



BRILL



Mortal Mistakes

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Abstract

What are the justifications and constraints on the use of force in self-defense? In his book *The Morality of Defensive Force*, Jonathan Quong presents the moral status account to address this and other fundamental questions. According to the moral status account, moral liability to defensive harm is triggered by treating others with less respect than they are due. At the same time, Quong rejects the relevance of culpability to the morality of defensive harming. In this article I argue that this rejection of culpability is unfounded and that Quong fails to establish his account as superior to the culpability account of liability to defensive harm.

Keywords

Jonathan Quong – liability to harm – moral status – rights – self-defense – culpability

1 Introduction

Most non-pacifists believe that it is sometimes permissible for a victim to repel an attack through defensive harm. One way of justifying this is by establishing that the target of the defense is morally liable to defensive harm. When a person is liable to defensive harm, he is not wronged when such harm is inflicted on him to avert the threat that the victim is facing. Establishing that a person is liable is therefore highly relevant when it comes to answering the question of whether and by what means a victim may defend himself.

How the conditions for moral liability to defensive harm should be spelled out and what it takes for an agent to meet these conditions has been the subject

of extensive debate in the philosophy of self-defense. In his book *The Morality of Defensive Force*, Jonathan Quong presents *the moral status account* of liability to defensive harm. Quong's moral status account offers an original justification for liability to defensive harm, which draws the line between those who are liable to defensive harm and those who are not in novel ways. Central to the moral status account is Quong's argument that moral demands have a distinctly interpersonal character. What triggers liability on the moral status account is whether you treat others as if they lack rights that people normally have. An interesting feature of Quong's account is that it bases liability on how we treat each other, and does so without tying liability to the beliefs of the agents. Whether we treat others with the concern and respect which they are due does not turn on our beliefs or culpable motives, but on whether we behave according to a reasonable standard of conduct and comply with reasonable demands. Or so Quong argues.

Quong identifies the culpability account as one of the main competing accounts of liability to defensive harm. According to this account, a person is liable only if he is culpably responsible for a threat of impermissible harm to an innocent person or persons. Quong describes an agent as fully culpable for a threat if that agent "intends or foresees the threat, or else is acting recklessly or negligently" and there are no relevant excusing conditions.¹ The moral status account, argues Quong, is superior to the culpability account. In this article I provide reasons to doubt this conclusion.

The article proceeds as follows. Section 2 presents and clarifies Quong's statement of the moral status account. In section 3 I point out that the account is vulnerable to various objections because of its rejection of the relevance of culpability to liability. In section 4 I address Quong's objections to the culpability account and argue that these can be refuted. Section 5 summarizes and concludes.

2 Quong's Moral Status Account

Quong defines liability in the following way:

Defensive Liability: A is liable to have some harm, H, imposed on him by B when he forfeits at least one of the claim rights he possesses against

¹ Quong, *Defensive Force*, 23. For a defense of the culpability account, see Ferzan "Justifying Self-Defense" and "Culpable Aggression". One may question Quong's description of agents who negligently act in a way that results in a threat of impermissible harm as *fully* culpable for that threat. It may be more plausible to regard such agents as less culpable than those who intentionally pose the same threat. We can leave this issue aside since nothing in this article turns on this disagreement.

B's imposition of H, and where the imposition of H is part of defending some person from a wrongful threat.²

Quong mentions four commonly accepted reasons for why it is important to establish whether a person is liable to defensive harm.³ Firstly, because imposing harm on a liable party does not wrong that person, it is significantly easier to justify defensively harming a liable person than a non-liable person. Second, a liable person has no right of counter-defense against harm he is liable to. Furthermore, third parties are morally permitted to intervene to impose harm on a liable person in defense of a non-liable person. Finally, a liable threatener is not owed compensation for the defensive harm he is liable to. Quong's novel contribution lies in his substantive account of what makes a person morally liable to defensive harm. A central motivating case for the moral status account is the following example:

The Resident: Twin, the identical twin brother of a notorious serial killer, is driving during a stormy night in a remote area when his car breaks down. Unaware that his brother has recently escaped from prison and is known to be hiding in this same area, he knocks on the door of the nearest house, seeking to phone for help. On opening the door, Resident justifiably believes that Twin is the killer. Resident has been warned by the authorities that the killer will certainly attack anyone he meets on sight, and so Resident lunges at him with a knife.⁴

Quong describes Resident's actions as permissible relative to his available evidence (hereafter evidence-relative permissible). Since Resident is justified in believing that he is under attack, he cannot be deemed culpable for threatening Twin, according to Quong. Consequently, the culpability account cannot rule mistaken threateners like Resident liable to defensive harm. Quong finds this strongly counterintuitive. According to Quong, it is clear that Resident *is* liable to defensive harm and that a successful account of liability to defensive harm must be able to deliver this verdict along with a convincing explanation.

