albeit unintentional, my action causes. Although preventing my own wrongful death under usual circumstances is sufficient to render killing my attacker in self-defense permissible, excessive harm to innocent individuals far would far outweigh this good consequence. This would make my action impermissible due to considerations of wide proportionality.

But there is also a limit to the amount of defensive harm that we can inflict on potentially liable, i.e. non-innocent, individuals, beyond which any further harm would be deemed excessive in relation to the wrongful harm to be prevented, independent of any considerations of wide proportionality. Following McMahan, we can call this the narrow proportionality constraint on defensive harming. Throughout the rest of this essay, I will be focused primarily on narrow proportionality, and unless otherwise stated, all future uses of ‘proportionality’ will be used to refer to it.

Most accounts of liability agree that proportionality is internal to the concept. Although we might often say that one is liable without qualification, this is really shorthand for saying that one is liable to a particular amount of harm.\textsuperscript{10} This is the proportionality constraint on liability—one can only be liable to proportionate harm. If one is harmed

\textsuperscript{10} Helen Frowe (2014) makes a similar point in Defensive Killing (Oxford: OUP): 118. “...it seems that proportionality must be internal to liability, because one cannot simply ‘be liable’, but must rather be liable to something—namely, to suffer a certain amount of harm. Stipulating the amount of harm one is liable to seems to be the work of the proportionality requirement.”
with disproportionate harm, i.e. harm to which one is not liable, then one is wronged by that harm.

While most agree that proportionality is internal to liability, the more controversial matter is what determines whether a given harm is proportionate. We now turn to this question.

1.2. That Proportionality is Partly a Function of the Wrongful Harm to Be Prevented.

As with wide proportionality, narrow proportionality is partly a function of the severity of the wrongful harm to be prevented. The following case is compelling intuitive support for this claim:

*Culpable Pincher:* A is about to pinch V for no good reason. He simply wants to inflict a bit of pain on V against V’s will. V can prevent A from doing this only by killing him.\(^{11}\)

Although A wrongfully threatens V with a pinch and V’s killing A is the only way to prevent this wrong, it seems pretty clear that it would be impermissible for V to do so. Moreover, it seems that V’s killing A would wrong A, as A’s threatening to pinch V doesn’t seem serious enough to cause the forfeiture of A’s right not to be killed. If all this is true, then A is not liable to be killed. A is not liable to be killed since this harm would be disproportionate to the harm to be prevented—a pinch.

Of course, A would likely be liable to some lesser harm if that would prevent V from being wrongfully pinched. If V’s pinching A preemptively, or perhaps even punching

\(^{11}\)This is a slightly different version of a case offered by McMahan (personal conversation).
him, would prevent A from wrongfully pinching V, then it might be permissible for V to do this. Moreover, it would seem that V’s preemptively harming A in this way would not wrong A. Thus, it seems that A would be liable to this lesser harm to prevent V from being wrongfully pinched.

In short, an agent is not liable to any amount of harm in order to prevent a threat of wrongful harm. The amount of defensive harm to which he is potentially liable is limited by the amount of wrongful harm that would be prevented by harming him.

**1.3. That Proportionality is also a Function of One’s Moral Responsibility for the Wrongful Harm to Be Prevented.**

But there are quite plausibly other variables that determine whether defensive harm is proportionate. Following McMahan, it seems that proportionality is also a function of the degree of one’s responsibility for the wrongful harm to be prevented. McMahan makes this point here:

> [Moral] [r]espponsibility for an unjust threat can vary in degree, and liability varies concomitantly. A person’s liability is therefore greater when his action is culpable, and the degree of his liability varies with the degree of his culpability. The degree of a person’s liability is manifest in the severity of what may be done to him without wronging him—that is, in the stringency of the proportionality requirement.\(^{12}\)

Here’s a case that supports the claim that responsibility affects the proportionality constraint on defensive harming:

**Fully Culpable Pincher:** A is about to pinch V because he wants to kill him and, for whatever reason, he falsely believes that pinching V will do the trick. V knows all this and can prevent A from pinching him only by breaking his arm.

In *Culpable Pincher*, A threatens to pinch V because he intends to inflict a small amount of pain on V. In *Fully Culpable Pincher*, A threatens to pinch V in order to kill him. This difference accounts for the fact that A is more culpable (i.e. more responsible) for pinching V in *Fully Culpable Pincher* than he is in *Culpable Pincher*. And this fact seems to support the intuition that A is liable to a broken arm when he is fully culpable, and that he would not be liable to it in the first case, even if breaking his arm were necessary to prevent V from being pinched.

Of course, one might debate the specifics of these cases, in particular, whether a broken arm is in fact proportionate in *Fully Culpable Pincher*. Or perhaps one might believe that a broken harm would be proportionate in both cases if that were necessary to prevent the pinching. Perhaps that’s right. But my point is simply that whatever the amount of harm to which A is potentially liable in *Culpable Pincher*, he is potentially liable to more harm in *Fully Culpable Pincher*. And if that’s the case, then responsibility, along with the wrongful harm that would be prevented, affects the proportionality constraint.

Not all are convinced that responsibility is relevant to proportionality, and hence liability, in the way I have described. Helen Frowe explicitly rejects this idea:

I find the idea that proportionality is sensitive to moral responsibility quite puzzling, especially in light of what McMahan says about the permissibility of killing even fully excused threats in self-defence. For example, McMahan thinks it permissible to kill Resident in *Breakdown*:
Breakdown: Victim’s car breaks down in a remote area. He knocks on the door of an isolated farm to ask to use the phone. Unbeknown to him, there’s been a series of gruesome murders in the local area. Warnings have been issued to local residents to be wary of strangers. When Resident opens the door, she thinks Victim is the violent murderer come to kill her and tries to shoot him.\textsuperscript{13}

Frowe rightly points out that on McMahan’s view, Resident is liable to be killed in self-defense even though she is fully excused for her wrongful threat to Victim. And this, Frowe argues, seems inconsistent with the claim that proportionality is sensitive to moral responsibility since, given that Resident is fully excused for posing the wrongful threat, she “has only a low degree of moral responsibility for the threat she poses.”\textsuperscript{14} So how, one might ask, could it be proportionate to kill her?

Frowe then suggests that on McMahan’s account, what’s really doing the work regarding degrees of liability is one’s causal (not moral) responsibility for a threat. She cites McMahan’s argument for the claim that most non-combatants are not liable to killing in war (while most unjust combatants are) as evidence of his conflating the two concepts:

The defence of the claim that non-combatants lack sufficient moral responsibility focuses not, for example, on their excusable ignorance with respect to what they do, but rather on the causal triviality of what they do. What makes killing non-combatants disproportionate, then, is not that proportionality is sensitive to moral responsibility, but rather that it is sensitive to causal contributions.\textsuperscript{15}

\textsuperscript{13} Frowe (2014): 173. Frowe’s case is based on one presented by McMahan (2009): 164.

\textsuperscript{14} Ibid.

\textsuperscript{15} Ibid.: 174.
Frowe is correct that McMahan focuses on the “causal triviality” of what typical non-combatants contribute to war in order to argue that most are not liable to be killed. But to do this is not to conflate moral and causal responsibility. Rather, it is to recognize that one’s degree of moral responsibility for a threat is a function not only of any excusing conditions for one’s contribution to the threat, but also the *significance* of one’s contribution to the threat. So if McMahan is right that non-combatants typically contribute substantially less to the total threat of war than do combatants, it follows that, other things being equal, they are typically less *morally* responsible for the threat of war. And conversely, even if unjust combatants are just as excused for their contributions as are non-combatants, the former are likely to be more morally responsible for the total threat of war given that they are more *causally* responsible for it than are non-combatants.

The above rationale is also what underlies McMahan’s claims about the liability of non-culpable threats like the Resident. Even though Resident is fully excused for her wrongful threat, it does not follow, as Frowe claims, that she is minimally morally responsible for the total threat to Victim. And that is because Resident is fully causally responsible for the total threat—she poses it. This would plausibly raise her level of moral responsibility for the threat, even while being fully excused for her contribution, to a non-negligible level, a level perhaps sufficient for liability to lethal harm.\(^\text{16}\)

\(^{16}\) McMahan refers to fully excused threats like the Resident as “minimally [morally] responsible threats.” This terminology is a bit misleading given that the minimally responsible threats McMahan discusses *pose* the total wrongful threat. Thus, they are fully *causally* responsible for the total threat, which, together with their minimal moral responsibility for that contribution, entails that they have a non-negligible degree of
Frowe then goes on to argue, contra McMahan and Cecile Fabre, that proportionality is not sensitive to the degree of one’s causal contribution either. More specifically, she criticizes the view that “any kind of liability-based account of defensive killing must look at what non-combatants do as individuals, not merely invoke the results of group endeavors.”

Frowe then presents the following case to refute this view:

Hit: Mafia Boss wants to take Victim out, but he cannot afford to hire Assassin, who is extremely skilled and thus extremely expensive. Mafia Boss has a whip-round amongst all the members of his mob, none of whom really like Victim. Everyone coughs up a few extra pounds for the assassination fund.

Frowe’s argues that on the view described above, none of the members of the mob would be potentially liable to be killed as a means of saving the victim. And this is because, as Frowe points out, each of the members’ contributions is very small, and very likely too small to make killing any of them proportionate if proportionality is sensitive to the degree of one’s causal contribution as McMahan and Fabre believe. It might seem that on their view, perhaps only the assassin and the mob leader would be potentially liable, given that each of their contributions are much more substantial. But, Frowe suggests, whatever the responsibility threshold is for liability to lethal harm, it seems doubtful that individual members reach it. She concludes in the following way:

moral responsibility for the total threat, despite the fact that they are fully excused for it. It would be more accurate to refer to those who contribute minimal amounts to a total harm and are fully excused for this contribution (e.g. some non-combatants) as minimally responsible threats.

17 Frowe (2014): 175.

18 Ibid.
Fabre is right that an individual’s liability to defensive harm is determined by her individual contribution to an unjust threat. But she is wrong to focus on the extent to which an individual contributes to the threat rather than on the magnitude of the threat to which she contributes. We do not care, for the purposes of liability, how much money each member of the mob gives in *Hit*—about the extent of their contribution to the assassination fund. All we care about is the fact that they gave money to fund a lethal threat. And because they funded a lethal threat, they are liable to lethal defence. Proportionality is about the harm one helps bring about—the threat that faces a victim partly as a result of one’s behaviour.¹⁹

So on Frowe’s view, the size of one’s contribution to a wrongful threat is irrelevant to questions about proportionality and liability. All that matters is the size of the threat to which one contributes. This is the lesson we are supposed to draw from *Hit*. In *Hit*, all that matters is that each of the members contributes to a lethal threat. This is what makes them potentially liable to lethal harm despite the fact that each of them contributes very little to this total threat.

Most, including McMahan and Fabre, would certainly agree with Frowe that proportionality, and hence liability, is sensitive to the size of the total threat. After all, as we said earlier, proportionality is (partly) a function of the wrongful harm to be prevented. There is no disagreement here. The disagreement is over whether the size of one’s contribution to the total threat is relevant. And there are two reasons why I think Frowe’s *Hit* case is not successful in establishing the irrelevance of that.

First, while I agree with Frowe that each of the members is potentially liable to lethal harm, I’m not convinced that McMahan’s or Fabre’s view implies otherwise. And that’s

¹⁹ Ibid.: 177.
because in *Hit*, while each of the members’ contributions are small in size, they are nevertheless *significant* since the assassination’s taking place is counterfactually dependent on each of them. Of course, this is not explicit in *Hit*, but it does seem to be implied in the case. And I suspect that this is one source of the intuition that each of the members is potentially liable to lethal harm.

Second, even if we concede that the size of each of the members’ contribution would not be significant enough to make killing any of them proportionate were they *non-culpable* for their contribution, it seems pretty clear that each of the members in *Hit* is *culpable* for contributing to the fund. Recall that the members are described as not particularly fond of Victim, and there is no suggestion of duress or non-culpable ignorance on the part of any of the members. Indeed, each of them seems fully culpable for their contribution to the fund. And this, quite plausibly, renders each of them sufficiently responsible for the lethal threat to Victim (so that killing them would be proportionate) despite, per our current concession, their insignificant causal responsibility for it. Thus, a proponent of McMahan’s view can account for the strong intuition that killing any one of the members of the mob would be proportionate.

Of course, as we have already seen, Frowe denies that proportionality is sensitive to the level of one’s moral responsibility for one’s contribution, and so she would deny that each member’s being fully culpable for his contribution is doing any of the work
regarding their liability to lethal harm. But if that’s correct, then we should judge all the members in the following case no differently than we judge those in *Hit*: 20

*Hit 2*: Mafia Boss wants to take Victim out, but he cannot afford to hire Assassin, who is extremely skilled and thus extremely expensive. Mafia Boss tells the members of his mob to each cough up a few dollars for a “special” fund. The older members of the group all know from experience that they will be contributing to Victim’s assassination, and they are happy to do so. However the newer members of the group, although they have good reason to believe that their money will contribute to some illicit activity, do not know it is for an assassination. Furthermore, they know that if they start asking questions, they will be killed. Everyone coughs up a few dollars for the fund.

