

# The Rhetoric of Self-Defense

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*The true is the name of whatever proves itself to be good in the way of belief.<sup>‡</sup>*

## INTRODUCTION

The rhetoric of self-defense is powerful. A claim of self-defense captures our moral and legal imagination, prompting us to consider, and sometimes reconsider, the foundational premises of the law as well as the rationales underlying our social practice of blaming and punishing. It entreats us to think about what it means to be right, fair, or justified when using violence to accomplish our ends, and how such notions might define the boundaries of the criminal law. In the course of such assessment, we may arrive at new and refined conclusions about rights and the expectations individuals have of one another, allowing for legal and political institutions to better reflect shared reasons and sensibilities.

But the rhetoric of self-defense is also fraught with uncertainty. All self-defense situations involve making predictions – about the necessity of using force,<sup>1</sup> as well as the amount of force that is appropriate to use. In cases where the claimant has killed his<sup>2</sup> alleged attacker, we may be left with only one

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‡ WILLIAM JAMES, PRAGMATISM, 37 (Bruce Kuklick, ed. 1981) (1907).

1. See Kimberly Kessler Ferzan, *Justifying Self-Defense*, 24 LAW & PHIL. 711, 715 (2005) (describing two levels of uncertainty for a self-defender: (1) whether force is truly necessary to avert harm, and (2) whether the victim-aggressor will actualize her intent). Although Ferzan conditions morality on such uncertainties, Montague argues that epistemic questions ought to be separated from moral ones in evaluating the justifiability of self-defense. PHILIP MONTAGUE, PUNISHMENT AS SOCIETAL DEFENSE 47 (1995).

2. I use the masculine pronoun throughout this piece because it is particularly appropriate to the concept of self-defense, which many have observed expresses a kind of manly ideal. See, e.g., FREDERIC S. BAUM & JOAN BAUM, LAW OF SELF-DEFENSE 1 (1970) (“[T]he defense of one’s self is a requirement of the masculine mystique.”); RICHARD MAXWELL BROWN, NO DUTY TO RETREAT 9-10 (1991) (describing how a Ohio state judge used the concept of a “true man” to reject the duty to retreat).

version of the events. In cases where both parties survive, both may make honest and conflicting claims of self-defense. Although many believe criminal law without self-defense is unthinkable,<sup>3</sup> these uncertainties raise serious problems in our efforts to define and operationalize the concept of self-defense.<sup>4</sup>

This article seeks to identify the bases upon which we can distinguish between rhetoric and substance in self-defense. Two related purposes are served by engaging in this inquiry: first, it will lead to a better understanding of the claims that criminal defendants make when they justify their violence in the language of self-defense. To the extent that the criminal law is committed to hearing the narratives that defendants tell, it ought to be sensitive to the meaning and modes of interpretation of such narratives.<sup>5</sup> Second, it will help us to construct a well-reasoned concept of self-defense that accounts for not only the legal definition of self-defense but also its moral and political function. This, of course, will enable a superior evaluation of which violent conduct society should recognize as justified.

The discussion begins in Section I with an attempt to identify a paradigm of self-defense. Identifying a paradigm is important because the legal definition of self-defense is both broad and vague, and yet manages to exclude certain claims, suggesting there is a more limited and concrete understanding of self-defense at work. The paradigm is also a useful tool for exploring the ideal of self-defense as well as its most basic principles. The self-defense paradigm I describe is couched in the narrative of a sudden, deadly attack. Within this description, I also unpack some of its underlying themes and assumptions in order to more fully reveal the sources of its rhetorical power.

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3. See, e.g., V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1710 (2003); *infra* text accompanying note 10.

4. These problems are exacerbated by the fact that the concept of self-defense is implicated in varied contexts, such as abortion, see, e.g., Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1818 (2007) (drawing parallels between “lethal” and “medical” self-defense), racial oppression, see, e.g., Lisa Cardyn, *Sexualized Racism/Gendered Violence*, 100 MICH. L. REV. 675, 679 (2002) (describing how reconstruction-era Klansmen regarded themselves as “defenders of a defeated social order”), and preemptive war, see, e.g., Sean Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 744 (2005) (suggesting that domestic criminal law’s treatment of self-defense can inform international law’s concept of national self-defense).

5. Legal scholarship has long recognized the important role of narrative and rhetoric in law. See, e.g., LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz, eds. 1996). The difference between “narrative” and “rhetoric” is sometimes hard to define. Roughly speaking, “narrative” is used in this article in the sense of “plot” – a way of organizing events to make a coherent story that ideally contains a beginning, middle, and end. “Rhetoric,” on the other hand, may involve a plot but is also meant to persuade. See Peter Brooks, *The Law as Narrative and Rhetoric*, in 44 LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14 (Peter Brooks & Paul Gewirtz, eds. 1996). Naturally, rhetoric is more suspect than narrative because of the speaker’s purpose (i.e., interest in a particular outcome), which may lead to manipulation. Thus, I highlight in this article the tension between rhetoric and substance in self-defense.

Section II exposes the uncertainties in self-defense, even within the paradigmatic case. One is the descriptive uncertainty involved in the paradigm, especially as it relates to the motive behind self-defense. What do we really mean when we describe someone as having acted “in self-defense”? Although the answer to this question may seem obvious at first, a closer examination reveals significant ambiguity about motive with considerable implications.

A second uncertainty involves the moral evaluation of the paradigmatic case. Is acting in self-defense truly the morally right thing to do, and what makes it so? I submit that the moral righteousness of self-defense is probably overstated and does not survive sustained scrutiny, especially in light of the law’s failure to explicate motive. These uncertainties naturally lead to problems in the legal understanding of self-defense, which necessarily remains vague as to the descriptive and moral bases of the concept. Thus, while Section I explains that the rhetoric of self-defense is powerful precisely because of the narrative paradigm, Section II suggests that the descriptive, moral, and legal uncertainties of that paradigm should lead us to question whether our understanding of self-defense relies too much on rhetoric rather than substance.

Section III argues for a more political, as opposed to exclusively moral, approach to self-defense that takes into account the concept itself and its role in society. Here, I attempt to contextualize self-defense within criminal law by positing that a common reason animates both under the social contract theory of the state – i.e., that the motive of self-preservation constitutes the political rationale for both self-defense and the criminal law. This Section then considers what the legal limits of self-defense should be under the social contract, ultimately concluding that the motive of self-preservation, once politicized into a principle of general harm prevention, severely restricts the incidence of defensive force by private individuals. Thus, the significance of motive cannot be exaggerated, as it articulates both the justification *and* the limitations of self-defense. Section IV ends by considering some arguments for an extension of the concept, both within the terms of the social contract and outside of them – namely, under the competing theory of monopoly of violence.

I conclude in Section IV by noting the need for further work on substantiating the rhetoric of self-defense, lest the rhetoric overrun the moral and political content that lends self-defense its fundamental place in the law.

## I. A SELF-DEFENSE PARADIGM

What does it mean to call an event a case of self-defense? Depending on one’s perspective, there are at least two answers to this question. For a defendant in a criminal trial, self-defense is a self-interested claim – a plea to the judge or jury for exoneration based on a particular, possibly false, characterization of what happened and why. For the rest of us, a case of self-

defense is also a characterization of events, but one that bears the stamp of truth and invokes the moral and legal rules that set forth the kinds of violence we may do without fear of punishment or moral opprobrium. In other words, we do not designate an event as a case of self-defense unless we believe it satisfies the requirements of self-defense.

We might assume that most of the requirements of self-defense are found in its basic legal definition, which demands a defendant have a reasonable belief that his use of “force is necessary to protect himself from imminent use of unlawful force by another person.”<sup>6</sup> When making a claim, the defendant will undoubtedly try to fashion the facts of his case to track this definition as closely as possible. His success will depend on both credibility and fit – that is, the rest of us must believe the defendant’s recounting is true to both reality and the legal definition of self-defense before we, too, designate it self-defense and withhold punishment.

But in the end, the legal definition gives only the broadest of guidance about what self-defense really is. The sets of facts that satisfy these requirements inevitably vary, and a defendant’s story may entail some stretching of the definition to fit the facts, as well as facts to definition.<sup>7</sup> It is probably inevitable that such variety of facts will generate some ambiguity in conceptualizing self-defense.<sup>8</sup>

Doubts about credibility and fit, and the ambiguities that they generate are, of course, not limited to the self-defense context but pervade every legally interesting case. Self-defense, however, suffers from a more unique and significant problem because even its basic legal definition obscures its doctrine by omitting to establish a seemingly crucial element of self-defense: the motive. The conventional definition, described above, demands that a defendant reasonably believe force is necessary to protect himself, but falls short of requiring that he *want* to protect himself. While such motive is often assumed in self-defense cases, one could easily imagine an unusual situation where a defendant will meet the requirements by possessing the requisite belief that force is necessary but no desire to save his life by his actions – if, for example, he happens to be a fatalistic aggressor, or an opportunistic killer.<sup>9</sup>

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6. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 237 (4<sup>th</sup> ed. 2006). This definition reflects the three conditions common to all justification defenses: triggering conditions, necessity, and proportionality. See PAUL ROBINSON, 1 CRIMINAL LAW DEFENSES 86-88 (1984).

7. See Daniel Markovits, *Legal Ethics from the Lawyer’s Point of View*, 15 YALE J. L. & HUM. 209, 212 (2003). Hence, the practice of Anglo-American adversarial law always has an artful quality to it.

8. See *infra* text accompanying notes 28-34.

9. See, e.g., David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFFAIRS 356, 368 (1987) (discussing the “‘law-abiding’ sociopath who provides himself with a pretext for killing”). The reasonable belief requirement appears to be aimed at those whose reason is overwhelmed by a desire to save themselves, and thereby presupposes that such a desire actually exists. See Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51, 69-71 (2008).

A third and related source of ambiguity is the link between self-defense and the category of actions we call “justified,” which, in contemporary criminal law scholarship shades the definition by locating its technical requirements within a complex, and distinctly moral, discourse – one that naturally takes into account the good or bad intentions of the individual actor. While moral discourse undoubtedly enriches our understanding of self-defense, it also clouds the cut-and-dry, elemental design of the legal definition.

Still, it seems most people are convinced that self-defense exists – that it is “difficult to the point of impossibility” to think of the criminal law without it.<sup>10</sup> Such conviction suggests not only that self-defense is fundamental to the criminal law, but also that we have a clearer sense of what it is than the legal definition conveys. This is not a novel proposition. Many legal scholars have observed that self-defense is limited in ways that are not obvious from the words that contain its requirements. Unsurprisingly, defendants and their advocates have challenged strict interpretations of self-defense, arguing over the meaning of legal terms such as “reasonableness,” “necessity,” and “imminence.”<sup>11</sup> In doing so, they have uncovered a paradigm of self-defense that assigns more specific interpretations to these words through the narrative of a “barroom brawl,” in which two men “willingly enter into a punching match; and one of them, believing he is losing, suddenly pulls out a weapon and threatens to kill the other.”<sup>12</sup> The barroom brawl, however, is a somewhat dubious self-defense case in modern law, and some scholars have opted to treat it as a case of provocation instead.<sup>13</sup> The more prevalent – and convincing – version of the self-defense narrative is the second type of situation identified by Cynthia Gillespie: “the sudden assault by a murderous stranger, such as when someone, perhaps bent on robbery, comes out of a dark alley with a gun and threatens to kill a person walking innocently down the street.”<sup>14</sup> This second scenario appears to describe the quintessential self-defense paradigm, where the innocent individual acts quickly, forcefully, and justifiably in order to save himself from death.<sup>15</sup> Self-protection from a sudden, unwarranted attack

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10. See DRESSLER, *supra* note 6, at 237 (quoting *Griffin v. Martin*, 785 F.2d 1172, 1186 n.37 (4<sup>th</sup> Cir. 1986)).

11. See Whitley R.P. Kaufman, *Self-Defense, Imminence, and the Battered Woman*, 10 NEW CRIM. L. REV. 342, 367-68, 348-49, 345-46 (2007) (on reasonableness, necessity, and imminence, respectively).

12. CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE 4* (1989).

13. See, e.g., Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 124 (1996); Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597, 606 n. 62 (2004); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L. J. 1331, 1345-46 (1997); see also Kaufman, *supra* note 11, at 359 (arguing that self-defense was never historically limited to the barroom brawl model); cf. V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1286 (2001) (observing that “when the beer bottle is about to be thrown after a barroom brawl, few doubt that a self-defense instruction is appropriate”).

14. See GILLESPIE, *supra* note 12, at 4.

15. See, e.g., Wasserman, *supra* note 9, at 365 (calling “the killing of a deliberate,

(usually by a stranger) is the central motif of the self-defense narrative and, indeed, it seems well-nigh impossible to think that using force in such a case could invite punishment.<sup>16</sup>

What does this paradigm of self-defense tell us about the nature of the defense? For one thing, it clearly contemplates a specified motive – a desire to preserve oneself. To claim that one acted in self-defense conveys a sense of purpose on the part of the self-defender beyond a description of the objective events and reasonable beliefs. The prerogative of self-preservation plays a major role in both the moral and legal interpretations of self-defense, and will be discussed in greater detail in the sections that follow. For our purposes now of sketching out a paradigmatic self-defense case, it is enough to observe that a supposed self-defense narrative without the requisite motive of self-preservation is likely to be rejected as such.

The narrative paradigm also relates the story of a person who kills when faced with his own imminent death at the hands of an assailant. In this, there is suggestion of suddenness and, most likely, the use of force where there was no peaceable alternative. In other words, the use of defensive force was probably the individual's only option for survival. Some may argue the self-defense narrative would be acceptable even if lesser force could have been used or safe retreat obtained, but the paradigm does not tend to suggest as much. For our immediate purpose of identifying a paradigmatic case, we will be on surer ground by positing a kill-or-be-killed situation.

Another noteworthy feature of the narrative is the relative moral stance of the two persons involved. The assailant's unexpected attack on the unsuspecting self-defender sets the parties in dramatic opposition – the violator of peace versus the law-abiding citizen, or, more simply, antagonist versus protagonist, villain versus hero.<sup>17</sup> In addition, this aspect of the paradigm advances three major themes in self-defense that are not altogether appealing and yet obviously enduring. First, self-defense is cast in a conspicuously masculine light. This is particularly true of the barroom brawl situation, but also relevant in the paradigm of the sudden attack. Scholars have observed that countering unjust violence with just violence evokes romanticized images of

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unprovoked aggressor" the paradigm self-defense case). Judith Thomson also calls such a case of killing "obviously permissible." Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFFAIRS 283, 283 (1991). One advantage of using a narrative paradigm, beyond its ability to clarify, is its adaptability to changing norms. See Gina Heathcote, *Article 51 Self-Defense as a Narrative: Spectators and Heroes in International Law*, 12 TEX. WESLEYAN L. REV. 131, 142 (2005).

16. Historically, however, homicide in self-defense did result in punishment as an unexcused homicide that required pardon and obligated the defendant to forfeit his chattels. See SIR FREDERICK POLLOCK & F.W. MAITLAND, 2 HISTORY OF ENGLISH LAW 479-81 (1968); Paul Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 275 (1975).

