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A UNIFIED EXCUSE OF PREEMPTIVE SELF-PROTECTION

Larry Alexander*

It is a rare achievement to be a giant in a field of law. How much rarer it is to be a giant in several fields. Kent Greenawalt is such an extreme rarity. In almost every area of law in which I have worked, Kent has made major contributions. He is a leading theorist in the fields of law and religion,1 freedom of speech,2 the obligation to obey the law,3 and legal interpretation,4 and I have benefited immensely from his contributions in every one of these fields. (His contributions extend to other fields as well, though fields that I have not entered.5)

One field that he and I have both worked in and in which he has made important contributions is substantive criminal law. Among his contributions to that field is his attack on any attempt to draw a neat boundary between the defenses of justification and excuse.6 And it is the relationship between justification and excuse, and why the boundary between them is so problematic, that is my topic in this Article,

* Warren Distinguished Professor of Law, University of San Diego. I would like to thank the following people for their comments on drafts of this Article: Elaine Alexander, Kevin Cole, Josh Dressler, Steve Duke, Claire Finkelstein, Kent Greenawalt, Heidi Hurd, Dan Kahan, Leo Katz, Kim Kessler, Evan Lee, Michael Moore, Steve Morse, Paul Robinson, Tony Sebok, Ken Simons, Alec Walen, Daniel Yeager, and Ben Zipursky. I would also like to thank Cliff Krieger for his able research.

1 See, e.g., KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988).


3 See, e.g., KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY (1987).

4 See, e.g., KENT GREENAWALT, LAW AND OBJECTIVITY (1992); Kent Greenawalt, From the Bottom Up, 82 CORNELL L. REV. 994 (1997).


which I dedicate to Kent for the many things he has taught me and for the example of dedication to the ideals of scholarship that he has set.

The Article is organized as follows: in Part I, I describe various theoretical difficulties with the current doctrine of self-defense. In Part II, I turn to the excuse of duress, which is limited in various ways that I find theoretically problematic. In describing the excuse of duress and its problematic limitations, I point out how easily the excuse of duress can handle most cases of self-defense, including those with which self-defense, conceived of as a justification, has difficulty. In Part III, I propose extending the excuse of duress in a way that would eliminate the unjustified lacunae in its coverage and clearly cover most cases of self-defense. Finally, in Part IV, I discuss what would remain of self-defense and defense of others as justifications once so much protection against attacks is assimilated to the excuse of duress.

I. Self-Defense: Theoretical and Doctrinal Disarray

The law of self-defense permits the use of force, including deadly force, to prevent "unlawful" attacks that threaten life, limb, and bodily integrity (and, under some codes, the consummation of certain property crimes). This much is relatively clear: the defensive use of force must be "necessary"; the defensive force must be "proportional" to the interest threatened; the requirement that the attack be "unlawful" does not preclude using force against infants, the insane, and other "innocent aggressors"; and others may assist or stand in the shoes of the one attacked if the facts as they believe them to be would permit the one attacked to employ force in his defense. Beyond these fixed points, both the law of self-defense and its theoretical justification are matters of great contention.

A. Necessity: Preemption and Probability

Self-defensive force is always preemptive. That is, we employ self-defensive force before the attack we fear has fully materialized. A draws his pistol and points it threateningly at B. B draws his own pistol and fires at A. B's act is one of paradigmatic self-defense. But A had not yet fired at B. It was the danger A appeared to pose that justified

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8 See Murillo, 587 N.E.2d at 1204; 40 Am. Jur. 2d Homicide § 153 (1968); Dressler, supra note 7, § 18.02; Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 5.7(b) (2d ed. 1986).

9 See Dressler, supra note 7, § 18.05(d)(2).
B’s use of self-defense.10 Had A actually fired all of his bullets before B could draw, B’s subsequent use of force would not be self-defensive but retaliatory.

Self-defense, therefore, is preemptive action. It is analogous to civil commitment of the dangerous, gun control, “no contact” orders, preemptive military strikes, and other practices in which the future dangerousness of others, not their past transgressions, is taken to justify depriving them of life, liberty, or property. Because no one can ever be absolutely certain what will happen if he does not employ preemptive defensive force, he must act on an assessment of probabilities.

B, for example, must roughly estimate the likelihood that A will fire and hit him if he does not fire first. A may only be joking. Or A’s gun may be unloaded or jammed. Or A may miss. Or A may have a last-second change of heart. None of these may be likely, but from B’s perspective, they are all possible. B must therefore act, if at all, in the absence of complete certainty.

How likely from B’s perspective must A’s attack be to justify B’s preemptive use of defensive force? The common law required that A’s attack be “imminent.”11 The Model Penal Code has changed this and requires that the use of force be “immediately necessary.”12 The change seems well-justified because there may be many situations where the use of defensive force may be immediately necessary but where the attack is not imminent. Consider the situation where A has announced his intention to kill B, who is in a wheelchair in an otherwise abandoned building, as soon as A goes into his office and gets his gun. B has a gun and can shoot A now, before A goes into his office. But once A has a gun, B will not be able to win a duel with A. A’s attack may not be “imminent,” but B’s shooting A may be “immediately necessary” to save B’s life.13

10 See generally LaFave & Scott, supra note 8, § 5.8(b).
11 See Murillo, 587 N.E.2d at 1204; LaFave & Scott, supra note 8, § 5.7(d).
12 See Model Penal Code § 3.04(1) (Proposed Official Draft 1962). The Model Penal Code actually qualifies the “immediately necessary” language by restricting the use of defensive force to that “immediately necessary to defend against unlawful force on the present occasion.” Id. The referent of “present occasion”—to the necessity of force or, alternatively, to the unlawful attack—is unclear. If it is to the latter, then depending on the meaning of “present occasion,” the difference between the Model Penal Code’s formulation and that of the common law may not be very significant.
13 There are two interesting variants of this scenario. In one, A has announced his intention to kill whomever is sleeping with his wife. When A goes inside his office, he will find a note from his wife confessing to an affair with B. A also has a loaded gun in his office. B knows both these facts and remains, as before, trapped in his wheelchair, but with a gun he can use effectively only now, as A is entering the office.
If “immediately necessary” is the legal standard, what does it mean? It cannot mean that in the absence of defensive force, the attack is one hundred percent certain to occur, for reasons I have pointed out. Only God can foresee the future with absolute certainty. If we must employ self-defense with less than God’s degree of confidence in its necessity, what level of probability is required?

The law does not answer this question. Even more surprisingly, perhaps, moral theorists have generally ignored the whole issue of what probability of harm justifies preemptive action, especially where embedded within the overall probability of harm is the probability of a free human choice to do harm. Some appear to distinguish between preemptive action against the morally nonresponsible—which they find relatively unproblematic—and preemptive action against the morally responsible, which they find troubling to the point of opposing it categorically. Frequently, however, they have in mind preventively imprisoning the “dangerous” but not mentally ill and ignore the full range of otherwise unremarkable preemptive actions taken against the morally responsible, particularly ordinary self-defense.

I believe that setting the probability of harm that justifies preemptive defensive acts will be extraordinarily difficult as a matter of moral theory, at least when that probability rests on a prediction regarding a free, morally responsible agent’s choice to act wrongfully. Nonetheless, it is something moral theorists must do if they are to tell us when such acts are morally permissible or required. If the answer turns out to be simply one that is a function of (1) the harm threatened times...
its probability if no action is taken, and (2) the harm times its probability if self-defense is employed, that answer would appear to license preemptive imprisonment of "dangerous" individuals. Essentially, this answer treats the "probability" of a dangerous human choice no differently from the way it treats the probability of a natural event, such as whether a boulder will crush me unless I run over a child on the road. Nor does it distinguish between the choices of responsible actors and the choices of the nonresponsible. Predicting free, responsible human choices is not necessarily less reliable than predicting natural events or the conduct of the insane or immature, but it may be less respectful of moral autonomy.

