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QUESTIONS OF VALUE: AN EVALUATIVE STUDY OF SELF-DEFENSE THEORY AND PRACTICE IN GERMANY, ENGLAND, AND THE UNITED STATES

Approximately 99,800 Words

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Complies with the Format for Theses
Per agreement with Professor Jonathan Herring, the citation style used here departs from OSCOLA in that it generally follows The Bluebook

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ABSTRACT

Self-defense is a topic about which scholars, legislators, judges, and laymen alike have strongly held—and often strongly divergent—opinions. While some favor 'tough-on-crime' approaches according broader leeway to defenders, others advocate for a more empathetic, 'humanitarian' construction of the law.

By way of illustration of such polarities of perspective, consider the 20th century German case allowing a farmer to shoot a youthful fruit thief in the back because the 'right need never yield to the wrong.' Many contemporary commentators, in contrast, reject deadly force to defend property, considering it justified only when death is threatened. Despite what will be argued is the inherently value-laden nature of such choices, debates surrounding self-defense have in the main more narrowly focused on the 'technical' legal aspects of the exercise of self-preferential force.

This thesis tests the hypothesis that values, including protection of the attacker and defender, general and specific deterrence, maintenance of equal standing, and ensuring the primacy of the legal process, provide the rationale for self-defense and should, therefore, be treated as decision-grounds for determining when self-preferential force should be authorized. The hypothesis relatedly posits that such a value-centric approach to self-defense law will improve the transparency and quality of decision-making.

To test this hypothesis, the thesis develops the 'value-based model' of self-defense that seeks to offer a plausible (though not the only) value-centric approach. Following a thematic literature review, the thesis uses the value-centric perspective to address certain central theoretical questions underlying self-defense doctrine. Finally, the thesis deploys the value-based model as a template against which to compare the self-defense laws of Germany, the U.S., and England.

The thesis ultimately confirms the hypothesis that a broader consideration of the values implicated in self-defense will improve the transparency and quality of decision-making, and, correspondingly, reduces the impact of hidden normativity.

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TABLE OF ABBREVIATIONS & FOREIGN JOURNALS

Abbreviation	Full Form
A.B.A. Crim. Just.	American Bar Association Criminal Justice Magazine
A.B.A. J.	American Bar Association Journal
AC	Appeal Cases
AG	Amtsgericht [lower court]
Akron L. Rev.	Akron Law Review
Ala. Code	Alabama Code
Alaska Stat.	Alaska Statutes
Alb. L. Rev.	Albany Law Review
All ER	All England Law Reports
Alternative L.J.	Alternative Law Journal
Am. Crim. L. Rev.	American Criminal Law Review
Am. J. Bioethics	American Journal of Bioethics
Am. J. Juris.	American Journal of Jurisprudence
Am. L. Rec.	American Law Record
Am. U. L. Rev.	American University Law Review
Ann. Rev. Psychol.	Annual Review of Psychology
Ariz. L. Rev.	Arizona Law Review
Ariz. Rev. Stat. Ann.	Arizona Revised Statutes Annotated
Ariz. St. L.J.	Arizona State Law Journal
Ark. Code Ann.	Arkansas Code Annotated
Ark. L. Rev.	Arkansas Law Review
B.C. Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
B.C. L. Rev.	Boston College Law Review
B.U. L. Rev.	Boston University Law Review
BayObLG	Bayerisches Oberstes Landesgericht [Bavarian Supreme State Court]
Behav. Sci. & L.	Behavioral Sciences & the Law
Berkeley Bus. L.J.	Berkeley Business Law Journal
Berkeley J. Crim. L.	Berkeley Journal of Criminal Law
Berkeley J. Gender L. & Just.	Berkeley Journal of Gender, Law & Justice
BGH	Bundesgerichtshof [Federal Court of Justice]
BGHSt	Bundesgerichtshofes in Strafsachen [Federal Court of Justice in Criminal Matters]
British J. Soc. Work	British Journal of Social Work
Brook. L. Rev.	Brooklyn Law Review
BT-Drucks	Deutscher Bundestag Drucksache [German Federal Parliament Printed Matter]
Buff. Crim. L. Rev.	Buffalo Criminal Law Review
Buff. L. Rev.	Buffalo Law Review
BYU J. Pub. L.	Brigham Young University Journal of Public Law
CA	Court of Appeal

Abbreviation	Full Form
Calif. L. Rev.	California Law Review
Cambridge J. Int'l & Comp. L.	Cambridge Journal of International and Comparative Law
Cambridge L.J.	Cambridge Law Journal
Cambridge Student L. Rev.	Cambridge Student Law Review
Can. J.L. & Juris.	Canadian Journal of Law & Jurisprudence
Cardozo L. Rev.	Cardozo Law Review
Case W. Res. L. Rev.	Case Western Reserve Law Review
Cath. U. L. Rev.	Catholic University Law Review
CCA	Court of Criminal Appeal
CD	Commission Decision (European Human Rights Reports)
Chap. L. Rev.	Chapman Law Review
Chi. Bar Assoc. Rec.	Chicago Bar Association Record
Chi.-Kent L. Rev.	Chicago-Kent Law Review
Clev. St. L. Rev.	Cleveland State Law Review
Colo. Rev. Stat.	Colorado Revised Statutes
Colum. Hum. Rts. L. Rev.	Columbia Human Rights Law Review
Colum. J. Gender & L.	Columbia Journal of Gender and Law
Colum. L. Rev.	Columbia Law Review
Com. L. League J.	Commercial Law League Journal
Common L. World Rev.	Common Law World Review
Cong. Rec.	Congressional Record
Conn. Gen. Stat.	Connecticut General Statutes
Conn. L. Rev.	Connecticut Law Review
Cornell Int'l L.J.	Cornell International Law Journal
Cornell J.L. & Pub. Pol'y	Cornell Journal of Law and Public Policy
Cornell L. Rev.	Cornell Law Review
Cox CC	Cox's Criminal Cases
Cr App R	Criminal Appeal Reports
Crim. Just. & Behavior	Criminal Justice and Behavior
Crim. Just. Ethics	Criminal Justice Ethics
Crim. L. & Phil.	Criminal Law and Philosophy
Crim. L. Bull.	Criminal Law Bulletin
Crim. L. Rev.	Criminal Law Review
Crime & Just.	Crime and Justice
Dalhousie L.J.	Dalhousie Law Journal
Del. Code Ann.	Delaware Code Annotated
Dick. L. Rev.	Dickinson Law Review
Drake L. Rev.	Drake Law Review
Drexel L. Rev.	Drexel Law Review
Duke L.J.	Duke Law Journal
E.T.S.	European Treaty Series
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Edinburgh L. Rev.	Edinburgh Law Review
EHRR	European Human Rights Reports

Abbreviation	Full Form
Emory Int'l L. Rev.	Emory International Law Review
Emory L.J.	Emory Law Journal
ER	English Reports
Ethics	Ethics
Eur. J. Criminology	European Journal of Criminology
EWCA Civ	England and Wales Court of Appeals (Civil Division)
EWCA Crim	England and Wales Court of Appeals (Criminal Division)
EWHC (Admin)	England and Wales High Court (Administrative Division)
FBI L. Enforcement Bull.	FBI Law Enforcement Bulletin
Fla. L. Rev.	Florida Law Review
Fla. St. U. L. Rev.	Florida State University Law Review
Fla. Stat.	Florida Statutes
Fla. Stat. Ann.	Florida Statutes Annotated
Fordham L. Rev.	Fordham Law Review
Fordham Urb. L.J.	Fordham Urban Law Journal
G.A. Res.	General Assembly Resolution
GA	Goltdammer's Archiv für Strafrecht [Goltdammer's Archive for Criminal Law] (Germany)
Ga. L. Rev.	Georgia Law Review
GC	General Chamber
Geo. L.J.	Georgetown Law Journal
Geo. Mason L. Rev.	George Mason Law Review
Geo. Wash. L. Rev.	George Washington Law Review
Grundgesetz	German Constitution
Global Jurist Frontiers	Global Jurist Frontiers
Harv. C.R.-C.L. L. Rev.	Harvard Civil Rights-Civil Liberties Law Review
Harv. J. on Legis.	Harvard Journal on Legislation
Harv. J.L. & Gender	Harvard Journal of Law & Gender
Harv. L. Rev.	Harvard Law Review
Harv. Women's L.J.	Harvard Women's Law Journal
Hastings Bus. L.J.	Hastings Business Law Journal
Hastings L.J.	Hastings Law Journal
Haw. Rev. Stat.	Hawaii Revised Statutes
HL	House of Lords
Hofstra L. Rev.	Hofstra Law Review
Hous. Bus. & Tax L.J.	Houston Business and Tax Law Journal
Ill. Comp. Stat.	Illinois Compiled Statutes
Ind. L.J.	Indiana Law Journal
Int'l J. Const. L.	International Journal of Constitutional Law
Int'l J.L. Pol'y & Fam.	International Journal of Law, Policy and the Family
Int'l Theory	International Theory
Iowa L. Rev.	Iowa Law Review
Isr. L. Rev.	Israel Law Review
J. Am. Inst. Crim. L. & Criminology	Journal of the American Institute of Criminal Law and Criminology
J. Applied Psychol.	Journal of Applied Psychology

Abbreviation	Full Form
J. Comp. L.	Journal of Comparative Law
J. Contemp. Legal Issues	Journal of Contemporary Legal Issues
J. Crim. L.	Journal of Criminal Law
J. Crim. L. & Criminology	Journal of Criminal Law and Criminology
J. Disp. Resol.	Journal of Dispute Resolution
J. Econ. Literature	Journal of Economic Literature
J. Eur. Tort Law	Journal of European Tort Law
J. Fam. Psychol.	Journal of Family Psychology
J. Hum. Resources	Journal of Human Resources
J. Interpersonal Violence	Journal of Interpersonal Violence
J. Legis.	Journal of Legislation
J. on Eur. Hist. L.	Journal on European History of Law
J. Phil.	Journal of Philosophy
J. Pol. Econ.	Journal of Political Economy
J. Prac. Ethics	Journal of Practical Ethics
J. S. Afr. L.	Journal of South African Law
J. Soc. & Soc. Welfare	Journal of Sociology and Social Welfare
J. Tort L.	Journal of Tort Law
J.L. & Econ.	Journal of Law and Economics
J.L. & Pol.	Journal of Law & Politics
J.L. & Soc. Challenges	Journal of Law & Social Challenges
J.L. Econ. & Pol'y	Journal of Law, Economics & Policy
J.L. Soc'y	Journal of Law in Society
JR	Juristische Rundschau [Legal Review] (Germany)
Jura	Jura [Law] (Germany)
Jurid. Trib.	Juridical Tribune
Just. Q.	Justice Quarterly
JZ	Juristen Zeitung [Lawyers Newspaper] (Germany)
Kan. Stat. Ann.	Kansas Statutes Annotated
KB	King's Bench
Ky. L.J.	Kentucky Law Journal
L. Annals Titu Maiorescu U.	Law Annals of Titu Maiorescu University
L. Q. Rev.	Law Quarterly Review
La. L. Rev.	Louisiana Law Review
La. Stat. Ann.	Louisiana Statutes Annotated
Law & Contemp. Probs.	Law and Contemporary Problems
Law & Dev. Rev.	Law and Development Review
Law & Ethics Hum. Rts.	Law and Ethics of Human Rights
Law & Hum. Behav.	Law and Human Behavior
Law & Phil.	Law and Philosophy
Law & Pol'y	Law and Policy
Law & Soc'y Rev.	Law and Society Review
Legal Stud.	Legal Studies
Lewis & Clark L. Rev.	Lewis & Clark Law Review
LG	Landgericht [regional court]

Abbreviation	Full Form
Man. L.J.	Manitoba Law Journal
Md. L. Rev.	Maryland Law Review
MDR	Monatsschrift für Deutsches Recht [Monthly Journal for German Law]
Me. Crim. Code	Maine Criminal Code
Me. Rev. Stat.	Maine Revised Statutes
Melb. J. Int'l L.	Melbourne Journal of International Law
Mich. L. Rev.	Michigan Law Review
Minn. L. Rev.	Minnesota Law Review
Miss. C. L. Rev.	Mississippi College Law Review
Mo. L. Rev.	Missouri Law Review
Mo. Rev. Stat.	Missouri Revised Statutes
Mod. L. Rev.	Modern Law Review
Monash U. L. Rev.	Monash University Law Review
Monist	Monist
Mont. Code Ann.	Montana Code Annotated
MPC	Model Penal Code
N. Ill. U. L. Rev.	Northern Illinois University Law Review
N.C. Gen. Stat.	North Carolina General Statutes
N.C. L. Rev.	North Carolina Law Review
N.H. Rev. Stat. Ann.	New Hampshire Revised Statutes Annotated
N.J. Rev. Stat.	New Jersey Revised Statutes
N.J. Stat. Ann.	New Jersey Statutes Annotated
N.Y. Penal Law	New York Penal Law
N.Y.U. J. Legis. & Pub. Pol'y	New York University Journal of Legislation and Public Policy
N.Y.U. L. Rev.	New York University Law Review
N.Y.U. Rev. L. & Soc. Change	New York University Review of Law and Social Change
N.Z. L. Rev.	New Zealand Law Review
Nat'l L. Sch. India Rev.	National Law School of India Review
Neb. L. Rev.	Nebraska Law Review
Neb. Rev. Stat.	Nebraska Revised Statutes
New Crim. L. Rev.	New Criminal Law Review
New L.J.	New Law Journal
NI	Northern Ireland Law Reports
NJW	Neue Juristische Wochenschrift [New Legal Weekly] (Germany)
Nomos	Nomos [Law] (United States)
Notre Dame J.L. Ethics & Pub. Pol'y	Notre Dame Journal of Law, Ethics & Public Policy
Notre Dame L. Rev.	Notre Dame Law Review
Nottingham L.J.	Nottingham Law Journal
NStZ	Neue Zeitschrift für Strafrecht [New Journal for Criminal Law] (Germany)
Nw. U. L. Rev.	Northwestern University Law Review

Abbreviation	Full Form
Ohio St. J. Crim. L.	Ohio State Journal of Criminal Law
Ohio St. L.J.	Ohio State Law Journal
Okla. L. Rev.	Oklahoma Law Review
OLG	Oberlandesgericht [higher regional court]
Or. L. Rev.	Oregon Law Review
Or. Rev. Stat.	Oregon Revised Statutes
Osgoode Hall L.J.	Osgoode Hall Law Journal
Oxford J. Legal Stud.	Oxford Journal of Legal Studies
Pa. Cons. Stat.	Pennsylvania Consolidated Statutes
Pac. L.J.	Pacific Law Journal
Pace L. Rev.	Pace Law Review
PC	Privy Council
Penn St. Int'l L. Rev.	Penn State International Law Review
Phil. & Pub. Aff.	Philosophy & Public Affairs
Phil. Issues	Philosophical Issues
Phil. Rev.	Philosophical Review
Phil. Stud.	Philosophical Studies
Police Q.	Police Quarterly
Polish Pol. Sci. Y.B.	Polish Political Science Yearbook
Pravnik	Pravnik [Lawyer] (Slovenia)
Proc. Aristotelian Soc'y	Proceedings of the Aristotelian Society
Psychol. Pub. Pol'y & Law	Psychology, Public Policy, and Law
QB	Queen's Bench
Queen's L.J.	Queen's Law Journal
R.I. Gen. Laws	Rhode Island General Laws
RG	Reichsgericht [Federal Court of Justice 1879–1944]
RGSt	Reichsgericht in Strafsachen [Federal Court of Justice in Criminal Matters] (Germany)
Rutgers U. L. Rev.	Rutgers University Law Review
S. Afr. L.J.	South African Law Journal
S. Cal. Interdisc. L.J.	Southern California Interdisciplinary Law Journal
S. Cal. L. Rev.	Southern California Law Review
S. Cal. Rev. L. & Soc. Just.	Southern California Review of Law and Social Justice
San Diego L. Rev.	San Diego Law Review
Santa Clara L. Rev.	Santa Clara Law Review
SC(J)	Session Cases, High Court of Justiciary
Seton Hall L. Rev.	Seton Hall Law Review
Soc. Probs.	Social Problems
Social Phil. & Pol'y	Social Philosophy and Policy
St. Louis-Warsaw Transatlantic L.J.	Saint Louis-Warsaw Transatlantic Law Journal
St. Mary's L.J.	St. Mary's Law Journal
Stan. L. & Pol'y Rev.	Stanford Law and Policy Review
Stan. L. Rev.	Stanford Law Review
Stellenbosch L. Rev.	Stellenbosch Law Review
StGB	Strafgesetzbuch [German Criminal Code]

Abbreviation	Full Form
Suffolk Transnat'l L. Rev.	Suffolk Transnational Law Review
Sw. U. L. Rev.	Southwestern University Law Review
Tenn. L. Rev.	Tennessee Law Review
Tex. Code Ann.	Texas Code Annotated
Tex. L. Rev.	Texas Law Review
Tex. Penal Code	Texas Penal Code
Tex. Penal Code Ann.	Texas Penal Code Annotated
Tex. Rev. L. & Pol.	Texas Review of Law and Politics
Tex. Tech L. Rev.	Texas Tech Law Review
Tex. Wesleyan L. Rev.	Texas Wesleyan Law Review
Theoretical Inquiries L. F.	Theoretical Inquiries in Law Forum
U. Chi. L. Rev.	University of Chicago Law Review
U. Chi. Legal F.	University of Chicago Legal Forum
U. Cin. L. Rev.	University of Cincinnati Law Review
U. Colo. L. Rev.	University of Colorado Law Review
U. Det. Mercy L. Rev.	University of Detroit Mercy Law Review
U. Ill. L. Rev.	University of Illinois Law Review
U. La Verne L. Rev.	University of La Verne Law Review
U. Louisville L. Rev.	University of Louisville Law Review
U. Md. L.J. Race Religion Gender & Class	University of Maryland Law Journal of Race, Religion, Gender and Class
U. Miami L. Rev.	University of Miami Law Review
U. Mich. J.L. Reform	University of Michigan Journal of Law Reform
U. Pa. J. Const. L.	University of Pennsylvania Journal of Constitutional Law
U. Pa. L. Rev.	University of Pennsylvania Law Review
U. Pac. L. Rev.	University of the Pacific Law Review
U. Pitt. L. Rev.	University of Pittsburgh Law Review
U. Rich. L. Rev.	University of Richmond Law Review
U. St. Thomas J.L. & Pub. Pol'y	University of St. Thomas Journal of Law and Public Policy
U. Tas. L. Rev.	University of Tasmania Law Review
U. Toronto L.J.	University of Toronto Law Journal
U.C. Davis L. Rev.	University of California-Davis Law Review
U.C. Irvine L. Rev.	University of California-Irvine Law Review
U.N.S.W. L.J.	University of New South Wales Law Journal
U.S.F. L. Rev.	University of San Francisco Law Review
UCL J. L. & Juris.	University College London Journal of Law and Jurisprudence
UCLA L. Rev.	University of California-Los Angeles Law Review
UMKC L. Rev.	University of Missouri-Kansas City Law Review
Utah Code Ann.	Utah Code Annotated
Utah L. Rev.	Utah Law Review
Utrecht L. Rev.	Utretcht Law Review
Va. J. Crim. L.	Virginia Journal of Criminal Law
Va. J. Int'l L.	Virginia Journal of International Law
Va. L. Rev.	Virginia Law Review

Abbreviation	Full Form
Val. U. L. Rev.	Valparaiso University Law Review
Vand. L. Rev.	Vanderbilt Law Review
W. St. U. L. Rev.	Western State University Law Review
Wake Forest J.L. & Pol'y	Wake Forest Journal of Law & Policy
Wake Forest L. Rev.	Wake Forest Law Review
Wash. L. Rev. Online	Washington Law Review Online
Wash. Rev. Code	Revised Code of Washington
Wash. U. J.L. & Pol'y	Washington University Journal of Law & Policy
Wash. U. Juris. Rev.	Washington University Jurisprudence Review
Washburn L.J.	Washburn Law Journal
Wayne L. Rev.	Wayne Law Review
WLR	Weekly Law Reports
Wm. & Mary J. Race Gender & Soc. Just.	William & Mary Journal of Race, Gender, and Social Justice
Wm. & Mary L. Rev.	William & Mary Law Review
Women's Rts. L. Rep.	Women's Rights Law Reporter
Yale L. & Pol'y Rev.	Yale Law & Policy Review
Yale L.J.	Yale Law Journal
ZStW	Zeitschrift Für Die Gesamte Strafrechtswissenschaft [Journal of the Complete Criminal Science] (Germany)

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I. INTRODUCTION

The 'ancient right'[1] of self-defense is a topic on which academics, legislators, judges, and laymen alike have strongly held—and often strongly divergent—views. Some, like Engberg, Erb, Schopp, and Kates, have advocated what can be characterized as 'tough on crime' approaches that would more broadly authorize deadly force in defense of the defender's 'personal domain.'[2] On the other side of this debate stands the balance of prominent academics, including Ashworth, Fletcher, and Leverick, who call for a more 'pacifist' and 'humanitarian' account of self-defense that, for example, would deny deadly force in defense of property or to ward off 'mere' serious bodily injury (as opposed to death). And somewhere in the middle is found the law of self-defense, as the majority of jurisdictions enact it and enforce it.[3]

Considering the normative distance between these positions, an important assumption tested here is that value-judgments (whether expressed or not) permeate self-

[1] Johnson describes the right of self-defense as 'undergird[ing] our basic thinking about fundamental rights and duties,' as a 'building block of our culture,' and a 'backstop of our civilization.' *See* Nicholas J. Johnson, *Self-Defense*, 2 J.L. ECON. & POL'Y 187, 196 (2006). *See also* Benjamin Porat, *Lethal Self-Defense against a Rapist and the Challenge of Proportionality: Jewish Law Perspective,* 26 COLUM. J. GENDER & L. 123, 124–25 (2013); Moses F. Wilson, *System of Self-Redress*, 7 AM. L. REC. 577, 583 (1879); Plato, *The Laws*, *in* THE COLLECTED DIALOGUES 1429 (Edith Hamilton & Huntington Cairns eds., 1961) (360 B.C.); *McDonald v. Chicago*, 561 U.S. 742, 767 n.15 (2010).

[2] Note that the focus here is largely on using self-preferential force to *kill* the attacker. This limitation was selected because the use of deadly force against a real or putative attacker involves the irremediable killing of another to save oneself. It, therefore, is the most challenging type of defensive force to justify. Put another way, if deadly defensive force can be justified in a particular circumstance, then so, too, can resorting to lesser levels of force. *See generally* FIONA LEVERICK, KILLING IN SELF-DEFENCE 4 (2006). This thesis, moreover, will largely (though not exclusively) focus on *self*-defense, rather than defense of *others*—or private defense more generally—because self-preferential force is the most challenging to justify in light of the inherent self-interest involved when one opts to save one's own life at the expense of another's.

[3] As discussed herein, the pacifist position, close to representing today's scholarly orthodoxy, diverges significantly from the law in the subject jurisdictions and elsewhere. Deviating from the mainstream among self-defense theorists, most jurisdictions, for example, do not require a 'wrongful' attack, strictly require retreat, or limit self-defense to deadly threats. The 'libertarian' position, on the other hand, is also in tension with what is seen in the 'real world.' For example, most jurisdictions require citizens to defer to public authorities for their protection when possible and do forbid deadly force in defense of property. *See generally* Victoria F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1272–74 (2001) ('[N]either the libertarian nor the pacifist can claim to have won the debate about self-defense. Neither theoretical position actually describes the law of self-defense.').

defense doctrine, generally, and individual self-defense decisions, specifically. In fact, the relative absence of a more transparent and comprehensive value-centric approach shared among experts in the field informs the hypothesis at the heart of this thesis.[4] More specifically, the hypothesis tested here, from what is conceded is a generally Anglo-American perspective, is that a broader and more explicit consideration of the values[5] potentially implicated when a person elects to engage in the self-preferential use of force will improve the transparency and quality of the decision-making, and, relatedly, will reduce the role of hidden normativity.

But the hypothesis' assessment of decision-making 'quality' does not rely on individual normative evaluations of end-states or social outcomes. Rather, the inquiry concerns the application of self-defense rules in terms of whether developing a common analytical and value-explicit language encourages and facilitates more nuanced, focused decision-making. To the extent this thesis reveals that a value-explicit approach permits a justice system to reach self-defense decisions in a more democratic, logical, and policy-based manner—and, relatedly, to identify and narrow areas of dispute, leaving less room for hidden normativity—then the hypothesis' prediction concerning 'quality' will be deemed confirmed.

In the context of the hypothesis' baseline focus on whether, when, and how values function as self-defense decision-grounds,[6] consider the 1920s case involving a youthful

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[4] For a discussion of the importance of transparency in democratic criminal justice systems, *see generally* Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose*, 65 CLEV. ST. L. REV. 519, 531–32 (2017); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 961 (2006).

[5] A few words on nomenclature may be appropriate at this early stage. In academic literature, the terms 'principles' and 'values' are often conflated. *See generally* Peter A. Alces, *Regret and Contract Science*, 89 GEO. L.J. 143, 156–61 (2000). That conflation is, in fact, understandable, as the two terms share much in common. The decision here is to default to the term 'value,' however, because it has become a legal colloquialism used by commentators (though some alternatively refer to 'self-defense factors,' *see, e.g.*, Christopher Kopacz & Elena Penick, *Double-Edge Sword of Victim Survival: Imperfect Self Defense*, 29 CHI. BAR ASSOC. REC. 32, 34 (2015)).

[6] The term 'decision-ground,' as used here, distinguishes values actually implicated in a particular self-defense scenario ('value-based decision-grounds') from those that are not. Put another way, when a value

German fruit thief and an older orchard-owning farmer armed with a shotgun and accompanied by his dog.[7] The German Supreme Court ruled that the farmer, who shot and seriously injured the youth fleeing with the bag of fruit, acted properly in defense of his property. The court justified this outcome by noting that the farmer was protecting a legally recognized personal interest (his fruit), thus putting the farmer's actions within the penumbra of self-defense.[8] More specifically, the court found that the farmer had engaged in justified potentially deadly force because shooting the youth was the only way the farmer could stop the youth from running away with the illegally picked fruit.[9] Even though the tangible interest protected was only a bag of fruit, and the potential cost was the young man's life, the ruling was in line with the then-prevalent systemic value-judgment that a criminal should never be permitted to 'get away' with his crime (thus impermissibly forcing the 'right' to yield to the 'wrong').[10] The holding, moreover, reflected the largely unbounded notion that a person, once he knowingly became a criminal threat, forfeited the full array of rights the justice system otherwise accorded him. Such a culpable actor could not expect an innocent victim to subjugate his interests (no matter how trivial) to the 'attacker's' physical welfare. As the court put it, 'where the

provides a reason for deciding a self-defense case one way or the other, it becomes a 'decision-ground.' *See generally Deere v. Calderon*, 890 F. Supp. 893, 897 (C.D. Cal. 1995).

[7] [1920] 55 RGSt 82, 83 (Sept. 20, 1920), *discussed in* CARL-FRIEDRICH VON SCHERENBERG, DIE SOZIALETHISCHEN EINSCHRÄNKUNGEN DER NOTWEHR 22–23 (2009).

[8] As discussed in Chapter V(d)(i), German law has always interpreted the 'self' to include property and other personal interests beyond mere bodily integrity.

[9] 55 RGSt 82, 83–84.

[10] *Id.* at 85–86. *See also* Henning Rosenau, *Notwehr und Notstand*, *in* 4 STRAFGESETZBUCH: KOMMENTAR, side-note 2 (Helmut Satzger & Wilhelm Schluckebier eds., 2019); THOMAS FISCHER, STRAFGESETZBUCH, § 32 side-note 2 (2019); Volker Erb, *Notwehr und Notstand, in* MÜNCHNER KOMMENTAR ZUM STRAFGESETZBUCH, BAND 1, side-note 12–18 (Bernd von Heintschel-Heinegg ed., 2017). [Note that German textbooks typically refer to 'Vorbemerkung' and 'Randnote'—the former refers to sections providing 'introductory comment,' and the latter to the 'side-note' or 'margin-note' accompanying the particular section; for consistency's sake, this thesis will throughout refer to 'Vorbemerkung' and 'side-note.'] As will be explained in subsequent chapters, this outcome is no longer possible under today's re-interpretation of the statutory German law of self-defense. It, moreover, would also likely violate Article 2 of the European Convention on Human Rights, which provides, among other things, that '[e]veryone's right to life shall be protected by law.' *See* Chapters IV(d) & V(b)(ii).

right is to be protected against the wrong,' it is inappropriate to ask the defender, acting in the urgency of the moment, to be concerned about avoiding disproportionate damage to the attacker's interests.[11] The court also noted that a contrary ruling would preclude all deadly force in defense of property (an outcome the court apparently considered untenable).[12] The German Supreme Court, in delivering this ruling, therefore explicitly rejected the notion that self-defense cases required any 'weighing' of competing values. To the contrary, it held that there was only *one* outcome-determinative systemic value or goal, namely, ensuring the primacy of the 'right' over the 'wrong.'[13]

A person who today reviews this holding may understandably be unpersuaded—or even offended—by it.[14] The underlying reasons for this rejection, in turn, provide insights into the values, as well as their relative accommodation, that those reviewing the case consider prerequisite to justified self-preferential force.

And so, on a macro-morality-level, this ruling can be viewed as elevating the farmer's interests over those of the broader community to such an extent that the individual can be said to become an alienated being, lacking responsibilities or obligations to his fellow man (other than to not improperly invade another's personal sphere).[15] It will be proposed, moreover, that, by merely proclaiming a categorical rule ('the right need never yield to the wrong') and then strictly applying that rule to the facts of the case, the German court for no good stated reason omitted other equally important

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[11] 55 RGSt 82, 85–86.

[12] *Id.* at 85.

[13] *Id*. at 86–87.

[14] As noted, today's 'socio-ethical limitations' would preclude such an outcome. *See* Chapter V(b)(ii).

[15] *See generally* John Rawls, *The Basic Liberties and Their Priority*, *in* THE TANNER LECTURES ON HUMAN VALUES III, 3, 46–63 (Sterling M. McMurrin ed., 1982). *See also* Gregory S. Alexander, *Intergenerational Communities*, 7 LAW & ETHICS HUM. RTS. 21, 29 (2014); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 15 (1996); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 742 (1994); Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371, 375–81 (1992).

value-based decision-grounds.[16] These grounds, summarized and defended in Chapter II, include the systemic, collective interest in reducing overall violence and protecting the state's monopoly on force; protecting the fruit thief's individual right to life on humanitarian grounds; safeguarding the equal standing between farmer and the fruit thief; ensuring the primacy of the legal process; avoiding decisions that could lead to an erosion of the criminal justice system's moral credibility (and, thus, legitimacy); and deterrence.[17]

More recently, a division of public sentiment of self-defense's core function was in evidence when, on a rainy April day in 2012, 28-year-old Neighborhood Watch Captain George Zimmerman shot and killed 17-year-old Florida teenager Trayvon Martin.[18] After informing the 911 operator that there was a 'real suspicious guy' in his neighborhood (a neighborhood that had recently seen a spate of break-ins), Zimmerman began to chase the unarmed, but physically more imposing, Martin, ultimately fatally shooting him following a scuffle. Zimmerman claimed he shot Martin in self-defense and invoked Florida's 'Stand Your Ground' law.[19] Family and friends of the slain Martin, on the other hand, portrayed Zimmerman as a vindictive, racist man chasing the unrealized dream of being in law enforcement.[20]

Following a three-week trial, the jury acquitted Zimmerman of murder. The jury rejected the prosecutor's argument that Zimmerman had deliberately pursued Martin and

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[16] *See* Chapter V(b).

[17] *See* Chapter II(c)(i)–(vii).

[18] *See generally Zimmerman v. State*, 114 So.3d 446 (Fla. Dist. Ct. App. 2013); CNN Library, *Trayvon Martin Shooting Fast Facts*, CNN (June 5, 2013), https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html; Cynthia K.Y. Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1612 (2013).

[19] *Zimmerman*, 114 So.3d at 446.

[20] *See generally* Darren L. Hutchinson, *Continually Reminded of Their Inferior Position: Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 93–94 (2014); Mary Anne Franks, *I Am/I Am Not: On Angela Harris's Race and Essentialism in Feminist Legal Theory*, 102 CALIF. L. REV. 1053, 1062–64 (2014). As the thesis will discuss in Chapter VI(b), the concept of 'reasonable fear' is central in U.S. self-defense cases. Zimmerman carrying a firearm while Martin was unarmed and Zimmerman's mixed martial arts training were major challenges he was able to overcome.

instigated the fight in order to be able to claim self-defense.[21] The verdict sparked a national debate about both race and self-defense.[22]

Missing from both the public debate and the court's legal analysis, however, was a discussion of how Zimmerman's claimed effort to instigate the confrontation impacted the state's interest in protecting the equal concern and reciprocal respect among people. Similarly undiscussed was whether and how Zimmerman's conduct impacted the state's interest in protecting Zimmerman's *and* Martin's individual autonomous rights, whether the ruling allowed self-defense to become a substitute for the legal process, whether the result from a collective perspective failed to properly protect the state's monopoly on force, and what specific or general deterrent impact Zimmerman's conduct might have.

For a final introductory illustration of the hypothesis' underlying assumption that (often hidden) normative judgments about values drive self-defense decisions, consider the highly publicized English case of eccentric Norfolk farmer Tony Martin, who in the Crown Court at Norwich was convicted of murder and given a life sentence.[23] Martin had used an illegally possessed pump-action shotgun to shoot and kill unarmed 16-year-old burglar Fred Barras, and to seriously injure Barras' accomplice, Brendan Fearon.[24]

The fact that Martin's attackers had extensive criminal records caused politicians—echoing the type of public sentiment expressed in the Trayvon Martin case—to advocate for reform of England's self-defense law.[25] The suggestion was that, because

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[21] *See* Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 13, 2013, at A1. For a discussion of the duty to retreat and avoid conflict under U.S. law, *see* Chapter VI(c)(viii) & (ix).

[22] *See* Lee, *supra* note 18, at 1567, *citing* Krissah Thompson & Jon Cohen, *Poll Finds Sharp Racial Divides over Martin Case*, WASH. POST, Apr. 11, 2012, at A3.

[23] *See* Ian Dobinson & Edward Elliot, *A Householder's Right to Kill or Injure an Intruder Under the Crime and Courts Act 2013: An Australian Comparison*, 78 J. CRIM. L. 80, 83–84 (2014).

[24] Martin's conviction was subsequently reduced to manslaughter on appeal because of Martin's purported diminished capacity. *See R v. Martin* [2001] EWCA Crim 2245.

[25] *See generally* Clare Dyer & Alan Travis, *Hague's Law: The Whole Truth and Nothing But?*, THE GUARDIAN (Apr. 26, 2000, 20:34 EDT), http://www.guardian.co.uk/martin/article/0,2763,214670,00.html.

an after-the-fact analysis of Barras' background established that Barras was a 'career criminal,' his right to life deserved lesser legal protection. This argument, however, sounds less in self-defense and more in punishment or societal vengeance. Missing was a recognition that Martin's decision not to retreat and not to avoid conflict implicated a broader, more inclusive array of values than articulated in the public discourse, legal commentary, or judicial decision-making.[26]

These real-life examples, taken from the subject jurisdictions, provide insights not only into the public's perception of what a 'right' or 'just' outcome is, but also into how different value-informed assessments can yield very different outcomes. For example, while the English farmer was jailed for using excessive force to protect his property, the German farmer was lauded as a defender of the entire legal order.

To help gauge the current level of attention paid to values as decision-grounds, Chapter III examines the extent to which scholars proposing comprehensive theories of self-defense engage in explicitly value-informed assessments of self-defense doctrine and decision-making. The survey reveals that the scholarly debate surrounding self-defense, rather than reflecting a comprehensively value-centric approach, tends to focus more narrowly on the 'technical' legal aspects of self-defense to determine whether and when instances of defensive force should be encouraged, authorized, merely tolerated, or outlawed. And those commentators who have treated values as self-defense decision-grounds usually anchor their analysis on only one or two values, such as the attacker's right to life, or, on the opposite side of the value continuum, the defender's right to protect her autonomy. The hypothesis tested here posits that, by focusing on facts, designing tactics, and treating self-defense instrumentally to advance certain goals, justice

[26] England's contemporary treatment of the duties to avoid conflict and to retreat is discussed in Chapter VII(d)(iii).

systems lose the opportunity to benefit from a deeper conversation about jurisprudential matters of value, moral principles, and fundamental human rights.

It, at the outset, is recognized that debates concerning the relative importance of a defender's 'autonomy' versus an attacker's 'humanity' (and intermediate variants thereof) have been carrying on in one form or another for generations.[27] And there is no dispositive 'winner' in sight. So, while hoping to find *the* answer to this long-standing debate could fairly be considered overly ambitious, the more modest goal here is to test the hypothesis that there are, in fact, benefits to encouraging a more value-centric, comprehensive dialogue about the roles values play when assessing doctrinal issues as well as an individual's use of self-preferential force in the face of a perceived threat.

It is also understood that there surely will be disagreement over what values matter (and why). But rather than undermining the hypothesis, this observation, as shall be seen, serves to reinforce the hypothesis' central tenet that an open and explicit debate about normative judgments is the core advantage of the more openly value-informed approach proposed here.

As this summary foreshadows, this thesis covers considerable ground. And yet, and as noted, the hypothesis tested here does not rely on the claim that the particular values included in the value-based model are the only ones that could possibly be included. Nor will it be contended that the proposed value-based model represents the only reasonable way of conceptualizing, ordering, or prioritizing the implicated values.

Criminal law, after all, is a notoriously untidy collection of proscriptions and corresponding moral judgments.[28] While it is true that there exists a considerable volume

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[27] *See generally* Heiko Lesch, *Die Notwehr*, *in* FESTSCHRIFT FÜR HANS DAHS 81, 90–93 (Gunter Widmaier *et al*. eds., 2005). *See also* Péter Bónis, *The Self-Defense in the Tripartitum and the European ius Commune*, 5 J. ON EUR. HIST. L. 80, 81 (2014) ('The issue of the legitimate self-defense has been one of the most debated question[s] in criminal law for centuries.').

[28] *See generally* Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 128–30 (2006); John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM.

of scholarship dedicated to synthesizing the relationship between moral and legal patterns in self-defense and other contexts,[29] the thesis will demonstrate that there is no emerging consensus on the 'values driving criminal law.' In the end, then, and important to the testing of the hypothesis, this thesis strives to introduce the value-based model as a reasonably defensible jumping-off point for a rational and transparent discussion of the patinaed topic of self-defense.

In summary, to test the hypothesis first introduced in this chapter, Chapter II proposes the 'value-based model' of self-defense. This model serves as a template facilitating a deeper exploration of the hypothesis by demonstrating how a value-centric approach might operate. With this value-based template in place, Chapter III conducts the aforementioned thematic literature review. One purpose of this literature review is to determine whether the value-based model holds up to scrutiny and, in fact, provides something 'extra' that usefully goes beyond what has already been articulated elsewhere. Chapter IV, in turn, relies on the value-based template to provide a sound point of departure for addressing some of the central theoretical questions characterizing the self-defense debate. To further test the hypothesis, Chapters V–VII deploy the value-based approach to evaluate the self-defense laws in Germany, the U.S., and England, respectively, with particular attention paid to whether and how these jurisdictions examine values in their self-defense legislation and decision-making.

CRIM. L. REV. 111, 118–27 (1996); Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 407–08 (1989). *See also* DAVID ORMEROD & KARL LAIRD, SMITH, HOGAN, AND ORMEROD'S CRIMINAL LAW 5–12 (15th ed. 2018).

[29] *See generally* Chapter III.

II. DEVELOPING THE 'VALUE-BASED MODEL' OF SELF-DEFENSE

Prominent theorists, including Ashworth, Erb, Fletcher, Leverick, and Sangero, are among the relatively few who at some level at least have examined whether and how questions of value should impact the broader self-defense debate.[30] Leverick, for example, views protecting the 'right to life' as the only relevant decision-ground.[31] Erb similarly invokes the basic right to life. He, however, reaches the conclusion that, because allowing a person to use deadly force to thwart potentially deadly threats is an 'imperative human right requirement,' any narrowing of this right must be carefully scrutinized.[32] Sangero, on the other hand, believes certain 'factors' (primarily the defender's autonomy, the attacker's culpability, and harm to the 'social-legal order') explain the underlying 'rationale' of self-defense law.[33] While these scholars are among the few to discuss values as providing the rationale justifying self-defense, this thesis will conclude that even their accounts are too limited.

As outlined above, this thesis tests the hypothesis that a more detailed accounting of the underlying values believed to provide a rationale for self-defense facilitates a more transparent and rational discussion concerning 'appropriate' self-defense outcomes. The proposed value-centric approach minimizes the hidden normativity characterizing much of the past and present self-defense discourse among legislators, scholars, judges, and the

[30] For a more detailed discussion of their respective approaches, *see* Chapter III.

[31] LEVERICK, *supra* note 2, at viii.

[32] Volker Erb, *Notwehr als Menchenrecht—Zugleich eine Kritik der Entscheiduing des LG Frankfurt am Main im 'Fall Daschner*,' 25 NStZ 593, 594 (2005).

[33] *See* BOAZ SANGERO, SELF-DEFENCE IN CRIMINAL LAW 90–106 (2006) [hereinafter SANGERO, SELF-DEFENCE]. *See also* Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475 (2006) [hereinafter *Sangero*, *New Defense*].

public.[34] This transparency, in turn, tends to enhance the community's acceptance of the decision-making.[35]

To test this hypothesis, this thesis constructs the 'value-based model' of self-defense. The value-based model is intended to provide a basis for critical analysis of the different legal systems and theoretically challenging scenarios. By first identifying a set of values believed to lie at the heart of self-defense doctrine, and then analyzing when and how, depending on the underlying operative facts, each value 'matters' (that is, becomes a 'decision-ground'), this thesis hopes to offer a different evaluative perspective from which to assess the self-defense questions that for centuries have challenged those who have considered them.

a. <u>An introduction to thinking of values as decision-grounds</u>

As noted above, and as elaborated on later, self-defense rulings and legislative enactments are rarely accompanied by discussions concerning the broader spectrum of values at play when self-preferential force is exercised, let alone by a deeper examination of how the criminal justice system should react when identified values come into conflict. So when members of the U.S. Congress, in support of a call for law reform, argue that U.S. subway vigilante Bernhard Goetz 'is the victim and the symbol of twin horrors in this Nation: rampant crime in the cities and gun control laws which do not allow the innocent to protect themselves,'[36] they do not explain (and themselves may not have sought to identify and understand) the deeper value-judgments driving their views.

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[34] *See generally* Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 1–7 (2001).

[35] The openness and accessibility of the government are, after all, said to be essential elements of liberal democratic theory and are consistent with modern Western political values. *See generally* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 894–902 (2006); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 781 (Erin Kelly ed., 2001). *See also* Chapter IV(c)(vi).

[36] 133 Cong. Rec. H3066-04 (daily ed. May 5, 1987) (statement of Rep. Marlene). *See also* 131 Cong. Rec. H317-03 (daily ed. Feb. 6, 1985) (statement of Rep. Mica) (discussing 'statistics on a national survey that indicated that 45 to 50 percent of all of the people in the United States agree with what Bernard [sic] Goetz did').

Rather, the implicit assertion, highlighting the noted concerns over hidden normativity,[37] is that more permissive self-defense laws, or more lax enforcement of these laws, will somehow deter criminal attacks.

But what tends to be absent from such pro-liberalization arguments is a recognition that any changes to self-defense law require challenging tradeoffs in terms of values. Making self-defense more readily available, for example, may also encourage vigilantism, increase overall societal violence, and undermine the very goals of most modern criminal justice systems. And so when framed in the context of the value-based model, broadening the self-defense justification threatens to: undermine the state's traditional monopoly on force; for no good reason, reduce protection of the (presumptive) right to life possessed by even culpable attackers; deprive purported attackers of the right to due process that is said to form the cornerstone of modern, pluralistic legal systems; allow self-preferential force to become a substitute for the legal process; and potentially conflict with widely held standards of right and wrong, thereby harming the criminal justice system's own legitimacy.[38] On the other hand, those, like Leverick, who would significantly limit the right to self-defense may also: define the state's monopoly on force overly broadly; fail to recognize that the culpable attacker's right to life is only presumptive; pay insufficient attention to the moral asymmetry between culpable, less-

[37] *See generally* CYNTHIA K.Y. LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 33–43, 65–66 (2003); Arthur G. LeFrancois, *The Act of Judging and the Performance of Being Earnest: Responding to Professor Chemerinsky's Informalism*, 54 OKLA. L. REV. 26, 32 (2001).

[38] A few additional words on terminology may be appropriate. First, although the term 'wronging' is often given a broader meaning in moral and legal evaluation, for our purposes the term refers to actions that reflect an intentional disregard for another's equal standing as a citizen. 'Autonomy,' on the other hand, is given a fairly expansive definition consistent with the term's usage in legal decisions and scholarly writings; an individual's autonomy, so defined, comprises all of that person's legally recognized interests, including his concrete interests and his sovereignty. Autonomy is thus synonymous with self-determination and is restricted when a person is prevented from acting in accordance with his lawful action-plans. Any unjustified threat to an individual's bodily integrity, property, or right to act—or to refrain from acting—therefore constitutes a threat to that individual's autonomous sphere of self-determination. *See generally* Alan Brudner, *The Ideality of Difference: Toward Objectivity in Legal Interpretation*, 11 CARDOZO L. REV. 1133, 1184–86, 1205–10 (1989–1990); JOHN RAWLS, A THEORY OF JUSTICE 209–10 (1971).

culpable, and innocent 'attackers'; undervalue the importance of protecting the defender's autonomy; threaten to damage the criminal justice system's moral authority and legitimacy; and significantly reduce self-defense's (general and specific) deterrent impact. The reality that different people will take different positions on these values reinforces, rather than devalues, the benefit of a more value-centric dialogue.

Leverick believes the right to life (or, rather, the attacker's right to life) demands that only a deadly attack justifies deadly force, and that any other outcome threatens the criminal justice system's moral authority.[39] Schopp, on the other hand, concludes that the defender's right to autonomy justifies killing the attacker to defend far more than only the defender's life, lest the public lose respect for a law that unduly (from his perspective) limits defensive force.[40] It will be contended that these accounts, while they do discuss self-defense from a value-centric perspective, for no persuasive reason are overly limited in the scope of values they consider.

Per Golding, legal rulings

> have to be supported by justifying reasons . . . . If values enter into a judicial justification, they do not do so as personal predilections. The values must have some purchase on the community to which they are addressed.[41]

[39] *See* LEVERICK, *supra* note 2, at 151.

[40] *See* ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 83–84 (1998). For a criticism of this approach, *see* T. Markus Funk, *Justifying Justifications*, 19 OXFORD J. LEGAL STUD. 631 (1999). *See also* Erb, *supra* note 32, at 596–97 (noting the normative difference between innocent and culpable attackers).

[41] Martin Golding, *A Note on Discovery and Justification in Science and Law*, *in* JUSTIFICATION: NOMOS XXVIII 124, 138 (J. Roland Pennock & John W. Chapman eds., 1986). *See also* Robert R. M. Verchick, *Culture, Cognition, and Climate*, 2016 U. ILL. L. REV. 969, 977 (2016); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 150 (2006), *cited in* Todd S. Aagaard, *Environmental Harms, Use Conflicts, and Neutral Baselines in Environmental Law*, 60 DUKE L.J. 1505, 1562 (2011); Richard K. Greenstein, *The Three Faces of ORPP: Value Clashes in the Law*, 54 LA. L. REV. 95, 121–23 (1993).

What is needed, then, is, first, an accounting of those values providing a reasonable (though, as noted, not necessarily the only) rationale for self-defense; second, a means of determining when and how these values in certain circumstances can become decision-grounds; and third, an understanding of how the values are accommodated when they come into conflict.

b. The orthodox view: 'Two principles in tension' (autonomy of the defender v. autonomy of the attacker)

The public and academic debate over the cases of Tony Martin, Bernhard Goetz, Treyvon Martin, and the German fruit thief illustrate the importance of answering the question of how a given self-defense outcome serves to protect (1) the autonomy of the defender[42] versus (2) the autonomy of the (culpable or innocent[43]) attacker. Theories of personal autonomy, developed by philosophers Immanuel Kant[44] and Georg Hegel,[45] and interpreted by criminal theorists such as George Fletcher,[46] support the orthodox view that these are, in fact, the two core autonomy-based *principles* in tension. And so the question becomes whether the justice system's resolution of a particular case strikes the proper balance between these two competing principles by, for example, vindicating individual autonomy, reducing violence, and treating people as ends rather than as means.[47]

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[42] Because the term 'victim' can be read to imply a culpable attack, this thesis will instead generally use the more neutral term 'defender.'

[43] The terms 'culpability' and 'innocence' in this thesis refer to legal culpability. As discussed in Chapter II(c)(vi)(1) & (2), however, moral and legal culpability ideally are co-extensive and overlapping in criminal justice systems grounded on the conventional public morality.

[44] *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 56–60 (1991). *See also* Michael Pawlik, *Die Notwehr nach Kant und Hegel*, 114 ZStW 259, 274 (2002).

[45] *See* GEORG HEGEL, PHILOSOPHY OF RIGHT 89–90 (Thomas M. Knox trans., 1952).

[46] *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 855–64 (1978) [hereinafter FLETCHER, RETHINKING], *discussed in* Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor's Culpability in Self-Defense*, 39 TULSA L. REV. 875, 892 (2004); George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367, 371 (1973) [hereinafter Fletcher, *Proportionality*].

[47] *See generally* Stephen Kershnar, *Forfeiture Theory and Symmetrical Attackers*, 36 CRIM. JUST. ETHICS 224, 224–45 (2017); JAN ARNO HESSBRUEGGE, HUMAN RIGHTS AND PERSONAL SELF-DEFENSE IN INTERNATIONAL LAW 266 (2016). *See also* ERNEST GELLNER, CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS 28–29 (1994); GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND

This thesis recognizes that identifying the two guiding principles in tension with each other in self-defense cases is important. But this only marks the starting point of the value-centric inquiry. The principle of protecting the defender and the principle of protecting the attacker are, after all, largely abstract concepts.[48] They must be given normative content and concrete meaning in order to be more analytically useful. What follows, therefore, is an attempt to bridge this rationale gap through the value-based model of self-defense. The enumerated individual values can, thus, be fairly conceptualized as standing behind, and providing analytical content to, the two (defender v. attacker) macro-principles.

c. Advancing the debate through a more value-centric dialogue—an introduction to (and preliminary defense of) seven proposed value-based decision-grounds

Did the young subway riders by whom Goetz felt threatened, or the youthful German thief who attempted to make away with the farmer's fruit, simply 'forfeit' their right to have the justice system protect their lives? Did they, through their conduct, step outside of the law's protection? Advancing the position that, say, the principle of protecting the defender in these cases outweighed the principle of protecting the attacker rings somewhat hollow when not buttressed by supporting analysis.[49] Per the hypothesis being tested, the two principles[50] said to be in tension in self-defense cases are only given meaning and weight by the values that inform them (and, once identified, the next step of

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THE LAW ON TRIAL 24 (1988) [hereinafter FLETCHER, A CRIME OF SELF-DEFENSE]; Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 454 (1982); Fletcher, *Proportionality*, *supra* note 46, at 377.

[48] *See generally* William N. Gemmill, *Criminal Procedure*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 566, 586 (1912).

[49] *See generally* Golding, *supra* note 41, at 138*, cited in* Erwin Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy,* 31 BUFF. L. REV. 107, 129–32 (1982). *See also* David Sandomierski, *Tension and Reconciliation in Canadian Contract Law Casebooks*, 54 OSGOODE HALL L. J. 1181, 1230–32 (2017).

[50] For a short comment on terminology, *see supra* note 5.

determining their relative priority is, as discussed Chapter II(d)(ii), even more challenging).

The hoped-for benefit of the value-based model's focus on protecting the state's monopoly on force (value #1); protecting the individual attacker's (presumptive) right to life (value #2); maintaining the equal standing between people (value #3); protecting the defender's autonomy (value #4); ensuring the primacy of the legal process (value #5); maintaining the legitimacy of the legal order (value #6); and deterring attackers (value #7) is not that the model in all cases dictates a particular balance or accommodation between the values. Rather, the model will achieve its transparency-enhancing objective if it offers a reasonable, defensible starting point for determining what is in fact 'at stake' in different self-defense scenarios. The hypothesis being tested, after all, is whether the self-defense discussion is enhanced by carefully tracing the landscape of implicated values; justifying why certain values should, under the facts of the case, receive more weight than others; and determining whether the balance of values can be said to reasonably justify treating the conduct as self-defense.[51]

[51] It is recognized that the seven values discussed in this chapter could of course be organized differently. For example, reducing overall societal violence (value #1), ensuring the primacy of the legal process (value #5), maintaining the legitimacy of the legal order (value #6), and general deterrence (a component of value #7) could be grouped together as tending to reflect broader *collective or societal* interests. On the other hand, protection of the attacker's individual (presumptive) right to life (value #2), maintaining the equal standing between persons (value #3), protecting the defender's autonomy (value #4), and specific deterrence (the other component of value #7) could be grouped together as tending to safeguard *personal or individual* interests. Alternatively, the values could be grouped by those *authorizing* defensive force (primarily values #3, #4, and #7) and those tending to *restrict* defensive force (primarily values #1, #2, and #5—value #6's focus on maintaining the legitimacy of the legal order tends to function more like a 'swing value,' in that normative judgments to a greater extent will impact whether it authorizes or restricts values). That said, it is believed that, even though such alternative groupings can be justified, the order selected here defensibly serves its hypothesis-testing function.

i. Value #1: Reducing overall societal violence by protecting the state's collective 'monopoly on force'

Summary Justification for Including This Value:

Reducing overall societal violence, generally, and preventing unjustified attacks on citizens' rights, specifically, are often described as the twin goals of most modern criminal justice systems. In that sense, then, value #1 recognizes the *collective* objective of seeking to minimize societal violence.

To help set the analytical stage, it is assumed that all citizens, including culpable attackers, have a fundamental right to life, and that when possible, this right to life should be protected. Relatedly, and from a more statist, collectivist perspective, in a modern pluralistic society, the state aims to advance such interpersonal violence reduction through its default monopoly on legitimate force.

But a state must erect guardrails around its right (and, practically speaking, ability) to prevent actors from exercising self-preferential force. Indeed, it is contended that a person's right to life is at least to some extent conditioned on his conduct. More specifically, engaging in conduct that makes one what this thesis will term an 'unjustified threat' to another limits the state's ability to fully extend all available legal protection to the attacker. The approach outlined here, however, considers only the most serious conduct as justifying the state's decision to effectively suspend a person's all-things-being-equal basic right to be free from intrusion into his personal sphere (such intrusions including, at the extreme end, death and serious bodily injury) unless and until that person no longer poses such a serious and unjustified threat.[52]

[52] Note that Chapter II(d)(i) advances an explanation for why it is reasonable to accept the position that by becoming an 'unjust threat,' the 'attacker' to some extent correspondingly 'forfeits' her right to non-

Tension with, or Support for, the Other Values:[53]

Reducing overall violence by protecting the state's monopoly on legitimate force, as defined here, is an inherently *collective* value that recognizes the systemic, societal interest in violence reduction and the state's role in achieving this end. In contrast, value #2 (protecting the individual attacker's presumptive right to life) is an *individual* value focused on protecting individual and personal right not to be killed. Because the collective interest of the state reflected in value #1 is omnipresent (in the sense that the modern state will want to resolve disputes through its enforcement mechanisms, an interest also directly reflected by value #5—ensuring the primacy of the legal process), it by necessity will tend to in all cases function as a decision-ground that, all other things being equal, is antagonistic to the private use of force. It, for example, will most frequently find itself in direct tension with the more defender-focused values of maintaining the equal standing between people (value #3) and protecting the autonomy of the defender (value #4). On the other hand, the collective interests this value represents tend to find support in value #5 (ensuring the primacy of the legal process) and value #6 (maintaining the legitimacy of the legal order). Whether protection of the individual attacker's presumptive right to life (value #2) or general and specific deterrence (value #7) are in tension, or aligned, with this

interference. As discussed, this thesis will try to bridge the analytical gaps traditional 'forfeiture-of-rights' theory has left open by introducing the concept of 'waiver' of the right to non-interference. It will be contended that this addition allows us to distinguish between those who 'waive' their right to non-interference (by knowingly/culpably initiating the threatened attack), and those who 'forfeit' their right to non-interference (by unwittingly/non-culpably becoming a threat).

[53] As discussed *infra* in Chapter II(d)(2), it is conceded that assigning any particular 'relative weight' to competing interests is inherently a normative judgment, rather than a quasi-scientific determination. In addition, seeking to balance basic individual human rights (like the right to life) against more collective interests (like reduction in crime) is jurisprudentially challenging. But it nevertheless is important for this undertaking to arrive at *a* reasonable way (though, as noted in *supra* note 51, not necessarily *the only* way) of accommodating the seven identified values when they come into conflict. In furtherance of this end, the thesis, therefore, must consider how each value tends to (prior to the introduction of specific fact scenarios) find itself supporting, or in tension with, the other six values.

collective state interest will largely depend on the particular factual scenario (and is particularly subject to normative weighting).

Limitations:

This value, in contrast to some of the others, will be implicated to varying extents in virtually all self-defense cases. The extent to which this value-as-decision-ground lends weight to either the principle of protecting the defender or the principle of protecting the attacker, however, will be in large part determined by the weight accorded to the six other values discussed immediately below. For those values on a sliding scale moderate the violence-reduction value, providing guidance concerning who should be protected in a conflict-of-rights situation.

Most will recognize the legitimate state interest in trying to reduce overall violence (and, in general terms at least, the importance of protecting the state's default monopoly on legitimate force).[54] Indeed, reducing interpersonal violence in this manner can be said to ensure certain fundamental human rights,[55] principally protecting every citizen's

[54] *See generally* Robert Pest, *Die Erforderlichkeit der Notwehrhandlung, in* DER ALLGEMEINE TEIL DES STRAFRECHTS IN DER AKTUELLEN RECHTSPRECHUNG 137 (Fabian Stam and Andreas Werkmeister eds., 2019); Luís Greco, *Notwehr und Proportionalität*, [2018] GA 670 (defining self-defense as an exception to the State's monopoly on force ('*Gewaltmonopol*'); the citizen who defends the legal order is thus operating as a surrogate of the State). *See also* Lesch, *supra* note 27, at 87. Max Weber advanced the position that the state alone has the right to use or authorize the use of physical force, and that this represents a defining characteristic of the modern state. *See* Max Weber, *Politics as a Vocation, in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (Hans Heinrich Gerth & C. Wright Mills eds., 1946) (1919). That said, some scholars have diverged from Weber, following the tradition set by Thomas Hobbes and arguing that ideal of the monopoly of violence concerns not only its control, but also its use. Viewed from this perspective, the State alone can legitimately wield violence *except* in cases of immediate self-defense. *See generally* Ralf Poscher, *The Ultimate Force of the Law: On the Essence and Precariousness of the Monopoly on Legitimate Force*, 29 RATIO JURIS 311, 313–14 (2016).

[55] With regard to the fundamental human rights that will be discussed herein in the context of each of the seven articulated values, this thesis in this chapter will primarily focus on specific articles in the 1948 UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS: Article 1 (all humans are born free and equal in dignity and rights, endowed with reason and conscience, and should act towards one another in a spirit of brotherhood), Article 2 (equal rights and freedoms for all), Article 3 (equal right to life, liberty, and security), Article 6 (equal recognition as person before the law), Article 7 (right to equality and equal protection), Article 8 (right to effective remedy by competent national tribunals for violations of fundamental rights), Article 10 (right to fair and public hearing in the determination of rights or criminal guilt), Article 11 (presumption of innocence), Article 12 (right to legal protection against arbitrary interference with privacy, family, home, or correspondence), Article 13 (right to freedom of movement), Article 17 (right to own property), Article 20 (freedom of association), Article 21 (will of people is basis of

(presumptive) right to life.[56] While this value, therefore, may be less controversial, it still must be examined to ensure that it, indeed, should be treated as a decision-ground in self-defense cases.[57]

The principle of protecting even the culpable attacker can be considered one of the most persuasive examples demonstrating the criminal law's desire to reduce *all* violence.[58] For if the law concerned itself solely with value #4 (protecting the defender's autonomy), then even the most trivial infringement would authorize the defender to use all defensive force, up to and including deadly force, necessary to ward off that 'threat.'

The apparent tension between the state's monopoly on force and the below-discussed value of protecting the defender (#4) is eased when one understands self-defense as *an alternative* to state power, available where protection by the state

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government's authority), Article 22 (right to economic, social, and cultural rights indispensable for dignity and free development of personality), and Article 29 (free and full development of personality in a community also involves reciprocal duties; laws should be limited to securing basic rights and freedoms and ensuring morality, public order, and general welfare in a democratic society). *See* G.A. Res. 217 (III) A, UNIVERSAL DECLARATION OF HUMAN RIGHTS (Dec. 10, 1948) [hereinafter U.N. DECLARATION]. This thesis will also throughout this chapter consider specific articles and protocols in the 1953 (effective date) EUROPEAN CONVENTION ON HUMAN RIGHTS: Article 2 (right to life and State's obligation to secure this right), Article 5 (right to liberty and security of person), Article 6 (right to a fair trial), Article 8 (right to respect for one's private and family life), Article 11 (right to freedom of association), and Article 13 (right to an effective remedy for rights violations). *See* Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 005 [hereinafter ECHR], as well as Protocol 1's Article 1 (right to peaceful enjoyment of possessions) (ECHR, Mar. 20, 1953, E.T.S. No. 009) and Protocol 4's Article 2 (freedom of movement) (ECHR, Sept. 16, 1953, E.T.S. No. 046).

[56] *See generally* U.N. DECLARATION, *supra* note 55, Article 3; ECHR, *supra* note 55, Article 2. *See also* KRISTIAN KÜHL & MARTIN HEGER, *Vorbemerkung* § 32, side-note 11a *in* STRAFGESETZBUCH: KOMMENTAR (2018); CLAUS ROXIN, STRAFRECHT ALLGEMEINER TEIL. GRUNDLAGEN. DER AUFBAU DER VERBRECHENSLEHRE, BD. I, § 15, side-note 4 (2006); Erb, *supra* note 32, at 596–97. *But see* U.N. Human Rights Council, Sub-Comm'n on the Promotion and Prot. of Human Rights, Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, U.N. Doc. A/HRC/Sub.1/58/27 (July 27, 2006) (prepared by Barbara Frey), available at http://www.smallarmssurvey.org/fileadmin/docs/N-Instruments/2006-UNGA-Prevention%20of%20human%20rights%20violations.pdf [hereinafter U.N. Small Arms] (concluding that the 'principle of self-defence' is not a broadly recognized human right).

[57] While the 'system' has an overall interest in reducing all kinds of violence (through, say, policing, education, judicial reform, etc.), the state's monopoly on force as discussed here is focused more narrowly on minimizing acts of inter-personal violence. *See generally* Weber, *supra* note 54, at 77, 78 (defining the state as 'a human community which claims the monopoly of the legitimate use of force within a given territory'). *But see* CHRISTOPHER W. MORRIS, AN ESSAY ON THE MODERN STATE 288–295 (2002) (arguing that states neither have nor seek a monopoly on legitimate force because they authorize a wide range of private violence both for personal reasons, including self-defense, and on behalf of the state, such as to prevent crime).

[58] *See generally* Erb, *supra* note 32, at 593–94. *See also* FISCHER, *supra* note 10, at side-notes 13–15b.

authorities is not reasonably available. In that sense, self-defense functions as a *subsidiary* right.[59] It is secondary to the state's use of force through its security apparatus (as relevant here, the police); only when the police are unavailable is self-preferential force said to be 'necessary' as an *exception* to the state's monopoly on force.[60] The state's obligation to protect individual rights thus creates a *default* priority for state force as a means of thwarting attacks (when available and effective).[61] The value, therefore, is opposed to private 'punishment.' As Nourse puts it:

> This is manifested nowhere more clearly than the standard requirement of defenses that the state be unavailable-a requirement that demands deference to the state's monopoly on violence. For example, the doctrine of self-defense insists that the threat be so imminent as to prevent lawful recourse and often emphasizes this fact by requiring retreat.[62]

In fact, limiting defensive force to that which is necessary under the facts, and that which is not disproportionate considering the totality of the circumstances, can, as discussed below, be said to recognize basic human solidarity. At the same time, these requirements also preserve the collectivist interest of ensuring that self-preferential force does not become an alternative to (or undermine) the state's default obligation to protect its citizens.[63]

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[59] *See* Lesch, *supra* note 27, at 111–12; FISCHER, *supra* note 10, at side-note 35.

[60] *See* Thomas Rönnau & Kristian Hohn, *§ 32 Notwehr*, *in* STRAFGESETZBUCH: LEIPZIGER KOMMENTAR, BAND 3, side-note 183–84 (Gabriele Cirener *et al*. eds., 2019).

[61] *See id*. *See also* KÜHL & HEGER, *supra* note 56, at side-note 11a.

[62] Victoria Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1725 (2003).

[63] *See generally* Josef Isensee, *Die Friedenspflicht der Bürger und das Gewaltmonopol des Staates*, *in* STAATSORGANISATION UND STAATSFUNKTIONEN IM WANDEL: FESTSCHRIFT FÜR KURT EICHENBERGER ZUM 60. GEBURTSTAG 23 (1982); DETLEF MERTEN AND GUNTHER ARZT, RECHTSSTAAT UND GEWALTMONOPOL (RECHT UND STAAT IN GESCHICHTE UND GEGENWART) 33 (1975).

At this point, a few words of clarification may be in order. The criminal justice system's common (and necessary) response to unjustified private violence is that agents of the law have the ability to apply force against those who transgress criminal proscriptions.[64] This 'legal violence,' then, is fundamentally anti-violent because its ultimate aim is to reduce the level of overall violence in society.[65] In this respect law has a negative relation to violence; by countering violence, law contributes to social order.[66]

Skeptics of this collectivist position, like Schopp, counterpose that the attacker, and particularly the culpable attacker, deserves no quarter. They claim that the criminal law must, therefore, not concern itself with protecting such an attacker's purported rights.[67] Rather, the focus must more narrowly be on whether the defensive force was in fact necessary.[68]

Assume, for example, that Andrew knowingly takes Victor's matches from a restaurant table and is just about to drive away. A self-defense law grounded exclusively in the principle of protecting the defender (and that ignores the state's interest in reducing overall violence) would permit Victor, the owner of the matches, to use deadly force if that was the only way for Victor to ensure the safe return of his property.[69]

But even supporters of such hard-edged positions are likely to agree that there must be some limits on self-defense. Whether these limits are based on the law's

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[64] *See* Nathan Sales, *Regulating Cyber-Security*, 107 NW. U. L. REV. 1503, 1521 (2013).

[65] *See* Harry Schwirck, *Law's Violence and the Boundary Between Corporal Discipline and Physical Abuse in German South West Africa*, 36 AKRON L. REV. 81 (2002), *discussing* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1605–17 (1986). *See also* Liudmyla Sytnichenko, *Otfried Hoffe's Theory of Social Justice*, 44 POLISH POL. SCI. Y.B. 23, 28 (2015).

[66] *See generally* Guyora Binder, *Victims and the Significance of Causing Harm*, 28 PACE L. REV. 713, 727 (2008).

[67] *See* SCHOPP, *supra* note 40, at 84. *See also* Chapter II(c)(iv) (discussing Schopp's perspectives on the value of protecting the defender's autonomy).

[68] *See* SCHOPP, *supra* note 40, at 84. For an analysis and criticism of this approach, *see* Funk, *supra* note 40, at 631. *See also* Erb, *supra* note 32, at 596–97 (noting the normative difference between innocent and culpable attackers).

[69] *See generally* SCHOPP, *supra* note 40, at 83–84.

recognition of empathy and the basic human solidarity between people, the notion that unfettered defensive force amounts to an abuse of the right, or more functional limiting concepts such as 'necessity' and 'proportionality,' there is general agreement that some limits on defensive force are appropriate and required.[70] By developing these boundaries of self-defense,[71] and in so doing helping define the role of citizens and the state, the justification functions as a means of allocating the permission to use violence.[72]

ii. Value #2: Protecting the attacker's individual (presumptive) right to life

Summary Justification for Including This Value:

While value #1 concerned society's *collective* interest in minimizing interpersonal violence by protecting the state's monopoly on force, value #2 focuses on the attacker's *individual*, personal right to life. The central (and largely uncontroversial) limitations on self-defense—namely necessity, imminence, and proportionality—apply to both culpable and non-culpable attackers. These near-universally recognized limits demonstrate that protecting the attacker, and even a culpable one, is in fact considered an important stand-alone value. And while few values will generate as much disagreement as value #2, the very fact that different observers will want to add or take weight away from this value underscores how

[70] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 225–29.

[71] *See generally* Daniel Sweeney, *Standing Up to Stand Your Ground Laws: How the Modern NRA-Inspired Self-Defense Statutes Destroy the Principle of Necessity, Disrupt the Criminal Justice System and Increase Overall Violence*, 64 CLEV. ST. L. REV. 715, 727 (2016); Donald L. Creach, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615, 627–29 (1982). *See also* MARK DSOUZA, RATIONALE-BASED DEFENCES IN CRIMINAL LAW 47, 53–56 (2017) ('[C]onstitutent elements [including the right to protect one's life] mark the boundaries of the positive guidance that can be given by any moral criminal law.').

[72] *See generally* Kimberly K. Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 460–61 (2008). *See also* James Q. Whitman, *Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 39 TULSA L. REV. 901, 902 (2004), *cited in* Ferzan, *supra* note 72, at 463; Sanford Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 884 (1976), *discussed in* Re'em Segev, *Fairness, Responsibility and Self-Defense*, 45 SANTA CLARA L. REV. 383, 446–47 (2005).

important the normative assessment of this value is to self-defense outcomes (and why the proposed value-centric dialogue aids transparent decision-making).

Tension with, or Support for, the Other Values:

The notion of protecting attackers (and, in particular, culpable attackers) is likely to generate disagreement between those who bring into the debate very different normative judgments about the extent to which defensive force should be authorized, generally, and to what extent culpable offenders deserve protection, specifically. Those (like Schopp) who accord more weight to warding off the imputation of unequal standing between people (value #3), protecting the defender's autonomy (value #4), and deterrence (value #7), will likely be the most skeptical about the inclusion of this value as a stand-alone decision-ground. On the other hand, those (like Leverick) who focus on reducing overall violence by protecting the state's monopoly on force (value #1) and ensuring the primacy of the legal process (value #5) can be expected to place more weight on this value when compared to the other more 'pro-defender' values.[73]

Limitations:

While this thesis later will discuss the value of protecting the defender's broad autonomy (value #4), the instant value's interest in protecting the attacker's presumptive 'right to life' is framed in terms of protecting the attacker from *death*. This asymmetry (the defender's broader autonomy interests versus the attacker's narrower right to life) is intentional. It reflects that this thesis is explicitly focused on deadly self-preferential

[73] *See supra* note 51 for a discussion concerning how the values might alternatively be grouped as tending to protect the attacker versus the defender.

force.[74] Additionally, it is consistent with the position that (as discussed in the forfeiture context in Chapter II(d)(i)) culpable attackers are presumptively entitled to less relative protection than moral innocents.

According to Leverick, 'in a legal system that holds the equality of life to be a fundamental value, the aggressor has a right to life just as the victim does.'[75] Protecting the attacker (even the culpable one) is, in fact, part and parcel of modern self-defense law.[76] Consider, for example, the aforementioned doctrinal necessity and imminence limitations. They, as noted,[77] play an important part in preserving the state's monopoly on force and are central to the subject jurisdictions' self-defense laws. Additionally, and unless overridden or outweighed by other values, these guardrails around self-preferential force also help secure the *individual* attacker's right to due process of law.[78] For, wherever one believes the line must be drawn, few are likely to disagree that the criminal law must also at some level consider the well-being of the *source* of the threat to the defender, namely, the well-being of the attacker.[79] In fact, notions of basic human solidarity and respect for fundamental human rights arguably compel this conclusion.[80]

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[74] *See supra* note 2.

[75] LEVERICK, *supra* note 2, at 45, *citing* Cheyney C. Ryan, *Self-Defense, Pacifism and the Possibility of Killing*, 93:3 ETHICS 508, 510 (1983).

[76] *See generally* F. Patrick Hubbard, *The Value of Life: Constitutional Limits on Citizens' Use of Deadly Force*, 21 GEO. MASON L. REV. 623, 646 (2014); Stephen E. Henderson & Kelly Sorensen, *Search, Seizure, and Immunity: Second-Order Normative Authority and Rights*, 32 CRIM. JUST. ETHICS 108, 114 (2013).

[77] *See* Chapter II(c)(i).

[78] *See* Robert Leider, *Taming Self-Defense: Using Deadly Force to Prevent Escapes*, 70 FLA. L. REV. 971, 1002 (2018).