2 Quong, *Defensive Force*, 21. By adopting a notion of liability based on rights forfeiture, Quong is in agreement with the majority of authors writing on this topic. See for instance Rodin, *War and Self-Defense*, 72; McMahan, *Killing in War*, 10; Ferzan, "Culpable Agression", 669; Frowe, *Defensive Killing*, 3; and Bazargan, "Killing Minimally", 119. For an exception to this agreement, see Tadros, "Orwell's Battle", 48.

3 Quong, *Defensive Force*, 18.

4 Quong, *Defensive Force*, 23. This case was initially introduced by McMahan, *Killing in War*, 164. Quong calls this case *Mistaken Attacker*, but I refer to the case here by its original and more neutral title given by McMahan. I have also named the killer's harmless twin, Twin, for easy reference.

The reason that Resident is liable, according to Quong, is that a threatening agent like Resident “does not treat everyone with the concern and respect they are normally due: she acts as if some people have fewer rights (or less stringent rights) or moral claims relative to others.”⁵ Making a mistake about the moral status of others is a grave matter and functions as a basis of liability. This reasoning leads Quong to develop the moral status account.

Quong’s full statement of the moral status account is as follows:

“A is liable to defensive harm for φ -ing when: (a) the evidence-relative permissibility of φ -ing depends on the assumption that at least one person, B, lacks a moral right, but (b) B in fact possesses the relevant moral right, and thus B faces a threat, or apparent threat, to her rights.”⁶

This account explains why agents such as Resident are liable to defensive harm. Although Resident is justified on his available evidence, treating Twin as if he has less rights than he in fact has amounts to a lack of respect for Twin’s moral status. The rationale behind the account is that when we treat others as if they lack moral rights, we go out on a “moral limb”. When we make a mistake of this sort, Quong argues “it is only reasonable that we – as opposed to the innocent person who now faces a threat of harm – may be liable to defensive harm.”⁷

2.1 *Clarifying the Moral Status Account*

Unfortunately, Quong’s statement of the moral status account is unclear. A key term in need of clarification is the term “assumption” in the first clause of the account:

“A is liable to defensive harm for φ -ing when: (a) the evidence-relative permissibility of φ -ing depends on the assumption that at least one person, B, lacks a moral right.”

The question that this clause generates is *whose assumption* this refers to. It seems that the obvious answer to this question is “A’s assumption” (who else’s assumption could it refer to?). The clause can then be read as “A is liable to defensive harm for φ -ing when: (a) the evidence-relative permissibility of φ -ing depends on A’s *assumption* that at least one person B, lacks a moral right.”

This proposed clarification reveals a problem. The problem arises because A’s *evidence*-relative permission cannot depend on A’s assumptions.

⁵ Quong, *Defensive Force*, 37.

⁶ Quong, *Defensive Force*, 38.

⁷ Quong, *Defensive Force*, 39.

To assume something is to accept that thing (if only for the sake of argument). If A assumes that P (say, that B lacks rights) without evidence, and A's evidence-relative permission to act depends on P, then plainly A does *not* have evidence-relative permission for this act. If on the contrary, A has evidence that P, and A's evidence-relative permission depends on P, then A has evidence-relative permission independently of whether A assumes that P or not. In either case, A's evidence-relative permission does not depend on A's assumption. A's assumption, just like A's beliefs are irrelevant to the evidence-relative permission that A may or may not have for a given act. Consider an example. A's evidence-relative permission to take your pencil plainly cannot depend on A's assumption about your rights to your pen. It is the other way around, the justification for A's assumptions about your pen ought to depend on A's evidence. In short, evidence-relative permissions can support an assumption; it cannot depend on assumptions.

Several passages in the book support the reading that what does the justificatory work on the moral status account is the evidence that the defensive agent has, not the assumptions. Quong writes:

“in considering whether a defensive agent's [evidence-relative] justification depends on the assumption that a target is liable, we must hold constant the other facts of the case, and only eliminate the evidence that supports the assumption of liability [...]”⁸

The quote indicates that Quong is thinking of assumptions *justified by evidence*. The question then becomes whether assumptions are doing any justificatory work on the moral status account above and beyond the evidence. In passages immediately preceding Quong's statement of the account, he suggests that what matters is in fact the evidence, not the assumption:

“Other [risk-imposing] actions are evidence-relative permissible, however, only because the evidence gives us reason (or apparent reason) to believe that some person has lost his standing to press claims against us, or at least that his claims have less weight.”⁹

Quong's discussion of two variations of *The Resident* further supports the reading that liability turns on available evidence and not what the Resident believes or assumes.¹⁰ In the first variation of the case, Resident unjustifiably

8 Quong, *Defensive Force*, 93.

9 Quong, *Defensive Force*, 38.

10 Quong, *Defensive Force*, 93–95.

believes that Twin is an involuntarily drugged threatener who is not morally responsible and therefore not liable (Quong labels such agents “non-responsible threats”). On Quong’s view, we have an agent-relative prerogative to defend ourselves against non-responsible threats.¹¹ Resident would therefore be permitted, by Quong’s lights, to defend himself against the Twin if in fact he were a non-responsible threat. However, Quong rejects the suggestion that Resident’s unjustifiable belief means that Resident escapes liability when he mistakenly defends himself against Twin:

