PUTATIVE SELF-DEFENSE: A BORDERLINE CASE BETWEEN JUSTIFICATION AND EXCUSE

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I. INTRODUCTION TO THE PROBLEM: THE DISTINCTION BETWEEN JUSTIFICATION AND EXCUSE AND BETWEEN MISTAKE OF FACT AND MISTAKE OF LAW

Problems of language sometimes merge with misunderstandings generated by differences of philosophical temperament. For example, legal terms of art might lend themselves to translation, but misunderstandings by scholars prevent the harmonization of legal cultures. A good example is the pair of German terms "Rechtfertigung" and "Entschuldigung," which map rather clearly onto the English terms "justification" and "excuse" and the Spanish terms "justificación" and "exculpación." According to two British criminal law scholars, "the neat conceptual frame may be useful as a model, but on close inspection we find that its elements shade into one another in a way that ultimately defies the analytical clarity to which doctrine aspires."[1] Nonetheless, George P. Fletcher and Albin Eser have emphasized

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1. Nicola Lacey & Celia Wells, Reconstructing Criminal Law: Critical Perspectives on Crime and the Criminal Process 53 (2d ed. 1998). In general British scholars are against this distinction; see, e.g., J.C. Smith, Justification and Excuse in the Criminal Law (1989) (also in J.C. Smith & Brian Hogan, Criminal Law 187–88 (7th ed. 1992)) and Michael Jefferson, Criminal Law 260 (6th ed. 2003) ("the division is a toll of analysis").

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the utility of this distinction as a basis for a general theory of criminal law that is applicable, in principle, in all legal cultures.[2]

This distinction can illustrate the nature of defenses that generate exemptions from penal responsibility. It is not particularly difficult to understand:

Claims of justification concern the rightness of an act that nominally violates the law. Examples of justifications include self-defense, necessity, consent, and the use of force in law enforcement. No one is entitled to defend himself from a justified act, and third parties are permitted to assist the justified actor.

Excuses, such as insanity, involuntary intoxication, duress, or mistake of law, imply that the actor is not personally to blame for the unlawful act.[3]

So far, so good. Some penal systems, notably the German and Spanish ones, cultivate this distinction as fundamental to understanding the basic elements of criminal responsibility. Things complicate themselves, however, when we turn to the question of how to solve cases of so-called *putative justification*, that is, of *mistakes about factual elements of justification.* It is safe to say that the way in which we should treat mistakes of this sort confounds both courts and theorists.

The Spanish Penal Code of 1995 contains no legislated solution for the problem. Some systems, such as the French and Anglo-American systems, which have shown little concern about elaborating the distinction between justification and excuses and exploring its implications, treat putative justification as a justification in itself. In this sense, the Model Penal Code has taken the position that putative self-defense should be treated just like actual self-defense: if the actor believes that she is being attacked or that the use of force is immediately necessary to repel the attack, then the use of force is justified.[4] That is the traditional position of the Spanish

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2. See generally 1 Justification and Excuse: Comparative Perspectives (Albin Eser & George P. Fletcher eds., 1987); id., Introduction, 1–13.

3. About this distinction in Anglo-American criminal law, see generally Joshua Dressler, Understanding Criminal Law 221–32 (4th ed., 2006) and especially George P. Fletcher, Basic Concepts of Criminal Law 73–92 (1998) (Spanish translation by Francisco Muñoz Conde, Conceptos básicos de Derecho penal (1997)); Fletcher, Rethinking Criminal Law 799–800 (1978); Fletcher, The Right and the Reasonable, 98 Harv. L. Rev. 949 (1985) (as well in Eser & Fletcher, supra note 2, at 68–119, Spanish translation by Paulo Busato & Francisco Muñoz Conde, Lo justo y lo razonable (2006)).

4. See Fletcher, Basic Concepts, supra note 3, at 88, 161–62.

Supreme Court as well.[5] The German courts and theorists support the position that putative justification negates intent and, by analogy, apply the rule for mistakes of fact[6] to mistakes about the factual elements of a justification. Fletcher thinks that the correct view in cases of putative justification is to treat it as an excuse if the mistake is reasonable.[7] In this way, the aggression of the putative defender remains wrongful and it is also possible to confer on a person a right to defend himself against one who mistakenly believes, either reasonably or unreasonably, that she is a victim of an aggression.

In my opinion, the standard of "a reasonable person in the defendant's situation" belongs to the concept of wrongdoing to solve problems not only of impossible attempts, but also of putative justification.[8] The strategy of this argument is, as Kent Greenawalt says, to shift the focus from whether the invasion of the victim's interest was justified to whether the risk that the actor took—regardless of the impact on the victim—was reasonable and therefore justified.[9]

This position does not mean that the only requirement for justification is the good-faith subjective beliefs of the defendant, but rather that the subjective beliefs and reactions of the defendant must be tested against the objective community standard of reasonableness. This standard is then a "'two-pronged' or 'hybrid' test."[10] In its first prong, the test requires that the defendant actually believe that the factual elements of justification exist (an aggression in case of self-defense, a risk to life or physical integrity of the woman in cases of legal abortion, the consent of the woman in case of rape, legal authority to arrest and detain a suspect in a case of kidnapping).

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5. See infra, section V.

6. See § 16 StBG (German Penal Code).

7. See Fletcher, Basic Concepts, supra note 3, at 90–91.

8. See, e.g., Francisco Muñoz-Conde, Universalizing Criminal Law, 39 Tulsa L. Rev. 951–53 (2004); Francisco Muñoz Conde & Mercedes García Arán, Derecho penal, Parte General 312–15 (2007) (in relationship with the distinction between "impossible crime" and "attempted crime," at 420); and Muñoz Conde, Putativ Notwehr, in Bausteine des europäischen Strafrechts, in Coimbra-Symposium für Claus Roxin 213–27 (1995) (Spanish version: ¿"Legítima" defensa putativa?: Un caso limite entre justificación y exculpación, in Fundamentos de un sistema europeo del derecho penal, Libro Homenaje a Claus Roxin 183–204 (J.M. Bosch ed., 1995).

