An Attack on Self-Defense

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INTRODUCTION

Debate surrounding the structural boundaries and differential application of justification and excuse in Anglo-American criminal law has continued to generate an impressive body of scholarship over the last three decades. As Professor Mitchell Berman recognized, “[i]n the field of Anglo-American criminal law theory perhaps no subject has been more in vogue the past twenty-odd years than the distinction between justification and excuse.”¹ The confusion between justification and excuse has been raised with respect to several other defense doctrines,
including, but not limited to, duress, self-defense (and defense of others), mistake of fact, mistake of law, and even insanity.

Although self-defense is generally treated as a justification, it is not difficult, given the broad range of cases to which the defense has been applied, to appreciate why the defense’s nature and structure have persisted as topics of scholarly inquiry. In the present Article, I agree with and build upon a formulation of self-defense (and, likewise, defense of others) as justification that requires both objective and subjective factors. I recognize that formulations of self-defense that require both objective and subjective components, or arguments on their behalf, are not exactly new. These formulations reflect, with some variation, Professor George Fletcher’s perspective in his debate with Professor Paul Robinson, the latter of whom, along with Professor Heidi Hurd, favors a construction of justification in which only objective factors are relevant. The present Article, however, significantly adds to the debate about self-defense in multiple, critical ways.


4. E.g., Terry L. Price, Faultless Mistake of Fact: Justification or Excuse?, 12 CRIM. JUST. ETHICS 14, 14–15 (1993) (posing that actions based upon a faultless mistake of fact are appropriately deemed excused, not justified).

5. E.g., Re’em Segev, Justification, Rationality and Mistake: Mistake of Law is No Excuse? It Might Be a Justification!, 25 LAW & PHIL. 31, 31–33 (2006) (arguing that ignorance or mistake of law, while not an excuse, could be justified when based on a rational analysis of the information the actor has or should have).

6. See Norman J. Finkel & Christopher Slobogin, Insanity, Justification, and Culpability Toward a Unifying Schema, 19 LAW & HUM. BEHAV. 447 (1995) (discussing insanity as an excuse versus justification by comparing tests applied to the defense of insanity); see also Fletcher, supra note 2, at 956 (1985) (criticizing Abraham Goldstein’s neglect of the justification/excuse distinction in Goldstein’s writings about insanity).

7. Hereafter, I only discuss self-defense, but it should be understood that the presented arguments apply equally to defense of others. References to the doctrine of defense of others are made where necessary.

8. Here, the word “objective” is used to mean that which is real and exists independent of subjective interpretation or understanding. In contrast, although the reasonable person standard is typically considered an “objective” standard, its application is more accurately characterized as the subjective estimation of the fact finder as to a normative condition (i.e., what judgment would generally be exhibited in the scenario in question).

9. See George P. Fletcher, The Right Deed for the Wrong Reason: A Reply to Mr. Robinson, 23 UCLA L. REV. 293, 295 (1975) (arguing that it is consistent with the theory of justification to make the justificatory defense defense available only to those whose intent is meritorious).

10. See Paul H. Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Responsibility, 23 UCLAL. REV. 266, 266 (1975) (arguing that if the criminal law is extended to punish bad intent alone or the mere possibility of harmful conduct, it goes beyond its accepted role and injures its credibility).

11. See Heidi M. Hurd, Justification and Excuse, Wrongdoing and Culpability, 74 NOTRE DAME L. REV., 1551 (1999) (arguing that an action is justified only if it is permitted by our best moral theory, regardless of the beliefs of the actor).
ways that, ultimately, provide some clarity as to how the defense should be reconsidered and reframed. In the present Article, I first clarify the nature and structure of self-defense as justification and outline the objective and subjective criteria by which self-defense killings should be framed, and secondly argue that cases of supposed “self-defense” that are based in part or in whole on mistake of fact cannot be justified. With this foundation, I argue that because self-defense is a full justification defense, and “self-defense” cases that are based in part or in whole on the defendant’s reasonable mistake of fact cannot be justified, a new, separate defense, which I call mistaken self-defense (and mistaken defense of others), need be recognized. This new defense would function to excuse (and not justify) the defendant’s understandable but erroneously motivated violent act.

Boundaries of self-defense, as the doctrine is currently framed, are improperly set. That is, contemporary self-defense doctrine includes cases in which either no defense of oneself has actually occurred in the killing of one’s victim or, although one has, in fact, defended himself via his mortal act, he has done so in an unjustifiable manner (e.g., the case in which an innocent bystander is killed in order to preserve one’s own life). Although these reactive killings may be understandable, and thus potentially excusable, they are not justified. In order to more fully illustrate the “boundary problem” of self-defense, I, at various points throughout this article, contrast self-defense with the doctrine of heat of passion, the latter of which correctly allows for reasonable but mistaken beliefs of provocation in its partial excusal of emotionally disrupted, reactive killers. Elsewhere, I have attempted to provide clarification of the necessarily excusatory nature of heat of passion doctrine.

According to the doctrine, which is also referred to as “provocation,” a defendant charged with murder may be found guilty of the lesser offense of manslaughter if, in response to (the reasonable belief of) serious provocation by the victim, he became emotionally charged and killed the victim while in this state of compromising emotional arousal. It is via the killer’s understanding that he has

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12. I have placed the term self-defense in quotations here because cases of mistaken self-defense involve no real defending of oneself (or, in the case of defense of others, defending of another).

13. Although the position I articulate herein may be equally applied to non-mortal acts, I focus on mortal instances of defensive and otherwise reactive violence so as to efficiently illustrate problems with the self-defense doctrine as currently framed.

14. Reid Griffith Fontaine, Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification, 43 U. MICH. J.L. REFORM 27, 27 (2009) (arguing that the emotional disturbance brought about by heat of passion situations can only be characterized as an excuse) [hereinafter Fontaine, Adequate (Non) Provocation]; Reid Griffith Fontaine, On Passion’s Potential to Undermine Rationality: A Reply, 43 U. MICH. J.L. REFORM 207, 213 (2009) (insisting that there is an important moral distinction between justification and excuse) [hereinafter Fontaine, On Passion’s Potential]. Certainly, several others have made convincing arguments, the most comprehensive of which is perhaps Joshua Dressler. See, e.g., Dressler, Provocation: Partial Justification or Partial Excuse?, 51 MOD. L. REV. 467, 467–80 (1988) (arguing that the criminal law ought to send clear moral messages and that common intuition tells us that provocation partially excuses, but does not partially justify a homicide) [hereinafter Dressler, Provocation].
been so seriously wronged that he becomes emotionally overcome such that his self-control and rationality are undermined. Regardless of the validity of the interpretation of provocation by the victim, the defendant’s invocation of heat of passion will not be successful unless he can adequately demonstrate that she killed while in an emotionally disturbed state. Thus, the critical mechanism of the heat of passion defense is disruptive emotion.

In contrast, the doctrine of self-defense has no requirement of emotion. In Anglo-American criminal law, traditional self-defense doctrine has recognized five basic requirements. First, the defendant must have honestly and reasonably believed that she was faced with an imminent threat of grievous bodily harm or death. Second, she needed to have honestly and reasonably believed that it was necessary to kill the victim in order to prevent the threat from being realized. Third, the amount of the defendant’s force must not have exceeded the degree of force posed by the threat. Fourth, the defendant needed to have honestly and reasonably believed that the threat against her was unlawful or unjustified. Finally, many jurisdictions require that the defendant not be the initial aggressor or provoker of the threat. Nowhere in these requirements does one find even a mention of emotion, never mind a requirement that it exist in such substantial form that it influences the defendant’s decision making in the course of his reactive killing.

Self-defense differs from heat of passion in other important ways, too, of course, but it is heat of passion’s emotion requirement that is most critical in definitively placing it in the excuse camp. Like heat of passion homicide, killing in self-defense is enacted in response to the belief of another’s wrongful action. However, this is where the likeness ends. Killing in self-defense is considered justifiable homicide when it is reasonably believed that the victim poses an
imminent threat of grievous bodily harm or death\textsuperscript{20} to the killer. It does not matter if the killer acts in an entirely non-emotional (e.g., fearless), rational, and self-controlled manner—the killing is deemed to be fully justified. Unlike with heat of passion, impairing emotion (or emotion of any degree or kind) is not necessary in self-defense. Rather, in the case of self-defense, one’s right to prevent another from wrongfully causing grievous bodily harm or death itself entitles him to intentionally, emotionlessly, and otherwise soundly engage in reactive violence against the threat.\textsuperscript{21}

Although at times left unrecognized, a problem exists, however, in the case that no real imminent threat of death is present. That is, in the case in which the killer reasonably but erroneously believes that another is about to cause him mortal harm, the perceived offender has acted in no way that would adequately change the moral balance of the relationship between the victim and killer. As such, the victim has not acted such that he deserves to die or in a way that entitles the killer to take his life. In fact, there exists no characteristic—related to the victim or otherwise—of such a scenario that gives rise to entitlement on the part of the killer. This is the absolute critical element as a killing may not be said to be justified if the actor is in no way entitled to kill. Whereas the reasonableness of the killer’s belief that he is being mortally threatened may make his act understandable, and thus potentially excusable, it does not and cannot make his act justifiable.

This troubling inconsistency raises some questions as to the nature of self-defense. Is it a justification or excuse? Is it possible for self-defense to at times be a justification and, at other times, an excuse? Herein, I argue that self-defense is a full justification and that it is never an excuse. I assert criteria by which justifiable homicide should be determined and suggest that the doctrine of self-defense be reframed such that cases in which there is no real defense—such as in the case of a reasonable but erroneous belief of a mortal threat—be excluded and handled under a separate excuse-based doctrine of mistaken self-defense. Also, I address self-defense cases of the excessive force and otherwise imperfect varieties and discuss the degrees to which culpability and punishment in such cases should be mitigated and on what bases (i.e., justification versus excuse; full versus partial). In sum, this Article takes issue, from a deontological retributivist perspective, with the traditional common law framing of self-defense, and, via a proposed standard of three criteria, offers a restructuring such that self-defense may be more accurately limited to truly justifiable reactive homicides, and a separate excuse-based defense may be considered by which the role of reasonable mistake in reactive killing may be more properly understood and handled.

