Abstract    Jonathan Quong argues for the “moral status” account of defensive liability. According to the moral status account, what makes it the case that assailants lack rights against the imposition of defensive violence on them is that they are treating defenders as if those defenders lack rights against the imposition of aggressive violence on them. This “as if” condition can be met in some situations in which one person, A, commands very good but factually inaccurate evidence that another person, B, poses a lethal danger to her. In this “Mistaken Attacker” case, A will be entirely blameless. Nonetheless, A is defensively liable, because A assumes that B is defensively liable despite the fact that B is not defensively liable. In other cases, A may threaten B, who is innocent and hence defensively non-liable, without treating B as if B lacks rights. For example, in the “Conscientious Driver” case, A may have lost control of her car, having taken all due precautions, and be posing a lethal threat to an innocent pedestrian, B, but A is not treating B as if B lacks rights because B’s interests have already been taken fully into account in arriving at the verdict that careful driving is morally permissible. In this paper, I explore and criticize Quong’s account. I argue that the distinctions Quong draws between Conscientious Driver and Mistaken Attacker cannot be sustained in ways that uphold the moral status account, and I suggest that the moral status account’s focus on the “as if” condition is morally undermotivated. The drift of my argument is that we should take much more minimal accounts of defensive liability more seriously than we typically do.

Keywords: Defensive Liability; agent-centered prerogatives; moral responsibility account; moral status account

In Chapter 2 of The Morality of Defensive Force, Jonathan Quong argues for a distinctive account of defensive liability: the “moral status account.” The moral status account significantly expands our options for thinking about defensive liability, and it deserves serious scrutiny. My aim in this paper is to raise a few critical concerns for it.

The paper unfolds as follows. I provide some basic exposition of Quong’s account in sections 1 and 2, and further distinguish between two (related) dimensions of assessment: the “extension dimension” and the “intension dimension.” In section 3, I make some critical remarks about the extension dimension, focusing in particular on the moral status account’s differential treatment of two important cases, Conscientious Driver and Mistaken Attacker. Quong’s differential treatment of these two cases forms the crux of his dispute with perhaps the most influential alternative account of
defensive liability in the contemporary literature: the “moral responsibility account.” In section 4, I turn to the intension dimension and try to explain why Quong’s reasoning for it does not convince me. I advance a brief conclusion in section 5.

I. Preliminaries

First things first: what is defensive liability? Quong defines it as follows:

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

A person is defensively liable, then, when she lacks a right against the imposition of defensive violence on her. The broad aim of any theory of defensive liability is to explain when, and why, persons become liable to defensive violence. Different theories of defense will have different ways of fulfilling this central aim.

Two further preliminary comments about Quong’s commitments. First, A’s liability is not a sufficient condition for the permissibility of B’s imposition of H. It merely removes an important moral barrier to the imposition of H. Second, A’s liability is not a necessary condition for the permissibility of B’s imposition of H. This is because in some situations there can be defensive permissions without liability. These situations arise due to the existence of “agent-relative prerogatives,” which permit innocent defenders to favor themselves in some situations against threats who do not qualify as defensively liable. In such cases, there will be two-way defensive permissions between defender and attacker. Because neither defender nor attacker is liable, neither of them forfeits their rights against violence, and each of them is entitled to take defensive action, due to the existence of these agent-relative prerogatives, to protect themselves. We will be encountering agent-relative prerogatives again at various points. It is Quong’s story about defensive liability, however, that I want to focus on in the first instance.

Quong provides the following basic summaries of the moral status account, which will be useful for grasping its basic shape:

What matters for liability... is whether you behave *as if* others do not have the sort of moral claims against harm that each person normally possesses.

In paradigmatic cases where A is liable to defensive force... A treats B as if B lacks important moral rights. Put differently, A fails to treat B in accordance with the moral status that she in fact possesses.

[I]n paradigmatic cases of [defensive] liability... [t]he risk-imposing agent 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.\textsuperscript{9}

We will see in section 2 what these descriptions of the moral status account amount to, and how Quong applies his account to different cases. However, it might be useful even at this early stage to flag up one important issue before we get any deeper into these details because this will help us to identify the broad orientation of Quong’s account.

This issue concerns the significance of this “as if” phrase. When would it be true to say that A treats B \textit{as if} B lacks rights that he in fact possesses? On one possible interpretation—not Quong’s, as we shall see—B’s rights come first, and whether A acts “as if” B has those rights depends only on whether B’s rights are threatened by A’s actions. This interpretation focuses primarily on B, and only derivatively on A. The “as if” is little more than a decorative or rhetorical afterthought, since all the real critical work is done elsewhere. This interpretation carves A’s duties out of B’s rights. Specifically, it instructs us to ascertain what rights B has, and then to determine what “as if” ascriptions are appropriate for A by noting whether A’s actions can be regarded as being compliant or non-compliant with the duties that apply to her, given this prior and independent understanding of B’s rights. This interpretive exercise has no deep interest in A’s attitudes. B’s rights are what matter, and the “as if” ascriptions to A are derivatively settled by determining whether B’s rights are threatened or remain unscathed by A’s actions. We can call this the \textit{redundancy interpretation} of the moral status account because it awards no real explanatory role to the “as if” phrase.