9. See Kent Greenawalt, The Perplexing Borders of Justification and Excuse, 84 Colum. L. Rev. 1897 (1984).

10. See Fletcher, A Crime of Self-Defense 42 (1988).

The second prong is that this belief must correspond to what a reasonable person would believe under the circumstances. Only if the test passes both prongs, the subjective and the objective standards, could the action be considered justified. The right of the victim to defend her- or himself, which Fletcher considers incompatible with this position,[11] can be admitted as both a case of necessity and a claim of justification—that is, as a claim of justification that is different in nature (self-defense) than the claim of justification that the putative actor can invoke (necessity). When Fletcher says "[o]thers may be wrong, but their wrong path might still be on the map of reasonable alternatives,"[12] why not on the map of justified alternatives too?

Some argue that this theory about putative justification in cases of reasonable mistakes negates the basic distinction between justification and excuse.[13] Nevertheless, I think that this position preserves these categories as basic elements of a structured analysis of criminal liability. One should not forget that deciding whether a person is justified is not a purely theoretical question that can (or should) be answered by appealing to perfect standards of conduct that are unattainable. Thus, it is true, as Greenawalt states, that "the criminal law does not demand ideal behaviour from people."[14] Consequently, as Joshua Dressler has correctly asserted, "all that the law can fairly expect of a person is that she (or he) make(s) a conscientious effort to determine the true state of affairs before acting. If she (he) does this, . . . her (his) conduct is justifiable, although the result of her conduct may prove be tragic."[15]

A related problem that I will not consider here has to do with actors that are unknowingly justified.[16] If X kills Y without knowing that Y was

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11. See generally Fletcher, Basic Concepts, supra note 3, at 89–91.

12. Fletcher, supra note 10, at 40.

13. See, e.g., Bernd Schünemann, Die Funktion der Abgrenzung von Unrecht und schuld für das Strafrechtssystem, in Coimbra-Symposium für Claus Roxin, supra note 8, at 173; see as well Maria da Conceicao S. Valdagua, Notwehr und Putativnotwehr, Bmerkungen zum Referat von Muñoz Conde, in Coimbra-Symposium für Claus Roxin, supra note 8, at 229; Claus Roxin, Strafrecht, Allgemeiner Teil 662 (4th ed. 2006) (see infra).

14. Greenawalt, supra note 9, at 1905.

15. Joshua Dressler, supra note 3, at 232.

16. See Larry Alexander, Unknowingly Justified Actors and the Attempt/Success Distinction, 39 Tulsa L. Rev. 851 (2004).

about to shoot at him, the action of X is certainly unlawful. However, the offense really committed is an attempt rather than a consummated crime, for although the result is justified, the action remains wrongful. In any case, there should be no doubt about the culpability of X, who acted with the *mens rea* of homicide.[17] It should be noted, however, that this case has nothing to do with putative self-defense, for, regardless of whether we treat such cases as instances of justification or not, the putative defender certainly acts without culpability.

As one can see, the distinction between justification and excuse is sufficiently important (and sufficiently complex) to merit close attention. In this article I will focus on a much debated and confused aspect of the theory of criminal law defenses—*putative claims of self-defense*. This problem dovetails with questions about how to deal with claims of mistaken

17. See Muñoz Conde & García Arán, Derecho penal, supra note 8, at 311. For a different opinion, see Paul Robinson, A Theory of Justification: Social Harm as a Prerequisite for Criminal Liability, 23 UCLA L. Rev. 226 (1975), who states that a criminal act that occurs in circumstances that would legally justify it is not harmful and thus not deserving of punishment. George P. Fletcher, The Right Deed for the Wrong Reason: A Reply to Mr. Robinson, 23 UCLA L. Rev. 293, 320 (1975), rejects Robinson's position by stating that one who attacks a victim that he is unaware is about to attack him or others commits a wrongful act. A special position is held by R.A. Duff, Rethinking Justifications, 39 Tulsa L. Rev. 842 (2004) (Spanish translation by Luciana Dos Santos and Débora López, Sobre las justificaciones, in 2007-A Nueva Doctrina Penal, Buenos Aires 13) who in cases of "unknown justifications" distinguishes between "right" and "warranted": "While the law should acquit someone who does what is in fact 'the right deed,' even if she does it for the wrong reason or not even intentionally, it should convict one who does a merely 'permissible deed' unknowingly or for the wrong kind of reason" (at 849–50). The problem here is, as Duff says: "When can we, and when can we not, distinguish "the right deed" from "the right reason"? (Id. at 850.) Duff says: "'Right' and 'warranted' would be possible terms—so long as they are defined with sufficient clarity and lack of ambiguity" (at 841), and that is exactly the problem that he does not solve. An extreme position is presented by Larry Alexander, in Tulsa Law Review (supra note 16, at 858), who says that there is no reason to distinguish between attempted and consummated crimes. Thus, for him punishment should be the same in both cases (he calls his position "the attempt-culpability-subjectivist side," at 859). In my opinion, the relevance of the victim's suffering in the criminal law poses a serious hurdle to this position. Of course, the distinction between "attempted" and "consummated" crime is sometimes a question of "luck," but as Fletcher says: "We cannot adequately explain why harm matters, but matter it does" (Fletcher, supra note 10, at 83). Regarding the relevance of the luck for penal responsibility, see Jaime Malamud Goti, Rethinking Punishment and Luck, 39 Tulsa L. Rev. 861, 871–73 (2004), and Jaime Malamud Goti, La suerte en Derecho penal (foreword by Francisco Muñoz Conde, 2008).

justification and, as a result of this, with the issue of the borders between justification and excuse—the key to understanding the wrongdoing/culpability distinction. Before doing so, however, a brief discussion of the nature of self-defense and its relationship with claims of necessity is warranted.