[79] *See generally* Hubbard, *supra* note 76, at 646.

[80] *See generally* U.N. DECLARATION, *supra* note 55, Article 1 (all humans born free and equal in dignity and rights, endowed with reason and conscience, and should act towards one another in a spirit of brotherhood), Article 2 (equal rights and freedoms for all); Article 3 (equal right to life, liberty, and security); Article 6 (equal recognition as person before the law); Article 7 (right to equality and equal protection); ECHR, *supra* note 55, Article 5 (right to liberty and security of person).

It may be argued, of course, that there is no such thing as a legally or morally recognized systemic interest in protecting the attacker; or that describing this interest as a 'value' overstates the case. The weakness of such positions, as examined in Chapter II(c)(ii), is that there are persuasive value-based arguments for treating protection of even culpable attackers as something the criminal justice system (presumptively) values. Even the culpable attacker's welfare must be considered, because even the culpable attacker is a human who does not under all circumstances forfeit his complete entitlement to human concern and respect on account of his misbehavior. As Kahan and Braman, discussing the contemporary law's humanist commitment, frame it:

> The self-conscious refusal of contemporary doctrine to license deadly force to protect nonvital affronts . . . expresses the 'supreme value of human life' recognized by any civilized system of law.[81]

In the modern democratic tradition, ethical, social, and political thought is anchored to the idea of equality of people under the law, and the worth of even the criminal human.[82] This position is based on the assumption that, all other things equal (and they, by definition, are not always equal in self-defense cases), two human lives, as human lives, are similarly valuable.[83] If this were not so, then all culpable attacks, regardless of how trivial, could be met with deadly force (bringing to mind the case of the

[81] Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 9 (2008).

[82] *See generally* Brian-Vincent Ikejiaku, *International Law, the International Development Legal Regime and Developing Countries*, 7 LAW & DEV. REV. 131, 139–40 (2014); Erdwin H. Pfuhl, Jr., *Humanistic Criminology: Future Prospects*, 12 J. SOC. & SOC. WELFARE 604, 625–26 (1985); John Delaney, *Towards a Human Rights Theory of Criminal Law: A Humanistic Perspective*, 6 HOFSTRA L. REV. 831, 857–58 (1978). *See also* Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 J.L. & POL. 189, 234–35 (2014).

[83] *See generally* IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 158–99, 161–66 (1989). *See also* Hubbard, *supra* note 76, at 646.

youthful fruit thief discussion from Chapter I). But this is not the law in any known contemporary jurisdiction.

iii. Value #3: Maintaining the equal standing between people

Summary Justification for Including This Value:

An ordered society is said to require an equal concern, and reciprocal respect, for rights between and among citizens. Building on this foundation, culpable attackers, like criminals/victimizers more generally, uniquely threaten not only to *harm* their victims, but they additionally threaten their victims with a unique *wrong* by effectively disrespecting the victim's right to equal standing in the public and private spheres. Particularly in cases involving culpable attackers, self-preferential force exercised in self-defense allows the defender to most immediately repel the attack (thwarting the threatened harm). The defender also puts himself in a position to maintain the equal standing between himself and his attacker by protecting his personal domain (thwarting the threatened wrong). In this sense, then, self-defense permits individuals to be sovereign by allowing them to not only assert rights, but to also recognize those same rights in others. But self-defense also renders them subject in the sense that they must obey the laws they, as a collective, impose on their fellow humans.

Tension with, or Support for, the Other Values:

Warding off the imputation of unequal standing inherent in culpable attacks can be understood as a value ancillary to protecting the defender's autonomy (value #4) and is also generally aligned with deterrence (value #7). On the other hand, violence reduction (value #1), protection of the attacker (value #2), and ensuring the primacy of the legal process (value #5) are, all other things being equal, generally antagonistic to this more defender-centric value. Maintaining the

legitimacy of the legal order (value #6), moreover, finds itself in an unusual posture with respect to this value, because cases in which maintenance of equal standing is under- or over-weighted can yield results potentially threatening to the legal order's moral legitimacy.

Limitations:

Because this decision-ground is necessarily based on thwarting a *culpable* attacker's attempted imposition of unequal standing, it is not implicated in the case of non-culpable/innocent aggressors. This is so because, without a culpable attack, the attacker through his actions does not threaten to disrespect or discount the defender's right to equal standing. Such an attacker may threaten a *harm* but is not threatening a *wrong*.

1. The importance of equal standing—and the unique threat posed by culpable attacks

Unlike the collective value of overall violence-reduction and protection of the monopoly on force (value #1), and the individual value of protecting even the culpable attacker's right to life (value #2), the instant value of ensuring the equal standing between people (and, relatedly, recognizing the unique threat culpable attacks pose) is less self-explanatory. It, moreover, stands in tension with most of the other values because those have a tendency toward *limiting* a defender's exercise of self-preferential force. This value, in contrast, when implicated through culpable attacks, has the characteristic of *expanding* a defender's all-other-things-equal right to exercise self-defense.[84] That said, and as with the other values, its individual impact on whether defensive force should be justified must be measured on a relative sliding scale.[85]

[84] *See generally supra* note 51.

[85] More on this in Chapter II(d), below.

As discussed in Chapters II(c)(1) and (2), controlling social harm and evaluating conduct on the basis of relative culpability can be said to be the criminal law's central organizing principles.[86] Relatedly, this thesis will assume general (though not universal)[87] agreement that the criminal law furthers the preservation of fundamental human rights[88] by requiring individuals to maintain relationships of restraint.[89] As a result, the criminal law can be said to in the main aim to punish and deter those who knowingly violate these relationships of restraint.[90] Put another way, the criminal law at its core can be said to focus on the attitudes a criminal defendant expresses toward rights and related proscriptions.[91] And so a person who controls her conduct in a manner designed to avoid violating rights and proscriptions conveys respect for them, whereas a person who opts to not conform her conduct in this manner conveys disrespect.[92]

The result, as Bottoms and Tankebe writing in the context of procedural justice put it, is that 'citizens who have deliberately chosen the path of obedience might well be resentful if and when they observe a blatant lack of obedience to law, or an absence of

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[86] *See generally* JEREMY HORDER, ASHWORTH'S PRINCIPLES OF CRIMINAL LAW 1–3, 53–58 (8th ed. 2016); ANDREW SIMESTER & ANDREAS VON HIRSCH, CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINILISATION 3–31 (2011).

[87] *See* Chapter II(c)(vi)(2)(b).

[88] *See generally* U.N. DECLARATION, *supra* note 55, Articles 1, 2, 7, 12, 17, 21, 22, and 29; ECHR, *supra* note 55, Articles 2, 5, and 13.

[89] *See generally* Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99, 124 (1996); Benjamin B. Sendor, *Restorative Retributivism*, 5 J. CONTEMP. LEGAL ISSUES 323, 363 (1994) [hereinafter Sendor, *Restorative Retributivism*].

[90] *See generally* Sendor, *Restorative Retributivism*, *supra* note 89; Benjamin B. Sendor, *Mistakes of Fact: A Study in the Structure of Criminal Conduct*, 25 WAKE FOREST L. REV. 707 (1990) [hereinafter Sendor, *Mistakes of Fact*]. *See also* Rönnau & Hohn, *supra* note 60, at side-note 66–68, 71.

[91] *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.01(B) (1995); Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1393–94 (1986). *See also* ORMEROD & LAIRD, *supra* note 28, at 10–12 (noting that criminal conduct can be 'wrongful without being harmful'). *Cf.* Chapter II(c)(vi)(2)(b) (discussing 'regulatory' and strict liability offenses).

[92] *See generally* Sendor, *Restorative Retributivism*, *supra* note 89, at 323; Rönnau & Hohn, *supra* note 60, at side-note 66–68, 71. *See also* Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252, 261 (1994) (contending that culpable attackers are liable to more defensive harm).

self-restraint . . . .'[93] Erb similarly comments that attacks by innocents, such as children or individuals operating under a mistake, do not knowingly elevate their interests over those of their victims. Culpable attackers, in contrast, threaten to impose such unequal standing on their victims.[94] In this sense, then, 'respecting' rights and proscriptions means according other persons' rights sufficient value when compared to one's own interests, and, relatedly, taking the steps necessary to avoid engaging in actions in pursuit of one's own interests that are likely to violate another's rights.[95]

It follows that laws embodying what herein will be described as the 'fully expressed public morality'[96] not only enable individuals to make universal demands, but also carry with them corresponding reciprocal obligations. So my demand that I not be

[93] Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 138 (2012).

[94] Erb, *supra* note 10 at side-note 209. *But see* Rönnau & Hohn, *supra* note 60, at side-note 72 (describing recognition of reciprocity in the context of equal standing—*störung des Gegenseitigkeitsverhältnisses*—as dangerous, and commenting that, while it may be a justifiable consideration in the context of intentional attacks, self-defense is also available for unintentional and morally involuntary attacks).

[95] *See generally* Erb, *supra* note 32, at 594, 596–97.

[96] The use of the term 'public' morality here is meant to recognize that, while most people have their own *private* morality, the *malum in se* (i.e., wrong because morally blameworthy) core of democratic criminal justice systems, as applied by the courts and police, is the product of *society* acting out of broad social consensus to criminalize conduct that threatens harm to others and is 'substantially wrongful.' *See generally* Federico Picinali, *Innocence and Burdens of Proof in English Criminal Law*, 13 LAW PROBABILITY & RISK 243, 256 (2014); Alden D. Miller, *Two Theories of Criminal Justice*, 79 MICH. L. REV. 904 (1981). *But see* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 281–83 (2018). *Malum prohibitum* (i.e., wrong only because criminalized) offenses, in contrast, do not typically draw the same public approbation. Such offenses include 'regulatory' or 'pre-emptive' criminal proscriptions that have little to do with willed anti-social conduct (to wit, 'wronging'), but rather are aimed at changing conduct for other instrumental reasons. *See generally* Sandra G. Mayson, *Collateral Consequences and the Preventative State*, 91 NOTRE DAME L. REV. 301, 332 (2015). The focus is on defining and declaring a set of 'pre-existing [public] wrongs' resulting in formal, public, and punitive measures through the criminal process. *See* Anthony Duff, *A Criminal Law We Can Call Our Own*, 111 NW. U. L. REV. 1491, 1496–1501 (2017). *See also* ANTHONY DUFF, THE REALM OF CRIMINAL LAW 52–91 (2018). *But see* Michelle M. Dempsey, *Public Wrongs and the 'Criminal Law's Business'—When Victims Won't Share, in* CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTHONY DUFF 254–72 (Rowan Cruft *et al*. eds., 2011) (disagreeing with Duff's approach and focusing on the reasons that apply to the conduct of criminal justice officials, rather than on values that are threatened by a defender through her criminal conduct). For a comprehensive critique of the trend of 'over-criminalizing' conduct for regulatory reasons, *see* Andrew J. Ashworth, *Is the Criminal Law a Lost Cause?*, 116 L. Q. REV. 225 (2000).

harmed inherently carries with it the obligation that I not harm anyone else.[97] Rousseau articulated a similar notion of reciprocity:

> [I]t is in order that we may not fall victims to an assassin that we consent to die if we ourselves turn assassins. . . . The rights one recognizes in others one can demand in others; but we cannot demand from others what we refuse to respect. It is a practical impossibility.[98]

When other competent individuals who claim similar rights to be absolute ends recognize one's equal standing (and equal right to non-interference), then that right becomes an objective reality, as opposed to a mere subjective claim.[99] As Leoni, defending Rousseau's position, observed:

> [I]t is no nonsense to presume that every criminal would admit and even request condemnation for other criminals in the same circumstance [because] there is a 'common will' on the part of every member of a community to hinder and eventually punish certain kinds of behavior that are defined as crimes in that society.[100]

In this sense, then, individuals are sovereign in the sense that they are able to assert rights and recognize the same rights in others. But they are also subject because they must obey the laws which they themselves collectively make.

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[97] S*ee generally* Erb, *supra* note 32, at 595–96 (contending that culpable individuals 'choose' to expose themselves to defensive force). But for a view that the criminal law is best envisioned as being a branch of public or administrative law lacking such a distinct moral basis, *see, e.g.*, Terry Skolnik, *Homelessness and the Impossibility to Obey the Law*, 43 FORDHAM URB. L.J. 741, 744–63 (2016); Vincent Chiao, *Ex Ante Fairness in Criminal Law and Procedure*, 15 NEW CRIM. L. REV. 277, 279–90 (2012); Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1097–1109 (2008); Stephen B. Young, *The Moral Basis of American Law: An Hypothesis*, 82 U. DET. MERCY L. REV. 649, 651–55 (2004–2005).

[98] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 28 (George D. Cole, trans., 1947) (1762).

[99] *See id.* at 139–41.

[100] BRUNO LEONI, FREEDOM AND THE LAW 136 (3d ed. 1991).

Applying these conceptions of rights to the criminal law, 'traditional' or 'core' criminal liability can be said to employ the sanction uniquely at the criminal law's disposal, namely, individualized moral blame.[101] As Ormerod and Laird put it, in contrast with civil law, conduct that is criminal *traditionally* (though, as discussed, not always)[102] involves a 'public wrong' (reflecting the important role the public has in defining and punishing crimes) as well as a 'moral wrong.'[103]

Lessons learned in everyday life teach that a person can show hostility or disrespect toward another's right by intentionally, recklessly, or carelessly violating or otherwise disregarding it.[104] By so doing, that person conveys the viewpoint that he does not consider others' rights to be sufficiently important when compared to the offender's own competing interests.[105]

Even something as relatively benign as getting cut off in traffic by a reckless driver while the other drivers are patiently waiting in queue serves to make this point. For many, such an action can trigger anger and frustration explainable not by any concrete delay or other 'injury.' Rather, the reckless driver shows disrespect for the other

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[101] *See generally* Benjamin Vogel, *The Core Legal Concepts and Principles Defining Criminal Law in Germany, in* THE LIMITS OF CRIMINAL LAW: ANGLO-GERMAN CONCEPTS AND PRINCIPLES 26 (Matthew Dyson & Benjamin Vogel eds., 2018). *See also* U.N. DECLARATION, *supra* note 55, Article 29 (standing for legislative minimalism, in that laws should be limited to securing basic rights and freedoms).

[102] *See generally* Chapter II(c)(vi)(2)(b).

[103] ORMEROD & LAIRD, *supra* note 28, at 5–12 (2019). *See also* Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1772 (2005); ANTHONY DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 143–45 (2001), *cited in* Jacob Bronsther, *Torture and Respect*, 109 J. CRIM. L. & CRIMINOLOGY 423, 430 (2019); Richard H.S. Tur, *Justifications of Reverse Discrimination, in* LAW, MORALITY AND RIGHTS 259, 274 (Michael Stewart ed., 1983) ('[T]he "fault principle" is the basis . . . of the criminal law of at least the western world.'). *But see* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 658 (1984) (noting situations like strict criminal liability 'in which furtherance of the utilitarian goal of deterrence disregards principles of culpability'), *cited in* Amy J. Sepinwall, *Faultless Guilt: Toward a Relationship-Based Account of Criminal Liability*, 54 AM. CRIM. L. REV. 521, 523 n.4 (2017).

[104] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 70–71. *See also* Grant Lamond, *Core Principles of English Criminal Law, in* THE LIMITS OF CRIMINAL LAW, *supra* note 101, at 26.

[105] *See generally* Peter Ramsay, *The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State*, 69 MOD. L. REV. 29, 45–49 (2006); Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES L. F. 1, 29 (2000); Rosa Eckstein, *Towards a Communitarian Theory of Responsibility: Bearing the Burden for the Unintended*, 45 U. MIAMI L. REV. 843, 844–48 (1991).

drivers by elevating his interests in advancing through traffic more quickly over the other drivers' right to safety.[106] (In fact, even in cases of criminal negligence, an interpretive assessment of the objective facts arguably shows some—though admittedly a reduced—level of disregard).[107] So, when viewed from this perspective, as a systemic matter a 'core' criminal offense's mental element (1) signals the criminal actor's inherent disrespect for the right(s) of his victim and (2) typically serves as threshold condition (via a negative departure from the norm of respect) allowing for the criminalization of the disrespectful conduct.[108]

Assuming, then, that a given legal system defines certain knowing and intentional physical contact, such as assault or battery, as morally blameworthy, it will also find that the conduct signifies a substantive break in the above-described relationship of restraint.[109] Character theorists, in fact, would contend that such an insufficient concern for the interests of others is in itself a blameworthy character trait[110] (though a counter-

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[106] *See generally* Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 1009 (2008); Stephen J. Morse, *Craziness and Criminal Responsibility*, 17 BEHAV. SCI. & L. 147, 149 (1999); Michael Corrado, *Notes on the Structure of a Theory of Excuses*, 82 J. CRIM. L. & CRIMINOLOGY 465, 471 n.12 (1991).

[107] *See generally* Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1535–44 (1992); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992); Jean Hampton, *Forgiveness, Resentment and Hatred and the Retributive Idea*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 35, 111–61 (1988); NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 176 (1988). *See also* Herbert Morris, *Persons and Punishment*, *in* HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 36 (1976). *See also* discussion about different levels of culpability in Chapter II(c)(vi)(2)(b).

[108] *See generally* Sendor, *Mistakes of Fact*, *supra* note 90, at 727–29. *See also* Anthony Duff, *Penal Coercion and the Apology Ritual*, 31 TEOREMA 109, 109–13 (2012) ('We come closer to finding a role for criminal law, as a distinctive mode of law, when we note that a decent polity will be concerned . . . with wrongs done or suffered by its members, and with the provision of an appropriate response to such wrongs. . . . [I]t will take an interest in wrongs that are public in the sense that they violate the values that define and structure the civic enterprise: for to ignore such wrongs would be to betray the values that are violated, to which the polity is supposedly committed . . . .'); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 35–52 (1985) (recognizing deterrent and censuring function of the criminal law and highlighting the condemnatory connotations of punishment).

[109] *See generally* RÖNNAU & HOHN, *supra* note 60, at side-note 64, 68–73; Lamond, *supra* note 104, at 26.

[110] Consider in this context the choice-based theories proposed in Claire O. Finkelstein, *Responsibility for Unintended Consequences*, 2 OHIO ST. J. CRIM. L. 579 (2005). *See also* Michael Moore & Heidi Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147 (2011).

argument is that this defines the principle domain of criminal law too broadly[111]). And so innocent actors merely err as to the scope of the victim's rights, whereas culpable aggressors who threaten a wrong deny the victims their right to respect.[112] For innocent 'attackers' do not break the relationship of restraint and do not threaten the equal standing of the defender and the attacker.[113]

Finally, it is important to reiterate that, while an attacker's culpability has the above-stated normative significance, the mere presence of culpability does not allow the victim to 'punish' or exert his 'revenge' (either individually or 'on behalf of society').[114] An attacker's culpability, rather, can be said to be relevant only in the sense that it changes the basic *nature of the threat*; in essence, the culpable attacker is threatening a harm, and he is *also* threatening a wrong that (1) reduces the criminal law's interest in protecting the attacker from a subsequent intrusion into the attacker's personal domain and (2) increases the law's interest in protecting the defender.[115] By threatening a unique

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[111] *See, e.g.*, Anthony Duff, *Choice, Character, and Criminal Liability*, 12 LAW & PHIL. 345 (1993).

[112] *See* Alan Brudner, *Agency and Welfare in the Penal Law*, *in* ACTION AND VALUE IN CRIMINAL LAW 32 (Stephen Shute *et al.* eds., 1996).

[113] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 66–68, 71; Stephen Macedo, *What Self-Governing Peoples Owe to One Another: Universalism, Diversity, and the Law of Peoples*, 72 FORDHAM L. REV. 1721, 1725–38 (2004); Robert F. Schopp, *Reconciling Irreconcilable Capital Punishment Doctrine as Comparative and Noncomparative Justice*, 53 FLA. L. REV. 475, 516 (2001) [hereinafter Schopp, *Reconciling*]; STEPHEN R. MUNZER, NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 167 (2001); SCHOPP, *supra* note 40, at 71–83. *See also* Robert F. Schopp, *Multiple Personality Disorder, Accountable Agency, and Criminal Acts*, 10 S. CAL. INTERDISC. L.J. 297, 319 (2001) [hereinafter Schopp, *MPD*] ('The criminal justice system of a liberal society protects equal standing and individual self-determination by proscribing and punishing conduct that violates protected rights and interests.'). *Cf.* HELEN FROWE, DEFENSIVE KILLING 1–2 (2014).

[114] *See generally* Pest, *supra* note 54, at 144; Rocio Lorca, *The Presumption of Punishment: A Critical Review of Its Early Modern Origins*, 29 CAN. J.L. & JURIS. 385, 398 n.57 (2016).

[115] The *mens rea* justifying criminal punishment under the paradigm advanced here, therefore, is intention or reckless advertence to the excessive risk. While negligent individuals may be liable in tort, they arguably are inappropriate for criminal liability because they cannot be said to have disrespected another's equal standing or to have imputed inequality. *See generally* Rönnau & Hohn, *supra* note 60, at side-note 66–68, 71.

wrong, then, the morally culpable attacker poses a threat to the equal standing of his putative victim which, in turn, shifts the relative, sliding-scale balance of interests.[116]

2. Why protection of the socio-legal order is not treated as a separate value

This may be an appropriate point at which to explain why this thesis elected to not treat protection of the socio-legal order as an independently cognizable value. It is true that a number of scholars, including Sangero and Kremnitzer,[117] have followed the German approach[118] of treating protection of the legal order as an independent factor, value, or principle. Sangero, for example, echoes the German approach in that he believes that 'the justification of private defence . . . is based on the social interest of protection of the public order in general and the legal system in particular.'[119]

While this thesis certainly does not take the position that protection of the legal order is irrelevant, it maintains that this concept of protecting (or enforcing) 'the law' is already sufficiently accounted for elsewhere in the value-based model. Specifically, the present subsection (value #3) explicitly grounds the value of warding off the imputation of lesser standing on the criminal actor's inherent disrespect for the legally recognized rights of his victim (and authorizes the defender to use force to prevent this imputation). Value #1, in turn, seeks to promote collective violence-reduction by limiting individual self-defense to those cases in which the state, through its law enforcement organs, is

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[116] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 226–27 (discussing advantages—and disadvantages—of a 'flexible' approach to identifying the limits of self-defense).

[117] *See* Mordechai Kremnitzer, *Proportionality and the Psychotic Aggressor: Another View*, 18 ISR. L. REV. 178, 181–91 (1983), *discussed in* Sangero, *New Defense*, *supra* note 33, at 527–28 ('I agree with Kremnitzer that the protection of the socio-legal order is immense[ly] important for the justification of private defense.'). *See also* Khalid Ghanayim & Mohammed Saif-Alden Wattad, *Reconsidering the Grounds and the Causing Conditions for the Necessity Defense: Between Justification and Excuse—A Comprehensive Study*, 86 UMKC L. Rev. 111, 138 (2017); Liat Levanon, *Criminal Punishment as a Restorative Practice*, 18 NEW CRIM. L. REV. 537, 568 (2015); Nancy M. Omichinski, *Applying the Theories of Justifiable Homicide to Conflicts in the Doctrine of Self-Defense*, 33 WAYNE L. REV. 1447, 1459–60 (1987), *citing* FLETCHER, RETHINKING, *supra* note 46, at 869.

[118] *See generally* Chapter V(b)(i).

[119] SANGERO, SELF-DEFENCE, *supra* note 33, at 67. *See also* Chapter V(b).

unable to protect the person being attacked.[120] Value #4, moreover, authorizes force to protect the defender's legally recognized right to autonomy,[121] value #6 seeks to avoid outcomes that could undermine the perceived moral legitimacy of the legal order,[122] and value #7 concerns deterring future violations of the law.[123] Considering this back-drop, the interests reflected in these four free-standing values infuse the concept of 'protection of the socio-legal order' with its substance.[124] While this thesis, therefore, recognizes that it is possible to try to unify these different legal-order-protecting interests under one umbrella term, the position taken here is that those interests are dispersed throughout these different values. This thesis therefore posits that setting up 'protection of the socio-legal order' as a separate value is not required.

iv. Value #4: Protecting the defender's autonomy

Summary Justification for Including This Value:

Related to the concept of safeguarding the equal standing between people is the value of protecting the defender's autonomy.[125] An individual's exercise of autonomous rights (including the right to self-directed action, to a personal sphere, and to own property) can be instrumentally closely related to his pursuit of self-fulfillment. The personal sphere, in turn, allows one to develop one's

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[120] *See* Chapter II(c)(i).

[121] *See* Chapter II(c)(iv).

[122] *See* Chapter II(c)(vi).

[123] *See* Chapter II(c)(vii). While, as noted, values #2, #3, and #4 concern private/relational harm against the victim, the society's more general right to remain free from violence are most directly addressed in this value (value #7) as well as in value #1.

[124] *See, e.g.*, FLETCHER, RETHINKING, *supra* note 46, at 869 ('[T]he autonomy of the individual is identified with the sanctity of the Legal Order.'). *See also* SANGERO, SELF-DEFENCE, *supra* note 33, at 68 (discussing, in the context of 'protection of the socio-legal order,' self-defense's impact on 'deterring offenders and preventing offences').

[125] In fact, some could argue that the discussion of protecting the autonomy of defenders should be subsumed within the preceding approach towards safeguarding the equal standing of citizens, *see* Chapter II(c)(iii), since individual autonomy can be said to be part and parcel of equal standing. While that argument has some appeal, the decision made here is to give them separate treatment since protection of the defender's autonomy can be said to be a sufficiently distinct value as to justify such individualized treatment.

personality. The modern liberal state accords free people equal standing in the public sphere (see value #3) and, relatedly, strives to ensure that people have a private domain of nonpublic life in which they are given the opportunity to exercise their own comprehensive moral doctrines, and to develop their own conceptions of the good.

Tension with, or Support for, the Other Values:

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

Limitations:

Protecting equal standing (value #3) is only implicated in the context of *culpable* attackers. In contrast, protecting the defender's autonomy (admittedly a bit of a catch-all term that is defined here as including the defender's legally protected private sphere, personal sovereignty, personal domain, and right to non-interference) can apply to both culpable *and* non-culpable attackers—though this thesis will contend that a culpable attack poses a greater, normatively distinguishable threat to a defender's autonomy than an innocent one.

As the term '*self*-defense' implies, protecting the threatened defender's autonomy grounds self-defense.[126] That said, and as recognized both by the violence-reducing function of self-defense (value #1) and the understanding that even culpable attackers have a right to life (value #2), life in modern society necessarily entails that citizens must at times tolerate certain intrusions into their autonomy in order to advance broader welfarist objectives.[127] If, as argued here, the mutual recognition and acceptance of individual rights is a prerequisite to a functioning legal system, then self-defense must safeguard the individual by preventing *unjustified* (as determined by weighting this value against the others) threats against, or intrusions into, his personal domain when equally effective state protection is unavailable.[128]

1. The personal domain is important . . .

Continuing the discussion started in Chapter II(c)(iii) with value #3 (ensuring equal standing among individuals), an ordered modern society must afford some room for individual expression within each person's personal domain.[129] Without such a protected personal domain 'we are thrown back on the sort of structure found in the mob, in which everybody is free to express himself against some hated object of the group.'[130] Raz agrees that 'the promotion and protection of personal autonomy are the core of the liberal

[126] *See* SANGERO, *supra* note 33, at 67–73.

[127] *See generally* Erb, *supra* note 10, at side-note 87; Robert M. Ackerman, *Communitarianism and the Roberts Court,* 45 FLA. ST. U. L. REV. 59, 87 (2017). *See also* George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 556 (1996).

[128] *See generally* George P. Fletcher, *The Nature of Justification*, *in* ACTION AND VALUE IN CRIMINAL LAW 175, 181 (Stephen Shute *et al*. eds., 1993) [hereinafter Fletcher, *Nature of Justification*]; George P. Fletcher, *Punishment and Self-Defense*, 8 LAW & PHIL. 201, 210, 213–15 (1989) [hereinafter Fletcher, *Punishment and Self-Defense*].

[129] *Cf.* Richard Washburn, *The Decline of Authority*, 32 COM. L. LEAGUE J. 229, 230 (1927).

[130] GEORGE H. MEAD, MIND, SELF, AND SOCIETY 221 (1967).

concern for liberty.'[131] The U.N. has in fact long recognized personal autonomy as a fundamental human right.[132]

Nozick posits that only a person who has the ability to shape his own life in accordance with some overall plan, has—or can strive for—a meaningful life.[133] A liberal state must, therefore, accord free people generally equal standing in the public sphere (value #3), but as reflected by value #4 must also ensure that people have a private, autonomous domain of nonpublic life.[134]

This thesis' description of this value, and its focus on the defender's personal autonomy, is not meant to devalue the attacker's legitimate interests. Instead, the value more narrowly focuses on safeguarding the defender's rights.[135] One impact of unjustified attacks (whether culpable or non-culpable) is that they breach the sphere of autonomy enjoyed by everyone—and culpable attacks, as noted above, also uniquely threaten the broader legal order.[136]

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[131] JOSEPH RAZ, THE MORALITY OF FREEDOM 203–04 (1986).

[132] *See generally* U.N. DECLARATION, *supra* note 55, Articles 12, 13, 20, 22, and 29; ECHR, *supra* note 55, Articles 1, 8, and 11. *See also* Walter Kargl, *Die Intersubjektive Begründung und Begrenzung der Notwehr*, 110 ZSTW 38, 57–60 (1998); WILHELM VON HUMBOLDT, THE LIMITS OF STATE ACTION 12–13 (John W. Burrow ed., 1993); FRIEDRICH A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 62–64 (1988) (discussing the impact of the State's respect for the personal domain); LEONI, *supra* note 100, at 93; MEAD, *supra* note 130, at 221.

[133] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 31 (1974). *See generally* Rönnau & Hohn, *supra* note 60, at side-note 64.

[134] *See generally* RAWLS, *supra* note 35, at 139, *discussed in* Arthur Ripstein, *Tort Law in Liberal State*, 1 J. TORT L. 1, 9 (2007). *See also* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11–12, 347–378 (1980).

[135] *See generally* Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2070 (1996); JOEL FEINBERG, HARM TO SELF, 52–70 (1986). *See also* JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 19–27 (2013).

[136] *See generally* Rönnau & Hohn, *supra* note 60, at side-notes 64–66; Colton Fehr, *Self-Defence and the Constitution*, 43 QUEEN'S L.J. 85, 96-98 (2017); Sangero, *New Defense, supra* note 33, at 552–53; Omichinski, *supra* note 117, at 1459–60.

2. . . . But autonomy cannot be absolute

The position advanced immediately above is that a person's autonomous sphere has value and is, therefore, something the criminal law must protect (including through law relating to self-defense). That said, like all rights, the right to autonomy is not limitless.

Raz has noted the difficulties with the positions taken by 'pure individualists,' such as Kant and Nozick, who he believes ignore the reciprocal reasonable limitations on autonomy.[137] The U.N. in its Universal Declaration of Human Rights has similarly observed that, in the context of development of individual personality, '[e]veryone has duties to the community.'[138] Indeed, paying taxes, driving the speed limit, appearing for jury duty, and countless other restrictions on our autonomous activities demonstrate that, in modern liberal democracies (and, for that matter, in non-modern society), our individual desires must frequently yield to broader social interests.[139]

It would, therefore, be odd if self-defense was the only area of human endeavor where a person was permitted to ignore all other societal considerations and could act in a purely self-interested and self-directed manner without regard for the attendant external costs of such action.[140] Stated differently, while self-defense obviously plays the herein-discussed important role in ordered society, the criminal law must provide even the fully culpable attacker's autonomy with some level of protection because the law concerns

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[137] RAZ, *supra* note 131, at 273–74. *See also* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 399 (2009).

[138] *See generally* U.N. DECLARATION, *supra* note 55, Article 29.

[139] *See generally* Cynthia V. Ward, *Restoring Fairness to Campus Sex Tribunals*, 85 TENN. L. REV. 1073, 1105–08 (2018); Erb, *supra* note 10, at side-note 215; Tsilly Dagan, *The Currency of Taxation*, 84 FORDHAM L. REV. 2537, 2558–59 (2016). *Cf.* JOHN STUART MILL, ON LIBERTY AND UTILITARIANISM 143–50 (1993), *discussed in* Jacob Chapman, *Doomsday: A Look at the Ethical Issues Behind the Government's Coercive Powers in Response to a Public Health Nightmare*, 9 J.L. & SOC. CHALLENGES 24, 35–37 (2008).

[140] *See generally* Steven D. Smith, *Is the Harm Principle Illiberal*, 51 AM. J. JURIS. 1, 4–14 (2006); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1167–71 (2003); JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 11 (Stefan Collini ed. 1989).

itself with protecting the well-being of *all* people.[141] That said, it is recognized that there will be disagreement on precisely where the boundary should be drawn (indeed, the resolution of this core challenge is what the value-based model seeks to make more explicit). As the thematic literature review in Chapter III illustrates, even though the value of protecting the defender's autonomy is almost universally recognized, there is far less agreement on how it should function when in tension with competing values (and, for that matter, on what values are in fact 'competing').

v. Value #5: Ensuring the primacy of the legal process

Summary Justification for Including This Value:

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

Tension with, or Support for, the Other Values:

This value supports the proposition that, all other things being equal, societies prefer to have disputes settled in court, rather than through the exercise of self-

[141] *See generally* LEVERICK, *supra* note 2, at 3; Erb, *supra* note 10, at side-note 217–23. *Cf.* Creach, *supra* note 71, at 672 ('Self-defense represents legally sanctioned vigilante action.').

preferential force. As such, this value is most closely aligned with protection of the state's monopoly on force (value #1), protection of the individual attacker (value #2), and maintenance of the legitimacy of the legal order (value #6). Warding off the imputation of unequal standing (value #3), protection of the defender (value #4), and deterrence (value #7) are, all other things being equal, more likely to be antagonistic to, and therefore in tension with, this value.

Limitations:

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

As observed with value #1 (collective violence-reduction/monopoly on force), in a liberal society, law and private violence can fairly be viewed as presumptively antagonistic.[142] Law serves to minimize violence in society while concurrently striving to be no more coercive than necessary.[143] Unjustified and unsanctioned violence, on the other hand, is disruptive and undermines organized society and threatens the legal order. This is one reason that resorting to the available legal process to resolve disputes is considered a fundamental human right—and why necessity should not be the only limitation on a defender's exercise of self-preferential force.[144] This value (like the

[142] *See generally* Janine Young Kim, *The Rhetoric of Self-Defense*, 13 BERKELEY J. CRIM. L. 261, 290 (2008); Whitman, *supra* note 72, at 903; Austin Sarat & Thomas Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, *in* THE FATE OF LAW 209, 212 (Austin Sarat & Thomas R. Kearns eds., 1991); Cover, *supra* note 65, at 1613. *See also* Chapter II(c)(iii)(2) (discussing why the value-based model does not treat protecting the socio-legal order as a stand-alone value).

[143] *See generally* Schwirck, *supra* note 65, at 81.

[144] *See generally* U.N. DECLARATION, *supra* note 55, Articles 6, 7, 8, and 11; ECHR, *supra* note 55, Articles 1 and 13.

collective interest in minimizing violence (value #1) and the individual attacker's right to life (value #2)) is, therefore, in tension with the preceding value's focus on the defender's autonomy (value #4). For if the defender's autonomy were the only interest of concern, then a defender would, in fact, be permitted to deploy all force necessary to prevent any intrusion into it.

1. Another argument against unfettered 'self-help'

Based on the foregoing discussion, this thesis assumes relatively broad agreement that society has a powerful collective interest in thoughtfully circumscribing the situations in which citizens are permitted to use private violence against each other (though disagreement over the precise boundaries will, as noted, surely persist). The criminal justice system, for example, must delicately balance the citizen's right to safety (and the use of self-defense to ensure protection of the defender's autonomy (value #4)) against its commitment to maintaining a stable society that punishes only after affording the accused due process, and that does not tolerate vigilante law enforcement or acts of revenge that threaten to undermine the legitimacy of the legal order (generally, values #5 and #6).[145]

To the extent possible, then, the justice system must promote the resolution of disputes in the courts. Vigilantism and similar 'self-help' crime-control options, in contrast, seek to wrest from the liberal state the authority to punish and condemn, and threaten to incrementally push society toward non-democratic lawlessness.[146]

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[145] *See generally* HENRY L. HART, THE CONCEPT OF LAW 1 (1994) (providing a comprehensive discussion of the function of the law); Laura Nader, *The Anthropological Study of Law*, *in* LAW AND ANTHROPOLOGY 3 (Peter Sack & Jonathan Aleck eds., 1992) (same, but from an anthropological perspective); HERMANN KANTOROWICZ, THE DEFINITION OF LAW 1 (1980) (same, but discussing the law's function).

[146] *See generally* Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 33 (2012); Suzanne Uniacke, *Self-Defense and Natural Law*, 36 AM. J. JURIS. 73, 79 (1991). *See also* Kenworthey Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1101 (2007); William Gossett, *The Rule of Law or the Defiance of Law*, 55 A.B.A. J. 823, 824 (1969).

2. Why ensuring the primacy of the legal process and maintaining the legitimacy of the legal order are not coextensive values

One may wonder why ensuring the primacy of the legal process (value #5) is not subsumed within the to-be-discussed value-based decision-ground of maintaining the legitimacy of the legal order (value #6). The answer is that the value of maintaining the legitimacy of the legal order, as it will be defined here, is only implicated in cases when the defensive conduct under consideration, or the proposed limitation of such conduct, is so far outside the bounds of the fully expressed public morality[147] that it threatens to undermine the law's very moral authority in the sense of public respect.[148] Such cases will necessarily (one hopes) be relatively rare—but, nevertheless, it is a particularly important value to consider in self-defense cases given the unusually intense amount of public scrutiny they often receive.[149]

As noted, ensuring primacy of the legal process seeks to reasonably avoid self-help options by presumptively relying on the judicial forum to adjudicate disputes, address losses to person or property, and impose punishment. In this sense, this value is in most direct tension with the value of protecting the defender's autonomy interests (value #4). Because in liberal democracies it is the criminal justice system that is

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[147] More fully articulated in Chapter II(c)(vi)(2).

[148] *See generally* Steven E. Clark *et al.*, *Legitimacy, Procedural Justice, Accuracy, and Eyewitness Identification,* 8 U.C. IRVINE L. REV. 41, 61–66 (2018); Bottoms & Tankebe, *supra* note 93, at 120; Tom Tyler & Jeffrey Fagan*, Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 233 (2008–09); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 283–357 (2003) [hereinafter Tyler, *Procedural Justice*]; Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B U. L. REV. 361, 378 (2001) [hereinafter Tyler, *Trust and Law Abidingness*]; TOM TYLER, WHY PEOPLE OBEY THE LAW 20–26, 161–65 (1990) [hereinafter TYLER, OBEY]. *See also* Sanford Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CM. L. REV. 423 (1963), *discussed in* John Coffee, *Hush: The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121, 148 (1988).

[149] *See generally* Mary E. Castillo, *Florida's Stand Your Ground Regime: Legislative Direction, Prosecutorial Discretion, Public Pressures, and the Legitimization of the Criminal Justice System*, 42 J. LEGIS. 101, 101–02 (2016), HEINONLINE, https://heinonline.org/HOL/P?h=hein.journals/jleg42&i=90.

responsible for punishment,[150] instances of claimed self-defense must be carefully scrutinized to confirm that legal process options were not reasonably available.

vi. Value #6: Maintaining the legitimacy of the legal order

Summary Justification for Including This Value:

A longer-term, and frequently discussed, objective of a functioning criminal justice system is that the populace respects it and considers it legitimate. A criminal justice system's proscriptions and defenses can, sociologically speaking at least, be fairly described as the formal embodiment of a set of elementary moral values (usually those of the group dominant in political authority) in an official edict. These values, in turn, are reinforced with exceptions (defenses) and an official penal sanction. A functioning justice system must, therefore, embody widely held moral standards of right and wrong (that is, it must reflect—or at least come close to reflecting—what has already been termed the 'fully expressed public morality').[151] As procedural justice theory teaches, a justice system that in this manner enjoys popular support is able to more effectively draw on the stigmatic effect of conviction to reinforce basic moral standards and encourage compliance.

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[150] *See generally* Angela E. Addae*, Challenging the Constitutionality of Private Prisons: Insights from Israel*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 527, 549–52 (2019); Markel, *supra* note 146, at 38–43, *discussed in* David Gray, *Retributivism, Confrontation, and the Death Penalty: Some Skepticism About Dan Markel's Skepticism*, 51 TEX. TECH L. REV. 1, 11 (2018); Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1089–90 (2010).

[151] 'Public morality,' as used herein, refers to the moral and ethical standards enforced in a society, whether through law enforcement, social pressure, or otherwise. *See generally* Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 19 (2000); Henry L. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 1–13 (1967); Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175, 175–88 (1967). The concept of violations of the criminal law reflecting successive levels of substantive and procedural societal condemnation is discussed by, among others, Robert Schopp in his book JUSTIFICATION DEFENSES AND JUST CONVICTIONS, *supra* note 40, at 30–31 (discussing the 'fully-articulated conventional morality').

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

Placing these more generalized observations in the self-defense framework, to maintain the criminal law's moral authority and corresponding popular legitimacy, the justice system's range of permissible defensive force outcomes must not drastically deviate from the community's perceptions of 'just results.' For even though political liberalism may be premised on a plurality of reasonable moral doctrines, there is a limit to what a free democratic regime bound by the majority principle can tolerate.

Tension with, or Support for, the Other Values:

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

reaching results that shake people's fundamental confidence in the moral legitimacy of the legal order are the ones that implicate value #6.

Limitations:

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

1. Legitimacy and procedural justice

Trust and legitimacy, both central to ensuring the moral authority of the law,[152] dominate contemporary discussions of procedural justice.[153] Social psychology has produced an

[152] RAZ, *supra* note 131, at 400–01.

[153] *See generally* Clark *et al.*, *supra* note 148, at 61–66; Stephen Cody & Alexa Koenig, *Procedural Justice in Transnational Contexts*, 58 VA J. INT'L L. 1, 8–11 (2018); Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice,* 2016 U. CHI. LEGAL F. 295, 356; Kristina Murphy *et al*., *Motivating Compliance Behavior Among Offenders: Procedural Justice or Deterrence?*, 43 CRIM. JUST. & BEHAVIOR 102, 103 (2016); Bottoms & Tankebe, *supra* note 93, at 120; JONATHAN JACKSON *ET AL*., JUST AUTHORITY?: TRUST IN THE POLICE IN ENGLAND AND WALES 1 (2012); Tyler & Fagan*, supra* note 148, at 233; Tyler, *Procedural Justice, supra* note 148, at 283–357; Tyler, *Trust and Law Abidingness*, *supra* note 148, at 378; TYLER, OBEY, *supra* note 148, at 20–26, 161–65. Perceived 'procedural injustice,' in contrast, has been said to contribute to increased public support for violent self-help mechanisms, including vigilante violence. *See generally* Justice Tankebe, *Self-Help, Policing, and Procedural Justice: Ghanaian Vigilantism and the Rule of Law*, 43 LAW & SOC'Y REV. 245, 270 (2009). Note that the term 'procedural justice' is a broad concept that encompasses both the quality of decision-making and outcomes, as well as the more process-based quality of treatment. *See* Bottoms & Tankebe, *supra* note 93, at 145. This thesis will focus on the former (outcomes) more than on the latter (procedure).

extensive literature on the central concept that, to be considered *legitimate*, the public must collectively believe that 'authorities, institutions, and social arrangements are appropriate, proper, and just.'[154] To be *effective*, on the other hand, 'legal rules and decisions must be obeyed.'[155] The procedural justice perspective is that, when compared to punishment, deterrence, or other external incentives, internalized feelings of legitimacy and trust are more potent and longer lasting.[156] As Tyler frames it, the public's 'law-related behavior [is] powerfully influenced by people's subjective judgments' about the system's fairness.'[157] And so, when the system is viewed as achieving unfair results, '[t]his undermines [the legal order's] legitimacy.'[158]

Identifying an agreed-upon definition of 'legitimacy' is challenging.[159] Sociologists and psychologists focus on people's attitudes towards authority.[160] From this perspective, legitimacy, rather than being dictated by a single transaction, 'is more like a perpetual discussion, in which the content of the power-holders' later claims will be affected by the nature of the audience response.'[161]

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[154] Tom Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 375–400 (2006). *See also* Cody & Koenig, *supra* note 153, at 9–11; Miranda Boone & Mieke Kox, *Neutrality as an Element of Perceived Justice in Prison: Consistency Versus Individualization*, 10 UTRECHT L. REV. 118 (2014); Ian Loader & Richard Sparks, *Unfinished Business: Legitimacy, Crime Control, and Democratic Politics, in* LEGITIMACY AND CRIMINAL JUSTICE: AN INTERNATIONAL EXPLORATION 105–26 (Justice Tankebe & Alison Liebling eds., 2013); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 265 (2004).

[155] Tom Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U CINN. L. REV. 847, 856 (1998).

[156] *See* Miller, *supra* note 153, at 356; Tyler, *Procedural Justice*, *supra* note 148, at 283–84. *See also* Matthew Dyson & Benjamin Vogel, *Reflections on Criminal Law in England and Germany, in* THE LIMITS OF CRIMINAL LAW, *supra* note 101, at 563–64.

[157] Tyler, *Procedural Justice*, *supra* note 148, at 284.

[158] *Id*. at 287; RICHARD SPARKS *ET AL*., PRISONS AND THE PROBLEM OF ORDER 2 (1996), *discussed in* Bottoms & Tankebe, *supra* note 93, at 121, 131–32.

[159] *See generally* DAVID BEETHAM, THE LEGITIMATION OF POWER 34 (2nd ed. 2013) (discussing differences between the legal, philosophical, and sociological meanings of 'legitimacy'). *See also* Bottoms & Tankebe, *supra* note 93, at 124–32; JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 128 (2009); MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIETY 53–56, 215 (1978).

[160] Bottoms & Tankebe, *supra* note 93, at 129. *See also* BEETHAM, *supra* note 159, at 20; Tyler, *Procedural Justice, supra* note 148, at 307–08; MAX WEBER, *supra* note 159, at 31–36.

[161] Bottoms & Tankebe, *supra* note 93, at 129.

Normative legitimacy, on the other hand, is a moral and political concept. It is intertwined with the idea that the legal authority has a right—indeed, a moral right—to regulate conduct or issue directives, and requires that the process is (morally or politically) fair or just or lawful.[162] Legal legitimacy, which can be considered a species of normative legitimacy, requires that authority be exercised according to legally valid rules.[163] Finally, democratic legitimacy requires an authority that allows its subjects to participate in the decision-making process and that also is genuinely responsive to their interests.[164]

Procedural justice, as discussed here in the main, concerns itself with sociological and psychological creditworthiness (that is, how people *feel* about authorities and the broader criminal justice system) rather than democratic or normative legitimacy (which focuses on whether the authority's actions are, in fact, lawful or responsive or justified). Social science research has, in fact, raised doubts about the once-popular notion that legislators can effectively deter crime purely by manipulating the universe of criminal proscriptions or by increasing punishment.[165]

Value #6's goal, then, is to avoid self-defense cases that discourage three desirable general behaviors among the public, namely, compliance with the law, cooperation with legal authorities, and support for the empowerment of the law.[166] And, to this point, research has consistently demonstrated that '[t]he loss of popular legitimacy

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[162] *See, e.g.*, Joseph Raz, *Legitimate Authority, in* THE AUTHORITY OF LAW 3–4 (2009). *See also* Miller, *supra* note 153, at 358; Bottoms & Tankebe, *supra* note 93, at 131–32.

[163] *See* Miller, *supra* note 153, at 356.

[164] *Id*. at 357.

[165] EVAN OSBORNE, SELF-REGULATION AND HUMAN PROGRESS: HOW SOCIETY GAINS WHEN WE GOVERN LESS, ch. 2 (2018).

[166] *See* Tyler, *Procedural Justice*, *supra* note 148, at 290, 310–18.

for the criminal justice system produces disastrous consequences for the system's performance. If citizens do not trust the system, they will not use it.'[167]

Perceived *in*justice in a self-defense outcome, in short, can seriously (though typically only incrementally) undermine the perceived trustworthiness of the broader criminal justice system.[168] And this can lead to the justice system rendering itself unable to safeguard the fundamental human rights discussed throughout this chapter.[169]

2. The value-based model's eight stages of condemnation lead to the 'fully expressed public morality'

The discussion that follows addresses the ongoing debate over whether self-defense should be considered a justification or excuse (or neither).[170] Specifically, this thesis will deconstruct, from an Anglo-American procedural perspective, how a person can be said to violate the 'fully expressed public morality.' This, in turn, will help us better understand the procedural justice view that widely rejected self-defense decisions can adversely impact the broader public's view of the legitimacy of the legal order. The

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[167] *See* Mark Moore, *Legitimizing Criminal Justice Policies and Practices*, FBI L. ENFORCEMENT BULL. 14, 17 (October 1997), *quoted in* Tyler, *Procedural Justice*, *supra* note 148, at 292–97 (discussing research on procedural justice). *See also* Bottoms & Tankebe, *supra* note 93, at 154–55, 160–68 (discussing legitimacy studies and calling for more empirical work); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 134–37 (2011), *cited in* Pamela Foohey, *Jevic's Promise: Procedural Justice in Chapter 11*, 93 WASH L. REV. ONLINE 128, 142 (2018) (canvassing procedural justice research); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 3–4 (2011) (examining research about the effects of people's perceptions of procedural justice); John Darley *et al*., *Enacting Justice: The Interplay of Individual and Institutional Perspectives, in* THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY 458–76 (Michael A. Hogg & Joel Cooper eds., 2003); DAVID BEETHAM, THE LEGITIMATION OF POWER 3–114 (1991); Martin Hoffman, *Moral Internalization*, 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 85, 85–133 (1977).

[168] Cody & Koenig*, supra* note 153, at 24; Maarten Van Craen & Wesley G. Skogan, *Trust in the Belgian Police: The Importance of Responsiveness*, 12 EUR. J. CRIMINOLOGY 129, 145 (2015); Tankebe, *supra* note 153, at 252; David De Cremer & Tom R. Tyler, *The Effects of Trust in Authority and Procedural Fairness on Cooperation*, 92 J. APPLIED PSYCHOL. 639, 640 (2007).

[169] *See, e.g.*, U.N. DECLARATION, *supra* note 55, Articles 1, 2, 3, 6, 7, 8, 10, 11, 12, 13, 17, 20, 22, and 29; ECHR, *supra* note 55, Articles 2, 5, 6, 8, 11, and 13.

[170] *See generally* Gloria Gaggioli, *Human Rights and Personal Self-Defense in International Law*, 18 MELB. J. INT'L L. 460, 464 (2017). For a fuller discussion of this topic, *see* Chapter IV(a).

analysis, moreover, offers additional reasons for why maintaining the legitimacy of the legal order (value #6) deserves a place within the value-based model of self-defense.

a. Additional comments on condemnation and the criminal justice system

Criminal justice systems punish by inflicting hard treatment on those who, on a prior occasion, provably failed to abide by certain rules or commands relating to proscribed conduct.[171] Self-defense outcomes that are broadly rejected as immoral threaten to incrementally erode the justice system's moral credibility, undermine compliance with the law, and reduce cooperation with legal authorities.[172] And, to this point, research has consistently demonstrated that '[t]he loss of popular legitimacy for the criminal justice system produces disastrous consequences for the system's performance. If citizens do not trust the system, they will not use it.'[173]

But understanding the meaning of a conviction on a deeper level requires analysis beyond the observation that the criminal justice system 'condemns' that conduct and that bad outcomes can erode respect for the system. To provide additional clarity on these modalities of operation, this thesis endeavors to (in summary form) deconstruct the criminal conviction. Specifically, it will be suggested that an individual must pass through the eight distinct stages of legal (as well as consequently moral) evaluation before he can be punished criminally as (1) a fully culpable actor who (2) has violated the integrated set of provisions that constitute the criminal law.

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

[172] *See* Tyler, *Procedural Justice*, *supra* note 148, at 290, 310–18.

[173] *See* Moore, *supra* note 167, at 17, *quoted in* Tyler, *Procedural Justice*, *supra* note 148, at 292–97 (discussing research on procedural justice). *See also* Bottoms & Tankebe, *supra* note 93, at 154–55, 160–68 (discussing legitimacy studies and calling for more empirical work); Hollander-Blumoff, *supra* note 167, at 134–37, *cited in* Foohey, *supra* note 167, at 142 (canvassing procedural justice research); Hollander-Blumoff & Tyler, *supra* note 167, at 3–4 (examining research about the effects of people's perceptions of procedural justice); Darley, *supra* note 167, at 458–76; BEETHAM, *supra* note 167, at 3–114; Hoffman, *supra* note 167, at 85–133.

In brief, the first such stage is institutional, in that the criminal justice system *defines* certain *conduct* as condemnable. The second through eighth stages, on the other hand, are applied by the prosecutor, judge, or jury in the process of allocating institutional condemnation to a *particular defendant*.[174] The position tested here is whether, to deserve criminal punishment in a liberal criminal justice system, a defendant must pass through *all eight* evaluative stages.

b. Stage one: Defining the partially expressed public morality

Legislators (and, to a lesser extent, the courts) are charged with the task of creating offense definitions that designate certain conduct as 'criminal.'[175] They in so doing transform a broad prohibitory norm ('thou shall not kill') into a specific offense definition with action (*actus reus*) and, typically, state-of-mind (*mens rea*—'the actor is not guilty unless the mind is guilty')[176] elements. These offense definitions thus seek to capture the blameworthiness of the overall conduct resulting in criminally punishable harm (such as 'first-degree homicide').

The institutional actors can in this sense be said to represent, reinforce, and maintain what this thesis has described as the 'partially expressed public morality.'[177] Criminal conduct, after all, is 'conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the

[174] It is of course possible to think of, and order, the stages differently, but the classification and ordering in this subchapter fairly reflects the actual procedural and conceptual operation of the criminal law.

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

[176] Examples include 'malice aforethought,' 'knowingly,' 'willfully,' 'recklessly,' and (sometimes) 'criminally negligently.'

[177] Relatedly, Schopp has extensively discussed the 'conventional morality.' *See* Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & LAW 161, 166 (1995).

community.'[178] The 'morality' contained in the offense definition is therefore described here as 'public,' because it, in a functioning justice system, is shaped by broad public support, typically develops 'organically' over the years,[179] and is designed to represent widely held moral standards of right, wrong, evil, and good.

By labeling certain conduct 'criminal,' then, the justice system, as conceived here, at a bedrock level[180] expresses widely accepted (and thus 'conventional') moral standards within the given society.[181] Note, however, that the partially expressed public morality as defined here only addresses those (core) aspects of morality that are commonly perceived as falling within the public jurisdiction, and that are, therefore, properly subject of the criminal law.[182]

Moving from the general to the specific, and accepting for present purposes the assumption above, individual offense definitions seek to account for these rather abstract

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[178] Hart, *supra* note 171, at 405. *See also* Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095, 1107 (1998); George K. Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953).

[179] *See* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 148–61 (1990); JAMES COOLIDGE CARTER, THE PROVINCES OF WRITTEN AND UNWRITTEN LAW 11–12 (1889). *See also* Alana Klein, *Criminal Law and the Counter-Hegemonic Potential of Harm Reduction*, 38 DALHOUSIE L.J. 447, 462–63 (2015).

[180] Note that this minimalist understanding of what should be criminalized finds support in, among other places, the U.N. Declaration of Human Rights. *See generally* U.N. DECLARATION, *supra* note 55, Article 29. *See also* ORMEROD AND LAIRD, *supra* note 28, at 8 (contending that conduct should only be criminalized when it protects individual autonomy or 'those social arrangements necessary to ensure that individuals have the capacity and facilities to exercise their autonomy').

[181] *See generally* James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 MOD. L. REV. 217, 245 (2008); John Gardner, *The Mark of Responsibility*, 23 OXFORD J. LEGAL STUD. 157 (2003); David L. Bazelon, *The Morality of the Criminal Law*, *in* CRIMINAL LAW 5 (Thomas Morawetz ed., 1991); Hart, *supra* note 171, at 404–05.

[182] In this sense, the conventional *social* morality does not overlap completely with the conventional *public* morality. The social morality addresses aspects of the citizens' social life, such as courtesy to strangers and helpfulness to neighbors and the elderly, which are not properly the subject of criminal legislation. *See generally* Ondre Bakircioglu, *The Contours of the Right to Self-defence: Is the Requirement of Imminence Merely a Translator for the Concept of Necessity*, 72 J. CRIM. L. 131, 131, 152–53 (2008); Schopp, *supra* note 135, at 2079–80; *Gregg v. Georgia*, 428 U.S. 153, 181 (1976). *But see* Dempsey, *supra* note 96, at 269–70 (contending that the criminal justice system should also seek to redress communal 'character flaws' such as racism, patriarchal violence, structural inequalities, and homophobia). In any event, a full treatment of whether the criminal law can and should be employed as an instrument for such aspirational undertakings is beyond the scope of this thesis.

prohibitory norms by providing citizens with more specific behavioral directives.[183] By criminalizing murder, for instance, the legal order expresses the conventional moral standard that unjustified killing is condemnable. A fully culpable attacker deserving punishment under this understanding of the criminal law is consequently always condemned for having violated the partially expressed public morality represented by the offense definition because that, after all, is where the inquiry starts.[184] (This is not to deny, of course, that many of today's criminal codes frequently are replete with largely regulatory provisions that bear what can be characterized as a faint relation to conduct meriting broader moral condemnation.[185])

c. Stage two: The prosecutor decides to bring charges

Though this step may appear pro forma, prior to deciding to file formal charges, diligent prosecutors will usually have carefully examined the facts of the case, analyzed the legal basis for bringing charges, and listened to defense counsel 'pitch' them on what (reduced) charges, if any, are most appropriate.[186] This second level of condemnation, thus, can be said to occur at the level of *specific* application. Indeed, U.S. and English prosecutors have considerable, and often overlooked, discretion in deciding whether to prosecute

[183] *See generally* Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 PAC. L. J. 1233, 1270 (1993).

[184] Recall from our prior discussion that the conventional public morality allows us to delineate those wrongs that are criminal from the universe of wrongs. This is why intentional breach of contract, for example, is not criminalized even though it involves the intentional disregard for another's rights and equal standing. *See* Chapter II(c)(vi)(2).

[185] *See generally* Grant Lamond, *What Is a Crime*, 27 OXFORD J. LEGAL STUD. 609 (2007); Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 501–03 (2004).

[186] One could reasonably argue that there should be an intermediate step, namely, a step at which the police or other law enforcement personnel either arrest the individual (in reactive cases) or otherwise recommend to the prosecutor that the person be prosecuted. Because this 'police discretion' step is handled so differently from jurisdiction to jurisdiction, for the sake of simplicity, this thesis will essentially roll this activity—which also clearly has a condemnatory flavor to it—into the prosecutorial decision to bring charges.

offenses that are 'on the books'[187] (where the *Legalitätsprinzip*, in contrast, requires German prosecutors, following the 'the principle of compulsory prosecution,' to press charges whenever they have sufficient evidence to support a conviction).[188] Prosecutors, moreover, not only select the specific charges that will be filed, but they also determine what penalties to request from the court.[189] The mere act of filing the charges, then, initiates the first (though still only partially expressed) defendant-specific aspect of public/systemic condemnation.

d. Stage three: Establishing the defendant's mental fitness to proceed

Moving through the procedural and substantive steps, consider next mental competency. In the U.S., before a defendant can plead or be tried criminally, the judge must determine that the defendant is mentally fit to plead and to take part in his trial.[190] An individual whose mental condition renders him unable to understand the proceedings against him is not mentally fit to plead or proceed to trial and must (if possible) first have his competency restored.[191] At a later stage (the sixth stage), the fact-finders determine whether the defendant is excused; but note that excuses presuppose wrongdoing on the defendant's part.[192] At this early second stage, in contrast, no such wrongdoing is presupposed, but, rather, the defendant—who may or may not be guilty of the crimes

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[187] *See generally* William H. Simon, *The Organization of Prosecutorial Discretion*, *in* PROSECUTORS AND DEMOCRACY—A CROSS-NATIONAL STUDY 176, 177 (Maximo Langer & David Sklansky eds., 2017); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 256–60 (2007).

[188] *See generally* Marie Manikis & Peter Grbac, *Bargaining for Justice: The Road Toward Prosecutorial Accountability in the Plea Bargaining Process*, 40 MAN. L.J. 85, 88 (2017); John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 467 (1974). *See also* discussion at Chapter V(b)(ii).

[189] *See generally United States v. Fokker Servs. B.V.*, 818 F.3d 733, 738 (D.C. Cir. 2016).

[190] *See generally* HORDER, *supra* note 86, at 157.

[191] *Id*.

[192] *See State v. Leidholm*, 334 N.W.2d 811, 814–15 (N.D. 1983); FISCHER, *supra* note 10, at side-note 14; Alan Brudner, *Constitutionalizing Self-Defense*, 61 U. TORONTO L.J. 867, 893 (2011); Douglas Husak, *A Liberal Theory of Excuses*, 3 OHIO ST. J. CRIM. L. 287, 291 (2005).

charged—is found mentally fit to plead and/or to take part in his trial. This stage, therefore, is not truly condemnatory. Instead, it is more akin to a required procedural step that may remove some quantum of stage one and two condemnation from those who have been declared incompetent.

e. Stage four: The fact-finder determines that this particular defendant violated the offense definition

When a prosecutor decides to prosecute a case, a judge declines to find the defendant incompetent or to dismiss the charges, and the fact-finder (whether judge or jury) thereafter convicts the defendant, the fact-finder reaffirms the stage-one institutional condemnation. In addition, the fact-finder determines that the defendant standing in the well of the court in fact is guilty of violating the particular offense definition. The fourth condemnatory stage thus focuses on the conduct of a specific defendant and shares more in common with the cognitive process of fact-finding than with imposition of moral value-judgment.[193]

The fact-finder at this stage in effect says that the *system* appropriately criminalized and condemned the certain type of conduct as violating the partially expressed public morality (that is, there was no jury nullification (in the U.S.) or perverse verdict (in England) or, in theory at least, 'judicial nullification' when the judge is the fact-finder (in all three subject jurisdictions)). The fact-finder additionally conveys that this *particular* defendant is guilty of the crime charged. That is, the fact-finder determines that the prosecutor met her burden of proving beyond a reasonable doubt that the defendant engaged in the criminal proscription's action (*actus reus*) and state-of-mind (*mens rea*)[194] elements. The defendant, therefore, can pass through this fourth stage as

[193] *See generally* Sophie Klinger, *Youth Competence on Trial*, 2007 N.Z. L. REV. 235, 240 (2007).

[194] Some criminal proscriptions, such as statutory rape, are strict liability offenses that do not contain a *mens rea* element requiring proof that the defendant had the degree of belief or willful disregard as to the existence of certain facts or circumstances that are typically required in criminal cases. *See* Tiffany Dupree,

having violated the partially expressed public morality represented by the offense definition.

Of course, if the defendant made a *mistake* as to the circumstances, this may vitiate his *mens rea.* In such cases, the defendant operated based on an incorrect assumption of fact, rather than for a *prima facie* criminal purpose. For example, assume Victor and Andrew (who do not know each other) are having dinner at the same restaurant. Unbeknownst to both, the waiter slips a powerful hallucinogenic into Andrew's drink, causing Andrew to develop an ungovernable fury against Victor. Andrew grabs a steak knife from the table and chases Victor, cornering Victor. Victor grabs his own steak knife to defend himself but is unsuccessful in the combat that ensues—Andrew stabs Victor to death. Andrew's conduct was involuntary (despite being the initial aggressor); he, therefore, lacks the *mens rea* for murder.[195]

f. Stage five: The defendant was not justified

Justification defenses (including self-defense)[196] become relevant at the fifth stage, where the actor who violated an offense definition without having a justification for doing so is condemned. The discussion at the first stage drew attention to the fact that an offense definition merely contains the partially expressed public morality; the offense definition describes a general category of conduct proscribed at the institutional level (but this only tells part of the story). To establish that a defendant violated the *fully expresse*d public morality of a liberal society by wronging or attempting to wrong another, the prosecutor

You Sell Molly, I'll Sell Holly: Prosecuting Sex Trafficking in the United States, 78 LA. L. REV. 1025, 1046–47 (2018).

[195] *See generally* Joshua D. Brooks, *Deadly-Force Self-Defense and the Problem of the Silent, Subtle Provocateur*, 24 CORNELL J.L. & PUB. POL'Y 533, 549 (2015). *Cf.* Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 259 (1987) (distinguishing 'genuine human actions' and 'mere events . . . which happen to involve a human body'); Robert C. Hauhart, *The Involuntary Action Defense to a Criminal Indictment*, 11 N. KY. L. REV. 321, 350 (1984) (taking the position that the *actus reus* requires the 'determination of the actor'). For a discussion of whether a mistake of fact may also undermine the *actus reus*, *see* Chapter IV(a)(ii)(4).

[196] *See* Chapter IV(a).

must not only show that the defendant's conduct satisfies the offense definition, but he must also refute any claim made by the defense that the defendant's conduct fell into a subset of generally proscribed behavior that is exempt from condemnation and punishment because it was justified as, say, self-defense.[197]

If the fact-finder concludes that the conduct occurred under justifying circumstances that create such an *exception* to the broader proscription contained in the offense definition, then the defendant cannot be condemned as having violated the fully expressed public morality.[198] An act initially perceived as wrongful from the 'outsider's' perspective as violating the partially expressed public morality contained in the offense definition may, therefore, in fact be legally permissible (though not necessarily laudatory) from a more fully informed all-things-considered perspective.

While it of course is possible that Anglo-American prosecutors, knowing that the defendant can make a strong self-defense case, may decide not to charge the defendant in the first place, or may drop charges upon such a realization, the reason that justifications are part of the fifth condemnatory stage is that a defendant's stage-five condemnation is a prerequisite to violating the fully expressed public morality.[199] An offense description such as 'it is illegal to intentionally kill another person' accordingly only represents the partially expressed public morality. 'It is illegal to intentionally kill another person, *except* when the killing occurs in the course of actual self-defense,' in contrast, represents

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

[198] *See generally* FLETCHER, RETHINKING, *supra* note 46, at 457. *See also* KÜHL & HEGER, *supra* note 56, at side-note 2; KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 286 (1989). For more on justifications versus excuses, *see* Chapter IV(a).

[199] *See generally* Robert A. Hillman, *The Rhetoric of Legal Backfire*, 43 B.C. L. Rev. 819, 859 (2002); ERIC D'ARCY, HUMAN ACTS 81 (1963).

the fully expressed public morality, for it also contemplates potential justifications that create exceptions to the prohibitory norm expressed by the offense definition.[200]

g. Stage six: The defendant is not excused

The discussion so far has sought to demonstrate that justified conduct creates an *exception* to the proscription contained in the offense definition, and that using force in self-defense consequently does not infringe on the attacker's rights because it does not in a legal sense *wrong* him. An excused defendant, in contrast, actually *does* violate the offense definition; he, however, does so under circumstances that make punishment inappropriate because the defendant's conduct cannot be morally attributed to him.[201] Stated differently, offense definitions require *action-plans*; excuses, in contrast, function *retrospectively* to undermine the required relation between the proscribed conduct and the actor's pursuit of his action-plan with regard to the offense.[202] A conviction and subsequent punishment hence condemn the defendant as one who transgressed the fully expressed public morality as an accountable agent by systemic standards, and who, therefore, is morally blameworthy for the wrong he inflicted or intended to inflict.[203]

The conclusion reached in this thesis is that self-defense can only provide a justification.[204] It cannot excuse, for the excused actor, unlike the justified actor, in fact violated the fully expressed public morality. We would not, after all, say 'unlawful killing is wrong except when the killer is insane.' Rather, we say 'unlawful killing is

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

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

[202] *See generally* Schopp, *supra* note 183, at 1277.

[203] *See generally* Grant Lamond, *Coercion and the Nature of Law*, 7 LEGAL THEORY 35, 52–53 (2001); SCHOPP, *supra* note 40, at 29; SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE 137–41 (1994).

[204] *See* Chapter IV(a).

wrong, but we will not criminally condemn and punish actors who were insane when they killed.'[205]

h. Stage seven: The defendant is sentenced

Because the sentencing of defendants is so fact-specific, there is little benefit to be had from discussing here which defendants might receive what sentences. That said, any discussion of condemnation by the fully expressed public morality is incomplete without recognizing that the judicial officer's act of imposing a sentence completes the condemnatory cycle. It can also serve to either enhance the level of condemnation applied to an individual (through a harsh sentence and/or a harsh assessment of the defendant and her conduct), or it can diminish the level of condemnation (through a light sentence or a statement by the judicial officer that somehow minimizes the defendant's moral blameworthiness).

i. Stage eight: The conviction is upheld on appeal and becomes final

The final step in the subject jurisdictions is that a reviewing body determines that the proscription is lawful (e.g., the law is constitutional), the charges were properly filed, the defendant had a fair trial, and the sentencing was lawful.[206] While in many cases the public may have already reached their conclusion following the conviction and may not wait for the appeal, from a technical perspective one cannot say that a defendant was condemned by the fully expressed public morality unless and until his conviction has gone through the process provided and was found to have been just.

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[205] While some actors are excused because their incompetency prevents them from being legally accountable for their actions, others did not apply their capacities to their selection of an action-plan due to reasonably mistaken beliefs that render them internally, but not externally, justified. For a more detailed discussion, *see* Chapter IV(a)(ii).

[206] *See also* ECHR, *supra* note 55, Protocol 7, Article 2 (Nov. 22, 1984, E.T.S. No. 117) (providing for the right to appeal in criminal matters).

j. 'Unjust' self-defense outcomes as threats to the broader justice system

Self-defense almost by definition governs how people act in a time of crisis, exempting certain behaviors from criminal liability. As discussed above in Chapter II(c)(vi)(1), self-defense outcomes are uniquely susceptible to sharply diverging from what the broader public may intuitively consider acceptable and just.[207] When self-defense outcomes drastically (and consistently) diverge from a community's shared intuitions of justice (in the form of the fully expressed public morality), one impact is that the law's moral credibility risks being undercut.[208]

vii. Value #7: Deterring (potential) attackers

Summary Justification for Including This Value:

Systemically deterring crime is generally (though not universally) considered a central function of the criminal justice system. When a particular defender uses force to thwart an attack, on the other hand, she clearly imposes a cost on the attacker that makes wrongdoing riskier. The greater the scope of self-defense permitted against attackers, the higher the likelihood that potential (and, in particular, *culpable*) attackers will be deterred from engaging in the kind of conduct that authorizes defensive force.

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[207] *See generally* JULIAN V. ROBERT AND JAN W. DE KEIJSER, DEMOCRATISING PUNISHMENT: SENTENCING, COMMUNITY VIEWS AND VALUES (2014); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 31 (2007). *See also* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Arms and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 217 (2012); Paul H. Robinson *et al.*, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 2026 (2010); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1417 (2005); Jeremy A. Blumenthal, *Who Decides? Privileging Public Sentiment About Justice and the Substantive Law*, 72 UMKC L. REV. 1, 9 (2003); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV., 349, 351 (1997).

[208] Rönnau & Hohn, *supra* note 60, at side-note 231–33.

Tension with, or Support for, the Other Values:

Successful general deterrence tends to support value #1's interest in minimizing violence and protecting the state's monopoly on force. And authorizing deadly force to defend a culpable attack on a trivial interest might in fact deter attacks (value #7), serve to provide maximum protection to the defender's autonomy (value #4), and ward off the imputation of lesser standing in the case of a culpable attacker (value #3). But such arguably disproportionate force also undermines the value of maintaining the primacy of the legal process (value #5), provides almost no protection for the attacker (value #2), and may yield results deemed unacceptable by the public so that it harms the legitimacy of the legal order (value #6).

Limitations:

This admittedly more controversial decision-ground, like safeguarding the equal standing between citizens (value #3), is only implicated when the attacker is culpable. If, on the other hand, the attacker is not culpable because she, for example, is operating under a mistake (that is, she does not know she is threatening both a wrong and a harm), then the attacker will likely not be deterred by the availability of self-defense.

The final value considered here is deterrence.[209] Indeed, this value in many ways can be viewed as buttressing the other values (and the fundamental human rights they

[209] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 66–67; Kremnitzer & Ghanayim, *supra* note 46, at 886; Daniel M. Farrell, *The Justification of General Deterrence*, 94 PHIL. REV. 367, 369–73 (1985), *discussed in* Theodore B. Randles, *Soft-Served Deserts: Soft Retributivism as a Free Will-Independent Alternative for the Criminal Justice System*, 67 CATH. U. L. REV. 495, 506 (2018). *See also* Erb, *supra* note 10, at side-note 4. *But see* Dennis P. Rosenbaum, *Community Crime Prevention: A Review and Synthesis of the Literature*, 5 JUST. Q. 323, 336 (1988) ('Clearly, deterrence (whether specific or general) and self-defense are separate objectives.').

represent and protect[210]). This thesis, moreover, for ease of reference generally refers to the two standard species of deterrence (general deterrence and specific deterrence[211]) interchangeably, despite their admitted differences, which will be discussed immediately below.

