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# WHAT FOLLOWS FROM DEFENSIVE NON-LIABILITY?

GERALD LANG

Theories of self-defence tend to invest heavily in ‘liability justifications’: if the Attacker is liable to have defensive violence deployed against him by the Defender, then he will not be wronged by such violence, and self-defence becomes, as a result, morally unproblematic. This paper contends that liability justifications are overrated. The deeper contribution to an explanation of why defensive permissions exist is made by the Defender’s non-liability. Drawing on both canonical cases of self-defence, featuring Culpable Attackers, and more penumbral cases of self-defence, involving Non-Responsible Threats, a case is assembled for the ‘Non-Liability First Account’ of self-defence.

## I

*Introduction.* In canonical cases of individual self-defence, in which an Attacker culpably attacks an innocent Defender, something normatively eventful happens to both of them: the Attacker seems to lose normative powers, whereas the Defender appears to gain normative powers. When the conditions for permissible self-defence are in place, the Attacker is no longer protected by a right against harm which he used to have, and the Defender acquires a right, to inflict harm, which she did not used to have. The normative baton is somehow passed from one of these agents to the other. We can refer to this as the ‘Central Normative Transition of Self-Defence’, or the ‘Central Normative Transition’ for short (Lang 2014, p. 38). What explains the Central Normative Transition? What are the moving parts of that explanation, and how are they related to each other? These are the questions which concern me here.

The argument unfolds as follows. §II sets up the basic picture in more detail. In §III, I outline the *Falling Man* case, in which the Defender is threatened by a falling person who is not exercising his agency at all. With the aid of a further familiar case, *Rolling Stone*, §§IV to VII explore various puzzles and slowly build up a case for what I call the *Non-Liability First Account*. §VIII returns to the canonical case of self-defence to see how, even here, the Non-Liability First Account has an important role to play.

## II

*Why Liability?* A commonly invoked piece of critical apparatus in accounts of self-defence is *liability*: specifically, the Attacker's defensive liability.<sup>1</sup> The fact that the Attacker is liable to defensive violence is supposed to explain how defensive violence is morally permissible. This is because, in becoming liable to be attacked, the Attacker loses the protection of his ordinary right not to be attacked (McMahan 2009, p. 10).<sup>2</sup> If the Attacker is no longer protected by this right, then the Defender does not infringe or violate it in defending herself against the Attacker, and so the mere fact of defensive violence becomes morally unproblematic.<sup>3</sup>

Two further important achievements ensue from liability justifications; alternatively, two problems are avoided (cf. Quong 2012, pp. 45-6).

First, the Defender's possession of a liability justification ensures that the Attacker, upon being attacked, does not, at least typically, acquire the permission to counter-defend himself against the Defender. We do not end up, implausibly, with a symmetrical set of permissions, possessed by the Defender and Attacker alike: the Attacker's offence, however culpable, does not become morally revalorized due simply to the fact that the Defender, however innocent, is defending herself against him. Thus liability justifications are in a position to avoid the *Symmetry Problem*.

Second, the right of self-defence does not expand to become, in effect, a right of self-preservation: the Defender cannot kill Innocent Bystanders in order to save herself, since it is commonly supposed that Innocent Bystanders, unlike the Attacker, are not liable to be attacked. The Defender's liability justification for responding with lethal defensive force will be properly directed at the Attacker, but not at those other people whose deaths would neutralize the threat posed by the Attacker, and thereby serve as a vehicle of the Defender's self-preservation. (Imagine, in the *Shield* case, that the Defender was in a position to grab an Innocent Bystander as a shield, thus forcing him to absorb the Attacker's aggression. The Defender lacks a liability justification for using the Innocent Shield in this way.) In this way, liability justifications avoid the over-generation of defensive permissions. We can call this the *Over-Generation Problem*. Liability justifications sidestep the Over-Generation Problem, whereas any theory of self-defence that purported to be able to do without liability justifications would appear to be highly vulnerable to it.

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<sup>1</sup> There are, of course, other species of liability in the criminal law and tort law. My concern here is solely with defensive liability—moreover, with moral, not legal, defensive liability.

<sup>2</sup> For McMahan, the languages of loss, liability, and forfeiture are stationed together.

<sup>3</sup> Subject to the familiar conditions of necessity, proportionality, and imminence.

So far, liability is a normative place-holder. It announces itself primarily by its effects: it has the effect of restricting counter-defensive measures by the Attacker, and focusing defensive violence only on the Attacker rather than on Innocent Bystanders as well. But how exactly does it do this?

There are really two issues embedded in this question. The first concerns the *criterion* of liability, or a statement of the conditions in which liability is triggered. The second concerns the *explanation* of why liability is triggered in these particular circumstances.<sup>4</sup>

There are different criteria of defensive liability. I shall mention just two of them. Judith Thomson, for example, makes the Attacker defensively liable just when and because the Attacker will otherwise violate the Defender's rights (Thomson 1991). Jeff McMahan, by contrast, insists that the Attacker is liable only when he poses an objectively unjust threat to the Defender for which he is also responsible (McMahan 2005). There are different explanatory pictures in play as well. Thomson thinks that defensive liability ensues from rights violation; in threatening to violate the Defender's rights, the Attacker forfeits his own rights. For McMahan, defensive liability is the solution to a distributive problem: when harm is unavoidable, it is fitting to distribute it in ways which are just. Since the Attacker's actions make harm unavoidable, then the just solution will make the Attacker liable to bear that harm (McMahan 2005, 2009).<sup>5</sup>

