Defensive Injuries and the Prorating of Punishment

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Abstract: In my view, any plausible account of what justifies the visiting of defensive or punitive harms upon a wrongdoer must invoke the notion of rights forfeiture. However, insufficient attention has been given to how these different types of forfeiture relate to one another. In this essay, I seek to outline the various conceptual options for how the imposition of defensive harms might impact one's vulnerability to punishment. The question pursued is this: Does an injury sustained through the successful use of defensive force in averting a culpable attacker reduce the attacker's subsequent moral liability to punishment? Ultimately, I attempt to motivate the claim that *all* defensive injuries have some rights-reclaiming effect against punishment.

Keywords: rights forfeiture, punishment, defensive force, rights reclamation, culpability, the necessity condition

1. Introduction

All moral rights are enforceable, and they are enforceable in two distinct ways correlating to the two distinct domains under which a wrongdoer might forfeit her rights against the imposition of harms: defensive force and punishment. Most broadly, this essay seeks to examine the relationship between forfeiture against defensive force and forfeiture against punishment—a topic which has received surprisingly little attention from those working in the relevant literature.[1] The main question pursued is this: Does an injury sustained through the successful

[1] Brief treatment of the issue is given by Helen Frowe who considers whether liability to punitive harms might justify the infliction of unnecessary defensive harms, focusing especially upon cases in which the use of defensive force by a victim is insufficient to avert a threat, and thus fails the necessity condition. Helen Frow, *Defensive Killing* (Oxford: Oxford University Press, 2014), 106-109.

use of defensive force in averting a culpable attacker reduce the attacker's subsequent moral liability to punishment? In posing this question, I assume that a culpable aggressor forfeits both her rights against defensive harms (when such harms are the necessary means for averting the relevant threat) and against the imposition of punishment. The interesting issue concerns whether the successful deployment of defensive measures against an attacker has any *rights-reclaiming effect* as it pertains to a wrongdoer's liability to punishment. I argue in the affirmative: There are some, if not many, cases in which the defensive injuries sustained by a culpable assailant mitigate the sort of penal consequences to which that assailant is vulnerable. Indeed, I will defend the more ambitious thesis that defensive harms *always* help to partially restore the forfeited rights of a wrongdoer. As will be elaborated upon below, I believe this claim has interesting and significant implications for how the notion of forfeiture might be conceptualized.

The structure of the paper is as follows. I begin by considering the Independence Thesis—namely, the view that forfeiture against defensive force differs from forfeiture against punishment such that injuries incurred via the former have no bearing upon the degree of severity of punishment to which a culpable aggressor is liable. Next, I consider the view that harms suffered via defensive force may *sometimes* lessen a culpable aggressor's vulnerability to punishment—namely, in those cases where the victim of an attack fails to act in accordance with the necessity constraint, or in which disproportionate defensive force is used. I then present and defend the claim that injuries acquired through defensive attack *always* help to partially restore forfeited rights against punishment. Thus, the order of presentation reflects the increasing levels of plausibility I find in each view.

2. The Main Case and Question

To begin thinking about the interplay between defensive force and punishment, consider the following case:

> *Marathon Race*: Tom and Dave will be competing against each other in an upcoming marathon. Tom is psychotically competitive and believes that Dave is his main threat to winning. So, Tom plots to disable Dave by vaporizing one of his legs. However, when Dave sees Tom approaching with ray gun in hand, he discerns Tom's diabolical intentions. Before Tom can fire his weapon, Dave uses his own trusty ray guy to avert the attack by nonfatally blasting off one of Tom's legs.

Note, the harm Tom suffers in this case is exactly proportionate to the harm he intended to inflict upon Dave. The question which concerns the present inquiry is this: Does the fact that Tom suffered the loss of his leg when Dave defended himself against attack mitigate the severity of punishment to which Tom is rendered vulnerable as a result of his rights-violating behavior? For instance, suppose one endorses some version of the principle of *lex talionis*. Should an "eye for eye" retributivist maintain that, when it comes to the doling out of proportionate punishment, Tom deserves to lose his other leg too? Notice, the question here is *not* whether the relevant punishing party may use moral discretion and reduce Tom's sentence out of sympathy, or whether the occasion merits leniency. Rather, the question is whether Tom's has a right to lesser punishment (or no punishment at all).

