

Helen Frowe's "Practical Account of Self-Defence": A Critique

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Abstract. Helen Frowe has recently offered what she calls a "practical" account of self-defense. Her account is supposed to be practical by being subjectivist about permissibility and objectivist about liability. I shall argue here that Frowe first makes up a problem that does not exist and then fails to solve it. To wit, her claim that objectivist accounts of permissibility cannot be action-guiding is wrong; and her own account of permissibility actually retains an objectivist (in the relevant sense) element. In addition, her attempt to restrict subjectivism primarily to "urgent" situations like self-defense contradicts her own point of departure and is either incoherent or futile. Finally, the only actual whole-heartedly objectivist account she criticizes is an easy target; while those objectivist accounts one finds in certain Western European jurisdictions are immune to her criticisms. Those accounts are also clearly superior to hers in terms of action-guidingness.

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I. THE ACTION-GUIDINGNESS OF OBJECTIVIST ACCOUNTS

Frowe states:

We must clarify precisely what we are after when we think about permissible defence. Do we want an account of praise, blame and excuses that tells us how *we* may treat Victim after he uses force? Or do we want an account of permissible killing that tells Victim how *he* may treat someone who (appears to) threaten his life, bearing in mind, of course, that appearances are all that Victim will have to go on? It seems to me that we ought to want the latter[...] Thinking about this different [*sic*] points us towards the fact that an account of permissible defence should be action-guiding, or *practical*. By practical, I mean that an account of permissible defence must be able to tell Victim what he is permitted to do in self-defence in advance of his actually doing it. Given this requirement, we cannot deny subjectivism the central role in determining what Victim is permitted to do in self-defence. Objectivist accounts will require Victim to act differently in cases that he cannot tell apart. If it matters which situation Victim is in, and, *ex hypothesi*, Victim cannot *tell* which situation he is in, he cannot know how he is permitted to act at any given time. Accounts that yield Victim different permissions in subjectively identical situations cannot be action-guiding in the way that I have described, and must be rejected. (252)¹

This leads her to favor an account of subjective permissibility, which, however, she connects with an account of objective liability (esp. 260-68). That is, while she thinks that a person can be *justified* in killing an innocent and only apparent "attacker" in "self-defense" on the grounds of her subjective epistemic situation, the innocent pseudo-attacker would still not be *liable* to attack because objectively he is no attacker or threat at all. In the following, I will focus on Frowe's view about subjective permissibility.

[1] All page numbers in brackets refer to Frowe 2010.

To begin with, if Frowe were right about the "impracticality" of objectivist accounts of what we should do, then recipes and user manuals as they are written today could not be action-guiding. After all, according to Frowe's logic, the instruction "Take three cups of flour ..." cannot help very much since there is always the possibility that some people have put something into one's kitchen that only *looks* like flour (and perhaps has even been designed to taste like flour), but really isn't flour and will ruin the cake. Of course, that is not very *likely*, but that is irrelevant: the situation Frowe describes as "Innocent Apparent Threat," and which is fundamental for her argument, is not very likely, either.² However, obviously recipes and user manuals as they are written today *are* action-guiding – despite (or rather because of) the fact that they take an objectivist approach.

Here I have come across the objection that the comparison with recipes and user manuals is unconvincing since it runs together prescription (what someone should do) with permission (what someone is permitted to do), and thus that a permission to act that involves removal of a strong moral and legal constraint against the use of harmful force against another person is not analogous to other cases where we act on the basis of beliefs that might be false. However, it is this objection that is unconvincing. The cases at issue *are* analogues *in the relevant sense*, and what the relevant sense is here is determined by what Frowe sees as the problem in terms of the (allegedly missing) action-guidingness of objectivist accounts: the problem is supposed to be that objectivist accounts require persons "to act differently in cases that [they] cannot tell apart." Yet, this problem, if it exists, is obviously not different for permissions formulated in an objectivist way than for prescriptions formulated in an objectivist way. The latter would also require people to act differently in cases that they cannot tell apart. If someone disagrees and claims that the lack of certainty about someone being an unjust aggressor is more problematic with regard to action-guidingness in the case of the permissive norm "You may harm unjust aggressors in proportionate and necessary defence" than in the case of the prescriptive norm (for example directed at police officers) "You must stop unjust aggressors with proportionate and necessary force," then we should like to hear an argument for that curious claim.