II. SELF-DEFENSE AND NECESSITY: PROPORTIONALITY AND THE AGGRESSOR'S CULPABILITY IN SELF-DEFENSE

In a book published in 1970, *Kriminalpolitik und Strafrechtsystem*, my admired teacher and mentor Claus Roxin stated that "[the realm] of wrongdoing is the place where solutions to social conflicts are afforded, the domain in which collisions between conflicting individual interests or between social exigencies and personal necessities occur . . . [In sum, this dominion] is always about the socially fair regulation of contradictory interests."[18] Moreover, when Roxin talks about this realm he is above all making reference, as is logical, to justification defenses—the negative component of wrongdoing that brings to light the true battleground in which the interests of individuals are pitted against each other or against societal interests on a daily basis.

Looking for a solution to these conflicts that would not derive solely from an automatic application of doctrinal concepts, and always seeking that such a solution be adequate from the standpoint of the aims of the criminal law, in the above-mentioned book Roxin proposed the elaboration of "a limited number of guiding substantive principles that, upon different combinations, would determine the scope of justification defenses and whose application in concrete cases would fix determinations about the utility or social harm of a given conduct, and about the justification or wrongfulness [of the act]."[19]

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18. Claus Roxin, Kriminalpolitik und Strafrechtssystem 15 (2d ed. 1970) (Spanish translation and foreword by Francisco Muñoz Conde, Política criminal y Sistema del Derecho penal 40 (1972)). There is as well a translation of the German second edition by Francisco Muñoz Conde (2001).

19. Id. at 26.

But it is in the domain of self-defense, a topic to which Roxin later dedicated other excellent articles,[20] where there exists a unique necessity to revise the conclusions that follow from the automatic application of doctrinal concepts that have been elaborated without taking into account policy considerations, which in this context have a strong social connotation. The right to self-defense is evidently a fundamental right of the individual, as elemental and old as the human condition and the instinct of self-preservation. However, in modern states that abide by the rule of law, recourse to self-defense should be the exception rather than the rule, and, in any case, the boundaries of the defense should be demarcated with as much precision as possible. In this, as in many other topics, the works of Professor Roxin in Germany and of George P. Fletcher[21] in America have been influential and masterful. They have always seen self-defense as one of those areas in which one can immediately grasp the apparent contradiction between the solutions that follow from standard criminal law doctrines and those that derive from an examination of normative considerations. The gap between these two solutions is more inexcusable in this context than in any other.

Why must one appeal, asked Roxin in 1970, to the principle of "defense of the legal order against unlawful aggression" in cases involving attacks carried out by children or the mentally ill in order to justify the application of self-defense in circumstances in which the defensive response would have been prevented merely by avoiding the initial confrontation with the aggressor?[22] The state, not the individual, is the only one called to "defend the legal order against unlawful aggression."[23] Furthermore, the

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20. See, e.g., Die provozierte Notwehrlage, in 75 Zeitschrift für die gesamte Strafrechtswissenschaft 541 (1963); Über den Notwehrexzess, in Festschrift für Friedrich Schaffstein zum 70. Geburtstag 106 (1975); Die "sozial-ethischen" Einschränkungen des Notwehrrechts, in 93 Zeitschrift für die gesamte Strafrechtswissenschaft 68 (1981). See a general view of his position in Strafrecht, supra note 13, at 650–719.

21. For Fletcher, see, e.g., supra note 10; The Right Deed for the Wrong Reason, supra note 17; Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory, 8 Isr. L. Rev. 367 (1973); Punishment and Self-Defense, 8 Law & Phil. 201 (1989); Domination in the Theory of Justification and Excuse, 57 U. Pitt. L. Rev. 553–78. For a recent analysis of self-defense in the international law of war, see George P. Fletcher & Jens David Ohlin, Defending Humanity: When Force Is Justified and Why (2008).

22. Roxin, supra note 18, at 28.

23. Roxin, Die "sozial-ethischen," supra note 20.

legal order doesn't need to be defended against people who cannot be motivated by the norms they have infringed, particularly when it is because of this very reason that their acts are not punishable.[24] These considerations led Roxin to limit self-defense by appealing to the principle of self-protection. Thus, he declared the use of force by individuals to be taboo unless it is employed exclusively for one's own protection and, even then, he placed limits on the right of self-defense in light of "ethical and social considerations."[25]

In fundamental agreement with these premises, Mordechai Kremnitzer and Khalid Ghanayim objected in a recent article[26] to Fletcher's contention that someone who kills a nonculpable (psychotic) aggressor acts in self-defense.[27] For them, such a case falls within the purview of justifiable necessity rather than self-defense. In any case, there must be proportionality between the gravity of the attack and the reaction of the victim of the attack both in cases of self-defense and necessity.[28] As I will examine later in this article, questions regarding whether the applicable defense should be self-defense or necessity also surface in the context of cases of putative self-defense.

III. SOME CASES OF PUTATIVE SELF-DEFENSE

Let me start by positing various cases that can serve as a model or starting point for the exposition of my thesis.

First case: Antonio, an opulent banker who has been receiving death and kidnap threats from a terrorist group, fires his gun at night against

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24. Id.

25. Id.

26. Mordechai Kremnitzer & Khalid Ghanayim, Proportionality and the Aggressor's Culpability in Self-Defense, 39 Tulsa L. Rev. 875.

27. See Fletcher, Proportionality and the Psychotic Aggressor, supra note 21; Rethinking Criminal Law, supra note 3, at 802, 853; Basic Concepts, supra note 3, at 143–45.

28. See Kremnitzer & Ghanayim, supra note 26, at 887–88: "The necessity defense is a residual framework that is appropriate for treating situations that are not entirely appropriate to self-defense." As well, Fletcher (Basic Concepts, supra note 3, at 145) admits: "If the wrongful nature of the attack, whether by a psychotic or a culpable actor, proves to be a less-compelling rationale for self-defense, then necessity might indeed be the better way to justify the use of force against a psychotic aggressor."

someone who is climbing the fence of his chalet. It turns out that the mysterious climber was his son, who did not want his parents to know that he was getting home so late.