\textsuperscript{20} For the purpose of simplicity, “grievous bodily harm or death” is hereafter referred to as either death or mortal harm.

I. REVISITING JUSTIFICATION AND EXCUSE

By its nature, the distinction between justification and excuse is guided by the retributive principle of penal proportionality, such that one is blamed and punished no more or less than he deserves. Just as a defendant does not deserve punishment when he acts rightfully, he does not deserve punishment when he has committed a wrongful act for which he is not responsible. Although there have been attempts to “reframe” the distinction to account for actions that are generally desirable but not always rightful, these attempts have met with limited success, in part, I expect, because they misunderstand the retributive nature of the distinction as utilitarian (or at least partly utilitarian), and in part because although the actions for which they account may be generally desirable, they are, at times, clearly wrong and undesirable.

Justified conduct refers to action that is permissible or acceptable. In the case of the justified act, the actor has done nothing wrong. Justified action is not prohibited and, in many cases, is favorably evaluated and encouraged as a good or right way to act. In contrast, excused conduct refers to action that is impermissible and unacceptable, but, because of circumstances that are relevant to why the action in question was enacted, the actor’s culpability and punishment are mitigated (or partially excused), as in the case of heat of passion, or fully exonerated, as in the case of insanity. Excused conduct is, by its nature, bad and wrong. The conduct is not excused because it is allowable, but, despite its objectionable nature, because of the specific characteristics of the actor (e.g., cognitive functioning) or the context in which the act was committed (e.g., material features of the social situation appear as they are not) suggest that the actor was not responsible for the undisputed wrongdoing.

In criminal law, justification defenses admit that the defendant is responsible for the alleged conduct, but necessarily assert that the defendant has done nothing wrong by engaging in the act—that is, the defendant is responsible for his rightful act. In effect, the successful justification defense satisfactorily rebuts the prosecution’s prima facie case that the defendant committed any criminal act at all. In

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22. See Paul H. Robinson, A System of Excuses: How Criminal Law’s Excuse Defenses Do, and Don’t, Work Together to Exculpate Blameless and Only Blameless Offenders, TEX. TECH L. REV. (Forthcoming); see also Eugene R. Milhizer, Group Status and Criminal Defenses: Logical Relationship or Marriage by Convenience?, 71 Mo. L. REV. 548, 572 (2006) (“A proper understanding of excuse theory, as with justification theory, begins with a recognition that criminal law ought to stigmatize and punish a person only if he merits it.”).

23. I have placed the word reframe in quotes because the effect of these attempts is more to dissolve the basic distinction between right and wrong upon which the justification-excuse dichotomy rests.

24. Some criminal law theorists believe that some actions should be classified as “warranted,” as opposed to justified or excused. The “warranted” label applies to actions that are generally desirable but may cause social harms in certain instances (such as a police officer’s shooting of an innocent pedestrian who is mistaken as a threatening criminal). See R. A. Duff, Answering for Crime: Responsibility and Liability in the Criminal Law 296 (Hart Publishing 2007); Kenneth W. Simons, Self-Defense: Reasonable Beliefs or Reasonable Self-Control? 11 NEW CRIM. L. REV. 51, 65 n.27 (2008).
contrast, excuse defenses admit not only to having engaged in the alleged act, but that doing so was wrongful. The successful excuse defense accepts the prosecution’s *prima facie* case that the defendant has committed a crime, but adequately demonstrates that the defendant acted in a nonculpable, and therefore nonpunishable, manner by providing evidence of extenuating circumstances that show that he committed the act without the requisite degree of guilty mind. That is, excuse defenses assert that although the defendant indeed acted wrongfully, he should not be held responsible for having done so. As Professor Joshua Dressler has correctly stated, “[w]hereas a justification negates the social harm of an offense, an excuse negates the moral blameworthiness of the actor for causing the harm.”  

In either case, the defendant is exonerated of culpability and punishment—just as one who has committed an act that is determinedly acceptable is not punished, neither is a person who, although admittedly committed a wrongful act, acted in a manner for which he cannot justly be blamed.

Although to the criminal law theorist the importance of understanding and defining the boundaries of and distinction between justification and excuse may be self-evident, it may be less obvious to others. In his reviews of the justification-excuse distinction, Professor Dressler provided excellent discussions of the many reasons why the distinction is critical and, as such, I do not review them here. At the top of the list, though, lies the essential purpose of the criminal law to define and prohibit conduct that is wrongful and socially harmful in a clear and consistent manner. Indeed, invaluable is the criminal law that realizes this goal—a goal that is naturally embodied by scholarly discussions in pursuit of understanding the boundaries of and distinction between justification and excuse.

Typically, the question of justification or excuse arises in consideration of undisputed conduct that, if unjustifiable and inexcusable, is of a heinously reprehensible kind, like violent crime. As such, it is all the more important that the criminal law be correct, clear, and consistent in its treatment of alternative cases in which examples of the conduct are charged. Likewise, it is all the more important that criminal law cautiously (if not conservatively) frame justifications so as to limit the number and kind of example to only those that are indisputably morally and legally acceptable. It is one thing to excuse a wrongful act; it is quite another to say that the conduct is not wrongful (and thus justified). The moral implications of this distinction are only magnified as the reprehensibility of the criminal conduct in question rises to the level of that which is truly wicked and evil (e.g., murder in

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26. The question of why the distinction between justification and excuse is important arises more than occasionally among non-criminal law theorist audiences. See, e.g., Michael L. Corrado, *Notes on the Structure of a Theory of Excuses*, 82 J. CRIM. L. & CRIMINOLOGY 465 (1991). This is likely due, at least in part, to the fact that both justifications and excuses result in the defendant being exonerated from culpability and punishment.


28. Undisputed, and not alleged, as justifications and excuses both affirm the *actus reus*. 
cold blood).

It is based, in part, on this rationale that the present Article more narrowly tailors self-defense. While this Article may raise the floor of justification, it simultaneously raises the ceiling of excuse. It is not my intention to reframe doctrine such that culpability and punishment are assigned where they are not deserved. Rather, it is my intention to reframe the doctrine such that criminal law may more accurately define and prohibit conduct that is culpably formed, wrongful, and socially harmful. As stated above, I believe that this is the primary reason why the justification-excuse distinction is crucial.

Historically in Anglo-American criminal law, there has been much debate as to whether certain affirmative defenses are, by their nature, structure, and function, justifications or excuses. The reasons for the persistence of such debates are dependent to varying degrees on the affirmative defense in question. However, as I discuss below, there exists one major issue that is central to the justification-excuse debate, regardless of the subject affirmative defense, and is captured by the question: Is an otherwise justifiable act justifiable if it is based on mistake of material fact? The answer is no.

This issue was central to an argument that I made elsewhere that heat of passion is a partial excuse, and not justification, defense. There is perhaps no defense that has received more attention (and been the subject of more confusion) with respect to justification and excuse than heat of passion. A review of all points of disagreement is not warranted here and, despite the continued scrutiny it receives and contention by which it is surrounded, the doctrine has been quite sufficiently handled in other scholarly articles.

Recounting one particular point of disagreement about the nature of heat of passion is warranted, though, and this has to do with what I have called adequate non-provocation. United States common law jurisdictions typically require that the defendant who has invoked heat of passion as a partial defense to murder must demonstrate that, among other criteria, she was adequately provoked. “Adequate provocation” includes social stimuli or scenarios that a reasonable person would interpret to be so serious and severe in nature that it would cause her to experience significant emotional disturbance. On multiple occasions, however, American courts have recognized the invokability of heat of passion in cases in which either no real, serious provocation occurred, or, alternatively, although the defendant was really and seriously provoked, the provocation was exacted by someone other than his victim. In either variety, although no true provocation by

31. Fontaine, Adequate (Non) Provocation, supra note 14 at 29.
the victim ever occurs, the circumstances are deemed to be sufficient to meet the adequate provocation standard—hence the name adequate non-provocation. In such cases, the courts have asserted that heat of passion may still be raised as a defense because the defendant killed his victim while in a state of rage, a state of emotional disturbance that resulted from his subjective experience of being provoked. As one court wrote:

The excitement is the effect of a belief, from ocular evidence, of the actual commission of [a wrongful act]. It is the belief, so reasonably formed, that excites the uncontrollable passion. Such a belief, though a mistaken one, is calculated to induce the same emotions as would be felt were the wrongful act in fact committed.33

The case of adequate non-provocation involves a scenario in which the defendant’s belief of provocation by the victim is genuine but erroneous. This type of scenario is arguably far more difficult to justify than the case in which the reactive killer was first seriously provoked by his victim. Nevertheless, it remains possible to imagine some points of disagreement from scholars and jurists who believe that heat of passion is a partial justification. First, such justification proponents may argue that the courts in adequate non-provocation cases simply got it wrong. That is, heat of passion should not have been allowed because the defendant’s actions were not, in fact, partially justified. The problem with this retort is that heat of passion doctrine has never required that there exist a real provocation, or any provocation by the victim for that matter, but only that the killer’s interpretation of provocation be reasonable.34 This is not problematic, of course, where heat of passion is regarded as excuse.

