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Quong on Proportionality in Self-defense and the "Stringency Principle"

Jonathan Quong endorses a strict proportionality criterion for justified self-defense, that is, one that is harsh on the defender, not on the aggressor. He invites us to assume that an aggressor, Albert, is only going to break your finger, and you kill him in defense of your finger. And Quong says: "Albert, I hope you will agree, is not liable to *this* level of defensive harm."[1] It is unclear, however, *why* Quong hopes that. One would assume that he hopes it because he thinks that it is *true* that Albert is not liable to this level of defensive harm. Yet does he have an argument for this? Let us see.

Quong thinks that proportionality is internal to liability to defensive force, so that one can only be liable to proportionate force and so it cannot be that force to which one is liable is disproportionate.[2] (That one is liable to some force means that one would not be wronged, one's rights would not be violated, by the infliction of such force.) I reject this assumption, but we can set it aside here, not least since Quong's "stringency principle," which is central for his account of proportionality, is actually formulated without any reference to liability.

> *The Stringency Principle (General)*: If a wrongful attacker threatens to violate a right with stringency level X, then the level of defensive *force* it is proportionate to impose on the attacker is equivalent to X.[3]

"Force" is used "as a metric that combines the variables of moral status, degree of harm, and mode of agency."[4] By "moral status" Quong means something like, for instance, "our moral status as free and equal participants in the democratic process,"[5] "harm" refers to such things as loss of property or bodily injuries,[6] and "mode of agency" refers, for instance, to the distinction between eliminative and opportunistic harming, or (this is not the same distinction as the previous one,[7] but we need not belabor this point) between harming someone as a side-effect of one's course of action (for example, harming someone by diverting a runaway trolley away from five people, foreseeing, but not intending, that it will then kill another person) and harming someone as a means to an end (pushing one person in front of the trolley in order to stop it and save the other five).[8] Finally, the "stringency of a right … refers to the strength or weight of the right-holder's claim. … For example, it might be permissible to infringe [that is, *justifiably* transgress]

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[1] Jonathan Quong, "Proportionality, Liability, and Defensive Harm," *Philosophy and Public Affairs* 43(2) (2015), pp. 144-173, at 144.
[2] Ibid., esp. at 144-145.
[3] Ibid., p. 166.
[4] Ibid.
[5] Ibid., p. 159.
[6] Ibid.
[7] Victor Tadros, "Wrongful Intention without Closeness," *Philosophy and Public Affairs* 43(1) (2015), pp. 52-74, at 64, shares this assessment.
[8] Quong, "Proportionality, Liability, and Defensive Harm," p. 160.

right R1 only if we could, at a minimum, save one innocent person from having his legs broken. But it might be permissible to infringe right R2 only if we could, at a minimum, save fifty innocent people from being killed."[9]

In a first example of how this is supposed to work in order to determine proportionality, Quong leaves "mode of agency" and "moral status" out of the equation in order to simplify things and focuses instead only on harm (the reader can simply replace "harm" with "force" to get to Quong's full account). He explains:

> Suppose Albert is threatening to wrongfully violate Betty's right against having her arm broken. Let's assume, for simplicity, that having her arm broken causes her 30 units of harm. … Let's stipulate that Albert could only permissibly infringe Betty's right if doing so averted *more than* 120 units of harm to someone else. The harm-focused stringency of Betty's right is thus 120 units of harm. Under these conditions, it would be proportionate for Betty to impose *up to* 120 units of harm on Albert to avert his wrongful threat. Albert is liable to this amount of defensive harm because he is not justified in breaking Betty's arm unless doing so would avert more than 120 units of harm, and thus he has no standing to complain when up to 120 units of harm are imposed on him to prevent him from breaking Betty's arm.[10]

There are a number of problems with Quong's account. Imagine the following background to Quong's example. Albert has in the past repeatedly saved Betty's life, risking his own. However, an affliction runs in his family that makes male family members prone to attempt to break people's arms in fits of rage once they get older. Betty, in contrast, is normally prone to utterly excessive self-defense but also to keeping promises. Given this situation, Albert promises Betty to overcompensate her afterwards if he should ever break her arm and asks her, in turn, to promise him not to inflict more than 30 units of harm on him in case he should ever try to break her arm (he is afraid that their friendship otherwise might end, and so, in fact, is Betty). She makes this promise. Thus here we have a situation where Albert could (ex exemplo) only inflict up to 30 units of harm on Betty "if doing so averted more than 120 units of harm to someone else," yet Albert would *not* be liable to this amount of harm (120 units): if Betty inflicted this amount of harm on Albert to defend her from his unjustified attempt to break her harm, she would violate her promise (which under the circumstances seems to be a valid one) and thus, correspondingly, Albert's *right* that she does not inflict this amount of harm on him. Since he does have this right, he is *not* liable to the amount of harm. Thus, the stringency principle is wrong.