I shall not attempt here to answer the question of what the morally sanctioned probability threshold is for preemptive action.\textsuperscript{14} For in this Article I am not primarily concerned with when self-defense is morally permissible or required. Rather, I am primarily interested in when self-defense is excusable even if not morally right. For those, however, who are interested in the moral rightness of self-defense rather than its excusability, the problem of how probable the attack must be to warrant preemptive action is one they must solve.

\section*{B. Necessity and Proportionality}

The law of self-defense requires rough proportionality between response and threat. One may kill to avert a killing, a rape, or serious bodily injury, but to not prevent the theft of apples from one's apple tree.\textsuperscript{15}

The proportionality requirement, when conjoined with the "immediately necessary" requirement, entails a requirement of retreat. Suppose A is coming to shoot B on Main Street, where B is currently shopping, and B knows this. B can avert the danger now if he goes home. If he "retreats" to his home, B will have sacrificed an interest to which he is entitled, namely, the liberty to shop on Main Street. If he does not retreat and chooses to kill A in self-defense when A arrives, he will have taken a life. If taking a life is not a proportional response to a threat to a few minutes or hours of liberty to shop on Main Street, then even if it is a proportional response to a threat to B's life, B should be required to retreat before A arrives. B's use of deadly force will not have been immediately necessary at the time he could engage in a safe retreat, nor would the use of deadly force be proportional to

\textsuperscript{14} I make a quick stab at answering this question. See infra Part IV.A.4.

the interest sacrificed by such a retreat.16 (Interestingly, many criminal codes do not require the absence of an ability to retreat as a pre-condition for the use of force in self-defense.17 At the same time, those codes do require proportional response.18 Such codes are internally contradictory.)

If retreat is required, when is the requirement triggered? Suppose the Marshal knows that the man he sent away to prison has just gotten off the train and is aiming to settle the score in a gun fight. It’s a fifteen-minute walk from the station to Main Street, where the Marshal presently is waiting. Assume the Marshal should retreat rather than kill in self-defense (forget his law enforcement status). When must he do so? He has the greatest chance of retreating safely now, but if he does so, he sacrifices several minutes on Main Street. Moreover, the chances are greater now than they will be later that even if he waits, no gun fight will ever occur. The attacker may have a change of heart, become scared, get waylaid, fall and injure himself, and so on. On the other hand, if the Marshal waits too long, he may be unable to retreat safely and will then have to shoot to protect himself. And if he waits until the very last moment before he believes a gun fight will be virtually inescapable, something may happen—he may trip and fall, for example—that will force the gunfight in any event, and perhaps on less favorable terms to the Marshal.

There are just probabilities on probabilities on both sides—probabilities that the attacker will desist, probabilities that the retreat will or will not be safe, probabilities that the Marshal will prevail in a gunfight—and both the law and theorists have been silent on how these issues should be resolved.

(Some theorists, invoking the example of some continental criminal codes, argue that proportional response—and thus, by logical implication, retreat—should not be a requirement of self-defense: Right

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16 Ironically, as Leo Katz has pointed out to me in private correspondence, one is not required to turn over one’s wallet to a mugger who demands “your money or your life,” even if one expects a deadly attack to follow and intends to respond with lethal force. In other words, one may assume the mugger will act rightfully and not launch the threatened attack. That permissible assumption then entitles one to use deadly force, ultimately in defense of one’s wallet. If one generalizes this permission to stand one’s ground (keep one’s wallet), the retreat requirement dissolves. See e-mail correspondence from Leo Katz to Larry Alexander (Jan. 3, 1999) (on file with author).


should never have to bend to Wrong, even if the right threatened is trivial compared to the harm required to avert the threat.\textsuperscript{19} Some support for this position can be found in the fact that although in Anglo-American criminal law, I am not privileged to shoot people attempting to pick apples from my tree, even if I first warn them and even if I have no other means to prevent the thefts, and all more burdensome means, such as engaging the thieves in fist fights, require me to sacrifice rights that are less trivial than the right to my apples—yet I may “defend” the apples by placing them in obviously dangerous places, such as on an island within my property that is surrounded by an alligator-infested swamp.\textsuperscript{20} Why I may “protect” an interest by use of a disproportionate danger but may not “defend” it with a disproportionate response is an interesting theoretical conundrum. And what if I protect my apples by rigging a device that will kill me if my apples are picked: may I then warn thieves that picking my apples will kill me and, if they do not desist, shoot them in self-defense? If so, then it is difficult to see why I should not be able to defend the apples with deadly force straightaway.

The proportionality requirement is not only inconsistent with the absence of a retreat requirement, but it is also in some tension with the law’s permission to employ force, including deadly force, to prevent “consummation” of certain property crimes.\textsuperscript{21} We end up with the odd result that I may shoot a robber who is running away with my billfold, but I may not use my gun to avert a beating by a group of thugs if I do not believe the thugs will inflict serious bodily injury.

C. Innocent Aggressors, Swords, Shields, and Bystanders

Both the law of self-defense and some theorists distinguish among various nonculpable persons, the killing of whom would save a life. First, there are the innocent aggressors, those who appear to be attacking me without legal justification, but who are legally and mor-

\textsuperscript{19} See George P. Fletcher, Rethinking Criminal Law 870–75 (1978); see also Edmund Coke, Third Institute *55 (1644).

\textsuperscript{20} Query: If those seeking my apples are rational—though not necessarily culpable (they may believe mistakenly that the apples are theirs)—may I do more than place them in a dangerous place? That is, may I construct a dangerous place, such as digging a moat around my apple trees and filling it with sharks? (Assume I post notice warning of the sharks. Would this be morally required if the apple pickers were always culpable as well as rational?)

\textsuperscript{21} See Model Penal Code § 3.06(3)(d) (Proposed Official Draft 1962); cf. Dressler, supra note 7, § 20.02(B)(3) (stating that deadly force is never permitted to defend property, but can be transformed by circumstances into a separate right to use deadly force).
ally nonculpable in doing so. They may be acting on a reasonable but mistaken belief that I am threatening them or others. They may be insane. Or they may be small children who have picked up loaded pistols.

The law is clear that I may employ force, including deadly force, to defend myself from innocent aggressors. Moreover, I may do so even if I am cognizant of their innocence, and even if I have to kill more than one.²²

The same is true of so-called “innocent swords.” Here is an example: A has pushed B over a ledge, and B is falling toward C, who is currently immobilized. If B falls upon C, C will be killed, but B will live. C, however, has a long knife and can save himself by impaling B.

The law and most theorists would permit C to impale B, the so-called innocent sword. And surely if innocent aggressors can be killed in self-defense, innocent swords should fare no better. For it seems immaterial to C’s relation to B whether A threatens C by pushing B over a ledge or by falsely telling B that C is a dangerous enemy agent who must be killed on sight. In either case, B is an innocent threat to C; and if C can kill B in one case, he should be able to do so in the other.

Matters are different with innocent shields and bystanders, however. Suppose someone is firing at me from a crowded section of a stadium. I can take him out with a hand grenade, but only by killing several bystanders as well. Here the law tells me I cannot save myself.²³ Indeed, it tells me I cannot save myself even if there is only one bystander endangered.

An innocent shield is a bystander who is placed in, or merely finds himself in, a position shielding an attacker from defensive responses. If A grabs B and holds B in front of him while he attacks C, B is, from C’s perspective, an innocent shield. And because an innocent shield is no different from bystanders whose presence protects an attacker from defensive responses, what holds for innocent bystanders should hold for innocent shields.

I have criticized the attempts to distinguish between innocent aggressors and swords on the one hand, and innocent shields and bystanders on the other.²⁴ All are by hypothesis nonculpable. All endanger others, either by being the instruments of harm or by pro-

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²² See supra note 9 and accompanying text.
tecting those instruments. I cannot find any convincing explanation for why the differences among them should be morally or legally material.