Second, justification proponents may argue that the defendant’s reasonable belief that he was provoked is itself what partially justifies his conduct. This argument is deeply troubled on many grounds, including, but not limited to: (a) a reasonable, genuine belief that another has seriously provoked the killer, in and of itself, in no way makes the perceived provoker deserving of harm; (b) similarly, nor does this belief entitle, in any way, the killer to inflict any degree of harm against the perceived provoker, and (c) any harm inflicted based on an erroneous belief that one has been wronged itself upsets the moral balance that previously existed between the killer and his victim. Of course, even in the case in which the killer’s belief that he has been seriously provoked is accurate, it seems odd to characterize heat of passion as a partial justification for the simple reason that the killing is not mitigated if the killer did not act while emotionally disturbed! But

33. State v. Yanz, 50 A. 37, 39 (Conn. 1901).
34. See Wayne R. LaFave & Austin W. Scott, Criminal Law § 7.10 (2d ed. 1986) (noting the requirements for heat-of-passion voluntary manslaughter).
this is a matter for another discussion, and, in fact, I have addressed it elsewhere.35

For those who (incorrectly, in my view) believe that heat of passion is a partial justification (or hybrid justification-excuse) defense, it may be tempting to assert that, although the defense is one of partial justification, it is, at times, only a partial excuse. This raises the more general question of whether a defense can ever be both a justification and excuse, or, more accurately, whether it is possible for a defense to alternate, depending on the scenario in question, between justification and excuse. Here again, the answer is no. As discussed below, this point is critical to understanding the need to reframe self-defense doctrine.

What distinguishes justification and excuse has nothing to do with culpability and punishability, but rather the fact that excuse defenses admit that a social harm was caused as the result of the defendant’s act. This distinction is crucial because it defines the difference between admitting to an act that is acceptable, right, and lawful versus unacceptable, wrong, and unlawful. At the core of this distinction is the moral—or, more accurately, lawful—meaning that may be attributed to the conduct. A justification defense asserts that the defendant’s conduct is non-culpable and non-punishable because the defendant did not do anything legally wrong. Alternatively, an excuse is the combination of an admission that one has engaged in wrongdoing that has produced social harm and an exonerating explanation as to why he has so acted. To summarize, whereas a justification defense is a negation of wrongdoing altogether, an excuse defense is an explanation as to why one should not be held responsible for his admittedly wrongful conduct.

This distinction between legally acceptable and wrongful conduct is fundamental to the necessary conclusion that a defense cannot simultaneously or alternatively be a justification and excuse. An act must meet a notably higher standard in order for it to be deemed justified. In fact, the legal nature of a justified act is naturally diametrically opposed to that of an excused act in that, unlike the former, the latter is entirely unacceptable and produces social harm. Surely it is an altogether materially different matter to defend an act that is right from one that is undisputedly wrong. Classes of conduct that are distinguished at such a basic level—that is, the nature of their moral essence—necessarily require separate defenses that reflect this meaningful distinction.

Doctrines that are (confusedly) depicted to represent simultaneous or alternative justification-excuse defenses may be clarified by either—but not both—of two explanations. The first explanation is that the defense is never in fact a justification; a problem exists where an excuse defense is sometimes mischaracterized as a justification. This explanation applies to heat of passion.36 In sum, heat of passion would never apply to an even partially justifiable scenario because the justificatory nature of the scenario (such as in the case that one’s reactive violence prevents further wrongdoing from occurring or

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36. Id.
greater social harm from being realized) would make unnecessary the criterion of emotional disturbance. Rather, such cases would be more accurately classified as self-defense, defense of others, necessity, and the like.

Professor Kyron Huigens made a related argument recently in his rejection of the claim by Professor Peter Westen and Mr. James Mangiafico that duress is a justification defense. Professor Huigens described the first of what he claimed were two primary errors made by these scholars as follows:

[Professors Westen and Mangiafico] show that hypothetical cases that are identifiable as duress on relatively uncontroversial criteria are analyzable as cases of justified action. While they succeed in this effort, they fail to show that there is no case of duress that can also be analyzed as a case of excuse. That is, they fail to show that duress is a justification in the sense that they apparently intend: that duress is in all cases a justification and never an excuse.

The fact that duress can be an excuse naturally undermines the argument that it is a justification. This problem is particularly evident (and exposing) in cases in which the defense in question is characterized to favor a reading of justification, such as in certain instances of heat of passion homicide. If conduct that is admittedly criminally wrongful meets the criteria of the defense in question, then the nature of the defense itself must necessarily be that of excuse—that is, the fact that the admittedly criminally wrongful conduct qualifies means that only the lower standard of excuse may be met for the defense in question to apply.

The second explanation is that the defense in question has been improperly (e.g., too broadly) framed, characterized, and/or applied such that, although it is, by its nature, a true justification, it has been used to pertain to excuse-oriented scenarios that have been mistakenly included under its doctrinal umbrella. Whereas this explanation does not apply to defenses such as heat of passion and duress, which are natural excuses more properly clarified by explanation one above, it goes directly to the heart of justification/excuse debate surrounding the doctrines of self-defense and defense of others. Resolution of this second kind of problem (justifications improperly broadened to include excuses) may be realized by deconstructing the doctrine and properly reframing it.

37. Huigens, supra note 2 at 303.
38. Westen & Mangiafico, supra note 2 at 833.
39. Huigens, supra note 2, at 303.
II. SELF-DEFENSE AS LEGITIMATE JUSTIFICATION

Debate of justification versus excuse in self-defense doctrine is longstanding in Anglo-American criminal law. As mentioned earlier, debate between Professors Fletcher and Robinson in the 1970s is credited for sparking this recent trend in the American Academy. Also of note is a pair of provocative articles that stirred debate in the 1990s. In the first of the articles, Professor Judith Thomson offered six hypothetical scenarios in which a person kills another in order to save his own life.

The scenarios were designed to illustrate differences between killings that meet only the lower standard of excuse (i.e., the killing is wrong, but understandable due to the circumstances under which it was committed) versus the higher standard of justification (i.e., the killer is entitled to take the victim’s life). Thomson made clear that only in the scenarios in which another is about to wrongfully, though not necessarily intentionally or even knowingly, take your life are you justified to kill him in self-defense. In response, Professor Larry Alexander took issue with both Thomson’s category of justified self-defense scenarios, arguing that some of them may be merely excusable, as well as her non-justified killing category (in which one kills an innocent bystander to save his own life), suggesting that some of the scenarios may rise to the standard of justification.

Although it is outside the scope of this Article to review the various issues about
which Thomson and Alexander disagreed, it is worthwhile to recognize the fundamental difference in their philosophies by which they reach their respective conclusions. This difference lies in the question: Does one have a natural right not to be killed, and, if so, what defines such a right? Or, put another way: When is it permissible to kill another? Recognition that one does indeed have a right not to be killed necessarily acknowledges that acting so as to protect this right, as long as said conduct does not itself violate the natural right of another, it is permissible (or justifiable) conduct. However, there are conditions that limit actions that are otherwise permissible in the preservation of one’s life.

Some scenarios in which one harms another in order to save his own life are clearly unacceptable. The burglar who kills the inhabitant of a dwelling when suddenly faced with the threat of being killed by the inhabitant is in no way justified or even excused. Rather, the burglar’s homicidal act would typically be deemed murderous (even if only via felony murder law). Other cases are less obvious, though, and, as such, it is important to distinguish between acts of self-defense and acts of self-preservation, a distinction I believe Professor Thomson correctly articulated. Historically, self-defense has referred to cases by which the killer reasonably believes that his victim is about to wrongfully take his life. Anglo-American criminal law has long viewed these killings as justified. Alternatively, self-preservation cases involve the killing of one whom, although not about to take the killer’s life, must be killed in order for the killer to prevent the taking of her own life. These killings are wrong and unjustifiable. In the case of a self-preservation killing, the victim is in no way deserving of being killed and the killer in no way has the right to kill the victim. Indeed, it may be argued that such self-preservation scenarios are not even excusable. In the case of a person who is of sound mind, and in a rational, controlled manner kills another who bears no mortal threat, she is culpable and punishable for the wrongful killing of another. It may be understandable, to some degree, as to why the person killed the nonthreatening victim, but not to the degree that the killer’s act may be excused. The misfortune of the killer (i.e., the killer faces death if he does not kill the innocent victim) has no bearing on the culpability and punishability of intentionally and

47. For example, one is not justified to use an innocent third party as a human shield to prevent a killer from wrongfully taking her life.

48. This is a narrowly-tailored definition of self-preservation, purposefully bound in order to illuminate the distinction between self-defense and self-preservation in cases that involve a human killer and human target. As such, scenarios such as Kant’s classic case of two individuals at risk of drowning competing for a floating plank are not at issue. See, e.g., IMMANUEL KANT, LECTURES ON ETHICS 346–47 (Cambridge: Cambridge University Press 1997).

49. Thomson, among others, argued that it is not excusable for one who has been wrongfully imprisoned to eat a “plump baby” in order to prevent his own death by starvation. Thomson, supra note 3, at 290–91. I agree. Of course, if the hypothetical were altered, by which the self-preserver killed the plump baby as a result of, due to, say, hunger and fatigue, his control and rationality having been diminished (clearly for reasons for which he could not rightfully be held responsible), the killing may well be excusable, though by a different defense doctrine (e.g., legal insanity, diminished capacity/responsibility).
wrongfully taking the life of her victim.50

Whereas it may be challenging to reach consensus as to what distinguishes punishable (e.g., a felonious actor’s defensive killing) from non-punishable (e.g., self-defense) killings, surely scholars have had much greater difficulty distinguishing between nonpunishable killings that are justified versus excused. This debate, for example, was central to Larry Alexander’s contention with Thomson, the underlying question of which asked: When is a killing that is committed in order to save one’s life permissible versus impermissible but excusable? In the process of discussing, and attempting to resolve, this issue, scholars have described certain kinds of killings in ways that beg a different but related and equally important question: Can self-defense ever be an excuse? For instance, Alexander has discussed “justifiable, as opposed to excusable, self-defense,”51 suggesting that whereas some self-defense killings may merely be excused, others may rise to the level of justification. I, however, find both the terms justified self-defense and excused self-defense to be odd terms—whereas the former is redundant, the latter is necessarily confounded. Typically, the killings that are considered excused self-defense cases in the Thomson-Alexander exchange are not acts of self-defense at all, as much as they are self-preservation killings (in that an innocent bystander is killed to save one’s own life), as this distinction was earlier clarified. That is, the more accurate distinction is between self-defense and self-preservation than “justified self-defense” and “excused self-defense.”