17. Judith Thomson's "obvious" self-defense case calls the assailant "Villainous Aggressor." See Thomson, *supra* note 15, at 283; cf. Ferzan, *supra* note 1, at 727 (describing the defender and the aggressor as "good guy" and "bad guy," respectively).

the cowboy or adventurer, defending himself (and perhaps also his honor) against the perils of the lawless frontier.<sup>18</sup> On the other hand, the violent ideal of self-defense does not so readily suit the conduct of women, who are generally expected to cry and fail in deadly confrontation.<sup>19</sup> Accordingly, this gendered narrative implies that defensive violence under the paradigm is not so much heated and impulsive (i.e., emotional, like women) as it is rational and even judicious.<sup>20</sup>

Second, the fact that the parties involved in self-defense are imagined as fulfilling role *types* reveals a deep-seated fear about the prevalence of violence in society. In other words, when the paradigm of self-defense assigns people to the roles of villain and hero, it indicates that villains are not anomalous and strange, but rather regular and familiar. It is not through an odd twist of fate that one suffers an attack; on the contrary, there are people out there – known and unknown – ready to victimize the innocent.<sup>21</sup> This fear may be connected to the stubborn belief that crime rates are constantly rising, despite contrary statistical evidence.<sup>22</sup> In a society where people sometimes cross the street to avoid nearing others – especially young black men<sup>23</sup> – the self-defense option

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18. See RICHARD MAXWELL BROWN, NO DUTY TO RETREAT 17, 39-86 (1991); BAUM & BAUM, *supra* note 2, at 38-40; see also Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1101 (2007) (observing that states in the South and the West allow for greater flexibility in individual self-help than the laws of the Northern states). There is an obvious tension within the self-defense paradigm between the notion of last-resort, reactive violence described earlier and the cowboy-hero who may act affirmatively for justice.

19. Cf. Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1090 (1986) (arguing that rape law's resistance requirement reflects "'boys' rules' applied to a boys' fight"); *Rusk v. State*, 43 Md. App. 476, 494 (1979) (Wilner, J. dissenting) (observing that in the face of rape, a vast majority of women make verbal – not physical – resistance); ROBBIN S. OGLE & SUSAN JACOBS, SELF-DEFENSE AND BATTERED WOMEN WHO KILL 72-74 (2002) (discussing the social and physical explanations for women's reactions in confrontation).

These assumptions are apt to change as more women engage in violent self-defense through training and use of weapons. The law has also recognized the "reasonable woman" standard to accommodate the self-defense claims of women who understandably react differently from a "reasonable man." See *State v. Wanrow*, 88 Wash.2d 221, 239-41 (1977).

20. See Pat K. Chew & Lauren K. Kelly-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643, 652 (2007) (identifying characteristics such as rationality, assertiveness, independence, intelligence, and analysis as being stereotypically masculine); cf. Victoria Nourse, *Hearts and Minds: Understanding the New Culpability*, 6 BUFF. CRIM. L. REV. 361, 362 (2002) (observing that *crime* is "impulsive, fraught with emotion, full of strange meaning and exertions of power") (emphasis added).

21. See, e.g., BAUM & BAUM, *supra* note 2, at 59 (noting that interviews with Nebraskans revealed "the unfounded or unexplained conviction that there were have-nots 'out there' who were determined to take it away from those who had..."). In addition, most people may believe the criminal law is largely ineffectual in capturing and punishing such offenders. See CYNTHIA LEE, MURDER AND THE REASONABLE MAN 153 (2003).

22. See, e.g., Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L. J. 536, 554 & n. 83 (2006) (noting that a majority of the public incorrectly believes crime rates are either increasing or holding steady even though studies show them declining throughout the 1990s).

23. See, e.g., GEORGE FLETCHER, A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 3 (1988) (describing how the black youths shot by Bernhard Goetz were seen by

will seem crucial to continued survival.

The third theme builds on the first two: the narrative invites a first-person perspective when thinking about self-defense. In other words, people are apt to think, “it could be me.” This is, in some ways, a simple function of the narrative form – stories engage, often morally and emotionally, their audience.<sup>24</sup> Moreover, it seems natural that most people would identify with the potential victim rather than the assailant, the heroic protagonist rather than the villain. This must surely be the case with law-abiding persons, and maybe for law-breaking persons as well – most people view themselves in more positive than negative light, regardless of what others may think about them.<sup>25</sup> Such tendency is likely to be amplified by the widely-held belief that we live in a dangerous society where anyone may become vulnerable to the violence of others.<sup>26</sup> Accordingly, the paradigm of self-defense can be quite personal: *I* may be the person attacked someday, and *I* may be the one who must kill to save myself. These themes help to reinforce the notion that defensive force is a reasoned response, and to explain the increasing tendency to subjectivize the legal and moral analysis of these events.<sup>27</sup>

To summarize, the paradigm of self-defense is most clearly expressed in narrative form as a realistic but imagined scene of sudden, unprovoked violence. But ultimately, it is a scene that blinds us to the unresolved uncertainties of self-defense. The next section examines these uncertainties –

the public as “stereotypical muggers who harass and hound a frail-looking middle-class ‘whitey’”); Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907, 931-32 (2006) (discussing how the association of blackness with criminality informs our interpretations of images from the aftermath of Hurricane Katrina); cf. BARRY GLASSNER, *THE CULTURE OF FEAR* 109 (1999) (noting that black men are more likely to be victims than perpetrators of crimes). Thus, in addition to the masculinity of the paradigmatic defender, we might also add whiteness to the description, especially when the attacker is imagined to be black. The fear of young black men is not limited to whites, however; Jesse Jackson famously admitted that he is relieved when he discovers that the footsteps he hears behind him belong to a white person. Paul Glastris & Jeannye Thornton, *A New Civil Rights Frontier*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 38.

24. See Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 233-34 (2002); cf. UMBERTO ECO, *SIX WALKS IN THE FICTIONAL WOODS* 9 (1994) (observing that storytellers contemplate a “model reader – a sort of ideal type whom the text not only foresees as a collaborator but also tries to create”).

25. See Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1100 (2002) (citing to Henri Tajfel’s social identity theory); see also Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration and Example*, in LAW’S VIOLENCE 175, 180 (Austin Sarat & Thomas R. Kearns, eds. 1992) (“Much privately inflicted violence in our society may be logically remedial in some factually grounded or morally coherent sense, wholly aside from whether it is legally authorized.”).

26. Cf. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination*, 107 HARV. L. REV. 1255, 1259-60 (1994) (advocating for a change in attitude toward the criminal justice system that “includes...a sympathetic identification with the actual and potential victims of crime”).

27. See George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 563 (1996).



the descriptive, the moral, and the legal – in an effort to better understand the nature of self-defense law.

## II. UNCERTAINTY IN SELF-DEFENSE

A paradigm is an archetype – the perfect model or illustration of an idea. As the previous section demonstrated, a paradigm can help expose some of the underlying assumptions and values that inform both theory and practice. It is also useful in analysis for the comparisons that can be made *between* theory and practice, to identify and assimilate the deviations that occur when we go from model to reality and vice versa. Without a doubt, recognizing a paradigm is a step toward greater clarity and understanding of the concept at hand.

But paradigms are also limited: they are mere models that cannot capture the vicissitudes of reality and experience.<sup>28</sup> The narrative paradigm of self-defense that I describe in this article is no exception. Unusual situations always complicate the analysis, as when deadly defensive force is used against a so-called “innocent,” or non-culpable, assailant, such as the proverbial psychotic aggressor<sup>29</sup> or the child waving a gun.<sup>30</sup> A significant portion of the scholarship on self-defense is devoted to such difficult cases in an effort to delineate the contours of the concept. As a result, the literature is full of brain-twisting hypotheticals involving falling fat men,<sup>31</sup> nearsighted doctors who swallow pacemakers,<sup>32</sup> runaway trolleys,<sup>33</sup> and so forth that help identify the outer reaches of self-defense.<sup>34</sup>

We should not assume, however, that the paradigmatic case must be easy by implication. To be sure, we can readily understand the narrative and picture it in the mind’s eye. But the narrative is not an ordinary story to be enjoyed in the clarity of its telling; it is *paradigmatic*, meant to enable evaluation and judgment. With respect to this feature of the narrative, there are key

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28. For example, some scholars have argued that race relations in the United States are no longer accurately captured by the black/white paradigm because the population has become more diverse. See, e.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 154-55 (2d ed. 1994) (asserting that a bipolar model of race relations is obsolete). On the foreign policy level, one often hears of how the threat of terrorism mandates a shift from the Cold-War paradigm. See, e.g., Charles V. Pena, *Bush’s National Security Strategy: A Global Security Strategy that Undermines National Security*, 6 J. L. & SOC. CHALLENGES 45, 55 (2004) (arguing that the Administration has failed to recognize a paradigm shift in the new war against terrorism).

29. See George P. Fletcher, *Proportionality and the Psychotic Aggressor*, 8 ISR. L. REV. 367, 371 (1973).

30. See JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 504 (4<sup>th</sup> ed. 2007).

31. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 34 (1974); Thomson, *supra* note 15, at 287.

32. See Philip Montague, *Self-Defense and Choosing between Lives*, 40 PHIL. STUDIES 207, 217 (1981).

33. See Thomson, *supra* note 15, at 289-90.

34. Cf. Shlomit Wallerstein, *Justifying the Right of Self-Defense*, 91 VA. L. REV. 999, 1001-02 (2005) (identifying four classes of victims in self-defense: (1) intentional aggressors, (2) innocent aggressors, (3) innocent threats, and (4) innocent bystanders).

uncertainties that remain. First, there is descriptive uncertainty – particularly in the way that motive is understood in the context of self-defense. Second, there is uncertainty as to why even properly-motivated self-defense is morally justified. Although there is a significant amount of discussion about these two issues as they arise in the difficult cases described above, they are too often assumed to be self-evident in the paradigmatic case. Once we parse the narrative to identify its inherent uncertainties, we can also more clearly see how it contributes to the uncertainty that haunts self-defense in law.

### A. Descriptive Uncertainty

The salient, *threshold* question in a case of self-defense is the defender's motive: the desire or purpose to protect his life. Without articulation of such motive by the defender, there would be no occasion to embark on a self-defense analysis at all. The defender's state of mind is one of the most widely-discussed aspects of self-defense. Some while ago, criminal law scholars were intently engaged with the problem of "putative self-defense" – the case where a person kills with an honest but reasonably mistaken belief of deadly attack.<sup>35</sup> While opinions differ as to whether a putative defender should be treated identically as the defender who correctly surmises the situation, there appears to be wide agreement that a person whose mistake is reasonable ought not to be punished.<sup>36</sup> The consensus reached on this point has led at least one theorist to conclude that self-defense is "based almost exclusively on motivation."<sup>37</sup>

But this conclusion is somewhat misleading. The literature on self-defense has been preoccupied with a defender's *beliefs* about his circumstances, not his *motive*.<sup>38</sup> Two things should be borne in mind with respect to the debate about such reasonable beliefs. First, it is largely irrelevant for our exploration of the paradigmatic case since the paradigm posits a scenario in which the reasonableness of the defender's belief cannot be in question – i.e., the defender is actually under attack. Second, we should recognize that a reasonable belief of deadly attack (or better yet, a reasonable

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35. Compare Fletcher, *supra* note 27, at 563-65 (arguing that putative self-defense is an excuse) with 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, 92-95 (1984) (arguing that putative self-defense should be treated as justified).

36. That is, a person who is justified or excused on the basis of putative self-defense would not face punishment either way.

37. Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 630 (1996). The most prominent dissenter from this view is Paul Robinson, who argues that deeds, not motives, should ground justification defenses. See Paul H. Robinson, *The Bomb Thief and the Theory of Justification Defenses*, 8 CRIM. L. FORUM 387, 407-08 (1997).

38. Just after raising the question of motive, Finkelstein continues: "[I]t says that a defendant can do whatever she believes necessary to avert an attack by an aggressor, provided that her belief meets some sort of minimal standard of rationality, considered from the standpoint of someone in the defendant's position and with the defendant's psychological profile." Finkelstein, *supra* note 37, at 630-31.

belief that it is necessary to kill in order to avert a deadly attack) does not necessarily entail a defensive motive. Motive suggests the pursuit of an end – in paradigmatic self-defense, the desire for self-preservation – while belief relates more to the occasion and also the means to that end. In other words, what a person knows or believes, correctly or not, about his circumstances is quite different from the purpose that motivates him to act in order to bend such circumstances to his will.

This distinction may seem trivial or academic at first glance. For many, it may seem a very small leap from belief-of-necessary-force to use-of-force-in-order-to-live. In the paradigmatic case especially, where a person kills in response to a deadly attack, motive is rarely put at issue. It seems sensible – almost biological – to believe that a person confronted with death kills in order to save himself.<sup>39</sup> If only for the sake of precision, it is important to recognize that there is an inference (however small) required to move from belief to motive. In addition, however, there are less trivial reasons for exploring the distinction. After all, if motive is indeed crucial to characterizing an act as self-defense, it makes sense to talk about it or to ask why it is not being talked about.

One obvious impediment to talking about motive in any definite way is that it is, ultimately, unascertainable. Our inability to access others' thoughts leaves us with imperfect methods of divining true motives for actions. One way is to simply choose to believe the purported self-defender when he claims that he killed in order to save himself. But if we are concerned with finding out the truth, it will probably be necessary to prove motive with more than biased avowals. More often than not, we will look to indirect evidence, gleaned from a person's motive from his (preferably involuntary) actions and accepting all of the risks of error and deception that such inference entails.<sup>40</sup>

Indeed, we routinely make inferences about mental states in the criminal law. For example, the law allows factfinders to assume that a person intends the natural and probable consequence of his actions.<sup>41</sup> Accordingly, this rule of ordinary intention allows us to infer that when a self-defender intentionally shoots a gun at a human being, for example, he shoots to kill. It seems we do something similar when we talk about the self-defender's belief that force is

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39. See Simons, *supra* note 9, at 69 (discussing a person's "instinctive defensive reactions").

40. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 2 (1959). Goffman suggests that the knowledge of such risks "sets the stage for a kind of information game – a potentially infinite cycle of concealment, discovery, false revelation, and rediscovery." Nonetheless, he argues that the "witness" will have an advantage over the "actor" because people are generally more skilled in detecting manipulation than in practicing it. According to Goffman, this dynamic does not necessarily lead to truth so much as agreement about the situation that he labels a "working consensus." *Id.* at 8-10. Interestingly, recent research on deception suggests that in fact we are generally bad lie detectors and that liars are often more convincing than truth-tellers. See Margaret Talbot, *Duped*, *THE NEW YORKER* 52 (July 2, 2007).

41. See, e.g., *People v. Conley*, 187 Ill. App. 3d 234, 242 (1989) (calling this an "ordinary presumption").

necessary. To say that he had a reasonable belief is basically equivalent to saying that the objective circumstances reinforce his avowals about his motive. But it should be noted that the belief required in self-defense involves a more complex inference than the relatively simple rule of ordinary intention just described. To determine a person's belief about the necessity of using force, we must look not only at the defender's own conduct, but also the victim-aggressor's conduct as well as the defender's perception and interpretation thereof. Clearly, the inference here is much less direct than in ordinary intention. By the time we get to motive, the inference becomes even more oblique – we must go from acts to intent (the defender used force intentionally), then to belief (upon reasonable belief that such force was necessary), and finally to motive (in order to save his own life). It is an inference built on other inferences, and shakier thereby. Given the indeterminate nature of motive, it is not surprising that we do not press the issue too far.

This suggests that even though motive is the threshold issue in claims of self-defense, our inability to give a more exacting account of it leaves us no choice but to accept obviously vague inferences about its existence. But I suspect there are other reasons that contribute to this somewhat unsatisfactory state of affairs. For one, a tendency to put ourselves in the defender's shoes helps to make the inference appear simple – certainly simpler than the process I have described here. Most of us probably cannot imagine killing another human being unless it is an instinctive, almost involuntary, defensive act in response to the threat of an attack.<sup>42</sup> This perspective on one's own violent capabilities, coupled with the belief that violence by others is somehow more common and uncontrolled, makes inference-making in this context much easier so long as there is some objective basis for it.