If proportionality is not sensitive to one’s level of moral responsibility as Frowe argues, we would have no good reason to kill one of the older members of the group instead of one of the newer ones in order to save Victim. That the newer members are more culpable for their contributions by virtue of their knowledge and willingness to contribute would be morally irrelevant in deciding whom we should kill to save Victim. All of that seems very implausible. Perhaps, despite their excusing conditions, the new members would be liable to lethal harm if this were necessary to save Victim, but surely we have more reason to harm the older members if killing an older or newer member would be equally effective. If that’s correct, then proportionality must be sensitive to the level of responsibility for one’s contribution.

Ultimately then, *Hit* is unsuccessful as a counterexample to McMahan and Fabre’s view. Despite the small size of each member’s contribution to the fund, it still seems that each of their contributions is significant. That seems to matter with regard to their potential

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liability. And even if we concede that their contributions are not very significant, their level of culpability for their contributions does seem to affect their potential liability. We can see this pretty clearly when we contrast the potential liability of the newer and older members in *Hit 2*.

Let us conclude with one final case that demonstrates that proportionality, and hence liability, is sensitive to both the significance of one’s contribution to a threat and one’s level of moral responsibility for that contribution:

*Bullies*: Tim has suffered cruel mental and physical bullying attacks from several of his classmates over the past six months. As a result of these uncoordinated attacks, Tim has reached his breaking point. The next attack, however slight, will cause him to commit suicide. Bob, who has never bullied Tim before and knows nothing about the previous attacks on Tim nor of his mental state, decides to tease Tim about the shoes he is wearing that day just for a laugh. Tim, pushed over the edge by this final attack, kills himself later that night. Tim’s death could have been prevented only by killing Bob before he teased Tim.

It seems clear to me that Bob is not liable to be killed to save Tim. Perhaps he *would* be liable to a broken arm if that would save Tim, but *killing* Bob to save Tim is intuitively disproportionate. Of course, killing Bob would prevent a seriously wrongful harm; that part of the proportionality equation seems satisfied. But Bob does not seem sufficiently morally responsible for that total harm. And the best explanation for this is that Bob’s contribution to the total threat is not substantial enough to make him sufficiently responsible for it. And all this seems true despite the fact that he is culpable for his contribution.
This is not to say that Bob’s contribution would not render him liable under different circumstances. Although Bob is culpable for his contribution, we can imagine circumstances under which he would be even more culpable, so much so that he would perhaps be liable to lethal harm. For example, suppose that Bob knew about all the previous attacks and as a result had a pretty good idea that his teasing Tim could send him over the edge. In this case, it seems plausible that Bob would be liable to lethal harm, or at least harm more serious than a broken arm. This again supports the claim that proportionality is sensitive to the level of one’s culpability for one’s contribution to a threat, not just the significance of one’s contribution.

2. The Wrongoing Test—An Intuitive Test for Liability.

As McMahan notes, “[A]t least part of what it means to say that a person is liable to attack is that he would not be wronged by being attacked, and would have no justified complaint about being attacked.” And one who is liable is not wronged by being attacked since, according to McMahan, his “being liable to attack just is his having forfeited his right not to be attacked, in the circumstances.” This last part has invited a great deal of confusion and is perhaps partially responsible for the popularity of the wronging test. According to the wronging test, in order to determine whether a certain wrongdoer is liable to some harm, we can ask ourselves “Would he be wronged by the harm?” If there is widespread agreement that he would not be wronged by the harm (negative test result), this is supposed to be good evidence that he is liable to the harm.


22 Ibid.: 10.
And one way in which we might see that one would not be wronged by some harm would be to see that one has no justified complaint against suffering it. On the other hand, if one would be wronged by some harm (positive test result), then one is not liable to it.

This test, however, can be misleading, particular in the case of negative test results. In order to see this more clearly, let us first consider more carefully the concept of wronging harm.

In the language of rights, we can say that we all have the right against suffering pointless physical harm. This is a claim right that imposes a corresponding duty on potential threats to not harm us, such that when they do attack us, they violate this duty. And as Leif Wenar notes, “The violation of any duty may be wrong (it may be wrong not to give to charity), but the violation of a directed duty is a wronging of the being to whom the duty is owed: it wrongs that being.” It follows from all of this and what we have said about liability that individuals who would be wronged by some harm are not liable to it, and of course, by contraposition, that individuals who are liable to some harm would not wronged by it.

What does not follow, however, is that individuals who would not be wronged by some harm are liable to it. And this is because, once again, non-wronging harm requires only non-liability.

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that an individual merely lack the right against the relevant harm, whatever the reason for
the absence of this right. And there are at least two other possible reasons for the lack of
a right against being harmed. An individual might lack the right by virtue of his consent
to be harmed in the circumstances. Consenting individuals waive their right against the
relevant harm, and so no right is violated in harming them. Thus, they are not wronged
by the harm. Liable individuals, on the other hand, forfeit their right against the
relevant harm, regardless of any consent on the matter. And they do so by virtue of some
wrongful behavior. But the latter is true of deserving individuals as well. And so even
non-wronging harm in the absence of consent does not entail liability to that harm due to
the possibility of desert-based reasons for harming.

Of course, a negative result on the wronging test could be a reliable indicator of liability
provided we could rule out consent-based and desert-based reasons for harming in a
particular case. And perhaps many who employ the wronging test are confident that they
are able to do this. I am not as confident. While it might be fairly easy to rule out
consent as a basis for non-wronging harm, at least in the cases we will consider\textsuperscript{25}, I am
much less confident that we can do the same with desert. Indeed, I will argue that our
intuitions on the liability of culpable attempters are heavily influenced by desert-based
reasons for harming.

\textsuperscript{24} It is a further question whether mere consent to harm can be sufficient for all-things-
considered moral permissibility to harm a person.

\textsuperscript{25} Although even ruling out consent as the basis for non-wronging harm might not be so
easy in other cases, particularly those involving ineffective \textit{combatants}, where it might be
that combatants consent to being harmed \textit{ex ante} by virtue of their voluntary participation
in a war (conscripts would be a different matter of course).

First, let’s review the case:

*Basement Window*: Aware that a First Villain plans to kill you, you begin to carry a gun. On one occasion you have the opportunity to empty the bullets from his gun and you do so. Immediately thereafter, he confronts you in an alley and tries to fire. As he continues to pull the trigger in frustration, you see that a Second Villain is preparing to shoot you from behind a narrow basement window (it is a tough neighborhood). Unable to flee in time and also unable to fire with accuracy through the tiny window, you can save yourself only by shooting First Villain, causing him to slump in front of the window, thereby blocking Second Villain’s line of fire.\(^{26}\)

Although McMahan suggests that First Villain is liable to be killed to prevent the wrongful harm posed by Second Villain, he recognizes this position might come with a substantial theoretical cost:

These cases [like *Basement Window*] suggest, at least to many people, that we should accept an extended criterion of liability to defensive killing that recognizes liability for culpable attempts. But why stop there? It seems arbitrary to draw the line at attempts. Suppose that in *Basement Window*, the first villain follows [Victim] into the alley with the intention of killing [him], but decides to check his gun before firing. Just as the second villain appears in the window, the first villain discovers that his gun is empty…[T]he only way [Victim] can prevent the second villain from killing [him] is to kill the first villain, who not only poses no threat but also now makes no attempt to kill [Victim]—though he would kill [Victim] if he could…

…What if [first villain] is not now attempting to harm [Victim] but made an attempt on [Victim’s] life earlier in the day? Or a month ago? What if, instead, he made an attempt on someone else’s life a year ago? What if he is not now attempting to kill anyone but is a murderer who was never punished?…

…I find it plausible that [first villain] would not…be wronged if [Victim] were to kill him. But once liability is divorced from culpability for an actual threat, I do not know where to draw a principled line at which culpability ceases to be a basis of liability.\(^{27}\)

\(^{26}\) From McMahan (2005): 391.

\(^{27}\) Ibid.: 392-3.
In short, we might worry that First Villain’s being liable to Victim’s lethal harm commits us to what Helen Frowe calls the *broad view* of liability, which she distinguishes from the *narrow view*:

A person is *narrowly* liable to be harmed if she is liable to be harmed only to avert the particular threat for which she is responsible. A person is *broadly* liable to be harmed if, once she is morally responsible for posing an unjust threat, she is liable to harm to avert any unjust threat, provided the harm we inflict upon her is proportionate to the threat for which she is responsible.\(^\text{28}\)

While the narrow view of liability is consistent with the responsibility principle, the broad view is not. The broad view allows that an agent could be liable to harm to prevent a threat for which he is not responsible. According to the broad view, so long as an agent is responsible for a wrong morally comparable to the current threat, she could be liable to harm to prevent it. This might entail, as McMahan suggests above, that one who culpably attempted to murder a different Victim a year ago could be liable to be killed to prevent the current threat to Victim in *Basement Window*. That seems counter-intuitive to me. What seems less counter-intuitive to me is that this attempted murderer, particularly when he has not been punished for his crime, would not be wronged by Victim’s lethal harm, or at least that he would be wronged less than Victim would be were Victim to suffer the lethal harm. But I think that desert-based reasons for harming can support these claims. We need not reject the responsibility principle to explain all this. Before I support my desert-based explanation for First Villain’s not being wronged, let us consider the case for the liability-based explanation.

4. The Liability of Culpable Attempters.

Let’s begin by stating what I take to be some uncontroversial claims about the case. First, we can say that, other things being equal, it would be, from an impersonal moral point of view, better that First Villain rather than Victim dies. Second, we can say that, if it were possible for Victim to shoot Second Villain to eliminate the threat, then that’s what he ought to do—Second Villain would be liable to the harm, while First Villain would not be. And so in this case, it would be impermissible to shoot First Villain as a means to eliminating the threat. Third, we can say that First Villain is culpable for his wrong of attempting to kill Victim, and furthermore, that he would have killed Victim had he gotten his way. He intended to kill Victim, attempted to do it, but failed to do so. And his failing to do so was purely a matter a moral luck. Of course, none of the above entails that First Villain is liable to be killed, but some additional things might be said to support this further claim.

4.1. The Case for Liability.

The main argument for First Villain’s being liable to lethal harm seems to rely heavily on consideration of the wrongdoing test. McMahan invokes the test here:

My intuition, which is not shared by everyone, is that [Victim] would be justified in killing the first villain. Because he is culpably attempting to pose the same threat [Victim] in fact face[s] from another agent, it is difficult to accept that [Victim] would wrong him by killing him in order to avert that threat…

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Although McMahan does not explicitly claim in the above passage that First Villain therefore seems liable to be killed, he has suggested this elsewhere, and he has been quite deliberate in attempting to rule out desert-based reasons for harming as the source of the potentially non-wronging harm to First Villain. Nevertheless, as far as I can see, he has failed to provide any arguments that are successful in doing so.

McMahan’s rationale for the possibility that First Villain would not be wronged by Victim’s lethal harm is worth emphasizing: “Because he is culpably attempting to pose the same threat [Victim] in fact face[s] from another…” This might suggest the following alternative to the responsibility principle:

**Responsibility Principle 2**: An agent, A, is liable to a harm, H, to prevent some wrongful threat, T, only if A is sufficiently morally responsible for T, or for a wrong morally comparable to T and A would have been liable to H had he been just as responsible for T.

And one might think that First Villain’s culpable attempt on Victim’s life is a morally comparable wrong to Second Villain’s effective lethal threat. Thus, although First Villain’s being liable to lethal harm is not consistent with the responsibility principle, it

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30 McMahan (personal conversation).

31 Shortly, I will offer arguments that desert-based reasons for harming are the source of non-wronging harm to First Villain, if in fact he is not wronged by being killed.


33 Although McMahan does not explicitly state and defend the Responsibility Principle 2, it is a plausible principle that is consistent with McMahan’s explicit rationale for the possibility that First Villain is liable.
might be consistent with the above alternative principle, so long as First Villain’s culpable attempt is morally comparable to Second Villain’s threat.

But even if we reject the responsibility principle in favor of this alternative, it is difficult to see how First Villain’s being liable to lethal harm would be consistent with even the latter. While First Villain’s culpable attempt on Victim’s life is wrong, it seems implausible that it is morally comparable to Second Villain’s effective threat. Second Villain’s effective threat will kill Victim unless defensive action is taken. It will violate Victim’s right against wrongful harm, and thus, it will wrong him. And while it’s true that First Villain would harm Victim were he to do that which he intends, he has no chance of succeeding. And so even if the mere imposition of risk of harming could constitute a wrong comparable to an effective threat, First Villain’s attempt imposes no risk of harm.34

But let’s grant for the sake of argument that First Villain’s attempt is a morally comparable wrong to Second Villain’s threat, and thus, that First Villain’s being liable to lethal harm by Victim is consistent with the alternative responsibility principle. I have a more fundamental worry about this principle. I believe it is motivated by desert-based beliefs regarding First Villain. I will defend this claim a bit more in the next section, but for now let us note the following. The alternative principle does make an implicit appeal to some kind of notion of proportionality, but it is one that seems more consistent with the retributivist type than it does with the liability type (i.e. narrow proportionality). The

34 I’ll come back to this point shortly.
former, although somewhat mysterious, is simply a function of the gravity of one’s wrong, where this is a function of the severity of the wrong and one’s responsibility for it.\textsuperscript{35} And while, as I mentioned previously, this measure is most often applied to determine proportionate punishment, it seems plausible that it would also be relevant to situations of unavoidable harm. For if a person is deserving of lethal harm by virtue of some unrelated wrong, the just distribution of harm might very well be for him rather than an innocent bystander or even a minimally responsible person to be killed to prevent a wrongful harm since the deserving individual would not be wronged by this amount of harm (because he deserves it).

