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Self-Defense as a Rational Excuse

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TABLE OF CONTENTS

I. INTRODUCTION

Unlike other defenses,[1] the permissibility of self-defense has hardly been the subject of controversy.[2] Philosophers and lawyers have tended to agree not only *that* it is permissible, but about the sorts of cases to which its permissibility applies. Even supposed marginal cases, such as attacks by insane or incompetent aggressors, have not generated much controversy, and a general consensus in favor of permissibility in such cases has emerged.[3] A certain class of cases of recent inter-

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1. *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 10.3.1 (1978) (arguing that duress expresses theory of excuses that could absorb entire criminal law); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 643-44 (1981) (arguing that duress defense represents severe threat to ordinary criminal law discourse).

2. Even some pacifists accept the permissibility of self-defense. *See* Cheney C. Ryan, *Self-Defense, Pacifism, and the Possibility of Killing*, 93 ETHICS 508, 510 (1983) (arguing that problem of self-defense for the pacifist is not problem of whether self-defense is permissible, but rather of why it is permissible).

3. *See generally* George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367 (1973); Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252 (1994); Judith J. Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283 (1991). *But see* Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFF. 74 (1994) (arguing that impermissibility of killing innocent bystanders entails that of killing innocent threats and insane aggressors).

est among legal commentators, however, pressures the rationale for the defense and suggests the need for reexamination. This is the class of killings of abusive partners at the hands of their victims, where self-defense as traditionally understood is often inapplicable because the aggressor's attack was not sufficiently imminent or certain to occur.[4] We might think of these as *near* self-defense cases, that is, cases in which a defendant is *motivated* by the desire to protect herself against unlawful aggression, but in which her legal claim of self-defense fails because one or more of the legal requirements for the defense is not met.[5]

In focusing on what I am calling "near" self-defense cases, I am laying to one side two other types of cases. On the one hand, I leave aside cases in which the defendant's claim falls squarely within the parameters of traditional self-defense doctrine.[6] While courts may not always have recognized the applicability of self-defense to such situations,[7] the objections to such cases are practical and political, not philosophical. On the other hand, I do not address cases in which a victim of abuse kills her abuser where the defendant would more appropriately assert one of the other standard legal defenses, such as insanity or provocation.[8] Such cases raise no question of interest for the doctrine of self-defense.

If we restrict our focus to *near* self-defense cases, the following difficulty emerges. Courts and commentators have come increasingly to believe that the right of self-defense should extend to a number of cases

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4. *See, e.g*, State v. Norman, 378 S.E.2d 8 (N.C. 1989) (holding self-defense instruction properly denied for defendant who shot husband while latter was sleeping).

5. Near self-defense should not be confused with the doctrine of *imperfect self-defense*. The latter refers to cases in which a defendant is unreasonable in his belief in the need for defensive force. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 207 (2d ed. 1995) (defining imperfect self-defense as killing with unreasonable belief that factual circumstances justify killing). I leave such cases out of what I am calling *near* self-defense. Imperfect self-defense, moreover, is only a doctrine of mitigation. *See* State v. Powell, 419 A.2d 406 (N.J. 1980) (allowing imperfect self-defense to reduce second-degree murder to manslaughter). The cases of *near* self-defense we shall consider, however, will be those in which a complete defense seems warranted.

6. *See* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 384 (1991) (presenting evidence that majority of cases where battered women kill fit model of standard, confrontational self-defense).

7. *See id.* (arguing that high reversal of battered woman self-defense cases is due to trial judges' "refus[al] to apply long-standing principles of substantive, evidential, and procedural law").

8. *See, e.g.*, State v. Burton, 464 So. 2d 421 (La. Ct. App. 1985) (rejecting battered woman syndrome as supportive of insanity plea when defendant pleaded not guilty to manslaughter by reason of insanity); State v. Anaya, 438 A.2d 892 (Me. 1981) (admitting expert testimony on battered woman syndrome to support possible defense of provocation); State v. Briand, 547 A.2d 235 (N.H. 1988) (same).

in which the traditional legal requirements for the defense are not met.[9] The refusal to allow Judy Norman's claim of self-defense to go to a jury, for example, has provoked widespread criticism, despite Norman's evident failure to satisfy the imminence requirement.[10] While the sense that defendants like Norman merit exoneration may not be universally shared, it appears to be sufficiently common to raise the following question: Is there a coherent account of self-defense that would extend the defense to cases like Norman's, where the defendant is clearly motivated by self-preservation, and indeed where her fear for her life seems reasonable under the circumstances? The sort of account required is a highly subjective one, focusing on defendants' reasons for acting over and above the objective elements of their situations. My question, then, is about the theoretical *rationale* for a defense with this shape. In what follows, I shall argue that *if* self-defense is to be conceived primarily as a defense based on reasons for acting, it must be understood quite differently from the way in which self-defense is commonly viewed. The common view, articulated in different variations, is that self-defense is a *justification*. This view of self-defense is so widely shared that it is espoused by lawyers and philosophers, rights-based theorists and utilitarians alike.[11] In this article, however, I sketch a view which challenges this received wisdom, one that would regard the right to kill in self-defense as a weaker right than has been traditionally supposed. On the view I trace, self-defense should be thought of as a species of *excuse*, in particular, a kind of excuse I shall call "rational excuse."[12]

The claim that self-defense should be conceived as an excuse will depend most heavily on arguments *against* a justification picture of

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9. *See, e.g.*, Richard A. Rosen, *On Self-Defense, Imminence and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993).

10. State v. Norman, 378 S.E.2d 8 (N.C. 1989). Judy Norman killed her husband while he was sleeping, following a prolonged and vicious beating and threats by him to kill her, and fearing a resumption of violence when he awoke. Although an intermediate appellate court held the trial court's failure to instruct on self-defense was improper, the Court of Appeals reinstated the trial court's verdict on grounds that the imminence requirement was not satisfied.

11. *See* FLETCHER, *supra* note 1, § 10.5.4; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.7 (2d ed. 1986); Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871 (1976); Thomson, *supra* note 3.

12. Only one other commentator, to my knowledge, has argued that self-defense should be thought of as an excuse. *See* 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 (1986). One essential difference between our approaches is that Rosen would allow the excuse for unreasonable actors, whereas I would not.

self-defense. The initial implausibility of this negative claim may stem from a certain equivocation about the meaning of the term "justification." Justification appears to be broader in ordinary language than it is in the criminal law. In the criminal law, to call a violation of a prohibitory norm *justified* is to say not only that it is *permissible*, but that it is *encouraged*. In ordinary language, by contrast, to say an act is justified is to say only that it is permissible. Moral philosophers have mostly followed ordinary usage in this regard.[13] The common and philosophical senses of justification should therefore be understood as applying to *all* of the criminal law's justifications, plus the intermediate category I call "rational excuse." The claim that killing in self-defense is not *justified* killing will seem less counterintuitive in the narrower, criminal law sense of the term.

On the excuse side, the initial implausibility of my thesis will stem from the fact that excuses are normally associated with lack of responsibility. I wish to suggest the applicability of excuse, however, where there is no relevant psychological impairment. Excuse should be available in cases where the ground for exoneration lies in the content of an agent's reason for doing what she did. Rational excuses thus share a characteristic with justifications: they apply to actions *done for a reason*, where the excuse itself provides the reason for the violation of the prohibitory norm.[14] As I shall argue, however, a defense which falls in this category lacks the primary identifying characteristic of justifications in the criminal law—the endorsement of the agent's behavior. Elsewhere I have suggested that the defense of duress should also be thought of as exoneration of intentional, nonjustified conduct.[15] In this sense, defenses like duress and, as I argue, self-defense, are situated between full moral endorsement and lack of responsibility.