The assumption that the self-defender is motivated by survival is also supported by the value that the criminal law places on life. Life, more than any other interest, is paramount in the criminal law; the taking of life, only, merits the punishment of death.<sup>43</sup> It is not only natural but also logical, then, to believe that the defender desires that which is valued above all else.<sup>44</sup> Outside

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42. As Baum & Baum have observed, however, there is a certain degree of contradiction between the instinctive view of self-defense and the reasonable belief requirement. BAUM & BAUM, *supra* note 2, at 30. This contradiction is further exacerbated in forced choice theories of self-defense, where the defender is thought to be rationally redistributing the harm occasioned by the attacker's use of force. See, e.g. Wasserman, *supra* note 9, at 371-72 (describing how the aggressor forces a choice of lives); Wallerstein, *supra* note 34, at 1028-31 (proposing that harm be distributed to the one who caused the threat).

43. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (holding that death is "an excessive penalty for the rapist who, as such, does not take human life"). The Supreme Court recently reaffirmed this position by striking down a state law that would impose the death penalty on rapists of children. See *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

44. Cf. Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 871 (1976) ("Life is a unique kind of good because it is the necessary condition for the enjoyment of all other goods. Therefore, every person by and large tends to value his life

of the law, however, people may very well have other priorities – they have been known to risk and sacrifice life for a number of other goals such as freedom, glory, greed, and revenge.

I have said enough about the difficulty of ascertaining motive in self-defense, especially since it is counterintuitive and oxymoronic to think of a self-defender as being without the requisite desire for life. Not *every* uncertainty in self-defense can be resolved, especially when it runs up against a basic limitation in human cognitive capacity. It is enough, for now, simply to recognize such issues exist and may be material in some cases. For the sake of progress, then, let us assume the motive without dwelling any longer on how to discover it; thus, in the paradigm case, the self-defender kills because he wants to live. Here, too, however, is a different kind of uncertainty, for the meaning of “because” in this sentence is not obvious.<sup>45</sup>

Motive is commonly defined as a reason for acting,<sup>46</sup> and there is no question that a specified motive is necessary in self-defense. But the notion that one acts in defense of oneself is rather broad, raising several potential interpretations. One interpretation is to say that the self-defender has one reason and one reason only: to save himself. It is possible to imagine that when confronted with a deadly attack, a defender’s mind empties of all other thoughts save the one required for self-defense. This is the simplest, but also the narrowest, interpretation, and as such, likely suffers from a lack of realism.<sup>47</sup> A paradigm is an ideal, but to be useful it should be a realistic one.

A second interpretation is to require only that such a reason exist but need not be exclusive. In other words, the self-defender must act *with* the self-defense motive, but it may be one reason among many others that he might have at the time he kills. On the one hand, this is a more realistic view of the paradigm – it seems that people often have multiple explanations for their conduct.<sup>48</sup> I go to work, for example, because I enjoy my job, I need the

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preeminently....”).

45. Cf. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 179 (1979) (“Discriminatory purpose...implies that the decisionmaker...selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.”); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265 (1977) (holding that proof of discriminatory purpose does not require the showing of a single or even dominant motivation).

46. Merriam-Webster’s Dictionary defines “motive” as “something (as a need or desire) that causes a person to act.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 810 (11<sup>th</sup> ed. 2003).

47. Cf. Simons, *supra* note 9, at 53 (arguing that when confronted with imminent death, a person may have *no* thought in his mind whatsoever but is instead simply reacting to the threat). Simons posits that although requiring reasonable beliefs about necessity and proportionality may be unfair, valid self-defense must include, at a minimum, (1) belief of imminent threat, and (2) purpose of defending oneself. *Id.* at 56. In so doing, Simons appears to also draw the relevant distinction between beliefs and motives. See also Robinson, *supra* note 16, at 286 (rejecting the relevance of motive because of the difficulties created by mixed and ulterior motives).

48. See Simons, *supra* note 9, at 70-71; see also Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279,

money, I signed a contract, etc. A person who kills in the course of another's attack may also have various reasons besides saving his own life, such as avoidance of pain, vindication of autonomy, or simply antipathy towards the attacker. On the other hand, however, this interpretation seems too weak; if saving one's life is of relatively low priority, it does not seem correct to say that the individual acted in self-defense.<sup>49</sup>

As might be expected, the third interpretation takes the middle ground. It acknowledges the likelihood of mixed motives, but insists that preservation of life take the highest, or at least some relatively higher, priority among reasons for action. In other words, the self-defender must not only act *with* the self-defense motive, but *out of* the self-defense motive.<sup>50</sup> This appears to be a happy medium as it seems to resolve the problems in the first two interpretations of the paradigm. I suspect, however, that most people imagine the paradigmatic narrative pursuant to the first interpretation, or at least would insist that the motive of self-preservation be predominant. In any case, the question is far from settled – a predictable state of affairs where motive is assumed to be so obvious as to require no serious commentary.<sup>51</sup>

Even if we assume that this third interpretation is indeed the most reasonable one, there are other difficulties with which to contend. It is problematic enough to identify a person's motives without trying to, in addition, rank order them. This is hard not only for the outsider, but the actor himself: I cannot say whether I went to work yesterday mainly for the love of my job or for the money.<sup>52</sup> Moreover, motives not only divide into primary and secondary ones, but also immediate and ultimate ones.<sup>53</sup> Assuming we can

281 (2007) ("Motivations...are complex; decisions are often made for multiple purposes.").

49. *But cf.* Covey, *supra* note 48, at 309-10 (arguing, in the jury selection context, that strikes may be considered improperly motivated even if such improper motivation forms only a "part" of the decision-making process).

50. *See also* Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 147 (2006) (arguing for the need to clarify and differentiate among predominant, substantial, significant and contributing reasons for action); *cf.* Simons, *supra* note 9, at 71 (describing how putative self-defense may be found where the defender is "motivated in substantial part" by the need for self-protection).

51. Ironically, motive was also ignored because it was thought to be irrelevant to criminal liability. *See* Guyora Binder, *The Rhetoric of Motive and Intent*, 6 BUFF. CRIM. L. REV. 1, 1-2 (2002). Several scholars have challenged this assumption in recent years and a growing body of literature has developed to explore the role of motive in criminal law. *See, e.g., id.* at 5 ("[W]hen understood in light of its origins and development, the irrelevance of motive maxim is revealed to now stand for two principles, one lacking normative content, and the other lacking legal authority."); Hessick, *supra* note 50, at 90 (observing that motive is relevant in criminal defenses, offenses, and sentencing).

52. It may be the case, however, that when we engage in non-routine actions like killing a human being, we have a clearer sense of priority in our motivation.

53. The Supreme Court has recognized as important the distinction between immediate versus ultimate purposes in *Ferguson v. City of Charleston*, 532 U.S. 67, 82-83 (2001), holding that suspicionless prenatal drug tests are unconstitutional if the immediate purpose of the program is to further ordinary law enforcement (that is, to institute criminal charges against mothers), even

identify them as such, which are relevant to the self-defense paradigm?

My (primary and immediate) purpose in talking about motive here is to demonstrate how the issue is far from self-evident despite the apparent clarity and simplicity of the narrative paradigm. Once we try to unpack what the narrative means as to the defender's reasons for killing, several unresolved, and some unresolvable, problems emerge. As the following sections will demonstrate, this descriptive uncertainty in the paradigm exacerbates the moral, and ultimately, legal uncertainty in the concept of self-defense.

### B. Moral Uncertainty

Another aspect of the paradigm that is less clear than one might expect is its moral meaning. Most people tend to assume that the paradigmatic self-defender is morally justified.<sup>54</sup> This means more than that a self-defender will not be punished, although that is, of course, a significant consequence of the defense. It also means that the self-defender is not merely excused for his actions. When a killing is justified, it is said that society approves of the killing, or at the very least, that society deems it to be morally permissible.<sup>55</sup>

Although there is a fair amount of controversy over whether particular instances of self-defense ought to be treated as justified,<sup>56</sup> there seems to be little doubt that the paradigmatic case discussed herein squarely falls within that category.<sup>57</sup> Indeed, I suspect that most people would not only permit but endorse the paradigmatic self-defender's actions as a moral good. As David Wasserman has observed, "[s]elf-defense provides a particularly strong and unapologetic defense to killing."<sup>58</sup> This makes sense especially if we take into

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if the ultimate purpose is to protect the health of the mother and her unborn child.

54. The two dissenters from this view that I know of are Claire Finkelstein and Cathryn Rosen. See generally Finkelstein, *supra* note 37, at 623; Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 25-26 (1986). Both argue that self-defense is a species of excuse.

55. See, e.g., SUZANNE UNIAKKE, PERMISSIBLE KILLING 13 (1994). Claire Finkelstein argues that the concept of justification only makes sense in the case of moral approval, while Anthony Duff suggests that moral permissibility should suffice. See Finkelstein, *supra* note 37, at 624; R.A. Duff, *Rethinking Justifications*, 39 TULSA L. REV. 829, 831 (2004).

The dividing line between justification and excuse has also been described as marked by the difference between objective versus subjective claims. So, for example, self-defense as justification would suggest that it is applicable universally, based on the objective circumstances that gave rise to the occasion to kill. In other words, it is the *act* rather than the person that is justified. On the other hand, an excuse, like the insanity defense, is applicable only to those who are judged to be legally insane and is based on the special mental status of the defendant who is making the claim. Here, it is the *person* who is excused, not the act. The claim I make for motive in this article does not transform self-defense into an excuse. Although I place emphasis on motive, it is not the only relevant element in self-defense but rather an important, threshold question that helps to determine the objective requirements that must be satisfied. See *infra* Section III.B.

56. See *infra* text accompanying notes 90-96, 167-71.

57. See UNIAKKE, *supra* note 55, at 1; Kaufman, *supra* note 11, at 353.

58. Wasserman, *supra* note 9, at 356. Moreover, self-defense is widely considered to be the

account some of the themes of paradigmatic self-defense mentioned earlier – i.e., the tendency to lionize the defender and demonize the attacker, the belief that the social condition is one of violent disorder, and the ease with which we step into the shoes of the defender.

Let us examine, then, the rationales behind the notion that self-defense is justified as a moral good.<sup>59</sup> Certainly, it appears that self-defense is derived from the positive moral value we place on life, or, more abstractly and universally, the right to life. But in the paradigmatic case, the defense of life entails the taking of it, and it follows from this conflict that the latter act must be justified. It is clear that significant moral work is being done by self-defense if it can transform an intentional taking of human life into a commendable act, for surely such killing is usually morally problematic if not outright wrong. Criminal law literature conventionally explains the moral justification behind self-defense in two different ways: (1) by weighing harm done against harm averted (“harm versus harm”), and (2) by weighing harm done against the reason for doing it (“harm versus reason”).<sup>60</sup>

The first approach to justification compares potential harms – if the harm done is less than the harm averted, then the action is good, since there is overall less harm in the world than there would have been had no action been taken. There is, in other words, an objective net gain because the greater, otherwise inevitable, harm is avoided. The harm versus harm calculation has the advantage of clarity, at least initially. If, for example, I save your life by pulling you out of the way of an oncoming car, but break your arm in the process, I am justified in doing what I did because life is clearly more valuable than a broken arm. The same is probably true if I were trying to save *my* life by breaking *your* arm, for this still posits an asymmetry in our respective interests. Many of the harms people do will have already been contemplated and ranked by the criminal law to provide more or less straightforward calculations of harm.<sup>61</sup>

The harm versus harm approach is not so simple when applied to the self-

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paradigm of all justification defenses. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 328 (1996); UNIAKKE, *supra* note 55, at 1-2; *but see* Robinson, *supra* note 16, at 284 (asserting that self-defense is “the weakest case for justification”); Larry Alexander, *Lesser Evils: A Closer Look at the Paradigmatic Justification*, 24 LAW & PHIL. 611, 611-12 (2005) (asserting that choice of evils is the paradigmatic justification defense).

59. The arguments I present against this position apply equally to the weaker position that self-defense is morally permissible.

60. See Ferzan, *supra* note 1, at 711-13. These two ways of justifying self-defense can be divided along different axes, but more or less replicate the “harms” and “reasons” rationales I describe here. See e.g., Wallerstein, *supra* note 34, at 999-1000 (arguing that there are “three main lines of argument” involving lesser harmful results, forced choice, and rights).

61. As discussed earlier, other values, such as freedom and dignity, are not as clearly ordered in the criminal law. See *supra* text accompanying notes 43-44. Thus, killing another in order to gain freedom from confinement is more difficult to measure and compare.



defense paradigm; in such a case, the life of the defender is saved at the cost of the life of the attacker.<sup>62</sup> It appears that no net gain is achieved unless there is some other way to differentiate the lives at stake.<sup>63</sup> One obvious way to accomplish this is to devalue the life of the attacker – after all, the attacker is the villain in the paradigm and if one life is to be held less valuable, it seems sensible to choose the attacker's. There is, however, understandable reluctance to engage in this type of evaluation because taking this road leads to rather thorny questions about a person's moral worth.<sup>64</sup> For one thing, we would have to determine whether we can fairly judge a person's worth based on his fault for a single (and possibly singular) event in the course of his life.<sup>65</sup> And if the attacker's life can be devalued in this way, is this devaluation permanent or situational? If the latter is correct, what aspects of the situation would justify such a radical change in the fundamental status of the individual from a position of having a right to life, then no right, then back again?<sup>66</sup> Does this kind of analysis require an inquiry into the worth of the defender's life, too?<sup>67</sup> How, for example, would the fact that the defender is an encyclopedia salesman and the attacker a microbiologist studying cancer affect the relative values of these lives? What if the defender was once an attacker himself?<sup>68</sup>

Requiring such considerations forces the harm versus harm approach to

62. If we tweak the paradigm case to include more than one assailant, the cost-benefit analysis clearly comes out the other way. It seems to be no less true, however, that the defender in this case is justified. Cf. Wasserman, *supra* note 9, at 362 & n.15 (addressing the multiple-aggressors scenario).

63. The problem is the same whether one thinks of self-defense as justified because it is morally good, or merely morally permissible. That is, there is no reason to think that a one-for-one substitution of life is permissible any more than that it is good.

64. See Wallerstein, *supra* note 34, at 1003; cf. Kaufman, *supra* note 11, at 353 (observing that even preemptive force is morally justified because the aggressor who is planning but not yet engaged in the attack is already acting unjustly).

65. See Thomson, *supra* note 15, at 285 (suggesting that this is not a fair determination of moral worth).

66. See George Fletcher, *The Right to Life*, 13 GEORGIA L. REV. 1371, 1380-83 (1979). According to Judith Thomson, the right not to be killed is assumed to be a natural right that a human being always has. Consequently, "it is not possible that a human being possesses it at one time and not another, so long as he remains a human being throughout." JUDITH JARVIS THOMSON, SELF-DEFENSE AND RIGHTS 14 (1977).

Self-defense law generally holds that an aggressor may be killed justifiably until he reasonably communicates an end or withdrawal of aggression. See DRESSLER, *supra* note 6, at 242. It does this, however, without devaluing the attacker's life, focusing instead on the situational aspect of self-defense. That is to say, once the attacker effectively withdraws, the defender is no longer defending and therefore, there can be no question of self-defense. A more elemental interpretation of this rule would be to decide that after withdrawal, there is no longer a threat of imminent attack. See also *id.* at 240-42 (describing withdrawal as a way to "remove" one's status as the aggressor in the fray).