Stopping short of claiming that First Villain is liable to be killed in \textit{Basement Window}, Victor Tadros does say this:

> One deficiency of my discussion in \textit{The Ends of Harm} is that I did not consider in depth the possibility that the fact that [First Villain] is attempting to kill you makes a difference to [First Villain’s] liability to be harmed to avert a threat. Compare [First Villain] and an innocent bystander, B. Does the fact that [First Villain] is attempting to harm you make a difference to the costs that may be imposed on [First Villain] to avert the threat posed by [Second Villain] when compared with B?\textsuperscript{36}

Tadros does seem right that, even if First Villain is not liable to be killed, his culpable attempt on Victim’s life might constitute a morally relevant difference between First Villain and B. And this difference might support the claim that, although B would not be


liable to lethal harm to save Victim, First Villain would be liable to some smaller amount. And if that’s correct, then the responsibility principle is false.

While it does seem that there is a morally relevant difference between First Villain and B, this difference need not make it the case that First Villain is liable to some harm. It might just mean that it would be better from an impersonal moral view that First Villain rather than B suffer some harm, even if both would be wronged by that harm. After all, First Villain is culpable for a wrong, while B is completely innocent. So perhaps it’s better that a wrongdoer suffer a harm than to have an innocent person suffer it. That claim seems uncontroversial, but it does not entail that First Villain would be liable to that harm. And even if we concede that First Villain would not be wronged by some harm to prevent the lethal threat to Victim, liability-based reasons for harming need not be behind this. Indeed, I will argue in the next section that if First Villain would not be wronged by lethal harming (or some lesser harm), desert-based reasons could explain this fact.

But one might insist that, even if there is no morally relevant difference between First Villain and B, it does seem that we would have a reason to have First Villain bear some lesser cost rather than allow Victim to be killed. That seems right, but this can be explained by lesser-evil reasons for harming. While most cases of lesser-evil justified harm involve the permissible harming of a non-liable individual to save a much larger number of people, it seems plausible that we could be justified in inflicting a very small harm on a non-liable person in order to save one person from a far greater harm. All of this seems right even when we take seriously the moral asymmetry between doing and
allowing harm. Thus, we can explain why it might be permissible to inflict some lesser harm, say e.g. a broken finger, on First Villain in order to prevent lethal harm to Victim without appealing to liability.

4.2. *The Case for a Desert-Based Explanation of Non-Wronging Harm.*

I’d like to begin with a point of clarification. I will not argue here that there are, in fact, desert-based reasons for harming First Villain. I will argue only that our desert-based beliefs, whether or not they’re true, are the primary source of the intuition that First Villain, and culpable attempters like him, are liable to some harm. I will now offer two arguments to support this claim.

4.2.1. *The Argument from Punishment.*

Recall that McMahan has us consider the case of a past murderer who has never been punished for his crime. As I briefly mentioned earlier, I don’t find it so counter-intuitive that this past murderer might be liable to lethal harm to prevent a wrongful threat for which he is not responsible. But I doubt that this is because he would be liable to the harm. The fact that this murderer has not been punished for his past crime seems to best explain the intuition that he would not be wronged, but this explanation, while compelling, invokes the concept of desert.

Consider this variant of *Basement Window*:

*Punished Attempter:* Aware that a First Villain plans to kill him, Victim begins to carry a gun. On one occasion Victim has the opportunity to empty the bullets from First Villain’s gun and does so. Immediately thereafter, First Villain confronts
Victim in an alley and tries to fire. Immediately after his attempt, First Villain is arrested by the police, justly convicted of attempted murder in court, and subjected to fifty lashings (assume this is a retributively proportionate punishment) all in the span of twenty-four hours (their criminal justice system is very efficient). The next day, Victim sees that a Second Villain is preparing to shoot him from behind a narrow basement window while First Villain just happens to be walking by with no further intention of harming Victim. Unable to flee in time and also unable to fire with accuracy through the tiny window, Victim can save himself only by shooting and seriously wounding First Villain (assume this is a harm equivalent to fifty lashings), causing him to slump in front of the window, thereby blocking Second Villain’s line of fire.

My intuition is that First Villain in *Punished Attempter* would be wronged by Victim’s lethal harm. This intuition seems supported by the fact that First Villain has received a retributively just punishment for his culpable attempt on Victim’s life. Given that, it would seem unjust to inflict further harm on First Villain to prevent a threat for which he bears no responsibility; he has already paid for his crime. Thus, I think there is no reason for First Villain to bear any further harm. If I’m right, then First Villain’s (*Basement Window*) not being wronged by Victim’s lethal harm, to the extent that’s true, is grounded entirely in First Villain’s deserving that harm. That is, First Villain (*Basement Window*) is not liable to any harm.

One might object that, even if First Villain (*Punished Attempter*) would be wronged by Victim’s lethal harm, it does not follow that desert-based reasons for harming offer the full explanation that First Villain (*Basement Window*) would not be wronged by Victim’s harm. The reason for this might be that punishment not only extinguishes further desert-based reasons to harm, but also liability-based reasons to harm. And so, it might be that

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37 Although I don’t think the amount of lapsed time is relevant here, I’m just trying to rule that out as a possible explanation for why First Villain would be wronged by Victim’s lethal harm.
liability, and not desert, still provides the best explanation for non-wronging harm to First Villain (\textit{Basement Window}).

In response, while it does seem plausible that desert-based reasons to harm are sensitive to measures of \textit{distributive} justice, it does not seem plausible that liability-based reasons to harm are sensitive to measures of \textit{retributive} justice. In defense of the former, we can imagine an attacker who, by virtue of his culpably posing a wrongful threat, is both deserving of and liable to a harm comparable to, say, a broken arm. Suppose that the victim breaks his attacker’s arm in self-defense. I find it plausible that the attacker is no longer deserving of any harm, or at least that he is now deserving of less harm. If one deserves a harm, we have reason inflict that harm on him regardless of any instrumental good that might result. But this does not rule out the possibility that a person’s bearing a harm to which he is liable might also satisfy his retributive debt.

On the other hand, it seems that liability-based reasons to harm are \textit{not} sensitive to measures of retributive justice, e.g. punishment. To see this, consider an attacker who succeeds in wrongfully harming his victim by breaking his finger. Suppose that the attacker would have been liable to a broken arm to prevent the wrongful harm, but it was not possible for his victim to do this. As a result of the wrongful harm, let’s say that the attacker is now liable to compensate his victim by paying for his surgery. Now suppose that the attacker receives a retributively just punishment of five lashings. By my lights, he is still liable to pay for victim’s surgery, despite the fact that his retributive debt has been satisfied. The attacker’s punishment addresses his \textit{wrong}; it does not address his
wronging of his victim. The latter is addressed only by compensation to the victim.

Thus, liability-based reasons to harm (or compensate) are not sensitive to measures of retributive justice.

4.2.2. The Argument from Non-Culpability.

Now let’s consider another variant of *Basement Window*:

*Non-culpable Attempter*: Aware that a First Threat plans to kill him, Victim begins to carry a gun. Victim knows that First Threat is a model citizen—he has and would never threaten to harm a person other than to protect his family from wrongful harm. He also knows that the only reason First Threat plans to kill him is that First Threat, based on extremely compelling evidence, has been fooled by an enemy of Victim’s into believing that Victim will kill First Threat’s child in the very near future and the only way to prevent this is to kill Victim. Very soon after learning all this, Victim has the opportunity to empty the bullets from First Threat’s gun and does so. Immediately thereafter, First Threat confronts Victim in an alley and tries to fire. As First Threat continues to pull the trigger in frustration, Victim sees that a Second Threat is preparing to shoot him for no good reason from behind a narrow basement window. Unable to flee in time and also unable to fire with accuracy through the tiny window, Victim can save himself only by shooting First Threat, causing him to slump in front of the window, thereby blocking Second Threat’s line of fire.³⁸

If First Villain (*Basement Window*) is liable to some harm, it seems that First Threat (*Non-culpable Attempter*) would be liable to at least some lesser harm. In other words, if there is a liability-based reason for harming First Villain, there is also a liability-based reason for harming First Threat. Recall that according to McMahan’s responsibility account of liability, a person need not be culpable for his wrong in order to be liable to harm. Nevertheless, other things being equal, a non-culpable wrongdoer would be liable to less harm than a culpable one. But the non-culpable wrongdoer would still be liable to some harm, assuming it’s necessary to prevent the threat, such that harming him in this

³⁸ Thanks to David Black for suggesting a case of this type.
way would not wrong him. He would have no justified complaint against being harmed in that way. And furthermore, we can rule out any desert-based reasons for harming in the above case, given that the First Threat is non-culpable.

My intuition is that First Threat (Non-culpable Attempter) is not liable to any harm. He would be wronged by any amount of harm imposed on him by Victim. He would have a justified moral claim against Victim were he to bear any of the cost.

One might resist the claim that First Threat (Non-culpable Attempter) would have a justified complaint against Victim’s harm. After all, First Threat does attempt to kill victim, and this killing would be impermissible. We can also say that his mere attempt to kill Victim is impermissible, regardless of whether First Threat’s attempt is successful. He ought not to even attempt to kill Victim, and so to do so is wrong. Furthermore, First Threat is responsible, however minimally, for this wrong. And this attempt, despite its lack of success, still wrongs Victim. It wrongs Victim because, one might think, Victim has a right against not only wrongful harm, but also the risk of suffering this harm.

McMahan seems to endorse this last point by claiming that what matters for liability is the “expected wrongful harm,” which he says is “the product of a harm of a certain magnitude and the [objective] probability of its occurrence.” And so First Threat’s attempt, despite its lack of success, violates that right. Perhaps then, First Threat, by virtue of his wronging Victim in this way, forfeits his right against lethal harming by Victim. Or at least, perhaps this constitutes enough of a morally relevant difference

between First Threat and B, such that First Threat would be liable to *some* harm (and B liable to none) if that would save Victim from Second Threat.

In response, I don’t think it’s plausible that First Threat’s attempt wrongs Victim. While it’s true that First Threat *would have* wronged Victim had things gone his way, his mere attempt does not seem to constitute a wrong to Victim. Why is that? Well, even if we concede that the mere imposition of a *risk* of harm can constitute a wrong to a Victim, it’s difficult to see how First Threat’s attempt does even that. The objective probability that First Threat’s attempt will be successful is 0—he has no bullets in his gun.\(^{40}\) And even if we allow that subjective probability, i.e. the probability that an attempt will succeed from the Victim’s point of view, is what counts, that doesn’t help the case—Victim knows that First Threat has no chance of succeeding since he emptied the bullets from the gun!

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\(^{40}\) This does bring up an interesting, although seemingly intractable problem regarding risk and harming. One might insist that, although First Threat poses no risk or threat of harm to Victim at the time they meet, he did in fact pose a risk of harm prior to Victim’s taking out the bullets. After all, it was not certain that Victim would be able to do this. And so the overall objective probability that First Threat will kill Victim ought to take into account the probability of Victim’s being successful in removing the bullets. And if that’s right, then it seems that this overall probability would be something greater than 0. But we can take this even further, and argue that it was neither certain that First Threat would attempt to kill Victim, and so that probability ought to reduce the overall probability of the threat to Victim. Rather than helping the case for First Threat’s liability, all of this makes me suspicious that the mere risk of harm is relevant to wronging and liability. I think it is better to say that all of this, while relevant to subjective permissibility, is irrelevant to liability. All that matters regarding liability is the wrongful harm that *would* come about were defensive action not taken. In any case, I cannot defend all of this here, so I’m simply conceding that risk is relevant to wronging and liability, but claiming that there is no risk, or threat, to Victim. Thus, Victim is not wronged by First Threat’s attempt.
So if I am right that First Threat (Non-Culpable Attempter) is not liable to any harm, it follows that First Villain (Basement Window) is not liable either. It also follows that First Villain’s suffering any harm would wrong him, absent any desert-based reasons for harming. In other words, if it is the case that First Villain would not be wronged by some amount of harm, this is due to his being deserving of that harm by virtue of his culpable attempt.

Of course, one might object to the above argument by claiming that First Villain’s (Basement Window) being liable to some harm does not entail that First Threat (Non-culpable Attempter) would be liable to some lesser harm. For one might claim that, while culpability is not required in typical cases of defensive harming, i.e. those involving eliminative harm, it is required for liability to harm in cases of opportunistic harming like Basement Window and Non-culpable Attempter. One’s defensive harming is eliminative when harming a person directly extinguishes the source, or at least one of the sources, of a threat (e.g. one-on-one cases of self-defense). In contrast, one’s defensive harming is opportunistic when harming a person is instrumental in eliminating a threat posed by someone, or something, else.\footnote{See Warren Quinn (1989) “Actions, Intentions, and Consequences: The Doctrine of Double Effect,” \textit{Philosophy and Public Affairs} 18: 344.} The following passage from McMahan might lend some support to this view:

\begin{quote}
...the constraint against [opportunistic] harming is arguably stronger than the constraint against causing the same degree of harm by action that is defensive. The conditions for liability to opportunistic killing are, intuitively, more demanding. It
\end{quote}
may be, indeed, that liability to opportunistic killing requires a significant degree of culpability rather than mere responsibility.  