Broadly speaking, deterrence is divided into two categories.[212] *General* deterrence is indirect, in that it focuses on general prevention of crime by sending a 'message' to the universe of potential bad actors.[213] *Specific* deterrence, in contrast, focuses on the individual in question; its intent is to discourage her from future criminal acts by instilling an understanding of the adverse consequences of criminality.[214] So, while general deterrence strategies focus on future group behaviors by impacting potential criminals' rational decision-making processes, specific deterrence focuses on directing the threat of punishment or negative consequences to known individuals in order to prevent those persons from committing crimes in the future.[215]

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[210] Both general and specific deterrence, for example, can be said to protect the right to life and the equality between people. *See generally* U.N. DECLARATION, *supra* note 55, Articles 1, 3, and 29; ECHR, *supra* note 55, Articles 2 and 5.

[211] *See generally* Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand*, 80 FED. PROBATION 33, 34 (2016).

[212] *See generally* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 992–95 (2003) (discussing these factors), *cited in* David Crump, *Deterrence*, 49 ST. MARY'S L.J. 317, 320 (2018); Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521, 535 (1973).

[213] *See generally* Mirko Bagaric & Peter Isham, *A Rational Approach to the Role of Publicity and Condemnation in the Sentencing of Offenders*, 46 FLA. ST. U. L. REV. 239, 247–48 (2019); Athula Pathinayake, *Should We Deter Against General Deterrence*, 9 WAKE FOREST J.L. & POL'Y 63, 78 (2018).

[214] *See generally* Mirko Bagaric *et al*., *Trauma and Sentencing: The Case for Mitigating Penalty for Childhood Physical and Sexual Abuse*, 30 STAN. L. & POL'Y REV. 1, 43 (2019).

[215] *See generally* Robert E. Wagner, *Corporate Criminal Prosecutions and Double Jeopardy*, 16 BERKLEY BUS. L.J. 205, 218 (2019); Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1, 61 (2007). *See also* Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 203 (2011).

1. General deterrence and self-defense

Elaborating on the above, when applied to self-defense, the theory grounding general deterrence leads to the reasonable assumption[216] that more permissive self-defense laws will generally deter crime. The logic is that individuals will be more likely to 'think twice' before engaging in criminal conduct of the type that could invoke the right of the victim to exercise self-defense.[217] Thus, there is a claimed benefit when self-defense laws and enforcement approaches create in the potential criminal's mind the worry that his criminal behavior is likely to result in tangible negative consequences.[218]

But do criminals in fact act sufficiently rationally to render the deterrence argument persuasive? There is substantial support for the view that criminals, as a group, are not typically characterized by highly rational future planning.[219] Instead, research has shown that criminals tend to more commonly act on impulse and behave opportunistically; in fact, violent attackers in particular tend to least carefully weigh the pros and cons of their attacks. As the court put it well in *United States v. Gulley*:

> Many of the offenders that we see commit what we would consider almost irrational crimes. They're impulsive, they have difficulty controlling their impulses, and they exercise poor judgment. That's a characteristic of their lives.[220]

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[216] It must be conceded that this proposition, to the best of the author's knowledge, has not been (and perhaps cannot be) empirically tested with reliable/conclusive results. *See generally* Raymond Paternoster, *Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective*, 23 LAW & SOC'Y REV. 7, 8 n.1 (1989) (noting that deterrence theory has received 'scant research attention').

[217] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 66–67.

[218] *But see* Lesch, *supra* note 27, at 86–87, 106 (taking the position that deterrence should not play a role in self-defense analysis).

[219] *See generally* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 178–81 (2004) (reviewing evidence that suggests that criminals do not behave rationally), *cited in* Ahson T. Azmat, *What Mistake of Law Just Might Be: Legal Moralism, Liberal Positivism, and the Mistake of Law Doctrine*, 18 NEW CRIM. L. REV. 369, 397 (2015). *Cf.* Charles N.W. Keckler, *Life v. Death: Who Should Capital Punishment Marginally Deter?*, 2 J.L. & ECON. 51, 77 n.61 (2006) (contending that 'even highly abnormal offenders act rationally to avoid arrest').

[220] 29 F. App'x 228, 230 (6th Cir. 2002). *See also* Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5 (2017); Warren Brookbanks & Richard Ekins, *The*

True, there is some support for the idea that criminals in the main act instrumentally rationally.[221] But harboring some doubts about the efficacy of deterrence does not in any event negate this value since few consider deterrence entirely irrelevant. Instead, a system so persuaded can simply decide to give this value less weight.

Turning to this value's limitations, here, too, the culpability of the attacker plays a crucial role in determining whether the value is considered a decision-ground. If an individual is not culpable (to wit, is not following a voluntary action-plan that involves posing a criminal threat to someone), then changing the nature or amount of defensive force available can be expected to have little or no impact on that attacker's behavior.[222] A young child or mentally incompetent attacker who mistakenly thinks that the person he is attacking is a tree, for example, will not change his conduct, regardless of the amount of defensive force potentially coming his way (though it might make a more rational potential attacker more careful about his conduct).

2. Specific deterrence and self-defense

Vindicating the rights of defenders by permitting defensive force entails the imposition of costs on an attacker—and that is true whether the deterrent effect is focused on the general public or on an individual person. Specific deterrence, as relevant here, potentially impacts those who have faced such defensive force in the past and who, it is hoped, have 'learned their lesson.' Most of the arguments made, and limitations noted,

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Case Against the 'Three Strikes' Sentencing Regime, 2010 N.Z. L. REV. 689, 708 (2010); T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 929 (1996); *United States v. Reynolds*, 235 U.S. 133, 150 (1914) (Holmes, J., concurring).

[221] *See, e.g.*, Lucian E. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargain, and the Loss of Innocence*, 101 KY. L.J. 723, 739–40 (2013); Anna Driggers, *Raj Rajaratnam's Historic Insider Trading Sentence*, 49 AM. CRIM. L. REV. 2021, 2036 (2012); Keckler, *supra* note 219, at 77 n.61; DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 19–22 (1990).

[222] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 66–67; Michelle Y. Ewert, *One Strike and You're Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violated Due Process and Fair Housing Principles*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 57, 77 n.130 (2016).

above concerning general deterrence also apply to specific deterrence. The reason for including this short discussion, then, is to simply recognize that there are two types of deterrence potentially at play.[223] The value of deterrence, moreover, is largely in harmony with the value of protecting the defender (value #4) and ensuring the equal standing between individuals (value #3). But, at some level at least, it is in general tension with the remaining values.

d. Balancing the competing values

Above, this thesis proposed a template, dubbed the 'value-based model,' anchored on the seven values that collectively represent one perspective on self-defense's underlying rationale. The objective of the exercise was to test the hypothesis that a more value-centric dialogue facilitates a more transparent, quality-enhancing understanding of self-defense's underlying rationale.[224] It is believed that the discussion thus far has provided initial support for the hypothesis (subject to testing in subsequent chapters) and demonstrated that values do, and should, matter in self-defense cases. This thesis has also discussed the general tensions and conflicts between the values. Building on this understanding, this thesis can now turn to the challenging question of how values as decision-grounds should be ordered or balanced, and how conflicts between them might be resolved when they conflict or 'clash.'

But prior to this more fine-grained discussion of how to approach accommodating values in different self-defense scenarios, this thesis must address the foundational question of whether and when an attacker can be said to 'forfeit' her right to life (which is antecedent to the discussion over what constellation of value-weighting might justify such a forfeiture). The discussion will conclude that the distinction between the

[223] For a deeper discussion about proportionality and excessive force, *see* Chapter IV(c).

[224] *See* Chapter II.

attacker's threatening harm versus wrong—and the related distinction between 'waiving' and 'forfeiting' rights—provides a persuasive explanation of what happens when rights 'clash.' This waiver-versus-forfeiture distinction, it will be argued, offers a helpful improvement on traditional forfeiture theory.

i. The value-based model and the 'forfeiture' of rights

As discussed below, a number of commentators, including Leverick, Sangero, Uniacke, and Thomson, have endorsed the position that a person's right to life is ultimately conditioned on conduct. But this observation merely initiates the analysis because, in order to infuse the position with content, one at a minimum must understand what types of conduct create what kinds of 'gaps' to, or limitations on, a person's conditional right to life.

1. Rights theory

Rights theorists Uniacke,[225] Leverick,[226] Sangero,[227] Thomson,[228] Rodin,[229] and others broadly maintain that the right to self-defense is not a right grounded merely on the passive right not to be killed. Rather, they contend that it is a moral right that affirmatively authorizes the defender's self-preferential conduct. They point to what they describe as the moral asymmetry between the defender and the attacker, and use that as the basis for justifying the resulting 'forfeiture' (either conditional or unconditional) of the attacker's right to life and to non-interference. Dressler, in fact, goes so far as to reject forfeiture theory entirely because he considers the killing of a wrongdoer 'morally insignificant.'[230]

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[225] *See* UNIACKE, *supra* note 203, at 213.

[226] *See* LEVERICK, *supra* note 2, at 166.

[227] *See* SANGERO, *supra* note 33, at 39, 44, 88.

[228] *See* Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 299 (1991).

[229] *See* DAVID RODIN, WAR & SELF-DEFENSE 88–89 (2002).

[230] *See* Joshua Dressler, *Battered Women and Sleeping Abusers: Some Reflections*, 3 OHIO ST. J. CRIM. L. 457, 465–66 (2006), *discussed in* Vera Bergelson, *Justification or Excuse—Exploring the Meaning of*

One challenge faced by such a broad conception of forfeiture is that, once forfeited, the attacker's right to life can be said to be forfeited even after the immediate threat subsides. To address this concern, Uniacke and Leverick[231] argue in favor of a narrower conception of forfeiture. Uniacke's notion of 'temporary forfeiture' refers to a 'right lost . . . due to some crime or fault, breach . . . or neglect of contract or rules on the part of the person who forfeits.'[232] She also draws on the concept derived from forced choice theory that a person posing an 'unjust threat' *temporarily* loses her right to non-interference. This loss-of-right situation continues only as long as the culpable or innocent attacker 'for no good reason' poses the threat.[233]

The position advanced here is that a theory of forfeiture provides the most persuasive avenue for justifying self-defensive killing. Alternative methods proffered to explain self-defense are, as discussed, less convincing. For example, Wallerstein claims that the right to life cannot be forfeited—even temporarily.[234] Yet in her final analysis, she contends that when a defender uses deadly force against an aggressor 'he has justifying circumstances and does not violate the aggressor's right to life and does not wrong him.'[235] In the absence of some type of forfeiture theory, this final step in Wallerstein's analysis appears incomplete because killing an innocent attacker certainly violates his right to life—indeed, it extinguishes it.

Provocation, 42 TEX. TECH. L. REV. 307, 316 (2009). *But see* Douglas N. Husak, *Partial Defenses*, 11 CAN. J.L. & JURIS. 167, 170 (1998).

[231] LEVERICK, *supra* note 2, at 66.

[232] UNIACKE, *supra* note 203, at 201.

[233] *Id*.

[234] Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 1032 (2005).

[235] *Id*. at 1031.

2. Forced choice theory[236]

Forced choice theory postulates that when an attacker 'forces' a defender into a position where the defender has no option but to make a choice between lives, the attacker loses the right to complain that his life is the one in jeopardy.[237] The defender, thus, faces a ('forced') choice between sustaining a deadly injury or killing the attacker. In contrast, the attacker, who under the theory is able to stop his attack at any time and thereby avoid harm to anyone, does not face a similar forced choice.[238]

For commentators like Wasserman, the very justification[239] of self-defense is deeply rooted in this 'critical asymmetry between the present aggressor and his victim.'[240] Viewed from this perspective, forced choice theory applies to all self-defense cases. The challenge to forced choice theory, however, is that it does not substantively distinguish between culpable and non-culpable threatened attacks. Instead, it simply assumes that all attackers are culpable and, therefore, are making a deliberate decision to 'force' the defender's hand to either kill or absorb the attack.[241] This presumption, however, is the significant weakness of the theory, because the difference between culpable and non-culpable attackers is in fact critical.[242]

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[236] Note that forced choice theory is also discussed in some detail below at Chapter II(d)(i)(2).

[237] *See generally* Erb, *supra* note 32, at 596–97; David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFF. 356, 371 (1987); Phillip Montague, *Self-Defense and Choosing Between Lives*, 40 PHIL. STUD. 207, 211, 216 (1981).

[238] *See* Wallerstein, *supra* note 234, at 1010–11. *See also* Susan Dimock, *Criminalizing Dangerousness: How to Preventively Detain Dangerous Offenders*, 9 CRIM. L. & PHIL. 537, 551–52 (2015); Kimberly K. Ferzan, *Culpable Aggression: The Basis for Moral Liability to Defensive Killing*, 9 OHIO ST. J. CRIM. L. 669, 688–89 (2012).

[239] The thesis concedes that the term 'justification' is normative and has no pre-ordained meaning; thus, a 'correct' approach cannot be discovered through theorizing.

[240] Wallerstein, *supra* note 234, at 1027. *See also* Kim, *supra* note 142, at 281; Segev, *supra* note 72, at 432–33.

[241] *See generally* Wasserman, *supra* note 237, at 364.

[242] *Cf.* Erb, *supra* note 32, at 597 (distinguishing between culpable and innocent attackers).

Any comprehensive theory of self-defense must address—and distinguish—culpability-based conceptions of responsibility (morally intentional actors), on the one hand, and causally based conceptions of responsibility (morally unintentional actors), on the other.[243] By fixating on the defendant rather than the act, forced choice theory tends to blur the lines between excuse and justification—and, for reasons discussed in Chapter IV(a), this is a valuable distinction worth maintaining.

3. Answering the gateway questions: Can rights ever be 'forfeited' by an innocent attacker?

Kasachkoff critiques forfeiture theory by questioning whether an attacker's right to life can ever be 'forfeited' when the attacker is non-culpable.[244] He contends that forfeiture must be linked to fault because blameless persons cannot be said to 'deserve' to lose their lives.[245] Uniacke, in response, argues that forfeiture is based purely on the *conduct* of the aggressor, rather than on any notion of the aggressor's *fault*.[246] That is, it is only by becoming an 'unjustified immediate threat to the life of another' that a person forfeits his right to life.[247] And while Schopp does not formally use the language of forfeiture, his culpability-based analysis appears to track the same concept:

> By engaging in a criminal law violation of the victim's sovereignty, the aggressor steps outside the domain of central, self-regarding life decisions within which he can claim a right to freedom from interference. The victim's

[243] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 68.

[244] Tziporah Kasachkoff, *Killing in Self-Defense: An Un-Questionable or Problematic Defense?*, 17 LAW & PHIL. 509, 519 (1998).

[245] Tziporah Kasachkoff, *Comment and Reply to Suzanne Uniacke's 'A Response to Two Critics'*, 19 LAW & PHIL. 635, 639 (2000).

[246] Suzanne Uniacke, *In Defense of 'Permissible Killing': A Response to Two Critics*, 19 LAW & PHIL. 627, 629 (2000).

[247] *Id.*

> exercise of defensive force against the aggressor does not, therefore, violate his right to self-determination.[248]

Schopp, consequently, believes that the attacker has a right against non-interference that could be forfeited, for his 'right to self-determination never extended to actions that intrude into the [defender's] protected domains.'[249] But, while Schopp frames his analysis from the perspective of a presumptively morally culpable attacker threatening a 'criminal law violation,' is the morally innocent attacker really seeking to 'intrude' on the defender's right to self-determination or equal standing?[250] For the reasons set forth below, the position taken here is that the approaches developed by scholars such as Kasachkoff, Uniacke, and Schopp have merit. But it is hoped that, by introducing an alternative way of understanding forfeiture that directly addresses the innocent versus culpable attacker conundrum, a more robust forfeiture argument can be advanced.

4. The value-based model's approach to the 'forfeiture' of rights—introducing the concept of 'waiver'

Adopting Uniacke's and Thomson's approaches, Leverick concludes that:

> It is acceptable to kill an aggressor because the aggressor, in becoming an unjust immediate threat to the life of another that cannot be avoided by reasonable means, *temporarily forfeits her right to life*, at least as long as these conditions remain in force.[251]

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[248] SCHOPP, *supra* note 40, at 75–76.

[249] *Id*. at 78.

[250] Farrell argues that notions of distributive justice allow us to allocate harm to an unjust aggressor. *See generally* Farrell, *supra* note 209, at 372.

[251] LEVERICK, *supra* note 2, at 2. (Emphasis added).

Leverick's quasi-Hohfeldian 'claim-right' point of departure,[252] however, is, as in the cases noted above, hampered by the bluntness of the term 'forfeiture.' Under the orthodox view, an attacker 'forfeits' his rights as a result of his 'wrongful' conduct; this implies a form of open-ended punishment or penalty.[253] Dsouza faults forfeiture theory because it, in the self-defense context, 'carries with it punitive undertones and suggests some element of fault on the part of the person suffering the defensive action.'[254]

The position proposed here seeks to overcome these challenges by replacing the notion of blanket forfeiture with a more fine-tuned analysis which distinguishes between (morally) intentional and unintentional actors.[255] This thesis' position, therefore, is that such a bifurcation blunts, and in fact perhaps overcomes, the traditional arguments advanced against the concept of forfeiture of rights.

It has been recognized that there can be a '*conditional forfeiture*' or '*temporary suspension of rights*,' either of which apply to innocent defenders who, because they pose unjust threats of *harm*, forfeit their right to non-interference conditioned on their being a continued threat.[256] As Simons, discussing Bergelson, puts it, conditional forfeiture is 'a special kind of forfeiture, involving a conditional right to life, where the actor loses the right if he becomes an unjust immediate threat.'[257]

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[252] *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16–59 (1913).

[253] *See generally* Thomson, *Self-Defense*, *supra* note 228, at 261. *See also* LEVERICK, *supra* note 2, at 67; Whitley Kaufman, *Is There a Right to Self-Defense?*, 23 CRIM. JUST. ETHICS 20, 25–29 (2004); SCHOPP, *supra* note 40, at 75–76.

[254] DSOUZA, *supra* note 71, at 66–67. *See also* JONATHAN HERRING, LAW AND THE RELATIONAL SELF 714–15 (manuscript on file with author) (discussing the various traditional arguments against forfeiture theory).

[255] Erb, for example, recognizes this distinction in the self-defense context, contending that the 'duty of interpersonal solidarity' is greater with innocent attackers. *See* Erb, *supra* note 32, at 596.

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

[257] Kenneth W. Simons, *The Relevance of Victim Conduct in Tort and Criminal Law*, 8 BUFF. CRIM. L. REV. 541, 544 n.9 (2005). *See also* Catherine Elliott, *Interpreting the Contours of Self-Defence Within the*

Building on this concept of forfeiture conditioned on conduct, this thesis introduces the concept of '*conditional waiver*' to describe culpable attackers who knowingly pose a threat of both harming and *wronging*, thereby waiving their right to non-interference.[258] While Simons contends that self-defense 'involves (involuntary) forfeiture,'[259] the position developed here is that knowing and intentional attackers are, in fact, morally blameworthy.[260] The natural consequence of launching a morally blameworthy attack is that the conduct creates in the defender the right to resort to lawful defensive force, which, in turn, justifies imputing the intent to conditionally *waive* the attacker's right to non-interference.[261]

The decision to in this manner bifurcate the traditional omnibus term 'forfeiture' also responds to critics such as Kasachkoff by recognizing the considerable normative asymmetry between those who threaten to merely harm, and those who threaten to both harm *and* wrong.[262] And so while 'forfeiture' traditionally refers to the simple *loss* of a particular right,[263] waiver includes conduct-inferred *knowing and intentional relinquishment* or abandonment of a known right.[264] So when an individual engages in a

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Boundaries of the Rule of Law, the Common Law and Human Rights, 79 J. CRIM. L. 330, 339 (2015); Samantha Krause, *Killing in Defence of Property: A Constitutional Approach*, 2012 J. S. AFR. L. 469, 477.

[258] The notion that the normative culpability/responsibility of the attacker is relevant to the defender's ability to exercise defensive force (and what amount of defensive force the defender can utilize) finds support in some of the German scholarship. *See, e.g.*, Lesch, *supra* note 27, at 91.

[259] Simons, *supra* note 257, at 544 n.9.

[260] *See generally* Vogel, *supra* note 101, at 43–44; Robert E. Wagner, *Corporate Criminal Prosecutions and the Exclusionary Rule*, 68 FLA. L. REV. 1119, 1123 (2016). *Cf.* Karen L. Bell, *Toward a New Analysis of the Abortion Debate*, 33 ARIZ. L. REV. 907, 927 (1991).

[261] *See generally Taylor v. United States,* 414 U.S. 17, 20 (1973) (finding implied waiver of right to be present during trial when defendant absconded). *See also* Adrienne Rose, *Forfeiture of Confrontation Rights Post-Giles: Whether a Co-Conspirator's Misconduct Can Forfeit a Defendant's Right to Confront Witnesses*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 281, 293–94 (2011); *United States v. Carlson*, 547 F.2d 1346, 1358 (8th Cir. 1976).

[262] *See* Chapter II(c)(iii).

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

[264] *See generally Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *See also* Luis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive*

criminal attack on another, she knows (or can be imputed to know) that she, through her conduct, has relinquished her right to non-interference in her autonomous sphere of self-determination.[265] Innocent attackers, in contrast, by definition do not know of the wrongfulness of their conduct. They, therefore, at worst can be said to forfeit some of their ability to claim an absolute right to non-interference because the defenders cannot be expected to always subjugate their own substantive interests to those of the attacker (whether innocent or otherwise).

5. Bridging the 'culpable' versus 'innocent' divide through the concept of 'waiver' of rights

It is therefore accepted here that, by becoming what Uniacke has aptly termed an 'unjust threat,'[266] the attacker creates a morally distinctive asymmetry between himself and the person whom he is threatening.[267] Uniacke argues that individuals cannot be said to possess unconditional human rights; rather, they have rights that are *conditioned* on their behavior (that is, on their not wronging *or* harming another).[268]

Uniacke shares the view of philosophers like Grotius and Pufendorf that the moral or criminal culpability of the 'unjustified threat' is irrelevant. Grotius described as 'innocent' or 'unoffending' those who do not create a dangerous situation that threatens an unjust injury. Pufendorf, like Grotius who equates 'innocent' with 'unoffending' (in

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Punishment in Civil Forfeiture, 19 U. PA. J. CONST. L. 1111, 1159 (2017); *Brookhart v. Janis*, 384 U.S., 1, 4 (1966).

[265] *See generally Taylor,* 414 U.S. at 20; Rose, *supra* note 261, at 293–94.

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

[267] *See generally* Eamon Aloyo, *Just Assassinations*, 5 INT'L THEORY 347, 359 (2013); UNIACKE, *supra* note 203, at 75–81.

[268] UNIACKE, *supra* note 203, at 157–58. *See generally* Henry L. Hart, *Are There Any Natural Rights?*, *in* POLITICAL PHILOSOPHY 53 (Anthony Quinton ed., 1967). *See also* Terrance McConnell, *The Nature and Basis of Inalienable Rights*, 3 LAW & PHIL., 25, 28 (1984); Hugo Bedau, *The Right to Life*, 52 MONIST 550, 568 (1968) (adopting a forfeiture theory in the case of culpable aggressors: '[T]he offender, by violating the life or liberty or property of another, has lost his own right to have his life, liberty, or property respected.'), *discussed in* Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 20–21.

the sense of not creating a dangerous situation threatening an unjust injury),[269] likewise implied that self-defense against insane or reasonably mistaken—and therefore morally innocent—aggressors is justifiable: '[I]t is enough that the other have no right to attack or kill me, and there be on my side no obligation to die in vain.'[270] While the person posing the threat may be morally innocent, the threat he is posing is therefore nonetheless 'unjust' in the sense that there is no objectively good reason warranting it. The defender need not tolerate it.[271]

This argument supports a right of self-defense against moral innocents such as madmen, sleepwalkers, and those laboring under a mistake who pose an immediate and identifiable threat. Such actors threaten the defender's autonomy with harm the defender cannot be legally required to absorb.[272] Once an actor through his actions—either voluntary or involuntary, culpable or blameless—becomes an immediate unjust threat to another, his right to non-interference in his personal domain is either conditionally waived or forfeited (depending on the culpability of the attacker) to an extent compatible with the implicated decision-grounds. The right to non-interference, moreover, remains forfeited until he ceases to be such a threat.

The position taken here is generally in accord in terms of certain outcomes. But it differs in terms of the rationale and practical implications. A significant point of

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[269] HUGO GROTIUS, ON THE RIGHTS OF WAR AND PEACE 62 (William Whewell ed., 2009) (1625).

[270] 2 SAMUEL VON PUFENDORF, DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO 31 (Frank G. Moore trans., 1927) (1682).

[271] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 64, 68–73; Krause, *supra* note 257, at 478; Jeremy Horder, *Redrawing the Boundaries of Self-Defence*, 58 MOD. L. REV. 431, 435–38 (1995); Uniacke, *supra* note 146, at 95; JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY 42–46 (William Parent ed., 1986). For an analogous discussion of morally innocent actors in tort law, *see* JULES L. COLEMAN, RISKS AND WRONGS 332 (1992). For a criticism of Coleman's argument, *see* Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus; Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051, 1098–1100 (1997). *See also* UNIACKE, *supra* note 203, at 157–58.

[272] *See generally* Jeff McMahan, *Self -Defense Against Morally Innocent Threats, in* CRIMINAL LAW CONVERSATIONS 385–406 (Paul H. Robinson *et al*. eds., 2009); Lesch, *supra* note 27, at 103.

departure is that the above approach arguably pays insufficient attention to the significant normative distinction between culpable and innocent threats.[273] Leverick, in fact, allows that a forfeiture-based account of self-defensive killing is 'likely to be controversial' because 'of the term's association with fault, penalty, or punishment.'[274]

While threats of harm from innocents threaten defenders with concrete losses (*see* value #4), threats of wrong posed by culpable attackers *additionally* threaten to impute lesser standing to the defender (value #3). Similarly, the concept that all individuals owe each other a basic obligation of 'human solidarity' (and, thus, the responsibility to refrain from harming others when possible) can reasonably be interpreted more strictly in the context of morally innocent attackers who do not threaten the imputation of lesser standing (value #3).[275] Parting from Uniacke's approach, then, the theory proposed here draws a distinction between culpable and innocent threats—that is, between wrongs implicating waiver and harms implicating forfeiture—on the basis of their normative/qualitative differences. These differences, in turn, affect the relative weights accorded to the value-based model's decision-grounds that provide content to the macro principles of 'protecting the defender' and 'protecting the attacker.' It is believed that employing this proposed distinction between waiver and forfeiture of an attacker's rights allows one to meaningfully distinguish between culpable and non-culpable threats, thereby overcoming the deficiencies in Uniacke's and Leverick's conception of the undifferentiated 'aggressor' posing an 'unjust and immediate threat.'

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[273] *See generally* Segev, *supra* note 72, at 392 n.27.

[274] LEVERICK, *supra* note 2, at 67. *See also* Kaufman, *supra* note 253, at 25–29; SCHOPP, *supra* note 40, at 75–76; Thomson, *supra* note 228, at 261.

[275] *See generally* Lesch, *supra* note 27, at 103–04 (retreat and avoiding conflict, and absorbing minor harm, appropriate in such cases; contending that resulting damage to a defender's property must be covered by the state). *See also* Chapter II(c)(iii).

ii. Considering alternative value-accommodation methods

The discussion thus far has sought to demonstrate that culpable attackers waive their right to non-interference, whereas non-culpable attackers merely forfeit the right. This analysis, in turn, provides the analytical grounding for a discussion of how the values implicated in self-defense cases should be ordered, or accommodated, in those cases where they come into friction or outright conflict. Put another way, the discussion concerning the general *existence* of forfeiture and waiver sets the stage for an examination of how the implicated values become decision-grounds that justify *individual instances* of forfeiture or waiver.

Recall that, if the hypothesis being tested holds, in cases of purported self-defense the value-based model will serve to enhance the discussion by making more explicit (a) *what* decision-grounds are at play, (b) the *extent* to which the implicated decision-grounds are at play, and (c) the necessary *sliding-scale accommodation* between conflicting decision-grounds. This, it is hoped, will facilitate more transparent and balanced decision-making. That said, it is also conceded that any 'balancing approach,' including the one proposed here, is inherently challenging. Assigning any particular relative weight to competing interests, after all, requires the application of normative judgments, rather than reaching quasi-scientific determinations.[276] In addition, there are some jurisprudential challenges implicated when seeking to balance basic individual human rights (such as the right to life) against more collective interests (such as reduction in crime).[277]

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[276] *See generally* Lucia Zedner, *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*, 32 J.L. & SOC'Y 510, 510–11 (2005). *See also* Ivica Pavic, *Human Dignity in the Context of Prison Privatization*, 8 JURID. TRIB. 6, 14 (2018); Niels Petersen, *Avoiding the Common-Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication*, 11 INT'L J. CONST. L. 294, 299–300 (2013).

[277] *See generally* Ronald Dworkin, *Rights as Trumps, in* THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984), *cited in* Christopher Michaelsen, *Reforming Australia's National Security Laws: The Case for a Proportionality-Based Approach*, 29 U. TAS. L. REV. 31, 35 (2010).

But it will be set aside for the moment, since they are not fatal to the undertaking, that all such 'balancing' efforts are open to some level of critique. For when the right of a defender to use self-preferential force clashes with, say, the right of an attacker to be free from harm, the conflict between them must somehow be resolved by reference to established legal principles (and, central here, to the recognized interests/values driving them). This orientation toward principles, while not free from doubt, aids judges and other fact-finders in their efforts to determine which right takes priority, and under what circumstances.[278] If the hypothesis being tested holds, then a more transparent approach to taking account of the conflicting demands between rights will help narrow (though not eliminate) the scope of conflicts between rights.[279]

1. Single value approach

One could argue that a system based entirely on a *single* decision-ground avoids inconsistency and potential abuse. German law, as introduced in Chapter I, in the early part of the last century broadly endorsed such a single-value system. The German view was that 'the right must not have to yield to the wrong,' and that the defender therefore was only limited by necessity.[280] Similarly, Leverick has largely focused on the 'equality of [the attacker's] life' as the critical decision-ground dictating outcomes.[281] And Schopp, in turn, has built his model around protecting the autonomy of the defender.[282] The difficulty with such single-value systems, however, is that, while it is true that they

[278] *See generally* Gunnar Beck, *The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness*, 25 PENN ST. INT'L L. REV. 615, 630 (2007).

[279] *See id*. *See also* Gunnar Beck, *The Moral Void at the Heart of Human Rights Adjudication*, 8 J. COMP. L. 237, 238–40 (2013); Laura K. Klein, *Rights Clash: How Conflicts Between Gay Rights and Religious Freedoms Challenge the Legal System*, 98 GEO. L.J. 505, 519 (2010).

[280] *See, e.g.*, 55 RGSt 82, 83.

[281] *See* discussion in Chapter III(c).

[282] *See* discussion in Chapter III(e).

provide bright-line answers to most questions, they also for no objectively good reason ignore competing values.

Consider the aforementioned German fruit thief example. The 'traditional' German approach permitted the Prussian farmer to use deadly force to ensure that the youthful thief was not able to make off with his fruit because the 'wrong' must never yield to the 'right.' The German Supreme Court, in delivering this ruling, made no effort to analyze competing interests at stake. The exclusion of the other decision-grounds from consideration, however, called for an explanation. But none was forthcoming. Instead, the court simply re-stated the categorical rule and strictly applied it to the facts of the case.[283] Yet, as demonstrated above, there are multiple values that, depending on the circumstances, arguably have an equally valid claim for consideration as decision-grounds. It, therefore, is contended that the single-value approach inadequately explains self-defense's underlying rationale.

2. Simple priority approach

Alternatively, one could use a *simple priority approach* allowing the value most directly at play to dictate the self-defense outcome.[284] While employing such a more open-textured tactic may be preferable to the competing single-value approach, this solution likewise requires the decision-maker to for no good reason ignore other impacted values.[285]

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[283] 55 RGSt 82, 85. *See also* Chapter V(b).

[284] *See generally* Nicolas Croquet, *Implied External Limitations on the Right to Cross-Examine Prosecution Witnesses: The Tension Between a Means Test and a Balancing Test in the Appraisal of Anonymity Requests*, 11 MELB. J. INT'L L. 27, 63–64 (2010); Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 131, 134 (2003); David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, 40 CLEV. ST. L. REV. 517, 520 (1992).

[285] *See generally* Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 29 (1987–1988).

3. The proposed weighted value approach

As already mentioned, it is accepted that the identified values do not have self-evident weights. As such, any 'balancing' of values is inherently challenging. As Zedner puts it:

> Typically, conflicting interests are said to be 'balanced' as if there were a self-evident weighting of or priority among them. Yet rarely are the particular interests spelt out, priorities made explicitly, or the process by which a weight is achieved made clear. . . . Although beloved of constitutional lawyers and political theorists, the experience of criminal justice is that balancing is a politically dangerous metaphor unless careful regard is given to what is at stake.[286]

Recall that the hypothesis tested here is whether consideration of a broader array of values operating as decision-grounds will improve the transparency/quality of self-defense decision-making. The proposed numerical assignments that follow are designed to broadly illustrate (1) that different fact-scenarios appropriately require one to consider different values as decision-grounds; (2) that consideration of these values, and their relative weighting, improves the transparency of decision-making; and (3) that such a value-centric discussion lays the groundwork for the challenging task of determining a reasonable accommodation of the different values when the defender's and attacker's interests conflict.

Put another way, the illustration that follows is designed to help test the hypothesis, but it is not meant to suggest that the value-based model (or, for that matter, any similar model) will yield precise and fully defensible self-defense outcomes in all

[286] Zedner, *supra* note 276, at 510–11. *See also* Jürgen Habermas, *Reply to Symposium Participants, Benjamin N. Cardozo School of Law, in* HABERMAS ON LAW AND DEMOCRACY CRITICAL EXCHANGES 430 (1998), *discussed in* Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT'L J. CONST. L. 572, 573 (2005); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1001–05 (1987).

cases.[287] With these points and limitations in mind, this thesis for illustrative purposes will assign numerical values to different fact scenarios.

Table 1 (Key)

Weight	**Meaning**
1	Decision Ground Favors Protecting *Defender*
0	Decision Ground Not Pertinent
-1	Decision Ground Favors Protecting *Attacker*

To demonstrate the application of value quantification to a hypothetical in the self-defense context, consider the case of hallucinating and mentally incompetent Andrew who is threatening to slap Victor as Victor is sitting on a park bench. Andrew, in fact, believes Victor to be a fly. Assume further that Victor's only means of avoiding the minor battery is by using deadly force against Andrew. To understand whether such deadly force should be sanctioned, this thesis must examine how the facts of this particular case would be evaluated under the value-based model of self-defense.

The scenario just described leaves undisturbed the presumption that both parties have a fundamental, individual right to life deserving protection (values #2 and #4), and that the state has the related collective interest in reducing interpersonal violence (as reflected in value #1). The harm posed by the attack, moreover, is not so severe as to be non-compensable (and could be resolved in court, implicating value #5), and the use of deadly force to avert it is therefore disproportionate to the interest threatened. The incompetent Andrew, moreover, is unable to conform his conduct to the strictures of the law and is not attempting to elevate his interests above those of the victim. Deterrence

[287] *See generally* Jonathan Herring & Charles Foster, *Welfare Means Relationality, Virtue and Altruism*, 32 LEGAL STUD. 480, 484 (2012) (commenting that balancing tests can inaccurately lend a 'quasi-scientific credibility'); Michael Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 DREXEL L. REV. 101, 161 (2012) (same); Zedner, *supra* note 276, at 510–11 (noting that, in the typical 'balancing test,' 'rarely are the particular interests spelt out, priorities made explicitly, or the process by which a weight is achieved made clear.').

(value #7) and maintaining equal standing between people (value #3) are, therefore, also not implicated.[288] While Andrew's act clearly threatens Victor's autonomy (value #4), it, moreover, is not the type of 'most serious' (culpable) conduct implicating equal standing (resulting in the complete 'forfeiture' of Andrew's right to non-interference discussed in Chapter IV(d)(i)).

Turning to maintaining the legitimacy of legal order (value #6), not authorizing Victor to use lethal force to avoid a slap will not cause the public to lose respect for, or confidence in, the criminal justice system (indeed, authorizing such force against the hallucinating Andrew will likely pose a greater threat to this value). Finally, ensuring the primacy of the legal process (#5) also counsels against authorizing deadly force because the relatively minor harm can, as necessary, be civilly compensated.

Considering all the values at play, then, Victor's right to autonomy and non-interference in this case should yield to the justice system's interest in protecting the hallucinating, non-culpable Andrew:

Table 2

Nature of Threat: Non-culpable threat from insane Andrew		
Seriousness of Threat: Low (slap on the face)		
Defensive Force: Deadly force		
Decision Ground	**Weight**	**Summary of Reasoning**
Value #1: Collective violence-reducing function	-1	The criminal justice system's collective interest in reducing violence by protecting its monopoly on force here favors the hallucinating Andrew because, in the context of a balancing of harms, the system is being asked to sanction deadly force against the morally innocent attacker so that Victor can avoid slight bruising. From a collective perspective,

[288] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 66 (deterrence largely not implicated in innocent attacks).

Decision Ground	Weight	Summary of Reasoning
		permitting such outcomes in cases like this threatens to without compelling reason undermine the state's monopoly on force.
Value #2: Protecting the individual attacker's (presumptive) right to life	+1	Andrew is facing deadly force merely because Victor wants to avoid possible slight bruising. Given this balance of harms, the presumption that Andrew has a right to life is not overcome.
Value #3: Maintaining equal standing (*see* Chapter II(c)(iii))	0	Andrew is mentally incompetent and is, therefore, not following a self-willed action plan. As a morally innocent attacker, he thus is only posing a threat of *harm,* and not wrong, to Victor. Maintaining equal standing is, consequently, not implicated.
Value #4: Protecting the defender's autonomy (*see* Chapter II(c)(iv))	0	Andrew's attack is threatening Victor's right to non-interference (even though the threatened harm from the slap is both relatively trivial and compensable). Given the nature of the threatened attack, the interest in protecting the defender's autonomy is neutral (though one could reasonably argue that it should be +1 because the compensable and trivial nature of the attack are accounted for elsewhere).
Value #5: Ensuring the primacy of the legal process (*see* Chapter II(c)(v))	-1	Victor, if he were so inclined, could bring a civil suit against Andrew or his guardians to try to receive nominal compensation for the trivial harm. Because this is an acceptable alternative to deadly force, this value favors not authorizing deadly force.
Value #6: Maintaining the legitimacy of the legal order (*see* Chapter II(c)(vi))	-1	Permitting a defender to use deadly force against an incompetent (and, thus, morally innocent) person in order to avoid receiving a slight bruise will likely be broadly viewed as harsh and unjust, threatening to undermine the public's view of the criminal justice system's moral legitimacy.

Decision Ground	Weight	Summary of Reasoning
Value #7: Deterrence (*see* Chapter II(c)(vii))	0	Andrew is incompetent and unable to control his conduct. Allowing self-preferential defensive force in such a circumstance would have no specific or general deterrent impact on Andrew or others similarly situated.
TOTAL	**-2**	**Deadly force is presumptively (and narrowly) unjustifiable.**[289]

[289] Note that a fully culpable attacker threatening serious harm could have a +6-point total. But the sliding-scale nature of the analysis naturally means that changes in the assumptions change potential outcomes. *See generally* Rönnau & Hohn, *supra* note 60, at side-note 113, 226.

III. THEMATIC LITERATURE REVIEW

This thesis tests the hypothesis that a more detailed accounting of the underlying values believed to provide the rationale for self-defense will aid in both highlighting and minimizing some of the hidden normativity characterizing much of the past and present self-defense discourse. It also examines the related claim that a more value-centric approach will enhance the transparency and quality of the decision-making. As a foundational matter, then, it is sensible to determine the extent to which, when viewed against the backdrop of the approaches championed by the leading scholars in the field, this proposed value-centric approach is necessary and helpful. In so doing, this chapter also examines whether this thesis' analysis of the hypothesis adds something extra to the ongoing scholarly debate (or whether, instead, self-defense scholars have already developed fully comprehensive theories grounded on the full array of values-as-decision-grounds implicated in self-defense cases).[290]

a. Protecting the state's monopoly on force (and the primacy of the legal process)

Ashworth's and Leverick's analyses differ on the topic of the state's interest in protecting its monopoly on force, in that Leverick more explicitly mentions the justice system's collective interest in reducing overall societal violence (and, thus, protecting the state's monopoly on force).[291] But it is among the German scholars that this topic has received

[290] Note that the discussion that follows largely focuses on the scholars who have developed the most comprehensive theories of self-defense. That said, none of the discussed (and undiscussed) commentators' treatment considers the full range of values discussed here.

[291] LEVERICK, *supra* note 2, at 45, *citing* Ryan, *supra* note 75, at 510. *See also* Weber, *supra* note 54, at 78 (defining the State as 'a human community that (successfully) claims the monopoly of the legitimate use of physical force').

the most searching treatment. Pest,[292] Greco,[293] Nourse,[294] and Roxin[295] are just a few of the scholars who have in their analyses emphasized that reducing interpersonal violence advances the systemic interest in helping protect the fundamental right to life[296] because self-defense functions as an alternative to state power. Specifically, justified self-preferential force is available in those situations where police protection is not reasonably accessible. And so the Kühl and Heger have argued that a state's obligation to protect individual rights creates a default priority for state force as a means of thwarting attacks, and, conversely, requires presumptive deference to state action (when available and effective).[297] Similarly, according to Rönnau and Hohn, only when the police are unavailable is self-preferential force 'necessary' as an exception to the state's monopoly on force.[298] Necessity and imminence, then, are generally considered critical limits on self-preferential force intended to ensure that self-defense does not become an alternative to, or undermine, the state's collective obligation to protect its citizens.[299]

b. Respect for the attacker's 'right to life'

Efforts to engage in a comprehensive discussion of the values at play in self-defense cases are, as shown here, rare. And those scholars who do discuss self-defense from a value-centric perspective tend to narrowly focus on the *attacker's* right to life. Schopp, in

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[292] Pest, *supra* note 54, at 137.

[293] Luís Greco, *supra* note 54, at 670.

[294] *See* Nourse, *supra* note 62, at 1692–1726 (arguing that the criminal law is an instrument of the state, designed to maintain a liberal political order and contending that defenses, like offenses, accomplish the common task of preserving the State's monopoly on force).

[295] ROXIN, *supra* note 56, at § 15, side-note 4.

[296] *See generally* U.N. DECLARATION, *supra* note 55, Article 3; ECHR, *supra* note 55, Article 2. *See also* KÜHL & HEGER, *supra* note 56, at side-note 11a; Erb, *supra* note 32, at 596–97. *But see* U.N. Small Arms, *supra* note 56 (concluding that the 'principle of self-defence' is not a broadly-recognized human right).

[297] *See* KÜHL & HEGER, *supra* note 56, at side-note 11a. *See also* FISCHER, *supra* note 10, at side-note 35; Lesch, *supra* note 27, at 111–12.

[298] *See* Rönnau & Hohn, *supra* note 60, at side-notes 183–84.

[299] *See generally* Isensee, *supra* note 63, at 23; MERTEN, *supra* note 63, at 33.

contrast, champions the more 'libertarian'[300] perspective and would permit deadly force to avert even non-deadly (and, arguably, trivial) threats when such defensive force is 'necessary.'[301] He contends that 'culpable transgressions move aggressors beyond the boundaries of their protected domains.'[302]

While Erb also invokes a *defender's* right to life as an 'imperative human right requirement' requiring protection,[303] the majority of contemporary scholars, including prominently Ashworth,[304] Ryan,[305] Fletcher,[306] Leverick, Robinson,[307] Darley,[308] Fontaine,[309] and Schulhofer,[310] have endorsed different variants of the 'pacifist' position which in the main focuses on the *attacker's* right to life. Sangero similarly comments that the system determines just self-defense outcomes.[311]

By way of an example of this human rights focus, Ashworth in his influential 1975 *Cambridge Law Journal* article on self-defense against deadly attacks proposed one of the early value-based approaches to thinking about self-defense.[312] In an effort to find

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[300] *See* Nourse, *supra* note 3, at 1271–72 (distinguishing between 'pacifist' and 'libertarian' conceptions of self-defense).

[301] SCHOPP, *supra* note 40, at 9.

[302] *Id*. at 77.

[303] Erb, *supra* note 32, at 594.

[304] *See* Andrew J. Ashworth, *Self-Defence and the Right to Life*, 34 CAMBRIDGE L. J. 282, 289 (1975).

[305] *See* Ryan, *supra* note 75, at 508.

[306] *See* FLETCHER, A CRIME OF SELF-DEFENSE, *supra* note 47, at 34.

[307] *See* PAUL. H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 60 (1995), *cited in* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1443 (2001).

[308] *See id*.

[309] *See* Reid G. Fontaine, *In Self-Defense Regarding Self-Defense: A Rejoinder to Professor Corrado*, 47 AM. CRIM. L. REV. 97, 101–02 (2010).

[310] *See* Stephen Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL. 105, 129, 132–133 (1990).

[311] SANGERO, *supra* note 33, at 72–73.

[312] Ashworth, *supra* note 304, at 282, *discussed in* Nourse, *supra* note 3, at 1272. *See also* Margaret Raymond, *Looking for Trouble: Framing and the Dignitary Interest in the Law of Self-Defense*, 71 OHIO ST. L.J. 287, 326 (2010); Sangero, *New Defense*, *supra* note 33, at 506; George P. Fletcher, *The Right to Life*, 13 GA. L. REV. 1371, 1376–80 (1979).

consistency in the law of self-defense, Ashworth set out to examine the values and interests involved in self-defense cases. Ashworth, who advances what he terms a 'human rights approach' to self-defense, in the course of arguing against justifying deadly self-defensive force against a fully culpable attacker to prevent serious bodily injury short of death, contends that:

> The harm caused by homicide is absolute and irredeemable, whereas the harm caused by many other crimes is remediable to a degree. Even in crimes of violence which leave some permanent physical disfigurement or psychological effects, the victim [maintains] his or her life and, therefore, the possibility of further pleasures and achievements, whereas death is final.[313]

As this passage illustrates, Ashworth, by according central importance to the proportionality of harms, sets forth what in practice amounts to the rule that even the fully culpable aggressor's right to life must be protected whenever possible. He then uses this point of analytical departure to conclude that, out of 'respect for the attacker's right to life and physical security,'[314] defenders must always avoid conflict, seek to retreat, use an amount of force that is strictly proportionate to the amount of harm threatened, and never use deadly force to defend property. What Ashworth ultimately advances, then, is a largely monistic justification of self-defense that anchors the analysis on the attacker's right to life; posits that certain principles are important; evaluates the principles independently; and then stipulates that one or the other principle should be considered *prima facie* superior.

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[313] ANDREW J. ASHWORTH & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW 249 (5th ed. 2006). *See similarly* Elliott, *supra* note 257, at 339; Robert Young, *What Is So Wrong with Killing People?*, 54 PHILOSOPHY 515, 518 (1979).

[314] Ashworth, *supra* note 304, at 297. *See also* Sangero, *New Defense*, *supra* note 33, at 533.

While Ashworth imposes a presumptive duty on putative defenders acting outside their homes to avoid and retreat from conflict if reasonably possible, and like Smith also assesses the compatibility of self-defense and the right to life,[315] he derives this position from the requirement of necessity.[316] That said, and even though the same necessity analysis could arguably compel a different outcome, Ashworth also takes the above-referenced 'pro-defender' position that individuals can remain in, and even go to, places where they know an attack is possible or even likely.[317]

Leverick pays less attention than Ashworth to the moral asymmetry between the attacker and the defender.[318] But Leverick, building her approach on Ashworth's human rights focus, is also open and direct about the monistic decision-ground she relies on to reach her various conclusions, namely, that the life of the aggressor and the life of the defender are almost always equally worthy of the law's protection.[319] Put another way, because she views 'all human life [as being] of equal value,' and notes that the 'right to life uniquely cannot be remedied once it is lost,'[320] Leverick's perspective is that the right to life must *always* be respected as much as reasonably possible (though, as discussed below, the challenge for her is to identify that dividing line). '[I]n a legal system that holds the equality of life to be a fundamental value, the aggressor has a right to life just as the victim does.'[321]

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[315] *See* John C. Smith, *The Use of Force in Public or Private Defence and Article 2*, 2002 CRIM. L. REV. 961, 961–62.

[316] Ashworth, *supra* note 304, at 293–94.

[317] *Id*. at 295–96.

[318] *See generally* Arlette Grabczynska & Kimberly K. Ferzan, *Justifying Killing in Self-Defence*, 99 J. CRIM. L. & CRIMINOLOGY 235, 254 (2008) (book review).

[319] LEVERICK, *supra* note 2, at 2.

[320] *Id*. at 2, 58–68 (contending that the 'right to life [is the] most fundamental of all human rights').

[321] *Id*. at 45, *citing* Ryan, *supra* note 75, at 510.

In fact, a fair reading of Leverick's position is that she views the right to life as so important that no balancing need take place (and in this sense Leverick is considerably more 'pro-attacker' than Ashworth); she posits that the right to life is an ultimate touch-stone that cannot be outweighed by, and trumps the consideration of, any other values.[322] As Leverick states in the Preface of her book:

> My primary concern is with the right to life of both aggressor and victim and *it is my firm conviction* that the rules governing self-defence should be formulated with this in mind. As such, this is a book about the right to life, as much as it is a book about self-defence.[323]

Leverick does allow that human dignity, civil liberties, and sexual autonomy are values that some argue *may* 'outweigh' the value of the attacker's life, but she ultimately declares her view that they do not.[324] Under Leverick's parity-assuming model, then, only when a defender's right to life is threatened can the defender use deadly force and deprive the attacker of his right to life.[325] Leverick, however, does not address why other circumstance-dependent values such as those discussed in Chapter II(c) do not also deserve consideration (or, for that matter, even mention).

George Fletcher, like Ashworth and Leverick (though following different reasoning), also pursues a largely monistic, autonomy-focused approach to addressing values in self-defense.[326] Fletcher, however, does not detail what 'autonomy' actually is;

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[322] *See id.* at viii.

[323] *See id*.

[324] *Id*. at 3.

[325] *Id*. at 45 (Leverick adopts Uniacke's position—which will be discussed at some length later—by contending that the aggressor 'forfeits' his right to life by becoming an 'unjust immediate threat' to the defender).

[326] *See generally* George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 971 (1985). *See also* David A. J. Richards, *Rights, Resistance, and the Demands of Self-Respect*, 32 Emory L.J. 405, 424–25 (1983).

he, instead, simply describes it as a 'pre-legal' concept and claims it is under attack whenever an attacker threatens the defender's legally protected rights and interests.[327] In the end, however, Fletcher, like Ashworth and Leverick, pursues a theory of self-defense heavily invested with pacifism and social responsibility toward the attacker's right to life.[328] And so a defender's deadly self-preferential force would only be justified when strictly necessary, where 'necessity' means that the defender had *no alternative* but to kill her attacker.[329]

Fletcher, in so doing, takes Germany's below-described 'right need never yield to the wrong' concept and uses it as the theoretical (and, at first blush, moral absolutist) basis for his treatment of self-defense as a justification.[330] But he then adds the moderating, flexible concept of 'abuse of rights' so that, for example, self-preferential killing is only 'necessary' when it serves to right the wrong of a *deadly* attack.[331] The imminence requirement, moreover, becomes an essential dividing line between retaliatory and defensive behavior.[332] The requirement that an attacker's use of force be unlawful, in turn, ensures that defensive force is employed as a matter of right.[333]

c. Protecting equal standing among people

Self-defense as a method of avoiding the implication of unequal standing between people has received surprisingly little attention. In fact, Erb is among the few to explicitly

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[327] FLETCHER, RETHINKING, *supra* note 46, at 857–60.

[328] *See generally* Fletcher, *supra* note 127, at 560; FLETCHER, A CRIME OF SELF- DEFENSE, *supra* note 47, at 33. *See also* Nourse, *supra* note 3, at 1271 (discussing Fletcher's theory of self-defense).

[329] *See* Fletcher, *supra* note 127, at 559.

[330] *See generally* Fletcher, *Nature of Justification*, *supra* note 128, at 181; Fletcher, *Punishment and Self-Defense*, *supra* note 128, at 210, 213–15 (1989); FLETCHER, RETHINKING, *supra* note 46, at 860–74; FLETCHER, A CRIME OF SELF-DEFENSE, *supra* note 47, at 32–33, 35–36; Fletcher, *Proportionality*, *supra* note 46, at 378–87. *See also* Chapter V(b).

[331] *See generally* Fletcher, *Punishment and Self-Defense*, *supra* note 128, at 181; FLETCHER, RETHINKING, *supra* note 46, at 860–74; Fletcher, *Proportionality*, *supra* note 46, at 368, 390.

[332] *See* Fletcher, *supra* note 127, at 553.

[333] *Id*. at 558–59.

endorse equal standing between defender and attacker as an important, independent consideration. He concludes, in the context of advancing the position that protection of the individual defender should be the only objective of any self-defense regime, that individuals should be authorized to use whatever force is necessary to ward off imminent threats.[334] In support, he argues that protecting the right of the individual includes allowing the individual to ensure equal standing (*Gleichordnung*) between herself and her attacker.[335] Ashworth, in contrast, does not discuss whether protecting peoples' equal standing should play any role in self-defense (though one can assume, based on his focus on the attacker's right to life, that Ashworth would reject equal standing as a stand-alone decision-ground).[336]

Leverick, on the other hand, as part of her 'strict proportionality' analysis implicitly *rejects* the notion that the threatened imposition of unequal standing between attacker and defender should play an outcome-determinative role. Consider Leverick's claim that, even accepting that rape equates to serious bodily injury, deadly force to defend against rape is not, without an accompanying threat of *death*, justified.[337] For, according to Leverick, rape 'alone' does not necessarily threaten the defender with *death*. The 'very serious injury' rape causes to the 'honor' of victims (which can fairly be viewed as a variant of equal standing), moreover, is also insufficient to justify the use of deadly force.[338] Leverick, thus, rejects the generally accepted position[339] that threatened rape can justify deadly self-preferential force.

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[334] *See* Erb, *supra* note 10, at side-note 18.

[335] *See id*. at side-note 18; SUSANNE RETZKO, DIE ANGRIFFSVERURSACHUNG BEI DER NOTWEHR 127 (2001); JOACHIM RENZIKOWSKI, NOTSTAND UND NOTWEHR 275 (1994).

[336] Ashworth, *supra* note 304, at 282.

[337] LEVERICK, *supra* note 2, at 143–58.

[338] *Id.*

[339] *See, e.g.*, *State v. Baker*, 441 S.E.2d 551, 555 (N.C. 1994), *cited in* Lauren Hoyson, *Rape Is Tough Enough Without Having Someone Kick You from the Inside: The Case for Including Pregnancy as*

What is more, Leverick rejects the position that deadly force should be permitted to prevent serious bodily injury. To her thinking, unless defensive force is being deployed by the defender to save her *life*, it can never qualify as justified self-defense.[340] Leverick seeks to buttress her position with the claim that cases in which rape results in death are rare. According to Leverick, studies reveal that 'only' one to three percent of 'rapists kill their victims.'[341] It, therefore, is *prima facie* unreasonable for a defender to without more believe that a rapist is threatening death.[342]

Building on her premise that serious bodily injury, regardless of the culpability of the attacker, cannot ever justify deadly defensive force, Leverick claims that '[a]ttacks on bodily integrity, although painful, are generally events from which the victim can recover and go on to lead a fulfilling life. Deprivations of life are not.'[343] She says:

> Traumatic as the harmful psychological effects of a rape may be, they are psychological effects that are almost certainly remediable over time. Granted, the rape victim's life may never be quite the same again, but the psychological harm of rape does at least leave open the possibility of recovery and readjustment [whereas] the harm of killing does not leave open this possibility.[344]

Leverick also examines potential unwanted pregnancy resulting from rape. '[W]hile pregnancy is an extremely unpleasant potential consequence of a rape, the harm caused is not permanent because the rape victim will generally be able to have an

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Substantial Bodily Injury, 44 VAL. U. L. REV. 565, 580 (2010); Kremnitzer & Ghanayim, *supra* note 46, at 894; Kadish, *supra* note 72, at 882.

[340] LEVERICK, *supra* note 2, at 151.

[341] *Id*. at 151.

[342] *Id.*

[343] *Id*. at 152. *Cf.* HERRING, *supra* note 254, at 23. ('The right to bodily integrity is one of the most strongly protected rights that one can have.').

[344] LEVERICK, *supra* note 2, at 155.

abortion.'[345] From Leverick's perspective, then, deadly force to prevent rape (or, for that matter, any kind of attack or injury) may only be authorized if the facts of the case establish that the rape attempt 'approaches the standard of a wrong *equivalent to a deprivation of life itself*.'[346]

It must be noted that Leverick's position that threatened serious bodily injury cannot, without more, justify deadly defensive force finds little support in any known jurisdiction and runs against the bulk of the literature.[347] In fact, one of the harms rape uniquely inflicts is that it objectifies and dehumanizes the victim (even in the absence of physical violence or injury), thereby upending the equal standing between attacker and victim (value #3).[348] But this argument is not part of Leverick's analysis.

In fact, Leverick throughout remains true to her baseline 'firm conviction' about the equal value of the lives of aggressors and defenders, including in the context of 'battered women.'[349] According to Leverick:

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[345] *Id*. at 153.

[346] *Id*. at 157 (emphasis added). Note, however, that determining the 'standard of a wrong' inevitably involves the same line-drawing that Leverick finds so objectionable in the context of deadly force in defense of property.

[347] *See generally Commonwealth v. Emmons*, 43 A.2d 568 (Pa. 1945) (ruling that '[a] homicide is justifiable when committed by necessity and in good faith in order to prevent a felony . . . such as . . . rape'), *cited in* Charles W. Watson, *Justifiable Use of Deadly Force in Law Enforcement*, 78 DICK. L. REV. 115, 129 (1973); *People v. Cebalos*, 526 P.2d 241, 245 (Cal. 1974) (ruling that rape is among crimes that may be resisted with deadly force). *See also* Kremnitzer & Ghanayim, *supra* note 46, at 894 ('[T]he law of self-defense allows deadly force in order to prevent death or rape, but not simple assault or theft.'); Don B. Kates, Jr. & Nancy J. Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873, 881 (1982) ('Judicial decisions regularly include rape, and sometimes sodomy, in illustrative lists of crimes which may be resisted with deadly force.'); Kadish, *supra* note 72, at 882 (noting that the common law permitted a victim to take life even when lesser interests were threatened and that, therefore, a woman could use deadly force to prevent rape or kidnapping); MPC § 3.04(2)(b) (authorizing deadly force when necessary to prevent 'sexual intercourse compelled by force or threat').

[348] *See generally* Courtney Ginn, *Ensuring the Effective Prosecution of Sexually Violent Crimes in the Bosnian War Crimes Chamber: Applying Lessons from the ICTY*, 27 EMORY INT'L L. REV. 565, 580 (2013); Jeremiah Harrelson, *Genocide and the Rape of Armenia*, 4 U. ST. THOMAS J.L. & PUB. POL'Y 163, 178 (2010).

[349] For the leading, and controversial, research-based study of the syndrome, *see* LENORE E.A. WALKER, THE BATTERED WOMAN SYNDROME (4th ed. 2016). *See also* Aya Gruber, *The Duty to Retreat in Self-Defense Law and Violence Against Women*, OXFORD HANDBOOKS ONLINE (6 July 2017), https://doi.org/10.1093/oxfordhb/9780199935352.013.5 (discussing the complex relationship between the duty to retreat in self-defense law and violence against women).

> [S]elf-defense is only permissible where the accused faced a threat of death (or one of near equivalent seriousness) or where such a threat might reasonably be assumed. The level of violence faced by the majority of battered women is unlikely to meet this threshold.[350]

And while Sangero places ultimate emphasis on *culpable* attackers, he omits a discussion of the unique 'wrong' threatened by a culpable attack.[351] Ashworth, like Sangero, also recognizes that attackers threatening greater concrete harm deserve less protection. Focusing on the respect for the attacker's right to life and physical security, moreover, Ashworth argues that the amount of force used must be strictly proportionate to the amount of harm threatened.[352] Like Sangero, however, Ashworth does not address the distinction between innocent attackers threatening a *harm* and culpable attackers threatening a *wrong*.

In contrast to Leverick, Kates and Engberg's discussion of deadly force to protect victims from both mental harm and psychological damage reflects an understanding that protecting the victim's equal standing should play a part in self-defense theory (even though they do not use this term). For Dsouza, on the other hand, self-defense is a justification that 'negate[s] the wrongness of what occurred.'[353] In fact, Dsouza views the right to use defensive force to protect life and limb as 'constituently human'; asking the question of whether this conduct is moral hence is akin to asking a person whether it is moral 'for us to have opposable thumbs.'[354] In other words, in circumstances where defensive force is necessary, there is no point of asking whether the defensive force used

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[350] LEVERICK, *supra* note 2, at 91.

[351] *See* SANGERO, SELF-DEFENCE, *supra* note 33, at 90–106.

[352] Ashworth, *supra* note 304, at 296–97.

[353] DSOUZA, *supra* note 71, at 3.

[354] *Id*. at 50–51.

is right or wrong, blameworthy or blameless, good or bad—it is (or, rather, must be) acceptable because it is inherent in our natures. As Dsouza puts it, such conduct must 'logically stand outside the realm of moral guidance and assessment.'[355] But Dsouza's argument is tautological in that it stakes out the position that self-defense is uniquely incapable of being evaluated by third parties (including judges and legislators), yet largely overlooks the foundational question of when a criminal justice system should sanction such self-preferential force (or, rather, what makes self-defense justified as a matter of law).

In contrast to Dsouza, Sangero, Leverick, and Ashworth, Schopp's focus on vindicating the *defender's* individual autonomy when faced with a culpable threat is explicitly grounded in what he views as the normative asymmetry in the form of imputation of lesser standing created by the culpable attack.[356] Erb, reflecting agreement with value-based model value #3, likewise believes that protecting the right of the individual *includes* allowing the individual to ensure the equal standing between herself and her attacker.[357]

d. <u>Protecting the defender's autonomy</u>

Schopp, once again in contrast to Ashworth and Leverick, places near-singular importance on protecting the *defender's* interest in vindicating his individual autonomy when faced with an attacker's culpable threat. Similar to Wallerstein,[358] Schopp contends that self-defense and punishment 'reflect a deeper value for the equal status of persons as

[355] *Id*. at 51.

[356] SCHOPP, *supra* note 40, at 83–84.

[357] *See* Erb, *supra* note 10, at side-note 18. *See also* Wallerstein, *supra* note 234, at 1028.

[358] *See* Wallerstein, *supra* note 234, at 1028 (self-defense allows a defender to ward off 'an indirect threat to autonomy, a threat that is generated by the fear and instability that the lack of such a right would bring about. It constitutes one of the basic conditions that allow people to live together in society').

autonomous individuals with their own spheres of personal sovereignty.'[359] Accordingly, Schopp endorses the position that any criminal justice system that refuses to recognize a defender's right to use whatever force is necessary to protect his autonomy and self-determination in the absence of state protection ultimately aids and abets the culpable aggressor's threatened violation of the defender's *non-compensable* sovereignty and the corresponding imputation of lesser standing (thus implicating value #3).[360]

Schopp, echoing Kopel,[361] therefore, justifies the use of deadly force to avert a non-deadly culpable threat so long as such force is 'necessary,' for the threat to the 'victim's sovereignty and standing takes priority over the concrete interest in the culpable aggressor's life.'[362] Effectively breaking the linkage between proportionality and the justified exercise of self-defense, Schopp believes the attacker's act of engaging in 'culpable transgressions move aggressors beyond the boundaries of their protected domains.'[363] The defender, as a consequence, is authorized to inflict '*any* necessary injury to the aggressor's concrete interests as the lesser sacrifice of important moral value.'[364]

Erb likewise advocates for an interpretation of self-defense that, in a departure from the majority view of German scholars and the value-based model, focuses narrowly on protection of the individual defender's rights.[365] Erb, in fact, concludes that the state

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[359] SCHOPP, *supra* note 40, at 75. *See also* Robert F. Schopp, *Justifying Capital Punishment in Principle and in Practice: Empirical Evidence of Distortion in Application*, 81 NEB. L. REV. 805, 830–32 (2002) [hereinafter Schopp, *Justifying*]; Schopp, *supra* note 135, at 2075–76; Robert F. Schopp *et al.*, *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 69.

[360] SCHOPP, *supra* note 40, at 75, 79.

[361] David B. Kopel *et al.*, *The Human Right of Self-Defense,* 22 BYU J. PUB. L. 43, 177–78 (2007).

[362] SCHOPP, *supra* note 40, at 9.

[363] *Id*. at 77.

[364] *Id*. (emphasis added), *discussed in* Elliott, *supra* note 257, at 337–38.

[365] *See* Erb, *supra* note 10, at side-note 18. *See also* Erb, *supra* note 32, at 601.

owes it to the individual to permit her to use all available means to ward off a threatened attack when the state is unable to offer protection.[366] To Erb, such a position is consistent with the conception of self-defense as mediating a conflict between right and wrong. And any approach that would limit such a necessary defense threatens to make the justice system an 'accomplice' of the attacker.[367] Sangero does not go as far as Schopp and Erb in according protection of the defender's autonomy such a central role. But he agrees with them that 'the autonomy of the person attacked' is the key interest self-defense law must protect.[368]

Don Kates has written about self-defense from many perspectives, but his most prominent theoretical discussion (in which he was joined by Engberg) focuses on using deadly force to prevent rape.[369] From Kates and Engberg's perspective, such deadly force is justified because of rape's threatened 'intrusion of mind and body.'[370] Kates and Engberg's theory is grounded on what they describe as the 'ancient principle' that deadly force necessary to 'avert death or serious bodily harm' is justified.[371] In sharp contrast to Leverick's conception of self-defense, then, Kates and Engberg believe that deadly force is justified to ward off death *or* great bodily harm (the latter term, from their perspective, encompassing both physical injury and psychological trauma).[372] And while they posit that rape poses the threat of a unique 'violation,' Kates and Engberg curiously do not

[366] *See* Erb, *supra* note 10, at side-note 18.

[367] *Id*.

[368] *Id*. at side-note 72–73.

[369] *See, e.g.*, Kates & Engberg, *supra* note 347.

[370] *Id*. at 873.

[371] *Id*. at 874–79.

[372] *Id*. at 886–88, 894–903.

specify what exactly that violation is (other than stating that 'the law and common sense recognize [it]').[373]

e. Ensuring the primacy of the legal process

Most theorists agree that the availability of the legal process to resolve conflicts and disputes is a fundamental human right.[374] As Hart and Kantorowicz observe, individuals have collective interests in maintaining a stable society that punishes only after affording the accused due process, and that does not tolerate vigilante law enforcement or acts of revenge.[375] Uniacke agrees that vigilantism and similar 'self-help' crime-control options seek to wrest from the state the authority to punish and condemn, threatening non-democratic lawlessness.[376]

But other commentators, including many of the German scholars discussed below, turn this argument around: The right to self-defense, according to scholars such as Kremnitzer and Ghanayim, 'is intended to preserve the legal order by granting every person the right to fend off unlawful attacks.'[377] This conception of self-defense's rationale, however, can perhaps more accurately be viewed as reflecting fact-specific instances justifying *exceptions* to the state's default collective interest in minimizing violence by maintaining its monopoly on force (value #1).[378]

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[373] *Id*. at 906.

[374] *See generally* U.N. DECLARATION, *supra* note 55, Articles 6, 7, 8, and 11; ECHR, *supra* note 55, Articles 1 and 13. *See also* Michael J. Perry, *The Morality of Human Rights*, 50 SAN DIEGO L. REV. 775, 808–09 (2013); Leonardo A. Crippa, *Multilateral Development Banks and Human Rights Responsibility*, 25 AM. U. INT'L L. REV. 531, 572–73 (2010).

[375] *See generally* HART, *supra* note 145, at 1 (providing a comprehensive discussion of the function of the law); Nader, *supra* note 145, at 3 (same, but from an anthropological perspective); KANTOROWICZ, *supra* note 145, at 1 (same, discussing the function of law).

[376] *See* Uniacke, *supra* note 146, at 79. *See also* Markel, *supra* note 146, at 33; Bilz, *supra* note 146, at 1101 (noting that states in the South and the West allow for broader definitions of self-defense than the laws of the Northern states); Gossett, *supra* note 146, at 824.

[377] *See* Kremnitzer & Ghanayim, *supra* note 46, at 899, *discussed in* John D. Moore, *Reasonable Provocation—Distinguishing the Vigilant from the Vigilante in Self-Defense Law*, 78 BROOK. L. REV. 1659 (2013).

[378] *See* Moore, *supra* note 377, at 1659. *See also* Creach, *supra* note 71, at 627.

f. Maintaining the legitimacy of the legal order

Trust and respect play an important part in shoring up the legitimacy of the law.[379] Stated differently, the public's 'law-related behavior [is] powerfully influenced by people's subjective judgments' about the system's fairness.'[380] Nevertheless, the research conducted in support of this thesis has not identified any comprehensive commentary on self-defense that treats avoiding self-defense outcomes threatening to erode the moral legitimacy of the legal order as stand-alone values.

Stepping back a bit, this thesis will examine the position, echoed most prominently in the German scholarship,[381] that self-defense protects the 'socio-legal order.' According to this perspective, 'the person attacked acts as the representative and protector of society, public order and the legal system, since his actions are directed at neutralizing a violation of the law.'[382] Sangero's account is generally in accord, providing that protection of the socio-legal order is of 'immense importance' but should play a role subsidiary to 'the autonomy of the person attacked and . . . the guilt of the aggressor, while also taking the interest of the aggressor into account.'[383] It is worth noting, however, that acts of self-defense may not always serve to 'protect' the socio-legal order. Rather, and as discussed in Chapter II(c)(vi), 'extreme' self-defense outcomes, whether favoring attackers or defenders, can also operate to *undermine* the legitimacy of the legal order.

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[379] *See* Chapter II(c)(vi).

[380] Tyler, *Procedural Justice*, *supra* note 148, at 284.

[381] *See* Chapter V(b)(i).

[382] SANGERO, SELF-DEFENCE, *supra* note 33, at 68–69, *discussing* Kremnitzer, *supra* note 117, at 181–91.

[383] *Id*. at 72–73.

g. Deterrence

Deterrence has long been recognized as a primary value providing self-defense's rationale. Paul Robinson, for example, recognizes that '[f]orce in self-defence may injure the aggressor, but the injury is outweighed by the societal value of the defensive force . . . in avoiding the threatened harm to the victim and in condemning and deterring unjustified aggression generally.'[384] Sangero agrees with Robinson that, in the context of self-defense law, the 'deterrent function has a dual character: the individual aggressor is effectively deterred by the repelling of his attack, and the potential offenders will be deterred when they know that their plan may be frustrated not only by the police.'[385]

Stell echoes Robinson and Sangero, commenting that imposing limits on defensive force will result in attackers fearing 'violence from the police only.'[386] Kremnitzer and Ghanayim similarly take the position that self-defense is 'intended to deter potential aggressors' and protect the 'legal order.'[387] (Potentially presenting a challenge to this deterrence position, Cheng and Hoekstra have, in the context of a study on 'stand your ground' laws, concluded that, while it would be 'reasonable to expect that strengthening self-defense law would deter crime, we find this is not the case.'[388])

h. Self-defense scholarship's treatment of values as decision-grounds

The foregoing thematic literature review demonstrates that, to the extent that values as decision-grounds are discussed in the mainstream scholarship, they are typically framed

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[384] Paul H. Robinson, *Competing Theories of Justification: Deeds v. Reasons*, *in* HARM AND CULPABILITY 45, 46 (Andrew Simester & Anthony Smith eds., 1996).

[385] SANGERO, SELF-DEFENCE, *supra* note 33, at 68.

[386] Lance K. Stell, *Close Encounters of the Lethal Kind & The Use of Deadly Force in Self-Defense*, 49 LAW & CONTEMP. PROBS. 113, 120 (1986).

[387] *See* Kremnitzer & Ghanayim, *supra* note 46, at 885–86. *See similarly* Ghanayim & Saif-Alden Wattad, *supra* note 117, at 138–39; John Q. La Fond, *The Case for Liberalizing the Use of Deadly Force in Self-Defense*, 6 U. PUGET SOUND L. REV. 237, 283 (1983).