Moreover, because self-defense against innocent aggressors and swords is conventionally deemed to be justified, those who assist the endangered person logically should also be deemed to be justified, even if they are aware of the innocence of the attackers. Yet why should a third party, who must choose between, say, five innocent children who have picked up loaded guns and one innocent person whom the children threaten, choose to defend the latter and harm the former? Where all are innocent, and some must die or be injured, why should the one attacked be morally preferred to his innocent attackers? His rights against culpable creation of risks to his interests do not necessarily entail rights against nonculpable risk creation. Would not the third party intervenors be more justified using a criterion such as relative numbers to choose between innocents than using the criterion of who is (nonculpably) attacking whom?25

D. Nonculpable Mistakes

Every criminal code deems the use of force in self-defense to be justifiable, even if the defender is mistaken about the necessity to act in self-defense, so long as the defender’s mistake is a “reasonable” one.26 The Model Penal Code has gone further and deemed all acts of self-defense premised on mistaken but sincere beliefs justified, although the defender can be liable for negligent or reckless use of force if his mistaken belief was negligently or recklessly held.27 The Model Penal Code’s position is the more logical of the two, at least insofar as the question of whether the defender should be punished at the level of intentional or knowing homicide (if he causes death), attempted homicide, or battery. What is doubtful about both the Model Penal Code’s position and the common law position that it amends is not whether the mistaken defender should have a defense to his use of force, but whether that defense should be deemed one of justification as opposed to excuse. Paul Robinson, almost alone, has argued

25 For arguments focusing on innocent aggressors that expose the weaknesses of two accounts of why self-defense is justified, see Tziporah Kasachkoff, Killing in Self-Defense: An Unquestionable or Problematic Defense?, 17 LAW & PHIL. 509, 518–26 (1998). Kasachkoff assumes self-defense against innocent aggressors is justified; however, she quarrels with standard accounts for why this is so. See id.

26 See LAFAVE & SCOTT, supra note 8, § 5.7(c).

for treating these cases as ones of excuse, and here I wish to join him. 28

Robinson argues that justifications should turn on what the facts are, not what they are believed to be at the time of the acts in question. 29 This objective approach to justification cannot, of course, deny that all any of us can act upon is our beliefs about what the facts are. Indeed, even our “mistakes” are gauged by what a court at some later time fallibly “believes” the relevant facts are; and no one but God is privileged to foresee the entire unfolding of events in order to determine which choices of evils truly turn out to have been choices of lesser evils.

Nonetheless, the objective approach to justification instructs a third party, who sees the facts differently from the one employing self-defense, not to regard the latter as legally justified in using force, even if his apparently mistaken beliefs would give him a defense to any crime he is otherwise committing. From the third party's perspective, if the defender’s justification is a matter of what the facts are, not what he believes, then he is unjustified in using force, even if he should be excused. The mistaken defender is just another type of innocent aggressor, materially no different from the insane and the infant. If this were not the case—if, instead, the law took seriously its characterization of the mistaken self-defender as “justified” and his use of force as legally “privileged”—a third party, seeing A about to employ force against an innocent B because of a mistaken belief that B was attacking him, would be justified in coming to the mistaken A’s rather than the innocent B’s aid. Indeed, on one reading of the Model Penal Code, B himself could not use self-defensive force against A because A’s use of force against B would be “privileged.” 30

28 Here I part company with Kent Greenawalt, who sides with the majority opinion. See Greenawalt, Perplexing Borders, supra note 6, at 1903; see also Kent Greenawalt, Justifications, Excuses, and a Model Penal Code for Democratic Societies, 17 CRIM. JUST. ETHICS 14, 20-23 (1998).

There are some parallels, but also some significant differences, between my position on self-defense in cases of mistake, innocent aggression, etc., and Claire Finkelstein’s position. See Claire O. Finkelstein, Self-Defense as a Rational Excuse, 57 U. PITT. L. REV. 621 (1996).


30 See MODEL PENAL CODE §§ 3.04(1), 3.11(1) (Proposed Official Draft 1962). Paul Robinson believes that the Model Penal Code actually backs away from this result by adopting the objective view of justification for cases such as this. See Paul H. Robinson, Competing Theories of Justification: Deeds v. Reasons, in HARM AND CULPABILITY 45-70 (A.P. Simester & A.T.H. Smith eds., 1996) (referring to MODEL PENAL CODE § 3.11(1), cmt. 159 (1985)). The Model Penal Code does clearly adopt the objective approach
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(The fully objective approach to justification also means that one who commits a crime in circumstances that would justify his conduct, but who is unaware of and perforce unmotivated by those justifying circumstances, should not be guilty of the crime. If justifying circumstances are read as exceptions to criminal prohibitions, then the unknowingly justified have not violated those prohibitions. Robinson and I agree that the proper charge against the unknowingly justified is the charge of an attempted crime, not a successful one, even though all elements of the successful crime—apart, that is, from the (absence of) justifying facts—are present. Because I, unlike Robinson, also believe that attempts and successes should be punished the same—

insofar as it forbids third party assistance of reasonably mistaken self-defenders, at least when the third party is aware of the mistake. See Model Penal Code § 3.05(1) (Proposed Official Draft 1962). On the other hand, it permits third parties to resist objectively justified law violators who fail to realize that they are justified. See Robinson, supra note 30, at 59–60. For example, if a third party sees A about to divert a river and flood B’s farm, and the third party knows both that diverting the river will save a town downstream from flooding and that A is unaware of this, the third party may prevent A from diverting the river because A is unaware of the justificatory facts and therefore unjustified under the objective approach of the Model Penal Code. Robinson believes that although the Model Penal Code drafters would not welcome this result, their subjective approach to justification leads to it. See id.

Russell Christopher, in a series of articles, has criticized Robinson’s objective approach to justification on the ground that it leads to paradoxes. See Russell Christopher, Mistake of Fact in the Objective Theory of Justification: Do Two Rights Make Two Wrongs Make Two Rights . . . ?, 85 J. CRIM. L. & CRIMINOLOGY 295 (1994); Russell Christopher, Self-Defense and Defense of Others, 27 PHIL. & PUB. AFF. 123, 128–30 (1997); Russell Christopher, Unknowing Justification and the Logical Necessity of the Dason Principle in Self-Defense, 15 OXFORD J. LEG. STUD. 229 (1995); see also Russell Christopher, Self-Defense and Objectivity: A Reply to Judith Jarvis Thomson, 1 BUFF. CRIM. L. REV. 537 (1998). All Christopher has shown, however, is that sometimes morality cannot choose among lives based on either numbers or culpability, and must break justificatory “ties” on some other bases. Moreover, in the examples he uses, the culpable can all be punished as attempters even if they are objectively justified, and only third parties seeking to intervene must worry on which side justification truly lies. See infra notes 31–32 and accompanying text.

Perhaps the strongest case for a subjective account of justification is with regard to police conduct. Suppose, for example, police officer P reasonably believes that V, who is fleeing arrest, is armed and dangerous. Current law permits P to use deadly force against V. See, e.g., Model Penal Code § 3.07(2)(b) (Proposed Official Draft 1962). Suppose, however, that in addition, third party T knows V is hard of hearing (and is not “fleeing”), and is also unarmed. Should T be able to use force against P to prevent P’s killing V? On the objective view of justification, P is excused but not justified. On the subjective view, P is justified. The latter view would presumably oppose T’s intervention. The objective view at least leaves the matter open.

31 See Larry Alexander, Crime and Culpability, 5 J. CONTEMP. LEGAL ISSUES 1, 13 (1994).
indeed, that all crimes should be defined as attempts—treating the unknowingly justified actor as an attempter, despite the actual injury inflicted and the presence of full culpability, causes me no embarrassment.

Note, however, that if justifications are permissions to act rather than mandates, then it is possible that among the facts giving rise to such permissions are facts about the actor’s state of mind, such as that he be aware of the (other) justifying facts and act only for certain reasons. If that is the case, then the distinction between objective and subjective approaches to justification collapses.

