Self-Defence Against Multiple Threats

Kerah Gordon-Solmon

Department of Philosophy, Queen's University, Canada

kg59@queensu.ca

Abstract

If a threat (or threatener) is liable to be defensively killed, there is a defeasible justification for killing her. On certain prevailing assumptions about liability, which I accept, there are liability justifications for killing *any number* of minimally responsible threats, each of whom would otherwise kill a single non-responsible victim. Absent harms to third parties, these justifications appear, counter-intuitively, to be undefeated. I argue that this counter-intuitive appearance is deceptive.

1   Introduction

If a threat (or threatener) is liable to be defensively killed, there is a *pro tanto* (or defeasible) justification for killing her. The primary defeasor of liability justifications is the *wide proportionality constraint*. This is concerned with the harms that would be caused to third parties, who are not liable to those harms, by killing the threat.[1] When the badness of those harms is excessive, weighed against the good killing the threat would achieve, the liability justification for

1   Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), p. 21.

killing the threat is defeated by the wide proportionality constraint. On certain assumptions about liability, which I accept, there are liability justifications for killing *any number* of minimally responsible threats, each of whom would otherwise kill a single non-responsible victim. Absent harms to third parties, these justifications appear, counter-intuitively, to be undefeated. I shall argue that this counter-intuitive appearance is deceptive.

2   Background Assumptions about Liability

Let me begin by laying out the relevant background assumptions I'll make about liability to being defensively killed (or 'liability' for short).[2] I draw these from Jeff McMahan's development of his Responsibility Account of liability.

First, the definition: if a person is liable, it means that she has forfeited her right against being killed in certain circumstances, for a certain reason. Killing her does not wrong her, and she has no right to defend herself against it.[3]

There are three necessary conditions of liability, which for the present purposes I'll treat as jointly sufficient. These are instrumentality, necessity, and narrow proportionality.

First, it's necessary for liability that the killing be *instrumental*: it must serve to achieve some good, or be an unavoidable side-effect of the achievement of some good.[4] In the type of case on which I'll focus, the good to be achieved by killing the threat is saving her victim's life.

Second, it's necessary that the killing be *necessary* to achieve the relevant good.[5] If the good can be achieved without killing the threat (and other things are equal), then the threat is non-liable.[6] I'll assume throughout that the necessity condition is met.

Third, it's necessary that the killing be *narrowly proportionate*.[7] This requires that the good that would be achieved by killing the threat be proportionate to the badness of the harm of her death, given the threat's degree of responsibility

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2   People can also be liable to lesser defensive harms. But unless specified otherwise, I'll use "liability" to refer to liability to being defensively killed.

3   McMahan (2009), pp. 8-14.

4   McMahan "Liability, Proportionality, and the Number of Aggressors" (unpublished notes, April 2014). The descendant paper is forthcoming in Saba Bazargan and Samuel Rickless, eds., *The Ethics of War* (New York: Oxford University Press).

5   McMahan (2009), p. 9.

6   That is, she's not liable to being *killed*. She might be liable to a lesser harm if it's necessary for achieving the relevant good.

7   McMahan (2009), pp. 20-21.

relative to her victim's. (I'll say more about the latter clause below.) If the victim is threatened with fatal harm and the threat bears some responsibility for that fact while the victim bears none, and if killing the threat will save the victim's life, then, other things being equal, killing the threat is narrowly proportionate.[8]

The "other things being equal" clause is important. Suppose the threatener bears minimal responsibility for the threat to her victim. The victim bears no responsibility for that threat. But the victim is in her 90s, with just a few more weeks to live, while the threat is in her 20s, with several decades of good life ahead of her.[9] Here, the good of a few more weeks of life for the victim is disproportionate to the badness of the harm of death for the threat, given the threat's low degree of responsibility. Killing the threat under these circumstances would be narrowly disproportionate, making her non-liable.[10]

Let me briefly (1) give a characterization of minimally responsible threats, and (2) offer support for the claim that minimally responsible threats to non-responsible victims are liable. I'll do so through an example of a single minimally responsible threat who will kill a non-responsible victim unless her victim kills her first:

> *Conscientious Driver*: A person who keeps her car well maintained and always drives cautiously and alertly decides to drive to the movies. ... [F]reak circumstances cause the car to go out of control. It has veered in the direction of a pedestrian whom it will kill unless she blows it up [with an] explosive device.[11]

Driving carefully under normal circumstances is a morally permissible type of activity; the driver is not at fault or blameworthy in any way. But driving is a type of activity that foreseeably imposes on others a slight risk of severe harm. The fact that the driver's engaging in a morally optional risk-imposing activity, the risk of which will be realized, is sufficient to make the driver minimally responsible for the threatened harm.[12] By contrast, the pedestrian bears no

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8   I assume that *some* degree of responsibility on the part of the threat is internal, or necessary, to narrow proportionality.