[388] *See* Cheng Cheng & Mark Hoekstra, *Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine*, 48 J. HUM. RES. 821, 849 (2013), *discussed in* Sweeney, *supra* note 71, at 734.

in terms of a broad 'struggle' or 'clash' between the criminal justice system's (1) obligation to safeguard the (generally undefined) 'autonomy' of the defender, and (2) interest in protecting broader welfarist concerns, typically the attacker's 'right to life.'[389] Scholars such as Ashworth, Fletcher, Schopp, and Leverick in their comprehensive theories of self-defense, moreover, at least on some level, ground their individual analyses on one or two values (such as protecting the attacker's right to life).[390]

The prevailing value-dichotomous (defender's autonomy versus attacker's right to life) discussion may, in fact, be the natural starting point for a value-centric dialogue about self-defense. But this thesis tests the hypothesis that understanding the moral, ethical, and public-policy underpinnings of self-defense theory requires a more in-depth value-centric discussion. The proposed value-based model, and its effort to propose a reasonable accounting of the values that, depending on the circumstances, become self-defense decision-grounds, is designed to provide the vehicle for such a discussion concerning self-defense doctrine's deeper rationale.

Consider, by way of example, the relatively short shrift values-as-decision-grounds receive even in some of the most comprehensive scholarly accounts of self-defense, such as Leverick's quickly abandoned effort to discuss values in the context of 'avoiding trouble.'[391] Leverick in her analysis of when a person might have to stay away from a place where she knows an attack will, or is likely, to occur, mentions: (1) freedom of movement (encompassed in value #4—protecting the defender's autonomy), and (2) the duty to avoid violent conflict that might result in the loss of life.[392] Leverick in so doing refers to violence reduction and protection of the attacker's right to life, but does

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[389] *See generally* Lesch, *supra* note 27, at 81, 82.

[390] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 226.

[391] *See generally* LEVERICK, *supra* note 2, at 127–28.

[392] *See id.*

not engage in a searching analysis of when and why these values pertain, how they interact with each other, or whether there are other values that should in fairness also be considered.[393]

Fletcher, despite adapting certain aspects of the German law of self-defense to his approach, like Leverick and Ashworth in the end sides with the more pacifist conception of self-defense.[394] While one may expect to see his scholarship take on a value-centric approach, his focus instead is on what he considers 'logical consequences'—technical legal questions, such as the applicability of the 'incompatibility thesis' (that there cannot be two mutually justified defenders) and the related requirement that defenders be both internally and externally justified.[395]

The closest Fletcher comes to a value-centric analysis is when he considers the role 'humanitarian grounds' might play in the state's effort to reduce overall societal violence (value #1).[396] That said, Fletcher also concedes that requiring proportionate force may conflict with the 'absolute' right to defend one's individual autonomy.[397] But Fletcher only goes so far with his consideration of values (and the tension between them). What is absent from his extensive self-defense scholarship is a deeper discussion of what actually makes his defenders' purportedly justified acts so 'right.' And this is so even though the normative distinction between justified ('right') and excused ('wrongful but

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[393] *See id.*

[394] *See generally id.* at 560 (discussing the 'social point of view' that requires a proportionality rule sensitive to the 'competing interest' in life of the aggressor); FLETCHER, A CRIME OF SELF-DEFENSE, *supra* note 47, at 33.

[395] *See generally* Fletcher, *supra* note 326, at 971–80; George P. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse For Escape?*, 26 UCLA L. REV. 1355, 1358 (1979); George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1264 (1985) [hereinafter Fletcher, *Paradoxes*]. On the incompatibility thesis, Fletcher appears to have been inspired by Immanuel Kant. *See* Immanuel Kant, *The Doctrine of Right*, *in* KANT, THE METAPHYSICS OF MORALS, *supra* note 44, at 60 ('It is evident that were there such a right the doctrine of right would have to be in contradiction with itself.').

[396] *See* Fletcher, *supra* note 127, at 559–60.

[397] Fletcher, *Proportionality*, *supra* note 46, at 371–80. *See also* Rönnau & Hohn, *supra* note 60, at side-note 68, 113.

acceptable') conduct anchors most of his work.[398] Fletcher ultimately focuses on 'logical consistency' as the 'overriding legal value.'[399]

Schopp, like Leverick, anchors his analysis on a near-singular focus on autonomy—but in sharp contrast to Leverick's aggressor-centric approach, Schopp focuses narrowly on the autonomy of the defender.[400] Schopp's all-or-nothing approach, however, arguably places outsized importance on protecting the defender's interest in his individual autonomy (and, relatedly, on the claimed normative asymmetry created by the culpable attack), while for no stated or good reason ignoring other competing values and legitimate collective or welfarist goals. For example, Schopp does not address the danger that, in according defenders near-unlimited discretion to use defensive force, he might increase overall societal violence by paying insufficient attention to the state's monopoly on force (value #1) and essentially invalidates any right to life the attacker might have (value #2). Similarly, Schopp's detailed writings do not address whether and how his conception of justified self-defense can be squared with the primacy of the legal process (value #5) and achieve results that do not threaten to undermine the moral legitimacy of the legal order (value #6).

In short, scholars like Schopp, Ashworth, and Leverick on some level at least recognize that certain values should matter. But they differ markedly on which ones and why—and none engage in a sustained, comprehensive value-centric examination. Nourse, who has become one of the leading commentators on self-defense in the context of the battered intimate partner syndrome, in fact *rejects* the notion that studying the values underlying self-defense is sensible.[401] Instead, she believes that the analysis of

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[398] *See* FLETCHER, RETHINKING, *supra* note 46, at 559–60.

[399] *See* Fletcher, *Paradoxes*, *supra* note 395, at 1264–65.

[400] *See* SCHOPP, JUSTIFICATION DEFENSES, *supra* note 40, at 83–84.

[401] Nourse, *supra* note 3, at 1274 n.200. *See also* Nourse, *supra* note 62, at 1692–1726 (2003).

self-defense must proceed 'in a different key, not as a set of values or functions or end-states but as a question of the key relationships involved between citizens and between citizens and state.'[402]

Setting aside for now Nourse's debatable differentiation between 'values' and 'key relationships between citizens and between citizens and the state,' she conceptualizes the justice system as being designed to serve the 'demands of majorities and the state.'[403] While this perspective, if accurate, could be described as descriptive, it explicitly forgoes a discussion over what values and interests might drive such purported majoritarian state interests. In other words, even if Nourse is correct that the justice system is in reality just a means of enforcing certain 'key relationships,' this does not necessarily mean that such relationships are any less value-driven.

Uniacke in her comprehensive work (the only pre-2006 book devoted entirely to the theory of self-defense) argues that an individual's rights—including, most fundamentally, the right to life—are limited from the outset: 'Our possession of the right to life is conditional, the condition relevant to the justification of self-defense being that we not be an unjust immediate threat to another person.'[404] Uniacke's focus on double-effect and the incompatibility thesis (also known as the 'paradox of unknowing justifications'), and her normative theory based on a person not becoming an 'unjust immediate threat' to another, like Fletcher advances a juridical conception of criminal defenses premised largely on logical expedience and consistency. She does not, however, pursue the additional step of engaging in a more searching analysis of the underlying values that might, for example, support her forfeiture theory.[405] Had she done so, she

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[402] Nourse, *supra* note 3, at 1274 n.200.

[403] Nourse, *supra* note 62, at 1726. *See also* Kim, *supra* note 142, at 288 (discussing Nourse's theory).

[404] UNIACKE, *supra* note 203, at 213.

[405] For more on forfeiture theory—and recommendations on how its shortcomings can be overcome—*see* Chapter II(d)(i).

could have fortified her conception of an 'unjust threat' by injecting it with more analytic content.

Frowe takes a different approach from her peers, broadly dividing self-defense theorists into objectivists (who, following consequentialist approaches, are most concerned with 'how the world really is') and subjectivists (who are most concerned with 'how the world appears').[406] According to Frowe, most accounts of self-defense have an 'objectivist slant' because attention is focused on what a person *should* be permitted to do in light of various possible outcomes.[407] She, however, fundamentally agrees with this approach. According to Frowe, self-defense doctrine should not be constructed around knowledge that a defender cannot have because, given less-than-perfect knowledge, self-defense cannot be conduct-guiding.[408] While Frowe's account is focused on advancing the broad position that permissible self-defense should be 'practical,' in the sense of action-guiding, she, like Uniacke, does not conduct an analysis of the values that would make certain self-preferential actions more acceptable than others.

Dsouza's conception of the positionality of blame and his reliance on fact-finders assessing morality on a case-by-case basis (in essence building on the concept of jury nullification)[409] does not provide what Frowe is most concerned about, namely, conduct-guiding predictability.[410] By broadly cleaving conduct Dsouza characterizes as

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[406] Helen Frowe, *A Practical Account of Self-Defence*, 29 LAW & PHIL. 245, 245–47. *See also* FROWE, DEFENSIVE KILLING, *supra* note 113.

[407] *See* Frowe, *A Practical Account of Self-Defence*, *supra* note 406, at 249.

[408] *Id*. at 250–51 (noting that self-defense accounts must take into consideration that defensive actions are taken under conditions of particular epistemic limitations and typically must be performed urgently).

[409] *See generally* Caisa E. Royer, *The Disobedient Jury: Why Lawmakers Should Codify Jury Nullification*, 102 CORNELL L. REV. 1401, 1404–15 (2017).

[410] Dsouza's approach (*see* DSOUZA, *supra* note 71, at 51, 65–63) may be confusing the specific 'blame' flowing from systemic conviction and punishment as described in the value-based model (*see* discussion at Chapter II(c)(vi)(2)) with the broader concept of 'societal blame' (including species of blame that may not have resulted in criminal proscription). *See also* Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U. L. REV. 111, 131 (1999–2000) ('A second dimension of the multiple victimization

'existentially immune'[411] from the criminal law's moral judgments, from conduct that 'society' on a case-by-case basis deems 'moral' (and thus unpunishable), he provides little of the guidance Frowe considers so important.

Dsouza dedicates a lengthy subchapter to his model's implications on persons contemplating defensive action.[412] But other than distinguishing between two broad categories of rights (inherent 'constituent' rights versus subsidiary/state-granted 'posited' rights),[413] he explicitly disavows any intention to examine the 'exact specifications' of when and why the state ought to permit citizens to resort to self-preferential force.[414] By not grappling with these challenging questions, however, Dsouza creates dissonance with his book's stated purpose of disentangling the 'moral norms relevant to defensive action.'[415] Additionally, while Dsouza acknowledges that there may be a 'hierarchy of rights,' and that 'the right to possess purposive agency' may be the 'most important right,'[416] his analysis ultimately does not endeavor to determine the truth of these broader observations.

In contrast to his peers, Sangero has, in fact, developed a self-defense theory animated by a balancing between multiple values, namely, the autonomy of the person attacked (his 'crucial factor'), protection of the socio-legal order, and the 'legitimate' interest of the attacker.[417] According to Sangero, these 'abstract interests' must be 'placed

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of women [in the context of rape cases] is societal blame—blaming the domestic violence victim often occurs.'); Chapter II(c)(iii).

[411] DSOUZA, *supra* note 71, at 51, 65–63.

[412] Talge, *supra* note 410, at 138–65.

[413] *Id*. at 138.

[414] DSOUZA, *supra* note 71, at 69–72, 139.

[415] *Id*. at i.

[416] *Id*. at 74–75.

[417] *See generally* SANGERO, SELF-DEFENCE, *supra* note 33, at 67–73, 93–106. Sangero also mentions deterrence, but only in the context of describing Kremnitzer's approach. *Id*. at 68.

on the scales' and evaluated by the fact-finder using a 'lesser evils framework.'[418] From Sangero's perspective, then, unlawful attack not only threatens injury to the defender but, in line with the position advanced by German theorists for generations,[419] also constitutes a harmful and malicious attack on the broader social-legal order.[420]

According to Sangero, his model's 'main innovation' is that it seeks to integrate '*all the important factors* in justifying private defense. . . .'[421] And Sangero does, in fact, recognize the importance of protecting the 'social-legal order.' He does so by adopting the German perspective that the defender's conduct must ensure that the 'wrong not triumph over the right.'[422] Self-preferential force helps ensure that, in the absence of police assistance, the person threatening the (culpable) wrong cannot 'get away with it.'[423]

But Sangero does not consider whether transforming citizens into *de facto* law enforcement officers, animated by the more collective objective of protecting the broader legal order, threatens to devalue the 'self' in self-defense.[424] Even his more value-centric analysis does not, moreover, address the collective interest in reducing violence by protecting the state's monopoly of force (value #1), ensuring the primacy of the legal process (value #5), or maintenance of the legitimacy of the legal order (value #6). And while he recognizes that an attacker's culpability should play a role in determining when and to what extent to authorize defensive force,[425] he does not treat protecting the

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[418] *See* SANGERO, SELF-DEFENCE, *supra* note 33, at 73–77.

[419] *See* the discussion of German law's treatment of this topic at Chapter V(d).

[420] *See* Sangero, *New Defense*, *supra* note 33, at 521–31.

[421] *See id*. at 558 (emphasis added).

[422] *See id*. at 542–58.

[423] *Id*.

[424] *See* Chapter (c)(iv).

[425] *See* Sangero, *New Defense*, *supra* note 33, at 542–58.

defender's equal standing (value #3) or deterrence (value #7) as representing independent potential decision-grounds.

As this survey demonstrates, most of the leading self-defense scholars recognize that values, at some level at least, inform the defense's underlying rationale. By articulating what values they consider implicated in different self-defense scenarios, moreover, it can be said that these scholars, implicitly at least, agree that engaging in a value-centric dialogue is important. This fairly broad consensus among scholars can, therefore, be said to support the hypothesis that a broader consideration of the values implicated when a person elects to engage in the self-preferential use of force improves the transparency of decision-making and, relatedly, reduces the role of hidden normativity. That said, only Sangero comes close to developing a truly value-centric analysis. And, in contrast to the value-based model, even Sangero's effort does not provide what has been argued is the necessary broader accounting of the values that may provide insights into self-defense's rationale.

IV. THE VALUE-BASED MODEL'S ANSWER TO CERTAIN COMMON THEORETICAL QUESTIONS

To test the hypothesis introduced in Chapter I, the thesis thus far has identified an array of values and endeavored to justify why they deserve to be considered self-defense decision-grounds. Further, the thesis has compared and contrasted the values, described when and how they most frequently will come into conflict with (or, alternatively, reinforce) each other, and proposed a means of ordering them when they are in tension. Finally, this thesis determined that this comprehensive, value-centric approach adds something new and valuable to the extensive scholarship on self-defense reviewed in Chapter III. It, consistent with the hypothesis being tested, offers a more transparent means of evaluating self-defense doctrine, generally, and individual scenarios, specifically. Having engaged in this foundational work, the thesis now examines how (and, relevant to testing the hypothesis, how well) the value-based model answers some of the theoretical questions common to self-defense scholarship and judicial decision-making.

a. Is self-defense a justification or excuse (or neither)? . . . And why the answer matters.[426]

The thesis has discussed why justified conduct is best conceived of as creating an exception to the proscription contained in the offense definition (and, therefore, to the fully expressed public morality).[427] The position advanced is that an excused defendant, in contrast, in fact does violate the offense definition; she, however, does so under circumstances that, in retrospect, make punishment inappropriate because her conduct cannot be morally attributed to her (that is, she did not pursue a freely chosen action-plan

[426] This thesis does not purport to be a comparative work and so this section will not undertake a detailed comparison between German and English law's differing approaches to justifications/excuses. *See generally* Albin Eser, *Justification and Excuse: A Key Issue in the Concept of Crime, in* 1 JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES 17, 61–66 (Albin Eser & George P. Fletcher eds., 1987).

[427] *See* Chapter II(c)(vi)(2).

manifesting her moral character).[428] As Fletcher articulated it, '[a] justification speaks to the rightness of an act; an excuse, to whether the actor is accountable for a concededly wrongful act.'[429] The necessity requirement, in turn, distinguishes justified from merely 'tolerated' or 'excused' conduct,[430] with proportionality serving a similar moderating function.[431]

But this bifurcation between justification, excuse, and necessity is not universally accepted. Dsouza's perspective on the 'positionality of blame,' for example, draws on what he terms the 'hypocrisy-based conception of excuses and defenses.'[432] At the crux of his account is the belief that excuses are defenses granted to defendants because not granting them would be hypocritical; society is not in a moral position to blame a defender for the conduct.[433] Dsouza asserts that his approach is both intuitively plausible and compatible with 'most familiar accounts of rationale-based excuses.'[434]

The challenge to this interpretation, however, is that it is based almost entirely on an assessment of social morality—and, so, if a particular society has, say, racist tendencies, a person who assaults another based on the color of his skin would likely be excused because a conviction under these circumstances would, per Dsouza, constitute 'hypocritical blaming.' Dsouza's perspective, moreover, is at odds with the standard view of excuses (and, it is argued, Dsouza takes this unorthodox position for no compelling reason).[435]

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[428] *See id*. *See also* Schopp, *supra* note 183, at 1275; JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 274–75 (1970).

[429] FLETCHER, RETHINKING, *supra* note 46, at 759. *See also* Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1900 (1984).

[430] FLETCHER, RETHINKING, *supra* note 46, at 559.

[431] *Id*. at 559–60.

[432] *See* DSOUZA, *supra* note 71, at 111–20.

[433] *See id*.

[434] *Id*. at 112–13.

[435] *See generally* Chapter III(i).

As discussed in Chapter II(c)(vi)(2), under the value-based model, conviction, and subsequent punishment, condemns the defendant as an accountable agent who by systemic standards has transgressed the 'fully expressed public morality,' and who is therefore morally blameworthy for the wrong he inflicted or intended to inflict.[436] As Packer, consistent with this approach, put it, punishment without reference to the actor's state of mind 'is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy.'[437] In short, this thesis concludes that moral blameworthiness must be inherent in criminal punishment for it to maintain its stigmatic effect. A defendant who is not morally accountable for his conduct should be excused and remain free from criminal liability.[438]

In addition to being excused on the basis of insanity, a defendant may also be excused as not blameworthy because his volitional and reasonable action-plan did not accord with the result actually achieved (even though, depending on the offense definition, it may have formally met the *mens rea* requirement(s)).[439] Consider the case of Andrew, who reasonably thinks he is being attacked. Because of this subjective and reasonable belief, Andrew may select an action-plan that includes using deadly force in self-defense. This action-plan ultimately proves to be mistaken, however, because there is no actual attack. A defendant in Andrew's position is not morally accountable for his actions, even though he violated the fully expressed public morality, because he did not

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[436] *See also* SCHOPP, *supra* note 40, at 29; UNIACKE, *supra* note 203, at 137–41.

[437] Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109. *See also* Michele Boggiani, *When Is a Trafficking Victim a Trafficking Victim: Anti-Prostitution Statutes and Victim Protection*, 64 CLEV. ST. L. REV. 915, 951 (2016).

[438] *See generally* ORMEROD & LAIRD, *supra* note 28, at 7–8; Russell L. Christopher, *Exculpation as Inculpation*, 49 ARIZ. ST. L.J. 1141, 1146–48 (2017); Kate Harker & Ellen Wright, *The HIV Stigma: Duty or Defence*, 4 UCL J.L. Juris. 55, 70–71 (2015); *Garnett v. State*, 632 A.2d 797, 801 (Md. 1993).

[439] *See generally* Chapter IV(a)(ii) (discussing mistakes).

intend to wrong another by engaging in the act he was charged with (to wit, he did not intentionally and without justification kill another).

As articulated here, then, offense definitions require action-plans, whereas excuses function retrospectively to undermine the required relation between the proscribed conduct and the actor's *pursuit* of his action-plan with regard to the offense.[440] The defenses of duress and provocation discussed below reflect this perspective.[441] They undermine the required voluntary selection of an action-plan that reflects a disrespect of the victim's equal standing. The will of the person acting under duress is said to be overborne by the threat to the point where most reasonable people would have acted in the same way, whereas the person who was provoked lost self-control under extreme circumstances.[442] In neither case does the action compel an adverse judgment about the actor, for the actor was not acting in accordance with a freely selected action-plan manifesting his moral character. He, rather, was acting as the result of an external threat, or a loss of self-control, which permits us to say that his conduct was morally involuntary—though, depending on the circumstances, perhaps still subject to a lower level of criminal sanction if he, for example, acted negligently or recklessly.[443]

At this point a hypothetical may be useful. Assume Victor honestly and reasonably believes Andrew is about to kill him because Andrew is pointing an object that looks like a gun in Victor's direction. Because of this belief, Victor selects an action-

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[440] *See generally* DENNIS J. BAKER, TEXTBOOK OF CRIMINAL LAW 56 (4th ed. 2015); Schopp, *supra* note 183, at 1320–21.

[441] *See* Chapter IV(b)(i).

[442] *See generally* discussion at Chapter IV(b)(i). *See also* HERRING, *supra* note 254, at 643–59; Eric Colvin, *Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility*, 27 MONASH U. L. REV. 197, 210–16 (2001).

[443] *See generally* discussion at Chapter II(c)(vi). *See also* Colton Fehr, *(Re-)Constitutionalizing Duress and Necessity*, 42 QUEEN'S L.J. 99, 103 (2017); Arnold N. Enker, *In Support of the Distinction Between Justification and Excuse*, 41 TEX. TECH. L. REV. 273, 283–84 (2009); Ian H. Dennis, *On Necessity as a Defence to Crime: Possibilities, Problems and the Limits of Justification and Excuse*, 3 CRIM. L. & PHIL. 29, 41 (2009). *Cf.* Birju Kotecha, *Necessity as a Defence to Murder: An Anglo-Canadian Perspective*, 78 J. CRIM. L. 341, 357 (2014).

plan that includes using defensive force against Andrew to fend off the perceived threat. While Victor's belief in Andrew's attack may be reasonable, Andrew is in fact not attacking Victor. Rather, Andrew is merely holding a cellular phone that in the dark vaguely resembles a handgun. An actor such as Victor who acts under a *reasonable*, but ultimately mistaken, action-plan is not properly subject to the sixth category of condemnation (the defendant is not excused) because, though he is competent, his reasonable error resulted in his selection of an action-plan that did not include wronging another.[444] Victor acted as the result of a reasonable mistake, and therefore did not select an action-plan on the basis of all the objectively relevant information. Victor's objectively mistaken action consequently cannot be subjectively attributed to him.[445] To the extent Victor took the action for *no* objectively good reason (such as racism, homophobia, or some other suspect motivation), however, self-defense, as discussed below, could be unavailable.

Under this account, self-defense can only provide a justification. It cannot excuse, for the excused actor, unlike the justified actor, violated the fully expressed public morality.[446] One would not, after all, usually say 'unlawful killing is wrong except when the killer is insane.' Rather, when discussing excused conduct, adherents to the orthodox position followed here would say 'unlawful killing is wrong, but we will not criminally condemn and punish actors who were insane when they killed.'

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[444] *See* Chapter II(c)(vi)(2)(g).

[445] Fletcher distinguishes 'objective attribution' (did the actor cause the violation?) from 'subjective attribution' (is the actor accountable for the violation?). *See* FLETCHER, RETHINKING, *supra* note 46, at 492–504.

[446] *See* Chapter II(c)(vi)(2). This view is inconsistent with the approach taken in Germany. *See generally* Chapter V(c).

i. Aggressors v. passive threats v. innocent bystanders—the importance of accurate labeling

Not only is the justification of self-defense less susceptible to abuse via false claims concerning the motivation of the action than is an excuse, but fair labeling arguably compels separate treatment.[447] Put another way, citizens are entitled to have the courts label their defensive conduct as accurately as possible because those labels inherently include a normative (and potentially stigmatizing) element.[448] And while, as noted, claims of justification focus primarily on the *act* itself, excuses focus on the *actor* (and, more to the point, on the actor's *motivation* for acting).[449] Society at large, like criminal justice professionals,[450] intuitively judges a person based on how the courts classify that person's conduct.[451] And so it is posited here that saying 'I did it out of self-defense' carries less of a stigma than saying 'I killed him, but I was under duress' or 'my conduct was deemed acceptable because it was ruled to be necessary under the circumstances.'[452]

And in line with this perspective, the commonly (and, it is concluded here, for good reason) held distinction is that self-defense functions as a justification that considers the conduct to be, all things considered, acceptable.[453] This is so even though the conduct may have met the offense definition (the value-based model's first stage of

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[447] *See generally* Kotecha, *supra* note 443, at 352; Beatrice Krebs, *Justification and Excuse in Article 31(1) of the Rome Statute*, 2 CAMBRIDGE J. INT'L & COMP. L. 382, 385 (2013); Glanville Williams, *Convictions and Fair Labelling*, 42 CAMBRIDGE L.J. 85 (1983).

[448] *See generally* Chapter IV(a).

[449] *Id*.

[450] *See* John L. Anderson, *Playing with Fire: Contemporary Fault Issues in the Enigmatic Crime of Arson*, 39 U.N.S.W. L.J. 950, 952 (2016), *citing* Chalmers & Leverick, *supra* note 181, at 234. *See also* Winnie Chan and Andrew Simester, *Four Functions of Mens Rea*, 70 CAMBRIDGE L.J. 381, 388–93 (2011).

[451] *See* Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 621–49 (1996). *See also* Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1329–31 (2017).

[452] *See generally* Michael P. Wilt, *Civil Disobedience and the Rule of Law: Punishing Good Lawbreaking in a New Era of Protest*, 28 GEO. MASON U. C.R. L.J. 43, 49–51 (2017).

[453] *See generally* Finkelstein, *supra* note 451, at 621–49. *See also* Kim, *supra* note 142, at 266.

condemnation)[454] and received condemnation during the three stages that follow (bringing of charges, mental fitness to proceed, and fact-finder's conclusion that the conduct meets the offense definition, respectively).[455] Duress and necessity, in contrast, are considered excuses, in that the conduct, while wrong, was engaged in for a reason rendering the accused blameless (and thus immune from value-based model stage-six condemnation).[456] By stating clearly why a person is being punished, as well as why a person is *not* being punished, the distinction between justifications and excuses provides the type of moral clarity that has long, and for good reason, been the criminal law's objective.[457] As a result, from the value-based perspective, there is no compelling reason to deviate from this intuitive and common distinction.

ii. Mistakes: External, internal, and legal justification

Although this thesis contends that self-defense is best considered a justification, and, therefore, constitutes an exception to the fully expressed public morality discussed in Chapter II(c)(vi)(2), additional case-specific limitations to the justifiable exercise of self-defensive force deserve discussion. Specifically, and as detailed below, the defender must be both externally *and* internally justified (adopting the 'deeds and reasons' view[458]) before he can claim a positive right to self-defense. That is to say that the facts as they *actually exist* must objectively justify the defendant,[459] and she must also *know* of, and in

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[454] *See* Chapter II(c)(vi)(2)(b).

[455] *See* Chapter II(c)(vi)(2)(c)–(e).

[456] *See generally* discussion at Chapter II(c)(vi)(2)(g). *See also* Michele E. Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 507 (2013); Tracey L. Meares *et al.*, *Updating the Study of Punishment,* 56 STAN. L. REV. 1171, 1202 (2004); HENRY L. HART, PUNISHMENT AND RESPONSIBILITY 212–22 (1968) (describing justified conduct as 'something the law does not condemn or even welcomes').

[457] *See generally* Gabriel J. Chin, *Unjustified: The Practical Irrelevance of the Justification/Excuse Distinction*, 43 U. MICH. J.L. REFORM 79, 91 (2009); George Mousourakis, *Distinguishing Between Justifications and Excuses in the Criminal Law*, 9 STELLENBOSCH L. REV. 165, 180 (1998). *Cf.* Greenawalt, *supra* note 429, at 1924–27.

[458] *See generally* HERRING, *supra* note 254, at 688.

[459] Note that, when this thesis speaks of the 'objective facts' establishing that there was or would be an 'actual attack,' it is nearly always dealing at least partly with supposition based on probabilities or witnesses' potentially mistaken perceptions and recollections. This is not an impediment to the analysis,

fact *act because of*, these justificatory circumstances (which, of course, include the facts implicating the seven value-based decision-grounds).

1. External justification

Turning first to the requirement of external justification, the criminal law is said to provide the public with minimum standards of acceptable conduct.[460] Justified conduct therefore need not be the morally best conduct, but rather is conduct that is legal by the appropriate standard.[461] By way of recap, the value-based model and its eight stages of condemnation uses a transparent approach to endorse the orthodox view that justifications focus on the act, whereas excuses focus on the actor.[462] The value-based model's fully expressed public morality does not justify mistaken actors, however reasonable the mistake, because their actions are not considered positively lawful exceptions to offense descriptions (that is, they are still subject to stage-five condemnation).[463] Not only is a putative defender objectively unjustified, but he also harms the 'attacker' by violating her right to life (value #2). That said, the putative defender does not *wrong* the attacker (in the sense of creating an unequal standing between the attacker and the defender, in

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however, because the fact-finder decides what, based on all the evidence, the actual facts were and whether an actual attack was in fact in progress. The fact-finder's conclusion as to what occurred or would have occurred therefore takes the place of the conclusion that the fictional omniscient observer would have reached.

[460] *See generally* Chapter II(c)(vi)(1) & (2). *See also* Bazelon, *supra* note 181, at 5 ('[T]he criminal code should define only the minimum conditions of each individual's responsibility to the other members of society in order to maximize personal liberty.').

[461] *See generally* Sendor, *Mistakes of Fact*, *supra* note 90, at 772.

[462] *See generally* LARRY ALEXANDER *ET AL.*, CRIME AND CULPABILITY 89 (2009), *quoted in* Brenner M. Fissell, *Federalism and Constitutional Law*, 46 HOFSTRA L. REV. 489, 536 n.310 (2017); C.M.V. CLARKSON & HEATHER M. KEATING, CRIMINAL LAW: TEXT AND MATERIALS 278–80 (9th ed. 2017); UNIACKE, *supra* note 203, at 6, 23; FLETCHER, RETHINKING, *supra* note 46, at 759; D'ARCY, *supra* note 199, at 85; JOEL FEINBERG, HARM TO OTHERS 108 (1984); WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 509–10 (2d ed. 1826); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 181 (1776).

[463] *See* Chapter II(c)(vi)(2)(f).

accordance with value #3) because the defender is acting under a mistaken belief in the rightness of his conduct.[464]

An actor who honestly believes that he is acting in self-defense, but actually acts under a mistaken belief regarding the justificatory circumstances, can therefore at best claim that he was *internally* justified because he subjectively and reasonably believed that his conduct was necessary to prevent an immediate attack.[465] The putative defender is not externally justified, however, because he in reality was not being attacked (and thus value #1—violence reduction; value #3—protecting equal standing; and value #4—protecting the defender's autonomy were not implicated).[466] Because justifications, as defined here, require both internal *and* external justification, an actor acting in putative self-defense is subject to stage-five condemnation, though he may of course be excused from punishment at stage six if his mistake was reasonable, or if he was legally incompetent.[467]

2. Internal justification

Turning from external to internal justification, actors may act under circumstances in which reasons exist for exempting their conduct from the fully expressed prohibitory norm, but where they are not aware of these reasons.[468] Because of their lack of awareness, then, they cannot be said to have selected their action-plans because of these reasons. Such actors are considered 'unknowingly justified' because they lack internal (that is, 'subjective') justification.[469]

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[464] *See* Chapter II(c)(iii).

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

[466] *See* Chapter II(c)(i), (iii) & (iv).

[467] *See* Chapter II(c)(vi)(2)(f) & (g).

[468] *See generally* Schopp, *supra* note 183, at 1284.

[469] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 262; Laurence Alexander, *Unknowingly Justified Actors and the Attempt/Success Distinction*, 39 TULSA L. REV. 851, 854–57 (2004).

Assume that, as Andrew is coming out of a movie one afternoon, his old nemesis Victor rushes towards him holding an uplifted sword. Andrew reasonably believes that Victor is about to attack him and therefore pulls out his gun. In reality, however, Victor is merely excited about the sword he just purchased from an antiques store down the road. Victor, realizing that Andrew is about to shoot him, stabs Andrew through the heart with his sword because this is the only way Victor can protect himself against the mistaken Andrew. In this unfortunate situation both Victor and Andrew acted in reasonable apprehension of imminent death or serious bodily harm, and both are, therefore, internally justified. Only Victor was externally justified in acting as he did, however, for Andrew's belief, while perhaps entirely reasonable under the circumstances, was mistaken. If internal (subjective) justification alone was sufficient to justify self-defense, then both Andrew and Victor would be justified in killing each other. The 'incompatibility thesis'/'paradox of mutual justifications' precludes such a result.[470]

3. The value-based model's requirement of both external *and* internal justification

The value-based model has concluded that justificatory circumstances only provide exceptions to the fully expressed public morality if the actor is (a) aware of them, and (b) acting *because* of them.[471] External justification alone, therefore, cannot exempt the actor's conduct from stage-five condemnation, for an actor must also be internally justified.[472] By requiring external *and* internal justification, the law prevents mutually

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[470] *See generally* Rosenau, *supra* note 10, at side-note 118; Luis E. Chiesa, *The Rise of Spanish and Latin American Criminal Theory*, 11 NEW CRIM. L. REV. 363, 380 (2008); Eser, *supra* note 426, at 31–32. *See also* Fletcher, *supra* note 326, at 975; Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61, 86–88 (1984); Robinson, *supra* note 290, at 278; CHARLES FRIED, RIGHT AND WRONG 48 (1978); KANT, THE METAPHYSICS OF MORALS, *supra* note 44, at 60. *Cf.* Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387, 404 (2005).

[471] *See* Chapter II(c).

[472] *See* Chapter II(c)(vi)(2)(f).

justified attacks that conflict with the above-mentioned incompatibility thesis.[473] The paradoxical result that the incompatibility thesis seeks to ward against is that, if each of the actor's force is justified, then neither actor's force can be justified, and if neither actor's force can be justified, then both actors' force is justified.[474] Indeed, regardless of how reasonable the mistake may have been, it will not *justify* the conduct because the mistaken actor has no objectively superior social interest or right that would support creating an exception to the general prohibitory norm. As a result, self-defense provisions must be drafted in terms of conduct, circumstances, result, and *knowledge*.[475] This approach is coherent, and reflects the above-discussed normative significance of justifications.

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

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[473] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 113; Reid G. Fontaine, *An Attack on Self-Defense*, 47 AM. CRIM. L. REV. 57, 77–79 (2010); Russell L. Christopher, *Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights...?*, 85 J. CRIM. L. & CRIMINOLOGY 295, 319–20 (1994).

[474] *See* Rosenau, *supra* note 10, at side-note 18; Russell L. Christopher, *Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defence*, 15 OXFORD J. LEGAL STUD. 229, 242 (1995); Christopher, *supra* note 473, at 307.

[475] SCHOPP, *supra* note 40, at 37.

defense as a justification is, therefore, partially agent-centered, and partially target-centered. It requires both a particular mental state on the part of the defender, as well as an actual threat of harming or wronging.[476]

4. The value-based model's rejection of the utilitarian 'legal justification'

England's Lord Macaulay was one of the first commentators to expressly examine the issue of unknowing justification. And he reached a conclusion contrary to the one advanced here. Macaulay, like Robinson, adopted a utilitarian approach, arguing that the defender's mental state is unimportant; a defensive act that ultimately benefits society should be encouraged:

> [W]hen an act is really useful to society, an act of a sort which it is desirable to encourage, has been done, it is absurd to inquire into the motives of the doer, for the purpose of punishing him if it shall appear that his motives were bad.[477]

Other commentators, including Simester, have taken a contrary, public-policy based position, contending that unknowingly justified conduct should in fact be discouraged because it results in social *dis*-utility by encouraging the commission of *prima facie* offenses in the hope that they might turn out to be fortuitously defensible.[478] Still others have criticized the requirement that defenders must be aware of the justifying circumstances on the ground that the principle weakens the legitimacy of the criminal

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

[477] THE WORKS OF LORD MACAULAY: VOLUME 7 552–53 (Hannah Macaulay Trevelyan ed., 1866). *See also* Sangero, *New Defense*, *supra* note 33, 499; MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 180–81 (1993); Robinson, *supra* note 290, at 289–90.

[478] Andrew Simester, *Mistakes in Defence*, 12 OXFORD J. LEGAL STUD. 295, 303 (1992). *See also* Laurence Alexander, *Lesser Evils: A Closer Look at the Paradigmatic Justification*, 24 LAW & PHIL. 611, 626–36 (2005).

law.[479] As noted above, however, this thesis concludes that unknowingly justified actors are not candidates for the justification of self-defense.[480]

Having plowed this theoretically dense ground, the focus can turn next to the question of why the presence of justificatory facts does not negate the offense definition's *actus reus* requirement at the value-based model's fourth stage of condemnation (the fact-finder determines that the defendant meets the offense definition).[481] The answer to this question can be found in the distinction between offense and defense definitions, and in the difference between the value-based model's conception of the partially expressed public morality and the fully expressed public morality.[482]

If the offense–defense distinction is applied, the question of whether a defense is available (that is, whether the defendant's conduct is an exception to, or a justified infringement of, the fully expressed public morality) is distinct from the question of whether the defendant violated the partially expressed public morality represented by the offense definition. Contrary to the claims of Professors Williams[483] and Robinson,[484] the availability of a defense, and the corresponding negation of condemnation at either stage five (if the defendant's defensive conduct is justified) or stage six (if the defendant is excused), is considered independently and has no bearing on whether the defendant satisfied the offense definition's *actus reus* requirement.[485] The defense, then, renders the

[479] Robinson, *supra* note 290, at 266. *See also* SCHOPP, *supra* note 40, at 35–36 (arguing that unknowingly justified actor could still be liable for attempt); Andrew J. Ashworth, *Belief, Intent and Criminal Liability*, *in* OXFORD ESSAYS IN JURISPRUDENCE 1, 28 (John Eekelaar & John Bell eds., 1987).

[480] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 262.

[481] *See* Chapter II(c)(vi)(2)(e).

[482] *See* Chapter II(c)(vi)(2).

[483] GLANVILLE L. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 24 (2d ed. 1961) ('[T]he rule hardly accords with the requirement of an *actus reus*.').

[484] *See* Robinson, *supra* note 290, at 266.

[485] *See* Chapter II(c)(vi)(2)(f) & (g).

commission of the *prima facie* offense permissible[486] on the basis of accompanying circumstances not directly contemplated in the definition of the *actus reus*.[487]

If the distinction between offenses and defenses is disregarded, on the other hand, defenses become nothing more than negative definitional elements of the offense.[488] The *actus reus* of an assault, for example, would require both the typical features of an assault, *and* would require that the assault occur in such circumstances that no defense pertains. A defendant's unlawfulness would, therefore, be treated as a circumstance that is part of the *actus reus* necessary for criminal liability.[489]

Such a conception of utilitarian 'legal justifications' is arguably flawed, however, because viewing unlawfulness as part of the *actus reus* puts the proverbial cart before the horse. 'Unlawful' merely describes conduct that satisfies both the *actus reus* and *mens rea* requirements of the offense definition.[490] Only after the fact-finder determines that the defendant fits the offense definition, and that he therefore is condemnable at stages one through four, does the issue of a possible defense become relevant.[491] This approach, which also finds support among German theorists, recognizes the basic normative distinction between offenses and defenses that, among other things, allows the public to better understand proscribed conduct.[492]

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[486] The conduct is either an exception to (in the case of justified conduct), or an excusable infringement of (in the case of excused defendants), the fully expressed conventional morality embodied in the prohibitory norm. *See generally* John Gardner, *Justifications and Reasons*, *in* HARM AND CULPABILITY 103, 118–22 (Andrew Simester & Anthony Smith eds., 1996).

[487] *See* Andrew Simester, *Mistakes in Defence*, *supra* note 478, at 296–302. *See also* David Lanham, *Larsonneur Revisited*, 1976 CRIM. L. REV. 276 ('[A]s a matter of analysis we can think of a crime as being made up of three ingredients, *actus reus*, *mens rea* and (a negative element) absence of a valid defence.').

[488] *See generally* Rosenau, *supra* note 10, at side-note 4; Rönnau & Hohn, *supra* note 60, at side-note 15; Lamond, *supra* note 104, at 26. *Cf.* Enker, *supra* note 443, at 278–79 (2009).

[489] *See generally* HERRING, *supra* note 254, at 684.

[490] *See Albert v. Lavin* [1982] AC 546, 561 (HL) (arguing that in setting forth the elements in criminal offenses the word 'unlawful' is tautologous).

[491] *See* Chapter II(c)(vi)(2)(b)–(e).

[492] *See generally* Rosenau, *supra* note 10, at side-note 4; Gunnar Duttge, *§ 16 Irrtum über Tatumstände*, *in* GESAMTEST STRAFRECHT side-note 14 (2017); HANS-HEINRICH JESCHECK & THOMAS WEIGEND,

The result is that self-defense, as discussed, can only be 'legally justified' if the actor was both internally *and* externally justified. Smith argues that any requirement of internal justification is based on public policy rather than on logic.[493] But the thesis concludes that requiring both internal and external justification, in fact, represents a principled, coherent, and logically compelled method of preventing unknowingly justified actors from benefitting from their fortuitous justification, while concurrently avoiding the paradox of unknown justifications. Requiring internal justification is furthermore consistent with the requirement found in stage six providing that excuses can only be claimed by actors to whom the harm cannot be 'subjectively attributed' in the sense that they are not morally accountable for the harm.[494]

iii. 'Unreasonable' mistakes of fact

Mistakes of fact in the context of self-defense can be made with regard to three distinct issues, namely, whether: (a) the actor is *actually* being attacked, (b) the degree of defensive force is *necessary* to ward off the attack, and (c) the degree of defensive force is grossly *disproportionate* to the harm threatened.[495] The first two questions are matters of fact, whereas the third question is ultimately a value judgment that is answered by reference to the fully expressed public morality (though the facts underlying the assessment concededly could of course also be subject to a mistake of fact). The discussion above has shown that a reasonable mistake of fact as to the extant circumstances will not justify defensive force, but instead may constitute an excusable

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LEHRBUCH DES STRAFRECHTS, ALLGEMEINER TEIL 250 (5th ed. 1996) [hereinafter JESCHECK & WEIGEND, 5th ed.]. *See also* Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 291 n.164 (1982) ('The distinction between offenses and defenses is perhaps the most basic distinction in criminal law that lawyers . . . recognize.'), *cited in United States v. Ortiz*, 927 F.3d 868, 873 (5th Cir. 2019).

[493] JOHN C. SMITH, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW 31–32 (1989).

[494] *See* Chapter II(c)(vi)(2)(g).

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

infringement of the prohibition (because external justification is required for conduct to be justified).[496] Still unresolved, however, remains the important foundational question of what an 'unreasonable' mistake is, and what impact such a mistake should have on the analysis.

People form unreasonable beliefs in the self-defense context for two basic reasons: (a) they fail to take sufficient *care* in evaluating the circumstances that confront them before resorting to defensive force; or (b) their *capacity* to evaluate the relevant circumstances is to some extent impaired.[497] The first scenario presents the least analytical difficulty because an actor who simply does not take the proper care in evaluating whether defensive force is necessary can surely (at some level at least) be morally blamed for his mistake. Because of his carelessness, such an actor culpably infringes on an innocent victim's autonomy, and he, therefore, may not claim self-defense. Such an actor meets the requirements of the value-based model's stage-five condemnation because he was not externally justified, and he passes through stage six because he neither lacked legal competency nor chose a reasonably mistaken action-plan.[498] The defender's relative lack of blameworthiness may, nevertheless, be taken into account by the judge at the sentencing stage as a mitigating circumstance; or it may prevent him from having the necessary *mens rea* required by a particular offense definition; or, if merely negligent, it may make him inappropriate for certain categories of criminal punishment.

The second type of unreasonable mistake is made by an actor whose *capacity* to properly evaluate the situation is impaired due either to a psychological disability or

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[496] *See* Chapter IV(a). *See also* FLETCHER, RETHINKING, *supra* note 46, at 696–97, 762–69, *cited in* Vera Bergelson, *Duress Is No Excuse*, 15 OH. ST. J. CRIM. L. 395, 401 n.34 (2018).

[497] *See generally* Sendor, *supra* note 91, at 1399 n.127.

[498] *See* Chapter II(c)(vi)(2)(f) & (g). *See also* Judith J. Johnson, *Why Mississippi Should Reform Its Penal Code*, 37 MISS. C. L. REV. 107, 134 (2019); Diamond, *supra* note 28, at 123–24.

because of some other personal characteristic such as fearfulness or a bad temper. An unreasonably mistaken person suffering from a psychological disability preventing him from properly evaluating the circumstances will be excused because he was legally incompetent at the time of the act and therefore is not appropriate for the value-based model's stage-six condemnation.[499] While an insane attacker infringes on the private domain of another, and is, therefore, subject to justified defensive force, he cannot be said to be legally accountable for his actions or for the harm he threatens.[500]

On the other hand, actors who are impaired in their ability to evaluate the relevant circumstances because of fear, nervousness, or natural aggressiveness—and therefore unreasonably think that they are acting in self-defense—*do* impermissibly infringe on the 'attacker's' personal domain without justification or excuse (thereby implicating value #2; and, depending on the circumstances, value #3—equal standing).[501] In contrast to legal insanity, personality traits such as fearfulness or aggression are, broadly speaking, within the actor's control.[502] The fictitious 'reasonable person' should not be endowed with traits such as timidity or fearfulness, for the law expects people to control such 'flawed' personal characteristics.[503] The moral norm inherent in the 'reasonable person' test is, thus, that persons who fail to overcome personal characteristics that they can fairly be expected to surmount are blameworthy, and are, therefore, liable for punishment.[504]

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[499] *See* Chapter II(c)(vi)(2)(g). *See also* Fontaine, *supra* note 473, at 85–88.

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

[501] *See* Chapter II(c)(ii) & (iii).

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

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

[504] *See generally* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 789 (1994), *discussing* George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1291 (1974).

While such actors are not what this thesis will term 'strongly culpable,' in the sense that they did not act with an evil purpose, they can be described as 'weakly culpable' because of their failure to control their excessive fearfulness or aggression. Such weakly culpable actors are undeserving of an excuse or justification because their conduct reflects a disregard for the interests of others and therefore inflicts a wrong (implicating values #3—equal standing; #4—protecting the defender's autonomy; and #7—deterrence).[505] A contrary result would allow actors who are sane (and thus subject to all eight stages of value-based model moral condemnation),[506] but overly aggressive or fearful, to unjustly infringe on the private domains of others. (Note, however, that the actor's fearfulness or aggression may of course be considered as a mitigating circumstance but will provide neither a justification nor a complete excuse.)

b. <u>When is defensive force 'necessary'?</u>[507]

The thesis now turns its attention to self-defense's most fundamental (and most litigated) limitation, namely, the requirement of 'necessity.'[508] For defensive force to have been 'necessary,' the force used must have been indispensable or unavoidable if the actor was to successfully block or fend off the threat.[509] The (forced-choice) logic is that the attacker cannot complain that his rights were violated if he puts the defender in a position where the defender faces the Hobson's choice of either tolerating the serious intrusion or

[505] *See* Chapter IV(a). *See also* Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 17 (2003).

[506] *See* Chapter II(c)(vi)(2).

[507] The issue of proportionality will be addressed in Chapter IV(c).

[508] *See generally* Fritz Allhoff, *Self-Defense Without Imminence*, 56 AM. CRIM. L. REV. 1527, 1531–48 (2019); Leider, *supra* note 78, at 995–1002.

[509] *See* UNIACKE, *supra* note 203, at 32.

using reasonable means available to him that are required to block or fend off the attack.[510]

But necessity also plays a (and, perhaps, the) critical part in reinforcing the humanitarian core of self-defense law, as reflected most directly in value #2 (protection of the attacker). As Leider has maintained, the centrality of the necessity requirement not only protects aggressors' rights to due process of law, but it relatedly also prevents situations where the putative defender might otherwise employ self-preferential force too early.[511] Put another way, the limitation is thought to make self-defense unavailable if the aggressors have not yet made up their minds to attack.[512] Necessity, therefore, helps us understand the boundaries of self-defense. In so doing, it defines the role of citizens and the roles of the state (and, consistent with value #1, allocates their respective permissions to lawfully deploy violence).[513]

i. Distinguishing self-defense from necessity and duress

Is self-defense a species of necessity, or perhaps an example of duress? The defense of necessity, after all, is said to apply in cases of emergency when an individual is faced with a choice between two 'evils.'[514] Similar to duress situations,[515] the individual in such a predicament must decide whether to break the literal terms of the criminal law, or whether to instead abide by the law's requirements and thereby permit the even greater

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[510] THOMAS HOBBES, LEVIATHAN ch. 14, (Crawford B. Macpherson ed., 1974) (1651), *discussed in* Lesch, *supra* note 27, at 113–14. *See also* Greco, *supra* note 54, at 675; Erb, *supra* note 10 at § 32, side-note 5; Wallerstein, *supra* note 234, at 1005–15. *See also* Chapter II(d)(i)(2).

[511] Leider, *supra* note 78, at 1002. *See also* Nourse, *supra* note 62, at 1725.

[512] *See* Leider, *supra* note 78, at 1002

[513] *See* Ferzan, *supra* note 72, at 460–61.

[514] *See generally* Ivo Coca-Vila, *Conflicting Duties in Criminal Law*, 22 NEW CRIM. L. REV. 34, 37–40 (2019); Christopher, *supra* note 438, at 1153–54; Michele Cotton, *The Necessity Defense and the Moral Limits of Law*, 18 NEW CRIM. L. Rev. 35, 40 (2015).

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

harm to occur.[516] The answer proffered here is that self-defense is neither an example of necessity, nor a form of duress.

Assume Andrew is driving a train with defective breaks. Andrew approaches a 'Y' in the tracks and discovers to his horror that Peter, Michael, and John are tied to the left tracks, whereas Steve is doing repair work on the track to the right. Steve is facing away from the train and from the others and is unable to hear the oncoming train due to his deafness. Andrew is thus faced with a conflict of rights in which either outcome will cause the death of innocent life. Under these circumstances, Andrew decides to divert the train to the right tracks because this saves the lives of Michael, Peter, and John, although it causes the death of Steve. Andrew will be able to claim necessity.

It might therefore be argued that, if Victor is attacked by the insane Thomas, Victor is normatively in the same position as Andrew in the prior hypothetical. After all, both, through impersonal necessity, find themselves in a conflict of rights situation. In the case of the insane Thomas, this impersonal necessity is brought about by the disease working on Thomas' powers of perception and judgment.

While this parity argument has initial appeal, on a deeper level it overlooks the relevance of the *source* of the threatened harm.[517] Instead, it merely relies on necessity's utilitarian/teleological public policy claim that otherwise illegal conduct is permitted because 'higher values' are achieved at the expense of 'lesser values.' In the first scenario, Andrew diverts the train even though this act causes Steve's death. Andrew is immune from punishment because there was a moral imperative for his actions that

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[516] *See generally* Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 10 J. CRIM. L. & CRIMINOLOGY 575, 577–78 (2011); Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 48–49 (2002); WAYNE R. LAFAVE & AUSTIN WAKEMAN SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.4 (1986).

[517] *See generally* Michael Bayles, *Reconceptualizing Necessity and Duress*, 33 WAYNE L. REV. 1191, 191–92 (1986).

provided an overriding reason for the otherwise illegal conduct. Although Steve's rights are thus violated, the violation is deemed legal.

Necessity cases, therefore, involve an actor who is said to be morally *compelled* to act in the way that he did.[518] If, for example, Andrew forces Victor at gunpoint to block the road with Victor's car so that the insane Thomas is unable to drive to town with a bomb, Andrew's actions clearly violate Victor's rights. Andrew's conduct furthermore would not qualify as self-defense, since Victor was not the source of the threat.[519] Andrew may, nevertheless, be justified under the doctrine of necessity, because his commandeering of Victor's car arguably avoids a 'greater evil.'[520] Nevertheless, and as discussed in Chapter IV(e)(i)(4), there certainly are difficult cases involving passive threats where drawing the line is more challenging.

As conceived here, self-defense cases, in comparison, do not involve violations of the attacker's rights, for the attacker *himself* poses the threat,[521] thereby conditionally creating a gap in his otherwise inviolable personal domain.[522] The insane Thomas, for example, is the source of the unjust threat (and threatens value #4—protection of the defender's autonomy); his rights are not violated when Victor uses reasonable force to repel the threat he poses. In short, whether there is a conditional gap, and what the size of it might be, are in turn determined on a sliding scale informed by the balance of the implicated decision-grounds.[523]

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

[519] *See generally* Grabczynska & Ferzan, *supra* note 318, at 235.

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

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

[522] *See* Chapter II(d)(i).

[523] *See id*.

Duress cases are even more readily distinguishable. They involve compliance with an illegal *threat*, rather than the avoidance or neutralization of harm through force.[524] The evil Andrew forces Victor to steal Peter's car and threatens to kill Victor's son if he fails to comply. Peter does not pose an unjustified threat to Victor, and Victor may, therefore, not claim that he was acting in self-defense. Victor may, however, argue that he was acting under duress and should not be punished because he does not pass through the value-based model's stage-six condemnation. But duress of circumstance cases (where the threat emanates from the circumstances, rather than from a verbal command[525]) are more challenging in that they share a great deal in common with the passive threat issues discussed below in Chapter IV(e)(i)(4).[526]

ii. <u>The relationship between necessity and imminence</u>

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

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[524] *See generally* BAKER, *supra* note 440, at 1119–20; Ken Levy, *Does Situationism Excuse—The Implications of Situationism for Moral Responsibility and Criminal Responsibility*, 68 ARK. L. REV. 731, 777 (2015); Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 178 (2013).

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

[526] *See generally R v. Hasan* [2005] 2 AC 467 (requiring defendant to reasonably believe there was a threat of death or serious injury, and that defendant's reaction was also reasonable).

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

Self-defence is frequently formulated so that defensive force is authorized only if it is '*necessary* to prevent an *imminent* attack.'[527] Such a formulation treats necessity and imminence as independent requirements; the threatened attack must be imminent, *and* the defensive force must also be necessary to prevent the attack.[528] Under this decoupled standard, Victoria's use of force could be viewed as unjustified because the threatened harm was not technically imminent. Andrew, after all, still had to make the long drive to Walden to turn off the water supply. Although Victoria's defensive force remains her only way of escaping certain death, this common standard would not authorize it (more on this in Chapter IV(e)(i)(6) discussing the value-based model's treatment of battered intimate partner syndrome).

Recall that the self-defense regime developed here is also concerned with the equal standing of defenders and attackers (value #3) and protecting the defender's private domain (value #4).[529] As such, it is argued that the value-based model must permit

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[527] *See, e.g.*, Allhoff, *supra* note 508, at 1541–47; *United States v. Jennings*, 855 F. Supp. 1427, 1435–36 (M.D. Pa. 1994), *citing United States v. Oakie*, 12 F.3d 1436, 1443 (8th Cir. 1993), *aff'd*, 61 F.3d 894 (3d Cir. 1995); *United States v. Acosta-Sierra*, 690 F.3d 1111, 1126 (9th Cir. 2012).

[528] *See generally* Leider, *supra* note 78, at 994 n.158; Kimberly K. Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 247 (2004).

[529] *See* Chapter II(c)(iii) & (iv).

appropriate force to be used whenever it is *immediately necessary* to block or fend off an unjust threat.[530] This formulation thus treats *immediacy* of the threat as a *factor* in determining whether the defensive force was necessary, reflecting an unwillingness to leave defenders without the ability to lawfully protect themselves.[531]

Applied to our hypothetical case, this admittedly broader formulation allows the type of preemptive strike Victoria delivered. By clearly threatening Victoria and engaging in physical conduct that demonstrates his intention to act on his threat (beating her and driving off in the car), Andrew became an immediate and culpable threat to Victoria. Victoria is, therefore, both internally and externally justified in killing Andrew in order to save her own life.[532]

Leverick, in contrast, relies on her baseline 'firm conviction' about the equal value of the lives of aggressors and defenders to reject such a test in cases involving battered women.[533] According to Leverick:

> [S]elf-defense is only permissible where the accused faced a threat of death (or one of near equivalent seriousness) or where such a threat might reasonably be assumed. The level of violence faced by the majority of battered women is unlikely to meet this threshold.[534]

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

[531] *See* Lesch, *supra* note 27, at 110–11; Shana Wallace, *Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defense*, 71 U. CHI. L. REV. 1749, 1761–62 (2004).

[532] *See* Chapter IV(a)(ii).

[533] It will be conceded that the term 'battered women' is admittedly dated. 'Battered intimate partner' is more contemporary and appropriately descriptive. That said, because the literature for years has used 'battered woman' or 'battered spouse,' those terms are on occasion repeated here (though not exclusively so). For the leading, albeit controversial, research-based study of the syndrome, *see* WALKER, *supra* note 349. *See also* GRUBER, *supra* note 349 (discussing the complex relationship between the duty to retreat in self-defense law and violence against women).

[534] LEVERICK, *supra* note 2, at 91.

Leverick, therefore, favors a strict temporal interpretation of imminence and disfavors a substitute 'necessity test.' She contends that such 'loosening' of the imminence requirement basis of 'lesser values, such as personal honor or the desire for revenge,' fails to accord maximum protection to the value of protecting the attacker's life.[535] But by side-stepping the more challenging discussion of the other values implicated in battered intimate partner cases, and by focusing on motivations such as 'revenge,' Leverick may be missing the opportunity to anchor her analysis with stouter analytical gear.[536]

The skeptic may of course assert that Andrew could possibly cool down and change his mind during his drive. He in the end may decide not to kill Victoria (or at least not to kill her today). But the same argument can be made in the context of any attack. It is always possible that an aggressor will at the last minute or second stop just short of, say, pulling the trigger of his gun or plunging his knife into the defender's chest. And so if the fact-finder believes, given the surrounding circumstances and the relationship between the parties, that the threat will in fact be carried out (that is, that the defender is *externally* justified), and that the defender acted in reaction to this threat (that is, that the defender is *internally* justified), then the defender's conduct must be legally justified.[537] The common 'necessary to prevent an imminent threat' language, in contrast, for no good reason forecloses the possibility that a jury could rule Victoria's action as

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

[536] *Compare* Lesch, *supra* note 27, at 110 (arguing that defenders have the right to defend against the fear of future attack violent intimate partners may create).

[537] *See generally* Shazia Choudhry & Jonathan Herring, *Righting Domestic Violence*, 20 INT'L J.L. POL'Y & FAM. 95, 109 (2006) ('[T]he key question should be whether the infringement of the right is necessary to avoid an inevitable attack, rather than whether there is imminence.'). *See also* Chapter IV(a)(ii).

self-defensive. The position taken here is that such an outcome is normatively undesirable and inconsistent with the balance of the decision-grounds.[538]

For illustrative purposes, what follows is intended to graphically illustrate how the value-based model might approach such a challenging fact pattern set out at the beginning of this subchapter:

Table 3

Nature of Threat: Culpable		
Seriousness of Threat: Severe (Death)		
Defensive Force: Severe (Death)		
Decision Ground	**Weight**	**Summary of Reasoning**
Value #1: Collective violence-reducing function (*see* Chapter II(c)(i))	+1	Andrew is culpably posing a serious threat. He, therefore, has conditionally waived his right to non-interference. Victoria, moreover, is only using necessary force to ward off the threatened harming *and* wronging. From a systemic perspective, permitting deadly force here does not inappropriately threaten the state's monopoly on violence.
Value #2: The attacker's right to life (see Chapter II(c)(ii))	0	Andrew's decision to engage in a culpable attack threatening death overcomes the presumption that the attacker's right to life must be safeguarded.
Value #3: Maintaining equal standing (*see* Chapter II(c)(iii))	+1	Andrew is aggressively claiming he will kill Victoria, and he, therefore, is threatening to impose his will on her and to elevate his interests above hers. Defensive force is necessary to ward off this threatened imputation of unequal standing.
Value #4: Protecting the defender's autonomy (*see* Chapter II(c)(iv))	+1	Andrew's culpable attack threatens a severe injury (namely, death).

[538] *See generally* Chapter II(c) & (d).

Decision Ground	Weight	Summary of Reasoning
Value #5: Ensuring the primacy of the legal process (*see* Chapter II(c)(v))	+1	Victoria is facing a non-compensable injury at the hands of a fully culpable attacker. She, therefore, has no acceptable or practicable legal recourse. As a consequence, the primacy of the legal process is not threatened by her use of defensive force.
Value #6: Maintaining the legitimacy of the legal order (*see* Chapter II(c)(vi))	+1	Refusing to permit Victoria to use defensive force under these circumstances could reasonably be perceived as very unjust and, therefore, could cause damage to the legal system's legitimacy (in the sense of moral authority in the eyes of the public).
Value #7: Deterrence (*see* Chapter II(c)(vii))	+1	The fully culpable Andrew is threatening Victoria with deadly force. Permitting Victoria to counter this threat with deadly force will, on balance, add to self-defense's specific and general deterrent impact.
TOTAL	**+6**	**Deadly force is presumptively justifiable (and +6 indicates relatively strong justification).**

iii. Retreat and avoiding conflict

The private domain consists of concrete interests and sovereignty.[539] Some may conclude therefrom that any requirement that the defender retreat from, or avoid going to, a place where he has a legal right to be would impermissibly infringe on his autonomy (value #4), and in fact would strengthen the imputation of lesser standing inherent in the threatened wronging (value #3).[540] Victor, they would say, may, therefore, go to the local pub even though he believes it to be certain that the aggressive Andrew will also be there and will likely pick a fight with Victor. In fact, the argument often advanced is that, in a liberal society, individuals should have the right to go anywhere they are legally

[539] *See generally* Schopp, *supra* note 135, at 2075. *See also* Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 22–23 (2016).

[540] *See generally* Erb, *supra* note 32, at 597 (in extreme cases a strict duty to retreat could force a person out of the public sphere).

permitted to be, regardless of what aggressors they may find there, because freedom of movement is part of individual autonomy (value #4).[541]

Leverick, in contrast, characterizes the 'strong retreat rule' (requiring the defender to make an attempt to retreat before using force) as the most 'morally appropriate' because, by requiring retreat whenever it is a safe possibility, it (consistent with the approach taken by the U.S. Model Penal Code) 'promotes maximum respect for the right to life.'[542] She conversely dismisses the 'no-retreat rule' because it does not seek to 'save[] both the life of the aggressor and the life of the victim.'[543] She, similarly, rejects the 'weak retreat rule' because:

> Allowing the accused to make the choice to use violence on any occasion where this could have been avoided implies that the law does not respect the right to life of an aggressor and places some other value, such as honor, dignity, or vengeance, higher than that of the aggressor's life.[544]

Leverick's approach, in short, places paramount emphasis on value #2 (protecting the attacker's right to life). The value-based model, however, considers a broader spectrum of values and, accordingly, rejects any categorical duty to, under all circumstances, retreat or avoid places where one may become a victim.[545] That said, broader welfarist concerns,[546] as reflected in the balance of the value-based model's decision-grounds,[547] do suggest that the value-based model should require retreat when

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[541] *See id*. *See also* Chapter II(c)(iv).

[542] LEVERICK, *supra* note 2, at 76.

[543] *Id*. at 78–79.

[544] *Id*. at 81.

[545] *See* discussion in Chapter IV(b)(iii).

[546] *See generally* Kremnitzer & Ghanayim, *supra* note 46, at 894.

[547] Consider, for example, value #1 (reduction in overall societal violence), value #2 (protecting the attacker), and value #5 (ensuring the primacy of the legal process). *See* Chapter II(c)(i), (ii), & (v).

(1) the attacker is an innocent, and (2) it can be done safely. In fact, Richardson and Goff have argued that a failure to retreat under these conditions establishes that the defender is 'no longer morally innocent.'[548]

But going back to the value-based model's approach, if the defender knows that he will be set upon by an innocent attacker (a person laboring under a mistake, a child, etc.) and retreat can be accomplished without materially increasing a risk of serious harm, then values #1 and #2 would counsel in favor of requiring retreat.[549] But, as already noted, these determinations occur on a sliding scale and the related value-judgments are heavily fact-dependent. It, therefore, is not possible to provide *post-facto* rules governing every conceivable action.

To further illustrate this point, assume that Victor knows that Andrew will threaten Victor with a beating as soon as Victor appears at the pub, and that Victor in fact sees Andrew through the window of the pub. According to Leverick:

> Where it does not conflict with any other value, the accused should have the freedom to go to any public place she chooses, but [in a situation like this] the value of freedom of movement is outweighed by the weightier value of minimizing violence.[550]

This thesis agrees with Leverick to a point. By entering into the pub with this knowledge, Victor knowingly increases the likelihood that a conflict will arise (thus negatively implicating values #1 and #2—collective violence reduction by protecting the state's monopoly on force, and protection of the individual attacker, respectively; and value

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[548] *See* L. Song Richardson & Phillip Atiba Goff, *Self Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 333 (2012).

[549] *See* Chapter II(c)(i) & (ii).

[550] LEVERICK, *supra* note 2, at 126.

#5—ensuring the primacy of the legal process).[551] The criminal justice system's interest in protecting Victor's rights can, therefore, fairly be said to be negatively impacted by the fact that Victor in essence 'assumed' a certain amount of risk when he entered the pub (weakening the impact of value #3—equal standing; value #4—protecting the defender's autonomy; and value #7—deterrence).[552]

It, after all, would not be asking too much for Victor to avoid this particular pub, even if this causes him to have to suffer some minor inconvenience (he could, for example, inform the police of the situation).[553] Similarly, if a defender refuses to retreat from a place when escape is possible, decision-grounds such as protecting the equal standing among people (#3) and protecting the defender's autonomy (#4) become less weighty, particularly if it is reasonably foreseeable that the defensive conduct necessary to thwart the attack will be severe (thus adding weight to safeguarding the collective violence-reduction function of the criminal law (#1), protecting the attacker (#2), and ensuring the primacy of the legal process (#5)).[554]

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

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[551] *See* Chapter II(c)(i), (ii), & (v).

[552] *See* Chapter II(c)(iii), (iv), & (vii).

[553] *But see* Erb, *supra* note 32, at 597 (restricted duty to retreat allows aggressors to limit innocents' personal freedom).

[554] *See* Chapter II(c)(i), (iii), & (iv).

c. Proportionality of defensive force

i. Rejecting strict proportionality and addressing excessive force

Some, like Leverick[555] and Wallerstein,[556] wish to impose exacting proportionality between the harm threatened and the defensive force used.[557] In this view, the systemic demand for precise proportionality between the severity of the punishment and the severity of the committed abstract crime should also apply in the context of actions taken in self-defense.[558]

Leverick, by way of illustration, concedes pregnancy is an 'extremely unpleasant potential consequence of a rape'; but, adopting a strict proportionality approach, she asserts that deadly force to prevent rape should only be permitted if the threatened attack 'approaches the standard of a wrong *equivalent to a deprivation of life itself*.'[559] Given, moreover, that respect for autonomy requires the wrongdoer to in some sense 'will' his own coercion (by threatening a *wrong*, rather than a mere *harm*),[560] the argument advanced by commentators like Leverick is that the same principle could be said to also require that the wrongdoer will the *measure* of his coercion.

This argument, however, overlooks that punishment is an institutionalized legal response to wrongdoing that is constrained by systemic factors in the way it is

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[555] *See* LEVERICK, *supra* note 2, at 143–52 (demanding precise proportionality, so that severe injury (such as loss of a limb) is not enough to, without more, justify deadly defensive force).

[556] *See* Wallerstein, *supra* note 234, at 1024–25.

[557] *See generally* Richard J. Arneson, *Self-Defense and Culpability: Fault Forfeits First*, 55 SAN DIEGO L. REV. 231, 261–62 (2018); Marvin Lim, *A New Approach to the Ethics of Life: The Will to Live in Lieu of Inherent Dignity or Autonomy-Based Approaches*, 24 S. CAL. INTERDISC. L.J. 27 (2014); Porat, *supra* note 1, at 128; Kremnitzer & Ghanayim, *supra* note 46, at 894–99. *Cf.* Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 74 (2010); Renee Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON & POL'Y 331, 361 (2006).

[558] *See* LEVERICK, *supra* note 2, at 143–52.

[559] *Id*. at 157 (emphasis added). *See also* discussion at Chapter III(c). Note, however, that determining the 'standard of a wrong' inevitably involves the same 'line-drawing' that Leverick finds objectionable in the context of deadly force in defense of property.

[560] *See generally* Chapter II(c)(iii).

distributed.[561] Stated another way, while consistency may require a uniform system of sentencing that incorporates strict proportionality, the value-based model recognizes that the same cannot reasonably be said to be true for unpredictable, heat-of-the-moment actions taken in self-defense. Self-defense, after all, is *anticipatory* in the sense that its aim is the avoidance of harm.[562] Punishment (through sentencing), in contrast, is largely *retrospective* in that it responds to harm with retaliatory harm that is meted out for a variety of reasons, including general and specific deterrence, incapacitation, and prevention.[563] Punishment, in short, occurs under different circumstances and for different reasons than self-defensive conduct. Attempts to analogize the two on the basis of 'willed coercion' thus lack persuasive force.

Under the approach developed here, however, the argument for cabining a defender's ability to exercise force is stronger when the attacker is morally innocent (and, therefore, does not fully implicate values #3—equal standing; #4—protecting the defender's autonomy; #5—primacy of the legal process; and #7—deterrence).[564] As discussed previously in the context of the decision-grounds' concern with ensuring equal standing among people and deterring crime,[565] beyond 'willed coercion,' there are sound normative (and utilitarian) reasons for imposing additional limitations on the amount of force that can be used against an innocent attacker.

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

[562] *See generally* Marina Angel, *Why Judy Norman Acted in Reasonable Self-Defense: An Abused Woman and Sleeping Man,* BUFFALO WOMEN'S L.J. 16, 65–88 (2008).

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

[564] *See* Chapter II(c)(iii)–(v). *See also* Rönnau & Hohn, *supra* note 60, at side-notes 6, 13, and 74; Erb, *supra* note 10, at side-notes 60, 209.

[565] *See* Chapter II(c)(iii) & (vii).

It is of course true that the innocent attacker also threatens concrete harm to the defender. But it is important to consider that the innocent attacker, as the value-based model recognizes, does not deny the intersubjective foundation of the defender's rights (value #3) in the way that a culpable attacker does.[566] And, as already noted, the law cannot expect a defender to absorb an attacker's seriously harmful and unjustified, though innocent, attack. Such a requirement would compel the defender to subordinate his autonomy and concrete interests to the welfare of the attacker.[567] A defender may, therefore, under the value-based method use force even against an innocent attacker. But the amount of harm threatened by the attacker will be more carefully weighed against the amount of defensive force that may be used, whether safe retreat is required, and what amount of harm the defender can be expected to absorb.

Whenever a defender uses force, moreover, he may err and use more force than is actually necessary to ward off the culpable threat. Pace Grotius,[568] an unreasonable error that results in the defender using excessive force to ward off the threat, intrudes on the violence-reducing function of the criminal law by threatening the state's monopoly on force (value #1). It also impermissibly harms the individual attacker (value #2) because such force lies outside the conditional gap created by the person purportedly posing the threat. Consistent with the value-based model's treatment of mistake,[569] then, a reasonable mistake as to the amount of force necessary to thwart the attack will excuse the defender (that is, exempt the defendant from value-based model stage-six

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[566] *See* Chapter II(c)(iii). *See also* Erb, *supra* note 10, at side-note 18; RETZKO, *supra* note 335, at 127; RENZIKOWSKI, *supra* note 335, at 275.

[567] *See* Chapter II(c)(iv).

[568] *See generally* Robert Feenstra, *Dutch Kantharos Case and the History of Error in Substantia*, 48 TULSA L. REV. 846, 856 (1973–1974).

[569] *See* Chapter II(c)(i) & (ii).

condemnation).[570] An unreasonable mistake of fact, on the other hand, renders self-defense unavailable.

ii. Deadly force in defense of property

Controversially in some circles,[571] the value-based model (admittedly narrowly) agrees with the U.S. and English courts that deadly force in defense of property should, as a general rule, be rejected. While certainly susceptible to different normative appraisals, and recognizing the argument that property is an extension of the 'self,'[572] the value-based model nevertheless agrees that, while most property interests are generally compensable, a human life is not.[573]

Of course, it is difficult to *ex ante* determine whether law enforcement will be able to recover the property or arrest the thieves so that alternative compensation can be sought. As articulated here, however, the criminal law's objectives include violence reduction and protection of the state's monopoly on force (value #1), protection of the attacker's presumptive right to life (value #2), ensuring the primacy of the legal process (#5), and avoiding results that could threaten the legitimacy of the criminal law (#6).[574] Consequently, the law, on balance, would be hard-pressed to permit a defender to

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[570] *See* Chapter II(c)(vi)(2)(g).

[571] The majority position among German scholars, for example, holds that deadly force may be used to defend property. *See, e.g.*, CLAUS ROXIN, STRAFRECHT, ALLGEMEINER TEIL 590 (3d ed. 1997). *See also* JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 348 n.49. *But see* Greco, *supra* note 54, at 671 (discussing a minority position that even the threatened loss of 5,000 Euro is insufficient to justify deadly defensive force); Klaus Bernsmann, *Überlegungen zur tödlichen Notwehr bei nicht lebensbedrohlichen Angriffen*, [1992] 104 ZStW 290, 326 (contending that deadly force in defense of property is never justified). *See also* TEX. PENAL CODE ANN. § 9.42(3)(A) (2019) (stating that the use of deadly force in defense of property is justified when 'the land or property cannot be protected or recovered by any other means'); Robert Schopp, *Self-Defense*, *in* IN HARM'S WAY (Jules Coleman ed., 1994), *discussed in* Kaufman, *supra* note 253, at 28.