II. DURESS: A SWISS CHEESE EXCUSE

The criminal law recognizes as a defense to the commission of a crime that the defendant acted in response to a threat of unlawful force directed at him or at a family member. The defense is available if, in the language of the Model Penal Code, a “person of reasonable firmness” would have been unable to resist committing the crime under the circumstances.

Unlike self-defense, duress is regarded as an excuse rather than a justification. Almost no one argues that the defendant’s crime is the morally correct response to the unlawful threat; it is assumed that both the victims of the defendant’s crime and third parties may resist the defendant, perhaps even with deadly force if the defendant is attempting to commit a serious crime.

What is disputed is the theoretical basis of the defense. Some argue that duress is a character-based excuse: the defendant’s crime reveals no character flaws meriting a retributive response when he acts

32 See generally id.
33 Kent Greenawalt would deem the unknowingly justified actor guilty of the completed crime rather than an attempt because he finds no relevant difference between that offender and those who are unjustified. See Greenawalt, supra note 28, at 24. Greenawalt, however, is assuming that attempts should be punished less than completed crimes.

Perhaps the strongest argument on behalf of deeming the unknowingly justified offender guilty of the successful crime is not his culpability—an attempter is fully culpable—but is, rather, the fact that justifications are at bottom permissions, not mandates, and that the state of the world in which the permission is exercised is not morally superior to the state of the world in which it is not. See infra note 61.
34 See also infra note 61.
36 But see LaFave & Scott, supra note 8, § 5.3. The position taken by Profs. Wayne LaFave and Austin Scott—that duress is a justification—is criticized by Dressler. See Joshua Dressler, Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits, 62 S. Cal. L. Rev. 1331, 1350–53 (1989).
no differently from a "person of reasonable firmness." Other argue
that the defense is choice-based, and that the defendant is excused
because the choice he faced was too difficult to hold him morally or
legally responsible.

I shall not weigh in on the theoretical underpinnings of the du-
ress defense, except to state my suspicion that the character-based and
choice-based accounts may, when fully elaborated, turn out to be in-
distinguishable. What is more interesting, I believe, is how duress dif-
fers from other excuses recognized by criminal law, such as insanity,
intoxication, and infancy. The latter excuses reflect the requirement
of both law and morality that a defendant, to be held morally and
legally responsible, possess the capacity to engage in practical reason-
ing and to act in accordance with the conclusions of practical reason-
ing. The defendant invoking duress, on the other hand, is not
claiming a defect in his practical reasoning. He is claiming, rather,
that although an impartial weighing of the values at stake would dic-
tate his conformity with the law, when he gives his own values the
weight in his calculations that a "person of reasonable firmness"
would, the result points toward law violation.

Alternatively, the defendant’s dilemma could be characterized as
a case where the results of weighing everyone’s interests impartially
conflict with the result of giving the defendant’s own interests the added
weight we expect ordinary people to give their own concerns. The defendant acting under duress has not had his status as a practi-
cal reasoner and moral agent undermined; rather, the act that is mor-
ally justified from an impersonal point of view is not the act that is
justified for him. On this account, duress is less an excuse than a "per-
sonal justification"—a justification that only he, not third parties, can
claim, and that does not preclude resistance by his victims.

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40 That claim could, of course, be characterized as asserting an "inability" to will in accordance with the results of impartial practical reasoning. That is, the defendant could say that the prospect of sacrificing his own interests, even though warranted by impartial practical reasoning, undermined his capacity to will compliance with the law. I do not see any theoretical advantage to this characterization of the claim. Moreover, I think the characterization is, in fact, misleading.
Although the basic criteria of the duress defense are relatively clear, there are many aspects of it that are either uncertain or troubling. The most important such aspects for my purposes are whether duress extends to cases of homicide, and why duress is limited to threats, to unlawful threats, and to unlawful threats of bodily injury.

A. Duress and Homicide

The great majority of American jurisdictions do not recognize the defense of duress in cases of criminal homicide. Only the Model Penal Code and a small number of jurisdictions permit duress to excuse all crimes. If, however, one accepts my argument above that innocent shields and bystanders should be no less vulnerable to self-defensive force than innocent aggressors and swords, then if one may kill the latter in self-defense, so should one be able to kill the former. And if one may kill innocent bystanders and shields in ordinary self-defense, one should be able to kill innocent third parties when one is threatened with a force comparable to the threat that permits use of deadly force in self-defense. Conversely, if one accepts the Model Penal Code's minority position that duress may excuse homicide, then one should accept that self-defense should be available against innocent shields and bystanders. The victim in cases of duress is usually an innocent bystander. Finally, if, as every jurisdiction accepts, force short of deadly force may be used against innocent third parties, then that entails the law's rejection of the materiality of the bystander/shield-aggressor/sword distinction.

The upshot of these points is that if the excuse of duress extends to use of force against innocent third parties—which it does—and if deadly force may be employed in self-defense against innocent aggressors and swords, then the defense of duress should be available in cases of homicide, and force in self-defense should be available in cases of innocent shields and bystanders.

B. Duress, Preemption, and Probability

Because the defense of duress excuses actions taken in response to threats, it presents a problem similar to the preemptive strike problem discussed in connection with self-defense: How likely must it be that the threat will be carried out successfully against the defendant or his family for him to be excused for committing a crime to avert the

42 See Dressler, supra note 7, § 23.04.
44 See Dressler, supra note 7, § 23.01(B) ("Generally speaking, a person will be acquitted of any offense except murder."); id. § 27.04(A).
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threat? However, unlike the law of self-defense, which is silent on this matter, the law of duress purports to supply an answer, albeit a quite vague one. For example, the Model Penal Code permits the excuse of duress whenever a "person of reasonable firmness in the actor’s situation" would succumb to the threat and commit the crime. Presumably included within this standard is a level of probability that the threat will be carried out at which a "person of reasonable firmness" would so succumb—a level, moreover, that would vary inversely with the seriousness of the harm threatened and vary directly with the seriousness of the crime necessary to avert the threat.

C. Duress, Imminence, and Attacks on the Threatener

The legal expressions of the defense of duress make no reference to the imminence of the threat beyond the standard of assessing how a "person of reasonable firmness" would react. Presumably, however, the same temporal considerations that are relevant to self-defense should be relevant in cases of duress. This is easiest to see if we imagine a case in which A is ordered by B, on pain of death, to kill innocent C. Instead, A kills B. If someone’s death was unavoidable, then surely this is the preferable outcome, so A should have a defense. Technically, such a case does not fit within the formulation of duress because B was not coercing A to kill B. (Of course, a number of classic duress cases involve crimes committed to escape threats rather than to carry out the wishes of the threateners.45) Nor is it a conventional case of self-defense, given that A could avoid B’s threat by killing C. Yet we should assume that by extension of one or the other of these defenses, A should have a defense.

Because A would be limited by the "immediately necessary" requirement were B threatening only to kill A (ordinary self-defense), it would seem to follow that A should be similarly limited where the threat is in the alternative (to C or to A). That is, the requirement of self-defense that the use of force be "immediately necessary" should extend to the defense of duress for crimes committed against either third parties or threateners.

D. The Threat Requirement

Duress is available as an excuse only in cases where crimes are committed in response to human threats.46 Thus, if a defendant is told that he must drive over the two children in the road or else a

45 See Dressler, supra note 7, § 23.05.
46 See id. § 23.01(B).
boulder will be rolled down a hillside into his car and kill him, he may have a duress defense if he drives over the children and is prosecuted for homicide (at least in Model Penal Code states). On the other hand, a defendant who sees a boulder plummeting toward his car and can save his life only by driving over two children cannot raise duress as a defense to vehicular homicide. This distinction makes no sense and has been criticized by most who have noted it. Indeed, the distinction gives rise to unanswerable questions, such as whether duress is available once the threatener has set the boulder in motion. On the one hand, the boulder is surely as much a "threat" by the threatener as the verbal threat. On the other hand, once set in motion, the boulder is just a natural threat. In any event, from the defendant's standpoint, any distinctions among a threatened boulder, a boulder set in motion by a threatener, and a boulder set in motion by natural causes appear immaterial to the rationale behind the defense of duress. The defendant's choice is equally hard in all cases.