“Resident has sufficient evidence to believe that there is a liable attacker at the door. Given his evidence, Resident has a liability-based justification but no agent-relative justification, since Resident has no reason to believe that he faces a non-responsible threat.”¹²

Resident therefore remains liable in this variation, according to Quong. In a second variation, where Resident has misleading evidence that Twin is a drugged non-responsible threat rather than a notorious murderer, Quong grants that Resident would not be liable.¹³ The two variations differ only with respect to Resident’s evidential situation – the belief-relative and fact-relative perspectives are the same across both. It is clear from this that threatening a non-liable person in the presence of misleading evidence that this person is liable is both necessary and sufficient to render the mistaken agent liable.

When Quong explains what it means for a person to treat others as if they lack rights against harm, he clearly ties this to the person’s available evidence:

“the moral status conception declares that what matters is whether a person, judged from the evidence-relative standpoint, acts as if others lack rights against harm. When, and only when, our actions have this particular feature – treating others with something less than the concern and respect they are due – we make ourselves liable to defensive harm.”¹⁴

The quote makes clear that Quong equates “acting as if others lack rights against harm” with “treating others with something less than the concern and respect they are due,” tying both to the person’s available evidence, not his actual beliefs or intentions. Applying this understanding to the variation

¹¹ Quong, *Defensive Force*, ch. 3.

¹² Quong, *Defensive Force*, 93.

¹³ Quong, *Defensive Force*, 93.

¹⁴ Quong, *Defensive Force*, 41.

where Resident unjustifiably believes that Twin is a non-responsible threatener, we see that Resident still counts as acting *as if* Twin is responsible, and thus liable, given that this is what the evidence gives him reason to believe.

Based on these passages by Quong, we can make the following clarification of the moral status account.

A is liable to defensive harm for φ -ing when: a) the evidence-relative permissibility of φ -ing depends on the evidence that at least one person, B, lacks a moral right but (b) B in fact possesses the relevant moral right, and thus (c) B faces a threat, or apparent threat, to her rights.

3 Problems for the Moral Status Account

3.1 *Counterintuitive Results*

Once it is clear that the moral status account grants the agent's actual beliefs and assumptions no role in matters of liability, it is clear that the account provides a radically different basis for liability than does the culpability account. With respect to reasonably mistaken agents like Resident, the moral status account provides a broader basis for liability than the culpability account. In other respects, however, the moral status account's rejection of the relevance of the agent's beliefs and assumptions to liability makes the account narrower than the culpability account.

One type of case where the basis for liability provided by the moral status account appears too narrow, and where the culpability account fares better, arises in situations where the agent acts in evidence-relative impermissible ways. Another type arises in cases where agents have a mistaken lesser-evil based evidence-relative permission.¹⁵ The first type can be illustrated with variations of the following case:

Negligent trolley mistake (lesser-evil): A runaway trolley is heading down a track, where five people are trapped. However, an obstacle on the track will stop the trolley and prevent it from hitting the five. Albert is standing by a switch which can redirect the trolley to a side-track where Betty is trapped. If Albert had taken a good look down the main track, he would have seen the obstacle which would have stopped the trolley. Instead he forms the unjustifiable belief that the five on the main track are in mortal danger and redirects the trolley, killing Betty.

¹⁵ Like Quong, I believe one can have a lesser-evil justification for infringing a person's moral rights against harm if it prevents *substantially* greater harm to others.

Consider now two variations of this case, which only vary with respect to a belief of Albert. In a first variation, call it *Negligent trolley mistake (liability)* Albert redirects the trolley because he unjustifiably believes that Betty is liable to defensive harm. In a second variation, call it *Murder By Trolley*, Albert does not believe that redirecting the trolley is permissible, but redirects it nonetheless because he hates Betty. In all three versions the evidence and the facts remain the same; the only thing that changes is the belief of Albert. In all three cases, Albert is culpable, either because he culpably fails to consult available evidence prior to engaging in high-risk action or because he deliberately kills Betty despite his belief that doing so is impermissible. Redirecting the trolley to the side-track is evidence-relative impermissible across all the cases, and there is no sense in which Albert's action could only be permissible if there was evidence of Betty being liable.

These examples illustrate that Quong's account struggles to explain how agents who engage in evidence-relative impermissible actions become liable. The weakness is apparent when we consider Quong's explanation for how agents who act in evidence-relative impermissible ways incur liability:

“Paradigmatic cases of liability to defensive harm, however, are different. In these cases, the person who is liable to defensive harm, A, acts in a way that foreseeably might result in harm to some other person (or group), B, and the risk-imposing act that A performs *would not be evidence-relative permissible unless those who might be harmed lack rights against the imposition of the harm.*”¹⁶

Quong believes that the moral status account captures agents who act in evidence-relative impermissible ways, because such acts could only be evidence-relative permissible if those who might be harmed by the act lacked rights against harm.¹⁷ But this is a mistake. As the cases above reveal, the risk-imposing act that Alfred performs clearly could be evidence-relative permissible even if those who might be harmed have rights against the imposition of the harm. In evidence-relative terms, Alfred could have a lesser-evil

¹⁶ Quong, *Defensive Force*, 36. (my emphasis).