The moral status account, in Quong’s hands, is not supposed to invite the redundancy interpretation. This is not because we are unable to make sense of B’s rights as being settled independently of A. Quong permits us to think of B’s rights as broadly independent of any facts about or expectations of A.\textsuperscript{10} We are free to think of B’s rights, in other words, in a “fact-relative” way, rather than an “evidence-relative” way or as determined by A’s evidence for which courses of action would fulfill her duties in respect of B.\textsuperscript{11} Even so, the “as if” part of the characterization of the moral status account is clearly meant to be more consequential than the redundancy interpretation suggests. We need to be keeping our eye on A’s acts and attitudes in ways that go beyond noting what happens to B as a result of what A does. On Quong’s view, then, there are independent constraints operating on what it would be for A to treat B \textit{as if} B lacks the rights he actually has, which will then notify us as to whether A is defensively liable. This opens up the possibility that A might be causally threatening B’s rights, but in such a way that A is not defensively liable as a result of her causal threat. Quong’s theory, then, is attacker-focused or threat-focused, rather than defender-focused. The following sections add further essential details to his account.
II. Mistaken Attacker, Conscientious Driver, and the “As If” Role

This is the full definition of the moral status account:

A is liable to defensive harm for \( \Phi \)-ing when: (a) the evidence-relative permissibility of \( \Phi \)-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 (c) B faces a threat, or apparent threat, to her rights.\(^{12}\)

One central measure of the moral status account’s plausibility, for Quong, is that it delivers plausible verdicts on various cases. Getting clear about how the moral status account delivers these verdicts will also help us to see how we should understand the working parts of this definition.

Two particularly important cases in Quong’s discussion are Mistaken Attacker and Conscientious Driver. I quote them verbatim:

*Mistaken Attacker*: 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 the harmless 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.\(^{13}\)

*Conscientious Driver*: Driver, who always keeps his car well maintained and always drives carefully and alertly, decides to drive to the movies. On the way a freak accident occurs that causes his car to veer out of control in the direction of a pedestrian. The out-of-control car will now kill the pedestrian unless the pedestrian destroys the car with a grenade, thereby killing Driver.\(^{14}\)

A further useful case is Ambulance Driver:

*Ambulance Driver*: An emergency medical technician (EMT) is driving an ambulance to the site of an accident to take one of the victims to the hospital. She is driving conscientiously and alertly but a freak event occurs that causes the ambulance to veer uncontrollably towards a pedestrian. The out-of-control ambulance will now kill the pedestrian unless the pedestrian destroys it with a grenade, thereby killing the EMT (the victim whom the EMT was going to pick up will be fine).\(^{15}\)

What should we make of these cases? In each case, there is an obviously innocent person—the twin in Mistaken Attacker, the pedestrian in Conscientious Driver, and
the pedestrian in Ambulance Driver—who is lethally threatened by someone else’s activity. Can these agents defend themselves against the agents who threaten them? A theory of defense that denied them any defensive possibilities might seem unreasonably stringent. That conviction counts against the “culpability account,” which sets the bar high and makes an attacker’s culpability or blameworthiness a necessary condition for defensive liability. But if the defenders in these cases can count on such defensive possibilities, then the question immediately arises as to what status their assailants have. Have the agents threatening them—Resident in Mistaken Attacker, Driver in Conscientious Driver, and EMT in Ambulance Driver—made themselves liable to defensive violence?

An important rival theory, the moral responsibility account, makes an agent defensively liable if she is morally responsible for an objectively unjust threat. Responsibility in the moral responsibility account amounts to more than causal responsibility. The outcome has to be the upshot of voluntary agency, and foreseeable in principle. An important proponent of the moral responsibility account, Jeff McMahan, thinks that this moral responsibility condition is satisfied in both Conscientious Driver and Mistaken Attacker. Admittedly, both Driver and Resident are blameless, which confirms the distinctness of the moral responsibility account from the culpability account. The culpability account, unlike the moral responsibility account, insists on blameworthiness as a condition for defensive liability. The moral responsibility account concedes that both Driver and Resident act in an entirely evidence-relative permissible way, and are thus blameless. Driver is participating in a dangerous but permissible activity and does not act recklessly or negligently. He has no reason to suppose that his vehicle is unroadworthy or that he is driving in unusually treacherous conditions. Similarly, Resident responds to the compelling evidence that his life is under immediate threat by taking lethal defensive action against the innocent twin. The fact remains, however, that both Driver’s and Resident’s actions pose a lethal danger to innocent people. Their actions were also voluntarily undertaken, and thus the threats Driver and Resident pose to the pedestrian and the killer’s twin, respectively, are the upshots of these agents’ voluntary agency. Moreover, it was foreseeable that they are both engaging in dangerous types of activity, and that the people endangered by their actions may be innocent. McMahan thus declares both Driver and Resident to be defensively liable.

Quong’s moral status account, by contrast, classifies Resident as defensively liable but Driver and EMT as defensively non-liable. Now the pedestrians in Conscientious Driver and Ambulance Driver can still permissibly defend themselves. This is because they can take advantage of their agent-relative prerogatives. The resulting defensive permissions are more restricted, however, than those that would ensue from a liability justification. First, these defensive permissions are two-way because Driver and EMT also have agent-relative prerogatives to defend themselves; and second, third parties lack permission to intervene to aid these pedestrians’ defensive efforts.

