THE MORAL INDEFENSIBILITY OF STANDING YOUR GROUND

Abstract. This paper examines the moral status of the central provision of Stand Your Ground laws: that people lawfully occupying public spaces are legally permitted to inflict self-defensive harm on aggressors even if the defenders can easily and safely retreat. The relation of this provision to existing theories of self-defense is examined, and critiques are offered of two attempts at defending it. Then reasons are presented for concluding that the provision is morally indefensible.

Key Words: Self-Defense, Rights, liberties, necessity, retreat/

Stand Your Ground laws (henceforth, “SYG laws”) attracted widespread attention in connection with the 2012 killing of Trayvon Martin by George Zimmerman, and the subsequent trial of Zimmerman for murder. Since then, much has been written about SYG laws, although - with few exceptions - from the standpoint of law or politics. I propose here to examine SYG laws from the perspective of moral philosophy, and to argue that their characteristic provisions are morally indefensible. Before presenting that argument, however, I will explain why two attempts at defending those provisions are unsuccessful.

I.

SYG laws are exemplified by Florida’s statute, which runs as follows:

A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be. (776.012(2))

The “no duty to retreat” provision is a defining characteristic of SYG statutes, and is the focus of the controversy that has surrounded the laws.[[1]](#footnote-0) It is worth bearing in mind that, in virtue of their references to retreating, the distinctive application of SYG laws is to self-defense situations in which the defenders can avoid being harmed by changing their locations.[[2]](#footnote-1) Additionally, although SYG laws that pertain to the use of deadly force have received the bulk of attention, states with SYG laws typically include “no duty to retreat” provisions in their more general self-defense statutes.

 The important philosophical question about SYG laws is whether theories of self-defense can be relied on when considering the moral permissibility of standing one’s ground in “SYG situations” - that is, in self-defense situations where safe retreat is an option. Traditionally, philosophical discussions of self-defense have focused on situations in which defenders have only two options: allow themselves to be harmed by aggressors, or harm the aggressors. In some of these situations, inflicting self-defensive harm seems clearly to be permissible, and yet there is a basic moral prohibition against harming others. Theories of self-defense that appear in the literature propose conditions that are sufficient for this prohibition to be overridden in certain harm-or-be harmed situations, so that inflicting self-defensive harm in those situations is morally permissible all things considered.

Because existing theories of self-defense are concerned with harm-or-be harmed situations, their sufficient conditions for the permissibility of self-defensive harming include necessity constraints. These theories are all equivalent to, or at least imply, propositions of this form: “If x satisfies condition C, and if y can avoid being harmed by x only by harming x, then (other things being equal) y is morally permitted to harm x.”[[3]](#footnote-2) In virtue of containing necessity constraints, existing theories of self-defense are inapplicable to SYG situations.[[4]](#footnote-3) Two examples of theories of which all this is true are Judith Thomson’s and Jeff Mcmahan’s, both of which are directed at kill-or-be-killed situations.

According to Thomson’s theory, x satisfies C if x will violate someone else’s right to not be killed.[[5]](#footnote-4) And for Jeff Mcmahan, x’s satisfying C consists in x’s

moral responsibility, through action that lacks objective justification, for a threat of unjust harm to others, where a harm is unjust if it is one to which the victim is not liable and to which she has not consented. [[6]](#footnote-5)

Both Thomson’s and Mcmahan’s theories conjoin their respective conditions C with necessity constraints; and both imply that, if their conditions C are satisfied in the presence of these constraints, then self-defensive killing is morally permissible if other things are equal. Hence, neither theory applies to SYG situations.[[7]](#footnote-6)

 Of course, there are ways in which existing theories of self-defense could be modified so that they do apply to SYG situations. For example, if the necessity constraint of a theory were replaced by “y can avoid being harmed by x only by harming x or retreating,” then the theory would not only apply to SYG situations, but it would also imply that harming aggressors in those situations - standing one’s ground - is morally permissible. If, on the other hand, a theory included the necessity constraint in conditions that are necessary for the permissibility of inflicting self-defensive harm, then the theory would apply to SYG situations, but would imply duties to retreat.