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

[573] *See generally* Kaufman, *supra* note 253, at 28.

[574] *See* Chapter II(c)(i), (ii), (v), & (vi).

extinguish another's life solely because the defender at that time believes this to be the only way for him to ensure that his property is not damaged or permanently taken away (impacting values #3—equal standing; and #4—protecting the defender's autonomy) or to send a deterrent message to would-be criminals (value #7).[575]

iii. Responding to 'trivial' threats

This thesis has sought to establish that both innocent and culpable threats infringe on the defender's autonomy (value #4).[576] It has also discussed how and why the value-based model devalues threats to property when compared with threats of physical harming.[577] So does this mean that a person can use deadly force to, say, prevent another from stepping on one's toes if that is the only way to avoid the threatened physical 'harm' (or, rather, discomfort)?

1. A comparison with Schopp's approach

Schopp, as noted, argues that a liberal society must treat *any* culpable infringement of an individual's autonomy as extremely serious.[578] At the very heart of his argument lies the strict separation between public and private spheres of action. Relying heavily on the work of Feinberg[579] and Rawls,[580] Schopp argues that 'substantive liberals' (like him) consider sovereignty a categorical, underivative, non-instrumental, and, most significantly, non-compensable fundamental value.[581] The right to self-determination in the public sphere, the right to unfettered choice in those matters falling into the private domain, and equality of citizenship are thus central to Schopp's thesis. He concludes that

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[575] *See* Pest, *supra* note 54, at 165; Green, *supra* note 268, at 38. *See also* Chapter II(c)(iii), (iv), & (vii).

[576] *See* Chapter II(c)(iv).

[577] *See* Chapter IV(c)(ii).

[578] *See* JUSTIFICATION DEFENSES, *supra* note 40, at 83–88. *See generally* Chapter III(e). *Cf.* Chapter II(c)(iv).

[579] *See generally* FEINBERG, *supra* note 135, at 28–31.

[580] *See generally* JOHN RAWLS, POLITICAL LIBERALISM Lect. I, §§ 1–3 (1993).

[581] SCHOPP, *supra* note 40, at 67.

only a system allowing largely *unlimited* discretionary authority in the private sphere can be described as 'liberal' in this sense. The private sphere should therefore be beyond the reach of political interference.[582]

Schopp uses the example of an elderly farmer who is working at her market stall (this example may ring familiar, as it appears to be a variation on the German fruit thief case introduced in Chapter I). A local bully approaches the stall and takes one of the farmer's apples. When she asks the bully to return the apple, he replies '[t]ough, old lady, what are you going to do about it?' The farmer in response takes a handgun from under her apron and kills the bully. According to Schopp, the shooting was necessary to prevent the theft of the apple. It, therefore, 'does not seem counterintuitive to say that [the victim] was justified [in shooting the bully dead].'[583] This outcome certainly may appear harsh, but it is predictable in light of Schopp's stipulations.

But it is in these very stipulations that the weakness of this argument becomes manifest. Schopp provides that 'gratuitous' defensive force is not to be permitted.[584] This, however, is not saying very much more than that necessity is required. Moreover, to simply assert, as Schopp does, that the 'private sphere' is outside the reach of the criminal law's influence or that an individual's sovereignty can never be infringed because it is non-compensable are conclusory assertions of belief demanding principled (and, it is argued, value-based) support. Schopp, however, provides no such arguments.

The fundamental difficulty with Schopp's categorical conception of individual autonomy (much like with the old German law's treatment of the fruit thief), in short, is that it is challenging to square it with life in modern society. Whether called 'welfarist'

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[582] *Id*. at 77. *See also Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S. Ct. 2169, 2184–85 (1986).

[583] SCHOPP, *supra* note 40, at 84.

[584] *Id*. at 78.

or 'humanitarian' concerns, or 'value #1, #2, and #5 issues,' life routinely, predictably, and justifiably imposes on citizens demands that they must at times restrict their otherwise autonomous spheres of activity in order to promote other legitimate interests.[585] As discussed above, restricting certain purely autonomous action can in fact be said to be the very function of the criminal law.[586]

In sum, the position taken here diverges from Schopp's theory in part because the value-based model views trivial harms as adding little (or, indeed negative) weight to competing decision-grounds such as violence reduction and protection of the state's monopoly on force (value #1), protection of the attacker (value #2), and ensuring primacy of the legal process (value #5).[587] While Schopp's position may add additional protection to the defender's autonomy (value #4) and increase deterrence (value #7),[588] it does so at such a great cost in the sense of the exercise of disproportionate force, implicating values #1 and #2. Indeed, it can be said to potentially undermine the moral legitimacy of the legal order (value #6).[589]

In cases involving trivial threats, then, defensive force must be limited by more than simple necessity. Contrary to Schopp's claim, and providing further support for the hypothesis' assumptions about the importance of transparency to sound decision-making, the nature and amount of harm threatened very directly impact the implicated values. The interplay with the facts and the values, in turn, provide a reasonable (and reasoned) argument for whether the conduct should qualify as justified self-defense.[590]

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

[586] *See generally* Chapter II(c)(i)–(iv). *See also* Anthony Simester & Andreas von Hirsch, *On the Legitimate Objectives of Criminalisation*, 10 CRIM. L & PHIL. 367, 376–78 (2016).

[587] *See* Chapter II(c)(i), (ii), & (v).

[588] *See* Chapter II(c)(iv) & (vii).

[589] *See* Chapter II(c)(i), (ii), & (vi).

[590] *See generally* Chapter II(c)(iii).

2. Subjective or objective evaluation of triviality?

Assume Andrew is about to dispossess Victor of a stamp that, viewed objectively, is of little financial value. To Victor, however, the stamp holds immense value because it was a special gift from his grandfather who spent years trying to locate and purchase it. To remain consistent with the logic underlying the requirement that mistakes of fact must be objectively reasonable,[591] the position taken here is that triviality must likewise be determined objectively, based on a 'reasonable person' standard.[592]

An exception to this rule, however, is carved out for situations in which the attacker in fact *knows* that the object he is threatening has a particular subjective value to the defender (that is, Andrew is aware that the stamp's theft constitutes a subjectively serious intrusion on Victor's personal autonomy (value #4) and, relatedly, realizes that such a theft reflects significant disrespect to Victor's equal standing (value #3)).[593] In contrast, an individual who, due to some personal idiosyncrasy, *unreasonably* places a non-trivial value on an objectively worthless item such as, say, a napkin, will not qualify for this possible exception to the general rule.

If, then, the attacker knows that the (objectively) trivial interest threatened has a special (subjective) value for the defender, and if this attribution of subjective value is reasonable under the circumstances, the otherwise trivial threat is weighted based on the subjective non-trivial value due to the parties' shared understanding of the object's value.

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[591] *See* Chapter IV(a)(ii).

[592] *See generally Caleshu v. S.C. Merrill Lynch*, 737 F. Supp. 1070, 1083–87 (E.D. Mo. 1990) (using reasonable person standard to determine triviality of alleged misconduct in employment context). *Cf.* Tatjana Hörnle, *Social Expectation in the Criminal Law: The Reasonable Person in a Comparative Perspective*, 11 NEW CRIM. L. REV. 1, 32 (2008) ('A reference to the "prudent and reliable person in the specific situation and social role of the actor," which is the standard phrase in German criminal law, is better suited.').

[593] *See* Chapter II(c)(iii) & (iv).

The attacker's knowledge of the sentimentality magnifies the imputation of lesser standing (value #3) such a threat implies.[594]

d. Necessity, proportionality, mistakes, and the European Convention on Human Rights

This thesis recognizes that: (1) Germany and England are subject to the jurisdiction of the European Court of Human Rights ('ECtHR'),[595] (2) this is an evaluative undertaking, and (3) the value-based model analyzes the seven posited rights in the context of whether and how they reflect fundamental human rights. It, therefore, is appropriate to include a short discussion of the European Convention on Human Rights ('ECHR'). Article 2 of the ECHR aims to protect the 'right to life,' providing, in part, that:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> > a. in defence of any person from unlawful violence . . . .[596]

i. The current status of positive obligations imposed by Article 2

Today, states must not only refrain from the intentional and unlawful taking of life directly through their agents (police, army, etc.) but must also take appropriate steps to

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[594] *See* Chapter II(c)(iii).

[595] *See generally* Rönnau & Hohn, *supra* note 60, at side-notes 54–55; Rosenau, *supra* note 10, at side-note 37; Vogel, *supra* note 101, at 41; Rachel Macmillan Moon, *An Examination of UK Law as It Pertains to the Unmarried Father: Current Legal Thinking Is an International Context*, 6 CAMBRIDGE STUDENT L. REV. 259, 262 (2010).

[596] ECHR, *supra* note 55, Article 2. *See generally* Waseem Ahmad Qureshi, *Legal Exceptions to the Inalienable Right to Life*, 53 U.S.F. L. REV. 263, 273 (2019).

safeguard the lives of those within their jurisdiction (in particular by putting in place effective criminal-law provisions backed up by law-enforcement machinery).[597] That said, positive obligations flowing from Article 2 should 'be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.'[598]

ii. Article 2 in the self-defense context: Defensive force must be 'absolutely necessary'

The *McCann* court, in line with the text of Article 2(2)(a), ruled that Article 2 allows for exceptions to the right to life only when 'absolutely necessary,' a term indicating

> that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether state action is 'necessary in a democratic society' under paragraph 2 of Articles 8 and 11 of the Convention.[599]

iii. Article 2 in the self-defense context: 'Strict proportionality' required

It must first be noted that the proportionality principle does not appear in the text of Article 2. But it is clearly established in the Court's caselaw. In most ECtHR cases, proportionality is in fact simply viewed as part and parcel of the 'absolute necessity' requirement. Indeed, the Article itself provides that '[d]eprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of *force*

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[597] *See L.C.B. v. United Kingdom* [1998] ECtHR 108 (judgment of June 9, 1998); *Osman v. United Kingdom* [1998] ECtHR 101 (judgment of Oct. 28, 1998); *HLR v. France* [1998] 26 EHRR 29; *Stubbings v. United Kingdom* [1997] 23 EHRR 213. *See also Oneryildiz v. Turkey* [2005] 41 EHRR 20 (ruling that Article 2 'entails above all a primary duty on the state to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right of life'). That said, some have argued that Article 2 only applies to the state, and not to relationships between citizens. *See generally* FISCHER, *supra* note 10, at side-note 39; Rosenau, *supra* note 10, at side-note 37; JOHANNES WESSELS & HELMUT SATZGER, WESSELS/BEULKE: STRAFRECHT—ALLGEMEINER TEIL, § 32 side-note 526 (2018). *But see* Rönnau & Hohn, *supra* note 60, at side-notes 235–37.

[598] *Osman v. United Kingdom* [1998] ECtHR 101, 116.

[599] *McCann and Others v. United Kingdom* [2016] 21 ECtHR 97, 146–49 GC. The *McCann* case concerned the death of three members of the IRA suspected of having on them a remote-controlled device intended to be used to explode a bomb. The men were shot dead on the street by Special Air Service soldiers in Gibraltar. The court concluded that there had been a violation of Article 2 because the operation could have been planned and controlled without the need to kill the suspects. *See also Putintseva v. Russia* [2012] ECtHR 820.

which is *no more* than *absolutely necessary.*'[600] Put another way, the requirement of 'absolute necessity' in Article 2 means that any force used for any of the purposes mentioned in Article 2 must be 'strictly proportionate' to the achievement of any of the aims set out in subparagraphs 2(a), (b), and (c) of that article.[601]

iv. Article 2 and deadly force in defense of property

The ECtHR has not yet ruled explicitly on whether state actors (or individuals) violate Article 2 if and when they use deadly force in defense of property.[602] That said, given that Article 2(2)(a) provides that the use of force must be 'no more than absolutely necessary . . . in defence of any *person* from unlawful *violence*,' it is difficult to see how the Court could permit deadly force in defense of property (since a threat to belongings is not a threat of 'violence').[603] Only if the threat of violence happened to accompany a threat to property, then, would deadly force likely be authorized by the Court. Some German commentators, however, have pointed to Article 2's limitation of state power (rather than citizens' use of force) to argue that the German law's permission of deadly force against property is not implicated by the Article.[604]

v. Article 2 and mistakes

As noted, it is now well-settled that Article 2 requires lethal force to have been 'absolutely necessary' to defend a person from unlawful violence.[605] And, read strictly,

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[600] *See* ECHR, *supra* note 55, Article 2(2). *See also* Stefan Trechsel, *Comparative Observations on Human Rights Law and Criminal Law*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 22 (2000).

[601] *McCann* GC judgment, § 149.

[602] *See* HESSBRUEGGE, *supra* note 47, at 266 (noting that '[i]n academic literature the question remains in dispute'). *Cf.* Daniel Rietiker, *Police Violence and How to Fight It, in Particular When Racially Motivated: The Example of the European Court of Human Rights*, 52 SUFFOLK U. L. REV. 417, 419–25 (2019).

[603] *See generally* FISCHER, *supra* note 10, at side-note 40; Rönnau & Hohn, *supra* note 60, at side-note 55.

[604] *See, e.g.*, FISCHER, *supra* note 10, at side-note 39; Rosenau, *supra* note 10, at side-note 37; WESSELS & SATZGER, *supra* note 597, at side-note 526. *But see* Rönnau & Hohn, *supra* note 60, at side-notes 235–37; *Oneryildiz v. Turkey* [2005] 41 EHRR 20.

[605] *See generally Da Silva v. UK* [2016] 63 EHRR 12 (addressing England's law of self-defense in the context of Article 2), *discussed in* Liora Lazarus & Jessie Blackbourn, *Intelligence and the Criminal Law in*

this seemingly would require that the force was, as a matter of objective fact, indeed 'absolutely necessary.' Article 2, after all, does not provide that the person must 'believe' or 'reasonably believe' the force to be 'absolutely necessary.' But that is not the position the Court has adopted.

In *Kelly v. United Kingdom*, the Court was confronted with the case of a 17-year-old joy rider whom soldiers in Northern Ireland shot and killed because they mistakenly believed that he and the other three occupants of the vehicle were escaping terrorists.[606] The Court ruled that the soldiers in that case 'reasonably believed' that the occupants of the vehicle were, in fact, escaping terrorists. Whether mistaken or not, the soldiers' conduct, therefore, apparently met the Court's absolute necessity test.[607] Whether this counter-textual holding stands the test of time remains to be seen.

e. Application of the value-based model to other challenging cases[608]

i. Innocent attackers—the 'standard' case

Andrew is playing with his younger cousin's air gun in his back yard. Andrew thinks that it is a harmless toy, but, in reality, the gun is loaded, the safety mechanism is disengaged, and the gun is fully pressurized. Andrew playfully points the gun at his friendly neighbor Victor, who happens to be walking by on his way home from work. Victor immediately

England and Wales, in THE LIMITS OF CRIMINAL LAW, *supra* note 101, at 501*; Bubbins v. UK* [2005] 41 EHRR 24 (same).

606 [1993] 16 EHRR 20, 21.

607 *Id*. at 22. *See also Makaratzis v. Greece,* [2005] 41 EHRR 49; *Bubbins v. United Kingdom* [2005] 41 EHRR 24; *Gul v. Turkey* [2002] 34 EHRR 28; *McCann and Others v. United Kingdom* [1996] 21 EHRR 97. *Cf*. Clemency Wang, *The Police Are Innocent as Long as They Honestly Believe: The Human Rights Problems with English Self-Defense Law*, 49 COLUM. HUM. RTS. L. REV. 373, 375 (2017) (describing England's subjective approach as resulting in 'unfair verdicts' and being in 'blatant violation' of Article 2 of the ECHR); ANDREW J. ASHWORTH, POSITIVE OBLIGATIONS IN CRIMINAL LAW 196 (2013).

608 The cases that follow are described as theoretically challenging because they have become regularly debated features of scholarly discussions on the subject. Other issues, such as provocation, battered intimate partner cases, defense of home, retreat, and mistake, have already been discussed (or in the case of battered intimate partner cases will be discussed later). *See* Chapter IV(e)(i)(6). As Russell puts it, the challenge inherent in an undertaking such as this is to 'devise a theory which yields the same conclusions as our nearly undisputed intuitions' and that explains why 'the initial application of force is not impermissible aggression but rather permissible self-defense.' *See* Russell, *supra* note 476, at 571–72.

recognizes that Andrew is in fact pointing an armed and loaded air gun at him, and he also realizes that Andrew is about to discharge it. Victor believes Andrew does not understand that the gun is loaded. The only way for Victor to avoid being injured by the pellet is to throw his heavy briefcase at Andrew a split-second before Andrew pulls the trigger, thereby knocking Andrew off balance and causing him to sustain a concussion.

Andrew's conduct clearly constitutes a threat of harm to Victor's autonomy and concrete interests (value #4), for Victor will be injured by the pellet if he does not throw his briefcase at Andrew.[609] Setting aside for now the possibility that Andrew's conduct is subjectively reckless because Andrew knows that he should never point even a toy firearm at a person, it can be said that Andrew is morally innocent in the sense that he does not *intend* to inflict any injury on Victor, nor does he seek to place his own interests or desires over those of Victor (that is, his conduct does not implicate value #3).[610]

The following simplified table is designed to, in a general sense at least, again confirm the hypothesis by demonstrating how the value-based model facilitates a more transparent discussion about how the values operate on a sliding scale (as well as whether some values might be missing). This approach, moreover, illustrates how a more value-centric dialogue helps root out the hidden normativity that has characterized much of the self-defense debate and has resulted in questionable and unpredictable decision-making.

[609] *See* Chapter II(c)(iv).

[610] *See id*.

Table 4

Nature of Threat: Innocent		
Seriousness of Threat: Moderate to Serious (pellet injury; potential eye injury)		
Seriousness of Defensive Force: Moderate (concussion)		
Decision Ground	**Weight**	**Summary of Reasoning**
Value #1: Collective violence-reducing function (*see* Chapter II(c)(i))	+1	Both Victor and Andrew are facing similar levels of force, and Andrew is not acting culpably. That said, the law cannot compel someone in Victor's position to absorb Andrew's harmful and unjustified force, for this would require Victor to subordinate his non-compensable interests. The collective violence reduction function, therefore, *narrowly* leans towards authorizing defensive force (narrowly because value #1 serves to protect all individuals from harm and, therefore, in part serves 'humanitarian' objectives; if the injury to Andrew were greater, this value would begin to disfavor authorizing self-preferential force).
Value #2: Protecting the individual attacker's (presumptive) right to life (*see* Chapter II(c)(ii))	-1	Andrew is facing moderately serious physical injury and is not engaging in morally culpable conduct. Under these circumstances it is not appropriate to treat as overcome the presumption that Andrew's right to life continues on.
Value #3: Safeguarding equal standing (*see* Chapter II(c)(iii))	0	Victor realizes that Andrew is about to accidentally cause him harm, and he also knows that Andrew is not pursuing an action plan that includes wronging Victor. Victor, therefore, is being threatened with harm (pellet injury) but is not about to be wronged. Maintaining the equal standing is not implicated.
Value #4: Protecting the defender's autonomy (*see* Chapter II(c)(iv))	+1	Andrew's attack, though non-culpable, still threatens a non-trivial (and potentially non-compensable) injury.

Decision Ground	Weight	Summary of Reasoning
Value #5: Ensuring the primacy of the legal process (*see* Chapter II(c)(v))	0	Although one could argue that Victor could simply sustain the pellet injury and then proceed against Andrew through the civil court system, the competing harms here are not trivial. Victor cannot be morally blamed for being unwilling to absorb the potentially serious injury. Because of the potentially non-compensable nature of the injury (damage to Victor's eyes), the primacy of the legal process is not being challenged by authorizing defensive force.
Value #6: Maintaining the legitimacy of the legal order (*see* Chapter II(c)(vi))	+1	While this is a relatively close decision, there is more potential for broad criticism if the legal system forced Victor to absorb the potentially serious injury. Therefore, this decision-ground leans slightly in favor of authorizing defensive force. That said (and once again highlighting the model's adaptability and ability to help avoid hidden normativity), an argument can also be made that in a case like this the public does not have a strong reaction and the value, therefore, should be zero.
Value #7: Deterrence (*see* Chapter II(c)(vii))	0	Andrew is not purposefully posing a threat to Victor. The deterrent impact of permitting self-defense is, therefore, negligible. While one could argue that Andrew is being reckless, and that authorizing defensive force here will deter Andrew and others like him from acting similarly carelessly in the future, the known facts fall short of establishing such recklessness.
TOTAL	**+2**	**Deadly force is presumptively justifiable (+3 indicates moderate justification).**

1. Nozick's 'well hypothetical'

Consider next a version of Nozick's famous hypothetical in which Brutus throws the faultless Andrew down a deep and narrow well. The hapless Victor is at the bottom of the well. If Victor does not first vaporize him with his ray gun, Andrew is certain to crush Victor to death.[611] While Andrew cannot be described as an 'attacker' in the ordinary sense of the word because cruel Brutus threw him down the well against his will (that is, value #3—safeguarding equal standing is not implicated),[612] Andrew does, in fact, pose an actual and immediate threat of serious harm to Victor because, whether he likes it or not, he is about to crush Victor to death (thus placing great weight on value #4—protecting a defender's autonomy—while arguably not implicating values #1—collective violence-reduction, #2—protecting the individual attacker, #5—primacy of the legal process, and #7—deterrence).[613]

While Andrew, as an innocent threat, would generally deserve protection, the gravity of the threatened harm (namely, death) justifies Victor vaporizing Andrew with his ray gun (a result that will likely not so offend widely held moral standards of right and wrong as to implicate value #6[614]). Victor will not be punished because he is not subject to the value-based model's stage-five condemnation (because his action was justified).[615] It is argued here, however, that if Victor were to merely suffer slight bruising as a result of Andrew's fall, then the comparatively minor threatened harm (lessening the pro-

[611] NOZICK, *supra* note 133, at 34–35. *See also* Peter Westen, *Reflections on Joshua Dressler's Understanding Criminal Law*, 15 OHIO ST. J. CRIM. L. 311, 326–27 (2018).

[612] *See* Chapter II(c)(iii).

[613] *See* Chapter II(c)(i), (ii), (iv), (v), & (vii).

[614] *See* Chapter II(c)(vi).

[615] *See* Chapter II(c)(2)(vi)(2)(f).

defense impact of values #1, #2, #3, #4, and #5) would shift the balance in favor of the innocent Andrew and would, therefore, likely require Victor to absorb the slight injury.[616]

2. The fetus as an innocent threat

A difficult, unpleasant, and surely controversial (though appropriately addressed) application of the value-based model's self-defense regime under circumstances similar to those invoked by Nozick's well hypothetical discussed immediately above may be implicated when a woman seeks an abortion to remove an unwanted fetus. For the sake of argument, the thesis will assume that a fetus is, in fact, an individual vested with human rights. Even given this assumption, however, self-defense law may under specific circumstances have a role to play in the abortion debate.

Turning to some baseline assumptions, it must be stipulated that the fetus, like the person being thrown down Nozick's well, is morally innocent. It will be assumed further that the mother contemplating the abortion, like the person at the bottom of the well, has only one means of stopping the 'injury' the fetus threatens (namely, through an abortion). Through no personal fault the fetus, moreover, is in a position where he threatens the mother with the arguable equivalent of serious bodily injury resulting from the pregnancy and delivery.[617]

As this thesis will discuss, the self-defense laws of Germany, England, and the U.S., like the value-based model, would authorize the innocent person in Nozick's well to use deadly force to vaporize the innocent threat. And so it is up for discussion whether a meaningful distinction can be drawn between the innocent person in those cases and a

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[616] *See* Chapter II(c)(i)–(v).

[617] *See generally* Hoyson*, supra* note 339, at 597 ('[T]he physical effects of pregnancy exceed the requirements set forth by the common definition of substantial bodily injury . . . .'). *See also* Bertha Alvarez Manninen, *Rethinking Roe v. Wade: Defending the Abortion Right in the Face of Contemporary Opposition*, 10 AM. J. BIOETHICS 33–46 (2010); N.H. REV. STAT. § 625:11 (2019) (defining serious bodily injury as 'any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body'); *Commonwealth v. Caterino*, 678 A.2d 389 (Pa. Sup. Ct. 1996) (broken nose qualifies as 'serious bodily injury').

situation in which an innocent fetus threatens similar *harm* (though, of course, not a *wrong*).[618] This analogy, moreover, arguably is even closer in cases of rape, where any argument that the mother played some role in becoming pregnant is unavailable.

3. Contingent threats and innocent shields

Contingent threats are only perceived as threats because of the direct danger coming from someone or something else. Consider, for example, a case in which an arrow is shot at the innocent Victor by crazed assassin Andrew. Ida happens to be standing directly behind Victor. If Victor were to jump out of the way of the arrow, Ida would certainly be killed. Ida would nevertheless be *un*justified in grabbing Victor and holding him in place as a sort of shield because Victor is merely a contingent threat (not implicating the previously discussed values); Andrew's arrow is the identifiable immediate threat.[619]

Innocent shields, while used as a *means* to ward off a threat, are themselves not threats. Their 'use,' therefore, once again amounts to impermissible self-preference.[620] (Of course, if Victor somehow colluded with the assassin Andrew and purposefully placed himself in front of Ida to prevent her from seeing the incoming arrow, Victor himself would become part of the immediate threat and Ida could use self-preferential force against him.)

4. Passive threats

The value-based model provides that a passive immediate threat can be blocked or fended off using justified defensive force. Consider a case in which the shipwrecked Andrew is

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[618] For more on the related issue of passive threats, *see* Chapter IV(e)(i)(4), below.

[619] And this result would not change even if it were certain that the arrow would only hit Victor in the hand, whereas it would go straight through Ida's heart. While some other defense such as lesser evils may apply, the right to freedom of Victor's discretionary control over his personal domain would make Ida's intrusion offensive, rather than defensive, thus eliminating the possibility that he would be able to claim self-defense.

[620] For the related discussion on necessity, *see* Chapter IV(b). *See also* John A. Cohan, *Homicide by Necessity*, 10 CHAP. L. REV. 119, 177–79 (2006); Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CALIF. L. REV. 711, 715–16 (2000).

on a ship's rescue ladder paralyzed by fear and unable to move.[621] His inability to either go up or down the ladder prevents the shipwrecked Victor from escaping the pounding seas. Andrew under these circumstances poses a serious, though innocent, direct threat of harm to Victor. Because the threatened harm is very great, Victor is subject to self-defensive force.

The reader, however, may recall our discussion immediately above and understandably wonder why Andrew under these circumstances is not considered a mere contingent threat who may not be met with defensive force? While the distinction between a direct and a contingent threat may not always be readily drawn, perhaps the most sensible means of distinguishing the two is to consider whether there is an objectively good reason for the paralyzed Andrew's threatening conduct. Consider also the herein-discussed case of shipwrecked Andrew and Victor clinging to same piece of driftwood that will support the weight of only one of them.[622] Any force to shove off the other would constitute improper self-preferential killing because there is an objectively good reason for why both men are hanging on to the driftwood—they, after all, are trying to save their own lives from a roiling sea.

While it is true that each is exacerbating the threat to the other, neither is directly causing the threat (and thus implicating value #3—equal standing).[623] If Andrew is paralyzed by fear and unable to climb up the rescue ladder, on the other hand, he is preventing Victor from escaping certain death for no objectively good reason (that is, he is unjustifiably threatening Victor's autonomy—value #4),[624] and this shifts the sliding-scale balance in favor of protecting the defender. Although Andrew's reason—fear—

[621] This hypothetical is drawn from the Zeebrugge disaster, discussed below in Chapter VII(c)(iv).

[622] *See* Chapter IV(e)(i)(4).

[623] *See* Chapter II(c)(iii).

[624] *See* Chapter II(c)(iv).

may be understandable and non-culpable, it is not objectively speaking a good reason, for Andrew is directly preventing Victor from saving himself by blocking the only escape route.

So, while Andrew is not morally culpable for staying in place, he without objectively good reason is threatening Victor's autonomy and right to life (value #4; the other values are largely left neutral in this scenario).[625] This outcome can be contrasted with the situation in which Victor is clinging to a plank following a ship-sinking. If Andrew tries to push Victor off of the plank, Victor is uniquely entitled to use self-defense to resist because Victor is not a direct threat to Andrew (though the converse is true).[626]

5. The case of the plank and the two shipwreck survivors

Imagine next a case similar to the one discussed by Carneades of Cyrene, Sanford Kadish, and others, and already noted above,[627] in which Andrew and Victor are shipwrecked and have been clinging to the same piece of driftwood.[628] Assume that the driftwood slowly begins to sink because it cannot take the weight of both men. Under our analysis, if either shoved off the other to save himself, his action would not be justified as self-defense because neither's equal standing (value #3) nor autonomy (value #4) is being threatened by the other's actions or inactions.[629] Such a use of force would instead constitute an impermissible self-preferential act of aggression that would justify the other in using defensive force to thwart the attack. If, in contrast, Victor held on to the driftwood first, and Andrew subsequently tried to also cling to it, causing it to sink,

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[625] *Id*.

[626] *See* discussion below at Chapter IV(e)(i)(4). *See also* DSOUZA, *supra* note 71, at 52.

[627] *See* Chapter IV(e)(i)(4).

[628] *See* Kadish, *supra* note 195, at 274. This thought experiment was first proposed by Carneades of Cyrene and is referred to as the 'plank of Carneades.' *See* SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS 95 (1710).

[629] *See* Chapter II(c)(iii) & (iv).

Victor would be justified in using defensive force against Andrew because Andrew's actions would implicate values #3 (equal standing), #4 (protecting the defender's autonomy), and (arguably) #6 (legitimacy of the criminal law), and would, thus, amount to impermissible self-selection.[630]

6. Battered intimate partner cases

The analysis turns next to the particularly challenging cases posed when the person claiming self-defense is a battered intimate partner. Such cases can generally be divided into two categories. In the first, the battered partner exercises force during an episode of physical abuse by the batterer. In the other category of cases, the partner uses deadly force against her batterer in the absence of any occurrent abuse, but in *fear* or *anticipation* of future renewed attacks. In the most controversial cases fitting into this latter (and more challenging) group, there is no overt evidence of a temporally 'immediate' threat because the batterer was, for example, sleeping.

This thesis will term these two contrasting fact patterns, respectively, as 'confrontation' and 'non-confrontation' cases. Theorists generally agree that the latter group of cases presents the greatest challenge under traditional legal doctrine. While some commentators concentrated on the substantive law of self-defense and on the admissibility of expert testimony regarding the battered intimate partner syndrome as relevant to self-defense, others have criticized substantive self-defense law as biased against the battered partner (or against women generally) and advocated either modifications of the self-defense standards or a separate defense.[631] Proponents of both perspectives will largely agree, however, that expert testimony regarding the battered

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[630] *See* Chapter II(c)(iii), (iv), & (vi).

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

intimate partner syndrome is necessary to dispel stereotypes of battered partners and to establish various components of the traditional (or modified) defenses.[632] (There is, in fact, a lively and ongoing debate over the long-term psychological effects of prolonged battery.)[633]

Some, like Dressler, have suggested that a battered woman acts under duress when she kills her sleeping violent partner in order to forestall future violence. That is, the woman avoids harm by complying with the 'demands' made by a person threatening the accused.[634] This argument is flawed, however, because the battered partner at bottom is still making a self-preferential decision to kill her battering partner. It is unconvincing to argue that the batterer is 'demanding' that his victim kill him. That is, she is not simply complying with any demand he has issued (which, after all, is the definition of duress—though the concept of 'duress of circumstances,' which is sometimes treated as a species of necessity,[635] may, as discussed herein, also apply).

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

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[632] *See generally* Kassandra Altantulkhuur, *A Second Rape: Testing Victim Credibility Through Prior False Accusations*, 2018 U. ILL. L. REV. 1091, 1108; Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 205–20 (1986). *See also United States v. Lopez*, 913 F.3d 807, 82–22 (9th Cir. 2019); *State v. Pisciotta*, 968 S.W.2d 185, 186 (Mo. Ct. App. 1998).

[633] *See generally* Martin Blinder, *The Battered Woman's Syndrome, in* PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW § 8:15 (5th ed. 2019).

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

[635] *See Hasan* [2005] 2 AC 467; *R v. Conway* [1989] QB 290, 297. While some may argue that these circumstances involve an implied threat of harm, such a fact-specific argument cannot be given blanket acceptance.

who are battered and, therefore, react differently than a 'reasonable person' would under like circumstances.

England, in an effort to protect victims of domestic violence, enacted legislation criminalizing controlling or coercive behavior[636] in the context of intimate and family relationships.[637] In particular, § 76 of the Serious Crime Act of 2015 created the new offense, which seeks to capture abusive conduct that may not formally fit the definitions of assault, threatening to kill or seriously injure, or stalking, but that has a serious impact on the victim even in the absence of physical violence (or the fear thereof).[638] This law, following Evan Stark's model of coercive control, reflects an evolution in the thinking about domestic abuse in that it helps explain why a purported defender (1) stayed in the abusive relationship and (2) felt trapped, without any viable option other than the use of deadly force. This information (supported by numerous studies[639]), in turn, relates to a defender's good-faith, subjective fear of imminent injury or death. It, moreover,

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

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

[638] *See generally* McMahon & Paul McGorrery, *supra* note 637, at 98–100

[639] *See generally* Ruth Aitken & Vanessa E. Munro, *Domestic Abuse and Suicide Report 2018*, REFUGE PUBLICATIONS (2018), https://www.refuge.org.uk/wp-content/uploads/2018/07/domestic-abuse-suicide-refuge-warwick-july2018.pdf; Torna Pitman, *Living with Coercive Control: Trapped Within a Complex Web of Double Standards, Double Binds and Boundary Violations*, 47 BRITISH J. SOC. WORK 143 (2016); Laura E Watkins *et al.*, *The Longitudinal Impact of Intimate Partner Aggression and Relationship Status on Women's Physical Health and Depression Symptoms*, 28 J. FAM. PSYCH. 655 (2014); MICHAEL JOHNSON, A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE (2008), https://www.researchgate.net/publication/320809177_A_Typology_of_Domestic_Violence; STARK, *supra* note 636, at 83–170; Deborah Loxton *et al.*, *Psychological Health in Midlife Among Women Who Have Ever Lived with a Violent Partner or Spouse*, 21 J. INTERPERSONAL VIOLENCE 1092 (2006); Mary Ann Dutton & Lisa A. Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 747 (2005). *See also* Amir Pichhadze, *Proposals for Reforming the Law of Self-Defence*, 72 J. CRIM. L. 409, 428–29 (2008). *Cf.* Joan S. Meier, *Dangerous Liaisons: A Domestic Violence Typology in Custody Litigation*, 70 RUTGERS U. L. REV. 115, 159 (2017).

appreciates the objective reality of domestic violence (in terms of patterns of violence, degree, triggers, etc.) and the related reasonableness of the response.[640]

As relevant here, and as detailed above, the value-based model's concern is with protecting the equal standing (value #3) and private domain (value #4) of both defenders and attackers. It, therefore, permits force to be used to the extent that it is *immediately necessary* to block or fend off an unjust threat.[641] By endorsing such a relatively broad formulation of what otherwise is the 'imminence' requirement, the value-based model leaves battered intimate partners with a comparatively flexible ability to lawfully protect themselves (and, more to the point, with the opportunity to persuade courts and juries that their conduct was, under the circumstances, justified self-defense).

ii. Special rules for 'attacks' on the police?

Police officers are by dint of their vocation frequently compelled to use force to subdue and arrest individuals with whom they come into contact. They, accordingly, tend to receive special training in dealing with unruly and violent individuals who pose a threat against them.[642] Yet despite this training, instances of alleged (and, in contemporary times, recorded) excessive force have become a regular fixture of the evening news in the U.S., England, Germany, and elsewhere.[643] Determining the legitimate extent of police violence in self-defense against attackers, is, therefore, a very topical issue.[644]

Because the value-based model, as discussed in Chapter IV(a)(ii), recognizes the paradox of mutual justification, if an officer's exercise of defensive force is justified, then

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[640] *See generally* Talge, *supra* note 410, at 163–64; Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 996–1026 (1995). *See also* Blinder, *Battered Woman's Syndrome, supra* note 633, at § 8:15*;* Jonathan Herring, *The Severity of Domestic Abuse*, 30 NAT'L L. SCH. INDIA REV. 37, 40–43 (2018).

[641] *See* Chapter IV(b).

[642] *See generally* Erb, *supra* note 10, at side-note 187.

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

[644] *See* DSOUZA, *supra* note 71, at 169–72.

a citizen will not receive the justification of self-defense if she counters the officer with force.[645] On the issue of retreat, for policy-based reasons there is broad agreement that officers need not retreat when facing potential aggression.[646]

Turning to the reasonableness of the officer's belief, the problem with the 'reasonable belief' standard in the police context is that the term is open-ended (or, as Baker puts it, a 'woolly word'[647]) and is often equated with typicality (that is, it is measured against the beliefs of the typical officer). Article 2(2) of the ECHR, for its part, dictates that self-defense is unavailable in cases where the officer was laboring under an objectively unreasonably mistaken belief because such force is not 'absolutely necessary.'[648]

Consistent with the value-based model's emphasis on value #1—collective violence-reduction, #2—protection of the individual attacker, and #6—maintenance of the legitimacy of the legal order,[649] and in line with the articulated policy reasons, law enforcement officers operating reasonably (that is, within their roles) should be considered *prima facie* justified when using reasonable force to effectuate arrests. Any use of force to 'defend' against officers operating reasonably cannot, therefore, qualify as

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[645] Because external justification is not required in England, citizens are in fact able to act in self-defense if they honestly believe they are being attacked. *See* Chapter VII(b). *See also* Rönnau & Hohn, *supra* note 60, at side-note 129–30; Erb, *supra* note 10, at side-note 192; BAKER, *supra* note 440, at 917, 926–31. Because an officer's use of deadly force to apprehend a fleeing felon or to effectuate an arrest does not, without more, implicate self-defense, those situations will not be discussed here.

[646] *See* N.Y. PENAL LAW § 35.15 (2)(a)(ii) (2019); *Boykin v. People*, 45 P. 419, 421 (Colo. 1896); Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1234 (2016); SANGERO, SELF-DEFENCE, *supra* note 33, at 202–03; Gail Rodwan, *Criminal Law*, 39 WAYNE L. REV. 503, 538 (1993).

[647] BAKER, *supra* note 440, at 919.

[648] *See generally Bubbins v. United Kingdom* [2005] 41 EHRR 24; *McCann v. United Kingdom* [1996] 21 EHRR 97; *Stewart v. United Kingdom* [1984] 7 EHRR 453; EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 22–23 (2019); IAN PARK, THE RIGHT TO LIFE IN ARMED CONFLICT 36–41 (2018). As discussed in Chapter VII(b), this objective test appears to conflict with the subjective 'genuine belief' standard adopted in England. HANNAH RUSSELL, THE USE OF FORCE AND ARTICLE 2 OF THE ECHR IN LIGHT OF EUROPEAN CONFLICTS 27 (2017); LEVERICK, *supra* note 2, at 190. *But see R (Bennett) v. Coroner* [2007] EWCA Civ 617 (contending Article 2 and England's reasonableness test not incompatible; presuming objective reasonableness of state agents).

[649] *See* Chapter II(c)(i), (ii), & (v).

self-defense lest the situation falls under the paradox of mutual justifications.[650] Any other outcome would make it exceedingly difficult for the police to, as a practical matter, effectively fulfill their professional obligations because their subjects would later claim that they were acting in self-defense by striking the officers or using other purportedly defensive force.

Consistent with Lee's position,[651] traditional self-defense doctrine applying to civilians, and the value-based model's emphasis on the right to life, this thesis concludes that the officer exercising defensive force must: have reasonable beliefs *and* reasonable actions, and her conduct must be immediately necessary and proportional. While retreat should not be required[652] as part of the reasonableness evaluation, the fact-finder should consider whether the officer engaged in any available de-escalation measures[653] prior to deploying deadly self-preferential force. This approach reasonably recognizes the attacker's individual right to life (value #2) without inappropriately infringing on the officer's rights (value #4 and possibly #3) or the state's collective interest in preserving law and order (value #1).

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[650] Also referred to as the 'incompatibility thesis.' *See* Chapter IV(a). *See also* Rosenau, *supra* note 10, at side-note 18; Fontaine, *supra* note 473, at 78–79.

[651] *See* Lee, *supra* note 643, at 661–75. *See also* Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191, 236–37 (1998) [hereinafter Lee, *Act-Belief*].

[652] *See* Chapter IV(b)(iii).

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

V. EXAMINING GERMAN LAW'S TREATMENT OF SELF-DEFENSE FROM A VALUE-CENTRIC PERSPECTIVE

England, Germany, and the U.S. are three jurisdictions with broadly similar political and cultural backgrounds but with notably different self-defense laws. In the next three chapters, this thesis will deploy the value-based framework to test the hypothesis by evaluating how these jurisdictions grapple with the difficult issues analyzed above—and how their approaches differ from, or mirror, the model's value-explicit approach. More specifically, in these chapters the thesis will examine whether, within a broadly liberal paradigm, values are explicitly (or, in the context of hidden normativity, implicitly) treated as decision-grounds that influence the authorization of self-preferential force.

One can of course as a normative matter disagree with the subject jurisdictions' outcomes (and thus conclude that the ultimate 'quality' of the decisions is flawed in terms of its social effects, even though the values animating the thinking about self-defense are commonly understood). But the hypothesis' assessment of 'quality,' again, does not rely exclusively on individual normative evaluations of end-states. Rather, the inquiry concerns the application of self-defense rules in terms of whether being value-explicit facilitates more nuanced, incremental, transparent, and focused decision-making.

Turning first to Germany's notably value-informed approach, because the values driving German self-defense law largely anchor the debate, scholars, judges, legislators, and laymen alike share a common analytical language they can use to approach disagreements. It will be contended that German courts and commentators, therefore, are better-positioned to evaluate whether and why reforms to, or adjustments of, self-defense doctrine are appropriate, and the extent to which, at the level of specific application, particular self-defense decisions are acceptable. This, it will be contended, in turn permits a German justice system to reach self-defense decisions in a more democratic, logical, and policy-based manner, and to, relatedly, identify and narrow areas of dispute

(even though one, as observed, can still disagree, as a normative matter, with the outcomes reached). The thesis will conclude that by in this manner encouraging a procedurally more democratic discussion around jurisprudential matters of value, moral principles, and fundamental human rights, and by leaving less room for hidden normativity, the 'quality' of the German justice system's decision-making process (and outcomes) is, comparatively speaking, enhanced.

While this thesis could have expanded its focus to other countries, going beyond the chosen subject jurisdictions would, given space-limitations, necessarily prevent the required thorough examination of the subject jurisdictions' positive laws and the theories and analyses buttressing them. The development of Germany's codified and heavily theory-driven self-defense law,[654] from a values-as-decision-grounds perspective, also presents a useful contrast to the common-law development of self-defense in England and the U.S.

a. <u>Putting Germany's self-defense law in context</u>

As will be discussed, Germany's self-defense regime is heavily value-driven. That said, its traditional conception of the implicated values has in the past been so narrow as to, from a normative perspective, produce results that are challenging by contemporary standards. In fact, even Germany's current self-defense law, allowing deadly force in defense of property, not requiring retreat or avoidance of conflict except under certain circumstances, and generally rejecting strict proportionality, has been fairly described as uniquely permissive.[655]

It is also important to recognize at the outset that the value-based model encompasses certain *functional* reasoning (principally, values #1—reducing overall

[654] *See generally* Vogel, *supra* note 101, at 41–42.

[655] *See* Rönnau & Hohn, *supra* note 60, at side-note 72, 181–82. *See also* Rosenau, *supra* note 10, at side-note 1.

societal violence by protecting the state's monopoly on force, #5—ensuring the primacy of the legal process, #6—maintaining the legitimacy of the legal order, and #7—deterring crime). The below-discussed German rulings and literature, in contrast, largely do not support the view that deterrence (*Abschreckung*)[656] and social cohesion are recognized rationales for determining the scope of self-defense.[657]

b. An introduction to self-defense in Germany

Self-defense is a justification that § 32 of the German criminal code (*Strafgesetzbuch*[658] or '*StGB*') defines as follows:

> (1) Whoever commits an act that is appropriate as self-defense does not act unlawfully.
>
> (2) Self-defense is that defense which is necessary in order to prevent a present unlawful attack on oneself or another.

Only under the exigencies of a case meeting these criteria can a defender ignore the state's monopoly on force (*Gewaltmonopol*).[659] If a defender's self-defensive conduct is justified (*gerechtfertigt*),[660] the defender need not absorb harm (*Duldungspflicht*) because

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[656] For support of this minority view, *see* Claus Roxin, *Die 'Sozialethische Einschränkungen' des Notwehrrechts*, 93 ZStW 68 (1981); Gerd Geilen, *Notwehr und Notwehrexzess*, 1981 JURA 200, 200–10 (1981). Opponents of this position, however, argue that this perspective ignores that the only question is whether, in a particular case, self-defense is *necessary* and could result in each citizen becoming a 'quasi-policeman' and 'punishment' of an individual for impermissible utilitarian reasons—questions of deterrence, then are, in the majority view, not relevant. *See, e.g.*, Vogel, *supra* note 101, at 43–44; Lesch, *supra* note 27, at 86–87, 106.

[657] *See, e.g.*, FISCHER, *supra* note 10, at side-note 2; Pest, *supra* note 54, at 139; Rosenau, *supra* note 10, at side-note 2; KÜHL & HEGER, *supra* note 56, at side-notes 1–2; BERND HEINRICH, STRAFRECHT ALLGEMEINER TEIL, § 32, side-note 337 (2016); ROXIN, *supra* note 56, at 650–57 (2006); Lesch, *supra* note 27, at 82, 88–89. *But see* Rönnau & Hohn, *supra* note 60, at side-notes 66–67.

[658] This and all other translations in this chapter are the candidate's.

[659] *See generally* FISCHER, *supra* note 10, at side-note 35; Pest, *supra* note 54, at 137; Erb, *supra* note 10, at side-notes 3, 31–33, 147–48; Pawlik, *supra* note 44, at 278. *See also* [2018] BGH NStZ 69, 70; Rönnau & Hohn, *supra* note 60, at side-notes 67, 73, 106, 120, 221.

[660] *See generally* Rosenau, *supra* note 10, at *Vorbemerkung* § 32, side-notes 1–3; Pest, *supra* note 54, at 139–40; Rönnau & Hohn, *supra* note 60, at side-note 114, 154; Vogel, *supra* note 101, at 51–52; KRISTIAN KÜHL, STRAFRECHT ALLGEMEINER TEIL § 32, side-note 1 (8th ed. 2017); KÜHL & HEGER, *supra* note 56, at side-note 2; MARK DEITERS *ET AL.*, SK-STGB—SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH, BAND 1, § 32, side-note 1 (2017).

he is acting lawfully.[661] The attacker, on the other hand, must absorb the damage without a right to exercise his own defensive force.[662] Procedurally, moreover, if the court determines that the elements of the defense are reasonably in place, then the defendant is entitled to the defense.[663]

Section 33, addressing the excuse of excessive force, caveats excessive force:

> The perpetrator will not be punished if he exceeds the bounds of self-defense because of confusion, fear, or fright.[664]

German law, citing to this rather laconic text, historically justified the use of defensive force under a very wide range of circumstances, and with little reference to proportionality between the harm inflicted and the harm threatened (*Güterproportionalität*).[665] It, moreover, treats an attack on one person's rights as an attack on the entire legal order (*Rechtsordung*).[666]

The German metaphysics of rights, thus, crafted a link between an attack on the rights of a defender and an attack on the broader legal order.[667] This linkage, as discussed below, was used to argue that the German defender must be permitted to use whatever

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[661] *See generally* [2018] BGHSt 208; [2015] BGHSt 606; [2003] BGHSt 267; [2000] BGHSt 331. *See also* Rosenau, *supra* note 10, at side-note 18; FISCHER, *supra* note 10, at side-note 22; Rönnau & Hohn, *supra* note 60, at side-notes 154, 285; Greco, *supra* note 54, at 676; Erb, *supra* note 10, at side-note 192; Erb, *supra* note 32, at 595; Lesch, *supra* note 27, at 91.

[662] *See generally* Rönnau & Hohn, *supra* note 60, at side-notes 154, 285; Lesch, *supra* note 27, at 91, 101.

[663] *See* Rönnau & Hohn, *supra* note 60, at side-note 289.

[664] *See generally* [2017] BGHSt 622; [2017] BGHSt 188. *See also* FISCHER, *supra* note 10, at § 33, side-notes 1–8; Rosenau, *supra* note 10, § 33 at side-note 1.

[665] *See* Rönnau & Hohn, *supra* note 60, at side-note 225; Erb, *supra* note 10, at side-note 2; ROXIN, *supra* note 56, at side-note 47. *See also* HELLMUTH MAYER, DAS STRAFRECHT DES DEUTSCHEN VOLKES 258 (1936); MAX MAYER, DER ALLGEMEINE TEIL DES DEUTSCHEN STRAFRECHTS 280 (1923) (contending that, in the context of proportionality, 'the wise may be able to suggest to the weak that he should cowardly yield to the wrong, but the State cannot reasonably demand this of the citizen, or else cowardice would be a legal requirement'); [1969] BGHSt GA 23, 24; [1968] BGHSt GA 182, 183; [1938] 72 RGSt 57, 58; [1935] 69 RGSt 308, 309–10; [1920] 55 RGSt 82, 85.

[666] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 66; Greco, *supra* note 54, at 667; Erb, *supra* note 10, at side-note 12.

[667] *See generally* Lesch, *supra* note 27, at 86. *See also* Chapter II(c)(vi).

force is necessary to thwart or repel the attack, irrespective of the damage to the defender resulting therefrom or the amount of harm threatened.

i. The theoretical foundations of self-defense in Germany

In contrast to the self-defense laws of England and the U.S., the German law is based on an articulated and value-explicit moral framework that determines when, why, and to what extent self-defense is authorized. As this thesis will discuss,[668] the undulating development of self-defense in England and the U.S. can in the main be traced to oft-undiscussed public-policy considerations and hidden normativity. German cases and commentators, in contrast, continue to be guided by the law's text and the overarching commitment to the values driving the idea that the 'right need not yield to the wrong' (though, as will be discussed, commentators and the courts have disagreed on how this commitment is to be construed and justified, both in terms of legal theory as well as in application to particular cases[669]).

1. Self-Defense Justification #1: Protecting the 'legal order'

One view of the foundations of German self-defense holds that self-defense is justified solely because it defends the empirical inviolability of the legal order (the *Rechtsbewährungsprinzip*, which translates into 'protection of the legal order justification').[670] On this view, every exercise of legitimate defensive force ensures that the collective legal order is protected and preserved and that the 'right need not yield to the wrong' (*das Recht muss dem Unrecht nicht weichen*).[671] In fact, the contemporary

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[668] *See* Chapters VI & VII.

[669] *See generally* KÜHL & HEGER, *supra* note 56, at side-note 15; Erb, *supra* note 10, at side-note 12.

[670] *See generally* Pest, *supra* note 54, at 140; Greco, *supra* note 54, at 667; Erb, *supra* note 10, at side-note 18; [2016] BGHSt 526; E. Schmidhäuser, *Die Begründung der Notwehr*, [1991] GA 97, 101; HELLMUTH MAYER, *supra* note 665, at 254.

[671] *See* Chapter V(b). This grounding principle of German self-defense, which provides the foundation for the *Rechtsbewährungsprinzip*, is explicitly discussed in Albert Berner, *Die Notwehrtheorie*, *in* ARCHIV DES CRIMINALRECHTS 547, 557, 562 (1884). *See also* [2016] BGHSt 523 (holding that the possibility of retreat does not vitiate the right to self-defense); [1920] 55 RGSt 82, 85; [1890] 21 RGSt 168, 170; Rönnau & Hohn, *supra* note 60, at side-notes 4, 65–66; Pest, *supra* note 54, at 141; KÜHL & HEGER, *supra* note 56, at

majority/consensus view is that German self-defense law's 'harshness' (*Schneidigkeit* or *Schärfe*) is derived from this collective legal order justification.[672]

In situations of conflict, then, the collective importance of in this manner protecting the legal order was given primacy over the attacker's right to life (value #2).[673] The traditional view was that defenders may exercise all force necessary to protect their autonomy (value #4) without regard for proportion. After all, their actions, unlike with the value-based model, need not be justified on the basis of a 'balancing of harms.' Correspondingly, defenders (except under certain circumstances) have no duty to retreat or to request the help of third parties.[674]

Because the German criminal law's traditional focus was not on welfarist interests and did not consider a weighing of harms, then, it historically rejected the concept of 'trading off' autonomy by measuring it on a balance of utilities. This explains why the defender was justified not only in defending against the attack (*Schutzwehr* or *Gegenwehr*),[675] but also at times in using offensive force to neutralize or limit an attack (*Trutzwehr*).[676]

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side-notes 15–16; Lesch, *supra* note 27, at 82; Theodor Lenckner, *§32 Notwehr*, *in* ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH 527 (25th ed. 1997); JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 336–40; ALBERT BERNER, LEHRBUCH DES DEUTSCHEN STRAFRECHTES, 107 (1989). *Cf.* Rönnau & Hohn, *supra* note 60, at side-note 66 n.174, 225.

[672] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 66; KÜHL & HEGER, *supra* note 56, at side-notes 15–16; Erb, *supra* note 10, at side-notes 12–13; Vogel, *supra* note 101, at 43–44; Lesch, *supra* note 27, at 83; ROBERT HAAS, NOTWEHR UND NOTHILFE: ZUM PRINZIP DER ABWEHR RECHTWIDRIGER ANGRIFFE 144 (1978).

[673] *See generally* Pest, *supra* note 54, at 140; HOLGER MATT AND JOACHIM RENZIKOWSKI, STRAFGESETZBUCH, § 32 n.2 (2013).

[674] *See* [2019] LG Dortmund 39Ks 8/14 (requiring retreat because putative defender's right to self-defense was limited because the defender armed himself and knowingly entered into a group fight prior to stabbing the unarmed putative attacker); Rosenau, *supra* note 10, at side-notes 1 & 25; FISCHER, *supra* note 10, at side-note 232; Rönnau & Hohn, *supra* note 60, at side-notes 66, 157, 181–82 (no retreat or avoidance of conflict required); Erb, *supra* note 32, at 593 (no retreat requirement).

[675] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 176; Erb, *supra* note 10, at side-note 120; Erb, *supra* note 32, at 593.

[676] *See generally* [2018] BGHSt 107; Pest, *supra* note 54, at 141–42; FISCHER, *supra* note 10, at side-note 23; Rönnau & Hohn, *supra* note 60, at side-note 158; Michael Bohlander, *When the Bough Breaks—Defences and Sentencing Options Available to Battered Women and Similar Scenarios Under German Law*,

2. Self-Defense Justification #2: Protecting the individual

While those championing the protection of the legal order justification of self-defense are chiefly concerned with collectively safeguarding the respect for the legal system,[677] an increasingly vocal segment of German scholars argues that self-defense can only be justified as a means of protecting the individual who is being attacked from harm (*Individualrechtliche begründung,* which translates into 'personal protection justification').[678] This personal protection justification broadly aligns with values #3—equal standing and #4—protection of the defender's autonomy.

3. Self-Defense Justification #3: Protecting both the legal order *and* the individual

While both of the above-described monistic views have received their fair share of scholarly support, contemporary commentators in the main endorse a dualistic position (*dualistische Begründung*). This approach finds the law's basis *both* in the protection of the (1) individual (*Individualinteresse,* also referred to as the *Schutzprinzip*) and (2) broader legal order (*Rechtsbewährungsprinzip*).[679] In the words of the

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in LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY 250 (Alan Reed & Michael Bohlander eds., 2016); ROXIN, *supra* note 56, at side-note 70.

[677] *See generally* Chapter II(c)(v).

[678] *See generally* Erb, *supra* note 10, at side-note 18; Erb, *supra* note 32, at 601. *See also* Rosenau, *supra* note 10, at side-note 2; JOACHIM HRUSCHKA, STRAFRECHT NACH LOGISCH-ANALYTISCHER METHODE 142 (1988). Others view protection of the broader legal order at the heart of self-defense. *See, e.g.*, Eberhard Schmidhäuser, *Über die Wertstruktur der Notwehr, in* FESTSCHRIFT FÜR RICHARD M. HONIG 193 (1970). *See also* JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 336–37; Peter Klose, *Notrecht des Staates aus staatlicher Rechtsnot*, [1977] 89 ZStW 61, 86.

[679] *See generally* FISCHER, *supra* note 10, at side-note 2; Pest, *supra* note 54, at 139; Rosenau, *supra* note 10, at side-note 2; Rönnau & Hohn, *supra* note 60, at side-notes 64–68; KÜHL & HEGER, *supra* note 56, at side-notes 1–2; AXEL MONTENBRUCK, DEUTSCHE STRAFTHEORIE 233 (2018); HEINRICH, *supra* note 657, at side-note 337; ROXIN, *supra* note 56, at 650–57 (2006); Lesch, *supra* note 27, at 82, 88–89. *See also* [1972] BGHSt 356, 359; Lenckner, *supra* note 671; ROXIN, *supra* note 571, at 551–52, 527; REINHART VON MAURACH, & HEINZ ZIPF, STRAFRECHT, ALLGEMEINER TEIL 354 (1992); Bernsmann, *supra* note 571, at 291; Günter Spendel, *§ 32 Notwehr*, *in* STRAFGESSETZBUCH: LEIPZIGER KOMMENTAR 15–16 (Burkhard Jähnke, *et al*., eds., 11th ed. 1992). But this view has its critics. *See, e.g.*, Erb, *supra* note 10, at side-note 202; MATT AND RENZIKOWSKI, *supra* note 673, § 32 n.3; Lesch, *supra* note 27, at 88–89; Pawlik, *supra* note 44, at 261. In fact, some contend that the individual's 'subjective' act to defend herself is simply part and parcel of protecting the legal order (which, after all, is focused on protecting individual rights); viewed this way, the individual and collective justifications collapse into one. *See* Rönnau & Hohn, *supra* note 60, at side-notes 66–69; Lesch, *supra* note 27, at 85.

Bundesgerichtshof (the Federal Court of Justice, which is the highest court in the system of ordinary jurisdiction), self-defense 'does not only serve to protect the person being attacked, but also *concurrently* protects the legal order.'[680]

But this view is not universally endorsed. Erb, for example, has argued that the current focus on collective/societal/welfarist interests in protecting even culpable attackers ignores the concrete interests of the individual defender, and, in so doing, violates the defender's human rights.[681] Some German scholars, moreover, have begun to also consider the role of the unique violation of equal standing (*Störung des Gegenseitigkeitsverhältnises*—roughly in accord with value #3) that, as maintained in Chapter II(c)(ii), accompanies culpable attacks.[682] They, generally consistent with the position articulated in Chapter II, maintain that self-defense at its core is a right grounded in the attacker's (knowing and intentional) refusal to follow legal norms.[683]

When an individual claims self-defense today, then, the court will consider not only whether the act served to protect the *individual* defender from a threat (values #3 and #4),[684] but also whether it served to protect the wider *legal order*. (As discussed in Chapter II(c)(iii)(2), however, this protection of the legal order is a broader concept than value #6's maintenance of the legitimacy of the law[685]).

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[680] [1972] BGHSt 356, 359 (emphasis added). *See also* Kargl, *supra* note 132, at 38–39; Günter Warda, *Die Geeignetheit der Verteidigungshandlung bei der Notwehr Strittiges in der aktuellen Diskussion*, [1996] GA 405, 406; Schmidhäuser, *supra* note 670, at 101.

[681] Erb, *supra* note 32, at 600 (rejecting claim that focus on the individual/victim is part of a fundamentalist ideology). *See also* Rönnau & Hohn, *supra* note 60, at side-note 64 (noting increasing popularity of view according more weight to the individualistic justification); Greco, *supra* note 54, at 677–78 (self-defense at bottom is grounded on protection of the individual).

[682] *See, e.g.*, Rönnau & Hohn, *supra* note 60, at side-notes 64, 68–71–73, 226 (also conceding that a determination of 'relative weights' is not testable).

[683] *Id*.

[684] *See* Chapter II(c)(iii) & (iv).

[685] *See* Chapter II(c)(vi).

What is, therefore, particularly notable about German self-defense law, and what in particular bears on the hypothesis being tested here, is that it engages in a unique type of (generally) explicit value-ordering. As will be discussed, this is largely absent when U.S. and English courts consider self-defense doctrine or render self-defense rulings.[686] Instead of simply announcing *ad hoc* changes in the rules of self-defense, the German courts, and the scholars that influence them, pay a great deal of attention to competing values that may be impacted by any reform proposals (though, as will be discussed, the range of values may still be too narrow when compared to the array in the value-based model).

In this sense, then, the German law comes closest to pursuing a value-explicit approach along the lines of what lies at the heart of this thesis' hypothesis. Indeed, considering the hypothesis that a common value-centric analytical language will foster greater transparency, thereby improving the quality (as defined above) of decision-making, the herein-described depth of German scholarly analysis of self-defense law is distinct from what is seen in the U.S. and England. This, in turn, leads to a more nuanced, incremental, and all-things-considered dialogue.

ii. 'Socio-ethical' limitations on defensive force

After World War II, and in particular during the past half century or so, so-called 'socio-ethical limits' (*sozialethische Einschränkungen)* on self-defense have gained prominence within the legal framework.[687] The appearance of these 'humane' bounds reflected a

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[686] *See generally* Chapter V(b). *See also* Dyson & Vogel, *supra* note 156, at 567–70 (noting that the purpose of German criminal law doctrine is to 'provide a coherent set of reasons for why specific conduct is criminalized and punished. . . . '[T]he need to give reasons for criminalization and punishment is rarely questioned by German constitutional law or academics.').

[687] *See, e.g.*, [2018] OLG Zweibrücken 42; [2016] BGHSt 523; [1995] BGHSt 97. *See also* Rönnau & Hohn, *supra* note 60, at side-notes 226, 242–44; Greco, *supra* note 54, at 667; Erb, *supra* note 10, at side-notes 201–28; DENNIS BOCK, STRAFRECHT, ALLGEMEINER TEIL 289–90 (2018); BURKHARD JÄHNKE *ET AL.*, STRAFGESETZBUCH (LEIPZIGER KOMMENTAR) 147 (2018); VON SCHERENBERG, *supra* note 7, at 76 (noting that the term is not provided for in the statute and is a largely contentless term in that it only becomes relevant in the most extreme situation that for other reasons would likely not be deemed self-defense); MICHAEL KOLLER, NOT KENNT KEIN GEBOT 196 (2006) (contending that the necessity of the defensive

growing skepticism about individual self-help. It represented an emerging sense that the aforementioned *Schneidigkeit* or *Schärfe* ('severity' or 'harshness') of Germany's self-defense law went too far and ignored, or at least undervalued, the 'minimal solidarity' (*Mindestsolidarität*) between people and the related expectation that citizens exhibit some level of tolerance toward each other (*Pflicht zur Rücksichtsnahme* or *Nachsicht gegenüber Rechtsgenossen*).[688] Such restrictions, moreover, are said to accord with the high regard for human life reflected in Articles 1 and 2 of the German Constitution.[689] Finally, these limits have also been characterized as being consistent with the 'relatively tolerant approach of [German] society with regard to slight deviations [from the law].'[690]

In fact, a survey of public attitudes in Germany toward self-defense law revealed that the broader public as a statistical matter neither knew of, nor agreed with, the 'harsh' traditional aspects of German self-defense.[691] As Rönnau and Hohn put it, the public's sense of justice shows that Germany's permissive, pro-defender self-defense law is, by

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force must also be viewed in the context of protecting the legitimacy of the criminal justice system); Lesch, *supra* note 27, at 82, 106. This concept of lenity has also variously been described as arising out of 'socio-ethics considerations,' the 'humane nature of criminal law,' and the 'duty of social solidarity.' *See, e.g.*, Kremnitzer & Ghanayim, *supra* note 46, at 893–94. But consider that even in the late 1800s, German scholars noted how the distinction between innocent and knowing attackers impacted the 'gap' between the state-sanctioned, 'energetic' right of self-defense, on the one hand, and the 'barriers to its exercise required by custom.' HANS TOBLER, DIE GRENZGEBIETE ZWISCHEN NOTSTAND UND NOTWEHR 62 (1894).

[688] *See generally* Rönnau & Hohn, *supra* note 60, at side-notes 70, 226–27; Erb, *supra* note 10, at side-note 214; Lesch, *supra* note 27, at 92–93, 106–09; Kargl, *supra* note 132, at 39; Lenckner, *supra* note 671, at 540–45; Kristian Kühl, *Die gebotene Verteidigung gegen provozierte Angriffe. Überlegungen aus Anlass der neusten Rechtsprechung des Bundesgerichtshofs zur Notwehrprovokation*, *in* JOACHIM SCHULZ & GUNTER BEMMANN, FESTSCHRIFT FÜR GÜNTER BEMMANN 194 (1997); ROXIN, *supra* note 571, at 575–77; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 344–49; Burkhard Koch, *Prinzipientheorie der Notwehreinschränkungen*, [1992] 104 ZStW 785, 785–820; Spendel, *supra* note 679, at 15–16; Schmidhäuser, *supra* note 670, at 123–24 (arguing that the state monopoly on force is not challenged by self-defense because the right to self-defense is not delegated by the state); Roxin, *supra* note 656, at 68. *See also* KOLLER, *supra* note 687, at 196.

[689] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 226; KÜHL & HEGER, *supra* note 56, at side-note 16.

[690] Kargl, *supra* note 132, at 38. Article 1 of the German Constitution speaks of the dignity of man and human rights, whereas Article 2 addresses the citizens' right to life and bodily integrity. *See generally* HANS DIETER JARASS & BODO PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 36, 49 (4th ed. 1997).

[691] *See* Rönnau & Hohn, *supra* note 60, at side-notes 72–73.

international comparisons, an outlier that is neither 'desired nor justified' by the public.[692] For even with these added socio-ethical restrictions in place, in the 'typical' case (*Normalfall*), German self-defense still grants defenders notably wide latitude.[693] (But note that the ability to identify and with nuance discuss these perceived shortcomings is, again, aided by German self-defense law's value-explicit approach.)

Ever since the introduction of these socio-ethical limitations, German scholars, consistent with their tradition, have debated over the textual foundation justifying such limits on the historically rigid and unforgiving § 32.[694] A persuasive textual argument may in fact be compelled.[695] For by limiting the scope of the self-defense justification, the German justice system necessarily was criminalizing otherwise justified conduct (that is, it was narrowing the carve-out for what under the value-based model is 'stage five' condemnation[696]).[697] Considering that Article 103(2) of the German Constitution forbids any expansion in the scope of criminal activity without prior legal enactment (under the '*Legalitätsprinzip*' principle of *nulla poena sine lege*), in this manner limiting a defense through interpretation, rather than statutory revision, has been characterized as problematic.[698]

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[692] *Id*.

[693] *See* Pest, *supra* note 54, at 665–83; Rönnau & Hohn, *supra* note 60, at side-notes 226–27.

[694] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 76.

[695] *See* Erb, *supra* note 32, at 596.

[696] *See* Chapter II(c)(vi)(2)(f).

[697] *See* Erb, *supra* note 32, at 596.

[698] *See id*.; DIETRICH KRATZSCH, GRENZEN DER STRAFBARKEIT IM NOTWEHRRECHT 29 (1968). For the argument that Article 103 is not infringed by § 32, *see* Rosenau, *supra* note 10, at side-note 30; WESSELS & SATZGER, *supra* note 597, at side-note 522; ROXIN, *supra* note 571, at 576; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 344. *See also* Rosenau, *supra* note 10, *Vorbemerkung* at side-notes 11–12.

The ongoing debate has specifically focused on whether these humanitarian or empathy-based limits are authorized by the 'appropriate' (*geboten*) language in § 32(1),[699] whether they instead derive from the 'necessary' (*erforderlich*) language in § 32(2),[700] or whether both terms actually mean the same thing.[701] The majority opinion is that the *erforderlich* language asks whether the defender has a normative right to self-defense at all,[702] whereas *geboten* is descriptive in that it refers to the type and manner of appropriate defensive conduct. The argument, therefore, is that the *geboten* language is the source for most limitations (*Schranken*) on defensive conduct (for example, distinguishing attacks by fully culpable individuals from attacks by moral innocents such as young children and those laboring under a reasonable mistake) and for denying self-defense in cases of gross disproportion (*krasses Missverhältnis*).[703]

The introduction of socio-ethical limitations on the right to self-defense, and the emerging focus on the principle of protecting the attacker (a principle that broadly aligns with values #1—reducing overall societal violence and maintaining the state's monopoly

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[699] *See, e.g.*, Rönnau & Hohn, *supra* note 60, at side-note 228; Rosenau, *supra* note 10, at side-notes 30, 32; WESSELS & SATZGER, *supra* note 597, at side-note 520 (2018); KÜHL & HEGER, *supra* note 56, at side-note 13; ROXIN, *supra* note 56, at side-note 47.

[700] *See* RENZIKOWSKI, *supra* note 335, at 303.

[701] *See generally* [2017] BGHSt 622 (finding that a knife attack to ward off insults 'exceeded the limits of what is appropriate [for self-defense]'). *See also* Rönnau & Hohn, *supra* note 60, at side-notes 76, 166–67, 180, 228; Erb, *supra* note 10, at side-note 205; DIETER DÖLLING *ET AL.*, GESAMTES STRAFRECHT, 375–99 (2017); Pest, *supra* note 54, at 137, 142–43.

[702] *See* KÜHL & HEGER, *supra* note 56, at side-note 9.

[703] *See generally* [2018] BGHSt 242; [2018] BGHSt 214; [2017] BGHSt 788 (knife attack to ward off mere verbal insults 'exceeded the boundaries of appropriate [self-defense]'); [1966] AG Bensberg NJW 733, 735; FISCHER, *supra* note 10, at side-note 39; Pest, *supra* note 54, at 137; Rönnau & Hohn, *supra* note 60, at side-notes 76, 225–26, 228, 230; Rosenau, *supra* note 10, at side-notes 34–35; KÜHL & HEGER, *supra* note 56, at side-notes 13–14; WESSELS & SATZGER, *supra* note 597, at side-note 524; Erb, *supra* note 10, at side-note 212; CHRISTIAN RÜCKERT, EFFECTIVE SELBSTVERTEIDIGUNG UND NOTWEHRRECHT 5, 13 (2017); ROXIN, *supra* note 56, at side-notes 83–85; Erb, *supra* note 32, at 593; Lenckner, *supra* note 671, at 544; ROXIN, *supra* note 571, at 575–77; Kühl, *supra* note 688, at 197; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 344–45; Spendel, *supra* note 679, at 124–25; Schmidhäuser, *supra* note 670, at 133–34; Ulrich Schroth, *Notwehr bei Auseinandersetzungen in engen persönlichen Beziehungen*, [1984] NJW 2562, 2562–63; Volker Krey, *Zur Einschränkung des Notwehrrechts bei der Verteidigung von Sachgütern*, [1979] 34 JZ 702, 710; Theodor Lenckner, *'Gebotensein' und 'Erforderlichkeit' der Notwehr*, [1968] GA 1, 7; Klaus Himmelreich, *Erforderlichkeit der Abwehrhandlung, Gebotensein der Notwehrhandlung; Provokation und Rechtsmissbrauch; Notwehrexzeß*, [1966] GA 129.

on force; #2—protecting the attacker's right to life; #5—ensuring the primacy of the legal process; and #6—avoiding harsh outcomes that could undermine the law's legitimacy),[704] has certainly received its share of criticism. Lenckner, for example, maintains that the limitations threaten to 'devalue' self-defense.[705] Schmidhäuser has commented that the limitations may be a result of a 'contemporary German vanity' whereby the professors who urge these new limitations enjoy thinking of themselves as being in solidarity with the attacker, whom they view as a victim of society.[706] And Erb more recently contended that the text of § 32 is at odds with contemporary efforts to further expand 'humanitarian' restrictions on self-preferential force.[707]

Whatever the merits of these critiques, the socio-ethical limitations are now part of Germany's self-defense law. And the German law, by introducing an element of concern for the welfare of the attacker, is now also more in line with the value-based model and the attention it pays to according appropriate value to all lives, including to those who become the lawful object of defensive force.[708]

c. <u>Subjective or objective standard as to justificatory circumstances?</u>

Both the text of § 32 and the overwhelming German scholarly consensus support the interpretation that the relevant justificatory circumstances must objectively exist before a defender can claim self-defense.[709] This formulation, which is consistent with the

[704] *See* Chapter II(c)(i), (ii), (v), & (vi).

[705] *See* Lenckner, *supra* note 671, at 545.