E. The Unlawfulness Requirement

The threats that give rise to the defense of duress must be threats of unlawful conduct. If, however, the rationale for the defense is that the defendant should be excused in cases where the choice not to commit the crime is so difficult because of the personal loss he will incur, then the lawfulness of the threat should be immaterial. For example, suppose a defendant is threatened with death unless he kills an innocent victim. And suppose, in a Model Penal Code state that permits duress to be raised as a defense to homicide, that a "person of reasonable firmness in the actor's situation" would kill an innocent person in response to a death threat. It would seem to follow, then, that a "person of reasonable firmness" would kill an executioner to escape execution. The executioner is acting lawfully and is innocent in that sense. And, of course, killing an executioner acting lawfully is not legally justifiable. But neither the innocence of the victim nor the unjustifiability of the defendant's act are material to the defense of duress. Rather, the defense is available in precisely those cases where there is no legal justification for harming the victim. Logically, therefore, duress should be available in response to lawful as well as unlawful threats.

47 See id. § 23.06.
48 See Model Penal Code § 2.09(1) (Proposed Official Draft 1962); Dressler, supra note 7, § 23.01(B).
49 Evan Lee has pointed out in private conversation that extending the defense of duress to lawful threats would not only excuse the condemned's killing of the execuc-
Another way to see the immateriality of the lawfulness of the threat in cases of duress is to contrast cases of duress with lesser evils cases. Many cases of duress appear at first glance to be cases of lesser evils: a defendant is faced with either having a greater crime committed against him or his family or committing a lesser crime against a third party. In cases of choosing the lesser evil, the lawfulness of the threat the defendant is seeking to avoid is clearly material, for a crime he commits cannot be considered a lesser evil than the harm he avoids if the latter is lawfully inflicted. Wounding a prison guard to escape a lawful execution is not a lesser “evil,” even if it is a lesser “harm” than the execution.

Duress cases are not lesser evils cases, however, for two reasons. First, duress is not ruled out in cases where, for example, the defendant has to kill two people to avoid being killed.

Second, and more importantly, even when the defendant is inflicting a lesser harm than that he seeks to avoid, he is appropriating a third party, which in many if not all cases will not be justifiable. Recall the matched pair of hypotheticals, one involving the runaway trolley that will kill five unless diverted to a siding, where it will kill one; the other involving the surgeon who can kill one healthy patient and use his organs to save five. Most conclude that it is right to divert the trolley but wrong to carve up the healthy patient because the latter action, but not the former, involves appropriating a person for the benefit of others. In cases of duress, appropriating others for the defendant’s benefit is common, if not paradigmatic. A defendant’s appropriation may be excusable, but it would ordinarily be deemed

tioner, but would also excuse killing the executioner by close relatives of the condemned. He regards this as a reductio of the extension. Unless, however, when protecting himself or others close to him from a threat of harm, the person of reasonable firmness is supposed to have more ability to resist harming others when the threat is lawful than when it is unlawful, the extension stands on the same footing as the core of the excuse. Keep in mind that in cases of duress, the defendant often will have wrongfully if excusably victimized someone acting lawfully in order to save himself (the defendant) or others with whom he is close. If the lawabidingness of the victims does not bar the defense, it is hard to see why the lawfulness of the threat would do so.

Alec Walen believes the unlawfulness limitation on duress can be supported by psychology. He argues that we find it easier to cope with a given problem if we view it as our problem rather than a problem that rightfully belongs to someone else but that has been unjustifiably forced upon us. See e-mail correspondence from Alec Walen to Larry Alexander (Jan. 20, 1999) (on file with author). I am skeptical that this is the case when what is at stake is victimizing an innocent third party.

unjustified, even if it, like the surgeon’s appropriation, brought about a net reduction in harm.

F. The Force Requirement

Duress requires a threat of unlawful force.\footnote{See \textit{Model Penal Code} § 2.09(1) (Proposed Official Draft 1962); \textit{LaFave \& Scott}, supra note 8, § 5.3.} I have criticized the requirements of a threat and that it be unlawful. The third requirement—that the unlawful threat be a threat of force—is also unwarranted.

Consider in this regard the following pair of cases. In the first, \(A\) is running off with \(B\)’s medicine, which \(B\) must take immediately or die. \(B\) can stop \(A\) only by shooting him, which he does. In the second case, \(A\) has taken \(B\)’s medicine and threatens to withhold it from \(B\) unless \(B\) steals from \(C\), which \(B\) does.

In the first case, \(B\) should have a valid claim of self-defense when charged with harming \(A\). \(B\) was averting an unlawful act that would otherwise result in his death.\footnote{Would \(B\) have a valid self-defense plea under the current formulation of the law? The Model Penal Code is unclear on this point. Section 3.04(1) limits defensive force to cases of threatened “unlawful force,” which would appear to exclude the unlawful withholding of life-saving medicine. \textit{See Model Penal Code} § 3.11(1) (Proposed Official Draft 1962) (defining “unlawful force”). But § 3.04(2)(b), which deals with the use of deadly force in self-defense, refers more generally to threats of death. \textit{See id.} § 3.04(2)(b).} In the second case, however, \(A\) is not threatening \(B\) with unlawful “force,” for withholding medicine is not force. Because \(B\) has stolen from \(C\) rather than attacked \(A\), \(B\) has neither self-defense nor duress available to defend against the theft.

Surely this is an indefensible result. If \(B\) may kill \(A\) to save his life, it is hard to understand why he may not steal from \(C\). (I am assuming stealing from \(C\) is not justified as a “lesser evil” because it involves appropriating \(C\) and \(C\)’s resources for \(B\)’s benefit.) Loss of life through the unlawful withholding of life-saving medicine is just as unwelcome a prospect as loss of life through unlawful force, and a “person of reasonable firmness” would choose to avoid the former as readily as the latter. If self-defense should be available when \(B\) kills \(A\), duress should be available when \(A\) steals from \(C\).

A final question is whether the excuse of duress should be available in response to threats of a nonphysical nature. For example, would not a “person of reasonable firmness” commit at least some trivial crimes—trespass or petty theft, for example—to avert damage to a prized possession or to his reputation? If so, then there is a case for extending duress to threats to possessions or to reputation.
The excuse of duress is unavailable to those who recklessly place themselves in situations where they are quite likely to be coerced into committing crimes. Thus, one who joins a violent criminal gang may not claim as an excuse the fact that he was threatened with death by fellow gang members if he refused to commit a crime. If the defendant has negligently placed himself in a situation where duress is likely, he may still claim duress as a defense; but he may not do so if the crime he is charged with requires only a mens rea of negligence. (Negligence regarding the conditions that lead to duress substitutes for negligence regarding conduct or result.)

Outside of criminal gangs, it is not clear what the law envisions as culpably placing oneself in a position where duress is likely. But one possible scenario is intriguing. Suppose there is a particularly rough section of town—or some rough establishment, say a pool hall—and outsiders who venture in are frequently threatened with violence unless they commit crimes as directed by the threateners. Suppose further that a defendant ventures into this area aware of the risk and is indeed threatened with death unless he mugs someone, which he does. Would the defendant be one whose ability to raise duress has been lost or diminished?

Despite the law's reference to recklessly or negligently placing oneself in situations of duress, the average reader is likely to balk at attaching this consequence to merely going where one has a legal right to go. Even if visiting a particular pool hall carries a high risk of being threatened, and not visiting it represents only a very minor setback of interests, wrongdoers should not be able to limit liberty in this way, or so one might believe.

