Nebraska Law Review

Volume 100 | Issue 1 Article 2

2021

# Cracking Self-Defense's Intractable "Difficult Cases"

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## ABSTRACT

*The "ancient right" of self-defense is among the handful of criminal law areas that has received substantial academic (and increasingly public) attention, and deservedly so, given the foundational role it plays in criminal justice systems the world over. The current debate about over-policing, violence, and self-defense has vividly brought to the forefront the challenges inherent in setting boundaries between the state's claimed "monopoly on force" and the individual's right to deploy self-preferential violence against an attacker. But, as this Article points out, by continuing to overlook the role values and value judgments play in guiding "just" self-defense outcomes, the bedrock analysis providing the starting point for this debate has been undermined. Put another way, the debate has, in a sense, lacked moral and analytical coherence.*

*In the wake of George Floyd's brutal killing, drawing the boundaries of appropriate self-preferential force has assumed a central role as society considers how the criminal justice system actually operates and where reform is most needed. This Article seeks to advance that debate by proposing a new, value-centric method of addressing the toughest self-defense questions that have bedeviled commentators for hundreds of years and across all legal systems. For example, is self-defense best viewed as a justification or an excuse? Should a person mistaken about the facts be authorized to use self-defense? What is the*




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*relationship between "necessary" defensive force and "imminent threats"? When should a person be required to retreat from a conflict (or avoid it altogether)? How should the law treat morally innocent threats? And should deadly force ever be authorized to defend mere property?*

*A tremendous amount of scholarly ink has been spilled on the various technical and instrumental aspects of self-defense, and one cannot really question the inescapable centrality of value judgments inherent in any adjudication of a self-defense scenario. Yet, curiously, there has been little scrutiny given to the core questions of how, when, and why values should influence self-defense outcomes. Rather, values and the related normative judgments have largely operated in the background and, thus, in the shadows.*

*The approach developed here is tethered to the recognition that justice systems, when confronted with self-defense claims, must always balance various competing interests (and values). These interests include ensuring procedural justice and the need to shore up the justice system's legitimacy and creditworthiness; the need to allow a defender to use defensive force for protection; the role of equal standing between citizens; everyone's presumptive "right to life"; the presumptive primacy of the legal process; general and specific deterrence; and the state's historical claim to a monopoly on force.*

*To date, the scholarly discussion, legislative debate, and judicial decisionmaking have largely failed to engage with this broader array of competing values in any comprehsnive manner, focusing instead on technical and instrumental interests or, to the extent discussed at all, on only one or two narrow values (specifically, the rights of the defender versus the rights of the attacker). As a result, justice systems, and those working within them and impacted by them, from the outset have been limited in their abilities to persuasively, transparently, and fairly address crucial public perceptions of what amounts to "just" and "right" self-defense outcomes as well as the emphasis the legal system places (and should place) on state power.*

*Some prominent self-defense scholars, for example, narrowly focus on one outcome-determinative value when they contend that human life is inviolate except in extreme situations involving fully culpable attackers threatening to kill their victim. The result is a proposed regime that is at odds with all known self-defense laws and would refuse a defender the right to use deadly force to prevent violent rape and all other forms of culpably inflicted serious bodily injury short of death. The other side of the continuum is occupied by commentators who support "stand-your-ground" and "castle doctrine" laws grounded almost exclusively on protecting the autonomy of the individual defender at any price. Supporters of such uncompromising views argue with equal passion for their respective positions when assessing prominent examples, such as George Zimmerman's claimed right to self-defense in his deadly encounter with Trayvon Martin; Texas retiree Joe Horn's shotgun killing of two men he suspected of burglarizing his neighbor's home; and Travis McMichael's taking of Ahmaud Arbery's life while purportedly trying to effect a "citizen's arrest" for a claimed trespass on a Georgia construction site. The position taken here is that all such hard-edged approaches—whether described as "pro-defender" or "pro-attacker"—are fundamentally flawed because they for no good reason elevate one or two narrow values to the exclusion of all others.*

*As these in-the-public-consciousness examples demonstrate, the absence of a truly value-centric self-defense dialogue has resulted in a weak methodology for meaningfully tackling a critical criminal justice issue in a manner that is*

*transparent, democratic, and sustainable. In the face of the various recent—and often tragic—high-profile incidents such as these referenced above, thoughtful people within and outside the halls of academia have had occasion to pause and think more profoundly about self-defense's underlying rationale. The present undertaking is designed to fortify this effort.*

*This Article's admittedly ambitious aim, then, is to dust off the existing approaches (some of which have been dominating the narrative for centuries), hold them to the contemporary light, and suggest that there is a better way of conceiving the doctrine of self-defense, specifically, and the limits on state power, more generally. Closely examining people's blend of deeply personal views on a range of competing values allows us to understand why the same set of facts may be applauded as justified self-defense in one legal culture or region of the country, while derided as criminal (or even barbaric) in another. This open discussion about the central role value judgments play in assessing self-defense claims, in turn, encourages more democratic and transparent legislative and judicial decisions and commentary.*

*Put another way, this Article argues that finding solutions to today's fraught criminal justice reform debates requires, as a starting point, a common language of values. Such a process promises to yield outcomes with staying power because they will have been reached not on the basis of hidden normativity and false dichotomies, but rather through an all-things-considered analysis of values, and the relative weighting of these values, deemed relevant in each challenging self-defense case where rights and interests lock horns.*

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## I. INTRODUCING THE VALUE-CENTRIC APPROACH TO SELF-DEFENSE

Identifying the outer boundaries of when a person should be permitted (and, some would contend, even *encouraged*) to deploy deadly self-preferential force[1] has long been the subject of heated discussion among legislators, academics, and the public. It is, in fact, among the handful of criminal law areas that has received substantial academic (and public) attention. What is more, the current law reform conversations about over-policing, violence, and self-preferential force have once again brought to the forefront the challenges inherent in setting boundaries between the state's claimed monopoly on force and the individual's right to deploy defensive violence against an attacker. In the wake of George Floyd's brutal killing, this topic, for good reason, has assumed a central role as society considers how the criminal justice system really operates and where reform is most needed.

Unfortunately, the vast bulk of scholarly discussion, legislative rulemaking, and caselaw concerning self-defense has paid near-singular attention to what can be best described as technical and instru-

1. Note that the focus here is largely on using self-preferential force to *kill* the attacker. This limitation was selected because the use of deadly force involves the irremediable killing of another to save oneself. It, therefore, is the most challenging type of defensive force to justify. If deadly defensive force can be justified in a particular circumstance, then so too can lesser levels of force. *See generally* FIONA LEVERICK, KILLING IN SELF-DEFENCE 4 (2006). This Article will also focus on self-defense, rather than defense of others—or private defense more generally—because self-preferential force is the most problematic in light of the inherent self-interest involved when one opts to save one's own life at the expense of another's. That said, much of what is written here will also be generally useful as an analytical lens through which to assess a broader range of defensive force situations, including those situations in which the quantum of self-preferential force falls short of deadly. In those situations, similar—though not necessarily overlapping or identical—value judgments will be implicated.

mental legal arguments. What has been overlooked is the central role that bedrock value judgments play in how we all assess self-defense claims. By ignoring the outcome-determinative impact of values, we have encouraged undemocratic legislative and judicial decisions, which, in the absence of a value-explicit dialogue, are necessarily reached on the basis of hidden normativity (that is, privately held evaluative standards) as well as false dichotomies (claiming a choice between two values when in fact others are also at play).

Although this is not the first time someone has said that "values matter," those who in the past have sought to tether their self-defense analyses to what they described as the "values" in the main considered only one or two values. By way of illustration, consider Fiona Leverick's narrow focus on the "right to life."[2] She uses this appealing baseline to develop her argument that only those threatening death may be met with justified deadly force. And so, even attackers culpably threatening rape or other forms of serious bodily injury short of death may not be met with deadly defensive force even if that is the only way to thwart the attack.

Robert Schopp, in sharp contrast, considers the autonomy of the defender so inviolate that he would sanction deadly force, provided it is necessary to prevent the theft of property or to ward off a fairly minor assault.[3] In the realm of application, certain legislators and other commentators in the public square favoring broad authorization for defensive force advocate for strict "stand-your-ground" and "castle doctrine" laws. Their justifications, in turn, are laser-focused on protecting the autonomy of the individual person being threatened with attack. Supporters of such harder-edged views press them when assessing controversial examples, such as George Zimmerman's claimed right to self-defense in his deadly encounter with Trayvon Martin; Texas retiree Joe Horn's shotgun killing of two men he suspected of burglarizing his neighbor's home; and Travis McMichael's taking of Ahmaud Arbery's life while trying to effect a purported "citizen's arrest" after Arbery allegedly trespassed on a Georgia construction site.

Both the "humanitarian" (roughly, pro-attacker) and "law-and-order" (roughly, pro-defender) perspectives, in short, have their passionate adherents. But the position advanced here is that these polarities in perspective elevate what ultimately are rather narrow personal moral preferences to conduct-guiding legal rules for no good reason. These approaches, it will be argued, should be rejected in favor of a theory that accords broader consideration of the full range of values implicated in self-defense scenarios. By so doing, we position ourselves

2. *See id.* at viii.

3. ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 83–88 (1998). For a criticism of this approach, see T. Markus Funk, *Justifying Justifications*, 19 OXFORD J. LEGAL STUD. 631 (1999).

to significantly improve the transparency of decision-making, reduce the role of hidden normativity and undiscussed baselines, and facilitate transparent and democratic decision-making leading to more thoughtful choices among available options.

## II. SURVEYING THE VALUE-BASED MODEL OF SELF-DEFENSE

Explaining the outer limits of the authorization to use self-preferential force has been an evergreen challenge to scholars, as well as to those legislators, jurists, and others who study their output. But, as I have detailed elsewhere,[4] a broader consideration of the values implicated in self-defense scenarios considerably improves the transparency of decision-making and, relatedly, reduces the role of hidden normativity. That said, let me at the outset acknowledge the virtual inevitability that there will be arguments for and against the inclusion of each of the values that follow. While I elsewhere offer a more full-throated defense for the inclusion of each of these values (and the exclusion of others), the scope of the present undertaking permits a thumbnail sketch of the reasoning motivating their inclusion.

As we will discuss, the values examined here are the following: protecting the state's monopoly on force (value #1); protecting the individual attacker's (presumptive) right to life (value #2); maintaining the equal standing between people (value #3); protecting the defender's autonomy (value #4); ensuring the primacy of the legal process (value #5); maintaining the legitimacy of the legal order (value #6); and deterring attackers (value #7). The hoped-for benefit of the value-based model, however, is not that it in all cases dictates a particular balance or accommodation between the values. Rather, the model will achieve its transparency-enhancing objective if it offers a reasonable, defensible starting point for determining what is, in fact, at stake in different self-defense scenarios. The core question we are assessing, after all, is whether the present, stale self-defense discussion is enhanced by first, carefully tracing the landscape of implicated values; second, justifying why certain values should, under the facts of the case, receive more weight than others; and third, determining whether the balance of values can be said to reasonably justify treating the specific conduct under consideration as justifiable self-defense.

It is also recognized that the seven values discussed here could of course be organized differently. For example, reducing overall societal violence (value #1), ensuring the primacy of the legal process (value

4. *See, e.g.*, T. MARKUS FUNK, RETHINKING SELF-DEFENCE: THE 'ANCIENT RIGHT'S' RATIONALE DISENTANGLED (2021); T. Markus Funk, *Understanding the Role Values Play (and Should Play) in Self-Defense Law*, 58 AM. CRIM. L. REV. 331 (2021); T. Markus Funk, *What U.S. Lawmakers Can Learn from Germany's Value-Explicit Approach to Self-Defense*, 73 S.C. L. REV. (forthcoming).

#5), maintaining the legitimacy of the legal order (value #6), and general deterrence (a component of value #7) could be grouped together because they tend to reflect broader collective, societal, and humanitarian interests. On the other hand, protection of the attacker's individual (presumptive) right to life (value #2), maintaining the equal standing between persons (value #3), protecting the defender's autonomy (value #4), and specific deterrence (the other component of value #7) could be grouped together because they tend to safeguard personal and individual interests. Alternatively, the values could be grouped by those *authorizing* defensive force (primarily values #3, #4, and #7) and those tending to *restrict* defensive force (primarily values #1, #2, and #5—value #6's focus on maintaining the legitimacy of the legal order tends to function more like a "swing value," in that normative judgments to a greater extent will impact whether it authorizes or restricts force). That said, for present purposes the view is that, even though such alternative groupings can be justified, the order selected here defensibly serves its hypothesis-testing function.

### A. Value #1: Reducing Overall Societal Violence by Protecting the State's Collective "Monopoly on Force"

#### *1. Why This Value Should Be Included*

Reducing overall societal violence, generally, and preventing unjustified attacks on people's rights, specifically, are the twin goals of most modern criminal justice systems (though there can certainly be others, including punishing the deserving and instrumentally protecting the goals valued by the state). In that sense, then, value #1 recognizes the collective objective of seeking to minimize societal violence.

It is assumed that all citizens, including culpable attackers, have a fundamental right to life. When possible (and appropriate), moreover, this right to life should be protected. Relatedly, and from a more statist and collectivist perspective, in a modern pluralistic society, the state is generally—though not universally—thought of as advancing interpersonal violence reduction through its default monopoly on legitimate force.

The state, however, must also erect guardrails around its right—and, practically speaking, ability—to prevent actors from exercising self-preferential force. Indeed, it is entirely reasonable to say that people's right to life is, and as a practical matter must be, at the outer periphery conditioned on their conduct. More specifically, engaging in conduct that renders the person an "unjustified threat" to another limits the state's interest in fully extending all available legal protection to the attacker. And this, it will be argued, is even more so when the person's conduct is culpable and the threat is serious.

The approach outlined here treats only serious conduct as justifying the state's decision to effectively suspend a person's all-things-being-equal basic right to be free from intrusion into his personal sphere (such intrusions including, at the extreme end, death and serious bodily injury). That suspension continues unless and until that person no longer poses such an unjustified threat.

*2. Tension with, or Support for, the Other Values*[5]

Reducing overall violence by protecting the state's monopoly on legitimate force, as defined here, is an inherently collective value that recognizes the systemic, societal interest in violence reduction and the state's role in achieving this end. In contrast, value #2 (protecting the individual attacker's presumptive right to life) is an individual value focused on protecting the individual and personal right not to be killed. Because the collective interest of the state reflected in value #1 is omnipresent (in the sense that the modern state will, when able to do so, want to resolve disputes through its enforcement mechanisms—an interest also directly reflected by value #5 (ensuring the primacy of the legal process)), it by necessity tends to function as a decision ground that, all other things being equal, is antagonistic to the private use of force. It, more specifically, will most frequently find itself in direct tension with the more defender-focused values of maintaining the equal standing between people (value #3) and protecting the autonomy of the defender (value #4).

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5. It is conceded that assigning any particular relative weight to competing interests is inherently a normative judgment rather than a quasi-scientific determination. The identified values, after all, do not have self-evident weights. As such, any balancing of values is challenging at the outset. In addition, there are some jurisprudential challenges implicated when seeking to balance basic individual human rights (such as the right to life) against more collective interests (such as reduction in crime). As Zedner puts it:

> Typically, conflicting interests are said to be 'balanced' as if there were a self-evident weighting of or priority among them. Yet, rarely are the particular interests spelt out, priorities made explicit, or the process by which a weighting is achieved made clear. . . . Although beloved of constitutional lawyers and political theorists, the experience of criminal justice is that balancing is a politically dangerous metaphor unless careful regard is given to what is at stake.

Lucia Zedner, *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*, 32 J.L. & SOC'Y 507, 510–11 (2005) (footnote omitted); *see also* Jürgen Habermas, *Reply to Symposium Participants, Benjamin N. Cardozo School of Law*, *in* HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 381, 430 (Michel Rosenfeld & Andrew Arato eds., 1998), *as discussed in* Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT'L J. CONST. L. 572, 573 (2005) (criticizing the balancing of values as a movement away from rendering judgments based upon what is "right" and "wrong"); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1001–05 (1987) (arguing against a balancing approach). The fact that all balancing efforts are open to some level of critique is not, however, fatal to our undertaking.

On the other hand, the collective interests this value represents tend to find support in value #5 (ensuring the primacy of the legal process) and value #6 (maintaining the legitimacy of the legal order). Whether protection of the individual attacker's presumptive right to life (value #2) or general and specific deterrence (value #7) are in tension or aligned with this collective state interest will largely depend on the particular factual scenario (and is particularly subject to normative weighting). After all, one could also reasonably take the position that the state's collective interest in violence reduction is not, in fact, antagonistic to the private use of force. Indeed, one can reasonably take the position, as the German law does, that the private use of force in the absence of state protection actually is, through both general and specific deterrence (value #7), supportive of the state's collective interest in violence reduction.

*3. Limitations*

This value, in contrast to some of the others that follow, is implicated to varying extents in virtually all self-defense cases. The extent to which this value, as a decision ground, lends weight to either the principle of protecting the defender or the principle of protecting the attacker, however, is largely determined by the weight accorded to the six other values discussed immediately below and on the evaluator's perspectives on the moral and functional legitimacy of the state's claimed monopoly on force. Those values and perspectives on a sliding scale moderate the violence-reduction value, providing guidance concerning who should be protected in a conflict-of-rights situation.

## B. Value #2: Protecting the Attacker's Individual (Presumptive) Right to Life

*1. Why This Value Should Be Included*

Value #1 concerns society's collective interest in minimizing interpersonal violence by protecting the state's monopoly on force. Value #2, in contrast, focuses on the attacker's individual, personal right to life. The central (and largely uncontroversial) limitations on self-defense—namely, necessity, imminence, and proportionality—apply to both culpable and non-culpable attackers. These near-universally recognized restrictions demonstrate that protecting the attacker, even a culpable one, in fact deserves treatment as an important stand-alone value. And although few values will generate as much disagreement as value #2, the very fact that different observers will want to add or take weight away from this value underscores how important the normative assessment of this value is to self-defense outcomes (and why the proposed value-centric dialogue aids transparent decision-making).

*2. Tension with, or Support for, the Other Values*

The concept of protecting attackers (and, in particular, culpable attackers) is likely to generate disagreement between those who bring into the debate very different normative judgments about the extent to which defensive force should be authorized, generally, and to what extent culpable offenders deserve protection, specifically. Those who accord more weight to warding off the imputation of unequal standing between people (value #3), protecting the defender's autonomy (value #4), and deterrence (value #7) will be the most skeptical about the inclusion of this value as a stand-alone decision ground. After all, they will contend, why should the culpable attacker acting outside of the law's bounds formally receive state protection? On the other hand, those who focus more narrowly on reducing overall violence by protecting the state's monopoly on force (value #1) and ensuring the primacy of the legal process (value #5) will place more weight on this value when compared to the other more "pro-defender" values.

*3. Limitations*

Although we will discuss the value of protecting the defender's broad autonomy (value #4), the instant value's interest in protecting the attacker's presumptive right to life is framed in terms of protecting the attacker from death. This asymmetry (the defender's broader autonomy interests versus the attacker's narrower right to life) is intentional. It reflects that this Article is explicitly focused on deadly self-preferential force.[6] Additionally, it is consistent with the position that culpable attackers are presumptively entitled to less relative protection than moral innocents.

## C. Value #3: Maintaining the Equal Standing Between People

*1. Why This Value Should Be Included*

Though controversial in some circles, recent events have focused a light on the reality that an ordered society requires an equal concern and reciprocal respect for rights between and among citizens. To make this value more tangible, consider why we get irritated when a person brazenly cuts in line at the grocery store, engages in a highway passing maneuver using the shoulder, or parks in a handicapped spot purely for the sake of convenience. What makes such conduct upsetting for most is not that the person behaving in such an asocial manner is necessarily causing tangible harm or delay. Rather, such conduct, when it happens in public, shows that this person has no con-

6. *See supra* note 1.

cern about elevating his or her interests and desires over the rest of us who are following society's "rules," whether written or not.