¹⁷ This understanding is clearly illustrated by how Quong explains why reckless drivers are liable on the moral status account: “[C]onsider a case where A recklessly drives too fast in order to get to the movies, thereby imposing a risk of harm on pedestrian B. Reckless driving is evidence-relative impermissible precisely because it imposes an unacceptable risk of harm on people who are not liable to bear harm. Because A's act of reckless driving could only be evidence-relative permissible if B was liable to the harm, A ought to be liable to defensive harm if his reckless driving turns out to pose a threat to nonliable B.” Quong, *Defensive Force*, 36.

permission, an agent-relative permission, or be required to redirect the trolley (e.g. if he had evidence that redirecting the trolley would save the five while not seriously harming Betty).¹⁸ The evidence-relative permissibility of Albert's actions in the cases provided therefore does not depend on anyone lacking rights. Perhaps a defender of the moral status account would object that the cases mentioned above do not fit the label "paradigmatic cases." If so, we are owed an explanation for what counts as paradigmatic cases and what the moral status account says about non-paradigmatic cases. Quong's appeal to a hypothetical scenario where an evidence-relatively impermissible act could be permissible on grounds that those who are harmed were liable allows for some factual changes in the background story (otherwise they would not be liable). Once we allow such changes, there is no non-arbitrary way to prevent us from comparing the same impermissible act with hypothetical scenarios where the background story is changed in a way that makes it permissible to impose the same harm on other grounds than liability.

Suppose that there is a way to get around this objection. Ignoring the relevance of the agent's culpable beliefs would still make the account vulnerable to counterexamples. This brings us to the second type of case that illustrates how the basis for liability provided by the moral status account is too narrow. Consider:

Murder by trolley 2: A runaway trolley is headed down a track. Five people appear to be trapped on the track and in lethal danger from the trolley. Albert is standing by the switch which can redirect the trolley to a side-track where Betty is trapped. Albert hates Betty and ignores the evidence that gives him reason to believe that redirecting the trolley will save the five. Because he hates Betty, he redirects the trolley in order to kill her. Contrary to the evidence, the five people are not stuck on the main track and were never in actual danger.

In this case, Albert is neither belief- nor fact-relatively permitted in redirecting the trolley. However, he is evidence-relative permitted in doing so because unlike Albert in *Negligent Trolley Mistake*, he has evidence that this will save the five on the main track. This evidence-relative permission does not rely on evidence that Betty lacks rights. Consequently, Albert is not liable to defensive

¹⁸ Uwe Steinhoff makes a similar point in the discussion of Quong's book in PEA Soup's Ethics Review Forum available at <https://peasoup.deptcpanel.princeton.edu/2021/04/ethics-review-forum-jonathan-quongs-the-morality-of-defensive-force/>. Steinhoff and I have developed our arguments independently of each other.

harm. Intuitively, this seems wrong. Albert is doubly culpable in this case: culpable for ignoring the evidence and culpable for acting contrary to what he believes is permissible. In ordinary language it certainly sounds like Albert treats Betty with less respect and concern than she is owed, even if his act is, unbeknownst to him, evidence-relative permitted. However, given that the moral status account ties respect and due concern to available evidence, and not to beliefs, the account does not consider Albert's act as disrespectful treatment. As we saw in the discussion of *The Resident* in the previous section, the moral status account counts Resident as acting as if Twin lacks rights against harm as long as this is what evidence gives him reason to believe, regardless of what he in fact believes. *Murder by trolley 2*, is the reverse. In this case, the moral status account counts Albert as treating Betty with respect, regardless of what he in fact believes, since the evidence-relative permissibility of his action does not rely on evidence that Betty lacks rights.

This discussion shows that tying what counts as “acting as if others lack rights against harm” to what an agent has reason to believe, rather than what he actually believes, does not correspond to an ordinary understanding of this expression and generates a series of counterexamples to the moral status account. In all the cases above, Albert is culpable either because he is culpably ignorant or because he deliberately acts against what he believes is permissible, or both. Since Albert meets the culpability account's conditions for liability, the account deems Albert liable to defensive harm in all of the cases, which intuitively seems like the right conclusion. In sum these cases undermine Quong's argument that the moral status account is superior to the culpability account.