A potentially helpful way of thinking about this issue may make use of the notion of rights reclamation. When Wrongdoer culpably breaches another person's moral boundaries, she forfeits her own rights against proportionate punishment. In forfeiting her rights, Wrongdoer's moral shields are lowered, making permissible the infliction of stigmatizing hard treatment that would ordinarily be prohibited. However, excepting those cases involving the most egregious of

rights violations (e.g., murder), forfeited rights are rarely permanently lost. Once a proportionate punishment is exacted, Wrongdoer's moral shields are raised—her forfeited rights *reclaimed*—thereby making it once more impermissible to visit upon her the sort of hardship and deprivation constitutive of punishment. While it is prima facie reasonable to assume that two offenders who commit the exact same crime should receive the exact same punishment, there are a variety of factors beyond culpability and the gravity of the committed offense which may bear upon the issue of rights reclamation. For instance, elsewhere I have defended the claim that a redemptive act (provided via compensation) paired with a regretful mind may result in partial or full reclamation of an offender's forfeited rights. The specific subject matter at hand, then, concerns whether injuries sustained through the imposition of defensive harms (e.g., Tom's loss of limb) might also have some *rights-reclaiming effect* against punishment.

Two quick clarificatory remarks are in order. First, if injuries suffered through the infliction of defensive harms really do help restore the forfeited rights of an aggressor, the prorating of punishment will intuitively be determined by the severity of the injury suffered and not the amount of force used by the victim. To illustrate, suppose Dave uses a rocket launcher to avert Tom's attack but misses his target entirely; nevertheless, Tom is scared into retreating. In this case, though Dave's defensive measures were successful in repelling Tom's assault, because Tom suffered no injuries, the use of such defensive measures has no rights-reclaiming significance. Similarly, if Dave were to avert Tom's attack by using a stun gun instead of a ray gun, such defensive measures would presumably have negligible impact upon Tom's vulnerability to punishment.

Second, even if proportionate defensive force is used and Aggressor suffers significant injury, it is plausible to think that this will not result in *complete* reclamation of forfeited rights—

that there will be some remainder of punitive harms to which Aggressor is still liable. This is because defensive harms are conceptually distinct from punitive harms in normatively important ways. Foremost, many believe that punishment is essentially *stigmatizing*—that in order for a response to count as punishment, the imposition of hard treatment by itself is not enough, rather, such hardship and deprivation must express condemnation of a perpetrator's actions.[2] Clearly, defensive force will typically lack the sort of symbolic denunciation and stigma naturally associated with punishment. Perhaps this need not be problematic though. After all, there are other vehicles by which moral censure could be accomplished. For instance, after an assailant has suffered serious defensive harms—harms which are in some sense equivalent to the sort of hardship that would be constitutive of proportionate punishment—a condemnatory message denouncing the assailant's actions could perhaps capture the crucial stigmatizing aspect of punishment, and thus punishment be precluded altogether.[3] Regardless, the question under consideration need not be construed as asking whether an injured aggressor reclaims *all* forfeited rights against punishment, only whether *some* rights are reclaimed. And, admittedly, while I have no easy formula which spells out precisely how much punishment might be deducted given the infliction of certain defensive harms, I hope others share my conviction that post-attack uniped Tom is vulnerable to less punishment than a Tom who escapes the confrontation unscathed. Finally, it is worth noting that leaving the details vague at this juncture is not too worrisome. Figuring out precisely what counts as proportionate punishment for a particular crime is a

[2] Joel Feinberg first drew attention to the communicative aspect of punishment in his famous and influential essay, "The Expressive Function of Punishment," *The Monist* 49 (1965): 397-423.