Building on this foundation, culpable attackers, like criminals and victimizers more generally, uniquely threaten not only to identifiably harm their victims, but through their threatened attack, they additionally threaten their victims with a unique wrong by effectively disrespecting the victims' right to equal standing in the public and private spheres. This is what is meant when victims of crime say that they have a profound sense of being violated. It, moreover, is not a feeling people have when a person acts by accident or inadvertence by, say, backing into their car, mistakenly taking their identical bicycle, or not realizing that they are standing in the wrong line at the grocery store.

Self-preferential force exercised in self-defense therefore allows the defender to most immediately repel or ward off the impending or launched attack (thwarting the threatened *harm*). The defender's force, however, also puts the defender in a position to maintain the equal standing between herself and her attacker by protecting her personal domain (thwarting the threatened *wrong*). In this sense, then, self-defense permits individuals to be *sovereign* by allowing them to assert rights, including the right to remain free from unjustified attack, for themselves. Concurrently, self-defense renders them *subject* in the sense that they must obey the laws that they, collectively speaking, impose on their fellow humans.

*2. Tension with, or Support for, the Other Values*

Warding off the imputation of unequal standing inherent in culpable attacks can be understood as a value ancillary to protecting the defender's autonomy (value #4) and also generally aligned with deterrence (value #7). On the other hand, violence reduction (value #1), protection of the attacker (value #2), and ensuring the primacy of the legal process (value #5) are, all other things being equal, generally antagonistic to this more defender-centric value. Maintaining the legitimacy of the legal order (value #6), moreover, finds itself in an unusual posture with respect to this value, because cases in which maintenance of equal standing is under- or over-weighted can yield results potentially threatening to the legal order's moral legitimacy.

*3. Limitations*

This decision ground is necessarily based on thwarting a culpable attacker's attempted imposition of unequal standing (because, setting aside fringe cases, only such a blameworthy attack, that is perceived as such, can in fact threaten to disrupt the equal standing between the attacker and defender). As a result, equal standing is not implicated in the cases involving non-culpable, innocent aggressors. This is so be-

cause, without a culpable attack (the requisite culpability will typically be intentional but could also be triggered in the case of a reckless attack), the attacker through his actions does not threaten to disrespect or discount the defender's right to equal standing. Such an attacker may threaten a *harm* but is not threatening a *wrong*.

### D. Value #4: Protecting the Defender's Autonomy

#### *1. Why This Value Should Be Included*

The value of protecting the defender's autonomy is understood by most. It is related to the concept of safeguarding the equal standing between people.[7] An individual's exercise of autonomous rights (including the rights to self-directed action, to a personal sphere, and to own property) can be fairly considered instrumentally closely related to his pursuit of self-fulfillment. The personal sphere, in turn, allows one to develop one's personality and to feel truly free. The modern liberal state accords free people equal standing in the public sphere (see value #3) and, relatedly, strives to ensure that people have a private domain of nonpublic life in which they are given the opportunity to exercise their own comprehensive moral doctrines and develop their own conceptions of the good.

#### *2. Tension with, or Support for, the Other Values*

Protection of the defender's autonomy is understandably widely considered the primary function of self-defense. In fact, it is this function that puts the "self" in self-defense. That said, defenders' interests in protecting their autonomy are not absolute and must at times yield to the competing interests of reducing overall societal violence by protecting the state's monopoly on force (value #1), protecting the attacker's presumptive right to life (value #2), and ensuring the primacy of the legal process (value #5). In contrast, maintaining the equal standing between people (value #3) and deterrence (value #7) tend to mutually support this value. Maintaining the legitimacy of the legal order (value #6), on the other hand, can once again be negatively impacted by an under- or over-weighting of the instant value.

#### *3. Limitations*

Protecting equal standing (value #3) is only implicated in the context of culpable attackers. In contrast, protecting the defender's auton-

7. In fact, some could argue that the discussion of protecting the autonomy of defenders should be subsumed under the value of safeguarding the equal standing of citizens (value #3), because individual autonomy may be part and parcel of equal standing. While that argument has some appeal, the decision made here is to give them separate treatment because protection of the defender's autonomy can be a sufficiently distinct value as to justify such individualized treatment.

omy (admittedly a bit of a catch-all term that is defined here as including the defender's legally protected private sphere, personal sovereignty, personal domain, and right to noninterference) may be relevant to both culpable and non-culpable attackers. That said, this Article will contend that a culpable attacker poses a greater, normatively distinguishable threat to a defender's autonomy than an innocent one.

### E. Value #5: Ensuring the Primacy of the Legal Process

#### *1. Why This Value Should Be Included*

Due process is the cornerstone of modern, pluralistic legal systems. And, as noted, self-defense must not become a substitute for the legal process, lest it undermine the primacy of the legal process. Consistent with value #1, the system's interest in due process signals that, in the type of conflict-of-rights situation created in self-defense scenarios, the state should, if possible, determine guilt or innocence, administer punishment, and determine restitution. And even in the case of morally innocent attackers who would not be appropriate for criminal sanction, or situations where only property rights are at issue, systemic interests lean in favor of letting the courts (in such cases, the civil courts) resolve disputes and affix blame. Consequently, instances of the private use of self-preferential force should be carefully circumscribed.

#### *2. Tension with, or Support for, the Other Values*

This value supports the proposition that, all other things being equal, societies prefer to have disputes settled in court rather than through the exercise of self-preferential force. As such, this value is most closely aligned with protection of the state's monopoly on force (value #1), protection of the individual attacker (value #2), and maintenance of the legitimacy of the legal order (value #6). Warding off the imputation of unequal standing (value #3), protection of the defender (value #4), and deterrence (value #7) are, all other things being equal, more likely to be antagonistic to, and therefore in tension with, this value.

#### *3. Limitations*

This value is only implicated in cases where (1) resort to the legal process is a realistic possibility and (2) the rights threatened are generally compensable. That is, in those cases where the attacker threatens death or serious bodily injury, resort to the legal process is unable to prevent or remedy the damage. In such cases, this decision ground carries far less weight.

## F. Value #6: Maintaining the Legitimacy of the Legal Order

### *1. Why This Value Should Be Included*

Perhaps none of the values we have surveyed is as timely in this era of doubts about the nature and purpose of our criminal justice system than the value of maintaining the legal order's moral legitimacy and creditworthiness. After all, a functioning criminal justice system must receive the respect of a populace that considers it legitimate. A criminal justice system's proscriptions and defenses can, sociologically speaking at least, be fairly described as the formal embodiment of a set of elementary moral values (usually those of the group dominant in political authority) in an official edict. These values, in turn, are reinforced with exceptions (defenses) and an official penal sanction. A functioning, democratic justice system must, therefore, embody widely held moral standards of right and wrong. That is, it must reflect—or at least come close to reflecting—what has elsewhere been termed the "fully expressed public morality."[8] As procedural justice theory teaches, a justice system that in this manner enjoys popular support is able to more effectively draw on the stigmatic effect of conviction to reinforce basic moral standards while simultaneously encouraging compliance.

Universal acceptance, of course, is not (and realistically probably cannot be) the hallmark of effective legislative efforts. But to the extent the community perceives the law as noticeably deviating from its shared, and publicly recognized, conceptions of bedrock justice, the law's moral credibility will be undercut. The result is a diminution of the law's legitimacy (in the sense of moral authority) and, derivatively, its ability to effectively fulfill its crime-control and conduct-guiding functions. Stated differently, when the justice system accepts laws or enforcement actions that corrosively clash with the fully expressed public morality on basic issues of right and wrong, the entire justice system may suffer.

Placing these more generalized observations in the self-defense framework, to maintain the criminal law's moral authority and corresponding popular legitimacy, the justice system's range of permissible defensive force outcomes must not, all other things being equal, dras-

8. "Public morality," as used here, refers to the moral and ethical standards enforced in a society, whether through law enforcement, social pressure, or otherwise. *See generally* Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 19 (2000); H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967); Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175 (1967). The concept that violations of the criminal law reflect successive levels of substantive and procedural societal condemnation is discussed by, among others, SCHOPP, *supra* note 3, at 30–31 (examining the "fully articulated conventional public morality").

tically deviate from the community's perceptions of just results. For even though political liberalism may be premised on a plurality of reasonable moral doctrines, there is a limit to what a free democratic regime bound by the majority principle can tolerate.

*2. Tension with, or Support for, the Other Values*

Maintaining the legitimacy of the legal order is another value that can be viewed (and weighted) very differently depending on one's perspective. Those who tend to place greater significance on the equal standing between people (value #3), protecting the defender (value #4), and deterrence (value #7) can be expected to object to outcomes that they consider too deferential toward collective violence reduction (value #1), protection of the attacker (value #2), and ensuring the primacy of the legal process (value #5). Of course, the same is true in the opposite direction. But although disagreement with outcomes is unavoidable, results that threaten to shake people's fundamental confidence in the moral legitimacy of the legal order are the ones that implicate value #6.

*3. Limitations*

This decision ground is, as noted, only drawn on in the relatively rare cases where the contemplated outcome is so out of bounds and at odds with the fully expressed public morality that it threatens to erode the criminal law's popular legitimacy. An example of such a rare case could be if the courts, say, adopted a Schoppian approach and authorized deadly force to defend against a teenager threatening trivial property interests. Alternatively, the legislature could follow Leverick's lead by making deadly defensive force legally unavailable even in cases of serious bodily injury or rape at the hands of a fully culpable attacker because of a narrow focus on value #2 (protecting the attacker's right to life). Unlike the other values, then, maintaining the legitimacy of the legal order is framed in terms of avoiding particular "extreme" outcomes—that is, avoiding erosion of the justice system's popular authority.

### G. Value #7: Deterring (Potential) Attackers

*1. Why This Value Should Be Included*

For good reason, systemically deterring crime is generally (though not universally) considered a central function of the criminal justice system. When a particular defender uses force to thwart an attack, she clearly imposes an immediate, and potentially significant, cost on the attacker that makes wrongdoing riskier. The greater the known scope of self-defense permitted against attackers, the higher the likelihood that potential (and, in particular, culpable) attackers will be de-

terred from engaging in the kind of conduct that authorizes defensive force.

*2. Tension with, or Support for, the Other Values*

Successful general deterrence tends to support value #1's interest in minimizing violence and protecting the state's monopoly on force. And authorizing deadly force to defend against a culpable attack on a trivial interest might in fact deter attacks (value #7), serve to provide maximum protection to the defender's autonomy (value #4), and ward off the imputation of lesser standing in the case of a culpable attacker (value #3). But such disproportionate force—and I say this with a recognition that others may not reach the same normative conclusion as to "disproportion"—also undermines the value of maintaining the primacy of the legal process (value #5), provides almost no protection for the attacker (value #2), and may yield results deemed unacceptable by the public so that it harms the legitimacy of the legal order (value #6).

*3. Limitations*

This admittedly more controversial decision ground, like safeguarding the equal standing between citizens (value #3), is only implicated when the attacker is culpable. If, on the other hand, the attacker is not culpable because she, for example, is operating under an honest and reasonable mistake (that is, she does not know she is threatening both a wrong and a harm), then the attacker by definition cannot be deterred by the availability of self-defense. (Of course, if the attacker is acting recklessly, carelessly, or even negligently, then this analysis might change.)

## H. The Model's Flexibility

As we wrap up this survey of potential decision grounds, let me be clear on one important point (and one that comes up frequently when I discuss the value-based model of self-defense). The set of values proposed here are *not* positioned as the *only* possible appropriate set of values. Nor is it claimed that there are not some other reasonable ways of ordering the proffered values. Instead, the claim here is that the model provides a reasonable and unique analytical point of departure for examining the thorny theoretical and practical issues involved in the self-defense cases that are the focus of this Article.

And so, if a future observer concludes that I, in setting up the value-based model, overlooked certain values, inappropriately included others, or confused the hierarchy or weighting between and among the included values, the observer's points do not undermine the present effort. To the contrary, they serve to *validate* the reason for constructing the value-based model in the first place, for such un-

clouded and pellucid disagreements inherently proceed on a value-centric footing. In short, I am not worried that others may point out the perceived errors in the proposed approach as long as, to do so, they concede that a proper and fulsome accounting of implicated values does, in fact, matter to the self-defense debate. This is a concession that, to date, has not been made in practice or in theory in any full-throated manner, so changing the tenor of the discussion in this way potentially offers a significant step forward.

## III. IS SELF-DEFENSE A JUSTIFICATION OR EXCUSE (OR NEITHER)? . . . AND WHY THE ANSWER MATTERS

Deconstructed, criminal justice systems punish by inflicting hard treatment on those who provably failed to abide by certain rules or commands relating to proscribed conduct.[9] Self-defense laws and outcomes that the public broadly rejects as immoral threaten to incrementally erode the justice system's credibility, undermine compliance with the law, and reduce cooperation with legal authorities. The result is that such flawed systems require ever more severe punishment to make up for decreased self-directed adherence to the law.[10] Indeed, research has consistently demonstrated that "[t]he loss of popular legitimacy for the criminal justice system produces disastrous consequences for the system's performance. If citizens do not trust the system, they will not use it."[11]

9. *See generally* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 403–05 (1958).

10. *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 290, 310–18 (2003).

11. Mark H. Moore, *Legitimizing Criminal Justice Policies and Practices*, 66 FBI L. ENF'T BULL. 14, 17 (1997), *quoted in* Tyler, *supra* note 10, at 291–97 (discussing research on procedural justice); *see also* Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 154–55, 160–68 (2012) (discussing legitimacy studies and calling for more empirical work); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 134–37 (2011), *cited in* Pamela Foohey, *Jevic's Promise: Procedural Justice in Chapter 11*, 93 WASH. L. REV. ONLINE 128, 128 (2018) (canvassing procedural justice research); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 3–4 (examining research regarding the consequences of people's perceptions of procedural justice); John Darley et al., *Enacting Justice: The Interplay of Individual and Institutional Perspectives*, *in* THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY 458, 458–76 (Michael A. Hogg & Joel Cooper eds., 2003) (examining the concept of a "community sense of justice" and its consequences); DAVID BEETHAM, THE LEGITIMATION OF POWER 3–114 (1991) (analyzing legitimacy through the lens of social science); Martin L. Hoffman, *Moral Internalization: Current Theory and Research*, 10 ADVANCES EXPERIMENTAL SOC. PSYCH. 85 (1977) (reviewing the research on how and why individuals in society internalize moral norms).

In broad terms, our criminal justice system, like that of most democratic countries, can be envisioned as operating in stages or phases. As an initial matter we have institutional condemnation—the criminal justice system, through the legislature, defines certain conduct as condemnable and worthy of criminal punishment. What follows is a process through which the prosecutor, judge, or jury allocates this institutional condemnation in a fair and even-handed manner to a particular defendant.[12] To deserve criminal punishment in a modern, liberal criminal justice system then, a defendant must be both (1) institutionally and (2) procedurally condemned.

Moving from the general to the specific, and starting with institutional condemnation, legislators (and, to a lesser extent, the courts) are charged with the task of creating offense definitions that designate certain conduct as "criminal."[13] They, in so doing, transform a broad prohibitory norm (such as "thou shall not kill") into a specific offense definition with action (actus reus) and, typically, state-of-mind (mens rea—the actor is not guilty unless the mind is guilty)[14] elements. These offense definitions thus seek to capture the blameworthiness of the overall conduct and package and label it as a type of criminally punishable harm (such as "first-degree homicide").

The institutional actors can in this sense be said to represent, reinforce, and maintain what has been described as the "partially expressed public morality."[15] Criminal conduct, after all, is "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."[16] The morality contained in the offense definition is therefore described here as "public," because, in a functioning justice system, it is shaped

12. It is of course possible to think of, and order, the stages differently, but the classification and ordering outlined here fairly reflect the actual, procedural, and conceptual operation of the criminal law.

13. *See generally* Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. 803, 825 (2010); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 376 (2005).

14. Examples include malice aforethought, knowingly, willfully, recklessly, and (sometimes) criminally negligently.

15. Schopp has extensively discussed the "conventional morality." *See* Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCH. PUB. POL'Y & L. 161, 166 (1995). Schopp's analysis has, in fact, at some level inspired the approach detailed here.

16. Hart, *supra* note 9, at 405; *see also* Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1107 (1998) (explaining that criminal law's ability to successfully communicate moral condemnation depends upon the moral credibility it has among citizens); George K. Gardner, Bailey v. Richardson *and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953) (contending that criminal conviction is the true punishment for moral delinquency).

by broad public support, typically develops organically over the years,[17] and is designed to represent widely held moral standards of right, wrong, evil, and good.

By labeling certain conduct "criminal," then, a functioning and sound justice system at a bedrock level[18] expresses widely accepted (and thus "conventional") moral standards within a given society.[19] Note, however, that this partially expressed public morality only addresses those (core) aspects of morality that are commonly perceived as falling within the public jurisdiction and that are, therefore, properly subjects of the criminal law.[20]

Turning to the issue at hand, justification defenses (including self-defense) involve actors who violated an offense definition without having a justification for doing so and, as a consequence, are systemically condemned and blamed. The offense definition, then, merely contains the *partially* expressed public morality; it describes a general category of conduct proscribed at the institutional level (but this, again, only

17. *See* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 148–61 (1972); JAMES C. CARTER, THE PROVINCES OF THE WRITTEN AND THE UNWRITTEN LAW: AN ADDRESS 11–12 (1889); *see also* Alana Klein, *Criminal Law and the Counter-Hegemonic Potential of Harm Reduction*, 38 DALHOUSIE L.J. 447, 462–63 (2015) (using prostitution as an example).

18. Note that this minimalist understanding of what should be criminalized finds support in, among other places, the U.N. Declaration of Human Rights. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 29 (Dec. 10, 1948); *see also* DAVID ORMEROD & KARL LAIRD, SMITH, HOGAN, AND ORMEROD'S CRIMINAL LAW 8 (15th ed. 2018) (contending that conduct should only be criminalized when it protects individual autonomy or "those social arrangements necessary to ensure that individuals have the capacity and facilities to exercise their autonomy").

19. *See generally* James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 MOD. L. REV. 217, 245 (2008); John Gardner, *The Mark of Responsibility*, 23 OXFORD J. LEGAL STUDS. 157, 169 (2003); David L. Bazelon, *The Morality of the Criminal Law*, *in* CRIMINAL LAW 5 (Thomas Morawetz ed., 1991); Hart, *supra* note 9, at 404–05.

20. In this sense, the conventional *social* morality does not overlap completely with the conventional *public* morality. The social morality addresses aspects of the citizens' social life, such as courtesy to strangers and helpfulness to neighbors and the elderly, which are not properly the subject of criminal legislation. *See* Onder Bakircioglu, *The Contours of the Right to Self-Defence: Is the Requirement of Imminence Merely a Translator for the Concept of Necessity?*, 72 J. CRIM. L. 131, 131, 152–53 (2008); Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2079–80 (1996); Gregg v. Georgia, 428 U.S. 153, 181 (1976). *But see* Michelle Madden Dempsey, *Public Wrongs and the "Criminal Law's Business": When Victims Won't Share*, *in* CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTHONY DUFF 269–70 (Rowan Cruft et al. eds., 2011) (contending that the criminal justice system should also seek to redress communal "character flaws" such as racism, patriarchal violence, structural inequalities, and homophobia). In any event, a full treatment of whether the criminal law can and should be employed as an instrument for such aspirational undertakings is beyond the scope of this undertaking.

tells part of the story). A prosecutor, in the main, must show that a defendant violated the *fully expressed* public morality of a liberal society by wronging, or attempting to wrong, another. For starters, the prosecutor must prove that the defendant's conduct satisfies the offense definition. She further must refute any claim made by the defense that the defendant's conduct fell into a subset of generally proscribed behavior that is exempt from condemnation and punishment because it was justified as, say, self-defense.[21]

If the fact finder concludes that the conduct occurred under justifying circumstances that created such an *exception* to the broader proscription contained in the offense definition, then the defendant cannot be condemned as having violated the fully expressed public morality.[22] An act initially perceived as wrongful from the outsider's perspective as violating the partially expressed public morality contained in the offense definition may, therefore, in fact be legally permissible (though not necessarily laudatory) from a more fully informed, all-things-considered perspective.