67. See Wasserman, *supra* note 9, at 368.

68. The answers to these questions may have implications for other areas of the criminal law besides self-defense. They would suggest, for example, that the killing of a drug dealer is less morally problematic than the killing of a schoolteacher, leading to a new kind of calibration within the law of murder and manslaughter.

lose much of the clarity that is its principal virtue. More significantly, some of the questions raised by this approach suggest that the paradigm may be insufficient to enable moral judgment because it fails to include the background information of the persons involved. If that is the case, we would have to conclude that the narrative case I have been using to frame this discussion is not much of a paradigm at all. Something is awry, either in the moral-worth analysis or in the paradigm itself. For my part, I think the fault lies with the analysis of moral worth. I think most people would agree that the paradigmatic narrative does convey a sufficiently clear case of justified self-defense – what has been called an “obvious” case<sup>69</sup> – and that most other details that inevitably emerge in true-life cases do not seriously impede our judgment. Moreover, there appears to be normative agreement that even if it is possible to fully account for such considerations, it is wrong to do so because all lives ought to be treated as equal and every human being possesses a right to life. The notion that an attacker is somehow less worthy, or by his actions forfeits his right, is therefore widely rejected within the literature.<sup>70</sup>

There is another variation of the harm versus harm argument to consider. Instead of devaluing the attacker’s life, we may assign greater harm to the defender’s death. Such a move need not involve a different assessment of the

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69. Shirley Sagawa, Note, *A Hard Case for Feminists: People v. Goetz*, 10 HARV. WOMEN’S L.J. 253, 273 (1987) (discussing a similar, male-centered paradigm of self-defense); see Thomson, *supra* note 15, at 283; see also Re’em Segev, *Fairness, Responsibility and Self-Defense*, 45 SANTA CLARA L. REV. 383, 387 (2005) (identifying the paradigm self-defense case as one in which “one person unjustifiably and culpably attacks another who in no way contributed to the conflict”).

70. See, e.g., DRESSLER, *supra* note 6, at 224 (noting that forfeiture “runs counter to the ‘good and simple moral principle that human life is sacred’” (quoting WORKING PARTY, BOARD FOR SOCIAL RESPONSIBILITY, CHURCH OF ENGLAND, ON DYING WELL – AN ANGLICAN CONTRIBUTION TO THE DEBATE ON EUTHANASIA 24 (1975))); Wasserman, *supra* note 9, at 358–59 (observing that equality of all human lives is “a fundamental principle of Anglo-American law”); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1753 (2006) (“The neutrality and universality of the law is weakened if a person’s general entitlement to state protection against violence and crime turns on their own good or bad behavior.”).

Sanford Kadish avoids the equality of life problem in self-defense by asserting a right to resistance principle. According to this approach, all persons have a right to resist aggression that the state may not deny. In a self-defense scenario, then, the defender asserts this right to resist while the aggressor has no such right because the defender is resisting, not aggressing. See Kadish, *supra* note 44, at 883–85. This account, to me, seems unsatisfactory for a couple of reasons. First, it is not clear where the right to resist aggression comes from if not ultimately from a basic right to life that the state is obligated to protect. In other words, asserting a personal right to protect something presupposes importantly that that something is valuable. Second, it is only by defining the defender’s actions as “not aggression” that this argument works. It seems odd, however, to say that resistance by deadly force is not aggressive, especially since there are forms of resistance, like verbal resistance, that are more clearly not aggressive in the same way. I think Jeremy Waldron has a better answer to why the aggressor may not resist: for the aggressor, ending his aggression is an alternative way to save himself. See Jeremy Waldron, *Self-Defense: Agent-Neutral and Agent-Relative Accounts*, 88 CAL. L. REV. 711, 725 (2000). This view is, of course, consistent with the part of self-defense doctrine that revives an aggressor’s self-defense claim upon his communication of withdrawal from aggression.

two lives at issue, but recognition that other harms attend the death of the defender. It is, for example, frequently acknowledged that criminal violence has a socially pernicious effect because it increases insecurity among the citizenry.<sup>71</sup> The attack that takes place in the paradigm case is an instance of such violence and may well be worth preventing even at the cost of human life. If we take into account the broader, social harm in addition to the personal, physical harm that is threatened by the attacker, the self-defender presumably does create a net gain by taking the attacker's life.

This approach appears to be a promising explanation of the moral justifiability of self-defense. Whatever else may be the case, it would seem that morality does and should say something about the harms people cause. Indeed, morality is often broadly defined as a guide to behavior, and is especially concerned with conduct that harms others directly or indirectly.<sup>72</sup> From this, we can derive that it is morally right to minimize any and all kinds of harm as much as possible. But there are two unsettling aspects to this justification for self-defense. First, taking social harm into account would destabilize the bedrock principle of proportionality in self-defense law,<sup>73</sup> always placing a thumb on the scale on the side of would-be defenders. Perhaps this has been occurring all along, but it certainly has not been acknowledged in any forthright way; the weighing of harms has generally been restricted to the more immediate and physical kind done or threatened by the parties in the case.<sup>74</sup>

Second, if all that is required to justify one's actions is to point out the lesser harm one has caused, what of motive? Paul Robinson, the most prominent advocate of the harm versus harm approach – or as he calls it, the “deeds theory of justification” – argues that reasons do not matter so long as the defender's act results in lesser harm.<sup>75</sup> This would mean that if *X* intentionally killed *Y*, not realizing that at that moment *Y* was about to attack *X*, *X* would still be justified.<sup>76</sup> Perhaps this is right, since *X* only did what he would have been able to do had he been in possession of better knowledge of his circumstance. But if *X* is justified under the deeds theory, we can hardly call what *X* did a case

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71. See Wallerstein, *supra* note 34, at 1004-05 (raising and rejecting this argument for self-defense). Although I mention here only the harm of social destabilization, other considerations may be relevant as well. See, e.g., Wasserman, *supra* note 9, at 360 (discussing Glanville Williams' argument that self-defense acts as a deterrent to aggression).

72. See Stanford Encyclopedia of Philosophy (“morality”), <http://plato.stanford.edu/entries/morality-definition/> (last visited June 19, 2007); Oberdiek, *infra* note 139, at 140 (“It is a basic feature of morality that it be capable of guiding human action.”).

73. See *infra* note 152 and accompanying text.

74. In addition, our intuitions about the rightness of self-defense probably do not depend on the presence or absence of social harm. See Wallerstein, *supra* note 34, at 1004 (explaining how self-defense would be allowed even if it occurred in secret); cf. Wasserman, *supra* note 9, at 361 (arguing that self-defense does not depend on marginal social gain or loss).

75. See Robinson, *supra* note 16, at 274.

76. See *id.* at 289 (“One's mental state simply cannot convert otherwise harmless conduct into a crime.”). Ferzan uses this example to criticize Robinson's “objectivist” reasoning. See Ferzan, *supra* note 1, at 732, 741-44.

of justified *self-defense*. A different vocabulary, and a different paradigm, would describe more accurately and coherently *X*'s conduct. Moreover, the deeds theory would also have to explain how *X* avoids greater harm. If the claim of greater harm relies on the incidence of social harm, the irrelevance of motive creates a problem: for if both *X* and *Y* are out to kill one another without knowing that the other is similarly engaged, who is to say that only one of them threatens the requisite social harm? In fact, the two are identically situated and it is utterly random that *X* managed to kill *Y* before *Y* could kill *X*. Put another way, had *Y* succeeded in killing *X* instead, *Y* should be able to also avail himself of a justification defense since *X* was, objectively speaking, engaged in an attack when killed. The conclusion that either (or both, if both survive) could claim justified self-defense upon the use of admittedly *aggressive* force is strange indeed.

As it turns out, the harm versus harm argument is less popular than the harm versus reason approach to self-defense.<sup>77</sup> Harm versus reason acknowledges the harm of self-defense (i.e., the loss of human life) and simultaneously looks to the defender's reasons for using force in order to come to a moral judgment. Unlike the harm versus harm approach, harm versus reason emphasizes the singularity of the self-defense claim – the motive of self-defense differentiates this defense from all other justification defenses and, moreover, plays an important part in making the case for the justifiability of the defender's conduct.<sup>78</sup> In that sense, harm versus reason more closely tracks the narrative paradigm that is so central to our prevailing conception of justified self-defense. On the other hand, comparing harms against reasons is a little like comparing apples against oranges: there seems to be no reliable or accurate way to measure the badness of harms against the goodness of reasons except at the extremes.

Moreover, we ought to be careful about making too much of the morality of reasons. Acting in order to save oneself may appear far superior to acting for other reasons such as hatred or jealousy, but this is clear only when the conduct is assumed to be a given. In other words, it is relatively better to kill in self-defense than to kill out of hatred.<sup>79</sup> This, however, does not answer

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77. See FLETCHER, *supra* note 23, at 25 ("The consensus among Western legal systems is that in order to invoke a sound claim of self-defense, the defender must know about the attack and act with the *intention* of repelling it."). Cf. UNIACKE, *supra* note 55, at 20-21 (observing that while *moral* justification requires the right motive and belief, *legal* justification need not require those things).

78. To my knowledge, no theorist of the harm versus reason school of thought asserts that reasons *alone* are enough to justify self-defensive taking of life. However, their rejection of the harm versus harm position as morally unjustified suggests that reasons enjoy special moral status.

79. To be sure, this situation establishes moral asymmetry between the defender and the aggressor who acts out of hatred. But mere asymmetry is not enough. To see this point, consider again *X* and *Y* who are out to kill each other but unaware of the other's plans. *X* has been paid to kill *Y* and is doing so in order to pay the medical expenses for his sick child. *Y* is also being paid to kill *X*, but *Y* is doing it in order to buy a car. I think most people would acknowledge that there

whether killing in order to save oneself is independently, morally good.<sup>80</sup> After all, in an act of deadly self-defense the defender chooses his life over that of another. Hatred and jealousy may seem inherently bad, but self-defense cannot be said to be inherently good; inherently good motives are generally reasons promoting the well-being of others, not the well-being of oneself.<sup>81</sup> No one truly deserves credit for looking out for number one.<sup>82</sup>

To be sure, what I have described may sound more like self-preference than self-defense. It is possible to view self-defense as a subset of self-preference – a *reactive* self-preference, one might say.<sup>83</sup> Our intuitions tell us there is a difference between, say, a starving, shipwrecked man killing and eating the sick cabin boy to survive,<sup>84</sup> and the paradigmatic defender who kills a villainous assailant. We are much less confident that the starving man is justified in choosing himself over another; when discussing such a case, my students often argue that the boy is innocent and ought not be killed. But it is not clear whether this distinction makes a moral difference to our evaluation of the *defender's* actions, even as it speaks to the assailant's fault. There is no reason to think that another person's fault has any moral effect, let alone a morally *redemptive* effect, on the defender; in this regard, we might recall the well-worn maxim that two wrongs don't make a right. It appears that the justification of self-defense must derive independently from the goodness of the defender's reasons for his actions, but how it is to be deduced remains uncertain.

Even assuming that the motive is a noble one, there is still further thinking to be done on the moral consequences of reasons. People do a number of harmful things for the "right" reasons, and we have varied responses to them. Sometimes when the harm done is small, the right reason can persuade us to withhold blame or even confer praise. If, for example, I throw away my

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is moral asymmetry that distinguishes *X* and *Y*, but their relative moral positions would not prompt us to say that *X* is justified in killing *Y*, let alone that *X* kills *Y* in self-defense.

80. Indeed, these "good" and "bad" reasons for killing in some cases may be coextensive: a person is most likely to harbor hatred and jealousy against those who threaten his rights or interests.

81. See KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 5, 27 (1987).

82. See Simons, *supra* note 9, at 55-56 (arguing that self-defense is justified by exercise of reasonable self control – that is, that the actor responded to a deadly threat with "appropriate restraint and sound judgment"). But see John Locke, *TWO TREATISES OF GOVERNMENT* 271 (Peter Laslett, ed. 1988) (1690) (arguing that we have an obligation to preserve life because we belong, in the end, to God).

83. See Wasserman, *supra* note 9, at 357 (arguing that self-defense has "peculiar force as justification" because the defender faced a forced choice); Wallerstein, *supra* note 35, at 1027-32 (extending forced choice theory to a "forced consequences" theory so as to justify the use of defensive force against innocent threats).

84. These facts are adapted from *The Queen v. Dudley & Stephens*, 14 Q.B.D. 273 (1884), in which three men, lost at sea for over 25 days with no food or water and no prospect of rescue, kill and eat the cabin boy who had become sick from drinking sea water. The three were convicted of murder despite their necessity, but were pardoned by the queen.

friend's cigarettes without permission because smoking is bad for her health, I have done harm by depriving her of her property and yet may be praised for my concern over her welfare. But at other times, especially when the harm done is significant, good reasons may not be enough to redeem the action. Torture of prisoners is widely condemned, even when committed in order to gain valuable information about past or future crimes.<sup>85</sup> Thus, a good motive may sometimes be redeeming, but how it is that it can redeem the intentional killing of another human being – no doubt a very significant harm<sup>86</sup> – is hard to explain.<sup>87</sup>

### C. Legal Uncertainty

It is hardly surprising to find, after all, that there is a great degree of ambiguity in the law of self-defense that flows from the descriptive and moral uncertainties discussed thus far. The law, as mentioned earlier, requires a defendant to have a reasonable belief that use of force is necessary to fend off an imminent attack. This formulation of self-defense appears to dodge the difficulties of motive, hinging the defense on reasonable belief instead. Indeed, some have gone even further from subjectivity to hold that if the grounds for reasonable belief exist, it is “immaterial” that *actual* belief exists.<sup>88</sup> Although the focus on reasonable belief, subjectively held or merely objectively grounded, simplifies the articulation and operation of self-defense law, it surely fails to capture the underlying spirit of self-defense. A defendant who claims to have harbored a reasonable belief of necessity without any desire to preserve himself should not be considered a self-defender, but rather an opportunistic killer; he asserts a limited right to kill, not a right to life.<sup>89</sup>

Avoiding the issue of motive creates serious problems for the law, especially as it creates space for other, possibly inappropriate, motives and

85. Cf. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 141 (2002) (asserting that a high level of oversight and accountability should be established for the likely use of torture in “ticking bomb” scenarios). Although many have characterized Dershowitz's position as one of advocating torture, he has repeatedly expressed his normative opposition to its use. See Alan M. Dershowitz, *Torture without Visibility and Accountability is Worse than with It*, 6 U. PA. J. CONST. L. 326, 326 (2003).

86. This is, of course, assuming that a reason-focused conception of self-defense does not depend also on the net harm argument in harm versus harm. If it were otherwise, then killing in self-defense would clearly be laudable or permissible since there would be no net harm and a good reason to boot. However, my sense is that those who espouse the harm versus reason approach assume there to be meaningful harm resulting from the death of the assailant.

87. The problem is no less acute when trying to determine whether a reason is good enough to *permit* the doing of great, intentional harm.

88. See BAUM & BAUM, *supra* note 2, at 36 (citing approvingly to *Lovett v. State*, 30 Fla. 142 (1892)). This view may be influenced by a strict, all-or-nothing interpretation of the notion that justifications are grounded in objective circumstances while excuses are grounded in subjective beliefs and reasons. See *supra* note 55.

89. Cf. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 185 (1799) (describing how the self-defender “turns upon his assailant...not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood”).

values to insinuate themselves into our understanding of self-defense. Consider, along these lines, a famously controversial self-defense case of uncertain motive: the subway shootings by Bernhard Goetz. In the *Goetz* case, the defendant was exonerated of a variety of assault and attempted murder charges relating to the shooting of four alleged muggers on a New York subway car.<sup>90</sup> In many ways, the *Goetz* case mimics the self-defense paradigm. Goetz was confronted in a subway car by strangers carrying screwdrivers: four young men with an apparent illegal purpose and the means to do serious physical harm.<sup>91</sup> Goetz himself was a law-abiding citizen (more or less<sup>92</sup>) and something of a gunslinger who had armed himself against the dangers of urban life. It is a life acknowledged to be fraught with violence and crime, and the public identified with and celebrated him. George Fletcher described the early attitude toward Goetz: “A common man had emerged from the shadows of fear. He shot back when others only fantasize their responses to shakedowns on the New York subways.”<sup>93</sup>

In one significant way, however, Goetz may be outside the paradigm: there is plenty of evidence to question his motive. According to Fletcher, Goetz’s own media statements began to stir doubts about his heroism.<sup>94</sup> It was also revealed that Goetz was a racist who wanted to “clean up the ‘spics and niggers’ on 14<sup>th</sup> street.”<sup>95</sup> Perhaps the most damaging of all was Goetz’s actions and statements during the confrontation itself – after shooting each of the four young men, he approached one of them and fired again, saying, “You seem to be [doing] all right; here’s another.”<sup>96</sup> Such details surrounding the case surely conflict with the paradigm’s noble self-defender, blurring the simple picture of a man who kills in order to avoid imminent death at the hands of four armed muggers.