Why does Quong differentiate between Resident and Driver? Why hold that
Resident, but not Driver, is defensively liable? His explanation of the difference between these two cases brings us to the heart of the moral status account.

We may start with Driver. Driver is acting in an evidence-permissible way: on the evidence available to him, he is permissibly participating in a practice, the benefits of which are substantial and widely dispersed, and which plausibly compensate for the costs of foreseeable traffic injuries and fatalities. Quong calls this the “driving practice.” I will assume for present purposes that the benefit-cost sheet presented by the driving practice passes the relevant tests and that conscientious and prudent drivers are engaged in an ordinarily permissible activity. From this fact, Quong surmises that Driver is not failing to regard anyone, including the pedestrian, as lacking the rights that everyone else has or as having rights that are less stringent than others’ rights. The rights of everyone have already been taken fully into account in arriving at the verdict about the driving practice’s permissibility.21 As Quong remarks:

> [W]hen any particular instance of prudent driving results in unintended harm to innocent people, this cost has already been counted in the evidence-relative justification of that particular instance of driving. If the best moral theory has already determined that permitting the practice of prudent driving is permissible despite the harms that will predictably result to innocent people, then I believe it is unreasonable to hold individual prudent drivers liable to defensive harm for the particular harms that result from their driving.22

Quong’s verdict on Conscientious Driver applies even more obviously to Ambulance Driver. EMT’s activity is not merely permissible. There is an extremely strong moral justification for this sort of activity that is concretely realized, for EMT, as a role-specific obligation.

In Mistaken Attacker, Resident also acts in an evidence-permissible way: he has compelling evidence, after all, that his life is in imminent danger. But what makes Resident’s act evidence-permissible, more specifically, is that Resident has compelling evidence indicating that the twin is about to attack him. If the twin is about to attack him, then the twin will be liable to lethal defensive violence. Thus, Resident’s defensive response to the twin rests upon the assumption that the twin is liable to harm. If that is so, but Resident’s evidence is misleading and the twin is innocent (in fact-relative terms), then the twin is being treated as if he lacks the rights that he in fact has. That is what makes Resident defensively liable, according to the moral status account. However understandable his action is, Resident has misrepresented the twin’s moral status. This misrepresentation of the twin’s moral status explains Resident’s subsequent vulnerability to defensive liability.

Quong summarizes the difference between Conscientious Driver and Mistaken Attacker in the following way:

> There is an important moral difference between engaging in some activity
that carries some risk of harm to innocent others but that the correct moral theory declares to be evidence-relative permissible given the balance of costs and benefits, and acting in a way that would not be evidence-relative permissible unless we assume that certain others lack rights that people normally possess.23

As intimated at the start of this paper, I want to distinguish between two dimensions of assessment for the moral status account. The first of these is the extension dimension: this is concerned with the moral status account’s verdicts on the various cases to which it is applicable, or the way in which the moral status account is extended across these cases. To save words, and to adopt a habit of Judith Jarvis Thomson,24 I will describe a case affirming the presence of defensive liability as a “Yes” case and a case denying the presence of defensive liability as a “No” case. On Quong’s view, the moral status account scores more highly on the extension dimension than rival theories such as the moral responsibility account and the culpability account.25 It improves on the culpability account, which declares both Conscientious Driver and Mistaken Attacker to be No cases, by making at least Mistaken Attacker a Yes case. Since the moral responsibility account responds to the inflexibilities of the culpability account by making both these cases Yes cases, the moral status account improves on the moral responsibility account, in turn, by certifying Mistaken Attacker as a Yes case but Conscientious Driver as a No case.26 The second dimension is the intension dimension, which is concerned with the explanation of why we reach these verdicts in each of these cases. The intension dimension is concerned with the underlying justificatory story that fixes the extension of the account across the different cases.

Now it is plain enough to see that these two dimensions of assessment are connected. First, we can measure the interest or plausibility of the intension dimension, in part, in terms of the moral status account’s performance on the extension dimension. If the moral status account, whatever the intension dimension amounts to in detail, does not secure intuitively plausible verdicts on the different cases, then so much the worse for the intension dimension. Bad moral theories get bad results for (at least some of) the cases to which they can be applied; if these results are bad, then the theories are likely to be defective as well.27 Second, we get a better and fuller understanding of the intension dimension by noting how the moral status account is applicable to these individual cases.

The next two sections take a deeper look at these dimensions in turn. Again, there is a whiff of artifice in this treatment, since I do not deny that the extension dimension and the intension dimension enjoy an intimate connection. But that fact still permits us to divide the critical labor in certain ways. Accordingly, section 3 deals principally with the extension dimension, and, in particular, the differences between Conscientious Driver and Mistaken Attacker. Here most of the critical pressure will be on Conscientious Driver, since this is the No case that differentiates the moral status account from its principal rival, the moral responsibility account, and Quong has a great deal to say about it. Section 4 deals with the intension dimension, where
most of the critical attention will be on Mistaken Attacker, as this is the Yes case about which Quong has most to say.

