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Reid G. Fontaine, *University of Arizona*



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IN SELF-DEFENSE REGARDING SELF-DEFENSE: A REJOINDER TO PROFESSOR CORRADO

Reid Griffith Fontaine*

INTRODUCTION

I very much appreciate Professor Corrado's thoughtful, insightful Reply¹ to my Article, *An Attack on Self-Defense*.² In this Rejoinder, I clarify and defend my thesis in light of Corrado's observations. I also recognize where Corrado's comments are helpful toward strengthening my thesis and sharpening my proposed framework of legitimate (justification) and mistaken (excuse) self-defense subtypes.

Professor Corrado focused on two topics raised by my paper, and then presented a brief proposal of his own regarding how the law should treat legitimate—or what Corrado may prefer to term “actual”—and mistaken self-defense. First, Corrado takes issue with the second and third prongs of my proposed three-requirement framework of legitimate self-defense. Specifically, he questions whether prong 2, having to do with the temporal precedence of valid belief to action, is necessary (and “too strong”) and sufficient, and whether the accuracy of prong 3, requiring that the reactive force's objective effect is to defend against wrongful death, may be improved by making two changes in its language. Second, Corrado questions the extent to which the distinction between justification and excuse is useful; or, rather, whether its usefulness to understanding differential cases of defensive and defense-like force is equal to distinguishing traditional justification defenses, such as self-defense and necessity to traditional excuse cases, such as insanity and duress. In doing so, he questions the distinction's foundation in moral acceptability and argues in favor of treating reasonably mistaken self-defense as a justification, consistent with the traditional American common law framing. Finally, Corrado proposes that, as in cases of necessity in which the defendant who has caused

* Assistant Professor of Psychology, Associate Professor of Law, and Co-Director of the Program in Criminal Law and Policy, James E. Rogers College of Law, University of Arizona; B.A., Johns Hopkins University (1993); J.D., University of Pennsylvania (1996); M.S., Vanderbilt University (1997); Ph.D., Duke University (2001). I thank Professor Gabriel J. Chin for his thoughtful commentary and Professor Michael Corrado for kindly engaging me in this scholarly exchange. I further thank Brian Fox, Aiysha Hussain, and Jill Pasquarella for their editorial assistance and management of these papers. Related articles and resources are available at <http://ssrn.com/author=924700>, http://works.bepress.com/reid_fontaine/, and my university homepages: <http://www.u.arizona.edu/rgf2/> and <http://www.law.arizona.edu/Faculty/getprofile.cfm?facultyid=312>. © 2010, Reid Griffith Fontaine. Please note that Reid Fontaine will be Assistant Professor of Law at the Florida State University College of Law beginning in Fall, 2010. He may then be contacted at rfontaine@law.fsu.edu or FSU College of Law, 425 West Jefferson Street, Tallahassee, FL, 32301.

1. Michael Louis Corrado, *Self-Defense, Moral Acceptability, and Compensation*, 47 AM. CRIM. L. REV. 89 (2010).

2. Reid Griffith Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. 57 (2010).

damages to another must compensate the latter, the defendant who “injures” another in mistaken self-defense should likewise pay civil damages to his victim.

I. THE THREE-REQUIREMENT FRAMEWORK OF LEGITIMATE SELF-DEFENSE

In “An Attack on Self-Defense,” I proposed the following three-requirement framework:

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 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.³ Said genuine, valid belief must arise *prior* to the actor’s initiation of defensive force;
3. The defender’s act need prevent his life from being wrongfully taken by his victim.⁴

Professor Corrado questions requirements 2 and 3. Regarding requirement 2, he asks if it is necessary and sufficient. He suggests that this requirement may be “too strong” and offers the following fact pattern for illustration:

Suppose, for example, that Jones believes that she is being hunted by Smith. It is not true that Smith is hunting Jones, but she has in fact sworn to kill her if she spots her. In a dark wood where she is hiding Jones spots Smith, but cannot tell whether Smith has spotted her. Rather than wait until it is too late, Jones launches a deadly missile of some sort toward Smith, a missile which she can disarm if it proves that Smith is not in fact intent upon attacking her. Smith, alerted by the sound of the missile, turns and sees Jones, and decides to take this opportunity to kill her. She aims a weapon toward Jones, who allows the missile to complete its lethal mission and destroy Smith.⁵

I agree with Corrado that in this scenario Smith has surely engaged in legitimate (justified) self-defense.⁶ However, Corrado believes that this example undermines my framework—or, more specifically, requirement 2—in that Jones’ action of firing the missile is initiated prior to her having a valid belief that she is about to be

3. 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.