[3] I assume, without argument, what Douglas Husak labels the "dependent theory" of punishment. According to this view, the two main components constitutive of punishment—hard treatment and stigmatization—are inversely proportional: "the fact that an offender receives more or less of one component of punishment than she deserves is a good reason to vary the amount of the remaining component." See his "Already Punished Enough," *Philosophical Topics* 18 (1990): 95.

notoriously difficult problem.[4] Suggesting that harms suffered via defensive force should be factored in when determining what counts as a fitting punishment only adds another layer of complexity to an already difficult and complicated issue.

3. The Independence View

One salient response to the Main Question is the Independence View: Forfeiture against defensive measures functions differently than forfeiture against punishment, such that defensive harms have no bearing upon how much punishment to which an assailant is liable. According to this view, the amount and severity of punishment to which Tom is rendered morally vulnerable is exactly the same whether Dave averts Tom's attack by running away or he averts Tom's attack by vaporizing Tom's leg. Of course, one way punishment differs from defensive action is in its purely backwards-looking nature; punishment responds to a wrongdoing that has already occurred, while defensive action aims to avert an offense in progress. But more importantly, one possible motivating reason for the Independence View may be found in the fact that the *conditions* for forfeiture of rights against defensive force are different than the conditions for forfeiture against punishment.[5]

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[4] Along these lines, Daniel McDermott writes, "the problem of matching crime with punishment has occupied philosophers for centuries, and any theory of punishment that offered a simple formula for determining punishments should be immediately suspect." See McDermott, "The Permissibility of Punishment," *Law and Philosophy* 20 (2001): 425.

[5] It should be noted that many believe there are cases in which defensive measures may be permissibly deployed, even though the relevant threat has not forfeited any rights. To borrow an example from Robert Nozick: Suppose Tom is taking a nap at the bottom of a well. Dave sees this and decides to pick up an innocent party passing by, Graham, and hurl him at Tom. Many believe that Tom has an agent-relative permission to use his ray gun and disintegrate Graham's falling body before it crushes him to death. However, it is clear that because the risk of harm cannot be tied to any of Graham's voluntary actions, Graham is not *liable* to be killed; he is best considered an innocent threat. That is, *if* it is permissible to shoot Graham with a ray gun in this scenario, it is not because he has forfeited any rights. See Nozick, *Anarchy, State, and Utopia* (New York: Basic books, 1974), 34-35. For a recent defense of the view that an individual may possess an "agent-relative prerogative" to impose defensive harms upon a non-liable threat, see Jonathan Quong, *The Morality of Defensive Force* (Oxford: Oxford University Press, 2020), Ch. 3.

I believe the most plausible accounts of liability to defensive attack are *objectivist* with respect to the deontological status of an act. Thus, I am sympathetic to an analysis like Jeff McMahan's, who argues that the criterion of liability to defensive attack is moral responsibility for posing an objectively unjust threat.[6] On the other hand, I believe it reasonable to be a *subjectivist* with regard to punishment. Following Christopher Wellman, I believe the criterion for forfeiture against punishment is rights-related culpability.[7] It does not matter whether a criminal's conduct fails to violate another's rights in some fact-relative sense, or whether the attempt is unsuccessful. An agent forfeits her rights against punishment when she *deliberately* attempts to violate the rights of an innocent.[8]

The upshot is that while forfeiture against defensive attack and forfeiture against punishment typically go hand in hand, it is possible to imagine cases whereby an agent's actions render her liable to defensive force, but not punishment (and vice versa). To illustrate with a famous example:

> *The Resident:* The identical twin brother of a notorious murderer is driving during a stormy night in a remote area when his car breaks down. Unaware that his brother has recently escaped from prison and is thought to be hiding in this same area, he knocks on the door of the nearest house seeking to phone for help. On opening the door, the armed and frightened resident mistakes the harmless twin for the murderer and lunges at him with a knife.[9]

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[6] Jeff McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues* 15 (2005): 394.
[7] Christopher Heath Wellman, *Rights Forfeiture and Punishment* (New York: Oxford University Press), 134.
[8] This analysis of culpability tracks closely with Alexander, Ferzan, and Morse, who write that the essence of culpability lies in "acts manifesting insufficient concern for the legally protected interests of others"—except that the focus here is upon moral rights as opposed to legal rights. See, Alexander, Larry, and Kimberly Ferzan, with Stephen Morse, *Crime and Culpability: A Theory of Criminal Law* (New York: Cambridge University Press, 2009), ch. 2.
[9] I take this example, without modification, from McMahan, "The Basis of Moral Liability to Defensive Killing," 387.