An offense description such as "it is illegal to intentionally kill another person" accordingly only represents the partially expressed public morality. "It is illegal to intentionally kill another person, *except* when the killing occurs in the course of actual self-defense," in contrast, represents the fully expressed public morality, for it also contemplates potential justifications that create exceptions to the prohibitory norm expressed by the offense definition.[23]

The discussion so far has sought to demonstrate that justified conduct creates an *exception* to the proscription contained in the offense definition, and using force in self-defense consequently does not infringe on the attacker's rights because it does not in a legal sense *wrong* him. An excused defendant, in contrast, actually *does* violate the offense definition; however, he does so under circumstances that

21. *Cf.* 18 U.S.C. § 1111 (defining murder as "unlawful killing"). *See generally* Boaz Sangero, *Heller's Self-Defense*, 13 NEW CRIM. L. REV. 449, 456–57 (2010); United States *ex rel.* Collins v. Blodgett, 513 F. Supp. 1056, 1060 (D. Mont. 1981).

22. *See also* KRISTIAN KÜHL & MARTIN HEGER, STRAFGESETZBUCH: KOMMENTAR § 32, sidenote 2 (2018); KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 286 (1987) (questioning whether specific exceptions cover all instances in which an actor's conduct may be justified). *See generally* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 457 (1978). Note that German textbooks, instead of citing to a page, in the main refer to "Vorbemerkung" or "Randnote"—the former refers to sections providing "introductory comment" and the latter to the "side-note" or "margin-note" accompanying the particular section. For the sake of consistency, the citations to German sources throughout this Article will refer to the Vorbemerkung or side-note.

23. In this context, consider studies showing the disjunction between public views on self-defense and existing and proposed statutes. *See*, *e.g.*, Kathryn C. Oleson & John M. Darley, *Community Perceptions of Allowable Counterforce in Self-Defense and Defense of Property*, 23 L. & HUM. BEHAV. 629, 644–45 (1999).

make punishment inappropriate because the defendant's conduct cannot be morally attributed to him.[24] Stated differently, offense definitions require action plans; excuses, in contrast, function *retrospectively* to undermine the required relation between the proscribed conduct and the actor's pursuit of his action plan with regard to the offense.[25] A conviction and subsequent punishment hence condemn the defendant, one who transgressed the fully expressed public morality, as an accountable agent by systemic standards and who, therefore, is morally blameworthy for the wrong he inflicted or intended to inflict.[26]

This analysis suggests that self-defense can only provide a justification.[27] It cannot excuse, for the excused actor, unlike the justified actor, in fact violated the fully expressed public morality. We would not, after all, say, "Unlawful killing is wrong except when the killer is insane." Rather, we say, "Unlawful killing is wrong, but we will not criminally condemn and punish actors who were insane when they killed."[28]

Moving from the general to the specific and accepting for present purposes the assumptions laid out above, individual offense definitions seek to account for these rather abstract prohibitory norms by providing citizens with more specific behavioral directives.[29] By criminalizing murder, for instance, the legal order expresses the conventional moral standard that unjustified killing is condemnable. A fully culpable attacker deserving punishment under this understanding of the criminal law is consequently always condemned for having violated the partially expressed public morality represented by the offense definition because that, after all, is where the inquiry starts.[30] (This is not to deny, of course, that many of today's criminal codes, perhaps unwisely, are replete with largely regulatory provisions that

24. *See generally* Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1045–46 (2011).

25. *See generally* Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 PAC. L.J. 1233, 1277 (1993).

26. *See generally* Grant Lamond, *Coercion and the Nature of Law*, 7 LEGAL THEORY 35, 52–54 (2001); SCHOPP, *supra* note 3, at 29; SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE 137–41 (1994).

27. *See* FUNK, *supra* note 4, at 93–105.

28. While some actors are excused because their incompetency prevents them from being legally accountable for their actions, others do not apply their capacities to their selection of an action plan due to reasonably mistaken beliefs that render them internally, but not externally, justified.

29. *See generally* Schopp, *supra* note 25, at 1270.

30. The conventional public morality allows us to delineate those wrongs that are criminal from the universe of wrongs, e.g., intentional breach of contract is not criminalized even though it involves the intentional disregard for another's rights and equal standing.

bear what can be characterized as only a faint relation to conduct meriting broader moral condemnation.[31])

It is hoped that we now have an adequate (and, hopefully, even a persuasive) answer to whether self-defense should be categorized as a justification, an excuse, or something else (and, for that matter, whether these labels matter). By way of recap, justified conduct is best conceived of as creating an *exception* to the proscription contained in the offense definition (and, therefore, to the fully expressed public morality).[32] The excused defendant, in contrast, in fact does violate the offense definition; however, she does so under circumstances that, in retrospect, *make punishment inappropriate* because her conduct cannot be morally attributed to her (that is, she did not pursue a freely chosen action plan that at some level at least manifested her moral character).[33] In the words of Fletcher: "A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act."[34] The necessity requirement, in turn, distinguishes justified from merely "tolerated" or "excused" conduct,[35] with proportionality serving a similar moderating function.[36]

Despite the argument outlined above, it is readily accepted that the proposed division between justification, excuse, and necessity has not been universally accepted. Dsouza's approach to positioning blame, for example, draws on what he terms the "hypocrisy-based conception of rationale-based excuses."[37] At the crux of his account is the belief that excuses are defenses granted to defendants because not granting them would be hypocritical; society is not in a moral position to blame a defender for the conduct.[38] Dsouza asserts that his approach is both intuitively plausible and "compatible with most familiar accounts of rationale-based excuses."[39]

The challenge to this interpretation, however, is that it appears to largely be based on a populist assessment of social morality—and so, if a particular society has, say, racist tendencies, a person who as-

31. *See generally* Grant Lamond, *What Is a Crime?*, 27 OXFORD J. LEGAL STUDS. 609, 611–12 (2007); Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 501–03 (2004).
32. *See supra* notes 15–25 and accompanying text.
33. *See* Schopp, *supra* note 25, at 1275 (discussing the problem of attaching knowledge requirements to justification defenses); JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 274–75 (1970) (categorizing excuses in terms of compulsion and ignorance).
34. FLETCHER, *supra* note 22, at 759; *see also* Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1900 (1984) (distinguishing between the features of justification and excuse).
35. *See* FLETCHER, *supra* note 22, at 559.
36. *See id*. at 559–60.
37. MARK DSOUZA, RATIONALE-BASED DEFENCES IN CRIMINAL LAW 116 (2017).
38. *See id*. at 111–20.
39. *Id*. at 113.

saults another based on the color of his skin would likely be excused because a conviction under these circumstances would, per Dsouza, constitute hypocritical blaming. Dsouza's perspective, moreover, is at odds with the standard view of excuses (and it is argued Dsouza, for no particularly convincing reason, takes this unorthodox position that would change how most observers traditionally view the excuse-versus-justification divide).[40]

Under the value-based model, then, conviction—and subsequent punishment—condemns the defendant as an accountable agent who, by systemic standards, has transgressed the fully expressed public morality and who is therefore morally blameworthy for the wrong he inflicted or intended to inflict.[41] As Packer, consistent with this approach, put it, punishment "without reference to the actor's state of mind . . . is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy."[42] Moral blameworthiness must, therefore, be inherent in criminal punishment for it to maintain its stigmatic effect. A defendant who is not in any way morally accountable for his conduct should, thus, be excused and remain free from criminal liability.[43]

In addition to being excused on the basis of insanity, a defendant may also be excused as not blameworthy because his volitional and reasonable action plan did not accord with the result actually achieved (even though, depending on the offense definition, it may have formally met the mens rea requirement(s)).[44] Consider the case of the hypothetical Alex, who reasonably concludes that he is being attacked. Because of this belief, which is both subjectively held and reasonable, Alex may select an action plan that includes using deadly force in self-defense. This action plan ultimately proves to be mistaken, however, because there is in fact no actual attack. The position advanced here is that a defendant in Alex's position is not morally accountable for his actions, even though he violated the fully expressed public morality, because he did not intend to *wrong* another by engaging in the act he

40. *See generally* FUNK, *supra* note 4, at 82–83.

41. *See also* SCHOPP, *supra* note 3, at 29 (explaining that condemnation is warranted when an actor violates the criminal law as an accountable agent); UNIACKE, *supra* note 26, at 137–41 (analyzing the circumstances in which an act is morally permissible).

42. Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109; *see also* Michele Boggiani, *When Is a Trafficking Victim a Trafficking Victim: Anti-Prostitution Statutes and Victim Protection*, 64 CLEV. ST. L. REV. 915, 951 (2016) (asserting the criminal justice system is misguided when it prosecutes victims of sex trafficking because the individual lacks culpability).

43. *See generally* ORMEROD & LAIRD, *supra* note 18, at 7–8; Russell L. Christopher, *Exculpation as Inculpation*, 49 ARIZ. ST. L.J. 1141, 1146–48 (2017); Kate Harker & Ellen Wright, *The HIV Stigma: Duty or Defence*, 4 U. COLL. LONDON J.L. & JURIS. 55, 70–71 (2015); Garnett v. State, 632 A.2d 797, 801 (Md. 1993).

44. *See generally infra* section III.B (discussing mistakes).

was charged with (stated differently, he did not intentionally and without justification kill another).

As articulated here, then, offense definitions require action plans, whereas excuses function retrospectively to undermine the required relation between (a) the proscribed conduct and (b) the actor's *pursuit* of his action plan with regard to the offense.[45] The defenses of duress and provocation discussed below reflect this perspective.[46] They undermine the required voluntary selection of an action plan that, at some level at least, reflects a disrespect of the victim's equal standing (value #3).

The will of the person acting under duress, for example, is said to be overborne by the threat to the point where most reasonable people would have acted in the same way, whereas the person who was provoked lost self-control under extreme circumstances.[47] In neither case does the action compel an adverse judgment about the actor, for the actor was not acting in accordance with a freely selected action plan manifesting his moral character. Rather, he was acting as the result of an external threat, or a loss of self-control, which permits us to say that his conduct was, legally speaking, morally involuntary—though, depending on the circumstances, perhaps still subject to a lower level of criminal sanction if he, for example, acted negligently or recklessly.[48]

At this point, another similar hypothetical may be useful. Assume Victor honestly and reasonably believes Andrew is about to kill him because Andrew is pointing an object that looks like a gun in Victor's direction. Because of this belief, Victor selects an action plan that includes using defensive force against Andrew to fend off the perceived threat. While Victor's belief in Andrew's attack may be reasonable, Andrew is in fact not attacking Victor. Rather, Andrew is merely hold-

45. *See generally* DENNIS J. BAKER, TEXTBOOK OF CRIMINAL LAW 56 (4th ed. 2015); Schopp, *supra* note 25, at 1320–21.

46. *See* discussion *infra* section IV.A.

47. *See* discussion *infra* section IV.A.; *see also* JONATHAN HERRING, CRIMINAL LAW 643–59 (8th ed. 2018) (discussing the defense of duress in depth); Eric Colvin, *Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility*, 27 MONASH U. L. REV. 197, 210–16 (2001) (comparing the defenses of provocation and duress).

48. *See infra* text accompanying notes 84–85; *see also* Colton Fehr, *(Re-)Constitutionalizing Duress and Necessity*, 42 QUEEN'S L.J. 99, 103 (2017) (disagreeing that an actor who acts disproportionately in response to a perceived threat should be subject to criminal sanction); Arnold N. Enker, *In Support of the Distinction Between Justification and Excuse*, 42 TEX. TECH L. REV. 273, 283–84 (2009) (discussing whether the defenses of necessity and duress function as excuses or justifications); Ian Howard Dennis, *On Necessity as a Defence to Crime: Possibilities, Problems and the Limits of Justification and Excuse*, 3 CRIM. L. & PHIL. 29, 41 (2009) (arguing that an actor whose reaction is disproportionate to the perceived harm should not escape all culpability); *cf.* Birju Kotecha, *Necessity as a Defence to Murder: An Anglo-Canadian Perspective*, 78 J. CRIM. L. 341, 357 (2014).

ing a cellular phone that in the dark vaguely resembles a handgun. An actor, such as Victor, who acts under a *reasonable*, but ultimately mistaken, action plan is not properly subject to condemnation because, though he is competent, his reasonable error resulted in his selection of an action plan that did not include wronging another.[49] Victor acted as the result of a reasonable mistake and, therefore, did not select an action plan on the basis of all the objectively relevant information. Victor's objectively mistaken action consequently cannot be subjectively attributed to him.[50] To the extent Victor took the action for an *objectively* bad reason (such as racism, homophobia, or some other legally and morally unacceptable motivation), self-defense would be unavailable.

### A. Why Accurate Labeling Matters

The careful reader will have already recognized that a foundational position staked out here is that how we formally characterize conduct is significant. As relevant here, not only is the justification of self-defense less susceptible to abuse (via false claims concerning the motivation of the action) than is an excuse, but fair labeling in fact compels separate treatment.[51] People, after all, are entitled to have the courts label their defensive conduct as accurately as possible. Those labels, as shown immediately above, necessarily include a normative, and potentially stigmatizing, element. And while, as noted, claims of justification focus primarily on the *act* itself, excuses focus on the *actor* (and, more to the point, on the actor's *motivation* for acting). Society at large, like criminal justice professionals,[52] intuitively judges a person based on how the courts classify that person's conduct.[53] And so it is posited here that saying "I did it out of self-defense" carries less of a stigma than saying "I killed him, but I was

49. *See infra* section III.B.

50. Fletcher distinguishes "objective attribution" (did the actor cause the violation?) from "subjective attribution" (is the actor accountable for the violation?). *See* FLETCHER, *supra* note 22, at 492–504.

51. *See generally* Kotecha, *supra* note 48, at 352; Beatrice Krebs, *Justification and Excuse in Article 31(1) of the Rome Statute*, 2 CAMBRIDGE J. INT'L & COMPAR. L. 382, 385 (2013); Glanville Williams, *Convictions and Fair Labelling*, 42 CAMBRIDGE L.J. 85 (1983).

52. *See* Chalmers & Leverick, *supra* note 19, at 234, *noted in* John L. Anderson, *'Playing with Fire': Contemporary Fault Issues in the Enigmatic Crime of Arson*, 39 U. NEW S. WALES L.J. 950, 952 (2016); *see also* Winnie Chan & A.P. Simester, *Four Functions of Mens Rea*, 70 CAMBRIDGE L.J. 381, 388–93 (2011) (discussing fair warning).

53. *See* Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621 (1996); *see also* Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1329–31 (2017) (discussing how reintegrative approaches would reduce the stigma associated with criminal convictions).

under duress" or "My conduct was deemed acceptable because it was ruled to be necessary under the circumstances."[54]

Consistent with this perspective, the commonly (and for good reason) held distinction is that self-defense functions as a justification that considers the conduct to be, all things considered, morally and societally acceptable.[55] This is so even though the conduct may have met the offense definition and received condemnation because it met the elements of the formal offense description, and the actor was mentally fit. Duress and necessity, in contrast, are considered excuses, in that the conduct, while wrong, was engaged in for a reason rendering the accused blameless.[56] By stating clearly why a person is being punished, as well as why a person is *not* being punished, the distinction between justifications and excuses provides the type of moral clarity that has long (and based on sounds reasons) been the criminal law's objective.[57] As a result, from the value-based perspective, there is no compelling reason to deviate from this intuitive and common distinction.

### B. How To Deal with Mistakes of Fact

Although self-defense is, as discussed, best considered a justification and, therefore, constitutes an exception to the fully expressed public morality outlined above, additional case-specific limitations to the justifiable exercise of self-defensive force deserve attention. Specifically, and as detailed below, the defender must be both externally *and* internally justified (adopting the "deeds and reasons" view[58]) before he can claim a positive right to self-defense. That is to say that the view endorsed here requires that the facts as they *actually exist*

54. *See generally* Michael Patrick Wilt, *Civil Disobedience and the Rule of Law: Punishing "Good" Lawbreaking in a New Era of Protest*, 28 GEO. MASON U. C.R.L.J. 43, 49–52 (2017).

55. *See also* Janine Young Kim, *The Rhetoric of Self-Defense*, 13 BERKELEY J. CRIM. L. 261, 266 (2008) (examining the paradigm of self-defense). *See generally* Finkelstein, *supra* note 52, at 621–49.

56. *See also* Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 507 (2013) (analyzing coercion defenses); Tracey L. Meares et al., *Updating the Study of Punishment,* 56 STAN. L. REV. 1171, 1202 (2004) (criticizing the conventional divide between justification and excuse); HENRY L. HART, PUNISHMENT AND RESPONSIBILITY 13–14 (1968), *discussed in* LEVERICK, *supra* note 1, at 18 ("Hart himself refers to justified conduct as 'something the law does not condemn or even welcomes.'"). *See generally* discussion *infra* section IV.A.

57. *See generally* Gabriel J. Chin, *Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction*, 43 U. MICH. J.L. REFORM 79, 91 (2009); George Mousourakis, *Distinguishing Between Justifications and Excuses in the Criminal Law*, 9 STELLENBOSCH L. REV. 165, 180 (1998). *Cf*. GREENAWALT, *supra* note 23, at 1924–27.

58. *See generally* HERRING, *supra* note 47, at 688.

must objectively justify the defendant,[59] and she must also *know of*, and in fact *act because of*, these justificatory circumstances (which, of course, include the facts implicating the seven value-based decision grounds).

### *1. External Justification*

Turning first to the requirement of external (or, if you will, factually objective) justification, the criminal law is probably best described as providing the public with minimum standards of acceptable conduct.[60] Justified conduct, therefore, need not be the morally best conduct but rather is conduct that is legal by the appropriate standard.[61] By way of recap, the value-based model uses a transparent approach to endorse the orthodox view that justifications focus on the act, whereas excuses focus on the actor.[62] The value-based model's fully expressed public morality, moreover, does not justify mistaken actors, however reasonable the mistake, because their actions are not considered positively lawful exceptions to offense descriptions. Not only is a putative defender objectively unjustified, but she also harms the "attacker" by violating her right to life (value #2). That said, the putative defender does not *wrong* the attacker (in the sense of creating an unequal standing between the attacker and the defender, in accordance with value #3) because the defender is acting under a mistaken belief in the rightness of her conduct.

An actor who honestly believes that he is acting in self-defense, but actually acts under a mistaken belief regarding the justificatory circumstances, can therefore at best claim that he was *internally* justified because he subjectively and reasonably believed that his conduct

59. Note that when this Article refers to the "objective facts" establishing that there was or would be an "actual attack," it is nearly always dealing at least partly with supposition based on probabilities or witnesses' potentially mistaken perceptions and recollections. This is not an impediment to the analysis, however, because the fact finder decides what, based on all the evidence, the actual facts were and whether an actual attack was in fact in progress. The fact finder's conclusion as to what occurred or would have occurred therefore takes the place of the conclusion that the fictional omniscient observer would have reached.

60. *See generally* Bazelon, *supra* note 19, at 5 ("[T]he criminal code should define only the minimum conditions of each individual's responsibility to the other members of society in order to maximize personal liberty.").

61. *See generally* Benjamin B. Sendor, *Mistakes of Fact: A Study in the Structure of Criminal Conduct*, 25 WAKE FOREST L. REV. 707, 772 (1990).

62. *See generally* LARRY ALEXANDER ET AL., CRIME AND CULPABILITY 89 (2009), *quoted in* Brenner M. Fissell, *Federalism and Constitutional Law*, 46 HOFSTRA L. REV. 489, 536 n.310 (2017); UNIACKE, *supra* note 26, at 6, 23; FLETCHER, *supra* note 22, at 759; ERIC D'ARCY, HUMAN ACTS 85 (1963); JOEL FEINBERG, HARM TO OTHERS 108 (1984); WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 509–10 (2d ed. 1826); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 181–84 (1770).

was necessary to prevent an immediate attack.[63] The putative defender is not externally justified, however, because he in reality was not being attacked. Thus, value #1 (violence reduction), value #3 (protecting equal standing), and value #4 (protecting the defender's autonomy) were not implicated.