My argument will proceed as follows. In the next part, I argue in favor of the law's motivation-based approach to self-defense, rejecting what I call the "bifurcation strategy," namely a position that treats a purely motivation-based defense under the heading of "putative,"

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13. While she does not explicitly use the term "justification," Judith Thomson contrasts an action's being *excused* with an action's being *permissible*. The suggestion as far as justification is concerned is that a justification is a mere permission to do a prohibited act. Thomson, *supra* note 3, at 283.

14. I mean here to reject the possibility that the act is done for a reason under a different description from the one to which the excuse applies.

15. *See* Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251 (1995) (arguing for a conception of duress as an excuse not premised on lack of responsibility). The label "rational excuse," however, is new to this article.

rather than actual, self-defense. I also argue, however, that the bifurcation theorists are right to reject the motivation-based account of justification. These two theses in combination entail that self-defense should be thought of as an excuse. In part III, I turn to the wider philosophical background to the notion of justification. I consider a conception of justification which, like the view of rational excuse for which I argue, focuses on agent-motivation, namely the Hobbesian conception. Insofar as it combines a focus on motivation with the justification picture of self-defense, the Hobbesian view represents the position towards which modern law tends. But the law does not take a consistently Hobbesian approach. Instead, it stands midway between the Hobbesian view and an older, quite limited picture of justification, one that regards justification as sharply limited to state action undertaken on behalf of collective welfare. In part IV, I offer a possible philosophical rationale for the older, more limited conception: other-regarding actions undertaken in defense of certain interests have a moral priority over comparable self-regarding actions. Insofar as it is self-regarding, on this view, killing or harming another in self-defense cannot be justified; it can, however, be permitted under the moral framework of *excuse*. In part V, I explore the doctrinal implications of conceiving of self-defense as a motivation-based excuse. Finally in part VI, I return to the battered woman cases that prompted our investigation, arguing that the notion of "rational excuse" helps to resolve the tension between intuition and doctrine in such cases.

II. Defenses for Battered Women Who Kill

A. Self-Defense on a Justification Theory

In his contribution to the present symposium, George Fletcher argues that the central legal requirements of self-defense should be understood as mandated by the defense's nature as a justification.[16] The imminence requirement, for example, establishes the essential dividing line between retaliatory and defensive behavior.[17] The requirement that the original use of force be unlawful is explained as ensuring that defensive force is employed as a matter of right.[18] Similarly, the necessity requirement distinguishes justified from merely tolerated or excused

16. *See* George Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. Pitt. L. Rev. 553 (1996).

17. *Id.* at 556-57.

18. *Id.* at 558-59.

conduct,[19] and proportionality serves a similar function.[20] Fletcher's suggestion is that defensive killing cannot be *justified* unless the above conditions are met.

Let us restrict our attention for the moment to the necessity requirement. One line of argument against a justification picture of self-defense would run as follows: *actual* necessity is a requirement of justification. But actual necessity is not required for self-defense. This shows that self-defense cannot be a justification.

There are two obvious avenues for rejecting this argument. The first is the law's solution: *actual* necessity is never required for justification. It is sufficient under prevailing American law that the defendant had a reasonable belief in the need to use defensive force.[21] The second is Fletcher's solution, namely to treat cases in which necessity is lacking as cases of mistaken self-defense, and then to allow for an excuse of "putative," rather than actual, self-defense.[22] It is because I side with Fletcher on the nature of justification, but with the law in its focus on the defendant's state of mind for purposes of self-defense, that I am drawn to the excuse picture of self-defense. Each of these elements requires substantiation, however.

First we must ask what reasons there might be to regard actual, rather than merely perceived, necessity as a requirement of justification. As Paul Robinson has argued, justification is objective, in the sense that it applies to cases in which no "bad act" has occurred. Where actual justification is present, nothing has happened that should attract the attention of the criminal law.[23] In a case of mistake about the availability of a justification, by contrast, a bad act *has* occurred, and thus the law cannot justify the conduct if it is to exonerate the

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19. *Id.* at 559.

20. *Id.* at 559-60.

21. The Model Penal Code consistently allows actors to avail themselves of a justification defense where they are mistaken about the availability of the justification, *see* MODEL PENAL CODE §§ 3.02, 3.04 (1985), with the caveat that actors who are negligent or reckless in their belief can be convicted of a crime for which the required mens rea is negligence or recklessness, as the case may be, *see* MODEL PENAL CODE §§ 3.02(2), 3.09(2) (1985). Some commentators side with the law's approach, dispensing with the requirement of actual necessity for justification. *See, e.g.*, Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1908-09 (1984) (arguing that reasonable belief is sufficient for justification); Arthur Ripstein, *Self-Defense and Inequalities of Power*, 57 U. PITT. L. REV. 685 (1996) (same).

22. Fletcher, *supra* note 1, at § 10.1.2.

23. Paul H. Robinson, *Competing Theories of Justification: Deeds vs. Reasons*, *in* HARM AND CULPABILITY (A.T.H. Smith & A. Simester eds., forthcoming) (manuscript on file with author).

defendant. Justification is about doing good in the world, or at least about minimizing harm.[24] It applies to cases in which the defendant has brought about no net harm, not to cases in which he merely thinks he has done so.[25] Robinson calls this the "deeds" view of justification—the view that justification should turn on what is *done*—and he contrasts it with the "reasons" view—the view that justifications should turn on the agent's reason for acting. Accordingly, Robinson thinks justification should be available to an agent who was unaware of the existence of the justification at the moment of action. In the case of self-defense, this view has few supporters.[26] But accepting actual necessity as a condition of justification does not inexorably commit one to extending justifications to unaware actors. One might see justification as requiring *both* that the agent did what would minimize harm, *and* that she did what she did for that reason. This is obviously only a gesture in the direction of an argument for a sensible objectivism about justification. While I cannot offer a fuller argument for the point here, I do not have much to add to the compelling arguments others have made for this position. For anyone already convinced of the salience of actual necessity to justification, at any rate, there is an argument for treating self-defense as an excuse.

The alternative, however, to the excuse theory is the view I pointed to above. It is the view that consists in distinguishing "putative" from actual self-defense, restricting self-defense to cases in which there is actual necessity, and treating mistake cases under the theory of excuse.[27] I shall call this the "bifurcation strategy." In order for the law's focus on motivation to provide us with a reason to turn to an excuse theory of self-defense, then, we require an argument against the bifurcation strategy, that is, an argument to the effect that all self-defense-type cases should be treated alike. Let us call this the "unity" requirement. One argument in favor of such a requirement is simply that it

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24. A rights-based approach to justification would of course deny this characterization. We shall turn to such views below. *See infra* part III.

25. Robinson, *supra* note 23, manuscript at 2. Robinson suggests that there might nevertheless be attempt liability in such a case.

26. 2 PAUL ROBINSON, CRIMINAL LAW DEFENSES § 122 (1984); GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 504 (2d ed. 1983) ("The law would be oppressive if it said: It is true that you took this action because you felt it in your bones that you were in peril, and it is true that you were right, but you cannot now assign reasonable grounds for your belief, so you were only right by a fluke and will be convicted."). Williams does not, however, address the case of the actor completely unaware of justifying circumstances, but rather the case of someone who has no reasonable belief in the need to use defensive force.

27. Fletcher, *supra* note 1, at § 10.1.2; Robinson, *supra* note 23, manuscript at 33-34.

seems odd to treat differently two defendants who, *from their perspectives*, do exactly the same thing. We would not, for example, attempt to correct the reasoning or methodology of the "putatively" exonerated defendant; in this sense we regard him as morally on a par with the justified actor. But if this is true, the legal doctrines of exoneration should be the same in both cases: both defendants should be excused or both should be justified.