Theories of individual defensive liability, whatever they amount to, tend to embark from the brightly lit cases in which there is a pronounced normative asymmetry between Attacker and Defender, and then rely on the powers of that illumination as they proceed to adjudicate on the murkier cases. Imagine, for example, that the Defender is wholly innocent—she is not endangering anyone, and is entitled to be where she is—while the Attacker is malicious, and comfortably satisfies whatever conditions for moral responsibility we would normally insist upon for the assignment of blame. Call this case *Culpable Attacker*. *Culpable Attacker* outlines the conditions in which a theory of defensive liability can expect to enjoy the most confident application. The normative asymmetry between Attacker and Defender helps to deliver the claim that the Attacker is liable to be attacked by the Defender, or by third-parties acting on the Defender's behalf. That is so, regardless of what the substantive content of the theory of self-defence amounts to: whether it is concerned with the fair distribution of unavoidable harm, or rights violation, or something else yet again.

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<sup>4</sup> Lazar (2009, p. 703), distinguishes in similar fashion between the 'explanatory structure' of an account of self-defence, and 'criteria of liability' for specific ways in which the right to life are lost.

<sup>5</sup> McMahan's position is forcefully tested by Lazar (2009) and Mapel (2010).

These theories must then find something to say about the less brightly lit cases in which that normative asymmetry between Attacker and Defender is reduced or even erased. In this sort of case, the Defender is still innocent, but the Attacker is also wholly innocent, due to his lack of moral responsibility for the threat he poses to the Defender. I want to give pride of place to one of these less brightly lit cases, in which the Attacker is not obviously liable. I then extend this discussion, in a reversal of the usual direction of travel, to the more brightly lit cases, in which the normative asymmetry between Attacker and Defender is ostensibly more pronounced. Though the full reasons for adopting this strategy will emerge in due course, my leading idea, very roughly, is that theorists of self-defence have focused too much on the Attacker's liability, when their primary investment should have been in the Defender's non-liability. It is the non-liability of the Defender, not the liability of the Attacker, which permits us a straightforward interpretation of the cases in which the normative asymmetry between Defender and Attacker is starkest, and also offers us a convincing way of interpreting cases in which that asymmetry is moot.<sup>6</sup>

My aim, then, is to sketch the Non-Liability First Account of private self-defence. According to the Non-Liability First Account, non-liability is the most important normative primitive in these cases; the facts about liability are constructed, in part, out of the facts about non-liability. The Non-Liability First Account pronounces on the harder cases, and makes it clearer on what is doing the justificatory work in the easier cases.

### III

*The Falling Man Case and the Scope of Defensive Permissions.* Here is a version of a famous case illustrating the erasure, or at least partial erasure, of normative asymmetry between Attacker and Defender, originally due to Robert Nozick:

*Falling Man:* Victoria is standing at the bottom of a well, with no escape options, and will be crushed to death by an entirely innocent, unconscious falling man, Victor, unless she vaporizes him with her ray gun. Victor, by contrast, will be saved if he falls on Victoria, who will cushion his fall (Nozick 1974, p. 37).

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<sup>6</sup> See Doggett (2017) for an argument whose ambitions are similar to mine. I am highly sympathetic to its basic thrust, but there are at least some differences in emphasis between us.

*Falling Man* is the most extreme instance of a *Non-Responsible Threat*: Victor poses danger to Victoria, who is not liable to be harmed, but in ways which entirely bypass his agency. Victor is falling, not acting; he is unconscious, not conscious. No agency is involved.<sup>7</sup>

For Thomson, the scope of the Defender's defensive permissions encompasses cases such as *Falling Man*. It does not matter that Victor's agency is entirely suppressed. His *movements* still threaten Victoria; and, since he is a moral agent and she is a moral agent, these movements acquire an immediate moral significance. More precisely, by threatening Victoria, who is innocent, Victor's movements risk a violation of her rights. Thomson thinks, in effect, that there are no relevant differences among the different species of Attackers, just as long as the Defender is innocent. On Thomson's view, Villainous Aggressors, Innocent Aggressors—whose threats to Defenders are explained by compromised agency such as ignorance and psychosis—as well as Non-Responsible Threats such as Victor in *Falling Man*, are all liable to be killed in defence, since they will otherwise violate the Defender's rights. She writes, in connection to the particular cases she uses to illustrate these different categories of Attacker:

[T]he villainous driver in Villainous Aggressor has no right to kill you, and surely it is also true of the fault-free driver in Innocent Aggressor that *he* has no right to kill you. In Hohfeldian terms, neither of the two drivers has a privilege of killing you. For them to lack the privilege of killing you, however, is for you to have rights (Hohfeldian claims) that they not do so, rights they will infringe if they succeed in killing you (Thomson 1991, pp. 300-1).