4. Fontaine, *supra* note 2, at 72–73.

5. Corrado, *supra* note 1, at 90.

6. Unless, of course, Jones’ action of firing the missile caused Smith, who was “alerted by the sound of the missile,” to attempt to kill the former. In this case, Jones is guilty of murder.

wrongfully⁷ killed. But this is not so. Here, the action is the omission of disarming the deadly missile. Jones' valid belief that she is about to be wrongfully killed precedes her act by omission of not disarming the missile. As such, this scenario neatly fits with my framework.

Another word, though, about requirement 2 should be said, having to do with the natural cognitive-behavioral sequence of social action.⁸ The effect of social stimuli on one's social action is mediated by her cognitive processing. There is considerable empirical evidence that supports this claim from various research programs in the psychological and behavioral sciences.⁹ To require that a belief take place prior to action is simply to recognize this natural causal chain. The requirement that the belief be valid represents a normative position consistent with Fletcher's hybrid theory¹⁰ that right deeds need be carried out for right reasons. If we were to eliminate the requirement that the valid belief exist prior to the action, we would be indirectly conceding that moral luck carries more weight than right reasons, a position I do not believe is correct.

So, to return to the Smith and Jones example, let us consider a scenario in which Jones does not have the ability to disarm the missile. She fires the missile at Smith, the latter of whom, upon hearing the discharge of the missile, notices Jones and attempts to wrongfully take her life. Jones' belief that her life is about to be wrongfully taken only becomes valid after she has fired the missile. If the missile kills Smith, Jones is guilty of murder and is not, by my proposed framework of legitimate self-defense, protected by (legitimate) self-defense. Alternatively, if the missile misses Smith and Smith is successful in killing Jones, she, too, is guilty of murder, for she has not met requirement 2 either.¹¹ As such, requirement 2 is *necessary*, and not too strong.

Finally, requirement 2 is *sufficient*, with respect to solving the paradox of

7. See footnote 6 of this Rejoinder.

8. Fontaine, *supra* note 2, at n.67.

9. E.g., see Albert Bandura, *Social Cognitive Theory: An Agentic Perspective*, 52 ANN. REV. OF PSYCHOL., 1, 18–23 (2001) (discussing the “emerging primacy of human agency in biosocial coevolution” and its significance); Catherine P. Bradshaw & James Garbarino, *Social Cognition as a Mediator of the Influence of Family and Community Violence on Adolescent Development: Implications for Intervention*, 1036 ANNALS N.Y. ACAD. SCI., 85, 86 (2004) (reviewing research on developmental changes and social cognition during adolescence that contribute to violent behavior); Nicki R. Crick & Kenneth A. Dodge, *A Review and Reformulation of Social Information-Processing Mechanisms in Children's Social Adjustment*, 115 PSYCHOL. BULL., 74, 97 (1994) (reviewing current literature and concluding that some cognitive processing likely causes social behaviors in children such as adjustment); Kenneth A. Dodge, et al., *Social Information-Processing Patterns Partially Mediate the Effect of Early Physical Abuse on Later Conduct Problems*, 104 J. ABNORMAL PSYCHOL. 632, 641 (1995) (finding that physical abuse affected children's cognitive processing and future social interactions).

10. See George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 308 (1975) (responding to Paul Robinson's article [on why justification should prevail regardless of intent or state of mind] and arguing that “claims of justification presuppose a meritorious intent” by elaborating the distinction between justification and the elements necessary for liability).

11. Again, unless Smith's attempt to kill Jones is enacted because she validly believes that Jones is trying to wrongfully take her life (e.g., she realizes that Jones has fired a deadly missile at her).

traditional framings of subjective, objective, and hybrid theories of self-defense.¹² Professor Corrado suggests that the paradox remains if both violent actors simultaneously form a valid belief that the other is about to wrongfully kill her. However, I must consider that this hypothetical defies logic. If both actors intend to wrongfully kill the other (i.e., kill the other for wrong reasons such as instrumental gain), then neither is killing the other for right reasons (e.g., legitimate self-defense) and any survivor is not protected by legitimate self-defense. If both actors intend to kill the other for what they believe are right reasons (e.g., to defend oneself against being wrongfully killed), both cannot be right simultaneously. Of course, in the case that both actors' beliefs that self-defense is necessary are simultaneously formed, both may be reasonably mistaken and any survivor of the exchange may be excused via mistaken self-defense. If one actor intends to kill the other for wrong reasons, and the latter intends to kill the former for right reasons, only the latter, if she survives, *may*¹³ be protected by legitimate self-defense. The two actors' simultaneously-formed beliefs that killing the other is necessary to prevent her own wrongful death cannot both be valid at formation. The defensive actors cannot both kill for *valid* right (e.g., to defend oneself against the imminent threat of his own wrongful death) and wrong (e.g., to take the life of another for instrumental interests) reasons simultaneously.

