

## SELF-DEFENSE: REASONABLE BELIEFS OR REASONABLE SELF-CONTROL?

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*The reasonable person test is often employed in criminal law doctrine as a criterion of cognitive fault: Did the defendant unreasonably fail to appreciate a risk of harm, or unreasonably fail to recognize a legally relevant circumstance element (such as the nonconsent of the victim)? But it is sometimes applied more directly to conduct: Did the defendant depart sufficiently from a standard of reasonable care, e.g., in operating a motor vehicle, that he deserves punishment? A third version of the reasonable person criterion, which has received much less attention, asks what degree of control a reasonable person would have exercised. Many criminal acts occur in highly emotional, stressful, or emergency situations, situations in which it is often both unrealistic and unfair to expect the actor to formulate beliefs about all of the facts relevant to the legality or justifiability of his conduct. A “reasonable degree of self-control” criterion is sometimes the best criterion for embracing these contextual factors.*

*In self-defense, for example, it is conventional to ask whether the actor believes, and whether a reasonable person would believe, each of the following facts: (a) an aggressor was threatening him with harm, (b) that harm would be of a particular level of gravity, (c) his use of force in response would prevent that harm, (d) the level of responsive force he expects to employ would be of a similar level of gravity, (e) if the force was not used, the threatened harm would occur*

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*immediately, and (f) no nonviolent or less forceful alternatives were available whereby the threat could be avoided. United States law typically requires an affirmative answer to each of these questions. Yet in many cases, an actor threatened with harm will actually have no beliefs at all about most of these matters. It would be unfair to deny a full defense to all such actors. At the same time, we should still hold such an actor to a normative standard of justifiable behavior. Specifically, this essay suggests that we reformulate the reasonableness criterion and require this type of actor to exercise a reasonable degree of self-control in response to a threat of force.*

“Detached reflection cannot be demanded in the presence of an uplifted knife.”<sup>1</sup> With these famous words, Justice Oliver Wendell Holmes declined to impose a broad duty to retreat before an actor may use deadly force in self-defense. The phrase has been endlessly repeated in subsequent self-defense cases, and has typically been invoked to emphasize that it would be unfair to expect an actor to make accurate assessments and predictions when suddenly, violently attacked. Such actors will inevitably form mistaken beliefs, the phrase suggests. But what if these extreme circumstances cause not only an absence of reflection, but an absence of any beliefs at all about some of the facts that are legally necessary to provide the actor with a full defense of self-defense? The dominant cognitive conception of self-defense doctrine must give an unsatisfying answer: this actor loses the right to self-defense. An alternative conception of self-defense doctrine can explain why he need not lose that right.

## I. THE PROBLEM

Standard American<sup>2</sup> criminal law doctrine provides that one can only use a certain degree of force in self-defense if one honestly and reasonably believes that a serious enough threat has been posed, and if one honestly

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1. *Brown v. United States*, 256 U.S. 335, 343 (1921).

2. Only four American jurisdictions, it appears, adopt a purely subjective test of self-defense. See Kevin Heller, *Beyond the Reasonable Man?, A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 *Am. J. Crim. L.* 1, 57 & Appendix (1998).

Interestingly enough, English law does not require a “reasonable” belief in the relevant facts in order to grant a full defense; an honest belief suffices. See Andrew Ashworth,

and reasonably believes that the use of force in self-defense is necessary to prevent that threat. Though jurisdictions differ in how they specify these elements of proportionality and necessity,<sup>3</sup> almost all endorse this basic structure.

But one underappreciated problem with the standard account is that it is excessively cognitive. In the suddenness of an attack, a private person might simply react, and might not actually form all the supposedly requisite beliefs about the extent of the threat, the expected seriousness of his violent response, and the availability of alternatives to using deadly force. Sometimes, I will argue, such a reaction is still justifiable, despite the absence of an honest belief in the facts that support the justification. And yet, the law cannot simply permit self-defense merely because the defendant genuinely reacted to a threat. A purely subjective criterion is inadequate;

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Principles of Criminal Law § 4.7(g), at 147 (5th ed. 2006); id. § 6.5, at 230 (“[A] putative defence will succeed wherever D raises a reasonable doubt that he actually held the mistaken belief, no matter how outlandish that belief may have been.”). However, Ashworth also believes that the subjective test might have to be changed to an objective, reasonable person test in order to conform with the view of the European Court of Human Rights that the actions of those who kill must be evaluated on the basis of facts that “they honestly believed, for good reason, to exist.” Id. § 4.7(g), at 147. It is also surprising that English legislation and judicial decisions do little to specify or clarify the requirements of necessity and proportionality. Id. § 4.7(d), at 139.

German law differs from Anglo-American law in employing a more lenient proportionality requirement: the response is unjustifiable only if it is grossly disproportionate to the threat. See T. Markus Funk, *Justifying Justifications*, 19 *Oxford J. Legal Stud.* 637, 638–42 (1999); Heribert Schumann, *Criminal Law*, in *Introduction to German Law* 396 (M. Reimann & J. Zekoll eds., 2d ed. 2005). It is unclear whether German law requires an actor’s beliefs about the elements of self-defense to be both honest and reasonable. Id. According to Fletcher, “[t]he German code contains no legislated solution to the problem.” George P. Fletcher, *Basic Concepts of Criminal Law* 159 (1998).

French criminal law requires honest and reasonable beliefs that the relevant facts exist. However, the required elements of necessity and proportionality are not further specified in the governing legislation. Catherine Elliott, *French Criminal Law* 109–12 (2001).

3. Jurisdictions typically permit deadly force when the defendant is faced with a threat of death, serious bodily injury, kidnapping, or rape, but differ about whether other non-deadly threats (such as robbery, burglary, or other intrusions into a home) suffice. See Joshua Dressler, *Understanding Criminal Law* 283–87 (4th ed. 2006); Wayne LaFave, *Criminal Law* 541, 555 (4th ed. 2003). And jurisdictions differ about the requisite imminence of the threat and differ considerably about the existence and scope of a duty to retreat before employing deadly force. Dressler, *supra*, at 243–48; LaFave, *supra*, at 544–46, 547–49.

we must add some type of normative requirement, at least when we are proposing to give the defendant a full defense.

Consider some examples. In *Valentine v. Commonwealth*,<sup>4</sup> the defendant was cutting flowers in her garden when she was suddenly struck from behind by a larger and stronger woman. After initially attempting to ward off the blows, without success, the defendant struck back with her clenched fists “by raising her closed hands and striking downward in a similar manner as she was being struck.”<sup>5</sup> But she forgot that she held in her hand an open knife, and her blows caused the assailant’s death. Her use of deadly force was found to be permissible. On the conventional account of self-defense, she should not be entitled to a full defense unless she honestly and reasonably believed (among other things) either that the attacker was threatening deadly force, or, if she believed that the attacker was threatening *nondeadly* force, that her own response would only be likely to cause nondeadly harm. And yet it is quite possible that she did not *reasonably* believe that her response would be nondeadly (if the jury concluded that she should have remembered the knife in her hand). Even more fundamentally, it is also quite possible that she held no beliefs at all at that time about the seriousness of the harm that she was likely to inflict. She might simply have been shielding herself, or striking back in the only way that she could think of at the moment. Should we really preclude a self-defense claim merely because she lacked any belief about the degree of force she was about to inflict?<sup>6</sup>

In *People v. Aponte*,<sup>7</sup> the victim, who had joined another in robbing the defendant at gunpoint earlier the same day, again approached the defendant, who was now seated in his car. Defendant pointed his gun at the victim, who ran away, but then spun around and pulled out his

4. 48 S.E.2d 264 (Va. 1948).

5. *Id.* at 266.

6. Interestingly enough, in the actual case, the court dismissed the prosecution, not on the ground of justifiable self-defense, but on the ground that the homicide was “excusable homicide inflicted through misadventure in the lawful repulse of an unjustified attack.” *Id.* at 267. The court declined to rely on self-defense because objectively there was no threat of deadly harm, and because the defendant lacked a purpose to take life or inflict serious bodily harm. This reasoning is unconventional and surprising. A purpose to defend oneself even from a threat of nondeadly force ordinarily counts as self-defense.

7. 418 N.Y.S.2d 651 (N.Y. App. Div. 1979).

gun. Defendant promptly fired a shot that killed the victim. At trial, the prosecution pressed defendant on why he did not choose an alternative, less dangerous response:

In response to questioning, he stated that at the time the engine of his automobile was still running and that it was in neutral. He was asked whether there was anything stopping him from driving away at that time and he answered “No.” He guessed that he could have driven away but stated: “I wasn’t thinking, I didn’t know what I was thinking about when his friend ran towards the back of the car. I figured maybe he was coming on the other side because they were very, very bold. There was so much in my mind. I was confused. I wasn’t really thinking at that time. I really wasn’t aware. I didn’t even know that the car was on. I was intent on the situation. I didn’t want to get shot. It happened so fast. I didn’t think I really had an opportunity to drive away . . . I didn’t plan it. I didn’t plan on firing, it just happened.”<sup>8</sup>

The court described the evidence as “closely balanced (as to reasonable doubt about self-defense).”<sup>9</sup> Yet defendant’s statements for the most part suggest that he lacked some of the affirmative beliefs that the law requires—beliefs that his conduct was necessary and that he had no alternative but to use deadly force immediately.<sup>10</sup> Again, however, is it realistic, is it fair, to require such a defendant to have affirmative beliefs in order to obtain a full defense?<sup>11</sup>

My proposed solution, more fully articulated below, is to require that defendant exercise a reasonable degree of self-control in response to the threat, but not require that defendant actually form all of the specific beliefs that a jurisdiction’s self-defense doctrine formally requires—for example, the beliefs that he was threatened with deadly, imminent force,

8. Id. at 654.

9. Id. at 661.

10. To be sure, the statement “I didn’t think I really had an opportunity to drive away” could express either an affirmative exculpatory belief (“I consciously considered the matter and decided I had no realistic opportunity to drive away”) or the *absence* of an inculpatory belief (“I didn’t think about the question of an opportunity to drive away; so I didn’t have the positive belief that I could drive away”).

11. See also *Blackhurst v. State*, 721 P.2d 645, 648 (Alaska Ct. App. 1986) (reasoning that a defendant’s admissions that, when he shot the victim, “he ‘panicked,’ ‘was in shock,’ ‘wasn’t thinking,’ and might have had the opportunity to retreat by jumping overboard” all “tended to disprove” his claim of self-defense).

that the force he expected to inflict would itself be deadly, and that he had no alternative means of protecting himself. This test of “reasonable degree of self-control” would take into account both the power of fear and anger to induce instinctive defensive reactions, and our legitimate social expectation that the actor respond to and express such emotions with appropriate restraint and sound judgment.

Let me begin with a clarification. In order to validly assert self-defense, the actor must, I assume, at least (1) believe that he is imminently threatened with some degree of violence, and (2) react with force for the purpose of defending himself.<sup>12</sup> But what else should we realistically require him to believe?

Taken literally, existing American legal standards fail to provide a full defense to individuals who form no belief<sup>13</sup> about the severity of a threat,

12. Thus, I am not suggesting that a defendant is justified in employing self-defense when his conduct is a pure reflex reaction characterized by no thought or intentionality at all.