In this case, the two different types of forfeiture pull apart. Resident is liable to defensive harms because she launches an objectively wrongful attack against an innocent. To underscore this point, notice that third parties (who possessed of all the relevant facts) would be justified in forcibly interfering and stopping Resident's attack, but interference against the innocent twin's counterattack would be prohibited. However, because Resident has a *justified* belief that the stranger at her door is a dangerous homicidal maniac, she enjoys full epistemic excuse and thus is not liable to punishment.

Where does this leave us? Certainly, it makes no sense to ask whether Resident, if she sustains significant injury through the twin's use of defensive force, reclaims rights against punishment, because Resident, being a non-culpable aggressor, never forfeits such rights in the first place. However, to conclude from this that defensive injuries never affect one's liability to punishment would be unwarranted. Rather, what I believe this case highlights is the need to narrow the focus of the current discussion and concentrate solely upon the category of culpable aggressors, because only culpable aggressors forfeit rights against both defensive and punitive harms. The relevant question, then, is: Do *culpable* assailants have the standing to demand lesser punishment because they were subject to defensive injury?

4. Defensive Measures *Sometimes* Have Rights-Reclaiming Effect

The overwhelming majority of those working on self-defense agree that the permissible use of defensive force is constrained by conditions pertaining to both proportionality and necessity. Concerning the former, it is widely assumed that the amount of force a victim uses must be in proportion to the severity of the threatened harm. If Tom were to attempt to steal Dave's copy of *Anarchy, State, and Utopia*, despite the obvious and stinging injustice involved in that sort of theft, it would be wrong of Dave to defend his property rights by pulling out a gun and using

lethal defensive force. That would be excessive and so unjust. Indeed, it seems that proportionality is *internal* to liability: Tom only forfeits rights against a proportionate amount of defensive force. There is more debate regarding the necessity condition. Some believe that necessity is internal to liability as well, such that an attacker only forfeits her rights against harm if there are no other viable means by which the threat could be averted. So, Jeff McMahan writes: "If harming a person is unnecessary for the achievement of a relevant type of goal, that person cannot be liable to be harmed."[10] On the other hand, others argue that necessity is an external constraint. According to the externalist, a culpable attacker forfeits rights against defensive attack, and so, is liable to be harmed, but liability by itself does not determine the "all things considered" permissibility of a defensive attack.[11] For the externalist, it would be impermissible for Dave to use unnecessary defensive measures to avert Tom's attack, but not because Tom would be wronged by such actions. Rather, in this case, the obligation to refrain from imposing gratuitous harm upon an attacker would be freestanding—still binding, but failing to correspond to any particular individual's claim-right. Regardless of how the details are parsed out, nearly everyone recognizes that if Dave could just as easily avert Tom's assault by hopping on his motorcycle and safely speeding away, it would be a wrong for Dave to stand his ground and engage in lethal counterattack.

Focusing first upon the necessity condition, here is one possible line of thinking to which I am broadly sympathetic. Whenever a defensive agent believes she is imposing *unnecessary* harms upon a culpable attacker, whatever injuries are sustained should be deducted from the

[10] Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), 9.
[11] Helen Frowe defends a version of what she calls "proportionate means externalism". See, *Defensive Killing* (Oxford: Oxford University Press, 2014).

punishment that would otherwise have been imposed.[12] The reasoning for why we can ascribe to the rights-violator a credit of hardship-received in this type of scenario is twofold. First, when a victim knowingly fails (or at least believes she has failed) to act in accordance with the necessity condition, it is plausible to think the counterattack is not a purely defensive action but rather blends the punitive with the defensive. When Dave could easily avert Tom's attack by riding away on his motorcycle, but instead chooses to vaporize one of Tom's legs with his ray gun, it is plausible to suppose there is some punitive force behind the zapping. But if a victim's defensive actions are infused with punitive force, then it straightforwardly follows that the attacker will reclaim some of her forfeited rights against punishment when subjected to such mixed measures.