Thomson's argumentative path appears to be plotted firmly from within the familiar Hohfeldian nexus, according to which, if agent *T* lacks the claim-right to kill agent *D*, then *D* must have the right not to be killed by *T*—a right which *T* will violate if he is not resisted, however faultless he would be for this violation. So in this way all species of Attackers, including Non-Responsible Threats, will be imported into the moral world of rights-violations, regardless of their current agential capacity.<sup>8</sup>

Thomson remarks that rights violation 'is necessary, for it just is not sufficient to justify your killing a person that that person will otherwise kill you' (Thomson 1991, p. 303). If these Threats and Attackers are not imported into the moral world as would-be rights-violators, the

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<sup>7</sup> See McMahan (2009, pp. 167-73). The term 'Non-Responsible Threat' is slowly acquiring hegemony over the term 'Innocent Threat' which was relatively commonplace in the older literature, including Thomson (1991) and McMahan (1994).

<sup>8</sup> Thomson's stance on the scope of defensive permissions does not follow just from the fact that she advances a rights-based account. Rodin (2002), (2014) also espouses a rights-based account, but insists upon a narrower range of permissions which exclude Non-Responsible Threats and some forms of Innocent Aggressor.

Defender will either be left without adequate protection, given these agents' likely immunity to defensive force, or the Over-Generation Problem will immediately arise. To see why, compare *Falling Man* with *Bridge*, which conforms to the structure of what Thomson calls a 'Riding-Roughshod-over-a-Bystander' case (Thomson 1991, p. 290):<sup>9</sup>

*Bridge*: Jules is fleeing from Jim's culpable and impermissible attack on him. His only hope of escaping from it is to cross a rickety rope bridge. This bridge will bear the weight of only one person. Already standing on the bridge is Catherine. If Jules shakes the bridge, Catherine will fall to her death, leaving the bridge unoccupied, and Jules can make good on his escape. If Jules refrains from removing Catherine from the bridge and securing this escape option, he will be killed by Jim.

On Thomson's view, Catherine retains the right to life, and Jules will act impermissibly if he removes her from the bridge. The difference between Catherine in *Bridge* and Victor in *Falling Man* is that Victor is threatening to violate Victoria's rights, whereas Catherine (unlike Jim) does not threaten to violate Jules' rights. So the reference to rights-violation is required, by Thomson's own lights, to distinguish Attackers and Threats, on the one hand, from Innocent Bystanders, on the other hand.

Many writers have argued, in response to Thomson, that Victor cannot be reasonably represented as being liable to being killed in self-defence. This conclusion arises from deeper reflection on the fact that the threat posed by Victor is not the product of his agency. He has no agential capacity: his *falling* cannot qualify as *acting*, and *a fortiori* cannot qualify as rights-violation. To boost support for this conclusion, a Non-Responsible Threat such as Victor is often compared to a non-sentient entity, entirely lacking in agency. This is the *Stone Objection* (Otsuka 1994, p. 80; Rodin 2002, pp. 85-7; McMahan 1994, p. 276, Quong 2009, p. 515, and elsewhere). Consider:

*Rolling Stone*: A stone is rolling slowly towards Sly, who can avoid being crushed by it only by destroying it with his bazooka.

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<sup>9</sup> Although Thomson herself is committed to the claim that Catherine is inviolable, it must be acknowledged that *Bridge* presents us with a controversial form of bystander, as Catherine's blockage of Jules' escape options may tempt us to characterize her as an *indirect* Threat. For a helpful discussion, see Frowe (2014, pp. 31 ff.). Feel free to substitute another sort of bystander, such as one the one in *Shield*, if you think *Bridge* is not fit for purpose.

No one is denying, of course, that Sly may destroy the stone. The problem is that the claim that Victor is capable of violating Victoria's rights in *Falling Man* is no more plausible than the claim that the stone threatens to violate Sly's rights in *Rolling Stone*. However deadly the stone may be, it does not exhibit any signs of agency. The stone may present a deadly threat to a morally significant entity—Sly—but its movements resist any moral characterization. Whatever happens to Sly, the stone will not have violated his rights. The problem now is that a Non-Responsible Threat, such as Victor, appears to be in exactly the same position as the stone. Even Thomson admits that the falling Non-Responsible Threat does not *do* anything; he is merely falling in the direction of the Defender (Thomson 1991, p. 287). It follows that we have no more secure a basis for saying that Victor will violate Victoria's rights than we have for saying that the stone will violate Sly's rights. The Stone Objection thus makes an important contribution to the claim that Victor is an unintelligible subject of duties. Since he is not an intelligible subject of duties, the threat he poses to Victoria, as McMahan puts it, 'is neither permissible nor impermissible' (McMahan 2009, p. 169).

If Victor is relevantly like the stone, then he will not violate Victoria's rights, and there is no basis on which to establish his liability. Compare Catherine in *Bridge*: she is simply in the way. She does not fall within the scope of Jules' liability justification because being in the wrong place at the wrong time—from Jules' perspective—does not suffice to establish her liability. So, if Victor does not threaten to violate Victoria's right, then Victoria's violent response to him cannot be depicted as the exercise of her right of self-defence, but simply one of self-preservation. This exposes Thomson to the Over-Generation Problem. If Victoria can permissibly kill Victor, then it should also be permissible for Jules to kill Catherine.

How should Thomson respond to the Stone Objection? She might say that, given the fact that Victor, unlike the stone, is a moral agent, it then follows that his movements, even if there is nothing he can do to control them, command a special moral significance simply because of his status *as* a moral agent. Just as a rising tide lifts all boats, the fact that Victor possesses this general moral standing may have the effect of transforming the significance of events and movements that would, in other circumstances, remain morally inert. Though this line of argument does not strike me as obviously unsatisfactory, it risks a stalemate with its opponents, so I will not be relying upon it.