III. Conscientious Driver and the Extension Dimension

As far as the moral status account is concerned, we already know the main difference between Mistaken Attacker and Conscientious Driver. Though both Resident and Driver act evidence-permissibly, the explanation of what makes their acts evidence-permissible is different in each case. Driver does not assume that the pedestrian he endangers lacks rights, or rights with their usual stringency. Resident, by contrast, does assume that the twin lacks rights, in light of his supposition (for which he has compelling evidence) that the twin is about to engage in a lethal attack on Resident. I now want to take a closer look at Conscientious Driver, in order to suggest that the differences between Conscientious Driver and Mistaken Attacker are less significant than Quong thinks.

In his commentary on Conscientious Driver, Quong wishes to explain both why Driver can permissibly engage in moderately risky behavior, and why he is not defensively liable if that risk turns bad, as it does in this case. In a recent paper, Helen Frowe has forcefully interrogated Quong’s argument on both points. Since I am in partial agreement with Frowe, but also partially disagree with her, it may be useful to examine her argument as a prelude and a foil to my own view.

With respect to Driver’s initial permission to engage in this risky behavior, Frowe avers that

... cost-benefit analyses of types of risky activity cannot justify individual tokens of risk imposition. Actions that risk incidentally harming others must be justified by the prospective benefits of that token action.

Frowe thinks that we cannot provide a justification for tokens or individual instances of a type of activity through a general justification for the type of activity they exemplify because “nothing unifies prudent driving as a morally salient kind.” Driver’s journey in Conscientious Driver, for example, cannot be justified by reference to the value of the mass of harmless and socially useful Amazon deliveries or bus journeys. As far as the justification for driving is concerned, each token act must earn its own way.

Frowe argues that, when we detach token acts from the type of activity they instantiate, the reasons Quong offers for the absence of Driver’s defensive liability become much less convincing. Frowe advances instead the internalization model. On this model, Driver’s permission to participate in the driving practice is conditional on his willingness to internalize the costs of his risky behavior. If the risk goes bad, Driver is liable. In the circumstances of Conscientious Driver, Driver will be defensively liable. In other circumstances, in which the accident has already occurred and we are dealing with questions of compensation, then Driver might be liable for
compensatory duties. Now there are different ways of establishing connections between the defensive liability of individuals before the accident occurred and the compensatory duties that arise after the accident occurred. The internalization model seeks to offer a strongly unified model of compensation both ex ante and ex post: the compensatory duties are generated in response to defensive liability after it is too late to apply defensive remedies.

I distinguished above between two parts of Quong’s theory. One of these parts is concerned with the initial permission to participate in risky activity. Call this the permission thesis. Driver, in Conscientious Driver, satisfies the permission thesis. The other part concerns the denial of agents’ liability for when the risks they bear turn bad, as long as these agents have already satisfied the permission thesis. Call this the non-liability thesis. These two theses are connected via a third ingredient in Quong’s theory, which we have also already encountered: the benefits thesis, according to which the benefits of a risky activity such as driving comfortably exceed the costs. On Quong’s view, the benefits thesis lies behind both the permission thesis and the non-liability thesis. In other words, the benefits thesis, having provided the justification of why Driver is permitted to drive in the first place (permission thesis), also provides a justification of why he should not be deemed liable when the risks turn out badly (non-liability thesis).

Frowe inverts this justificatory strategy. As she sees matters, the benefits thesis can justify neither the permission thesis nor the non-liability thesis. The token actions in the driving practice must be justified independently, one at a time, by reference to the prospective benefits of particular or token car journeys. Moreover, Frowe holds that the internalization model is the appropriate model for making sense of what should happen when the risks turn out badly. If Driver is to be justified for getting into the circumstances of Conscientious Driver in the first place, then he must take individual responsibility for what happens when things go wrong. That will involve the conferral of defensive liability on him.

As we shall see, I think Frowe’s internalization thesis is defensible. Her treatment of the permission thesis, by contrast, strikes me as incomplete. Not every risky activity, after all, is permissible just as long as the would-be participants in it are prepared to accept liability for harmful outcomes or threats to other people. We do not permit knife-throwers and grenade-dodgers to practice their crafts in crowded urban areas. The benefits thesis must therefore be relevant to the permission thesis. The presumptive permission for Driver to undertake his particular journey should have something to do with the general benefits offered by the driving practice. Contrary to what Frowe suggests, it appears that Driver can indeed appeal to these benefits as a way of satisfying the permission thesis. I think Quong is broadly right about this. Other risky and dangerous activities cannot meet the benefits thesis—either the activities are not sufficiently beneficial, the costs are too high, or the distribution of benefits and costs is problematic—and so these activities remain forbidden (at least outside highly specialized environments), regardless of whether would-be participants
in them would willingly internalize the costs they inflict on others. Without the connection between the benefits thesis and the permission thesis, we would have meager resources for explaining the difference between permissible and impermissible risky types of activity. Furthermore, the pressures on the formulation of public policy make it important to assimilate tokens of an activity to types of activity. By doing so, we make supervision of this activity tractable, rather than committing ourselves in principle to running expected cost-benefit calculations for each and every token of each and every type of activity.

If the benefits thesis still matters to the permission thesis, do we now owe Quong the courtesy of restoring the no-liability thesis? I do not think so. On this matter, I side with Frowe. But we need to take a fresh look at the connections among these theses to see why.