One might object at this point that any unnecessary defensive harms imposed by non-state actors should not be construed as punishment because punishment must have a political source. For example, it is in this vein of thought that H. L. A. Hart writes that punishment "must be imposed and administered by authority constituted by a legal system against which the offense is committed."[13] If this correct, then the hardship inflicted by private parties can never aid in the reclamation of forfeited rights; only governmental authorities acting on behalf of a legitimate state's legal system could have such transformative moral powers.

Several things may be said in response. To start, consider the following scenario:

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[12] Note the ambiguity in the claim that defensive actions failing to adhere to the necessity condition are to be construed as punitive. Is it that defensive actions which, from an objective point of view, fail to accord with necessity are partly punitive? Or is the relevant factor here the beliefs of the defensive agent? I have opted for the latter interpretation in the above discussion. Suppose Niklas charges at Graham with a knife in hand, planning to stab and kill him. It so happens though, that Graham is standing on a stage next to a lever which if pulled, will open a trapdoor allowing Niklas to fall through, thus averting the threat without having to resort to violence. It is clear that if Graham has no knowledge of this trapdoor, he is not culpable when he applies defensive force to rebut Niklas's attack. Moreover, I would allege that if Graham does not knowingly apply unnecessary defensive measures, it would seem odd to describe his actions as punitive.

[13] H. L. A. Hart, "Prolegomenon to the Principles of Punishment," in *Punishment and Responsibility* (New York: Oxford, 1968), 5.

Vigilante Justice: Julia steals Anne's fancy new sailboat and moves it to a hidden location. Anne reports the crime, however, despite a thorough investigation into the matter, police do not uncover enough evidence to charge Julia, let alone convict her for the crime. Nonetheless, Anne is rightly convinced of Julia's nautical thievery. Deciding to take matters into her own hands, Anne constructs a private prison in her home, kidnaps Julia, and confines her there for a year's time. After one year, Julia escapes, authorities discover the missing boat, and new evidence is gained that proves Julia was indeed the culprit.[14]

For the purposes of argument, assume that serving a one-year prison sentence is a proportionate punishment for stealing another's boat. Is Julia liable to further punishment because her "imprisonment" was not carried out by civil authorities? I believe the answer is clearly "no". First, following natural rights theorists such as Locke, Nozick, and Simmons, I believe there is a pre-institutional right to punish wrongdoers—a liberty right shared by all in the state of nature.[15] But if individuals outside of political society can exact punishment with rights-reclaiming effect, why think the victim of vigilantism does not also reclaim forfeited rights? The fact that the state has a justified monopoly over the enforcement of rights for its given territory is perfectly compatible with the claim that victims of vigilante justice, like Julia the boat-thief, are the recipients of rights-reclaiming punishment. Indeed, I believe there are good reasons to prefer the institution of state punishment over a system of open punishment, and so I believe Anne, by kidnapping and incarcerating Julia in a homemade prison, culpably fails in her duty to respect the

[14] A similar case is provided by Husak in, "Already Punished Enough," 88-89. Husak is concerned with whether extralegal punishment might provide good reason for reducing a criminal's sentence, but while the focus of his article is upon the stigma that might be imposed by private parties, the concern here is with the hard treatment aspect of punishment.

[15] If one takes moral rights seriously, as I do, then Simmons's piece on Locke and the "natural executive right" is one of the most important articles published on the topic of punishment in the past several decades. See, John Simmons, "Locke and the Right to Punish," *Philosophy & Public Affairs* 20 (1991), 311-349.

state's exclusive right to punish criminals. But none of this entails that the hardship inflicted upon Julia in response to her boat-theft should not qualify as punishment. At minimum, the onus is upon those like Hart to explain why state-administered punishment has rights-reclaiming uptake but privately-exacted punishment does not.