3.2 *Rights as Reasonable Demands*

In the previous section, I showed how the moral status account, in its effort to establish the liability of mistaken threateners, fails to deliver intuitive verdicts in cases where culpably responsible agents deliberately or ignorantly threaten to impose impermissible harm. The reason why the moral status account grants available evidence a central role and rejects the role of beliefs and intentions is connected to Quong's understanding of rights. Quong argues that rights and duties must be derived from what we can reasonably demand of each other. This implies, according to Quong, that our rights cannot directly depend on the mental states of others:

“[A] right not to be harmed is not a claim that others form particular attitudes or intentions. A right not to be harmed is rather a claim that others' behavior conforms to certain reasonable standards of conduct – standards that are, at least in principle, publicly verifiable. Omniscience

isn't a requirement to successfully avoid violating the rights of others. Conversely, we needn't have access to the mental states of others to judge whether our rights against harm are being threatened."¹⁹

Understanding rights against harm as a claim that other's behavior "conforms to reasonable standards of conduct" explains why agents may incur liability even when they do not in fact intend to harm a person. The following case offered by Quong illustrates the point:

Albert's Bluff: Albert maliciously decides to scare Betty. He points what he knows to be an unloaded gun at Betty's head and says, "I'm going to blow your brains out." Betty, believing Albert's threat to be real, pulls out her own gun and kills Albert in "self-defence."²⁰

Albert does not in fact intend to harm Betty in this case. However, Quong plausibly claims that Albert's behavior violates his duty to Betty. He declares that Albert is liable to defensive harm, since "the evidence-relative permissibility of his act depends on the assumption that Betty lacks certain rights (we have moral rights against being threatened in this way)."²¹ By the lights of the moral status accounts, Albert's bluff and an actual threat can be judged in the same way. Here is Quong's explanation:

"At the point at which Betty must decide whether to impose defensive harm in Albert's Bluff, the facts might be identical to the facts in the paradigmatic case in which Albert intends to murder Betty. The very same considerations that ground Albert's liability in the paradigmatic case also ground Albert's liability in the case where he is bluffing. The fact that Albert does not sincerely intend to murder Betty is irrelevant [...]"²²

By facts, Quong clearly means facts except facts about Albert's motives and intentions, since obviously these differ between Albert in the paradigmatic case where he intends to murder Betty and Albert in the case where he is

19 Quong, *Defensive Force*, 207. See also p. 46, where Quong writes: "Whether A violates a duty he owes to B is generally not a matter of what A believes or even intends, but rather whether A's behavior conforms to a certain objective, publicly verifiable standard of conduct."

20 Quong, *Defensive Force*, 43.

21 Quong, *Defensive Force*, 42.

22 Quong, *Defensive Force*, 44.

bluffing. In both cases, Albert has acted in ways that “give Betty sufficient reason to believe that he is wrongfully attacking her with lethal force.”²³

Granting defenders a right of defense both against bluffs and actual threats is a virtue of the moral status account since they appear the same to a defender. However, there is a third type of threat that appears identical to a defender, that of innocent apparent threats, such as Twin in *The Resident*. To see how innocently apparent threats and bluffs appear the same to a defender, consider a version of *The Resident* where Twin knows that his brother is on the loose and that the authorities have warned residents in the area about him. Call this case *Evil Twin’s Bluff*. In this case, Evil Twin is like Albert in *Albert’s Bluff*; by acting in ways that give Resident reason to believe that he is wrongfully attacking him with lethal force. But to Resident, Evil Twin and Twin appear the same. The behavior of both Twin and Evil Twin gives Resident reason to believe that he is under attack. But only Evil Twin makes himself liable to attack. How do we distinguish Evil Twin and Twin for purposes of liability, when we cannot appeal to the difference in their beliefs and intentions?

Presumably, a proponent of the moral status account would distinguish the cases by pointing out that the Evil Twin and Twin also differ with respect to the evidential situation that they are in. Evil Twin has available evidence that his murderous brother is on the loose, that Resident has been warned about this, and that his own behavior appears threatening to Resident. In *The Resident*, this evidence is not available to Twin in the relevant sense (or so we must assume). By pointing to differences in their evidential situation, the proponent of the moral status account can explain why only Evil Twin violates “reasonable standards of conduct,” without appeal to their mental states or beliefs. While this explanation points to a fact that distinguishes Twin and Evil Twin, it is not a fact that is accessible to Resident. Resident’s evidence gives him reason to believe that he is under attack in both cases. Given that Resident cannot verify whether the stranger approaching his house violates “reasonable standards of conduct,” he cannot know whether he in turn behaves according to this standard when he defends himself. In such cases, then, a defensive agent is left in radical uncertainty.

The same problem goes for real threats. Just as we cannot know whether a person’s evidence gives him reason to understand that his behavior appears threatening to others, we cannot always know whether a person has evidence that his action threatens to impose harm. The following case offered by Quong illustrates this challenge:

23 Quong, *Defensive Force*, 43.

Phone: Albert is deciding whether to press a button on his phone. Albert does not believe that doing so poses a risk of harm to others, but if he possessed an advanced degree in electronics, he would be able to see that there's a chance his phone has been tampered with and turned into a detonator for a bomb.²⁴

Consider what Quong says about this case:

“Some people exposed to this evidence (those with advanced degrees in electronics) would conclude that there's a risk of harm to others. But, since Albert lacks the requisite expertise, the risk of harm seems not to be foreseeable to Albert in the evidence-relative sense.”²⁵

Whether or not Albert is a responsible threat in this case depends on whether the risk of harm is foreseeable to him, which in turn depends on whether Albert has an advanced degree in engineering. Imagine a version of this case where a third party, Betty, is aware that pressing the button will detonate the bomb, killing an innocent person. Suppose that Betty can intervene by killing Albert before he presses the button. If Betty does not know Alfred, she cannot tell whether he has an advanced degree in electronics that would enable him to realize that his actions pose a lethal threat. Consequently, she cannot know whether Albert is liable. What should Betty do?