9   McMahan, "Duty, Obedience, Desert, and Proportionality in War: A Response," *Ethics* Vol. 22 No. 1 (October 2011), p. 154.

10   McMahan (2014). McMahan's current view that the 20-year-old is not liable diverges from his 2011 view, which is that the 20-year-old is liable but the liability justification is overridden (McMahan [2011], p. 154).

11   McMahan, "The Basis of Moral Liability to Defensive Killing," *Philosophical Issues*, Vol. 15 (2005), p. 393 and (2009), p. 165. (I've blended the two iterations of the example).

12   McMahan (2009), p. 166.

responsibility for the harm; 'conscientious walking' does not impose on anyone a risk comparable to the risk imposed by driving.

By stipulation, either the driver or the pedestrian will be killed. Because the driver bears some responsibility for that fact while the pedestrian bears none, it's *fair* that the driver be killed, other things being equal.[13] The driver is therefore liable to be killed, other things being equal. (If certain other things weren't equal – if the driver were 20 and the pedestrian 90 – killing the driver would be narrowly disproportionate, and so the driver would be non-liable. By contrast, if both the driver and pedestrian were healthy 20-year-olds, but the explosion the pedestrian would cause blowing up the car would kill a bystander, then the driver would be liable to be killed, but killing her [by the only means available] would be widely disproportionate, and therefore wrong).

3   The Problem

Conceiving the liability of minimally responsible threats in this way has embarrassing implications for cases involving high numbers of minimally responsible threats.[14] Consider an example identical to Conscientious Driver in all but the following respect: now, 1,000 drivers simultaneously threaten a single (young and healthy) pedestrian. Just in case the pedestrian doesn't kill each driver, her death is overdetermined: it's true of each driver that she will kill the pedestrian unless the pedestrian kills her first. Suppose the pedestrian will in fact kill all the drivers. Each killing will save the pedestrian's life. Because in each case the driver is minimally responsible and the pedestrian is non-responsible, each killing is narrowly proportionate. So each driver is liable to be killed and each killing is *pro tanto* justified by the driver's liability.[15]

The liability justification for killing each driver would be defeated by the wide proportionality constraint if a bystander would be killed along with the drivers, or if the side-effect harms to those close to the drivers would be excessive, weighed against the good of saving the pedestrian. But I'll assume that no bystanders would be harmed, and set aside side-effect harms to third parties as irrelevant to what's intuitively disturbing about this case, which is that it seems

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13   McMahan (2009), p. 177.

14   Some critics view the judgment that the driver is liable as itself troubling, and reject the Responsibility Account for that reason. But I'll assume that judgment is intuitively acceptable. My concern is what follows from that judgment in cases involving high numbers of minimally responsible threats.

15   My characterization of the case follows McMahan's (2014).

wrong to kill 1,000 minimally responsible drivers because the badness of the harms *to the drivers* is excessive, or disproportionate weighed against the good of saving the pedestrian. But since each driver is liable, and harms to which people are liable (by definition) do not count toward wide proportionality, when we consider only the harms to the drivers and the pedestrian, each killing is justified. This conclusion both contravenes powerful intuitions about the case and appears unavoidable, given the commitments of the Responsibility Account. This threatens to undermine the account.

4   Why Killing 1,000 Minimally Responsible Threats Is Unjustified

I shall argue that this conclusion's appearance of unavoidability is deceptive. The argument that supports it relies on a false inference, namely, that the only side-effect harms caused by killing the drivers would be to third parties. In fact, I'll argue, by killing *all* the drivers, the pedestrian would also cause a non-trivial side-effect harm to each one. These are harms to which the drivers are non-liable; they can therefore be aggregated in wide proportionality calculations. The aggregate badness of these harms makes killing the drivers widely disproportionate. Thus, considering only harms to the drivers and the pedestrian, the killings are unjustified because they violate wide proportionality.