Moreover, in order for the issue of a defense even to arise, the actor must have satisfied the mental state requirements for the crime of which he would, absent a defense, be guilty (such as murder or assault). In the case of murder, the actor typically must have acted with purpose to kill, knowledge that he will kill, or extreme recklessness or a depraved heart. All of these states of mind (with the possible exception of common law depraved heart) require at least some consciousness of the risk that his acts will kill.

What if D’s use of force is (objectively, i.e., in view of the actual external facts) justified but D is not aware of any of the justifying facts? (Unknown to D, V is posing a threat of harm.) Scholars differ on whether unknowing justification should lead to full liability or to a reduction to attempt liability (or sometimes to no liability at all). For a recent discussion of the debate, see R.A. Duff, *Rethinking Justifications*, 39 *Tulsa L. Rev.* 829, 842–50 (2004). But this debate is orthogonal to the issues I am discussing here, since I do assume that the defendant is motivated by a defensive purpose, and I then explore whether defendant should be entitled to a defense if he is unaware of or lacks a belief about *some* of the justifying facts.

What if D is aware of the justifying facts but does not act for the purpose of defending himself? (D sees that V is a threat; he would ordinarily permit the minor assault without defending himself; but on this occasion, he takes the opportunity to violently push V away only because of personal dislike for V.) The law is unclear. For a discussion, see Paul Robinson, *Criminal Law* 973 (1997). The issue is not significant to this paper: if indeed such a defendant should be justified, then I would replace the minimal requirement “must act for the purpose of self-defense” with something like “must act with the belief that he is facing a serious threat of violence if he does not respond with force.”

13. I deliberately use the term “no belief” rather than the more familiar terms “mistake” and “ignorance.”

“Mistake” is inapt here because it refers to an actor’s actual belief that is contrary to fact, whereas I am addressing the situation in which the actor lacks a belief either that certain facts exist that would justify him, or that certain facts exist that would not justify him. I take

about the severity of the force they expect to inflict in response, or about the available alternatives to employing force, even if their actual conduct conforms to legal requirements of reasonableness. I strongly suspect that the law actually applied in the jury room (and in lawyers' offices when plea deals are worked out) is not so harsh. But it is anomalous that the legal standard demands a standard of consciousness and lucidity that is so unrealistic. Can we do better?

This issue is situated within two broader debates in criminal law doctrine and theory. The first debate concerns whether justifications (such as self-defense, defense of others, or choice of lesser evils) should be understood as imposing "subjective" requirements, "objective" requirements, or both.<sup>14</sup> My view, elaborated below, is that a valid self-defense claim requires:

(a) *A justificatory intent* (i.e., the actor must indeed act for the purpose of self-defense);

(b) *Either (1) reasonable beliefs in the legally relevant external facts or (2) reasonable self-control in light of those external facts* (where it is justifiable that the actor lacks beliefs in some of these facts). Requirement (b) is a normative, "objective" constraint. Here, the term "objective" underscores that the actor's subjective, honest beliefs and his subjective good intention to defend himself are not sufficient to warrant a defense. These normative limits serve

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it for granted that the actor is entitled to a full defense of self-defense if he possesses all the requisite honest and reasonable affirmative beliefs that, if true, would justify him (a belief that deadly force is threatened, that deadly force is immediately necessary, and so forth).

"Ignorance" is also not quite the right term to use here, though it is more difficult to explain why. Suppose defendant is suddenly attacked and does not realize that he is being attacked with nondeadly rather than deadly force, or does not realize that he could safely retreat. In a sense he is "ignorant" of these facts. But suppose (as in my hypothesized scenarios) he has not even adverted to the possibility of these facts being true. Then I think it is more natural to say that he has "no belief" about these facts, not that he was "ignorant" of them. By contrast, if someone asks me to name the U.S. Congressman from Idaho, I would claim ignorance: I am adverting to the factual question but am unable to answer it with any level of belief. Perhaps one reason for a reluctance to employ "ignorance" in my scenarios is that the actor's failure to advert to the facts in question is perfectly understandable, given the sudden attack; and "ignorant" often carries a pejorative connotation. (But not always. We would naturally describe an unconscious patient under anesthesia as "ignorant" of an unplanned procedure that the doctors perform while she is unconscious.) In any case, the choice of terminology here is a linguistic question, and not of substantive importance.

14. For some recent discussions, see Duff, *supra* note 12; Kimberly Ferzan, *Justifying Self-Defense*, 24 *Law & Phil.* 711 (2005).

as *ex ante* guides to action, and thus are better classified as aspects of justification than as aspects of excuse.

The “external facts” relevant here are facts indicating *conformity with specified “objective” or external requirements of necessity and proportionality* (where “objectivity” now refers to the *ex post* justifiability of the conduct). For example, if the actor uses deadly force against a threat that the law deems insufficient to permit that response,<sup>15</sup> then in this “objective” sense, the actor’s response is disproportionate. It is unfortunate that the same language, “objective,” is employed sometimes to describe a requirement of reasonable beliefs (rather than subjective beliefs) and sometimes to describe the very different idea that the actual state of the world is such that, after the event, we can say that the actor used necessary and proportionate force.

Because a person obtains a full defense if he acts with reasonable beliefs or reasonable self-control, *an actor’s actual conformity with the legal necessity and proportionality requirements of the defense is not required*. In the case of beliefs, this is the doctrine of reasonable mistake; in the case of self-control, no analogous term exists.<sup>16</sup>

The second debate is about the meaning and significance of reasonable person criteria in the criminal law. A reasonable person test is often employed in criminal law doctrine as a criterion of *cognitive* fault: Did the defendant unreasonably fail to appreciate a risk of harm, or unreasonably fail to recognize a legally relevant circumstance element (such as the non-consent of the victim)? But it is sometimes applied more directly as a norm of permissible conduct: Did the defendant depart sufficiently from a standard of reasonable care, e.g., in operating a motor vehicle, that he deserves punishment? A third type of criterion, which has received much less attention, asks what degree of control a reasonable person would have exercised: Did the defendant fail to act with the degree of self-control that can fairly be expected? Many criminal acts occur in highly emotional, stressful, or emergency situations, situations in which it is often both

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15. For example, suppose, after the fact, it is clear that the assailant was only threatening to shove the actor.

16. “Reasonable ignorance” might appear to be the analogous term, but it is not. See *supra* note 13; text accompanying *infra* notes 55–56.

unrealistic and unfair to expect the actor to formulate beliefs about all of the facts relevant to the legality or justifiability of his conduct. A “reasonable degree of self-control” criterion is sometimes better than the first, “cognitive fault” criterion insofar as it embraces these contextual factors in judging the actor’s culpability. At the same time, this type of criterion is also sometimes used as a criterion of excuse rather than justification (as in the doctrine of duress), and indeed as a criterion of partial rather than complete defense (as in the doctrine of provocation), so care is needed in articulating the meaning and significance of the criterion in different criminal law contexts.

The discussion proceeds in three parts. First, I review three possible alternative solutions to the “absence of belief” problem. These other approaches turn out to be inadequate. Next, I offer a solution, demonstrate its compatibility with recent psychological and neuroscientific research, and address some doctrinal wrinkles. Third, I respond to six possible objections to this solution.

## II. POSSIBLE SOLUTIONS

Here are three possible solutions to the problem. Each initially appears promising but turns out to be unsatisfactory.<sup>17</sup>

### A. Rely on an Expanded Interpretation of Belief that Encompasses Tacit or Latent Beliefs

“Belief” is often a legal requirement in the criminal law, both in offense and defense definitions. But perhaps the requirement need not entail that the actor holding the relevant belief is consciously preoccupied with it.

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17. A fourth possible solution is to emphasize the criminal law requirement that the defendant commit a voluntary act, and to argue that in “no belief” cases, the defendant does not make a sufficiently considered, deliberate choice to satisfy that requirement. But the argument is weak. The voluntariness requirement is not nearly so stringent: habitual and impulsive actions easily satisfy it. And here, by hypothesis, the defendant has indeed consciously chosen to engage in defensive action. Cf. *People v. Newton*, 87 Cal. Rptr. 394 (1970) (the court requires a voluntary act instruction in a case where defendant’s conduct might be interpreted as an act of self-defense, but it so requires only because defendant provided credible evidence that he was unconscious when he fired the deadly shot). To be sure, if neuroscientific evidence demonstrates that the effect of the violent threat on the

Perhaps it is enough that the belief is immediately accessible, and can play a role in the actor's practical reasoning. For example, suppose one element of aggravated bank robbery is "knowingly carrying a loaded gun." We might properly say that a bank robber, having loaded the gun earlier in the day, "believes" that it is loaded when he pulls it out and points it at the bank teller, even though he gives no conscious thought, at that moment, to whether it is loaded or not. One way to spell this out is as follows: if asked at that moment whether he believed the gun was loaded, a truthful bank robber would say "yes, of course."<sup>18</sup>

In my view, when the law imposes legal requirements of belief, it does (and should) embrace tacit or latent belief to some extent.<sup>19</sup> But we must be cautious here. How far can we justifiably expand the concept of belief beyond an actor's consciously held thoughts and focused awareness? The more expansive the interpretation, the greater the risk that our definition of subjective belief collapses into a broader, objective criterion, "should have believed (or realized)." And such a collapse is inconsistent with the prevalent legislative intention in modern criminal statutes to distinguish

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defendant was genuinely to make it physically impossible for him to act otherwise than he did, a voluntary act defense would be plausible. But the current state of the scientific evidence hardly suggests that defendants subjected to threats are so compelled by the threat that their acts are "involuntary" in the strong sense that criminal law doctrine requires; these acts are not comparable to the acts of those who are physically coerced by another or even the acts of those who are hypnotized. See Michael Moore, *Causation and the Excuses*, 73 Cal. L. Rev. 1091 (1985).

18. For some useful discussions of subconscious, tacit, and latent beliefs, see Stephen Shute, *Knowledge and Belief in the Criminal Law*, in *Criminal Law Theory: Doctrines of the General Part* 171 (S. Shute & A.P. Simester eds., 2002); G.R. Sullivan, *Knowledge, Belief, and Culpability*, in *Criminal Law Theory: Doctrines of the General Part*, supra, at 207, 210–12; Kimberly Ferzan, *Opaque Recklessness*, 91 J. Crim. L. & Criminology 597, 627–45 (2001); R.A. Duff, *Intention, Agency, and Criminal Liability* 159–65 (1990). See also Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 Ohio State J. Crim. L. 179, 192–93 (2003).

19. One complication here is that jurisdictions following the Model Penal Code's definition of recklessness as "conscious" disregard of a risk must adopt a narrower conception of both recklessness and knowledge, a conception that has much less room for latent beliefs. For "consciousness" of a risk or fact must mean that the actor either is preoccupied in his thought with the risk or fact, or at least has some level of specific contemporary awareness of it. And because recklessness requires consciousness, "knowledge" or "belief" in a fact must require consciousness as well. For the code's hierarchy of mental states treats knowledge as a more culpable state of mind than recklessness; it would therefore make no sense

subjective and objective criteria of culpability (and inconsistent with the underlying moral difference between the two types of criteria).