This case shows two things. First, as in the previous case, it shows that a defensive agent cannot always know whether a person who threatens to impose harm has evidence that his actions are or appear threatening to others. Secondly, it shows that what counts as available evidence for a person may depend on that person's mental state (such as beliefs and knowledge). This means that whether an agent conforms to a reasonable standard of conduct may turn on that agent's mental state after all, and that this mental state cannot always be verified by others.

The reason why Quong denied that we need access to others' mental state to know whether our rights are threatened is partly because it would unreasonably require omniscience on the part of the person facing a rights violation. But as I have shown, the potential rights violator's evidential situation may be equally obscure to a victim as the rights violator's beliefs or intentions, and in certain respects the two questions overlap since whether evidence counts as available may turn upon one's mental state. Since Resident and Betty are in epistemic circumstances where they cannot know the evidential situation of

²⁴ Quong, *Defensive Force*, 30.

²⁵ Quong, *Defensive Force*, 30.

the threatener, they cannot know whether the threatener behaves according to a reasonable standard of conduct. In such cases, it seems that the moral status account presupposes omniscience to know whether a victim's rights are violated after all.

Admittedly, the culpability account may also be accused of unreasonably requiring omniscience on the part of the victim, as there will be cases where a victim may be unable to tell whether the threatener is culpable for his actions. But this section shows that the moral status account does not have the upper hand in this respect, which Quong's argument, if successful, would otherwise imply. Moreover, the cost of failing to meet the epistemic demand entailed by the moral status account makes the demand in some respects more problematic than the epistemic demand entailed by the culpability account. On the moral status account, a mistake about the liability of another makes you liable to defensive harm regardless of how reasonable the mistake is, whereas the same harsh consequences do not follow on the culpability account if you make a reasonable mistake about a threatener's culpable responsibility.

3.3 *Defense as Moral Gambles*

By rejecting that agents may become liable when they act permissibly in light of their justified beliefs, the culpability account grants agents' robust control over their own liability to defensive harm. In contrast the moral status account accepts that liability can come down to factors outside the agent's control. Quong grants this and states that "the moral status account thus does not eliminate the possibility of defensive agents suffering bad moral luck with regard to their liability."²⁶ Quong does not find this to be a compelling objection to the moral status account and justifies this feature of the account in the following way:

"[W]e sometimes gamble with the moral rights of others in the sense described above: we act in ways that we ought to know would be wrong but for the assumption that certain others lack rights. Though it does not make sense to blame us when we act in these ways, it does make sense to say that we may forfeit some of our rights when we take these sorts of risks."²⁷

The analogy to a gamble would, if successful, grant luck a legitimate role in an account of liability to defensive harm. Like the gambler, a defensive agent knows that there is a chance that he is mistaken. Since it is permissible to hold a gambler responsible for the consequences of his gamble, one could argue

²⁶ Quong, *Defensive Force*, 42, fn. 45.

²⁷ Quong, *Defensive Force*, 37.

that it makes sense to hold a defensive agent responsible for his actions too, if the gamble is lost and it turns out that the target of his defensive action is innocent.

However, the analogy to gambling is problematic. Quong's stipulation that it does not make sense to blame agents who "gamble with the rights of others" is hard to comprehend. Consider a case where I gamble with your money. Absent your consent, this is clearly blameworthy. Gambling with a much more valuable possession, such as your moral rights, surely must be blameworthy too. Moreover, if I gamble with something that is yours, it does not follow that I lose anything if the gamble is lost (this is why engaging in such gambles are blameworthy).

When Quong writes, "we gamble with the rights of others," he may be mixing up (i) the stake you gamble with (ii) what you gamble on being the case. When we engage in self-defense, we believe that the target of our defensive harm has forfeited his right against this harm. But this is what we are gambling *on* being the case; it is not the stake we gamble *with*. For the gamble analogy to fit the moral status account, we must conceive of agents who act in self- or others' defense as gambling with *their own* rights, where what they gamble on is whether the target has a right or not. To say that defensive agents gamble with their own rights is, however, simply a description of the role that Quong argues luck should play, not a justification of it. A central justification for why it may be fair that gamblers carry the consequences of their gambles is that the gamble is freely accepted. Engaging in self-defense, on the other hand, is not freely accepted because it cannot easily be avoided. The price of never engaging in defensive harming would amount to pacifism, which may lead to a high cost for yourself or others you would otherwise have defended. Were it not for the high cost of refraining from defensive action, people would certainly avoid engaging in it. Because gambling is not an apt analogy of self-defense, it fails to justify how luck can be granted a legitimate role in an account of liability to defensive harm.²⁸

4 Quong's Argument Against the Culpability Account

The preceding arguments point to challenges to the moral status account, stemming from its rejection of the role of culpability. Of course, there are objections to the culpability account as well. In his book, Quong presents three arguments against the culpability account.