Second case: In a New York subway car in which fifteen or twenty people are traveling, four African American youths approach one of the passengers and ask him for five dollars. Without saying a word, the passenger, who had recently been assaulted on various occasions, pulls out a gun and fires five shots, seriously injuring one of the youths.

Third case: Luis, a supermarket owner who had recently been assaulted on several occasions, observed a young man entering the establishment right before closing time. The youth looked extraordinarily like one of the persons who had attacked him in the past. Nervous, afraid, and believing that he was about to be attacked once again, Luis pulled out a gun and fired against the young man, causing him grave bodily injury. It turned out that the youth was someone who had forgotten to buy several items that he needed in order to prepare supper.

Fourth case: Three aspiring young bullfighters decide to go to a nearby farm one night to tempt a couple of young bulls that belonged to a rich cattle-owning neighbor. After jumping over the fence and right before the youths attempted to separate a couple of bulls from the herd, they were discovered by the night watchman of the farm. Following the orders of the farm owner, and believing that he was acting in defense of property, the night watchman fired without warning at the three youths at close range, killing them all.

Fifth case: A simulated armed robbery that was carried out without prior warning in a local police department caused alarm in the building. Several members of the police grabbed their weapons in an effort to repel the supposed attack. In the midst of the confusion, a police officer went out to the street in front of the building to protect two girls who were passing by the area. In an attempt to protect the girls, the officer fired his weapon, causing serious injuries to one of the supposed assailants.

In each of these five cases someone who has reason to believe that he is going to be attacked, and perhaps killed, employs force against a person who is not really an aggressor. This gives rise to what some commentators have called the problem of "putative self-defense," that is, the defensive force employed to repel an imaginary aggression that is objectively inexistent.

As an initial approach to the problem, we could advance the following thesis: the use of force by someone who is defending himself against an aggression that only exists in his mind cannot be justified. Claims of justification or

of conformity to law are an objective phenomenon. Simple beliefs cannot generate justification defenses, although they could lead to an excuse, or at least to a mitigation of the criminal responsibility of the person who acted on the basis of the beliefs. Therefore, the supposed aggressor, who is really an innocent person who is being attacked by the putative defender, has a right to defend himself from the person who erroneously took him to be an aggressor. In sum: both the putative defender and the supposed aggressor may be acquitted. Acquittal in the putative defender's case would be grounded on his reasonable and well-grounded mistake. In the case of the supposed aggressor, acquittal would be based on a claim of self-defense.

A curious role swap occurs in cases of putative self-defense: whereas the person who was mistakenly believed to be an aggressor could end up legitimately defending himself from the real aggression that he faces, the person who erroneously believes that he is employing force against an unlawful aggressor might find himself on the receiving end of the justifiable defensive response of the mistaken aggressor. Thus, somewhat paradoxically, both may end up being relieved of criminal responsibility even if they mutually inflict on one another grave injuries.

The problem, however, does not lie in the fact that both may be relieved of liability, but in determining whether their exemption from responsibility has the same basis and hierarchical importance within the different stages of inquiry that undergird the general theory of criminal responsibility.

IV. THE THEORIES

In these cases we are faced with what German and Spanish criminal law theorists have usually dubbed as a "mistake about the factual or objective elements of justification defenses."[29] These scholars have traditionally offered two theories in an attempt to solve these types of cases:

(a) The so-called *culpability theory*, which holds that the objective elements of justification defenses (the wrongfulness of the aggression in cases of self-defense, for example) are an essential part of the

29. For a general description of those theories see Roxin, Strafrecht, supra note 13, at 622–32; Muñoz Conde, El error en derecho penal (1987, 2d ed. 2004); Lothar Kuhlen, Die Unterscheidung von vorsatzausschliessenden uhd nichtvorsatzusschliessenden Irrtum (1987).

claim of justification itself. Thus, a mistake as to these elements should be treated in the same manner as a mistake as to the very existence of legal justification. Consequently, this type of mistake is treated as an excuse that only affects the culpability of the mistaken actor, not the wrongfulness of the act. If the mistake is unavoidable (i.e., reasonable), the person is held not to have acted culpably. Thus, the reasonably mistaken actor will be relieved of responsibility. However, if the mistake is avoidable (i.e., unreasonable), his culpability is mitigated but not totally excluded. Hence, the unreasonably mistaken actor is not exempted of criminal liability, but his punishment can be mitigated in light of his mistake.[30]

(b) Contrarily, the so-called *negative elements of the offense theory* holds that the objective elements of justification defenses are negative elements of the crime. Thus, a mistake about these elements should be treated in the same manner as a mistake of fact, that is, as a mistake that affects the actor's *mens rea*.[31] The consequences of this theory are as follows:

(1) If the mistake about the objective elements of the claim of justification is unavoidable, the actor will be deemed to have acted without the *mens rea* required for the consummation of an offense (i.e., intent or negligence). As a result of the absence of *mens rea*, the mistaken actor's conduct will not be considered wrongful and the victim of the mistaken attack would not be able to repel it in self-defense. Thus, for example, the customer shot by the supermarket owner who mistakenly took him to be an aggressor in light of his extraordinary physical resemblance to a past assailant would not be able to repel the attack in justifiable self-defense.

(2) A third party who cooperates in some way to repel the supposed aggressor despite being aware of the mistake would also be relieved of criminal responsibility. In the above-mentioned case, this will lead to the acquittal of a clerk who, because of

30. Its principal author is, in Germany, Hans Welzel, Das deutsche Strafrecht 168 (11th ed., 1969), and in Spain, José Cerezo Mir, Curso de derecho penal español 205 (6th ed. 2006) (as well as earlier, Muñoz Conde, supra note 29, at 52 and 132, but now with some nuanced differences).