Professor Corrado also made two suggestions to sharpen the accuracy of the third requirement. First, he asserted that requirement 3 qualify in the case that the defender's act is necessary to prevent "grievous injury from being inflicted upon him by his victim." Second, he suggested that the language "The defender's act need prevent" be changed to "The defender's act is necessary to prevent . . ." I agree with Corrado that both changes improve the framing of requirement 3, and for these observations and suggestions I am quite grateful.

II. JUSTIFICATION, EXCUSE, AND MORAL ACCEPTABILITY

Professor Corrado is not sure if the distinction between justification and excuse is clear. To the degree that it is, though, he believes that its value to distinguishing types of defenses in some areas (e.g., self-defense versus insanity) is greater than it is to other areas (e.g., legitimate self-defense versus mistaken self-defense). He writes:

Some years ago I argued against the idea that there was a clear distinction between justification and excuse, and though I am no longer as confident as I once was I am still a bit skeptical. What I do know for sure is that there is much

12. See Russell L. Christopher, *Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights. . . ?*, 85 J. CRIM. L. & CRIMINOLOGY 295, 301 (1994) (arguing that a subjective theory of justification is conceptually consistent and preferable to Fletcher and Robinson's objective theories of justification).

13. If all three requirements are met.

better reason to distinguish the excuses of insanity and duress from the justifications of necessity and self-defense than there is to classify mistaken necessity and mistaken self-defense as excuses and distinguish them in that way from actual necessity and actual self-defense.¹⁴

It is unclear what exactly Corrado continues to find unclear about the distinction between justification and excuse, as he neither explains his former understanding that the distinction is unclear nor his current, softer understanding that it *may* be clear. However, it is clear that he believes that, at least to the degree that the distinction is a clear and valid one, its importance depends on the types of affirmative defenses one is considering.

At an analytical level, I do not understand how this can be. As Professor Joshua Dressler has argued,¹⁵ and as I have agreed elsewhere,¹⁶ two of the fundamental reasons for recognition and valuation of the distinction between justification and excuse are that the criminal law need (a) send clear moral messages, and (b) be guided by an internally valid and consistent theory. If the distinction between justification and excuse is indeed important to these values—values that I believe are commonly shared among criminal law scholars, law-makers, and judges—it would seem unclear as to (a) how it may be that the importance of the distinction depends on the affirmative defense or defenses in question, and (b) how such a differential, hierarchical valuation may be determined. That is, how is it that the rightness and wrongness of acts matter more in one context than another, and how is it that such a determination can be made? To be clear, in the case of reactive killings, we are talking about the gravest of outcomes—the termination of human life. Since I cannot confidently infer Professor Corrado’s rationale, I only add that the road he suggests may potentially be a rocky and dangerous one. Indeed, in his recognition of statutes within the same jurisdiction that represent opposing values, Professor Paul Robinson has recently reminded us of the incoherent law making within jurisdictions that can materialize in the absence of theoretical consistency in criminal law.¹⁷

Professor Corrado correctly points out that I view mistaken self-defense as only excusable and not justifiable because it is morally unacceptable. That is, the mistaken self-defender is not entitled to kill his victim (his mistake does not create such an entitlement no matter how reasonable it is), his victim does not deserve to be killed, and the “defender’s” killing of his victim upsets their natural moral

14. Corrado, *supra* note 1, at 92 (internal citations omitted).

15. *E.g.*, Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1167–1174 (1987).

16. *E.g.*, Reid Griffith Fontaine, *On Passion’s Potential to Undermine Rationality: A Reply*, 43 U. MICH. J.L. REFORM 207, 208–241 (2009).

17. Paul 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) (nothing inconsistencies in Alabama law allowing control impairment to excuse a defendant when the result of involuntary intoxication but not when the result of mental illness).

balance.

This rationale for the distinction is not compelling to Professor Corrado, though. To illustrate, Corrado points to my distinction of legitimate and mistaken self-defense in the case of innocent aggressors. Here, the aggressor is no way responsible for the imminent, mortal threat that she presents, though I argue that the defender is entitled to take her life to defend his own because, regardless of the aggressor's non-responsibility, she presents an unjustifiable threat to his life. Corrado questions the distinction I draw because, in this case, the aggressor does not *deserve* to die or be harmed in any fashion. I understand Corrado's concern, but the aggressor's non-desert does not negate the killer's natural entitlement to defend himself against the wrongful, mortal threat posed by the innocent aggressor. As such, he acts rightly and justifiably in defending himself. While I would agree that this is a less compelling case for justification than one in which the defender kills an evil aggressor who poses an imminent, mortal threat, it is, nevertheless, a clear case of justified, legitimate self-defense. Dichotomies, such as the justification-excuse distinction, do not necessarily rule out discernible grades within a category.