Consider a different example, involving a second bank robber. Suppose it would have been obvious to almost anyone in this bank robber's position that the gun was loaded, because his confederate just handed it to him and he knows that his confederate normally carries only loaded guns. It does not logically follow that the robber actually believed that it was loaded. (Of course, if he did fail to form that belief, his failure to do so is most likely negligent.) A legislative distinction between subjective awareness of *x* (belief that *x* is possible, or probable, or highly probable), on one hand, and negligent failure to be aware of *x*, on the other, is supposed to limit the former to an extra, and narrower, form of culpability. A typical rationale for the distinction is that only when the actor is subjectively aware of the legally relevant features of his conduct is he culpable in a special way for deliberately choosing to do wrong.

How does this analysis apply to the beliefs (and lack of beliefs) of actors suddenly confronted with the need to use force in self-defense? Some such actors have "preoccupying" beliefs about the relevant facts (such as the severity of the threat, the likely severity of the response, and the availability of the alternatives). They might literally think to themselves: "He might kill me! I'd better use my knife, and stick it in his chest right now, even though this might kill him. If I don't do this right away, if I try anything else, I'm done for." Other actors in this situation might have latent or tacit beliefs. If asked, and if they replied truthfully, they would give essentially the same account, but those thoughts were not uppermost in their minds at the time they acted; indeed, the thoughts might not have been in their minds, might not have surfaced at some level of consciousness, at all. But actors in a *third* category, I submit, do not satisfy even the requirement of latent beliefs. If asked, they would truthfully say, "I wasn't thinking about how likely it was he would kill me; I simply felt terribly threatened." Or, even more likely: "I didn't really think about how likely it was that my stabbing him would kill him. I just wanted him to stop attacking and that is all I could think of doing at the time." And: "I didn't look around to see what alternatives I had. I felt trapped, so I reacted

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to impose on the state a more stringent proof requirement (i.e., to require the state to prove consciousness) only for the less culpable state of mind, recklessness, and not for the more culpable, knowledge.

and lashed out at him.” Yet in some instances within this third category, the actor nevertheless acts justifiably (as I will explain further below).

Accordingly, although a recognition that legal belief requirements can encompass latent beliefs expands the category of belief somewhat, and perhaps significantly, beyond preoccupying beliefs, I do not think that this expansion suffices to address the self-defense problem I focus on in this paper.<sup>20</sup>

### **B. Treat the “Lack of Belief” Scenario as One of Excuse, not Justification**

Perhaps the problem should not be treated as a matter of justification at all. Perhaps, in other words, I have described a situation in which a person, suddenly threatened, understandably has a tendency to panic, or to act without thinking clearly, and perhaps this warrants a full defense—but on the grounds, not of justification, but of excuse. Arguably it is too much to expect a person to think clearly, and to act properly and permissibly, in such emergency circumstances. Compare duress, a true excuse at least in its Model Penal Code version: an actor who is coerced by a violent threat into committing a criminal act is fully excused if “a person of reasonable firmness in his situation would have been unable to resist.”<sup>21</sup> Perhaps in the self-defense scenarios we are considering, too, a reasonable person in the actor’s situation would have been unable to

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20. However, it is worth noting that the rationale for not unduly expanding latent or tacit knowledge when we are interpreting the scope of “belief” or “knowledge” as to an *offense* element (specifically, the need to distinguish between “did know” and “should have known”) is not the same as the rationale for not unduly expanding latent or tacit knowledge when we are interpreting “belief” as to the element of a *defense*. In the latter case, if there is a sufficient policy reason for limiting defenses to actors who possess actual knowledge of or belief in certain facts supporting the defense, then the reluctance to read “belief” expansively obviously has the effect of excluding a defense and thus imposing, rather than excluding, criminal liability. So it is at least conceivable that the law should take a more expansive view of “belief” in the context of defenses. Just how expansive this interpretation should be depends on how rigorous our expectation is that the actor invoking a defense must act for all the right reasons and with all the right (exculpatory) beliefs.

21. Model Penal Code §2.09 (1) (Proposed Official Draft 1962).

think clearly and rationally about the propriety of his response and the available alternatives.<sup>22</sup>

I agree with this response to some extent. Some cases in which defendants are entitled to acquittal on grounds of self-defense—and more cases than you might think—indeed can only be explained as a matter of excuse, not justification.<sup>23</sup> But I don't think this response suffices to cover all of the cases we are examining here. Insofar as the distinction between justification and excuse is morally and legally legitimate, and I think it is, many cases of “no belief” defensive force ought to be classified as justified, not excused. In many such cases, we would not really expect a law-abiding, permissibly motivated defendant to form an accurate belief about the severity of the threat or, especially, about the range and efficacy of different alternative courses of response. And in many such cases, we could not expect any law-abiding, properly motivated defendant to *do* better, to act differently than

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22. See, e.g., R.A. Duff, Rule-Violations and Wrongdoings, in *Criminal Law Theory: Doctrines of the General Part*, supra note 18, at 64 (describing a case in which a tortured defendant reveals secret information); Jeremy Horder, *Excusing Crime* 48–52 (2004). Another rationale for duress as an excuse is that an actor whose own life or welfare is at stake might (even if not panicky or thinking irrationally) understandably though unjustifiably overvalue his own welfare, relative to the interests of other victims or of the community. This excusatory rationale, too, sometimes applies in the context of self-defense.

23. See Model Penal Code, art. 3, Introduction, cmt. at 3–4 (Official Draft and Revised Comments 1985):

For many cases of self-defense it would probably be generally agreed that the use of deadly force was actually desirable, but for others, e.g., resistance by one family member to attack by another, there would be disagreement whether the use of deadly force was actually desirable or should merely be accepted as a natural response to a grave threat.

See also Kent Greenawalt, *The Perplexing Boundaries of Justification and Excuse*, 84 *Colum. L. Rev.* 1897, 1904–06 (1984); Heller, supra note 2, at 28–30. (I do take issue, however, with the assumption in this passage that the conduct in question must, in order to count as a justification, be “desirable” as opposed to morally permissible.)

Consider the legal status of the duty to retreat. American jurisdictions universally exclude the duty when the actor is using only nondeadly force, and either deny or narrowly restrict the duty even when the actor is using deadly force. One plausible rationale for the policy is an excuse based on psychological realism: many or most citizens simply will not retreat in the face of threats of violence, and this reaction is understandable though not commendable or socially acceptable. See Greenawalt, supra, at 1906.

Moreover, in many self-defense cases resulting in death, the deceased has provoked the defendant by his initial assault, and that provocation is often legally sufficient to warrant a mitigating instruction on voluntary manslaughter. However, I am focusing on when a defendant who is suddenly attacked is entitled to a full, rather than partial, defense.

the actual defendant did.<sup>24</sup> Indeed, it will often be a self-defeating strategy for an actor who is suddenly attacked to pause and carefully examine his options; the very effort to form accurate, or indeed any, beliefs might increase his risk of injury or decrease the efficacy of his planned response. More subtly, an actor unused to employing violence might rationally decide (perhaps after taking a self-defense course) not to permit herself to think about the consequences of her defensive actions, plausibly concluding that if she were to contemplate the pain or the specific injuries she might cause to the assailant, her anxiety and misgivings about these effects might disable her from using sufficient force to defend herself.<sup>25</sup> Thus, in many cases, an actor who does not form the full set of beliefs that the law purports to require is acting justifiably: he is acting as he should, or at least in a tolerable or permissible manner. His reaction is thus unlike that of a person who takes advantage of an excuse like duress; it is not best described as an unfortunate, regrettable, but understandable and largely blameless human response.

To be sure, there is a significant debate in the criminal law literature about whether the analogous issue of “reasonable mistake” is better analyzed as an instance of justification or of excuse.<sup>26</sup> If an actor reasonably believes that the threat is of deadly force, or reasonably believes that he has no alternative but to use force immediately, yet is mistaken about these

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24. German criminal law includes a provision that somewhat resembles my proposal. See Strafgesetzbuch [StGB] [Penal Code] 1987, as amended Dec. 19, 2001, § 33, “Excessive Self-Defense” (“If the perpetrator exceeds the limits of necessary self-defense due to confusion, fear or fright, then he shall not be punished.”), translated in *The German Penal Code* § 33 (Stephen Thaman trans., 2002).

This provision seems to reflect an excuse perspective, though it also might reflect a justification perspective, insofar as a properly motivated actor using sound judgment might nonetheless, in the confusion and suddenness of an attack, fail to form the beliefs about the facts supporting self-defense that the law normally requires. However, on its face the German provision is extraordinarily broad, allowing the defense whenever the (objectively unjustifiable) response is due to the subjective confusion or fear of the defendant. My proposal is much narrower, allowing the defense only when the actor’s confused or fearful response is also consistent with reasonable self-control.

25. I thank Marcia Baron for suggesting this last point. Note, however, that the actor in this last situation sometimes will at least have a *latent* belief that she will harm the other. See text accompanying *supra* notes 18–20.

26. Compare Greenawalt, *supra* note 23, at 1907–09 (justification), with George Fletcher, *Rethinking Criminal Law* 691–98 (1978) (excuse). For a citation to some of the literature, see Duff, *supra* note 12, at 838 n.27.

issues of proportionality or necessity, it is widely agreed that he is nevertheless entitled to a full defense; but people disagree about whether justification or excuse explains why he should not be punished. I come down on the “justification” side of this dispute. Or perhaps we need a third category, of “justification\*” rather than simply “justification,” to account for (justified\*) reasonable *mistakes* and to differentiate them from (justified) reasonable beliefs that are true.<sup>27</sup> Whatever label we attach here, it is important to remember that a reasonable mistake is a belief that it is not blameworthy or culpable to have; indeed, often it is a belief that we want to encourage actors to form, since it will ordinarily lead to conduct that is objectively desirable (or at least permissible) in the *ex post*, external sense.<sup>28</sup> Criminal law norms of reasonable belief are action guiding: they provide *ex ante* standards of ideal behavior for real-world actors who must make decisions without any guarantee that their prudent assessment of the facts will be correct. Thus, I believe that actors who make reasonable mistakes are better understood as justified than as excused.<sup>29</sup> And that explains

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27. See *id.* at 841–42 (distinguishing “warranted” from “justified” acts, and defining “warranted” similarly to my definition of “justified\*”).

28. See Greenawalt, *supra* note 23, at 1907–09. See also Hamish Stewart, *The Role of Reasonableness in Self-Defence*, 16 *Can. J.L. & Juris.* 317 (2003).

29. See Shelly Kagan, *Normative Ethics* 66 (1998). To be sure, the action-guiding characteristic of reasonable mistakes is less obvious, and indeed more often inapplicable, when the mistake pertains to an element of an offense rather than to a defense. If an actor reasonably believes that a firing range target is a manikin when it is actually a human being, and therefore accidentally kills the person, perhaps we should not say that it is actually positively desirable, *ex ante*, that people act upon similar appearances in the future. Here, reasonable mistake might be a norm of permissible rather than desirable behavior (*ex ante*), or even a matter of excuse, and thus not action-guiding in the strong sense suggested in the text. (I thank Peter Westen for the example and for pointing out this objection.) Similarly, there might be few reasonable mistakes as to nonconsent in rape that we want to encourage, as opposed to permit or excuse.

