DEFENSIVE AND REMEDIAL LIABILITY

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This paper is about the relationship between moral liability to defensive measures and moral liability to remedial measures. It considers the extent to which justified remedial liability in private law can be understood as grounded in the same considerations as justified defensive liability. It defends the thesis that the facts which make a person morally liable to private law remedial enforcement are the same, or very similar, facts as make a person morally liable to defensive force. On this view, the facts which make it the case that I do not wrong a culpable attacker in justified self-defence are the same, or very similar to, the facts which make it the case that a person is not wronged when their resources are taken to compensate a person whom they have culpably harmed. For instance, if it is the threatened violation of a right which makes a person liable to defensive measures, then it is the violation of a right which makes that person liable to be forced to bear a compensatory cost.

Here, then, is the paper’s basic thesis:

SIMILARITY. The same or highly similar normative considerations which ground moral liability to defensive measures also ground moral liability to non-punitive remedial measures.

Why care about the truth of SIMILARITY? There are at least two reasons. The first is that, if the thesis is true, we can reasonably hope to improve our theoretical understanding of both remedial liability and defensive liability. If true, it will count against a theory of defensive liability that, when applied to remedial liability, it entails results which are inconsistent with firm convictions about the morality of remedial liability, and *vice versa*. I give a concrete example of this pay-off in Part 4. A second reason is that SIMILARITY assists in assessing the justification of parts of the private law of remedies. In Part 5 I examine a number of puzzling features of the existing law which make more sense when SIMILARITY is borne in mind. In particular, the necessity and proportionality conditions of defensive liability illuminate parts of the law on injunctive relief, self-help, contractual penalties, and compensatory damages, and the role of the court in granting remedies. However, I will also show the limits of SIMILARITY in relation to understanding morally justified legal remedial liability.

A number of writers, starting, perhaps, with Christian Thomasius in the seventeenth century, and slightly more recently Andrew Gold, Jeff McMahan, Guy Sela, Rebecca Stone, and Victor Tadros have invoked or defended SIMILARITY or something, well, similar.[[1]](#footnote-1) What this paper adds is two-fold. First, it deepens the defence of SIMILARITY, in part by considering further important objections to it, particularly objections stemming from the role of courts in enforcing rights. Second, it explains in greater detail scope and implications of SIMILARITY, in particular in relation to its ability to illuminate different aspects of private law remedies.

The paper is structured as follows. In Part 1, I sharpen up SIMILARITY and explain further what is at stake. In Part 2, I set out some arguments for SIMILARITY. In Part 3, I raise problems for the idea that the morality of defensive liability is an important guide to the interpersonal morality of remedial liability and suggest that these problems can be overcome. In Part 4, I consider objections to SIMILARITY stemming not from the interpersonal situation between the right-holder and right-violator, but from the normative role of courts. Here it is argued that courts have both more limited and more extensive permissions to enforce rights than private persons, but that this can largely be explained internally to SIMILARITY. In Part 5, I give some examples of how SIMILARITY helps to illuminate normative issues within private law remedies. In Part 6, I show a theoretical implication of SIMILARITY.

**1. Defence and Remedies: Preliminaries**

Here it is again:

SIMILARITY. The same or highly similar normative considerations ground moral liability to defensive measures as ground moral liability to non-punitive remedial measures.

*Liability*. First, here, ‘liability’ means[[2]](#footnote-2) that one is situated such that a harm, cost, or burden may be imposed upon one, without one’s consent, in circumstances in which one would normally have a right not to be subject to suffering such harm or to bearing such a cost or burden, but without one being wronged.[[3]](#footnote-3) To be morally liable to a compensatory burden means, then, that one may have a burden imposed upon one, in order to compensate another, without one’s consent, in such circumstances in which one would normally have a right against bearing such a burden.[[4]](#footnote-4)

Notice, then, that this is not a dispute about ‘liability to pay compensation’ as that phrase would sometimes be understood, namely, as a dispute about when a person is under a moral duty to pay compensation.[[5]](#footnote-5) It is a dispute about permissible imposition of harm, burden or cost. It may well turn out that one is only permissibly harmed to achieve some purpose when one is under a duty to serve that purpose, but this requires argument.[[6]](#footnote-6) In any event, even if a compensatory duty is a necessary, grounding condition of a compensatory *liability*, it is not sufficient. There are duties to compensate which do not generate moral liability to bear a compensatory cost. Sometimes an appropriate expression of gratitude may generate a duty to compensate which cannot be permissibly enforced, because any enforcement would necessarily be ineffective—or, if forced gratitude still has some small value, disproportionate. Suppose for instance that I, a stranger to you, permit you to break my arm in order to avoid some serious harm to yourself, even though I have no duty to allow you to do so. Although you do not wrong me in breaking my arm, gratitude might require, depending on the circumstances, an offer to compensate. Forcing you to compensate me will not serve the value of expressing gratitude, however, and so cannot ground a liability to compensatory cost.

*Defensive and remedial measures.* The paradigm of a defensive measure is harm imposed upon a person who will otherwise imminently violate one’s rights in order to prevent the violation. I intend it also to include any measure taken by a right-holder which is specifically designed to prevent the violation of their right(s) by another, which would normally be a violation of the other’s rights. The measure may not be harmful: if I grab your fist to stop you punching me, I do not necessarily harm you, but I do take a measure that would normally violate your rights in order to prevent the violation of my rights.

What I want to investigate is the connection between moral liability to defensive measures and moral liability to interferences, authorised by courts, in private law litigation, which would normally violate one’s rights, whose aim is to address a wrong or the threat of a wrong. I have chosen the phrase ‘remedial measures’ to capture the phenomenon to which I am comparing defensive liability. By this, I mean ‘liability to enforcement of a primary or secondary legal duty’. Enforcement means ‘securing of the performance of the duty, or the state of affairs that would have been produced by performance, regardless of the consent of the duty-bearer, by taking steps that would normally violate the duty-bearer’s rights’. This would include, then, the seizing and delivery up of converted property, selling the duty-bearer’s assets to satisfy a judgment debt, garnishing the defendant’s earnings for that purpose, confining the duty-bearer in order to incentivise performance of a duty, and by issuing threats of enforcement that one would not be permitted to make against a non-wrongdoer. Remedial measures can be court-authorised or not. In the latter case, then, it includes ‘self-help remedies’.

In one way, the terminology of ‘remedial’ is misleading: in one prominent usage, a remedy is either (a) the exercise of a normative power by a court to address a right-violation, or the prospect of a right-violation – for instance, an order to pay compensation, which creates a legal duty to pay the compensation or (b) the issue of a demand for conformity with an existing legal right, when a court issues an order to perform an existing duty. The paper is not directly concerned with liability to the court’s normative power to impose new duties or make demands, but with the permissibility of the material implementation of those duties or demands.

**2. SIMILARITY: an Initial Defence**

In this section, I argue that the conceptual similarities between defensive measures and remedial measures are sufficiently great, and the conceptual differences relatively normatively unimportant, that the same, or highly similar, normative facts must ground liability to both.

