

ELAC 2017 annual conference

JUSTIFYING PREVENTIVE HARM: RETRIBUTIVE AND DISTRIBUTIVE APPROACHES

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Do liability justifications of preventive harm appeal to principles of distributive or retributive justice? Or do they appeal to altogether different moral principles? How we answer these foundational questions will influence how we respond to a range of enduring issues about preventive harm. For example, can an aggressor become liable to more harm than what she threatens to impose on her victim, if this is necessary to avert the threat (e.g. may a victim kill his would-be rapist as a last resort)? And can an aggressor be liable to more harm than what is necessary to avert the threat she poses (may a victim break both arms of his would-be-rapist, if breaking just one of them would avert the threat)? Most people believe that the answer to the first question is yes, and to the second is no, yet providing explanations for these answers that are not in tension with each other is less straightforward than it may seem. If we think liability is based on a principle of retributive justice, then explaining the affirmative answer to the first question may seem relatively easy: the victim may impose more harm on her aggressor than what she would otherwise impose on the victim because the aggressor deserves to be harmed, whereas the victim does not. Yet if we accept this explanation, it is harder to see why the second question ought to be answered in the negative. After all, if liability is based on a principle of retributive justice, it is natural to think that the aggressor's desert, rather than the minimum amount of harm necessary, should determine the aggressor's liability. If we think that liability is based a notion of distributive justice and reject the relevance of desert, it may be easier to explain why we ought to give a negative answer to the second question. But then, giving a positive answer to the first question seems more difficult. If the aggressor doesn't deserve to be harmed, then how can a distributive rationale justify why the aggressor is liable to more harm than she would otherwise impose?

The claim that liability to preventive harm is based on a principle of distributive justice can be spelled out in different ways. One way to explain the distributive rationale is to say that a liability justification aims at approximating a distribution of harm where each party gets her "fair share" and where this share corresponds to the party's degree of responsibility. On a somewhat different understanding of the distributive rationale, liability tracks whichever distribution of harm that minimizes the morally weighted harm. A third way to understand the distributive rationale is in luck-egalitarian term, according to which a person who voluntarily engages in an act that foreseeably imposes a risk of unjust harm, must carry the entire cost of averting the harm if the risk

eventuates. All accounts that deny that retributivism plays a central role in preventive harm, face the challenge of explaining why, exactly culpability affects the amount of harm a person can become liable to and what reasons we have to treat desert differently in the spheres of preventive and punitive harm.

The claim that liability to preventive harm is based on principles of retributive justice denies that desert and liability are fundamentally different moral concepts. On offer are also hybrid accounts, which argue that while a retributive principle justifies preventive harm by appeal to the threateners' desert, a distributive principle justifies why it may be permissible to impose preventive harm in excess of what the threatener deserves, if the alternative would be to force the victim to suffer the threatened harm.

The relevance of desert and moral responsibility to distributive justice has been extensively debated in political theory and moral philosophy over the last few decades. Within legal philosophy, theorists have long debated the basis for punitive liability and the relationship between retributive, corrective and distributive justice. This year, scholars from both inside and outside the just war community are invited to the conference uncover issues of common interest and to identify how advances in one field may illuminate related debates in others.

In addition to the questions raised in the paragraphs above, possible themes or topics include

- If one accepts the relevance of desert to punitive harm, by what reasoning can it be excluded as a component of preventive harm? More generally, how can the view be defended that preventive harming is a separate moral sphere, where otherwise relevant moral factors are rendered mute?
- Is there a reason to believe that distribution of benefits ought to be governed by different principle compared to those that govern the distribution of harms?
- Does liability remove a constraint on harming or provide a justification for harming?
- If a threatener's blameworthiness weakens the proportionality constraint, can a threatener's praiseworthiness strengthen it?
- Is there a difference between blameworthiness, culpability and fault, and do they differ in their relevance to preventive harming?
- Ordinarily, liability is understood in binary terms: a right is either intact or suspended. Can liability be conceptualized in a scalar manner?
- When, if ever may a bystander's culpability affect the permissibility of harming him?
- A popular view of liability views it as a principle for the just distribution of "unavoidable harm" (where "unavoidable harm" means harm made unavoidable by the liable party). Yet at the same it is widely agreed upon that that a victim may sometimes impose more preventive harm on a culpable aggressor than what the aggressor would otherwise inflicted on the victim. In what sense is the preventive harm that exceeds the amount that the aggressor would otherwise have imposed on the victim "unavoidable"?
- How should we understand the notion of reasonably avoidable risk imposition, and how can this notion be distinguished from culpable risk imposition?