31. A more modern version of this theory is the so-called limited culpability theory; see, e.g., Roxin, Strafrecht, supra note 13, at 626. In Spain, a similar position is held by Santiago Mir Puig, Derecho penal, Parte General 425 (7th ed. 2004).

vengeance, hatred, or enmity towards the customer, hands a gun to the mistaken supermarket owner despite being aware of what is really going on. The acquittal follows from the derivative nature of accomplice liability. Since the supermarket owner has committed no crime because he lacks the requisite *mens rea* in light of his mistake, the clerk's complicity in the act cannot be considered criminal, either.

(3) Furthermore, if no harm was caused to the customer as a result of the mistaken attack, the supermarket owner could not be found guilty of an attempt, either. Since attempts require intent and the supermarket owner's *mens rea* is negated by his mistake, no attempt liability could be imposed. Moreover, he would not be guilty of an attempt *even if his mistake was avoidable*, since even unreasonable mistakes negate intent and there is no attempt liability for negligent acts.

Naturally, the consequences would be entirely different if, as the culpability theory holds, one considers that mistakes about objective elements of justification defenses in no way affect the wrongfulness of the act or the *mens rea* of the actor. If mistakes of this nature do not negate in any way the wrongfulness of the conduct, in the above-mentioned case the customer could respond in self-defense, the clerk could be held liable as an accomplice of the acts of the supermarket owner, and the owner could be convicted of attempted homicide or battery if the harm intended to be caused (death or injury of the supposed aggressor) did not ensue.

In America, Fletcher distinguishes at least three distinct approaches to the problem of putative self-defense in particular and to the issue of putative justification:

> One approach is to assimilate the claims of putative justification to claims of actual justification; alternatively, one might argue that a mistake about the conditions of justification negates the intent required for the commission of the offense; a third way of approaching a putative justification focuses on the prohibition of excusing rather than justifying the use of force.[32]

It is only on a few occasions that a discrepancy that is, at least in principle, a purely doctrinal one can have so many practical consequences, particularly if one focuses on the rights of the putative defender. Suppose,

32. See Fletcher, Basic Concepts, supra note 3, at 88–89.

for example, that the putative defender's mistake was avoidable because he could have become aware of his error by more diligently attempting to determine the identity of the supposed aggressor. According to the negative elements of the offense theory, this type of mistake should lead, at the most, to convicting the putative defender of a negligent crime. Contrarily, under the culpability theory, avoidable mistakes would lead to holding the putative defender liable for the commission of an intentional homicide or battery. However, such mistakes could ground a discretional mitigation of punishment.

In favor of the latter thesis one could point out that, from a normative perspective, a mistake about an objective element of a justification defense (the wrongfulness of the aggression, for example) differs from a mistake of fact with regard to some objective element of an offense. As Hans Welzel once stated, it is not the same thing to kill a human being in self-defense as to kill a fly.[33] In cases of putative self-defense, the mistake about a factual element—the existence of a wrongful aggression, for example—leads to confusing a peaceful citizen with a dangerous aggressor. Thus, the person who mistakenly believes to be defending himself against an attack knows and wants (i.e., "intends") to kill another person—the supposed aggressor—although he thinks that his act is justified.

Cases of mistake of fact are different. Take, for example, the case of a hunter who believes that he is killing game when he is really killing another hunter. If the hunter's mistake was avoidable, it seems proper to convict him of negligent homicide, for he really *didn't* know that he was killing a human being, nor did he want to do so (i.e., he did not "intend" to kill a human being). Contrarily, the putative defender who kills a supposed aggressor because he unreasonably believed he was being attacked should be convicted of a full-blown intentional homicide, for he *did* know that he was killing a human being, and *did* want to do so.

Furthermore, even though unavoidable mistakes about the objective elements of justification defenses relieve the actor of responsibility under both the culpability theory and the negative elements of the offense theory, the exemption of liability does not have the same meaning when it is

33. See Welzel, supra note 30, at 81. A similar argument by Fletcher, Basic Concepts, supra note 3.

treated as a mistake of fact (negative elements of the offense theory) as opposed to being treated as an excuse (culpability theory). Unavoidable mistakes of fact lead to an acquittal because they negate *mens rea*. Hence, these mistake defenses allow for the resolution of the conflict in the first stage of analysis of the theory of criminal responsibility: the definition of the offense (as long as one considers that *mens rea*—intent and negligence—are subjective elements of the offense). Contrarily, although excuses also generate an acquittal, the reason for the exemption of liability lies in the fact that the actor cannot be fairly blamed for engaging in the admittedly wrongful act. Thus, excuses lead to an acquittal despite the fact that the defendant's conduct satisfied both the objective (*actus reus*) and subjective (*mens rea*) elements of the offense.

Therefore, putative justifications in general and putative self-defense in particular cannot be treated in the same manner as claims of justification that are grounded on an objectively correct factual belief. In the former case, an unavoidable mistake leads to an exemption of punishment because it negates the culpability of the actor, a category which allows for resolving the problem without negating the fact that the actor's conduct satisfied the elements of an offense or that his act was wrongful. In the latter case, the exemption of punishment is deduced simply and solely from the legality of the conduct performed, for the act ceases to be wrongful in light of the presence of the objective and subjective elements of a claim of justification.

V. THE TRADITIONAL SPANISH CASE LAW

Spanish case law departs from the position just described above, since it usually treats putative claims of justification in the same way as real cases of justification, as long as the mistake about the objective elements of the defense is rational and well-grounded (i.e., "unavoidable" or "reasonable"). This is especially the case in the context of claims of putative self-defense. If the mistake is avoidable or unreasonable, however, courts usually hold the defendant responsible for a negligent offense.