The Stone Objection is often deployed in the argument as little more than satirical embellishment for those who wish to persuade us that Victor is not defensively liable. I want to deny that deeper reflection on *Rolling Stone* can get us to reach that particular verdict about *Falling Man*. But I also think that reflection on *Rolling Stone* can help us to recover deeper lessons about

*Falling Man*, and indeed about the Central Normative Transition itself. It can help us to see that the primary normative focus on should be on Victoria's non-liability, rather than Victor's liability. We must proceed slowly, however.

#### IV

*Stones and Privileges.* There may be an immediate problem with the Stone Objection. By uncovering it, we can make more fundamental progress, not just with our grasp of the *Falling Man* case, but with the respective roles that liability and non-liability play in the Central Normative Transition. To set the ball rolling, we need to revisit what Thomson says in the passages we encountered above, as well as *Rolling Stone*.

Thomson's argument is that, because the Threat lacks the privilege or liberty right to kill the Defender, he threatens to violate the Defender's right. Perhaps we can get by, in the first instance, with only the first of these claims. For it seems to be a robust truth that the Threat, whatever level of responsibility or agency it manifests, *lacks the right* to kill the Defender, if the Defender is innocent. If it should turn out that the Threat kills the Defender, it will at least be true that the Threat had no right to do so. The death of the Defender will not emerge as the result of any permission to kill her.

*This* claim does not have any embarrassing immediate implications. It applies to *Rolling Stone* as well as to *Falling Man*. I focus for the moment on the former, since this is where the critical venom for the case against Victoria's defensive permissions is supposed to be gathered. The plain fact of the matter is that the stone *does* lack the privilege, or liberty right, to kill Sly. It does not have the liberty right to do *anything*, and so, as one particular instance of that truth, it does not have the right to kill Sly. The normative strain here is carried by the stone, but in a way that avoids our having to imbue it with embarrassingly outlandish moral properties.

We can put the point in another way. Here is one claim:

- (1) The stone lacks the right to kill Sly.

The truth of (1) does nothing to augment the prospects of the following claim:

- (2) If the stone kills Sly, then Sly's rights are violated.

There is no support for (2) from (1). This is for reasons which are hiding in plain sight in the Stone Objection itself. There is no prospect of ratifying (2) due to the truth of the following claim:

(3) Stones cannot violate or infringe rights.

Stones are simply not in the rights-violation business. So (3) is plainly true. Sly's rights will not be violated by the stone. But there is surely no immediate tension between (1) and (3). If (3) is true, then (1) is merely a highly obvious truth. It *could not* be the case that the stone has the right to kill Sly,<sup>10</sup> and so *it is not* the case that the stone has the right to kill Sly; accordingly, a stone lacks the right to kill Sly.<sup>11</sup> True, a claim of the form '*T* lacks the right to kill Sly' would in most contexts license the inference 'If *T* kills Sly, then Sly's rights have been violated'. But any such implication can be comfortably cancelled without conceptual confusion, when the particular identity of '*T*' is disclosed.

The stone lacks the right to kill Sly. Sly is also permitted to destroy the stone. These are easy claims, and obvious truths. But trouble may lie ahead. Consider (1) again:

(1) The stone lacks the right to kill Sly.

Since (1) is true, it is not the case that Sly is liable to being killed by it. So does (4) follow plausibly from (1)?

(4) Sly is not liable to be killed by the stone.

If (4) is true, then (5) may be true:

(5) Sly is wronged by being killed by the stone.

But (5) must be false. The stone cannot wrong Sly for exactly the same reason that it cannot violate his rights: stones do not interact with moral agents in ways which admit of this kind of moral characterization.

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<sup>10</sup> Ignore 'magic wand' cases of transformation, such as we find in some of the abortion literature.

<sup>11</sup> If the 'ought' implies 'can' principle strikes most people as true under at least some description of it, an even greater level of security should attach to the 'cannot' implies 'does not' principle.

This, then, is the danger: we appear to risk the ascription of extravagant moral properties to the stone, after all, if we allow (1) to license, in turn, (4), and then (5). We will have ended up with the same embarrassment that was facing us when we first entertained the idea that a Non-Responsible Threat can violate a Defender's rights.

## V

*Non-Responsible Threats and Normative Gaps.* We need to take a step back. In brightly lit self-defence cases such as *Culpable Attacker*, the Attacker acts impermissibly, and threatens the Defender's rights. It is the impermissibility of the Attacker's actions which inversely mirrors the permissibility of the Defender's defensive violence. As McMahan sees matters, *Falling Man* breaks the justificatory circuits of this basic picture. If Victor's movements are not impermissible, the justificatory chain is broken, and we cannot appeal to them to support the claim that Victoria's defence is permissible. The *permissibility* of Victoria's defence cannot be traced to the *impermissibility* of Victor's attack.<sup>12</sup> The normative baton cannot be passed between them in the normal way. For McMahan, that fact ends the argument: it denies Victoria defensive permissions against Victor. Since Victoria's defence is not the response to an impermissible attack on her, she cannot acquire a permission to attack Victor. Victoria's defence is not permissible because Victor's attack is not impermissible. She is simply out of luck, and is under moral instruction to resign herself to her fate.<sup>13</sup>

There are further implications of this picture, however, which McMahan does not trace out, and which leave us in a more theoretically unsettled position. Victor's attack may not be impermissible, but it is not permissible either, if we go on what McMahan himself tells us: as a Non-Responsible Threat, Victor is not an intelligible subject of duties, and so his attack is neither permissible nor impermissible. As a result, it will then follow that the *impermissibility* of Victoria's defence cannot be traced back to the *permissibility* of Victor's attack. But this particular breakage in the usual justificatory circuits does not encourage McMahan to abandon his steadfast commitment to the impermissibility of Victoria's defence. The impermissibility of Victoria's defence does not, it would seem, need to be partnered with the permissibility of Victor's attack.