A related point of confusion as to the justification-excuse debate arises when there is a mistake of fact as the reactive killer’s interpretation of threat. Professor Russell Christopher has described this “particularly thorny instantiation”52 of the incompatibility of subjective and objective reality as the “problem of mistaken justification.”53 Mistaken justification, simply put, characterizes scenarios in which the killer would have been justified to kill the victim if his erroneous belief that his homicide is justified, but no more so than is the common law approach mistaken by its classification of such cases as justified self-defense.
criminal law may handle mistaken justification in two ways. The first, which reflects a subjective theory of self-defense, treats a killing that is reasonably believed by the actor to be necessary in order to prevent another from wrongfully taking his life as justified. It is the reasonable belief that the killing is necessary that is itself sufficient to meet the standard of justification. The second, which reflects an objective theory of self-defense, treats the killing as unjustified, though it does not negate the excusability of the act.

Traditionally, there have been three conceptualizations of self-defense. The Anglo-American common law conceptualization, the five requirements of which are described above, treats a reactive killing as justified via self-defense as long as the killer honestly and reasonably believed that it was necessary to kill his victim in order to eliminate the latter’s imminent threat of grievous bodily harm or death. Here, the subjective interpretation of the killer is sufficient, and, as such, this approach is purely *subjective*. Alternatively, Robinson55 and Hurd56 have advanced a purely *objective* approach by which the killer’s state of mind is irrelevant as long as the defendant’s act actually prevented his victim from wrongfully taking his life. Here, even if the defendant had every good reason to believe that his victim was about to wrongfully take his life, his reactive killing is not justified.57 Finally, Fletcher has argued in favor of a hybrid58 or “dual requirement”59 theory.

The hybrid theory of self-defense states that the defendant is only justified in his killing of the victim if both (a) the killer acted with the belief that his act was necessary to prevent the victim from carrying out his imminent threat of grievous bodily harm or death, and (b) the killing did indeed prevent the victim from causing grievous bodily harm or death to the killer.

A tremendous amount of literature exists that analyzes the merits and difficulties presented by each of these approaches.60 As such, I do not herein review them. Rather, I outline three criteria by which self-defense may be viewed as a legitimate justification. This three-requirement framework places me squarely in the Fletcher camp, although it raises some important questions about self-defense as justification that have not been adequately handled in past writings. In addition, I recognize that other acts that are related in some fashion to but not self-defense or defense of others may be, in part, justifiable and/or completely or partially excusable. I offer a hierarchy of defense tiers by which these acts may be understood and handled.

57. Although the killing may be excused.
58. Christopher, *supra* note 41, at 297. Note that Christopher alternates in his characterization of Fletcher’s theory as “objective” and “hybrid.” As Fletcher demands both objective and subjective requirements in his formulation, the terms “hybrid” and “dual” seem most fitting.
59. *See* Lee, *supra* note 17, at 219–21 (describing Robinson’s theory that the defendant must both perform the right deed and act for the right reason).
III. MAKE NO MISTAKE, MISTAKEN SELF-DEFENSE IS NO JUSTIFICATION

Before presenting the three-requirement framework of self-defense as justification, I should briefly state my opposition to the alternative approaches that have received the greatest scholarly attention. First, as discussed earlier, I reject the Anglo-American common law approach to self-defense because the mere belief that one has been presented with an imminent threat of grievous bodily harm or death, no matter how honest and reasonable it may be, does not make it permissible for the killer to take the life of his innocent, non-threatening victim. The killer’s subjective belief in no way entitles him to kill the latter. As such, a reactive killing that is based on an honest and reasonable but erroneous belief that the victim is about to unlawfully take his life is wrong, impermissible, and unjustified. Of course, depending on the circumstances, it may be entirely excusable, though not via the doctrine of self-defense.

Second, I reject the purely objective approach of Professors Robinson and Hurd because with it comes the capacity to deem evil acts permissible. That is, if X kills Y in order to then take Y’s money, and it turns out that, unbeknownst to X, Y was about to kill X for the same reason, X’s killing of Y is justified via Robinson’s purely objective approach. In other words, although X planned, with malice aforethought, to kill Y in order to achieve personal gain, according to the purely objective approach, X’s act is justified as it prevented Y from wrongfully killing X. I do not believe that the kind of luck bestowed upon X (i.e., that his homicidal act prevented Y from wrongfully killing him) is naturally moral such that it reverses the wildly impermissible (and evil) act and makes it permissible.

Rather, at least in the abstract, I prefer Fletcher’s general hybrid theory that, in addition to the objective requirement, the defendant’s mental state prior to and during the killing of the victim is important. However, I would state the requirements, consisting of both objective and subjective criteria, of self-defense as legitimate justification as follows:

1. The defender need be faced with a real, imminent threat of grievous bodily harm or death. As is typically accepted, the defender should not be expected to

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61. Or what Professor Hurd has called “culpable right actions”—defined as “actions that one has a right to do, but that one does with bad intentions or for bad reasons.” Hurd, supra note 11 at 1565–67. Culpable right actions is a term that only avoids being oxymoronic if “right-doing” (or the rightness of actions) is defined in a purely objective manner, by which culpability (or non-culpability) is treated separately from wrongdoing (or rightdoing). If the rightness of actions is based, in part, on the subjective mindset of the actor, we must come to a conclusion that is altogether different. That is, if X culpably kills Y, who was just about to wrongfully kill X, X’s prevention of Y wrongfully taking his life does not make X’s act “right.” Rather, it makes X lucky; but it has no bearing on the evil nature of his act.

62. Of course, had Y killed X first, Y’s otherwise murderous act would be deemed justified self-defense, as well, according to this purely objective approach. This makes for a problematic paradox, discussed in detail by Professor Russell Christopher. Christopher, supra note 46. Professor Christopher argues that this paradox is created by the hybrid approach as well, and I discuss this matter and explain its solution below.
discern between non-mortal threats of grievous bodily harm and mortal threats;
2. The defender need act with the genuine, valid belief that it is necessary to kill the perceived source of the threat in order to prevent himself from suffering grievous bodily harm or death.\textsuperscript{63} The genuine, valid belief must arise prior to the actor’s initiation of defensive force;\textsuperscript{64}
3. The defender’s act need prevent his life from being wrongfully taken by his victim.

Whereas requirements 1 and 3 are objective, requirement 2 is subjective. All three of these criteria must be met. The following are hypothetical scenarios by which two but not all three requirements are present.

\textit{Mistaken Source of Threat} (requirements 1 and 2, but not 3): X aims his loaded gun at Y and yells, “You’re a dead man, Y!” Y, having had his back to X, turns around to identify the source of the threat. Although he does not see X, he does see Z, the latter of whom is loading his gun. Based on his (perhaps quite reasonable) belief that Z is about to kill him, Y shoots and kills Z. Y, however is not justified in his killing of Z, as Z was not the actual source of the threat.

\textit{Lucky Wrongdoing} (requirements 1 and 3, but not 2): X aims his loaded gun at Y with the intent to shoot and kill him for the thrill of it. Y, unaware of X’s intent and conduct, is amusing himself by practicing gun tricks. In the process of carelessly practicing a particularly dangerous trick, Y fires his gun and shoots and kills X. Here, Y’s act prevented X from wrongfully taking his life. However, Y did not kill X for this purpose, but rather killed X as a result of criminally reckless conduct. Y is not justified in his act, but rather appears to be guilty of reckless homicide (manslaughter). The fact that X was about to wrongfully take Y’s life in no way justifies the latter’s clearly culpable wrongdoing. Y’s conduct, though wrongful,

\textsuperscript{63} There exists the question of whether the defendant need act with the belief that the killing is necessary or if acting with a non-culpable mental state is sufficient for the killing to be justified via self-defense. If the killing is accidental and non-negligent, and thus committed with a non-culpable mental state, and serves to prevent the victim from wrongfully taking the killer’s life, then the killing is exactly that—a non-negligent accident that is non-culpable and non-punishable. In such a case, self-defense would not apply because the act is non-culpable regardless of any threat posed by the victim.

\textsuperscript{64} Although one’s subjective, conscious experience of reacting to a threat may be consistent with the idea that onset of (a) the evaluation of the threat (cognitive activation), and (b) the defensive response (enactment of the conduct) occur simultaneously, they do not. Now, it may well be that in the more hurried or impulsive instance the cognitive onset takes place only a fraction of a second prior to the enactment. Regardless, cognitive activation triggers (i.e., gives rise to) the enactment. In other words, consistent with a scientific articulation of cognitive mediation, the evaluation of the threat, or the belief that one is faced with a threat of grievous bodily harm or death; mediator (M) mediates the temporal sequence defined by presentation of threat (cause X) and defensive response (effect Y): X→M→Y. Professor Ken Simons recently argued that the standard “honest and reasonable belief” requirement of traditional common law self-defense is “cognitively excessive” and should be replaced by a requirement of reasonable exertion of self-control. Kenneth W. Simons, \textit{Self-Defense: Reasonable Beliefs or Reasonable Self-Control?} 11 NEW CRIM. L. REV. 51, 52–53 (2008). In contrast, I here require that the defender’s belief be valid and not just reasonable, and I have defined belief such that it is not cognitively excessive but rather consistent with scientific research on information processing in real time.
was lucky in that it prevented X from wrongfully taking Y’s life. Y’s luck is not so powerful, though, that it makes his wrongful act rightful. Y could just as easily have hit Z, an innocent bystander.65

Mistaken Imminence of Threat (requirements 2 and 3, but not 1): X and Y are friends, both of whom are romantically interested in Z. Z is only romantically interested in X and has explicitly rejected Y on numerous occasions. Z convinces X that they will not be able to marry in peace unless Y is removed from the picture as Y has been relentless in his aggressive pursuit of Z. X believes that, at the end of the month, Y may accept a job that will require him to move to a different country. X devises a detailed plan to kill Y at the end of the month if Y remains in town. Unbeknownst to X, the job offer that Y had been considering is withdrawn. As such, there is now no chance that Y will move by the end of the month, making it virtually certain that X will later kill Y in accordance with the former’s plan. The day after X decides that he will kill Y at the end of the month if Y remains in town, X and Y see each other at the town fair. As a joke, X points a realistic toy gun at Y in order to get a friendly rise out of him. Based on his belief that X is about to kill him, Y shoots and kills X. Although Y believes that his act is necessary because X poses an imminent mortal threat, and Y’s act does indeed prevent his own life from being wrongfully taken by X (X would have killed him at the end of the month), there existed no imminent threat of grievous bodily harm or death.