If we were to modify an existing theory in either of these ways but leave it otherwise the same, then its implications for harm-or-be harmed situations would remain unchanged. We could not use the theory as a basis for determining whether defenders have duties to retreat in SYG situations, since that would have been decided in advance. Alternatively, we could start from scratch, develop a comprehensive theory of self-defense without any pre-theoretic assumptions about the morality of standing one’s ground, and use it as a basis for determining whether standing one’s ground in SYG situations is permissible. Needless to say, this is not the place to pursue the latter alternative. My more modest intentions were stated at the outset of this discussion. The first is to examine and critique two attempts at undermining the idea that defenders have duties to retreat in SYG situations. I will then argue that employing defensive force in SYG situations is morally indefensible. If this argument succeeds, then theories of self-defense should either be inapplicable to SYG situations, or imply duties to retreat in those situations.

II.

I suggested above that traditional theories of self-defense could be modified so that they permit defenders to stand their ground in SYG situations by changing their standard necessity constraints to “y can avoid being harmed by x only by harming x or retreating.” Kimberly Kessler Ferzan seems to espouse an alternative - namely, simply eliminate the standard necessity constraint. Ferzan has this to say on the topic of necessary defensive harm:

Although necessity seems extremely attractive, there is reason to doubt that there is a robust, objective necessity requirement for self-defense . . .. The concern is that almost no action is *actually necessary*. It is not just that a defender cannot know whether she must act at the time that she will take preemptive action . . .; it is also that there is almost always a lesser harm that the defender could administer if she knew what it was. Unbeknownst to her, the defender can stomp on a loose floorboard such that it hits the attacker in the face, or shoot at an angle where the bullet will graze the attacker’s ear and frighten her away, or say just the thing that will distract the attacker with thoughts of her mother. .. . .[[8]](#footnote-7)

Elsewhere Ferzan states that a “defender cannot know but can only predict” the necessity of killing an aggressor in order to avoid being killed.[[9]](#footnote-8) I am unsure of what Ferzan’s various claims mean and how they are meant to fit together, so my comments on her argument will be somewhat speculative.

 Ferzan states that “almost no action is actually necessary, but the necessity constraint refers to a necessary *condition* - not to necessary actions. The constraint doesn’t say that every action is such that it might not be - or might not have been performed. Rather, it says that a necessary condition for defenders to prevent themselves from being harmed is that they harm aggressors. Hence, Ferzan’s claim about necessary action is irrelevant to whether there is a necessity constraint on the use of self-defensive force.

 There are also problems with Ferzan’s claim that defenders “cannot know but can only predict” that the necessity constraint is satisfied in their situations. Assuming that contingent propositions about the future can possess standard truth values, defenders can predict *correctly* that the constraint is satisfied.[[10]](#footnote-9) When they do, and the other conditions for propositional knowledge are satisfied, then defenders know that they can avoid being harmed only by harming aggressors. Other claims that are present in the quoted passage are quite puzzling. If a loose board is in fact available, then shooting the aggressor is not necessary, and so the defender does not know that it is. But this casts no doubt at all on whether there are situations in which defenders do know that they can avoid being harmed only by employing defensive force. Perhaps Ferzan is implicitly relying on this proposition: x does not know that p is true if x can be mistaken that p is true. (There *might* *be* a loose board - that is, the defender *might be* mistaken in thinking that shooting the aggressor is necessary; hence, the defender does not know that shooting is necessary) If Ferzan is indeed endorsing this line of thinking, then she is mistaking a false epistemic proposition for a true one. The false proposition - which Ferzan might be embracing - is that, in order to know that a proposition is true, the proposition must be true. That is, x knows that p only if p is necessarily true - which implies that no contingent propositions are knowable. The true epistemic proposition is that, necessarily, x knows that p is true only if p is true - which does not appear to be of any help to Ferzan.

As acknowledged above, I am unsure of what the steps are in Ferzan’s argument. It seems fair to say, however, that she has not provided any “reason to doubt that there is a robust, objective necessity requirement for self-defense.”

Heidi Hurd’s approach to supporting standing one’s ground is very different from Ferzan’s. In Hurd’s words,

Of course you should be able to stand your ground when threatened with unjustified aggression.To think otherwise is to subscribe to the view that you must forfeit *your* liberty to an assailant when so doing will be a means of saving *his* life. It is to think that your rights end where others’ wrongs begin.