*Preventive enforcement rights.* Some private law enforcement rights are straightforwardly defensive in character. Consider the right to abate a nuisance. This permits A to prevent B’s continuing nuisance by taking steps that otherwise violate B’s rights.[[7]](#footnote-7) In the classic example, A is permitted to lop off overhanging tree branches belonging to B.[[8]](#footnote-8)

*Restitutionary enforcement rights.* Less obvious, but still intuitive, is the conceptual connection between defensive liability and remedial restitutionary liability in specie, where it is arguably the same primary right that is being enforced by defensive measures and remedial measures. Suppose, at *t*, you are about to take my bag without permission. I am permitted to use *some* force to stop you—suppose, for instance, I could resist you by grabbing your arm. Suppose now, at *t* + 1, you have wrongfully obtained possession by taking my bag without permission and are absconding with it. Surely I am still permitted to use *some* force to prevent this—suppose I could trip you up so that you landed on a nearby bouncy-castle or fall into a nearby hedge. The doctrine of recaption of chattels is consonant with this.[[9]](#footnote-9) Here my right to exclude you from my property permits some defensive measures and some remedial, restitutionary, measures to be taken. It seems difficult to accept that there is a significantly different explanation of *why* I am permitted to use force at *t* + 1, compared to *t*. The explanation is that it’s my bag.

*Compensatory enforcement rights*. Consider now the less intuitive case of defensive liability and remedial-compensatory liability. Compensatory liability, as a matter of legal practice, consists of monetary awards with at least three distinct, regulative ideals: compensation as *prevention or mitigation*, compensation as *counterbalancing*, and compensation as *expression.*

Consider, first, examples of compensatory liability which aim at *preventing* or *mitigating* negative states by eliminating or disabling the source of risk which threatens those negative states. Example: B fires at A, damaging A’s leg. The leg will highly probably develop arthritis in the future unless expensive treatment is obtained. The compensation B will be ordered to pay will include a sum to provide the means of preventing the arthritis. In such cases, the compensation aims to provide the means to prevent the occurrence of a negative state upon the victim—the debilitating effects of the arthritis—by disabling or eliminating the risk source of that negative state—here, by attending to the facts which will probably give rise to the arthritis.

Not all compensation is preventative in this sense, however. Some compensation does not aim to prevent the occurrence of a specific negative impact upon the victim. As Adam Slavny puts it, the compensation merely *counterbalances* that negative impact by rendering the victim equally well off as they would have been had the compensatory-duty-generating event not occurred.[[10]](#footnote-10) For example, if A will inevitably develop painful arthritis as a result of B’s injuring A, then any compensation will only be able to counterbalance the effect of the pain. For instance, it might provide A with the means of pursuing alternative projects to those that the arthritis has made impossible, such that A maintains A’s level of well-being.

Compensation is also sometimes *expressive*. In English law, if B wrongfully spits on A, A will be entitled to substantial damages.[[11]](#footnote-11) This need not prevent, mitigate or counterbalance any detriment to A’s well-being. It is intended to express the wrong done to A, without hoping to make it the case that any material effect of the wrong is undone or counterbalanced.

Each form of compensation has a defensive counterpart. Perhaps the paradigm defensive acts aim to *prevent* the occurrence, or to diminish the impact, of negative right-infringing states by harmfully eliminating or disabling the source of risk which threatens those negative states, before that risk materialises. A simple example: A kicks B to prevent B from firing B’s gun at A. B’s attempting to fire B’s gun is a source of a risk of negative state to A. A causes the non-occurrence of a negative state, to wit, the harm that will result from B’s firing the gun at A, by disabling the risk source of that negative state, prior to the materialisation of the risk of the negative state.

There are also clearly cases of permissible defence which *mitigate* the effect of an inevitable negative impact that will be caused by an attacker. Suppose that A is wrongfully attacking B and will damage B’s arm causing pain of size *n*. B is unable to prevent A from damaging B’s arm entirely, but B is able to use force against A such that B will suffer *n – x* pain in the arm. Subject to necessity and proportionality constraints, it is permissible for B to take such mitigatory steps. Defence which involves *ex ante* mitigation is structurally parallel to compensation that involves *ex post* mitigation, such as compensating for the cost of pain relief medication.

*Ex ante* mitigation is not the same, however, as *ex ante counterbalancing*. In mitigating the effect of a negative state, one can reasonably be described as preventing a specific negative impact that would otherwise occur. In the example in the last paragraph, B prevents the pain being as great in size as it would otherwise have been. Here is a case of *ex ante* counterbalancing:

*Sporting pianist.* Bert is a promising young concert pianist, having been an equally promising squash player. Anja culpably attacks Bert, damaging Bert’s left hand. Bert’s left hand is irreparably damaged, his career as a pianist ended. Anja’s attack unwittingly alerts another nearby attacker to Bert’s location. The other attacker damages Bert’s right hand. The function in the right hand can only be saved if Bert is immediately taken to hospital. Bert’s only route to hospital is by driving over Anja’s arm. If Bert’s right hand is saved, he will have a successful career as a squash player, which will leave him equally well off compared to the well-being he would have had as a concert pianist.

To my mind, it would be permissible for Bert to damage Anja’s arm in order to counterbalance the harm she will do by causing him not to become a concert pianist. Anja’s arm may be damaged in order to ensure that Bert will be equally as well off as if she had not culpably attacked him. If, as this suggests, there are permissible cases of *ex ante* counterbalancing, it is not clear why they should be grounded in different considerations to *ex post* counterbalancing.

Finally, there is what might be termed *expressive* defence. Suppose that B is sexually assaulting A. A is unable to prevent B’s assault, but A can inflict some harm on B, say breaking B’s wrist. Some philosophers argue that forcible action is permitted against B in these circumstances even if it will certainly not prevent the wrongful assault.[[12]](#footnote-12) The justification is that A’s action is permitted as a means of expressing A’s worth or dignity. If it is permissible to do this *ex ante* even when there is no prospect of a material improvement of A’s well-being, then it is unclear why it would be impermissible *ex post*, if there is some harm that can be inflicted ex post, which will also express A’s worth or dignity.

**3. SIMILARITY: Problems and Objections at the Interpersonal Level**

This section considers some possible problems and objections to SIMILARITY which relate directly to the interpersonal moral situation between the right-holder and the duty-bearer against whom an enforcement measure is taken. The next section will deal with problems which relate more specifically to the idea that *institutional*, *legal* remedial liability is grounded in the same considerations as defensive liability.

*Time.* Most obviously, defence is an *ex ante* measure whereas remedial measures are generally *ex post*. More precisely, defensive action is typically action taken in order to prevent the occurrence of a negative impact upon a person or their resources, prior to the occurrence of any negative impact. Preventive and mitigatory compensatory cost imposition is action taken after the occurrence of an initial negative impact to prevent or mitigate further effects of that initial impact. Once described in this way, however, it is obscure why one should believe there is any significant normative difference simply because, in the (typical) defensive case, the harm imposition occurs *prior* to any negative impact, in order to prevent (or mitigate) that impact, but with compensatory action, an initial negative impact has already occurred. In both cases, one person is imposing a burden upon another in order to prevent or mitigate the negative effect of the other’s conduct upon them.