Even if one rejects the suggestion of there being a punitive impulse sneaking into the application of unnecessary defensive harms, another reason the victim of unnecessary defensive violence may have a right to lesser punishment has to do with compensation. To be sure, this second reason assumes an internalist rendering of liability. But, if Assailant is the recipient of defensive harms to which she is not liable (because such harms are unnecessary), then Assailant is the victim of a crime and so is entitled to compensation. Typically, a duty to provide compensation will be discharged through a financial settlement, however, this need not be so. Compensation, as I understand it, is fundamentally about restoring things back to the status quo—cancelling out, to the best of one's ability, the harmful consequences that follow from an injustice being committed. Given this, there is no reason to think that compensation must be carried out via monetary mechanisms. And in this case, if Assailant is the recipient of undue hardship, the most natural mode of remedy will involve counting Assailant's injuries toward a credit of hardship-received and deducting that credit from the amount of punishment to which Assailant would otherwise be vulnerable

A similar logic can be applied to cases in which disproportionate defensive force results in serious injury. In fact, it is reasonable to suppose that when an individual uses defensive measures which flagrantly violate the proportionality requirement, not only does Assailant merit a lesser punishment, she is plausibly owed financial payment as well. For example, if Tom attempts to steal Dave's water bottle, and the latter defends himself by incinerating one of Tom's

legs with his ray gun, it is plausible to judge that the infliction of such a gratuitous injury not only cancels out Tom's vulnerability to punishment, but moreover, Tom is owed monetary damages to make up for the excessive and undue hardship to which he was victim.

5. Defensive Measures *Always* Have Rights-Reclaiming Effect

I find the view sketched in the previous section—namely, that unnecessary or disproportionate harms have rights-reclaiming effect against punishment—to be extremely plausible. It may very well be correct. However, I endorse and so aim to defend an even more progressive position in this final section. To start, notice that the conclusion reached in Section 4 is consistent with both of the following propositions:

(1) At least in *some* cases, the amount of punishment to which a culpable assailant is vulnerable should be prorated according to the severity of defensive injuries sustained.

(2) In *only* those cases where defensive measures fail to conform to proportionality and/or necessity should the amount of punishment to which a culpable assailant is vulnerable be prorated according to the severity of defensive injuries sustained.

Of course, without more being said, (2) is the more natural conclusion to reach. However, one way to demonstrate the preferability of (1) over (2) is to introduce a third proposition which is consistent with (1) but not with (2). Consider, now, the main thesis I wish to advance in this section:

(3) A culpable assailant's vulnerability to defensive and punitive harms—*considered in their totality*—should not be determined by matters of luck.

Given this, I will argue that (3) is incompatible with (2), but that the conjunction of (1) and (3) yields:

(4) In *all* cases where defensive measures result in injury, the amount of punishment to which a culpable assailant is vulnerable should be prorated according to the severity of injuries sustained.

In other words, I will argue that luck-based considerations give us reason to push past the more moderate position expressed by (2) in favor of (4).

The contention that luck should play a minimal role in forfeiture theory is not a new idea. For example, Alexander, Ferzan, and Morse persuasively argue that results are irrelevant to how much punishment a wrongdoer deserves—only culpability matters.[16] To be sure, Alexander, Ferzan, and Morse cast their theory in the retributivist's language of desert; most of their claims, however, can be straightforwardly transposed into the terminology of forfeiture theory. The argument against results (in addition to culpability) having moral significance in the evaluation of an actor's blameworthiness rests on two main claims. First, Alexander, Ferzan, and Morse allege that the burden of proof lies with those who would insist that consequences are morally important. Unless a compelling argument can be supplied which explains why results should play a normatively important role in our evaluation of an agent, the view that culpability is all that matters should take precedence. Second, Alexander, Ferzan, and Morse believe that the only argument in favor of the results-matter view is a phenomenological one—that is, most people seem to intuitively think that an individual who attempts and succeeds in killing an innocent person is liable to much greater punishment than an individual who attempts murder but fails. However, Alexander, Ferzan, and Morse argue that such intuitions simply reveal our preferences against harm and should not be considered as genuine "moral intuitions."[17] To motivate their claim, consider the following case:

[16] Alexander, Ferzan, and Morse, *Crime and Culpability*, ch. 5.
[17] Alexander, Ferzan, and Morse, *Crime and Culpability*, 177.