Perhaps a stronger argument in favor of the unity requirement is that the two categories—actual and putative self-defense—do not cover all of the cases in which we wish to exonerate defendants: they fail, in particular, to cover those *near* self-defense cases which are not a matter of potential mistake. For if, on the bifurcation strategy, we extend a justification to defendants who actually meet the requirements for self-defense, and an excuse to those whose reasonable beliefs are such that the conditions for self-defense would be satisfied if correct, then there can be no defense for a defendant who acts on a motivation of self-preservation, but who, for example, does not *herself* believe the harm is imminent. Judy Norman does not have even a claim of "putative" self-defense. Again, many may think she should not have a defense to murder. I am not here arguing that she should. Rather, in view of what I take to be a growing consensus in favor of extending a defense to a defendant like Norman, my question is whether there is a plausible theory of self-defense that would extend the defense to her. My point here is simply that the notion of putative self-defense does not provide such a theory.

In order to extend self-defense to cases where the imminence requirement is not even "putatively" satisfied, the preferred solution has been to replace "imminence" with "immediate necessity," allowing a defendant to use force in self-defense where the use of force is immediately required, even if the harm she seeks to avoid is not immediately forthcoming.[28] This solution, however, would still probably not exoner-

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28. *See, e.g.*, 18 PA. CONST. STAT. § 505(a) (1983) ("use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary"); MODEL PENAL CODE § 3.04 (1985) (actor must believe use of force is "immediately necessary for purpose of protecting himself against use of unlawful force"). The MPC specifically intended to eliminate the strict imminence requirement. MODEL PENAL CODE § 3.04, cmt. 2(c). Courts, however, do not appear to have accepted the relaxed time frame, even in jurisdictions which statutorily require only "immediate necessity." Commonwealth v. Grove, 526 A.2d 369, 373-74 (Pa. Super. Ct. 1987). The "immediately necessary" standard, however, appears to be the favorite of commentators. *See* Robert F. Schopp et al., *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, 1994 U. ILL. L. REV. 45, 66-67 (giving example of

ate Norman, since although the use of force may be eventually necessary under the circumstances, it may not be necessary to kill *now*. The moment chosen might be one of any number of propitious moments for killing someone who will almost certainly kill you if you do not kill him. Accordingly, it has also been suggested that the imminence requirement might be eliminated altogether, on the grounds that the necessity requirement is adequate by itself to screen out cases in which the defense should not apply.[29] The argument is that there is no reason to require a defendant to wait until the last possible moment to avert an attack, and that we should allow the defense whenever the defendant can credibly claim she would have faced serious physical harm without the use of protective force.[30] Thus, if we wish to extend the defense to someone in Norman's position, we would do best to side with those who suggest the complete elimination of the imminence requirement.

In addition, courts have increasingly adopted a subjective approach to the question of reasonableness. This is because at least a *thoroughly* objective approach to that question will leave out the particular characteristics that might require a defendant who is much smaller and weaker than the aggressor to use force earlier than the hypothetical reasonable person.[31] On a slightly less extreme version of the objective approach, one considers whether a reasonable person in the actor's situation would think defensive force necessary, where the

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hiker in desert who will have only source of water poisoned if he does not kill second hiker now); 2 ROBINSON, *supra* note 26, § 131(c)(1) ("The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier—as early as is required to defend himself effectively."); WILLIAMS, *supra* note 26, at 503 ("The use of force may be immediately necessary to prevent an attack in the future.").

29. *See* Rosen, *supra* note 9 (issue for jury should be whether defendant reasonably believed defensive force was necessary, not whether threat was imminent).

30. The added advantage of the pure necessity standard over the "immediately necessary" standard is that the former may take care of the failure to retreat cases as well: if a defendant can take refuge from her attacker only by remaining out of public circulation, her use of protective force can be shown to be "necessary," although perhaps not "immediately necessary," as long as the law does not want to require her to spend the rest of her life indoors.

31. *See* State v. Baker, 644 P.2d 365, 368 (Idaho 1982) (instruction that would "encourage the jury to focus upon a defendant's subjective fears . . . would be contrary to the reasonableness requirement" for self-defense); People v. Cisneros, 110 Cal. Rptr. 269, 282 (Cal. Ct. App. 1973) ("In acting in self-defense the person assailed is not entitled to act upon a subjective standard."); State v. Cadotte, 42 P. 857 (Mont. 1895) (proper measure of circumstances justifying killing in self-defense is reasonable person, not person in particular class of men to which defendant belongs).

physical characteristics of the defendant are included in "the actor's situation."[32] But even the more moderate test will work to the exclusion of many of the cases we are calling *near* self-defense, because it leaves out both the personal history of the defendant and the general psychological effects of being subjected to years of abuse.[33] On the subjective approach, by contrast, as one court has said, "defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable."[34] The subjective approach thus makes possible not only consideration of the pattern of abuse that the defendant has come from past experience to expect, but also the admissibility of psychological testimony about the "normal" responses of victims of battering.[35]

When we combine these several aspects of contemporary self-defense law, the following picture emerges. In order to make a valid claim of self-defense, a defendant need only have a reasonable belief that the use of force under the circumstances was necessary in order to avert a perceived attack. Reasonableness is assessed from the defendant's perspective, taking into account her subjective peculiarities and past experiences. This turns self-defense into a defense based almost exclusively on motivation: it says that a defendant can do whatever she believes necessary to avert an attack by an aggressor, provided that her

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32. State v. Wanrow, 559 P.2d 548, 558 (Wash. 1987) (reasonableness interpreted so as to allow consideration of defendant's physical vulnerability). The *Wanrow* case required the court only to take a more flexible approach to objective reasonableness, although dicta in that case is often cited in support of the subjective approach. *See infra* note 33. For other intermediate, objective approaches, see Hart v. State, 637 S.2d 1329, 1339 (Miss. 1994) ("The defendant is judged not according to his own particular mental frailties, but by a 'reasonable person' standard."); People v. Aris, 264 Cal. Rptr. 167, 179 (Cal. Ct. App. 1989) ("[T]he reasonableness of the defendant's belief that self-defense is necessary . . . do[es] not call for an evaluation of the defendant's subjective state of mind.").

33. *Wanrow*, 559 P.2d at 558. The Model Penal Code's approach is another variation of the subjective approach: "[T]he use of force upon or toward another person is justifiable *when the actor believes that such force is immediately necessary* for the purpose of protecting himself against the use of force by such other person on the present occasion." MODEL PENAL CODE § 3.04(1) (emphasis added).

34. *Wanrow*, 559 P.2d at 555.

35. State v. Hundley, 693 P.2d 475, 478-80 (Kan. 1985) (correct standard is "how a reasonably prudent battered wife would perceive [husband's] demeanor," but referring to this as application of objective test); State v. Allery, 682 P.2d 312, 316 (Wash. 1984) (en banc) (evidence of battered woman syndrome "may have substantial bearing on the woman's perceptions and behavior at the time of the killing and is central to her claim of self-defense"); State v. Leidholm, 334 N.W.2d 811, 818 (N.D. 1983) ("a correct statement of the law of self-defense is one in which the court directs the jury to assume the physical and psychological properties peculiar to the accused").

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.