Suppose that McMahan is correct that the constraint against opportunistic harming is greater than that on the eliminative type. And perhaps this is because the former uses a person as a means to serve an end without his consent, while the latter does not force a person to serve some further end—it merely eliminates a wrongful threat, which, by necessity, harms the attacker. This might all support the claim that, while culpability is not required for liability to eliminative harming, it is required for liability to opportunistic harming. And if that’s right, my argument does not go through. It would not follow, as I claim, that First Villain’s being liable to lethal harm in *Basement Window* entails that First Threat (*Non-culpable Attempter*) would be liable to some harm.

This objection falls short. Even if we concede that there is a morally relevant difference between opportunistic and eliminative harming such that culpability would be required for lethal harm to First Threat in *Non-culpable Attempter*, it does not follow that culpability would be required for liability to any amount of opportunistic harm. And McMahan’s claims in the above passage are consistent with this—he merely suggests that liability to opportunistic *killing* might require culpability. Moreover, the claim that culpability would be required for liability to any amount of opportunistic harm seems *ad hoc*. After all, culpability is simply a degree of moral responsibility, and while it affects

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43 I question this later in the essay. It seems to me that the real moral difference between cases involving opportunistic and eliminative harming, in which there *is* a difference, is grounded in considerations of responsibility for the threat.
the proportionality constraint on harming, it seems implausible that it’s required to render any amount of harm proportionate.

Conclusion.
Although it is tempting to conclude that culpable attempters like First Villain can be liable to harm, the theoretical cost of this position gives us good reason to search for an alternative explanation of non-wronging harm. If First Villain is liable, then we must reject the responsibility principle, which commits us to the rather implausible view of broad liability. I argued for an explanation of non-wronging harm that does not entail First Villain’s being liable, thus allowing us to retain the responsibility principle. I argued that the claim that First Villain would not be wronged by Victim’s harm, to the extent it’s true, is due to desert-based reasons for harming. I defended this claim using two arguments—The Argument from Punishment and The Argument from Non-culpability.
ARTICLE 3: INEFFECTIVE THREATS, COMPLICITY, AND LIABILITY BY OMISSION.

Introduction.
To say that a person is morally liable to some harm implies that he would not be wronged by suffering it. The paradigmatic cases of liability are those in which an attacker is harmed to prevent a threat of wrongful harm that he poses. In these standard cases, we say that the unjust attacker, by virtue of his wrongful behavior, i.e. his posing the wrongful threat, makes himself morally liable to defensive harming by his potential victim. He becomes liable to the harm since, by virtue of his wrongful behavior, he forfeits his right against being harmed in this way. And this rights-forfeiture explains why the attacker is not wronged by the harm. Since he has no right against the relevant harm, he has no justified moral complaint against suffering it. Furthermore, the attacker’s liability provides the moral justification for the victim’s defensive action when there is little or no unintentional harm to innocent bystanders. These are the standard cases.

In standard cases like the above, wrongdoers become liable to defensive harm by causing a threat of wrongful harm. They cause the threat either by posing it themselves or by contributing to a threat posed by another. And their causing the wrongful threat makes them sufficiently morally responsible for the threat, such that they become liable to defensive harm to prevent it. Thus, the standard cases are consistent with the following plausible principle on liability to defensive harm:
Responsibility Principle: An agent, A, is morally liable to a harm, H, to prevent some wrongful threat, T, only if P is sufficiently morally responsible for T.

But what counts as being sufficiently morally responsible for T? In the standard cases, wrongdoers are sufficiently morally responsible for T given that they are culpable, or blameworthy\(^1\), for T. Indeed, some argue that culpability for T is required in order to have sufficient moral responsibility to render one liable to defensive harm.\(^2\) Others like Jeff McMahan, however, argue that one need not be culpable for T to have sufficient moral responsibility. According to McMahan, one who has just minimal moral responsibility for T, i.e. non-culpable moral responsibility, is potentially liable to H.\(^3\)

Despite this disagreement, both accounts treat the responsibility principle as bedrock—A cannot be liable to H to prevent T unless A is sufficiently morally responsible for T, whatever the required minimum level of moral responsibility for T might be.

But even assuming that one can be sufficiently morally responsible for T without being culpable for T, we can still question whether one can be sufficiently morally responsible for T (or perhaps even responsible at all) without causally contributing to T. McMahan has defended this stance on the issue:

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\(^1\) I will use the moral terms ‘culpable’ and ‘blameworthy’ synonymously.


**Causality Principle:** A is sufficiently morally responsible for T only if A causally contributes to T.⁴

Together with the responsibility principle, the causality principle entails that A cannot be morally liable to H to prevent T unless A causally contributes to T.

While the causality principle is intuitively plausible, there are some problematic cases for it, particularly those involving *complicit threats*—those who are members of a collective group that threatens wrongful harm, but who, due to reasons independent of their responsible agency, fail to causally contribute to this threat. Saba Bazargan presents the following case as evidence that complicit threats can be liable to lethal harm:

**Bank 1:** A gang of five individuals agrees on a plan to rob a bank together. Part of their plan is to kill the head bank teller, who alone has access to the security alarm. One of the gang members, Jim, is stationed on a second floor balcony above the bank as a lookout. Jim intends to do his part, but accidentally falls asleep while in his position. As a result, Jim causally contributes nothing to the crime, but this does not negatively impact the operation. A nearby citizen hears all the radio traffic between the gang members, and thereby gathers that they plan to kill the head bank teller and that Jim is part of the group. The citizen knows that she can save the teller only by shooting and killing Jim, which will result in Jim’s rolling off the balcony and onto a gang member standing guard below. This will in turn cause all the other gang members to abort their operation. Prior to his falling asleep, Jim could easily save the teller at very little cost to himself by making an anonymous call to the police on his non-traceable cell phone.⁵

In **Bank 1**, we might think that Jim is liable to lethal harm to save the teller since his being complicit in the threat makes him sufficiently morally responsible for it. But if

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⁴ See McMahan (2011) “Who is Morally Liable to be Killed in War?,” *Analysis* 71 (3): 548.

⁵ This is a slightly revised version of Bazargan’s (2013) case in “Complicitous Liability in War,” *Philosophical Studies* 165: 177-95.
complicit threats like Jim can be liable to harm, then it seems that we must reject the causality principle, for while Jim is complicit in the wrongful threat to the teller, he does not causally contribute to it.

In this essay, I argue for an alternative explanation for liability in *Bank 1*—Jim’s wrongful failure to save the teller. In arguing for this explanation, I develop and defend a theory of liability by omission. I argue that my explanation is preferable to Bazargan’s complicity-based explanation on the following grounds: (1) it accounts for all the morally salient features of Bazargan’s case, while the complicity-based explanation does not; (2) it relies on a less mysterious source of moral responsibility than that of the complicity account—responsibility by omission; (3) unlike the complicity account, it seems better equipped to handle what I will call the proportionality problem; (4) it extends to other cases of intuitively liable individuals who are not complicit.

As for the causality principle, I will remain neutral as to its truth or falsity. On my view, the standing of the causality principle would depend on the answer to the somewhat intractable problem of whether a wrongful omission to prevent a threat can be a way of causally contributing to that threat. If omissions cannot be causal contributions, the causality principle would be false on my view since, as I argue, one can sufficiently morally responsible for a threat, and hence liable to harm to prevent it, merely by virtue of a wrongful omission. But if a wrongful omission is a causal contribution, my argument for the liability of complicit threats could be consistent with the causality principle.

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6 Thanks to Jonathan Parry for this suggestion.
principle. And rather than disprove the causality principle, my account would give us a richer picture of how one could causally contribute to a threat.7

This essay is organized as follows. In section 1, I discuss two of the core aspects of the concept of liability—moral responsibility and proportionality. In section 2, I explain and evaluate Bazargan’s argument for the liability of complicit threats like Jim and suggest my alternative explanation—liability by omission. Finally, in section 3, I develop my account of liability by omission.

1. Two Core Aspects of The Concept of Liability.


According to most accounts of liability, an agent A is liable to some harm H to prevent some wrongful threat of harm T only if A is responsible to some degree for T. And while the concept of moral responsibility is somewhat nebulous, we can settle on this rather plausible understanding, which seems consistent with McMahan’s account: A is responsible for T if, and only if, the existence of T is attributable, at least in part, to A’s responsible agency.8 Seth Lazar explains below what is required, according to McMahan, for this attributability:

For [T to be attributable to A’s responsible agency], A must meet the minimum standards for responsible agency; and he must have made voluntary choices that foreseeably contributed to the threat coming about. The criteria for responsible agency include some degree of physical and psychological self-control, and the

7 Thanks to Jonathan Parry for suggesting this way of putting things.

capacity for rational choice. The foreseeability qualifier is weak, and in *Killing in War* somewhat vague: A’s responsibility is only defeated if he could not have known that his action risked contributing to the threat.\(^9\)

In the most straightforward cases, A is responsible for T by virtue of A’s *posing* T. But clearly one’s posing a threat is not necessary for one’s being responsible for it. Consider:

**Bad Sheriff**: A small town sheriff plans to kill the newly elected mayor after finding out that the mayor plans to replace him with a new officer. The sheriff blackmails a young farmhand to carry out the killing by threatening to frame him with a recent murder if he does not agree to kill the mayor. The mayor learns of the entire plan, arms himself, and sets out to confront the sheriff. As he sees the sheriff approaching in the distance, he comes upon the farmhand who takes aim to shoot and kill him. The mayor cannot defend himself by shooting the farmhand, as he is standing behind a tree. The only way he can defend himself is by shooting the sheriff farther off in the distance. He knows that this would eliminate the threat from the farmhand, as the farmhand threatens to kill the mayor only to avoid being blackmailed.\(^10\)

Although the sheriff does not pose the wrongful threat to the mayor, he is nevertheless responsible for it. The threat to the mayor is attributable to the sheriff by virtue of the latter’s blackmailing the farmhand. The sheriff’s blackmailing the farmhand causally contributes to the foreseeable threat, and this is the basis of his being responsible for it, despite that fact that he does not pose the threat.

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\(^9\) Lazar (2010): 183-4. McMahan’s foreseeability clause has attracted a great deal of criticism since it implies that non-culpable wrongdoers can be liable to defensive harm. And this is because on McMahan’s account, an agent can be responsible for a threat, and hence potentially liable to harm, by virtue of the fact that the threat’s coming about was a foreseeable consequence of his objectively wrong, yet blameless, action. McMahan refers to agents of this type as “minimally responsible threats.”

\(^10\) This is a slightly modified version of a case presented in McMahan (2009): 205-7.
None of this is to suggest, of course, that the farmhand is *not* responsible for the threat. He is responsible for the threat by virtue of *his* causal contribution to it—posing the threat.

Both the sheriff and the farmhand are responsible for the wrongful threat to the mayor by virtue of their respective wrongful actions, which causally contribute to the foreseeable threat. But this leads us to a further question—who is *more* responsible for the threat? In order to answer this question, we must first discuss the factors that determine an individual’s level of responsibility for a threat.

McMahan plausibly argues that “the degree of an agent’s [responsibility] is a function of these variables—whether the wrongful threat is intentional, reckless, or negligent, whether the agent has an excuse and how strong that excuse is, and the magnitude of the threatened harm…” The last factor, “magnitude of the threatened harm,” is somewhat ambiguous. And it is an ambiguity that seems to underlie an ambiguity in talk about responsibility.

When we talk of an agent’s level of responsibility for a threat, we can mean one of two different things. We might be talking about his level of responsibility for *his contribution* to the total threat, or we might be talking about his level of responsibility for the total threat. The latter is the relevant factor in assessing one’s potential liability, but the former is what we use to determine the latter. For example, the relevant factor in

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assessing the sheriff’s potential liability is his level of responsibility for the lethal threat to the mayor. But we determine this by first determining his level of responsibility for his contribution to this lethal threat. And his level of responsibility for that is a function of whether his contribution is intentional, reckless, or negligent, and the strength of his excusing conditions, if any. Since the sheriff’s contribution is intentional and he presumably has no excusing conditions for it, we can say that he is fully culpable, or responsible, for his contribution—the blackmailing. But one’s being fully culpable for one’s contribution to the total threat does not entail that one is fully culpable for the total threat. Whether one is also fully culpable for the total threat depends on the magnitude of one’s contribution to the total threat. And this is what McMahan is referring to when he mentions the “magnitude of the threatened harm” (i.e. magnitude of one’s contribution) as one of the variables that determine one’s level of responsibility for the total threat.