Still, I believe that there are many reasonable mistakes, both as to defenses and as to offense elements, that we do want to encourage—for example, the policy of having police officers arrest based on reasonable appearances, or the policy of a liquor store owner to require two photo IDs to ensure that the buyer is above age. It is sometimes better, indeed much better, to engage in an activity or act with a known small risk of harm (that cannot realistically be lowered without incurring significant burdens or costs) than to avoid the activity. Of course, reasonable mistakes about *justifications* (such as self-defense) are especially likely to be *ex ante* desirable, because by definition the actor has a compelling (*ex ante*) reason or “justification” for acting, based on reasonable appearances, to further the interests protected by the justification defense.

why I also conclude that the “no belief” actor who has exercised reasonable self-control should similarly be treated as justified, not as excused.<sup>30</sup> He, too, has acted as he should have acted, from an *ex ante* perspective. He, too, has followed a rule (“exercise reasonable self-control”) that guides action.

### C. Rely on the Distinction between Beliefs and Actions

This distinction, articulated by Cynthia Lee, helpfully focuses attention on the inadequacy of a merely cognitive articulation of self-defense requirements. Lee points out that legal doctrine and jury instructions sometimes are not as explicit as they should be in requiring that the defendant’s *conduct*, and not merely his emotions and beliefs, satisfy legal standards of self-defense. It is not enough that the actor possess the emotion of fear, or the belief that he is about to be attacked; he must also *act* reasonably in using only proportional force in response, and in not inflicting force when safer alternatives exist.<sup>31</sup>

Lee’s approach, by expanding the law’s focus beyond beliefs, might appear helpful in resolving the problem posed in this paper. However, her analysis still assumes that honest and reasonable beliefs are *necessary* to the successful assertion of self-defense. I am questioning that assumption in a certain category of cases.

Moreover, although Lee’s emphasis on the legal requirement that acts as well as beliefs (or emotions) be reasonable is valuable, it is also potentially misleading. Ordinarily, “objective” (in the sense of external) self-defense

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30. In this paper, I do not pursue the question whether the justification of self-defense is ultimately rooted in a deontological rationale, a consequentialist rationale, or some combination of the two. Whatever the underlying rationale, I believe that many “no belief” cases warrant a full defense if “honest and reasonable belief” cases do. But the precise contours of my “no belief” proposal would indeed depend on the rationale. For example, if an incentive-focused consequentialist endorses a privilege of self-defense only insofar as the primary norm against killing can have absolutely no deterrent effect, he might adopt a narrower version of the proposal than a retributivist who believes that forming and acting upon accurate beliefs in these stressful and constrained situations is extremely difficult but not impossible.

31. See Cynthia Lee, *Murder and the Reasonable Person: Passion and Fear in the Criminal Courtroom* ch. 10 (2003). See also Cynthia Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 *Buff. Crim. L. Rev.* 191 (1998).

proportionality and necessity requirements—that is, requirements other than belief requirements—are not articulated simply as requirements that the force be “reasonably” proportionate or “reasonably” necessary. Rather, the (typically legislative) articulation of proportionality and necessity is usually in the form of a rule, not a (“reasonableness”) standard—for example, the defendant may only use deadly force if faced with deadly force, rape, or kidnapping; or may only use force if the threat is imminent (on one version) or immediately necessary (on another); or must retreat in circumstances X but not Y (or alternatively, is never required to retreat).<sup>32</sup>

Furthermore, the actual cases that she cites as proof of a need for an independent reasonable act requirement seem instead to be examples where the law should more explicitly require honest and reasonable beliefs, not about the existence of a threat, but about necessity and proportionality. That is, she aptly criticizes the courts’ overemphasis on honest and reasonable beliefs that one is being threatened, and their neglect of the questions whether the actor should have used lesser force, or should have avoided the use of force altogether, in response. But those neglected questions could, under the traditional model, be answered by requiring the actor to honestly and reasonably believe that (a) the degree of force he is using in response is not disproportionate (e.g., he reasonably believes that he will only inflict nondeadly harm in response to a threat that the jurisdiction would consider nondeadly); and (b) the response is necessary to protect himself (e.g., he reasonably believes the threat is imminent in a jurisdiction articulating “necessity” in that manner, and he reasonably believes that no nonviolent alternatives are available by which he could protect his safety).

In short, it is not clear what a reasonable act requirement adds to the traditional requirement that the actor honestly and reasonably believe a specified set of facts that are, as a matter of law, legally sufficient to provide a defense. Indeed the addition of an independent act requirement seems in tension with the well-accepted doctrine that a person who makes a reasonable mistake about one of the required elements of self-defense is still entitled to a full defense.

To be sure, an act requirement of a modest sort is indeed implicit in self-defense tests—namely, the requirement that the actor’s forceful response be

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32. See, e.g., Model Penal Code § 3.04–09 (Proposed Official Draft 1962).

in conformity with his honest and reasonable beliefs. Imagine that I honestly and reasonably believe that I am threatened with nondeadly force, that my forceful response is necessary, and that it will cause only nondeadly harm. Now suppose that my use of force causes the death of the aggressor. How could this happen? First, perhaps I tried to use nondeadly force but accidentally caused more harm than I reasonably expected. This is a case of reasonable mistake; I did act in conformity with my beliefs, and should receive a full defense. Second, perhaps I got carried away and just chose to kill him. In this case, of course, although my initial beliefs were honest and reasonable, my final decision to kill was not in conformity with those beliefs, so they cannot provide a defense.

Lee's analysis is helpful in reminding us that this last, implicit act requirement is scanted in most formulations of self-defense doctrine. It essentially amounts to a concurrence requirement: just as "knowingly causing harm" is a legitimate category of murder only if the actor knows, before (and not merely after) he acts, that his act will cause harm, in the same way the "honest and reasonable belief" requirements of criminal law defenses make sense only insofar as the actor incorporates these beliefs into his conduct.<sup>33</sup>

### III. A PROPOSED STANDARD FOR "NO BELIEF" CASES

#### A. In General

Here is a proposed legal standard to encompass this special category of "no belief" cases:

If the actor honestly and reasonably believes that the appropriate facts supporting self-defense exist, and acts in conformity with such beliefs, he is entitled to a full defense of self-defense. ("The appropriate facts" is merely a stand-in for whatever precise legal self-defense requirements the jurisdiction in question imposes.)

But even if the actor has no beliefs about many of the relevant issues (imminence and severity of threat, severity of his own response, available

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33. Cf. Kenneth Simons, Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"? Examining the Requisite Connection between Mens Rea and Actus Reus, 6 *Buff. Crim. L. Rev.* 219, 247-57 (2002).

alternatives), he should be entitled to a full defense of self-defense if his conduct conforms to that of a person in the circumstances exercising a reasonable degree of self-control.<sup>34</sup> The actor need not honestly and reasonably believe all the relevant facts that would, in law, provide a complete justification.

In determining whether the actor exercised reasonable self-control in response to an imminent threat, a jury may properly consider the power of fear, panic, and anger, and their tendency to induce instinctive defensive reactions, but the jury should also keep in mind society's legitimate expectation that all citizens who choose to use violent force should respond to and express such emotions with due restraint, caution, and focus. The jury should consider whether the defendant acted with good, sound judgment under the circumstances; the answer could be affirmative even if he did not form beliefs about all of the relevant facts.<sup>35</sup> Although "reasonable self-control" is a useful shorthand version of the test, "self-control" is not the only relevant question. A jury should inquire whether the defendant acted reasonably in the circumstances, taking into account the exigencies of the situation,<sup>36</sup> the emotions he justifiably

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34. Recall, however, the qualifications that the actor at least must believe that he is being threatened and must act for the purpose of self-defense. See text accompanying *supra* note 12.

The "reasonable self-control" language might appear to be a version of the doctrine of provocation, which affords only a *partial* defense. I address this concern below. See text accompanying *infra* notes 60–68.

35. Compare this language from the Restatement (Second) of Torts, § 70, cmt. b ("[T]he qualities which primarily characterize a reasonable man [for purposes of self-defense] are ordinary courage and firmness.")

My emphasis on sound judgment is consistent with the virtue ethics approach to moral decision making. See Rosalind Hursthouse, *On Virtue Ethics* (1999); Rosalind Hursthouse, *Virtue Ethics*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Fall 2007), <http://plato.stanford.edu/archives/fall2007/entries/ethics-virtue>. But I propose it here as a standard that supplements, but does not replace, more cognitive and more rule-like criteria. I hope thereby to minimize the force of the vagueness objection that I believe constitutes a legitimate reason not to employ exclusively virtue-based criteria in the law.

36. Peter Westen has, in private communication, offered a vivid illustration of how even an unemotional, calm actor might justifiably or nonculpably fail to form some of the legally required beliefs. If a former Army sniper receives word that three men are on their way to kill him, and if he coolly tracks the three as each successively approaches his house, he might reasonably be so focused on preventing the immediate threat of the first two that he reasonably fails to notice whether the third assailant is also posing an imminent threat. This is a case in which focusing only on the terms "reasonable self-control" oversimplifies the considerations that explain why his ignorance is reasonable.

felt, the beliefs he justifiably held, and the beliefs he justifiably lacked. The jury should also take into account the jurisdiction's legal requirements for the permissible use of self-defense, including its criteria of proportionality (e.g., when can deadly force be used?) and necessity (e.g., what is the scope of any duty to retreat?). This last consideration complicates the analysis, as we shall see below. To be clear, my argument is not that "reasonable self-control" is itself the basic criterion or standard of justifiable self-defense, but, rather, that the "objective" or external requirements of necessity and proportionality should be supplemented either by "reasonable belief" requirements or by "reasonable self-control" requirements.<sup>37</sup>

The jury should also carefully consider the actor's motives in reacting as he did.<sup>38</sup> Indeed, motives must play an even more important role in these "no belief" cases than under traditional self-defense doctrine, because in these cases, we lack the usual justification structure, which requires that the actor possess honest and reasonable beliefs in the legally relevant facts comprising necessity and proportionality. How should the jury evaluate the actor's motives in "no belief" cases? If his motives were pure, i.e., his exclusive intention in using force as he did was to protect himself from further harm, then we should adopt a strong presumption that he is justified. But suppose instead, as is much more realistic, that his motives were mixed, and included illicit as well as legitimate reasons. Thus, suppose one of his reasons for responding as he did was revenge, or a desire to cause the aggressor to suffer, or anger at being publicly humiliated. We should not automatically exclude the defense in

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37. In private conversation, Kim Ferzan has pointed out that one might view "reasonable self-control" as the metastandard for the justification of self-defense, and then view proportionality and necessity rules as specifications of that standard. But that is not the way in which my approach employs a criterion of reasonable self-control.