My claim, then, is simply that *if* one is inclined to accept the above parameters for the defense, one should also find an excuse formulation attractive, insofar as it allows one to avoid bifurcation. Methodologically, a nonbifurcated approach to these cases seems defensible: one starts with the group of cases in which one is inclined to allow the defense and then locates the lowest common denominator across all such cases. My claim, then, is that proceeding in this way one is inevitably pulled towards a subjectification of self-defense, because the lowest common denominator of the *near* self-defenses cases (at least where exoneration seems appropriate) and the regular self-defense cases taken together is the belief on the part of the agent that the use of force was necessary to avert death or serious bodily injury, along with a judgment that such belief was reasonable. What I think this shows is that the element that most strongly inclines us to allow a claim of self-defense is the deference we accord the motivation of self-preservation, assuming the motivation was reasonably called into play. A motivation-based defense, however, is one that is difficult for a justification picture of self-defense to accommodate. In part III, I shall make a more robust argument for this claim, suggesting that the only clear motivation-based picture of justification available is the Hobbesian picture, and that modern law cannot accept the implications of that view. Before I turn to this argument, however, we must consider a bifurcation position which would not suffer from the particular defect of Fletcher's view: this is the claim that all of self-defense should be treated as a justification, but that at least in the case of battered women, self-defense per se is not required to exonerate the defendant. On this view, battered women should be thought of as having an excuse, where the claim to excuse falls outside the ambit of self-defense. I shall argue, however, that this view suffers from other defects.

B. An Excuse of Battered Woman Syndrome

While the theory has hardly found favor with courts,[36] some com-

36. *See, e.g.*, Hawthorne v. State, 408 So.2d 801, 805 (Fla. Dist. Ct. App. 1982) (holding that battered woman syndrome testimony only properly introduced to bear on defendant's claim of self-defense, not to establish novel defense); State v. Stewart, 763 P.2d 572, 577 (Kan. 1988) ("[N]o jurisdictions have held that the existence of the battered woman syndrome in and of itself operates as a defense to murder."). *But see* McMaugh v. State, 612 A.2d 725 (R.I. 1992) (sug-

mentators have suggested the creation of a special defense for battered women, what is sometimes referred to as the defense of "battered woman syndrome."[37] Drawing on Lenore Walker's work in experimental psychology which purports to show the existence of a psychological syndrome specific to victims of domestic abuse,[38] the novel defense would claim that battered women who kill their abusers should be regarded as lacking responsibility for their conduct. Such women, according to the syndrome, become helpless and passive, unable to leave the relationship and incapable of seeking help, even when help is available.

The possible legal relevance of the syndrome, however, remains unclear. If the syndrome is meant to suggest a form of incapacity, the most obvious candidate for a theory of legal defense is lack of voluntariness, along the lines of defendants who perform otherwise criminal acts while unconscious, for example, in their sleep or during an epileptic seizure.[39] But lack of voluntariness usually means that the actor literally cannot control her bodily movements, and this is unlikely to be the case where the killing is conducted by an awake actor whose body is not moved by an external physical force, and where the movement is not a reflex reaction. A claim of incapacity applicable to such cases would thus be more like what the insane actor can claim—not that there is no voluntary act, but that there is no mens rea, because the defendant lacks the general capacity to form an evil intent. The more promising suggestion of incapacity, then, is that the battered woman has had her judgment clouded by the abuse she has suffered, and that her ability to think rationally about her alternatives has become impaired. In this way, the existence of the syndrome can only constitute the basis for a defense in its own right if there is a type of impairment which does not imply complete loss of agency, but which nevertheless destroys an agent's responsibility for her conduct.

An initial difficulty is this. If past experiences are to have impaired the defendant's responsibility for conduct, they must have done so with respect to everything she does, not just at the moment she kills. And no

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gesting battered woman syndrome might be presented as affirmative defense to murder to defeat evidence of premeditation).

37. *See, e.g.*, Mira Mihajlovich, *Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self-Defense*, 62 IND. L.J. 1253, 1280 (1987) (arguing diminished capacity proper plea for defendants displaying battered woman syndrome).

38. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984).

39. *See* People v. Newton, 87 Cal. Rptr. 394, 405 (Cal. Ct. App. 1970) (unconsciousness complete defense to charge of criminal homicide as long as not voluntarily induced); People v. Graham, 455 P.2d 153, 161 (Cal. 1969) (same).

one has suggested, or would suggest, that a battered woman should be exonerated for *any* illegal act she might perform, although it has been suggested that the syndrome might have application to cases in which women commit crimes under duress from abusive husbands.[40] This underscores the basic difference between the proposed battered woman syndrome defense and the insanity defense. What the proponent of a separate battered woman syndrome defense would require, then, is a theory under which a sane agent's responsibility for her conduct can be destroyed, not in a permanent fashion, but destroyed only with respect to a particular act she performs, where the nature of the impairment leaves the act a voluntary one, in the sense the criminal law acknowledges. Can we find examples of such a psychological middle road elsewhere in our theory of voluntary action?

First consider cases of accidental harm. In some such cases the agent's behavior is intentional under *some* description, but not under the one in terms of which the behavior is harmful. Thus I might stretch my arms intentionally, but I might not slap you in the face intentionally if I did not know that by stretching my arms I would slap you in the face. While I am responsible for stretching my arms, I am not responsible for slapping you in the face. But *this* sort of lack of responsibility is hardly applicable to the situation of the battered woman who kills, since the battered woman, we are presuming, is aware of what she is doing, while the reason we can say I do not slap you in the face intentionally is that I lack awareness of slapping you in the face.[41] In short, since the required mens rea for murder is not purpose, but at most knowledge, cases in which the defendant consciously controls her bodily movements will be ones in which it will be difficult to show lack of responsibility without alleging insanity.

Coerced acts may provide a more promising model for the middle road the battered woman theorist needs. On one view of coercion, if a person holds a gun to your head and threatens to kill you unless you turn over your money, you lack responsibility for handing over your money, even though you are aware of what you are doing, since you hand over your money under duress. Perhaps, then, lack of responsibil-

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40. *See* Beth I.Z. Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603 (1994). It would be equally difficult to limit the application of the syndrome to 'near duress' cases.

41. This is at least the case in ordinary language and in the law. Philosophers have a narrower (indeed too narrow, as I have suggested elsewhere) understanding of the notion of intentional action. Claire Finkelstein, *The Irrelevance of the Intended to Prima Facie Moral Culpability: Comment on Moore*, 76 B.U. L. REV. 2101, 2104 (1996).

ity can be inferred from a lack of "willingness," rather than from lack of control.[42] But I think this understanding of coerced acts is itself untenable.[43] There is a clear sense in which the coercer is presenting you with a choice: while he has severely restricted your options there are still two things you can do under the circumstances. The point of restricting your options is of course to make one course of action vastly more attractive to you than another. But this means that the coercer is relying on your intact powers of ratiocination, since he *wants* a particular course of action to recommend itself forcefully to your reason. Lack of rationality on your part would foil his plans. It is unclear, then, how pressure that does not destroy the possibility for intentional action is supposed to weaken the agent's responsibility. Indeed, your handing money over to the coercer seems more emblematic of agency than the case in which I unintentionally hit you in the face when I put on my coat: At least in the former case there is something you want to which handing over money is a means, whereas in the latter, although I control the movements of my body by which I hit you in the face, there is nothing I am seeking to accomplish by doing so.

Insofar as women who kill their abusers control their bodily movements and are aware of what they are doing, then, they should be thought of as killing intentionally. The problem is that there is no coherent theory under which some agents who act both voluntarily and intentionally can be thought of as lacking responsibility for their conduct. The sort of defense required is one that applies to responsible agents, but which does not demand the stringent conditions of self-defense on a justification theory of the defense. The notion of a "rational excuse" will play precisely this role—it applies to sane, responsible agents in virtue of a judgment made about the *content* of their reasons for acting. We shall explore the notion of "rational excuse" further in part V.