Note my emphasis on the word perceived in requirement 2: The defender need act with the belief that it is necessary to kill the perceived source of the threat in order to prevent his own grievous bodily harm or death. The justified defender may be mistaken as to the source of the threat, as long as all three requirements are met. To illustrate this possibility, consider the following extension of the hypothetical scenario presented in Mistaken Source of Threat above: X threatens Y’s life and prepares to kill him. In his effort to identify the source of the threat, Y observes Z loading his gun, leading to his mistaken belief that Z is the source. Based on Y’s belief that it is necessary to kill Z in order to justifiably defend himself, Y aims and shoots at Z. However, Y misses Z and hits X, the actual threat. Y has acted in self-defense and has justifiably killed X. Y was entitled to take X’s life in order to defend his own from being wrongfully taken, and he acted with the correct belief that his conduct was necessary to defend himself. Although Y was mistaken as to the source of the threat, he acted (i) in response to a real, imminent threat of death, (ii) based on a genuine belief that killing the perceived victim was necessary, and (iii) to prevent his life from being wrongfully taken by X. In this way, X’s intent to

65. Do outcomes matter with respect to the moral meaning of the actors and acts that caused them? Of course. If X unjustifiably shoots his gun at Y, and a large bird flies in the bullet’s path and saves Y’s life by absorbing the bullet, X is only guilty of attempted murder, not murder. Whereas this morally lucky outcome has served to reduce the degree of wrongfulness of X’s act, I do not believe that outcomes can be so morally lucky that they can turn wrongfulness into rightfulfulness, or, rather, make evil (e.g., malice aforethought murder) non-evil (e.g., justifiable homicide).
justifiably kill Z is transferred to X.

A related transfer-of-intent scenario exists by which self-defense may be replaced by defense of others, or vice-versa. Consider the following transferred defense scenario: If X poses a real, imminent threat of death to Y, Y may justifiably shoot at X to kill in order to defend himself. If Y hits Z, an innocent bystander, X has not committed justifiable homicide, as Y’s killing of Z is only excusable (if that). However, if Z, who is an innocent bystander with respect to the specific relationship between X and Y, poses an unjustifiable, real, imminent threat of mortal harm to yet a fourth individual, Z₂, Y’s killing of Z is justified via defense of others. Alternatively, if Y intends to kill Z to justifiably defend Z₂, and accidentally kills X, who was about to wrongfully kill Y, Y has committed justifiable homicide via self-defense, rather than defense of others. In such cases, the defender’s intent transfers, as does the specific defense. In either case, Y has met all three criteria of self-defense as a legitimate justification.

Special note should be made that many cases of “self-defense” that involve mistake of fact are devoid of both requirements 1 and 3. Above, I noted specific instances of unjustifiable “mistaken self-defense.” In the mistaken source of threat scenario, Y meets requirements 1 and 2, but not 3, in that he mistakenly kills a non-threat. In the mistake of imminence of threat, Y meets requirements 2 and 3, but not 1, in that he mistakenly kills a real threat that poses him no imminent danger. However, the typical mistaken self-defense case involves the mistaken belief that there exists a mortal threat at all. For example, we may consider an altered version of the mistaken imminence of threat scenario. Suppose that X decides that being married to Z is not worth killing Y. He, too, highly values his friendship with Y and, furthermore, believes the risk of being found out and punished is too great to kill Y. As such, he fully abandons his homicidal plan. At the town fair, X and Y meet and X decides that it would be fun to scare Y by pointing a (realistic) toy gun at him. Y, honestly and reasonably but erroneously believes that X is about to kill him and, in response, shoots and kills X. Here, only requirement 2—that Y need act with the belief that it is necessary to kill X in order to prevent X from wrongfully taking his life—is met. Based on his mistaken belief, Y killed X having met only the subjective requirement of self-defense as justification. Although this is sufficient according to traditional Anglo-American common law, it falls significantly short of the three-requirement framework that I offer herein. Here again, Y’s mistaken belief that he must kill X in order to defend himself against being murdered in no way makes X deserving of death or Y deserving to take his life. The belief, by itself, has no bearing on the objective moral relationship (or balance) between X and Y. As such, this conception of self-defense is sorely confounded.

Of course, whereas this three-requirement framework incorporates some of the criteria recognized by the American common law formulation of self-defense (e.g., belief of necessity), it nullifies or eliminates the need for others. For one, the common law requirement that the defender need believe that the threat is imminent
is eliminated. It is enough for the defender to believe that his defensive force is necessary to combat a wrongful, mortal threat, as long as the wrongful, mortal threat is objectively imminent. Second, the common law requirement that the defensive force used is proportional to (or, more accurately, no greater than) that which is posed by the threat is made moot in that the defensive force cannot be greater than that posed by threat if indeed the threat is objectively mortal. In these ways, the three-requirement framework more efficiently formulates self-defense as justification.

The three-requirement framework herein advanced allows for a tidy, proper handling of the much-debated cases that involve an innocent aggressor, as well. For instance, imagine the scenario by which X is drugged (or hypnotized) against his will by villainous W, altering X’s mental state, and, in turn, his conduct, such that it is now fully controlled by W. W directs X to find and kill Y. X finds and aims his loaded gun at Y, but Y first shoots and kills X to prevent X from wrongfully taking his life. Here, Y has justifiably killed X. X posed a real, imminent threat of mortal harm to Y. Y killed X based on his genuine belief that it was necessary to do so in order to prevent X from wrongfully taking his life. And, finally, Y’s elimination of X did, in fact, prevent his life from being wrongfully taken by his victim (X). Now, in no way is X responsible for the mortal threat with which Y was presented. However, although X acted in no way that makes him deserving of death, he has indeed posed an unjustified, imminent, mortal threat to Y, entitling Y to justifiably take X’s life in order to rightfully protect his own. The permissibility of Y’s defensive act toward X is not affected by X’s intent, or lack thereof, or the degree, if any, to which X is responsible for the mortal threat he posed to Y. It is the wrongful threat of death posed to Y, however unintentionally by X, which entitles Y to kill X.

Of course, treating acts of self-defense against innocent aggressors as justifiable never “feels” as good as it does in cases in which the aggressor threatens in a fully responsible, malicious manner. And, indeed, it should not, as X in no way deserves his mortal consequence. In this sense, the justifiability of self-defense in innocent aggressor cases may be deemed less compelling. Though it should be sufficiently compelling in the face of its alternative—that Y be forced to allow X to unjustifiably take his life. The reality that X unjustifiably endangers Y’s life entitles Y to take X’s life if it is necessary to prevent Y’s from being wrongfully taken. Y does not owe X anything more.

Alternatively, one is not entitled or justified to kill an innocent bystander in order to defend (or, more accurately, preserve) his own life. If X has one bullet left, and is about to use it to shoot and kill Y, Y may not pull Z, an innocent bystander, in front of him to use as a shield to absorb X’s final bullet. Z has no bearing on the

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66. See, e.g., Thomson, supra note 3; Alexander, Justification and Innocent Aggressors, supra note 3; Alexander, Self-Defense, supra note 45; Dressler, Justifications and Excuses, supra note 25, at 1161–1163 n.2.
relationship between X and Y, and Y is not entitled to introduce Z to the relationship such that Z should suffer a mortal consequence in place of X. As described above, such a case is more accurately described as self-preservation than self-defense. 67 Indeed, it may be argued (quite correctly, I believe) that not only is Y’s act unjustifiable, it is inexcusable. 68 Here, X has committed a culpable homicide (what, in most jurisdictions, would likely amount to second degree murder).

Likewise, I believe my three-requirement framework of self-defense as legitimate justification answers and resolves the paradox of the hybrid approach that was presented by Professor Christopher. 69 To be clear, Christopher argued that subjective, objective, and hybrid theories of self-defense as justification alike are in jeopardy because they allow for “paradoxes” that he otherwise called “logical contradictions” and “incompatible justifications.” 70 Let us suppose that X and Y use violent “defensive” force against each other based on their equally reasonable and erroneous beliefs that each is about to kill the other. 71 According to the subjective theory, it first appears that both X and Y are justified in their “self-defense” acts as their beliefs were reasonable that they needed to act as they did in order to prevent their own lives from being wrongfully taken. However, if they are both justified to have acted as such, then each is necessarily (and paradoxically concurrently) unjustified to have acted in response to justified force. Herein lies the paradox of incompatible justifications.

This paradoxical case is no better with respect to the purely objective theory of justification. X and Y are seemingly simultaneously unjustified and justified in their violent acts of force. Here, it makes no difference as to their subjective mental states prior to and during their acts. Because each actor concurrently uses significant force against the other, the objective theory of justifiable self-defense dictates that each is justified to act in defense of himself. Of course, if both X and Y

67. Although X is acting to defend himself, his act is not one of force directed toward the source of the threat, and, in this way, not a scenario to which the defense of self-defense applies.