Returning to Bad Sheriff, although the sheriff is fully culpable for his contribution (blackmailing) to the lethal threat to the mayor, he is less than fully culpable for the total threat to the mayor given that he provides only a partial, albeit significant, contribution to the total threat. In other words, we might say that his being less than fully causally responsible for the total threat renders him less than fully morally responsible, even though his contribution is intentional and he lacks any excuses for it. This is a point that Seth Lazar seems to miss in this interpretation of McMahan: “A is maximally morally responsible for threat X when X can be attributed to A’s agency, and A can appropriately be blamed or praised for his contribution to X.”12 Presumably, Lazar means to say that A

is maximally morally responsible for X when X can be attributed to A’s agency and A is *fully* blameworthy (i.e. he has *no* excusing conditions) for his contribution to X. But that’s still not a correct explanation of McMahan’s account. Again, the sheriff is fully blameworthy for his contribution, yet he is not “maximally morally responsible” for the lethal threat to the mayor. And that’s because he is not fully *causally* responsible for the threat.

The farmhand, on the other hand, does seem to be fully *causally* responsible for the threat to the mayor, given that he poses the threat. Yet, intuitively, he seems *less* morally responsible than the sheriff for the lethal threat. As McMahan notes, “The farmhand…is a reluctant and largely innocent dupe who has been deceived, manipulated, and coerced as a means of achieving the Sheriff’s goal.”\(^\text{13}\) Of course, this does not mean that causal responsibility for a threat is irrelevant to moral responsibility for the threat. If other things were equal, the farmhand would be more morally responsible than the sheriff for the threat to the mayor by virtue of his being fully causally responsible for it. But other things are not equal. The sheriff is fully culpable for his smaller yet significant causal contribution, while the farmhand is partially excused for his greater contribution. Thus, it is not surprising that we find the sheriff to be more responsible for the total threat.

Having explained the relevance of responsibility, we are now in a better position to understand the next requirement for liability—proportionality. This is because, as we

\(^{13}\) McMahan (2009): 207.
will see, what counts as proportionate defensive harm to an agent is partly a function of how responsible he is for the total threat to be avoided.

1.2. Proportionality.

Proportionality in the ethics of defensive harming is, generally speaking, a matter of comparing the severity of a wrongful harm to be prevented with the harm that would result from its prevention. If the latter is deemed excessive in relation to the former, the defensive action is typically impermissible. But there are two ways in which defensive harm might be excessive in relation to the wrongful harm to be prevented, i.e. there are two different ways in which defensive harming might be disproportionate.

1.2.1. Narrow and Wide Proportionality.

Most claims about proportionality, particularly those made in the context of war, are claims about whether a particular action causes excessive harm, usually as an unintentional side-effect, to innocent persons. For example, if an attacker threatens me with wrongful lethal harm, under usual circumstances I am morally permitted to kill him in self-defense, assuming that killing him is necessary to prevent my own wrongful killing. But suppose that I could kill him in self-defense only by blowing up a bridge on which ten innocent bystanders are also standing. In this case, my defensive action would very likely be impermissible given the excessive harm, albeit unintentional, my action

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14 One exception would be an action justified on lesser-evil rounds. E.g. It could be permissible to inflict disproportionate harm on an individual in order to prevent some great calamity.

15 Jeff McMahan was the first to articulate this distinction between narrow and wide proportionality. Most of my discussion in this section echoes McMahan (2009): 20-21.
causes. Although preventing my own wrongful death under usual circumstances is sufficient to render killing my attacker in self-defense permissible, excessive harm to innocent individuals far would far outweigh this good consequence. This would make my action impermissible due to considerations of *wide proportionality*.

But there is also a limit to the amount of defensive harm that we can inflict on potentially liable, i.e. non-innocent, individuals, beyond which any further harm would be deemed excessive in relation to the wrongful harm to be prevented, independent of any considerations of wide proportionality. Following McMahan, we can call this the *narrow proportionality* constraint on defensive harming. Throughout the rest of this essay, I will be focused primarily on narrow proportionality, and unless otherwise stated, all future uses of ‘proportionality’ will be used to refer to it.

Most accounts of liability agree that proportionality is internal to the concept. Although we might often say that one is liable without qualification, this is really shorthand for saying that one is liable to a particular amount of harm.\(^\text{16}\) This is the proportionality constraint on liability—one can only be liable to proportionate harm. If one is harmed with disproportionate harm, i.e. harm to which one is not liable, then one is wronged by that harm.

\(^{16}\) Helen Frowe (2014) makes a similar point in *Defensive Killing* (Oxford: OUP): 118. “…it seems that proportionality must be internal to liability, because one cannot simply ‘be liable’, but must rather be liable to something—namely, to suffer a certain amount of harm. Stipulating the amount of harm one is liable to seems to be the work of the proportionality requirement.”
While most agree that proportionality is internal to liability, the more controversial matter is what determines whether a given harm is proportionate. We now turn to this question.

1.2.2. That Proportionality is Partly a Function of the Wrongful Harm to Be Prevented.

As with wide proportionality, narrow proportionality is partly a function of the severity of the wrongful harm to be prevented. The following case is compelling intuitive support for this claim:

_Culpable Pincher: _A is about to pinch _V for no good reason. He simply wants to inflict a bit of pain on _V against _V’s will. _V can prevent _A from doing this only by killing him._17

Although _A wrongfully threatens _V with a pinch and _V’s killing _A is the only way to prevent this wrong, it seems pretty clear that it would be impermissible for _V to do so. Moreover, it seems that _V’s killing _A would wrong _A, as _A’s threatening to pinch _V doesn’t seem serious enough to cause the forfeiture of _A’s right not to be killed. If all this is true, then _A is not liable to be killed. _A is not liable to be killed since this harm would be disproportionate to the harm to be prevented—a pinch.

Of course, _A would likely be liable to some lesser harm if that would prevent _V from being wrongfully pinched. If _V’s pinching _A preemptively, or perhaps even punching him, would prevent _A from wrongfully pinching _V, then it might be permissible for _V to do this. Moreover, it would seem that _V’s preemptively harming _A in this way would not

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17 This is a slightly different version of a case offered by McMahan (personal conversation).
wrong A. Thus, it seems that A would be liable to this lesser harm to prevent V from being wrongfully pinched.

In short, an agent is not liable to any amount of harm in order to prevent a threat of wrongful harm. The amount of defensive harm to which he is potentially liable is limited by the amount of wrongful harm that would be prevented by harming him.

1.2.3. That Proportionality is also a Function of One’s Moral Responsibility for the Wrongful Harm to Be Prevented.

But there are quite plausibly other variables that determine whether defensive harm is proportionate. Following McMahan, it seems that proportionality is also a function of the degree of one’s responsibility for the wrongful harm to be prevented. McMahan makes this point here:

>Moral responsibility for an unjust threat can vary in degree, and liability varies concomitantly. A person’s liability is therefore greater when his action is culpable, and the degree of his liability varies with the degree of his culpability. The degree of a person’s liability is manifest in the severity of what may be done to him without wronging him—that is, in the stringency of the proportionality requirement.\(^{18}\)

And as we discussed in the previous section, the level of one’s responsibility for a wrongful threat (i.e. the total harm to be prevented) is a function of the size of one’s contribution to the total harm (i.e. one’s degree of causal contribution) and one’s responsibility for that contribution (i.e. whether there are any excusing conditions relevant to the contribution).

Here’s a case that supports the claim that responsibility affects the proportionality
constraint on defensive harming:

_Fully Culpable Pincher:_ A is about to pinch V because he wants to kill him and, for
whatever reason, he falsely believes that pinching V will do the trick. V knows all
this and can prevent A from pinching him only by breaking his arm.

In _Culpable Pincher_, A threatens to pinch V because he intends to inflict a small amount
of pain on V. In _Fully Culpable Pincher_, A threatens to pinch V in order to _kill_ him.
This difference accounts for the fact that A is more culpable (i.e. more responsible) for
pinching V in _Fully Culpable Pincher_ than he is in _Culpable Pincher_. And this fact
seems to support the intuition that A is liable to a broken arm when he is fully culpable,
and that he would not be liable to it in the first case, even if breaking his arm were
necessary to prevent V from being pinched.

Of course, one might debate the specifics of these cases, in particular, whether a broken
arm is in fact proportionate in _Fully Culpable Pincher_. Or perhaps one might believe that
a broken harm would be proportionate in both cases if that were necessary to prevent the
pinching. Perhaps that’s right. But my point is simply that _whatever_ the amount of harm
to which A is potentially liable in _Culpable Pincher_, he is potentially liable to more harm
in _Fully Culpable Pincher_. And if that’s the case, then responsibility, along with the
wrongful harm that would be prevented, affects the proportionality constraint.
Not all are convinced that responsibility is relevant to proportionality, and hence liability, in the way I have described. Helen Frowe explicitly rejects this idea:

I find the idea that proportionality is sensitive to moral responsibility quite puzzling, especially in light of what McMahan says about the permissibility of killing even fully excused threats in self-defence. For example, McMahan thinks it permissible to kill Resident in *Breakdown*:

*Breakdown*: Victim’s car breaks down in a remote area. He knocks on the door of an isolated farm to ask to use the phone. Unbeknown to him, there’s been a series of gruesome murders in the local area. Warnings have been issued to local residents to be wary of strangers. When Resident opens the door, she thinks Victim is the violent murderer come to kill her and tries to shoot him.  

Frowe rightly points out that on McMahan’s view, Resident is liable to be killed in self-defense even though she is fully excused for her wrongful threat to Victim. And this, Frowe argues, seems inconsistent with the claim that proportionality is sensitive to moral responsibility since, given that Resident is *fully* excused for posing the wrongful threat, she “has only a low degree of moral responsibility for the threat she poses.” So how, one might ask, could it be proportionate to *kill* her?

Frowe then suggests that on McMahan’s account, what’s really doing the work regarding degrees of liability is one’s causal (not moral) responsibility for a threat. She cites McMahan’s argument for the claim that most non-combatants are not liable to killing in war (while most unjust combatants are) as evidence of his conflating the two concepts:

The defence of the claim that non-combatants lack sufficient moral responsibility focuses not, for example, on their excusable ignorance with respect to what they do,

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20 Ibid.
but rather on the causal triviality of what they do. What makes killing non-combatants disproportionate, then, is not that proportionality is sensitive to moral responsibility, but rather that it is sensitive to causal contributions.21

Frowe is correct that McMahan focuses on the “causal triviality” of what typical non-combatants contribute to war in order to argue that most are not liable to be killed. But to do this is not to conflate moral and causal responsibility. Rather, it is to recognize that, as we saw earlier, one’s degree of moral responsibility for a threat is a function not only of any excusing conditions for one’s contribution to the threat, but also the significance of one’s contribution to the threat. So if McMahan is right that non-combatants typically contribute substantially less to the total threat of war than do combatants, it follows that, other things being equal, they are typically less morally responsible for the threat of war. And conversely, even if unjust combatants are just as excused for their contributions as are non-combatants, the former are likely to be more morally responsible for the total threat of war given that they are more causally responsible for it than are non-combatants.

The above rationale is also what underlies McMahan’s claims about the liability of non-culpable threats like the Resident. Even though Resident is fully excused for her wrongful threat, it does not follow, as Frowe claims, that she is minimally morally responsible for the total threat to Victim. And that is because Resident is fully causally responsible for the total threat—she poses it. This would plausibly raise her level of

21 Ibid.: 174.
moral responsibility for the threat, even while being fully excused for her contribution, to a non-negligible level, a level perhaps sufficient for liability to lethal harm.\textsuperscript{22}

Frowe then goes on to argue, contra McMahan and Cecile Fabre, that proportionality is not sensitive to the degree of one’s causal contribution either. More specifically, she criticizes the view that “any kind of liability-based account of defensive killing must look at what non-combatants do as individuals, not merely invoke the results of group endeavors.”\textsuperscript{23} Frowe then presents the following case to refute this view:

\textit{Hit}: Mafia Boss wants to take Victim out, but he cannot afford to hire Assassin, who is extremely skilled and thus extremely expensive. Mafia Boss has a whip-round amongst all the members of his mob, none of whom really like Victim. Everyone coughs up a few extra pounds for the assassination fund.\textsuperscript{24}

Frowe’s argues that on the view described above, none of the members of the mob would be potentially liable to be killed as a means of saving the victim. And this is because, as Frowe points out, each of the members’ contributions is very small, and very likely too small to make killing any of them proportionate if proportionality is sensitive to the degree of one’s causal contribution as McMahan and Fabre believe. It might seem that

\textsuperscript{22} McMahan refers to fully excused threats like the Resident as “minimally [morally] responsible threats.” This terminology is a bit misleading given that the minimally responsible threats McMahan discusses pose the total wrongful threat. Thus, they are fully causally responsible for the total threat, which, together with their minimal moral responsibility for that contribution, entails that they have a non-negligible degree of moral responsibility for the total threat, despite the fact that they are fully excused for it. It would be more accurate to refer to those who contribute minimal amounts to a total harm and are fully excused for this contribution (e.g. some non-combatants) as minimally responsible threats.

\textsuperscript{23} Frowe (2014): 175.