Quong argues that the absence of Driver’s assumption that the pedestrian lacks rights can be explained by the considerations justifying the driving practice in the first place. The costs and benefits of the driving practice have already been taken into account when Driver acquires permission to drive in a conscientious and prudent way, and in this sense the driving practice is ex ante justifiable to everyone. But ambiguity lurks in this invocation of the benefits thesis. It depends on what has already cleared the justificatory bar before Driver steps into his car on the fateful evening of Conscientious Driver.

Even if the driving practice can be justified in advance, its precise boundaries are up for grabs: this is for the simple reason that fatalities are not necessary for the driving practice but are merely a foreseeable consequence of its adoption. This is a subtle but important distinction. In agreeing to the practice of prudent driving, we do foresee that things sometimes go wrong and that there will be accidents, leading to fatalities and injuries. But these fatalities are not necessary for the driving practice. The driving practice would, in fact, be more successful and satisfactory if there were no such fatalities. No one needs, then, to be sacrificed for the realization of the driving practice. In accepting that there is a decisive moral case for the permissibility of the driving practice, we are not accepting a practice that simply entails a certain number of fatalities. Rather, we accept the case for the driving practice despite these foreseeable fatalities. This fact permits more than one interpretation of what, exactly, we have signed up for when we sign up for the driving practice. And these different interpretations, in turn, accommodate faultless fatalities in different ways.

We can refer to the first of these interpretations as the liability-resisting interpretation. In the liability-resisting interpretation of the driving practice, faultless fatalities are simply absorbed into the outcomes of the driving practice that have already cleared the justificatory bar: the driving practice, together with faultless fatalities, are ex ante justifiable to everyone. When we make the driving practice permissible, we also grant permission for a certain range of outcomes: the normal journeys that drivers undertake, but also the faultless fatalities that regretfully accompany these ordinarily uneventful journeys. These deaths are simply part of the justificatory budget. Of course, we
may all strenuously hope for the absence of these fatalities, and it is assumed that participants in the driving practice, as conscientious and prudent individuals, will do everything they can to avoid them. The fact remains, however, that the driving practice has already budgeted for them. They are already included in the package we have morally secured. If these fatalities occur, despite everyone’s best efforts to avoid them, then their occurrence is part of what we initially permitted.

To be clear, we need not embrace the liability-resisting driving practice simply because we wish to make prudent driving permissible and because we can strongly predict that faultless fatalities will ensue from its adoption. This, again, is because these faultless fatalities are not entailed by the adoption of the driving practice. Because the driving practice will very probably lead to faultless fatalities, we need to know what our moral attitude to the drivers responsible for them should be. The liability-resisting driving practice is one such solution. But it is not the only one.

We can refer to the second interpretation of the driving practice as the liability-risking interpretation. In the liability-risking interpretation of the driving practice, we give advance clearance to the driving practice, but faultless fatalities are dealt with in a more complicated way. Pedestrian retains a right not to be killed, so what Driver is permitted to do—in being permitted to participate in the driving practice—is to engage in activity that creates the subsequent risk of incurring defensive liability for endangering others. We award the permission to drive to careful drivers because of the overall collection of benefits offered by the driving practice. We also put up with the prospect of faultless fatalities for the sake of these overall benefits. These benefits may induce each of us to take the chance when we get behind the wheel of our cars that we might end up, through no fault of our own, in a situation in which we are defensively liable because we are endangering the life of an innocent person. And this is the sorry situation that Driver finds himself in, according to the liability-risking interpretation, when his car veers towards the pedestrian in Conscientious Driver. Naturally, he is no more blameworthy in this situation than he was under the liability-resisting interpretation of the driving practice. But he is defensively liable. He took a gamble, and the gamble did not pay off. It is perfectly consistent with any plausible story we might tell about the driving practice that the participants in it accept the risk of ending up as defensively liable in such circumstances.

So far, I have been keen to emphasize that there is more than one interpretation of the driving practice in play. Nothing forces us to accept the liability-resisting interpretation from the outset. We are free to accept the liability-risking interpretation instead, to which Frowe’s internalization model is a natural partner. We are now faced with a further question: why should the liability-resisting driving practice be regarded as a better interpretation of our practice than the liability-risking driving practice?

I start with an ad hominem point, but it will quickly lead to a more robust argument against Quong’s position. Quong agrees that the pedestrian in Conscientious Driver does not simply have to stand there and accept his demise. True, he avoids any appeal to a liability justification in recovering a case for the pedestrian’s permissible defense.
He appeals instead to agent-relative prerogatives, which permit both Driver and the pedestrian to defend themselves against the other. But it appears to me that Quong could not obviously appeal even to agent-relative prerogatives if the liability-resisting interpretation were on the right lines. The fact that the liability-resisting interpretation is concerned with, specifically, liability-resistance does not show, in and by itself, that agent-relative prerogatives can be relied upon for immediate deployment in the absence of defensive liability. This is because, according to the liability-resisting interpretation, the explanation of why we are able to trace such connections among the benefits thesis, the permissibility thesis, and the non-liability thesis turns on everyone’s tacit or implicit acceptance that these are the costs worth paying in order to reap the benefits of the driving practice.

When we fully grasp what the liability-resisting interpretation commits us to, in fact, a dilemma awaits Quong.