Goetz’s exoneration has been extremely controversial within legal scholarship, especially because the verdict reveals an unacceptable tolerance for racism within the public and within the law of self-defense. For many legal scholars, the central issue is the reasonableness of Goetz’s belief in the necessity of using force, in light of the fact that he is a racist and racists are

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90. 68 N.Y.2d 96, 99 (1986).

91. There is no evidence to suggest that Goetz actually knew about the screwdrivers and so the fact may be irrelevant to determine whether he had a “reasonable belief” about imminent deadly attack. See FLETCHER, *supra* note 23, at 26.

92. Goetz was eventually convicted of one count of illegal gun-possession. See *id.* at 198.

93. *Id.* at 2; see also Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 423 (1988) (“To his public, Mr. Goetz was cool and calculating, showing the courage that millions of others would wish for themselves.”).

94. Goetz advocated for the distribution of 25,000 guns to arm citizens. On another occasion, his lawyer admitted that Goetz felt no remorse about the events in the subway. *Id.* at 5.

95. *Id.*

96. *Id.* At this point in the shooting, it is also clear that Goetz did not have a reasonable belief in the necessity of force and could not plausibly fall within the parameters of self-defense.

liable to jump to conclusions about the threat posed by young black men.<sup>97</sup> Indeed, the outcome of *Goetz* seemed to signal to these scholars that lethal overreaction to the mere presence or approach of a young black man could be condoned because the pervasiveness of the public fear of black men might make such overreaction appear quite rational, especially in light of statistics about black criminality.<sup>98</sup> Accordingly, they advocate a normative understanding of reasonableness that embraces a more qualitative as opposed to quantitative definition.

But it is at least debatable whether Goetz's assessment of his objective situation was truly an overreaction; he was, after all, outnumbered by insistent, (to him, possibly) armed young men in a relatively confined space, suggesting that there were some objective grounds for concluding that the four youths posed a threat of serious harm, and even death.<sup>99</sup> Even under a strongly normative approach to reasonableness, there is room for interpretation of the events. The troublesome aspect of the case has less to do with the reasonableness of his beliefs and more to do with what *else* Goetz might have been thinking at the time – why he was carrying a gun and why he chose to sit near these four men when everyone else in the subway car was trying to avoid them.<sup>100</sup> Evidence about his racist views and the circumstances of the fifth shot does not necessarily alter the reasonableness of his initial belief that danger was imminent. Nor does it preclude a defensive motive – the law makes self-defense available to even gun-toting, racist vigilantes so long as the situation calls for it. But it does make us wonder about (1) how Goetz's ulterior motives cast the entire episode in a different light, and (2) whether it is different enough to be described as a crime rather than a case of self-defense. Goetz admitted, after all, that beyond saving himself, he became a "vicious animal" intent on killing the young men.<sup>101</sup>

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97. See, e.g., CYNTHIA LEE, MURDER AND THE REASONABLE MAN 243-45 (2003) (arguing that the law's conception of a reasonable person ought to be a normative one that rejects the reasonableness of widespread racism); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 805-15 (1994) (explaining that allowing racial considerations to affect reasonableness would violate equal protection). Although I argue that there were objective circumstances in the *Goetz* case that supports his self-defense claim, I do not mean to downplay the racial dimensions of the case. It may very well be correct that had a black man shot four white men on the subway, the jury might not have acquitted. See *id.* at 154.

98. See Armour, *supra* note 97, at 787-805 (describing three race-based claims about the reasonableness of white-on-black "self-defense").

99. A rather similar scene, with a very different ending, is portrayed in the award-winning film, *Tsotsi* (Miramax 2005), where four young men mug an older man in a train car and stab him with a sharp tool, killing him. Cynthia Lee argues, however, that Goetz might have waited until one of the youths actually started to attack. LEE, *supra* note 21, at 150. Whether a would-be defender should have to bear the risk of waiting for the attack is a matter of some debate. See, e.g., Ferzan, *supra* note 1, at 719.

100. See FLETCHER, *supra* note 23, at 1 (stating that there were 15-20 other passengers that had moved to the other end of the car by the time Goetz entered.)

101. FLETCHER, *supra* note 23, at 17.



This uncertainty is exacerbated by a moral analysis of Goetz's actions. There is no question that if Goetz was motivated by a racist desire to kill young black men, most of us would condemn his actions as a hate crime. Racism is an obviously immoral reason to kill – no conduct sparked by it would be condoned as morally justified.<sup>102</sup> But Goetz was also seen as a vigilante, and for that, he was celebrated by a large segment of the public. With respect to values like vigilantism, there appears to be significant moral ambivalence.<sup>103</sup> Our society is fascinated by, if not approving of, vigilantes who seek private punishment – real-life people like Bernhard Goetz and fictional characters like Paul Kersey in *Death Wish*, to whom Goetz was compared.<sup>104</sup> How do we interpret this public reaction – as a moral judgment about what is “right”<sup>105</sup> or an amoral outburst of fear and frustration?<sup>106</sup>

It is difficult to answer this question because a typical, though not definitive, source for interpreting what is “right” is often the opinions or beliefs of the collective, based on the social and cultural conditions and norms of the society that seeks to define the term. Some values, like racism, are clearly immoral even if widely held.<sup>107</sup> But vigilantism is not like racism – its immorality is not so obvious. There is a part of us that says the victims of vigilantism probably deserved some, if not all, of what they got; after all, the principle of “just deserts” constitutes a fundamental moral justification for

102. George Fletcher writes that public opinion turned on Goetz once it was discovered that he had made overtly racist remarks to his neighbor. See FLETCHER, *supra* note 23, at 5. According to Jody Armour, however, even racism may appear reasonable to a person who relies on the typicality of black criminality and violence to make his case. See Armour, *supra* note 97, at 790-91.

103. See, e.g., FLETCHER, *supra* note 23, at 27-28 (observing that self-defense can be theorized as “a form of just punishment”); see also James Q. Whitman, *Between Self-Defense and Vengeance*, 39 TULSA L. REV. 901, 914 (2004) (explaining that vengeance is often associated with justice and personal honor, and viewed by some as a right); Kaufman, *supra* note 11, at 366 (describing how some feminists argue that battered women should be permitted to exact vigilante justice); Weisberg, *supra* note 25, at 1885-86 (noting that “the modal killing in our legal culture is between nonstrangers; as a matter of psychological interpretation, it is often a form of moral revenge, an impassioned attempt to perform a sacrifice to embody one form or another of the Good”).

104. See FLETCHER, *supra* note 23, at 2. Fictional hero-vigilantes have emerged once again in movie theatres with the release of *Death Sentence* (2007), starring Kevin Bacon as a father who hunts down and kills his son's murderer (tagline: “Protect What's Yours”), and *The Brave One* (2007), with Jodie Foster as a victimized woman who becomes a vigilante (tagline: “How many wrongs to make it right?”).

105. More than a few people have observed that private justice of this kind is still justice, even if such actions are not “justifiable.” See Fletcher, *supra* note 27, at 556 (citing the distinction made by Joel Feinberg). The thin line between the just and the justifiable, in that case, may not be a moral one. Indeed, the comparison may not be fruitful for purposes of understanding self-defense, which may be accepted only as both just *and* justifiable.

106. See LEE, *supra* note 21, at 153-54 (discussing how crime regularly went unpunished in the New York subways when the Goetz shooting occurred).

107. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (discussing the prevalence of unconscious racism in American society).

publicly administered punishment under the criminal law.<sup>108</sup> If we take public views about this issue seriously, it may turn out that the popular imagination accepts self-defense as one form of morally legitimate private justice, and Goetz's brand of vigilantism as another.<sup>109</sup> In the absence of a "vigilante's defense," however, such moral intuitions are likely to push the boundaries of self-defense in cases where defendants pursue goals other than self-preservation.<sup>110</sup> In other words, Goetz's actions on the subway may define him at once as both vigilante and self-defender.

There are two features of the law of self-defense that allow this to occur. As a general matter, the emphasis (by both jurists and laypeople) on the role of morality in criminal law opens the door to a wide array of values that may be pursued through that law. This is particularly true for justification defenses, like self-defense, that are thought to be justified precisely because the actor's conduct is one that is socially and morally approved, notwithstanding the literal injunctions of the law of offenses. In the absence of a clearly defined motive requirement, then, self-defense law may absorb other motives conceived to be righteous so long as there is a plausible case to be made for the presence of a defensive motive as well.

This is not necessarily bad. If we are committed to the idea that good reasons can sometimes justify harmful acts, as self-defense law seems to suggest, then there is no reason to think that the range of justified killings is fixed. It is beyond dispute that we ought not punish anyone for doing the right thing, even if defining what is "right" is often difficult and changing. But self-defense law not only omits an articulation of what the right reasons are for taking life; it even fails to set a standard for the types of reasons that qualify. Since self-preservation – the only reason that is needed in self-defense – is itself not clearly good, the example it sets is morally weak and amorphous, allowing for values like vigilantism and punishment to be subsumed in self-defense law.<sup>111</sup> The outcome of the *Goetz* case, then, was foreseeable – not because the law of self-defense tolerates racism but because it tolerates most everything else.

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108. Cf. LEE, *supra* note 97, at 229 (discussing victim's desert in the context of the provocation defense).

109. As James Whitman observes, the law has failed "to grapple directly and unembarrassedly with the logic of vengeance that drives much of human behavior." See Whitman, *supra* note 103, at 902; cf. Robert J. Beck & Anthony Clark Arend, "Don't Tread on Us": *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L. J. 153, 205 & n.297 (1994) (examining the argument that the distinction between self-defense and reprisal should be abandoned).

110. For a more detailed discussion of this phenomenon, see *infra* Section III.C.

111. Indeed, I suspect that moral arguments in favor of vigilantism (at least with respect to red-handed villains) may turn out to be superior to those in favor of self-defense since the former asserts a kind of moral reckoning that the latter does not.

## III. SELF-DEFENSE IN CONTEXT

Despite many uncertainties in our understanding of self-defense, one thing is clear: we cannot do without it so long as there is criminal law. To punish the paradigmatic self-defender is to delegitimize the law in a way that probably no other misstep can.<sup>112</sup> Our sensibilities rail against the notion that a self-defender will be punished, even if we acknowledge that he causes harm through his actions. In short, the rhetoric of self-defense is powerful because it puts the criminal law on trial.<sup>113</sup>

How can we be so sure that the self-defender ought to go free, and yet be so uncertain as to why? I think much of our uncertainty stems from an over-reliance on morality to explain self-defense. As Kent Greenawalt has observed, “[m]oral philosophy is notably inept in indicating precisely how competing moral claims should be resolved.”<sup>114</sup> Although moral distinctions are drawn between the defender and the assailant, and between the assailant and a sick cabin boy, the bases for such distinctions seem to run afoul of other moral principles such as the equality of life principle.<sup>115</sup> Because of our inability to identify a stable basis for moral asymmetry that would justify the taking of life, the discourse becomes convoluted. Technical exceptions and ill-fitting definitions are used to rescue the notion of self-defense as justified, but such maneuvers also remove self-defense further from the simplicity of the paradigm.<sup>116</sup> To hinge the justifiability of a harmful act upon its moral quality

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112. I suspect, for example, that there would not be much outrage at punishing the insane or persons who act under duress. There is also some measure of acceptance for punishing people who kill out of necessity, as in the famous case of *The Queen v. Dudley & Stephens*, 14 Q.B.D. 273 (1884). On the other hand, to say that there is no self-defense is likely to be taken to mean that the innocent will be punished. Victoria Nourse observes that the law does not take such steps because “the resulting political order would be intolerable.” V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1692, 1725 (2003); see also Claire Oakes Finkelstein, *On the Obligation of the State to Extend a Right of Self-Defense to Its Citizens*, 147 U. PA. L. REV. 1361, 1397-98 (1999) (arguing that self-defense is necessary because its denial would “enfeeble [the state’s] authority”); David Gauthier, *Self-Defense and the Requirement of Imminence: Comments on George Fletcher’s Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 615, 616 (1996) (questioning the validity of a criminal law that fails to recognize self-defense).

113. I paraphrase here the subtitle of George Fletcher’s book on the *Goetz* case. See FLETCHER, *supra* note 23.

114. See GREENAWALT, *supra* note 81.

115. See *supra* note 70 and accompanying text.

116. Take, for example, Cheyney Ryan’s claim that in self-defense, the defender does not choose to kill, but rather chooses who is to be killed, the loss of life being occasioned by the aggressor’s actions in the first place. Cheyney C. Ryan, *Self-Defense, Pacifism, and the Possibility of Killing*, 93 ETHICS 508, 515-16 (1983). This seems to me a rather artful way of describing the events, leading to two possibilities for absolving the defender. One is that there is in fact no act that is ascribable to the self-defender; the act of killing can only be attributed to the aggressor. See *id.* at 515 (analogizing to a killing under duress under which the act is distanced from the actor). Such a description of the events is highly counterintuitive, suggesting that the aggressor, in essence, committed suicide. Ryan’s claims are susceptible to a second, more plausible description that relies on a variation of the principle of no-net-harm. Under this

forces us to engage in clumsy analyses. It is, perhaps, time to rethink self-defense.

A few scholars have called for such a move. Recently, Victoria Nourse has argued for a “reconceptualization” of criminal defenses that focuses on the role that defenses play in constructing the political relationship between the state and its citizens.<sup>117</sup> Nourse suggests that the criminal law is an instrument of the state, designed to maintain a liberal political order.<sup>118</sup> This statement is true not only for offenses but defenses as well, and argues against the commonplace assumption that defenses necessarily constitute individualized exceptions to the more general, or institutional, commitments of the criminal law. Instead, Nourse posits that offenses and defenses accomplish a common task: they preserve the state’s monopoly on violence.<sup>119</sup>

Although my own perspective differs somewhat from Nourse’s view, her admonition is well taken; we should not lose sight of the political nature of criminal law. In discussing how the law is shaped by the “demands of majorities and the state,”<sup>120</sup> Nourse implies an idea I believe is central to understanding the criminal law. Too often, scholars simply assume the criminal law’s existence and focus on how to justify its function, especially the practice of punishment. Given this approach, the discourse naturally has been dominated by questions of individual morality – did the defendant engage in correct action or, alternatively, did the defendant choose the lesser evil?<sup>121</sup> But such questions have yielded less than satisfying answers about the workings of the criminal law.<sup>122</sup> These moral theories suggest when we may punish without explaining why we ought to punish or, for that matter, why we have created a large and intricate system of rules and their enforcement called “the criminal law.”

Acknowledging the criminal law’s political and dynamic nature, however,

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interpretation of the events, the self-defender is the one who kills but his act does not cause the harm; instead, the only “act” that remains to be justified is the *decision* to choose the aggressor’s life to be lost rather than his own. *See id.* at 515. Given Ryan’s subsequent discussion about the moral quality of this decision, I believe that this second version of the claim is more likely to be the correct one. Under this move, Ryan minimizes what needs to be justified – for it is no longer a harm-causing act that is at issue – but I am not sure why the criminal law would demand any justification for a decision that ostensibly leads to no harm.

If, on the other hand, we acknowledge that reasons matter and that the relevant reason in self-defense is the preservation of one’s own life, it seems to me that we do have a basis for describing the defender’s actions as a choice to kill and to find that we need a justification of the resulting act of *killing*.

117. *See generally* Nourse, *supra* note 112; *cf.* Kaufman, *supra* note 11, at 354 (arguing that the imminence requirement of self-defense “derives not from morality but from political theory”).