Notice, however, that reading the law of duress to preclude the defense in such a situation is quite consistent with the requirement of retreat in the law of self-defense. That requirement entails that I must give up my liberty, on pain of forfeiting the right to employ deadly force to defend myself, rather than remain where I have a right to be. By logical extension it entails that I may not go where I otherwise have a right to go, again on pain of forfeiting the right to use deadly force in self-defense, if I am aware that in so going I am likely to be attacked. Thus, if I must retreat from the 7-Eleven to my house to avoid a deadly attack by a knife-wielding lunatic, even if in doing so I must forgo getting a Mars Bar, then likewise I should not be able to venture from my house to the store to get the Mars Bar, prepared to shoot my .45 to protect myself, if I am aware that the lunatic is there. If that is
III. A Proposal: A Unified Excuse of Preemptive Self-Protection

I propose a single excuse of preemptive self-protection. The formulation of the proposed excuse is as follows:

It shall be a defense to any crime that the defendant committed it to avoid harm to himself or others, and a "person of reasonable firmness" in the defendant's situation would have committed the crime.

The proposed excuse would include both the current excuse of duress and much of what currently is deemed justified self-defense. It would include, for example, self-defense against innocent aggressors—the young, the insane, the mistaken or duped, and even those who themselves are excused under the excuse proposed here.53

The excuse would extend beyond the current excuse of duress and current justification of self-protection in various ways indicated by my criticisms of these doctrines. It would extend to attacks on innocent shields and bystanders. It would extend to crimes committed in response to lawful as well as unlawful threats. It would extend to crimes committed in response to threats to injure other than by force. And it would extend to cases of situational duress, that is, cases where the crime is committed to escape a nonhuman threat. In these cases (situational duress), the defendant's act would not be preemptive in the sense of anticipating a human choice, though it would, of course, rest on a prediction about future events and be preemptive in that sense. Finally, like the current defense of duress, the proposed excuse extends beyond protection of the defendant himself to include protection of immediate family members and any other persons (and perhaps, in some cases, animals or even possessions) whom a "person of reasonable firmness" would commit a crime in order to protect.

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53 The one worker on the trolley siding, for example, would not be justified in shooting someone attempting to switch the trolley to save the five, but he could easily be excused under the excuse proposed here; that would mean in turn that the one throwing the switch would be excused under the same excuse in using force against the worker to protect himself, though he would also be justified because of the five lives he is trying to save.

Likewise, if the trolley is heading toward the one worker, one would not be justified switching it to head toward the five, but one might be excused for doing so if the solitary worker were one's child.
A. Issues

1. Formulation: Standard Versus Rules

The first issue regarding the proposed excuse concerns its formulation. I have essentially taken a "person of reasonable firmness" standard from the Model Penal Code's defense of duress and made it the standard governing a much broader domain of self-protection. And the standard is quite abstract and informal, giving very uncertain guidance both to defendants before the fact and judges and juries after the fact. Why have I not proposed determinate rules instead? After all, jurisprudentially, I am a great fan of determinate rules. If the cases of self-protection I am interested in are truly cases of excuse, then a standard rather than guidance-providing rules is appropriate. We are not telling defendants when it is all right for them to succumb to their self-protective desires. We are asking whether they constrained those desires in order to avoid harming others to the extent we expect ordinary persons to do so. We are not asking whether they did the right thing: they did not. We are asking whether their having done wrong is excusable given their situation. For an excuse—whether one believes that excuses rest on assessments of the difficulty in choosing correctly or on the character reflected in the choices—a standard rather than rules seems appropriate. The situations defendants will confront will be impossible to anticipate and cabin in general rules.

On the other hand, although I have deemed my proposed defense an excuse, I am in fact equivocal regarding whether it is better seen as a personal justification. A personal justification would be a justification reflecting the moral permissibility of a defendant's giving more weight in the moral calculus to his and his family's interests than those interests would be given from an impersonal perspective. In other words, the defense could reflect the fact that morally speaking, a defendant may treat his life as more important than, say, the lives of five innocent aggressors, even though from society's perspective their five lives morally outweigh his.

If my proposed defense is a personal justification rather than an excuse, then perhaps it could and should be "rulified." If we can calibrate the extra moral weight which we can assign to our own interests in the moral calculus, then we could perhaps decide, say, that one

may kill two but not more than two innocent aggressors to save one’s own life, and so forth.55

I am going to continue here to assume that the defense is, like duress, a pure excuse and thus avoid any speculation about how the defense might be reduced to rules. If that is the proper approach, then a “person of reasonable firmness” is the proper standard for assessing the defendant’s self-protective crimes.

2. Probabilities, Retreat, and Proportionality

My proposed defense of preemptive self-protection, with its single standard of a “person of reasonable firmness,” handles, in one fell swoop, the vexing problems of what probability of attack is necessary to trigger preemptive force, when the defender must retreat rather than use preemptive force, and whether the defender may use disproportionate force to prevent an attack. With respect to the first question, the defendant is excused for using preemptive force whenever he estimates that the likelihood of attack on him is at a level at which a “person of reasonable firmness” would use force self-protectively rather than wait for the probability of attack to increase. And with respect to the interrelated doctrines of retreat and proportionality, viewing self-protection as an excuse rather than a justification helps support their presence in the law. The choice between killing an attacker and safely retreating is not a hard choice, nor is the choice between killing to protect one’s apples and losing one’s apples if disproportionate force will not succeed. A “person of reasonable firmness” would safely retreat rather than kill and would lose his apples rather than kill. Or, put differently, it takes no extraordinary courage or resolve to forgo killing and suffer the minor losses of retreating or employing lesser force.

3. Mistakes

Because the proposed defense of preemptive self-protection is an excuse, not a justification, it is immaterial whether the defendant’s assessments of the probability of attack, the likely consequences of attack, the time left to retreat, the safety of the retreat, the force necessary to resist, and so forth are correct or mistaken. The question is whether, given the defendant’s beliefs on these matters, he acted as

55 The personal nature of the justification would still render it excuse-like—that is, unjustified—insofar as third party intervenors are concerned. (They might have to intervene on the side of the two innocent aggressors rather than the one personally justified defender.)
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would a "person of reasonable firmness" in the situation as the defendant assessed it.

If the defendant's beliefs were mistaken in a way such that a "person of reasonable firmness," apprised of the mistake, would have acted differently from the defendant and not committed the crime, the defendant still may invoke the defense. However, if the defendant's mistakes were culpable, then, although he retains the defense for more serious charges, the defense should be unavailable if he is charged with the degree of the crime committed that corresponds in mens rea to the defendant's level of culpability for his mistakes. Thus, if he incorrectly and culpably believes that he must use deadly force and does so, then although he cannot be prosecuted for the knowing homicide he commits (assuming he otherwise meets the "person of reasonable firmness" test), he can be prosecuted for the degree of homicide that matches the culpability of his mistake. His culpability regarding the necessity of using deadly force (or the ability to retreat, etc.) substitutes for culpability regarding the risk of death in the crime of homicide. This is the scheme the Model Penal Code generally adopts for mistakes regarding justifications (and also, implicitly at least, for mistakes regarding the condition of duress).

4. Third Party Intervention

Because the proposed defense is an excuse, it is limited to the defendant. Third parties who are not themselves threatened cannot stand in the defendant's shoes and invoke his excuse to justify or excuse their conduct. Thus, if two innocent aggressors are attacking one innocent defender, the latter may be excused for using deadly force against the former. Third parties, however, if they may intervene at all, may not intervene with deadly force on defender's side of the struggle. Because the defendant is only excused and not justified, and because the third parties are not in danger themselves, the third parties would be neither excused nor justified.

B. A Possible Extension? Preemptive Collective-Protection and Preventive Detention

The excuse of preemptive self-protection, except for cases of situational duress, deals with commission of crimes based on predictions of future human choices. Whether the defendant is reacting to one

56 At least they may not do so as a matter of justification. If the defendant were, say, a close family member, the third parties might themselves be able to invoke duress to excuse their aiding the defender rather than his attackers.
who appears to be about to attack him or to one who has threatened him with a future attack, what gives rise to the excuse is the defendant’s prediction that if he does not commit the crime, another will choose to aggress against him.