Setting aside the latter proposition (convicting the defendant of a negligent offense when his mistake was avoidable, which coincides with the negative elements of the offense theory that was criticized earlier), let us focus our attention on the former proposition holding that claims of

putative justification should be equated with real justificatory claims whenever the actor's mistaken belief in the existence of a factual element of a claim of justification is rational and well-grounded. As the Spanish criminal law scholar Juan Córdoba Roda once asserted, according to the jurisprudence of the Spanish Supreme Court, "the well-grounded belief in the existence of wrongful aggression will lead to a finding of the requisite attack, as if it had really taken place."[34]

There are several reasons underlying this jurisprudential approach. On the one hand, there are evidentiary reasons that require courts to focus their attention on those facts or criteria that can objectify and add credibility to the allegations made by defendants with regard to their motivations and their beliefs. Subjective elements are notoriously difficult to prove during the criminal process, since the fact finder can only infer them, not directly observe them. This inference should be based on facts or criteria (*indicators*) that can be empirically corroborated and that can reveal in the most trustworthy manner the subjective element that is sought to be proven.[35]

In cases of self-defense, the objective indicators of wrongful aggression have been elaborated at length by the case law. Thus, in the Judgment of the Spanish Supreme Court of March 11, 1972, it was stated:

> [W]hen assessing cases of putative self-defense that are the product of avoidable and unavoidable mistakes, the judge ought to proceed with extreme caution. [He] must require a clear, well-formed and objective picture of the false suppositions made by the agent that takes into account his subjective attributes and the realities of the circumstances that were taking place at the time. . . . In sum, the [circumstances that gave rise] to the mistake must be demonstrated by the trial court judge by reference to facts.

As a result of this, the few cases in which the case law has considered putative self-defense to be a complete bar to criminal liability dealt with instances in which the prior experiences of the actor (he or his family had

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34. In 1 Comentarios al Código penal, 260 (Juan Córdoba Roda & Gonzalo Rodríguez Mourullo eds., 1972).

35. See Winfried Hassemer, Einführung in die Grundlagen des Strafrechts 170 (1980) (Spanish translation by Francisco Muñoz Conde and Luis Arroyo Zapatero, Fundamentos del Derecho penal 277 (1984)).

been subjected to similar attacks in the past) or the circumstances surrounding the alleged attack (e.g., dark and empty place, high-crime area, late at night, the attitude of the supposed aggressors) made it possible for one to conclude that the actor had relatively sound reasons to believe that wrongful aggression was imminent.

Thus, in light of the existence of these proven facts, the Spanish Supreme Court has sometimes found a valid claim of self-defense to exist even though the existence of a real, imminent, and wrongful aggression cannot be corroborated. However, in order to consider such claims to be authentic cases of self-defense, the Court has required that "the mistaken belief be entirely rational and well-grounded."[36]

VI. THE REASONABLE PERSON STANDARD

This jurisprudential position of the Spanish Supreme Court is not objectionable as long as the "rational and well-grounded" nature of the belief is used as an objective criterion with which to judge the defensive reaction that took place and not as a subjective standard that allows the actor to make up facts that have nothing to do with what really transpired.

In these types of cases, total congruence between objective reality and subjective perception is practically impossible. There are always circumstances that are incorrectly or incompletely perceived and facts that the individual misinterprets. As the Spanish saying goes, "at night, all cats are black." Even Sancho Panza, who doesn't remotely share the visions of his master Don Quixote, interpreted the noises that the windmills made in an otherwise silent night to be the voices of terrible gigantic monsters.

It would be absurd to require a person who needs to act quickly in light of the imminence of what objectively looks like an aggression to calmly and coolly corroborate all of the objective criteria that support his beliefs before proceeding to defend himself. One cannot require everyone to exhibit the coolness of character and serenity that are needed to effectuate such corroboration. Furthermore, if one wastes too much time trying to

36. Take, for example, the Spanish Supreme Court Judgments of May 26, 1987, or May 21, 2003.

corroborate the facts, the defensive response might lose efficacy because it could come too late.

In view of these considerations, Spanish case law has never required that the aggression be consummated by acts that harm the personal interests of the actor. Instead, only the imminence of such an attack is required, coupled with a showing of the seriousness of the threatened aggression and of the rational and well-grounded belief in the existence of the threat.

Once again, as in many cases in which one tries to establish an objective standard with which to compare a person's conduct, recourse is made to the objectifiable criteria of the "rational," or more properly, as the Anglo-Americans typically say, to the "reasonable," that is, to what an average person would have done if she had faced the same circumstances. This standard is frequently employed in other contexts, such as when one examines the "*reasonable* foreseeability" of harm as a way of analyzing whether the actor's conduct was the proximate cause of a result. It is also employed when determining whether the actor's conduct was negligent or reckless because she did not exhibit due diligence[37] and when distinguishing between non-punishable "impossible" attempts and punishable "impossible" attempts.[38] An appeal to reasonableness is also central to law enforcement defenses. The use of deadly force by police officers is justified if they reasonably believed it was necessary to use such force in order to prevent the commission of a crime that threatened the life or limb of third parties. Thus, as the U.S. Supreme Court stated in the *Garner* case, the use of deadly force by an officer is lawful if he "has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others, and such force is necessary to make the arrest or prevent escape."[39]

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37. In context of "recklessness," the Model Penal Code Section 2.02 uses the expression "law-abiding person": "Disregard involves a gross deviation from the standard of conduct that a *law-abiding person* would observe in the actor's situation."

38. See Muñoz Conde, Universalizing, supra note 8, at 946 ("An attempt can only exist if the 'ordinary reasonable man in the defendant's situation' could have believed that the facts were as the defendant believed them to be").

39. See Tennessee v. Garner, 471 U.S. 1 (1985), and commentary by Dressler, supra note 3, 302–04. That was the issue in the "Rodney King case"; see Fletcher, With Justice for Some 57 (1995) (Spanish translation by Juan José Medina Ariza and Antonio Muñoz Aunión, Las víctimas ante el Jurado, Editorial Tirant Lo Blanch, Valencia (1997)).