In McMahan's argument, Victoria's defence is not permissible due to the fact that Victor's attack is not impermissible. The fact that Victor's attack is not permissible makes no difference. We simply do not encounter these broken justificatory connections in the canonical

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<sup>12</sup> If you feel that the term 'attack' is too suggestive of agential life to be strictly appropriate, feel free to substitute a more neutral term.

<sup>13</sup> Though—most writers are careful to add—Victoria might perhaps be *excused* for killing Victor.

self-defence cases such as *Culpable Attacker*. In these cases, when the Attacker does not act permissibly, he also acts impermissibly: the property of not acting permissibly is coextensive with the property of acting impermissibly. Clearly, the usual Hohfeldian connections between Defender and Attacker cannot be relied upon in *Falling Man*. There is a *normative gap* here, which invites a new normative settlement about the permissions and non-permissions on offer to the various parties. The existence or significance of this gap is not fully appreciated by either McMahan or Thomson.

To make progress, we can revisit *Rolling Stone*. The stone's movements, rather more obviously than the Non-Responsible Threat, fail to be permissible, and they fail to be impermissible. There is no passing of the normative baton from the stone to Sly. The permissibility of Sly's defence cannot be traced to the impermissibility of the stone's movements. But it should be noticed that this claim mirrors the structure of *Falling Man*, on McMahan's interpretation of it: the permissibility of Victoria's defence cannot be traced to the impermissibility of Victor's movements. Now, in *Falling Man*, McMahan thinks that this particular breakage in the normative circuit demonstrates that Victoria's defence is impermissible. But that would not be the correct line to follow in *Rolling Stone*. Sly is clearly permitted to destroy the stone.

Let us consider the other connection in the justificatory circuit, concerning the non-permissibility of the Threat's movements and the permissibility of the Defender's defence. What seems to certify Sly's defence as a permissible case of defence is that the stone lacks any moral standing, and that its movements are therefore not permissible.

It may be protested that we cannot expect any lessons to be straightforwardly transferred from *Rolling Stone* to *Falling Man*. First, Victor is a morally significant being—a person, albeit a temporarily incapacitated one—unlike the stone.<sup>14</sup> Second, and relatedly, the fact that the stone has no moral standing at all will place *Rolling Stone* outside the category of ordinary defensive cases. Perhaps we might describe *Rolling Stone* as a case of threat management, rather than a defensive case, properly considered.<sup>15</sup> Now these points of disanalogy between *Rolling Stone* and *Falling Man* may exist. But there is still something to learn from *Rolling Stone*, regardless of how

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<sup>14</sup> Otsuka (1994, p. 92), leans heavily on the difference in moral status between Defenders and Attackers for some cases of Non-Responsible Threats: for example, when the Non-Responsible Threat is a grizzly bear, or an incorrigibly violent psychopath whose agency is permanently compromised. I am not fully convinced that this is an advisable strategy for securing these particular verdicts. My main concern, however, is to establish that there is another way to go.

<sup>15</sup> Thanks to Corine Besson for discussion of this point.

we classify this case; nothing necessarily stops cases of threat management from shedding light on cases of defence.

*Rolling Stone* teaches us that the impermissibility of a threat is not a necessary condition for the permissibility of defensive action. Even if, in the domain of threat management, that is an obvious lesson, it is one which can be put to more interesting uses in the domain of defence. For we can still ask how the fact that Victor is a morally significant entity manages to defeat the suggestion that Victoria lacks permission to defend herself against him, given the fact that the threat he poses to her is not permissible. There are different answers to explore in response to this question, but they collapse quickly—perhaps unexpectedly quickly.

It will not do to reply that, because his agency is incapacitated, Victor's movements are not impermissible. We already know, from *Rolling Stone*, that the non-impermissibility of the movements made by a threatening entity, *T*, does not confer immunity on *T*. So perhaps it all now depends on what *kind* of threat *T* is: Victor, unlike the stone, has moral standing. But Victoria also has moral standing. That yields a tie between Victor and Victoria. We need something to break that tie: whatever happens, after all, one of them is going to be killed.

A further suggestion, from McMahan, is that, other things equal, it is better that we should settle for a *letting die* rather than a *killing* (McMahan 2009, p. 169). If Victoria lets herself be killed, rather than choosing to kill Victor, then we will have a letting die rather than a killing. But this suggestion is unpromising: Victoria's inaction can only produce an outcome where it is she who is killed by Victor. She may *allow* herself to be killed, but it is still a *killing* which she allows. We have a choice of killings, not a choice between a killing and an event which carries less moral disvalue than a killing. Of course, McMahan might point out here that Victor's killing of Victoria will lack its usual moral toxicity, precisely because he is a Non-Responsible Threat, whereas Victoria's killing of Victor will be one for which she is morally responsible. But this asymmetry can be pressed into service only if it turns out that Victoria's defensive killing of Victor is impermissible. That is precisely what McMahan's argument is trying to establish. He would be jumping the gun if he were to rely on this point in order to establish his favoured conclusion.