Actions that are preemptive in that way are troubling. We generally condemn preemptive restraints on liberty based on predictions of future dangerous choices. There are exceptions, of course. We countenance not only self-defense, but also restraining orders, peace bonds, gun restrictions, and restrictions on information that is dangerous in the wrong hands, and we do allow the preventive detention of those who, due to mental defects, will not be morally responsible for their predicted dangerous acts.

We draw the line, however, with preventive detention of those who are predicted to commit future crimes but who are fully responsible actors. We associate such preventive detention with totalitarian regimes, which paradigmatically act preemptively.

If, however, actors are excusable for acting preemptively in self-defense and duress situations, then is it possible that society as a whole could be excused for preventively detaining the sane but dangerous? The idea of a society’s being “excused” rather than justified may seem strange, but a society is nothing but those individuals who comprise it. If those individuals, acting as “persons of reasonable firmness,” would preemptively restrain the sane, but dangerous, rather than wait for the latter to choose to commit crimes, then it is possible that collectively they may *excusably* impose preventive restraints. In any event, it is worth exploring whether looking at preemptive restraints through the prism of excuse is more enlightening than working out the contours of when preemptive action is justified.57

### IV. THE RESIDUE OF JUSTIFIED DEFENSE OF SELF AND OTHERS

Essentially, I have proposed expanding the excuse of duress to cover lawful threats, threats other than force, and nonhuman threats (situational duress). I have also proposed that many cases that today are assigned to the justifications of defense of self and defense of others be reassigned to the expanded excuse of duress. These include

57 Another matter for speculation along these lines concerns social schemes that appropriate others in order to avoid great losses. Such schemes include conscription for the military. But they might also include mandatory organ pooling. Because they are appropriative, they cannot be justified, at least for libertarian liberals. But as with duress, which often involves appropriation, such schemes might be deemed “excused.” Likewise, the surgeon who cuts up a healthy patient for organs to save five dying ones might be “excused” for such an appropriative act if the five patients were, say, his children.
attacks by innocent aggressors of various kinds, plus cases involving
innocent shields and innocent bystanders, which typically are not in-
cluded within any defense. The question that remains to be ad-
dressed is what, if anything, is left of justified protection of self and
others?

A. The Basic Model for Justification Defense: Choice of the Lesser Evil

I believe that all true justifications can be modeled on the lesser
evils defense. That defense is available when the defendant has com-
mitted the crime with which he is charged because he believed that
committing it avoided a greater evil, and the legislature has not al-
ready considered and rejected an exception for cases where the
choice was as the defendant perceived it.58 Some cases of preemptive
self-, and other-, protection and situational duress are cases of choos-
ing the lesser evil, and defendants who commit crimes in those cir-
cumstances should be deemed justified.59 In the following Sections, I
enumerate some of the factors that should determine whether a de-
fendant who commits a crime to protect himself or others should be
able to claim a justification as opposed to an excuse.60

1. The Culpability of the Victim

If one is being attacked by culpable aggressors, or so one
nonculpably believes, one should be justified in using force, including
deadly force, to prevent the attack. As between an innocent attacker
and a culpable one, the law should always favor the innocent.61

59 There will be cases when defendants are justified for having chosen the lesser
evil but not excused under the excuse I have proposed here. For example, if A threat-
enes to steal five dollars from B unless B stops and talks with A for a few minutes, and B
is carrying life-saving medicine that is urgently needed at the hospital, B will be justi-
fied in harming A in order to proceed on his way, but he will not be excused: a
“person of reasonable firmness” would have given up either five dollars or a few min-
utes of time rather than harm another.

60 Third party interventions, unless the third parties are themselves under duress,
should always be governed by the lesser evils standard. Basically, when the lesser evils
justification is present, the defendant is permitted (not mandated) to violate the crim-
nal law for some net social benefit, the calculation of which should take account of
the factors mentioned here. One way the factors might be taken into account is
through general rules formulated ex ante rather than through case-by-case decision-
making. Such general rules would, I would think, be sensitive to the factors I discuss.
See Alexander, supra note 24, at 65–66.

61 This does not mean that one who is attacked by someone who appears to be a
culpable aggressor may not retreat or use less force than would be permitted and
thereby cede his rights to the culpable attacker. Even if self-defense against a culpa-
Culpability here means culpability that would be sufficient for criminal charges. The insane and children should not be deemed culpable for purposes of justifying, as opposed to excusing, those who defend against insane or youthful attackers. The same is true of nonculpably mistaken attackers (for example, those who mistakenly but nonculpably believe the defender is out to kill them): they should be regarded as similar to children and the insane, and defense against them should not be justified on grounds of their culpability.

In taking the position that one is justified, not merely excused, in using force against a culpable aggressor, I may appear to be contradicting another position that I have taken. In a recent article, a co-author and I agreed that taking steps toward committing a crime—short of the last step necessary—while intending to commit it, should not be deemed a culpable act. Rather, we argued that only the last act believed necessary for committing the crime should be deemed a culpable act. For, an act is only culpable if it unleashes a risk of harm to others’ interests. We concluded that only completed attempts, and not incomplete ones, should be criminally punishable.

Now in cases of presumptive self-or other-protection, the culpable aggressor has not yet unleashed the risk. Even if an assailant has fired his gun at the defender, the defender’s defensive response is meant to preempt the second shot. Otherwise, we would be dealing with retaliation, not self-defense. So, for purposes of preemptive uses of force, we must assume that the aggressor has not committed a culpable act as we have defined it.

That does not mean, however, that one who has a culpable state of mind by virtue of intending to harm another, without justification or excuse, is not a culpable person, even if he is not (yet) a culpable...
actor. His malicious intent disables him from protesting the preemptive use of force against him, once the threshold probability—whatever it is—that he will choose to harm and that harm will result from his choice is reached. He cannot complain that he has not yet unleashed his attack because it is his current intention to unleash it, and because once unleashed, the attack can no longer be preempted. So although his intention plus the danger that he will act as he now intends do not make him a culpable actor, they do deprive him of moral standing to object to preemptive force.

2. The Relative Numbers

Taking fewer lives to save more lives should be deemed justified, with exceptions I shall mention. In other words, in the basic trolley hypothetical, where switching the trolley will kill one worker but save five, one who switches the trolley should be deemed justified. Likewise, if more people are excusably attacking fewer, then intervention on the side of the greater number will ordinarily be justified, and resistance by the fewer will at best only be excused.

There are exceptions to locating justification on the side of the greater number. First, the relative culpability criterion trumps the relative numbers criterion. Thus, if ten culpable aggressors are about to attack one innocent defender, justification lies with the defender, not with the more numerous attackers. Likewise, if the five workers in the path of trolley are culpable for being in danger, and the one worker

63 Query: Does my position entail the possibility of a preemptive attack on someone whom we believe (beyond a certain threshold of probability) now intends to attack us, even though we think the risk that he will successfully attack us is barely greater than zero? If he is culpable, and there is some chance, however slight, that he will accomplish his evil intention, how can he have standing to object to our preemptive action?

64 Note the implications for the hypotheticals in note 13. See supra note 13. In the first hypothetical, A intends to kill whoever is sleeping with his wife, but he has not yet discovered that that person is B. Arguably, A is a culpable person if not yet a culpable actor. In the second hypothetical, A has no murderous intent, but B fears he will shortly acquire one. A is neither a culpable actor nor a culpable person at the moment preemptive action is contemplated. Even if A is equally dangerous in both hypotheticals, only in the first could B possibly be justified, as opposed to excused, in acting preemptively.

65 There is some dissent to this proposition that is worth noting. See, e.g., John M. Taurek, Should the Numbers Count?, 6 Phil. & Pub. Aff. 293 (1977); see also Robert Nozick, Anarchy, State, and Utopia 33 (1974). For responses to Taurek, see 1 F.M. Kamm, Morality, Mortality 75–98 (1993); Derek Parfit, Innumerate Ethics, 7 Phil. & Pub. Aff. 285 (1978).
on the siding is not, switching the trolley should not be deemed justified.\textsuperscript{66} No innocent life should be sacrificed to save the culpable.