Here is the first horn of it. If we have accepted in advance the liability-resisting interpretation of the driving practice, then we have also accepted in advance these deaths as the price worth paying for driving, and we will accordingly have to accept prudent drivers’ moral immunity to violence. Under the liability-resisting interpretation, we would all know the risks in advance, and we would all have accepted them, which would give us reasons for accepting that faultless fatalities were simply bad luck for these pedestrians. We had already budgeted for these costs. If so, there would be no justificatory budget for the exercise of any permissible defensive violence: there would be no scope for either defensive liability or agent-relative prerogatives.

Here is the second horn of the dilemma for Quong. If we deny that our acceptance in advance of the driving practice excludes agent-relative prerogatives, then we have no good reasons for excluding liability justifications either. Whatever the interpretation of the driving practice amounts to, it does not exclude defensive permissions. If agent-relative prerogatives are ready for deployment, then a liability justification may be available as well.

One sometimes detects in writings on defense the thought that to be defensively liable is in some way to be morally tainted. We should resist this tendency. To be defensively liable is of course to be morally vulnerable to harm (the same goes for agent-relative prerogatives, of course), but it is no moral disgrace to find oneself in this situation. Driver suffers no moral disgrace by engaging in an activity that was permissible for him to engage in, and then finding himself, through no fault of his own, in a situation where he lacks a right against lethal defensive violence. He is not liable to punishment or to serious moral criticism. These are simply the risks we run, the chances we take, when we participate in permissible dangerous activities. The pedestrian may find himself as a defender with defensive rights on one day, and as a driver who is defensively liable the next day. (Admittedly, this would be a bad week for him.) His moral record will not have suffered any moral deterioration over this period. He was blameless throughout.
To round off this section, I want to make a couple of further points about Quong’s attitude to the differences between Mistaken Attacker and Conscientious Driver. Quong makes the following remark:

*Ex ante*, Driver has no reason to believe that his act is likely to cause any harm. But *ex ante* Resident is virtually certain that his act will cause serious harm.\(^{41}\)

I offer two replies to this remark.

First, even if these *ex ante* claims are true of these *token* actions, we also know *ex ante* that the *type* of action in both Conscientious Driver and Mistaken Attacker can endanger innocent people. As we have seen, it is the type of action rather than individual tokens of it that Quong has relied on in his argument for the permissibility of prudent driving. I have supported this focus on types rather than tokens in the explanation of why it is permissible to drive in the first place. It seems odd, then, for Quong to change his focus from types to tokens at this point, when we are paying attention to the particular tokens described in the two cases. The salient fact is that both types of activity—driving and lethally defending yourself against a supposed assailant—are dangerous. The generally dangerous nature of driving is now fully manifest in the particular token described in Conscientious Driver: there is, after all, an imminent threat to the pedestrian’s life. It does not matter that the Driver did not expect to be in this situation. He *is* in this situation.

Second, the distinction between types and tokens would be more relevant if we were focusing on the threat’s *attitude to the victim*, but Quong also thinks that

\[\ldots\text{liability to defensive harm is not a reactive attitude. A person can be liable for the consequences of her actions even when she is not blameworthy or subject to criticism.}\]^{42}\n
As I see it, then, the difference Quong upholds between Conscientious Driver and Mistaken Attacker is indefensible. Both Driver and Resident should be treated alike: they take gambles, and they lose these gambles. Now the moral responsibility account, at least in McMahan’s version of it, will declare both cases to be Yes cases: Driver and Resident are both defensively liable. If the moral status account accepts this correction in the extension of the account, then the gap between the moral responsibility account and the moral status account will be reduced. However, there is still the intension dimension of the moral status account to consider, which I will examine next.

**IV. Mistaken Attacker and the Intension Dimension**

What exactly does the intension dimension amount to? The following instructive passage provides all the clues we need to assemble Quong’s basic case:
To treat others as if they lack moral rights against having harm imposed is a grave matter, and so it’s plausible to suppose that, when we act in this way, we must accept a certain substantive responsibility for our actions. When we act in this way, we go out on a moral limb: we knowingly take the risk of treating others as if they lack moral rights, and we also ought to know that the permissibility of our actions depends on this judgment about the moral status of others. When we take such a risk, 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 when our judgment about the moral status of others turns out to be mistaken.\textsuperscript{33}

There seem to be a number of ideas working in combination described in this complex passage. I shall now enumerate them, labeling the characters, as before, as A and B.

The first step in Quong’s thinking is that A makes a mistake about B’s moral status, imputing liability to B even though B is non-liable. A’s misrepresentation of B’s status is what the “as if” phrase is meant to draw our attention to. Call this the Misrepresentation Thesis. The second step is concerned with how the misrepresentation arises. Here the salient phrases are “knowingly take the risk” and “go out on a moral limb.” The idea is that, when we interact in such ways with other individuals in such high-stakes situations, we are taking a gamble, and this is a gamble we can lose. If we lose it, then we must pay the price by being eligible for defensive liability. Call this the Gambling Thesis. Thus, in cases that trigger defensive liability, A misrepresents B’s moral status (Misrepresentation Thesis), and she has lost a gamble in misrepresenting his status (Gambling Thesis).\textsuperscript{44} But what is the significance of misrepresenting B’s status in this way? This takes us to the third step in Quong’s argument. His suggestion here is that, if A’s actions rest upon the assumption of B’s reduced moral status, then A’s actions offend against ideals of reciprocity, and A cannot reasonably expect B’s treatment of A to embody those same ideals if doing so would be very costly for B. Call this the Reciprocity Thesis.