*Prevention v cure.* It might be objected that defensive action is preventive, while compensation action is curative, and that this has important implications for the justification of each type of act. Defensive action is preventive, it might be said, on the basis that it avoids any negative impact upon the victim at all. By contrast, compensatory action is curative in that it responds to a negative impact upon the victim, by acting upon it so that the victim’s well-being is identical to what it would have been had the impact not occurred. Setting aside cases of counterbalancing, this distinction seems unimportant. Contrast these two cases. Case 1: you succeed in injecting me with a poison which poses a 75% risk of killing me. I can break your arm to obtain access to the antidote, otherwise I will die. Case 2: you are about to inject me with a poison which poses a 75% risk of killing me. There is no antidote. I can break your arm to stop you poisoning me. It is obscure why there should be a significant difference in the reasons why I am permitted to break your arm in each case, even though the first case might be described as ‘curative’, while the second is purely preventative.

*Wrong* *versus* *no wrong*. In cases in which an attacker succeeds in causing harm to the victim, then, it might be said the attacker is a wrongdoer but, if the harm has not occurred, then B is a potential, or failed, wrongdoer. The actual occurrence of a wrong might be thought to be of normative significance. This contrast—between the occurrence and non-occurrence of a wrong—does not hold in all cases, however. In some cases, B will be a wrongdoer by attempting or risking the harm by breaching a duty not to impose certain kinds of risk without justification. But it may be true that, when the harm occurs, B will have completed a further wrong. The only difference this makes to the permissibility of harming B, however, seems to be evidential: if the harm has occurred, we generally know that the harm-based wrong has occurred. Before that wrong has occurred, it is a matter of probability. I doubt that there is a special significance to wrongdoing that has actually occurred in relation to the principles governing a person’s liability to bear a burden. Suppose that you have wrongfully and culpably rolled two boulders down a hill. One has injured a victim. One is about to injure another victim. Your kidney can be removed to save the injured victim, killing you, or you can thrust yourself in front of the other victim, killing yourself, to protect the other victim. There is no reason to favour the injured victim over the about-to-be-injured victim.

*Different consequences*. When most people think about defence they probably think about acting against a threat’s body in order to prevent harm to the threatened person’s body. By contrast, the usual case of compensation involves money taken from one person in order to restore another’s body, property, or finances. The fact that defence involves acting against a person’s body, it might be said, suggests that it should involve different, more restrictive, principles. In short, the stakes for the attacker are greater in self-defence: usually their body stands to be harmed in some way.

This does not show that the two have different normative grounding. The fact that it is usually easier to justify compensation than defensive acts on a person’s body may be the result of the application of a single normative principle, or set of normative principles, to different factual situations. Constraints of necessity and proportionality govern the infliction of harm to prevent harm. If harming a threat’s *body* to degree *h* to prevent harm of degree *h* to the threatened person’s body is necessary and proportionate, *a fortiori*, harming a person’s *economic* resources to some degree to cure that harm is also proportionate, given the lesser importance of economic resources (at least up to some value). Further, it will generally be the case that bodily injury is not necessary in cases of compensatory harm: generally it is not necessary to harm a person’s body in order to obtain compensation from them. So the fact that compensatory acts are typically easier to justify is itself explained by the ideas of necessity and proportionality, principles which plausibly governs both domains.

If this were true, however, we would expect similar results as to the permissibility of harming to be reached in compensatory cases which *do* involve harming an attacker’s body to prevent harm to the victim’s body. Such cases are somewhat difficult to construct, but here is one.

*Protection*. Andy and Bill are involved in a car accident in which Andy culpably damages Bill’s leg. Andy knows that Bill will forever lose the use of his leg, causing pain of degree *h*,unless he is delivered to a nearby hospital in less than one hour. Unfortunately, Andy’s leg is trapped due to damage caused to his car in the collision with Bill and unless Andy releases his leg, thereby breaking it, causing pain of degree *h*, he cannot take Bill to this hospital. No one else is around or contactable.

Here Andy’s only way of ensuring the repair of Bill’s leg is by breaking his own leg, with the same consequences. It seems to me that Andy has a duty to do this, and Bill could break Andy’s leg if that was likely to ensure that Andy took Bill to hospital, and no other reasonable means of ensuring this was available. This is consonant with the view that Bill would clearly be entitled to break Andy’s leg ex ante to prevent his own leg being broken. So when we compare cases of self-defence and compensation in which the stakes for the defendant are equal, we appear to arrive at similar verdicts.[[13]](#footnote-13)

*Avoidability*. One way of thinking about the morality of defence is as a problem of distributive justice. In particular, one might think that the morality of defence is one part of the morality of the distribution of unavoidable suffering. Here is Jeff McMahan:[[14]](#footnote-14)

[I]n cases in which a person’s [wrongful] action ... has made it inevitable that someone must suffer harm, it is normally permissible, as a matter of justice, to ensure that it is the [wrongdoer] who is harmed rather than allowing the costs of his wrongful action to be imposed on the [other(s) on whom they might instead have fallen]

Suppose I deliberately roll a boulder in your direction and that the only way you can avoid being harmed is by pushing the boulder on an innocent person or back towards me. Here I have made it inevitable that someone is harmed: you, the innocent, or me. It seems just (assuming the levels of harm are similar, anyway), given the role of my wrongful action in producing this situation, that I am the one to bear the harm.

Now suppose I deliberately roll a boulder in your direction and as a result you suffer an irreparably damaged leg. You could have a replacement leg for £10,000. I, the wrongdoer, have not made it ‘inevitable’ that a person must suffer harm here. We could take a penny from everyone, and if everyone is large enough, we could cure your harm without harming anyone (surely being made to pay a penny is not a harm). In short, dispersing harm across many people is a possibility in cases of compensation but not self-defence.

But, again, this is a contingent feature of self-defence and compensation. *Protection* is a case in which, as things turn out, bodily harm to someone *is* inevitable as a result of the wrongdoer’s action. Conversely, we can imagine cases of self-defence in which the person subject to a threat has a choice between imposing a harm on one person or a miniscule amount of detriment on a large number of nearby people, when both options are equally effective at preventing the harm. In these cases, it is not true that harm is inevitable to someone regardless of what is done.

Even if it is true that it is *typically* possible to disperse the burdens of compensation in a way that is not possible with the burdens of self-defence, it is not clear whether the mere fact that dispersal is factually *possible* makes a normative difference to liability to pay compensation, if the victim cannot effect the dispersal. It does not make a difference, it seems to me, to unusual cases of self-defence in which a group of people *could* be organised, by a third party, so as each to bear a very minor burden instead of a single threatening person suffering a harm, in order to prevent a harm. Even if all of these people could legitimately be required to bear this minor burden, if they had been coordinated to do so, if the victim cannot achieve this coordination alone, it seems to make no difference to the permissibility of the victim harming the threat. It may mean that a third party, who could have effected this coordination, has breached a duty to the threat, but this does not affect the permissibility of the threat being harmed by the victim. For instance, suppose that B wrongfully and culpably puts A at risk of drowning. C, a lifeguard, could easily organise D, E, F, G and H to form a human chain which would reach A, but chooses not to do so. This means that A’s only route to safety is to harm B. The fact that others could easily have been arranged to prevent this being the only means of preventing harm does not affect the permissibility of A’s act.