### *2. Internal Justification*

As signaled above, individuals may act under circumstances in which persuasive reasons exist for exempting their conduct from the fully expressed prohibitory norm even though they are not aware of these reasons.[64] Because of their lack of awareness then, they cannot be said to have selected their action plans because of these reasons. Such actors are considered "unknowingly justified" because they lack internal—that is, subjective—justification.[65]

Assume that, as Andrew is coming out of a movie one afternoon, his old nemesis Victor rushes towards him holding an uplifted sabre. Andrew reasonably believes that Victor is about to attack him and therefore pulls out his gun. In reality, however, Victor is merely excited about the sabre he just purchased from an antiques store down the road. Victor, realizing that Andrew is about to shoot him, stabs Andrew through the heart with his sabre because this is the only way Victor can protect himself against the mistaken Andrew. In this unfortunate (and also unlikely—but that is what hypotheticals calibrated at probing the outer boundaries of a situation tend to be) situation, both Victor and Andrew acted in reasonable apprehension of imminent death or serious bodily harm. Both are, therefore, internally justified. Only Victor, however, was externally justified in acting as he did; Andrew's belief, while perhaps entirely reasonable under the circumstances, was mistaken. If internal (subjective) justification alone was sufficient to justify self-defense, then both Andrew and Victor would be justified in killing each other. The "incompatibility thesis" or "paradox of mutual justifications," discussed below, however, precludes such a result.

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63. *See generally* People v. White, 409 N.E.2d 73 (Ill. App. Ct. 1980); People v. Pappas, 383 N.E.2d 1190 (Ill. App. Ct. 1978); People v. Kelly, 322 N.E.2d 527 (Ill. App. Ct. 1975); Gunn v. State, 365 N.E.2d 1234 (Ind. Ct. App. 1977).

64. *See generally* Schopp, *supra* note 25, at 1284.

65. *See generally* Thomas Rönnau & Kristian Hohn, *Notwehr*, *in* STRAFGESETZBUCH LEIPZIGER KOMMENTAR, BAND 3, § 32, sidenote 262 (Gabriele Cirener et al. eds., 2019); Larry Alexander, *Unknowingly Justified Actors and the Attempt/Success Distinction*, 39 TULSA L. REV. 851, 854–57 (2004).

### *3. Why We Should Require Both External and Internal Justification*

The value-based model has concluded that justificatory circumstances only provide exceptions to the fully expressed public morality if the actor is (a) aware of them and (b) acting *because* of them. External justification alone, therefore, cannot exempt the actor's conduct from criminal condemnation, for an actor must also be internally justified. By requiring external *and* internal justification, the law prevents mutually justified attacks that conflict with the above-mentioned incompatibility thesis and that are confronted with the paradox of mutual justifications.[66] The paradoxical result that the incompatibility thesis seeks to ward against is that if each of the actor's force is justified, then neither actor's force can be justified, and if neither actor's force can be justified, then both actors' force is justified.[67] Indeed, regardless of how reasonable the mistake may have been, I contend that it will not *justify* the conduct, because the mistaken actor has no objectively superior social interest or right that would support creating a special exception to the general prohibitory norm. Self-defense provisions must, as a consequence, be drafted in terms of (1) conduct, (2) circumstances, (3) results, and (4) *knowledge*.[68] It is hoped that the reader will agree that this approach is coherent and reflects the normative significance of justifications laid out above.

At the risk of some repetition, the value-based model's decision necessarily limits the weight given to the principle of protecting the defender when the defender lacks subjective perception of the nature and seriousness of the attack. Assume Victor thinks he is about to be hit on the head with a harmless toy hammer. In fact, Andrew is about to hit him on the head with a real iron hammer. Because Victor thought that he would be subjected to only very minor discomfort, the value-based model dictates that he would not be justified in using deadly force to deflect what he believes to be a culpable, but minor, threat. The fact that the actual threat was in fact much greater than Victor perceived it to be at the time will not provide him with an after-the-fact justification, as his subjective assessment of the threat is not changed by the objective facts. The value-based model's conception of self-defense as a justification is, therefore, partially agent-centered,

66. *See generally* Rönnau & Hohn, *supra* note 65, at sidenote 113; Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. 57, 77–79 (2010); Russell L. Christopher, *Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights . . . ?*, 85 J. CRIM. L. & CRIMINOLOGY 295, 319–20 (1994).

67. *See* Henning Rosenau, *Notwehr und Notstand*, *in* 4 STRAFGESETZBUCH: KOMMENTAR, sidenotes 2, 18 (Helmut Satzger & Wilhelm Schluckebier eds., 2019); Russell L. Christopher, *Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defence*, 15 OXFORD J. LEGAL STUDS. 229, 242 (1995).

68. *See* SCHOPP, *supra* note 3, at 37.

and partially target-centered. Properly conceived, self-defense, therefore, requires both a particular mental state on the part of the defender, as well as an actual threat of harming or wronging.[69]

### *4. Why We Should Reject the Utilitarian "Legal Justification"*

England's Lord Macaulay was one of the first commentators to expressly examine the issue of unknowing justification. And he reached a conclusion contrary to the one advanced here. Macaulay, like Robinson, adopted a utilitarian approach, arguing that the defender's mental state is largely unimportant; a defensive act that ultimately benefits society should be encouraged: "[W]hen an act which is really useful to society, an act of a sort which it is desirable to encourage, has been done, it is absurd to inquire into the motives of the doer, for the purpose of punishing him if it shall appear that his motives were bad."[70] Other commentators, including Simester, have taken an opposing, public policy-based position, contending that unknowingly justified conduct should in fact be discouraged because it results in social *dis*-utility "by encouraging the commission of prima-facie offences in the hope that they might turn out to be fortuitously defensible."[71] Still others have criticized the requirement that defenders must be aware of the justifying circumstances on the ground that the principle weakens the legitimacy of the criminal law.[72] As noted above, however, un-

69. Russell Christopher refers to this approach as the "agent-centered subjective approach." Russell Christopher, *Self-Defense and Objectivity: A Reply to Judith Jarvis Thomson*, 1 BUFF. CRIM. L. REV. 537, 565 (1998).

70. 7 THE WORKS OF LORD MACAULAY 552 (Hannah Macaulay Trevelyan ed., 1866); *see also* Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 499 (2006) (discussing the varying perceptions of justification); MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 180–81 (1993) (questioning whether the justification defense should be available to defendants who are unaware of the justifying circumstances); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Responsibility*, 23 UCLA L. REV. 266, 289–90 (1975) ("One's mental state simply cannot convert otherwise harmless conduct into a crime . . . .").

71. A.P. Simester, *Mistakes in Defence*, 12 OXFORD J. LEGAL STUDS. 295, 303 (1992); *see also* Larry Alexander, *Lesser Evils: A Closer Look at the Paradigmatic Justification*, 24 LAW & PHIL. 611, 626–36 (2005) (discussing defendants whose actions are unknowingly justified).

72. *See* Robinson, *supra* note 70, at 266; *see also* SCHOPP, *supra* note 3, at 35–36 (arguing that the unknowingly justified actor could still be liable for attempt); Andrew Ashworth, *Belief, Intent and Criminal Liability*, *in* OXFORD ESSAYS IN JURISPRUDENCE 1, 28–29 (John Eekelaar & John Bell eds., 1987) ("[A]lthough the absence of actual unlawfulness should prevent conviction for the substantive offence, there is a strong prima facie argument that a conviction for attempt should follow.").

knowingly justified actors should not, in fact, be candidates for the justification of self-defense.[73]

Having plowed this theoretically compacted ground, we turn next to the question of why the presence of justificatory facts does not negate the offense definition's actus reus requirement. The answer to this question can be found in the distinction between offense and defense definitions. If the offense–defense distinction is applied, the question of whether a defense is available (that is, whether the defendant's conduct is an exception to, or a justified infringement of, the fully expressed public morality) is distinct from the question of whether the defendant violated the partially expressed public morality represented by the offense definition. Contra the arguments advanced by Professors Williams[74] and Robinson,[75] the availability of a defense should be considered independently and has no bearing on whether the defendant satisfied the offense definition's actus reus requirement. The defense, then, renders the commission of the prima facie offense permissible on the basis of accompanying circumstances not directly contemplated in the definition of the actus reus.[76]

If the distinction between offenses and defenses is disregarded, on the other hand, defenses become nothing more than negative definitional elements of the offense.[77] The actus reus of an assault, for example, would require both the typical features of an assault *and* would require that the assault occur in such circumstances that no defense pertains. A defendant's unlawfulness would, therefore, be treated as a circumstance that is part of the actus reus necessary for criminal liability.[78]

My view is that such a conception of utilitarian "legal justifications" is flawed, because viewing unlawfulness as part of the actus reus puts the proverbial cart before the horse. "Unlawful" merely describes conduct that satisfies both the actus reus and mens rea re-

73. *See generally* Rönnau & Hohn, *supra* note 65, at sidenote 262; FUNK, *supra* note 4, at 98–103.

74. *See* GLANVILLE L. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 23 (1953) ("[T]he rule seems hard to reconcile with the requirement of an *actus reus*.").

75. *See* Robinson, *supra* note 70, at 266.

76. *See* Simester, *supra* note 71, at 296–302; *see also* David Lanham, *Larsonneur Revisited*, 1976 CRIM. L. REV. 276, 276 ("As a matter of analysis we can think of a crime as being made up of three ingredients, *actus reus*, *mens rea* and (a negative element) absence of a valid defence.").

77. *Cf.* Enker, *supra* note 48, at 278–79. *See generally* Rosenau, *supra* note 67, at sidenote 4; Rönnau & Hohn, *supra* note 65, at sidenote 15; Grant Lamond, *Core Principles of English Criminal Law*, *in* THE LIMITS OF CRIMINAL LAW: ANGLO-GERMAN CONCEPTS AND PRINCIPLES 26 (Matthew Dyson & Benjamin Vogel eds., 2018).

78. *See generally* HERRING, *supra* note 47, at 684.

quirements of the offense definition.[79] As a matter of logical process, only after the fact finder determines that the defendant fits the offense definition should the issue of a possible defense become relevant. This approach, which also finds support among German theorists, appropriately recognizes the basic normative distinction between offenses and defenses that, among other things, allows the public to better understand proscribed conduct.[80]

The result is that self-defense, as discussed, can only be legally justified if the actor was both internally *and* externally justified. Smith argues that any requirement of internal justification is based on public policy rather than on logic.[81] I, for the reasons articulated, disagree. Requiring both internal and external justification represents a principled, coherent, and logically compelled method of preventing unknowingly justified actors from benefitting from their fortuitous justification while concurrently avoiding the paradox of unknown justifications. Requiring internal justification is furthermore consistent with the requirement that excuses can only be claimed by actors to whom the harm cannot be "subjectively attributed" in the sense that they are not morally accountable for the harm.

### C. Addressing "Unreasonable" Mistakes of Fact

Mistakes of fact in the context of self-defense can be made with regard to three distinct issues: (a) whether the actor is *actually* being attacked, (b) whether the degree of defensive force is *necessary* to ward off the attack, and (c) whether the degree of defensive force is grossly *disproportionate* to the harm threatened.[82] The first two questions are matters of fact, whereas the third question is ultimately a value judgment that is answered by reference to the fully expressed public morality (though the facts underlying the assessment concededly could of course also be subject to a mistake of fact). The discussion above has hopefully demonstrated to most readers that a reasonable mistake of fact as to the extant circumstances will not justify defensive force but

79. *See* Albert v. Lavin [1982] AC 150 (HL) 152 (appeal taken from Eng.) (arguing that in setting forth the elements in criminal offenses the word "unlawful" is tautologous).

80. *See also* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 241 n.164 (1982) ("The distinction between offenses and defenses is perhaps the most basic distinction in criminal law that lawyers . . . recognize."), *quoted in* United States v. Ortiz, 927 F.3d 868, 873 (5th Cir. 2019). *See generally* Rosenau, *supra* note 67, at sidenote 4; Gunnar Duttge, *Irrtum über Tatumstände*, *in* GESAMTES STRAFRECHT § 16, sidenote 14 (2017); HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS, ALLGEMEINER TEIL 250 (5th ed. 1996).

81. J.C. SMITH, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW 31–32 (1989).

82. *See generally* Kenneth W. Simons, *Self-Defense, Mens Rea, and Bernhard Goetz*, 89 COLUM. L. REV. 1179, 1186 (1989).

instead may constitute an excusable infringement of the prohibition, because external justification is required for conduct to be justified.[83] Still unresolved, however, remains the important foundational question of what an "unreasonable" mistake is, and, more importantly, what impact such a mistake should have on the analysis.

People form unreasonable beliefs in the self-defense context for two basic reasons: (a) they fail to take sufficient *care* in evaluating the circumstances that confront them before resorting to defensive force, or (b) their *capacity* to evaluate the relevant circumstances is to some extent *impaired*.[84] The first scenario presents the least analytical difficulty. An actor who simply does not take the proper care in evaluating whether defensive force is necessary can surely (at some level at least) be morally blamed for his mistake. Because of his carelessness, such an actor culpably infringes on an innocent victim's autonomy, and therefore, he may not claim self-defense. Such an actor was not externally justified, and he also neither lacked legal competency nor chose a reasonably mistaken action plan. The defender's relative lack of blameworthiness may, nevertheless, be taken into account by the judge at the sentencing stage as a mitigating circumstance; it may prevent him from having the necessary mens rea required by a particular offense definition; or, if he was merely negligent, certain categories of criminal punishment may be inappropriate.

The second type of unreasonable mistake is made by an actor whose *capacity* to properly evaluate the situation is impaired due either to a psychological disability or because of some other personal characteristic, such as fearfulness or a bad temper. An unreasonably mistaken person suffering from a psychological disability preventing him from properly evaluating the circumstances will be excused because he was legally incompetent at the time of the act. While an insane attacker infringes on the private domain of another and is, therefore, subject to justified defensive force, he cannot be said to be legally accountable for his actions or for the harm he threatens.[85]

On the other hand, per the value-based model, actors who are impaired in their ability to evaluate the relevant circumstances because of, say, fear, nervousness, or natural aggression—and therefore unreasonably believe they are acting in self-defense—*do* impermissibly infringe on the "attacker's" personal domain without justification or

83. *See supra* section III.B; *see also* FLETCHER, *supra* note 22, at 696–97, 762–69 (asserting that a reasonable mistake as to the presence of justifying conditions prevents justification), *noted in* Vera Bergelson, *Duress Is No Excuse*, 15 OH. ST. J. CRIM. L. 395, 401 n.34 (2018).

84. *See generally* Benjamin B. Sendor, *Crimes as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1399 n.129 (1986).

85. *See generally* Daniel Yeager, *Decoding the Impossibility Defense*, 56 U. LOUISVILLE L. REV. 359, 362–64 (2018).

excuse, thereby implicating value #2 and, depending on the circumstances, value #3 (equal standing). In contrast to legal insanity, personality traits, such as fearfulness or aggression, are, broadly speaking at least, within the person's control.[86]

The fictitious "reasonable person," moreover, should not be endowed with problematic traits, such as timidity or fearfulness, for the law expects people to control such "flawed" personal characteristics.[87] Putting these pieces together, the moral norm inherent in the reasonable person test is that persons who fail to overcome personal characteristics that they can fairly be expected to surmount are blameworthy and are, therefore, liable for punishment.[88]

Such actors are not necessarily strongly culpable, in the sense that they may not have acted with an evil purpose. Depending on the facts, however, they can be described as "weakly culpable" because of their failure to control their excessive fearfulness or aggression. The position staked out here is that such weakly culpable actors do not, as a default position, deserve to be excused or justified. Their conduct, at some level at least, reflects a disregard for the interests of others and therefore inflicts a wrong—thus implicating value #3 (equal standing), value #4 (protecting the defender's autonomy), and value #7 (deterrence).[89] A contrary result would allow actors who are sane, but overly aggressive or fearful, to unjustly infringe on the private domains of others. (Note, however, that the actor's fearfulness or aggression may of course be a mitigating circumstance.)

### D. The Value-Based Model's Approach to the "Forfeiture" of Rights: Introducing the Concept of "Waiver"

Echoing the positions advanced by Uniacke and Thomson, Leverick argues that "[i]t is acceptable to kill an aggressor because the aggressor, in becoming an unjust immediate threat to the life of another that cannot be avoided by any reasonable means, *temporarily forfeits*

86. This is in contrast to other factors that are relevant in determining whether a person acted reasonably, such as the actor's physical size, ability, and age.

87. *See generally* Ann C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1, 26–27 (2012); G.L. Mogridge, *The Reasonable Man: Negligence and Criminal Capacity*, 97 S. AFR. L.J. 267, 270–71 (1980).

88. *See* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 789 (1994) (discussing George P. Fletcher's position on the reasonable person standard); George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1291 (1974).

89. *See supra* sections II.C–D, G; *see also* Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 17 (2003) (noting that morally justified defenses may go unrecognized in the criminal law and justified legal defenses may include conduct that is not morally justified).

*her right to life*, at least as long as these conditions remain in force."[90] Leverick's quasi-Hohfeldian "claim-right" argument,[91] however, is hampered by the bluntness of the term "forfeiture." Under the orthodox view, an attacker "forfeits" his rights as a result of his "wrongful" conduct; this, in turn, implies a form of open-ended punishment or penalty.[92] Dsouza faults forfeiture theory because it, in the self-defense context, "carries with it punitive undertones and suggests some element of fault on the part of the person suffering the defensive action."[93] Leverick similarly allows that a forfeiture-based account of self-defensive killing is "likely to be controversial" because "of the term's association with fault, penalty, or punishment."[94]

The position proposed here seeks to overcome these well-grounded challenges by replacing the notion of blanket forfeiture with a more fine-grained approach which distinguishes between (morally) intentional and unintentional actors.[95] This approach deploys the forfeiture versus waiver bifurcation to blunt—and, in fact, perhaps overcome—the traditional arguments advanced against the concept of forfeiture of rights.

It is widely recognized that there can be a "conditional forfeiture" or a "temporary suspension of rights." These concepts apply to innocent actors who, because they pose unjust threats of *harm*, forfeit their rights to non-interference as long as they continue to present an ongoing threat.[96] As Simons, discussing Bergelson, puts it, conditional forfeiture is "a special kind of forfeiture, involving a conditional right to

90. LEVERICK, *supra* note 1, at 2 (emphasis added).

91. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

92. *See also* LEVERICK, *supra* note 1, at 67 (asserting that the term "forfeiture" is used in a "non-punitive sense"); Whitley Kaufman, *Is There a "Right" to Self-Defense?*, 23 CRIM. JUST. ETHICS 20, 25–29 (2004) (explaining the concept of forfeiture); SCHOPP, *supra* note 3, at 75–76 ("By engaging in a criminal violation of the victim's sovereignty, the aggressor steps outside of the domain of central, self-regarding life decisions within which he can claim a right to freedom from interference."). *See generally* Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283 (1991).

93. DSOUZA, *supra* note 37, at 66–67 (footnote omitted); *see also* HERRING, *supra* note 47, at 714–15 (discussing the various traditional arguments against forfeiture theory).

94. LEVERICK, *supra* note 1, at 67; *see* sources cited *supra* note 92.

95. Erb recognizes this distinction in the self-defense context, contending that the duty of interpersonal solidarity is greater with innocent attackers. *See* Volker Erb, *Notwehr als Menschenrecht: Zugleich eine Kritik der Entscheidung des LG Frankfurt am Main im "Fall Daschner,"* 25 NSTZ 593, 596 (2005).

96. One way of conceptualizing this is thinking of the waiver or forfeiture as opening a gap in the attacker's otherwise inviolable personal domain. This gap remains open so long as the individual continues to pose such a threat, and because the availability of self-defense is limited by the value-based model's decision grounds, the gap, once created, does not result in unconditional and open-ended forfeiture.

life, where the actor loses the right if he becomes an unjust immediate threat."[97]

So far, so good—but there is something missing in this analysis. Building on this concept of forfeiture conditioned on conduct, we here introduce the concept of "conditional *waiver*" to describe culpable attackers who *knowingly* pose a threat of both harming and wronging, thereby affirmatively waiving their right to non-interference.[98] While Simons contends that self-defense "involves (involuntary) forfeiture,"[99] the position advanced here is that knowing and intentional attackers are, in fact, morally blameworthy.[100] The natural consequence of launching a morally blameworthy attack is that the conduct creates in the defender the right to resort to lawful defensive force, which, in turn, justifies imputing on the attacker the intent to conditionally *waive* his right to non-interference.[101] And so a culpable attacker assaulting an innocent defender through his conduct conditionally waives his right to not be met with the full measure of permissible defensive force (more on this below).