Of course, the *consequences* of the alleged problem of a lack of action-guidingness will (normally) be much more dire in the case of a permission of legal self-defence than in the case of a recipe for a chocolate cake, but *the problem itself* would remain the same. If someone shouts "Get down" at a deaf person, then the lack of action-guidingness of this warning will have less dramatic consequences when the warning pertains to an approaching ball than when it pertains to an approaching and well-targeted spear, but the *reason* the warning is not action-guiding is exactly the same in both cases. If, however, the person is not deaf, then the warning can be action-guiding in both cases, whether a ball is approaching or a spear. In the same vein, if objectivist prohibitions or permissions in form

2] Innocent Apparent Threat: "Victim happens across Actor who, unbeknown to Victim, is rehearsing for his gangster play. Not noticing Victim, Actor points the replica gun in Victim's direction whilst saying the line, 'I'm going to kill you.'" (248) Frowe thinks Victim is permitted to kill Actor.

of recipes or user manuals are action-guiding, there is no reason why they should not also be action-guiding in the form of permissions or proscriptions with regard to defensive force.

Moreover, not only objectivist recipes and user manuals work perfectly well when it comes to guiding action. Penal codes all over the world are almost entirely written in an objectivist way (and penal codes in most Western European countries are also quite objectivist about self-defense and necessity), despite the fact that they involve the removal of strong moral and legal constraints against imprisoning people (or using force against them). Likewise, the international laws of armed conflict are stated in an objectivist fashion although they remove strong legal constraints against the use of harmful force against another person. Still, the laws of armed conflict, and in particular domestic penal codes in Western countries, clearly are action-guiding. Thus, the claim that objectivist accounts of permissions involving strong moral and legal constraints against the use of harmful force against other persons are not action-guiding is empirically simply wrong.

This, of course, is hardly surprising. For if, as Frowe rightly says, appearances are all an agent can go on, the permission to shoot the unjust aggressor will trigger *exactly the same* behavior as the permission to shoot *what appears to be* the unjust aggressor. If appearances are all we can go on, then adding an “what appears to be” to one’s instructions or norms or laws is completely superfluous if it comes to guiding actions. Worse perhaps – it might actually confuse people. Thus, objectivist accounts of self-defense do just fine in terms of practicality.

II. NOT STAVING THE TIDE OF MORAL SUBJECTIVISM, AND THE PROBLEM OF URGENCY

But is there not, one might object, *another* morally relevant distinction between self-defense on the one hand and recipes and certain parts of the penal code on the other, so that Frowe’s argument would not imply the necessity of rewriting all objectivist permissions and prohibitions? After all, Frowe wants to avoid this implication. She wants to “stave the tide of moral subjectivism,” that is, resist *general* moral subjectivism “by showing that we should treat defence as a special case within morality.” And she explains:

What morality can require of us is surely constrained by what it is possible for us to do, and these constraints are especially in force in the circumstances surrounding self-defence. Defence is by its nature urgent: it does not allow for the deliberation or investigation that we ought to require in other parts of morality. (257)

However, Frowe’s original argument did not turn on “urgency” but on the fact that appearances are all we can go on. But this is *always* the case and not peculiar to self-defense at all. It is very important to not confuse this argument with the very *different* argument from urgency.