A further problem with Quong's account is that it relies on a number of arbitrary choices. First, it is mysterious why the stringency of Betty's right against Albert should be exclusively measured by how much force Albert would have to avert from "*someone else*"[11] through his act of transgressing Betty's right in order to have a necessity justification for transgressing it.[12] Quong provides no argument for why he chooses this

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[9] Ibid., p. 159.
[10] Ibid., p. 162.
[11] In addition to the example already quoted, see also ibid., p. 166. I have added the emphasis.
[12] Some authors use the term "infringement" exclusively to refer to justified

particular measuring rod although there are obvious alternatives that suggest themselves (but remain unmentioned by Quong). To wit, why not measure the stringency of a right by how much *compensation* (where compensation need not be exclusively monetary) a transgressor of the right would owe to the rights-holder (or her dependents)? Or why not measure it by what the rights-holder may do *to protect* her right against a potential rights-violator? Of course, this latter option would not help to answer the proportionality question as it presupposes an answer to it. But by what right can we assume that one *can* gauge the stringency of a right without first considering what amount of force would be proportionate for its protection? Quong doesn't say.

Moreover, even if we accepted (for no apparent reason) that what determines the stringency of a right is exclusively the amount of force that one would have to avert from someone in order to have a necessity justification for one's transgressing the right in order to avert said force – why should it be someone *else*? The suggestion that one should assess what an innocent victim could proportionately do to a culpable *aggressor* by measuring what could be done to the victim for the benefit of an *innocent* person looks suspiciously like an attempt to stack the decks against a harsh proportionality criterion. Moreover, the principle itself only states, to repeat: "If a wrongful attacker threatens to violate a right with stringency level X, then the level of defensive *force* it is proportionate to impose on the attacker is equivalent to X." But *which* right is under threat of violation? Obviously, Betty's right *against Albert*. (Quong himself states that "Betty has a right against Albert" imposing certain amounts of force on her,[13] and Betty's rights against Albert are not the same as Betty's rights against, say, Carl. Quong clearly – and wisely – accepts such a Hohfeldian relational account of rights.[14]) But then the stringency of this right should be measured by how much force Albert must be able to avert *from himself* in order to have a necessity justification for infringing Betty's right against him.

This, however, has the consequence that Quong's account cannot "explain" – contrary to what Quong claims[15] – the allegedly intuitive judgment that it would be disproportionate to kill Albert in order to keep him from breaking one's finger. Nor can it function as an arbiter between this intuition and an opposing intuition that deems killing Albert permissible. A first reason for the suspicion that Quong's account cannot perform these tasks is that it appears to be purely formal. His account says that you may not kill Albert to keep him from breaking your finger if your right that your finger not be broken is not *that* stringent as to rule out the permissibility of infringing the right in order to avert *less* than lethal threats from "someone else." The formality lies in the fact that someone who deems killing Albert permissible in defense of the finger could simply deny that the right to the integrity of the finger is not that stringent. After all, nowhere does Quong provide an argument to show that it isn't. It is such an independent argument, however,

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transgressions of rights, while they use the term "violation" exclusively to refer to unjustified transgression. I therefore use the term "transgression" here in order to have a neutral term.

[13] Quong, "Proportionality, Liability, and Defensive Harm," p. 166.

[14] See, for example, Joanna Mary Firth and Jonathan Quong, "Necessity, Moral Liability, and Defensive Harm," *Law and Philosophy* 31: 673-701, where the use of the Hohfeldian framework is particularly clear.

[15] Quong, "Proportionality, Liability, and Defensive Harm," pp. 172-173.

that would do the substantive moral work, not Quong's formal stringency principle. Yet while I think that this argument has considerable force against Quong's account, he could point out that his principle might nevertheless fulfill a limited function as arbiter, as follows: if someone initially has the intuition that killing Albert in defense of your finger is permissible, but has an even stronger intuition that your right that your finger not be broken is not that stringent as to rule out the permissibility of infringing the right in order to avert *less* than lethal threats from "someone else," *and* has been convinced that the stringency principle is correct and should operate with reference to "someone else," he would be forced to give up, or at least to call into question, his initial intuition that killing Albert in defense of the finger was justified.

In reply to this, however, we can turn to the considerations above: Quong has not provided any argument as to why, first, the stringency of a right should be measured exclusively with reference to permissible rights-infringement; and second, and more importantly in the present context, he has not provided any explanation as to why the permissibility of the rights-infringement should be established with reference to "someone else," namely with reference to an "innocent person,"[16] instead of, far more plausibly, with reference to the person against whom the right in question is actually being held: the aggressor. If we do that, however, the hard-core self-defender's conversion experience we speculated about at the end of the previous paragraph will surely fail to materialize: someone who has the intuition that you can justly (and thus without any rights-violation) kill a culpable aggressor in order to keep him from breaking your finger will most certainly not simultaneously have the intuition that the very same aggressor may rights-infringingly, and only for his own benefit, break your finger in order *to keep you* from killing him. While this would not be a logical contradiction, it would certainly not make normative sense.