38. For discussions of the importance of motive in the context of self-defense, see Ashworth, *supra* note 2, at 147 (considering the "simple view" that self-defense doctrine should simply ask, "was the use of force an innocent and instinctive reaction, or was it the product of revenge or some manifest fault?"; Ashworth goes on to reject this view as too permissive and resting ultimately on excuse rather than justification); Paul Robinson, *Criminal Law* 469–75 (1997).

For discussions of the importance of motives in assessing criminal culpability more generally, see Douglas Husak, *Motive and Criminal Liability*, 8 *Crim. J. Ethics* 3 (1984); Guyora Binder, *The Rhetoric of Motive and Intent*, 6 *Buff. Crim. L. Rev.* 1 (2002).

such cases. After all, even in cases when the actor's use of force is accompanied by his honest and reasonable beliefs in facts that justify him, his motives will often be mixed in this way. At the same time, because we lack the discipline of the usual justification structure, we need to be cautious in allowing the defense here. Perhaps it is sufficient that: (1) the actor's conduct is no different from what we would expect of a (reasonable) person who was exclusively motivated by the need to protect himself; and (2) the actor was actually motivated in substantial part by such a need.

A further question about the proposed test is how it would address a recurrent problem in self-defense law—whether, and to what extent, the “reasonable” belief requirement should be individualized. May the physical, ethnic, racial, cultural, age, sexual preference, or gender characteristics of the defendant properly be considered? This is, of course, a topic of some difficulty and great controversy.<sup>39</sup> I do not engage the topic here except to suggest that, in general, the extent of individualization that the law should endorse in determining whether the defendant formed a “reasonable *belief*” or acted “reasonably” in light of his beliefs is an appropriate measure of the extent of individualization that it should endorse in determining whether the defendant exercised a reasonable *degree of self-control* in responding to a sudden violent threat.

Finally, I turn to a difficult question about the scope of the test. In the “no belief” scenario, must the actor's defensive reaction still be “objectively” necessary and proportional (in the sense of conforming to the actual, external state of the world)?<sup>40</sup> My test is most persuasive, of course, when

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39. Peter Westen has recently provided a novel, intriguing analysis of how to analyze individualization. He suggests that we: (a) take the defendant precisely as he is, with all of his physical, psychological, and emotional traits, and then “moralize” him, e.g., ask whether his inadvertence was culpable or excusable in light of the degree of his individual incapacities; rather than (b) (the usual approach) start with an abstract, idealized reasonable person and then selectively add some individual qualities of the defendant. Peter Westen, *Individualizing the Reasonable Person in Criminal Law*, 2 *Crim. L. & Phil.* (forthcoming 2008).

40. It is not entirely clear how to specify all the elements of necessity and proportionality in terms of the “actual state of the world.” After all, even the prediction that the aggressor would have continued the attack is an inevitably uncertain judgment made from a particular epistemic perspective. See Ferzan, *supra* note 14. One might doubt whether this prediction is much different from asking what a reasonable person in the actor's shoes would have predicted.

the actor's conduct does conform in this way, when his response is actually necessary and proportionate. But should he lose the defense if it turns out that the force he used was greater than necessary to prevent the attack, or that the aggressor was not planning any further attack, or that he could have safely retreated (in a jurisdiction requiring retreat)? On first impression, there is no good reason to impose these additional requirements. In the usual case when the actor has subjective beliefs about all the legally relevant factors, the actor can still get a defense even if his beliefs are mistaken and the objective, external facts don't satisfy necessity and proportionality, so long as his beliefs are reasonable. The same approach arguably should be taken here: even if the objective facts don't satisfy necessity and proportionality, the actor should be entitled to a full defense if he exercised "reasonable" self-control as defined above.

However, there is a special complication here, a complication that requires us to analyze the "no belief" cases differently from cases of honest and reasonable beliefs that are mistaken. Under traditional self-defense rules, the legislative specifications of proportionality and necessity settle, as a matter of law, what counts as reasonable force under the circumstances. So if a defendant believes that robbery justifies deadly force, or that retreat is never required, or that the threat need not be imminent, when the jurisdiction actually provides otherwise, then defendant has made a mistake of law, one that ordinarily would not exculpate. Indeed, neither mistake *nor ignorance* of such legal standards is ordinarily a defense. Someone (say, Bernard) who forms a mistaken belief that he is entitled to use deadly force in response to nondeadly force (when he actually believes the threat is only of nondeadly force) would not get a defense; nor would someone (say, Carl) who forms a mistaken belief that retreat is not required (even though he actually believes, correctly, that it is in fact feasible). Similarly, if Bernard and Carl had affirmative beliefs about the relevant facts but were simply *ignorant* of the legal standards, again they would have no defense. So why should the result be different, why should they suddenly be entitled to a full defense, just because, instead of having beliefs about the relevant facts, they do not have such beliefs?

How, in other words, do the "objective" or external legislative self-defense criteria affect the permissible use of force under my proposal? Here, by hypothesis, the actor has no beliefs at all about certain elements of proportionality or necessity. Somehow these elements need to be taken into account in applying my test, but how? Should we allow a full defense

to Arthur, who used deadly force against someone who (as he correctly perceived) was merely robbing him, not threatening deadly harm, even though the jurisdiction forbids deadly force in response to a robbery? To Benjamin, who formed no belief about whether the force he planned to use would be deadly rather than nondeadly, and who actually used deadly force in reaction to a threat that only legally warranted a nondeadly response? To Claudio, who did not retreat even though the jurisdiction requires it under the circumstances, and who formed no belief about the availability of retreat?

The proper analysis, I think, is as follows. First, Arthur's case is the least difficult. Here, we can readily deny the defense, for even on my proposal, the actor needs to have some affirmative beliefs that warrant characterizing his reaction as a genuine case of self-defense. So it is plausible to require him to believe that he is facing a type of threat that, under the law of the jurisdiction, permits a violent defensive response.

Second, the Benjamin and Claudio examples would also be easy if we imagine variations in which the actors were "objectively" or externally justified (given the actual state of the world) rather than unjustified, as in the original examples. If Benjamin actually used nondeadly rather than deadly force, but formed no beliefs about the degree of force he was about to inflict, or if Claudio had no chance to retreat, but again formed no beliefs about the matter, then (if their reactions otherwise satisfy my test) they should get a complete defense. Affirmative beliefs in the justifying facts should not always be required. And the very fact that Benjamin and Claudio in these variations were objectively justified is significant (though hardly conclusive) evidence that they exercised reasonable self-control under the circumstances.

Third, in the actual Benjamin and Claudio examples, we cannot analyze "reasonable self-control" in isolation from the jurisdiction's legal requirements. And yet it is often unrealistic and unfair to expect such an actor both to be aware of those requirements and to incorporate them as constraints on his conduct, given the exigencies of the situation. To some extent, then, a jurisdiction's specified requirements will inevitably receive less weight than in traditional cases of reasonable mistake. I believe this is an acceptable cost to pay for fairness to many "no belief" defendants, but it is indeed a cost, as we shall see.

Consider more closely the examples of Benjamin and Claudio. Here, we cannot ignore entirely the jurisdiction's specified proportionality and necessity criteria, which I am assuming the actor did not actually satisfy.

We do need to impose constraints in these cases against an unduly capacious self-defense privilege. How should we give weight to these legislative criteria? In principle, we should do so by asking: *Did the actor show the same respect for the legislative rules that we can fairly expect of an actor who does have accurate beliefs about the relevant facts underlying his self-defense claim?* This question is admittedly difficult to answer. For it rests either on a legal fiction that everyone knows the law (including the detailed contours of the law of self-defense), or at least on the moral falsehood that anyone who fails to know the law is blameworthy for that failure. Moreover, this fiction and this falsehood are especially objectionable in the emergency circumstances of self-defense.

One way to make the question a bit more tractable is to focus on the “no belief” actor’s motivation. In traditional cases, both a legally adequate motive and adequate beliefs are legally required. In “no belief cases,” an important constraint remains: an adequate motive is still required. If Benjamin and Claudio are properly motivated, if their reason for using force is really to defend themselves from future harm, then they will normally also have appropriate respect for the legal judgments of necessity and proportionality that the state has implemented. But this analysis is far from conclusive; after all, jurisdictions can differ significantly in those legal judgments. So we need to put the issue more concretely: is the “no belief” actor’s response consistent with what we would fairly expect of an actor who is fully aware of the jurisdiction’s legal requirements? In other words, even if we accept the fiction that all citizens do know the law or the falsehood that all should know it, we should ask whether someone in the extraordinary circumstances of a sudden attack who knew the legal standards and was generally motivated to comply with them would actually be able to form the necessary factual beliefs that would then permit him to find a less violent response, or to delay his response, or otherwise to act in objective or external conformity with the requirements of necessity and proportionality. For example, suppose Benjamin knew that he was not legally entitled to use deadly force in response to a nondeadly threat of force. The question for the jury is whether in actually using deadly force, but forming no belief about whether he was employing deadly rather than nondeadly force, he has acted with reasonable self-control and with appropriate respect for the legal norms. And the answer could be yes, if he acted with a proper motivation, if he had little time and opportunity

to perceive his environment and consciously contemplate an appropriate response, and if he acted with reasonable self-control.

Two additional constraints can limit the scope of the defense for “no belief” actors. First, notice something special about the Claudio example. Jurisdictions following the Model Penal Code’s approach to retreat resolve this example by providing a full defense unless Claudio actually forms the affirmative (and correct) belief that he can retreat safely. So if Claudio forms no belief about the efficacy of retreat, one way or the other, he obtains a full defense. This considerably narrows the duty to retreat, of course. If we adopted similar requirements for all elements of self-defense, then my proposal would be otiose: an actor motivated by self-defense would lose the defense only if he affirmatively knew that his force was excessive in degree, or knew that the threat was nonimminent, or knew that he was using force against a *lawful* aggressor, and so forth. There may be good reasons not to adopt such requirements generally, however.<sup>41</sup> Still, it is important to keep in mind that even a selective use of such requirements can be helpful in significantly constraining the scope of the defense for “no belief” defendants.

Second, another potentially significant constraint on such a defense is this: actors cannot obtain a full defense if they hold affirmative beliefs that are directly *inconsistent* with the jurisdiction’s legal requirements.<sup>42</sup> So if Claudio actually affirmatively believes that the aggressor will depart before inflicting any further violence, he should lose the defense. (I discuss this second constraint below.<sup>43</sup>)

So, to answer the question posed a few paragraphs earlier, if Benjamin and Claudio obtain a full defense, they do not really receive

41. A general requirement of this sort would, for example, give a full defense (a) to an actor whose reason for ignorance of the relevant facts is culpable or (b) to an actor who failed to exercise reasonable self-control. Here are examples of each scenario: (a) a gang member Max is paying insufficient attention to the imminence or non-imminence of an attack by a member of a rival gang because Max is focusing his attention on beating up another member of the rival gang; (b) a hot-headed person regularly responds to modest physical contact with extreme violence.

42. This second constraint, which requires the actor to meet general defense requirements but causes the actor to forfeit the defense if he has an inculpatory belief, is considerably weaker than the first, which automatically provides a full defense *unless* the actor has an inculpatory belief.