III. Conceptions of Justification

Thus far we have considered approaches to self-defense, and I have argued that the law currently adopts a motivation-based approach

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42. Aristotle rejects the suggestion. Although he calls actions performed under duress "mixed," he concludes that such acts are essentially voluntary, since "the principle that moves the instrumental parts of the body in such actions is in [the man,] and the things of which the moving principle is in a man himself are in his power to do or not to do." Aristotle, *Nicomachean Ethics*, *in* Collected Works of Aristotle § 1110(b)(33-34) (Jonathan Barnes ed., 1984).

43. I critique this approach more fully in Finkelstein, *supra* note 15.

to that defense. If we side with the law on the nature of self-defense, the question arises whether the motivation-based approach to *self-defense* is compatible with the background philosophical account we might give of *justification*. There is one clear approach to justification that hinges justification entirely on motivation. This is the Hobbesian approach.

For Hobbes, the right to act on the motive of self-preservation is the most essential of the rights that man has outside of civil society, and a state's ability to recognize it constitutes one of the central conditions of legitimate political authority. As David Gauthier in his contribution to this symposium suggests, "A legal system which failed to recognize the right, which failed to recognize the justification each person has to act in her own protection in the light of imminent danger, could have no valid claim on the allegiance or obedience of those it sought to bring within its sway."[44] This thought is nowhere more seriously maintained than in *Leviathan*, where Hobbes argues that there are "some rights which no man can be understood by any words or other signs to have abandoned or transferred," chief among them "the right of resisting them that assault him by force."[45] So strong is the right to defend one's life against attack, that it prevails even as against the sovereign, whose powers, Hobbes makes clear, are otherwise so extensive that "nothing the sovereign representative can do to a subject, on what pretense soever, can properly be called injustice, or injury."[46] Thus if the sovereign comes to kill me, I am at liberty to resist him, although he does not do me an injustice in trying to kill me. Similarly, Hobbes says that "[i]f the sovereign command a man (though justly condemned) to kill, wound, or maim himself, or not to resist those that assault him . . . yet hath that man liberty to disobey."[47] Hobbes appears to have laid the foundation for the modern rights-based tenor of contemporary accounts of the defense.

There is, however, a striking difference between the Hobbesian and the modern views of justified self-defense. As commentators generally agree, one mark of a justification is that the use of force in response cannot itself be justified.[48] This aspect of justification can be

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44. David Gauthier, *Self-Defense and the Requirement of Imminence*, 57 U. PITT. L. REV. 615, 616 (1996).

45. THOMAS HOBBES, LEVIATHAN ch. XIV, para. 8 (1994) (1651).

46. *Id.* at ch. XXI, para 7.

47. *Id.* at ch. XXI, para 12.

48. FLETCHER, *supra* note 1, § 10.1.1.

derived from the requirement, specific to self-defense, that the use of force by the initial aggressor must itself be unlawful. But for Hobbes, the fact that the sovereign is justified in trying to kill me does not mean that I am not justified in resisting him. So we can have a situation in which two agents are attacking one another, each of whom is justified. Hobbes in effect rejects the requirement on justification that the use of force be unlawful. We shall return to differences between the Hobbesian and modern views below.[49]

What *is* uniquely modern about this conception is the idea that the legitimate scope of sovereignty is limited by the background, prepolitical right of self-defense; in other words, that individual right provides the limiting principle against which the power of the state is defined. This follows axiomatically from the way in which the state is constituted—by agreement of its putative members—and the purpose for which such agreement is entered into—the improved security of one's life. In other words, self-defense provides the very condition for the willingness of individuals to leave the state of nature, and the scope of duty to the sovereign is limited by the latter's ability to fulfill that purpose: "The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth by which he is able to protect them."[50] Self-defense on a Hobbesian view is thus the essence of justification.

The law of Hobbes's own day, however, and that stretching back to the Middle Ages, suggested a very different picture of justification—in particular, a much narrower conception. Justified violations of the law were restricted to those committed by state agents, either as state officials or as private citizens representing the common good. The person who killed accidentally, under duress, or *se defendendo*, thus fell outside the scope of justification. Accordingly, a person who had killed *per infortunium* or *se defendendo* required a pardon from the king,[51] whereas a jailer who killed an escaping prisoner or a private citizen who killed a felon in "hue and cry"[52] would be acquitted if brought to justice at all.[53] When the executioner put in motion the state's machin-

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49. *See infra* text accompanying notes 62-67.

50. HOBBES, *supra* note 45, at ch. XXI, para. 21.

51. 2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW 479-83 (1959) (1895).

52. *See id.* at 478, 578-80.

53. NAOMI D. HURNARD, THE KING'S PARDON FOR HOMICIDE BEFORE 1307, at 88-90 (1969).

ery of death, these were not the acts of a man, but the acts of the state which merely passed through the person of the executioner.

In asserting a justification, then, a defendant does not attempt to claim the law's protection for acts performed for self-interested reasons. He presents instead a privilege to act as a representative of the state, and it is the common welfare rather than individual self-interest that provides the grounds for the legitimacy of his act. Although the dispensation of pardons became routinized and could eventually be expected as a matter of course where applicable,[54] the principle remained that he who claimed a defense for actions undertaken as a private, self-interested being could not demand the mantle of legal protection. Exoneration for such acts thus was formally a matter of mercy rather than of justice,[55] and one who was extraordinarily denied a pardon would have no legal claim for redress. Exoneration for killings committed *se defendendo* and *per infortunium* remained a matter of pardon until relatively late in the history of Anglo-American law.[56]

One finds the older view of justification in many of Hobbes's predecessors. St. Thomas Aquinas clearly limits the operation of justification to state agents acting for the common good. In his Question on murder, for example, Aquinas allows that it is permissible in general to kill sinners,[57] but he restricts the permissibility of such killings to those undertaken by agents charged with the public welfare: "it is lawful to kill an evildoer in so far as it is directed to the welfare of the whole community, so that it belongs to him alone who has charge of the community's welfare."[58] And he goes on to say that "the care of the common good is entrusted to persons of rank having public authority: wherefore they alone, and not private individuals, can lawfully put evil-

54. 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 313 (3d ed. 1927).

55. This was set out formally in the Statute of Gloucester (1278) which enacted that one who killed *se defendendo* or otherwise "without felony" must plead to the justices in eyre or of gaol delivery, and "in case it be found by the country that he did it in his defence or by misfortune, then by the report of the justices to the king the king shall take him to his grace if it please him." 6 Edw. 1, ch. 9 (1278) (Eng.), *quoted in* 3 HOLDSWORTH, *supra* note 54, at 312.

56. It was not formally abolished until 1828. 9 Geo. 4, ch. 31 § 10 (1828) (Eng.). The Statute of Gloucester already either reflected or instituted a regularization of the pardon process; the defendant was instructed to request pardon under the statute even though these were by then pro forma. By the reign of Edward III, the declining importance of the power to pardon is evidenced by the fact that the Chancellor had taken over the process. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1123-24 (3d ed. 1982).

57. ST. THOMAS AQUINAS, SUMMA THEOLOGICA II-II, Q. 64, art. 2 (Benziger Brothers, Inc., 1948).

58. *Id.* at II-II, Q. 64, art. 3.

doers to death."[59] While it is hardly surprising that Aquinas thought public executions lawful only when conducted by public authority, the impermissibility of private killings of evildoers must apply to other situations as well, since what is unlawful can never be made lawful for Aquinas by considerations of the greater good.[60] The difficulty this creates for the theory of self-defense is clear: one can never hope to *justify* killing in self-defense, since this would be to allow that evil can be outweighed. Aquinas's famous attempt to explain the permissibility of self-defense in terms of the fact that what is intended is saving one's life, while killing the aggressor is "beside the intention"[61] is an effort to obviate the absolute prohibition on private killing without having to justify such killing. *If* justification is the only moral principle one has for exonerating intentional violations of a prohibitory norm, calling the conduct "unintentional" is the only remaining route to permissibility. As I am in effect suggesting, however, one might reject the antecedent of the conditional and locate a principle of permissibility in excuse instead.