\textsuperscript{24} Ibid.
on their view, perhaps only the assassin and the mob leader would be potentially liable, given that each of their contributions are much more substantial. But, Frowe suggests, whatever the responsibility threshold is for liability to lethal harm, it seems doubtful that individual members reach it. She concludes in the following way:

Fabre is right that an individual’s liability to defensive harm is determined by her individual contribution to an unjust threat. But she is wrong to focus on the extent to which an individual contributes to the threat rather than on the magnitude of the threat to which she contributes. We do not care, for the purposes of liability, how much money each member of the mob gives in Hit—about the extent of their contribution to the assassination fund. All we care about is the fact that they gave money to fund a lethal threat. And because they funded a lethal threat, they are liable to lethal defence. Proportionality is about the harm one helps bring about—the threat that faces a victim partly as a result of one’s behaviour.25

So on Frowe’s view, the size of one’s contribution to a wrongful threat is irrelevant to questions about proportionality and liability. All that matters is the size of the threat to which one contributes. This is the lesson we are supposed to draw from Hit. In Hit, all that matters is that each of the members contributes to a lethal threat. This is what makes them potentially liable to lethal harm despite the fact that each of them contributes very little to this total threat.

Most, including McMahan and Fabre, would certainly agree with Frowe that proportionality, and hence liability, is sensitive to the size of the total threat. After all, as we said earlier, proportionality is (partly) a function of the wrongful harm to be prevented. There is no disagreement here. The disagreement is over whether the size of

25 Ibid.: 177.
one’s contribution to the total threat is relevant. And there are two reasons why I think Frowe’s *Hit* case is not successful in establishing the irrelevance of that.

First, while I agree with Frowe that each of the members is potentially liable to lethal harm, I’m not convinced that McMahan’s or Fabre’s view implies otherwise. And that’s because in *Hit*, while each of the members’ contributions are small in size, they are nevertheless *significant* since the assassination’s taking place is counterfactually dependent on each of them. Of course, this is not explicit in *Hit*, but it does seem to be implied in the case. And I suspect that this is one source of the intuition that each of the members is potentially liable to lethal harm.

Second, even if we concede that the size of each of the members’ contribution would not be significant enough to make killing any of them proportionate were they *non-culpable* for their contribution, it seems pretty clear that each of the members in *Hit* is *culpable* for contributing to the fund. Recall that the members are described as not particularly fond of Victim, and there is no suggestion of duress or non-culpable ignorance on the part of any of the members. Indeed, each of them seems fully culpable for their contribution to the fund. And this, quite plausibly, renders each of them sufficiently responsible for the lethal threat to Victim (so that killing them would be proportionate) despite, per our current concession, their insignificant causal responsibility for it. Thus, a proponent of McMahan’s view can account for the strong intuition that killing any one of the members of the mob would be proportionate.
Of course, as we have already seen, Frowe denies that proportionality is sensitive to the level of one’s moral responsibility for one’s contribution, and so she would deny that each member’s being fully culpable for his contribution is doing any of the work regarding their liability to lethal harm. But if that’s correct, then we should judge all the members in the following case no differently than we judge those in Hit: 26

*Hit 2*: Mafia Boss wants to take Victim out, but he cannot afford to hire Assassin, who is extremely skilled and thus extremely expensive. Mafia Boss tells the members of his mob to each cough up a few dollars for a “special” fund. The older members of the group all know from experience that they will be contributing to Victim’s assassination, and they are happy to do so. However the newer members of the group, although they have good reason to believe that their money will contribute to some illicit activity, do not know it is for an assassination. Furthermore, they know that if they start asking questions, they will be killed. Everyone coughs up a few dollars for the fund.

If proportionality is not sensitive to one’s level of moral responsibility as Frowe argues, we would have no good reason to kill one of the older members of the group instead of one of the newer ones in order to save Victim. That the newer members are more culpable for their contributions by virtue of their knowledge and willingness to contribute would be morally irrelevant in deciding whom we should kill to save Victim. All of that seems very implausible. Perhaps, despite their excusing conditions, the new members would be liable to lethal harm if this were necessary to save Victim, but surely we have more reason to harm the older members if killing an older or newer member would be equally effective. If that’s correct, then proportionality must be sensitive to the level of responsibility for one’s contribution.

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Ultimately then, *Hit* is unsuccessful as a counterexample to McMahan and Fabre’s view. Despite the small size of each member’s contribution to the fund, it still seems that each of their contributions is significant. That seems to matter with regard to their potential liability. And even if we concede that their contributions are not very significant, their level of culpability for their contributions does seem to affect their potential liability. We can see this pretty clearly when we contrast the potential liability of the newer and older members in *Hit 2*.

Let us conclude with one final case that demonstrates that proportionality, and hence liability, is sensitive to both the significance of one’s contribution to a threat and one’s level of moral responsibility for that contribution:

*Bullies:* Tim has suffered cruel mental and physical bullying attacks from several of his classmates over the past six months. As a result of these uncoordinated attacks, Tim has reached his breaking point. The next attack, however slight, will cause him to commit suicide. Bob, who has never bullied Tim before and knows nothing about the previous attacks on Tim nor of his mental state, decides to tease Tim about the shoes he is wearing that day just for a laugh. Tim, pushed over the edge by this final attack, kills himself later that night. Tim’s death could have been prevented only by killing Bob before he teased Tim.

It seems clear to me that Bob is not liable to be killed to save Tim. Perhaps he would be liable to a broken arm if that would save Tim, but *killing* Bob to save Tim is intuitively disproportionate. Of course, killing Bob would prevent a seriously wrongful harm; that part of the proportionality equation seems satisfied. But Bob does not seem sufficiently morally responsible for that total harm. And the best explanation for this is that Bob’s contribution to the total threat is not substantial enough to make him sufficiently
responsible for it. And all this seems true despite the fact that he is culpable for his contribution.

This is not to say that Bob’s contribution would not render him liable under different circumstances. Although Bob is culpable for his contribution, we can imagine circumstances under which he would be even more culpable, so much so that he would perhaps be liable to lethal harm. For example, suppose that Bob knew about all the previous attacks and as a result had a pretty good idea that his teasing Tim could send him over the edge. In this case, it seems plausible that Bob would be liable to lethal harm, or at least harm more serious than a broken arm. This again supports the claim that proportionality is sensitive to the level of one’s culpability for one’s contribution to a threat, not just the significance of one’s contribution.

2. The Argument for Complicitous Liability.
According to Bazargan, a non-contributing member of group can be sufficiently responsible for a wrongful threat posed by his more effective comrades merely by virtue of his complicit role in the threat. If he’s right, then mere complicity could be grounds for liability to some harm. This is all consistent with the responsibility principle, and while that’s a welcomed feature of Bazargan’s view, it suffers from another problem. In short, it seems unlikely that mere complicity could make a person sufficiently responsible for a wrongful threat to which he contributes nothing such that he would be liable to serious harm, as Bazargan argues, to prevent it. Perhaps mere complicity could be grounds for liability to some harm, but due to considerations of proportionality, it seems
unlikely that it could ground liability to more serious harm. We can refer to this as the
*proportionality problem* for complicitous liability.

Let us review Bazargan’s case before considering his argument:

_Bank 1_: A gang of five individuals agrees on a plan to rob a bank together. Part of their plan is to kill the head bank teller, who alone has access to the security alarm. One of the gang members, Jim, is stationed on a second floor balcony above the bank as a lookout. Jim intends to do his part, but accidentally falls asleep while in his position. As a result, Jim contributes nothing to the crime, but this does not negatively impact the operation. A nearby citizen hears all the radio traffic between the gang members, and thereby gathers that they plan to kill the head bank teller and that Jim is part of the group. The citizen knows that she can save the teller only by shooting and killing Jim, which will result in Jim’s rolling off the balcony and onto a gang member standing guard below. This will in turn cause all the other gang members to abort their operation. Jim could easily save the teller at very little cost to himself by making an anonymous call to the police on his non-traceable cell phone but fails to do so.²⁷

The basic argument for Jim’s complicitous liability is the following:

1. Jim is morally liable to be killed to prevent the unjust killing of the teller.
2. Jim makes no causal contribution to the unjust threat.
3. The best explanation for (1), given (2), is Jim’s complicitous role in the unjust threat.

Although Bazargan finds it intuitive that Jim is liable to be killed despite his lack of causal contribution, I’m not as convinced. I do find it highly plausible that Jim is liable to some harm, perhaps even serious harm, but I’m not sure about lethal harm.

Nevertheless, let’s put that worry aside for now, and grant him premise one. As for premise two, given that Jim fell asleep on the job, he makes no causal contribution to the threat to the teller. To further bolster this premise, we can also stipulate that Jim made

²⁷ This is a slightly revised version of Bazargan’s case (2013): 182-4.
absolutely no contribution to the planning of the job, that Jim’s participation had no
effect on the others (e.g. encouragement), etc. Given these premises then, it seems that
Jim’s complicity in the crime explains his liability to be killed. As I said, I believe there
is a better explanation for Jim’s liability, but let us first consider Bazargan’s account of
complicitous liability.

On Bazargan’s account, “I am liable for the wrongs committed by other members of a
cooperative project in which I intentionally participate, even if my participation fails to
contribute causally to those wrongs.” He refers to this as the “complicity principle.”
And one intentionally participates in a cooperative project (or act) when he intends to
“act according to a role, the function of which is to contribute to a cooperative act.” Bazargan refers to this intention to act according to a role as a “participatory intention.”
And when members of a group have this participatory intention to act according to their
roles in furtherance of a cooperative act, we can say that these members share
participatory intentions. Finally, Bazargan argues that we can assign responsibility (or
“authorship”) for the cooperative act to each member based on his deciding to act
according to his role:

…enacting a role in the cooperative project relates the participant teleologically to the
cooporative act – the decision makes it her function to help bring about this act.
Because she willingly took on this function, we can ascribe to her inclusive
authorship of the function’s end – i.e., the cooperative act that the participants in the
cooporative act commit together. And this ascription of inclusive authorship provides


29 Ibid.
a basis for holding her accountable [i.e. liable] for the cooperative act, if the cooperative act is wrongful.  

In short, one can be liable to defensive killing merely by intending to act according to a role in a cooperative project. One need not actually perform one’s role. Returning to Bank 1, we can say that Jim has the participatory intention to serve as the lookout, the function of which is to kill the teller and rob the bank (and perhaps other cooperative acts associated with the project). And this participatory intention is sufficient to give Jim authorship for these cooperative acts (it does not matter that Jim was ineffective in his role). This is the basis of Jim’s liability to lethal harm.

But even if we grant that Jim’s participatory intention gives him some authorship, or responsibility, for the lethal threat to the teller, it is difficult to see how it would give him sufficient responsibility for the threat such that he’d be liable to lethal harm. This brings us back to the proportionality problem mentioned earlier. Clearly the more effective members of Jim’s group have sufficient responsibility for the threat to the teller such that they’d be potentially liable to lethal harm, but the explanation for that is fairly straightforward—they are culpable for causally contributing to the threat. But the explanation for Jim’s having sufficient responsibility is a bit more mysterious. Do we really think that his mere intention to act according to his role gives him sufficient responsibility for the lethal threat? For that matter, does it give him any responsibility for the threat?

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30 Ibid.: 188.
To be clear, Bazargan is not arguing that Jim has the same level of responsibility for the lethal threat as the other members. His explanation can account for the fact that, were it possible to harm one of the other members to prevent the threat, one of them would be liable. And Jim would not be liable due to considerations of comparative responsibility. He writes:

But not all participants in a cooperative project will bear the same degree of complicitous liability. One factor determining how much complicitous liability a participant bears is the degree of inclusive authorship that can be properly attributed to the participant. And one factor determining the degree of inclusive authorship a participant bears is the type of role that the participant has in the cooperative project...some roles have the function of contributing far more than others. All things being equal, the greater the degree to which one is supposed to contribute to a cooperative act, the more prominent one’s roll in that collective act. The more prominent one’s role in a cooperative act, the greater the degree of inclusive authorship that the participant bears. And since inclusive authorship is a basis of complicitous liability, the stronger the attribution of inclusive authorship, the greater the degree of complicitous liability that an individual will [potentially] bear for the cooperative act.31

So according to Bazargan, given the prominence of Jim’s role as a lookout, he bears sufficient responsibility for the threat to the teller to make him potentially liable to lethal harm. And given that it is not possible to harm the more responsible members of the group to save the teller, Jim is liable to be killed.

It does seem that Jim’s role is sufficiently prominent, such that, were he to effectively execute it, he would be potentially liable to lethal harm. But how does his mere intention to serve in that role, albeit a prominent one, give him sufficient responsibility for the threat? On this point, perhaps Bazargan would concede that perhaps Jim is not liable to

31 Ibid.
be killed. Perhaps his mere intention to serve in his role, although it does not make him liable to lethal harm, does make him liable to some serious lesser harm. I am suspicious even of this claim, but this seems like a somewhat intractable debate. I think we would make more progress by considering an alternative explanation for Jim’s liability.\footnote{Another possible explanation is that Jim is liable to some harm by virtue of his culpable attempt to causally contribute to the threat, and if that’s true, that would be a problem for the responsibility principle. However, my arguments against such claims in the previous chapter can be extended to this case as well. In any case, I am about to present a case in which Jim is neither complicit nor culpably attempting to causally contribute, yet, I will argue, the amount of harm to which he is liable in Bank 1 does not seem to diminish in the new case.}

I think there is a better explanation for Jim’s liability. And I believe it has less to do with his participatory intention than Bazargan insists. Consider:

\textit{Bank 2:} All is the same as in \textit{Bank 1} except the following. Suppose that just prior to the crime Jim announces to the group that he no longer wishes to participate in the plot. He says, “I hereby renounce my role in this plot and I no longer intend to participate in any way. Since I’m already here, I will occupy my look-out position, but I will take a nap instead of keeping watch.” Jim really means it, and he lies down for a nap shortly after taking his position. Furthermore, the other members of the group are okay with this. Consequently, they officially declare that Jim is no longer part of the group.