68. In her articulation of what I have distinguished as self-preservation scenarios, Professor Thomson argued that this type of case is non-justifiable. Thomson, supra note 3, at 289–91. In contrast, Professor Alexander, in his response article suggested that some instances of self-preservation may rise to meet the standard of justification. Alexander, Self-Defense, supra note 45, at 64 (concluding self-defense killing justifiable in Thomson’s categories of Villainous Aggressor and Villainous Risk-Imposer). My position is more consistent with that of Professor Thomson. Now, such a case may be partially excused via the heat of passion (or provocation) defense. In this case, Y would need to demonstrate that, in response to realizing that X was about to kill him, he became so emotionally panicked, that his control and rationality were undermined such that he was not of sound mind when he pulled Z in front of him to absorb X’s final bullet. This, of course, would be an exceptionally unusual heat of passion scenario, but I believe the case could be fairly made according to the criteria traditionally recognized by American common law jurisdictions (it is unlikely that such a case could be successfully made elsewhere in Anglo-America, such as England, for example).

69. Christopher, supra note 41 at 304–07.

70. E.g., id. at 298–99. Hereinafter referred to as the “paradox of incompatible justifications,” or, simply, the paradox.

71. See Fletcher, supra note 2 at 972–73.
are justified in their forceful acts against each other, then they are necessarily, paradoxically simultaneously unjustified to use force to prevent or defend against each other, as well.

Professor Christopher claims that the paradox of incompatible justifications applies equally to the hybrid theory of self-defense. Here, the first objective criterion is met in that both X and Y are, in fact, using mortal force against each other. Also, the subjective criterion is met by each in that both X and Y exact this force out of his genuine, reasonable belief that he need act in such a way so as to prevent his life from being wrongfully taken by the other. Here again, if both are justified in their acts, then they necessarily must be simultaneously unjustified to act as such as their respective acts serve to oppose each other’s paradoxically justifiable acts of force against the other.

The paradox of incompatible justifications, though, does not apply to the hybrid theory as articulated by my three-requirement framework of self-defense as legitimate justification. Recall that requirement 2 states: “The defender need act with the genuine, valid belief that it is necessary to kill the perceived source of the threat in order to prevent himself from suffering grievous bodily harm or death. Said genuine, valid belief must arise prior to the actor’s initiation of defensive force.” It is in the second sentence that the key lies. The belief not only must arise prior to the actor’s initiation of force, it must be valid prior to any forceful conduct. That is, it is not enough for a belief that is initially erroneous, no matter how genuine and reasonable, to become valid after the defensive force has been initiated.

With respect to the paradox, then, X and Y both act unjustifiably (and not, paradoxically, justifiably). Their “defensive” acts are motivated by erroneous beliefs that they are under attack. As such, they do not act based on prior, valid beliefs. As already discussed, their wrongful acts do not become rightful after the fact—that is, after they were already initiated for the “wrong” reason. The impetus or reason for acting is necessarily wrong in that it is erroneous at its origin, and continues to be erroneous until X’s and Y’s respective acts of “defensive” force are initiated. Upon initiation of defensive force, the reason for acting can be said to be valid in the sense that the belief that the force is necessary to defend a mortal threat is no longer incorrect (remember that both X and Y initiate their respective acts of “defensive” force at the exact same time). By “wrong,” I do not mean that X and Y acted with malicious intent, but rather that the acts are based on factually incorrect understandings of reality.

Now, inasmuch as X and Y both act unjustifiably, the question, with respect to the paradox of incompatible justifications, may be asked. If X and Y are defending against unjustifiable acts of violent force, then are not their actions both simultaneously and paradoxically justified? The answer is no, because they have still acted for the wrong reason. That is, it is not the case that one is justified to act in a way that, for the wrong reason, happens, by luck, to prevent oneself from being harmed by an unjustifiable act. In other words, it is not the case that an otherwise unjustifiable act becomes justifiable simply because, due to the sheer luckiness of
having made a particular, erroneous judgment, it serves to prevent the actor from being subject to, or harmed by, another’s unjustified act of force. In this way, the three-requirement framework of justification of self-defense is untroubled by the paradox of incompatible justifications that undermines other theories of self-defense.

IV. MISTAKEN SELF-DEFENSE AND OTHER “DEFENSE-RELATED” DEFENSES

The three-requirement framework of self-defense as legitimate justification herein advanced precludes a number of defense-like scenarios that, by another less stringent standard (such as the subjective approach common throughout Anglo-American common law, or the purely objective approach professed by Robinson and Hurd) may otherwise qualify as justifiable self-defense. This leaves open questions as to what to make of and how to handle these defense-related—many of which are objectively non-defense—scenarios. I propose the following six-tier taxonomy by which self-defense and defense-related scenarios may be hierarchically organized and properly managed by the law, according to degree of wrongfulness. The first three of these tiers represent self-defense cases in which at least some form of serious defensive force was needed in order to combat an imminent threat of harm, and, as such, are based at least in part on justification. The final three tiers represent defense-related scenarios by which, although the defendant’s act is completely non-justifiable, it may be excusable, at least in part.


Self-defense, as herein articulated, is a complete justification. It is never a partial defense. It is never an excuse. Defense-related defenses of a partial and/or excuse nature are listed below, appropriately placed on lower rungs of the ladder. Self-defense is placed at the top of the hierarchy, the class for which includes only acts that are entirely morally and legally permissible.

72. The terms “defense-related defenses” and “defense-like scenarios” should be distinguished from the term “near self-defense cases,” discussed by Professor Claire Finkelstein in her proposal of an excuse-based self-defense-like defense for victims who kill their abusers but do not meet all requirements of traditional self-defense (e.g., imminence of mortal threat). I believe that victims of chronic abuse who kill their abusers may be afforded a legitimate excuse defense, but only in the case that the victim’s psychological status has been significantly affected by genuine fear or the honest belief that the killing is necessary. Whereas this Article does not allow for a full discussion of this topic, I will add only that I believe that such an excuse defense would necessarily be different from legitimate self-defense and the defense-related defenses I hereafter propose that it would be best handled as a separate defense entirely. See Claire O. Finkelstein, Self-Defense as a Rational Excuse, 57, U. Pitt. L. Rev. 621, 622 (1996); see also Hibi A. Pendleton, A Critique of the Rational Excuse Defense: A Reply to Finkelstein, 57 U. Pitt. L. Rev. 651 (1996).

73. Tiers 2 and 3, representing variations of partial self-defense, include multiple subtypes.

There may be cases of self-defense in which, though the actor is partially justified to have used deadly force in his defense, she is not fully justified because her belief that mortal defensive force is needed is based, in part, on mistake. In the case that the defender’s mistake is genuine and reasonable, the defender is fully exonerated, recognizing that her act is, in part, justifiable, and, in other part, only excusable. As is the case with any complete defense, this defense recognizes that the defendant act non-culpably and relieves her of punishment. I call this defense partial self-defense: excessive force based on genuine and reasonable mistake.

There are two subtypes of Tier 2 partial self-defense. The first subtype is characterized by the case in which the defender is faced with a mortal threat and reasonably, though erroneously, believes that deadly force is necessary to combat the threat. Imagine that X and Y are lumberjacks. X is atop a tall ladder chopping off branches with her axe. Although it is normal practice in the industry and required by X and Y’s company, X is not wearing the protective harness that would prevent her injury if the ladder were to collapse. Y is at the base of the ladder, picking up fallen branches. X, who mistakenly believes that Y has tricked her once again into doing the harder job, threatens to throw her axe at Y in order to kill her. Y is aware that X has a reputation for having particularly good aim and that it is even the case that X has won local axe-tossing contests. Y, in her valid belief that X poses a mortal threat, reasonably but mistakenly believes that she needs to shoot and kill X with her gun in order to prevent X from wrongfully taking her life. However, Y could just as easily push the ladder out from under X, causing X to fall and suffer non-mortal injuries (in fact, pushing the ladder would be more immediately effective as it would take less time than drawing, aiming, and firing the gun). However, Y does not recognize this option since X normally follows the harness policy and, from his position below, he cannot see that X is unharnessed. Certainly, Y is entitled to respond with the degree of force necessary to combat X’s wrongful, mortal threat. However, it would be rather easy to prevent X’s threat in a non-mortal way but for Y’s reasonable mistake that X is harnessed. As such, although harming X to some degree—remember that X would suffer non-mortal injury if she fell from atop the ladder—it is not objectively necessary for Y to kill X in order to prevent X from wrongfully taking her life.

The second subtype is characterized by the case in which the defender is faced with a serious threat of harm, but responds with deadly force based on his reasonable but mistaken belief that the threat of harm is so serious that he is at imminent risk of grievous bodily harm or death. Imagine that X, who is a man of formidable size and stature, mistakenly believes that Y, a man of distinctly lesser

74. In the case that the threat is real but that the actor’s mistaken belief that deadly force is necessary is unreasonable, his act is only partially justifiable. This type of defensive act is discussed under tier 3 below.
proportions, has been romantically pursuing his daughter. X sees Y at the town market and threatens to beat him to death with his fists as he quickly approaches him. Unbeknownst to Y, though, X has a muscular disorder by which, although he is capable of causing some moderate but meaningful injury to Y, he is physically unable to exert enough force to cause him grievous bodily harm or death. As X nears Y, Y, based on his reasonable but mistaken belief that X is about to wrongfully take his life, shoots and kills X. Although X was indeed about to cause Y injury, and although a reasonable person may respond similarly, X’s threat could have just as easily been warded off if Y had defended himself with non-deadly physical force (such as engaging X with a physical exchange of punches). In this way, Y is partially justified in his act, as the situation objectively calls for some serious degree of defensive force. In addition, although Y is mistaken in his belief that deadly force is necessary, his mistake is genuine and reasonable, and thus understandable. To the degree that Y is partially unjustified in his conduct, he is partially excused, the combination of which completely recognizes that Y acted non-culpably and exonerates him of punishment.


