

Unreasonableness and Rights: On Quong's *Liberalism without Perfection*¹

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Abstract

This article argues that Quong's *Liberalism without Perfection* errs in claiming that the grounds for enforceably prohibiting unreasonable conduct are that it is unreasonable. What grounds that prohibition is, rather, that such conduct violates independently determined distributively just rights. Political liberalism *presupposes* a theory of distributive justice.

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Let me start with two questions: Do we have a moral right to do wrong—that is, to engage in morally wrong conduct? And do we have a moral right to be unreasonable—that is, to engage in unreasonable conduct?² Quong's answer to the first question is 'yes', and to the second question, 'no' (*LWP*: 305 ff.). I am inclined to agree with both of Quong's answers here, but not with the reasons he advances in support of his second answer. And this disagreement may, I think, shed some further light on what we might more generally call the 'political liberalism project'.

First, however, a word of clarification before we get into that. For, more strictly, what both questions are asking is: 'Do our moral rights include Hohfeldian claims to other persons' forbearance from interfering with our morally wrong, or unreasonable, conduct: that is, interfering *solely on the grounds that* this conduct is morally wrong or unreasonable?'.³ There are obviously many forms

¹ Quong 2011; cited hereafter as *LWP*.

² The Rawlsian conception of *reasonableness*, which Quong deploys, is extensively articulated in Rawls 1993, pp. 48-54: "Persons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so. Those norms they view as reasonable for everyone to accept and therefore as justifiable to them; and they are ready to discuss the fair terms that others propose." (p. 49).

³ A Hohfeldian claim, or what Hohfeld called 'a right in the strict sense', is an entitlement held by one person that correlatively entails the presence of a duty in another: 'X has a claim that Y pay her five dollars' entails 'Y has a duty to pay X five dollars'. It is to be

of morally wrong conduct: Quong identifies three of them as rudeness, ingratitude, and selfishness (*LWP*: 306), and many others could be added to that list. But, clearly, one that *cannot* sensibly be added in the present context is injustice or moral right-violation itself. Whereas we can make sense of the idea of a moral right to do wrong by acting rudely, we cannot here sensibly ask whether we have a moral right to do wrong by violating moral rights.

Of course, we can easily envisage circumstances where, in order to *prevent* one right-violation, it is necessary to violate another right. This is, for example, what Amartya Sen's cases of *multilateral interdependences*⁴ were meant to illustrate: the only way to stop time-bomber A from killing innocent B is for preventer C to break into innocent D's locked office, in order to telephone a warning through to B. Part of what is going on in such cases is the pitting of D's first-order right against B's presumed second-order right to have her first-order right protected. Enforcing first-order rights, by complying with the duties entailed by second-order rights, all too frequently involves violating others' first-order rights. And this does indeed pose a familiar set of problems, to which liberalism *per se* offers no distinctive solution. For while it is pretty clear that stopping A from killing B is, in itself, morally permissible, it is at least less clear that conscripting D or his belongings for that exercise is also morally okay.

In any case, though, these are *not* the problems that Quong is alluding to, in his discussion of rights to do wrong. There, he is talking about wrongdoings that are *not* rights-violations: I am going to call these wrongdoings *not unjust* wrongdoings, or *NUs*. And what Quong is saying is that *NUs* are immunised against permissible interference by the rights of the wrongdoer. That wrongdoer is said to be acting entirely within what Quong calls his own *domain* and, hence, his undesirable conduct must be tolerated. However, the same is *not true* of those who engage in unreasonable conduct. And the question is '*Why not?*'.

Evidently, any answer must depend on our understandings of 'rights', 'domains', and 'unreasonable conduct'. How do our rights constitute domains which are immunised against others' permissible interference with our *NUs* but not with our unreasonable conduct?