Notions of reasonableness also inform what has been dubbed the "communicative concept of action."[40] This theory holds that human conduct is a form of expression or relevant communication between human beings. Judgments of reasonableness under this theory are contextual. Think, for example, about whether we would recognize as reasonable a belief that someone is acting in self-defense when the alleged aggressor put his hand in his pockets and at the same time said "I am going to kill you." The reasonableness of the belief seems to depend on the context surrounding the act and the knowledge that the threatened person has regarding the reputation and personality of the alleged aggressor. Maybe the threatened person knows that the aggressor is a killer for hire who always has a gun in his pocket, or maybe he knows that the supposed aggressor is mentally ill and that he threatens people with killing them all the time without meaning any real harm.[41]

There is nothing to object to in this standard, as long as one is conscious that it establishes an objective test that is not intended to substitute real facts with the subjective beliefs of the actor, even if it allows for the consideration of the circumstances surrounding the actor's conduct. This objectification of subjective perception is perfectly proper and remains within the boundaries of objectivity that are needed in order to evaluate

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40. This is compatible with the analytical philosophy of Wittgenstein. George Fletcher (1 Grammar of Criminal Law, American, Comparative, International 281–83 (2007); Spanish translation by Francisco Muñoz Conde, Gramática del Derecho penal (2008)) and the Spanish criminal law scholar Tomás Vives Antón (Fundamentos del sistema penal (1996)) have developed this "communicative" concept of action. For an exploration of this concept and its consequences for the theory of criminal law, see Francisco Muñoz Conde & Luis Ernesto Chiesa, The Act Requirement as a Basic Concept of Criminal Law, 28 Cardozo L. Rev. 2461. Kyron Huigens criticizes this theory in his Introduction, 28 Cardozo L. Rev. 2408; but Meir Dan-Cohen, Thinking Criminal Law, 28 Cardozo L. Rev. 2425, agrees with the "communicative theory of action" by Fletcher: "in interpreting an action . . . we must eventually reach a unitary judgment in which semantic as well as pragmatic and contextual factors are combined." In Spain, Vive's communicative theory of action is defended by Carlos Martínez-Buján Pérez, La "concepción significativa de la acción" de T.S. Vives, in 1 Homenaje al dr. Marino Barbero Santos (Luis Alberto Arroyo Zapatero & Ignacio Berdugo Gómez de la Torre coords., 2001); Muñoz Conde & García Arán, Derecho penal, supra note 8, at 213–15; Paulo César Busato, Derecho penal y acción significativa (2007); José Antonio Ramos Vazquez, Concepción significativa de la acción y teoría del delito (2008).

41. Muñoz Conde & Chiesa, supra note 40, at 2469.

the presence of factual elements of claims of justification in a concrete case. However, to the degree that the standard allows for a certain amount of discretion when evaluating the reasonableness of the subjective perceptions of the actor, it introduces a possibility of arbitrariness that is difficult for the trier of fact to control. From a juridical point of view, to act reasonably is not the same thing as to act correctly. American jurists, strongly influenced by notions of the "reasonable" introduced by Coke and Blackstone, believe that there can be more than one reasonable response to a legal problem. For Americans, as George Fletcher has asserted, the voice of reason has transformed itself into the spirit of tolerance, since "others might be mistaken, but their reasons might still be within the scope of reasonable alternatives."[42]

In this vein, New York's Penal Code[43] requires that the actor "reasonably believe" that he is about to be the victim of a robbery or homicide in order for a claim of self-defense to be successful. This requirement is quite similar to the Spanish case law's requirement that the actor's belief in the imminence of the aggression be "rational and well-grounded" in order to establish a valid self-defense claim. Notice that in both cases the conduct is deemed justified as long as it falls within the scope of reasonably available alternatives. A perfect (i.e., non-mistaken) appreciation of the circumstances leading to the use of force is not required.

VII. REASONABLE TO WHOM?

Joshua Dressler has described the difficulties that arise when applying the "reasonable person standard" in self-defense cases in the following way:

> The law of self-defense represents a compromise. The right of self-defense is not based on objective reality (whether the person about to be killed represents a real threat to the life of the actor) but neither is it based solely on the actor's subjective impressions: A person may only defend himself if he subjectively believes that deadly force is required and a reasonable person would also believe that it is appropriate under the circumstances. The crux of the issue, at least as courts see the matter, is: Who is the "reasonable person" to whom the defendant is compared? Or, put slightly differently, to what extent

42. Fletcher, The Right and the Reasonable, supra note 3; Fletcher, supra note 10, at 40.
43. Quoted by Fletcher, supra note 10, at 9, 35.

> should courts permit juries, as factfinders, to incorporate the defendant's own characteristics or life experiences in the "reasonable person" standard?[44]

This "reasonable person standard" raises then the following question: To whose reason should we appeal in order to apply a "reasonableness" standard?

A subjective approach would lead to considering that any belief of the actor, as long as it is an honest belief, should be deemed reasonable. This approach subjectifies the concept so much that it conditions the assessment of reasonableness on whether the conduct seemed reasonable *to the actor*. Such a high level of subjectivity would perforate the objective efficacy of legal norms, reducing them to a dead letter. Furthermore, it would lead to intolerable results because it would grant a license to kill to anyone who honestly believed that he was about to be attacked, regardless of the rationality of the belief.