As already pointed out, if we allow (and I do not say we shouldn’t) completely unlikely examples like the “Apparent Innocent Threat” in one area, we cannot simply disallow

them in another. If only subjectivist accounts can be action-guiding (as allegedly shown by such unlikely examples), then it makes no sense to claim that in some parts of morality (or of law, for that matter) objectivism is still quite all right – after all, it is the very point of law and morality to be action-guiding. Or to put it differently: to proclaim on the one hand that accounts that yield an agent “different permissions in subjectively identical situations cannot be action-guiding” and therefore “must be rejected” (252), while on the other hand claiming that objectivism is nevertheless acceptable in most of law and morality, is incoherent. Either objectivist accounts of what we ought to do are action-guiding or they are not. If they are not, we *need* a tide of subjectivism. If they are, Frowe’s whole point of departure is illusory.

But still, isn’t there something to Frowe’s point about urgency; is it not true that in “self-defence, as opposed to many other aspects of morality, [...] demanding a high epistemic standard is simply incompatible with the necessity condition that governs defence” (258)? First of all, in her main example of the Innocent Apparent Threat, there is *ex hypothesi* no necessity – the threat is only apparent, after all. To be sure, one may argue that in (real or apparent) self-defense situations (involving real or apparent lethal threats and counter-measures) the price for getting it wrong is the life of the agent, and that this gives the situation its urgency so that we cannot require a high epistemic standard. However, this argument is clearly a double-edged sword, for the price for getting it wrong the other way around is the life of an only apparent threat, that is, of an innocent person – and the need to avoid this seems to *require* a high epistemic standard.

Conversely, in situations where not much is at stake, it might not be correct at all that we “ought to require” a high epistemic standard. This seems to be true, for example, for a case where Frowe apparently sides with Ferzan: she does not want “Alice’s reasonable belief that an umbrella is hers” to “justify her taking it even when it in fact belongs to Betty” (255). But why not? Presumably because this situation does allow for “deliberation or investigation.” Yet, this is no longer so clear if we do not look at this case as a one-off situation. After all, we are confronted *all the time* with such banal day-to-day situations: if we were to invest very much deliberation or investigation into them each and every time, our lives would come to a halt.

Thus, one could also make the following alternative argument: Given that in those banal day-to-day situations so little is at stake, not much deliberation or investigation is required; and given that they happen all the time, high epistemic standards cannot be allowed lest our lives come to a grinding halt. Conversely, given that self-defense situations are so rare, higher epistemic standards can be allowed; and given that so much is at stake, high epistemic standards are actually also required. Thus, Frowe’s claim that self-defense is “special” in the way she makes it out to be is certainly far from evident.

Let me remind the reader again, however, that her original point of departure actually relies on the example of the Apparent Innocent Threat and on the claim that accounts that yield an agent “different permissions in subjectively identical situations cannot be

action-guiding.” But this problem is entirely independent of the problem of urgency, and therefore the talk about urgency seems to be only a distraction anyway.

To claim, in reply, that urgency exacerbates uncertainty will not do. First, again, urgency does not *produce* uncertainty. With objectivist accounts uncertainty will *always* be there, and if uncertainty is the problem, the tide of subjectivism cannot be staved. Second, urgency does not always exacerbate uncertainty. A person facing a (literal) crossroads contemplating whether she should now visit her grandmother on the maternal side or her grandmother on the paternal side might be quite uncertain what to do. But once she hears the screams of the child drowning at that very moment in the shallow pond a few feet away, she will probably be quite certain what she should do now, namely help the child.

Admittedly, however, in many situations urgency will indeed exacerbate uncertainty. Yet, third, and most importantly, the issue is *action-guidingness*, and that means that uncertainty or urgency are only interesting here to the extent that they prevent objectivist norms, proscriptions, permissions, recipes, and so on, from guiding actions. But they do not. Consider again the recipe example. Suppose we are dealing with a recipe for baking chocolate cake. In one situation, the baker has two hours to prepare the dough and then put it into the oven, which is plenty of time; in the other situation he has only 15 minutes, which puts him under considerable stress (he might be in a baking competition). What will he think now, in the second situation, when looking at the recipe? Will he think: “Oh, if only the recipe had been written in a subjectivist fashion, stating something like ‘Take what you believe to be one pound of flour’ instead of saying what it actually says, namely ‘Take one pound of flour,’ then I would know what to do, but now I am completely at a loss”? Hardly. And what formulation would the drowning person urgently in need of help use? The objectivist formulation “Help” or the subjectivist formulation “Do what you think amounts to helping me”? Which of the two formulations is more likely to guide action in the desired way? The answers to these questions, I submit, are quite obvious.