Let’s assume that, as in \textit{Bank 1}, the bystander’s killing Jim is necessary to save the teller. As in \textit{Bank 1}, Jim makes no causal contribution to the crime. However, unlike \textit{Bank 1}, Jim does not have a participatory intention in this case. Indeed, Jim intends to\textit{ not} participate. Furthermore, Jim is not even a member of the group. Thus, we cannot hold that Jim is liable to be killed based on his complicity in the crime (at least not in the sense...}
that Bazargan means). Yet it still seems clear to me that, whatever harm Jim is liable to in Bank 1, he’s liable to at least that amount of harm in Bank 2.33

If not because of complicity, then why is Jim liable in Bank 2? I think he’s liable to serious harm to save the teller because he is culpable for failing to save her—he is culpable for his wrongful omission. And this contribution34 to the threat to the teller, although not as significant as the causal contributions of the other members, is quite substantial. And quite plausibly, it’s substantial enough to make him sufficiently responsible for the threat such that he’s liable to serious harm to prevent it.

If I’m right about Bank 2, then complicity is not necessary for liability absent causation. Bazargan does not claim that it is, but he does seem to be claiming that complicity can be sufficient for liability absent causation. That’s the conclusion we’re supposed to draw from Bank 1. But my intuitions about Jim’s liability to lethal harm in Bank 1 are greatly influenced by what he fails to do, particularly when we consider what he failed to do (i.e.

33 One might object here that Jim in Bank 2 is complicit in the crime despite the fact that he no longer intends to participate. After all, he does participate in the crime in some sense. He goes along with it all, albeit with no role in the operation. And it is his “going along with it” (i.e. his complicity) that makes him liable to be killed. Part of this objection seems right to me, but this is hardly an argument for Bazargan’s complicitous liability. What does seem right is that Jim goes along with the crime in that he fails to do anything to stop it. And I believe that this is what makes him liable to be killed, given certain other circumstances that are present (e.g. that killing Jim is necessary and sufficient to prevent the crime).

34 My use of ‘contribution’ might be somewhat unconventional, as I use it to refer to omissions, although only those that are necessary “contributions” to threats—i.e. cases in which threats are counterfactually dependent on the relevant omission.
prevent the murder of the teller) and how easily he could have done it. Jim could have tipped off the police anonymously at any point during the weeks leading up to the crime.

Perhaps it will turn out that those who are complicit in grave wrongdoing will tend to be liable to defensive killing in that they will likely satisfy other more plausible grounds for liability, even when they are ineffective. But even if this were true, it would not be their complicity per se that would make them liable. Again, I believe that Jim is culpable for the threat to the teller in virtue of his failing to avert the threat, not his complicity.

3. Liability by Omission.

One of my criticisms of Bazargan’s complicity account was that there is a fundamental worry about the core concept of complicitous responsibility. And I claimed that my explanation of Bank 1 was preferable to Bazargan’s because, in part, it relies on a less mysterious source of moral responsibility—responsibility by omission. Furthermore, I pointed out that complicitous liability suffers from a proportionality problem. That is, even if a person could be liable to some harm by virtue of his complicity, it’s difficult to see how he could be sufficiently responsible such that he’d be liable to serious harm as Bazargan claims. I then suggested that liability by omission is better equipped to handle this proportionality problem. In this section, I will defend an account of liability by omission that supports this last claim.

It is uncontroversial that a person can bear some responsibility for a wrongful threat merely by virtue of his allowing the wrongful threat to eventuate. This is not to say that
anytime one allows wrongful harm to occur that one is morally responsible for it. Rather, it must be the case that one allowed the harm to occur and that one had a moral duty to prevent it—his omission must be wrongful. Only then can we say that one bears some moral responsibility for the wrongful harm by virtue of his omission.

It also seems uncontroversial that a person could be liable to some harm merely by virtue of his wrongful omission. If a person can be responsible for a wrongful threat of harm by omission and this harm can be prevented by harming him, it could be permissible to do so—he could be liable by omission.

The controversial issue is whether a person’s omission could make him liable to serious harm. Returning to Bank 1, most would agree that each of the effective members of the group is potentially liable to lethal harm, but again, there is a straightforward explanation for that. Each of them is culpable for causally contributing to the lethal threat to the teller. Jim, on the other hand, is merely culpable for allowing the threat to persist. He would be culpable for simply allowing the teller to be harmed. Does that make him sufficiently responsible for the threat to the teller such that he’d be liable to serious harm to prevent it?

Before I deal with the proportionality problem for liability by omission, there is perhaps a more serious related problem for my view. I will call this the *Duty-Limited Liability* problem. In the following section, I will explain this problem and how liability by
omission can overcome it. We’ll then move on to the proportionality problem in the subsequent section.


We might doubt that a person could ever be liable to lethal harm by virtue of a wrongful omission when we consider the stringency of the duty to save. And one way of considering the stringency of this duty is to consider the extent to which we may permissibly harm one to make one serve that end. Most of us believe, quite rightly I think, that the duty to save is much less stringent than the duty not to kill. So, other things being equal, we may permissibly harm one to a greater extent to prevent him from killing than we may harm one to prevent him from failing to save (i.e. use one as a means to save a person whom one was obligated to save). We can call this limit of harm to enforce one’s duty the enforceability of the duty. In short, it seems that the enforceability of one’s duty is harm, H, only if one is morally required to perform this duty up to the cost of H. Call the cost up to which one is morally required to perform a duty one’s required cost. In terms of liability, all this implies

\[ \text{Duty-Limited Liability: An agent, A, is liable to a harm, H, to prevent some wrongful threat, T, only if A’s required cost to prevent T is H.} \]

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35 This is a corollary of the claim that killing a person is a much more serious moral wrong than allowing one to die.


But based on what we have said so far about the stringency of the duty to save, it seems that one is rarely, if ever, required to save another at the cost of one’s life. Duty-limited liability would seem to imply, then, that one could rarely, if ever, be liable to be killed by virtue of one’s failure to save. This would be a problem for my theory of liability by omission.

Adil Haque appeals to duty-limited liability in the following passage:

In general, the stringency of a moral duty should determine the moral consequences of its violation. If morality requires you to suffer some harm rather than violate some duty then, if you violate that duty, it may be fair to inflict the same degree of harm on you to correct or prevent the unjust result of your violation. You cannot complain about suffering such harm since you had a moral duty to suffer similar harm to avoid producing such unjust results in the first place. However, it would be unfair to inflict a higher degree of harm on you than you had a duty to suffer. For example, the duty not to kill the innocent is very stringent. In general, we are morally required to die rather than breach this duty. It is therefore fair to kill someone who tries to kill an innocent person; in doing so we only inflict a harm on them that they have a duty to accept. Conversely, the duty to save the innocent is less stringent. In general, we are not morally required to die or suffer serious injury to save one innocent person from comparable harm. It is therefore unfair to kill one innocent person to save another; in doing so we inflict a harm on the first person that person has no duty to accept.  

Now let’s consider the following two cases that seem to support duty-limited liability:

*Foul Play:* D pushes V into a pond with no good reason. V will drown unless D saves him, which D can do at very little cost to himself. Nevertheless, D can’t be bothered to do so. The only way for V to save himself is by shooting D dead. D will then fall into the pond, and V can climb over him to safety.

*Enforced Rescue:* V is drowning in a pond through no fault of his own. D could rescue V at little cost to himself, but he can’t be bothered to do so. The only way for

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V to save himself is by shooting D dead. D will then fall into the pond, and V can climb over him to safety. D will then fall into the pond, and V can climb over him to safety.39

Most would agree that while D (Foul Play) is liable to be killed, D (Enforced Rescue) is not. And duty-limited liability offers us a nice explanation for this. D (Foul Play) would seem to be required to save V up to the cost of his own life. And that’s because he’s culpable for causing the lethal threat to V—he pushed V into the pond for no good reason. On the other hand, it seems that D (Enforced Rescue) would not be required to save V if it would cost him his life. Perhaps he’d be required to do so up to the cost of, say, a broken toe. But it does not seem that he would be required to sacrifice his own life for V. After all, we wouldn’t expect anybody else to sacrifice his life for V. Thus, according to duty-limited liability, D (Enforced Rescue) would not be liable to lethal harm to save V. Indeed, it seems that he would not be liable to any harm beyond a broken toe.

Duty-limited liability is likely true, but the above application of it is a bit misleading. The above explanation implies that one’s required cost is static. But that seems wrong. While it might be the case that D’s (Enforced Rescue) initial required cost to save V is only a broken toe (suppose that this would be the required cost for any innocent bystander), this required cost might increase. Haque says that it is unfair to kill an innocent person to save another since death is beyond the required cost of the former. But D (Enforced Rescue) is no longer innocent when he culpably fails to perform his duty. He is a wrongdoer. I believe that by virtue of D’s (Enforced Rescue) culpable

wrongdoing, he is liable to more than his initial required cost of a broken toe.

Furthermore, this is all consistent with duty-limited liability. And that’s because while D’s (Enforced Rescue) initial required cost (when he’s innocent) is a broken toe, his current required cost (after he culpably fails to save) is something more than that. And D’s (Enforced Rescue) current required cost is what limits the amount of harm that V can permissibly impose upon D (Enforced Rescue) according to duty-limited liability.

That one’s required cost, and hence the harm to which one is liable, can increase post-wrongdoing is analogous to the imposition of late fees on those who fail to pay traffic tickets on time.\(^\text{40}\) When one receives a speeding ticket with the fine of $100, one’s required cost is simply that. But it is fair for the court to demand that one pay, say, $125 if the ticket is not paid on time. This is not because it is fair for the court to demand that one pay $125 when one’s required cost is only $100. Rather, it is fair because one’s required cost is now $125.

The general point in the preceding discussion is that a previous wrongful failure to perform one’s duty can raise one’s required cost to perform the same duty at a later time. And if that’s right, then duty-limited liability implies that one can be liable to a greater harm than that which one was initially required to bear to perform one’s duty.

In order to see this more clearly, consider:

\(^{40}\) Thanks to Doug Husak for suggesting this analogy.
**Multiple Failures:** At T1 V is drowning in a river through no fault of his own. D is not responsible for V’s current predicament, but he could save V at the cost of a broken toe. D decides not to rescue V and continues walking down the river. A bit farther down the river at T2 D again has the opportunity to save V, but this time it would cost D a broken leg. He again decides not to save V and continues down the river. Farther down the river at T3, D has another opportunity to save V, but this time it will result in two broken legs for D.41

Let’s call the harm that will actually cost an agent to prevent some threat the necessary cost.42 So D’s necessary cost is a broken toe at T1, a broken leg at T2, and two broken legs at T3. And let’s stipulate that D’s required cost to save V at T1 is a broken toe. Given that, D is obligated to save V at T1 since his necessary cost at T1 does not exceed his required cost. But D’s necessary cost at T2 and T3 exceeds his required cost at T1. Nevertheless, it seems plausible that D is obligated to save V at these times. And that’s because, although his required cost at T1 is only a broken toe, it seems that his required cost would be something greater than that at T2, and even greater at T3.

So one’s required cost can increase as a result of previous wrongful failures to save, but it can also increase as a result of other wrongful omissions that are relevant to a victim’s current predicament.43 For example, suppose that the reason V ended up in the river was

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41 Thanks to Victor Tadros for suggesting this example to me. Tadros (2014) and Barry and Overland (2014) make the same point about the impact of previous failures to save on one’s required cost, although Tadros is skeptical that this could ever make one liable to be killed. I am suggesting otherwise, particularly when we consider the moral relevance of “assistance shortfall,” which I will discuss in the following section.

42 I borrow this terminology from Barry and Overland (2014).

43 And obviously, previous wrongful acts that causally contribute to the victim’s current predicament can raise one’s required cost to save. But in these cases, it won’t be as clear that the wrongdoer would merely be allowing the victim to die. For example, if D pushes V into the river and then fails to save V, it seems incorrect to say that D merely allows V to die. More accurately, we would say that D killed V.
that he was blind and stumbled into it. And suppose further that D knew that V was blind, saw him stumbling toward the river, and could have very easily prevented him from doing so. In that case, it seems plausible that D’s required cost at T1 would be something more than broken leg.

Let’s return now to Jim in Bank 1. Is it plausible to suppose that Jim would be required to save the teller up to the cost of his own life? That depends. Perhaps Jim’s required cost would be something more like a broken toe had he joined the gang just prior to the operation and had only one opportunity to call the police. But presumably Jim had multiple opportunities to prevent the threat to the teller. After all, although he did not contribute to the planning, he was there for all of it and did nothing to stop any of it. And we might think that due to the level of his complicit involvement, his is required to save the teller up to the cost of his own life at the time of the crime.