In this regard, Quong's proffered example of unreasonableness here is one concerning the acknowledged right to freedom of religion. And what he says is that

The right to freedom of religion ... cannot be used to justify your theft of my laptop computer, even if your religious beliefs really do require you to steal my laptop computer on pain of eternal damnation. Your theft of my laptop cannot be an exercise of your right to religious freedom, even if the theft was sincerely and religiously motivated. Rights are only intended to permit or protect choices made within a limited domain. Your theft of my laptop computer is not part of the domain that is protected by your right to religious freedom, but the important question for our purposes here is this: how are the limits of a given right-protected domain defined? That is, how do we *know* that the laptop theft clearly falls outside that domain? (*LWP*: 307).

distinguished, in particular, from a liberty which is an entitlement of one person that entails the absence of a duty in that same person; 'Y has a liberty to refrain from paying X five dollars' entails 'Y has no duty to pay X five dollars'. Cf. Hohfeld 1919: 36 ff.

⁴ Sen 1982.

This is, indeed, the important question. And one answer to this question that Quong rules out is that

the right to religious freedom cannot protect your religiously motivated theft of my laptop computer for the simple reason that doing so will violate my right to private property. Rights can only protect actions that respect the boundaries of other people's rights—once an act ceases to respect the rights of others, it is no longer possible for that act to be itself protected by a right. As Rawls explains: 'justice is prior to the good in the sense that it limits the admissible conceptions of the good, so that those conceptions the pursuit of which violates the principles of justice are ruled out absolutely: the claims to pursue inadmissible conceptions have no weight at all' (*ibid.*).

Quong correctly deems this answer to be unsatisfactory because

it begs the crucial question—it *assumes* that it is unjust for you to steal my laptop computer, but we want to know *why* this is the case. If we agree that people normally have a right to religious freedom, why should my right to private property make the exercise of your religion impermissible? If this really was a conflict of rights, surely the right to religious freedom is more important than the right to a laptop? (*LWP*: 307-308).

So what we have here is a genuine conundrum. But, before we proceed to look at possible solutions to it, let us put a little more flesh on the bones of Quong's example.

Here you are, a devout adherent of a religion that stringently requires you to send an e-mail to God each day before the close of business: an e-mail reporting and repenting all the *NUs* you have committed during the previous 24 hours; your failure to do so will result in eternal damnation. On this particular day, your faithful computer decides to crash, leaving you with no option but to steal my laptop in order to transmit the required message punctually. So the next day, in court, you are charged with theft and your defence is that, in taking my laptop, you were exercising your just right to freedom of religion. More precisely, your argument is that, had I managed to prevent your taking it, I would have been guilty of violating that right of yours. And my counter-claim is that, in taking it, you were violating my just property right to possess that laptop. Faced with these mutually opposed rights claims, what should the judge do?

Now, I have pretty much made my living by worrying about conflicts of rights and how to avoid them or, at least, minimise their frequency. And one conclusion I have reached is that certain ways of *conceiving* rights do not help in that regard. Specifically, the view which Quong takes from Jeremy Waldron, namely that

a right exists when an agent has a sufficiently strong interest to justify holding some other person or persons to be under a duty (*LWP*: 306)

is *not* a way of conceiving rights that is going to be of much assistance in this case. After all, eternal damnation is a pretty heavy sentence and, for those who believe in its possibility, avoiding it has to come fairly near the top of their scale of strong interests.

Nor, I think, will it do for me to assert *my* interest in untrammelled possession of my laptop, and thereby invite the judge to compare the strengths of our competing interests. For, unless she misguidedly imagines her task to be one of maximising social utility, any judgement she delivers on the basis of *these* arguments would, ineluctably, amount to nothing less than an illiberal endorsement of one contestable conception of the good at the expense of another.

Regrettably enough, our world is heavily populated by interpersonal conflicts of strong interests, with the consequence that rights conceived as protections of strong interests are unlikely to deliver the protection they promise. In other words, the rights constituting our respective personal domains—the domains that are said to set limits on what we may do without others' permissible interference—had better *not* be ones determined by reference to our strong interests. Otherwise, our court hearing may itself be destined to carry on for eternity.