*Using as a means.* It may be objected that defensive harming does not involve using an attacker or their resources as a means, while compensatory cost imposition does involve such use. If so, liability to compensatory cost imposition has an extra moral obstacle standing in the way of its justification compared to liability to defensive harming.

There are different accounts of what ‘using a person or their resources as a means’ amounts to and its moral significance.[[15]](#footnote-15) A plausible view is that one uses a person or their resources as a means if and only if one harms the person in order achieve an end which cannot be achieved without the presence of the person or their resources. Thus, if one pushes a large person in front of a trolley in order that the large person’s body blocks the trolley’s path to five people further down the track, one uses the large person as a means. By contrast, if the trolley is approaching a fork in the track, and one diverts the trolley away from the track at the end of which five persons are tied, to the other track at the end of which one person is tied, one does not use the latter person as a means. The end of saving the five can be achieved without the presence of that person.[[16]](#footnote-16)

Now consider defensive action. If B damages A’s arm in order to prevent A firing a gun at B, B does not use A as a means. B harms A, but B’s end—being free of harm—does not require the presence of A’s body or resources. Suppose, however, that A fires the gun and damages B’s body. In order to prevent an extremely painful worsening of a bodily injury, A’s only option, suppose further, is to obtain financial resources from B which will prevent this occurring. In taking those resources, one might be said to be using B as a means: B’s resources are being used in order to secure A’s end of not suffering future harm, and the presence of B’s resources are necessary for that end to be secured. Thus, it appears that compensatory cost imposition involves using a person’s resources as a means, while defensive harming does not necessarily involve this.

If this is correct, there are two possible concessive responses. First, one could tweak SIMILARITY so that it asserts an identity of rationale only between cases of defensive liability which involve use as a means—for instance, when a victim must use an attacker as a shield against a threat the attacker previously created—and compensatory cost imposition. Second, one could accept that there is a moral consideration which applies to compensatory cost imposition which does not apply to defensive harming, but nonetheless maintain that, otherwise, the two have the same moral basis.

Here is a different, non-concessive, response. In cases in which one is imposing a cost on a person in order to prevent the harmful effects of their previous conduct, it seems that one should assess whether one is objectionably benefitting from that person’s presence by reference to the position that would have existed had the person not initially acted at all. If so, then compensatory cost imposition either does not involve use as a means or does not involve a morally objectionable form of such use.

*Cases in which ex ante and ex post permissibility diverge.* There are situations in which defensive harm is impermissible *ex ante*, but compensatory cost imposition is permissible *ex post* and *vice versa*. Suppose that the only way you can defend yourself against a person who is wrongfully threatening to break your finger is to kill them. It would be wrong to do so. However, clearly a cost may be imposed upon the attacker, *ex post*, in order to compensate you. Given, then, that there are situations in which defensive harm is impermissible *ex ante*, but not *ex post*, doesn’t this suggest that the two permissions have different grounding? No. The reason it is impermissible *ex ante*, and permissible *ex post* in the last example is explained by the same principle: proportionality. Monetary compensation will often be a proportionate response while physical violence is not.

But there may be harder cases in which it is not obvious how to explain this divergence in a way that is consistent with SIMILARITY. In such cases, defence appears to be permissible, yet the person against whom one may exercise self-defence appears not to be liable to compensatory cost imposition *ex post*, but this cannot be explained by the necessity or proportionality constraints. Consider:[[17]](#footnote-17)

*Ray gun.* Falling Person is blown by the wind down a well at the bottom of which Victim is trapped. Falling Person will crush Victim to death unless Victim vaporizes her with his ray gun. If he does not vaporize her, Victim will cushion Falling Person’s landing, saving her life.

I share the intuition that it is permissible to kill Falling Person in self-defence. But I initially find it difficult to accept that Falling Person is liable to compensate Victim if Falling Person in fact harms Victim.

Here are two responses to this problem. First, even if it is permissible to harm Falling Person, it is not clear that this is because Falling Person is *liable.*[[18]](#footnote-18)SIMILARITY only asserts a unity of rationale in relation to liability. Second, if we do accept a verdict of defensive liability in *Ray gun*, it seems to me that ultimately we must accept a verdict of compensatory liability in the compensatory variant. If it is permissible to kill or seriously injure Falling Person in defence to prevent harm, it is obscure why the mere fact that Falling Person has injured Victim should then prohibit Victim from imposing a cost on Fall(en) Person to prevent the harmful effect of that injury. At any rate, my confidence in the basic argument for SIMILARITY is significantly greater than my confidence in any particular intuition about liability in *Ray gun*—such cases notoriously elicit different intuitive responses, and the case for liability seems finely balanced. It may also be worth noting that compensatory liability in cases of innocent threats is not unknown to the law. In English law, for instance, a person can be liable to pay compensation for damage caused during a schizophrenic episode.[[19]](#footnote-19) In German law, it appears that one may be liable to pay compensation for damage caused when one unforeseeably becomes unconscious.[[20]](#footnote-20) It is doubtful, then, whether we should think that SIMILARITY is deeply at odds with legal practice.[[21]](#footnote-21) [[22]](#footnote-22)

*Interaction.* The permissibility of some acts of self-defence seems to depend upon the availability of restitutionary enforcement. Suppose I steal your extremely valuable watch. It is a special watch: you can press a button and the watch reliably flies back to you. As I run off, you are unable to press the button, which is not nearby, and can only stop me by breaking my arm. You will be able to press the button 10 minutes later. It seems wrong to break my arm because you could obtain restitution shortly after. So the existence and permissibility of restitutionary enforcement *ex post* may affect the permissibility of defensive action *ex ante*. This is consistent, however, with considerations of necessity and proportionality governing both, and with both being grounded, say, in the victim’s primary rights, as in the example of the watch.

*Necessity.* Permissible self-defence is subject to a necessity limitation. This is sometimes understood as the condition that one is only permitted to impose defensive harm if this is the *least harmful means* of preventing the threat.[[23]](#footnote-23)

The following objection to the idea that defence and compensation have similar grounding might now be made. Legal systems allow a victim to recover compensation against a wrongdoer even if the victim has insurance cover. If this is justified, then liability to compensatory harm cannot have the same basis as liability to defensive harm. This is because recovering compensation from the wrongdoer is not the least harmful means in the circumstances: it is not necessary, since the victim can claim under their insurance policy.

However, harming the wrongdoer may still be the least harmful means of recovering compensation *which* *corrects the injustice* between the two parties. Just as *ex ante* a person can insist upon their primary rights, to some degree, even when they know compensation is forthcoming from another source, *ex post*, they can also insist upon their secondary rights.