²⁸ I expand on this Christie, "Causation and Liability".

4.1 *Duress*

Quong's first objection is that the culpability account cannot hold agents who act under duress liable to defensive harm when they threaten to harm innocent others. Quong presents a case where a terrorist group kidnaps Albert's son. The group tells Albert that they will kill and torture the son unless Albert kills ten innocent government officials. Even if we cannot blame Albert in this case if he goes ahead and kills the officials, says Quong, it is very counterintuitive to think that Albert is not liable in this case.²⁹

There are several ways to defend the culpability account against this challenge. One is to deny that we cannot blame Albert in this case. It does not seem obvious that we cannot blame a person who decides to kill ten people whom he knows are innocent in order to save a person whom he deeply cares about. Another way to defend the culpability account is to grant that it is inappropriate to blame Albert in this case, but deny that we can infer from this that Albert is not blameworthy. In general, the reason why it may be inappropriate to blame another may have to do with the standing of the person expressing the blame, rather than the blameworthiness of the person blamed.³⁰ If Betty had not acted differently than Albert under the same circumstances, then Betty does not have standing to blame Albert. Yet Albert may be blameworthy all the same. It strikes me as plausible for a defender of the culpability account to define culpability (i.e. blameworthiness) as knowingly acting in ways that you believe are wrong. This, moreover, corresponds with how we usually think about culpable mental states in criminal law. Even though a culpable mental state is a requisite for criminal liability, duress does not usually count as a defense to crimes of murder and attempted murder. If we can hold a person culpably responsible when he knowingly acts wrongly under duress (albeit less culpable than if it was done freely) in criminal law, then I do not see why we cannot apply the same understanding of culpability when it comes to defensive harming.

4.2 *Mistaken Threateners*

Quong's second objection to the culpability account is that it fails to get the right verdict in *The Resident*. Given that Resident is not culpable for his actions in this case, he is not liable to defensive harm according to the culpability account. To Quong, this is clearly the wrong answer. It is, however, difficult to know how much one can read into intuitions about this case. Quong stipulates

²⁹ Quong, *Defensive Force*, 24.

³⁰ This point and the objection to the *Duped Soldiers* below are elaborated in Barry and Christie, "Moral Equality of Combatants".

that since Resident acts on the basis of a justified belief, he therefore cannot be culpable for his behavior.³¹ Yet both Resident and Twin are described in ways that make it natural to characterize Resident's behavior as blameworthy, despite stipulations to the contrary. If one is warned by the authorities that there is a person on the loose in your neighbourhood who "will certainly attack anyone he meets on sight," the natural response would be to lock the door and not open it to strangers. If, however, one does open the door for a stranger, it hardly seems justified to lunge at him without warning and before the stranger displays any weapon, when all one bases this on is that he matches a description of a killer. In order to justify a pre-emptive lethal response of the kind Resident engages in against a non-threatening person, one would presumably need stronger evidence than a mere visual match with a description of a murderer you have never seen in real life before. In light of the tension between the stipulation that Resident is blameless and the description of his behavior in ways that seem rash, it is not clear that intuitions that one may have about this case do in fact support that non-culpable threateners can be liable to defensive harm.

In further support of his position, Quong introduces another case, *Duped Soldiers*, where a group of soldiers is convincingly tricked into believing that they are attacking terrorists, when in fact they are attacking civilians.³² If a peacekeeping force which is aware of the mistake can intervene to prevent the attack by killing the soldiers, Quong finds it obvious that they should do so, even if they would have to kill significantly more soldiers than the number of civilians they would thereby save.³³ Quong claims that this shows that the soldiers are liable, even when they do not act culpably. Again, however, the example is flawed in ways that make it difficult to draw the conclusion which Quong wants us to draw. The intuitive moral difference between the duped soldiers and the civilians could equally well track a commonly held view that it is worse to harm civilians than soldiers, and if presented with a choice, we should always minimize the loss of civilians' lives over soldiers'. Moreover, peacekeepers typically have explicit mandates to protect civilians and to stop armed conflict, giving them role-based duties to intervene to stop the soldiers.

In addition to the problem of confounding variables, we cannot infer from the intuition that a victim of a mistaken threatener may defend himself the conclusion that the mistaken threatener is liable to defensive harm. One may explain this by appeal to the idea that we have agent-relative prerogatives

31 Quong, *Defensive Force*, 24.

32 Quong, *Defensive Force*, 33.

33 Quong, *Defensive Force*, 121.

to accord disproportionate weight to our own life compared to the lives of others, and that a victim may therefore defend himself even if the threatener is not liable (Quong defends this sort of agent-relative prerogative in Chapter three of the book). This explanation does not support the view that third parties ought to intervene on the side of the victim, but I doubt that people have equally clear intuitions about this as they have about self-defense, once we filter out confounding variables. Although there are objections to the idea of agent-relative prerogatives, it is sufficiently plausible to undermine Quong's argument that the cases conclusively show that non-culpable threateners can be liable.