The worry may persist that, since it is *always* permissible for Sly to destroy the stone, no special role in the explanation of that fact is played by the fact that the stone's threat to him is not permissible.<sup>16</sup> But I am not proposing to collect any such immediate lessons for our verdict on *Falling Man* from our verdict on *Rolling Stone*. Victor's attack on Victoria may not be impermissible, but it is not permissible either. And *Rolling Stone* does teach us that the mere fact

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<sup>16</sup> Thanks, in particular, to Guy Longworth and Léa Salje for discussion of this point.

that Victor's attack is not impermissible does not immediately settle the case against the permissibility of Victoria's defence. We need more; the story, accordingly, is about to continue.

## VI

*Broad Non-Liability.* To recapitulate some relevant points so far: in cases of defence, the movements of the threatening entity, *T*, against the Defender can fall into one of three categories. First, *T*'s movements might be permissible. Second, *T*'s movements might be impermissible. Third, *T*'s movements might be neither permissible nor impermissible. If *T*'s movements are permissible, then the permissibility of defence is blocked. If *T*'s movements are impermissible, then the permissibility of defence is enabled. If *T*'s movements are not permissible and not impermissible, then there are no clear lines of normative transmission from *T*'s situation to the Defender's situation. But we need concrete settlements in these cases, on pain of gaps in our theory of defence.

Now it is self-evident that Sly can destroy the stone in *Rolling Stone*. That fact suggests that, at least for some values of *T*, where *T*'s movements are not permissible and not impermissible, we should be guided by the *non-permissibility* of *T*'s movements in arriving at the verdict that defence against *T* is permitted. The only challenge for Sly is to ensure that the stone's movements fail to be permissible. An easy enough task: nothing the stone ever did could be permissible. The stone's movements do not need, in addition, to be *impermissible*. Sly can destroy it without a second thought.

More generally, though, what could explain the significance of the non-permissibility of *T*'s movements, if and when they are not also impermissible? I suggest that the answer should be centrally concerned with facts *about the Defender*. The Defender has interests which her rights serve to protect. The central function of her rights is to protect those interests, and to give her normative remedies for preventing their frustration. As a rights-bearer, the Defender can typically be expected to have permissible means to frustrate those frustrations, unless she has already acted in such a way as to endanger the interests of other rights-bearers.<sup>17</sup> These thoughts suggest the following schema for what I call 'broad non-liability', where '*D*' designates the Defender, and '*T*' designates the Threat:

### BROAD NON-LIABILITY:

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<sup>17</sup> See Lang (2014, pp. 55-7), for one way of articulating this line of argument, drawing liberally on Narveson (1965).

If  $D$  is broadly non-labile to be attacked by  $T$ , then it is either the case that (i)  $D$  is not wronged by  $T$ , but is permitted to defend herself by taking the necessary steps to neutralize the threat posed by  $T$ , or it is the case that (ii)  $D$  is wronged by  $T$ , and is permitted to defend herself by taking the necessary steps to neutralize the threat posed by  $T$ .

BROAD NON-LIABILITY encompasses a heterogeneous catalogue of Threats. It clearly encompasses, as possible values for  $T$ , stones, which will fall under (i), and Culpable Attackers, who will fall under (ii). These provisions are not suspicious, at least as far as the Defender's relationships with Culpable Attackers and stones are concerned. The Defender is, after all, permitted to destroy stones. That settles the case for the applicability of (i). And the Defender is also permitted to kill Culpable Attackers, assuming necessity and proportionality conditions are in place. That settles the case for the applicability of (ii). BROAD NON-LIABILITY is constructed, in the first instance, out of these data points.

So far, BROAD NON-LIABILITY is just a schema. It does not contain an argument for why *every* threatening individual should be assigned to either (i) or (ii). So what about Non-Responsible Threats such as Victor? Morally speaking, Non-Responsible Threats such as Victor have a hybrid character: according to proponents of the Stone Objection, they retain the high moral standing of ordinary non-labile human persons, which renders it impermissible for Defenders to kill them. But the reasons for their moral immunity derive from the fact that their movements can be significantly compared to the stone in *Rolling Stone*. Their agential incapacity makes it implausible to suggest that Non-Responsible Threats can *wrong* the Defender. And isn't that the sticking point? If they don't wrong the Defender, how can it be permissible to kill them?

My suggestion is that, when all is said and done, we do not have to worry about this issue. We need not agonize over whether Victor wrongs Victoria. All we need to establish is that Victor's attack is not permissible. So either we can take seriously the analogy between Non-Responsible Threats and stones, and assign Victoria's permission to kill Victor under sub-category (i), or we can resist that analogy, and insist that Victoria's permission to kill Victor falls under sub-category (ii). Either way, Victoria is permitted to kill him. That should count as an advantage, given the likelihood of low credences for our intuitions in these unusual cases.