Some states recognize the defense of imperfect self-defense. The imperfect self-defense case is one in which the killer uses deadly force based on the honest but unreasonable belief that mortal, defensive force is necessary. One type of imperfect self-defense scenario is one in which there exists a real but non-deadly threat of harm, here called partial self-defense: excessive force based on genuine but unreasonable mistake. This defense is a partial justification in that although a serious degree of defensive force is warranted, it does not rise to the level of deadly force used by the defendant.

As discussed with respect to Tier 2 partial self-defense, this second type of partial self-defense that involves unreasonable mistake may be categorized into two subtypes. The first subtype includes cases in which the killer’s determination that mortal defensive force is necessary to combat the perceived threat is partially valid and partially unreasonable. In other words, the killer validly believes that she is faced with a mortal threat but is unreasonably mistaken in her belief that deadly force is needed to combat it. Imagine again that X and Y are lumberjacks. X is atop a tall ladder chopping off branches with her axe. In this version of the lumberjack scenario, Y knows that X is unharnessed. As such, Y is standing at the base of the ladder.


76. I do not use the term imperfect self-defense in my six-tier hierarchy of self-defense and defense-related defenses because all but tier 1 reflect a defensive or defense-related act that is, in at least one way, imperfect. I here discuss the defense briefly only because it reflects the role of genuine but unreasonable mistake in self-defense doctrine, an issue that is relevant to the organization of the six-tier hierarchy.
ladder in order to steady it so that it does not become unstable and cause X to fall. X, again angry that Y should enjoy the easier of roles, threatens to throw her axe at Y in order to kill him. Again, Y is aware that X is known to have stellar aim, particularly with respect to axe-throwing. Y, in her valid belief that X poses a mortal threat, unreasonably believes that she needs to shoot and kill X to combat X’s threat. Y, of course, could just as easily push the ladder out from under X, causing X to fall and suffer non-mortal injuries (in fact, one may argue that immediate and thorough effectiveness of this response course would be obvious to the reasonable person). Certainly, Y is entitled to respond with the degree of force necessary to combat X’s wrongful, mortal threat. However, the reasonable person in Y’s position would realize that the non-deadly act of pushing the ladder would just as successfully serve to defend against X’s threat without leading to X’s death.

The second subtype of Tier 3 partial self-defense is reflected by cases in which the defender is faced with a serious but non-grievous and non-deadly threat of harm and unreasonably mistakes the stimulus as a deadly threat. Imagine again that X, a man of greater size and stature than Y, threatens Y’s life via physical beating as he quickly approaches Y at the town market. It is common knowledge throughout the town that X has a muscular disorder and that, due to his medical condition, he has only limited strength and stamina. As X approaches Y, Y shoots and kills X to defend himself. Here, X poses a real threat of non-mortal physical injury to Y, entitling Y to use proportionate, non-deadly force in defense of himself. Y’s belief that X poses a physical threat is valid, but his mistaken belief that the threat is deadly is unreasonable. Y is thus justified to act as he does only to the degree that his defensive force is proportionate with the degree of harm posed by X’s threat.

Tier 3 partial self-defense is a partial justification in that the threat posed wrongfully upsets the moral balance between the stimulus-actor and defender. In addition, the stimulus-actor of the threat wrongfully places his target at clear risk of meaningful but non-grievous and non-deadly harm. In acting as he does, the stimulus-actor entitles the defender to use proportionate force against the former for the purpose of defending against the former’s threat. Because the defender is partially justified in his commission of reactive violence, and because he is mistaken as to the degree of force warranted by the threat, he should not be convicted of the charge of murder, but rather the lesser charge of voluntary manslaughter.

For example, let us imagine that X and Y are in a subway station near active tracks. Y sees that X is aiming to punch her in the face. To prevent X, who is physically larger than Y, from wrongfully harming her, Y pushes X with all of her might. Indeed, Y pushes X so hard that X stumbles back several feet, falls onto the tracks, and is killed by a subway train. Here, Y is entitled to use some force to prevent X’s wrongful punch. Although she does not intend to kill X, she pushes X with disproportionate force, based on her mistaken belief that this level of force is required to defend X’s punch, and causes X’s death.

The traditional approach to self-defense adopted by Anglo-American common law consumes cases of mistaken self-defense. As long as the killer genuinely and reasonably believes that she needs to kill her victim in order to prevent the latter from wrongfully taking his life, she is deemed to have committed justifiable homicide via self-defense and is entirely exonerated. As discussed, it is confounded to consume mistaken self-defense scenarios within a self-defense as legitimate-justification framework. Indeed, such scenarios are not cases of self-defense whatsoever. Furthermore, in no way does one’s belief that she is being threatened alone, no matter how honest and reasonable it may be, have any bearing on the reality of whether she is faced with an imminent threat of grievous bodily harm or death, or, for that matter, the moral status of her relationship with the victim. As such, such scenarios are not cases of justification whatsoever.

However, acts of mistaken self-defense, when the mistaken belief of fact made is genuine and reasonable, are understandable and committed without malice. These are acts that, if the actor’s judgment of his situation were not mistaken, would qualify as fully justifiable instances of self-defense—acts that a reasonable person in the defendant’s situation would, or at least may, perform. The acts, though, because they are based on mistaken belief, do not and cannot serve as a means of prevention of wrongful harm against the actor. The fact that the judgment as to the existence of a mortal threat is genuine and reasonable makes the actor’s conduct understandable as minimal perspective taking is needed to digest the actor’s sense that she need act as she does in order to defend herself against the perceived threat to her well-being. Thus, although such acts are wrong and cause significant social harm (and are therefore entirely unjustifiable), they are excusable and need to be recognized by a separate, excuse-based defense called mistaken self-defense.77 Make no mistake, mistaken self-defense, as well as related mistaken defense acts (such as partial mistaken self-defense—see tier 5) are in no part justifiable.78

In some states,79 a reasonable mistake that, if correct, would have been grounds for self-defense, a complete justification, reduces murder to manslaughter. In these jurisdictions, mistaken self-defense appears to act as a partial excuse, and neither a complete justification nor a complete excuse.80 The defense is partial in that it only

77. Although our theories of justification differ, Hurd supports this proposal. She writes, “[the criminal law] ought, instead, to craft a special excuse doctrine to exonerate such a nonculpable person of the wrong that she has done.” Hurd, supra note 11, at 1565.
78. Rather, self-defense acts that are based, in part, on the defender’s mistake, are classified as types of partial self-defense (see tiers 2 and 3).
79. E.g., Gautier, 950 A.2d at 413–15; Sons, 164 Cal. App. 4th at 92 n.2.
80. Here again, the jurisdiction that treats mistaken self-defense as a partial justification defense is itself mistaken in that the actor is not justified, even partially, in his or her enactment of “defensive” violence in response to a non-threat.
reduces murder to manslaughter and does not fully exonerate the defendant. The defense is an excuse because, as discussed, the defendant acted based on his genuine mistaken belief. However, I must conclude that only partially excusing the mistaken self-defense defendant is improper. Here, the defendant acts in a way that, because his belief that mortal, defensive force is needed is genuine and reasonable, is completely, and not partially, non-culpable and understandable. That is, he acts as responsibly as may be expected, and so he should not be punished.

In contrast with cases of provoked killings, the heat of passion defense reduces murder to manslaughter via the rationale that the killer acted, due to emotional disturbance, out of a largely impaired capacity to act otherwise. Heat of passion only partially exonerates the defendant because the killing is intentional and non-entitled in a culpable way—that is, the stimulus (the reasonable belief of substantial provocation), even if the defendant’s perception of which were entirely valid, in no way justifies \(^{81}\) the defendant’s homicidal response. Mistaken self-defense killings, on the other hand, are entirely non-culpable (and thus non-punishable) in that, if the defendant’s assessment of the stimulus (a mortal threat) were valid, his conduct would be entirely, and not just partially, justified. In further contrast, tier 5 discusses mistaken self-defense killings for which only partial exoneration via excuse of the killer should be recognized.

**Tier 5. Partially Reasonable Mistaken Self-Defense (Partial Excuse).**

Tier 5 covers the last class of defense-related killings for which I believe there is need to recognize an actual defense and at least partially exonerate the actor for his commission of mortal violence. The defense of partially reasonable mistaken self-defense applies to scenarios in which (i) there is no real, imminent threat of grievous bodily harm or death, and (ii) although the killer is reasonable in his mistaken judgment that he faces an imminent, meaningful threat of harm, he is unreasonable to believe that the threat presents a substantial risk of grievous bodily harm or death. That is, the threat is entirely mistaken by the killer and the mistake is only excusable to the degree that a reasonable person in a similar situation would likely believe that an imminent but non-grievous and non-deadly threat exists. Tier 5 includes reactive killings in which, had the actor’s assessment of the threat been valid, he would have been justified to use non-deadly force to defend himself, and thus he is only partially excused for his entirely wrongful conduct.

Imagine that X, a thrill-seeker who continues into his early adulthood to enjoy a carefree, reckless lifestyle, goes into town on a paintball shooting spree. X sees Y at the town square, yells “Time to dance!” and shoots some paintballs that hit the ground near Y’s feet. Y, correctly realizing that someone is shooting paintballs at him, looks around to identify the shooter. X, seeing that Y is turning to look for the shooter, retreats and leaves the area. Y never sees X, but rather sees Z, who is

\(^{81}\) For a detailed discussion, see Fontaine, Adequate (Non) Provocation, supra note 14.
looking in Y’s direction with his one hand placed inside his coat. Y mistakenly but reasonably believes that Z is about to shoot paintballs at him, and, furthermore, unreasonably mistakes that his life is therefore in danger (remember that not only does Y discern that the shooter is firing paintballs, a danger that is reasonably understood to be highly undesirable but non-deadly, but that X’s assault on Y begins by X yelling “Time to dance!” and firing paintballs that hit the ground near Y’s feet, the combination of which reasonably indicates that the threat of incoming fire is only to Y’s feet). Based on his mistaken understanding of the situation before him, Y draws his real gun and shoots and kills Z.