Let us say that X and Y are on the sidewalk of a busy street during rush hour. X sees that Y is attempting to pass by her, at which point he will step right in front of swiftly moving traffic. Y may move aside so that X can enter the street, or she may simply raise her arm to signify to X that he is about to place himself in considerable danger. Certainly, it is morally preferable that Y perform the simple action of raising her hand to stop X, but Y acts rightly, just the same, if she steps out of X's way and watches as he approaches his doom.¹⁸ That the hand-raising action is morally preferable does not make the stepping-aside action morally unacceptable. Both actions are morally acceptable.

Professor Corrado believes that there is insufficient moral distinction between the legitimate/actual self-defender and the mistaken self-defender to recognize the former as justified and the latter as only excused. He takes issue with the distinction I make and asserts that reasonably mistaken self-defense is just as justifiable as legitimate self-defense because the reasonably mistaken self-defender knows no better than the legitimate (or actual) self-defender. Corrado, then, concludes that both should be viewed equally by the criminal law.

Professor Corrado believes that the reasonably mistaken self-defender should not be found culpable or punished. With this, I agree, of course. This outcome is consistent with a complete excuse framing. However, Corrado also believes that the law should treat reasonably mistaken self-defense as a justification and encourage human beings to act upon what they "know" and "feel," even when their knowledge is false and their feelings are spawned by mistaken understandings. It is hard to understand why the law should encourage human beings to act upon beliefs that are, as matters of fact, wrong. Rather, the law should (a) encourage individuals

18. Notwithstanding, of course, some type of wildly unreasonable, *Seinfeld*-like Good Samaritan law.

to act upon right beliefs, such that human beings may be motivated to be as sure as possible of their understandings prior to enacting violent force, and (b) understand human fallibility and excuse social harms that result when individuals act reasonably but mistakenly and wrongly.

III. PROFESSOR CORRADO'S PROPOSAL OF CIVIL DAMAGES FOR INJURED VICTIMS OF MISTAKEN SELF DEFENSE

Although Professor Corrado does not believe that the difference between legitimate and mistaken self-defense is sufficient to differentiate them on moral grounds, he does distinguish them according to social harm caused. Indeed Corrado finds this distinction so important that he dedicates a section of his Reply to an issue that I had not raised. I welcome the introduction to the topic, as well as Corrado's proposed solution to the problem posed by mistaken reactive killings.

Corrado suggests that, similar to cases of necessity in which the defendant compensates her victim for the damages she caused, "injured" victims of mistaken self-defense should be compensated by their inflictors. It is unclear what Corrado proposes as restitution, if any at all, for victims who die as a result of mistaken self-defense. This individual cannot be restored, of course. Presumably, the families of such victims would be entitled to compensation under Professor Corrado's proposal. I agree with Corrado that such victims deserve to be compensated by their inflictors. They are, in fact, *victims*, as there nothing about the scenario in which they were injured (or killed!) that justifies the suffering and harm they incurred.

Note here that Professor Corrado is drawing a distinction between legitimate self-defense and mistaken self-defense. That is, those who are injured by the latter *deserve* compensation because they were *wronged*. Corrado believes that the balancing of scales may be better achieved via civil law than criminal law by said compensation. However, the notion that guides Corrado's distinction is not at all inconsistent with treating mistaken self-defense as an excuse, as my proposal of mistaken self-defense (tier 4 of the six-tier hierarchy¹⁹) is framed as a complete excuse by which the defendant is not blamed or punished. In fact, it would seem that Corrado's proposal is entirely consistent with my self-defense thesis because the former recognizes that legitimate self-defense and mistaken self-defense differ as a function of caused social harm.²⁰

CONCLUSION

I again extend my immense gratitude to Professor Corrado for engaging me in this exchange. Although he may question the importance of the distinction of

19. Fontaine, *supra* note 2, at 82–84.

20. Whereas mistaken self-defense as excuse serves to relieve the wrongdoer of criminal responsibility, it does not necessarily relieve her of civil responsibility.

justification and excuse for understanding and diagnosing variations of defensive and defense-related homicide, his thoughtful Reply suggests that he does indeed believe the distinction bears relevance for several matters of considerable jurisprudential importance. I look forward to future iterations of this discussion, as well as related discussions it has apparently inspired.