> *Satanic Cult:* Members of the gang kidnapped someone. They have strapped him to a chair behind a partition, with the barrel of a rifle running through a small hole in the partition and pointing at the kidnapped victim's heart. The rifle holds twenty rounds, and the gang loads it with nineteen blanks and one live shell. No one has any idea which shell is the live one. Twenty gang initiates who want to become full-fledged gang members are each required as a condition of membership to pull the rifle's trigger once…Each initiate pulls the trigger, and at the conclusion of the rite, the victim is found to have been killed by the one live round. No one can tell which initiate fired the round that killed him, nor is there a scientific test that can determine who did so.[18]

I believe it unquestionably clear that, in this case, it matters not one iota which gang member was causally responsible for firing the bullet which killed the kidnapped victim. All initiates in this case are equally guilty and deserving of punishment because all participated in culpable rights-violating behavior. And if an initiate's blameworthiness should not be lessened because, as a matter of luck, she was not the one to actually deliver the lethal shot, then neither should an initiate face a lesser punishment if, by fortuitous circumstances, the gun misfired on the one live round sparing the victim's life. In general, whether a perpetrator is successful in killing an innocent person, or the attempt is thwarted by "unlucky" circumstances, the consequences of culpable behavior make no difference to the magnitude of forfeitures against punishment.

A similar line of reasoning can be found in the literature on self-defense. For instance, Quong and Firth criticize the internalist view of liability on the grounds that it is too dependent upon variables of chance.[19] And though the case they build against luck is primarily an intuitive

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[18] Alexander, Ferzan, and Morse, *Crime and Culpability*, 175.

[19] Joanna Mary Firth and Jonathan Quong, "Necessity, Moral Liability, and Defensive Harm," *Law and Philosophy* 31 (2012): 282-286. Firth and Quong cast their argument against what they call the "instrumental" account of liability. However, there is good reason to prefer the label of "internalism."

one, at minimum, their argument demonstrates a certain oddity in allowing luck and necessity to determine whether one forfeits rights against defensive harms. Consider the following pair of cases:

> *Murder 1*: Albert is about to kill Betty in order to inherit her fortune. Though there are various moderate harms Betty could instinctively inflict on Albert in self-defence (e.g., a broken wrist), there is nothing Betty can do that will successfully avert Albert's threat.
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> *Murder 2*: Albert is about to kill Betty in order to inherit her fortune. In this case, however, Betty just happens to be carrying a gun and shooting and killing Albert (and only this) will successfully avert his threat.[20]

Of course, there is an obvious sense in which luck can play a decisive role in determining what our obligations and rights are at any given moment.[21] But in the context of rights forfeiture, there is something strange about an assailant's forfeiture of rights being determined by variables of chance, such as whether a victim happens to be carrying a firearm.

What explains this oddity? Zooming out, so that both punishment and defensive force are in view, I would allege that forfeiture theory, from first to last, and for whichever type of forfeiture we are considering, is about moral *agency*—about whether or not one treats others with the moral respect they are owed as autonomous beings endowed with rationality and rights-generating dignity. The sole basis of forfeiture is our voluntary behavior. It is our choices that determine our moral standing. This is why a person thrown down a well and whose falling body threatens to crush that of an innocent forfeits no rights against attack. An agent's moral shields

[20] Firth and Quong, "Necessity, Moral Liability, and Defensive Harm," 286.