I’m not entirely sure, though, that this response is sufficient. Suppose that *ex ante* you are posing an unjust, but non-culpable, threat to my leg. I can protect my leg from your breaking it only by damaging your leg. Suppose that *ex ante*, I am able to drink a potion which will ensure that my leg is as good as new almost immediately after the wrongful threat to my leg is realised. Intuitively, I am entitled to prevent the injustice here—ie, the injustice that will arise if the threat is realised—but only at very minimal cost to the wrongdoer. So, while preventing an unjust harm could permit the infliction of some cost on the wrongdoer, it seems that it would not permit much.[[24]](#footnote-24)

*Shared responsibility.* Most legal systems allow a victim’s entitlement to compensation against another to be influenced by the extent to which the victim was also responsible for the occurrence of their harm. For instance, a victim’s failure to wear a seatbelt which exacerbated their harm may reduce their entitlement to compensation against a culpable driver. There is no clear parallel with defensive rights: either one has the right to inflict the defensive harm or one does not. But, in response, this is generally a consequence of the fact that defence often involves a stark choice: either the attacker bears a harm or the victim bears a harm. So there is often no room for victim fault to play a role, other than entirely defeating the conclusion of liability. However, there are cases in which there are multiple possible distributions of harm between the attacker and the victim, and here victim fault seems to play a role in defensive harm, too. Suppose driverless cars are common and that one is expected to update the software on the car regularly in order to improve safety measures in the event of accidents. A fails to download a software update for A’s car. As a result of this, when B’s driverless car is advancing towards A, risking A’s death, due to negligent maintenance on B’s part, A’s only options, controlled by a device in A’s car, are (i) [paralyse B for life, avoid harm to A] or (ii) [avoid harm to B, but A suffers blindness in one eye]. If A had downloaded the software update, suppose that a third option would’ve been available: (iii) [avoid harm to B, avoid all harm to A]. Intuitively, A is required to take (ii). This is explicable on the basis that the victim is at fault for the fact that the defensive options involve greater harm to B than would otherwise be the case.

*Relationality.*

**4. SIMILARITY and the Role of Courts**

The last section was concerned with potential normative differences that could in principle arise independently of the existence legal institutions. This section is concerned with the normative impact of legal institutions on the truth of SIMILARITY. Here are three ways in which the role of courts may be said to undermine SIMILARITY as a thesis about what grounds remedial liability.

**4.1. Courts as Third Parties**

The paradigm case of defensive measures is a two-party one in which A repels B’s wrongful force. The paradigm of remedial measures is not like this: it is a three-party case in which A secures C’s assistance in enforcing A’s right against B, where C is a court. It might then be thought that whatever makes a person morally liable to remedial measures *by a court* must be different to what makes a person morally liable to defensive measured *by a right-holder*.

The thought, in so far as it points merely to the involvement of a third party, is mistaken as an objection to SIMILARITY. Consider defensive cases involving third parties. Sometimes, C is permitted to use defensive force against B in order to protect A. If C sees A being wrongfully assaulted by B, C is normally permitted to intervene. There is at least one ground of C’s permission which is the same as what permits A to use force against B: the fact that A is being seriously wronged.[[25]](#footnote-25) SIMILARITY succeeds if what grounds C’s permission in the defensive case is the same, or highly similar, to what ground C’s, a court’s, permission in the remedial case. Since it seems that what grounds C’s permission is essentially the same as what grounds A’s permission, this objection does not raise a new problem for SIMILARITY.

Note, also, that A has a special normative control over defensive third-party action, in the same way as A is recognised in law to have a special normative control over the court’s remedial action. If A consents to B’s action, then normally no wrong is done to A, and so C will not have permission to intervene defensively on that basis. Even if A does not consent to B’s act, but simply refuses C’s assistance in repelling B, this may have a substantial impact upon the permissibility of C’s using force against B.[[26]](#footnote-26) Suppose that B is trying to park in A’s car-parking spot without permission. A is pushing B’s car out of the spot. C witnesses this and insists upon providing help. If A tells C to mind her own business, intuitively, this has an impact upon the justifiability of C’s interfering with B. C can no longer rely upon the justification that C is protecting A’s rights—C can only rely upon the justification that she is preventing a crime, if there is a crime. This may affect the force which could be used against B. Similarly, if A has not authorised a court to enforce A’s rights, if the relevant facts are found, then the court’s only justification for remedial measures will have to be something other than A’s rights being at stake.

**4.2. Courts have Special Powers**

Intuitively, it seems that courts have special permissions to engage in or authorise remedial measures compared to non-institutional persons. This is reflected in the limits on permissible self-enforcement: the boundaries of self-help remedies are narrowly drawn.[[27]](#footnote-27) Further, it seems that some rights are *only* enforceable by courts. Consider contractual rights. There is no direct equivalent to self-enforcement remedies as exist in relation to bodily rights and property rights. Self-help remedies in contract are normally normative powers to rescind or to terminate that arise due to some flaw in the formation of the contract or due to breach. The exercise of these powers does not secure conformity to the contract, however. Rescission and termination are modes of exiting the contract, rather than enforcing it.

These facts about legal practice might suggest that there is some distinctive normative fact about courts which confers special permission to interfere. The special permission to interfere can largely be explained internally to SIMILARITY, however. If private enforcement of rights will likely lead to, or substantially risk, harms to third parties, then it may not be proportionate to enforce privately. So the proportionality condition of defensive force will normally give courts additional permissions to interfere, on the basis that court action will not so often tend to public disorder to the detriment of third parties. Similarly, to the extent that private enforcement involves comparatively greater risk of error than court proceedings, then it may fail the necessity condition on defensive force. If one has a choice between two methods of enforcement, one of which imposes a much smaller risk of error than the other, then, other things being equal, the former is required.

Sometimes, however, courts may do things to people which go beyond the kind of interference which can be justified as necessary and proportionate force in the enforcement of an individual’s right. That is: the level of force may be greater than what the threat to the individual’s right may justify, even taking into account the different factual circumstances of courts and private enforcers in relation to the necessity and proportionality conditions. This occurs because, sometimes, the violation of a court-created duty, designed to give effect to a person’s right, is an affront to the court’s authority. The wrong is then not simply to the right-holder, but also to the court. This wrong against the court may justify additional force being applied against a wrongdoer, in a way that will assist in the enforcement of the right-holder’s right, compared to what would be permitted if the wrong were simply against the right-holder.

**4.3. Courts have Diminished Powers**

Less noted is the fact that courts may also have diminished permissions to enforce relative to the permission of a private enforcer. Court enforcement may bring with it negative consequences that would not otherwise ensue. For instance, it could be the case that court enforcement of doctors’ secondary moral duties to compensate for mistreatment contributes to defensive medicine, with the result that more people receive substandard medical care than if court enforcement were not granted. This is relevant to the moral permissibility of court enforcement.[[28]](#footnote-28) This is an example in which court enforcement would essentially fail the proportionality condition.