Proponents of the Stone Objection will, of course, resist these options, and claim that, because the Non-Responsible Threat does not violate the Defender's rights, the Defender ought to refrain from violent defence. But I find this attempt to carve out new space for Non-Responsible Threats unconvincing. It fails to explain, when everything else has been taken into

consideration, why the hybrid category of *not-permissible-but-not-impermissible* should take one form when applied to Non-Responsible Threats and another form when applied to stones. The fact that Victor is morally valuable and the stone is valueless, which is an obvious enough contrast, does not make the critical difference, as we have seen. So what else do we have to go on? We should allow Victoria's non-liability to call the shots.

## VII

*From Broad Non-Liability to Broad Liability.* Even if we are sceptical about the claim that Victor violates Victoria's rights, several claims are true: first, Victor poses a causal threat to Victoria; second, Victor *lacks* a right to threaten Victoria; and, third, Victoria is broadly non-labile to be threatened by Victor. The combination of these facts delivers the verdict that Victoria may kill Victor in defence. Now Victor is clearly liable in *some* sense. If it is *permissible* for Victoria to use defensive force against him, then Victor is an *appropriate object* of defensive force. But if Victor is an appropriate object of defensive force, then it may seem difficult, in turn, to deny that he is *liable* to defensive force. But if he is liable to defensive force, then aren't we committed to the familiar entailment that he has—in an agency-free way—wronged her after all?

My suggestion is that we can indeed affirm that Victor is liable, but in a way that simply reflects a correlative fact about Victoria's broad non-liability. To see what his liability amounts to, I am going to suggest, as an accompaniment to the BROAD NON-LIABILITY schema, the following BROAD LIABILITY schema, in which *D* and *T* change places:

### BROAD LIABILITY:

If *T* is broadly liable to be attacked by *D*, then it is either the case that (iii) *T* poses a threat to *D* where *D* is broadly non-labile in sense (i) of BROAD NON-LIABILITY, or it is the case that (iv) *T* poses a threat to *D* where *D* is broadly non-labile in sense (ii) of BROAD NON-LIABILITY.

How are these two schemas connected? BROAD NON-LIABILITY is the primitive, and BROAD LIABILITY is the correlate of it: that is the essence of the Non-Liability First Account.

If we apply BROAD LIABILITY, then Victor will be broadly liable under either (iii) or (iv). Victor's instantiation of broad liability is simply the correlate of the relevant sense of broad non-liability instantiated by Victoria. The facts about broad liability ensue from, or are constructed out of, the facts about broad non-liability. Once again, BROAD LIABILITY encourages us not to worry too much about which of these sub-categories Victor falls under.

Victoria need not be depicted as being *wronged* by Victor. Again, perhaps his movements are not *impermissible*. But Victoria is nonetheless entitled to kill Victor, because she is broadly non-liable not to be killed by him.

Here is an immediate problem with this line of argument: by the same token, the stone, which falls squarely under sub-category (iii), also emerges as being broadly liable. Is this ridiculous? No, it is not: the stone's satisfaction of broad liability is simply the correlate of the relevant sense of broad non-liability satisfied by Sly. Sly is of course not wronged by the stone—that thought *is* ridiculous—but he is certainly permitted to destroy it. Because he is permitted to destroy it, the stone is broadly liable to be destroyed by him.

A further challenge awaits BROAD LIABILITY. If Victor has not determinately wronged Victoria—if he is simply broadly liable to be killed—then we should recognize that there is no real moral stigma that can be attached to him which demonstrates that he, and not an Innocent Bystander, is appropriately selected to bear the costs of Victoria's defence. This point gives rise to a dilemma.

The first horn of it returns us directly to the Over-Generation Problem. If what really matters, at the end of the day, is Victoria's broad non-liability, and if Victor is not determinately guilty of wrongdoing, then this point might reduce the significance of the distinction between self-defence and self-preservation, and call into question the claim that it is Victor, rather than an Innocent Bystander, who is chosen as the appropriate recipient of defensive force. Does it matter which one of them bears the costs of Victoria's defence? *Can* it matter, if the difference between Victor and the Innocent Bystander is not a morally deep one?

The second horn of the dilemma is this: if the Over-Generation Problem is resisted simply by reiterating the claim that Victor, but not the Innocent Bystander, is broadly liable to defensive force, then it may seem that we are forced to endow the fact that Victor causally threatens Victoria, and lacks the right to do so, with a significance that cannot be reconciled with his lack of occurrent agency. Isn't the fact that Victor threatens Victoria and *lacks the right to do so* being given a tacit significance which belies the official view that Victor's *wronging* of Victoria is not functioning as the key consideration?

The concerns lying behind the horns of this dilemma are understandable, but they can be dealt with by closer attention to the commitments of the Non-Liability First Account. To tackle the first horn, we can simply invoke the difference between being broadly liable and not being broadly liable: Victor is broadly liable, and the Innocent Bystander is not broadly liable. The Non-Liability First Account holds that this is a morally relevant distinction. To tackle the second horn, the moral significance of the distinction between being broadly liable and not being

broadly liable does not require the ascription of wrongdoing to Victor. The distinction between Victor's broad liability and the Innocent Bystander's broad non-liability is significant because Victoria is broadly non-labile not to be harmed by someone who threatens her. It is *that* fact—Victoria's broad non-liability—which makes *Victor's* broad liability morally significant. The Non-Liability First Account does not attempt to downplay the moral significance of Victor's broad liability. It simply makes the moral significance of Victor's broad liability derivative from the moral significance of Victoria's broad non-liability.

