

Uwe Steinhoff

Quong on Agent-Relative Prerogatives to Do Harm: A Very Brief Refutation

Abstract

In a recent paper, Jonathan Quong tries to offer further support for “the proposition that there are sometimes agent-relative prerogatives to harm nonliable persons.” In this brief paper, I will demonstrate that Quong’s argument implicitly relies on the premise that the violinist in Thomson’s famous example has a right not to be unplugged. Yet, first, Quong provides no argument in support of this premise; and second, the premise is clearly wrong. Moreover, throughout his paper Quong just question-beggingly and without argument assumes that one cannot lose rights in other ways than by one’s own responsible action. I conclude that Quong has failed to provide further support for his thesis.

Key words

agent-relative prerogatives; harm; justification; liability; Jonathan Quong

In a recent paper, Jonathan Quong tries to offer further support for “the proposition that there are sometimes agent-relative prerogatives to harm nonliable persons.”¹ He thereby explicitly wishes to continue the work done in “a paper in which [he] offered an argument for the permissibility of imposing harm in these sorts of cases [that is, certain cases that involve nonliable persons].”²

A first question to ask is what he means by a “nonliable person.” Elsewhere he, together with Joanna Mary Firth, defines liability as follows:

To say that a person is liable to suffer defensive harm is to say that she has forfeited her right against it and retains no other rights against it. She would therefore not be wronged (in the sense that her rights would not be violated or infringed) by the harm.³

This raises the question as to how Quong understands the term “forfeiture.” Since he relies heavily on Jeff McMahan, one might speculate that he uses the term in McMahan’s sense. However, McMahan basically *defines* “forfeiture” such that it refers to losing a right through responsible action.⁴ But if this is also Quong’s understanding, then for him, as for McMahan, someone can, *by definition*, only be liable to attack if he has lost his right not to be attacked through his own responsible action. Such a result, however, is

¹ Jonathan Quong, “Agent-Relative Prerogatives to Do Harm,” *Criminal Law and Philosophy* (Online First 2014), DOI 10.1007/s11572-014-9345-y, p. 1 (Abstract).

² *Ibid.*, p. 3. The paper in question is Jonathan Quong, “Killing in Self-Defense,” *Ethics* 119 (2009), pp. 507-537.

³ Joanna Mary Firth and Jonathan Quong, “Necessity, Moral Liability, and Defensive Harm,” *Law and Philosophy* 31: 673-701, at 677.

⁴ Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), pp. 7-37; “Individual Liability in War: A Response to Fabre, Leveringhaus and Tadros,” *Utilitas* 24(2) (2012), pp. 279-299, at 296.

only a definitional stipulation and answers no substantive moral questions. After all, there are authors who think that one can *lose* rights in *other* ways than by one's own responsible action. In fact, McMahan is one of those authors.⁵ In the article I am discussing here, Quong does not mention this fact, nor does he mention any other authors (like Thomson or myself⁶) who claim that one can forfeit or lose rights without responsible action.

Moreover, if Quong does understand liability in this narrow sense (one can only become liable by one's own responsible action), then his suggestion that there are only two alternatives to his own account, namely a "liability-based justification" and a "consequentialist justification," is grossly misleading.⁷ After all, there might also be a "loss-of-a-certain-right-based justification," and even a "lack-of-a-certain-right-based justification" (someone might not have had a certain right in the first place).

In fact, Quong's pivotal example for his argument is a case in point. To wit, Quong's argument relies on Judith Jarvis Thomson's violinist example. There some group of music lovers plugs the circulatory system of an unconscious violinist into your own circulatory system against your will to save the violinist's life (he suffers from a fatal kidney ailment) and then disappears from the scene. You have to suffer the considerable inconveniences of this situation for nine months, only then can the violinist be unplugged without killing him.⁸

And Quong states:

Almost everyone agrees that you are morally permitted to unplug yourself from the violinist. I believe it is permissible to unplug oneself in Violinist in part because we each have a limited agent-relative moral permission to countenance serious harm to others even when those others have done nothing to forfeit their rights, and even

⁵ Jeff McMahan, "Humanitarian Intervention, Consent, and Proportionality," in N. Ann Davis, Richard Keshen, and Jeff McMahan (eds.), *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (Oxford: Oxford University Press, 2010), pp. 44-72, at 65. See also "Self-Defense Against Justified Threateners," in Helen Frowe and Gerald Lang (eds.), *How We Fight* (Oxford: Oxford University Press, 2014), pp. 104-137. McMahan there talks of people not having "cause of complaint." But for McMahan someone not having a cause for complaint if a certain harm is done to him is tantamount to saying that he has no right that the harm not be done to him. See on this Jeff McMahan, "Torture in Principle and in Practice," *Public Affairs Quarterly* Volume 22(2) (2008), pp. 111-128, at 119.

⁶ More precisely, he does mention Thomson, but not *as* an author who thinks that non-responsible threats can lose their right not to be attacked. And this although the very text of Thomson from which Quong takes the violinist example (see below) precisely expounds such an account. As to my views on this issue, see Uwe Steinhoff, "Rights, Liability, and the Moral Equality of Combatants," *The Journal of Ethics* 13 (2012), pp. 339-366, esp. section 3; "Justifying Defense Against Non-Responsible Threats and Justified Aggressors: the Liability vs. the Rights-Infringement Account," *Philosophia: Philosophical Quarterly of Israel* (Online First, 2015), DOI 10.1007/s11406-015-9666-7.