So how *can* these rights be determined? How can we get a set of personal domains that are *compossible*? Quong's sensible solution to our conundrum is to invite us to return to the foundational ideal from which our just rights all derive. What he says is that

To successfully answer our question we need ... to ask whether the particular act that is alleged to be protected by a right is consistent with the overall moral ideal which the system of rights is meant to uphold. That moral ideal, I assume, is the ideal of society as a fair system of social cooperation for mutual benefit amongst free and equal citizens. Thinking about the question in this way yields a coherent solution to the laptop example. Private property rights (including rights over laptop computers) are perfectly consistent with the idea of fair cooperation amongst free and equal people; indeed it seems unlikely that this moral ideal could be realized without property rights. My right over my laptop is thus consistent with our foundational moral ideal. The right to religious freedom, however, though also securely derived from that moral ideal, cannot be coherently extended to protect the theft of others' property. The right to religious liberty is meant to protect each person's religious choices from the interference of others, to provide each person with their fair share of *moral space* within which they can make religious choices free from the interference of others. It cannot be used to give a person the moral right to appropriate other people's property whenever this is required for their religious purposes..... (*LWP*: 308; italics added)

I think this is almost exactly right. In particular, I think Quong's concept of 'moral space' is an extremely useful one, and I take it to be pretty much identical with what he refers to as persons' domains. These are the personal spaces within which people can conduct themselves in whatever way they choose—religiously, rudely, or what have you—free from permissible interference by others.

Where I think this quoted passage goes astray is in its suggestion that it is the *right to religious freedom* that is providing each person with that personal space. The right that is providing that space, not least in Jon's own laptop example, is *not* the right to religious freedom but rather the right to private property. To see how and why this must be so, let us return to our courtroom hearing and revise it a little.

Again, your defence is that, in taking the laptop, you were simply exercising the general right we all have, to religious freedom: you were acting within the personal space reserved for you by that right. But now, instead of my

counter-argument being that you were violating my right to private property, what I advance is the claim that you were violating my equally acknowledged *right to free expression*. I was about to engage in an important discussion on the internet, and your taking the laptop prevented me from doing so: it trespassed on the personal space reserved for me by *that* general right, which is also one that is securely derived from our overall moral ideal. After all, does not the right to free expression similarly ‘give each person their fair share of moral space within which they can make *expressive* choices free from the interference of others’? And, if so, then how is the judge to determine where the moral space for religious choices ends and the moral space for expressive choices begins? I do not see how the very good idea of consulting our foundational ideal—society as a fair system of social cooperation for mutual benefit amongst free and equal citizens—is going to yield an answer to that demarcation question.

What *is* going to give us that answer is a line of reasoning about how that foundational ideal generates the right to private property and, beyond that, what set of just private property rights is derivable from it. In that regard, Quong is absolutely correct in saying that “indeed it seems unlikely that this moral ideal could be realized without property rights”. For it is those very property rights that are doing the heavy lifting when it comes to determining each person’s fair share of moral space, each person’s interference-free domain of protected choices. In the present case, it is my right to private property that trumps—that sets the limit on—your right to religious freedom, and that gives us the verdict which Quong endorses: namely, that your taking the laptop is *unreasonable* and *not* a protected choice.

The point here is that, for liberals more generally, the right to private property is *not* one right that simply sits alongside others, such as the rights to freedom of religion, free expression, free contract and free association. Rather, it is the *platform* on which these other rights are erected, exercised, and more significantly, *demarcated* one from another. Ranging over rights to persons and to extra-personal objects, it is *that* right that determines the boundaries of our protected domains, within which each of us can behave religiously, expressively, rudely, and so forth, free from one another’s permissible interference. For it is only by intervening in persons’ dispositions of themselves and extra-personal objects that interference can occur.