43. See text accompanying *infra* notes 53–54.

unfair preference relative to Bernard and Carl (who will not), so long as their defense is based on a sound criterion of reasonable self-control, one that gives appropriate weight to the legislature's specified requirements. And "appropriate weight" means that the actor must show the same respect for the legislative rules that we can fairly expect of an actor who does have accurate beliefs about the relevant facts underlying his self-defense claim (as explained above).

In the end, I confess, I doubt that we can fully solve the problem of reconciling the "no belief" approach with both the jurisdiction's objective, external legal requirements and the traditional rule that an actor is normally strictly liable despite his reasonable mistake or ignorance about the governing criminal law. That traditional rule is itself in considerable tension with the most defensible conceptions of moral fault. Why, for example, should a defendant with honest and reasonable beliefs about most elements of self-defense lose the defense because he understandably fails to grasp the intricacies of a state's retreat rules?<sup>44</sup> A more ideal legislative standard would provide a defense of honest and reasonable mistake or ignorance of law, and then would also provide a concomitantly greater privilege to use force when a person exercising reasonable self-control and showing due respect for the governing legal standards would do so.

## **B. The Teachings of Psychology and Neuroscience**

Scientific evidence of how individuals make decisions, in general, and how they respond to stress, in particular, provides some support for my approach. Dual processing theories of brain function suggest that many human actions involve, first, an immediate, unconscious "System I" response, followed by a more considered, reflective "System II" response,

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44. For example, under the Model Penal Code, one has a general (though narrow) duty to retreat if one is planning to use deadly force, but one has no such duty if assailed in his place of work, but then again, one does have a duty if, when assailed in his place of work, he is assailed by someone else who he knows also works there. Model Penal Code § 3.04(2)(b), §3.04(2)(b)(i) (Proposed Official Draft 1962).

which might (or might not) “correct” the initial response.<sup>45</sup> Indeed, remarkably enough, actors who make fully conscious choices often register responses in the “emotional” part of the brain even without the actor’s awareness, and those who register such “emotional” responses perform tasks better than those who do not.<sup>46</sup> It appears, then, that conscious means-end reasoning is only one effective path towards realizing one’s ends; intuitive and emotional responses can also shape behavior in ways that serve the actor’s goals.

Actions in response to a threat of violence certainly fit this general pattern. Even when emotional reactions such as fear are not fully conscious, they contain significant cognitive content that plays a role in directing and shaping the actor’s behavior. Moreover, reactions to sudden threats also reveal a more particular set of characteristics—namely, a pattern of “fight or flight” (or, perhaps more accurately, “freeze (hypervigilance), flight, fight, or fright”).<sup>47</sup>

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45. See D. Kahneman & S. Frederick, Representativeness Revisited: Attribute Substitution in Intuitive Judgment, in *Heuristics and Biases: The Psychology of Intuitive Judgment* 49 (T. Gilovich, D. Griffin, & D. Kahneman eds., 2002):

The essence of such a [dual-processing] model is that judgments can be produced in two ways (and in various mixtures of the two): a rapid, associative, automatic, and effortless intuitive process (some times called System 1), and a slower, rule-governed, deliberate and effortful process (System 2). System 2 “knows” some of the rules that intuitive reasoning is prone to violate, and sometimes intervenes to correct or replace erroneous intuitive judgments. Thus, errors of intuition occur when two conditions are satisfied: System 1 generates the error and System 2 fails to correct.

Daniel Kahneman, *Autobiography*, Nobelprize.org (2002), <http://www.nobel.se/economics/laureates/2002/kahneman-autobio.html>. Kahneman is here summarizing research from the following article: D. Kahneman & S. Frederick, Representativeness Revisited: Attribute Substitution in Intuitive Judgment, in *Heuristics & Biases: the Psychology of Intuitive Judgment* 49 (T. Gilovich, D. Griffin, & D. Kahneman eds., 2002). See also Oliver R. Goodenough & Kristin Prehn, A Neuroscientific Approach to Normative Judgment in Law and Justice, 359 *Phil. Transactions Royal Soc’y London B* 1709, 1713 (2004).

46. See Joseph LeDoux, *The Emotional Brain* 174–78 (1998); Gretchen Vogel, Scientists Probe Feelings behind Decision Making, 275 *Sci.* 1269 (1997) (commenting on Antoine Bechara, Hanna Damasio, Daniel Tranel, & Antonio R. Damasio, Deciding Advantageously before Knowing the Advantageous Strategy, 275 *Sci.* 1293 (1997)); J. Lehrer, Followers of Passion, *Boston Globe*, Apr. 29, 2007, at E3.

47. See H. Stefan Bracha, Freeze, Flight, Fight, Fright, Faint: Adaptationist Perspectives on the Acute Stress Response Spectrum, 9 *CNS Spectrums* 679 (2004); see also Bracha et al., Does “Fight or Flight” Need Updating, 45 *Psychosomatics* 448 (2004) (letter); LeDoux, *supra* note 45, at 149–50.

This pattern of extraordinarily quick reactions has obvious adaptive value for the type of emergencies faced by our ancestors, such as threats of harm by predators.<sup>48</sup> At the same time, these spontaneous reactions are sometimes crude, resulting in inaccurate or excessive responses to threats.<sup>49</sup> Furthermore, there is evidence that fright, like other emotions, can trigger mental processing of which the actor is not conscious. According to Professor Joseph LeDoux of New York University,

[F]rightening stimuli were processed by the emotional part of the brain before they were processed by the cortex, the seat of conscious thought. This “low-road” of sensory processing is almost twice as fast as the “high-road.” As a result, we experience strong emotional reactions before knowing what, exactly, we are reacting to.<sup>50</sup>

My proposal is consistent with this scientific evidence. In the fast-moving context of a violent attack, it is often unrealistic to expect the person attacked to consciously and carefully evaluate the precise extent of a threat, the likely effect of his response on the aggressor, and the availability of alternatives. Yet his emotional and intuitive<sup>51</sup> reactions will often display a “wisdom” of their

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48. See *id.* at 163–65. See also Aaron T. Beck, *Prisoners of Hate: The Cognitive Basis of Anger, Hostility, and Violence* 72 (1999):

When we are confronted with a threat, we have to be able to label the circumstances quickly so that an appropriate strategy (fight or flight) can be put into effect. The thought processes activated by threats compress complex information into a simplified, unambiguous category as rapidly as possible. These processes produce dichotomous evaluations, such as harmful/harmless, friendly/unfriendly.

49. See *id.* at 73 (“primal thinking processes” are generally adaptive for sudden emergencies but tend to “crowd[ ] out our more reflective thinking”).

50. Lehrer, *supra* note 46, discusses Joseph E. LeDoux et al., *The Lateral Amygdaloid Nucleus: Sensory Interface of the Amygdala in Fear Conditioning*, 10 *J. Neurosci.* 1062 (1990). For a less technical discussion, see Joseph E. LeDoux, *The Emotional Brain, Fear, and the Amygdala*, 23 *Cellular & Molecular Neurobiology* 727 (2003).

51. Emotions and intuitions are overlapping but sometimes distinct phenomena. “It is possible for humans to make intuitive judgments about the world that have a low level of emotionality.” Goodenough & Prehn, *supra* note 45, at 1717. In the context of this paper, it is possible for a person under attack to respond relatively calmly and to rely on an intuitive judgment about what response would be appropriate rather than on a set of explicit beliefs about all the legally relevant elements of self-defense.

own, providing unconscious or subconscious insight into the nature of the threat and the appropriate, effective possible responses.<sup>52</sup>

### C. Doctrinal Wrinkles: “Negating Beliefs” and “Reasonable Ignorance”

Consider two doctrinal wrinkles. The first, precluding the defense when the actor has a “negating” belief inconsistent with a claim of self-defense, qualifies the account above (in a small number of cases). The second, a loosening of self-defense requirements to encompass reasonable ignorance as well as reasonable mistake, appears to be a simpler approach than the one I endorse, but I will argue that it is inadequate.

#### 1. Negating (Inculpatory) Beliefs

Should we impose a limitation on the assertion of self-defense when the actor happens to possess a *negating* belief, a belief substantively inconsistent with a claim of self-defense? That is, should the actor lose the defense if he actually believes facts that would, if true, render his action *unjustifiable*? Indeed he should. If the actor actually believes that he is being confronted with a toy gun as a joke, or if he actually believes that he could easily use nondeadly force to prevent a deadly attack yet chooses to use deadly force instead, he should not be entitled to the defense.

An interesting doctrinal example of a distinct negating belief limitation of this sort is the modern (Model Penal Code) approach to retreat. Even when retreat is otherwise legally required, the actor is required to do so only “if the actor knows he can avoid the necessity of using [deadly] force with complete safety by retreating.”<sup>53</sup> The Model Penal Code treats the quoted language as a limitation *on the duty to retreat*, and thus as an expansion of the right to self-defense. However, if a jurisdiction adopted my proposed approach to the “no belief” scenario, permitting a full defense in some cases where the traditional requirement of various beliefs would not permit a full defense, then by adopting this quoted language as well, the

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52. A recent popular book provides a number of examples supporting this assertion. See Gavin de Becker, *The Gift of Fear* (1997).

53. Model Penal Code § 3.04(2)(b)(ii) (Proposed Official Draft 1962).

jurisdiction would actually expand the duty to retreat and limit the right to self-defense. For the language suggests that even if an actor otherwise demonstrates a reasonable degree of self-control, he should *lose* the defense if he knows that he could retreat with complete safety.<sup>54</sup>

## 2. Reasonable Ignorance Rather Than Reasonable Self-control?

Should we reformulate my argument as simply requiring reasonable ignorance (or reasonable lack of belief)? Perhaps an actor should be entitled to self-defense only if he honestly and reasonably believes facts that would provide a justification, *or* if he lacks any beliefs about such facts<sup>55</sup> and his ignorance or lack of belief is “reasonable” (while if his lack of belief is unreasonable, he should not be entitled to the defense). Thus, suppose Jones has plenty of time to think about how to react, and calmly chooses to use violent force against the other, but is so preoccupied with seeking vengeance that he never forms any beliefs about whether his reaction is excessive for purposes of self-defense or whether alternative, less violent responses would protect his safety equally well. Jones’s lack of belief is plainly “unreasonable” and he is not entitled to a defense.

Expanding self-defense beyond actors who possess honest and reasonable beliefs about the legally necessary justifying facts, to encompass actors who are reasonably ignorant about the facts, is often sensible. (This is especially true when the actor plausibly concludes that if he makes an effort to acquire information sufficient to form a definite belief, he will increase the risk of suffering a violent attack and decrease the chance of escape or effective defensive response, as noted earlier.) Moreover, this expansion modifies existing self-defense doctrine less radically than my proposal does. However, this formulation is inadequate, because it remains

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54. Note that negating belief provisions occasionally are included as inculpatory elements of offenses (and not just part of defenses). Consider the MPC’s bigamy provision, § 230.1 (1)(a), (d), providing that one is guilty of the offense unless, *inter alia*, he believes that the prior spouse is dead, or reasonably believes that he is legally eligible to remarry. Similarly, the MPC defines perjury as making a false statement under oath when the actor “does not believe it to be true.” Model Penal Code § 241.1(1) (Proposed Official Draft 1962). See also Shute, *supra* note 18, at 174.