The decision to bifurcate the traditional omnibus term "forfeiture" also responds to critics such as Kasachkoff. It recognizes the considerable normative asymmetry between those morally innocent attackers who threaten to merely harm and those morally culpable attackers who threaten to both harm *and* wrong. This is also on all fours with

97. Kenneth W. Simons, *The Relevance of Victim Conduct in Tort and Criminal Law*, 8 BUFF. CRIM. L. REV. 541, 544 n.9 (2005); *see also* Catherine Elliott, *Interpreting the Contours of Self-Defence Within the Boundaries of the Rule of Law, the Common Law and Human Rights*, 79 J. CRIM. L. 330, 339 (2015) (examining proportionality within the forfeiture analysis); Samantha Krause, *Killing in Defence of Property: A Constitutional Approach*, 2012 J. S. AFR. L. 469, 477 (discussing the competing interests between attackers and defenders).

98. The notion that the normative culpability and responsibility of the attacker is relevant to the defender's ability to exercise defensive force (and what amount of defensive force the defender can utilize) finds support in some of the German scholarship. *See*, *e.g.*, Heiko Lesch, *Die Notwehr*, *in* FESTSCHRIFT FÜR HANS DAHS 81, 91 (Gunter Widmaier et al. eds., 2005).

99. Simons, *supra* note 97, at 544 n.9.

100. *Cf.* Karen L. Bell, *Toward a New Analysis of the Abortion Debate*, 33 ARIZ. L. REV. 907, 927 (1991). *See generally* Benjamin Vogel, *The Core Legal Concepts and Principles Defining Criminal Law in Germany*, *in* THE LIMITS OF CRIMINAL LAW: ANGLO-GERMAN CONCEPTS AND PRINCIPLES 43–44 (Matthew Dyson & Benjamin Vogel eds., 2018); Robert E. Wagner, *Corporate Criminal Prosecutions and the Exclusionary Rule*, 68 FLA. L. REV. 1119, 1123 (2016).

101. *See also* Adrienne Rose, *Forfeiture of Confrontation Rights Post-Giles: Whether a Co-Conspirator's Misconduct Can Forfeit a Defendant's Right to Confront Witnesses*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 281, 293–94 (2011) (explaining various ways a defendant may forfeit his confrontation rights); United States v. Carlson, 547 F.2d 1346, 1358 (8th Cir. 1976) (reviewing instances in which the Supreme Court held a defendant may waive his right to confrontation by misconduct). *See generally* Taylor v. United States, 414 U.S. 17, 20 (1973) (finding an implied waiver of the right to be present during trial when the defendant absconded).

the prevailing nomenclature; "forfeiture" in the main refers to the simple *loss* of a particular right,[102] whereas waiver includes conduct-inferred *knowing and intentional* relinquishment or abandonment of a known right.[103] When an individual engages in a criminal attack on another, she knows—or can be imputed to know—that she, through her conduct, has knowingly and intentionally relinquished her right to non-interference in her autonomous sphere of self-determination.[104]

Innocent attackers, in contrast, by definition do not know of the wrongfulness of their conduct. They, therefore, at worst can be said to forfeit some of their ability to claim an absolute right to non-interference. After all, defenders cannot be expected to always subjugate their own substantive interests to those of the attacker—whether innocent or otherwise.

The instant analysis, in short, endorses, and in fact is grounded upon, the argument that by becoming what Uniacke has aptly termed an "unjust threat,"[105] the attacker creates a morally distinctive asymmetry between himself and the person whom he is threatening.[106] Per Uniacke, individuals cannot be said to possess unconditional human rights; rather, they have rights that are *conditioned* on their behavior (that is, on their not wronging *or* harming another).[107]

Uniacke, in line with philosophers like Grotius and Pufendorf, however, also maintains that the moral or criminal culpability of the "unjustified threat" is irrelevant. Grotius similarly described as "inno-

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102. *See generally* David Alm, *Self-Defense, Punishment and Forfeiture*, 32 CRIM. JUST. ETHICS 91, 99 (2013).

103. *See also* Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. PA. J. CONST. L. 1111, 1159 (2017) (discussing that due process requires a waiver to be "voluntary, knowing, and intelligent"); Brookhart v. Janis, 384 U.S. 1, 4 (1966) (noting that an effective waiver must be a deliberate relinquishment of the right). *See generally* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

104. *See generally Taylor,* 414 U.S. at 20; Rose, *supra* note 101, at 293–94.

105. It is important to note that this term does not rely on a negative moral judgment about the attacker, but instead is based entirely on the attacker's status as threatening an actual unjustified invasion of the defender's personal domain.

106. *See generally* Eamon Aloyo, *Just Assassinations*, 5 INT'L THEORY 347, 359 (2013); UNIACKE, *supra* note 26, at 75–81.

107. UNIACKE, *supra* note 26, at 195–96; *see also* Terrance McConnell, *The Nature and Basis of Inalienable Rights*, 3 LAW & PHIL. 25, 28 (1984) ("A right that can be forfeited is . . . conditional: to retain it, the possessor must not behave improperly."); Hugo Bedau, *The Right to Life*, 52 MONIST 550, 568 (1968) ("[T]he offender, by violating the life or liberty or property of another, has lost his own right to have his life, liberty, or property respected . . . .") (quoting W. DAVID ROSS, THE RIGHT AND THE GOOD 60–61 (1930)), *discussed in* Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 20–21. *See generally* H. L. A. Hart, *Are There Any Natural Rights?*, *in* POLITICAL PHILOSOPHY 53 (Anthony Quinton ed., 1967).

cent" or "unoffending" those who do not create a dangerous situation that threatens an unjust injury. And Pufendorf, like Grotius who equates innocent with unoffending (in the sense of not creating a dangerous situation threatening an unjust injury),[108] implied that self-defense against insane or reasonably mistaken—and therefore morally innocent—aggressors is justifiable: "[I]t is enough that the other have no right to attack or kill me, and there be on my side no obligation to die in vain."[109] While the person posing the threat may be morally innocent, the threat he is posing is therefore nonetheless "unjust" in the sense that there is no objectively good reason warranting it. The defender need not tolerate it.[110] These arguments may be correct at their core—but they overlook the moral distinction between morally culpable and innocent threats. This, for the reasons articulated above, is an important distinction that the present analysis seeks to both recognize and act on.

The position taken here, then, is to some extent in accord with the prevailing undifferentiated perspective on self-defense. Under the value-based model, a defender still has a right of self-defense against moral innocents, such as madmen, sleepwalkers, and those laboring under a mistake, who pose an immediate and identifiable threat. Such actors, after all, threaten the defender's autonomy with harm the defender cannot be legally required to absorb.[111] Once an actor through his actions—either voluntary or involuntary, culpable or blameless—becomes an immediate unjust threat to another, his right to non-interference in his personal domain is either conditionally waived or forfeited (depending on the culpability of the attacker) to an extent compatible with the implicated decision grounds. The right to non-in-

108. HUGO GROTIUS, ON THE RIGHTS OF WAR AND PEACE 62 (William Whewell ed., Lawbook Exchange 2009) (1853).

109. 2 SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO [ON THE DUTY OF MAN AND CITIZEN] 31 (Frank Gardner Moore trans., Wildy & Sons 1964) (1673).

110. *See generally* Rönnau & Hohn, *supra* note 65, at sidenotes 64, 68–73; Krause, *supra* note 97, at 478; Jeremy Horder, *Redrawing the Boundaries of Self-Defence*, 58 MOD. L. REV. 431, 435–38 (1995); Suzanne Uniacke, *Self-Defense and Natural Law*, 36 AM. J. JURIS. 73, 95 (1991); JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 42–46 (William Parent ed., 1986). For an analogous discussion of morally innocent actors in tort law, see JULES L. COLEMAN, RISKS AND WRONGS 332 (1992). For a criticism of Coleman's argument, see Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051, 1098–1100 (1997). *See also* UNIACKE, *supra* note 26, at 157–58 ("[T]he permissibility of acting directly to block an unjust immediate threat does not derive from, or depend upon, culpability on the part of the unjust threat . . . .").

111. *See generally* Jeff McMahan, *Self-Defense Against Morally Innocent Threats*, *in* CRIMINAL LAW CONVERSATIONS 385–406 (Paul H. Robinson et al. eds., 2009); Lesch, *supra* note 98, at 103.

terference, moreover, remains forfeited until he ceases to be such a threat.

A significant point of departure, however, is that the undifferentiated approach pays insufficient attention to the exceptionally significant normative distinction between culpable and innocent threats.[112] In so doing, this prevailing approach to the forfeiture of rights conundrum fatally overlooks that all attacks are, in fact, *not* created equally. To the contrary, morally distinguishable attacks and attackers compel morally defensible and gradated responses.

Moving from the general to the specific, while threats of harm from innocents threaten defenders with concrete losses (see value #4), threats of wrong posed by culpable attackers *additionally* threaten to impute lesser standing to the defender (value #3). Similarly, the concept that all individuals owe each other a basic obligation of "human solidarity" (and, thus, the responsibility to refrain from harming others when possible) can reasonably be interpreted more strictly in the context of morally innocent attackers who do not threaten the imputation of lesser standing (value #3).[113]

Parting from Uniacke's approach, then, the value-based model for normative and qualitative reasons draws a sharp distinction between culpable and innocent threats—that is, between (a) wrongs implicating waiver and (b) harms implicating forfeiture. These differences, in turn, affect the relative weights accorded to the value-based model's decision grounds. The distinction between waiver and forfeiture of an attacker's rights provides us with the ability to meaningfully distinguish between culpable and non-culpable threats. This, in turn, allows us to overcome the widely recognized deficiencies in Uniacke and Leverick's conception of the undifferentiated aggressor posing an "unjust and immediate" threat.

## IV. WHEN IS DEFENSIVE FORCE "NECESSARY"?[114]

Having set the analytical stage, we can now turn to self-defense's most fundamental (and most litigated) limitation, namely, the requirement of necessity.[115] For defensive force to have been "necessary," the force used must have been indispensable or unavoidable if the actor was to successfully block or fend off the threat.[116] The (forced-choice) logic is that the attacker cannot complain that his

112. *See generally* Re'em Segev, *Fairness, Responsibility and Self-Defense*, 45 SANTA CLARA L. REV. 383, 392 n.27 (2005).
113. *See generally* Lesch, *supra* note 98, at 103–04.
114. The issue of proportionality will be addressed in Part V.
115. *See generally* Fritz Allhoff, *Self-Defense Without Imminence*, 56 AM. CRIM. L. REV. 1527, 1531–48 (2019); Robert Leider, *Taming Self-Defense: Using Deadly Force To Prevent Escapes*, 70 FLA. L. REV. 971, 996–1002 (2018).
116. *See* UNIACKE, *supra* note 26, at 32.

rights were violated if he puts the defender in a position where the defender faces the Hobson's choice of either tolerating the serious intrusion or using the reasonable means available to him that are required to block or fend off the attack.

But necessity also plays a (and perhaps *the*) critical part in reinforcing the humanitarian core of self-defense law, as reflected most directly in value #2 (protection of the attacker). As Leider has persuasively maintained, the centrality of the necessity requirement not only protects aggressors' rights to due process of law, but it relatedly also prevents situations where the putative defender might otherwise employ self-preferential force too early.[117] Put another way, the limitation is thought to make self-defense unavailable if the aggressors have not yet made up their minds to attack.[118] Necessity, therefore, helps us understand the boundaries of self-defense. In so doing, it defines the role of citizens and the roles of the state and, consistent with value #1, allocates their respective permissions to lawfully deploy violence.[119]

### A. Distinguishing Self-Defense from Necessity and Duress

Is self-defense a species of necessity? Or perhaps an example of duress? The defense of necessity, after all, is said to apply in cases of emergency when an individual is faced with a choice between two evils.[120] Similar to duress situations,[121] the individual who finds herself in such a predicament must decide whether to break the literal terms of the criminal law or whether to instead abide by the law's requirements and thereby permit the even greater harm to occur.[122]

117. Leider, *supra* note 115, at 1002; *see also* V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1725 (2003) ("The doctrine of necessity requires that the defendant cannot take the law into her own hands—that the protester, for example, must assert her claims before the legislature.").

118. *See* Leider, *supra* note 115, at 1002.

119. *See* Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO STATE J. CRIM. L. 449, 460–61 (2008).

120. *See generally* Ivó Coca-Vila, *Conflicting Duties in Criminal Law*, 22 NEW CRIM. L. REV. 34, 37–40 (2019); Christopher, *supra* note 43, at 1153–54; Michele Cotton, *The Necessity Defense and the Moral Limits of Law*, 18 NEW CRIM. L. REV. 35, 40 (2015).

121. *See generally* Frances E. Chapman & Jason MacLean, "*Pulling the Patches" of the Patchwork Defence of Duress: A Comment on* R. v. Aravena, 62 CRIM. L.Q. 420, 426–27 (2015); Sabina Zgaga, *The Defence of Duress in International Criminal Law*, 68 PRAVNIK 95, 126 (2013).

122. *See generally* Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. CRIM. L. & CRIMINOLOGY 575, 577–78 (2011); Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 48–49 (2002); 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.4 (1986).

The value-based model's answer is that self-defense is neither an example of necessity nor a form of duress.

Another hypothetical may help shine some additional light on this point. Assume Steve is driving a train with defective breaks. Steve approaches a "Y" in the tracks and discovers to his horror that Giacomo, Brett, Greg, Denny, Tony, and John are tied to the left tracks, whereas Eric and Paul are doing repair work on the track to the right. Eric and Paul are facing away from the train and from the others and are unable to hear the oncoming train because they are deaf. Steve is thus faced with a conflict of rights in which either outcome will cause the death of innocent life. Under these circumstances, Steve decides to divert the train to the right tracks because this saves the lives of Giacomo, Brett, Greg, Denny, Tony, and John, although it causes the deaths of Eric and Paul. Steve will be able to claim necessity.

Switching gears, if Victor is attacked by the insane Thomas, is not Victor normatively in the same position as Steve in the prior hypothetical? After all, both, through impersonal necessity, find themselves in a conflict of rights situation. In the case of the insane Thomas, this impersonal necessity is brought about by the disease working on Thomas's powers of perception and judgment.

While this parity argument has initial appeal, it at a deeper level overlooks the relevance of the *source* of the threatened harm.[123] It merely relies on necessity's utilitarian and teleological public policy claim that otherwise illegal conduct is permitted because "higher values" are achieved at the expense of "lesser values." In the first scenario, Steve diverts the train even though this act causes Eric and Paul's deaths. Steve is immune from punishment because there was a moral imperative for his actions that provided an overriding reason for the otherwise illegal conduct. Although Eric and Paul's rights were violated, the violations are deemed legal.

Necessity cases, therefore, involve an actor who is said to be morally compelled to act in the way that he did.[124] If, for example, Andrew forces Victor at gunpoint to block the road with Victor's car so that the insane Thomas is unable to drive to town with a bomb, Andrew's actions clearly violate Victor's rights. Andrew's conduct furthermore would not qualify as self-defense since Victor was not the source of the

123. *See generally* Michael D. Bayles, *Reconceptualizing Necessity and Duress*, 33 WAYNE L. REV. 1191, 1191–92 (1987).

124. *See generally* Dennis J. Baker, *Mutual Combat Complicity, Transferred Intention/Defenses and the Exempt Party Defense*, 37 U. LA VERNE L. REV. 205, 260–61 (2016); Tsachi Keren-Paz, *Injuries from Unforeseeable Risks Which Advance Medical Knowledge: Restitution-Based Justification for Strict Liability*, 5 J. EUR. TORT L. 275, 282–83 (2014).

threat.[125] Andrew may, nevertheless, be justified under the doctrine of necessity, because his commandeering of Victor's car avoids a "greater evil."[126] (That said, it is conceded that one can of course come up with morally challenging cases involving passive threats where drawing the line is more difficult.)

Circling in a bit more on the central point here, self-defense cases do not involve violations of the attacker's rights, for the attacker *himself* poses the threat,[127] thereby conditionally creating a gap in his otherwise inviolable personal domain. The insane Thomas, for example, is the source of the unjust threat (and threatens value #4, protection of the defender's autonomy); his rights are therefore not violated when Victor uses reasonable force to repel the threat he poses. In short, *whether* there is a conditional gap and what the *size* of it might be are determined on a sliding scale informed by the balance of the implicated decision grounds.[128]

Duress cases are even more readily distinguishable. They involve compliance with an illegal or wrongful threat, rather than the avoidance or neutralization of harm through force.[129] The evil Andrew forces Victor to attack Peter and threatens to kill Victor's son if he fails to comply. Peter does not pose an unjustified threat to Victor, and therefore, Victor may not claim that he was acting in self-defense. Victor may, however, argue that he was acting under duress and should not be punished. But duress of circumstances cases—where the threat emanates from the circumstances rather than from a verbal command[130]—are more challenging in that they share a great deal in common with the passive threat issues discussed below in subsection VI.A.3.[131]

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125. *See generally* Arlette Grabczynska & Kimberly Kessler Ferzan, *Justifying* Killing in Self-Defence, 99 J. CRIM. L. & CRIMINOLOGY 235 (2009) (reviewing FIONA LEVERICK, KILLING IN SELF-DEFENCE (2006)).

126. *See generally* Peter Westen, *Poor Wesley Hohfeld*, 55 SAN DIEGO L. REV. 449, 452 (2018); David O. Brink, *Retributivism and Legal Moralism*, 25 RATIO JURIS 496, 505 (2012).

127. *See generally* Jeremy Horder, *Self-Defence, Necessity and Duress: Understanding the Relationship*, 11 CAN. J.L. & JURIS. 143 (1998).

128. *See id.*

129. *See generally* BAKER, *supra* note 45, at 1119–20; Ken Levy, *Does Situationism Excuse? The Implications of Situationism for Moral Responsibility and Criminal Responsibility*, 68 ARK. L. REV. 731, 776 (2015); Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 178 (2013).

130. *See generally* Glenys Williams, *Necessity: Duress of Circumstances or Moral Involuntariness?*, 43 COMMON L. WORLD REV. 1, 26–27 (2014).

131. *See generally* R. v. Hasan [2005] UKHL 22 (appeal taken from Eng.) (requiring the defendant to reasonably believe there was a threat of death or serious injury and to have a reasonable reaction).

### B. The Relationship Between Necessity and Imminence

Assume that Andrew and Victoria both live on an isolated ranch in the Rocky Mountain West. The ranch lacks telephones or other means of communicating with the outside world and is surrounded by a vast and inhospitable high-mountain desert. It would be impossible for anyone to cross the desert to the nearest town of Walden by foot. All of the ranch's water, moreover, is supplied by a single water main that runs from Walden to the ranch. Andrew and Victoria therefore have to drive their car to Walden when they need supplies. One cold night, Andrew is very angry because he believes that Victoria has been unfaithful to him. He verbally and physically abuses Victoria. After severely beating her, Andrew says, "Now that that's taken care of, I am going to drive to Walden, cut off the water supply to the house, and let you die a slow death of dehydration."

Based on Andrew's past behavior, Victoria has no doubt that Andrew will in fact fulfill his threat and leave her to die. Andrew gets into the car and starts to drive off. Victoria knows that if she does not stop Andrew he will act on his plan. She, therefore, grabs a rifle out of the closet and fatally shoots Andrew as he drives by the house on his way to Walden. Andrew of course was not yet in a position where he could cut off the water supply, but if Victoria had not used deadly force to prevent Andrew's "escape," her death would have been certain. The question is whether our value-based model will (or, rather, should) permit this sort of preemptive strike.