## VIII

*Putting Non-Liability First.* Even if the Non-Liability First Account explains defensive permissions in some penumbral cases of self-defence, why should it do any interesting work in cases such as *Culpable Attacker*? Even here, in these central cases of self-defence, I think liability justifications are much less forthcoming than they might be. It is really the Defender's non-liability that does the explanatory heavy lifting.

Liability justifications are primarily Attacker-focused rather than Defender-focused.<sup>18</sup> On Attacker-focused views, the Central Normative Transition is completed due to a loss of the Attacker's right—or, more clumsily but accurately—the disappearance of the protection offered by the Attacker's right.<sup>19</sup> When this happens, the route to defence is unobstructed.

It may appear at first that liability must be the missing or at least implicit ingredient in certain statements of how defensive permissions are generated. Again, we can look to Thomson and McMahan to see how the story might be constructed. First, Thomson:

[W]hat makes it permissible for you to kill [Attackers and Non-Responsible Threats] is the fact that they will otherwise violate your rights that they not kill you, and *therefore* lack rights that you not kill them (Thomson 1991, p. 302; emphasis added).<sup>20</sup>

The 'therefore' in Thomson's claim seems premature. *Why* does the fact that the Attacker threatens the Defender's right lead to the loss of *his* right? The Defender's right may be under unjustified threat, but why does any difference in the Attacker's moral standing ensue from that

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<sup>18</sup> In Lang (2014), I argued, more cautiously, that the explanatory burdens of a theory of self-defence should be distributed more evenly between a Defender-focused and an Attacker-focused approach. I maintain my earlier view that the debate on defence has often been too Attacker-focused, but I am now contending for the more fundamental importance of a Defender-focused approach.

<sup>19</sup> This caveat is to accommodate the view that our rights not to be attacked in defence only ever took a conditional form. See Tadros (2012) for this way of looking at matters.

<sup>20</sup> See Lang (2014, p. 51), for further discussion of this claim.

fact? The obvious answer, to Thomson, will invoke liability: in virtue of the fact that the Attacker threatens to violate the Defender's right, the Attacker then becomes liable to defensive violence. Without liability, it may at least appear that this explanation runs aground. But what produces the Attacker's liability? The fact that we must impute liability to the Attacker to show *why* the loss of his right ensues from his attempted violation of the Defender's right does not show liability to be anything more than a normative place-holder.

A more detailed and explicit acknowledgement of liability, or at least the role played by liability, can be found in this statement by McMahan:

If A will otherwise violate B's right, he loses his own right not to be attacked; thus, if B attacks him in self-defense, B does not violate any right of A's; therefore B retains his right not to be attacked; therefore A is not permitted to attack B in self-defense. On this theory, if one party to a conflict is justified, the opposing party cannot be. The same is true on the other major theories of self-defense (McMahan 2009, pp. 46-7).

This recital is more detailed than Thomson's, but the sequence of normative claims is still ultimately mysterious: the fact that liability is only triggered by an objectively unjust threat for which an individual is morally responsible does not fully explain *why* the Attacker is liable. It is *A*'s unjustified threat against *B* which, for McMahan, is supposed to *make A* liable. But it is far from clear why that makes *A* liable. Why does the fact that *A* is guilty of attempted wrongdoing against *B* then make it permissible to inflict the same sort of harm on *A*?<sup>21</sup> Though, as we have seen, McMahan's preferred substantive theory of self-defence is not Thomson's, there are also higher-order similarities between them. McMahan, like Thomson, risks investing in a *non sequitur*.

How do we avoid such *non sequiturs*? Though it seems to me that there must be provision for the *role* played by liability,<sup>22</sup> liability itself need not, and does not, deserve a fundamental role in the explanation of the Central Normative Transition. Liability, by itself, is just a normative place-holder. It seems to me that the explanation will run aground unless we invoke the Defender's non-liability. The Attacker's liability is a function of the Defender's non-liability. The Defender is entitled to take necessary steps to defend herself against the Attacker. She is not entitled to take necessary steps against just anyone; that would collapse the distinction between

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<sup>21</sup> The arguments contained in Renzo (2017), though officially targeted at only theories of rights forfeiture, may I suspect be largely applicable to liability justifications, and indeed to Attacker-focused theories more generally.

<sup>22</sup> The existence of the BROAD LIABILITY schema confirms this point. Though BROAD NON-LIABILITY is more fundamental than BROAD LIABILITY, our account of defence will be incomplete unless the former is accompanied by the latter.

self-defence and self-preservation. Given her broad non-liability, she is permitted to take necessary steps against those who are broadly liable, as defined by BROAD LIABILITY.

It is only by labouring the non-liability of the Defender do we even begin to understand why liability in the Attacker would ensue. To have a right is to be presumptively assured of permissible means for protecting the interests which that right protects against threats to those interests. Thus canonical cases of self-defence such as *Culpable Attacker*, just like more penumbral cases such as *Falling Man* and *Rolling Stone*, offer rich pickings for the Non-Liability First Account. Without an attention to defensive non-liability, we cannot make sense of the existence or significance of defensive liability. Non-liability comes first.<sup>23</sup>

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