118. *See* Nourse, *supra* note 112, at 1692-93.

119. *See id.* at 1725; *see also* Kaufman, *supra* note 11, at 354 (characterizing self-defense as an exception to the state’s monopoly on violence).

120. Nourse, *supra* note 112, at 1726.

121. *See id.* at 1695.

122. *See id.* at 1692.

offers a different perspective – one that takes the criminal law not as something that is, but as something that we *do*, *intentionally*. We do criminal law not only by imposing punishment, but also by creating the many rules whose violation triggers punishment. We also announce such rules beforehand – even those, like murder, that are already obviously immoral. And some of these rules constitute defenses that make avoidance of punishment possible even when a violation has occurred. From a political perspective, each of these steps will be seen as the result of (more or less) deliberated action on the part of the polity toward creating the criminal law, and by this I mean both the decision to create *a* criminal law and the decision to create *the particular kind of* criminal law that we have. In other words, the criminal law is a political institution of our making. To be sure, it is important to know what limits morality sets on our actions against law violation. But the ultimate question is not what we may do within moral limits, but, within such limits, why we actually do it.

### A. The Harm Prevention Principle

A very basic answer to this question is possible: we do the criminal law in order to prevent harm by one another.<sup>123</sup> As I have explored elsewhere, the harm prevention principle is arguably the most sensible explanation for the criminal law.<sup>124</sup> Briefly stated, it gives expression to the commonly-held belief that without the criminal law, life would consist of a series of calculated and random violence.<sup>125</sup> It captures the principle that we should not criminalize behavior that causes no harm, and lends significance to the *ex ante* creation of criminal offenses. It also communicates our natural preference for law-abidance over law-enforcement.<sup>126</sup> Finally, it is consistent with a political theory-perspective that posits that the law is primarily addressed to the law-abiding (i.e., the vast majority of society) as guidance to behavior and as a demonstration of the state's legitimacy.<sup>127</sup>

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123. See Robinson, *supra* note 16, at 266 (citing to O.W. Holmes, W. LaFave, and A. Scott as authorities for the proposition).

124. See Janine Young Kim, *Rule and Exception in Criminal Law*, 82 TUL. L. REV. 247, 275-77 (2007).

125. See Nourse, *supra* note 112, at 1697.

126. See, e.g., WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 248 (1799) (“[P]reventive justice is upon every principle, of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice[.]” (emphasis in original); GREENAWALT, *supra* note 81, at 15 (“From the law’s point of view, submission to the criminal sanction is not as desirable as compliance with the law in the first place.”). According to John Gardner, these conditions of criminal law are accepted by all but “fundamentalists.” John Gardner, *Prohibiting Immoralities*, 28 CARDOZO L. REV. 2613, 2613 (2007).

127. See Nourse, *supra* note 112, at 1696-1700; see also BLACKSTONE, *supra* note 126, at 249 (“[I]f we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past[.]”). But see VICTOR TADROS, CRIMINAL RESPONSIBILITY 108 (2005) (arguing that conduct guidance is only one important function of the criminal law, the other being its role in criminal conviction). I do not disagree with Tadros that offenses serve to define the conditions of conviction but hesitate to allow that

The harm prevention principle<sup>128</sup> is not incompatible with Nourse's thesis that the law of defenses advances the state's monopoly on violence because the notion that we ought to prevent harm *by one another* clearly dictates restricting private violence in favor of, when appropriate, public punishment.<sup>129</sup> But the harm prevention principle is better suited to another political explanation of the state: the theory of social contract. The social contract theory of the state is familiar to most legal scholars. One of its most influential early theorists is Thomas Hobbes, who hypothesized that individuals entered into the social contract in order to escape a pre-political, natural state of war.<sup>130</sup> Thus, the creation of a political society is, in essence, an act of self-preservation, to be free from harm.<sup>131</sup> Recently, James Whitman offered the following succinct description of the social contract explanation of the criminal law: "[T]he classic tradition of social contract justifies state coercion on the argument that each person has a natural right of self-defense, which he surrenders to the state through the social contract. Thereafter, it is the state that ministers to the collective need for self-defense, through the criminal law."<sup>132</sup> This description conveys well why self-defense is so integral a part of the criminal law that its rhetoric puts the "law on trial"; the criminal law is, like political society itself, founded on the concept of self-defense.

What does this mean for our understanding of the concept of self-defense? One striking implication of this view of criminal law is that self-defense and the law of offenses share a common aim. Indeed, Phillip Montague has argued that the criminal law is essentially self-defense writ large.<sup>133</sup> For purposes of this article, such a broad claim need not be defended; our discussion centers on

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such interest is as important as, or more important than, the conduct guidance function in the explanation of criminal law. In the end, our explanations may be sympathetic to one another since our attempts to explain the criminal law seem to run parallel: Tadros focuses on how particular offenses and defenses are shaped and categorized in order to discover their "moral architecture," *id.* at 266, while my analysis here looks to legitimate, originary reasons for the creation of the criminal law.

128. This term should not be interpreted too broadly; it does not suggest that harm is intolerable in every situation. I do not use "harm prevention" to set a standard for an objective condition for how the world must be, but instead as a motivating idea that informs our actions in the world, regardless of their true consequences.

129. Nourse, *supra* note 112, at 1705 (expressing concern that "private punishment...[tends] to be self-exempting").

130. THOMAS HOBBS, *LEVIATHAN* 185 (C.B. Macpherson, ed. 1985) (1651).

131. See Waldron, *supra* note 70, at 713 ("For Hobbes, self-preservation lies at the heart of the social contract; for Locke, self-defense lies at the heart of the theory of justified revolution. Both of them hold theories of self-preservation that have consequences running far beyond the criminal law, into more general issues about the nature and justification of political and economic systems.").

132. See Whitman, *supra* note 103, at 903. According to Whitman, the monopoly of violence tradition, on the other hand, is not a theory of collective self-defense but a theory of collective vengeance meted out by the state. *Id.*

133. See generally, PHILLIP MONTAGUE, *PUNISHMENT AS SOCIETAL DEFENSE* (1996); cf. Nourse, *supra* note 112, at 1709-10 (discussing the institutional role of self-defense).

how to think about self-defense, not about the criminal law as a whole. But the analogy drawn between self-defense and criminal law is revealing. It confirms that the aim of self-defense – what I have been variously calling “motive” and “reason” in this article – is important. Moreover, saying there is a shared aim in self-defense and the criminal law is to suggest that motive in self-defense has a specified content.<sup>134</sup>

If this is right, then the failure to define motive clearly in self-defense law is obviously problematic. In doing so, we lose sight of what self-defense is, as well as its connection to the larger ideas of the law and the state. On a practical level, also, this failure exacerbates what Whitman calls “the self-defense hypocrisy” – of calling “self-defense” acts of punishment and retaliation.<sup>135</sup> This is particularly troubling if we consider that the concept of self-defense is, in fact, “inherently pacifistic. . . which by its logic limits the right to do violence fairly severely.”<sup>136</sup> If both self-defense and the criminal law are meant to curb private violence in society,<sup>137</sup> continued uncertainty in the definition of motive that opens the door to more violence is surely counterproductive.

To be sure, clarifying the required motive will not resolve all of the descriptive uncertainties that are discussed in this article. A person’s subjective state of mind will remain unascertainable regardless of how we write or conceptualize the law. Epistemic limitations will, of course, affect the way we define and administer the law, but I do not believe that such limitations explain the current level of uncertainty. And to the extent we can do better, we should. For without clear, justifying motive, the law of self-defense becomes the repository for a number of values that have nothing to do with self-defense. In that case, the law and the concept of self-defense are liable to diverge, leading us to apply the rhetoric of self-defense in substantively inappropriate cases.

This analysis rejects the harm versus harm view of self defense, and it rejects the harm versus reason view as well. Instead, by recognizing the importance of intentionality in both self-defense and criminal law, it suggests a *reason versus reason* approach – the individual’s reason to kill compared

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134. In this way, the concept of self-defense offers what Christopher Kutz calls a “political justification,” which he defines as “a justification offered to each agent in that it respects the relative value each places on his own aims, but also demands of each agent that he respect the relative value others place on their aims as well.” Christopher Kutz, *Self-Defense and Political Justification*, 88 CAL. L. REV. 751, 751-53 (2000).

135. See Whitman, *supra* note 103, at 909. This is not the first or only instance where “self-defense” has been used to justify actions inspired by motives other than self-preservation. See Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413, 435 (1975) (indicating that early cases of self-defense counted among them defense of others). Such use of self-defense is not only hypocritical but stunts the development of genuine and coherent defenses. See *id.* at 436.

136. Whitman, *supra* note 103, at 913.

137. Nourse, in discussing monopoly of violence, also agrees that the criminal law is intended to limit violence. See Nourse, *supra* note 112, at 1697. If the state seeks to monopolize violence, it makes sense to define precisely and narrowly the occasions when an individual may lawfully kill.

against the political reason to prohibit the killing of another human being.<sup>138</sup> This approach has some obvious advantages. First, it is a more humane understanding of defensive killings in that it does not need to elide the death that has occurred in order to make a case for justified defense. To the extent that we value human life and are committed to the equality of life principle, we should avoid the conclusion that no harm has been done in the death of an aggressor. The emphasis on reason also reinforces the premise there is an existing harm that requires justification. Moreover, this approach avoids the difficulty of comparing two unlike things – harms and reasons – while at the same time acknowledging the salience of both individual and societal interests in the problem of violence. Such acknowledgment also appreciates the fact that justification is, in essence, the practice of giving publicly accepted or acceptable reasons.<sup>139</sup>

The reason versus reason approach suggests a homicide is justified or unjustified depending on how its underlying reason measures up against the reason that underlies the offense of murder. Reasons can be found all over the criminal law, and especially in the law of homicide.<sup>140</sup> For instance, killing for monetary gain is considered unjustified because it compares unfavorably against society's interest in preventing the harm of homicide.<sup>141</sup> On the other hand, killing an enemy soldier pursuant to one's duty in battle is considered justified because the reason for such killing outweighs the reasons that support the general prohibition against it.<sup>142</sup> Still, we often have a difficult time determining how to balance these reasons – assisted suicide, to take one example, is an area of the law that generates mixed moral responses and

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138. Cf. John Gardner, *Fletcher on Offences and Defences*, 39 TULSA L. REV. 817, 822 (2004) (“[W]hen the law grants a justificatory defence it unexcludes some otherwise excluded reasons and allows them once again to punch their weight in an ordinary rational conflict with the law’s ordinary (now unprotected) reasons for not offending.”).

139. Cf. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 680 (11<sup>th</sup> ed. 2003) (defining “justify” as “to prove or show to be just, right, or reasonable”); see also Michael Thompson, *Aquinas, Locke, and Self-Defense*, 57 U. PITT. L. REV. 677, 680 (1996) (allowing that justification constitutes or contains reason for action); John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD JOURNAL OF LEGAL STUDIES 127 (2008) (observing that as a general matter, calling an act “justifiable” is to say that there are “sound reasons” for violating the rights of another). Giving reasons is to be distinguished from giving excuses; the former aspires to impartiality while the latter is personal to the excuse-giver. It should also be distinguished from personal justification, which might more aptly be described as rationalization.

140. This is not to say that reasons are required everywhere in criminal law. The criminal law dispenses with reasons and even criminal intent in strict liability crimes, which range from minor public welfare offenses to more serious crimes like statutory rape and felony murder.

141. Indeed, the motive of monetary gain is often considered an aggravating “circumstance” that makes a defendant eligible for capital punishment. See Fagan, Zimring & Geller, *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803, 1815-16 (2006).

142. A soldier in war is not always justified in killing. Shooting an unarmed civilian, for example, would suggest that he was not motivated by military duty.



unresolved questions.<sup>143</sup>

Properly motivated self-defense, in this regard, yields a surer result. The reason the defender kills is the *same* reason for the prohibition against killing: both aim to prevent harm (specifically, the loss of life).<sup>144</sup> This mode of analysis explains the self-defense paradigm well. In the paradigmatic case, only the defender seeks to prevent harm; the assailant, in contrast, cannot be described as being similarly motivated. Indeed, in the paradigmatic case, the assailant's actions are most aptly explained by the desire to affirmatively create harm. If the criminal law is the consequence of a social contract to provide a defense against private aggression, then only the assailant's actions constitute a transgression of the law. The law is intended precisely to protect all would-be defenders from all assailants but not vice versa.<sup>145</sup> Thus, there is a strong *institutional* justification for self-defense within criminal law.

This account helps to explain why our understanding of self-defense is often more intuitive than deliberate. The rationale behind self-defense is both basic and familiar because it constitutes the foundation of our notion of an organized, civilized society.<sup>146</sup> Consequently, it is easy to experience as moral instinct what are actually fairly complicated reasons for establishing political association and rule of law. It also suggests why we think of self-defense as a paradigmatic justification;<sup>147</sup> it is supported by the same principles that justify the creation of the criminal law. This is not to argue that the concept of self-defense is a purely political construct, for it is clear that to serve as the foundation of the social contract self-defense must be pre-political.<sup>148</sup> Nor do I make the morally obtuse argument that institutional justification alone suffices to explain self-defense, since the institution itself may be immoral. Morality should always serve a critical function to test the law and the role of the state. But I think there are good grounds to believe that, generally speaking, our

143. For many, the reason behind assisted suicide is quite morally compelling as it is intended to end the patient's "desperate and pointless suffering." See Ronald Dworkin, *Introduction to Assisted Suicide: The Philosopher's Brief*, 44 THE N.Y. REV. OF BOOKS (Mar. 27, 1997).

144. In characterizing the defender's motive as one aimed at preventing harm, I am not making an argument about "double effect" — i.e., that the defender does not intend to kill but killing is a foreseen consequence of harm prevention. Instead, I suggest that the intent to kill and the intent to prevent harm (to self) co-exist, but that the latter's existence is particularly weighty in both self-defense law and criminal law in general.

145. In this way, the problem of resistance against self-defense is no problem at all. Cf. Kadish, *supra* note 44, at 885 (discussing why the assailant has no right to resist).

146. See Murray Forsyth, *Hobbes's Contractarianism*, in THE SOCIAL CONTRACT FROM HOBBS TO RAWLS 35, 37 (David Boucher & Paul Kelly eds., 1994) (describing the social contract as "a pact to *establish* rule ... mark[ing] the transition from the 'state of nature' to the 'civil state'").

147. See *supra* sources cited in note 58.

148. See Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 457 (2008). On the other hand, there is no reason to think that the concept of self-defense must remain unaffected even under radically altered conditions — e.g., where it operates in political society with a criminal law in place. See *infra* Section III.B.

criminal law is also a *moral* institution. I will not attempt to summarize here the vast literature on the morality of criminal law; it suffices to say that the criminal law has been subjected to – and has withstood – more extensive moral scrutiny than probably any other area of law.<sup>149</sup> Thus it seems to me that the shared reasons that inspire the social contract – what is sometimes called “political morality” – should be sufficient to make the case for the justifiability of self-defense in both a moral and institutional sense, without recourse to any more conventional and individual-oriented moral theory relating to good and evil or right and wrong.<sup>150</sup> Indeed, as I explain further below, the latter basis of analysis is not only inadequate for failing to recognize the political nature of criminal law, but it too often leads us astray.

### B. *The Limits of Self-Defense*

So far, I have offered some general thoughts about the concept of self-defense and the principles that may underlie its rhetoric. It remains to fill in some details. In this regard, consideration of the social contract and the harm prevention principle raises an important question: having surrendered the “natural right” of self-defense in exchange for the protections of the state, what does the law leave us?