[21] For example, suppose Albert is walking along a seldom-traveled path through the woods when he happens to come across Betty, whose ill-fated hiking adventures came to an abrupt end when, through an act of God, a small boulder dislodged itself from the hillside and rolled on top of Betty—trapping her in place. Despite Betty's bad luck, and the general randomness behind such events, if Albert can provide easy rescue by pulling Betty out from underneath the fallen rock, I believe he is obligated to do so.

are only lowered when her conduct manifests a will set against the rights-protected interests of others. Non-agential variables, such as whether a victim happens to be carrying a firearm, undoubtedly matter a great deal (we would prefer the killer's attempt be unsuccessful), but they do not affect the normative status of a culpable offender. In short, loss of rights is determined entirely by intentional behavior, not through luck or happenstance.

Here is the main claim I wish to advance: If one agrees that luck should not play a determinant role in forfeiture against punishment or defensive force, one ought also to conclude that forfeiture against the considered *sum* of defensive and punitive harms should not be determined by luck. But notice, the view considered in the previous section has just this consequence: The *total* amount of punitive and defensive harms which may be permissibly visited upon Assailant depends upon a combination of factors external to the will of Assailant, including whether Victim's actions happen to conform to conditions pertaining to necessity and proportionality. Here, my focus will be upon unnecessary harms. Returning to the Main Case, then, consider:

> *Motorcycle 1:* Dave is an ardent supporter of both stand-your-ground laws and the castle doctrine, such that, there is no set of circumstances under which he would consider retreating from an unprovoked attack. It just so happens that Dave's motorcycle is broken and in need of repair, a fact of which he is aware. When Tom attacks, Dave cannot escape the threat by merely speeding away, but can only avert the attack through armed self-defense. Dave vaporizes Tom's leg with his ray gun.
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> *Motorcycle 2:* Dave is an ardent supporter of both stand-your-ground laws and the castle doctrine, such that, there is no set of circumstances under which he would consider retreating from an unprovoked attack. Dave's motorcycle is in pristine condition, a fact of

which he is aware. When Tom attacks, Dave recognizes that he could escape by merely speeding away but chooses to engage in armed defense instead. Dave vaporizes Tom's leg with his ray gun.

It was argued above that as long as necessity is afforded deontological significance, when Dave imposes unnecessary harms upon Tom, his actions should be construed as containing a mixture of both defensive and punitive elements. According to that view, Tom is liable to much less punishment in the second case as compared to the first, because in the second scenario, he is the victim of unnecessary harms. But it strikes me as utterly strange that according to such an account, Tom is rendered morally vulnerable to potentially *twice* as much hardship in the second case as to the first, when the deliberate and unjustified risk of harm imposed upon Dave is identical in each case.

Might it not be more plausible to maintain that a culpable assailant's overall liability to punitive and defensive harms—*considered in the aggregate*—is held constant across these fluctuating circumstances, as long as the type and degree of rights-related culpability is unchanged? This seems an entirely reasonable suggestion. I believe the moral relevance of culpability cuts across both defensive and punitive contexts as it pertains to rights forfeiture. When a culpable aggressor attempts to inflict unjust harms upon an innocent person, she forfeits her rights against the imposition of both defensive and punitive harms, but, crucially, such harms should be considered *in tandem*. By attempting to violate another individual's rights, the moral shields of the culpable offender are dropped, making permissible the infliction of harms *in general* (as long as such harms are in response to the relevant wrongdoing). Hence, when hardship is visited upon our aggressor, whether such treatment comes via defensive force *or* punishment, her moral shields are raised in direct proportion to the extent of hardship received.

On this luck-free account, then, defensive injuries *always* have some rights-reclaiming effect against punishment.

6. Conclusion

I have defended the claim that the defensive injuries sustained by a culpable assailant always have a mitigating impact upon the severity of punishment to which an assailant is rendered vulnerable. However, the spirit of this essay is not dogmatic, but exploratory. I have attempted to address a question which has received scant attention in the literature, and to outline the various conceptual options one may adopt in response. So, even if one finds the bolder, more audacious thesis advanced in the final section unpersuasive, there are more moderate positions one may espouse. Furthermore, my hope is that the analysis offered here draws attention to an important but neglected area of rights forfeiture theory and can thus serve as a catalyst for stimulating further discussion and debate about the relation and potential interplay between the different types of forfeiture.

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