[706] Schmidhäuser, *supra* note 670, at 137. *See also* Spendel, *supra* note 679, at 147–55.

[707] Erb, *supra* note 32, at 596.

[708] *See generally* Chapter II(c)(2). *But see* Erb, *supra* note 32, at 596 (contending that the BGH 'corrected' the 'questionable tendency' toward an overbroad expansion of the limitation).

[709] *See, e.g.*, [2017] BGHSt 35; [2016] BGHSt 235; [1988] BGHSt 270, 279; [1985] BayObLG NJW 2600, 2601; [1963] BayObLG NJW 824, 825; [1930] 64 RGSt 101, 102; [1890] 21 RGSt 189, 190; Rosenau, *supra* note 10, at side-note 26; FISCHER, *supra* note 10, at side-note 4; Rönnau & Hohn, *supra* note 60, at side-notes 94, 154; Pest, *supra* note 54, at 143–44, 166–67; KÜHL & HEGER, *supra* note 56, at side-notes 6, 10; Lenckner, *supra* note 671, at 537; ROXIN, *supra* note 571, at 557–58; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 338 n.7; Spendel, *supra* note 679, at 109; MAURACH & ZIPF, *supra* note 679, at 373;

incompatibility thesis, also prevents situations in which self-defense can be used against self-defense.[710] And so defensive action is evaluated based on the facts as they actually are, which is consistent with the value-based model's approach.[711]

Indeed, and as discussed more fully below,[712] the only subjective justificatory requirement in German self-defense law is that the defender possess the necessary 'defensive will' (*Verteidigungswillen*).[713] So, the defender must be aware of the justificatory circumstances, *and* act, in part at least,[714] with defensive intention.[715] That said, while the consensus view is that the defender must act with the subjective intention of defending herself, a considerable (and growing) minority view is that the defender's mere knowledge or awareness of the justificatory circumstances should suffice.[716]

A small minority of commentators have also argued that self-defense should be available to persons who honestly (though perhaps inaccurately) believe that defensive

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JESCHECK & WEIGEND, 4th ed., *supra* note 290, at 308; HANS WELZEL, DAS DEUTSCHE STRAFRECHT 86 (11th ed. 1969).

[710] *See generally* Rosenau, *supra* note 10, at side-note 18; Rönnau & Hohn, *supra* note 60, at side-note 113. That said, earlier commentators would allow self-defense against self-defense. *See, e.g.*, WOLFGANG FRISCH, VORSATZ UND RISIKO 424 (1983); Armin Kaufmann*, Zum Stande der Lehre vom personalen Unrecht*, *in* FESTSCHRIFT FÜR HANS WELZEL ZUM 70. GEBURTSTAG AM 25. MÄRZ 1974, 393, 400 (1974).

[711] *See* Chapter IV(a)(ii).

[712] *See* Chapter V(c)(ii).

[713] *See generally* [2019] BGHSt 363; FISCHER, *supra* note 10, at side-note 25; Erb, *supra* note 10, at side-notes 239–43.

[714] The defensive intention need not be the only motivator (*Motivbündel*); others may also be present. *See* FISCHER, *supra* note 10, at side-note 26; Rönnau & Hohn, *supra* note 60, at side-note 267; KÜHL & HEGER, *supra* note 56, at side-note 3.

[715] *See* [2013] BGHSt 551; [2003] BGHSt 425. *See also* [2019] LG Muenster 123; [2018] OLG Zweibrücken 42; [1988] BGHSt 270, 279; [1953] BGHSt 245, 246; [1952] BGHSt 194, 198; [1952] BGHSt 110, 114; [1919] 54 RGSt 196, 199; FISCHER, *supra* note 10, at side-notes 25–27; Rosenau, *supra* note 10, at side-note 49; KÜHL & HEGER, *supra* note 56, at side-note 7; ROXIN, *supra* note 56, at side-note 129; Lenckner, *supra* note 671, at 551; MAURACH & ZIPF, *supra* note 679, at 362; WELZEL, *supra* note 709, at 86. *But see* Spendel, *supra* note 679, at 72–73 (arguing that the consensus view is incorrect). Note, however, that the text of § 32 does not necessarily compel this subjective element. *Cf.* Rönnau & Hohn, *supra* note 60, at side-notes 262–63, 266 (disagreeing with the consensus view and denying the necessity of a defensive will).

[716] *See, e.g.*, FISCHER, *supra* note 10, at side-note 25; Rosenau, *supra* note 10, at side-note 49; KÜHL & HEGER, *supra* note 56, at side-note 7; Erb, *supra* note 10, at side-notes 41, 241; ROXIN, *supra* note 56, at side-note 130.

force is necessary.[717] The overwhelming scholarly consensus, however, as noted above, continues to reject this contemporary English[718] position. Opponents note that such a subjective approach would (1) be incompatible with the text of § 32 and (2) unduly disadvantage the person incorrectly identified as an attacker.[719]

i. Mistakes of fact

While German scholars have advanced various competing theoretical approaches for addressing mistakes concerning the justificatory circumstances, the one that has received the preponderance of scholarly and judicial support is the 'theory of limited guilt' (*eingeschränkte Schuldtheorie*).[720] Section 16, which addresses mistakes of fact relating to the elements of the offense (*Tatbestandsirrtümer*), provides:

> (1) Whoever in committing an act is mistaken about the existence of facts which are part of the statutorily defined constituent elements of a crime does not act intentionally. The possibility of imposing criminal punishment for negligent conduct remains unaffected.
>
> (2) Whoever in committing an act mistakenly assumes the existence of circumstances which would form part of the statutorily defined constituent elements of a lesser offence can only be punished for intentional conduct in

[717] *See, e.g.*, Warda, *supra* note 680, at 419 n.29 (discussing the 'new direction in the literature' toward a subjective standard).

[718] *See* Chapter VII(b). *See also* Chapter V(c)(ii).

[719] *See, e.g.*, Erb, *supra* note 10, at side-note 246. *See similarly* [2017] BGHSt 35; [2016] BGHSt 235; Rosenau, *supra* note 10, at side-note 26; FISCHER, *supra* note 10, at side-note 4; Rönnau & Hohn, *supra* note 60, at side-notes 94, 154; Pest, *supra* note 54, at 143–44, 166–67; KÜHL & HEGER, *supra* note 56, at side-notes 6, 10; Lenckner, *supra* note 671, at 537; ROXIN, *supra* note 571, at 557–58; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 338 n.7; Spendel, *supra* note 679, at 109; MAURACH & ZIPF, *supra* note 679, at 373; JESCHECK & WEIGEND, 4th ed., *supra* note 290, at 308.

[720] *See generally* Erb, *supra* note 10, at side-note 246; Joachim Hruschka, *Der Gegenstand des Rechtswidrigkeitsurteils nach heutigem Strafrecht* [1980] GA 1, 20 n.48; Friedrich Schaffstein, *Putative Rechtfertigungsgründe und finale Handlungslehre*, 5 MDR 196, 200 (1951). *Cf.* Johann Andreas Dieckmann, *Plädoyer für die eingeschränkte Schuldtheorie beim Irrtum über Rechtfertigungsgründe*, 4 JURA 178, 179 (1994).

> accordance with the statute defining the lesser offence.[721]

Although § 16 strictly speaking only addresses mistakes relating to the *elements* of the offense, the theory of limited guilt has been applied by analogy to § 16 cases involving mistakes regarding justificatory facts (*Erlaubnistatbestandsirrtümer*).[722] In one example, the *Bundesgerichtshof* reasoned:

> The defender acting under a mistake concerning the true facts is basically law-abiding; he wants to follow the law but fails to do so simply because of a mistake concerning the factual circumstances upon which he based his behavior. This is why [§ 16] applies to him, in that it does not attribute to him the objective factual circumstances, but rather those circumstances that he believed existed.[723]

Putative excessive force (*Putativnotwehrexzess*), in turn, applies to cases in which the defender objectively errs both about the existence of an attack, *and* about the amount of force necessary to repel the attack.[724] Section 33, which deals with cases of excessive force during self-defense (*Notwehrexzess),* and is discussed in greater detail below,[725] notably does not apply to cases of *putative* excessive force.[726] In putative excessive force cases, the prevailing view is that there in fact was no § 32 'attack' that was reacted to in

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[721] *See also* KÜHL & HEGER, *supra* note 56, § 16 at side-note 3; Bohlander, *supra* note 676, at 249.

[722] *See* Rönnau & Hohn, *supra* note 60, at side-note 281; FISCHER, *supra* note 10, at side-note 51.

[723] [1952] BGHSt 105, 107. *See also* [1969] BGHSt GA 117, 118; [1962] BGHSt 88, 91; [1952] BGHSt 194, 196 (holding that an honest mistake of fact as to the justificatory circumstances can at most lead to a conviction of a crime involving negligence); [1952] BGHSt 8, 12; [1926] 60 RGSt 261, 262; [1994] OLG Düsseldorf NJW 1971, 1972; Peter Cramer, *§ 16 Irrtum über Tatumstände*, *in* ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH 282, 285–86 (25th ed., 1997); Warda, *supra* note 680, at 418–19.

[724] *See generally* [2017] BGHSt 588.

[725] *See* the discussion in Chapter (V)(e)(ii).

[726] *See generally* FISCHER, *supra* note 10, at § 33, side-note 5.

an excessively forceful manner.[727] Such a putative defender will instead be treated under the general rules relating to mistakes of fact dealt with in § 16.[728]

ii. Unknowingly justified defenders

The once-dominant German scholarly view was that, in contrast to the principle announced in the English *Dadson* case discussed below,[729] an actor was always justified if the objective facts (even if unknown to her) provided her with a justification.[730] Today, German scholars and the courts take the position that the defensive will forms the basis of self-defense, that there is no 'present and unlawful' attack if the attacker is justified by self-defense, and that self-defense accordingly cannot be exercised against self-defense (*Notwehr gegen Notwehr*).[731] Self-defense is, by its very nature, said to require that the defender be aware of, and in fact believe in, the justificatory circumstances.[732]

That said, 'defensive will' need not be the only, or even the primary, motivator for the use of force.[733] Motives such as hate and revenge may all play a role in a defender's conduct,[734] provided that there is sufficient evidence to establish the concurrent presence

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[727] *See generally* [2017] BGHSt 788.

[728] *See* [1988] LG München NJW 1860, 1861; [1968] BGH NJW 1885; [1962] BGH NJW 308, 309. *See also* Rönnau & Hohn, *supra* note 60, at side-note 281; Lenckner, *supra* note 671, at 555; Spendel, *supra* note 679, at 181–82. Section 16, rather than § 33, applies in such a case. *See generally* FISCHER, *supra* note 10, at §16.

[729] *See* Chapter VII(b)(ii)(1).

[730] Spendel was among the few who in the recent past supported this position. *See* Spendel, *supra* note 679, at 72–73 (citing to sources supporting his view).

[731] *See* [2019] BGHSt 456; FISCHER, *supra* note 10, at *Vorbemerk* side-note 22; Erb, *supra* note 10, at side-note 49.

[732] *See, e.g.*, [2019] BGHSt 456, *citing* [1983] BGHSt 703; [2012] BGHSt 197; [2003] BGHSt 403; [2000] BGHSt 331; [1980] BGH NJW 1806; [1972] BGHSt MDR 16; [1952] BGHSt 194, 198; [1952] BGHSt 112, 114; [1926] 60 RGSt 261, 262; [1921] 56 RGSt 259, 268; [1919] 54 RGSt 196, 199; ROXIN, *supra* note 571, at 539; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 342–43; B. Schünemann, *Die deutschsprachige Strafrechtwissenshcaft nach der Strafrechtsreform im Spiegel des Leipziger Kommentars und des Wiener Kommentars*, [1985] GA 341, 371; Cornelius Prittwitz, *Zum Verteidigungswillen bei der Notwehr*, [1980] GA 381 (arguing that issue has been settled since 1963).

[733] *See* [2018] OLG Zweibrücken 42; [2013] BGHSt 551; [1953] BGHSt 245, 247–48; [1952] BGHSt 194, 198; [1926] 60 RGSt 261, 261–62; [1919] 54 RGSt 196, 199.

[734] *See, e.g.*, [1926] 60 RGSt 261, 262 (holding that wife's motive for exercising her right to self-defense is irrelevant). *See also* Erb, *supra* note 10, at side-note 240.

of defensive intention.[735] Today, however, an unknowingly justified actor could be convicted of no greater crime than an impossible attempt.[736]

d. The attack

i. What interests can be defended?

German self-defense law at one time provided protection only against physical attacks. But by 1870, the law stipulated that defensive force could be used to protect against *all* threats to a defender's legally protected interests.[737] Today, § 32 continues to permit self-defense to protect against attacks on any legally protected interests a defender may have.[738] So self-defense can be used to defend interests such as one's freedom and honor,[739] life,[740] non-deadly assaults,[741] property,[742] the right to hunt,[743] the right to engage

[735] *See generally* [1980] BGHSt GA 67, 68; Rosenau, *supra* note 10, at side-note 43–49; Erb, *supra* note 10, at side-note 240.

[736] Which is essentially the same line of reasoning employed by Robinson. *See generally* Rönnau & Hohn, *supra* note 60, at side-note 270; PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 111 (1997), *discussed in* Lawrence Crocker, *Justification and Bad Motives*, 6 OHIO ST. J. CRIM. L. 277, 278 (2008).

[737] *See* FRIEDRICH SCHWARZE, DAS STRAFGESETZBUCH FÜR DEN NORDDEUTSCHEN BUND 88 (1870). *See also* Vogel, *supra* note 101, at 46–47; FRANZ LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS 137–38 (9th ed. 1899) (stating that, during the Middle Ages, self-defense was limited to defense of a person from physical attack).

[738] *See* Rosenau, *supra* note 10, at side-note 7; FISCHER, *supra* note 10, at side-note 8; Rönnau & Hohn, *supra* note 60, at side-notes 78–79; Erb, *supra* note 10, at side-notes 83–99; ROXIN, *supra* note 56, at side-note 30. *See also* [2019] BGHSt 363.

[739] *See, e.g.*, [2017] BGHSt 622 (noting that, because a person's honor is a legally protected interest, defensive force can be used to protect it), *citing* [1952] BGHSt 5; [1935] 69 RGSt 265, 268 (attack on soldier's honor); [1890] 21 RGSt 168, 168–70 (attack on defender's honour by priest during religious sermon). *See also* KÜHL & HEGER, *supra* note 56, at side-note 3.

[740] *See, e.g.*, [1993] BGHSt 374, 378; Rosenau, *supra* note 10, at side-note 7.

[741] *See, e.g.*, [2019] BGHSt 363.

[742] *See, e.g.*, [1926] 60 RGSt 273, 277; ROXIN, *supra* note 56, at side-note 87.

[743] *See, e.g.*, [1906] 35 RGSt 403, 407, *discussed in* Rönnau & Hohn, *supra* note 60, at side-note 86. *See also* Erb, *supra* note 10, at side-notes 83–99. *See, e.g.*, [1920] 55 RGSt 167.

in religious services,[744] home ownership rights,[745] a person's right to privacy,[746] and the right to be free from excessive noise.[747]

Section 32 does not, however, allow for the protection of relative rights such as contract rights, because a contrary outcome would lead to a situation where every creditor, for example, could use force to extract the money owed him by debtors.[748] Likewise, attacks on the 'public order' or the law in general do not constitute 'attacks' under § 32 because only the state (generally consistent with collective value #1) is thought to be authorized to defend against attacks that do not harm any individually recognizable interest of the defender.[749] A different result, it is said, would turn each citizen into a 'quasi-policeman.'[750] No individual can thus, for example, remove pornographic material from a newsstand because the individual believes the material offends the 'public morality.'[751]

ii. Need the attacker's conduct be criminal?

The 'unlawful attack' (*Rechtswidriger Angriff*) that § 32 allows defensive force against does not refer to the legal guilt of the defender. Rather, it simply describes the objective nature of the act.[752] This explains why one may lawfully defend against the attack of a

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[744] *See generally* Rosenau, *supra* note 10, at side-note 7; Lenckner, *supra* note 671, at 529; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 339; JESCHECK & WEIGEND, 4th ed., *supra* note 290, at 304; Gerhard Erdsiek, *Umwelt und Recht* [1962] NJW 2240; LISZT, *supra* note 737, at 140; SCHWARZE, *supra* note 737, at 88.

[745] *See* Lenckner, *supra* note 671, at 529.

[746] [1994] OLG Düsseldorf NJW 1971. *See also* [1962] BayObLG NJW 1782, 1782–83; KÜHL & HEGER, *supra* note 56, at side-note 3.

[747] *See, e.g.*, [1992] OLG Karlsruhe NJW 1329.

[748] *See generally* Rosenau, *supra* note 10, at side-note 8; KÜHL & HEGER, *supra* note 56, at side-note 3; Lesch, *supra* note 27, at 93.

[749] *See* FISCHER, *supra* note 10, at side-note 10; Rönnau & Hohn, *supra* note 60, at side-note 79; Erb, *supra* note 10, at side-note 100; [1975] BGH NJW 1161, 1162–63; [1966] OLG Stuttgart NJW 745, 748; [1953] BGHSt 245, 247.

[750] *See* [1975] BGH NJW 1161, 1162.

[751] [1953] BGHSt 245, 247.

[752] *See generally* FISCHER, *supra* note 10, at side-notes 5 & 21; KÜHL & HEGER, *supra* note 56, at side-note 5; ROXIN, *supra* note 56, at side-note 14; Erb, *supra* note 32, at 595; Lesch, *supra* note 27, at 94–96;

child,[753] a drunk,[754] a madman,[755] or a person acting under a mistake who may be legally excused from criminal liability.[756] The traditional definition of an 'unlawful attack' under § 32, therefore, refers to an attack on a person's legally protected interests that she is not obligated to tolerate.[757]

Contemporary scholarship, however, consistent with the value-based model has increasingly—though for markedly different reasons[758]—distinguished between the traditional 'sharp' or 'robust' self-defense available to ward off attacks by culpable attackers, and the 'small' or 'limited' self-defense available against young children, the mentally incompetent, innocently mistaken attackers, and other moral innocents where defensive force does not 'protect the legal order' in the same degree as with (morally) culpable attacks.[759] And a minority of commentators would go so far as to permit the use of self-defense only against culpable (criminal) attackers.[760] An emerging opinion,

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Lenckner, *supra* note 671, at 528; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 341; Spendel, *supra* note 679, at 19; REINHARD FRANK, DAS STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH 159–61 (1931).

[753] *See, e.g.*, [1991] BayObLG NJW 2031, 2031–32.

[754] *See, e.g.*, [1952] BGHSt 217, 218.

[755] *See, e.g.*, [1895] 27 RGSt 44, 45–47.

[756] *See generally* [1991] BayObLG NJW 2031; KÜHL & HEGER, *supra* note 56, at side-note 5; Lesch, *supra* note 27, at 101–04.

[757] *See* [1895] 27 RGSt 44, 45–46; [1890] 21 RGSt 168, 171. *See also* FISCHER, *supra* note 10, at side-note 21; Rönnau & Hohn, *supra* note 60, at side-note 109 (describing change in predominant view); KÜHL & HEGER, *supra* note 56, at side-note 5 (same).

[758] Proffered reasons include absent/limited deterrent value and interest in protecting the legal order or reduction in the relative interest in protecting the defender. Lesch, *supra* note 27, at 103–04. Because the value-based model's respect for the equal standing of the defender is not considered in German law, that interest is not discussed. The prevailing position is that the socio-ethical limitations on self-defense take into consideration that a defender has (or should have) greater human solidarity with an innocent attacker. *See generally* KÜHL & HEGER, *supra* note 56, at side-note 5; Lesch, *supra* note 27, at 103.

[759] *See, e.g.*, FISCHER, *supra* note 10, at side-note 37; Rosenau, *supra* note 10, at side-note 32; Rönnau & Hohn, *supra* note 60, at side-notes 66–67, 225; KÜHL & HEGER, *supra* note 56, at side-note 14; Erb, *supra* note 10, at side-note 212; ROXIN, *supra* note 56, at side-note 61; Lesch, *supra* note 27, at 102–04. *See also* Hans Kudlich, *Praxiskommentar*, 39 NSTZ 599, 599–600 (2019) (contending that the BGH is more likely to reach 'self-defense friendly' decisions than the lower courts because the BGH judges reach their rulings 'on the papers' and never meet those against whom potentially deadly defensive force has been used).

[760] *See, e.g.*, GÜNTHER JAKOBS, STRAFRECHT: ALLGEMEINER TEIL 14–20 (2011). *See also* Rosenau, *supra* note 10, at side-note 19.

moreover, is moving in the direction of at least limiting the 'attack' to situations where the attacker at a minimum is subjectively negligent (even if not fully culpable) in creating the need for the defensive force; the prior focus, in contrast, was only on the objective threat (regardless of whether culpable, blameworthy, or innocent).[761]

The subject jurisdictions, as well as the value-based model, are, therefore, in broad agreement that attacks need not be criminal or culpable (that means, they do not need to threaten a wrong or implicate corresponding value #3—equal standing)[762] to justify defensive force. That said, the trend in contemporary German self-defense scholarship is to increasingly add the normative responsibility of the attacker for the attack to the conversation.[763]

This trend can be said to, as noted, add value #3 (protection of the defender's equal standing and its related focus on harming versus wronging) to the analysis, while also placing greater emphasis on value #2 (safeguarding the attacker's presumptive right to life). The German justice system has thus demonstrated adaptability in terms of considering additional values, changing the weight given to already-considered values, and employing a common value-centric language to perform the analysis. This supports the hypothesis that a broad and systematic consideration of values improves transparency, reduces hidden normativity, and in so doing facilitates better decision-making.

iii. Special rules for 'attacks' on the police?

Self-defense is typically unavailable against the exercise of force by German state agents such as the police or prison guards acting in the line of duty.[764] In contrast to the U.S.

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[761] *See* Rönnau & Hohn, *supra* note 60, at side-note 109; KÜHL & HEGER, *supra* note 56, at side-note 5; Erb, *supra* note 10, at side-notes 35–41; Lesch, *supra* note 27, at 94–98.

[762] *See* Chapter II(c)(iii).

[763] *See* Lesch, *supra* note 27, at 94–98. For the minority view, *see* GÜNTHER JAKOBS, RECHTFERTIGUNG UND ENTSCHULDIGUNG IV, 148 (1993) (seeking to limit self-defense to cases of 'blameworthy' attacks).

[764] This is because their actions, even if wrongful, were generally not considered as a matter of law to be unlawful. But if a police officer does not follow the basic requirements set out by the law (*wesentliche*

position, which in these circumstances (and, therefore, on balance) provides the police greater latitude to exercise defensive force, regulations on the police (collectively *Hoheitsträger*) in Germany impose restrictions so that the police officer's ability to deploy deadly defensive force can be subject to disciplinary sanction even when it is deemed lawful. The prevailing view among scholars, however, is that a police officer acting in the course of her duties can rely on self-defense if the facts support such a claim.[765] A minority considers self-defense a 'private right' of the citizens that, generally consistent with value #1,[766] limits the state's monopoly on force (and is, therefore, not something police officers can claim when acting in an official capacity). The argument is that when the authorities intrude in citizens' activities (*hoheitlicher Eingriff*),[767] they are doing so under the color of law.

The officers are acting pursuant to the public law's (*öffentliches Recht*) legal permissions as reflected in the state-specific laws governing the police and policing (*Polizeirecht*), thus rendering the 'attack' justified.[768] Under the *Spaltungslösung*, an officer could face discipline and requests for compensation when she exceeds the authority provided by police regulations.[769] That said, some German commentators have objected to such limitations, arguing that they could lead to the public losing faith in the state's ability to effectively exercise its monopoly on force (implicating values #1 and #6).[770] But, as noted above, while the officer using excessive force may not be subject to

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Förmlichkeiten), her actions can constitute an 'attack' and provide a basis for self-defense. *See generally* [1928] 72 RGSt 305, 311; FISCHER, *supra* note 10, at side-notes 12 & 12a; LISZT, *supra* note 737, at 138.

[765] KÜHL, *supra* note 660, § 7, side-note 153 ff. *See also* [1958] BGH NJW 1405; [1991] BayObLG JZ 936; Peter Kasiske, *Begründung und Grenzen der Nothilfe*, 2004 JURA 832, 832–39.

[766] *See* Chapter II(c)(i).

[767] *See* Rönnau & Hohn, *supra* note 60, at side-notes 216–24.

[768] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 117; Kurt Seelmann, *Grenzen privater nothilfe*, [1977] 89 ZStW 36, 49 ff.; JAKOBS, *supra* note 760, § 12, side-note 41 ff.

[769] *See generally* Rönnau & Hohn, *supra* note 60, at side-notes 216–220.

[770] *See generally* VON SCHERENBERG, *supra* note 7, at 248–49.

criminal penalties, under the *Spaltungslösung* she could still face discipline and demands for compensation if she exceeds the authority provided by police regulations.[771]

iv. Can passive conduct constitute an 'attack'?

Though some scholars disagree,[772] the prevailing view is that physical action is not the prerequisite of an attack under German self-defense law.[773] The trespassing Andrew passively sitting without permission on Victor's couch in Victor's house is, therefore, deemed to be attacking Victor's legally protected interests in his property for purposes of § 32.[774] Courts have similarly ruled that, if an individual standing in a parking spot refuses to move because she is unlawfully trying to hold the spot for a friend, the driver of a car may use 'defensive force' to defend his right to the parking spot.[775]

Andrew, in contrast (and in deviation from the value-based model), would not be justified in pushing Victor out of his way in order to escape from a burning house unless Victor was purposefully blocking Andrew's escape, for Victor cannot be considered an 'attacker' under such circumstances. But Andrew would likely be able to claim necessity pursuant to § 34.[776] These examples illustrate the consensus view that a passive actor can only be considered a § 32 'attacker' when the *law requires* him to behave in a certain way (and this outcome is at odds with the value-based model's approach discussed at Chapter

[771] *See generally* Rönnau & Hohn, *supra* note 60, at side-notes 216–220.

[772] *See, e.g.*, Walter Perron, *§ 32, in* SCHÖNKE/SCHRÖDER: STRAFGESETZBUCH side-note 10 (Albin Eser *et al.* eds., 30th ed. 2019) (requiring active conduct).

[773] *See generally* Rosenau, *supra* note 10, at side-notes 4–6; FISCHER, *supra* note 10, at side-note 5a; ROXIN, *supra* note 56, at side-note 11.

[774] *See* [1938] 72 RGSt 57. *See also* FISCHER, *supra* note 10, at side-note 5a.

[775] *See* [1963] BayObLG NJW 824, 824–25, *discussed in* Rönnau & Hohn, *supra* note 60, at side-note 90.

[776] *See* Erb, *supra* note 32, at 595; Otto Lagodny, *Notwehr gegen Unterlassen* [1991] GA 300. In such a case, the accused would have to claim that, under § 34, there was a justifying necessity (*rechtfertigender Notstand*), however.

IV(e)(i)(4), which would permit self-defense against a passive actor who *without objectively good reason* is threatening the defender's right to life).[777]

v. Imminence

1. The general rule

German self-defense law has always required that the attack be imminent or present (*gegenwärtig*).[778] The common definition of imminence (again on all fours with the value-based model's approach)[779] is in turn pegged to the question of whether a later use of defensive force will, objectively speaking, be futile or more problematic (invoking the *Effizienzlösung*).[780] Moreover, it is not the bare *harm* stemming from the attack that must be imminent under German law, but, rather (and consistent with the value-based model's approach), it is the *danger* of harm that must be close at hand.[781]

So when three men in the course of ejecting a belligerent and previously insult-hurling New Year's party-goer cause him injury, they were not justified by self-defense because the party-goer was not insulting anyone *at the time* of the physical attack.[782] The

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[777] *See* Rönnau & Hohn, *supra* note 60, at side-notes 100–01; Lenckner, *supra* note 671, at 534; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 339; MAURACH & ZIPF, *supra* note 679, at 356; JESCHECK & WEIGEND, 4th ed., *supra* note 290, at 304. *But see* ROLAND FELBER, DIE RECHTSWIDRIGKEIT DES ANGRIFFS IN DEN NOTWEHRBESTIMMUNGEN 195 (1979) (attack requires action, not *in*action).

[778] *See generally* [2017] BGHSt 188 ('An attack is imminent when the conduct of the attacker can immediately turn into a rights-violation, so that a delay in engaging in defensive force can reduce the chances of it being successful or risks significant injury to the defender.'), *citing* [2017] BGHSt 303 and [2007] BGHSt 404. *See also* [2017] BGHSt 588; FISCHER, *supra* note 10, at side-notes 16–18; Rönnau & Hohn, *supra* note 60, at side-note 140; Rosenau, *supra* note 10, at side-note 12; KÜHL & HEGER, *supra* note 56, at side-note 4; Erb, *supra* note 10, at side-note 103; ROXIN, *supra* note 56, at side-note 21; Erb, *supra* note 32, at 601.

[779] *See* Chapter IV(b).

[780] *See* [2017] BGHSt 635; [2017] BGHSt 486; [2017] BGHSt 188; [2016] BGHSt 235; [1973] BGHSt 229, 230–31; [1933] 67 RGSt 337, 339–40; [1918] 53 RGSt 132, 133. *See also* Rönnau & Hohn, *supra* note 60, at side-notes 145–46 (attack is imminent when it is in the 'narrow final phase of the preparation').

[781] *Compare* [2017] BGHSt 635; [2017] BGHSt 486; [2017] BGHSt 35; [2016] BGHSt 235; [1991] BGHSt 535; [1978] BGHSt 336, 339; [1973] BGH NJW 255; [1927] 61 RGSt 216, 217; [1918] 53 RGSt 132, 133; *and* [1995] BGH NJW 973, *with* [1931] 65 RGSt 159, 160; [1979] BGH NJW 2053 (holding that defender's use of deadly force against the fleeing intruder failed to satisfy imminence requirement). *See also* Rönnau & Hohn, *supra* note 60, at side-note 140; FISCHER, *supra* note 10, at side-note 5. *But see* Helmut Frister, *Die Notwehr im System der Notrechte*, [1988] GA 291, 302 (the attack, rather than the danger flowing from it, must be temporally imminent).

[782] [2019] BGHSt 585.

attack would, however, be considered imminent/present as long as it is objectively reasonable for the defender to fear a renewed attack (or, in the context of the partygoer, impending additional insults).[783] Put another way, the focus is on an objective evaluation of the attacker's intention and the danger he presents.[784]

By way of additional illustration, in one 2017 case, the defender, who was physically weaker than the putative neighbor-attacker, armed himself with a handgun loaded with plastic bullets prior to knocking on the neighbor's apartment door and asking the neighbor to turn his music down.[785] The neighbor opened the door and in an intimidating fashion walked towards the defender, causing him to walk backwards to the top of a flight of stairs. With the neighbor less than six feet away, the defender shot the victim in the abdomen; the defender was later charged with attempted murder.

The court ruled that 'imminent,' as used in § 32, includes situations where there has not yet been a violation of the defender's rights, but where delaying the use of defensive force could limit its effectiveness or result in additional risk to the defender.[786] The court, moreover, emphasized that the question of whether the attack was imminent was to be determined objectively, rather than being based on the subjective perception of the defender.[787] And so an attack is considered imminent or ongoing until the objectively

[783] *See* [2017] BGHSt 588; [2016] BGHSt 4; [2005] BGHSt 99.

[784] [2016] BGHSt 138 (finding that uncertainty about the facts cannot adversely impact the defendant), *citing* [2012] BGHSt 4.

[785] [2017] BGHSt 635. *See also* [1933] 67 RGSt 337, 339–40.

[786] [2017] BGHSt 635. *See also* [2017] BGHSt 588; [2017] BGHSt 486; [2005] BGHSt 99; Pest, *supra* note 54, at 144. In this context, commentators have discussed how effective particular defensive measures (knife versus gun, for example) are to stop/immobilize the attacker (*Mannstoppwirkung*). *See* Pest, *supra* note 54, at 159.

[787] [2017] BGHSt 635, *citing* [2002] BGHSt 503 and [2015] BGHSt 397. *See also* [2017] BGHSt 588; [2017] BGHSt 486; [2016] BGHSt 235; [2005] BGHSt 99; [2002] BGHSt 503.

unlawful threatened action is abandoned or has failed, or until the damage has been done.[788]

2. Subjective or objective evaluation of imminence?

As discussed above, although some German commentators have asserted that it is unclear whether German law requires an actor's beliefs about the elements of self-defense to be both honest and reasonable,[789] German law in the main treats the imminence requirement as part of 'justifying necessity.'[790] As such, and given that both the text of § 32 and the scholarly consensus are in agreement that the relevant justificatory circumstances must objectively exist before a defender can claim self-defense,[791] it follows, consistent with the value-based model's approach,[792] that imminence is also evaluated objectively (that is, based on the facts as they actually were).[793]

3. German law's treatment of battered intimate partner syndrome

The German caselaw addressing battered intimate partner cases is relatively sparse. That said, the seminal 2003 *Bundesgerichtshof* 'family tyrant/house tyrant' case

[788] *See* [2018] BGHSt 421 (holding that the defender may use whatever defensive means are available to immediately stop the threat and need not deploy less-certain, but also less-damaging, defensive means). *See also* [1998] BGHSt 114; [1920] 55 RGSt 82, 83–84; Erb, *supra* note 32, at 598–99.

[789] *See* Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control*, 2 NEW CRIM. L. REV. 51, 53 (2008), *citing* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW, 159 (1998).

[790] *See generally* MARKUS D. DUBBER & TATJANA HÖRNLE, CRIMINAL LAW: A COMPARATIVE APPROACH 444 (2014).

[791] *See, e.g.*, [1988] BGHSt 270, 279; [1930] 64 RGSt 101, 102; [1890] 21 RGSt 189, 190; [1985] BayObLG NJW 2600, 2601; [1963] BayObLG NJW 824, 825; Lenckner, *supra* note 671, at 537; ROXIN, *supra* note 571, at 557–58; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 338 n.7; Spendel, *supra* note 679, at 109; MAURACH & ZIPF, *supra* note 679, at 373; JESCHECK & WEIGEND, 4th ed., *supra* note 290, at 308; WELZEL, *supra* note 709, at 86.

[792] *See* Chapter IV(a)(ii) & (b)(ii).

[793] *See generally* [2016] BGHSt 564; [2013] BGHSt 449; [2012] BGHSt 311; [2012] BGHSt 197; [1989] BGHSt 741. *See also* Erb, *supra* note 10, at side-note 104; Klaus Bernsmann, *Private Self-Defence and Necessity in German Penal Law and in the Penal Law Proposal—Some Remarks*, 30 ISR. L. REV. 171, 179 (1996) ('Justification of self-defence requires the presence of a subjective element in addition to the presence of an objective element. An actor must know that he is acting in a situation giving rise to a right to self-defence; he must, for example, be aware of the imminent attack.').

(*Haustyrannenfall*) has not been abrogated.[794] In that case, Germany's highest court ruled on a case involving a woman who killed her sleeping, abusive husband.[795]

The facts of the case were largely undisputed. The husband (an 'outlaw' biker gang member) for over a decade regularly exposed the defendant and her two minor daughters to considerable physical violence and psychological torture.[796] On the day of the homicide in September of 2001, the deceased came home from a bar and proceeded to once again assault his wife and threaten the children. Around noon that day, the defendant (who it was revealed had for some months contemplated killing her husband) fired six shots from her sleeping husband's .22 calibre handgun, hitting him twice and killing him.[797]

The court, noting the defendant's three failed suicide attempts, agreed that the defendant at the time of the shooting in fact felt she had 'no way out.' The court further observed that the defendant honestly believed leaving her victimizer and moving to a women's shelter was not a viable option. The court reached this decision because, during a prior visit to the women's shelter, the deceased reportedly told her he would harm her and their children if she ever left him again (and claimed he could do so through his confederates if incarcerated).[798]

The Federal Court of Justice in its ruling noted the trial court's conclusion that the defendant killed her husband 'by stealth' (*mit Heimtücke*) because he was sleeping at the time of the attack, and that she 'exploited' the defendant's defenselessness.[799] As a

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[794] [2003] BGHSt 483.

[795] *Id*., *discussed in* Rosenau, *supra* note 10, at side-note 17, and Rönnau & Hohn, *supra* note 60, at side-note 146.

[796] *Id*.

[797] *Id*.

[798] *Id*. at 7–8.

[799] *Id*. at 9–10 (commenting that the defendant had claimed she only shot her husband after he woke up, but that the forensic evidence and testimony from a cellmate proved he was sleeping at the time he was shot).

consequence, the defendant in the lower court was convicted of aggravated murder as dictated by § 211 of the StGB. Germany's highest court, however, interestingly left open the possibility of § 35(1) 'excusable necessity' (*entschuldigenden Notstand*) because the purportedly defensive act was motivated by the defendant's belief that shooting her husband was the only way to avoid future violence.[800] The court noted that, while self-defense requires an immediate *attack* (*Angriff*), excusable necessity only requires an immediate *danger* (*Gefahr*). The court went on to observe that the defendant and her children were in a perpetual state of ongoing fear of danger (including fear of being killed by defendant's husband).[801]

Despite evincing sympathy for the defendant's position, the court ultimately concluded that the defendant did, in fact, have 'other options' for avoiding the danger. The court, among other things, found that the defendant could have moved to a shelter with her children or called the police.[802] Indeed, the court *prospectively* noted that

> the ongoing danger caused by the reoccurring and significant violence on the part of a 'Family Tyrant' is always avoidable by means other than killing the 'Tyrant,' including by seeking the help of third parties, and, specifically, the state authorities.[803]

It is, however, difficult to distinguish the battered partner's situation from that of a bar-owner who late one night overhears two patrons discussing their plan to break into the bar after closing time and, therefore, mixes sedatives into their beer. Historically, both cases would have qualified as anticipatory self-defense (*Präventiv-Notwehr*).[804]

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[800] *Id*. at 13–14.

[801] *Id*. at 13.

[802] *Id*. at 15–16.

[803] *Id*. at 17.

[804] [1960] BGHSt 358, 361.

Today, however, it appears a defendant at best will have her *non*-lethal defensive conduct against a sleeping or incapacitated intimate partner classified as an instance of justifying necessity (*rechtfertigender Notstand*) under § 34,[805] or as excusable necessity under § 35(1),[806] because other options such as calling the police or retreating have, as noted, been judicially determined to be available.[807]

vi. A new definition of 'attack'?

At the outset of this chapter it was note that an emerging line of scholarly thought would disallow § 32 force against the attacker who is behaving with care (to wit, non-negligently/non-culpably).[808] To, under this emerging modern trend, qualify as an 'unlawful attack' justifying self-defense, the behavior at issue must, therefore, not only result in an unjust outcome (*Erfolgsunrecht*), but it also must result from *wrongful behavior* (*Handlungsunrecht*). The argument advanced in support of this modern trend is that there is no need to use defensive force to vindicate the legal order when the attacker is blameless and is trying to conform his behavior to the strictures of the law (this argument finds support in the value-based model's analysis of Values #2 (protection of the attacker's presumptive right to life) and #3 (safeguarding of equal standing)). In such a case, then, the defender's behavior is to be judged by the requirements corresponding to 'justifying necessity' under § 34.[809]

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[805] *See generally* Rosenau, *supra* note 10, at 1–43.

[806] *See generally id*. at 1–24.

[807] *See generally* [2003] BGHSt 483, at 17. Although § 34 also provides the defender with a justification that indicates the legal order's acceptance of the conduct, § 34, unlike § 32, offers less protection to the defender in that it, *inter alia*, requires that the harm cannot be averted by any other means, and that the potential harm defended against must be greater than the harm inflicted (*Prinzip des überwiegenden Interesses*).

[808] *See* Rönnau & Hohn, *supra* note 60, at side-note 109; KÜHL & HEGER, *supra* note 56, at side-note 5; Erb, *supra* note 10, at side-notes 35–41; Lesch, *supra* note 27, at 94–98. *But see* Erb, *supra* note 10, at side-notes 244–51.

[809] *See, e.g.*, Christian Bertel, *Notwehr Gegen Verschuldete Angriffe*, 84 ZStW 1, 11 n.41 (1972). *See also* ROXIN, *supra* note 571, at 558; Roxin, *supra* note 656, at 82–83. *But see* Erb, *supra* note 10, at side-notes 209–38; 244–51. *See also* the discussion at Chapters II(c) & IV(e)(i).

Recall, however, that German self-defense law is still not punitive. And so justified § 32 defensive force can still be exercised against morally innocent 'attackers,' such as children and madmen (though it is not unreasonable to predict that, consistent with the value-based model and the overall trend in German self-defense law away from 'harshness,' this position will, supported by considerable value-centric dialogue, shift in the next decade or so).[810]

e. Defensive conduct

i. Necessity

The term 'necessary' (*erforderlich*) in § 32 refers solely to the defensive *means* selected.[811] Section 32's necessity requirement, moreover, follows the 'principle of the most gentle available treatment of the attacker' (*Grundsatz der möglichsten Schonung des Angreifers*).[812] The defender, therefore, must select the *least harmful* defensive means (*mildeste Mittel* or *mildeste Abwehrmittel*) available to him, so long as opting for such means does not, all things considered, increase the risk of harm to him or his property.[813] Such an evaluation, moreover, is to be conducted from an objective, *ex ante*

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[810] *See* Chapter V(d)(ii). *See also* [2017] BGHSt 182; [2012] BGHSt 311; [1952] BGHSt 217, 218; Erb, *supra* note 10, at side-note 209. *Compare* ROXIN, *supra* note 571, at 559 (arguing that 'unlawful' § 32 behavior must at a minimum evidence an objective lack of care) *and* Roxin, *supra* note 656, at 82–83, *with* Spendel, *supra* note 679, at 19–20, 32–36.

[811] *See generally* [2019] LG Muenster 123; [1995] BGH NJW 973; [1938] 72 RGSt 57, 58; FISCHER, *supra* note 10, at side-note 28; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 343. Although the literature and the caselaw in the U.S. and England often confuses the respective definition(s) of necessity, this approach is consistent with those U.S. jurisdictions that define self-defensive force as being that force which is 'necessary to prevent an imminent harm.' In these jurisdictions, imminence is treated as an independent requirement, in that the means of force selected must be necessary given the circumstances, and the unlawful harm must be immediately forthcoming. In the jurisdictions that require force to be 'immediately necessary,' in contrast, imminence is treated as a factor regarding necessity.

[812] *See generally* Pest, *supra* note 54, at 142.

[813] *See* [2019] BGHSt 363; [2019] LG Muenster 123; [2018] BGHSt 421; [2017] BGHSt 219; [2017] BGHSt 188; [2017] BGHSt 182; [2016] BGHSt 564; [2016] BGHSt 138; [2014] BGHSt 134; [2013] BGHSt 347; [1998] BGHSt 114; [1996] BGHSt 432; [1989] BGH NJW 3027; [1978] BGHSt 336, 337; [1975] BGHSt 256, 257–58; [1973] BGHSt 229, 231–32; [1972] BGHSt 356, 358; [1969] BGHSt GA 23, 24; [1965] BGHSt GA 147, 148–49; [1938] 72 RGSt 57, 58–59; [1920] 55 RGSt 82, 85. *See also* Rosenau, *supra* note 10, at side-note 21; Pest, *supra* note 54, at 145; FISCHER, *supra* note 10, at side-note 30; Rönnau & Hohn, *supra* note 60, at side-notes 75, 172; Erb, *supra* note 10, at side-notes 129, 185; ROXIN, *supra* note 56, at side-note 42; Erb, *supra* note 32, at 593, 599.

perspective.[814] In situations where it will not reduce the defensive effectiveness, the armed defender prior to using his deadly weapon should thus first threaten its use, then fire a warning shot, and only if that fails or is not available, resort to a potentially lethal shot (particularly when the attacker is unarmed).[815]

The experienced boxer, moreover, should not throw punches at the attacker's head when a simple punch to the stomach would be equally effective.[816] And a counter-attack (*Trutzwehr*) is impermissible where purely defensive force (*Schutzwehr*) would suffice.[817] These limitations are consistent with the logic of the rule discussed above, pursuant to which a defender armed with a gun or knife should draw the attacker's attention to them prior to using such defensive means, provided that such a 'warning' does not objectively increase the risk to the defender and the defender has sufficient time to appropriately evaluate the situation.[818]

Whether defensive force is necessary in a particular case will, in short, be evaluated based on the objective circumstances. Considerations include how the conflict came to be, the strength and dangerousness of the participants, and the defensive options open to the defender.[819] In this, the German law is in accord with the value-based model and the laws of the U.S. and England.

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[814] *See* [2019] BGHSt 363; [2017] BGHSt 188; [2017] BGHSt 182; Erb, *supra* note 10, at side-note 208.

[815] *See* [2019] BGHSt 363; [2012] BGHSt 197; Pest, *supra* note 54, at 146–47, 149–52; FISCHER, *supra* note 10, at side-notes 33–35.

[816] *See* [2002] BGHSt 490; [2000] BGHSt 331; [1975] BGHSt 256, 257–58.

[817] *See* [2002] BGHSt 490; [2000] BGHSt 331; [1975] BGHSt 143, 145; [1972] BGHSt 356, 359. *See also* Rönnau & Hohn, *supra* note 60, at side-note 158.

[818] *See* [2017] BGHSt 635; [2017] BGHSt 219; [2016] BGHSt 564; [2016] BGHSt 138; [2014] BGHSt 630; [2014] BGHSt 134; [2013] BGHSt 449; [2013] BGHSt 347; [2012] BGHSt 311; [2012] BGHSt 197; [2010] BGHSt 351; [2003] BGHSt 458; [2001] BGHSt 48.

[819] *See* [2017] BGHSt 197; [2017] BGHSt 35; [2003] BGHSt 529; [1992] BGHSt 464; [1989] BGHSt 464; [1987] BGHSt 582; [1982] BGHSt 1375. *See also* [2017] BGHSt 188, *citing* [2015] BGHSt 84; Rönnau & Hohn, *supra* note 60, at side-note 177; Rosenau, *supra* note 10, at side-note 27; KÜHL & HEGER, *supra* note 56, at side-note 9. In the context of the use of firearms, this expectation of, when possible, using escalating force is called '*Stufenlehre*.' *See* Pest, *supra* note 54, at 163–64.

In one illustrative case, the defender called the police. But prior to their arrival, he was repeatedly beaten by the belligerent attacker living in the same homeless shelter. The court ruled that the defender, who had his head pressed against a window while armed with a kitchen knife, was not required to first stab his attacker in the arms or legs.[820] As the court put it, '[c]onsidering the difficulty in calculating the risk of making a bad self-defense decision, expecting the defendant to, in a moment of stress (*zugespitzte Situation*), first threaten the use of the knife or use the knife in a less deadly way is asking too much.'[821] Under the German law, moreover, the selected means of defense must, viewed from an *ex ante* perspective, also have the possibility of preventing, weakening, postponing, or otherwise interfering with the attack.[822]

ii. Proportionality and excessive force

1. The traditional rule

As noted, Germany's self-defense law traditionally rejected all attempts to require that the defensive force employed be proportional to the harm threatened by the attacker (*Güterproportionalität* or *Abwägung der betroffenen Rechtsgüter*).[823] A 1923 textbook, for example, informed that '[o]ne can shoot down an attacker to defend one's ownership of a match . . . .'[824] Mayer, in 1936 criticizing the suggestion that there be proportionality

[820] [2016] BGHSt 564. *See also* [2017] BGHSt 188, *citing* [2011] BGHSt 375.

[821] [2016] BGHSt 564. *See also* [2016] BGHSt 138, *citing* [2012] BGHSt 4.

[822] *See* [1994] OLG Düsseldorf NJW 1971 (holding that defender's otherwise legitimate use of force against an intruding photographer was not necessary under § 32 because the photographer did not have any film in his camera). *See also* [1988] LG München NJW 1860, 1861; [1985] BayObLG NJW 2600, 2601; KÜHL & HEGER, *supra* note 56, at side-note 10; Erb, *supra* note 10, at side-note 208.

[823] *See generally* Pest, *supra* note 54, at 138–39, 141; FISCHER, *supra* note 10, at side-note 31; KÜHL & HEGER, *supra* note 56, at side-note 11; ROXIN, *supra* note 56, at side-note 4; Erb, *supra* note 32, at 593. *See also* MATT AND RENZIKOWSKI, *supra* note 673, at § 32, side-note 10; [1935] 69 RGSt 308, 310.

[824] MAYER, *supra* note 665, at 280. *See also* ENTWURF EINES STRAFGESETZBUCHS [DRAFT CRIMINAL CODE] E 1962, BT-DRUCKS. IV/650 (1962) 16, 156–57 [hereinafter 1962 DRAFT CODE]; [1935] 69 RGSt 308, 310; Kühl, *supra* note 688, at 195–96; LISZT, *supra* note 737, at 140–41.

between the harm done and the threat averted (and in so doing invoking values #3—equal standing; and #4—defender's autonomy),[825] similarly opined:

> It is understandable that an era which only half-heartedly fights criminality would want to rid itself of the severity of the law of self-defense. But it is obvious that, if proportionality were required, the struggle between the attacked and the criminal would then be destined to be a losing one [for the attacked].[826]

Necessity was, therefore, historically the *only* requirement that limited the use of defensive force.

2. The 'grossly disproportionate force' exception

The overwhelming consensus view continues to reject a general requirement of strict proportionality between the competing goods (*Abwägung der betroffenen Rechtsgüter*).[827] As part of the socio-ethical limitations, however, an exception to this rule was developed in cases of 'gross disproportion' (*grobes* or *krasses* or *unerträgliches Missverhältnis*) between the harm threatened and the defensive force used.[828] In cases of relatively trivial threats, for example, it is said that neither the interest in protecting the individual nor the interest in protecting the legal order are implicated.[829]

Today, then, German law limits make self-defense unavailable when the interests being defended are grossly disproportionate to the defensive force used (and so deadly

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[825] *See* Chapter II(c)(ii) & (iii).

[826] MAYER, *supra* note 665, at 258.

[827] *See generally* [2019] LG Muenster 123, *citing* [2002] BGHSt 140; [1972] BGHSt 356, 358; [1963] BayObLG NJW 824, 825; Greco, *supra* note 54, at 667; Erb, *supra* note 32, at 593; Lesch, *supra* note 27, at 84; Lenckner, *supra* note 671, at 539; ROXIN, *supra* note 571, at 572–73; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 343; Spendel, *supra* note 679, at 111; MAURACH & ZIPF, *supra* note 679, at 363; JESCHECK & WEIGEND, 4th ed., *supra* note 290, at 99–100.

[828] *See* [2018] OLG Zweibrücken 42, *citing* [2003] BGHSt 403; FISCHER, *supra* note 10, at side-note 39; Rosenau, *supra* note 10, at side-note 34; Greco, *supra* note 54, at 667.

[829] *See generally* Rosenau, *supra* note 10, at side-note 34. *See also* FISCHER, *supra* note 10, at side-note 39; Greco, *supra* note 54, at 667.

force would be unavailable to, for example, protect against the theft of a bag of fruit).[830] Viewed from the value-based model's vantage point, because the defender's personal protection justification (from the value-based model's perspective, roughly values #3 and #4)[831] are said to carry diminished weight in cases of trivial or relatively minor harm, self-defense will be unavailable if the force used is grossly disproportionate to the harm sought to be averted.[832]

Turning to what happens when an individual who is justified in using self-defense *exceeds* the boundaries of self-defense, § 33 provides that a defender will not be criminally liable 'if [he] goes beyond the limits of self-defense because of confusion, fear, or fright.'[833] What these 'limits' are is not defined in § 32 or § 33, and must, therefore, be determined on the facts of the specific case.[834]

iii. Duty to retreat and avoid conflict

1. The general rule

As far back as the Middle Ages, the defender was, consistent with the value-based model's approach,[835] required to, if possible, retreat before he could use defensive force.[836]

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[830] *See generally* Rosenau, *supra* note 10, at side-note 34.

[831] *See* Chapter II(c)(iii) & (iv).

[832] *See* [1995] OLG Stuttgart NJW 2646 (threatening to drive into pedestrian who was holding parking space for friend excessive); [1965] BayObLG MDR 65; [1963] BayObLG NJW 824, 825 (holding that physical harm to woman who refused to move from parking space was abuse of right to self-defense); KÜHL & HEGER, *supra* note 56, § 33 at side-note 14; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 348; Spendel, *supra* note 679, at 151; Koch, *supra* note 688, at 785; Krey, *supra* note 703, at 711.

[833] *See generally* [2017] BGHSt 622 (the court ruled that the putative defender's reaction was excessive when he inflicted multiple stab wounds on person who insulted him). *See also* Pest, *supra* note 54, at 137–38; RÜCKERT, *supra* note 703, at 1.

[834] *See* Pest, *supra* note 54, at 137–38.

[835] *See* Chapter IV(b)(iii).

[836] RUDOLF HIS, DAS STRAFRECHT DES DEUTSCHEN MITTELALTERS 36 (1964).

Today, in contrast, defenders are not bound to retreat before using defensive force.[837] That said, some fairly narrow exceptions to the no-duty-to-retreat rule have emerged.[838]

2. Socio-ethical limitations and the duty to retreat and avoid conflict

As detailed in the subsections immediately below, a view is developing that retreat—like avoiding conflict[839]—should be required in some cases of attacks by innocents, such as madmen, children, and those laboring under a known mistake. Retreat, and avoiding conflict by not going to places where the defender knows the attacker is, is also increasingly required before fending off attacks by close relatives, such as a spouse, and in cases where the defender provoked (*provoziert*) the attack.[840] Some, in fact, have taken the more novel position that § 32 should be *entirely* unavailable in cases where the defender is set upon by an innocent such as a child, a madman, or a person laboring under a mistake because these moral innocents are not threatening an 'attack' as defined by § 32.[841] Whatever the merit of this position, it appears that, at a minimum, retreat and avoiding conflict are now required in many situations where 50 years ago they were not.[842]

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[837] *See* Rönnau & Hohn, *supra* note 60, at side-note 66 (noting that, pursuant to the prevailing opinion, the interest in protecting the legal order is 'immeasurably high').

[838] *See generally* Erb, *supra* note 10, at side-notes 119–21.

[839] *See generally* Michela D'Angelo, Merkmal Der Gegenwärtigkeit in Notwehrrech Bei Neuen Konfliktmustern Aus Rechtsvergleichender Sicht 187 (2016) (unpublished Ph.D. dissertation, Univeristy of Freiburg), https://freidok.uni-freiburg.de/data/11175.

[840] *See generally* [2019] LG Dortmund 39Ks 8/14 (retreat required when defender is armed with a deadly weapon and intentionally engages in fight—engages in 'disapproved prefatory activity' (*misbillingendes Vorverhalten*) with drunk, unarmed attacker). *But see* Rosenau, *supra* note 10, at side-note 40; KÜHL & HEGER, *supra* note 56, at side-note 14 (retreat only required when provoking behavior is unlawful); GEORG FREUND, STRAFRECHT: ALLGEMEINER TEIL § 3, side-note 117 (2008) (same).

[841] *See, e.g.*, Friedrich Wilhelm Krause, *Zur Einschränkung der Notwehrbefugnis*, [1979] GA 329, 335–36; Bertel, *supra* note 809, at 11 n. 41; [1962] BGH JR 186, 187. *But see* [1962] BGH NJW 308, 332. This contention lacks merit, however, because § 32 allows defensive force to be used against 'unlawful attacks,' rather than just against 'criminal attacks.'

[842] *See generally* Erb, *supra* note 10, at side-notes 116–21; Erb, *supra* note 32, at 593.

3. Retreat when attacked by 'innocents'

As just noted, in cases involving morally innocent attackers, the defender is now likely required to retreat if practicable. The motivation for this position is the lack of the attacker's moral responsibility (adding weight to value #2, and de-emphasizing values #3 and #7, as well as arguably #4).[843] Where retreat is not a viable option, moreover, the defender may even have to accept slight injury or damage before resorting to defensive force.[844] This requirement of 'risky care' (*riskante Schonung*) is narrowly limited, however.[845] Under German law, then, as under the value-based model, a person cannot be legally compelled to take a serious beating from, say, a legally innocent juvenile or madman.[846]

4. Attacks by close family members

As in the case of attacks by innocents, it has been argued that there is less interest in protecting the legal order when close family members, such as husband and wife, are attacking each other. In those cases, the defender is to some extent said to be the guarantor of the attacker (this is, depending on the context, known as the *Garantenpflicht* or *Garantenstellung*), obligating the defender to exercise special care/consideration (*Rücksichtsnahmeverpflichtung*).[847] A defender consequently may not use potentially lethal force to prevent slight discomfort or a minor physical injury resulting from a

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[843] *See generally* Erb, *supra* note 10, at side-notes 212, 247; [1952] BGHSt 217, 218. *See also* Ellen Schlüchter, *Kein Recht zur Beweisvernichtung nach einem potentiellen Selbstbedienungsladendiebstahl*, [1987] JR 309, 310; [1975] BGH MDR 194, 195.

[844] *See* Lenckner, *supra* note 671, at 546; Roxin, *supra* note 656, at 81. *See also* Krause, *supra* note 841.

[845] *See generally* Erb, *supra* note 10, at side-note 211.

[846] *See id*.

[847] *See generally* [2016] BGHSt 523; [2016] BGHSt 289, *citing* [2003] BGHSt 153; [1984] BGH NJW 986; [1975] BGH NJW 62; [1969] BGH NJW 802; FISCHER, *supra* note 10, at side-note 5a; Rönnau & Hohn, *supra* note 60, at side-notes 238–41; KÜHL & HEGER, *supra* note 56, at side-note 14; Erb, *supra* note 10, at side-note 71; ROXIN, *supra* note 56, at side-note 93; Lesch, *supra* note 27, at 82–93, 104–05; Bernsmann, *supra* note 571, at 298–99; Schroth, *supra* note 703, at 2563; Roxin, *supra* note 656, at 81. *See also* [1976] BGH JR 335, 335–36; [1969] BGHSt GA 117, 117–18; Gerd Geilen, *Eingeschränkte Notwehr unter Ehegatten?*, [1976] JR 314, 315–16.

spousal or child's attack, regardless of whether such force may be authorized if the culpable attack was by a stranger.[848]

Particularly relevant to battered intimate partner cases, however, the consensus view is that this limitation is abandoned in cases where the defender runs the risk of serious physical injury requiring medical care if she does not defend herself. Similarly, there is no requirement of 'heightened care' where, for example, the spouse is subjected to ongoing, though not necessarily always very violent, mistreatment that takes away her dignity and makes her the object of her husband's will.[849]

iv. Intentionally provoked attacks and other blameworthy conduct on the part of defenders

Absichtsprovokation refers to intentional, calculated provocation by the defender solely for the purpose of later being able to claim self-defense after the attacker 'rises to the bait.' (*Vorsatzprovokation*, in contrast, describes situations, such as those involving recklessness, that have not yet crossed over to the level of *Absichtsprovokation,* but where a person considers it to be possible that a situation of self-defense may follow from his actions, and accepts that.)[850] Some German commentators argue that self-defense should be entirely unavailable in cases of *Absichtsprovokation* (and in some cases *Vorsatzprovokation*) because there is no, or at least a far more limited, interest in

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[848] [1985] BGH JR 113, 115; [1984] BGH JZ 507; [1984] BGH NJW 986, 986–87; [1975] BGH NJW 62, 62–63. *See also* Rönnau & Hohn, *supra* note 60, at side-notes 238–41; Erb, *supra* note 10, at side-note 71. *See also* Chapter IV(e)(i).

[849] *Compare* [1969] BGH NJW 802 (holding that wife should not have used deadly force against her husband, even though less-harmful force may not have repelled the attack, because he was unarmed and they had engaged in similar physical arguments before), *with* [1975] BGH NJW 62 (no self-defense in husband–wife conflict) *and* [1984] BGH JZ 529, 529–30 (distancing itself from previous holdings). *See also* Erb, *supra* note 32, at 597 (noting the difficulty of 'retreating' from an aggressive partner); Lesch, *supra* note 27, at 104–05; Roxin, *supra* note 656, at 101–03 (arguing that limitation on the right to self-defense does not apply to situations where partner routinely mistreats the other).

[850] *See* [2019] BGHSt 456 (denying self-defense to attacker who intentionally provoked defendant in order to claim the justification and noting the absence of 'defensive will'); [2019] LG Muenster 123 (same, *citing* [2006] BGHSt 332). *See also* [2015] BGHSt 473; [2014] BGHSt 630; [2010] BGHSt 118; [2005] BGHSt 237; FISCHER, *supra* note 10, at side-note 42; Rosenau, *supra* note 10, at side-notes 43–44; KÜHL & HEGER, *supra* note 56, at side-note 14; Erb, *supra* note 10, at side-note 226.

protecting the legal order.[851] Others have taken the position that, unless the intentional provoker is engaging in a positively *unlawful* attack, his defensive options should remain entirely unchanged.[852] Others, still, contend that such purposeful provokers lack the genuine 'defensive will' the German law requires.[853]

The contemporary majority view preserves the self-defense option for the provoking defender, provided that he first retreat and accept the risk of slight injury.[854] If retreat is not possible, the provoking defender who is facing serious harm is permitted to act in self-defense because it is thought that putting an individual in a situation where he has to choose between giving up his physical safety to the attacker or being exposed to criminal liability is untenable.[855]

In 2019, for example, the court was faced with a situation in which a drunk defender acted as a watch-out while his girlfriend urinated in a train station waiting area.[856] A man walking by pointed out that the waiting area was not a bathroom, which resulted in a verbal altercation between the drunk boyfriend and the man. The boyfriend, after verbally challenging the man, pulled out a hunting knife. When the man approached the boyfriend to hit him, the boyfriend stabbed the man in his left side to ward off the

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[851] *See, e.g.*, WESSELS & SATZGER, *supra* note 597, at side-note 534; Roxin, *supra* note 656, at 85–86.

[852] *See, e.g.*, Rönnau & Hohn, *supra* note 60, at side-notes 190, 245–60 (unless unlawful, intentional provocation no limit to defensive force).

[853] *See* [2015] BGHSt 473; [2014] BGHSt 630; [2010] BGHSt 118; [2005] BGHSt 237; WESSELS & SATZGER, *supra* note 597, at side-note 534. For a discussion of self-defensive will, *see* Chapter V(c)(ii). *See also* Rönnau & Hohn, *supra* note 60, at side-note 251.

[854] *See* [1994] BGH NJW 871, 872; [1993] BGHSt 374, 378–79; [1991] BGH NJW 503, 505; [1975] BGHSt 256, 257; [1975] BGHSt 143, 145; [1972] BGHSt 356, 359; Erb, *supra* note 10, at side-note 227; Lenckner, *supra* note 671, at 547–48; Kühl, *supra* note 688, at 200–01; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 346–47; JESCHECK & WEIGEND, 4th ed., *supra* note 290, at 311. *See also* Wolfgang Mitsch, *Nothilfe gegen provozierte Angriffe*, [1986] GA 533, 544 (arguing that provoking attacker should retain full right to self-defense).

[855] *See* [1994] BGH NJW 871, 872; [1993] BGHSt 374, 378–79; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 346–47; Rosenau, *supra* note 10, at side-notes 39–45; JESCHECK & WEIGEND, 4th ed., *supra* note 290, at 311.

[856] [2019] BGHSt 456.

attack. The court remanded the matter for additional fact-finding concerning to what extent the boyfriend provoked the attack, and, therefore, should be restricted in terms of his defensive options.[857]

Although it is, therefore, clear that provocation under some circumstances limits one's ability to use self-defense, disagreements persist over what behavior amounts to 'provocation' and how self-defense can as a matter of legal theory be restricted.[858] Must the provoking activity be positively unlawful, or is it sufficient for the activity to be rude, annoying, or otherwise socially unacceptable (*sozialethisch zu missbilligen*)? And should such asocial conduct be measured on the basis of intent, recklessness, negligence, or some other basis?[859]

Though subject to vigorous ongoing debate,[860] today's majority view requires the behavior to be positively unlawful before the defender's ability to use self-defense is curtailed—that is, provided the defender is not engaging in unlawful conduct, he is able to resort to defensive force even if he knows or must have known that his provoking conduct is likely to result in an attack.[861] As Kühl and Heger put it, self-defense does not apply to cases of attacks that merely resulted from conduct that can be '*disapproved* of for legal or socio-ethical reasons . . . .'[862] This approach is also consistent with the 'three-level-progression theory' (*Dreistufenlehre* or *Dreistufentheorie*) when it comes to

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[857] *Id. See also* [2015] BGHSt 473; [2014] BGHSt 630; [2010] BGHSt 118; [2005] BGHSt 237.

[858] *See generally* KÜHL & HEGER, *supra* note 56, at side-notes 14–15 (surveying the breadth of the disagreements).

[859] *See generally* Rönnau & Hohn, *supra* note 60, at side-notes 190, 245–60; FISCHER, *supra* note 10, at side-note 44.

[860] *See generally* KÜHL & HEGER, *supra* note 56, at side-note 14.

[861] *See* [2019] BGHSt 456; [2018] BGHSt 208; [2012] BGHSt 197; [2010] BGHSt 483; [1993] BGHSt 354; [1989] BGHSt 2; [1972] BGHSt 356, 359; KÜHL & HEGER, *supra* note 56, at side-note 14; ROXIN, *supra* note 571, at 584; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 347 (arguing that one must tolerate lawful, but provoking, behavior without resorting to physical violence).

[862] KÜHL & HEGER, *supra* note 56, at side-note 14. *But see* [1996] BGH NJW 2315, *discussed in* Erb, *supra* note 10, at side-note 234.

provoked attacks (first seek to flee; then seek to deflect the attack (*Schutzwehr*); then deploy affirmative force to neutralize the attack (*Trutzwehr*)).[863]

f. Evaluating Germany's self-defense law from a value-centric perspective

The hypothesis tested here is that a broader consideration of the values implicated when a person elects to engage in the self-preferential use of force will improve the transparency of decision-making and, relatedly, reduces the role of hidden normativity. The foregoing analysis of the German self-defense law supports this hypothesis. The German approach to self-defense law distinguishes itself from the to-be-discussed laws of England and the U.S. in that it employs an explicit and transparent system of value-ordering, both when discussing self-defense doctrine and at the level of specific application. In fact, the primacy of values is carefully analyzed in any debate concerning proposed changes in the law.

For example, German self-defense is thought to be legally permissible because it both (1) protects the autonomy of the individual and (2) vindicates the legal order.[864] Each act of self-defense and any reform proposals are thus analyzed on the basis of how well they protect the individual defender and how well they protect the legal order. And as scholars debate the merits of whether it is appropriate to provide full weight to either or both of these values (or to, as discussed, other values, such as equal standing), their value-explicit conclusions, if accepted, will have a very direct impact on the amount of force legally available, and on the circumstances in which the force can be used.

One of the value-centric areas that deserves particular attention in light of the hypothesis' focus on transparency are the post–World War II efforts to introduce 'socio-

[863] *See generally* FISCHER, *supra* note 10, at side-note 45; Rönnau & Hohn, *supra* note 60, at side-note 256; WESSELS & SATZGER, *supra* note 597, at side-note 530; KÜHL & HEGER, *supra* note 56, at side-note 14.

[864] *See* Chapter V(b)(i).

ethical limits' (*sozialethische Einschränkungen*), discussed above in Chapter V(b)(ii).[865] Here, the driving principle ('the right need never yield to the wrong') was augmented by more humanitarian values because of the evolving belief among scholars that the German law was too 'harsh.' Put another way, permitting essentially unlimited defensive force, if necessary to protect *any* legally recognized interest, was considered unreasonable. It was broadly thought that the grossly disproportionate outcomes this rule allowed for created an unacceptable imbalance between the thing protected and the damage inflicted, thereby threatening the state's monopoly on force,[866] as well as undermining the legitimacy of, and respect for, the legal order more generally.[867]

German self-defense doctrine in many respects provides answers similar to the value-based model. Indeed, the biggest deviation was found in the area of what in particular can be defended.[868] In that regard, German law is much more permissive, providing for deadly force in defense of property and under circumstances where U.S. and English law would find the amount of force used to be disproportionate to the harm threatened. Also, while the value-based model would make defensive force available when 'immediately necessary,'[869] German law treats imminence as part of 'justifying

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[865] *See generally* [2016] BGHSt 597, *citing* [1996] BGHSt 432; [2015] BGHSt 10, *citing* [2015] BGHSt 303; [2014] BGHSt 630; [1995] BGHSt 97. *See also* KÜHL & HEGER, *supra* note 56, at side-note 13; BOCK, *supra* note 687, at 289–90; JÄHNKE *ET AL.*, *supra* note 687, at 147; VON SCHERENBERG, *supra* note 7, at 76 (noting that the term is not provided for in the statute and is a largely contentless term in that it only becomes relevant in the most extreme situation that for other reasons would likely not be deemed self-defense); KOLLER, *supra* note 687, at 196 (contending that the necessity of the defensive force must also be viewed in the context of protecting the legitimacy of the criminal justice system).

[866] *See generally* Kargl, *supra* note 132, at 39; Lenckner, *supra* note 671, at 540–45; Kühl, *supra* note 688, at 194; ROXIN, *supra* note 571, at 575–77; JESCHECK & WEIGEND, 5th ed., *supra* note 492, at 344–49; Koch, *supra* note 688, at 785–820; Spendel, *supra* note 679, at 15–16; Roxin, *supra* note 656. *But see* Schmidhäuser, *supra* note 670, at 123–24 (arguing that the state monopoly on force is not challenged by self-defense because the right to self-defense is not delegated by the state).

[867] *See* KOLLER, *supra* note 687, at 196.

[868] *Compare* Chapter IV(c)(ii) *with* V(d)(i).

[869] *See* Chapter IV(b).

necessity.'[870] And as discussed, every proposed change in Germany's self-defense law was accompanied by significant and transparent debate over how that change comports with the statute's text and the values sought to be protected.

While German self-defense law is still notably 'pro-defender,' it, in a gradual and very transparent manner, has witnessed significant changes that have opened the door for possible future restrictions on the right to self-defense. And these changes, thanks to the more value-centric style of the German debate, have largely come about in a logically incremental, predictable, and justifiable way. What once were minority positions concerning proposed law reform, for example, have over time, and through extensive analysis and debate, become part of the positive law of Germany. What is more, all sides of the debate(s) are generally aware of why this is so, what values are at issue, how these values are said to have been impacted by this law reform, and what future reform proposals may logically follow.

From the perspective of the hypothesis being tested, then, while there continues to, as a normative matter, be disagreement over the morality/appropriateness of certain German self-defense outcomes, the foregoing survey demonstrates that the application of self-defense rules and the common analytical language promote nuanced, incremental, and focused decision-making. Specifically, the discussion reveals that German scholars and jurists use this common value-centric language to evaluate whether and why reforms to, or adjustments of, German self-defense doctrine are appropriate. This value-aware approach, moreover, yields outcomes reached in a more democratic, logical, and policy-based manner. By in this manner encouraging more thoughtful choices among the various available perspectives and narrowing the areas of dispute, the German value-centric approach leaves limited room for hidden normativity. In short, the examination of

[870] *See* Chapter V(e)(i).

Germany's value-based approach, particularly once contrasted with the U.S. and English approaches, provides considerable support for the hypothesis being tested here.

VI. EXAMINING THE U.S. LAW'S TREATMENT OF SELF-DEFENSE FROM A VALUE-CENTRIC PERSPECTIVE

a. Putting U.S. self-defense law in context

When studying the self-defense law of the U.S., one must bear in mind that there is no such unitary entity as the 'U.S. criminal law.'[871] Rather, each state has its own unique mix of criminal code and common law decisions. In addition to the laws of the individual states, an expansive system of federal courts interprets both their own and state criminal statutes and cases.[872]

While this jurisdictional complexity may tempt one to limit the examination to, say, three 'representative' state jurisdictions, the substantial national diversity of opinion and approach renders this alternative inadequate. This chapter will, therefore, identify select cases representative of more widely held—or emerging—positions.

A few words on the chronological range of cases examined are also in order. The U.S. caselaw naturally encompasses self-defense cases that were decided well before the late 1800s. These earlier discussions, however, unsurprisingly focused largely on the common law of England, as put forward by commentators such as East, Hale, Blackstone, Russell, and Foster.[873] Because the law of self-defense in the U.S. was, therefore, substantially similar to England's law,[874] and because before the mid-1800s the domestic caselaw on self-defense did not develop its independent existence, this section will

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[871] *See generally* William Partlett, *Criminal Law and Cooperative Federalism*, 56 AM. CRIM. L. REV. 1663, 1685–86 (2019).

[872] *See generally* Joan L. Larsen, *State Courts in a Federal System*, 69 CASE W. RES. L. REV. 525, 530 (2019). *See also Frisby v. Schultz,* 487 U.S. 474, 482 (1988).

[873] *See generally* Rönnau & Hohn, *supra* note 60, at side-note 14. On a historical/linguistic note, the first time that self-defense was spelled with an 's' (to wit, 'self-defense') in the U.S. caselaw was apparently in *United States v. Travers*, 28 F. Cas. 204, 206 (C.C.D. Ma. 1814).