Other limits on a court’s power are external to the facts which ground defensive liability. A litigant’s abuse of the legal system may prohibit the court lending its assistance to enforcement, even if the litigant has an underlying moral permission to enforce. This is an example of an additional moral consideration that applies distinctively to courts. But it doesn’t seem to undermine SIMILARITY: the defendant is still morally liable to the court’s enforcement in the sense that this enforcement would not *wrong* the defendant. If it is impermissible for the court to enforce in these circumstances, it is not because the defendant is not liable to enforcement.[[29]](#footnote-29)

**5. Understanding Private Law Remedial Liability Doctrines**

**5.1. Monetary Enforcement v Specific Enforcement**

The normative choice between specific enforcement of rights and monetary enforcement by damages is illuminated by SIMILARITY. The traditional conditions for the award of damages in lieu of an injunction express necessity and proportionality considerations. Under the *Shelfer* criteria, if the damage to claimant’s right is small, adequately compensable, ie, by a small monetary payment, and the effect of an injunction on the defendant would be ‘oppressive’, then damages in lieu should normally be awarded.[[30]](#footnote-30) The comparison with defensive liability illuminates the weighing exercise here: it is not simply a matter of comparing harm to the claimant with harm to the claimant, and avoiding the greater harm. As in defensive liability, the harms are morally weighted: the effect on the defendant must be *significantly* greater than the harm to the claimant, because the defendant is violating the claimant’s rights. SIMILARITY also illuminates why the *Shelfer* criteria are too narrow in not considering the effects on third parties of enforcement. A third party’s permission to intervene defensively is affected by the harms caused to third parties by enforcement. If preventing an assault on you will kill two others, then clearly it is not permitted. To the extent that court enforcement will violate more important rights than it protects, it is not permitted.[[31]](#footnote-31)

**5.2. Remedial Enforcement Choices Generally**

Under the Consumer Rights Act 2015, a consumer who receives goods which do not conform to certain terms of a contract with a trader is given, under s 19, ‘rights to enforce terms about goods’. One such right is the ‘right to repair or replacement’.[[32]](#footnote-32) The consumer cannot insist upon one of these remedies—repair, or replacement—if the other remedy is ‘disproportionate’.[[33]](#footnote-33) This is one example of a general phenomenon of taking into account considerations of proportionality in determining the mode by which a right is enforced. The same phenomenon is evident in determinations as to whether a right to continued performance should be enforced by means of an order to pay for substitute performance of a contractual duty, or by a payment of damages for the diminished value of performance received.[[34]](#footnote-34) Whether the court will order damages for the ‘cost of cure’ will depend, inter alia,[[35]](#footnote-35) upon whether that cost is proportionate to the benefit to the right-holder. Again, the proportionality consideration is morally-weighted, as in defensive liability, such that the claimant’s interests are morally privileged in the calculation.

**5.3. The Role of Culpability**

As noted above, legal systems generally permit defensive action against non-culpable persons, even persons who pose a threat which is not due to their agency at the time—for example, against a person having an uncontrollable fit. And most legal systems grant rights to compensation, in some circumstances, against non-culpable persons under strict liability doctrines. SIMILARITY makes some sense of the fact that moral culpability does not have a *generative*, grounding role in relation to non-punitive remedial liability. Even if the permissibility of defensive action against non-agential threats is controversial, it seems unlikely that forcible self-defence is only permissible against morally blameworthy agents. In this way, given SIMILARITY, a theory which insists upon moral blameworthiness as a condition of compensatory liability is put on the back foot.[[36]](#footnote-36)

This is not to say, however, that culpability lacks any normative significance in determining remedial measures. The defendant’s culpability is relevant, for instance, to a court’s decision as to whether to grant damages in lieu of rescission.[[37]](#footnote-37) In determining whether to grant a mandatory injunction to take protective measures against an invasion of the claimant’s land, the defendant’s culpability has been held to be relevant.[[38]](#footnote-38) These facts can be understood as culpability bearing upon the proportionality of the remedial measure in question. If the defendant is culpably responsible for the state of affairs that stands to be remedied, then this may justify harm to the defendant being morally discounted in the proportionality calculation.

**6. A Theoretical Implication**

As noted at the outset, one main reason to care about the truth of SIMILARITYis that it may help to assess philosophical theories of liability to defensive or compensatory harm. Here are two important features of Quong’s theory of defensive liability which are undermined by SIMILARITY. These objections are not decisive, but they are sufficiently plausible to vindicate the claim that thinking about SIMILARITY can help us make progress in understanding both domains of liability.

**6.1. Non-Culpable Threats**

Quong argues that the driver in Jeff McMahan’s famous *Conscientious driver* example is not liable to defensive harm.[[39]](#footnote-39) Here is the example:

*Conscientious driver*. A person keeps his car well maintained and always drives cautiously and alertly. On one occasion, however, freak 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 by using one of the explosive devices with which pedestrians in philosophical examples are typically equipped

If the driver has taken all reasonable care, Quong claims, this entails that the driver has borne the burdens that morality requires the driver to bear. The driver is thus not liable to further burdens being imposed in defence.

Quong anticipates the objection that, in tort law, things are apparently different: some activities are permissible if done with due care—flying aircraft, keeping tigers in your garden, setting off explosives—but if these activities cause harm, the injurer is liable to pay compensation. Applied to *Conscientious driver*, one might think that, while the activity is permissible since done with due care, it could nonetheless be fair that the driver pick up the costs of the activity if there is an accident resulting from an inherent risk in the activity. And if this is true for compensatory liability, it is plausible also for defensive liability. That is: just as there are activities which one is permitted to engage in on condition that one is liable to compensatory costs if the risks of the activity materialise, there could be instances in which one is permitted to engage in activity only on condition that one is liable to defensive force if the risks of activity are likely to materialise.

He offers these replies.[[40]](#footnote-40) The first is that ‘the norms and principles governing compensatory liability may differ sharply from those that govern liability to defensive force’.[[41]](#footnote-41) If the defence of SIMILARITYabove is right, however, this reply is insufficient. The second is this:

the objection [that the structure of defensive liability could mirror the structure of compensatory liability]assumes that some activities have the following structure: the benefits to Albert in ϕ‎-ing are not sufficient to permit him to ϕ‎ given the risks imposed on Betty *unless* we use a regime of strict liability *ex post* to ensure that any costs Betty might suffer are transferred to Albert. A key assumption in generating the conclusion that ϕ‎-ing is permissible is that private law will be an effective means, *ex post*, of ensuring that Albert, and not Betty, suffers any costs arising from Albert’s ϕ‎-ing… But now consider defensive force. Making risk-imposing agents liable to defensive force does not ensure victims will be able to successfully deploy defensive force and avert the threat—many victims will be unable to successfully use defensive force to avert a threat. Because the prospects of success in using defensive force are so uncertain—and not equitably distributed across the population—it makes no sense to suppose that holding agents liable to defensive force is an effective way of distributing the costs of activities in a way that can render otherwise impermissibly risky activities permissible.[[42]](#footnote-42)