Of course, Quong claims that in the "initial comparison, we must gauge the degree of defensive force imposed on the attacker as if the attacker retains all his rights, though of course if we subsequently determine that some amount of defensive force is proportionate, then we will conclude that the attacker does not, in fact, retain rights against the imposition of this force,"[17] but it remains entirely unclear *why* we "must" do that in the initial phase. Why should one ignore that the aggressor is an aggressor? Given that Quong elsewhere (together with the co-author of that article) concerns himself with the question of how much force a culpable rapist may use against his victim to *defend himself*, *during the rape*, from serious but unnecessary force wielded by the rape victim against *him* and accordingly inquires into the amount of defensive force the victim is *liable* to,[18] the equivalent question in the present context of stringency should come quite naturally to him: what amount of rights-*infringing* (as opposed to defensive) force may the aggressor, during his aggression, inflict on his victim to avert a certain amount of force being inflicted on himself? What amount of force he may inflict for the purpose of helping *someone else*, in particular an *innocent* person, in contrast, can hardly be relevant

[16] Ibid., p. 159.
[17] Ibid., p. 166.
[18] Firth and Quong, "Necessity, Moral Liability, and Defensive Harm," p. 699. For a discussion, see Uwe Steinhoff, "Firth and Quong on Liability to Defensive Harm: A Critique," manuscript, available at http://philpapers.org/rec/STEFAQ.

to determining the stringency of his victim's right against *him*, a *culpable aggressor*, whose "moral status" is certainly different from that of an innocent person. That harsh force may be inflicted on him might therefore "reflect," to use Quong's expression,[19] his moral status, not violate or "infringe" it.

Thus, if we accepted Quong's suggestion that the stringency of a right should be measured exclusively with reference to permissible rights-infringement, then the only plausible point of reference can be how much force the *aggressor* would have to be able to avert from *himself* by transgressing the victim's right in order for this transgression to be justified. Consequently, Quong's "stringency principle" will be unable to adjudicate any substantive questions about proportionality in self-defense. The divergent intuitions harsh defenders and lenient defenders will input into the apparatus of "the stringency principle" in order to calculate the stringency of the victim's right against the defender will simply reflect the diverging intuitions they already have with regard to what is and what is not proportionate in the victim's defense against the aggressor. It seems the whole enterprise is circular, or at the very least pointless.

Finally, not only has Quong not provided any argument as to why we should measure the stringency of a right exclusively with reference to permissible rights-infringement, he has also not provided any argument as to why we should measure proportionality with exclusive reference to the stringency of a right. To be sure, he criticizes an alternative account, namely "the responsibility principle," and while I find Quong's criticism plausible, "the responsibility principle" is most certainly not the only and not even the most important alternative account of proportionality,[20] and thus it would be somewhat hasty to think that Quong's account wins out by default, as it were, once "the responsibility principle" has been refuted. Quong might also think that his account does not need any further supporting argument if it meets certain conditions that according to him "a successful account of proportionality" should satisfy and, also according to him, his account does satisfy.[21] Unfortunately, one of these conditions (number 4) simply presupposes an intimate connection between liability and proportionality and thus begs the question against accounts that deny such an intimate connection; another condition asks that a successful account be able to explain our intuitive judgments in paradigm cases (and I just argued that Quong's account does not have any explanatory power at all); and the other two conditions basically ask the account to get the considerations that play a role in proportionality right and to unify them under one rationale.

However, by providing an account that assesses proportionality with exclusive reference to the stringency of a right he does *not* get the considerations that play a role right. To wit, Quong states – correctly, in my view – that a fully culpable mugger and a partially excused mugger (excused due to "some mild coercion by others") "violate the

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[19] Quong, "Proportionality, Liability, and Defensive Harm," p. 159.

[20] Quong claims that this account is "very widely accepted," see ibid., p. 145. In fact, however, this account is only accepted (and not even there universally) among a small group of philosophers who usually describe themselves as "revisionary just war theorists." Other philosophers are less enthusiastic, and in the legal discussion the account in question is practically irrelevant.

[21] Ibid, pp. 149 and 172-173.

same type of right with the same stringency."[22] I do not see why this should change if the mugger is *fully* excused due to sufficiently harsh coercion. (Maybe Quong would suggest that the "mode of agency" is different. But why, if it isn't different in the first two cases? The mode of agency seems to be the same: it is the mugging mode.) The victim's right is the same and has the same stringency in all three cases. Yet it seems intuitively plausible – at least it is an intuition shared by most Western legal systems – that proportionality requires more leniency and less harshness in one's defense against fully excused aggressors than in one's defense against culpable ones.[23] Quong's account cannot explain this.

I conclude that Quong's account of proportionality in self-defense is inadequate. Moreover, nothing in his account offers any reason in support of the view that one must not kill in defense of property or in order to avoid minor injuries.

[22] Ibid., p. 169.

[23] George Fletcher, *Rethinking Criminal Law*, p. 865; Sangero, *Self-Defence in Criminal Law*, pp. 56 and 192-202; Volker Erb, "Notwehr," in Wolfgang Joecks and Klaus Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch*, *Vol. 1* (Munich: C. H. Beck, 2003), pp. 1249-1337, at 1321-1322.