Self-defense laws are most commonly drafted so that defensive force is authorized only if it is *necessary* to prevent an *imminent* attack.[132] Such a formulation treats necessity and imminence as independent requirements; the threatened attack must be imminent, *and* the defensive force must also be necessary to prevent the attack.[133] Under this decoupled standard, Victoria's use of force could be viewed as unjustified because the threatened harm was not technically imminent. Andrew, after all, still had to make the long drive to Walden to turn off the water supply. Although Victoria's defensive force remained her only way of escaping certain death, this common standard

132. *See, e.g.*, Allhoff, *supra* note 115, at 1541–48; United States v. Jennings, 855 F. Supp. 1427, 1435–36 (M.D. Pa. 1994) (citing United States v. Oakie, 12 F.3d 1436, 1443 (8th Cir. 1993)), *aff'd*, 61 F.3d 897 (3d Cir. 1995); United States v. Acosta-Sierra, 690 F.3d 1111, 1126 (9th Cir. 2012); *see also* Allhoff, *supra* note 115, at 1545–46 (discussing the commentary to Model Penal Code § 3.04, which provides that although "imminence" is the common formulation, the Model Penal Code's formulation requires a belief that the defensive action is "immediately necessary"); Leider, *supra* note 115, at 1002 ("Defensive violence is only justifiable based on an actual or threatened imminent attack.").

133. *See generally* Leider, *supra* note 115, at 995 n.158; Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 247 (2004).

would not authorize it (more on this in subsection VI.A.5, discussing the value-based model's treatment of battered intimate partner cases).

Recall that the self-defense regime developed here is also concerned with the equal standing of defenders and attackers (value #3) and protecting the defender's private domain (value #4).[134] As such, the value-based model permits appropriate force to be used whenever it is *immediately necessary* to block or fend off an unjust threat.[135] This formulation thus treats the immediacy of the threat as a factor in determining whether the defensive force was necessary, reflecting an unwillingness to leave defenders without the ability to lawfully protect themselves.[136]

Applied to our hypothetical case, this admittedly broader formulation allows the type of preemptive (and necessary) strike Victoria delivered. By explicitly and credibly threatening Victoria and engaging in physical conduct that demonstrated his intention to act on his threat (beating her and driving off in the car to engage in conduct calculated to end her life), Andrew, as a matter of fact, became an immediate and culpable threat to Victoria, even though the actual conduct may be delayed. Under the value-based model, Victoria is, therefore, both internally and externally justified in killing Andrew in order to save her own life.[137]

Others, however, will see this differently. Leverick, for example, will likely rely on her baseline, firm conviction about the equal value of the lives of aggressors and defenders to reject such a test in cases involving battered women.[138] According to Leverick: "[S]elf-defence is only permissible where the accused faced a threat of death (or one of near equivalent seriousness) or where such a threat might reasonably be assumed. The level of violence faced by the majority of battered

134. *See supra* sections II.C–D.

135. This formulation has been accepted in a number of U.S. jurisdictions. *See, e.g.*, 18 PA. STAT. AND CONS. STAT. § 505 (West 2021); TEX. PENAL CODE ANN. §§ 9.31, 9.32 (West 2019); N.J. STAT. ANN. § 2C:3–4(a) (West 2020).

136. *See* Lesch, *supra* note 98, at 110–11; Shana Wallace, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 U. CHI. L. REV. 1749, 1761–62 (2004).

137. *See supra* subsections III.B.1–2.

138. It will be conceded that the term "battered women" is admittedly dated. "Battered intimate partner" is more contemporary and appropriately descriptive. That said, because the literature for years has used "battered woman" or "battered spouse," those terms are on occasion repeated here, though not exclusively so. For the leading, albeit controversial, research-based study of the syndrome, see LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME (4th ed. 2016). *See also* Aya Gruber, *The Duty To Retreat in Self-Defense Law and Violence Against Women*, OXFORD HANDBOOKS ONLINE (July 2017), https://doi.org/10.1093/oxfordhb/9780199935352.013.5 [https://perma.cc/JYX9-8MQX] (discussing the complex relationship between the duty to retreat in self-defense law and violence against women).

women is unlikely to meet this threshold."[139] Leverick, consistent with her baseline objective of protecting both culpable and innocent life, favors a strict temporal interpretation of imminence and disfavors a substitute necessity test. She believes that such loosening of the imminence requirement in favor of "lesser values, such as personal honour or the desire for revenge," fails to accord maximum protection to the value of protecting the attacker's life.[140]

But by sidestepping the more challenging discussion of exactly what other values specifically are (or even might be) implicated in battered intimate partner cases, and by focusing so narrowly on motivations such as "revenge," commentators like Leverick miss the opportunity to anchor their analysis with stouter analytical gear.[141] Their view that a fully innocent defender must endure extreme violence and maiming amounting to serious bodily injury (but not threatened death) at the hands of a fully culpable attacker, furthermore, finds no support in *any* known jurisdiction (a fact that may matter little in some scholarly circles, but that is a rather significant, though curiously largely overlooked, point for those in pursuit of meaningful real-world law reform).

The skeptic may of course assert that in our hypothetical situation Andrew could possibly cool down and change his mind during his drive. He could ultimately decide not to kill Victoria (or at least not to kill her today). But can't the same argument be made in the context of almost any attack? It, after all, is always possible that an aggressor will at the last minute (or second) stop just short of, say, pulling the trigger of his gun or plunging his knife into the defender's chest.

The position taken here—and which finds support in most jurisdictions—is that if the judge or juror concludes, given the surrounding circumstances and the relationship between the parties, that the attack would in fact be carried out (that is, that the defender is *externally* justified) and that the defender reasonably interpreted and reacted to this threat (that is, that the defender is *internally* justified), then the defender's conduct must be *legally* justified.[142] The common

139. LEVERICK, *supra* note 1, at 91 (footnote omitted).

140. *Id.* at 102. Interestingly, however, Leverick momentarily appears to adopt a diluted equality of life position when she advocates in favor of replacing the imminence test with one focused on "inevitability of harm" because that "would bring at least some battered women within the ambit of the law of self-defence." *Id.* at 108.

141. *Cf.* Lesch, *supra* note 98, at 110 (arguing that defenders have the right to defend against the fear of future attack that violent intimate partners may create).

142. *See also supra* subsections III.B.1–2 (discussing external and internal justification). *See generally* Shazia Choudhry & Jonathan Herring, *Righting Domestic Violence*, 20 INT'L J.L. POL'Y & FAM. 95, 109 (2006) ("[T]he key question should be whether the infringement of the right is necessary to avoid an inevitable attack, rather than whether there is imminence.").

"necessary to prevent an imminent threat" language, in contrast, forecloses the possibility that a jury could rule Victoria's action as self-defensive for no good reason. Such an outcome is normatively undesirable and is inconsistent with the balance of the decision grounds.

For illustrative purposes, what follows is intended to broadly demonstrate (albeit in admittedly rough terms that are not meant to imply any quasi-scientific certainty) how the value-based model might approach the hypothetical situation's challenging fact pattern:

Nature of Threat: Culpable

Seriousness of Threat: Severe (Death)

Defensive Force: Severe (Death)

| **Decision Ground** | **Weight** | **Summary of Reasoning** |
|---|---|---|
| Value #1: Collective Violence-Reducing Function (see section II.A) | +1 | Andrew is culpably posing a serious threat. He, therefore, has conditionally waived his right to non-interference. Victoria, moreover, is only using necessary force to ward off the threatened harming *and* wronging. From a systemic perspective, permitting deadly force here does not inappropriately threaten the state's monopoly on violence. |
| Value #2: The Attacker's Right to Life (see section II.B) | 0 | Andrew's decision to engage in a culpable attack threatening death overcomes the presumption that the attacker's right to life must be safeguarded. |
| Value #3: Maintaining Equal Standing (see section II.C) | +1 | Andrew is aggressively claiming he will kill Victoria, and he, therefore, is threatening to impose his will on her and to elevate his interests above hers. Defensive force is necessary to ward off this threatened imputation of unequal standing. |
| Value #4: Protecting the Defender's Autonomy (see section II.D) | +1 | Andrew's culpable attack threatens a severe injury (namely, death). |
| Value #5: Ensuring the Primacy of the Legal Process (see section II.E) | +1 | Victoria is facing a non-compensable injury at the hands of a fully culpable attacker. She, therefore, has no acceptable or practicable legal recourse. As a consequence, the primacy of the legal process is not threatened by her use of defensive force. |

| **Decision Ground** | **Weight** | **Summary of Reasoning** |
|---|---|---|
| Value #6: Maintaining the Legitimacy of the Legal Order (see section II.F) | +1 | Refusing to permit Victoria to use defensive force under these circumstances could reasonably be perceived as very unjust and, therefore, could cause damage to the legal system's legitimacy (in the sense of moral authority in the eyes of the public). |
| Value #7: Deterrence (see section II.G) | +1 | The fully culpable Andrew is threatening Victoria with deadly force. Permitting Victoria to counter this threat with deadly force will, on balance, add to self-defense's specific and general deterrent impact. |
| **TOTAL** | **+6** | **Deadly force is presumptively justifiable (and +6 indicates relatively strong justification).** |

### C. Retreat and Avoiding Conflict

A person's "private domain" can fairly be said to consist of concrete interests and sovereignty, without which a person cannot be truly free.[143] Some will conclude therefrom that any requirement that the defender retreat from, or avoid going to, a place where he has a legal right to be would impermissibly infringe on his autonomy (value #4) and in fact, would strengthen the imputation of lesser standing inherent in the threatened wronging (value #3).[144] Victor, they would say, should therefore be able to go to the local pub even though he is certain that the aggressive Andrew will also be there and will pick a fight with Victor. In fact, the appealing argument often advanced is that, in a free and liberal society, individuals should have the right to go anywhere they are legally permitted to be, regardless of what aggressors they may find there, because freedom of movement is a central and necessary part of individual autonomy (value #4).[145]

143. *See also* Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 22–23 (2016) (describing the "centrality of the individual" in our legal scheme). *See generally* Schopp, *supra* note 20, at 2075.

144. *See generally* Erb, *supra* note 95, at 597 (explaining that in extreme cases a strict duty to retreat could force a person out of the public sphere).

145. *See id; see also supra* section II.D (discussing value #4 (protecting the defender's autonomy)).

Leverick disagrees. She characterizes the "strong retreat rule"—requiring the defender to make an attempt to retreat before using force "*only if an opportunity to do so actually exists*"—as the most "morally appropriate" because, by requiring retreat whenever it is a safe possibility, it (consistent with the approach taken by the U.S. Model Penal Code) "promotes maximum respect for the right to life."[146] She correspondingly rejects the "no retreat rule" because it does not seek to "sav[e] both the life of the aggressor and the life of the victim."[147] For similar reasons she is unpersuaded by the "weak retreat rule":

> Allowing the accused to make the choice to use violence on any occasion where this could have been avoided implies that the law does not respect the right to life of an aggressor and places some other value, such as honour, dignity, or vengeance, higher than that of the aggressor's life.[148]

Leverick's approach, in short, effectively places near-exclusive emphasis on value #2 (protecting the attacker's right to life). The value-based model, in contrast, considers a broader spectrum of values and accordingly does not endorse a categorical duty to, under all circumstances, retreat or avoid places where one *may* become a victim. That said, broader welfarist concerns,[149] as reflected in the balance of the value-based model's decision grounds,[150] render imposing a duty to retreat appropriate when (1) the attacker is an innocent and (2) retreat can be achieved safely. In fact, Richardson and Goff have argued with some persuasive force that a failure to retreat under these conditions establishes that the defender is "no longer morally innocent."[151]

So, under the value-based model, if the defender knows that he will be set upon by an innocent attacker (a person laboring under a mistake, a child, etc.) and retreat can be accomplished without materially increasing a risk of serious harm, then values #1 and #2 counsel in favor of requiring retreat.[152] But, as already noted, these determinations occur on a sliding scale, and the related value judgments are heavily fact-dependent.

By way of further illustration, assume Victor knows that Andrew will threaten Victor with a beating as soon as Victor appears at the pub. Victor knows Andrew is there because he sees Andrew through

146. LEVERICK, *supra* note 1, at 76.
147. *Id.* at 78–79.
148. *Id.* at 81.
149. *See generally* Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor's Culpability in Self-Defense*, 39 TULSA L. REV. 875, 894 (2004).
150. Consider, for example, value #1 (reducing overall societal violence), value #2 (protecting the attacker), and value #5 (ensuring the primacy of the legal process). *See supra* sections II.A–B, E.
151. L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 333 (2012).
152. *See supra* sections II.A–B.

the window of the pub. According to Leverick, in a situation like this, "the value of freedom of movement is outweighed by the weightier value of minimizing violence."[153]

The view developed here agrees with Leverick to a point. By entering the pub with this knowledge, Victor knowingly increases the likelihood that a conflict will arise, thus negatively implicating value #1 (collective violence reduction by protecting the state's monopoly on force), value #2 (protection of the individual attacker), and value #5 (ensuring the primacy of the legal process).[154] The criminal justice system's interest in protecting Victor's rights can, therefore, fairly be said to be negatively impacted by the fact that Victor in essence assumed a certain amount of risk when he entered the pub, thereby weakening the impact of value #3 (equal standing), value #4 (protecting the defender's autonomy), and value #7 (deterrence).[155]

It, after all, would not be asking too much for Victor to avoid this particular pub on this evening, even if this causes him to suffer some minor inconvenience (he could, for example, inform the police of the situation).[156] Similarly, if a defender refuses to retreat from a place when escape is possible, decision grounds such as protecting the equal standing among people (value #3) and protecting the defender's autonomy (value #4) become less weighty. This is particularly so if it is reasonably foreseeable that the defensive conduct necessary to thwart the attack will be severe—thus adding weight to safeguarding the collective violence-reduction function of the criminal law (value #1), protecting the attacker (value #2), and ensuring the primacy of the legal process (value #5).[157]

While the burden of course always remains on others not to become threats in the first place, the value-based model places a corresponding responsibility on individuals to at least attempt to avoid places where they *know* they are likely to be faced with a situation where they either submit to the attack or (more likely) must impose serious costs on the attacker. Similarly, individuals facing innocent threats (not implicating values #3 and #7) should retreat if they can do so safely. Even if the threat is culpable, depending on the nature of the threatened attack and the harm threatened (most directly involving consideration of values #1, #2, and #4), retreat may be called for.

153. LEVERICK, *supra* note 1, at 126.

154. *See supra* sections II.A–B, E.

155. *See supra* sections II.C–D, G.

156. *But see* Erb, *supra* note 95, at 597 (arguing that a restricted duty to retreat allows aggressors to limit innocents' personal freedom).

157. *See supra* sections II.A–E.

## V. WHEN IS DEFENSIVE FORCE "PROPORTIONAL" TO THE THREATENED HARM?

### A. Rejecting Strict Proportionality and Addressing Excessive Force

Some, like Leverick[158] and Wallerstein,[159] wish to impose exacting proportionality between the harm threatened and the defensive force used.[160] In this view, the systemic demand for precise proportionality between the severity of the punishment and the severity of the committed crime should also apply in the context of actions taken in self-defense.[161]

Leverick, by way of illustration, concedes that pregnancy is an "extremely unpleasant potential consequence of a rape"; nevertheless, adopting a strict proportionality approach, she asserts that deadly force to prevent rape should only be permitted if the threatened attack "approaches the standard of a wrong *equivalent to a deprivation of life itself*."[162] Given, moreover, that respect for autonomy requires the wrongdoer to in some sense "will" his own coercion (by threatening a *wrong* rather than a mere *harm*), the argument advanced by commentators like Leverick is that the same principle could be said to also require that the wrongdoer will the *measure* of his coercion.

This argument, however, overlooks that punishment is an institutionalized legal response to wrongdoing that is constrained by systemic factors in the way it is distributed.[163] Stated another way, while consistency may require a uniform system of sentencing that incorpo-

158. *See* LEVERICK, *supra* note 1, at 143–52 (demanding precise proportionality so that severe injury (such as loss of a limb) is not enough to, without more, justify deadly defensive force).

159. *See* Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 1024–25 (2005).

160. *Cf.* Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 74 (2010); Renée Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L., ECON. & POL'Y 331, 358–61 (2006). *See generally* Richard J. Arneson, *Self-Defense and Culpability: Fault Forfeits First*, 55 SAN DIEGO L. REV. 231, 261–62 (2018); Marvin Lim, *A New Approach to the Ethics of Life: The "Will to Live" in Lieu of Inherent Dignity or Autonomy-Based Approaches*, 24 S. CAL. INTERDISC. L.J. 27 (2014); Benjamin Porat, *Lethal Self-Defense Against a Rapist and the Challenge of Proportionality: Jewish Law Perspective*, 26 COLUM. J. GENDER & L. 123, 128 (2013); Kremnitzer & Ghanayim, *supra* note 149, at 894–99.

161. *See* LEVERICK, *supra* note 1, at 143–52.

162. *Id.* at 157 (emphasis added). Note, however, that determining the "standard of a wrong" inevitably involves the same line-drawing that Leverick finds objectionable in the context of deadly force in defense of property. *See id.* at 134–42.

163. *See generally* Mihai Raul Secula, *Particularities of Contraventions Against Other Forms of Legal Liability*, 2010 L. ANNALS TITU MAIORESCU U. 159, 161–62; Victor Tadros, *The Scope and the Grounds of Responsibility*, 11 NEW CRIM. L. REV. 91, 113–17 (2008); Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 CORNELL INT'L L.J. 675, 705–06 (2008).

rates strict proportionality, the same cannot reasonably be said to be true for unpredictable, heat-of-the-moment actions taken in self-defense.

Self-defense, after all, is *anticipatory* in the sense that its aim is the avoidance of harm.[164] Punishment (through sentencing), in contrast, is largely *retrospective* in that it responds to harm with retaliatory harm that is meted out for a variety of reasons, including general and specific deterrence, incapacitation, and prevention.[165] Punishment thus occurs under different circumstances and for different reasons than self-defensive conduct. Attempts to analogize the two on the basis of "willed coercion" consequently lack persuasive force.

Under the approach developed here, the argument for cabining a defender's ability to exercise force is stronger when the attacker is morally innocent—and therefore does not fully implicate value #3 (equal standing), value #4 (protecting the defender's autonomy), value #5 (primacy of the legal process), and value #7 (deterrence).[166] As discussed previously in the context of the decision grounds' concern with ensuring equal standing among people and deterring crime,[167] beyond willed coercion there are sound normative (and utilitarian) reasons for imposing additional limitations on the amount of force that can be used against an innocent attacker.

It is of course true that the innocent attacker also threatens concrete harm to the defender. But it is important to remember that the innocent attacker does not deny the intersubjective foundation of the defender's rights (value #3) in the way that a culpable attacker does.[168] And as already noted, the law cannot expect a defender to absorb an attacker's seriously harmful and unjustified, though innocent, attack. Such a requirement would compel the defender to subordinate his autonomy and concrete interests to the welfare of the attacker.[169] A defender may, therefore, under the value-based method use force even against an innocent attacker. But the amount of harm threatened by the attacker will be more carefully weighed against the

164. *See generally* Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and a Sleeping Man*, 16 BUFF. WOMEN'S L.J. 65 (2008).

165. *See generally* Rebecca L. Rausch, *Reframing Roe: Property over Privacy*, 27 BERKELEY J. GENDER L. & JUST. 28, 50–51 (2012); Volker Behr, *Punitive Damages in American and German Law—Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI.-KENT L. REV. 105, 113 (2003).

166. *See supra* sections II.C–E, G; *see also* Rönnau & Hohn, *supra* note 65, at sidenotes 6, 13, 74; Volker Erb, *Notwehr und Notstand*, *in* MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH, BAND 1, sidenotes 60, 209 (Bernd von Heintschel-Heinegg ed., 2017).

167. *See supra* sections II.C, G.

168. *See supra* section II.C; *see also* Erb, *supra* note 166, at sidenote 18; SUSANNE RETZKO, DIE ANGRIFFSVERURSACHUNG BEI DER NOTWEHR 127 (2001); JOACHIM RENZIKOWSKI, NOTSTAND UND NOTWEHR 275 (1994).

169. *See supra* section II.D.

amount of defensive force that may be used, whether safe retreat is required, and what amount of harm the defender can be expected to absorb.