This reply is unconvincing. To explain why, we need to understand why the payment of compensation could make ex ante risk imposition permissible when it would not otherwise be permissible. The most plausible reason is that the *prospect* of compensation makes the *ex ante* risk of (the negative impact of) harm lower than it would otherwise be, such that the risk is morally acceptable to those subject to it. If compensation is paid, the badness of any harm caused will be lower in so far as that harm is effectively compensated. Now Quong’s objection is that, while private law liability or some other institutional structure can make the prospect of compensation sufficiently high, such that the risk imposition becomes morally permissible, liability to defensive force cannot effectively make the prospect of harm sufficiently *low* because victims are often unable, as a factual matter, to employ defensive force. But this seems to be a purely empirical matter. Quong’s claim seems to be that there are *no* cases of defensive liability which have the structure he describes, and thus *Conscientious driver* cannot have that structure. Suppose, however, that we all have devices with which we can reliably impose defensive force upon attackers. Perhaps in the not-too-distant world of driverless cars, everyone’s car is fitted with a device which can repel other, out-of-control, cars due to a mechanical fault. Suppose that the device will only work if everyone’s car has the same device. In that world, it is not implausible to think that one is only permitted to drive if one installs the device in one’s car, and thus accept the risk of being harmed by another’s repulsion device. At least, in this world, defensive force is a reliable means of reducing the risk of harm, and it seems that this could have a parallel justificatory relevance to the reliable availability of compensation.[[43]](#footnote-43)

**6.2. Necessity**

Quong argues that the justification of the necessity condition on defensive force is a duty of rescue.[[44]](#footnote-44) Suppose that B wrongfully and culpably poses a risk of death to A’s life and A could prevent this risk materialising either by (i) pinching B or (ii) paralysing B. Quong argues that (i) is required because A owes B a moral duty of rescue, which requires A to protect B from easily avoidable harm at relatively low cost to A. If A’s only options were (iii) paralysing B and (iv) breaking B’s arm, but suffering blindness in one of A’s eyes, then A would be permitted to choose (iii), since the duty of easy rescue does not require a person to bear *very* significant costs for the benefit of others, such as becoming blind in one eye.

Now return to my driverless cars example:

Suppose driverless cars are common and that one is expected to update the software on the car regularly in order to improve safety measures in the event of accidents. A fails to download a software update for A’s car. As a result of this, when B’s driverless car is advancing towards A, risking A’s death, due to negligent maintenance on B’s part, A’s only options, controlled by a device in A’s car, are (i) [paralyse B for life, avoid harm to A] or (ii) [avoid harm to B, but A suffers blindness in one eye]. If A had downloaded the software update, suppose that a third option would’ve been available: (iii) [avoid harm to B, avoid all harm to A]

At the time A acts, A’s duty of easy rescue would apparently not require A to bear the cost of being blind in one eye (we can make this something less drastic—say, breaking his legs and arms—and it will still probably fall outside the scope of a duty of rescue). So, on the face of it, Quong’s view leads to the counterintuitive conclusion that A is permitted to take option (i) and paralyse B for life, despite being responsible for the fact that option (iii), which would have prevented all harm to B, is off the table.

A possible reply is that A’s duty of rescue comes into existence earlier: A has a duty of rescue prior to using the car to update the software and breaches that duty. When one breaches a duty, one ought to make the world as close as possible to the world in which the duty was not breached. If so, then A ought, during the accident, to take option (ii), because this would bring the world closer to one in which A complied with A’s duty of rescue.

But this reply will not work in the context of compensatory harm. Consider again the seatbelt example. It seems very plausible that compensatory liability ought to be partially reduced in cases in which a capable adult for no good reason chooses not to wear a seatbelt, knowing of the risks, and this exacerbates their harm.[[45]](#footnote-45) But it’s hard to see how this could be justified as a duty of rescue. The more obvious justification is that A is partly responsible for A’s injury and it would be unfair, in virtue of this, for A to foist all of the costs of the injury onto B, even given B’s negligence. If that’s right, then, by virtue of SIMILARITY, we have reason to think that considerations of distributive fairness, whose relevance to defensive liability Quong denies, are indeed important in both domains.[[46]](#footnote-46)