55. He still must, I assume, believe that he is being threatened with violence. See text accompanying *supra* note 12.

too focused on cognitive states—here, on what a reasonable person would actually believe. And this is problematic for three reasons.

First, not all who use defensive force while reasonably ignorant of the relevant facts are entitled to a complete defense. The more complex “reasonable self-control” criterion, which encompasses more relevant features of the situation, is therefore preferable. For example, suppose an actor is attacked very suddenly, with insulting words and a quick shove to the floor, followed by another shove as he tries to stand up. And suppose the actor then responds with extraordinary uncontrolled fury, pushing the assailant violently down a long flight of stairs, thus endangering the assailant’s life. In light of the sudden attack and the need to respond very quickly, it might be justifiable for this actor not to form any beliefs about the alternatives available to him (other than “I need to shove back”), and justifiable for him not to form any beliefs about the severity of the force he is inflicting on the attacker (other than “I need to protect myself”). But given the extreme violence of his response, my proposed requirement of “reasonable self-control” would deny a full defense. The “reasonable ignorance” approach might permit one. My approach seems preferable.

Second, in some situations an actor who is reasonably ignorant of some of the facts should, for that very reason, choose not to use defensive force at all (or at least not yet). So if the reasonable ignorance concerns whether the threat is deadly or not, and if the actor knows he could safely wait (because the threat is not yet imminent), then the reasonable ignorance test again permits too broad a defense.<sup>56</sup> Third, even when the reasonably ignorant actor is indeed entitled to a full defense, this is not simply because he acted while in a state of reasonable lack of belief about legally relevant facts, but also because, under all the circumstances, he was not culpable in using defensive force. (In the “blind fury” example from the prior paragraph, defendant might indeed have been reasonably ignorant of how much harm he would cause, but that does not justify his explosion of rage.)

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56. Peter Westen has pointed out to me that a defender of the “reasonable ignorance” approach could solve this overbreadth problem by endorsing a narrow version of the approach under which the actor must be reasonably ignorant of every feature that bears on culpability regarding self-defense—including, in my example, imminence as well as proportionality. This would solve the problem, I agree, but at the expense of restricting the “reasonable ignorance” approach to extremely rare cases.

The “reasonable self-control” criterion more faithfully implements this more global assessment of culpability.

#### IV. OBJECTIONS TO THE PROPOSAL

##### A. “You Can’t Escape Beliefs” Objection

One objection is that even the supposedly noncognitive “reasonable self-control” criterion must consider the actor’s beliefs, for we still must make sense of the requirement that the actor exercise a socially acceptable degree of self-control. Mustn’t he first consciously realize at least that there is a *risk* that he could be acting with excessive or unnecessary force, before we can fairly expect him to exercise self-control? If that is so, then the new proposal has not eliminated or even significantly minimized the conscious belief requirement, after all.

But conscious awareness of the risk of mistaken or excessive self-defense should not be required. In many scenarios, it is both highly unrealistic and unfair to expect actors to advert to such a possibility. Rather, the cognitive requirement should be less stringent: we should insist only that a person with a capacity for self-control both believe that he is imminently threatened with some degree of violence, and react with force for the purpose of defending himself. And, of course, short of demonstrable and serious mental defect, it is fair to expect all people, even in the circumstances of self-defense, to be alert to, or at least act in conformity with, their general social obligation to act carefully and not too violently.

##### B. The Objection that Scientific Evidence Shows “Reasonable Self-control” to Be Incoherent or Impossible

Perhaps the physical responses of the brain to a threat of physical harm are sufficiently patterned, predictable, and inexorable that no moral responsibility can be attributed to the actor who fails to act with what I call a reasonable degree of self-control.<sup>57</sup>

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57. Consider the comments of Richard Restak, a neurologist and neuropsychiatrist, about the Bernhard Goetz case. According to Restak:

[T]here are no reasonable people under conditions in which death or severe bodily harm are believed imminent. . . . [E]xpectations [that Goetz should have calmed down after the initial

In reply, I first note that this objection, in its broadest form, expresses the fundamental concern that causal determinism precludes moral responsibility. Whether this objection is persuasive is one of the most difficult topics in moral philosophy, and I will not take it on in this essay. My argument, like any other deontological or nonconsequentialist argument for self-defense, depends on refuting this objection. I believe, but will not here try to show, that it can be refuted.<sup>58</sup>

But a narrower version of the objection could have differential bite.<sup>59</sup> Suppose there were clear neuroscientific and psychological evidence that people threatened with serious harm not only tend to respond predictably in highly patterned ways, but also are physically *unable* to act otherwise. It would be no more fair to punish such a person than to punish a defendant whose arm was physically grabbed by another, more powerful actor who used the defendant's arm to strike the victim.

However, even as reformulated, the objection fails to persuade. Our actual experience shows that almost all people under threat of violence are

threat had passed] are neurologically unrealistic. Once aroused, the limbic system can become a directive force for hours, sometimes days, and can rarely be shut off like flipping a switch. The heart keeps pounding, the breathing—harsh and labored—burns in the throat; the thoughts keep churning as fear is replaced by anger and finally, murderous rage. At some point in this process memories for ongoing events may become permanently lost; false memories may be created as the frightened and rageful person lives over and over in his mind the act of violence that erupted in him in response to what he perceives as a threat to his life. . . .

Isn't it preferable therefore to face up courageously to these sometimes frightening and unpleasant realities instead of pretending that questions such as those being asked about Bernhard Goetz can be answered by courtroom speculations about how a reasonable person would have responded in his place?

To expect reasonable behavior in the face of perceived threat, terror and rage is itself a most unreasonable expectation.

Richard Restak, *The Law: The Fiction of the "Reasonable Man,"* Washington Post, May 17, 1987, at C3. Restak's argument obviously assumes that Goetz, and perhaps all other actors who actually respond with defensive force, are incapable of acting otherwise than they do, and thus cannot fairly be criticized for their reactions.

58. For some useful discussions of this topic, as applied to criminal responsibility, see Stephen J. Morse, *The Non-Problem of Free Will in Forensic Psychiatry and Psychology*, 25 *Behav. Sci. L.* 203 (2007); Peter Westen, *Getting the Fly out of the Bottle: The False Problem of Free Will and Determinism*, 8 *Buff. Crim. L. Rev.* 599 (2005).

59. A recent overview of contemporary neuroscientific evidence that purportedly demonstrates lack of criminal responsibility concludes that the evidence for this bold claim is inadequate, but also finds strong evidence that some kinds of brain dysfunction increase the probability of some kinds of criminal behavior. D. Mobbs, H.C. Lau, O.D. Jones, & C.D. Firth, *Law, Responsibility and the Brain*, 5 *PLoS Biology* 693 (2007).

able to modulate and control their responses to some degree. It is exceedingly unlikely that most people under threat, or even a substantial subset of them, are literally physically compelled or “on automatic pilot” such that they are entirely *unable* to act differently than they in fact act.

### C. The Objection that My Proposal Treats Self-defense as an Excuse Rather than a Justification

The proposal, some might object, is troublingly similar to the test for provocation or “heat of passion” as a partial defense to murder (mitigating it to voluntary manslaughter). Those tests, at least in their modern incarnations, consider whether the defendant exercised a reasonable degree of self-control.<sup>60</sup> Similarly, modern tests of duress sometimes frame the issue as whether the defendant “was coerced . . . by the use of, or a threat to use, unlawful force against his person . . . which a person of *reasonable firmness* in his situation *would have been unable to resist.*”<sup>61</sup> And yet the provocation doctrine is often considered a partial excuse, and the duress doctrine is often considered a complete excuse. So, notwithstanding my assertion earlier that providing a defense in the “no belief” scenario is sometimes a matter of justification, not excuse, the actual test that I suggest—a test of reasonable self-control—bears an uncanny and worrisome resemblance to standard doctrines of excuse.<sup>62</sup>

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60. See Model Penal Code § 210.3 (1)(b) (Proposed Official Draft 1962) (manslaughter includes “a homicide which would otherwise be murder [that] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse”); *People v. Berry*, 556 P.2d 777, 780 (Cal. 1976) (“[T]his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances” (quoting *People v. Logan*, 164 P. 1121, 1122 (Cal. 1917))); *People v. Manriquez*, 123 P.3d 614, 640 (Cal. 2005).

61. Model Penal Code § 2.09(1) (Proposed Official Draft 1962) (emphasis added).

62. Another objection based on the alleged similarity to provocation is that the “reasonably” provoked defendant only obtains a partial, not a full, defense; so why do I endorse a *full* defense for the actor who exercises reasonable self-control? This objection is unpersuasive because it misunderstands the function of the “reasonableness” requirement in heat of passion doctrine: its function is not to identify when a person is so seriously provoked that the *killing* is fully excusable, but instead to identify when a provoked defendant is understandably strongly tempted to react with violence, because it is understandable that he would become highly emotional in response to the provocation. See Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. Crim. L. & Criminol. 421 (1982).

This objection is overstated, though it contains a germ of truth. It is overstated because the mere fact that a legal standard refers to self-control does not mean that the standard is one of excuse rather than justification. The reasonable person is not devoid of emotions—indeed, if a person reacts with cold indifference to a traumatic event, such as the death of a loved one, we have reason to doubt his reasonableness, his capacity for empathy, sympathy, and human concern. Courts sometimes speak (especially in voluntary manslaughter cases) as if the relation of emotion to reason is a relation of subjective, uncontrolled irrationality to calm, sober reflection. Thus, they speak of the danger of emotion “dethroning” reason.<sup>63</sup> But emotions have cognitive content: in the specific context of self-defense, the emotions of fear and foreboding are valuable epistemic guides to danger.<sup>64</sup> And the fact that

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At the same time, even if a defendant who justifiably has no beliefs about some of the legally relevant aspects of self-defense does not exercise reasonable self-control, sometimes he might deserve a partial defense, analogous to provocation and also to imperfect self-defense. For the latter category permits punishment for a lesser crime, such as involuntary manslaughter rather than murder, when a defendant honestly but unreasonably believes the facts are such as would warrant a complete defense. See Dressler, *supra* note 3, at 239–40.

63. See, e.g., *State v. McDermott*, 449 P.2d 545, 548 (Kan. 1969), discussed in Lee, *Murder and the Reasonable Person: Passion and Fear in the Criminal Courtroom*, *supra* note 31, at 263. Consider Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* 24–25 (2001), critiquing the common view

that emotions are “non-reasoning movements,” unthinking energies that simply push the person around, without being hooked up to the ways in which she perceives or thinks about the world. Like gusts of wind or the currents of the sea, they move, and move the person, but obtusely, without vision of an object or beliefs about it. . . . Sometimes this view is connected with the idea that emotions derive from an “animal” part of our nature. . . .

Nussbaum objects that

this view, while picking out certain features of emotional life that are real and important, has omitted others of equal and greater importance, central to the identity of an emotion and to discriminations between one emotion and another: their aboutness, their intentionality, their basis in beliefs, their connection with evaluation.

*Id.* at 33.