Whenever a defender uses force, moreover, she may err and use more force than is actually necessary to ward off the culpable threat. Following the reasoning of Grotius,[170] an unreasonable error that results in the defender using excessive force to ward off the threat intrudes on the violence-reducing function of the criminal law by threatening the state's monopoly on force (value #1). It also impermissibly harms the individual attacker (value #2) because such force lies outside the conditional "gap" created by the person purportedly posing the threat. Consistent with the value-based model's treatment of mistake,[171] then, a reasonable mistake as to the amount of force necessary to thwart the attack will excuse the defender.[172] An unreasonable mistake of fact, on the other hand, renders self-defense unavailable.

### B. Deadly Force in Defense of Property

Controversially in some circles,[173] the value-based model, on balance, agrees with the U.S. and English courts that deadly force in defense of property should, as a general rule, be rejected. While certainly susceptible to different normative appraisals—and recognizing the power of the argument that property can in fact be a genuine extension of the "self"[174]—the value-based model nevertheless agrees that

170. *See generally* Robert Feenstra, *The Dutch* Kantharos *Case and the History of* Error in Substantia, 48 TUL. L. REV. 846, 856 (1974).

171. *See supra* sections II.A–B.

172. *See supra* section III.B.

173. The majority position among German scholars, for example, holds that deadly force may be used to defend property. *See, e.g.*, CLAUS ROXIN, STRAFRECHT ALLGEMEINER TEIL 590 (3d ed. 1997); JESCHECK & WEIGEND, *supra* note 80, at 348 n.49. *But see* Luís Greco, *Notwehr und Proportionalität*, 165 *Goltdammer's Archiv für Strafrecht (GA)* 665, 671 (2018) (discussing a minority position that even the threatened loss of €5,000 is insufficient to justify deadly defensive force); Klaus Bernsmann, *Überlegungen zur tödlichen Notwehr bei nicht lebensbedrohlichen Angriffen*, 104 ZStW 290, 326 (1992) (contending that deadly force in defense of property is never justified). *See generally* TEX. PENAL CODE ANN. § 9.42(3)(A) (West 2019) (stating that the use of deadly force in defense of property is justified when "the land or property cannot be protected or recovered by any other means"); Robert Schopp, *Self-Defense*, *in* IN HARM'S WAY: ESSAYS IN HONOR OF JOEL FEINBERG (Jules Coleman & Allen Buchanan eds., 1994), *discussed in* Kaufman, *supra* note 92, at 27–28.

174. *See generally* Daniel Austin Green, *Indigenous Intellect: Problems of Calling Knowledge Property and Assigning It Rights*, 15 TEX. WESLEYAN L. REV. 335, 344–45 (2009); Meir Dan-Cohen, *The Value of Ownership*, 1 GLOB. JURIST FRONTIERS 1, 25 (2001); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 343 (1988); Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN DIEGO L. REV. 79, 91 (1986).

while most (though not necessarily all) property interests are generally compensable, a human life is not.[175]

Of course, it is difficult to *ex ante* determine whether law enforcement will be able to recover the property or arrest the thieves so that alternative compensation can be sought. As articulated here, however, the criminal law's objectives include violence reduction and protection of the state's monopoly on force (value #1), protection of the attacker's presumptive right to life (value #2), ensuring the primacy of the legal process (value #5), and avoiding results that could threaten the legitimacy of the criminal law (value #6).[176] Consequently, the law, on balance, would be hard-pressed to permit a defender to extinguish another's life solely because the defender at the time believes this to be the only way for him to ensure that his property is not damaged or permanently taken away—impacting value #3 (equal standing) and value #4 (protecting the defender's autonomy)—or to send a deterrent message to would-be criminals (value #7).[177]

That said, and on a more practical note, threats purely to property occur relatively infrequently. Any indication by the attacker that he also poses a physical threat—for example, if the defender attempts to stop the theft of, or damage to, the property—will take the case outside of the realm of defense of property, shifting the value-based model's balance of concerns.

As a slight aside, my thinking on this topic has shifted over the years (candidly, having children has materially contributed to the softening of my views on deadly force in defense of property—and, for that matter, also in other contexts). I, therefore, today find myself challenged to agree with either of the standard hard-edged "yes" (Schopp) or "no" (Leverick and Ashworth) answers when it comes to whether deadly force should *ever* be authorized in defense of *any* property. But the attractiveness of the value-based model is that it provides the analytical flexibility to consider different circumstances and normative assumptions. Not everyone will reach the same conclusion, but the analysis can still follow the same common framework.

### C. Responding to "Trivial" Threats

We have shown that both innocent and culpable threats infringe on the defender's autonomy (value #4).[178] We have also discussed how and why the value-based model devalues threats to property when

175. *See generally* Kaufman, *supra* note 92, at 28.
176. *See supra* sections II.A–B, E–F.
177. *See* Robert Pest, *Die Erforderlichkeit der Notwehrhandlung*, *in* DER ALLGEMEINE TEIL DES STRAFRECHTS IN DER AKTUELLEN RECHTSPRECHUNG 165 (Fabian Stam & Andreas Werkmeister eds., 2019); Green, *supra* note 31, at 501; *see also supra* sections II.C–D, G (discussing value #3, value #4, and value #7).
178. *See supra* section II.D.

compared to threats of physical harming.[179] So does this mean that a person can use deadly force to, say, prevent another from stepping on one's toes if that is the only way to avoid the threatened physical "harm" (or, rather, discomfort)?

*1. A Comparison with Schopp's Approach*

Schopp, as noted, contends that a liberal society must treat *any* culpable infringement of an individual's autonomy as extremely serious.[180] At the very heart of this argument lies the strict separation between public and private spheres of action. Relying heavily on the work of Feinberg[181] and Rawls,[182] Schopp argues that "substantive liberals" (like him) consider sovereignty a categorical, underivative, non-instrumental, and, most significantly, non-compensable fundamental value.[183] The right to self-determination in the public sphere, the right to unfettered choice in those matters falling into the private domain, and equality of citizenship are thus central to Schopp's thesis. He concludes that only a system allowing largely *unlimited* discretionary authority in the private sphere can be described as "liberal" in this sense. A person's private sphere should therefore largely be beyond the reach of political interference.[184]

Schopp uses the example of an elderly farmer who is working at her market stall. A local bully approaches the stall and takes one of the farmer's apples. When she asks the bully to return the apple, he taunts the farmer for her inability to stop him, so the farmer takes a handgun from under her apron and kills the bully. According to Schopp, the shooting was necessary to prevent the theft of the apple. It, therefore, "does not seem counterintuitive to say that [the farmer] was justified" in shooting the bully dead.[185] Though this outcome will likely strike most as overly harsh, it is predictable in light of Schopp's stipulations.

When subjected to closer examination, however, some weaknesses begin to emerge. For example, Schopp provides that "gratuitous" defensive force is not permitted.[186] This, however, is not much different than saying necessity is required. Moreover, to simply assert that the "private sphere" is outside the reach of the criminal law's influence and that an individual's sovereignty can never be infringed because it

179. *See supra* section V.B.
180. *See* SCHOPP, *supra* note 3, at 83–88.
181. *See generally* JOEL FEINBERG, HARM TO SELF 28–31 (1986).
182. *See generally* JOHN RAWLS, POLITICAL LIBERALISM 4–21 (2005).
183. SCHOPP, *supra* note 3, at 67.
184. *Id.* at 77; *see also* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 770–72 (1986) (reaffirming that the Constitution promises that aspects of the private sphere are largely beyond government reach).
185. SCHOPP, *supra* note 3, at 84.
186. *Id.* at 78.

is non-compensable are conclusory assertions of belief demanding principled (and, it is argued, value-based) support. Schopp, however, provides no such arguments.

The fundamental difficulty with Schopp's categorical conception of individual autonomy, in short, is that it is challenging to square it with life in a modern society. Whether called "welfarist" or "humanitarian" concerns, or "values #1, #2, and #5 issues," life routinely, predictably, and justifiably imposes on citizens demands that they must at times restrict their otherwise autonomous spheres of activity in order to promote other legitimate interests.[187] Put another way, we do not live on an island. As discussed above, restricting certain purely autonomous action is in fact a (or perhaps *the*) core function of the criminal law.[188]

In sum, the position taken here diverges from Schopp's theory in part because the value-based model views trivial harms as adding little (or, indeed negative) weight to competing decision grounds, such as violence reduction and protection of the state's monopoly on force (value #1), protection of the attacker (value #2), and ensuring the primacy of the legal process (value #5).[189] While Schopp's position may offer additional protection to the defender's autonomy (value #4) and increase deterrence (value #7),[190] it does so at such a great cost in terms of the exercise of disproportionate force, implicating values #1 and #2. Indeed, it can be said to potentially undermine the moral legitimacy of the legal order (value #6).[191]

In cases involving trivial threats, defensive force must be limited by more than simple necessity. Contrary to Schopp's claim—and providing further support for the hypothesis's assumptions about the importance of transparency to sound decision-making—the *nature* and *amount* of harm threatened very directly impact the implicated values. The interplay with the facts and the values, in turn, provide a reasonable (and reasoned) argument for whether the conduct should qualify as justified self-defense.[192]

187. *See generally* Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387, 466–67 (2012); Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171, 1174–75 (1993).

188. *See also* A.P. Simester & Andreas von Hirsch, *On the Legitimate Objectives of Criminalisation*, 10 CRIM. L. & PHIL. 367, 376–78 (2016) (discussing when the government should regulate harmful activity). *See generally supra* sections II.A–D.

189. *See supra* sections II.A–B, E.

190. *See supra* sections II.D, G.

191. *See supra* sections II.A–B, F.

192. *See generally supra* section II.C.

*2. Subjective or Objective Evaluation of Triviality?*

Assume Andrew is about to dispossess Victor of a stamp that, viewed objectively, is of little financial value. To Victor, however, the stamp holds immense value because it was a special gift from his grandfather who spent years trying to locate and purchase it. Consistent with the logic underlying the requirement that mistakes of fact must be objectively reasonable,[193] the position taken here is that triviality must likewise be determined objectively based on a "reasonable person" standard.[194]

An exception to this rule, however, is carved out for situations in which the attacker in fact *knows* that the object he is threatening has a particular subjective value to the defender (that is, Andrew is aware that the stamp's theft constitutes a subjectively serious intrusion on Victor's personal autonomy (value #4) and, relatedly, realizes that such a theft reflects significant disrespect to Victor's equal standing (value #3)).[195] In contrast, an individual who, due to some personal idiosyncrasy, *unreasonably* places a nontrivial value on an objectively worthless item such as, say, a napkin, will not qualify for this possible exception to the general rule.

If then the attacker knows that the (objectively) trivial interest threatened has a special (subjective) value for the defender, and if this attribution of subjective value is reasonable under the circumstances, the otherwise trivial threat is weighted based on the subjective nontrivial value due to the parties' shared understanding of the object's value. The attacker's knowledge of the sentimentality magnifies the imputation of lesser standing (value #3) such a threat implies.[196]

## VI. OTHER CHALLENGING CASES[197]

### A. Innocent Attackers

Andrew is playing with his younger cousin's air gun in his backyard. Andrew thinks that it is a harmless toy, but in reality, the gun is

193. *See supra* section III.B.

194. *Cf.* Tatjana Hörnle, *Social Expectation in the Criminal Law: The Reasonable Person in a Comparative Perspective*, 11 NEW CRIM. L. REV. 1, 31 (2008) ("A reference to the 'prudent and reliable person in the specific situation and social role of the actor,' which is the standard phrase in German criminal law, is better suited."). *See generally* Caleshu v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 737 F. Supp. 1070, 1083–87 (E.D. Mo. 1990) (using the reasonable person standard to determine the triviality of alleged misconduct in the employment context).

195. *See supra* sections II.C–D.

196. *See supra* section II.C.

197. The cases that follow are described as theoretically challenging because they have become regularly debated features of scholarly discussions on the subject. Other issues, such as provocation, battered intimate partner cases, defense of one's home, retreat, and mistake, have already been discussed (or, in the case of

loaded, the safety mechanism is disengaged, and the gun is fully pressurized. Andrew playfully points the gun at his friendly neighbor, Victor, who happens to be walking by on his way home from work. Victor immediately recognizes that Andrew is in fact pointing an armed and loaded air gun at him, and he also realizes that Andrew is about to discharge it. Victor believes Andrew does not understand that the gun is loaded. The only way for Victor to avoid being injured by the pellet is to throw his heavy briefcase at Andrew a split second before Andrew pulls the trigger, thereby knocking Andrew off balance and causing him to sustain a concussion.

Andrew's conduct clearly constitutes a threat of harm to Victor's autonomy and concrete interests (value #4), for Victor will be injured by the pellet if he does not throw his briefcase at Andrew.[198] Setting aside for now the possibility that Andrew's conduct is subjectively reckless because Andrew knows that he should never point even a toy firearm at a person, it can be said that Andrew is morally innocent in the sense that he does not *intend* to inflict any injury on Victor, nor does he seek to place his own interests or desires over those of Victor (that is, his conduct does not implicate value #3).[199]

*1. Nozick's "Well Hypothetical"*

Consider next a version of Nozick's famous hypothetical in which Brutus throws the faultless Andrew down a deep and narrow well. The hapless Victor is already at the bottom of the well. If Victor does not first vaporize Andrew with his ray gun, Andrew is certain to crush Victor to death (or at a minimum, cause him great bodily injury).[200] While Andrew cannot be described as an "attacker" in the ordinary sense of the word because cruel Brutus threw him down the well against his will—that is, value #3 (safeguarding equal standing) is not implicated[201]—Andrew does, in fact, pose an actual and immediate threat of serious harm to Victor. Whether he likes it or not, he is about to seriously injure or crush Victor to death—thus placing great weight on value #4 (protecting a defender's autonomy), while arguably not implicating value #1 (collective violence reduction), value #2 (protect-

battered intimate partner cases, will be discussed later). As Russell Christopher puts it, the challenge inherent in an undertaking such as this is to "devise a theory which yields the same conclusion as our nearly undisputed intuitions" and that explains "why the initial application of force is not impermissible aggression but rather permissible self-defense." Christopher, *supra* note 69, at 571–72.

198. *See supra* section II.D.

199. *See supra* section II.C.

200. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 34–35 (1974); *see also* Peter Westen, *Reflections on Joshua Dressler's* Understanding Criminal Law, 15 OHIO STATE J. CRIM. L. 311, 326–27 (2018) (reviewing Nozick's hypothetical and examining which actor could be justified in vaporizing another actor).

201. *See supra* section II.C.

ing the individual attacker), value #5 (primacy of the legal process), or value #7 (deterrence).[202]

While Andrew, as an innocent threat, would generally be entitled to heightened protection because of his lack of moral culpability, the overwhelming balance of scholars who have examined this hypothetical are in accord that the gravity of the threatened harm (namely, death) justifies Victor vaporizing Andrew with his ray gun (a result that will likely not so offend widely held moral standards of right and wrong as to implicate value #6[203]). Victor will not be punished because his action was justified.[204] If Victor were to merely suffer slight bruising as a result of Andrew's fall, however, then the comparatively minor threatened harm (lessening the pro-defense impact of values #1, #2, #3, #4, and #5) would, at least from my perspective, shift the balance in favor of the innocent Andrew and would, therefore, likely require Victor to absorb the slight injury.[205]

### *2. Contingent Threats and Innocent Shields*

Contingent threats are only perceived as threats because of the direct danger coming from someone or something else. Consider, for example, a case in which an arrow is shot at the innocent Victor by crazed assassin Andrew. Ida happens to be standing directly behind Victor. If Victor were to jump out of the way of the arrow, Ida would certainly be killed. Ida would nevertheless be *un*justified in grabbing Victor and holding him in place as a sort of shield because Victor is merely a contingent threat (not implicating the previously discussed values); Andrew's arrow is the identifiable immediate threat.[206]

Innocent shields, though used as a *means* to ward off a threat, are not threats themselves. Their use, therefore, once again amounts to impermissible self-preference.[207] (Of course, if Victor somehow colluded with the assassin Andrew and purposefully placed himself in

202. *See supra* sections II.A–B, D–E, G.
203. *See supra* section II.F.
204. *See supra* Part III.
205. *See supra* sections II.A–E.
206. And this result would not change even if it were certain that the arrow would only hit Victor in the hand, whereas it would go straight through Ida's heart. While some other defense such as lesser evils may apply, the right to freedom of Victor's discretionary control over his personal domain would make Ida's intrusion offensive, rather than defensive, thus eliminating the possibility that she would be able to claim self-defense.
207. For the related discussion on necessity, see Part IV. *See also* John Alan Cohan, *Homicide by Necessity*, 10 CHAP. L. REV. 119, 177–79 (2006) (discussing the use of "innocent shields of threats" and the theory of necessity, which may lead someone to harm an innocent person to stop or prevent a greater harm); Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CALIF. L. REV. 711, 714–16 (2000) (examining necessity within the context of an innocent threat and the limits of self-defense).

front of Ida to prevent her from seeing the incoming arrow, Victor himself would become part of the immediate threat and Ida could use self-preferential force against him.)

*3. Passive Threats*

The value-based model provides that a passive immediate threat can be blocked or fended off using justified defensive force. Consider a case in which the shipwrecked Andrew is on a ship's rescue ladder paralyzed by fear and unable to move.[208] His inability to either go up or down the ladder prevents the shipwrecked Victor from escaping the pounding seas. Andrew under these circumstances poses a serious, though innocent, direct threat of harm to Victor. Because the threatened harm is very great, Victor is allowed to use self-defensive force.

The reader, however, may recall our discussion immediately above and understandably wonder why Andrew, under these circumstances, is not considered a mere contingent threat who may not be met with defensive force. While the distinction between a direct and a contingent threat may not always be readily drawn, perhaps the most sensible means of distinguishing the two is to consider whether there is an objectively good reason for the paralyzed Andrew's threatening conduct.

Consider also the case of shipwrecked Andrew and Victor clinging to the same piece of driftwood that will support the weight of only one of them. Any force to shove off the other would constitute improper self-preferential killing because there is an objectively good reason for why both men are hanging on to the driftwood—they are trying to save their own lives from a roiling sea.

While it is true that each is exacerbating the threat to the other, neither is directly causing the threat—thus implicating value #3 (equal standing).[209] On the other hand, if Andrew is paralyzed by fear and unable to climb up the rescue ladder, he is preventing Victor from escaping certain death for no objectively good reason—that is, he is unjustifiably threatening Victor's autonomy (value #4)[210]—and this shifts the sliding-scale balance in favor of protecting the defender. Although Andrew's reason—fear—may be understandable and non-culpable, it is not, objectively speaking, a good reason, for Andrew is directly preventing Victor from saving himself by blocking the only escape route.

208. This hypothetical is drawn from the 1987 Zeebrugge disaster. *See generally M.S. Herald of Free Enterprise*, WIKIPEDIA, https://en.wikipedia.org/wiki/MS_Herald_of_Free_Enterprise [https://perma.cc/7LB4-PGLD] (last visited Feb. 2, 2021).

209. *See supra* section II.C.

210. *See supra* section II.D.

So, while Andrew is not morally culpable for staying in place, he, without an objectively good reason, is threatening Victor's autonomy and right to life (value #4) (the other values are largely left neutral in this scenario).[211] This outcome can be contrasted with the situation in which Victor is clinging to a plank following the sinking of a ship. If Andrew tries to push Victor off of the plank, Victor is uniquely entitled to use self-defense to resist because Victor is not a direct threat to Andrew (though the converse is true).