Of course, in many situations urgency will increase the likelihood of making *mistakes* in following objectivistically formulated permissions or prescriptions. But giving undemanding prescriptions or permissions that are easy to follow, like “Do what you please” or “Do what you think is best,” is not the same as *guiding action*. Conversely, the fact that urgency might increase the likelihood that someone makes mistakes in trying to execute an objectivist prescription or to act according to an objectivist permission does not in any way mean that the action-guidingness of the prescriptions or permissions is undermined by urgency. To claim otherwise is a non-sequitur and ignores how language, including normative language, actually works.

III. OBJECTIVISM, UNCERTAINTY, URGENCY, AND ACTION-GUIDINGNESS

A further problem for Frowe’s approach is that her views about objectivist accounts of self-defense ignore not only empirical and linguistic reality but also legal reality. Thus, she states, after having described Jonathan Quong’s objectivist account of self-defense:

It strikes me as a mistake to build our accounts of permissible defence around knowledge that Victim cannot have. [A]t best Victim can have a reasonable belief about those facts. He can predict, perhaps accurately, the way in which events will unfold. But that one's prediction turns out to be true does not equate to the claim that one knew what was going to happen. The myth of 'full and accurate' knowledge that underpins existing accounts of permissible defence is just a myth, and can hardly be the best starting point for the correct account of permissible defence. (250)

I completely agree that it is a mistake to build our accounts of permissible defence around knowledge Victim *cannot* have. But Quong's account is Quong's account, and whatever its other merits or demerits, it strikes me as misleading to pick out a particularly unrealistic objectivist account of one philosopher in an argument directed against objectivist accounts *as such*. It would certainly have made more sense to have taken a look at the objectivist accounts found in some Western European jurisdictions, such as Denmark, Germany, Liechtenstein or Sweden. These *are* existing and objectivist accounts of permissible defence³ – but they are certainly not underpinned by a “myth of ‘full and accurate’ knowledge.”

Indeed, Frowe seems to succumb to a myth of her very own – namely the myth that we can have knowledge only if we are certain of what will happen. But knowledge does not require certainty (if it did, we would know *nothing*).⁴ The fact of the matter is that in *almost all cases* where we are under attack we do know that we are under attack – we have a justified true belief⁵ that we are under attack. And while Quong says that you can permissibly kill X if X will otherwise kill you,⁶ the law in the Western European jurisdictions I just referred to does *not* claim that you may kill a person only if he would otherwise kill you (and Frowe is right that this is often difficult to know; the attacker's shots might have missed you even if you had not fought back); rather, it refers to *averting threats* and *repelling attacks*. This makes a big difference because killing the shooting aggressor can be a necessary means to *repel his attack* although it was *not* a necessary means to *save one's life* from his attack. Moreover, that the means in question are “necessary” to repel the attack can be known much more easily than it can be known that the means were necessary to save one's life – in particular since case law in jurisdictions such as Sweden or Germany gives a quite lenient interpretation of what “necessary” means (many philosophers writing about self-defense interpret the necessity condition in a literal way, a habit that is out of touch with case law). This leniency is *part* of the objectivist account. In other words, it is quite possible to deal with the urgency Frowe emphasizes so much *without* weakening the epistemic

3] They are objectivist in quite a number of ways, the most relevant one for our discussion being that they certainly do *not* deem “self-defense” against innocent and merely apparent “attackers” *justified*. Thus, they require the objective existence of the “triggering conditions,” to use Ferzan's term (see Ferzan 2005). For an authoritative account of German self-defense law (which influenced the self-defense law of a number of other countries), see for example Erb 2003.