Second, the innocent need not cede \textit{any} interest to the culpable, no matter how numerous. Thus, the innocent should never be forced to retreat rather than use force, including deadly force, to resist culpable aggressors. Nor should they be restricted to proportionate force, which restriction, as I argued above, is but a logical corollary of the retreat rule, and vice versa.\textsuperscript{67}

3. Appropriation

Appropriation of third parties is never justified, no matter how minor the interest appropriated relative to the interest at stake. If \( A \) is under no affirmative obligation to use his labor or property to rescue \( B \), then \( C \) may not appropriate \( A \)'s labor or property to save \( B \).\textsuperscript{68} The surgeon cannot be deemed justified in carving up a healthy patient and harvesting his organs for the sake of five dying patients in need of those organs. Nor can a good Samaritan justifiably coerce a bad Samaritan to expend even the minimal effort required to throw a life preserver in order to save one or several people from drowning.\textsuperscript{69}

\textsuperscript{66} Obviously, the notion of culpability in this example is slightly different from that displayed in intending to attack or subject to risk. The workers would be culpable in, for example, placing themselves in the path of danger while understanding the danger, appreciating that their conduct might force a choice between their lives and the lives of others, and lacking a sufficient justification for their conduct.

\textsuperscript{67} However, one could argue for retaining the requirements of retreat and proportionality because of the uncertainties involved in a preemptive attack based on predicting a free and culpable human choice. \textit{See infra} Part IV.A.4.

For a view that supports the proportionality requirement, even if cases of culpable attack, see Phillip Montague, \textit{Punishment as Societal Self-Defense} 45–46 (1995).

It should go without saying that if culpability is not a factor, then if the greater number can safely retreat, they must. And of course this means that if they cannot retreat, they are restricted to proportionate force. For in the absence of culpability, it is better that ten victims suffer some harm than that an innocent attacker suffer a greater harm. The general principle of the lesser evils justification is minimizing harm among the nonculpable, and this principle governs both the primary defender and third party defenders.

\textsuperscript{68} Many would dissent from this proposition to this extent: although \( C \) may not coerce \( A \) to use his labor or property to rescue \( B \), \( C \) can grab \( A \)'s property (but not his body) and use it himself to rescue \( B \).

\textsuperscript{69} On this view, \textit{Regina v. Dudley and Stephens}, 14 Q.B.D. 273 (1884), killing for the purpose of life-saving which involved cannibalism, was a case of perhaps excused but surely unjustified appropriation. On the other hand, \textit{United States v. Holmes}, 26 F. Cas. 560 (C.C.E.D. Pa. 1842) (No. 15,383), which involved throwing overboard lifeboat occupants whose presence risked capsizing the boat, was a pure case of justification
4. Probability

Because culpability trumps numbers and eliminates the requirements of retreat and proportionality, the requisite degree of confidence in one's assessment of culpability should be set high, perhaps at the level of virtual certainty. The question then becomes what estimate of probability of (1) attack and (2) injury should be required, first, if the attacker's culpability is assumed, and second, if it is not. My sense here is that if the very high threshold of confidence in culpability is surpassed, any probability of a successful attack should be sufficient to justify a preemptive response. On the other hand, if the threshold is not surpassed, and the attacker(s) is (are) assumed to be nonculpable, then justification—as opposed to excuse—should turn on the probability of attack times the likely degree of injury (and the number of injured) versus the degree of harm which must be inflicted preemptively on the attacker(s) to avert the successful attack. If the discounted harm averted is more severe than that inflicted preemptively, the preemptive defense strike is justifiable, not merely excused.

(greater numbers) because it involve no appropriation of the victims. Dudley and Stephens, in other words, is like the Surgeon hypothetical, whereas Holmes is like the Trolley hypothetical.

Thus, if someone culpably intends to force a game of Russian Roulette on one—with one live round in a six-chambered pistol—and I am certain of his culpable intent, I can preemptively use deadly force against him, even though there is some chance he will not go through with what he presently intends, and even though, if he does, there is only a sixteen percent chance of my being killed. On the other hand, if I know him to be insane and thus nonculpable, although I would probably be excused for killing him in self-defense, I would not be justified. Nor would a third party be justified in killing him to defend me.

Note that I am assuming symmetry between the case where there is a high probability of attack but a low probability of the attack's success and the case where the probabilities are reversed.

Is the person who estimates the probability of attack to be above the threshold but who turns out to be incorrect (because, say, his victim was not intending to attack him), a justified self-defender or merely an excused one? The answer is important only insofar as a third party comes to the person's assistance in repelling or killing the putative attacker. If the third party assesses the facts the same way as the person he is assisting, then his status will be the same as that person's. If they are mistaken about the putative attacker, they will have a full defense if, had the facts been as they supposed, they would have been justified in acting preemptively against the putative attacker. If either's mistake is culpable, that party would be punished at the level of culpability of the mistake. And if the person who fears attack would only be excused, not justified, in the absence of mistake, then he—but not the third party—can claim an excuse regardless of the mistake. The third party, mistaken or not, cannot avail himself of the excuse. For a different approach, see Benjamin C. Zipursky, Self-Defense, Domination, and the Social Contract, 57 U. Pitt. L. Rev. 579, 603–04 (1996).
B. Mistakes as to Culpability, Likelihood of Attack, Safety of Retreat, Necessary Force, and Third-Party Intervention

With respect to both justified preemptive self-protection and excused preemptive self-protection, the defendant's mistakes should not deprive him of his defenses. Thus, if he misinterprets a threat, fails to notice an avenue of safe retreat, overestimates the force necessary to avert an attack, and so forth, he may still be deemed justified or excused, with these caveats. First, where defendant's mistakes are about matters of justification and he would not be justified if he had properly assessed the facts, then although he may still claim a justification, from a third-party perspective, he should be regarded as merely excused. In other words, third parties who have properly assessed the facts may not come to his assistance unless they would be justified under the facts as they perceive them. Thus, if a third party knows that A is not culpably attacking B but also knows that B mistakenly thinks otherwise, B's use of force may be "justified" from B's perspective. But it is only excused from the third party's perspective, in which case the third party has no basis in either the numbers or relative culpability for intervening on either party's behalf.  

The second caveat is that culpable mistakes regarding the facts can render the defendant criminally liable for his use of defensive force at the level of culpability of his mistakes. For example, if the defendant culpably misassesses the danger posed by the victim, or misassesses the victim's culpability, he may be prosecuted for his use of force, though not at a level of culpability higher than the culpability of his mistake. The same holds true for mistakes that go to the defendant's excusable use of preemptive force, as I have already argued.  

The role of mistakes is identical to the role given them explicitly in the justification defenses of Article 3 of the Model Penal Code and implicitly in the excuse of duress in § 2.09. Where I would diverge from the Model Penal Code is in cases where the defendant is objectively justified—justified under the facts as an omniscient observer would perceive them—but has acted culpably given his own assessment of the facts. In such cases I, like Paul Robinson, would deem the defendant guilty of an attempt, though unlike Robinson, I would punish attempts no differently from successes. Thus, I would end up where the Model Penal Code, which deprives such defendants of justi-

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72 See Finkelstein, supra note 28, at 644–46.
73 See supra Part III.A.3.
75 See Alexander, supra note 31.
fications, ends up—fully punishing defendants for the crimes they thought they were committing without justification.

V. Conclusion

Kent Greenawalt has argued that the border between justifications and excuses is a perplexing one. I have attempted to show why this is the case. Crimes are less frequently justified, and more frequently excused, than current criminal law doctrine would declare. By shifting the current doctrinal boundary to enlarge the excuse of duress and diminish justifications of preemptive criminal acts, we might achieve both a tad more coherence in the doctrines and more morally satisfying results. I know Kent believes that efforts to achieve these results are necessary. I hope that he will find my proposal a useful contribution to these efforts and an appropriate token of gratitude for the many things he has taught me.

76 See Greenawalt, Perplexing Borders, supra note 6.