Very little, it seems. The notion of self-defense, and the motive of harm prevention that underlies it, strongly militate in favor of limiting as narrowly as possible the incidence of private violence. To reiterate, self-defense is “inherently pacifistic. . . , which by its logic limits the right to do violence fairly severely.”<sup>151</sup> We must also keep in mind that the mostly self-interested motive of self-preservation cannot be without limits under the social contract, since it makes no sense for others to honor it if it does not offer similar protections for them as well. Accordingly, a subjective perspective on harm prevention cannot prevail. The conditions that permit self-defense, then, should be tightly circumscribed and objectively grounded.

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149. Much analysis of the criminal law begins with the premise that the law – because it is so coercive – must be morally justified. See, e.g., R.A. Duff & David Garland, *Introduction: Thinking about Punishment*, in A READER ON PUNISHMENT 1, 2 (R.A. Duff & David Garland, eds. 1994) (“Punishment...is morally problematic because it involves doing things to people that (when not described as ‘punishment’) seem morally wrong.”). Very few conclude that it cannot be. See, e.g., Herman Bianchi, *Abolition: Assensus and Sanctuary*, in A READER ON PUNISHMENT, *supra*, at 336, 340 (arguing for the substitution of criminal law with “reparative law” because “punishment usually provokes criminality”); DEIDRE GOLASH, THE CASE AGAINST PUNISHMENT 153 (2005) (advocating for compensation rather than punishment). Golash argues, however, that prevention of crime is a morally defensible goal. *Id.* at 160.

150. See *id.* at 43 (distinguishing between conventional morality and political morality); see also M. Thompson, *supra* note 139, at 683-84 (“[I]nsofar as a modern state claims a right to kill violent men in action, without trial, in defense of its agents and citizens, it is estopped from denying its citizens the same right when the state is inaccessible.”).

151. Whitman, *supra* note 103, at 913; cf. Kaufman, *supra* note 11, at 359 (suggesting that the limits of self-defense are intended to “ensure as far as possible the objectivity and disinterest of those who are authorized to use force”).

Legal scholars have long posited that the law of justified self-defense requires satisfaction of two main conditions: necessity and proportionality.<sup>152</sup> These two conditions have given rise to a number of elements thought to be, at various times and in various places, required for self-defense. Such elements include the threat of imminent attack, limitations on the degree of defensive force used, the requirement of retreat, and the non-aggressor rule.<sup>153</sup> That is to say, a self-defender may kill in order to preserve himself if he is threatened with imminent, deadly attack that cannot be warded off by using less than lethal force, he is not the initial aggressor, and he does not have a safe avenue of retreat. Although many jurisdictions in the United States have modified some or all of these elements, all of them continue to be significant in the rhetoric of self-defense (if only to explain why they are no longer necessary).

We can also see quite clearly that they are all present, implicitly or explicitly, in the paradigmatic case. Recall the paradigm's narrative. It describes an innocent person who is set upon by a deadly assailant and kills the assailant in order to save himself. The paradigmatic self-defender is the antipode to the aggressor – one who is peaceably pursuing his own security and happiness without harming others. The suddenness of the attack also suggests the use of force by the defender as an act of last and only resort against imminent deadly attack. This aspect of the paradigm captures the requirement of necessity and, subsumed within that idea, the use of an appropriate degree of force and an inability to retreat. Only through the satisfaction of these rigorous conditions is the self-defender truly justified as acting pursuant to the pacifistic harm prevention principle. Indeed, the paradigmatic self-defender seeks to do what the criminal law is meant to do: prevent harm within the bounds of necessity and proportionality.<sup>154</sup> Under this view, self-defense does not constitute a moral exception in the criminal law, but is part and parcel to its moral and political existence. The limitations of self-defense are familiar limitations as they are those of the criminal law itself. Notice, too, that the defender need not be cast as a hero with all of the normatively unattractive themes that attend such a notion. The defender, instead, is simply a person

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152. See, e.g., Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 236 (1982) (arguing that self-defense is justified so long as the defender can show that his actions are “necessary and reasonable in relation to the harm threatened”); DRESSLER, *supra* note 6, at 238 (adding also a third component of reasonable belief).

153. See DRESSLER, *supra* note 6, at 239-48.

154. This should not be confused with the law enforcement defense. To the extent that the law enforcement defense can justify forcible prevention of threatened harm, there may well be a coincidence of *circumstance*. However, two significant distinctions should be noted. First, the reasons for action are quite different – the self-defender is acting in order to preserve himself, not to vindicate the law. Second, the law enforcement defense typically has a less stringent – or conceptually different – proportionality requirement. Some jurisdictions allow the use of deadly force to forestall *any* felony, including nonviolent felonies; others require there to be a threat of a forcible felony, but not necessarily one that presents the threat of death or serious bodily harm. See DRESSLER, *supra* note 6, at 298-99.

whose reasons and actions are congruent to those that justify the criminal law.

To be sure, this is a stingy account of self-defense but also, I think, a theoretically accurate one. In order to curb violence and prevent harm, the state must check the use of force in all of its guises, including the *overuse* of defensive force. Paranoia and anxiety are as likely to lead to aggression as bravado.<sup>155</sup> Accordingly, the narrative paradigm is the *ideal* use of self-defensive force in a social contractarian state; it sets forth both the maximum and the minimum expectations for the individual who finds himself in such unhappy circumstances.

The logic of self-defense outlined here also extends to justify the use of force against a troublesome category of aggressor: the innocent aggressor. Conventional approaches to self-defense have difficulty justifying the defensive killing of an innocent aggressor (say, a small child waving a gun) because they usually struggle to establish a moral asymmetry between two innocents.<sup>156</sup> As described above, asymmetry typically relies on the aggressor's culpability to posit his forfeiture or devaluation, which then allows the defender to use righteous deadly force against the other.<sup>157</sup> By definition, no such one-sided culpability exists in the case of the innocent aggressor. Moreover, I have maintained that both of these arguments tend to raise more questions than they answer, even when there is a non-innocent aggressor involved.<sup>158</sup> From a political rather than exclusively moral view, however, the malevolence or innocence of the aggressor becomes irrelevant to justification, since the permission to prevent harm through violence arises from reason and circumstance, not the nature or quality of the person who threatens it. No doubt we will lament the death of a child aggressor more because we cannot help but feel more deeply the loss of innocent life,<sup>159</sup> but just as the malevolence of the

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155. As David Singh Grewal points out, Hobbes' vision of a pre-political "state of war" may not be due to any natural aggression of humankind but to interpersonal fear that leads individuals to "arm themselves against one another and strike preemptively." David Singh Grewal, *Hobbes' Realist-Utopian Peace Theory*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=969799](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969799); see also Whitman, *supra* note 103, at 915 (observing that Hobbes recognized that the natural state of war may derive also from widespread disagreement about the circumstances of justified self-defense); Gauthier, *supra* note 112, at 619-20 (classifying violent behavior into four types: aggressive, preemptive, defensive, and retaliatory).

156. On the other hand, Judith Thomson argues that denying self-defense against an innocent aggressor "requires an excessively high-minded conception of the requirements of morality," suggesting that this is not a troublesome category at all. See Thomson, *supra* note 15, at 285.

157. See *supra* text accompanying notes 63-64.

158. See *id.*

159. Cf. Marcia Baron, *Justifications and Excuses*, 2 OHIO ST. J. CRIM. L. 387, 390 (2005) (suggesting that even after justified action, an individual may have an obligation to make amends). The problem of innocent threats is more complicated. A classic example of the innocent threat is the fat man who is pushed off a cliff and is about to fall on you. Whether you have the right to use self-defensive force against the falling fat man is difficult to determine as the fat man is using neither aggressive nor even anticipatory force. He is not "acting" in any way at all. The specific condition that animated the social contract, and the criminal law, does not seem to embrace this scenario. Cf. Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46

aggressor cannot redeem the defender's acts, neither can his innocence corrupt them.

In the next section I will address the possibility of further extending the concept of self-defense to yet another troublesome category: cases of non-imminence. But before moving on to that discussion, there is one more thing to say about the implications of the limits of self-defense on its popular rhetoric. If my account of self-defense is correct, it may be counterproductive to refer to a "right" of self-defense in criminal law. The right has been largely surrendered to the state; thus, rights-discourse is somewhat misleading in this context. The criminal law presumes that all intentional killings are disallowed, and then permits it only under a very narrow set of circumstances.<sup>160</sup> Of course, rights need not be absolute, but the word nonetheless denotes a robust claim to be made against other persons and the state that belies the law's rather severe restrictions and theoretical underpinnings. Indeed, rights-rhetoric has been exploited by groups like the National Rifle Association to advocate for the passage of "stand your ground" laws that renounce the rule of retreat and expand the law of self-defense beyond recognition.<sup>161</sup>

To be sure, we do have an abiding interest in personal security, and perhaps the limited, residual claim we have is still correctly called a "right." But rights-discourse, coupled with the paradigm's exaggerated theme of moral opposition, tend to suggest that the law leaves us with more by emphasizing the priority of self (as the one with rights and in the right) and the worthlessness of the other (as the one without rights and in the wrong).<sup>162</sup> In so doing, it pushes

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ARIZ. L. REV. 213, 217 (2004) (suggesting that there must be an *actus reus* for aggression, i.e., imminence, to properly trigger self-defense).

160. But see Weisberg, *supra* note 25, at 179 (explaining that in other societies, "the presumption that killings or other attacks are 'legal' remedies for what are often nonviolent wrongs may be so strong that the notion of 'illegal' violence itself may almost be anomalous").

161. See 'Stand-your-ground' Laws Causing Confusion, <http://www.msnbc.msn.com/id/19680321>, Jul. 9, 2007; Patrik Jonsson, *Is Self-Defense Law Vigilante Justice?*, THE CHRISTIAN SCIENCE MONITOR, Feb. 24, 2006, available at <http://www.csmonitor.com/2006/0224/p02s01-usju.html>.

162. See Jonsson, *supra* note 161 (quoting an NRA member who states that these new laws "make it very clear that the good guy has the advantage, not the bad guy"); Ryan, *supra* note 116, at 522-23. As Ryan elegantly explains, exercising the "right" of self-defense can also express acknowledgment of one's own status as a person, and a refutation of the other's treatment of us as a thing to be destroyed at will, without necessarily negating the personhood of the other. See *id.* at 523. My skepticism toward "rights" rhetoric stems from the belief that it is, more often than not, self-preferential rather than even-handed. It is too easy to slide from an assertion of personhood, which is universal and therefore common to self and other to an "assertion of 'personality,'" which is unique and particular to each. See James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or the Setting of Prices?*, 71 CHL-KENT L. REV. 41, 62 (1995) (associating assertion of personality with a tradition of vengeance). Indeed, Ryan also describes the discourse as "inadequate for capturing certain features of our moral experience." See Ryan, *supra* note 116, at 522 n.12; see also Oberdiek, *supra* note 138, at 1 (observing that when used normatively, the invocation of rights tends to be insensitive to context). I am here advocating for a certain mode of analysis elegantly described by John Oberdiek – that "one argues *towards* rights, not *from* them." See Oberdiek, *supra* note 138, at 15.

the limits of self-defense in new and unfamiliar directions that sometimes threaten to undermine the fundamental principles backing the rhetoric of self-defense. It means, as just described, that resorting to self-defense is questionable in cases of innocent aggressors, leading to a reduction in one kind of violence – namely, the defensive kind. But ultimately such attitude lends itself to an increase in other kinds of violence as individuals discover virtue in countering aggression with not only defensive, but also anticipatory and retaliatory force.<sup>163</sup> This result, as David Gauthier observes, is fundamentally antithetical to the social contract tradition.<sup>164</sup>

### C. *Beyond Limits*

So far, this article has sought to understand the nature of the paradigmatic self-defense case. Not all self-defense claims, however, fit nicely within the paradigm. While the controversial *Goetz* case fits surprisingly well as long as Goetz's motives can be reconciled, other cases deviate further from the paradigm. Such cases, moreover, have not always been dismissed as *not*-self-defense cases. On the contrary, they too have captured our moral and legal imagination to challenge settled beliefs about self-defense. I am not speaking of the "difficult" cases I mentioned at the outset of this discussion.<sup>165</sup> Although they are interesting (though sometimes exasperating) to think about, they mostly remain the topic of conversation among philosophers.<sup>166</sup> I refer instead to the case of Judy Norman, whose self-defense claim is probably the most significant in the history of modern criminal law.

The *Norman* case has been the subject of extensive study about a variety of aspects of self-defense law, especially with respect to the proper interpretation of necessity and reasonable belief. But the *Norman* case is also extraordinary for triggering a different kind of insight that relates to the thesis of this article: that self-defense is political. In keeping with that thesis, these remaining pages will examine the political reasons the *Norman* case proffers for pushing the law of self-defense beyond the limits described above. In particular, I address two different strategies for a paradigm shift in self-defense – one that argues within the social contractarian model of the state and the other, outside of it.

First, a very brief description of the case is in order. In Judy Norman's murder trial, the defendant sought to prove that she engaged in self-defense when she shot her husband, J.T., as he slept. Based on this simple recounting, it is clear that Judy's actions cannot possibly constitute legal self-defense. But

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163. See Gauthier, *supra* note 112, at 620.

164. See *id.*

165. See *supra* text accompanying notes 29-34.

166. See Paul Robinson, *Justification Defenses in Situations of Unavoidable Uncertainty: A Reply to Professor Ferzan*, 24 LAW & PHIL. 775, 783 (2005) (expressing skepticism about the usefulness of "bizarre professorial hypotheticals").

it is the “backstory” that drives this case. Judy was horrifically abused for 20 years by J.T., who beat, degraded, and threatened her and forced her to prostitute herself. During the two days leading up to his death, J.T. was particularly angry and abusive after being released from jail for a DUI. When the police arrived on a domestic disturbance call, they (uselessly) advised her to take out a warrant on her husband. Judy later attempted to commit suicide and when emergency personnel arrived, J.T. interfered with her treatment, stating “Let the bitch die. . . She ain’t nothing but a dog.” When she returned from the hospital the next day, he was more menacing and violent than ever. When Judy’s mother called the police again, they did not come.<sup>167</sup>

It is difficult to hear even these abbreviated facts unmoved, or to accept that most of them are dismissed as the irrelevant backstory of this case. Indeed, a big part of the movement for a “battered woman’s defense” is to demonstrate that such circumstances should be brought into the foreground – that we can talk about the reasonableness of Judy Norman’s beliefs and actions only by recognizing that her more general predicament (namely, the brutality of her daily life), rather than a sudden event, can also be a triggering condition for self-defense.<sup>168</sup> Moreover, thinking about Judy Norman as a defender explodes other false assumptions embedded in the paradigm – most notably, the myths of the masculine defendant and the stranger attack.<sup>169</sup> On the other hand, the *Norman* case powerfully reinforces the paradigm’s premise of moral opposition: it is hard to imagine too many others who are as piteous as Judy or as monstrous as her husband.

In the end, Judy Norman was convicted of manslaughter but her sentence was commuted by the governor of North Carolina.<sup>170</sup> But this split decision has not quelled the debate over whether Judy acted in self-defense. If anything, it inflames the debate further. After all, what is the meaning of the governor’s decision? Does it constitute a political judgment that Judy Norman was justified? Is it a concession to public sympathies? An acknowledgment that the law is lagging behind social reality?<sup>171</sup>

If the state and its criminal laws are justified by their function in providing collective self-defense, there obviously was a grave malfunction with respect to the Normans. For 20 years, J.T. violated the law that should have protected

167. These facts are recounted by the appellate court, which held that the defendant was entitled to have a self-defense jury instruction. *See State v. Norman*, 89 N.C. App. 384, 385-89 (1988). That decision was reversed in *State v. Norman*, 324 N.C. 253 (1989).

168. *See, e.g., OGLE & JACOBS, supra* note 19, at 69-71 (calling the battering relationship “a long-term, ongoing homicidal process” to which a woman may reasonably respond with violence).