Hurd goes on to say that

 If one is otherwise within one’s rights, one should be permitted to employ whatever force is necessary to defend one’s rights against those who do wrong.[[11]](#footnote-10)

Hurd is implying that laws containing duties to retreat in SYG situations require people to act contrary to certain of their moral rights, and to do so in order to accommodate wrongful actions on the part of others. If this is indeed Hurd’s position, then fleshing it out would require attending to the crucially important distinction between moral rights strictly so-called on the one hand, and mere moral permissions on the other. Discussing this distinction risks becoming entangled in terminological matters that serve only as distractions from the conceptual points at issue, and so some clarification of the relevant concepts is called for.[[12]](#footnote-11)

The concept of a moral obligation will be taken as basic, since its nature is unlikely to be regarded as open to dispute. The interrelations among the obligations, rights, and permissions of particular individuals can then be explained as follows:

An individual’s permission to perform some action is equivalent to the individual’s not being obligated to refrain from performing that action.

An individual’s right to perform some action is equivalent to the individual’s being permitted to perform that action, together with obligations of noninterference on the part of others.

Here are the parallel explanations of the interrelations among generic obligations, rights, and permissions:

The existence of a permission to perform actions of some type is equivalent to the lack of an obligation to perform actions of that type.

The existence of a right to perform actions of a certain type is equivalent to the existence of a permission to perform actions of that type, together with obligations of noninterference on the part of others.

Note that some permissions follow from rights - and they also follow from obligations - while others do not. Thus, x might be permitted to do y because x has a right to do y or because x is obligated to do y; but x might also be permitted to do y because doing y has no morally significant features. In a parallel fashion, the permission to perform acts that are K might follow from the right or the obligation to perform acts of that type or, alternatively, from the fact that being K is a morally insignificant feature of actions. Permissions to perform morally insignificant actions or types of actions are the ones referred to above as “mere” permissions. So, for example, people are morally permitted to keep their promises, and also to speak their minds on political matters. But they are not *merely* permitted to do so because of the obligation to keep promises and the right of free speech. In contrast, there are mere moral permissions to ride in cars, look at trees, or swim laps.

But, one might ask, don’t people have *rights* to do these things? Don’t you have a right to swim laps if you want to?

 Suppose that you wish to swim laps, and that yoUR city’s public pool is the only available place for you to do so. Suppose further that a high school swim team is practicing, so that all of the pool’s lanes are occupied by swimmers. If you have a right to swim laps, then the other swimmers are obligated not to interfere with your doing so - and are therefore obligated to make room for you. Clearly, the other swimmers have no such obligation, because you do not have a right to swim. In this same vein, someone who begins splashing around in your lane, thereby interfering with you, might be acting discourteously, but violates no right of yours. The point here becomes clearer on contrasting “swim laps” with “swim laps in one’s own pool” - where the former is a mere permission, while the latter corresponds to a moral right.

 Now consider “occupy a public space.” If this corresponds to a moral right, then, if there is some public space that you wish to occupy, others are obligated to refrain from interfering with your doing so by occupying it themselves. But others are not so obligated. To be sure, if you are already occupying that space, others are obligated to refrain from knocking you aside so that they can occupy it. But this is because people are obligated to refrain from knocking others about - which has nothing to do with a right to occupy public spaces. After all, if you have finally gained access to your city’s pool and are swimming, others are obligated to refrain from interfering with you by jumping on your back. But, again, the existence of this obligation implies nothing about the existence of a right to swim laps. Both swimming laps and occupying public spaces are types of actions that people are merely permitted to perform - not actions that they have rights to perform.

In practical legal contexts, the expressions “has a right to act,” “is permitted to act,” “is at liberty to act,” and “is acting lawfully” are routinely used interchangeably. For the most part, mixing legal rights with legal permissions is of no consequence, because the applicable concepts are contextually determined. For example, the Florida SYG statute is understood as applicable to standing one’s ground in public places, and so its use of “has a right” rather than “ is permitted” raises no eyebrows and creates no problems. Matters are very different in moral contexts, where the distinction between rights and mere permissions is hard and fast and bears importantly on the moral status of standing one’s ground in SYG situations.