One might worry here that I am smuggling complicity into my omission-based explanation for the increase in Jim’s required cost.\(^4^4\) And so perhaps what’s really doing the work here, i.e. what’s really causing the increase in Jim’s required cost, is simply his complicity, not his wrongful omission. In response, it is not Jim’s complicity \textit{per se} that increases his required cost. Rather, my argument is that it is his previous wrongful failures to prevent the threat that increase his required cost. And on my view his complicity is relevant only insofar as it affords him better and more opportunities to prevent the threat. Indeed, I don’t even think being complicit is necessary to have a  

\(^{4^4}\) Thanks to Jeff McMahan for pressing me with this concern.
substantial required cost to save. To see this, let’s imagine that Jim was never a part of the group. He’s simply a bystander who learns of the group’s plot from the outset of the planning. Out of morbid curiosity, he spies on the group during their weeks of planning. He has multiple opportunities to call the police at no cost to himself throughout the planning, but he fails to do so because he wants the crime to happen. On the day of the crime, he continues to spy on the group and follows them all the way to the scene. He even passes a police officer on the street but says nothing. I find it quite plausible that Jim’s required cost at the time of the crime would be quite high. And perhaps he’d even be required to save the teller up to the cost of his life. And this seems plausible despite the fact that Jim is and was never complicit in the crime.

In summary, although duty-limited liability is likely true, this is not a problem for liability to serious harm by virtue of omission. Although one’s initial required cost (i.e. when he is innocent) to save another is likely quite low, it seems that this cost can continue to increase with wrongful omissions.45

3.2. Overcoming the Proportionality Problem for Liability by Omission.

Of course, that a person could be required to save another up to the cost of fatally harming himself does not entail that inflicting lethal harm on him would be proportionate. It does not entail that he’d be liable to this harm.

45 It’s also seems plausible that one’s required cost to save might be higher than another’s due to special obligations by virtue of certain roles (e.g. parents, policemen, doctors, soldiers, etc.), although I will not argue for this here.
As I explained earlier, one can be liable only to harm that is proportionate. And proportionality is a function of the wrongful harm to be prevented and one’s level of responsibility for that wrongful harm. And the latter is a function of the significance of one’s contribution to the threat and one’s responsibility for that contribution. The source of the proportionality problem for liability by omission, and more specifically Bank 1, is not the wrongful harm to be prevented. That harm is sufficiently serious—the teller is threatened with lethal harm. Nor is it the level of Jim’s responsibility for his contribution (i.e. his omission)—he’s highly culpable for that. Rather, the source of the proportionality problem is the significance of Jim’s contribution to the threat. The other members’ contributions are significant since they causally contribute in substantial ways to the threat. But one might argue that the significance of Jim’s contribution, i.e. his omission, is not enough to make him sufficiently responsible for the threat such that it would be proportionate to inflict serious harm on him, even though he is highly culpable for his contribution and harming him would save the teller. And if that’s right, Jim is not liable to the harm.

The proportionality problem for Jim’s liability is potentially exacerbated when we consider that he would be harmed opportunistically. Earlier, we considered McMahan’s suggestion that the proportionality constraint on opportunistic harming is greater than that on eliminative harming. Again, this would not be a problem for harming the effective members of the group. Harming any of them would be eliminative given that they are the very sources of the threat. Harming Jim on the other hand would be using him as a means to prevent a threat that he does not pose.
In the following sub-sections, I will attempt to overcome this proportionality problem for liability by omission by arguing the following: (1) that Jim’s being harmed would be opportunistic is not relevant to it’s being proportionate; (2) that Jim’s contribution is quite significant; (3) that Jim is even more culpable for his contribution than one might think. Thus, I believe that Jim could be liable to serious, perhaps even lethal, harm to save the teller.

3.2.1. Why Opportunistic Harming Is Irrelevant in Jim’s Case.

Perhaps there is something to the claim that typically opportunistic harming is more morally objectionable than eliminative harming. And perhaps this is because, as we said earlier, the former uses a person as a means to serve an end without his consent, while the latter does not force a person to serve some further end—it merely eliminates a wrongful threat, which, by necessity, harms the attacker. While this might be true in typical cases, there does not seem to be anything morally objectionable about harming Jim opportunistically. Consider this case of opportunistic harming:

*Brake Job*: A villain has disabled the brakes in your car in order to murder you. He knows that you will have to drive down a steep decline and will be unable to stop yourself from running off the road and over a cliff. He sets up a picnic on the side of the road where you will drive to your death in order to enjoy the show. There is nothing that he can do now to save you. As you speed down the road the villain calls you on the phone to let you know what he has done. As you approach him, you suddenly realize that the only way you can save yourself is to hit and kill him, which will cause you to stop short of the cliff.46

On the other hand, consider this case:

46 This case is very similar to one offered by McMahan (personal conversation).
*Cheerleader*: Everything is the same as in *Brake Job* except that you can’t hit the villain to save yourself. Instead, you can save yourself only by hitting an innocent bystander next to the villain. The bystander knows everything that is happening, and is very excited to be able to witness it all. He is jumping up and down and clapping his hands as he sees you speeding down the road. There is nothing the bystander can do to save you, and even if there were, he wouldn’t do it.

Although the cheerleader seems like a really bad person, there’s definitely something morally objectionable about killing him to save yourself. On the other hand, there doesn’t seem to be anything morally objectionable about killing the villain to save yourself in *Brake Job*, despite the fact that you would be killing him opportunistically. Thus, it seems to me that what makes the killing objectionable in *Cheerleader* is not that it is opportunistic. Rather, it is that you would be killing a person who is not responsible for the threat. On the other hand, the villain is responsible for the threat, and that seems to explain why it does not seem morally objectionable to kill him in *Brake Job*.

I suggest, then, that the real moral difference between most cases of opportunistic and eliminative harming is that the former tend to involve harming those who are not responsible for the relevant threats, while they latter tend to harm those that are responsible for them. But in *Bank 1*, although harming Jim would be opportunistic, it would not be morally objectionable on those grounds given that he is responsible for the threat by virtue of his wrongful failure to prevent it.

### 3.2.2. That Jim’s Contribution to the Threat Is Significant.

It might be difficult to imagine how killing Jim could be proportionate when we consider that he does not causally contribute to the threat. For without a causal contribution to the
threat, how could Jim’s contribution to it be significant enough to make him sufficiently responsible for the threat? Even if he is fully culpable for his contribution, it might seem too insignificant to give him sufficient responsibility such that he’d be liable to be killed.

In response, although Jim does not causally contribute to the threat, his contribution is quite necessary. That is, the persistence of the threat to the teller is counterfactually dependent on Jim’s wrongful omissions. Were it not for Jim’s wrongful failures to prevent the threat, the crime would not happen. Those seem like substantial contributions to me.

This is not to suggest that counterfactual dependence is required for a contribution to be considered significant. Substantial causal contributions could be quite significant even if they are not necessary for a wrongful harm. But it does seem that counterfactual dependence might be required for wrongful omissions to count as significant.

Of course, even if I’m right that Jim’s contribution is significant, it does not seem on par with those of the other members of the group. And so we might think that Jim would still not be sufficiently responsible for the threat such that he’d be liable to be killed. It seems that he’d have to be highly culpable for his contribution for that to be the case. I offer support for this in the following sub-section.
3.2.3. *That Jim is Even More Culpable for his Contribution than We Might Think.*

Besides Jim’s high required cost, there is another factor, I suggest, that supports the conclusion that he is liable to be killed to save the teller. Consider Jim’s necessary cost. Again, this is the cost that Jim would have to bear were he to save the teller. Jim’s necessary cost is quite low. At various points leading up to the crime, Jim could simply have called the police at no cost to himself. And I believe that this makes him more culpable for the threat than he would have been had his necessary cost been, say, two broken legs.

Following Barry and Overland, we can derive another value using Jim’s required and necessary cost—his “assistance shortfall.”[^47] We calculate Jim’s assistance shortfall by getting the difference between his necessary cost and his required cost. Let’s stipulate that Jim’s required cost is -100 (his life) and that his necessary cost is 0 (he could make a call at no cost to himself). So Jim’s assistance shortfall is +100. So perhaps the higher one’s assistance shortfall, the more culpable one is for failing to save. And given that Jim’s assistance shortfall is quite high, he seems very culpable for his failure to save.

But why think this? Why would one’s assistance shortfall be morally relevant in this way? Here’s another variation of *Bank 1* that might make the relevance of assistance shortfall more intuitive:

*Bank 3*: All is the same as in *Bank 1* except that there is another member of the group, Tim, who, like Jim, does not causally contribute to the group’s threat. He

[^47]: Barry and Overland (2014): 570-90. I independently developed a very similar view to Barry and Overland’s prior to learning of their publication on the topic.
merely fails to prevent the crime—his contribution is just as significant as Jim’s. Furthermore, Tim’s and Jim’s required cost is the same (-100). But while Jim’s necessary cost is 0, Tim’s is -90 (he’d be shot and seriously wounded for calling the police).

So while Jim’s assistance shortfall is quite high (+100), Tim’s is quite low (+10). And we might think that this is a morally relevant difference that makes Jim more culpable for his contribution than Tim would be for his.

But there is a problem with this view. Suppose that Tim would not have saved the teller even had his necessary cost been the same as Jim’s. He would not have saved the teller even had he had the same assistance shortfall as Jim (+100). Do we really think that he’d be any less culpable than Jim in this case? Probably not. This suggests that what matters for culpability is not necessarily one’s actual assistance shortfall, as Barry and Overland suggest. Rather, what matters is whether one would fail to save for a higher assistance shortfall, even if one’s actual shortfall is lower. Given that Jim does not save the teller at +100, it’s also true that he would not save the teller at +100. But given that Tim would not save the teller at +100 even though his actual assistance shortfall is +10, it seems that the morally relevant number is the former. So assistance shortfall is still morally relevant with regard to culpability, but what matters is not one’s actual shortfall, but rather one’s disposition to act with a given shortfall.

So despite the fact that Jim does not causally contribute to the wrongful threat to the teller, I think it is plausible that he is liable to be killed to save her. For one, it seems

48 Thanks to Victor Tadros for suggesting this.
plausible to suppose that Jim’s required cost is something close to his life given his numerous cost-free opportunities to prevent the threat. And it does seem that Jim could be sufficiently responsible for the threat given that (1) his contribution, although not a causal one, is significant—the persistence of the threat is counterfactually dependent on Jim’s wrongful omission, and (2) he seems highly culpable for his contribution given that he would not (he doesn’t after all) save the teller with such a high assistance shortfall. All this suggests that killing Jim to save the teller could be proportionate harm. Thus, it seems plausible that Jim is liable to the harm.

3.3. *The Innocent Bystander Objection.*

One might worry that my view implies that some innocent bystanders might be liable to lethal harm in virtue of their wrongful failure to save. That would seem to be a bad implication for my view, and perhaps good grounds for rejecting it. Here’s a case that demonstrates the worry:

*Bank 4:* All is the same as in *Bank 1* except that just prior to the robbery Jim leaves his lookout spot and tells a bystander who happens to be on the same balcony everything that is about to happen. The bystander knows that he can stop the killing of the teller by dropping a potted plant onto the gang member standing guard below, causing the other gang members to abort their operation. The bystander chooses not to do so for no good reason. A nearby citizen knows all that is happening, and knows that the only way he can save the teller is to shoot the bystander, causing him to fall on a gang member standing guard below. This will cause all the other gang members to abort their operation. 49

I agree that were my view to imply that innocent bystanders could be liable, we would have very good reason to reject it. But my view does not imply this. The first thing to

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49 Thanks to Adil Haque for pressing me with this case.
say about the above case is that the bystander is *not* innocent. He has a duty to save the teller, yet he fails to do this. He might very well have *been* innocent prior to his wrongful failure to save, but he is no longer innocent when he fails to do his duty. Let’s suppose that’s true, that the bystander is not responsible for any prior wrongs that enabled the current threat. We will call agents like this *previously innocent* bystanders. He’s still not liable on my account. Previously innocent bystanders just don’t have high enough obligated costs to generate sufficiently high required costs (and hence, assistance shortfalls), even when their necessary costs are minimal. In principle though, a bystander (not an innocent or previously innocent one though) could be liable to lethal harm in virtue of his failure to save. If there was a bystander who happened to be in a good position to foil the criminal plot on various occasions over the weeks leading up to the crime at very low actual cost, his cost differential might be high enough to render him liable to lethal harm. But that will rarely, if ever, be the case with bystanders. Yet it will often be the case with those complicit in a crime. Those who are complicit in a crime will often have various opportunities to save and fail to do so. But it is not their complicity *per se* (i.e. their participatory intentions or membership) that makes them liable. They are liable by omission.

*Conclusion.*

Although it is plausible to claim that Jim and other complicit threats like him could be liable to serious harm, I have argued that Bazargan’s complicity-based explanation has difficulty overcoming the proportionality problem. I then suggested another plausible explanation for Jim’s liability, his wrongful omission, and developed a theory of liability
by omission, which, I argued, is better equipped to handle the proportionality problem. And this is because wrongful omitters can be sufficiently responsible for a threat given that (1) their contributions are significant and (2) they can be highly culpable for these contributions given the consideration of assistance shortfall. Finally, given that my explanation for Jim’s liability does not require complicity, it can be used to explain other cases of intuitively liable individuals who do not causally contribute, at least in the traditional sense, to wrongful threats.


----- (2012) The Moral Target: Aiming at Right Conduct in War and Other Conflicts (New


----- (manuscript) “The Limits of Self-Defense.”


----- (manuscript) “Causation, Culpability and Liability.”