4.3 *Culpability and Liability Outside Defensive Harming*

Quong attempts to strengthen the case against the culpability account by pointing out that culpability does not serve as a plausible basis for determining liability in other normative realms. Quong writes that:

“[P]eople can act in ways that are not blameworthy (because their acts are justified or excused) but nonetheless be held responsible – that is, they can be required at the bar of justice to pay costs or suffer damages – for the consequences of those blameless actions.”³⁴

Insofar as this passage refers to a regime of compensatory liability in tort law, Quong is right in pointing out that many countries have laws that can hold people strictly liable for paying compensation for the harmful consequences of blameless actions. But as Quong notes elsewhere when he contrasts the justification for prudent driving with other risk-imposing behavior governed by strict liability, the basis of compensatory and defensive liability may differ sharply.³⁵ Strict liability is a legal regime by which certain risky activities are rendered legally permissible on condition that those who engage in them compensate for the cost they impose on others, regardless of the agent's mental state. As Quong also observes, behavior covered by strict liability regimes could legitimately be regulated in other ways as well (for instance by taxation).³⁶ The fact that we do not consider significant variations of strict liability between jurisdictions to be an affront to morality indicates that strict liability is a product of a contingent and explicit agreement about how to regulate risky

34 Quong, *Defensive Force*, 25.

35 Quong, *Defensive Force*, 49.

36 Quong, *Defensive Force*, 50.

behavior in a way that morality does not by itself settle. As the legal philosopher John Gardner pointed out, activities covered by strict liability are activities “one could (with enough effort) avoid getting into.”³⁷ In contrast, defensive harming is not a behavior that can be morally regulated through explicit agreement, nor is it a behavior one can choose to avoid (except at potentially lethal cost to others or oneself). A further indication that liability in tort law and in defensive harm are different is that the former type of liability can be transferred to another person or an insurance company. The idea that one can take out insurance against moral liability to defensive harm makes little sense. In sum, pointing out that there are certain types of compensatory liability where culpability plays no role does not undermine the claim that culpability is necessary for liability to defensive harm.

5 Conclusion

By effectively rejecting the relevance of an agent's beliefs and mental states to liability, the moral status account is unable to hold culpable agents who impose impermissible harm liable when they do not disrespect (in Quong's sense) the victim of their unjust attack. This shows that the basis for liability provided by the moral status account is too narrow in a range of cases where the culpability account is able to deliver the intuitively right verdicts. I have argued that the moral status account, contrary to what Quong promises, ultimately places unreasonable demands on defenders who are justified in believing that they are under attack. To know whether an apparent threatener is about to violate a defender's rights, the defender must know whether the apparent threatener has evidence that his actions threaten or appear to threaten to impose harm. In situations where it is unreasonable that a defender knows this, an apparent threatener's rights against the defender cannot be characterized as a reasonable demand. Finally, I have shown that the challenges which Quong presents to the culpability account can be answered in a satisfactory manner. In sum this severely undermines Quong's argument for preferring his account to the culpability account of liability to defensive harm.

37 Gardner, “Rule-of-Law Anxieties”, 219.

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References

- Barry, C., & Christie, L. "The Moral Equality of Combatants". In *The Oxford Handbook of Ethics of War* edited by S. Lazar & H. Frowe, 339–354. Oxford University Press, 2017.
- Bazargan, S. "Killing Minimally Responsible Threats". *Ethics* 125, no.1 (2014): 114–136.
- Christie, L. "Causation and Liability to Defensive Harm". *Journal of Applied Philosophy* 37, no. 3 (2020): 378–392.
- Ferzan, K. K. "Justifying Self-Defense". *Law and Philosophy* 24, no. 6 (2005): 711–749.
- Ferzan, K. K. "Culpable Aggression: The Basis for Moral Liability to Defensive Killing". *Ohio St. J. Crim. L.* 9 (2011): 669–697.
- Frowe, H. *Defensive Killing: An Essay on War and Self-Defence*. Oxford University Press, 2014.
- Gardner, J. "Some Rule-of-Law Anxieties about Strict Liability in Private Law". In *Private Law and Rule of Law*, edited by L. M. Austin & K. Dennis, 207–223. Oxford University Press, 2015.
- McMahan, J. *Killing in War*. Clarendon Press, 2009.
- Quong, J. *The Morality of Defensive Force*. Oxford University Press, 2020.
- Rodin, D. *War and Self-Defense*. Clarendon Press, 2002.
- Tadros, V. "Orwell's Battle with Brittain: Vicarious Liability for Unjust Aggression". *Philosophy and Public Affairs* 42, no. 1 (2014): 42–77.