What is peculiarly modern about the Hobbesian view, then, is the supposition that acts of a person, *qua* individual, self-interested being, can be the subject of justification. This supposition only became possible once individuals, as opposed to states, were viewed as sources of political legitimacy. Behind the difference between the modern and the medieval conceptions of justification lies a difference in the conception of the relation between state and individual authority. On an older, preindividualistic conception, there is no justification for individual self-interest, because such interest bears no separate political legitimacy. Although Aquinas himself does not appear to accept the suggestion, one might instead regard a privilege accorded individuals to protect their own, narrowly drawn interests as an expression of understanding or toleration, rather than as a limitation on state authority.

The implications of the difference between these political conceptions for the right of self-defense are apparent: on the older conception of state authority, any right to self-defense must be accorded, as a matter of grace, by the political body itself, where the grounds for according the right are the tendency of the right to enhance social welfare.

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59. *Id.*

60. According to Aquinas, this can be inferred from the fact that moral acts take their species from what is intended, *id.* at II-II, Q. 64, art. 7, and that the means is also intended, *id.* at I-II, Q.12, art. 3.

61. *Id.* at II-II, Q. 12, art. 7.

On this view, the right of self-defense does not operate outside the realm of law; it is only available within that realm, and exists only to the extent required to realize the fullest well-being of the collective. The right of self-defense is thus one asserted not over and against state authority, but in conjunction with it. On a view which locates the source of state legitimacy in the prepolitical rights of individuals, by contrast, the source of justification is also prepolitical. In according a right of self-defense, on this view, the law merely recognizes that which already obtains, namely a natural right to pursue one's own preservation under any circumstances which threaten it.

The current state of the Anglo-American law of justification lies midway between the Hobbesian picture of expansive justification for self-interested acts and the more limited, medieval view of justification. That is, there are several respects in which the Hobbesian notion of justification is stronger than its modern counterpart. As noted above, it applies even in the face of force which is itself justified, so that I can be justified in defending myself against the sovereign, even though the sovereign is justified in killing me.[62] Moreover under our present jurisprudence, while killing an aggressor (whether culpable or not) in self-defense is included in the ambit of justification, killing innocent bystanders when necessary for one's survival generally is not.[63] Our current jurisprudence thus contains an asymmetry: private necessity is recognized for killing unlawful aggressors, under the heading "self-defense," but not for actions taken against nonaggressors. This is so even when the violation against the latter is trivial in nature, such as stealing a loaf of bread to keep from starving. On a Hobbesian view of justification, by contrast, there is no basis for restricting actions taken in defense of one's life to self-defense: individuals can use whatever means are necessary to defend their lives, even those directed against nonaggressors.[64] As Hobbes says, "If a man, by the terror of present death, be compelled to do a fact against the law, he is totally excused, because no law can oblige a man to abandon his own preservation."[65] And Hobbes goes on to apply this reasoning to cases in which "a man is desti-

62. *See supra* text accompanying note 48.

63. *See* Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884) (Eng) (rejecting defense of private necessity for defendants who cannibalized innocent cabin boy in life boat).

64. The Hobbesian rationale is thus to be distinguished from more moderate rights-based approaches. *See generally* Thomson, *supra* note 3 (distinguishing killing of aggressors and persons presenting an innocent threat from killing of innocent bystanders).

65. HOBBES, *supra* note 45, at ch. XXVII, para. 25.

tute of food or other thing necessary for his life, and cannot preserve himself any other way but by some fact against the law."[66]

The comparably weak conception of justification of our current jurisprudence reflects, I think, a certain ambivalence about self-interested reasons for acting and an uncertainty about the scope of the privilege to which they should give rise. On the one hand, it fails to embrace the wholesale privilege for self-interest of the Hobbesian picture, but it also eschews the rejection of the privilege of self-interest that we find in medieval law. The uneasy compromise our legal jurisprudence makes is to limit the privilege of self-interested reasons to actions undertaken against one who is himself the source of the threat to one's survival. But it is unclear that a rationale for this compromise can be given.

Another sort of rights-based approach to self-defense more easily explains the asymmetry between aggressors and nonaggressors: so-called "forfeiture" theorists maintain that aggressors forfeit the right to life (or, as in Judy Thomson's famous variation, the right not to be killed by the person attacked[67]), whereas innocent bystanders do not. But it is a well-known difficulty with such theories that it is hard to see why innocent aggressors should be thought to forfeit such a right. The answer typically given is that even innocent aggressors are "wronging" the person they attack.[68] But if "wronging" is meant to imply anything in the nature of a negative moral judgment, it is not clear why it should apply to innocent aggressors. If no such implication is meant, then why should it apply only to aggressors, and not also to nonaggressing threats?[69] And if, indeed, one is willing to go further and apply it to nonaggressing threats, what precisely is the basis for denying its application to innocent bystanders? At any rate, the forfeiture theory is beyond the scope of our present concerns, since we are attempting to discover a rationale for a defense premised on the *motivation* of the agent employing defensive force. In its focus on the nature of the aggressor,

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66. *Id.* at ch. XXVII, para. 26.

67. *See* Thomson, *supra* note 3.

68. Grotius, Puffendorf, and many others in this line treat the right to kill in self-defense as requiring some injustice on the part of the attacker. But since all wish to extend the right of self-defense to cases of insane, incompetent, or mistaken aggressors, they too require a conception of injustice which leaves a significant gap between that notion and notions like fault or culpability. The required conception of "injustice," however, is never clearly articulated, and it is not clear it can be. For a helpful discussion of this point, see SUZANNE UNIACKE, PERMISSIBLE KILLING ch. 4 (1994).

69. For this reason, some have concluded that self-defense is not permissible against insane and incompetent aggressors. *See generally* Otsuka, *supra* note 3.

forfeiture theories are not potential candidates for providing the sought-after rationale.

IV. Self-Defense on a Welfarist Conception

A rejection of the Hobbesian picture of justification, along with a focus on motivation, does not by itself suggest that self-defense should be thought of as an excuse. On the picture of justification we have from medieval law, one might argue that killing in self-defense should nevertheless be considered justified killing, on the grounds that in self-defense self-interest and social welfare coincide. On what we might call the "welfarist" conception of justification, violations of the law that promote social welfare are to be encouraged, regardless of the motivation with which they are performed. Although contemporary interpretations of "promoting social welfare" will no doubt suggest a utilitarian account, we need not take such a view. The welfarist picture refers only to the privileging of what it is good to do over what it is permissible to do, a focus on well-being over rights. My claim, then, is that the traditional notion of justification is welfarist. But now it remains to be considered why a welfarist view of justification cannot accept self-defense as a justification.

The obvious first attempt to treat self-defense in welfarist terms is the argument that as between a wrongful aggressor and an innocent victim, society prefers that the wrongful aggressor lose her life than that the innocent victim lose *his*. Self-defense may thus appear to meet the primary welfarist test, namely the endorsement of the defendant's behavior. There are reasons, however, to reject this account of self-defense, the most obvious of which is the persistence of the right in cases of insane or otherwise excused aggressors. In such cases, the law cannot plausibly claim that it has a preference for preserving the life of the victim, or if the claim might be heard, *sotto voce* in the case of insane aggressors, it surely will not hold up in the case of infantile, but otherwise normal, aggressors.