Recall that inflicting self-defensive harm is morally problematic because of the general moral prohibition against harming others. In harm-or-be-harmed self-defense situations, the fact that harm is done to prevent harm carries enough moral weight to balance the prohibition against doing harm; and theories of self-defense propose conditions under which this moral balance tips in favor of defenders.[[13]](#footnote-12) Now, the idea that defenders are permitted to stand their ground in SYG situations presupposes that the mere moral permission to be located at some public place carries enough weight to balance the moral prohibition against doing harm. But, in and of themselves, mere moral permissions carry no moral weight at all: no moral significance attaches to the description “occupies a public space.” Hence, in SYG situations, the moral prohibition against doing harm carries the day, and Standing one’s ground in those situations is therefore morally indefensible. It follows that theories of self-defense should either be inapplicable to SYG situations, or include duties to retreat in those situations.

There remains the question of whether theories of self-defense should be applicable to situations to which the castle doctrine applies and, if so, what should be implied about duties to retreat in such situations.

In contrast to standard SYG situations, those to which the castle doctrine applies (henceforth, “CD situations”) do involve moral rights, although the precise nature and relevance of these rights is unclear. The central examples of CD situations are those in which people face the choice of allowing themselves to be harmed or leaving their homes; and it might therefore be tempting to regard the castle doctrine as based on rights to property. But appealing to property rights could furnish at most a partial explanation of the permissibility of standing one’s ground in one’s home. After all, many people don’t own their homes, and there are people who own pieces of property at which they do not reside. The moral rights associated with one’s home that transcend ownership prominently include rights to privacy, rights to enter and leave their homes as please, and the rights people have to quiet enjoyment of their living spaces. Except perhaps for the second of these rights, however, it is at least unclear how such rights might be related to the permissibility of standing one’s ground in CD situations.

In fact, I strongly suspect that the castle doctrine presupposes that, in the face of threats from without, one’s home is the safest place to be - in other words, that genuine CD situations are unlikely. “One’s home is one’s castle” means not only that homes are places where people rule their roosts, but they also afford protection from external threats. Laws that require people to retreat from their homes would therefore require them to abandon places of security, and render them vulnerable to being harmed by wrongdoers.

But what if the unlikely does occur? Imaginethat Al is approaching your house with a knife in hand and murder in his heart. He will enter and kill you if you don’t shoot and kill him - or unless you exercise your third option. You can walk easily and safely to your neighbor’s house, in which case Al will give up and move to norway, never menacing you or anyone else again. I must confess that I can see no basis for concluding that you are permitted to kill Al in these circumstances. Indeed, killing him instead of easily and safely retreating seems much more like punishment than morally justified self-defense.

For present purposes, however, the moral status of the castle doctrine can remain undetermined. Regardless of how this issue might be resolved, the fact would remain that SYG laws, applying as they do to public spaces, are morally objectionable.

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1. The “no duty to retreat” provision of Florida’s law seems to have played no role in Zimmerman’sdefense. Surprisingly, the prosecution did not argue that Martin was protected by that provision - that he reasonably feared for his life and, although he could have left the scene, he had no duty to do so. [↑](#footnote-ref-0)
2. Very oddly, many SYG laws - including Florida’s - apply only to situations in which people reasonably believe that they must employ defensive force to avoid being harmed - and yet retreating will not occur to people with this belief. Hence, the “no duty to retreat” provisions of the laws in question have no practical applications to the specific situations at which SYG laws are aimed. [↑](#footnote-ref-1)
3. For a useful review of theories of self-defense that conform to the suggested pattern, see Tyler Doggett, “Recent Work on the Ethics of Self-Defense,” *Philosophy Compass*, 6(2011), 220-233. [↑](#footnote-ref-2)
4. Note that the necessity constraints of theories of self-defense differ from those that are contained in self-defense laws that are not SYG laws. That is, the latter invariably refer to reasonable beliefs that self-defensive harming is necessary, while the former contain no such references. [↑](#footnote-ref-3)
5. Judith Jarvis Thompson, “Self-Defense,” *Philosophy and Public Affairs,* 20 (1991), p. 284. [↑](#footnote-ref-4)
6. Jeff Mcmahan, “The Basis of Moral Liability to Defensive Killing,” *Philosophical Issues,*  15 (2005), 386. [↑](#footnote-ref-5)
7. Mcmahan’s is a “liability” account that has two components.: “If x satisfies condition C, and if y can avoid being killed by x only by killing x, then x is liable to being killed by y. If y is liable to being killed by y and other things are equal, then y is permitted to kill x.” The conjunction of these propositions implies the one suggested above as embodying the form of traditional self-defense theories. [↑](#footnote-ref-6)
8. Kimberly Kessler Ferzan, “Stand Your Ground,” in *The Palgrave Handbook of Applied Ethics and the Criminal Law,* Larry Alexander and Kimberly Kessler Ferzan (ed.) (New York: Palgrave Macmillan, 2019), p, 735, [↑](#footnote-ref-7)
9. Ferzan, “Culpable Aggression: The Basis for Moral Liability to Defensive Killing,”*Faculty Scholarship at Penn Law*. 2613. [https://scholarship.law.upenn.edu/faculty\_scholarship/2613](https://scholarship.law.upenn.edu/faculty_scholarship/2613?utm_source=scholarship.law.upenn.edu%2Ffaculty_scholarship%2F2613&utm_medium=PDF&utm_campaign=PDFCoverPages), P.689.