169. Studies on violence against women indicate, on the contrary, that most women are attacked by people known to them. *See, e.g., Sally F. Goldfarb, Applying the Discrimination Model to Violence against Women: Some Reflections on Theory and Practice*, 11 AM. U. J. GENDER SOC. POL’Y & L. 251, 266 & n.79 (2003) (citing to a 1998 Department of Justice survey).

170. Fletcher, *supra* note 27, at 567.

171. *See, e.g., OGLE & JACOBS, supra* note 19, at 3 (“The social science literature often criticizes the rigidity of legal approaches for failure to embrace the reality of battered women.”).

Judy by threatening her, beating her, and prostituting her. During that time, the state did nothing effective to help her and, on the day of the shooting, did not bother to show up even when called upon.<sup>172</sup> These facts have led some commentators to argue that Judy Norman was justified because she was exercising her right of self-defense in circumstances where the state failed her.<sup>173</sup> This contention appears, at least upon first glance, consistent with the social contract theory of the state that permits private self-defense where the state cannot intervene to stop the aggression.

There are several explanations for why private self-defense becomes available during such times. According to Hobbes, for example, it is nonsensical to say that a person surrenders absolutely the right of self-defense because such an agreement is both unintelligible and impossible.<sup>174</sup> It is unintelligible because the point of entering into the social contract is the preservation of personal security, and so the contract cannot rationally be interpreted as a renunciation of the right to self-defense in the face of deadly attack.<sup>175</sup> Put another way, one does not rationally enter into a bargain to get less than what one had before. It is also impossible because “no one could be reasonably taken to promise to forgo self-defense, since it would be impossible for anyone *in extremis* to keep such a promise.”<sup>176</sup> George Fletcher also argues that individuals do not give up their entire right of self-defense; the right “kicks in . . . because immediate action is necessary” when the state fails in its protective function.<sup>177</sup> According to Fletcher, the limits of self-defense bear upon the “proper allocation of authority between the state and the citizen” to use force to prevent harm.<sup>178</sup> Locke, on the other hand, does not seem to contemplate any residual right remaining with the individual; instead, when the state fails to protect its citizens, private relations simply revert to a temporary state of nature where the right of self-defense is reinstated fully in the individual.<sup>179</sup>

Contemplation of state failure and the permitted use of private self-defense raises the important question of why the state sometimes fails in its task of collective self-defense. Is it the case that self-defense becomes

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172. Judy Norman turned to state agencies other than the police but received no help. See Fletcher, *supra* note 27, at 571. According to Ogle & Jacobs, there were three times as many animal shelters as there were women’s shelters in the United States in 1992. OGLE & JACOBS, *supra* note 19, at 74 (citing a Senate Judiciary Committee report).

173. See, e.g., Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 579, 587-88 (1996) (arguing that a rational person about to enter the social contract would agree to broaden the right of self-defense to take account of domination by men of women).

174. See Waldron, *supra* note 70, at 719; Thompson, *supra* note 140, at 683.

175. See Waldron, *supra* note 70, at 719-22.

176. Kutz, *supra* note 134, at 756.

177. Fletcher, *supra* note 27, at 570.

178. *Id.*

179. See Thompson, *supra* note 139, at 683.



available whenever the state fails, regardless of the reason why it does? Or does self-defense address a particular reason for failure, the absence of which also negates the use of self-defense? According to David Gauthier, the latter view is more consistent with social contract theory; he argues that self-defense derives from the *inherent* limitations of the state in implementing collective self-defense.<sup>180</sup> Gauthier writes: “For whatever the state may do to deter those who would mount attacks on life, liberty, and basic well-being . . . it is normally impotent at the actual moment of attack.”<sup>181</sup> Perhaps, then, it is not correct to call such instances “failures,” for that implies the state could have intervened but did not. For Gauthier, such failures suggest the need for reform.<sup>182</sup> In contrast, when the state does not do what it (usually) cannot do, it more properly signifies absence – a certain and inevitable gap in the protections the state offers, which can be filled in most cases only by the individual.

Advocates for Judy Norman’s use of force would naturally argue that self-defense should become available in cases of state failure as well as state absence.<sup>183</sup> Surely from Judy’s point of view, it would not matter which more accurately described her predicament. A *de facto* absence is, in substance, still an absence, and compassion would recommend that we give Judy the benefit of the doubt. But working within the social contract tradition, this argument would have to extend further: the very concept of self-defense that informs the tradition would have to be transformed beyond the distinction between failure and absence. In cases of state failure, self-defense would have to be redefined to allow the use of preemptive force, in contravention of the theory’s premise that the social contract arose from the need to curb the natural state of war marked by both ordinary and anticipatory aggression.<sup>184</sup> It would suggest that while the social contract should not be read to leave the individual with *less* than what he had before, it should be read to grant the individual *more*

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180. Gauthier, *supra* note 112, at 616. In more contractual language: “[h]owever much authority the individual cedes to the state, she does not cede to it an authority that the state *cannot* exercise.” *Id.* (emphasis added); see also Thompson, *supra* note 139, at 683 (arguing that the private right of self-defense becomes available “where and when the state is *incapable* of intervention”) (emphasis added).

181. Gauthier, *supra* note 112, at 616.

182. *Id.* at 618-19. The failures that are apparent in the *Norman* case, for instance, ought to make us think about ways to prevent and ameliorate battering relationships by creating better police procedures, establishing more women’s centers, and encouraging better education about relationships as well as self-defense.

Whitley Kaufman suggests that private violence may also become available in situations where the state has deliberately and systematically refused its protection, as in the examples of Jews in Nazi Germany or black slaves in the antebellum South. *Supra* note 11, at 361. Kaufman argues, however, that women do not face such total exclusion. *Id.* at 362-63.

183. A similar claim lies for Bernhard Goetz, who implicitly argued that the state failed to protect him from street crime. See FLETCHER, *supra* note 23, at 12-13; see also Weisberg, *supra* note 25, at 182 (observing that private violence may stem from the “absence of public faith in the ability of the police to deter or stop criminals”).

184. See *supra* note 155 and accompanying text.

whenever the state fails to effectively implement collective self-defense. But it is difficult to see why state failure gives greater moral and political authority to the individual it has failed than if the state had not existed in the first place. On the other hand, if the premise of social contract theory is correct and deadly self-defense is justified precisely because it is pacifistic and preventive in scope and purpose, it should not be extended beyond kill-or-be-killed cases.<sup>185</sup> A sleeping victim does not plausibly fit within that justification, no matter the history of the parties.

But perhaps the premise is wrong. Vengeance, it has been noted, is a real, albeit undesirable, feature of modern society.<sup>186</sup> A competing theory of the state posits that the state seeks to prevent uncontrolled violence, not by doing collective self-defense but by doing collective vengeance.<sup>187</sup> As Whitman observes, the monopoly of violence theory takes a radically different world-view from social contract theory – it “confer[s] a right of just violence . . . to require, not merely that we preserve ourselves, but that we harm others.”<sup>188</sup> A private right to vengeance would survive in this brand of state under circumstances of state failure (here, the notion of state absence is less intelligible), which occurs whenever the state fails to exact vengeance on behalf of victims.

The emphasis on state failure as a trigger to private violence makes this theory more immediately amenable to the *Norman* case. But can the case plausibly be re-characterized as vengeance-taking? Perhaps yes. Judy Norman may have been motivated by self-preservation, but the theme of justified private vengeance is also strong in her case. Clearly, the state failed to take vengeance for Judy; J.T. battered and abused his wife for 20 years with apparent impunity. One cannot help but feel that J.T. deserved to suffer for what he inflicted upon his wife. Those 20 years also offer ample reason for Judy to seek revenge. Indeed, it was reported that at the hospital after her suicide attempt, Judy repeatedly threatened to kill her husband “because of the things he had done to her.”<sup>189</sup> Soon after the shooting, she also told the deputy sheriff that she shot her husband “because ‘she took all she was going to take

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185. Those who advocate for the expansion of self-defense sometimes attempt to argue that someone like Judy Norman is indeed caught in a kill-or-be-killed predicament. They argue that death in such domestic relationships is common enough that it is reasonable to believe that death is inevitable. See OGLE & JACOBS, *supra* note 19, at 77-78. I do not see why this argument is any more valid in justifying a battered woman’s purportedly self-defensive actions than statistics about black criminality justify a racist’s purported self-defense. Obviously, a battered woman is not the moral equivalent of a racist. But in using such markers of reasonableness, this argument draws upon similar logic to permit private violence.

186. See Whitman, *supra* note 103, at 909.

187. See *id.* at 903.

188. *Id.* at 914.

189. 324 N.C. at 257. In addition to pointing out the strains of vengeance in the *Norman* case, Whitley Kaufman has criticized the stereotypical view that women become violent only out of fear, not revenge. Kaufman, *supra* note 11, at 365-66.

from him.”<sup>190</sup> In a system where vengeance is not only just but justified,<sup>191</sup> Judy Norman’s actions seem well within such justification. Moreover, the central difficulty of Judy Norman’s self-defense case from the social contract view – the fact that her husband was asleep – poses no problem from the monopoly of violence perspective. Vengeance requires no imminent danger; Judy could act against J.T. at any time once it became clear that J.T. deserved retribution and the state had failed to exact it.<sup>192</sup>

Our criminal law generally adheres to the social contract tradition of self-defense, renouncing the theory of vengeance.<sup>193</sup> Since the two theories are fundamentally incompatible with one another, it is unsurprising that the more normatively attractive social contract theory has won out. But our renunciation appears incomplete and creates a legal dilemma: cases of vengeance cloak themselves in the rhetoric of self-defense, and because of our secret belief in the righteousness of vengeance, we are sometimes moved by such claims.<sup>194</sup> Indeed, one might say there is something terribly wrong with a law that more readily endorses the actions of Bernhard Goetz than those of Judy Norman.

Before we attempt to justify vengeance to account for this reality, a few thoughts should be borne in mind. First, there is little doubt that reconsidering the criminal law according to the monopoly of violence theory would be highly undesirable.<sup>195</sup> To reduce the state to an instrument of vengeance is to abandon our aspirations of a better, more civilized society – one that prioritizes the norms of peace rather than the norms of retaliation. The fact that most of us are unwilling to own up to our baser instincts for revenge argues against organizing ourselves around this concept; to do so may afford a degree of freedom, but it also signals an unwarranted capitulation. Our institutions should reflect our social condition, which consists of not only who we are but also our hopes of what we can become. The latter, it seems to me, is as “real” as the former and

190. 324 N.C. at 255.

191. See Fletcher, *supra* note 27.

192. Justice Mitchell, whose opinion rejected Judy Norman’s self-defense claim, was obviously concerned about timing when he held that permitting her actions would “categorically legalize the *opportune killing* of abusive husbands by their wives.” 324 N.C. at 265 (emphasis added).

It should also be noted that Judy Norman may still encounter difficulties even under the monopoly of violence theory. While it is true that the role of the state here is not to prevent harm as far as possible but to do harm whenever merited, vengeance imposes its own limits. According to Whitman, the monopoly of violence theory originates from the talionic rule of an-eye-for-an-eye. Whitman, *supra* note 103, at 914. The rule is familiar to the criminal law as an expression of the requirement of proportionality in punishment. Thus, if taking life is disproportionate vengeance for 20 years of abuse, see *Coker v. Georgia*, 433 U.S. at 598, Judy’s actions would violate the logic of just vengeance.

193. See Whitman, *supra* note 103, at 904.

194. See *id.* at 909.

195. See, e.g., *id.* at 921 (calling the theory of vengeance “authentically disturbing”); Fletcher, *supra* note 27, at 571 (arguing that acts of self-defense must signal to the world that they are based on self-protection, not aggression).

should be a significant consideration in how we do criminal law.<sup>196</sup> At best, then, our unsettled thoughts and feelings about vengeance may be incorporated into the law but may not remake it.

Second, our criminal law is not entirely aspirational, and thereby artificial. There are areas in the law where vengeance has its place. In particular, the law of provocation recognizes the norms of vengeance through mitigation of the crime – from murder to manslaughter – under certain “adequate” circumstances. Such circumstances typically include extreme assault, mutual combat, adultery, and illegal arrest – cases where a person asserts a right to honor and respect, to freedom from betrayal and insult, rather than to preservation of life and limb.<sup>197</sup> Other jurisdictions have expanded the application of the provocation defense by adopting the Model Penal Code’s “extreme mental or emotional disturbance” defense, which has eliminated these rigid categories of adequacy.<sup>198</sup> Provocation, however, is usually characterized as an excuse, constituting concessions to human imperfection, not approval for doing right.<sup>199</sup> This appears to be the correct category for vengeance killings, disfavored as they are from a normative point of view. If, however, we want to insist that Judy Norman is nonetheless justified in seeking vengeance (assuming this is indeed the most appropriate description of her actions), we would do well to refrain from calling what she did “self-defense.” It would be untrue to the facts, and blurs a concept that has specific meaning within the prevailing theory of state and law.

### CONCLUSION

Our understanding of self-defense is necessarily incomplete without the narrative paradigm that substantiates the law’s vague definition of the concept. It is the narrative of the sudden attack that helps us to see more clearly the meaning behind words such as “reasonableness,” “necessity,” and “imminence” in the legal definition, and to fill in the gaps – such as in motive – that the law fails to define. The paradigm also posits the strongest possible case for self-defense, thereby justifying its existence within the scheme of the criminal law. Accordingly, it lends power to the rhetoric of self-defense, offering us both moral and political reasons to favor the defender in cases that closely track the paradigm.

But even as the paradigm grants us a measure of clarity, significant uncertainty remains to sow confusion and misjudgment. Because the motive required for self-defense is surprisingly indeterminate even in the paradigmatic case, the law of self-defense may be overbroad. This problem is exacerbated

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196. Cf. DRESSLER, *supra* note 6, at 233 (arguing that “the criminal law ought to send the moral messages we intend to send”).

197. See *id.* at 572-73.

198. MPC § 210.3(1)(b); see also DRESSLER, *supra* note 6, at 573.

199. See DRESSLER, *supra* note 7, at 581; Kadish, *supra* note 44, at 873.

by the paradigm's susceptibility to heavy-handed moral rhetoric that is, in the end, largely unsupported by consistent, widely-held moral principles. These uncertainties of motive and morality combine to create space for illegitimate values to penetrate self-defense law whenever we are morally ambivalent about such values, as when a killing is motivated by revenge taken upon a deserving and/or dangerous person.

This article has sought to resist the paradigm's negative tendencies by advancing a more political conception of self-defense that is still only incipient in the literature of criminal law. This perspective recognizes that the motive behind self-defense – self-preservation – has not only moral but political significance because it is also the reason that inspires the criminal law under a social contract theory of the state. Pursuant to this theory, self-defense is a pacifistic concept that strictly circumscribes the violence that individuals do under the guise of exercising the “right of self-defense,” much as the criminal law addresses instances of private violence more generally. Put another way, the concept of self-defense under social contract theory marks preemptive and aggressive violence as two sides of the same coin, each generative of the other. Self-defense, then, is about limiting rather than permitting harm; just like the rest of the criminal law, it is intended to curb private violence in order to promote peaceable coexistence.

This view runs contrary to conventional wisdom, which suggests that the concept of self-defense constitutes a moral limit on the criminal law and positions the individual right of the self-defender in opposition to the institutional prerogatives of the law and society. Accordingly, the conventional explanation struggles to find the limits of self-defense because it is difficult to know how to place limits on a limit, especially when it is already styled as being “moral.” Political theory, on the other hand, argues that self-defense and the criminal law reinforce one another and are both equally to be defined according to reasons of peace, which are in everyone's interest. Under this approach, the law of self-defense, like the criminal law itself, is derived from an intentional political decision that must be justified. This demand for a justification, which is expressed through the political motive of harm prevention, helps to ensure that the law of self-defense stays moored to its underlying principles and to establish the limits of self-defense that situate it at the heart of criminal law.