But here again the asymmetry with cases of necessity is instructive. An agent is typically justified in committing arson to save lives, or even in killing one to save many, but never in killing one to save one. Even the lesser evils defense, then, does not seem to take into account relative worth of lives and so does not express a preference in the one-for-one situation. As we have seen, however, the toting up of benefits and burdens does not always determine permissibility—I may not steal

a loaf of bread to keep from starving.[70] And this suggests that promotion of social welfare is not by itself sufficient to justify a violation of a prohibitory norm, but that one requires "authorization" to represent the public good before the promotion of social welfare can provide a justification. Thus, if self-defense were treated in the same way as necessity, it could *not* be counted a justification by dint of consequentialist reasoning, not only because the lowest common denominator methodology makes the defense applicable to one innocent victim who kills one excused aggressor, but also because we do not determine the permissibility of action undertaken for private benefit by a weighing up of evils.

There is, moreover, another reason for rejecting a justification picture of self-defense on a welfarist conception of justification, and this has to do with the nature of obligation. Killing performed for the sake of others' welfare presents a possible fulfillment of obligation: although the law usually recognizes no duty to rescue, it would not be antithetical to the nature of moral obligation to impose such a duty. Cases of justified public necessity are ones in which such a duty would apply; one might have a duty to burn a field to save a town or to steal a boat to rescue a drowning child. In such a case we could explain the justified nature of the violation by saying the agent had a moral obligation to do the prohibited thing, since an otherwise prohibited act which an agent has an obligation to perform must be more than merely excused; it *must* be justified. But killing in self-defense could never be an obligation; it can at most be a privilege or a right.[71] A person who would rather die than kill is surely permitted to do so, and this should be true, even if we are inclined to regard suicide as morally prohibited. Similarly, a person who would rather starve to death than steal a loaf of bread should not be thought of as under an obligation to steal the bread. A person, on the other hand, who would rather refrain from destroying an item of clothing needed as a tourniquet to save another from bleeding to death *could* be acting immorally.

The asymmetrical nature of possible obligations in the above cases suggests that whatever right the law or morality may accord us to act

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70. *See supra* text accompanying notes 63-64. The situation is obviously somewhat different in tort law, where it is generally accepted that private necessity negates fault. But even so, the defendant is required to compensate the victim for damage to the latter's property. Vincent v. Lake Erie, 124 N.W. 221 (Minn. 1910) (requiring boat owner to compensate owner of wharf for damage to latter when vessel tied up at wharf to find safety from storm).

71. *See* McMahan, *supra* note 3, at 261 (suggesting that on deontological view, decision not to act in self-defense cancels any reason to prevent injustice of her being killed).

in defense of our lives is considerably weaker than the right we might have to defend others or society at large. This is not to say that we may not regard a person who chooses to save her life rather than be killed in a favorable light. We might, for example, think her rational or prudent. But the sort of goodness that inheres in prudent behavior is not much stronger than the sort of goodness that inheres in other natural acts required for self-preservation: just as we sleep when we are tired, we defend ourselves when under attack. One deserves no special accolades for doing what it is natural to do. By contrast, the individual who does a good deed for a third party does something which deserves moral praise. He does what cuts against the grain of natural selfishness. Individuals are encouraged to act in defense of the common good; such conduct is more than merely tolerated. Where disinterested pursuit of social welfare requires a person to break the law, the law may extend the person a justification. The basis for extending a justification, however, must be narrowly drawn. It applies only where the state is unavailable to act on its own behalf, since the dangers associated with allowing individual judgment to substitute for public judgment are significant. For this reason, the substitution is allowed only where the content of the public judgment is clear, where the individual is in an appropriate position to represent public welfare, and where the state is completely and absolutely barred by circumstances from making the judgment itself.

Where an individual's reason for violating a prohibitory norm is self-interested, the judge of the necessity for the violation and the beneficiary of that act are one. By extension of the principle that no one should be judge in his own cause, the person who kills in self-defense is not the appropriate judge of the justifiability of the use of force. From a certain perspective, it is not only inappropriate to think of one's claim for self-defense as establishing a justification; it is outrageous. Why should *I* be able to insist that the preservation of my life is important for social welfare, just because it is important to *me*? This suggests that the person who acts in self-defense should be thought of as excused rather than justified, since his deeply interested relation to the victim bars him from asserting the objective value of his act.

The heart of the position I am attempting to sketch can thus be put as follows: a right premised on a self-regarding reason is weaker than one premised on an other-regarding reason. Since the right to kill in self-defense is of the self-regarding variety, it should be jurisprudentially distinguished, for example, from the right we have to defend

third parties, which is other-regarding. My suggestion is that the historical distinction between prima facie evil acts merely excused by self-interest and those justified by the demands of the common good captures this moral difference.

V. Doctrinal Implications

Conceiving of self-defense as an excuse has certain interesting doctrinal implications for the legal theory of the defense. There is, first of all, a difficulty in the justification picture of self-defense which the excuse account obviates, stemming from two widely accepted features of justification. The first is that already discussed, namely that there is no right to resist the justified use of force,[72] and the other is that justifications give rise to a right of third-party assistance.[73] If these features are taken to be essential to the notion of justification, however, the following problem infects cases of mistaken actors.

Suppose A attacks B, thinking erroneously, but reasonably, that B is about to attack him. On a justification picture, then, it is not permissible for B to respond with force to A's attack, since A is purportedly justified. But since A is wrongfully, although excusedly, attacking, B should have a right of self-defense against A. And this requires that we think of A as excused, rather than justified. Of course for Fletcher this would be another argument in favor of bifurcation. But if we reject bifurcation, as I have argued we should,[74] the preferred solution is to regard both parties in the above case as excused.

Alternatively, one might retain the essential unity of standard and putative self-defense within a justification picture by siding with Hobbes on the question of resistance: justification need not be regarded as silencing a right of resistance. The problem with this solution is that it would generate a right to resist law-enforcement officials in the execution of their duty, something Hobbes presumably thinks he can limit to defense of life and bodily integrity by the particularly powerful nature of his sovereign.[75] In the absence of the very strong notion of sover-

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72. *See supra* text accompanying note 48 and sources cited therein.

73. *See* Fletcher, *supra* note 1, § 10.1.1.

74. *See supra* text accompanying notes 27-35.

75. Hobbes is slightly unclear on this point. He suggests that the right of resistance stems from the fact that any covenant "not to defend a man's own body are void." Hobbes, *supra* note 45, at ch. XXI, para. 11. Such a principle would, in theory, limit the right of resistance only to those things, as Hobbes suggests, "without which [a man] cannot live." *Id.* at ch. XXI, para 12. But earlier he also suggests that a contract to be put in chains would be void, on the grounds that the contractor "cannot be understood to aim thereby at any good to himself." *Id.* at ch. XIV,

eignty that Hobbes suggests, regarding justified force as legitimately resisted would make political authority unwieldy, to say the least.

On a view of self-defense as an excuse, however, there remains the following problem. Since individuals have no right to respond with force to the justified use of force, but they may respond with force if the original use of force is only excused, it looks as though the original aggressor will have the right to defend himself against the victim who is defending herself against him. And this seems problematic, since it produces an infinite regress of permissible uses of force. I think, however, that the excuse theorist has an answer, which lies in the fact that the original aggressor's right to defend himself is only parasitic on his own wrongful attacking. The aggressor has a duty to desist from his attack, and therefore his use of force against the now attacking victim can only be legitimate to the extent it exists apart from his own wrongful aggression. This means that where the victim's responses are necessary to protect herself against attack and are proportionate to the end of doing so, the original aggressor's response to her will not be legitimate.