64. See de Becker, *supra* note 51; LeDoux, *supra* note 45. For further discussion of the relationship of emotion to “rational” or “reasonable” action, see Horder, *supra* note 22, at 74 (“Actions in anger, or out of fear, can be rationally or truly justified, in that the experience of the emotions in question may be what helps us to behave rationally or in a fully justifiable way” (footnote omitted)); Dan Kahan & Martha Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269 (1996) (arguing for an “evaluative” conception of emotion over a “mechanistic” conception that simply evaluates the degree

an attack puts an actor into a highly emotional state of fear, anger, or indignation is perfectly consistent with the actor's conduct being fully justifiable.

Indeed, my proposal that we evaluate whether the defendant exercised a reasonable degree of "control" over his emotions risks validating this incorrect view that emotions are legally relevant only insofar as they "dethrone reason." That is why I also suggest that, in applying the test, a jury should inquire whether the defendant acted reasonably in the circumstances, taking into account the beliefs he justifiably held, the beliefs he justifiably lacked, and the emotions he *justifiably* felt.

Moreover, although the use of a "reasonableness" limitation in both provocation and duress doctrine might seem to indicate that the doctrine must be an instance of justification rather than excuse,<sup>65</sup> this conclusion is incorrect. "Reasonableness" is a protean concept, sometimes operating as a shorthand for rules of conduct that a different decision maker is to specify, sometimes as a normative standard of ideal or socially acceptable behavior (in offense definitions and in justification defenses), and sometimes as a normative standard of understandable behavior that is not socially acceptable (in excuse defenses).<sup>66</sup> In provocation and duress, it serves the latter role. Thus, in these contexts, it might be defensible to interpret "reasonable" as average behavior, or even as behavior that a substantial minority of the population would engage in, but it would be unacceptable to so interpret "reasonable care" in an offense definition or in a justification defense.<sup>67</sup>

The germ of truth in the objection is that excuse does properly play a role in some of these "no belief" cases. Insofar as the actor has very little

to which emotions, of whatever sort, interfere with the actor's power of self-control); Ronald de Sousa, Emotion, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Spring 2003), <http://plato.stanford.edu/archives/spr2003/entries/emotion>.

65. See Peter Westen & James Mangiafico, *The Criminal Law of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 *Buffalo Crim. L. Rev.* 833, 897–900, 907–09 (2003); John Gardner, *The Gist of Excuses*, 1 *Buff. Crim. L. Rev.* 575, 579 (1998). See also Stephen J. Morse, *Culpability and Control*, 142 *U. Pa. L. Rev.* 1587, 1618 (1994); Antony Duff, *Choice, Character, and Criminal Liability*, 12 *Law & Phil.* 345, 358 (1993).

66. For an overview, see Kenneth W. Simons, *Dimensions of Negligence in Criminal and Tort Law*, 3 *Theoretical Inquiries L.* 283 (2002). On "reasonableness" tests and excuse, see *id.* at 314–15; Kenneth Simons, *Rethinking Mental States*, 72 *B.U. L. Rev.* 463, 551–52 (1992); Duff, *supra* note 22, at 61–68.

67. The average Boston driver does not use reasonable care, I can affirm as a long-time resident of the city.

time to think, or is understandably in a panicky, overwhelmed, highly confused, or highly frightened frame of mind, these factors are properly considered in determining whether his action was excusable, even if not justifiable (i.e., not commendable or permissible).<sup>68</sup> But I also believe that actors who are not clearly in a frame of mind that warrants a full excuse, and who nevertheless fail to form the affirmative beliefs that traditional self-defense doctrine requires, are entitled to a full defense if they satisfy the criteria I have articulated. Although these actors do not readily qualify for an excuse, I have tried to show that we have good reason to treat them as justified.

#### D. The Bernhard Goetz Objection

Would my proposal make it easier for a homophobe, or a racist, or a person relying on racist stereotypes, to obtain a complete defense? Suppose that Goetz (who is white) credibly testified that he was so overwhelmed with fear of the four African-American youths who he believed were attacking him in a New York City subway that he never formed any clear beliefs about the severity of the threat they posed, the likely severity of his response, or the available alternatives.<sup>69</sup> Wouldn't my approach justify acquittal, even if his fear was based entirely upon a highly inaccurate racial stereotype? Indeed, the defense strategy in *Goetz* included the claim that, after firing the first shot, Goetz was on "automatic pilot," so that he was not really to blame for the later shots; they were essentially involuntary.<sup>70</sup> Isn't the possibility of encouraging such claims further proof of the perils of a vague "reasonable self-control" test?

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68. Imagine, for example, that the defendant is suffering intense and inescapable pain at the hands of the aggressor, who is twisting his arm high up behind his back. Cf. Horder, *supra* note 22, at 85. If the defendant lashes out in violent response in order to stop the pain, we might want to treat the response as excused, but not necessarily justified.

69. To be sure, in his confession, Goetz proudly claimed to have formulated clear beliefs about all of these matters. Specifically, he claimed that if he had had more bullets, he would have fired again and again until the supposed assailants were dead, without regard to whether they were posing a continued threat. *People v. Goetz*, 497 N.E.2d 41, 44 (N.Y. 1986). At trial, however, the jury discounted the credibility of much of the confession.

70. See George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* 30–31 (1988).

Whether an actor is ever justified in considering race when deciding to employ force in self-defense is a difficult question.<sup>71</sup> Surely certain motives for the use of defensive force (such as outright racial hostility or homophobia) should render the use of that force impermissible. Perhaps my proposal makes it slightly easier, as a practical matter, for actors with such illegitimate motives to obtain acquittals. Compare the traditional requirement that the actor possess affirmative conscious beliefs in all of the facts necessary to justify his conduct: this more demanding requirement will tend to bar some self-defense claims in which a racist motive underlies the decision to use force. Still, it will not bar all such claims, so the question is one of degree. I am not convinced that the slightly increased risk of permitting a defense to one motivated by racism is sufficient reason to reject my proposal—especially since the proposal could be supplemented, in appropriate cases, with an instruction about the legal impermissibility of acting upon a racist reason.

### E. A Risk of Encouraging Law Enforcement Misconduct?

Would the proposal too readily excuse police and other law enforcement officials who respond to supposed threats unthinkingly, impulsively, and excessively? Would it result in too many Amadou Diallo or Rodney King tragedies?<sup>72</sup>

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71. Stephen Garvey has recently questioned the received view that the use of self-defense is invariably impermissible when affected by racial stereotypes. He argues that even under a test of self-defense requiring honest and “reasonable” beliefs, it is inconsistent with the commitments of a liberal state to cause a person to forfeit the right to self-defense because his honest belief that he needed to use deadly force was influenced by racism or racial stereotypes. Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 *New Crim. L. Rev.* 119 (2008). But see Jody Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 *Stan. L. Rev.* 781 (1994); Cynthia Kwei Yung Lee, *Race and Self-Defense: Towards a Normative Conception of Reasonableness*, 81 *Minn. L. Rev.* 367 (1996) (proposing race-switching jury instructions to encourage jurors to suppress their unconscious racism and stereotypes).

72. The 1999 Amadou Diallo incident, in which New York City police killed an innocent, unarmed man, is often viewed as the paradigm of unjustified, impulsive police overreaction, since police shot forty-one bullets into Diallo’s body. The truth appears to be more complicated, however. Some view the police’s conduct as based on a tragic mistake: one of the officers at the scene stumbled to the ground, and the other officers understandably

I don't believe so. Properly understood, the proposal addresses private citizens who are suddenly confronted with a violent threat. Police and other law enforcement officials, by contrast, are trained to deal with these situations. They are thus much more likely actually to form beliefs as to relevant facts. And if they do not form such beliefs but simply react, they should at least be judged by the standard of a reasonable officer with the requisite training, a much more demanding standard than should apply to a private citizen surprised by an act of violence.

### F. The Pragmatic Objection

Perhaps you are right in theory, the pragmatist concedes. But it is too dangerous to discard the cognitive approach and open the doors to a free-wheeling "reasonable degree of self-control" criterion. Jurors so instructed might tend to give a full defense to those who acted somewhat understandably but wrongly; the jurors might too easily conclude that the victim, overwhelmed by fear, cannot be blamed, and should be fully excused or justified, and they might fail to recognize that fear does not excuse or justify any and all responses. Or, conversely, they might tend to award the defense too sparingly, improperly assuming that it is relatively easy for a person to react calmly and sensibly in response to a threat.

This objection worries me, especially the risk that the criterion will open the floodgates to implausible or weak claims for a full defense. At the same time, insofar as the objection rests on the greater vagueness of the proposal relative to the "honest and reasonable belief" standard, I concur with those who point out that vagueness in the definition of a defense is much less problematic than vagueness in the definition of the affirmative elements of a crime.<sup>73</sup> Moreover, if vagueness is considered to be a significant problem, it would be possible to qualify the reasonable self-control approach even more than I already have, as follows: the jury could be instructed that ordinarily, what is a sensible and acceptable response is equivalent to what a person who had time to think about the alternatives

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believed that Diallo had shot him. For a thorough account, see Jeffrey Toobin, *The Unskated Question*, New Yorker, March 6, 2000, at 38.

73. See Glanville Williams, *Necessity*, 1978 *Crim. L. Rev.* 128, 130.

would do.<sup>74</sup> This qualification is somewhat arbitrary, however, and in tension with the arguments presented above.

## V. CONCLUSION

Most modern criminal law theorists and much modern criminal legislation endorse a cognitivist form of culpability, focusing on the beliefs that an actor had, or should have had, when engaging in wrongful behavior. This is understandable. A focus on beliefs is part of a reassuringly straightforward, rationalist conception of culpability. Only when actors choose evil or wrongdoing, with sufficiently clear and precise beliefs about the legally relevant circumstances, do they properly incur serious blame. And if they engage in otherwise wrongful action that is justifiable, they continue to incur blame unless they choose to take the justified action for all of the right reasons and with all the right beliefs.

But this picture of culpability is a caricature of a more complex reality. Self-defense scenarios illustrate with special vividness that the cognitivist portrayal is inaccurate and unpersuasive. Whether or not my own proposal is a convincing and workable alternative to current cognitivist tests of self-defense doctrine, I hope that this paper has suggested reasons for questioning and revising the traditional model.

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74. Another pragmatic objection relates to the burden of persuasion. The implications of my proposal vary significantly depending on whether the state has the burden of disproving the defense, or the defendant has the burden of proving it. I have implicitly assumed that the defendant has the burden; thus, I have been concerned about cases in which a defendant lacks one or more legally required beliefs, and responds to a threat justifiably, yet is required to prove those beliefs—a very difficult burden (unless the jury exercises its discretion to nullify the law). But suppose instead that once the defendant satisfies his burden of production and provides some minimal evidence of the legally required beliefs, the state must disprove beyond a reasonable doubt defendant's possession of those beliefs. In such a jurisdiction, in ambiguous situations, defendants have a greater chance of being acquitted. So long as there is minimal evidence that defendant might have had all the necessary exculpatory beliefs, the prosecution will often have difficulty proving beyond a reasonable doubt that he did not. In short, my proposal will make much less practical difference, relative to current law, if the state has the burden of disproving the defense.