4] Cf. Steup 2001.

5] Perhaps + factor X in order to deal with so-called Gettier problems. For this as well see Steup, *ibid*.

6] Quong 2009, 515.

standards – one can also weaken, as reasonable objectivist accounts do, the factual and “ontological” conditions triggering the right to self-defense.

Of course, people can get it wrong. (As we will see, they can still get it wrong under Frowe’s account as well.) For example, they might indeed be faced with an Innocent Apparent Threat. However, what is the problem supposed to be? Under such circumstances, an objectivist account can still *excuse* “Victim,” as Frowe knows very well (251). But why should it also justify him? Because, says Frowe, this makes the account more “action-guiding.” But this is not true, as we already saw. For what do you do differently if instead of acting on the conviction “I am permitted to kill the unjust deadly aggressor” you act on the conviction “I am permitted to kill what appears to be the unjust deadly aggressor”? Nothing.

Thus, Frowe’s account has no advantage with regard to “action-guidingness.” The objectivist account does, however, for it guides the actions not just of “Victim” but of *third parties*. Thus, by telling them that “Victim” is *not* permitted to kill Innocent Apparent Threat (the real victim here), it also tells them that they, the third parties, are (certain exceptional circumstances aside) permitted or, in case of the police, even required, to interfere and to save the innocent person.⁷ Conversely, police are not supposed to interfere in the permissible action of citizens.

One might perhaps think that Frowe can achieve this or an equivalent result, too, thanks to her distinction, already mentioned above, between the permissibility of the attack on the Innocent Apparent Threat on the one hand and his liability on the other hand. He can be permissibly attacked by “Victim,” says Frowe, but he is not *liable* to this attack (260-8). And one might conclude that this somehow implies that third parties are permitted to interfere to save Innocent Apparent Threat.

However, Frowe’s account implies nothing of this sort. After all, she argues that it can even be permissible to kill “non-liable people,” for example in pursuit of “the greater good or something similar” (264). (This is also a position that has been taken by the US Model Penal Code, and certain US states seem to have implemented this position into their own statutory law.⁸) Therefore it is not sufficient for police (or other *neutral* third parties – special responsibilities of parents etc. can change the picture) to merely know that somebody, for example another police officer, is attacking a non-liable person. They need to know whether he is attacking the other person permissibly or not. And if he does so permissibly, they better not interfere. If, however, he attacks a non-liable person impermissibly then they had better interfere.

Finally, legal and moral norms do not just tell us what to do – they also reflect values and express what is important. Consider another situation that is marked by urgency: emergency measures in a hospital ER. If Frowe’s remarks on the benefits of subjectivism

7] In my view, incidentally, they are even allowed to *kill* “Victim” if this would be necessary to save Innocent Apparent Threat. See Steinhoff 2007, 93-4.

8] See Nourse 2001.

under conditions of urgency applied to self-defense, they would apply here too for the same reasons. However, it would be strange to tell medical students that they are *permitted* to inject what appears to be 100mg of drug XY into a patient in a situation that appears to be Z. Such loose talk only suggests that it doesn't really matter what the *actual* situation is and what substance they *actually* inject. However, nothing could matter more. Therefore one should tell them what is *objectively* best in a given situation; and excuse them if they make a reasonable mistake. Similarly, it matters enormously whether an "attacker" is real or only apparent. Frowe's "subjectivist" account glosses over this fact.