Though it will have a certain role to play in the subsequent argument, I will not have a great deal more to say about the Reciprocity Thesis here.\textsuperscript{45} In my view, the mistakes in the moral status account are visible at an earlier stage, in connection with the Misrepresentation Thesis and the Gambling Thesis, in particular. There are problems with both of these theses.

First, the Misrepresentation Thesis. It is difficult to discern the significance of the Misrepresentation Thesis because it is difficult to see why A’s mistaken judgment about B’s status provides the relevant trigger to A’s defensive liability. Why isn’t the salient fact that B is non-liable, and that A’s actions are thus (faultlessly) fact-relative wrong? Why should our primary objection to A consist in the fact that A thought B was liable even though B is non-liable? The important fact is that B is (fact-relatively) non-liable, not that A supposed otherwise. Yes, in thinking mistakenly that B is liable when B is actually non-liable, A misrepresents B’s status. The moral status account is
correct about that. But B’s non-liability is what fundamentally matters, rather than
the fact that A has misrepresented the facts about B’s status.

Quong might reply that we can more easily grasp the significance of the Misrepre-
sentation Thesis when we recall its connection to the Reciprocity Thesis. For it is
A’s misrepresentation of B’s status that constitutes the specific failure of reciprocal
relations between them, rather than the fact that A is endangering an innocent person
who is not liable to be harmed. But if this is the reply that Quong would make, I
find it implausible. First, I am not convinced that misrepresentation is any more
consequential than actual endangerment. It seems, in fact, to be less consequential
than actual endangerment. Second, and in support of that first point, we might imagine
a sub-variant of the Mistaken Attacker case in which Resident is watching the news
about the serial killer’s escape, and muses to himself, in ignorance of the existence of
the serial killer’s identical twin, “Anyone who looks like that would be liable to be
killed on sight.” Resident has misrepresented the twin’s moral status, even if there is
no interaction between them, and if in fact Resident remains unaware of the twin’s
existence. (We can imagine in this less newsworthy sub-variant of Mistaken Attacker
that the twin’s car does not break down and that there is no knock on the door). But so
what? That does not mean that Resident is in significant breach of reciprocal moral
relations with others, and with the killer’s twin in particular. Resident’s attitudes may
be mistaken, but he has not forfeited his rights. He continues to enjoy the same moral
status as he had before. It is only if his acts threaten the rights of innocent others that
there might be a problem. What principally matters to reciprocity is how Resident
acts, not how he represents the moral status of other agents.

There is one further problem with the Misrepresentation Thesis as this applies
to Mistaken Attacker. Resident need not misrepresent the twin as being defensively
liable, even if, based on faulty evidence, he consciously takes lethal action against
him. This is because, by Quong’s own lights, there are defensive remedies of which
Resident can evidence-permissibly avail himself even if he thinks that the twin is not
defensively liable. Perhaps Resident thinks that the twin is not defensively liable: he
may be convinced that the twin is a brainwashed, non-responsible threat. In such
circumstances, Resident would still enjoy at least an evidence-relative, agent-relative
prerogative to defend himself against what he took to be imminent lethal assault.
Resident does not have to impute liability to anyone whom he deploys defensive
violence against when he acts in light of the evidence he has. He simply has to have
evidence for the judgment that he is in danger, together with the knowledge that he
himself is not liable to harm. He might actually suspend judgment as to the liability
status of the person whom he supposes to be endangering him. Of course, the fact that
Resident was acting in an evidence-relative permissible way would not show that he
was acting in a fact-relative permissible way. But we are investigating, specifically, the
basis of Resident’s liability, and the plain fact of the matter is that he does not have to
fall foul of the Misrepresentation Thesis in order to be posing an evidence-permissible
but fact-relative impermissible lethal danger to the twin.46
Second, the Gambling Thesis. Even if we have no quarrel with the Misrepresentation Thesis, this thesis becomes morally usable in the moral status account only as long as we can link it to the Gambling Thesis. I want to suggest that there is no plausibly tight link between the Misrepresentation Thesis and the Gambling Thesis. This is because the Misrepresentation Thesis will not identify compelling grounds for A’s loss of status as the outcome of a failed gamble if A was blameless for this mistake. We know, of course, that Resident has excellent evidence that the twin is about to kill him, and we know that the stakes for him could not be higher. Now, we might ordinarily make gambling behavior morally significant, in the sense that we can represent failed gambles as the result of option luck rather than brute luck. The difference between option luck and brute luck is that option luck reflects luck in the outcomes of actions that agents freely chose, whereas brute luck reflects luck in the outcomes of actions that agents did not freely choose. Even if the agent has no control over whether a gamble succeeds or fails, the fact that she gambles in the first place is the upshot of choice, not circumstance, and it is this fact that makes her liable to suffer the consequences of the failed gamble.

The decisions Resident makes in Mistaken Attacker, by contrast, are not plausibly the product of choice rather than circumstance. Resident can be perfectly aware that his actions may ensue from fallible sources of evidence, with the result that what is evidence-relative permissible can fail to coincide with what is fact-relative permissible. But this failure of alignment will look, in Mistaken Attacker, more like the product of brute luck than of option luck. It is far from clear, then, how the Gambling Thesis can build a convincing bridge between the Misrepresentation Thesis and defensive liability.