The claim that killing all the drivers causes a side-effect harm to each sounds paradoxical. But here's the argument for it.

First, consider the following feature of the case. It's a necessary condition for the liability of each driver that every other driver be killed.[16] This is because if even one driver survives, the pedestrian will be killed. (Her death will not even be postponed.) Suppose the pedestrian will succeed in killing only some of the drivers. These killings would fail to satisfy the instrumentality condition of liability: they would achieve no good.[17]

One might object that, on the contrary, each of these killings would achieve *some* good: each killing would save the pedestrian from the threat from *that driver*.[18] But construed in this way, the killings would fail to satisfy the narrow proportionality condition of liability: the badness of the death of each driver is disproportionate to the good of saving-the-pedestrian-from-the-threat-from-that-driver, given that the pedestrian will die anyway in the same instant, and the driver's minimal responsibility. (The contrary proposal that killing the

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16   McMahan (2014).
17   McMahan (2014).
18   McMahan (2014). McMahan neither rejects nor endorses this claim.

driver is narrowly proportionate in this scenario contravenes the judgment that it's narrowly disproportionate to kill a single 20-year-old driver to save a 90-year-old pedestrian; I think this is a decisive reason to reject it.)

Since each killing will satisfy the narrow proportionality condition only if all the drivers are killed, it's a necessary condition for the liability of each driver that all the *other* drivers are killed. And each driver will be killed just in case someone – in this case, the pedestrian – kills her in the pedestrian's defence. Thus, each act of defensively killing a driver performed by the pedestrian has a side-effect on each of the other drivers, which is as follows: it satisfies a necessary condition for every other driver's liability.

Since there are 1,000 drivers, the side-effect on each of the others of the pedestrian killing one is negligible. Her killing one satisfies 1 of 999 necessary conditions she must satisfy (namely, killing all 999 others) to secure the liability of each. But when the pedestrian kills *all* the drivers, each driver is made substantially worse off than she would otherwise have been by the aggregate 999 effects on her of all the others being killed.

I'll explain this claim, but first let me state the assumptions that underlie it. First, the pedestrian will kill the drivers just in case she believes she would be justified in killing them. Second, she believes she would be justified in killing them just in case she has an undefeated liability justification for killing each one. Third, she believes that were she to have liability justifications for killing each one, those justifications would be undefeated. Fourth, she accepts the account of liability laid out in section 2.

Now consider: By killing drivers 1-999, the pedestrian satisfies the 999 outstanding necessary conditions for the liability of driver 1,000. She thereby secures the liability justification on the basis of which she kills driver 1,000. Correlatively, by killing drivers 2-1,000, the pedestrian satisfies the 999 outstanding necessary conditions for the liability of driver 1, thereby securing the liability justification on the basis of which she kills driver 1. And so forth. By killing *all* the drivers, the pedestrian secures the liability justifications on the basis of which she kills each one. Thus, despite the air of paradox, the pedestrian's killing all the drivers *also* makes each of them substantially worse off as a side-effect, by bringing it about (1) that each is liable to be killed, and (2) that, consequently, she kills each. I submit that being made substantially worse off in this way constitutes a non-trivial harm.

The following objection can be raised here. It's an implication of my view that when the pedestrian kills the thousand drivers, she harms each twice over: once by securing the liability justification on the basis of which she kills her, and once by killing her. My view thus implies that the pedestrian harms each of the thousand drivers *more than* she harms the single driver in McMahan's

original case (whom the pedestrian harms only once, by killing her). But this implication is counter-intuitive; intuitively, the pedestrian inflicts the same harm on all the drivers (each of the thousand and the one), the harm of death.[19]

In response, I would argue that this implication is deceptively counter-intuitive. Granted, the pedestrian inflicts the same harm on each of the thousand drivers and the single driver, in the sense of making each of the thousand drivers and the single driver equally badly off. But the pedestrian *also* harms each of the thousand drivers *more* than she harms the single driver, in the sense of making each of the thousand drivers worse off *relative to where she started* than she makes the single driver.