⁷ Quong, "Agent-Relative Prerogatives to Do Harm," p. 8.

⁸ *Ibid.*, p. 4. Compare Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1(1) (1971), pp. 47-66, at 48-49.

when there is no consequentialist justification for permitting this harm. I do not, however, assume the agent-relative explanation of Violinist is true in the argument that follows. The argument begins only with the widely endorsed premise that it is permissible to unplug oneself in Violinist.⁹

Note that in the original article, to which the article I am discussing now is officially an amendment, Quong noticed a severe problem for the account presented there, namely to a justified infringement or self-preference account of self-defense in one-on-one situations: while we might think that it can sometimes be justified (on grounds of a necessity justification) to infringe one innocent person's right to life in order to save many other innocent persons, it would seem, Quong admits, that "saving a single life [and defending a single person's right to life], even if it is your own, is not sufficiently important to justify infringing a person's right not to be killed."¹⁰ Surprisingly, in the new paper there is absolutely no mention of rights-infringement. Yet, *this* is the question we want to have answered, isn't it: can one permissibly infringe a person's right to life to save one's own, let alone to save oneself from nine months of inconvenience?

But if one wants to give an answer to this question, the important thing to ask is not whether the violinist is "liable" in the sense of having, through his own responsible action, "forfeited" a right to life or the right not to be unplugged; rather, the question is: does he *have* such a right? If he does not, then the violinist example is most certainly not an example of justified rights infringement, even if the reason why he does not have such a right has nothing to do with "liability" or "forfeiture" in McMahan's (and, it seems, Quong's) sense.

Yet Quong provides no argument whatsoever to show that the violinist does have such a right. That is not surprising, though, for the violinist doesn't. That he does not have a right not to be unplugged and to thereby be killed (or allowed to die) is confirmed by the fact that no Western jurisdiction would allow the dependents of the violinist to sue you for wrongful death and accordingly get you to compensate them. And intuitively this also seems to be the entirely correct position from the moral point of view. (If Quong thinks it is not, he should provide an argument and show why all Western jurisdictions got it wrong. Unfortunately, he entirely ignores the issue.) Given that Quong affirms that rights-infringements call for compensation,¹¹ this should give him pause.

Quong's question-begging way of proceeding also shows when he provides the example of a justified attacker (he has a necessity or lesser evil justification in a trolley case, the details need not concern us) who can be justifiably counter-attacked by his potential "collateral" victim. To pass this as an example in support of his own theory he simply declares that the justified attacker "is not liable to attack."¹² But isn't *that* precisely the question? All Quong does, however, is to boldly state in a footnote: "Most existing accounts of liability to defensive harm deem Frank to be nonliable because he acts with both fact-relative and evidence-relative justification, he does not mistakenly treat anyone as lacking rights against harm, and he is not culpable for posing an unjust

⁹ Quong, "Agent-Relative Prerogatives to Do Harm," p. 4.

¹⁰ Quong, "Killing in Self-Defense," p. 511.

¹¹ *Ibid.*, p. 513.

¹² Quong, "Agent-Relative Prerogatives to Do Harm," p. 12.

threat of harm.”¹³ In other words, he refers here to McMahan’s new account, to his own (Quong’s) account, and to McMahan’s old account. How reference to two philosophers justifies the use of the adjective “most” is mysterious. Given that Hosein, Rodin, and myself do think that the justified attacker is liable to counter-attack,¹⁴ the odds against Quong seem to be at least 3 to 2. Moreover, I have criticized Quong’s rights-infringement account of killing justified attackers at length and defended an alternative liability-based account.¹⁵ Quong, however, simply chooses to ignore this criticism and the liability-based alternative.

I can only conclude that Quong’s newest defense of his account fails, not least since it avoids all the really relevant objections and begs all the really relevant questions.¹⁶

¹³ Ibid., n. 23.

¹⁴ Adam Hosein, “Are Justified Aggressors a Threat to the Rights Theory of Self-Defense,” in Helen Frowe and Gerald Lang (eds.), *How We Fight* (Oxford: Oxford University Press, 2014), pp. 87-103; David Rodin, “Justifying Harm,” *Ethics* 122(1) (2011), pp. 74-110, at 86-87; Steinhoff, “Rights, Liability, and the Moral Equality of Combatants”, esp. section 3; “Justifying Defense Against Non-Responsible Threats and Justified Aggressors.” For my most recent treatment of the issue, see “The Liability of Justified Attackers,” *Ethical Theory and Moral Practice* (Online First 2016), DOI 10.1007/s10677-016-9712-y.

¹⁵ Steinhoff, “Justifying Defense Against Non-Responsible Threats and Justified Aggressors.” Quong is well aware of this critique, not least since he provided feedback on a draft of that paper.

¹⁶ The research presented in this paper was supported by a grant from the Research Grants Council of the Hong Kong Special Administrative Region, China (Project No. HKU 17610315). I am very grateful for this support.