Ferzan’s theory is similar to Mcmahan’s in that it is framed in terms of the language of liability, and has two components whose conjunction implies the one suggested above for traditional self-defense theories. Interestingly Ferzan’s position includes the very necessity constraint that is questioned in the remarks I have quoted. (See Kimberly Kessler Ferzan, "Culpable Aggression: The Basis for Moral Liability to Defensive Killing" (2012). *Faculty Scholarship at Penn Law*. 2613. [https://scholarship.law.upenn.edu/faculty\_scholarship/2613](https://scholarship.law.upenn.edu/faculty_scholarship/2613?utm_source=scholarship.law.upenn.edu%2Ffaculty_scholarship%2F2613&utm_medium=PDF&utm_campaign=PDFCoverPages) [↑](#footnote-ref-8)
10. The topic of future contingents is a can of worms that need not be opened here, since Ferzan does not seem to be denying that, in general, propositions about the future can be true. [↑](#footnote-ref-9)
11. Heidi M. Hurd,, “Stand Your Ground,” in *The Ethics of Self-Defense,* Christian Coons and Michael Weber (ed.), (New York: Oxford University Press, 2016), p. 254. [↑](#footnote-ref-10)
12. Partly this is due to the influence on examinations of moral rights that has been exerted by Wesley Newcomb Hohfeld’s analysis of legal rights. (Hohfeld presented his analysis in two papers: *"Some* Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law journal.* 23 (1913), 16-59; and "Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law journal,* 26 (1917): 710-770.)

Let me emphasize, however, that what I have to say about moral rights and permissions is entirely unrelated to Hohfeld’s analysis. For him, legal rights (or “claims”) are relations, and are equivalent to relational legal duties. Even “*in rem*” rights are relations, although the precise nature of their relata is rather unclear.. Legal privileges are also relational in this sense, in that every privilege is equivalent to the lack of some individual’s relational legal duty.

 Hohfeld’s legal rights and privileges are therefore analogous to “special” moral rights and permissions. However, the moral rights and permissions relevant to my discussion of SYG laws are “general” rather than special. The difference here is exemplified by the contrast between, on the one hand, a creditor’s special and relational right to repayment that is held against a debtor and, on the other, a person’s general and nonrelational right to religious freedom. There is nothing in Hohfeld’s analysis that is even analogous to the concept of a general moral right - or to the concept of a moral permission that is related to that of a general moral right.

For an explanation of the fundamental difference between special moral rights and general moral rights, see

For examinations of Hohfeld’s analysis in the connection with explanations of the nature of moral rights, see L.W. Sumner, *The Moral Foundations of Rights* (Oxford: Oxford University Press, 1987); Carl Wellman, *A Theory of Rights* (Totowa, N.J., Rowman and Allanheld, 1985)); Matthew Kramer, N. E. Simmonds, and Hillel Steiner, *A Debate Over Rights: Philosophical Enquiries* (Oxford: Oxford University Press, 2000); and Heidi M. Hurd and Michael S. Moore, “The Hohfeldian Analysis of Rights,” *The American Journal of jurisprudence,* 63, (2018), pp. 295-354. [↑](#footnote-ref-11)
13. The references to carrying moral weight and to balance can be provided with literal interpretations by either “overriders” or by “specificationists”; and either one will do for present purposes. [↑](#footnote-ref-12)