*4. The Case of the Plank and the Two Shipwreck Survivors*

Imagine again a case similar to the one discussed by Greek philosopher Carneades of Cyrene, Sanford Kadish, and others, in which Andrew and Victor are shipwrecked and have been clinging to the same piece of driftwood.[212] Assume that the driftwood slowly begins to sink because it cannot take the weight of both men. Under our analysis, if either shoved off the other to save himself, his action would not be justified as self-defense because neither's equal standing (value #3) nor autonomy (value #4) is being threatened by the other's actions or inaction.[213] Such a use of force would instead constitute an impermissible self-preferential act of aggression that would justify the other in using defensive force to thwart the attack. If, in contrast, Victor held on to the driftwood first, and Andrew subsequently tried to also cling to it, causing it to sink, Victor would be justified in using defensive force against Andrew because Andrew's actions would implicate value #3 (equal standing), value #4 (protecting the defender's autonomy), and (arguably) value #6 (legitimacy of the criminal law), and would, thus, amount to impermissible self-selection.[214]

*5. Battered Intimate Partner Cases*

The analysis turns next to the particular challenge posed by cases where the person claiming self-defense is a battered intimate partner. Such cases can generally be divided into two categories. In the first category, the battered partner exercises force during an episode of physical abuse by the batterer. In the other category of cases, the partner uses deadly force against her batterer in the absence of any occurrent abuse, but in *fear* or *anticipation* of future renewed attacks. In the most controversial cases fitting into this latter (and more challeng-

211. *Id.*
212. *See* Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 274 (1987). This thought experiment was first proposed by Carneades of Cyrene and is referred to as the "plank of Carneades." *See* SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS 95 (Basil Kennett trans., Lawbook Exchange 2005) (1672).
213. *See supra* sections II.C–D.
214. *See supra* sections II.C–D, F.

ing) group, there is no overt evidence of a temporally "immediate" threat because the batterer was, for example, sleeping.

I distinguish these two contrasting fact patterns, respectively, as "confrontation" and "non-confrontation" cases. Theorists generally agree that the latter group of cases presents the greatest challenge under traditional legal doctrine. Some concentrate on the substantive law of self-defense and the admissibility of expert testimony regarding the battered intimate partner syndrome as relevant to self-defense. Others criticize substantive self-defense law as biased against the battered partner (or against women generally) and advocate for either modifications of the self-defense standards or a separate defense.[215] Contemporary proponents of both perspectives largely agree, however, that expert testimony regarding the battered intimate partner syndrome is necessary to dispel stereotypes of battered partners and to establish various components of the traditional (or modified) defenses.[216] (There is, in fact, a lively and ongoing debate over the long-term psychological effects of prolonged battery.)[217]

Some, like Dressler, have suggested that a battered woman acts under duress when she kills her sleeping violent partner in order to forestall future violence. That is, the woman avoids harm by complying with the "demands" made by a person threatening the accused.[218] This argument is flawed, however, because the battered partner at bottom is still making a self-preferential decision to kill her battering partner. It is unconvincing to argue that the batterer is "demanding" that his victim kill him. That is, she is not simply complying with her batterer's demand (which, after all, is the definition of duress—though

215. *Compare* Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 152 (1985) (calling for a reconsideration of substantive self-defense doctrine), *with* Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 415–22 (1988) (advocating for a "reasonable battered woman standard").

216. *See also* United States v. Lopez, 913 F.3d 807 (9th Cir. 2019) (allowing testimony on Battered Woman Syndrome to be heard by the jury to explain why a formerly abused woman may respond a certain way when under duress); State v. Pisciotta, 968 S.W.2d 185, 186 (Mo. Ct. App. 1998) (finding the woman did not act in self-defense, despite evidence that she was battered, because the battering only provided evidence of the woman's state of mind—not a defense). *See generally* Kassandra Altantulkhuur, *A Second Rape: Testing Victim Credibility Through Prior False Accusations*, 2018 U. ILL. L. REV. 1091, 1108; Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 205–20 (1986).

217. *See generally* MARTIN BLINDER, *The Battered Woman's Syndrome*, *in* PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW § 8:15 (5th ed. 2019).

218. Joshua Dressler, *Battered Women Who Kill Their Sleeping Tormenters: Reflections on Maintaining Respect for Human Life While Killing Moral Monsters*, *in* CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART 259–82 (Stephen Shute & Andrew Simester eds., 2002).

the concept of "duress of circumstances," which is sometimes treated as a species of necessity,[219] may, as discussed herein, also apply).

The particular difficulty with battered intimate partner cases is not analytical. Rather, their *facts* are typically unique and challenging. Indeed, if the matter were a simple deadly-force-in-defense-of-life situation, then there would be no need to create a separate category of self-defense cases dealing with the particularities of intimate partners who are battered and, therefore, react differently than a "reasonable person" would under like circumstances.

England, in an effort to protect victims of domestic violence, enacted legislation criminalizing controlling or coercive behavior[220] in the context of intimate and family relationships.[221] In particular, section 76 of the Serious Crime Act of 2015 created the new offense, which seeks to capture abusive conduct that may not formally fit the definitions of assault, threatening to kill or seriously injure, or stalking, but that has a serious impact on the victim even in the absence of physical violence (or the fear thereof).[222]

This law, following Evan Stark's model of coercive control, reflects an evolution in the thinking about domestic abuse in that it helps explain why a purported defender (1) stayed in the abusive relationship and (2) felt trapped, without any viable option other than the use of deadly force. This information (supported by numerous studies[223]), in

219. *See* R. v. Hasan [2005] UKHL 22 (appeal taken from Eng.); R. v. Conway [1989] QB 290, 297. While some may argue that these circumstances involve an implied threat of harm, such a fact-specific argument cannot be given blanket acceptance.

220. *See generally* EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 83–170 (2007).

221. Serious Crime Act 2015 § 76(1). *See generally* Emma E. Gorbes, *The Domestic Abuse (Scotland) Act 2018: The Whole Story*, 22 EDINBURGH L. REV. 406, 406–09 (2018); Marilyn McMahon & Paul McGorrery, *Criminalising Controlling and Coercive Behaviour: The Next Step in the Prosecution of Family Violence*, 41 ALTERNATIVE L.J. 98, 98–100 (2016).

222. *See generally* McMahon & McGorrery, *supra* note 221, at 98–100.

223. *See also* Amir Pichhadze, *Proposals for Reforming the Law of Self-Defence*, 72 J. CRIM. L. 409, 428–29 (2008) (discussing research on the battered woman theory); *cf.* Joan S. Meier, *Dangerous Liaisons: A Domestic Violence Typology in Custody Litigation*, 70 RUTGERS U. L. REV. 115, 159 (2017). *See generally* Ruth Aitken & Vanessa E. Munro, *Domestic Abuse and Suicide Report 2018*, REFUGE PUBL'NS (2018), https://www.refuge.org.uk/wp-content/uploads/2020/01/Domestic-Abuse-and-Suicide.pdf [https://perma.cc/S6CJ-WGRU]; Torna Pitman, *Living with Coercive Control: Trapped Within a Complex Web of Double Standards, Double Binds and Boundary Violations*, 47 BRITISH J. SOC. WORK 143 (2016); Laura E. Watkins et al., *The Longitudinal Impact of Intimate Partner Aggression and Relationship Status on Women's Physical Health and Depression Symptoms*, 28 J. FAM. PSYCH. 655 (2014); MICHAEL P. JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE (2008); STARK, *supra* note 220, at 83–170; Deborah Loxton et al., *Psychological Health in Midlife Among Women Who Have Ever Lived with a Violent Partner or Spouse*, 21 J. INTERPERSONAL VIOLENCE 1092 (2006); Mary Ann Dutton & Lisa A. Goodman,

turn, is relevant to a defender's good-faith, subjective fear of imminent injury or death. It, moreover, appreciates the objective reality of domestic violence (in terms of patterns of violence, degree, and triggers) and the related reasonableness of the response.[224]

As relevant here, and as detailed above, the value-based model's concern is with protecting the equal standing (value #3) and private domain (value #4) of both defenders and attackers. It, therefore, permits force to be used to the extent that it is *immediately necessary* to block or fend off an unjust threat.[225] By endorsing such a relatively broad formulation of what otherwise is the imminence requirement, the value-based model accords battered intimate partners with a comparatively greater ability to lawfully protect themselves—and, more to the point, with the *opportunity* to persuade courts and juries that their conduct was, under the circumstances, justified self-defense.

### B. Special Rules for "Attacks" on the Police?

Few topics have in recent years generated as much passionate debate as the use of force by (and against) the police. Police officers by dint of their vocation frequently (and, critics would contend, too frequently) find themselves in situations where they believe they must use force to subdue and arrest individuals with whom they come into contact. Accordingly, they tend to receive special training in dealing with noncompliant, violent individuals who pose a threat to them (though the quality and extent of that training—and the relative lack of emphasis placed on de-escalation techniques—are very much subjects of ongoing debate).[226] Yet despite this training, instances of alleged (and, in contemporary times, recorded) excessive force have become a regular fixture of the evening news in the U.S. and elsewhere.[227] Determining the legitimate extent of police violence in self-defense against attackers has, therefore, never been more topical.[228]

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*Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 747 (2005).

224. *See also* BLINDER, *supra* note 217, at § 8:15 (analyzing battered woman syndrome and case examples); Jonathan Herring, *The Severity of Domestic Abuse*, 30 NAT'L L. SCH. INDIA REV. 37, 40–43 (2018) (defining coercive control and its relation to domestic abuse cases). *See generally* Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. STATE U. L. REV. 111, 163–64 (2000); Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 996–1026 (1995).

225. *See supra* Part IV.

226. *See generally* Erb, *supra* note 166, at sidenote 187; FUNK, *supra* note 4, at 132–33.

227. *See generally* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 629–35.

228. *See* DSOUZA, *supra* note 37, at 169–72.

Because the value-based model recognizes the paradox of mutual justification, if an officer's exercise of defensive force is justified, then a citizen will not receive the justification of self-defense if she counters the officer with force.[229] On the issue of retreat, for policy-based reasons there is broad agreement in the U.S. that officers, as a general rule, are not legally obligated to retreat when facing potential aggression.[230] That said, basic prudence and common de-escalation methodologies teach that strategic retreat from a volatile or otherwise escalating situation is frequently the officer's best and most professional response.

Turning to the reasonableness of the officer's belief (often *the* outcome-determinative question), the problem with the common "reasonable belief" standard in the police context is that the term is open-ended (or, as Baker puts it, a "woolly word"[231]). It is often equated with "typicality" (that is, it is measured against the beliefs of the typical officer). Article 2(2) of the European Convention on Human Rights, for its part, rather reasonably dictates that self-defense is unavailable in cases where the officer was laboring under an objectively unreasonably mistaken belief because such force is not "absolutely necessary."[232]

Consistent with the value-based model's emphasis on value #1 (collective violence reduction), value #2 (protection of the individual at-

229. Because external justification is not required in England, citizens are in fact able to act in self-defense if they honestly believe they are being attacked. *See also* Rönnau & Hohn, *supra* note 65, at sidenotes 129–30; Erb, *supra* note 166, at sidenote 192; BAKER, *supra* note 45, at 917, 926–31 (discussing the circumstances in which a citizen may "use reasonable force" against the police). Because an officer's use of deadly force to apprehend a fleeing felon or to effectuate an arrest does not, without more, implicate self-defense, those situations will not be discussed here.

230. *See* N.Y. PENAL LAW § 35.15 (2)(a)(ii) (LexisNexis 2019); Boykin v. People, 45 P. 419, 421 (Colo. 1896); Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1234 (2016); BOAZ SANGERO, SELF-DEFENCE IN CRIMINAL LAW 202–03 (2006); Gail Rodwan, *Criminal Law*, 39 WAYNE L. REV. 503, 538 (1993).

231. BAKER, *supra* note 45, at 919.

232. *See generally* Bubbins v. United Kingdom, App. No. 50196/99 (March 17, 2005), http://hudoc.echr.coe.int/eng?i=001-68548 [https://perma.cc/8VUJ-NJK3]; McCann v. United Kingdom, App. No. 18984/91 (Sept. 27, 1995), http://hudoc.echr.coe.int/eng?i=001-57943 [https://perma.cc/YUP8-6BPH]; Stewart v. United Kingdom [1984] 7 E.H.R.R. 453; *Guide on Article 2 of the European Convention on Human Rights*, EUR. CT. HUM. RTS. 22–23 (last updated Dec. 31, 2020), https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf [https://perma.cc/N5RR-6WSG]; IAN PARK, THE RIGHT TO LIFE IN ARMED CONFLICT 36–41 (2018). This objective test appears to conflict with the subjective "genuine belief" standard adopted in England. *See* HANNAH RUSSELL, THE USE OF FORCE AND ARTICLE 2 OF THE ECHR IN LIGHT OF EUROPEAN CONFLICTS 27 (2017); LEVERICK, *supra* note 1, at 190. *But see* R. (Bennett) v. Coroner [2007] A.C.D. 2 (contending that Article 2 and England's reasonableness test are not incompatible and presuming that state agents are objectively reasonable).

tacker), and value #6 (maintenance of the legitimacy of the legal order),[233] and in line with the articulated policy reasons, law enforcement officers operating reasonably within their roles should be considered prima facie justified when using reasonable force to effectuate arrests when the circumstances dictate that such arrests are necessary. Any use of force to "defend" against officers operating reasonably cannot, therefore, qualify as self-defense, lest the situation fall under the paradox of mutual justifications.[234] Alternative outcomes would make it exceedingly difficult for the police to, as a practical matter, effectively fulfill their professional obligations.

Consistent with Lee's position,[235] traditional self-defense doctrine applying to civilians, and the value-based model's emphasis on the right to life, the conclusion reached here is that the officer exercising defensive force (1) must have reasonable beliefs *and* take reasonable actions, (2) must be subjectively motivated by those reasonable beliefs, and (3) the officer's conduct must be immediately necessary and proportional to the threat she is facing. These requirements are comparatively stringent, but recent events have demonstrated that such appropriate restrictions on force can no longer be pushed aside.

Retreat, on the other hand, is a difficult requirement to impose on the police.[236] That said, as part of the reasonableness evaluation, the fact finder should be directed to consider whether the officer engaged in any available de-escalation measures[237] prior to deploying deadly self-preferential force. This more balanced approach reasonably recognizes the attacker's individual right to life (value #2), without inappropriately infringing on the officer's rights (value #4 and possibly value #3) or the state's collective interest in preserving law and order (value #1). The value-based model, in sum, does not follow those U.S. jurisdictions that elevate the officer over the citizen by granting her unique protections (a) when she is acting objectively unreasonably or (b) lacks the requisite subjective defensive will.

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233. *See supra* sections II.A–B, F.

234. This is also referred to as the "incompatibility thesis." *See supra* subsection III.B.3; Rosenau, *supra* note 67, at sidenote 18; Fontaine, *supra* note 66, at 78–79.

235. *See* Lee, *supra* note 227, at 661–75. *See also* Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191, 235–37 (1998) (proposing a self-defense provision for Congress to adopt that relies on "reasonable beliefs and reasonable acts").

236. *See supra* section IV.C (discussing why retreat should not be legally required in all cases).

237. *Cf.* J. Pete Blair et al., *Reasonableness and Reaction Time*, 14 POLICE Q. 323, 336 (2011) (noting that officer reaction time is very limited). *See generally* Rachel Abanonu, *De-Escalating Police-Citizen Encounters*, 27 S. CAL. REV. L. & SOC. JUST. 239, 268–69 (2018); Ryan Geisser, *A Just War Inquiry of Police, Prosecutors & Deadly Force*, 10 WASH. U. JURIS. REV. 59, 63 (2017).

## VII. PARTING THOUGHTS ON THE FINDINGS' IMPLICATIONS

It is hoped that the reader who got this far, and who understands how the value-based model approaches the historically difficult self-defense scenarios, is persuaded that a broader consideration of the values implicated in self-defense scenarios considerably improves the transparency of decision-making and reduces the role of hidden normativity. At the level of specific application, I have tried to use the value-based model to address the central theoretical questions characterizing the self-defense debate. It is submitted that this approach allowed for the development of internally consistent, defensible answers to these core theoretical questions. For example:

- Self-defense functions as a justification, not an excuse.
- A defender must be both internally and externally justified to be able to claim self-defense (and reasonable mistakes of fact, therefore, make the justification of self-defense unavailable).
- Imminence should be evaluated objectively.
- Defensive force must be immediately necessary, making self-defense more available to battered intimate partners.
- Self-defense should be available (though in diminished form) even against morally innocent attackers because attacks need not be criminal.
- Objectively disproportionate force precludes self-defense.
- There should be no duty to retreat when faced with a culpable attack and safe retreat is not an option.
- Passive conduct can constitute an attack.
- Unknowingly justified defenders should not be able to cloak themselves in self-defense.
- Deadly force should not be available to defend property or to ward off trivial threats.
- Though there is no strict duty to avoid conflict, individuals must at least attempt to avoid circumstances where they know an attack is likely.

Of course, I hasten to add the concession that the proffered answers to these core doctrinal questions are very much subject to change as one's normative judgments concerning the implicated values shift (indeed, this observation undergirds the very point of the value-based model). But it is argued that the model's adaptability serves to confirm, rather than to invalidate, its appeal.

By framing the debate from a value-centric perspective, the analysis proceeds through an examination of whether important values were omitted or whether the weighting of others was appropriate. Forcing these inherently normative questions more squarely into the public forum expands the range of perspectives represented in the de-

bate. It also encourages more thoughtful and nuanced choices among those perspectives. Stated differently, by shifting the focus of the analysis to values, the methodology makes transparent the types of normative judgments that in the main have been left either un- or underaddressed.

As of this writing, there is a raging debate over various aspects of our criminal justice system—including, of course, self-defense and the use of force by the police. Finding solutions to today's fraught criminal justice reform debates requires, as a starting point, a common language of values. More transparency and less hidden, undemocratic normativity in the decision-making will serve to shore up the justice system's legitimacy and creditworthiness at a critical time in our history. Advancing those interests has been the central purpose of this undertaking.

### A. Core Theoretical Questions

| Issue | Value-Base Model | U.S. |
|---|---|---|
| **Does self-defense function as a justification or an excuse?** | Justification. | Justification. |
| **Must circumstances be both internally *and* externally justified to qualify as self-defense?** | Yes. | Yes. |
| **Do even reasonable mistakes of fact make self-defense unavailable?** | Yes. | Yes. |
| **Is self-defense available against morally innocent "attackers"?** | Yes. | Yes. |
| **Can an unknowingly justified defender claim self-defense?** | No. | No. |
| **Must the attack be criminal?** | No. | No. |
| **Can deadly force be used to protect property?** | No. | No. |
| **Can deadly force be used to ward off trivial threats?** | No. | No. |
| **Can passive conduct constitute an "attack" authorizing self-defense?** | Yes. | Yes. |
| **Is imminence of the threat objectively evaluated?** | Yes. | Yes. |

| Issue | Value-Base Model | U.S. |
|---|---|---|
| **What is the relationship between imminence and necessity?** | Defensive force must be "immediately necessary." | Imminence means "about to occur." Imminence and necessity are thus separate concepts (force must be "necessary" to respond to imminent harm). |
| **Can a "battered woman" rely on anticipatory self-defense?** | Yes, if force is "immediately necessary." | No. |
| **Are there special rules for "attacks" by the police?** | Yes—prima facie justification to effectuate arrest. If officers act outside of the scope of authorization, normal self-defense rules pertain. | Generally, no. |
| **Does objectively disproportionate defensive force preclude a self-defense justification?** | Yes. | Yes. |
| **Is there a strict duty to retreat?** | No. But retreat may be required if the defender knows the attack is by an "innocent," safe retreat is an option, or both. | Generally, yes (if outside of the home and not in a stand-your-ground state). |
| **Is there a strict duty to avoid conflict?** | No. But individuals must at least attempt to avoid places where they *know* an attack is likely. | No, unless the defender knows the attack is by an "innocent" or family member. |

### B. Proposed Value-Based Self-Defense Jury Instruction

The defendant has offered evidence of having acted in self-defense.

You are instructed that the use of force is justified when a person reasonably believes that it is immediately necessary for the defense of oneself [or another] against unlawful force. However, a person must use no more force than what, from an objective perspective, was reasonably necessary under the circumstances.

Force likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is immediately necessary to prevent death or great bodily harm.

The government must prove beyond a reasonable doubt that the defendant did not act in reasonable self-defense. Put another way, in this case the government bears the burden of *disproving* the defendant's self-defense claim.

### C. Comments to the Jury Instruction

When there is evidence of self-defense, this additional element should be added to the instruction on the substantive offense. For example, "Fourth, the defendant did not act in reasonable self-defense."

A defendant is entitled to a self-defense instruction when there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility.

The jury must unanimously reject the defendant's self-defense theory in order to find the defendant guilty.