So it turns out that what makes your taking the laptop *unreasonable* has less to do with the fact that its justification invokes an esoteric religious belief which many of us do not—and perhaps cannot—share, and much more to do with the fact that it is a violation of my just property rights. If I *were* to share that belief and to regard avoidance of eternal damnation as far more important than participation in that online discussion, I would have had good reason—*ex ante* or *ex post*—to waive my right against your taking my laptop and it would, consequently, not amount to a violation.⁵ Nor, I think, would it then count as *unreasonable*, notwithstanding the fact that its justification does invoke that esoteric religious belief. It would not be unreasonable because no one other than a fellow believer is being expected to bear the cost of your action.

⁵ Though what is also true is that, if I was an adherent of the *very same* religion as yours, we could still have a rights-conflict, since my consequent strong interest in sending a similar email at the same time would conflict with your interest in doing so.

So, as was said at the outset, I *agree* with Quong that unreasonable conduct does not fall within the personal domains—the moral spaces—that are protected against others’ permissible interference. But my reason for agreeing is that such conduct violates just property rights: what it amounts to is a *distributive injustice*. The set of unreasonable actions is a proper subset of the set of rights violations. And this implies that *an account of unreasonableness logically presupposes some conception of distributive justice*.

Precisely what that conception should be is, indeed, something that requires us to consult our foundational ideal of society as composed of free and equal individuals. In that regard, I’ve tended to follow H.L.A. Hart and others⁶ in seeing that ideal as simply and straightforwardly entailing a foundational *right to equal freedom*—a right which can, I think, be shown on analysis to generate a comprehensive set of compossible property rights, a set of non-conflicting personal domains.⁷

But other conceptions are also possible, depending on what further assumptions are introduced into the derivation of property rights. So if, for instance, we want to assume that all persons are rationally self-interested and non-envious and risk-averse and veiled in ignorance when exercising their right to equal freedom to design just basic structures, then it’s likely that the thereby derived set of property rights will be ones modified to reflect the demands of the Difference Principle. And if—and to the extent that—persons are *reasonable*, they will *not* insist on modifying the set of property rights in such ways as to reflect the demands of esoterically-held belief systems.

That said, however, it remains true that unreasonable people would still be vested with protected personal domains—domains constituted by, *and limited to*, whatever property rights they secure from exercises of their foundational right to equal freedom. Unreasonable people *do* have rights. What they don’t have are rights to behave unreasonably.⁸

⁶ Including Herbert Spencer, Henry George and, arguably, Locke, Kant, and Nozick.

⁷ Cf. Steiner 1994, *passim*.

⁸ An arguable exception: Nicola Mulkeen (correspondence) asks whether persons’ domains protect choices which are racially discriminatory. Is their conduct free from permissible interference if they will only help white people with their broken shopping bags, or will only permit a white person to use their laptop to send a message to God? On the one hand, such conduct does look to be unreasonable inasmuch as the justification for it invokes *ipso facto* esoteric reasons; on the other hand, it does not violate anyone’s property rights. My inclination is to see instances of such conduct as *NUs*, rather than as rights-violations: morally wrong, but not unjust. Assuming that persons with broken shopping bags, or with the need to use another’s laptop, do not have *rights* to others’ assistance, it seems to me that liberalism must allow individuals to confer or withhold their benevolence on whatever grounds they choose. Two reasons: (1) there seems to be a non-interruptible slippery slope connecting choices about benevolence recipients and choices about, say, marriage partners—and I presume that liberals would regard the latter as properly protected; and (2) racially discriminatory benevolence, deplorable as it is, entails no denial of all persons having “the same moral status as free persons—as people who are not naturally under the authority of someone else” (*LWP*: 2), nor of “their possession of two moral powers: a capacity for a sense of justice and a capacity for a conception of the good” (*LWP*: 38). On what I take to be a just way of addressing—and offsetting—the disadvantages of suffering racial discrimination, see Steiner 1994: 276. But see Carter 2013 for an argument that such racial discrimination *can* imply a denial of such Rawlsian agential status to its victims.

In short, the impartiality of political liberalism—its capacity to resist dispositive comparisons of the conflicting interests generated by rival perfectionist conceptions of the good—rests upon the set of distributively just property rights that prevail among free and equal individuals.⁹

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