[874] *See, e.g.*, FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 85–112 (7th ed. 1874); JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 349–75 (1858); FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 456–69 (3d ed. 1855). *See also United States v. Herbert*, 26 F. Cas. 287 (D.C. Crim. Ct. 1856).

largely confine itself to examining cases and commentary decided and written after the middle of the 19th century.

Some readers, moreover, may expect to see a heavy emphasis on the American Law Institute's influential 1962 Model Penal Code ('MPC'). The reason that the thesis will not discuss the MPC at great length is that most states have not, in fact, aligned their codes with the MPC's self-defense provisions. While the MPC's § 3.04 and accompanying sections have surely influenced the thinking of some judges and commentators,[875] it can be said that the MPC in the self-defense context has a tendency to seek to innovate the law, rather than restate it.[876] For example, it treats self-defense as an instance of 'lesser evils' justification, makes the issues of necessity and proportionality turn on the subjective beliefs of the defender, provides that a failure to retreat results in a complete loss of the right to self-defense, and seeks to replace the traditional imminence requirement with a broad requirement that the defensive force be 'immediately necessary . . . on the present occasion.'[877] None of these directives comport with the actual state of the law, and a detailed review of the MPC's self-defense provisions is, therefore, not particularly helpful.

Having discussed the scope and approach of this section, the thesis now turns to how the defense of self-defense is actually raised in American courts. If evidence in a trial permits a 'reasonable inference' that the accused may have acted in self-defense, the

[875] *See, e.g.*, Hava Dyan & Emanuel Gross, *Between the Hammer and the Anvil: Battered Women Claiming Self-Defense and a Legislative Proposal to Amend Section 3.04(2)(b) of the U.S. Model Penal Code*, 52 HARV. J. ON LEGIS. 17, 32–34 (2015).

[876] *See generally* Lee, *supra* note 643, at 663; George P. Fletcher, *Dogmas of the Model Penal Code*, 2 BUFF. CRIM. L. REV. 3, 15–16 (1998).

[877] *See* MPC § 3.04. This approach is in accord with the value-based model. *See* Chapter IV(b)(ii).

court in most states must allow the defense to go to the jury.[878] Unlike in England,[879] however, in the U.S. the defendant has the burden of raising the affirmative defense of self-defense.[880]

In the years around the turn of the 20th century, this American concept of self-defense was often referred to as the 'right to self-preservation' because it was seen as an underivative right founded on the laws of nature. A number of U.S. jurisdictions, moreover, continue to divide these cases into two general classes: *perfect* and *imperfect* self-defense.[881] Perfect self-defense describes those cases in which the defender was entirely free from blame in making his defensive force necessary.[882] A defender, for example, is justified as acting in perfect self-defense if he kills an attacker who makes an unprovoked murderous assault, or attempts any other forcible felony. Imperfect self-defense, in contrast, refers to a class of cases in which the defender's blameworthy conduct contributed to the defensive necessity arising, such as when the defender and the attacker get into a fight with each other, and the defender attempts to resist the non-felonious attack with force instead of seeking redress from the law.[883] Today, imperfect self-defense, which in contrast to perfect self-defense merely justifies a reduction in the

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[878] *See generally People v. Tyson,* 2019 WL 3852432, at *11–12 (Cal. Ct. App. Aug. 16, 2019); *Jenkins v. State,* 942 So. 2d 910, 914 (Fla. 2d DCA 2006); *State v. Gagnon*, 567 N.W.2d 807, 808 (N.D. 1997); *Commonwealth v. Mayfield*, 585 A.2d 1069, 1071 (Pa. Super. Ct. 1991); *State v. Herriges*, 455 N.W.2d 635, 639 (Wis. Ct. App. 1990). *See also Foreman v. State*, 257 N.W. 237, 240 (Neb. 1934); *State v. Walker*, 59 S.E. 878, 878–79 (N.C. 1907).

[879] *See* Chapter VII(a).

[880] *See Rosemond v. United States*, 134 S. Ct. 1240, 1256–57 (2014).

[881] *See, e.g.*, *State v. Harvey,* 828 S.E.2d 481, 484 (N.C. 2019); *State v. Lee*, 811 S.E.2d 562, 568 (N.C. 2018); *Porter v. State*, 166 A.3d 1044, 1053 (Md. Ct. App. 2017). *See also Wallace v. United States*, 162 U.S. 466, 472 (1896); *State v. Kindred*, 49 S.W. 845, 849 (Mo. 1899); *Hardin v. State*, 49 S.W. 607, 611–12 (Tex. Crim. App. 1899).

[882] *See, e.g.*, *State v. Flory*, 276 P. 458, 462–63 (Wyo. 1929); *State v. Zorn*, 100 S.W. 591, 599 (Mo. 1907).

[883] *See, e.g.*, *Nelson v. State*, 2019 WL 3955049, at *4–5 (Miss. Aug. 22, 2019); *State v. Silva*, 2019 WL 3311168, at *5–6 (Utah Jul. 23, 2019). *See also Dodson v. Commonwealth*, 167 S.E. 260 (Va. 1933).

degree of the offense of which the defender may be found guilty,[884] is typically used to describe situations in which the defender was subjectively justified, though a reasonable person would have found the defensive action unnecessary.[885]

Judicial pronouncements and scholarly commentary, generally consistent with the German approach,[886] previously took the position that it was not only a person's right, but in fact a person's *duty*, to the broader legal order, to prevent a felony; any killing necessary to achieve this end was, therefore, justified rather than merely excused.[887] Today, killing to prevent a felony is justifiable only when the felony is attempted by force or surprise, such as in cases of murder, robbery, burglary, arson, rape, or sodomy.[888] A U.S. defender today, therefore, can claim two distinct, but overlapping, defenses[889]: if his conduct is carried out both to prevent a felony *and* to protect himself from injury, then both defenses will be available.[890]

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[884] *See, e.g.*, *Harvey,* 828 S.E.2d at 484 (N.C. 2019); *State v. Barrett*, 442 P.3d 492, 499–500 (Kan. 2019); *In re Christian S.*, 872 P.2d 574, 588 (Cal. 1994); *Paz v. State*, 852 P.2d 1355, 1363 (Idaho 1993); *State v. Bowens*, 501 A.2d 577 (N.J. Super. Ct. 1985), *aff'd*, 532 A.2d 215 (N.J. 1987).

[885] *See, e.g.*, *Mobley v. State,* 2019 WL 290063, at *4 (Md. Ct. App., Jan. 15, 2019); *Neevel v. Herns*, 2018 WL 6441071, at *2 (W.D. Wis. Dec. 7, 2018); *Burch v. State*, 696 A.2d 443, 458 (Md. Ct. App. 1997); *In re Christian S.*, 872 P.2d at 575. *See also* Cynthia K.Y. Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 377 (1996).

[886] *See* Chapter V(b).

[887] *See, e.g.*, *Bond v. Baltimore & OR. Co.*, 96 S.E. 932, 934 (W. Va. 1918). *See also* WILLIAM LAWRENCE CLARK, HANDBOOK OF CRIMINAL LAW 178 (William Ephraim Mikell ed., 3d ed. 1915); BISHOP, *supra* note 874, at 604–07.

[888] *See, e.g.*, *State v. Copley*, 828 S.E.2d 35, 48–49 (N.C. Ct. App. 2019); *State v. Cardenas*, 380 P.3d 866, 870–71 (N.M. Ct. App. 2016); *State v. Havican*, 569 A.2d 1089, 1092 (Conn. 1990); *Laney v. State*, 361 S.E.2d 841 (Ga. Ct. App. 1987). *See also* Jason M. Whiteman, *Recent Decisions: The Court of Appeals of Maryland*, 61 MD. L. REV. 795, 897 (2002).

[889] *See generally State v. Pollard*, 900 N.W.2d 175, 178–79 (Minn. Ct. App. 2017).

[890] *See generally People v. Wafer*, 907 N.W.2d 584, 592–92 (Mich. 2018); *Laney*, 361 S.E.2d at 844; *State v. Harris*, 222 N.W.2d 462, 467 (Iowa 1974).

b. Subjective or objective standard as to the justificatory circumstances

i. Mistakes of fact

U.S. courts, in keeping with the traditional English rule[891] but at odds with both the German approach[892] and value-based model,[893] historically required mistakes of fact as to the justificatory circumstances to be objectively reasonable before self-defense could apply.[894] The right to self-defense in the U.S., thus, has always hinged neither on the actual existence of facts making the self-defensive conduct necessary nor on the actor's purely subjective belief. Self-defense, rather, was sanctioned if it appeared to the jury that such defense was necessary and reasonable under the circumstances the defender at the time knew about.[895] The *Shorter* court, for example, noted that a rule requiring the actual justificatory facts to be present before self-defense could apply (in the parlance of the value-based model, a requirement of 'external justification'[896]) 'would lay too heavy a burden on poor humanity.'[897] The jury, thus, evaluated defendant's conduct on the basis of how a reasonable person would have acted in such circumstances, and had to place itself into the shoes of the defendant at the time of the act.[898]

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[891] *See* Chapter VII(b)(i).

[892] *See* Chapter V(c).

[893] *See* Chapter IV(ii).

[894] *See, e.g.*, *Rowe v. United States*, 164 U.S. 546, 557 (1896); *Acers v. United States*, 164 U.S. 388, 392–93 (1896); *Addington v. United States*, 165 U.S. 184, 186–87 (1897); *Beard v. United States*, 158 U.S. 550 (1895); *State v. Gray*, 77 S.E. 833 (N.C. 1913); *People v. Williams*, 88 N.E. 1053, 1056 (Ill. 1909); *Young v. State*, 104 N.W. 867 (Neb. 1905); *State v. Sadler*, 26 So. 390, 399 (La. 1899); *Nabors v. State*, 25 So. 529 (Ala. 1899); *Redd v. State*, 25 S.E. 268 (Ga. 1896); *State v. Berkley*, 19 S.W. 192 (Mo. 1892); *State v. Harrod*, 15 S.W. 373, 377 (Mo. 1891); *State v. Jones*, 7 S.E. 296, 305–06 (S.C. 1888); *State v. Clifford*, 17 N.W. 304, 307–08 (Wis. 1883). *See also* CLARK, *supra* note 887, at 178; Joseph H. Beale, Jr., *Homicide in Self-Defense*, 3 COLUM. L. REV. 526, 526–27 (1903).

[895] *See, e.g.*, *People v. McGraw*, 2019 WL 1922855, at *5 (Cal. Ct. App. Apr. 30, 2019). *See also* Susan F. Mandiberg, *Reasonable Officers vs. Reasonable Lay Persons in the Supreme Court's Miranda and Fourth Amendment Cases*, 14 LEWIS & CLARK L. REV. 1481, 1486 (2010).

[896] *See* Chapter IV(a)(ii).

[897] 2 N.Y. 193, 197–98 (N.Y. Ct. App. 1849).

[898] *See State v. George*, 249 P.3d 202, 205–06 (Wash. App. 2011); *State v. Cadotte*, 42 P. 857, 860 (Mont. 1895); *McDonald v. State*, 14 S.W. 487, 487–88 (Tenn. 1890); *State v. Sterrett*, 25 N.W. 936, 938–39 (Iowa 1885). *But see Coleman v. State*, 320 A.2d 740, 742–43 (Del. 1974) (subjective standard as to

Today, jurors are still asked to place themselves in the defender's shoes when evaluating the *reasonableness* of the defender's actions.[899] But they are also generally instructed to, in their 'reasonable person' analysis, ignore the defendant's particular characteristics such as cowardice, nervous temperament, immaturity, or weak physical condition into account.[900] That said, a minority of U.S. courts continue to 'personalize' the objective approach by attributing to the hypothetical 'reasonable person of ordinary firmness' some physical characteristics such as the defendant's actual height and weight.[901] Outlier cases aside, however, contemporary U.S. courts in the main continue to instruct that the reasonableness of defensive force is to be determined *objectively*, and that the jury should not attempt to graft a particular defender's personal attributes and traits onto the proverbial reasonable man.[902] A reasonably or ordinarily prudent person in the defendant's shoes must consequently have believed both that the danger was imminent and that the defensive conduct was necessary.[903]

necessity and objective standard as to excessiveness), *discussed in Lloyd v. Jefferson*, 53 F. Supp. 2d 643, 687–88 (D. Del. 1999).

[899] *See, e.g.*, *State v. Johnson*, 2019 WL 1125924, at *2 (Wash. Ct. App. March 12, 2019); *People v. Wilburn,* 2019 WL 1746844, at *2 (Mich. Ct. App. Apr. 18, 2019); *Stillwagon v. City of Delaware*, 175 F. Supp. 874, 895 (S.D. Ohio 2016).

[900] *See generally J.D.B. v. North Carolina*, 564 U.S. 261, 286-87 (2011), *citing Stansbury v. California*, 511 U.S. 318, 323 (1994); Laura Cohen, *The 'Reasonable Black Child'—Youth, Race, and the Fourth Amendment*, 33 A.B.A. CRIM. JUST. 37, 38 (2018). *See also Fisk v. State*, 71 P.2d 499 (Okla. Crim. App. 1937); *Calloway v. State*, 262 P. 696 (Okla. Crim. App. 1928); *Ammons v. State*, 102 So. 642, 645 (Fla. 1924); *Bosler v. Modern Woodmen of Am.*, 160 N.W. 966, 968–69 (Neb. 1916); *State v. Usher*, 111 N.W. 811, 812 (Iowa 1907); *State v. Smith*, 71 P. 973, 975–76 (Or. 1903); *People v. Button*, 39 P. 1073, 1075 (Cal. 1895); *Gallery v. State*, 17 S.E. 863, 864 (Ga. 1893); *Sterrett*, 25 N.W. at 938–39.

[901] *See, e.g.*, *People v. Matthews*, 30 Cal. Rptr. 2d 330, 335 (Cal. Ct. App. 1994); *Rodriguez v. State*, 641 S.W.2d 669, 672 (Tex. Ct. App. 1982), *aff'd*, 710 S.W.2d 60 (Tex. Crim. App. 1986).

[902] *See, e.g.*, *People v. Khachaturyan*, 2019 WL 4296870 , at *3 (Cal. Ct. App. Sept. 11, 2019); *Nelson*, 2019 WL 3955049 at *4; *People v. Brady*, 232 Cal. Rptr. 3d 220, 225 (Cal. Ct. App. 2018).

[903] *See, e.g.*, *State v. Isbell*, 524 S.W.3d 90, 94 (Mo. Ct. App. 2017); *Castro v. State*, 2014 WL 5020052, at *4–5 (Tex. Ct. App. Oct. 8, 2014).

ii. Unknowingly justified defenders

Defenders unaware of the presence of justificatory circumstances found no refuge in the U.S. law of self-defense in the late 1800s and early 1900s. On the contrary, it was remarkably well-settled that, consistent with the value-based method,[904] an actor always had to persuade the jury that he was internally justified by his bona fide belief in the justificatory circumstances, and that he *acted* upon that belief.[905]

Today, defenders still can find no shelter in justificatory circumstances of which they were not aware.[906] To be justified, then, (1) a defender must subjectively believe that the force is necessary to prevent an imminent attack, and (2) the facts must be such that a reasonable person would objectively agree with the defender's conclusion.[907] This is, and has always been, the rule in U.S. jurisprudence, and it is in line with the position taken by the value-based model of self-defense.[908] This rule, however, was the product of hidden normativity in that it was simply brought forward from early judicial pronouncements. It did not have the benefit of being exposed to a substantive debate over the values that justified this outcome, even though such a rule, as discussed above in Chapter IV(a)(ii), inherently involves an accommodation between competing values.

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[904] *See* Chapter IV(a)(ii).

[905] *See, e.g.*, *State v. Keeter*, 174 S.E. 298 (N.C. 1934); *Forrester v. State*, 4 S.W.2d 966, 971 (Tex. Crim. App. 1927); *State v. Bethune*, 99 S.E. 753, 754 (S.C. 1919); *State v. Parks*, 183 P. 433, 434 (N.M. 1919); *Williams*, 88 N.E. at 1056; *People v. Emerson*, 62 P. 1069, 1071 (Cal. 1900); *People v. Bennett*, 80 N.W. 9, 11 (Mich. 1899); *Lovett v. State*, 11 So. 550, 555 (Fla. 1892); *Trogdon v. State*, 32 N.E. 725, 727 (Ind. 1892); *People v. Donguli*, 28 P. 782, 783 (Cal. 1891); *May v. People*, 6 P. 816, 824–25 (Colo. 1885). *See also* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 122 (2019).

[906] *See, e.g.*, *Priser v. State*, 2019 WL 3216805, at *2 (Alaska July 17, 2019); *Stillwagon*, 175 F. Supp. at 895; *Humphrey v. State*, 966 S.W.2d 213, 218 (Ark. 1998); *State v. Carter*, 713 A.2d 255, 263 (Conn. App. Ct. 1998); *State v. Marshall*, 573 N.W.2d 406, 410 (Neb. 1998).

[907] *See, e.g.*, *Priser*, 2019 WL 3216805 at *2; *Stillwagon v. City of Delaware*, 274 F. Supp. 3d 714, 748 (S.D. Ohio 2017); *Washington v. State*, 997 N.E.2d 342, 349 (Ind. 2013).

[908] *See* Chapter IV(a)(ii).

c. The attack

i. What interests can be defended?

Though the precise formulations sometimes differ, in the U.S., deadly force can be used to ward off death or serious bodily injury.[909] Serious (sometimes 'great') bodily injury is generally defined as '[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.'[910] While the courts and legislatures have not expressed a unified view on what 'serious bodily injury' encompasses, there is support for the position that deadly force can be used to prevent broken noses and severed arteries,[911] bone fractures and burns of the second or third degree,[912] and broken or fractured cartilage in the nose or elsewhere.[913] Deadly force, in turn, is force that the actor uses with the

[909] *See generally* TEX. CODE ANN. § 39-11-611 (2019), *quoted in* Allhoff, *supra* note 508, at 1533 n.29; *State v. Cook*, 802 S.E.2d 575, 578 (N.C. Ct. App. 2017); *Porter*, 166 A.3d at 1067. Note that in some states kidnapping, rape, and forcible sodomy justify deadly defensive force. *See, e.g.*, ALA. CODE § 13A-3-23 (2019); HAW. REV. STAT. § 703-304 (2019); TEX. CODE ANN. § 9.32(a)(2)(B) (2019); *State v. Matuu*, 2017 WL 4339427, at *2 (Haw. Ct. App. Sept. 29, 2017).

[910] *See, e.g.*, COLO. REV. STAT. § 18-1-901(3)(p); HAW. REV. STAT. § 707-700 (2019); ME. CRIM. CODE § 2(23) (2019); N.J. REV. STAT. § 2C:11-1(b) (2019); PA. CONS. STAT. § 2301 (2019). *See also Fleming v. State*, 604 So. 2d 280, 292 (Miss. 1992).

[911] *See, e.g.*, *Camarillo v. State*, 82 S.W.3d 529 (Tex. Ct. App. 2002); *Caterino*, 451 Pa. Super. Ct. at 42, 678 A.2d at 389. *But see Truelove v. State*, 2010 WL 8231393, at *12 (Miss. Dec. 20, 2010) (broken nose qualifies as 'bodily injury,' but not 'serious bodily injury'); *State v. Kane*, 335 N.J. Super. 391, 398 (App. Div. 2000) (broken nose not 'serious bodily injury'); *State v. Green*, 318 N.J. Super. 361, 371 (App. Div. 1999) (lacerations on hands and bruised leg not sufficient to qualify as serious bodily injury); *Webb v. State*, 801 S.W.2d 529, 531 (Tex. Crim. App. 1990) (holding that an injury that results in surgery to repair a broken bone did not amount to serious bodily injury); *Commonwealth v. Alexander*, 383 A.2d 887, 889 (Pa. 1978) (broken nose, two black eyes and facial lacerations not considered serious bodily injury).

[912] *See generally* COLO. REV. STAT. § 18-1-901(3)(p) (2019) (bone breaks or factures and burns of the second or third degree); *Camarillo*, 82 S.W.3d at 537–38 (broken nose and 'nose trauma' as 'serious bodily injury'); *People v. Culton*, 92 Cal. App. 3d 113, 117 (Cal. Ct. App. 1979) (evidence of bruises, abrasions, and broken bones to support a conviction of substantial bodily injury). *See also People v. Williams*, 115 Cal. App. 3d 446, 454 (1981) (evidence of a torn hymen and accumulation of blood was sufficient to support a finding of substantial bodily injury); Hoyson*, supra* note 339, at 597 (arguing, in the rape context, that 'the physical effects of pregnancy exceed the requirements set forth by the common definition of substantial bodily injury . . . .').

[913] *See, e.g.*, *People v. Jaramillo*, 183 P.3d 665, 671 (Colo. Ct. App. 2008).

intent of causing, or which the actor knows to create a substantial risk of causing, death or serious bodily harm.[914]

Early U.S. jurisprudence provided that, while reasonable force could be used to defend both personal property and dwellings,[915] a defender was never authorized to intentionally kill an attacker or use a dangerous weapon against him solely for purposes of protecting his property.[916] This rule, which conflicts with certain popular (and, as will be shown, erroneous) perceptions of U.S. self-defense law's 'harshness,'[917] was typically justified as follows:

> The preservation of human life, and of limb and member from grievous harm, is of more importance to society than the protection of property. Compensation may be made for injuries to, or the destruction of, property; but for the deprivation of life there is no recompense; and for grievous bodily harm, at most, but a poor equivalent.[918]

Applying such limitations on deadly force to instances where it protected 'life and limb' was thought to prevent the 'cheapening' of human life, and was said to 'comport[] with the public tranquility and the peace of society.'[919] Deadly force to thwart the wrongful taking or detention of personal property, without more, thus was never considered

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[914] *See generally* HAW. REV. STAT. § 703.300 (2019); *Matuu*, 2017 WL 4339427, at *3.

[915] *See, e.g.*, *State v. Howell*, 53 P. 314, 315 (Mont. 1898); *Goshen v. People*, 44 P. 503, 503–04 (Colo. 1896); *State v. Dooley*, 26 S.W. 558, 560–61 (Mo. 1894); *Townsend v. Briggs*, 34 P. 116, 117 (Cal. 1893); *Commonwealth v. Donahue*, 20 N.E. 171, 172 (Mass. 1889); *Rauck v. State*, 11 N.E. 450, 451 (Ind. 1887); *Fosbinder v. Svitak*, 20 N.W. 866, 868–69 (Neb. 1884); *Phillips v. Jamieson*, 16 N.W. 318 (Mich. 1883).

[916] *See, e.g.*, *Wallace*, 162 U.S. at 473–74; *Dryer v. State*, 53 P.2d 700 (Okla. Crim. App. 1936); *State v. Metcalfe*, 212 N.W. 382, 387 (Iowa 1927); *State v. Ciaccio*, 112 So. 486, 489 (La. 1927); *State v. Green*, 110 S.E. 145, 147–48 (S.C. 1921); *Bozeman v. State*, 104 S.E. 640 (Ga. 1920); *Barkley v. State*, 213 S.W. 642, 644 (Tex. Crim. App. 1919); *Montgomery v. Commonwealth*, 36 S.E. 371, 373 (Va. 1900); *Fertig v. State*, 75 N.W. 960, 963–64 (Wis. 1898); *Storey v. State*, 71 Ala. 329 (Ala. 1882).

[917] *See, e.g.*, Martin Dyckman, *Bringing the Wild West to Florida*, ST. PETERSBURG TIMES, Mar. 27, 2005, at 3P. Setting aside the availability of weapons, the actual U.S. law is, in fact, the most *restrictive* of those reviewed here.

[918] *Russell v. State*, 122 So. 683, 685–86 (Ala. 1929).

[919] *Storey*, 71 Ala. at 340–41.

justifiable by the U.S. law;[920] the defender with no option but deadly force, therefore, always had to suffer the wrong and seek redress at law (consistent chiefly with values #1 and #2—collective violence reduction and protection of the attacker, respectively, as well as value #5—ensuring the primacy of the legal process[921]).[922]

Some courts, however, carved out an exception which authorized deadly force if a non-violent theft occurred at *nighttime*. In the Alabama case of *Storey v. State*, for example, the court held that 'a strong case might be presented of one's shooting a felon to prevent the asportation of a stolen horse in the night-time, where no opportunity is afforded to recognize the thief, or obtain speedy redress at law.'[923] A Texas statute went even further with the following unequivocal language:

> [I]n cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building, or at the place where the theft was committed, or is within reach of gunshot from such place or building.[924]

These cases, therefore, evidence a narrow exception recognized in only a few states to the general rule prohibiting deadly force in defense of mere property (and they usually do so by following the implicit logic that a night-time intrusion is a particularly grievous attack on a person's autonomy (value #4).[925] The exception imputes to the attacker a greater

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[920] *See, e.g.*, *Darling v. State*, 225 S.W. 328 (Ark. 1920); *State v. Holbrook*, 188 P. 947 (Or. 1920); *Oldacre v. State*, 72 So. 303, 304 (Ala. 1916); *State v. Blane*, 116 P. 660, 662 (Wash. 1911); *Bloom v. State*, 58 N.E. 81 (Ind. 1900); *State v. Edgerton*, 69 N.W. 280 (Iowa 1896); *People v. Hecker*, 42 P. 307, 312 (Cal. 1895); *Crawford v. State*, 17 S.E. 628 (Ga. 1893), *overruled in part by Moyers v. State*, 197 S.E. 846 (Ga. 1938); *Chapman v. Commonwealth*, 15 S.W. 50 (Ky. Ct. App. 1891).

[921] *See* Chapter II(c)(i), (ii), & (v).

[922] *See, e.g.*, *State v. Baxendale,* 370 P.3d 813, 817 (N.M. Ct. App. 2016); *State v. McCracken*, 166 P. 1174, 1176 (N.M. 1917); *Driggers v. United States*, 95 P. 612, 620 (Okla. 1908); *Carpenter v. State*, 36 S.W. 900 (Ark. 1896); *State v. Smith*, 30 P. 679, 682 (Mont. 1892).

[923] 71 Ala. at 340.

[924] TEX. PENAL CODE art. 1105, subd. 8 (2019). *See also Whitten v. State*, 16 S.W. 296, 298 (Tex. Ct. App. 1891); *Gray*, 77 S.E. at 833.

[925] *See* Chapter II(c)(iv).

disrespect for the defender's equal standing (value #3)[926] and also reflects a belief that such conduct must be generally and specifically deterred (consistent with value #7)).[927]

Turning to defense of dwellings, the law in the U.S. used to be that deadly force could only be used if the defender was under a reasonable apprehension that the intruder intended to commit a felony therein or intended to inflict a personal injury that may have resulted in the loss of life or in the infliction of great bodily harm.[928] The earlier treatises and cases were, however, not in agreement as to whether deadly force could be used to prevent the commission of a felony of any kind within the home, or whether it instead was merely limited to preventing 'atrocious' felonies or felonies committed by 'force or surprise,' such as murder, arson, robbery, burglary, rape, and kidnapping.[929] While some cases went as far as to permit the use of deadly force against persons seeking to forcibly enter after being warned to desist,[930] such decisions were little more than aberrations.

The law has changed surprisingly little since these early decisions. Judges and juries still hand down verdicts that consider it unreasonable to use deadly force to prevent a mere trespass or theft of personal property, regardless of whether the harm could not

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[926] *See id*. at II(c)(iii).

[927] *See id*. at II(c)(vii).

[928] *See, e.g.*, *Bray v. State*, 78 So. 463, 464 (Ala. Ct. App. 1918); *State v. Perkins*, 91 A. 265 (Conn. 1914); *Armstrong v. State*, 143 P. 870, 873 (Okla. Crim. App. 1914); *Gray*, 77 S.E. at 834; *State v. Mills*, 69 A. 841 (Del. 1908); *Thompson v. State*, 85 N.W. 62 (Neb. 1901); *State v. Manns*, 37 S.E. 613, 615 (W. Va. 1900); *State v. Taylor*, 44 S.W. 785, 788 (Mo. 1898); *Wilson v. State*, 11 So. 556 (Fla. 1892); *People v. Coughlin*, 35 N.W. 72, 76 (Mich. 1887); *Sparks v. Commonwealth*, 20 S.W. 167, 169 (Ky. Ct. App. 1885).

[929] *Compare Emmons*, 43 A.2d at 569 (permitting deadly force against felonies that constituted 'either an atrocious crime or one attempted to be committed by force (or surprise)'), *with Viliborghi v. State*, 43 P.2d 210, 212 (Ariz. 1935) (justifying homicide in prevention of any felony). *See also Harold v. State*, 67 So. 761, 762 (Ala. Ct. App. 1915); *Foster v. Shepherd*, 101 N.E. 411, 416 (Ill. 1913), *overruled in part by Spiegel's House Furnishing Co. v. Indus. Comm'n*, 123 N.E. 606 (Ill. 1919); *State v. Marfaudille*, 92 P. 939, 940–41 (Wash. 1907); *Hecker*, 42 P. at 311; *Bostic v. State*, 10 So. 602, 603 (Ala. 1892); CLARK, *supra* note 887, at 179. *But see* BISHOP, *supra* note 874, at 607–08.

[930] *See, e.g.*, *Young v. State*, 104 N.W. 867 (Neb. 1905); *State v. Peacock*, 40 Ohio St. 333 (Ohio 1883); *State v. Conally*, 3 Or. 69 (Or. Cir. Ct. 1869). Other states put defense of habitation on statutory footing. *See Bailey v. People*, 130 P. 832, 835 (Colo. 1913); *Wells v. State*, 141 S.W. 96, 98 (Tex. Crim. App. 1911); *Freeney v. State*, 59 S.E. 788, 791 (Ga. 1907); *Hayner v. People*, 72 N.E. 792, 795 (Ill. 1904); *Brown v. State*, 18 S.W. 1051, 1053 (Ark. 1892).

otherwise be prevented (which is consistent with the value-based model's conclusion[931]).[932] The broad (but generally only implicit) reasoning supplied by the U.S. courts is, again, that the preservation of human life is assumed to be more important to society than the protection of property.[933]

With regard to defense of dwellings, the law generally continues to provide that a lawful occupant may use deadly force to prevent the attempted unlawful entry to his habitation, provided that (1) the defender has reasonable cause to believe that there is immediate danger that an entry will occur; (2) the intruder is attempting to enter with the purpose of killing or inflicting serious bodily injury upon one of the occupants, in order to commit a forcible felony therein; and (3) the force is necessary to prevent the entry.[934] The logic is that the house protects the individual, and forcing a person to retreat from it would inevitably leave her open to attack and increase the likelihood of injury.[935] The primary difference between the cases involving defending oneself and defending one's dwelling, then, is that the defender has no duty to retreat in cases of defense of dwelling (more on this later), and one therefore may engage in protective acts earlier than otherwise authorized.[936]

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[931] *See* Chapter IV(c).

[932] *See generally People v. Surber*, 2017 WL 281760, at *8 (Cal. Ct. App. Jan 23, 2017); *People v. Camacho*, 2015 WL 8551831, at *6 (Cal. Ct. App. Dec. 11, 2015); Franklin Stockdale, *Withdrawing a License to Kill: Why American Law Should Jettison Stand Your Ground and Adopt the English Approach to Retreat*, 39 B.C. INT'L & COMP. L. REV. 453, 456–60 (2016).

[933] *See, e.g.*, *Alexander v. Commonwealth*, 508 S.E.2d 912, 914–15 (Va. Ct. App. 1999), *rev'd*, 531 S.E.2d 567 (Va. 2000); *State v. Pellegrino*, 577 N.W.2d 590, 595 (S.D. 1998); *Washington v. State*, 263 S.E.2d 152, 154 (Ga. 1980); *Geralds v. State*, 647 N.E.2d 369, 373 (Ind. Ct. App. 1995). *See also Dearborn v. State*, 420 S.W.3d 366 (Tex. Ct. App. 2014).

[934] *See generally Mornes v. State,* 2018 WL 3751351, at *6 (Tex. Ct. App. Aug. 8, 2018); *Shipp v. Landry*, 147 So. 3d 721, 726 (La. Ct. App. 2014); *Alexander*, 508 S.E. at 915–16; *Commonwealth v. Haddock*, 704 N.E.2d 537, 540 (Mass. App. Ct. 1999); *State v. Pendleton*, 567 N.W.2d 265, 268 (Minn. 1997); *State v. Ivicsics*, 604 S.W.2d 773 (Mo. Ct. App. 1980).

[935] *See generally People v. Tomlins*, 107 N.E. 496, 497–98 (N.Y. 1914), *citing Beard*, 158 U.S. at 550; *Willis v. State*, 61 N.W. 254 (Neb. 1894); *Estep v. Commonwealth*, 4 S.W. 820, 821 (Ky. Ct. App. 1887); *State v. Middleham*, 17 N.W. 446, 448 (Iowa 1883).

[936] *See Hill v. State*, 143 So. 3d 981, 984 (Fla. Ct. App. 2014).

ii. Need the attacker's conduct be criminal?

U.S. law, like the English law[937] and the value-based model,[938] never required that the attacker's threatening conduct be criminal. 'Unlawful' attacks by children, innocents, female spouses, and drunks could and can, therefore, all be met with defensive force.[939]

iii. Special rules for attacks on the police?

In the U.S., no federal statute governs police use of deadly force.[940] Instead, police use of force is governed by a patchwork of U.S. Supreme Court rulings, state statutes, and state caselaw.[941] Most states require police officers to hold a reasonable belief that force was necessary under the circumstances.[942] The standard view is that, like in self-defense cases more generally, the reasonableness of the officer's belief as to the appropriate level of force is to be judged from the officer's 'on-scene' perspective.[943]

The court set out a test that cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene.[944] As a result, if an officer reasonably, but mistakenly, believes that a suspect was likely to fight back or otherwise assault the officer, for instance, the officer is justified in using more force than

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[937] *See* Chapter VII(c)(ii).

[938] *See* Chapter IV(e)(i).

[939] *See generally* Carla Graff, *The Religious Right to Therapeutic Abortions*, 85 GEO. WASH. L. REV. 954, 989 (2017). *See also State v. Maney*, 138 S.E. 441, 442 (N.C. 1927); *Kelton v. State*, 160 S.W. 342, 343 (Tex. Crim. App. 1913); *Jordan v. State*, 146 S.W. 881, 883 (Tex. Crim. App. 1912); *Lawson v. State*, 41 S.E. 993 (Ga. 1902); *Latham v. State*, 46 S.W. 638, 638–39 (Tex. Crim. App. 1898).

[940] *See* AMNESTY INTERNATIONAL, DEADLY FORCE: POLICE USE OF LEGAL FORCE IN THE UNITED STATES 17 (2015), *cited in* Lee, *supra* note 643, at 640 n.37.

[941] *See* Lee, *supra* note 643, at 640. *See also* AMNESTY INTERNATIONAL, *supra* note 940, at 4 (listing Maryland, Massachusetts, Michigan, Ohio, South Carolina, Virginia, West Virginia, Wisconsin, Wyoming, and the District of Columbia as jurisdictions that lack laws on the use of lethal force by law enforcement officers).

[942] *See, e.g.*, ALA. CODE § 13A-3-27(b) (2019); ARIZ. REV. STAT. ANN. § 13-410(C) (2019); COLO. REV. STAT. § 18-1-707(2) (2019); N.Y. PENAL LAW § 35.30(1) (2019); TEX. PENAL CODE ANN. § 9.51 (2019). *See also* Lee, *supra* note 643, at 654.

[943] *See, e.g.*, *State v. Ellis*, 186 P.3d 245, 260–61 (2008); *State v. Smith*, 807 A.2d 500, 518 (Conn. App. Ct. Oct. 22, 2002); *Graham v. Connor*, 490 U.S. 386, 396 (1989). *See also* Geisser, *supra* note 653, at 86.

[944] *Graham,* 490 U.S. at 393, 396, *quoted in Costello v. Town of Warwick*, 2008 WL 1752486, at *1 (2nd. Cir. Apr. 17, 2008).

was in fact objectively needed. So what the officer must show is that he had a 'reasonable belief' that such force was necessary under the circumstances.[945] In this regard, then, the law treats officers and civilians the same.[946]

One of the chief problems with this standard, however, is that 'reasonableness' in this context (and particularly when considered by a jury) tends to equate to 'typicality.' That is, the question becomes what would a reasonable *police officer* do, rather than what would a *reasonable person* do. In fact, some state courts explicitly use the heightened 'reasonable police officer' standard; in those jurisdictions, evidence of special training may work against officers advancing self-defense claims.[947]

A small minority of states, however, come close to adopting the subjective English approach for officers, so that the officer's subjective belief controls.[948] (This approach is, for the reasons discussed in Chapter IV(a)(ii), at odds with the value-based model.) The focus in these states is on the officer's subjective belief (this would qualify as an outlier if these rulings were rendered in non-police cases).[949]

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[945] *See, e.g.*, ALA. CODE § 13A-3-27(b) (2019); ALASKA STAT. § 11.81.370(a) (2019); ARIZ. REV. STAT. ANN. § 13-410(C) (2019); ARK. CODE ANN. § 5-2-610(b) (2019); COLO. REV. STAT. § 18-1-707(2) (2019); CONN. GEN. STAT. § 53a-22(c) (2019); FLA. STAT. § 776.05(3) (2019); 720 ILL. COMP. STAT. 5/7-5 (2019); KAN. STAT. ANN. § 21-5227(a) (2019); LA. STAT. ANN. § 14:20(A) (2019); ME. REV. STAT. tit. 17-A, § 107(2) (2019); MO. REV. STAT. § 563.046(3) (2019); MONT. CODE ANN. § 45-3-102 (2019); N.C. GEN. STAT. § 15A-401(d)(2)(a-b) (2019); N.H. REV. STAT. ANN. § 627:5(11) (2019); N.J. STAT. ANN. § 2C:3-7(b)(2) (2019); N.Y. PENAL LAW § 35.30(1) (2019); OR. REV. STAT. § 161.239 (2019); R.I. GEN. LAWS §§ 12-7-8, 12-7-9 (2019); TEX. PENAL CODE ANN. § 9.51 (2019); UTAH CODE ANN. § 76-2-404 (2019).

[946] *See Stillwagon*, 175 F. Supp. at 895.

[947] *See, e.g.*, *Collado v. City of New York*, 2019 WL 3996735, at *7 (S.D.N.Y. Aug. 23, 2019); *Kopf v. Skyrm*, 993 F.2d 374, 379 (4th Cir. 1993); *Smith*, 807 A.2d at 516–19; *Bell v. City of Albany*, 436 S.E.2d 87, 91 (Ga. Ct. App. 1993). *See also* Stephen Michael & Ian Kunen, *Superhuman in the Octagon, Imperfect in the Courtroom: Assessing the Culpability of Martial Artists Who Kill During Street Fights*, 60 EMORY L.J. 1389, 1408 (2011).

[948] *See, e.g.*, NEB. REV. STAT. § 28-1412(3) (2019); WASH. REV. CODE § 9A.16.040(3) (2019). *See also* Molly Alcorn, *Setting the Standard: Changing the Use of Force Standard Used by California Police*, 50 U. PAC. L. REV. 251, 260–61 (2018); MPC § 3.09 (mistakes of law as to unlawfulness of force and legality of arrest).

[949] *See, e.g.*, 18 PA. CONS. STAT. § 508(a) (2019); HAW. REV. STAT. § 703-307(3) (2019); NEB. REV. STAT. § 28-1412(3) (2019).

Turning to the use of force *against* the police, in the tradition of the Anglo-American common law, a police officer acting outside of her legal authority was little more than a common trespasser who could be resisted as such.[950] That said, courts and commentators have advanced various process and law-and-order-based justifications to abrogate the common law right to resist arrest.[951]

iv. Can passive conduct constitute an 'attack'?

Research has, somewhat surprisingly, not revealed any cases that explicitly deal with passive attackers. Passive attacks are most likely not specifically discussed by the U.S. courts because, although a favorite subject of academic debate, such cases in actuality occur rarely. It is worth noting, however, that passive threats can trigger lawful defensive force in Germany and England (as well, per the value-based model);[952] there is nothing unique to U.S. self-defense law that would prevent U.S. courts from reaching the same conclusion.

v. Imminence

1. The general rule

The law in the 1800s was that mere fear of *future* death or violence could not ground self-defense. What was required was a *present* threat by the attacker.[953] Today, the majority

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[950] *See generally* Paul G. Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1129 (1969), *cited in* Darrell A.H. Miller, *Retail Rebellion and the Second Amendment*, 86 IND. L.J. 939, 948 (2011). *See also* Craig Hemmens & Daniel Levin, *'Not a Law at All': A Call for a Return to the Common Law Right to Resist Unlawful Arrest*, 29 SW. U. L. REV. 1 (1999); Andrew P. Wright, *Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?*, 46 DRAKE L. REV. 383 (1997).

[951] *See, e.g.*, *Hicks v. State*, 984 A.2d 246, 253 (Md. Ct. Spec. App. 2009); *People v. Villarreal*, 604 N.E.2d 923, 929 (Ill. 1992); *People v. Hess*, 687 P.2d 443, 446–47 (Colo. 1984); *Ellison v. State*, 410 A.2d 519, 525 (Del. Super. Ct. 1979); *State v. Richardson*, 511 P.2d 263, 267 (Idaho 1973); *People v. Curtis*, 450 P.2d 33, 36 (Cal. 1969).

[952] *See* Chapters IV(e)(i)(4), V(d)(iv), & VI(c)(v).

[953] *See, e.g.*, *Acers*, 164 U.S. at 391–92; *State v. Sullivan*, 50 N.W. 572, 573 (Iowa 1879). *See also Treadway v. State*, 144 S.W. 655, 674–75 (Tex. Crim. App. 1912).

of U.S. jurisdictions still permit self-defense only when 'imminent' harm is threatened.[954] The most common definition of 'imminence' is temporal, in that the attack is 'about to occur,' rather than potentially occurring sometime in the future.[955] Put another way, the threatened injury is likely to happen within minutes or, more likely, seconds.[956]

As detailed in Chapter IV(b)(ii), some argue that 'imminent' must be sharply distinguished from the term 'immediate,' on the grounds that the latter implies a far more urgent, pressing, and present threat than does the former.[957] Whether this distinction is linguistically required is, as noted, questionable. But, in any event, neither formulation has ever meant that a defender had to, say, wait until the attacker was within striking distance[958] or had his finger on the trigger of his gun.[959] In this respect the U.S. law has not changed.

2. Subjective or objective evaluation of imminence?

While a minority of jurisdictions follow England's[960] subjective approach, which requires only an honest belief that the assailant intended unlawful harm,[961] the majority of U.S.

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[954] *See* WAYNE R. LAFAVE & AUSTIN WAKEMAN SCOTT, SUBSTANTIVE CRIMINAL LAW § 10.4(d) n.42 (2nd ed. 2003) (collecting statutes). *See also People v. Nguyen*, 61 Cal. 4th 1015, 1045 (Cal. 2015); *People v. Stevens*, 858 N.W. 2d 98, 104 (Mich. Ct. App. 2014).

[955] *See generally* Whitley R. P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 345 (2007); SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN 49 (Michael Silverthorne trans., 1991).

[956] *See, e.g.*, *United States v. Haynes*, 143 F.3d 1089, 1090 (7th Cir. 1998) (ruling that 'later' and 'imminent' are opposites). *See also* LAFAVE & SCOTT, *supra* note 954, at § 10.4(d) (describing 'imminent' as 'almost immediately forthcoming').

[957] *See generally Porter*, 166 A.3d at 1056–57; *People v. Aris*, 215 Cal. App. 3d 1178, 1187 (Cal. Ct. App. 1989), *overruled in part by People v. Humphrey*, 921 P.2d 1 (Cal. 1996); *State v. Hundley*, 693 P.2d 475 (Kan. 1985).

[958] *See Fortenberry v. State*, 55 Miss. 403, 409 (Miss. 1877). *See also People v. Bigford*, 2016 WL 10736071, at *3 (Mich. Cir. Ct. May 16, 2006); *Hundley*, 693 P.2d at 469.

[959] *See Goodall v. State*, 1 Or. 333, 337–38 (Or. 1861). *See also Hundley*, 693 P.2d at 469.

[960] *See* Chapter VII(b).

[961] *See, e.g.*, *State v. Winters*, 2004 WL 899732, at *4 (Wash. Ct. App. Apr. 27, 2004); *State v. Hodges*, 716 P.2d 563, 569 (Kan. 1986); *Leidholm*, 334 N.W.2d at 817–18; *State v. Thomas*, 423 N.E.2d 137, 139 n.2 (Ohio 1981), *overruled by State v. Koss*, 551 N.E.2d 970 (Ohio 1990); *Fielder v. State*, 683 S.W.2d 565, 592 (Tex. Ct. App. 1985), *rev'd*, 756 S.W.2d 309 (Tex. Crim. App. 1988); *State v. Allery*, 682 P.2d 312, 314 (Wash. 1984) (en banc).

states (and the value-based model[962]) disagree. In those states, a defender's belief as to the imminence of an attack—like with the value-based model, but unlike the English law—is evaluated objectively.[963]

3. U.S. law's treatment of battered intimate partner syndrome

In the U.S. and elsewhere, the debate surrounding the battered intimate partner syndrome and self-defense has ultimately turned on the above-described imminence rule (and, specifically, on what a 'reasonable' person would do).[964] While some have called for its elimination,[965] others have argued that it should be interpreted in such a manner that it takes into account the specific circumstances involved in battered intimate partner situations.[966] The fundamental challenge for the syndrome under U.S. law is that the imminence requirement is based on the premise, familiar from the law of premeditated murder, that individuals acting under stressful conditions inconsistent with thoughtful

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[962] *See* Chapter IV(a)(ii).

[963] *See, e.g.*, *People v. Wilkins*, 2018 WL 4091012, at *6 (Cal. Ct. App. Aug. 28, 2018); *State v. Parnoff,* 186 A.3d 640, 650–51 (Conn. 2018); *Porter v. State*, 148 A.3d 1, 15 (Md. Ct. Spec. App. 2016); *State v. Salary*, 343 P.3d 1165, 1173–74 (Kan. 2015). For examples of the application of this standard in cases involving battered women who killed their husbands, *see People v. Battle,* 129 Cal. Rptr. 3d 828, 846–47 (Cal. App. 2011); *State v. Gallegos*, 719 P.2d 1268, 1270 (N.M. Ct. App. 1986), *abrogated by State v. Alberico*, 861 P.2d 192 (N.M. 1993); *People v. Emick*, 103 A.D.2d 643, 658 (N.Y. App. Div. 1984); *People v. Reed*, 695 P.2d 806, 807 (Colo. Ct. App. 1984); *May v. State*, 460 So. 2d 778, 784 (Miss. 1984); *State v. Martin*, 666 S.W.2d 895, 899 (Mo. Ct. App. 1984); *State v. Kelly*, 478 A.2d 364, 373 (N.J. 1984); *State v. Nunn*, 356 N.W.2d 601, 604 (Iowa Ct. App. 1984), *overruled by State v. Reeves*, 636 N.W.2d 22 (Iowa 2001); *State v. Lynch*, 436 So. 2d 567, 569 (La. 1983); *Nygren v. State*, 616 P.2d 20, 22 (Alaska 1980); *Commonwealth v. Helm*, 402 A.2d 500, 504 (Pa. 1979); *Langley v. State*, 373 So. 2d 1267, 1271 (Ala. Crim. App. 1979); *People v. Dillon*, 180 N.E.2d 503, 504 (Ill. 1962); *Easterling v. State*, 267 P.2d 185, 187 (Okla. Crim. App. 1954). *See also* Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211, 229 (2002).

[964] *See, e.g.*, Michael Skopets, *Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law*, 55 AM. U. L. REV. 753 (2006); Jane Campbell Moriarty, *While Dangers Gather: The Bush Preemption Doctrine, Battered Women, Imminence and Anticipatory Self-Defense*, 30 N.Y.U. REV. L. & SOC. CHANGE 1 (2005); Ferzan, *supra* note 528, at 213; Wallace, *supra* note 531, at 1749.

[965] *See, e.g.*, Rosen, *supra* note 290, at 405–06 (proposing a burden-shifting approach that would eliminate imminence whenever a defendant meets a 'substantial' evidentiary threshold regarding necessity).

[966] *See, e.g.*, Kaufman, *supra* note 955, at 345.

reflection are less culpable than those facing less emotionally compulsive circumstances.[967]

At a deeper level, the imminence requirement is based on moral differences between *reactive* killers defending themselves in the heat of the moment and *preemptive* killers that may go so far as to plan their attacks. Viewed this way, then, the imminence requirement is the equivalent of an 'anti-self-help rule,' requiring the defender to seek the aid of others (thus invoking value #5—primacy of the legal process)[968] or to leave the area (invoking value #1—collective violence reduction and value #2—protecting the individual attacker's presumptive life),[969] rather than engaging in a preemptive strike. In contrast, a small number of jurisdictions and the Model Penal Code (as well as the value-based model[970]) require that force be 'immediately necessary,' rather than necessary to respond to 'imminent harm' (thus opening the door for a preemptive strike if necessary on the present occasion).[971]

While many commentators have argued that in such cases the *necessity* of self-preferential violence should be paramount,[972] rather than the imminence of the threat, that is not the law in the U.S. When an intimate partner attacks her abuser who is not posing a temporally current threat—for example, when that person is sleeping or unconscious[973]—

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[967] *See* Gruber, *supra* note 349.

[968] *See* Chapter II(c)(v).

[969] *See* Chapter II(c)(i).

[970] *See* Chapter IV(b)(ii).

[971] *See, e.g.*, MPC § 3.04(1); ARIZ. REV. STAT. ANN. § 13-404 (2019); DEL. CODE ANN. tit. 11, § 464 (2019). *See* LAFAVE & SCOTT, *supra* note 954, at § 10.4(d) n.43 (citing statutes). The MPC, however, does contain a temporal ceiling because it requires the attack to come on 'the present occasion.'

[972] *See, e.g.*, Kaufman, *supra* note 955, at 348; Rosen, *supra* note 290, at 380; Jeffrey B. Murdoch, *Is Imminence Really Necessity? Reconciling Traditional Self-Defense Doctrine with the Battered Woman Syndrome*, 20 N. ILL. U. L. REV. 191, 212 (2000); 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(B)(3) (1984); RODIN, *supra* note 229, at 41; MPC § 3.04(1) (PROPOSED OFFICIAL DRAFT 1962).

[973] For examples of such cases, *see State v. Guido*, 191 A.2d 45, 48 (N.J. 1963); *Emick*, 103 A.D.2d at 644; *Leidholm*, 334 N.W.2d at 814; *State v. Felton*, 329 N.W.2d 161, 162 (Wis. 1983). *See also* Kinports, *supra* note 631, at 466.

the U.S. courts have largely held that, as a matter of law, the imminence requirement prevents an acquittal on self-defense grounds.[974]

That said, in the 2017 case of *Porter v. State* (one of only a half-dozen or so reported cases discussing the imminence requirement in the context of self-defense since 2014), the Maryland Court of Appeals ruled that a woman who produced evidence showing that she suffered from battered woman syndrome was entitled to an imperfect self-defense[975] jury instruction (even though the woman hired a hitman to kill her husband—the hitman ultimately refused and contacted the police).[976]

vi. Necessity

Under U.S. law, the necessity element in self-defense requires that force, including deadly force, only be used to the extent that it is 'necessary.'[977] The underlying principle behind necessity as it relates to deadly force is that all human life, even the life of a violent criminal, is valuable and worthy of protection (thus drawing primarily on values #1—violence reduction and #2—protection of the attacker, but also value #5—ensuring the primacy of the legal process).[978] The necessity element likewise precludes the use of deadly force against a potentially deadly imminent assault if a non-deadly response would be sufficient to repel the attack.[979] Generalized fear alone, moreover, never justifies one

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[974] *See, e.g.*, *Porter,* 166 A.3d at 1051; *Battle,* 129 Cal. Rptr. 3d at 846–47 (Cal. App. 2011); *State v. Norman*, 378 S.E.2d 8 (N.C. 1989). *See also* Murdoch, *supra* note 972, at 200; Burke, *supra* note 963, at 229. *But see Wallace-Bey v. State*, 172 A.3d 1006, 1025 (Md. Ct. App. 2017).

[975] The elements of imperfect self-defense are similar to those of perfect self-defense, except where those elements require 'an objectively reasonable belief that [the defender] was in apparent imminent danger of death or serious bodily harm from the assailant, requiring the use of deadly force.' *State v. Peterson*, 857 A.2d 1132, 1148 (Md. Ct. Spec. App. 2004), *citing State v. Marr*, 765 A.2d 645, 648 (Md. Ct. App. 2001).

[976] *Porter*, 166 A.3d at 1044. *See also* Joy Dodge, *Porter v. State: Appropriately Pushing the Limits of the Battered Spouse Syndrome Statute*, 18 U. MD. L.J. RACE RELIGION GENDER & CLASS 235–54 (2018).

[977] *See generally Stillwagon*, 175 F. Supp. at 895.

[978] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 228 (6th ed. 2012)

[979] *See generally Stillwagon*, 175 F. Supp. at 895; *State v. Gheen*, 41 S.W.3d 598, 606 (Mo. Ct. App. 2001); *United States v. Peterson*, 483 F.2d 1222, 1229–30 (D.C. Cir. 1973).

person to take the life of another. Rather, the attacker must, through some overt act, gesture, or word spoken, induce in the defender a reasonable ground for believing the attacker threatens imminent death or great bodily harm.[980]

vii. Proportionality and excessive force

As discussed above in Chapter VI(c)(i), under prevailing U.S. law the use of deadly force is generally restricted to cases where the attacker threatens death or serious bodily harm. In such cases a defender need not first resort to less forceful means, such as shooting to wound.[981]

The Supreme Court of Georgia in the 1867 case of *Floyd v. State* held that, '[a]s a general rule it may safely be asserted that the law will not excuse or justify a man who repels a blow given him with the fist by stabbing the assailant.'[982] A defender who was merely threatened with a non-deadly assault could, therefore, not kill his attacker, nor was he permitted to use a dangerous weapon in his defense. If deadly force was the only available defense, the defender had to submit to being punched and could later seek redress in the courts (implicating value #5).[983]

The law as it relates to proportionality and excessive force has not changed appreciably since these earlier decisions. A defender who kills another in an honest, but

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[980] *See generally Watkins v. State*, 613 A.2d 379, 384 (Md. 1992); *West v. State*, 617 P.2d 1362, 1366 (Okla. Crim. App. 1980); *McKee v. State*, 372 P.2d 243 (Okla. Crim. App. 1962). *See also* Bruce Ching, *Mirandizing Terrorism Suspects—The Public Safety Exception, the Rescue Doctrine, and Implicit Analogies to Self-Defense, Defense of Others, and Battered Woman Syndrome*, 64 CATH. U. L. REV. 613, 622 (2015).

[981] *See, e.g.*, *Harbour v. State,* 37 So. 330, 331–32 (Ala. 1904); *People v. Newcomer*, 50 P. 405, 409 (Cal. 1897); *Babcock v. People*, 22 P. 817 (Colo. 1889).

[982] 36 Ga. 91, 93 (Ga. 1867). *See also Smith v. State*, 41 N.E. 595, 597 (Ind. 1895); *Scales v. State*, 11 So. 121, 124 (Ala. 1892); *Stewart v. State*, 1 Ohio St. 66 (Ohio 1852).

[983] *See State v. Doherty*, 98 P. 152, 154 (Or. 1908); ROLLIN M. PERKINS, CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS 600 (3d ed. 1966).

ultimately unreasonable, belief that such amount of force is necessary loses the benefit of perfect self-defense and is guilty of manslaughter.[984]

viii. Duty to retreat

U.S. law provides that, for cases occurring outside of the defender's home, a failure to take advantage of an available safe retreat option renders self-defense unavailable.[985] By 'retreating to the wall,' moreover, even an initially guilty attacker can regain his right to self-defense against a defender, for through this 'break' in the action the initial attacker then no longer is the cause of the conflict.[986]

In 'stand-your-ground jurisdictions,' the person who is attacked does not have a duty to first retreat, and, instead, may stand his ground and defend himself *even if* safe retreat is easily obtainable. Florida law, by way of example, provides that a defender justifiably using or threatening deadly defensive force 'does not have a duty to [first] retreat and has the right to stand his or her ground if the [defender] is not engaged in a criminal activity and is in a place where he or she has a right to be.'[987]

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[984] *See, e.g.*, *State v. Sims*, 431 P.3d 288 (Kan. 2018), *cited in Barrett*, 442 P.3d at 499; *People v. Vargas*, 2018 WL 6188255, at *5 (Cal. Ct. App. Nov. 28, 2018); *State v. Reece*, 349 P.3d 712, 723 (Utah 2015); *Commonwealth v. Niemic*, 696 N.E.2d 117, 121 (Mass. 1998); *People v. Mayfield*, 928 P.2d 485, 550 (Cal. 1997), *abrogated by People v. Scott*, 349 P.3d 1028 (Cal. 2015); *State v. Lea*, 485 S.E.2d 874, 878–79 (N.C. Ct. App. 1997); *State v. Collins*, 893 P.2d 217, 222–23 (Kan. 1995); *Bolyard v. Commonwealth,* 397 S.E.2d 894, 899 (Va. Ct. App. 1990). Note that there is a debate whether excessive force can result in a conviction for involuntary manslaughter. *See generally State v. Abeyta*, 901 P.2d 164, 172–73 (N.C. 1995), *abrogated by State v. Campos*, 921 P.2d 1266 (N.C. 1996); *Reid v. State*, 425 S.E.2d 315, 316 (Ga. Ct. App. 1992); *United States v. Skinner*, 667 F.2d 1306, 1309–10 (9th Cir. 1982).

[985] *See* LAFAVE & SCOTT, *supra* note 954, at § 10.4(f) n.72 (citing cases and statutes). *See also Haire v. State*, 393 P.3d 1304, 1311 (Wyo. 2017); *State v. Beltz*, 388 P.3d 93, 99–100 (Kan. 2017); *Corn v. Rivera*, 108 A.3d 779, 787 (Pa. 2014).

[986] *See, e.g.*, *Allen v. United States*, 164 U.S. 492, 497–98 (1896); *Rowe*, 164 U.S. at 549–50; *Hecker*, 42 P. at 312; *Hunt v. State*, 16 So. 753, 755 (Miss. 1895); *State v. Cable*, 22 S.W. 953, 954 (Mo. 1893); *State v. Thompson*, 13 So. 392 (La. 1893); *Johnson v. State*, 23 S.W. 7, 9 (Ark. 1893); *Duncan v. State*, 6 S.W. 164, 167 (Ark. 1887).

[987] FLA. STAT. ANN. § 776.012(2) (2019). *See also Dooley v. State,* 268 So.3d 880, 886–87 (Fla. Ct. App. Apr. 3, 2019); *State v. Irabor*, 822 S.E.2d 421, 424 (N.C. App. 2018).

Under widely accepted U.S. state law, an innocent defender is also not required to retreat when he is attacked in his dwelling,[988] whereas a defender who was the initial provoker must retreat as far as possible before using any defensive force.[989] While a defender still need not retreat in cases involving non-deadly defensive force, a narrow majority of courts require innocent defenders to retreat if they can do so safely (regardless of where they are) prior to resorting to deadly force (this, of course, is consistent with value #1—violence reduction, as well as value #5—primacy of the legal process[990]).[991] In short, while many commentators continue to claim that safe retreat is never required by U.S. law,[992] it appears that the most recent caselaw contradicts this position.[993]

ix. Duty to avoid conflict

U.S. law has never supported a requirement that defenders avoid potential conflict. So long as the defender did not provoke his adversary, he could go about his daily business and even arm himself without forfeiting any defensive rights.[994]

The U.S. Supreme Court in its 1896 case of *Rowe v. United States* found that the defendant could claim self-defense because he was 'where he had a right to be' when he

[988] *See, e.g.*, *State v. Gartland*, 694 A.2d 564, 569 (N.J. 1997); *People v. Lenkevich*, 229 N.W.2d 298, 300 (Mich. 1975).

[989] *See, e.g.*, *Lynn v. Commonwealth*, 499 S.E.2d 1, 9 (Va. Ct. App. 1998).

[990] *See* Chapter II(c) (i) & (v).

[991] *See generally State v. Jacobson*, 2018 WL 4395018, at *2 (Minn. Ct. App. 2018), *citing State v. Carothers*, 594 N.W.2d 897, 899 (Minn. 1999); *Commonwealth v. Schulze*, 2017 WL 665633, at *7 (Penn. Ct. C.P. Feb. 17, 2017); *State v. Friesz*, 898 N.W.2d 688, 698 (N.D. 2017); *State v. Terry*, 128 A.3d 958, 967 (Conn. App. Ct. 2015); *Miller v. Comm'r of Corr.*, 105 A.3d 294 (Conn. App. Ct. 2014). *See also* N.Y. PENAL LAW § 35.15(2) (2019).

[992] *See, e.g.*, Lee, *Act-Belief, supra* note 651, at 201–02.

[993] *See, e.g.*, Allhoff, *supra* note 508, at 1533.

[994] *See, e.g.*, *Nash v. State*, 84 S.W. 497, 499 (Ark. 1904); *Thompson v. United States*, 155 U.S. 271, 278–80 (1894); *Gourko v. United States*, 153 U.S. 183, 191 (1894); *Wilson v. State*, 36 S.W. 587 (Tex. Crim. App. 1896). *See also People v. Gonzales*, 71 Cal. 569, 578 (1887); *State v. Evans*, 28 S.W. 8, 11 (Mo. 1894); CLARK, *supra* note 887, at 178. *Cf. State v. Glowacki*, 630 N.W.2d 392, 402 (Minn. 2001).

justifiably killed his attacker.[995] The U.S. law continues to be in line with English law[996] (and, in a general sense, the value-based model's position[997]) that, all other things being equal, a person is not required to avoid a place that he has a legal right to be.[998] That said, the U.S. caselaw here as well as more generally, like the English law (but unlike the German law) generally does not discuss, for example, whether its rulings consider any competing values (such as value #1—protecting the state's monopoly on force, value #2—protecting the individual attacker, or value #5—ensuring the primacy of the legal process). Rather than engaging in a value-centric discussion, the individual U.S. courts simply make broad pronouncements based on their interpretation of legal precedent and their own interpretation of the facts.

x. Intentionally provoked attacks and other blameworthy conduct on the part of the defender

If a defendant started a conflict as a pretext to killing his adversary, the law used to provide that he was unable to claim self-defense.[999] This was true regardless of whether he struck the first physical blow, or whether the defendant merely insulted the attacker and thereby started the fight.[1000] That said, a reasonable person would have had to anticipate that, taking into account any prior relations between the parties, the

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[995] 164 U.S. 546, 557 (1896). *See also State v. Bristol*, 84 P.2d 757 (Wyo. 1938).

[996] *See* Chapter VII(d)(iii).

[997] *See* Chapter IV(b)(iii).

[998] *See, e.g.*, *Wade v. State*, 724 So. 2d 1007, 1010 (Miss. Ct. App. 1998), *aff'd*, 748 So. 2d 771 (Miss. 1999). That said, one court has ruled that 'self-defense is not available to a defendant who deliberately puts himself in a position where he has reason to believe that his presence will provoke trouble . . . .' *Sams v. United States*, 721 A.2d 945, 953 (D.C. 1998).

[999] *See, e.g.*, *Commonwealth v. Hammond*, 953 A.2d 544, 599–560 (Pa. Super. Ct. 2008); *Matthews v. State*, 58 S.W. 86, 90 (Tex. Crim. App. 1900); *Kennard v. State*, 28 So. 858, 859–60 (Fla. 1900); *Wallace*, 162 U.S. at 474–75; *State v. Hawkins*, 23 P. 475 (Or. 1890), *overruled in part by State v. Marsh*, 490 P.2d 491 (Or. 1971); *Gibson v. State*, 8 So. 98 (Ala. 1890); *State v. Cross*, 26 N.W. 62, 71 (Iowa 1885).

[1000] *See State v. Scott*, 43 N.W. 62 (Minn. 1889); *State v. Rider*, 1 S.W. 825 (Mo. 1886).

provocation would have been sufficiently severe to result in the attack.[1001] For example, if a man was committing adultery, he could not claim self-defense if the woman's husband attacked him shortly after finding out about the affair; this even applied if defensive force was the only means of saving his life.[1002]

In fact, the conduct did not have to even amount to such intentional provocation before the courts would limit a defender's right to self-defense. The fundamental rule was that a defender could not take advantage of a necessity that was in part caused by his own wrongful conduct.[1003] In keeping with these holdings concerning imperfect self-defense, most states provided that if two men engage in a fight by mutual consent, then neither can claim to have acted in self-defense in killing the other if the fight escalated, unless the person completely retreated from the conflict.[1004]

The state of the law was a bit hazier on the question of whether provocative or insulting *words* alone generate limits on a defender's right to self-defense. Some cases held that mere words could never limit the defender's right to self-defense.[1005]

The law has not changed significantly in this area. The generally accepted view continues to be that a defender who, through his intentional acts or words reasonably calculated to lead to an 'affray' or deadly conflict, displays a willingness to enter into the conflict may not thereafter seek to cloak himself in the justification of self-defense.[1006] If

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[1001] *See generally Hunter v. State*, 128 S.W.2d 1176, 1180 (Tex. Crim. App. 1939); *State v. Dephenbaugh*, 145 S.E. 634, 637 (W. Va. 1928).

[1002] *See, e.g.*, *Dabney v. State*, 21 So. 211, 212 (Ala. 1897). *See also Drysdale v. State*, 10 S.E. 358 (Ga. 1889).

[1003] *See, e.g.*, *Kennard*, 28 So. at 859–60; *State v. Ballou*, 40 A. 861, 863 (R.I. 1898); *Frank v. State*, 68 N.W. 657, 659–60 (Wis. 1896); *Gaines v. Commonwealth*, 14 S.E. 375, 377 (Va. 1892); *Commonwealth v. Hourigan*, 12 S.W. 550, 552 (Ky. Ct. App. 1889).

[1004] *See, e.g.*, *State v. Kennedy*, 85 S.E. 42, 44 (N.C. 1915); *Swanner v. State*, 58 S.W. 72, 73–74 (Tex. Crim. App. 1900); *Jackson v. Commonwealth*, 36 S.E. 487 (Va. 1900).

[1005] *See, e.g.*, *State v. Doris*, 94 P. 44, 53 (Or. 1908). *See also Petty v. State*, 216 S.W. 867, 868 (Tex. Crim. App. 1919)*; State v. Gordon*, 89 S.W. 1025, 1028 (Mo. 1905) (citations omitted). *But see State v. Lee*, 67 S.E. 141 (S.C. 1910).

[1006] *See generally State v. Grott*, 2019 WL 1040681, at *3–4 (Wash. Ct. App. March 5, 2019); *State v. Sullivan*, 383 P.3d 574 (2016); *Elizondo v. State*, 487 S.W.3d 185, 196 (Tex. Crim. App. 2016); *Smith v.*

the provoker in good faith withdraws from or abandons the conflict and communicates this to the adversary, however, he may use self-defense if the adversary nevertheless continues to pursue or attack him.[1007] The same holds true in cases of mutual combat.[1008] And if the at-fault provoker is unable to inform his adversary of his intention to withdraw, he must bear the consequences without being able to invoke self-defense.[1009]

d. Evaluating U.S. self-defense law from a value-centric perspective

U.S. self-defense law has remained fairly static when compared to the self-defense laws of Germany[1010] or England.[1011] While the drafters of the MPC and various commentators have, as discussed above, argued for reforms in different areas, the caselaw has shown limited change. What is more, contrary to the perception that U.S. self-defense law is particularly 'harsh' or intolerant of welfarist concerns, it is, in fact, more restrictive than the laws of the other subject jurisdictions (though the means of deploying deadly force—namely, firearms—are of course more widely available).[1012]

State, 965 S.W.2d 509, 512–13 (Tex. Crim. App. 1998); *State v. Jackson*, 936 P.2d 761, 767 (Kan. 1997); *Commonwealth v. O'Neil*, 641 N.E.2d 702, 705 (Mass. 1997); *State v. Mize*, 340 S.E.2d 439, 442 (N.C. 1986); *State v. Bougneit*, 294 N.W.2d 675, 680 (Wis. 1980); *State v. Potter*, 244 S.E.2d 397 (N.C. 1978); *State v. Craig*, 514 P.2d 151, 156 (Wash. 1973) (en banc). *Cf. Lynn*, 499 S.E.2d at 7–8. *See also* Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 9–13 (1985).

[1007] *See, e.g.*, COLO. REV. STAT. § 18-1-704(3)(b) (2019); TEX. PEN. CODE § 9.31(b)(4)(A) & (B) (2019). *See also Commonwealth v. Fowlin*, 710 A.2d 1130, 1133 (Pa. 1998); *State v. Lewis*, 717 A.2d 1140, 1158 (Conn. 1998); *Jackson*, 936 P.2d at 767; *State v. Stone*, 880 P.2d 1296, 1298 (Mont. 1994); *State v. Williams*, 815 S.W.2d 43, 48 (Mo. Ct. App. 1991); *Commonwealth v. Samuel*, 590 A.2d 1245, 1248 (Pa. 1991); *Commonwealth v. Naylor*, 553 N.E.2d 542, 543–44 (Mass. 1990); *People v. Beasley*, 778 P.2d 304, 307 (Colo. Ct. App. 1989); *McDonald v. State*, 346 N.E.2d 569, 572 (Ind. 1976), *overruled by Watts v. State*, 885 N.E.2d 1228 (Ind. 2008); *State v. Graham*, 195 N.W.2d 442, 444 (Minn. 1972); *Gann v. State*, 383 S.W.2d 32, 36 (Tenn. 1964).

[1008] *See, e.g.*, *State v. Bowers*, 2019 WL 3679665, at *7–8 (S.C. Ct. App. Aug. 7, 2019); *Johnson v. State*, 829 S.E.2d 652, 655 (Ga. Ct. App. 2019); *State v. Meyers*, 781 P.2d 700, 705–06 (Kan. 1989); *State v. Bingman*, 745 P.2d 342, 348 (Mont. 1987).

[1009] *See, e.g.*, *State v. Williams*, 815 S.W.2d 43, 48 (Mo. Ct. App. 1991); *Bellcourt v. State*, 390 N.W.2d 269 (Minn. 1986), *cited in State v. Peou*, 579 N.W.2d 471, 477 (Minn. 1998). *See also Gilbert v. Commonwealth*, 506 S.E.2d 543, 546 (Va. Ct. App. 1998); *People v. Armstrong*, 653 N.E.2d 17, 18–19 (Ill. App. Ct. 1995).

[1010] *See* Chapter V.

[1011] *See* Chapter VII.

[1012] *See generally* Andrew Punzo, *Microstamping: Hot Lead or Dud Round*, 49 SETON HALL L. REV. 375, 406–07 (2019); Linn White, *God, Guns & Money: A Global Perspective on Intentional Homicide*, 44 W.

Turning to how the value-based model's approach differs from U.S. law, the primary material difference is that the value-based model treats a reasonable mistake of fact as an excuse, rather than as justified self-defense.[1013] Moreover, in contrast to U.S. law, under the value-based model, individuals must at least attempt to avoid places where they know an attack is likely and must avoid places where they *know* an attack is likely.[1014] Finally, the value-based model would make defensive force available when 'immediately necessary,' whereas U.S. law defines imminence temporally to mean 'about to occur' (that is, U.S. law treats imminence and necessity as separate concepts).[1015] Notably, while not all U.S. states agree with these majority positions, the research has demonstrated that changes within and among the states were not accompanied by the type of deeper discussion concerning competing values that the value-based model urges.

More central to the hypothesis being tested, however, the review has revealed that U.S. courts and legislators, like their English counterparts, engage only in a limited value-centric dialogue (focusing largely on protection of the defender and deterrence). And even the U.S. scholarship on these cases in the main leaves undiscussed the value trade-offs and conflicts that are inherent in self-defense rulings, bringing to the fore concerns about hidden normativity.[1016] And so while states like Florida, without any deeper discussion of the values implicated (other than passing reference to protecting defenders—value #4, deterrence—value #7, and 'punishing' attackers—which the value-based model does not recognize as a legitimate purpose of self-defense), pass 'stand your

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ST. U. L. REV. 47, 51 (2016). *See also* Kevin Behne, *Packing Heat: Judicial Review of Concealed Carry Laws Under the Second Amendment*, 89 S. CAL. L. REV. 1343, 1346 (2016).

[1013] *See* Chapter IV(a)(ii).

[1014] *See* Chapter IV(b)(iii).

[1015] *Compare* Chapter IV(b) *and* Chapter VI(c)(v) & (vi).

[1016] *See generally* LEE, *supra* note 37, at 33–43, 65–66; LeFrancois, *supra* note 37, at 32.

ground' laws that do not require retreat or avoidance of conflict, others leave unlawful deadly defensive force when safe retreat or avoidance are options.