Y is entirely mistaken as to Z being the source of the threat (and, for that matter, that there exists a threat of any kind that demands even non-deadly force to combat). Thus, his act is entirely unjustifiable. Y is reasonable in his mistaken belief that Z poses a threat of imminent physical harm, but unreasonable in his understanding that such a threat, even if real, would place him at risk of grievous bodily harm or death. As such, Y’s killing of Z is excusable, but only partially. That is, Y is excused to the degree that he reasonably mistakes Z as a threat of bodily harm; he is likewise non-excused to the degree that he unreasonably misunderstands that Z poses a deadly threat of bodily harm that necessitates mortal defensive force to combat.

Y’s act of killing Z is completely wrong. However, it is partially understandable in that, although entirely mistaken that Z posed any threat of harm whatsoever, Y reasonably believes that Z poses a serious but non-grievous and non-deadly threat of harm that would justify some significant, proportionate amount of defensive force in the case that it is real. Of course, Y does not kill Z with the level of culpable mental state that is requisite of murder. Y’s charge of murder should thus be partially excused and his culpability and punishment should be mitigated such that they are consistent with the lesser charge of voluntary manslaughter.


Imperfect self-defense is a common law doctrine recognized by a minority of American jurisdictions82 whereby the charge of murder may be reduced to manslaughter based on the defendant’s genuine but unreasonable belief that mortal defensive force was needed to combat an imminent threat of grievous bodily harm or death. Imperfect self-defense may take multiple forms, as can the role of genuine but unreasonable mistake in self-defense and defense-related reactive

82. See E.g. State v. Revels, 673 S.E. 2d 677 (N.C. Ct. App. 2009) (stating that imperfect self defense may reduce a charge from murder to voluntary manslaughter); State v. Moore, 194 P.3d 18 (Kan. 2008) (holding that voluntary manslaughter based on imperfect self defense is a lesser degree of homicide); State v. Low, 192 P.3d 867 (Utah 2008) (allowing imperfect self defense as a defense and defining it in opposition to perfect self defense); State v. Gautier, 950 A.2d 400 (R.I. 2008) (explaining the doctrine of imperfect self defense as showing the element of malice is lacking).
killings. I have already discussed two such classes of reactive killings by which either (a) some degree of defensive force is needed and justified (see tier 3), or (b) no defensive force is needed but the killer is, in part, reasonable in his mistaken belief that it is and is therefore partially excused (see tier 5).

Tier 6, unreasonable mistaken self-defense, reflects scenarios in which the killer’s mistaken understanding that mortal defensive force is needed is genuine but in no part reasonable. For example, imagine that Z, in the paintball scenario, has both of his hands in plain sight and that it is clear that he is not holding any kind of weapon. Whereas it may be the case that he is in possession of a paintball gun and that it is hidden in his coat, it would be entirely unreasonable to believe that any degree of defensive force is needed to combat an imminent—whether Deadly or non-deadly—threat of harm. In such a case, the killer has completely failed his duty to be reasonable in his commission of conduct that carries with it the foreseeable potential to infringe upon the natural rights of others. I include this tier, in part, for the purpose of taxonomic completeness as I do not believe that this type of case is, in general, legitimately defendable—that is, with one exception.

What is to be made of the case in which the killer acts based on his genuine and completely unreasonable mistake that mortal defensive force is necessary where said unreasonable mistake is the product of non-culpable cognitive dysfunction? Elsewhere, in a series of articles on the structure, function, and nature of the heat of passion defense, I have written in some detail about the excusability of unreasonable mistakes that are based on what I shall herein call non-culpable etiology.

Non-culpable etiology involves causal, developmental paths that lead to the onset and potential maintenance of criminogenic mental processes. In other language, there are developmental courses by which, through no fault of the individual in question, mental processes may emerge that favor criminal forms of conduct. Although there are numerous ways in which such a developmental phenomenon may arise, just as there are numerous forms that its outcomes may take, these are enormous matters for a separate and more scientifically focused set of discussions to address. With respect to self-defense and defense-related killings, we will restrict our attention to the development of cognitive dysfunction in the form of interpretational bias.

Let us suppose that Y grew up in a community in which violent crime was a common occurrence. As a child, Y directly observed several violent crimes,

83. By non-culpable cognitive dysfunction, I mean cognitive dysfunction that is (a) not the creation of the actor’s own doing, (b) outside the actor’s control, and (c) either not known to the actor or is known to the actor but could not have reasonably been foreseen by the actor to play a significant role in the reactive killing in question.

including some of the most egregious imaginable (e.g., murder, rape), was himself threatened at gunpoint on multiple occasions, and suffered significant losses as some of his family members and friends fell victim to criminal violence. Y, as a result, grew up with an understanding that the world is a dangerous, unjust, violent place, and that if he were not careful he could just as easily suffer a prematurely fatal outcome. As such, in situations in which Y believes he is in danger of suffering a harmful outcome, and there is some question as to whom created this danger and what this person’s intent is, Y is strongly inclined to immediately (perhaps even automatically) interpret the situation as one in which the stimulus-actor is intentionally and unjustifiably trying to cause him harm.

Scientists have called this phenomenon *hostile attributional bias*—a form of cognitive dysfunction by which a person, when presented with a situation that is ambiguous as to certain qualities about the stimulus-actor’s mental state, tends to attribute “hostile intent,” or, in moral terms, culpable intent, to the stimulus-actor. Elsewhere, I have termed a related, broader phenomenon *provocation interpretational bias* (or PIB) to reflect the scientific evidence that more than just attributional processes are important to this type of negative cognitive bias.

Reconsider, then, the final version of the paintball scenario. Y sees that paintballs have hit the ground near his feet. When he turns to identify the shooter, Y sees Z, who makes eye contact with Y and has both of his hands in plain sight. However, Y is not familiar with paintball guns. In the community in which he grew up, people carried only real guns and never the less dangerous paintball variety. Furthermore, growing up, Y watched and learned from criminals who were cleverly experts in the art of concealing their weapons. As an indirect result of the environment in which he was brought up, and a direct result of his cognitive bias that he developed as a result of his upbringing, Y, then, quickly and genuinely comes to believe that Z poses an imminent deadly threat and that it is necessary to use mortal defensive force to prevent Z from wrongfully taking his life. Without consideration given to Y’s non-culpable cognitive dysfunction, his mistaken belief that he needs to use mortal defensive force against Z is unlikely to pass the reasonable person standard. As such, his mistaken belief would presumably be deemed unreasonable, and, according to my own six-tier hierarchy, Y is left with

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86. Fontaine, *Interpreting Wrongfulness*, supra note 84; Fontaine, supra note 14.

no defense.

I believe, though, that in such a case, that the killer’s unreasonable belief that he need use mortal force to combat a (mis)perceived threat of grievous or deadly harm, that his charge of murder should be mitigated to manslaughter. The defendant who has killed, at least in substantial part, due to non-culpable cognitive dysfunction, has not killed out of malice. Furthermore, it is unfair to expect an individual, whose mental disturbance impedes him from functioning in a way that is consistent with the reasonable person, to meet the same duty of care with respect to unique situations such as the one herein described. Certainly, this proposal is not at all inconsistent with the law’s treatment of mental dysfunction in other affirmative defense doctrines.

**CONCLUSION**

Perhaps at the top of the list of reasons why it is important to distinguish conduct that is justified (i.e., legally permissible) from that which is only excusable (legally impermissible, but, due to circumstances outside the actor’s control, committed non-culpably) is the core purpose of the criminal law to clearly and consistently delineate and prohibit conduct that is distinctly and significantly wrong and socially harmful. With respect to the arguably most serious and egregious of violent acts, such as those that result in the death of human life, the importance of this distinction is immediately and abundantly evident. Surely, only a small group of acts that are so violent in nature that they result in the death of another—an outcome that, although may mean no greater net social harm (legitimate self-defense), is nevertheless supremely harmful to the victim—may be said to be so clearly morally and legally acceptable that it may be deemed legitimately justifiable.

This Article raises the floor of justifiable acts of self-defense while simultaneously elevating the ceiling of “defense-related” acts that may be excused. It is not my interest to wrongfully label and punish those who have committed wrongful acts non-culpably; likewise, it is not my intention to mischaracterize their wrongful acts as legally permissible. In the context of a larger discussion as to justification versus excuse in self-defense (and, indirectly defense of others) doctrine in American common law, I offer a refined, specific three-requirement framework that combines both objective and subjective factors in the vein of Professor George Fletcher’s hybrid theory of self-defense. The three-requirement framework not only flushes out the detail of both objective and subjective criteria

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88. Or, alternatively, in jurisdictions that recognize levels of murder, from murder one to a lesser degree of murder (murder two or murder three) if mitigation to manslaughter is deemed too substantial.

89. I say “distinctly and significantly” because only conduct that is so seriously wrongful and socially harmful should qualify as justifiably prohibited by the law. Specifically, such prohibited conduct must be (a) distinguishable from other, related but morally differentiable forms of conduct, and (b) deemed so severe that it warrants prohibitions.
of self-defense as legitimate self-defense, but (at least attempts to) adequately counters certain criticisms of the hybrid model (e.g., the paradox of incompatible justifications). Lastly, I offer a detailed, six-tier taxonomy by which self-defense, partial self-defense, and defense-related acts of reactive homicide may be organized according to complete and partial levels of justification and excuse.

I have addressed the justificatory nature of pure self-defense and discussed the degree to which partial self-defense acts and defense-related conduct may be justified and/or excused. One effect to is to narrow the class of reactive homicides that qualify as self-defense as legitimate justification; however, another effect may be to broaden the class of defense-related killings that may be deemed excusable. It may be that such a discussion leads to little difference in how culpability is attributed and punishment is assigned, as these factors are held constant regardless of whether a defendant’s act qualifies as a justification or excuse. If so, this is fine. The point of the discussion goes to the core purpose of criminal law—that clear and consistent characterizations of the nature of alternative forms of conduct be made—and is the impetus for this Article.