A second potential problem emerges from the absence of a right of third-party assistance. It is clearly permissible for third parties to come to the aid of someone exercising a legitimate right of self-defense. And it is commonly thought that a third-party right of assistance must be derived from a first-party right of self-defense. But unlike justifications, excuses do not generate rights of assistance in others. So the excuse picture of self-defense seems problematic, for it appears to deny a right of third-party assistance when it should allow it. But we need not accept the dependence of the third party's right of assistance on the first party's right of self-defense. On an excuse conception, the right answer is that it is only the person whose interests are at stake that is barred from asserting a claim of justification for his own self-preserving actions. Third parties are justified in assisting a person wrongfully attacked, insofar as they are in a position to render an independent judgment about the necessity of using force to protect the victim of the attack. Thus a third party can assist, and is justified in doing so, even though the grounds for her assistance are not derivative of the first party's right of self-protection. This helps solve a problem which is

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para. 8. The point is puzzling, because it is easy to imagine a contract to be imprisoned which would be to the advantage of the prisoner, for example, if the alternative were death. Moreover, it seems that the suggestion would expand the right of resistance to law-enforcement almost without limit.

comparable to the right of resistance problem we saw above: If the rights of third parties *were* entirely dependent on the rights of first parties, there would be a problem on a justification picture of self-defense, since it seems as though third parties would have a right to assist actors mistaken in their right to use defensive force, *and that this right would obtain even if the third party knew the first party was mistaken.* But obviously third parties cannot ride on the coattails of first parties. The permissibility of using force will depend entirely on the judgment of the third party about the merits of the situation with which she is confronted.

The law has always been unsure of its response to a third party's rights where the person asserting defensive force is reasonably mistaken about the need to use force, and the third party knows him to be mistaken. It is also unclear what a third party should do where the initial aggressor is excused because of infancy or insanity, and where the third party is aware of the excuse. The third party should clearly not have a right to intervene by way of assisting the mistaken actor (a result that supports the argument against calling mistaken actors justified). But the third party may not have a right to intervene on the side of the victim either. It is similarly unclear whether a third party can assist the victim of an attack by an incompetent, and equally unclear whether she can assist the initial aggressor against the victim's counterattack. This ambivalence, however, is not peculiar to an excuse picture of self-defense; the justification picture is similarly uncertain in its response. In general, the rights of third parties are not affected by the move from justification to excuse.

Here, however, is a possible exception. Suppose a third party comes to the rescue of an individual under attack, where the third party's welfare is just an extension of the first party's, so that in protecting the first party, the third party is maximizing her own interests as well. Thus if I am a parent and my child is the individual under attack, my defense of my child can hardly be thought a disinterested act I perform for the sake of the common good. My welfare is so intrinsically bound up with the welfare of my child, that one must regard my attempt to save my child as a self-interested act on my part. Yet it must be the case that I have a justification, since it may be that I have a duty to save my child, and I am clearly justified in doing what duty requires. This case, then, presents a challenge to the view I have been suggesting, since the third party's interest in the first party's welfare is at least partially self-interested. And if it is self-interested, the defense

should be excuse. But it is clearly unacceptable to treat a parent who rescues her child as merely excused, and to treat her as justified if she rescues a stranger. Apart from the obvious implausibility of such a result, what would we do with more distant relatives and mere acquaintances?

I think there is, however, a basis for treating the parent as justified when she rescues her child, despite the partially self-interested nature of the act: the parent's behavior is still other-regarding, and thus the action should be justified, not merely excused. Moreover, dividing the cases in this way comports with the test from duty: the parent potentially has a duty to rescue her child, and the claim from duty is no weaker here than it is with respect to a stranger; indeed, it is stronger. This is in sharp contrast to a truly self-regarding action which, I have suggested, cannot be the basis for duty. Kant of course thought that an action otherwise in accord with duty loses its moral worth if it is done for self-interested reasons, and thus he would argue that only the rescue of someone the agent was not already inclined to rescue would have moral worth.[76] But on a social welfare conception of justification, the inclination to do one's duty would not detract from the socially beneficial character of acts such as parents defending their children.

VI. Self-Defense as a Rational Excuse

Between endorsement and lack of responsibility there is toleration—toleration of an agent on the grounds that her reason for doing what she did is comprehensible to us. To excuse conduct of this sort does not suggest that we would wish the agent to behave the same way next time—we may view her behavior in a negative light or we may be indifferent. It does suggest, however, that we regard the behavior as *permissible*, that we do not fault her for acting on that reason. The notion of rational excuse is meant to occupy this middle ground.

Rational excuse is distinguishable from other sorts of excuses by the fact that it applies to an agent's *reason* for acting. It is inapplicable when the agent had no reason for doing what she did, i.e. when the conduct was not intentional. It requires an inquiry into the content of an agent's reason for acting, and asks whether we can exonerate an agent for wrongdoing on the grounds that she did the bad deed with a certain end in view. In the case of self-defense, the defendant claims

76. Immanuel Kant, Groundwork of the Metaphysic of Morals 398 (Paton trans., 1948, rpt. 1956).

she violated a norm protecting life and bodily integrity because she believed it was *necessary* for her to do so for the sake of self-preservation. Hobbes was indeed partially correct in the privileged position he assigned to such a motive: we are inclined to give great weight to pleas of self-interest where survival is at issue. But Hobbes was wrong to suppose that this privilege need itself be thought of as supplying a basis for justifying prima facie wrongful acts. In the absence of a duty to save one's own life, a permission to harm another for the sake of self-preservation need not amount to a justification for doing so.

In suggesting that an excuse of personal necessity should turn on the content of an agent's reason for acting, I am implicitly proposing that we conduct the following two inquiries: first, we must consider whether the agent passes some minimum threshold of rationality—the minimum required to view the agent as having acted intentionally—and second, we must determine whether the agent honestly acted for the sake of one particular reason for acting—namely, self-preservation. In the case of self-defense, however, there is a third constraint of rationality that must be satisfied: not only must the agent be understood as having acted to protect her life, but she must have been *reasonable* in her belief that the use of force was necessary for the accomplishment of that end.

Some commentators who focus on motivation in explaining self-defense dispense with the reasonableness requirement. Glanville Williams, for example, maintains that an honest belief in the need to use defensive force, plus the satisfaction of an imminence condition is the correct set of requirements for the defense.[77] Some older cases support the proposition.[78] But a defense that consists in an evaluation of a defendant's reason for acting need not dispense with a normative inquiry into whether the motivation was appropriately arrived at under the circumstances. If a defendant sincerely believes that she must kill in order to save her life under conditions that a reasonable person would not regard as threatening, the law must reject her claim of self-defense. The excuse-based structure need not alter the normative aspect of substantive self-defense doctrine. It merely places that aspect in a different framework.

Applying an excuse theory of self-defense to the situation of battered women does not automatically result in acquittal for such defend-

77. WILLIAMS, *supra* note 26, at 504.

78. *See, e.g.*, Granger v. State, 13 Tenn. 459 (1830).

ants. Norman may still be judged unreasonable in her belief in the need to use defensive force under the circumstances. The significant advantage of the excuse formulation for defendants like Norman is that exoneration need not imply approval. A defendant's possibly exaggerated response to a threatening situation can be judged as understandable, and hence exonerating, even if a jury is prepared to regard the defendant's behavior as less than fully admirable. The framework of excuse would thus allow flexible application of the power of a sympathetic jury to exonerate. In this way, the extra-legal intuitions many seem to have about such cases would find expression in the law. While Anglo-American law is typically uncomfortable with doctrines that admit of individualized application, I have been concerned to suggest that such an approach may already be implicit in our moral intuitions about self-defense.