U.S. cases and scholarship rarely discuss what values animate U.S. self-defense doctrine, or how shifting perspectives concerning values impact self-defense outcomes. Instead, and in the absence of a common analytical language of values, courts (presumably deploying judge's own value system) simply hand down proclamations based, more or less, on precedent that itself devoted little or no time to examining any values beyond occasionally commenting on the need to protect the autonomy of the defender (value #4). What is lost, then, is the opportunity to engage in open debate about which values matters when. Such a discussion, in turn, would help replace the hidden normativity characterizing U.S. court rulings and legislative enactments.[1017]

It is true that many of the U.S. outcomes in fact align with how challenging self-defense issues are resolved in Germany and England as well as by the value-based model. But the non-transparent way in which those outcomes are achieved, the suddenness in which changes in the law can appear, and the hidden normativity that this lack of transparency inherently fosters, provide further support for the hypothesis being tested.

[1017] *See generally* Chemerinsky, *supra* note 34, at 1–7.

VII. EXAMINING THE ENGLISH LAW'S TREATMENT OF SELF-DEFENSE FROM A VALUE-CENTRIC PERSPECTIVE

a. Putting England's law of self-defense in context

Often referred to as 'private defence' or 'necessary defence,' the right to self-defense in England is the right to defend oneself against an unjustifiable attack. The law of self-defense, moreover, is one of the general defenses that can be raised by 'a person charged with [an] offence.'[1018]

Turning to the burden of proof and persuasion, unlike in the U.S., a defendant in England need not explicitly rely on self-defense during his trial for the question to go to the jury, so long as sufficient evidence was adduced to raise a *prima facie* case of self-defense.[1019] Once the defendant has adduced such sufficient evidence, the prosecution has the burden of disproving self-defense beyond a reasonable doubt.[1020]

The law of self-defense in England is now clarified in § 76 of the Criminal Justice and Immigration Act of 2008 ('2008 Act').[1021] Specifically, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 inserted the new § 76(6)(A) into the Criminal 2008 Act to explain, for example, that there is no duty to retreat (though, as discussed

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[1018] *See* Criminal Justice and Immigration Act 2008, § 76(1)(a). *See also R v. Renouf* [1986] 1 WLR 522 (CA); JONATHAN HERRING, CRIMINAL LAW 616 (2018).

[1019] *See R v. Robinson* [2017] EWCA Crim 923; *R v. O'Brien* [2004] EWCA Crim 2900; *DPP v. Bailey* [1995] 16 Cr App R 257. *See also* ORMEROD & LAIRD, *supra* note 28, at 380.

[1020] *See R v. Robinson* [2017] EWCA Crim 923; *R v. Martin* [2001] EWCA Crim 2245; *Beckford v. The Queen* [1988] AC 130, at 144 (PC); *R v. Wheeler* [1968] 52 Cr App R 28, 30 (CA); *R v. Lobell* [1957] 1 QB 547. *See also* JAMES RICHARDSON, ARCHBOLD: CRIMINAL PLEADING EVIDENCE & PRACTICE 1568 (67th ed. 2019); Alan Reed, *Self-Defence—Applying the Objective Approach to Reasonable Force*, 60 J. CRIM. L. 94, 98 (1996); RUSSELL, *supra* note 462, at 684.

[1021] *See generally R v. Cheeseman* [2019] EWCA Crim 149; *R v. Keane* [2010] EWCA Crim 2514; *R v. McGrath* [2010] EWCA Crim 2514 (CA); ORMEROD & LAIRD, *supra* note 28, at 380; HERRING, *supra* note 1018, at 616; Rönnau & Hohn, *supra* note 60, at side-note 14. Note that *defense of property* is covered in the Criminal Damage Act of 1971 and arrest and the *prevention of crime* is discussed in § 3 of the Criminal Law Act of 1967, to be read in light of § 76. While similar—and apt to be overlapping, depending on the facts of the case—these are technically different defenses. *See generally R v. Hitchens* [2011] EWCA Crim 1626 (ruling that self-defense and the defense of using reasonable force in the prevention of crime under the Criminal Law Act 1967 § 3 were capable of extending to the use of force against an innocent third party to prevent a crime being committed by someone else); *R. v. Hayes* [2011] EWCA Crim 2680 (describing this area as 'notoriously difficult').

below, an opportunity to retreat may still be taken into account in determining whether defensive force was justified).[1022]

Controversially, the Crime and Courts Act 2013 further amended § 76 to allow homeowners to use disproportionate force up to, but not including, that which is 'grossly disproportionate.'[1023] The amended § 76 also confirmed the common law's contentious subjective standard as to justificatory circumstances, which provides that reasonable force can be justified on the basis of an honest, but mistaken and potentially unreasonable, belief.[1024]

Turning back to the 'mechanics' of England's self-defense law, *justifiable* homicides were historically distinguished from *excusable* homicides. The former pertained strictly to cases in which the homicide was necessary, and the defender was faultless. Excusable homicides, in contrast, were divided into two categories: Homicide *per infortunium*, (where the defender did a lawful act without intention to hurt anyone, but through unfortunate chance killed another), and homicide *se defendendo* upon a 'chance medley' or sudden quarrel (where the defender was not 'altogether faultless').[1025] Because of this bifurcation, 18th and 19th century textbooks tended to classify 'self-defence' during a sudden affray as an excuse, and described as 'justifiable homicides'

[1022] *See* Criminal Justice and Immigration Act 2008, § 76(8). *See also* ORMEROD & LAIRD, *supra* note 28, at 384. Note, however, that § 76 of the Criminal Justice and Immigration Act of 2008, while not common law, functions to 'clarify the operation of the existing defences.' *See generally* BAKER, *supra* note 440, at 906; *R v. Cheeseman* [2019] EWCA Crim 149.

[1023] *See* Criminal Justice and Immigration Act 2008, §§ 76(5)(A) & (6). *See also R v. Ray* [2017] EWCA Crim 1391; *R (Collins) v. Secretary of State for Justice* [2016] EWHC 33 (Admin), *discussed in* Mark Thomas, *Defenceless Castles: The Use of Grossly Disproportionate Force by Householders in Light of R (Collins) v. Secretary of State for Justice*, 80 J. CRIM. L. 407, 407–27 (2016); Wang, *supra* note 607, at 373.

[1024] Criminal Justice and Immigration Act 2008, § 76(3). *See also R v. Cheeseman* [2019] EWCA Crim 149; *R v. Ray* [2017] EWCA Crim 1391.

[1025] *See* RUSSELL, *supra* note 462, at 511–15; ALURED M. WILSHERE, PRINCIPLES AND PRACTICE OF THE CRIMINAL LAW 205 (1936); SEYMOUR F. HARRIS, PRINCIPLES OF THE CRIMINAL LAW 147–53 (1877); EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 219–22 (1803); WILLIAM A. HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 108–15 (1787).

situations that now would be considered permissible uses of defensive force.[1026] Today, in contrast, the term 'self-defence' in England encompasses *both* homicide *se defendendo* and justifiable homicide. Finally, the contemporary English approach tracks that of the value-based model[1027] (and Germany and the U.S.), in that self-defense is grounded on the notion that a justified forceful response is to be considered right and proper (not merely excused).[1028]

With regard to the hypothesis being tested here, and as observed in the prior chapter's discussion concerning U.S. law, the examination that will follow reveals that England's law of self-defense developed with little discussion of the values providing its rationale. Because explicit debate concerning the spectrum of values acting as decision-grounds very rarely helped anchor the debate, English scholars, judges, and legislators, unlike their German counterparts, as a general matter lack a common analytical language to help them resolve important jurisprudential matters of value, moral principles, and fundamental human rights. This, in turn, impedes their ability to reach self-defense decisions in a fully democratic, incremental, and policy-based manner. It, moreover, makes it more challenging for them to identify and narrow areas of dispute.

The survey that follows helps illustrate why and how the law of self-defense in England has tended to follow a more haphazard and unpredictable path. This is perhaps most prominently true when it comes to the important topic of subjective, but mistaken, beliefs justifying the exercise of self-preferential force. Because the position taken here is that much of the unpredictability and related hidden normativity characterizing England's self-defense law can be traced to absence of a value-centric approach, the analysis that follows lends further support to the hypothesis this thesis is testing.

[1026] *See, e.g.*, RUSSELL, *supra* note 462, at 543–52.

[1027] *See* Chapter IV(a).

[1028] *See generally* James Slater, *Making Sense of Self-Defence*, 5 NOTTINGHAM L.J. 140, 154–57 (1996).

b. Subjective or objective standard as to the justificatory circumstances?

i. Mistakes of fact

A central, vexing question confronting any self-defense regime is whether the necessity of the conduct should be evaluated based on the defender's *subjective* perception of the facts, or whether it, instead, should be left to the fact-finder to evaluate the lawfulness of the putatively defensive conduct on the basis of how the hypothetical 'reasonable person' would have (*objectively*) perceived the situation. The thesis addresses this issue at the outset because England's answer to this question is, as noted immediately above, unique, diverging markedly from the value-based model,[1029] as well as the German[1030] and U.S.[1031] approaches. The English approach to necessity, indeed, stands as perhaps the most dramatic and controversial departure from what can be considered the 'mainstream' of contemporary self-defense law.[1032] It also illustrates some of the pitfalls encountered when self-defense regimes are not explicitly grounded on guiding values or principles that inform the law's development.

Defendants not infrequently are mistaken in their belief that they are being threatened. The court in *R v. Weston* in 1879 held that justifiable self-defense applied if the defendant used deadly force 'against serious violence or in the *reasonable* dread of it.'[1033] In the 1884 case of *R v. Rose*, moreover, the defendant shot and killed his violent father after concluding that his father was about to slash his mother's throat with a knife.[1034] In fact, there was no evidence that his father had a knife in his hand. The

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[1029] *See* Chapter IV(a).

[1030] *See* Chapter V(c).

[1031] *See* Chapter VI(b).

[1032] *See generally* Wang, *supra* note 607, at 375 (characterizing England's subjective approach as resulting in 'unfair verdicts' and being in 'blatant violation' of Article 2 of the ECHR).

[1033] *R v. Weston* [1879] 14 Cox CC 346, 351 (emphasis added). *See also Dakin's Case* [1828] 168 ER 999, 999–1000 (instructing the jury to acquit if the defendant 'used no more violence than was necessary to defend himself from the attack made upon him').

[1034] [1884] 15 Cox CC 540.

defendant was nevertheless acquitted because 'at the time he fired that shot he honestly believed, and had *reasonable grounds* for the belief, that his mother's life was in imminent peril, and that the fatal shot which he fired was absolutely necessary for the preservation of her life.'[1035]

The view that a mistake as to the justifying circumstances had to be reasonable was therefore well-established in the English law by the late 19th century. And, indeed, there was little reason to believe this position would not continue to be the law of the land throughout the 20th century.

In 1984, however, the Court of Appeal made what can only be described as a remarkable about-turn in the landmark case of *Williams (Gladstone)* by rejecting both the holdings in *Albert v. Lavin*[1036] and the prior string of like decisions. The court held that the common law is, *and has always been*, that a defendant relying on private defense is to be judged solely on his honest belief as to the necessity of the force, whether or not his belief was reasonable.

In light of our preceding historical discussion, it is not unfair to say that *Williams* represents law reform from the bench. The court was either unaware of, or ignored, the English common law's earlier pronouncements that the reasonableness of defensive force was to be judged objectively. The court's approach also treats unreasonable mistakes as positively lawful exceptions to the offense description, thereby ignoring the distinction between offenses and defenses noted by Lord Simon in *Morgan* and discussed in Chapter IV(a). This position, furthermore, does not take into account the incompatibility thesis (also known as the 'paradox of unknown justifications') discussed in Chapter IV(a)(iii), which permits mutually justified attacks.

[1035] *Id.* at 541 (emphasis added).

[1036] [1981] 1 All ER 628, 637 (QB).

In short, while the English law for many decades rejected the notion that a defender's actions should be evaluated based on her subjective (rather than objectively reasonable) beliefs, on the basis of *R v. Williams (Gladstone)*,[1037] *Beckford v. The Queen*,[1038] *R v. Wilson*,[1039] and *R v. Morris*,[1040] such defendants would today be entitled to be judged on the facts as they honestly believed them to be.[1041] This common law approach was clarified in §§ 76(3) and (4) of the 2008 Act, both as to (1) the threat and (2) the appropriateness of the amount of defensive force. Under consistent English caselaw, however, the type of mistake of fact that negates the requisite *mens rea* as to an element of the charged crime is governed by the law of mistakes, rather than by the law of self-defense.[1042]

A defender's *personal* characteristics, moreover, are admissible only insofar as they bear on her ability to be aware of, or to perceive, the circumstances.[1043] Similarly, a defender's *physical* characteristics may also be admissible; for example, what might

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[1037] [1984] 78 Cr App R 276, *discussed in R v. Faraj* [2007] EWCA Crim 1033.

[1038] [1988] AC 130 (PC). *See also R v. Martin* [2001] EWCA Crim 2245.

[1039] [2006] EWCA Crim 1880.

[1040] [2014] 1 WLR 16.

[1041] *See generally R v. Robinson* [2017] EWCA Crim 923; *R v. Faraj* [2007] EWCA Crim 1033; *R v. Ibrahim* [2014] EWCA Crim 121; *R (Bennett) v. Coroner* [2007] EWCA Civ 617. *See also* ORMEROD & LAIRD, *supra* note 28, at 383; HERRING, *supra* note 1018, at 716; Lamond, *supra* note 104, at 26–28. This subjectivism can be criticized because (1) it puts the public at greater risk (since it provides for a full acquittal of an individual who may be predisposed to unreasonably assume that he needs to use force), and (2) allowing for an acquittal on the basis of an unreasonable belief violates Article 2 of the ECHR (the latter issue is discussed in Chapter IV(d)(ii)–(v)). Note also that a defendant is not entitled to rely on a mistaken belief induced by the effects of self-induced inebriation. *See generally R v. Goode* [2014] EWCA Crim 90. Insane delusions, likewise, cannot set the standards of reasonableness as to the degree of force used. *See R v. Oye* [2013] EWCA Crim 1725 (ruling that it makes 'little sense to talk of the reasonable lunatic'); *R v. Canns* [2005] EWCA Crim 2264 (rejecting argument that jury should have been directed to consider the defendant's delusional state).

[1042] *See generally R v. Faraj* [2007] EWCA 1033; *Beckford v. The Queen* [1988] AC 130, 144 (PC). *See also DPP v. Morgan* [1975] 2 All ER 347 (HL); ORMEROD & LAIRD, *supra* note 28, at 332–40 HERRING, *supra* note 1018, at 678–81, 682–84; Lamond, *supra* note 104, at 26–28. For a discussion of how such a reasonable mistake of fact is treated under the value-based model, *see* Chapter II(c)(vi)(2)(e) (discussing the fourth state of condemnation, namely, when the fact-finder finds the defendant to have violated the offense definition).

[1043] *See* ORMEROD & LAIRD, *supra* note 28, at 384.

appear threatening to a frail elderly man may not appear threatening to a young athlete.[1044] The only relatively minor caveat to this modern subjective rule is that an honest mistake resulting from voluntary intoxication will not excuse the objectively unnecessary use of force in self-defense.[1045] Today, § 76 of the 2008 Act has also clarified this subjective common law trend.[1046]

ii. Unknowingly justified defenders

Another fundamental question concerning the scope of England's self-defense law is whether an actor should be able to rely on unknown facts to convert an otherwise illegal act into an act of self-defense.

1. The '*Dadson* Principle'

Under the value-based model, an actor unaware of the justificatory circumstances would not be able to claim self-defense because he lacked internal justification.[1047] To determine whether Andrew is able to avail himself of self-defense to avoid a conviction under English law, one must first turn to the much-debated 1850 case of *R v. Dadson*.[1048] In *Dadson*, the defendant was a constable assigned to watch a copse from which wood had previously been repeatedly stolen. While performing this task one night, the constable saw a person coming from the copse carrying wood in his arms. The constable called out, but the fleeing thief refused to stop. Because the constable had no other way of apprehending the thief, he shot him in the leg. While the shooting of a fleeing felon was legally permissible at the time of the incident, stealing wood, without more, did not constitute a felony. The prosecution argued that the constable was not justified in

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[1044] *See R v. Martin (Anthony)* [2001] EWCA Crim 2245; ORMEROD & LAIRD, *supra* note 28, at 385.

[1045] *See* Criminal Justice and Immigration Act 2008, § 76(5). *See also R v. Taj* [2018] EWCA Crim 1743; *R v. Coley* [2013] EWCA Crim 223; *R v. O'Grady* [1987] QB 995; HORDER, *supra* note 86, at 142.

[1046] *See generally* ORMEROD & LAIRD, *supra* note 28, at 380.

[1047] *See* Chapter IV(a)(ii).

[1048] [1850] 4 Cox CC 358.

discharging his weapon at the thief because he did not know whether or not the fleeing thief was committing a felony.[1049]

The thief had in fact previously been convicted of stealing wood, however, therefore making this particular instance of wood theft a felony. While shooting a fleeing felon was not a criminal offense, the constable was unaware of the thief's previous convictions at the time he shot him, and thus did not have any reason to think he was shooting a felon. The question before the Court of Appeal, therefore, was whether the constable could claim his conduct justified even though the underlying facts giving rise to the defense were unknown to him at the time.[1050]

In affirming the constable's conviction, the court held tersely that '[t]he [fleeing thief] not having committed a felony known to the [constable] at the time when he fired, the latter was not justified in firing at the [thief]; and having no justifiable cause, he was guilty of shooting at the [thief] with intent to do him grievous bodily harm, and the conviction is right.'[1051] The English law has, therefore, required defensive intention (that is, the defendant must be aware of,[1052] and in fact act because of,[1053] the justificatory circumstances) before a successful plea of self-defense or justifiable homicide could be made out. In this regard, the English law is in agreement with the value-based model's requirement of both external and internal justification before a claim of legal justification can be successful.[1054]

[1049] *Id.*

[1050] *Id*.

[1051] *Id*. *See also* Lamond, *supra* note 104, at 26; Brudner, *supra* note 192, at 876.

[1052] *See* Brian Hogan, *The Dadson Principle*, 1989 CRIM. L. REV. 679. *See also* EAST, *supra* note 1025, at 273 (contending that a defendant claiming self-defense must show that he either honestly, or honestly and reasonably, believed his use of force to be necessary to avert an imminent attack); *R v. Rose* [1884] 15 Cox CC 540, 541–42.

[1053] Brudner, *supra* note 112, at 12 ('[A]ny defendant who is to benefit from a justification must act for the reason that the justificatory facts obtain, but need not act for the reason that they count as justificatory, which is an ex post matter for the judge.'); BAKER, *supra* note 440, at 914–15.

[1054] *See* Chapter IV(a)(ii).

2. Defending the logic of *Dadson*

Dadson distinguished between the offense charged and the defendant's defense, ruling that knowledge of the justificatory circumstances was required before the constable's shooting of the thief could be found to be justified. Treating defenses as distinct from offenses is indeed the rule, rather than the exception, in the English law.[1055] If the *Dadson* court had not applied this distinction, then the defendant's unlawfulness would have been a circumstance that was part of the *actus reus* necessary for liability to exist, and he would have been acquitted. The *Dadson* holding, however, supports the position that the term 'unlawful' describes conduct that satisfies both the *actus reus* and *mens rea* requirements of a particular offense under circumstances where the defendant has no defense. This requirement that, for a defendant to successfully claim self-defense, the defendant must be aware of, and in fact act because of, the justificatory circumstances,[1056] is in keeping with the value-based model's resolution of this issue.[1057] Moreover, it (1) does not create a rule under which unknowingly justified actors could benefit from their fortuitous justification, and (2) avoids the paradox of unknown justifications.[1058]

[1055] *See generally R v. Knock* [1877] 14 Cox CC 1 (discussing *prima facie* case of unlawful killing and then going on to discuss whether self-defense applies); Glanville Williams, *The Logic of 'Exceptions'* [1988] 47 CAMBRIDGE L.J. 261, 269.

[1056] *See R v. Cheeseman* [2019] EWCR Crim 149 (finding that the defendant at the point he used purportedly defensive force lacked a genuine belief that the victim was, in fact, a trespasser); *R v. Taj* [2018] EWCA Crim 1743 (ruling that self-defense is 'available even if the defendant is mistaken as to the circumstances as he genuinely believed them to be whether or not the mistake was a reasonable one for him to have made'); *R v. Riddell* [2017] EWCA Crim 413 (ruling that self-defense requires an honestly perceived risk of immediate harm); *R v. Yaman* [2012] EWCA Crim 1075. *See also Beckford v. R* [1987] 3 All ER 425 (PC); *R v. Williams* [1987] 3 All ER 411 (CA); Criminal Justice and Immigration Act 2008, §§ 76(3) & (4) (focusing on the defendant's subjective belief as to the facts); ORMEROD & LAIRD, *supra* note 28, at 403, *citing* Funk, *Justifying Justifications*, *supra* note 40.

[1057] *See* Chapter IV(a)(ii).

[1058] *See id.*

c. The attack

i. What can be defended?

1. The general rule

English law has always authorized the use of deadly force in defense of one's life and to prevent serious bodily harm.[1059] The English law, however, has, with the narrow caveat discussed immediately below, traditionally rejected deadly force in defense of property. In so doing, it has (implicitly) favored the principle of protecting the attacker (that is, value #1—reducing overall societal violence, #2—protecting the individual attacker, and #5—primacy of the legal process).[1060]

2. The exception to the general rule

Homeowners are permitted the use of deadly force in self-defense if they can show that they were in fear of death at the hands of the burglar. But deadly force *purely* in defense of property is not, and has not been, part of the law of England.[1061]

ii. Need the attacker's conduct be criminal?

As noted above, § 3(1) of the Criminal Law Act 1967 provides that 'a person may use such force as is reasonable in the circumstances in the prevention of crime . . . .' Section 3 by its express terms, however, only applies to cases of crime prevention. It is, therefore, necessary to turn to the common law to discover whether attacks had to be criminal before defensive force may be used. The case of *R v. Hitchens* is one of many examples demonstrating that, under the common law, self-defense can be deployed against innocent individuals, such as sleepwalkers or a child, not threatening a crime, provided that the threat they pose is 'unjust' (in the sense of not legally justified).[1062]

[1059] *See, e.g.*, *R v. Smith* [1837] 171 ER 441, 442–43.

[1060] *See* Chapter II(c)(i), (ii), & (v).

[1061] *See generally* HORDER, *supra* note 86, at 134–35, 139–40.

[1062] [2011] EWCA Crim 1626, *discussed in* HERRING, *supra* note 1018, at 622–32.

iii. Special rules for 'attacks' by the police?

Under English law—like the value-based model[1063]— there exists a right of private defense against the police when, for example, an officer performs an illegal arrest.[1064] This is so because, under these circumstances, the officer is not acting in the execution of his duty.[1065]

In the 2018 *Oraki* case, the defendant was convicted of obstructing a police officer in the execution of his duty.[1066] The defendant believed the officer was assaulting his mother and, therefore, intervened. As relevant here, the court ruled that the defense of self-defense (or defense of another) is, as a matter of law, available to the charge of obstructing a constable in the execution of her duty under § 89(2) of the Police Act 1996—that is, a defender may resist a police officer's unlawful restraint.[1067] This holding was reaffirmed in the subsequent *Wheeldon* case, which similarly noted that there was no rule establishing that the defense of self-defense was unavailable to a person who assaulted a police officer.[1068]

On the other hand, police officers seeking to use self-defense are, like English citizens more generally, permitted to use deadly force if they honestly believe it is necessary (even if that honest belief turns out to be entirely mistaken).[1069] In *Sharman*, for example, the police received a tip that a man was carrying a sawed-off shotgun wrapped in a plastic bag.[1070] In fact, however, the man was carrying a table leg. The two officers

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[1063] *See* Chapter IV(e)(ii).

[1064] *See generally* BAKER, *supra* note 440, at 926. *See also* The Police and Criminal Evidence Act of 1984 ('PACE'), § 24A.

[1065] SANGERO, SELF-DEFENCE, *supra* note 33, at 134.

[1066] *Oraki v. DPP* [2018] EWHC 115 (Admin).

[1067] *Id*.

[1068] *Wheeldon v. CPS* [2018] EWHC 249 (Admin).

[1069] *See generally* Wang, *supra* note 607, at 393–94.

[1070] *Sharman v. Coroner* [2005] EWHC 857 (Admin).

who confronted him shot and killed him even though he 'was entitled to be where he was and was doing absolutely nothing wrong.' Nevertheless, because the jury concluded that the officers honestly believed the force was necessary, they were acquitted.[1071]

iv. Can passive conduct constitute an 'attack'?

English law has relatively consistently provided that passive conduct can in fact constitute an 'attack.' And so in the case of the shipwrecked defendant who finds himself holding onto the same plank as another shipwreck survivor, if the defendant reasonably determines that the plank will not support them both, then the law should permit the defendant to thrust the other person off of the plank leading to his certain death.[1072]

In the famous 1884 case of *Dudley and Stephens*, however, the three defendants were neither justified nor excused for killing and consuming a cabin boy who was stranded with them in a lifeboat for 18 days after their ship sank.[1073] There is, however, a distinction between *Dudley and Stephens* and the plank case. In the plank case, and assuming the first survivor sees the other survivor swimming over, the other survivor's presence on the plank will cause a direct threat to the defender (that is, the other shipwreck survivor is most directly threatening to adversely impact the plank-holder's autonomy (value #4)).[1074] The cabin boy, in contrast, did not pose such a threat but rather was 'sacrificed' in order to feed his fellow crewmen.

Today the English law on passive threats is more nuanced, although its precise contours are still somewhat uncertain. The inquest into the deaths caused by the sinking of the ill-fated ferry, The Herald of Free Enterprise, near Zeebrugge, Belgium, serves to

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[1071] *Id*., *discussed in* Wang, *supra* note 607, at 393–94.

[1072] *See* BLACKSTONE, *supra* note 462, at 185. *See also* MATHEW BACON, A NEW ABRIDGEMENT OF THE LAW 776 (1832).

[1073] [1884] 14 QB 273. *See also R v. Howe and Bannister* [1987] AC 417, 453 (HL).

[1074] *See* Chapter II(c)(ii) & (IV).

illustrate the probable present state of the law as it relates to innocent passive attacks.[1075] In that case, a number of individuals were in danger of drowning in the freezing water. Although there was a rope ladder that led to safety, the passage up the ladder was blocked by a young man who, either because of the cold or because of fear, was unable to move. Even after being shouted at for 10 minutes by a corporal the man did not budge. The corporal finally instructed another to push the man off of the ladder and into the water, and the man was never seen again.[1076]

As noted in *Dudley and Stephens*, the three defendants killed the cabin boy solely to save their own lives; he did not pose any direct threat to them, and his killing instead merely served an instrumental purpose. The unfortunate man on the escape ladder, in contrast, by his own immobility put himself in a position where he posed a direct threat to those who were trying to escape from the freezing water. While he may not have intended to harm anyone, his continued presence on the ladder did in fact pose a direct threat of death or serious bodily harm to those in the water. Under the value-based model, the man's conduct (or, rather, lack thereof) resulted in a *forfeiture* (as opposed to *waiver*) of his right to non-interference. For it created a gap in his otherwise inviolable personal domain when he, for no objectively good reason, became a direct (though passive) threat to the others; that gap remained open as long as he remained a threat.[1077] Pushing him off the ladder was therefore justified, whereas the killing of the cabin boy was not. Defensive force likely continues to be justified against a passive (and perhaps entirely innocent) 'attacker' posing a threat.

[1075] *See generally R v. HM Coroner for East Kent ex p Spooner* [1987] 88 Cr App R 10; *R v. P&O European Ferries (Dover) Ltd.* [1990] 93 Cr App R 72, *discussed in* SMITH, *supra* note 493, at 73.

[1076] *See HM Coroner*, 88 Cr App R 10.

[1077] *See* Chapter II(d)(ii).

In 2001, the Court of Appeals grappled with the difficult case of conjoined twins who both would have died within months if not separated at the abdomen.[1078] The court ruled that the medically determined weaker twin was still capable of independent breathing and thus was a human being vested with rights. As a result, she fell within the protection of the law of homicide and the operation to separate the twins (which would kill the weaker one) constituted the conduct element of murder with regard to the weaker twin, barring some legal justification for the homicide. The court, however, held that, under these circumstances, the operation was in fact justified.[1079]

Notably, however, the ruling was based on three entirely different lines of reasoning. Lord Justice Alan Ward based his ruling on self-defense and said that the case at bottom was about self-defense (or, rather, defense of others) because the doctors would come

> to Jodie's defence and remov[e] the threat of fatal harm to her presented by [conjoined sister] Mary's draining her life-blood. The availability of such a plea of quasi self-defence, modified to meet the quite exceptional circumstances nature has inflicted on the twins, makes intervention by the doctors lawful.[1080]

In contrast, Lord Justice Brooke relied upon *R v. Dudley and Stephens* and invoked necessity as a defense.[1081] Finally, Lord Justice Robert Walker focused upon the intention of the surgeons—and lack of *mens rea*—in concluding that surgery could proceed.[1082]

[1078] *Re A (Conjoined Twins: Surgical Separation)* [2001] 2 WLR 480.

[1079] *Id.*

[1080] *Id.*

[1081] *Id.*

[1082] *Id.*

v. Imminence

Courts and commentators in England have traditionally required self-defensive force to be in response to an 'imminent' threat. The imminence requirement has received little attention in the English common law, however, and most cases and commentary do little more than simply make a passing reference to it. Further, those discussions about imminence that have occurred make no reference to the interplay between the multiple values that, as contended above at Chapter IV(b)(ii), are implicated.

1. The general rule

Imminence (or 'immediacy') of the threatened attack, as well as the imminence of the necessity to use force to avoid a future attack, are part of the calculation of whether defensive force was necessary, rather than constituting an independent rule.[1083] That said, while a defender arguing self-defense can only rely on a threat of (or believed) imminent attack, if she seeks to invoke the defense of loss of control she need only establish that she relied on fear of future non-imminent attack and believed herself at risk of serious violence (including sexual violence).[1084] And while self-defense is a defense against all charges, loss of control is available only on a charge of murder and can at best result in a verdict of manslaughter.

2. Subjective or objective evaluation of imminence

As already discussed, under English law the defender customarily had to have an honest belief that the attack was imminent, and his belief, furthermore, had to be based on

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[1083] *See generally* BAKER, *supra* note 440, at 895. *See also* Criminal Justice and Immigration Act 2008, § 76(7) (fact-finders in self-defense cases are to consider that 'evidence of a person's having only done what the person honestly and instinctively thought was *necessary* for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose') (emphasis added).

[1084] *See generally* Criminal Law Policy Unit, Ministry of Justice, *Partial Defences to Murder: Loss of Control and Diminished Responsibility; and Infanticide: Implementation of Sections 52, and 54 to 57 of the Coroners and Justice Act 2009*, 2010, Circular 2010/13, ¶ 25 (UK), http://www.justice.gov.uk/downloads/legislation/bills-acts/circulars/moj/2010/circular-12-2010-coroners-justice-act-homicide-provisions.pdf.

objectively reasonable grounds.[1085] The question of whether a given threat is imminent, however, is part of the larger question of whether the defensive force is 'necessary' or 'reasonable under the circumstances.'[1086] Therefore, it follows that the English law surely must judge imminence on the basis of the same subjective standard. This supposition was confirmed by the Privy Council's decision in *Beckford v. The Queen,* where the court held:

> There are two separate matters: (i) the defendant's belief as to the circumstances; and (ii) the degree of force which the defendant is entitled to use. Reasonableness plays no part as to (i) but only as to (ii). If a defendant took steps for his own protection *genuinely believing* that he was in imminent danger, that belief does not have to be reasonable for him to have been acting in self-defence. A genuine belief, however unreasonable, entitles a defendant to be acquitted on the ground of self-defence.[1087]

3. English law's treatment of battered intimate partner syndrome

Those seeking to rely on the battered intimate partner syndrome have in the past received little assistance from England's common law. Under English law, battered partners have, as noted, typically fallen short in their self-defense claims because they were found to have failed to meet the 'immediacy' requirement or the objective 'reasonable man' standard of self-defenses.[1088] The standard objection is that women who kill a sleeping or

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[1085] *See Albert v. Lavin* [1981] 1 All ER 628, 633 (QB); *R v. Fennell* [1971] 1 QB 428, 431; *Owens v. HM Advocate* [1946] SC(J) 119, 125; *R v. Rose* [1884] 15 Cox CC 540.

[1086] *See generally R v. Whyte* [1987] 3 All ER 416 (CCA).

[1087] [1988] AC 130, 133 (PC) (emphasis added). *See also* Criminal Justice and Immigration Act 2008, § 76(7).

[1088] *See generally* LAW COMMISSION, PARTIAL DEFENCES TO MURDER FINAL REPORT 4.20–21 (2004), https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc290_Partial_Defences_to_Murder.pdf [hereinafter LAW COMMISSION, FINAL REPORT]; HELENA KENNEDY, EVE WAS FRAMED, WOMEN AND BRITISH JUSTICE 199–200, 211–12 (1992) (discussing difficulty battered women have in meeting 'immediacy' requirement of provocation and 'reasonable' standard of self-defense). *See also R v. Ahluwalia* [1992] 4 All ER 889, 893–94 (CA) (illustrating failure of defense of provocation at trial court level); *R v. Thornton* [1992] 1 All ER 306, 315–

otherwise temporarily defenseless man were not employing force necessary to resist actual or imminent violence, given a 'reasonable person' would have left the house, sought police protection, or taken other steps short of using lethal force (such logic, as discussed at Chapter IV(e)(i)(6), implicitly places significant weight on value #1—reducing violence and maintaining the state's collective monopoly on force, value #2—protecting the attacker, and value #5—ensuring the primacy of the legal process).[1089]

In England, then, the focus has been on the battered woman's purported 'mental abnormality' or 'impairment,' rather than on treating the battered woman syndrome as a normal state of thinking, given the underlying mistreatment.[1090] As a consequence, England has not joined the growing number of jurisdictions that allow expert testimony of battered woman syndrome to support establishing the state of mind of battered women accused of killing their abusers.[1091] Instead, cases in which the evidence establishes that the husbands engaged in extreme and/or prolonged mistreatment, and the women felt that killing their tormentor was the only 'way out,' typically result in the female defendants successfully claiming provocation or diminished responsibility.[1092]

In *R v. Ahluwalia*,[1093] for example, the battered wife created napalm and set fire to the bed of her husband after he had gone to sleep (the man on the night of the attack

16 (CA) (rejecting defense of provocation where stabbing not result of sudden loss of self-control); *R v. Duffy* [1949] 1 All ER 932, 932–33 (CA) (denying battered woman use of provocation defense).

[1089] LAW COMMISSION, FINAL REPORT, *supra* note 1088, at 4.21. *See also* Chapter II(c)(i) & (v).

[1090] *See* Stanley Yeo, *Battered Woman Syndrome in Australia*, 143 NEW L.J. 13 (1993). Whether the provocative acts or words and the defendant's response met the 'ordinary person' standard prescribed by the statute is the question the jury must consider, not the more open-textured questions of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable. The statute, after all, does not leave each jury free to set whatever standard they consider appropriate in the circumstances by which to judge whether the defendant's conduct is 'excusable.'

[1091] *See generally R v. Ahluwalia* [1992] 4 All ER 889 (CA) (recognizing the syndrome in 1992). *See also* Alexandra L. Wannop, *Battered Woman Syndrome and the Defense of Battered Women in Canada and England*, 19 SUFFOLK TRANSNAT'L L. REV. 251 (1995).

[1092] *R v. Ahluwalia* [1992] 4 All ER 889 (CA) (the Court of Appeal ordered a retrial on the basis that the new evidence showed an arguable case of diminished responsibility in English law).

[1093] *Id*.

allegedly burned her with a hot iron and attempted to break her ankles). The man suffered severe burns over 40% of his body and died 10 days later in the hospital.

Accusing him of domestic violence and marital rape, she claimed provocation. The judge directed the jury to consider whether, if she did lose her self-control, a reasonable person having the characteristics of a well-educated married Asian woman living in England (the judge omitted suffering from battered woman syndrome) would have likewise lost her self-control given her husband's provocation.[1094] The jury found in favor of the government.[1095]

In the 2003 case of *R v. Charlton*,[1096] following threats of sexual and violent abuse against herself and her daughter, the battered spouse killed her obsessive and controlling partner while he was restrained by handcuffs, blindfolded and gagged as part of what was described as their regular sexual activity. The term of five years' imprisonment was reduced to three and a half years because of the threats made by a man determined to dominate and control the defendant's life. The court found that the threats created a genuine fear for the safety of herself and her daughter, and this caused the defendant to lose control and commit the murder.[1097]

As detailed below, by passing § 54 of the Coroners and Justice Act 2009, Parliament abolished the common law defense of provocation and replaced it with the partial defense to murder—'loss of control.'[1098] This partial defense (reducing the conviction from murder to manslaughter) eases the burden on spouses seeking to argue they suffered from battered spouse syndrome. It is available if the defender commits the

[1094] Note that, since the passage of the Coroners and Justice Act 2009, the defense of provocation—used in a number of the aforementioned cases—has been replaced with 'loss of control.'

[1095] *R v. Ahluwalia* [1992] 4 All ER 889 (CA).

[1096] [2003] EWCA Crim 415.

[1097] *Id.*

[1098] Coroners and Justice Act 2009, § 54.

killing after losing self-control as the result of a 'qualifying trigger,' provided a person of the same sex, age, and with a normal amount of tolerance and self-restraint operating under like circumstances 'might have reacted in the same or in a similar way. . . .'[1099] The loss of control, moreover, need not be 'sudden.'[1100] On the other hand, the force used must not be the result of a 'considered desire for revenge.'[1101]

The burden is on the prosecution to prove beyond a reasonable doubt that the defense is not satisfied once the defendant adduces sufficient evidence to reasonably raise the issue.[1102] A battered spouse will, as a practical matter, therefore be in a much-improved position to successfully raise this partial 'loss of control' defense.

In addition, using coercive or controlling behavior towards an intimate partner or family member became a criminal offense under § 76(1) of the Serious Crime Act 2015.[1103] While in the past the imminence requirement prevented an intimate partner not facing an immediate attack from claiming self-defense, after the introduction of § 76(1), the defender can take the position that she was in imminent danger of being the victim of coercive control.[1104]

These changes to the law reflect a significant advance in society's understanding of domestic abuse. Continuous subjugation in intimate partnership relationships makes

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[1099] *Id*. at § 54(1).

[1100] *Id*. at § 54(2).

[1101] *Id*. at § 54(4).

[1102] *Id*. at §§ 54(5) & (6). *Cf. R v. Goodwin (Anthony)*, [2018] EWCA Crim 2287 ('It was by no means the case that a defence of self-defence in a homicide case necessarily of itself would carry with it a sufficient evidential basis in the alternative for a defence of loss of control.').

[1103] *See* Serious Crime Act 2015 § 76(1). *See generally* Gorbes, *supra* note 637, at 406–09; McMahon & McGorrery, *supra* note 637, at 98–100.

[1104] *See* Vanessa Bettinson, *Aligning Partial Defences to Murder with the Offence of Coercive or Controlling Behaviour*, 83 J. CRIM. L. 71, 72–78 (2019) (reflecting on the adoption of § 76, which criminalizes coercive or controlling behavior in an intimate or family relationship, and considering an argument for aligning partial defenses to murder with it). *See also* Jonathan Herring, *The Serious Wrong of Domestic Abuse and the Loss of Control Defence, in* LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY 68 (Alan Reed & Michael Bohlander eds., 2011).

targeted victims vulnerable.[1105] Understanding domestic abuse helps one recognize why a purported defender (1) stayed in the abusive relationship and (2) felt trapped, without any viable option other than the use of deadly force. This information (supported by numerous studies[1106]), in turn, relates to a defendant's good-faith, subjective fear of imminent injury or death. It also appreciates the objective reality of domestic violence (in terms of patterns of violence, degree, triggers, etc.) and the related reasonableness of the response.[1107]

d. Defensive conduct

i. Necessity

As discussed above, under the common law and its recent clarification, it is well-settled that force may only be used in self-defense when the use of such force is 'necessary.'[1108] A person threatened need not wait until struck before being permitted to strike in self-defense, moreover, and a preemptive strike may be lawful, provided that the fact-finder concludes that the strike was reasonably necessary under the circumstances to thwart the attack (that is, that no other avenues, such as availing oneself of police protection, were available).[1109] And, as the Court of Appeal ruled in the landmark case of *Williams (Gladstone)*, and consistent with § 76(7) of the Criminal Justice and Immigration Act 2008, a defender is judged *solely* on his honest belief as to the necessity of the force, whether or not his belief was reasonable.[1110]

[1105] *See generally* Aitken & Munro, *supra* note 639.

[1106] *See, e.g.*, Watkins *et al.*, *supra* note 639; Loxton *et al.*, *supra* note 639, at 1092; Dutton & Goodman, *supra* note 639, at 747. *See also* Pichhadze, *supra* note 639, at 428–29. *Cf.* Meier, *supra* note 639, at 159.

[1107] *See generally* Talge, *supra* note 410, at 163–64; Stark, *supra* note 640, at 996–1026. *See also* Herring, *supra* note 640, at 40–43.

[1108] *See generally Blackburn v. Bowering* [1994] 1 WLR 1324, 1329 (CA); *Palmer v. R* [1971] AC 814 (PC). *See also* Criminal Justice and Immigration Act 2008, § 76(7).

[1109] *See R v. Deana* [1909] 2 Cr App R 75 (CA). *See also Beckford v. The Queen* [1988] AC 130, 144 (PC); BAKER, *supra* note 440, at 894.

[1110] [1984] 78 Cr App R 276. *See also* ORMEROD & LAIRD, *supra* note 28, at 382–87.

ii. Proportionality and excessive force

1. The standard

In Chapter VII(b) this thesis discussed that, contrary to earlier English precedent, and in conflict with the value-based model's approach (discussed at Chapter IV(a)), when evaluating whether force was legally justified, today's English law requires judges and juries to limit their inquiry to the defender's honest (subjective) beliefs as to the circumstances under which defensive force was used. It does not necessarily follow, however, that a defender's belief concerning *how much* force is required to repel an attack should likewise be governed by this subjective standard. And so in *R v. Bowen*, the Court of Appeal ruled that, in cases of self-defense, the 'law permits the use of no more force than is reasonable in the circumstances.'[1111]

While proportionality was given little consideration in older texts and opinions, a review of the sources that did address the issue reveals that the amount of defensive force was in fact historically judged on the basis of objective reasonableness.[1112] The court in *R v. Rose*, for example, held that the defendant would be liable for murder if he did not have a reasonable belief that the amount of force he used was necessary to preserve his mother's life.[1113] The law, as set forth in *Williams*[1114] and *Palmer*,[1115] and as reaffirmed by

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[1111] [1996] 4 All ER 837, 841 (CA), *quoting R v. Graham* [1982] 1 All ER 801, 806 (CA). *See also R v. Wilson*, [2019] EWCA Crim 1882.

[1112] *See, e.g.*, *R v. Rose* [1884] 15 Cox CC 540, 541–42; *R v. Huntley*, [1852] 175 ER 497; RUSSELL, *supra* note 462, at 512–13. *See also R v. Hinchcliffe* [1823] 168 ER 998 (holding that a person may use such force in defense of his property as is reasonably necessary).

[1113] [1884] 15 Cox CC 540, 541–42. *See also R v. Owino*, [1995] Crim. L. Rev. 743; *Beckford v. The Queen,* [1988] AC 130, 134 (PC); *Palmer v. R* [1971] AC 814, 825 (PC), *discussed in* ORMEROD & LAIRD, *supra* note 28, at 399; *R v. Hinchcliffe* [1823] 168 ER 998; JAMES FITZJAMES STEPHEN, A DIGEST OF CRIMINAL LAW 251–52 (Lewis F. Sturge ed., 9th ed. 1950). *But see R v. Scarlett* [1994] 98 Cr App R 290 (standing for the rather novel proposition that, before self-defense would be unavailable, (a) the force used must have been unreasonable, and (b) the defender must have either believed that the force used was unreasonable or have given the matter absolutely no thought).

[1114] *R v. Williams (Gladstone)* [1987] 3 All ER 411 (CA).

[1115] [1971] 1 All ER 1077, 1088 (PC).

the 1994 Court of Appeal case of *Blackburn v. Bowering*,[1116] thus has clearly provided that a person may use such force as is *objectively* reasonable in the circumstances as he or she *subjectively* believes them to be.[1117]

The Criminal Justice and Immigration Act 2008 now provides that, when determining whether the degree of force used was reasonable, the fact-finder is to consider:

> (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
>
> (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.[1118]

Moreover, § 76(4) sets forth that the reasonableness of a defender's force is to be assessed on the facts and circumstances as the defender genuinely believed them to be, *even if* his belief as to the *circumstances* was mistaken and unreasonable.[1119] So the question today is whether, when faced with the threat honestly perceived by the defendant, a reasonable person would have used that level of force?[1120] Put another way,

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[1116] [1994] 1 WLR 1324, 1330, 1333.

[1117] *See generally* ORMEROD & LAIRD, *supra* note 28, at 389–90.

[1118] Criminal Justice and Immigration Act 2008, § 76(7).

[1119] *See generally R v. Chuong* [2013] EWCA Crim 1716; *R. v. Faraj* [2007] EWCA Crim 1033. *See also* ORMEROD & LAIRD, *supra* note 28, at 38–53. Note that expert medical evidence is admissible to help establish a defendant's genuine belief as to the facts that defendant believed existed. *See generally R v. Ibrahim* [2014] EWCA Crim 121; *R. v. Press and Thompson* [2013] EWCA Crim 1849.

[1120] *See R v. Robinson* [2017] EWCA Crim 923; *R v. Riddell* [2017] EWCA Crim 413; *R v. Mula* [2013] EWCA Crim 1293. *See also* ORMEROD & LAIRD, *supra* note 28, at 381–82.

was the force used reasonable in the circumstances and danger as the defender believed them to be?[1121]

The Act notably creates a carve-out for 'householder cases;' in those cases, the degree of force is only regarded as not being 'reasonable in the circumstances as [the defender] believed them to be' if it was 'grossly disproportionate' in those circumstances.[1122] This broadening of the law was instituted in response to calls to reform the law so that householders using force to defend themselves in their homes could receive greater legal protections.[1123] Presently in householder cases, a defendant is liable if, in the circumstances as he believed them to be, the jury concludes:

1. That he used grossly disproportionate force; or
2. The degree of force he used was disproportionate *and* was unreasonable.[1124]

In *non-householder* cases, in contrast, the focus is exclusively on reasonableness; a defendant is liable if the jury concludes that the amount of force he used was unreasonable in the circumstances as he believed them to be.[1125]

In householder cases, then, if the force used by the defender was not grossly disproportionate, the focus shifts to whether the degree of force deployed was reasonable. This, in turn, requires the jury to be instructed on the types of circumstances relevant to

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[1121] The circumstances, of course, directly implicate the perceived danger. *See generally R v. Harvey* [2009] EWCA Crim 469; *Shaw (Norman) v. R* [2002] 1 Cr App R 10.

[1122] Criminal Justice and Immigration Act 2008, § 76(5)(A). *See also* HERRING, *supra* note 1018, at 624–25.

[1123] *See* Jennifer Collins and Andrew J. Ashworth, *Householders, Self-Defence and the Right to Life*, 132 L.Q.R. 377 (2016); Sophie Miller, *'Grossly Disproportionate': Home Owners' Legal License to Kill*, 77 J. CRIM. L. 299 (2013), *cited in* ORMEROD & LAIRD, *supra* note 28, at 388. *See also* N. Wake, *Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian Perspectives*, 77 J. CRIM. L. 433 (2013) (contending that the 'grossly disproportionate' standard is confusing and permits 'dangerous' levels of violence).

[1124] *See R v. Cheeseman* [2019] EWCA Crim 149; *R v. Ray* [2017] EWCA Crim 1391 (effectively superseding *R (Collins) v. Secretary of State for Justice* [2016] EWHC 33 (Admin)).

[1125] *R v. Ray* [2017] EWCA Crim 1391.

this inquiry, including the time of day, the vulnerability of the occupants, the conduct of the intruder at the time, the shock of detecting an intruder, the presence and availability of other help, and the desire to protect the home and its occupants (collectively, on what the householder 'instinctively and honestly thought was necessary'[1126]).[1127]

2. No 'half-way house'

The English common law required that a person who used an unreasonable amount of force be held criminally liable. This thesis has not, however, yet examined the critical question of whether the liability is full, or, instead, is somehow *reduced* to reflect the arguably diminished culpability of the defender.

In *R v. Clegg*,[1128] the House of Lords confirmed, albeit *obiter*, *Palmer*'s[1129] holding that excessive force can lead to a conviction for murder because the defense of self-defense is only available to those who use proportionate force.[1130] The Lords found that the defense of self-defense

> is not a half-way house. There is no rule that a defendant who has used a greater degree of force than was necessary in the circumstances should be found guilty of manslaughter rather than murder.[1131]

Once again abruptly departing from the earlier common law position,[1132] and contrary to the law of most other jurisdictions (though with no discussion of the relative

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[1126] *R v. Hitchens* [2011] EWCA Crim 1626,

[1127] *See* ORMEROD & LAIRD, *supra* note 28, at 389. It is also important to recognize that 'householder cases' involve not just homeowners, but, rather, involve *non-trespassers*. That is, the defender must not be a trespasser, and he must believe that the attacker is entering the building (or part of it) as a trespasser. *See R v. Cheeseman* [2019] EWCA Crim 149; *R v. Day* [2015] EWCA Crim 1646.

[1128] [1995] 2 WLR 80 (HL).

[1129] *Palmer v. R* [1971] AC 814, 824–32.

[1130] [1995] 2 WLR 80 (HL). *See also R v. McInnes* [1971] 3 All ER 295, 301–03 (CCA).

[1131] *See generally* [1995] 2 WLR 80, 87 (HL); Krebs, *supra* note 447, at 396.

[1132] *See, e.g.*, *R v. Huntley*, [1852] 175 ER 497; *R v. Odgers*, [1843] 174 ER 355.

balancing of values justifying the decision),[1133] the defense of self-defense in England is in fact 'all or nothing.' Using excessive force in self-defense today (in non-householder-cases) results in the actor being subjected to full criminal liability, regardless of the actor's honest belief.[1134] No attempt is, therefore, made by the English cases to follow the value-based model's approach of distinguishing between negligent individuals who at most should be liable in tort and reckless individuals whose irresponsible use of excessive force makes them appropriate for criminal liability.[1135] And so a defender who through mere negligence makes an unreasonable mistake and uses excessive force may under the English law be guilty of murder, whereas the same actor under the value-based model would only be liable for civil damages.[1136]

iii. Duty to retreat and avoid conflict

While there historically was some dispute as to whether safe retreat was required in cases of justifying necessity,[1137] the dominant view was that actors committing a justifiable homicide were to be 'commended rather than blamed' for their actions.[1138] They, therefore, did not have to retreat, but rather could stand their ground and defend themselves 'on the spot.'[1139]

Excusable homicide, in turn, was divided into two categories: homicide *per infortunium*, where the defender did a lawful act without the intention to hurt anyone, but through unfortunate chance kills another, and homicide *se defendendo* upon a 'chance

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[1133] *See, e.g.*, Rönnau & Hohn, *supra* note 60, at side-note 281–82 (discussing German position).

[1134] *See generally* Chapter VI(d)(ii)(2).

[1135] *See* Chapter II(c)(iii). *See also R v. Martin* [2001] EWCA Crim 2245 (holding that, while '[i]t has been suggested that [a defendant mistakenly using excessive force] should be regarded as being guilty of manslaughter and not murder,' such a change 'would have to be made by Parliament').

[1136] *See* Chapter II(c)(iii).

[1137] *See* J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 234c (5th ed. 1983); BACON, *supra* note 1072, at 776.

[1138] *See* RUSSELL, *supra* note 462, at 509; BLACKSTONE, *supra* note 462, at 181.

[1139] *See generally* STEPHEN, *supra* note 1113, at 252; RUSSELL, *supra* note 462, at 435.

medley' or sudden quarrel, where the defender was not considered 'altogether faultless.'[1140] The latter case typically involved two combatants who engaged in a quarrel that escalated to a point where one of the them used deadly force.[1141]

While *chance-medley* and manslaughter were often not precisely distinguished in the treatises and cases of the day, the difference seems to have been that in the case of *chance-medley* the defendant, 'before any mortal stroke given . . . had declined any further combat and retreated as far as he could with safety . . . .'[1142] Once one of the slayers retreated to the wall, any killing during the *chance-medley* was viewed as a homicide *se defendendo*. In such a case, the slayer was not convicted but instead had to forfeit his goods.[1143] Blackstone,[1144] Foster,[1145] Hale,[1146] and Hawkins[1147] all agreed that, before a killing could qualify as homicide *se defendendo*, the common law required, with some relatively minor caveats,[1148] that the defender 'retreat to the wall.'[1149] In short, homicide *se defendendo* occurred when the killing resulted from a quarrel or fight, and the killer either did not begin the fight, but later was involved in it; or, having begun the

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[1140] *See* WILSHERE, *supra* note 1025, at 205; HARRIS, *supra* note 1025, at 147–53; RUSSELL, *supra* note 462, at 511–51; EAST, *supra* note 1025, at 219–22; HAWKINS, *supra* note 1025, at 108–15.

[1141] HAWKINS, *supra* note 1025, at 83, 87; MATTHEW HALE, PLEAS OF THE CROWN 479 (1736); Singer, *supra* note 28, at 472.

[1142] MICHAEL FOSTER, CROWN CASES 277 (1809). *See also R v. Odgers* [1843] 174 ER 355, 356; STEPHEN, *supra* note 1113, at 253; BLACKSTONE, *supra* note 462, at 184–85.

[1143] For a discussion of when forfeiture of goods was required, *see* HALE, *supra* note 1141, at 492–96. *See also* FOSTER, *supra* note 1142, at 288.

[1144] BLACKSTONE, *supra* note 462, at 183–85.

[1145] FOSTER, *supra* note 1142, at 275–78.

[1146] HALE, *supra* note 1141, at 479.

[1147] HAWKINS, *supra* note 1025, at 87.

[1148] Such as assaults on the 'highway.' When the attacker intends to feloniously rob or murder an individual who is on a highway, the individual 'may justify killing the other without giving back at all . . . .' *Id.* at 84.

[1149] Note that homicides in the 'advancement of public justice' (i.e., in felony prevention and the detention of fleeing felons) were the only killings that were considered justified; the actor was not viewed as acting *se defendendo*, and as a result he or she was not required to retreat. *See* BLACKSTONE, *supra* note 462, at 178–81; HALE, *supra* note 1141, at 478–83; Singer, *supra* note 28, at 472.

fight, declined any further struggle and tried to retreat before being pressed to kill his attacker in order to protect himself from death or serious bodily harm.[1150]

The English law up to this day continues to allow a person being attacked to forcefully repel the attack and does not impose a categorical duty to retreat.[1151] A showing that the defender sought to withdraw, however, continues to be potent evidence that the defender acted *reasonably* and that the defensive conduct was, in fact, necessary.[1152] In *R v. Bird,*[1153] for instance, the defendant was convicted after a retrial of unlawful wounding in violation of § 20 of the Offences Against the Person Act 1861. The defendant had been celebrating her 17th birthday when her ex-boyfriend arrived at the party with his new girlfriend. An argument broke out. During the course of the argument, which escalated into physical violence, the ex-boyfriend held the defendant up against a wall. The defendant hit the ex-boyfriend in the face with a glass she was holding, injuring his eye.[1154] The Court of Appeal held:

> There were formerly technical rules about the duty to retreat before using force, or at least fatal force. This is now simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force was reasonable.[1155]

The Criminal Justice and Immigration Act 2008 reflects this approach, providing that the 'possibility' of retreat is to be considered a 'factor to be taken into account,' but does not

[1150] *R v. Semini* [1948] 1 KB 405, 407.

[1151] *See generally* ORMEROD & LAIRD, *supra* note 28, at 399–400; BAKER, *supra* note 440, at 897. *See also R v. McInnes* [1971] 3 All ER 295.

[1152] *See R v. Ray* [2017] EWCA Crim 1391.

[1153] [1985] 1 WLR 816.

[1154] *Id*. at 817.

[1155] *Id*. at 816, 820.

'giv[e] rise to a duty to retreat.'[1156] Contrary to the more nuanced approach of the value-based model (discussed in Chapter II(d)(i)(4), which differentiates the relevant values implicated by threatened *harming* versus threatened *wronging*), then, the English cases do not distinguish between culpable and innocent attacks in the context of retreat.

iv. Intentionally provoked attacks and other blameworthy conduct on the part of the defender

Self-defense has been, and continues to be, unavailable where the defender purposefully provoked the attack so that he could kill using self-defense.[1157] This position accords with the value-based model.[1158] While the cases and commentators focus much attention on the intersection between self-defense and provocation, very little has been written by judges or commentators on the extent to which a defender's provocative behavior limits his right to self-defense. In *R v. Brittain*, the Court of Criminal Appeals cited to *Browne* and opined, albeit *obiter*, that it was 'less than certain' that the defendant in that case, who got out of his car and shouted at the driver of another car before assaulting him, would be able to properly invoke self-defense.[1159]

In passing § 54 of the Coroners and Justice Act 2009, Parliament, as noted, abolished the common law defense of provocation and replaced it with the partial defense to murder—'loss of control.'[1160] As discussed, that partial defense is only available if the defender commits the killing (or is party to it) after losing self-control as the result of a 'qualifying trigger.' Additionally required is a showing that a person of the same sex, age, and with a normal amount of tolerance and self-restraint operating under like

[1156] Criminal Justice and Immigration Act 2008, § 76(6)(A).

[1157] *See* Coroners and Justice Act 2009, § 56 ('Abolition of the common law defence of provocation'). *See also R v. Browne* [1973] NI 96, 107.

[1158] *See* Chapter II(a).

[1159] No. 3431/C/84, December 6, 1984 transcript.

[1160] Coroners and Justice Act 2009, § 54.

circumstances, 'might have reacted in the same or in a similar way. . . .'[1161] The loss of control need not be 'sudden,'[1162] cannot be the result of a 'considered desire for revenge,'[1163] and places the burden on the prosecution to prove beyond a reasonable doubt that the defense is not satisfied once the defendant adduces sufficient evidence to reasonably raise the issue.[1164] A defendant who is able to successfully raise the loss of control defense is liable for manslaughter instead of murder.[1165] Moreover, self-defense will be available to a person who started a fight, provided the person who he attacked goes beyond defending himself and, in fact, goes on the offensive.[1166]

e. Evaluating England's self-defense law from a value-centric perspective

The discussion thus far has traced out some significant—and largely unanticipated—changes in England's self-defense law during the past century. Notably, few broader trends or policy shifts could be recognized. Rather, the changes appear quite *ad hoc*; they seemingly were not driven by any particular logical pattern or progression.[1167] This, perhaps, reflects what Horder has described as the more general 'tendency of the English courts to reach for the concepts of reasonableness, without setting out the relevant rights first, [which is] an unfortunate aspect of legal culture.'[1168] Horder's observations find

[1161] *Id*. at § 54(1).

[1162] *Id*. at § 54(2).

[1163] *Id*. at § 54(4).

[1164] *Id*. at §§ 54(5) & (6). *See also R v.O'Brien* [2004] EWCA Crim 2900; ORMEROD & LAIRD, *supra* note 28, at 380.

[1165] Coroners and Justice Act 2009, § 54(7).

[1166] *See R. v. Rashford* [2005] EWCA Crim 3377, *discussed in Marsh v. DPP* [2015] EWHC 1022 (Admin). *See also R v. Keane* [2010] EWCA Crim 2514; *R v. McGrath* [2010] EWCA Crim 2514, [2011] Crim. L. Rev. 393; *R v. Harvey* [2009] EWCA Crim 469.

[1167] *See generally* ORMEROD & LAIRD, *supra* note 28, at 380 (describing the development of England's self-defense law as 'haphazard,' resulting in 'inconsistencies and anomalies'). Of course, one could argue that this is a feature of the common law more generally. *See generally* William N. Drake, Jr., *The Common Law and the Rule of Law: An Uncomfortable Relationship*, 45 STETSON L. REV. 439, 447 (2016).

[1168] HORDER, *supra* note 86, at 133. *See also* Dyson & Vogel, *supra* note 156, at 567 (noting that the 'English system [lacks a] clear hierarchy of norms').

support in the findings reached herein in the self-defense context, and this, as argued, lends further support for the hypothesis being tested.

Perhaps the most noteworthy, and unpredictable, change came in the area of determining when defensive force is 'necessary.' The common law historically provided that an actor's belief in the necessity of his defensive conduct had to be objectively reasonable. Today, in sharp contrast, if an actor can convince a jury that he honestly (subjectively) believed that the threat was imminent and that defensive force was necessary to ward off an unlawful attack, then he is entitled to claim self-defense irrespective of how unreasonable that belief is. By thus allowing even unreasonably (but honestly) mistaken actors to assert self-defense, the English law signals a particular devaluation of the protection of value-based model value #1 (collective reduction of violence) and value #2 (protecting the particular purported 'attacker'), while concurrently potentially overvaluing values #3 (equal standing) and #4 (protection of the defender's autonomy).[1169] Another notable difference is that, departing from the value-based model's approach, English self-defense law does not permit anticipatory self-defense. Under the value-based model, in contrast, self-preferential force is justified when it is 'immediately necessary.'[1170]

Largely mirroring the findings in the Chapter VI analysis of U.S. self-defense law, then, the examination of self-defense in England revealed little discussion over the values that do, or should, animate self-defense doctrine, or how changes in perspective might change self-defense outcomes. This thesis demonstrates that, in the absence of a shared analytical language of values, the English courts, on what appears to have been a largely *ad hoc* basis, handed down cases signaling significant changes in self-defense law. The

[1169] *See* Chapter II(c)(i).

[1170] *See* Chapter IV(b)(ii).

unpredictability of these changes in the English law of self-defense, and the hidden normativity that this lack of transparency encourages, thus lend additional support for the hypothesis.

VIII. CONCLUSIONS

This thesis examined the role values play in self-defense doctrine, as well as practice (via an analysis of the subject jurisdictions). More specifically, the thesis tested the hypothesis that a more detailed accounting of the underlying values believed to provide the rationale for self-defense will improve the transparency and quality of decision-making, and, relatedly, will reduce the impact of hidden normativity. The set of values the value-based model proposed, however, were not positioned as the only possible appropriate set of values. Nor was it claimed that there are not some other reasonable ways of ordering the proffered values.[1171] Instead, the more modest claim was that the model provides a reasonable and unique analytical point of departure for examining the thorny theoretical and practical issues involved in self-defense cases.

The hypothesis prediction concerning the 'quality' of value-based outcomes, moreover, was not based on individual normative evaluations of end-states and social outcomes. Rather, the prediction tested here was that a common analytical language that is value-explicit will facilitate more democratic, transparent, incremental and nuanced, policy-based, and focused decision-making.[1172]

The premise underlying the hypothesis is that an array of values drives self-defense decisions. Consequently, unless these values are identified and openly debated, hidden normativity can be expected to take hold so that the values driving self-defense decisions are most likely to be those of the individual scholar, legislator, or judge, rather than those agreed upon in the context of a broader democratic consensus. Based on the foregoing, and the supporting analysis conducted throughout, it is contended that the

[1171] *See* Chapter I.

[1172] Although outside the scope of the hypothesis being tested, it may be sensible to in future analysis attempt to institutionalize the value-based model by incorporating this thesis' findings in a model self-defense law and (in the Anglo-American context) jury instructions.

thesis has confirmed the hypothesis that a more value-informed assessment of self-defense doctrine's rationale will help refine and clarify the discourse.

In particular, and as detailed below, the analysis reveals that the value-based model discussed in Chapter IV, and German criminal justice system discussed in Chapter V, generally address challenging self-defense issues through careful and explicit discussion of the implicated values. This, in turn, allows them to make more thoughtful choices among the various available perspectives.

In contrast, it was demonstrated that in the U.S. (Chapter VI) and England (Chapter VII), important questions of value tend to be resolved in an *ad hoc* manner and based on resolution of technical-legal arguments. Rarely did legislators, judges, or scholars with granularity examine the tension between the respective U.S. and English systems' interests in protecting the attacker versus the defender (let alone the values animating these macro-principles).

A value-centric approach, in short, helps drive out much of the hidden normativity that inherently influences the decision-making seen in the U.S. and England. These notable differences in approach, process, and outcome, therefore, broadly confirm the hypothesis' prediction that a value-explicit approach improves the quality of decision-making (as that term is defined herein).

Moving from the general to the specific, to test the hypothesis first introduced in Chapter I, Chapter II constructed the 'value-based model' of self-defense to serve as a template allowing for an exploration of the proposed value-centric approach. The chapter began by examining the orthodox view that there are only two principles that clash in the self-defense context, namely, the principle of protecting the defender and the principle of protecting the attacker.

The discussion then progressed, concluding that merely recognizing these two principles, without more, provides only a minimal analytical foothold. In order to give these broad concepts content, the thesis proposed seven individual values that it contended provide a reasonable rationale for self-defense: collective violence reduction by protecting the state's collective monopoly on force (value #1), protecting the individual attacker's right to life (value #2), safeguarding the equal standing between people (value #3), protection of the defender's autonomy (value #4), ensuring the primacy of the legal process (value #5), maintaining the legitimacy of the criminal law (value #6), and deterring future attackers (value #7).

Beyond identifying the values, this thesis discussed why each of them deserves to be considered a potential decision-ground in self-defense cases. In so doing, the thesis not only examined the arguments for and against their inclusion, but also focused on how and when they can be in tension with, or support of, each other. The thesis also reviewed how to approach the relative ordering of these values under different self-defense scenarios. It is contended that this uniquely comprehensive array of values, and the discussion of how they may at times 'clash' with each other, went far to establish a defensible rationale for self-defense.

It is submitted that the findings in Chapter II support the hypothesis' central premise, namely, that the proposed values are in fact relevant to self-defense decisions (that is, that they, depending on the circumstance, can function as what have been termed 'decision-grounds'), and that they provide a persuasive explanation for the doctrine's rationale. Further, Chapter II demonstrated that, absent a value-based framework informing an open and value-centric dialogue, the underlying basis for self-defense rulings, as well as changes in self-defense doctrine, will, in an unnecessary deviation from the norm of systemic transparency, remain largely hidden from public view and will

be the individual decision-maker's own. Further, by introducing the state-of-mind-based distinction between forfeiting and waiving the right to non-interference, the thesis added a more nuanced way of thinking about the much-debated 'gap in the right to non-interference' said to occur in self-defense scenarios.

With this value-based template in place, Chapter III conducted a thematic literature review. The purpose of the review was two-fold. The first objective was to probe whether the value-based model held up to scholarly scrutiny and, in fact, served as a useful template. Second, the thesis sought to determine whether the value-based model was unique, or whether, instead, scholars had already proposed variants of a fully comprehensive, value-centric approach for analyzing self-defense cases.

The conclusion reached was that, while some scholars did tether their analyses on what they described as the values undergirding self-defense (and, thereby, recognized that values do in fact 'matter'), they in the main considered only one or two values. For example, Leverick narrowly focuses on the 'right to life' to develop her argument that only threatened death may be met with deadly force. And so even threatened rape or other forms of serious bodily injury do not justify deadly force in self-defense. Schopp, on the other hand, considers the autonomy of the defender so inviolate that he would sanction deadly force if it was necessary to prevent the theft of property or to ward off a fairly minor assault.

While Leverick and Schopp largely focused on one value, Sangero conducted the most searching analysis of the 'factors' (the defender's autonomy; the attacker's culpability; and harm to the 'social-legal order') he believes explain the underlying 'rationale' of self-defense law. But the thesis revealed that Sangero's analysis for no good reason neglected to pay equal attention to other important stand-alone values, namely, the state's collective violence-reduction role, the attacker's right to life, the

importance of equal standing, the primacy and legitimacy of the legal process, and deterrence. Nor did Sangero more closely examine the relationship between the three values he identified, or examine what might happen if and when they come into conflict with each other. And so, while Sangero's account comes closest to engaging in a comprehensive value-based discussion about self-defense, the Chapter III thematic literature review confirms that the value-based model offers a unique and useful template for understanding self-defense's rationale on the basis of the values that, when implicated, function as self-defense's decision-grounds.

Having in Chapter II developed the value-based model, and in Chapter III determined that the model offers 'something new' when it comes to the important discussion around self-defense, Chapter IV used the value-based template to drive the value-based analysis further. Specifically, Chapter IV addressed the central theoretical questions characterizing the self-defense debate. In so doing, the thesis showed how the value-based model allowed for the development of internally consistent, defensible answers to the core theoretical questions. For example, the thesis' analysis, as developed through the value-based approach, led to the conclusions that: self-defense functions as a justification, not an excuse; a defender must be both internally and externally justified to be able to claim self-defense (and reasonable mistakes of fact, therefore, make the justification of self-defense unavailable); imminence should be evaluated objectively; defensive force must be 'immediately necessary,' making self-defense more available to battered intimate partners; self-defense should be available (though in diminished form) against innocent attackers, as the attack need not be criminal; objectively disproportionate force should preclude self-defense; there should be no duty to retreat when faced with a culpable attack and safe retreat is not an option; passive conduct can constitute an 'attack'; unknowingly justified defenders should not be able to claim self-defense; deadly

force should not be available to defend property or to ward off trivial threats; and even though there is no strict duty to avoid conflict, individuals must at least attempt to avoid places where they know an attack is likely.

This thesis noted that the answers to these important doctrinal questions were subject to change as one's normative judgments concerning the implicated values shifts. And this recognition of the model's adaptability serves to confirm, rather than to invalidate, the hypothesis. Consistent with the hypothesis, by framing the debate from a value-centric perspective, the analysis proceeds by examining whether important values were omitted, or whether the weighting of others was inappropriate. By forcing these inherently normative questions more squarely into the public forum, the value-based approach expands the range of perspectives represented in the debate. It, moreover, encourages more thoughtful and nuanced choices among those perspectives. Stated differently, by refocusing the debate on values, the value-based model makes transparent the types of normative judgments that in the main have been left either un- or under-addressed. The research conducted in Chapter IV, therefore, lends significant support to the hypothesis.

To further test the hypothesis, Chapters V–VII used the value-based approach to evaluate the self-defense laws in Germany, the U.S., and England. What the thesis revealed was that in Germany, changes in the law of self-defense were in the main incremental and, relatedly, were accompanied by significant value-focused debate concerning the various alternative courses of action (and reasons for pursuing or rejecting them). In contrast, in the U.S., and even more so in England, law reforms tended to come about with little notice, and were largely untethered to any particular, explicit moral or value-based framework or discussions concerning alternative outcomes.

For example, English law's abrupt move away from objective reasonableness, so that self-preferential force was considered justified so long as the defender honestly believed the force was necessary, came about with little warning. The change, moreover, arrived unaccompanied by a discussion over how this change in the law impacted values such as the state's monopoly on force, the putative 'attacker's' interest, the primacy of the legal process, etc.

Substantively, the thesis pointed out other notable differences between how England addresses certain central self-defense questions and how they are handled in Germany, the U.S., and by the value-based model. For example, under English law, there is no objective evaluation of whether an attack is imminent, and there is also no default duty to retreat or to avoid conflict. And in the U.S., some (but not all) jurisdictions deviate from the objective reasonableness standard when it comes to law enforcement officers, justifying use of defensive force whenever an officer subjectively believes it was necessary.

While the decision to accept these rules may be defensible, there is little detailed, value-based discussion seeking to justify them. Rather, English cases and law reform proposals, like their U.S. counterparts, tend to be analyzed on the basis of technical legal arguments. They, in so doing, largely ignore the important value trade-offs that are inevitably implicated.

In contrast, and as Chapter V illustrated, when German law introduced 'socio-ethical' limitations on the once hard-edged law of self-defense, this resulted in significant scholarly debate that persists to the present day. Likewise, German law's permission to use deadly force to defend property has been widely analyzed. It is, therefore, much clearer what values the German proponents (and opponents) of authorizing deadly force

in defense of property view as most directly implicated, as well as, how and why the law may in the future change.

The thesis in Chapters V–VII therefore provided real-world illustrations of how a value-based approach leaves less room for hidden normativity by encouraging clarification and refinement of the (value-based) arguments. The chapters, moreover, demonstrate the advantages of having a shared value-centric language with which to identify disagreements, pin-point areas of common ground, and propose alternative constructions. These findings, in short, lend further support for the hypothesis that a value-centric approach to self-defense increases transparency and predictability.

It is, therefore, submitted that the thesis has confirmed the hypothesis that a broader consideration of the values implicated in self-defense scenarios improves the transparency of decision-making, and, relatedly, reduces the role of hidden normativity. By in this manner demonstrating not only that a value-centric dialogue drives normative questions out of hidden baselines, but also that expanding the range of perspectives represented in the debate facilitates more thoughtful choices among available options, the findings of this thesis validate the hypothesis.

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