V. A Final Thought

According to both the moral status account and the moral responsibility account, aggressors’ mistakes can be blameless but still morally consequential. These mistakes can still generate defensive liability. Person A might be thoroughly blameless for endangering person B, but these two accounts work hard—sometimes supremely hard—to identify something about the expression of A’s responsible agency that can support the ascription of defensive liability to him. All this effort is responsive to the fact that A is threatening B, and that B is non-liable.

Quong dismisses causal accounts, such as Thomson’s, very quickly in his book. For him, they are a non-starter. I think that judgment is rash. The purpose of theories of defense is to identify the basis of defensive possibilities for individuals who, though innocent, find themselves in danger because of others’ actions. When we fully realize that assailants may be dangerous without being blameworthy, and that assailants’ dangerousness can be explicable largely by bad brute luck or by being in the wrong place at the wrong time, we should come to accept, in my view, that the conditions for defensive liability can be much more minimal than these accounts hold. But that fuller story cannot be told here.
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**Notes and References**

1. Many thanks to Michelle Fath and the members of the *Washington University Review of Philosophy* both for the initial invitation to write this paper, and then for the many probing and insightful comments which helped me to improve it. I presented an earlier version of it at the PEAK workshop in 2021, where it also received many helpful comments. For further discussion, I am grateful to Joe Bowen, Helen Frowe, and Victor Tadros.


3. I disagree with both of these accounts, for reasons that will be a bit plainer by the end of the paper. The contrast between them is nonetheless especially useful for dialectical purposes.


5. Ibid, 22.

6. See section 2. Quong’s case for agent-centered prerogatives is set out in Chapter 3 of *The Morality of Defensive Force*.


8. Ibid, 34.


10. Ibid, 35.

11. I take the distinction between “fact-relative” and “evidence-relative” from Derek Parfit, *On What Matters: Volume One* (Oxford: Oxford University Press, 2011), 15-62. See also Quong, *The Morality of Defensive Force*, 20. A fact-relative standard is sensitive to all the relevant facts, regardless of whether the agents involved have cognitive access to these facts. An evidence-relative standard is sensitive to the facts available to the agent, i.e. her evidence. Now Quong’s full position is admittedly
more complicated than I have suggested so far—he argues in Chapter 6 that we should in fact favor an evidence-relative view of rights. However, he does not rely on this position in Chapter 2, since he wishes to commend the moral status account even to those who favor a fact-relative construal of rights (see p. 35). He thus allows a gap between B’s rights, understood in a fact-relative way, and A’s duties in respect of B, understood in an evidence-relative way. Michael Otsuka, “If One Can’t Lose Such a Right in These Circumstances, One Never Had it in the First Place,” Criminal Law and Philosophy (2021): 1-7 advances an interesting internal challenge to the tenability of Quong’s position, drawing principally on the cases I discuss in section 2. I cannot pursue this line of thought any further here.


15. Ibid, 27.


17. Ibid, 25-32.


21. We might worry that this reasoning embeds utilitarian considerations, and thus a puzzling form of impurity, into a framework that is supposed to be rights-based. This worry can, I think, be allayed. The essential point is that even a deontological rights-based framework can concede that we live in an unavoidably risky world, and have a mutual interest in imposing moderate risks on each other for the sake of living recognizably human lives. The challenge for a deontological theory is to distribute these risks fairly, not to pretend that we can find ways of not imposing them on each other.

22. Ibid, 36. Added emphasis.
23. Ibid, 37.


27. There might be moral theories that are, for whatever reasons, internally unsatisfactory, but which, when followed by agents in the real world, deliver satisfactory or even optimal results. Though there is much of interest to pursue in this connection, I cannot do so here. Thanks to the reviewers for drawing this issue to my attention.


30. Ibid, 5.


32. Ibid, 8-10.

33. Ibid, 12. Frowe is not hostile to the existence of more collective solutions to the problems individuals might face in paying compensatory duties. She does not object to risk-pooling social insurance schemes and the like. Her aim instead is to quarrel with Quong’s assertion that these individuals are non-liable.


35. Victor Tadros also thinks this model will be appropriate for some types of voluntarily undertaken risky activity, though he resists the internalization model for other types of risky activity in which agents are required to act in the light of their best evidence, in the interests of others, and perhaps bearing personal risk in doing so. See Victor Tadros, *To Do, To Die, To Reason Why: Individual Ethics in War* (Oxford: Oxford University Press, 2020), 137-43.

36. To save words, I will henceforth simply refer to fatalities, rather than fatalities and injuries.

37. The same will go for liability to pay compensatory duties, just as Frowe suggests.

38. For the details, see again Chapter 3 of Quong’s book.

39. We can still strongly predict that defensive violence, in the circumstances of Conscientious Driver, would be exercised, and perhaps we would want to make this violence excusable. But excusability is not permissibility.
40. See also section 5, below.


42. Ibid, 37.

43. Ibid, 39.

44. The Gambling Thesis, as I have called it, is not alien to presentations of the moral responsibility account. See, for example, Otsuka, “Killing the Innocent,” 91, and Otsuka, “If One Can’t Lose,” 2. What makes the moral status account distinctive is the connection between the Gambling Thesis and the Misrepresentation Thesis.


46. Thanks to Helen Frowe for suggesting this point and for further discussion of it.