To see this, consider the following. *Ex ante*, the single driver is liable to be killed to save the pedestrian. By contrast, *ex ante*, whether each of the thousand drivers is liable to be killed is indeterminate. (The latter is contingent on whether the pedestrian succeeds in killing all one thousand; if the pedestrian does not, none of the thousand drivers will be liable, and [on the assumption that the pedestrian will not kill any drivers who are not liable] all will survive). Since the thousand drivers start off in better-off positions than the single driver (of indeterminate liability; each with a greater chance of survival), by making the thousand drivers and the single driver equally badly off, the pedestrian *worsens the position* of each of the thousand drivers more than she worsens the single driver's.

Securing each driver's liability harms her in the strictly comparative sense. In the non-comparative sense, securing each driver's liability removes from her a benefit, which the single driver lacks, namely, the shield from liability that the presence of the other drivers provides.[20]

Let me now briefly argue that harming all 1,000 drivers in this way violates the wide proportionality constraint.

First, I take it as given that *if* these harms count in wide proportionality calculations, they make killing the drivers widely disproportionate: I take it as given that the aggregate badness of the harms to 1,000 drivers of having the liability justifications on the basis of which they're killed secured outweighs the badness of the death of the pedestrian.[21] Even one driver's being harmed in this way is, I think, quite bad; multiplied by 1,000 it's considerably worse than the death of a single pedestrian.

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19   Saba Bazargan and Andrew Ross each independently put this objection to me.

20   I owe this point to Louis-Philippe Hodgson.

21   I have no precise view about how many drivers need to be harmed in this way to save one pedestrian for the harms to be widely disproportionate; I assume it's significantly more than a handful, but fewer than 1,000.

The fact that the drivers are not more than minimally responsible is load bearing in this judgment. Things would be different if the threats were fully or partially culpable. (A culpable threatener is blameworthy; her culpability is a function of the magnitude of the harm she threatens, and her degree of blameworthiness for threatening that harm.) I think the impersonal badness of the harm of having the liability justification on the basis of which she's killed secured (or, plausibly, the impersonal badness of *any* harm constituted by the frustration of a non-rights-generating interest, which is how I will shortly argue the harms in question should be characterized) decreases as a threat's culpability increases. This implies that as the threats' culpability increases, increasingly high numbers need to be harmed in the relevant way for those harms to violate wide proportionately. I suspect the relevant harms to *fully* culpable threats (who are highly blameworthy for threatening great harm) either aren't impersonally bad at all, or aren't bad enough to clear the threshold of additivity.[22]

Recall now that harms count in wide proportionality calculations just in case they're caused to people who are not liable to them. Given this, and given the assumption of two paragraphs back, the harms in question are widely disproportionate just in case the drivers are not liable to them.

Here's the argument for why the drivers are not liable to those harms. Liability, by definition, implies rights-forfeiture. For the drivers to be liable to those harms, each would need to forfeit her right against being harmed in that way. Each, that is, would need to forfeit her right against having the liability justification on the basis of which she's killed secured by the killing of other people. But it's implausible that there exists such a right.[23] Each person has a strong interest in avoiding this fate, such that its frustration constitutes a nontrivial harm, but it's not an interest that generates (or corresponds with) a right. Since there's no right against this harm, the right cannot be forfeited; each driver is therefore not liable to this harm.

5   Conclusion

On certain core commitments of the Responsibility Account, there are liability justifications for killing any number of minimally responsible threats, each of

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22   I've adapted the latter suggestion from McMahan (2011), p. 157.

23   One might accept that the drivers all lack the right in question, but claim it's not because there exists no such right, but because they've each forfeited that right. To defend that claim, however, one would need to present a case in which someone *possesses* that right; I believe there are no such cases.

whom would otherwise kill a single non-responsible victim. Absent harms to third parties, these justifications appear, counter-intuitively, to be undefeated. I argued that this counter-intuitive appearance is deceptive. When the victim (or a third party) defensively kills all the threats, she harms each not just by killing her, but also by securing the liability justification on the basis of which she kills her. The threats are not liable to the latter harms, so those harms count toward wide proportionality. The aggregate badness of those harms to high numbers of minimally responsible threats outweighs the badness of the victim's death. Killing them therefore violates the wide proportionality constraint. Thus, even absent harms to third parties, the liability justifications for killing each threat are defeated by the wide proportionality constraint.