**7. Conclusion**

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 For discussion of SIMILARITY in Thomasius’ work, see Feras Gisawi, *Der Grundsatz der Totalreparation* (Mohr Siebeck 2015). For the recent defences: Andrew S Gold, *The Right to Redress* (OUP, 2020) at X; Guy Sela, ‘Torts as Self-Defense’ (*SSRN*, 6 August 2019) <<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433223>> accessed 20 March 2021; Rebecca Stone, ‘Private Liability without Wrongdoing’ (forthcoming, 2022); Victor Tadros, ‘Causation, Culpability, and Liability’, in Christian Coons and Michael Weber, *The Ethics of Self-Defense* (OUP 2016) 118. [↑](#footnote-ref-1)
2. The adjective ‘liable’ and the noun ‘liability’ are each used to refer to different phenomena. Sometimes the adjective is used non-normatively, as when someone says that a person is liable to fall over if he does not look where he is going. Here ‘liable’ means ‘is likely to, or is subject to a risk of’. When it is used to refer to normative phenomena, sometimes it simply is used to refer to ‘duties to compensate’ (see, eg, Judith Jarvis Thomson, ‘Remarks on Causation and Liability’ (1984) 13 Philosophy & Public Affairs 101). Sometimes it is used to refer specifically to being normatively situated such that another person has the normative power to alter one’s normative situation. The usage in the text is different to both of these. It refers to a different, but still important normative phenomenon, namely, when a person is situated such that they have less than their usual moral protection against bearing a cost, and will not be wronged by that cost being imposed upon them. The usage in the text has become relatively common in moral philosophy, but has, perhaps surprisingly, not much permeated philosophical discussions of private law. [↑](#footnote-ref-2)
3. Here I follow Jonathan Quong, *The Morality of Defensive Force* (OUP 2020) 18. [↑](#footnote-ref-3)
4. The fact that one may be harmed without being wronged does not entail that one is permissibly harmed, but I will leave aside this qualification for the moment. [↑](#footnote-ref-4)
5. See (n 2) above. [↑](#footnote-ref-5)
6. For the view that it does require a duty to bear the harm or cost, see Victor Tadros, *The Ends of Harm* (OUP 2011). [↑](#footnote-ref-6)
7. See *Jalla v Shell International Trading and Shipping Co* [2021] EWCA Civ 63. [↑](#footnote-ref-7)
8. *Lemmon v Webb* [1894] 3 Ch 1; affirmed [1985] AC 1. [↑](#footnote-ref-8)
9. *R v Milton* (1827) 173 ER 1097; 1 Mood & M 107. [↑](#footnote-ref-9)
10. Adam Slavny, ‘Negating and Counterbalancing: A Fundamental Distinction in the Concept of a Corrective Duty’ (2014) 33 Law and Philosophy 143. [↑](#footnote-ref-10)
11. See generally: Scott Hershovitz, ‘Treating Wrongs as Wrongs: An Expressive Argument for Tort Law’ (2018) 10 Journal of Tort Law 405 -- *Alcorn v Mitchell* 63 Ill 553 (1872). English law: X. [↑](#footnote-ref-11)
12. Daniel Statman, ‘On the Success Condition for Legitimate Self-Defense’ (2008) 118 Ethics 659, Helen Frowe, *Defensive Killing* (OUP 2014) esp ch 4. [↑](#footnote-ref-12)
13. It might be objected that Andy’s breaking his leg is not itself compensation for Bill’s injury. But monetary payments designed to prevent future harm are equally just *means* to prevent future injury. The prevention of the impact on the victim’s well-being is what constitutes the compensation. [↑](#footnote-ref-13)
14. Jeff McMahan, ‘Self-Defense and the Problem of the Innocent Attacker’ (1994) 104 Ethics 252, 259. I have taken this tweaked quotation from John Gardner, ‘What is Tort Law For? Part 2: The Place of Distributive Justice’ in John Oberdiek (ed), *Philosophical Foundations of Tort Law* (OUP 2014) 347 (reprinted in John Gardner, *Torts and Other Wrongs* (OUP 2019) ch 3). [↑](#footnote-ref-14)
15. See Ketan H Ramakrishnan, ‘Treating People as Tools’ (2016) 44 Philosophy & Public Affairs 133, and Quong (n 3) ch 7. [↑](#footnote-ref-15)
16. Warren S Quinn, ‘Actions, Intentions, and Consequences: The Doctrine of Double Effect’ (1989) 18 Philosophy & Public Affairs 334. [↑](#footnote-ref-16)
17. This is Frowe’s formulation of Nozick’s classic case: Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974) 34. See Frowe (n 11) 22. [↑](#footnote-ref-17)
18. Cf Frowe (n 11) ch 2, offering a combined liability/lesser-evil justification. See also Tadros(n 6) 249–251. Tadros no longer endorses this explanation: *To Do, To Die, To Reason Why: Individual Ethics in War* (OUP 2020), ch 9. [↑](#footnote-ref-18)
19. *Dunnage v Randall* [2015] EWCA Civ 673; [2016] QB 639—admittedly, English law denies liability when the defendant lapses fully into unconsciousness, so there is room to doubt whether these are cases of fully non-responsible threats. [↑](#footnote-ref-19)
20. See §829 BGB. For brief discussion of this, see Sandy Steel, ‘Culpability and Compensation’ (forthcoming). [↑](#footnote-ref-20)
21. Even if it were true that most legal systems endorse a divergence between defensive and compensatory liability in cases like Falling Person—and we thought this placed a burden of explanation on a defender of SIMILARITY—this divergence can be explained for reasons that do undermine SIMILARITY. A legal system might accept that a purely innocent threat should be legally liable to defensive harm, and yet for good reason not permit the enforcement of compensatory moral liability that exists in such cases. We have good reason to protect each other from the costs of liability in cases of purely innocent threats by establishing compensation schemes that apply to such cases (or, more realistically, dealing with such cases within more general social welfare schemes). [↑](#footnote-ref-21)
22. A further response is that the difference between *Ray Gun* and compensation is again the difference between opportunistic and eliminative harming. *Ray Gun* is a case of eliminative harming. It may be, then, that the reason why there is an intuition of no compensatory liability in *Ray Gun* is that this would involve opportunistic harming, and we might expect this feature to make a difference when there is no culpability or responsibility. If we would conclude that there is no defensive liability in an opportunistic harm version of *Ray Gun*, then there would indeed be a symmetry between defensive and compensatory liability. Consider a case in which B’s body is struck by a lightning strike and B falls unconscious against a boulder. The boulder rolls down a hill towards A. The only way to stop the boulder is to drag B’s body in front of the boulder. Here it doesseem less plausible that A is permitted to do this. [↑](#footnote-ref-22)
23. See Frowe (n 11) ch 4. [↑](#footnote-ref-23)
24. Perhaps the level of harm inflicted by the wrongdoer affects the amount of injustice they cause, so that the fact that the harm is prevented by the potion actually reduces the injustice inflicted. [↑](#footnote-ref-24)
25. A might have an additional ground which C does not possess. [↑](#footnote-ref-25)
26. See Jonathan Parry, ‘Defensive Harm, Consent, and Intervention’ (2017) 45 Philosophy & Public Affairs 356. [↑](#footnote-ref-26)
27. *Burton v Winters* [1993] 1 WLR 1077, 1082: ‘this never was an appropriate case for self-redress, even if the plaintiff had acted promptly. There was no emergency. There were difficult questions of law and fact to be considered and the remedy by way of self-redress, if it had resulted in the demolition of the garage wall, would have been out of all proportion to the damage suffered by the plaintiff.’ See also, for instance, *The Earl of Lonsdale v Nelson* (1823) 107 ER 396; 2 B & C 302, 311–312: ‘The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord Hale, and appeal to a Court of Justice.’ [↑](#footnote-ref-27)
28. See Sandy Steel, ‘Deterrence in Private Law’ (forthcoming), section on ‘Overdeterrence’ in H Psarras and S Steel (eds), *Private Law and Practical Reason* (OUP, 2022). [↑](#footnote-ref-28)
29. See eg *Johnson v Gore Wood & Co* [2002] 2 AC 1, 30: ‘The underlying public interest is ... that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.’ (Lord Bingham). [↑](#footnote-ref-29)
30. *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287. [↑](#footnote-ref-30)
31. Cf *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822, introducing ‘public interest’ as always relevant to the decision whether to grant damages in lieu of an injunction. The effect on third parties’ rights is not the same as ‘public interest’, however. [↑](#footnote-ref-31)
32. Consumer Rights Act 2015, s 19(3)(b). [↑](#footnote-ref-32)
33. Consumer Rights Act 2015, s 23(3)(b). [↑](#footnote-ref-33)
34. Cf *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344. [↑](#footnote-ref-34)
35. See eg *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (claimant's intention taken into account). [↑](#footnote-ref-35)
36. Cf Larry Alexander and Kimberly Kessler Ferzan, ‘Confused Culpability, Contrived Causation, and the Collapse of Tort Theory’ in John Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (OUP 2014) [↑](#footnote-ref-36)
37. See Misrepresentation Act 1967, s 2(2). [↑](#footnote-ref-37)
38. *Redland Bricks Ltd v Morris* [1970] AC 652, 667. [↑](#footnote-ref-38)
39. Jeff McMahan, ‘The Basis of Moral Liability to Defensive Killing’ (2005) 15 Philosophical Issues 386, 393. [↑](#footnote-ref-39)
40. Quong (n 3) 49. Quong offers a third reply, but it seems to be subject to the same rejoinder as I make to the second reply, so I won’t discuss it. [↑](#footnote-ref-40)
41. Ibid. [↑](#footnote-ref-41)
42. Ibid. [↑](#footnote-ref-42)
43. For a different objection, see Tadros (n 17) 143–146. [↑](#footnote-ref-43)
44. Quong (n 3) ch 5. [↑](#footnote-ref-44)
45. Or imagine the victim of a stab-wound who re-opens their wounds as an act of protest. Surely the wrongdoer is not duty-bound to compensate for this. [↑](#footnote-ref-45)
46. See Quong (n 3) 7. One argument Quong gives why distributive fairness is not relevant to defensive liability is that there are cases in which equalizing the risk of harm—the apparently fair thing to do—is impermissible. For instance, if a lethal threat is headed in my direction, it would be impermissible for me to toss a coin to decide whether to use a bystander’s body to protect myself against the threat. But a defender of the relevance of distributive fairness could appeal to the means principle to explain this, in much the same way as Quong appeals to the means principle as a limit on agent-relative prerogatives. [↑](#footnote-ref-46)