IV. THE CUMBERSOME RESIDUAL OBJECTIVISM OF FROWE'S ALLEGEDLY "SUBJECTIVIST" ACCOUNT OF PERMISSIBILITY

Ironically, in the end Frowe herself does not even offer a fully subjectivist account of permissible self-defense. Rather, her account goes like this:

[I]f defensive force is ever permissible, its use must be justified on the grounds of Victim's reasonable belief that (a) if he does not kill this person, then they will kill him, and (b) that he is innocent. (252)

It should be noted that, as Frowe surely knows, defensive force is permissible against a lot of things, not just potentially lethal force. And even lethal defensive force is permissible against more things than just potentially lethal attacks; and it is permissible also against attacks on *others*.

More important in our present context, however, is that the reference to *reasonable* belief introduces an objectivist element into Frowe's avowedly "subjectivist" account of permissibility. Of course, there are different meanings of the terms "subjective" and "objective" in this context. In one sense, "objective" refers to the situation outside of the agent, while "subjective" refers to her mental state. In this sense of "subjective," a belief, whether reasonable or not, is subjective because it is something in her mind, so to speak. In a second sense, however, "objective" refers to facts that exist whether the actor believes them to exist or not, while "subjective" does not refer to such facts. In this sense of "subjective," the reference to a reasonable belief is *not* a reference to something subjective, for an actor's belief is not reasonable merely because the agent *thinks* it is. I use here the terms "subjective" and "objective" in the second sense, for the problem Frowe identifies, namely that "[o]bjectivist accounts will require Victim to act differently in cases that he cannot tell apart" (252), cannot be solved by using accounts that are merely subjectivist in the first sense; instead, they would have to be subjectivist in the second sense. Yet, the account Frowe finally offers is *not* subjectivist in the second sense since her account continues to refer to something the agent can be *wrong* about.

Retaining the objectivist element of reasonableness is even more ironic given that Frowe repeatedly chastises Kimberly Kessler Ferzan for not having

done anything but move the bump in the carpet. The criticism she levels at objectivism is that it unfairly condemns Victim's risk taking, because "[t]he objectivist must acknowledge that the defender acts under uncertainty, yet simultaneously condemn him if he guesses wrong." Ferzan changes which guess can be the wrong guess. Victim's justification no longer rides upon the guess about whether defence is necessary, but upon the guess about whether the target is culpable. But this guess is also a guess, and should Victim guess wrongly, he "is not justified" on Ferzan's account. Her Victim also acts under uncertainty, and is condemned by Ferzan if he guesses wrong. (257)⁹

One of the reasons why Victim cannot escape the state of uncertainty, according to Frowe, is that even "a person shouting threats or abuse might be drugged or hypnotised" (258). That is true, but clearly Victim might also be drugged or hypnotized – yet, a drugged or hypnotized person will not necessarily *know* that he is drugged or hypnotized. Moreover, and more generally, an unreasonable person or a person acting on unreasonable beliefs or out of unreasonable thought processes might not know when he is unreasonable. Indeed, how can even a *reasonable* person *tell* that he satisfies Frowe's conditions that he has a *reasonable* belief that (a) if he does not kill this person, then they will kill him, and (b) that he is innocent? In an appendix Frowe discusses "reasonable belief" and claims that

the sort of reasonable belief that Victim needs on [her] account is a belief in his moral innocence. And it is much harder to imagine how one might be reasonably mistaken about this sort of belief. (270)

Leaving aside the question of how hard this really is, it is noteworthy that Frowe is not quite honest here: on her account Victim needs still a *further* reasonable belief, namely precisely the belief that "if he does not kill this person, then they will kill him." Yet, it is not hard at all to imagine how one might be reasonably mistaken about *this* sort of belief. Thus, Frowe hasn't done anything but move the bump in the carpet.

I conclude that Frowe's account of self-defense is not more practical than a wholeheartedly objectivist account – quite the opposite. It is also less plausible.

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⁹] Frowe quotes here Ferzan 2005, 716. Frowe repeats the reproach about only moving the bump in the carpet on page 268. It should be noted that Ferzan's talk of "condemnation" is misleading. The objectivist account is quite able to *excuse* would-be defenders if they make a reasonable mistake.

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