Therefore, it seems preferable to adopt an objective approach to reasonableness that would justify conduct only when it is compatible with the hypothetical conduct that a normal and reasonable person would have observed in the circumstances of the actor. However, this objective approach cannot be taken to the extreme of not allowing for the consideration of any of the subjective beliefs and representations held by the actor. This would entail substituting the "normal person" for a "hypothetical and standardized person" that has never existed. It is difficult not to take into account the knowledge that the putative defender had about past acts of violence of the supposed aggressor or of his violent nature when objectively evaluating whether the actor's defensive response was reasonable. This was precisely what the New York Court of Appeals did in the *Miller* case.[45]

The prosecutor in the *Goetz* case adopted a similar approach when building his case against the famous "subway avenger," for he believed that the resolution of the case required two levels of analysis: (1) an assessment of whether the actor honestly believed the use of force was necessary in order to repel an attack, and, if so, (2) an examination of whether his belief is compatible with what a reasonable person would have believed in the circumstances of the actor.[46] This analysis, like the Spanish Supreme Court's approach, is proper as long as the assessment of the actor's subjective

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44. Dressler, supra note 3, at 253.
45. Quoted by Fletcher, supra note 10, at 49.
46. Quoted by Fletcher, id. at 42.

beliefs is used as a vehicle for establishing the objective reasonableness of the conduct, not as a factor that bars engaging in an objective evaluation of the act. As the Spanish scholar Rodríguez Mourullo has observed, "the issue regarding whether one should assess the rationality of the conduct by appealing to the actor's rationality as opposed to the judge's rationality has been expressly decided by Spanish courts in favor of the latter solution."[47] In support of this contention he cited the Spanish Supreme Court judgment of February 14, 1966, in which the Court held that the proportionality between the defensive response and the wrongful attack averted "should be assessed in accordance with the judgment that reason would dictate to an impartial observer, in this case, the judge, and not according to the subjective judgment of the person who engaged in the defensive conduct."

So conceived, I do not object to considering that cases of putative self-defense where there is a "rational and well-grounded belief" in the existence of a wrongful attack should be considered full-blown claims of justification, even if it turns out that no aggression took place. The actor's subjective belief in the existence of an aggression is objectified by the judicial process in a way that transforms it into a legal fact. We should thus consider these cases to constitute authentic instances of justification, with all of the consequences that this entails. To talk about "putative self-defense" here is pointless. Thus, from this standpoint, a joke or an attack with a toy gun could be considered wrongful aggressions as long as they are capable of generating in the putative defender an objective, rational, and well-grounded belief that he is about to be attacked.

VIII. THE UNREASONABLE ACTOR'S SUBJECTIVE BELIEF AS FULL OR PARTIAL EXCUSE

We cannot remain in the domain of justification if the actor's conduct does not satisfy the objective standard discussed in the previous section. The actor's subjective belief that he is going to be attacked, understandable as it

47. Gonzalo Rodríguez Mourullo, Legítima defensa real y putativa en la jurisprudencia del T.S. 68 (1976). About the Spanish case law, see as well María José Magaldi Paternostro, La legítima defensa en la jurisprudencia española (1976); Diego Manuel Luzón Peña, Aspectos eseciales de la legítima defensa (1978); Carmen Requejo Conde, Legítima defensa (1998); Miguel Angel Iglesias Rio, Fundamentos y reaquisitos estructurales de la legítima defensa (1999).

may be, cannot exclude the objective wrongfulness of the act if it is not deemed to be "rational and well-grounded." The timorous or paranoid actor who interprets a verbal threat, an insult, or a slight physical contact as an imminent aggression to his bodily integrity can, from his own subjective point of view, be acting in self-defense. However, this conclusion is difficult to defend if one assesses the situation from an objective standpoint. In these cases we have fully entered the realm of putative self-defense, for the reality of the aggression only exists in the mind of the actor who believes to be defending himself, since an impartial observer in the circumstances of the actor would not harbor such a belief. Thus, these instances represent authentic cases of mistakes involving discrepancies between reality and subjective perceptions that cannot be resolved by way of an objective evaluation of the circumstances. These types of mistakes can be unavoidable from the perspective of the actor, and thus excusable, but they cannot negate the objective wrongfulness of the act.

In such cases, equating putative self-defense with true claims of justification would lead to subjectifying assessments of wrongfulness in a way that is incompatible with the objective nature of the concept. This is the case because in order to determine whether an act is wrongful one needs to engage in an impartial evaluation about whether the conduct conforms to legally appropriate standards of conduct. Not engaging in this type of objective and impartial evaluation of the conduct could lead to an infelicitous conflation of the concepts of wrongfulness and culpability, which form in my view[48] the cornerstone of modern theories of criminal responsibility.[49]

Furthermore, subjectifying wrongfulness would lead to results that are difficult to reconcile with our intuitions, namely, negating the possibility of self-defense to the victim of the attack carried out by the putative defender, or, what would be more absurd, to admit the possibility of justified self-defense against justified self-defense, a flagrant contradiction of the generally accepted principle that justifiable defensive force can only be employed against an *unjustified* aggression.

Cases in which battered women kill their partners in nonconfrontational situations in order to avoid being subjected to further abuse raise important questions with regard to how to determine the reasonableness of such courses of action. It seems difficult to justify homicides in such

48. See Muñoz Conde & García Arán, Derecho penal, supra note 8, at 307, 350.

49. See Eser & Fletcher, supra note 2; Dressler, supra note 3.

nonconfrontational situations when there isn't an imminent threat to the life and bodily integrity of the battered woman. This is particularly the case when she had other alternatives available, such as abandoning and denouncing her partner, seeking help from institutions devoted to helping battered women, etc. Of course, if the mental state of the woman at the moment she kills her partner is abnormal, because of, for instance, the so-called "battered woman syndrome," it is possible to provide her with a full or partial excuse on the grounds of insanity, duress, or diminished capacity. Furthermore, as a result of the difference between being justified and excused, if the sleeping partner were to unexpectedly awaken, he would be justified if he uses force to avoid the excused attack of the woman.[50]

One must recognize, however, that it is very difficult to differentiate "rational and well-grounded beliefs" from "purely personal beliefs." Nonetheless, the differentiation can and should be made in much the same manner as one can and should always try to distinguish justifications from excuses. In the former cases (those involving judgments of justification), we should compare the act performed with objective standards of reasonableness and consider the conduct wrongful if it falls short of the standard. In the latter cases (those involving judgments of culpability), we should delve more deeply into the subjectivity of the individual in an attempt to determine whether, notwithstanding his failure to meet objective standards of reasonableness, his personal circumstances, character, or psychological makeup warrant a full or partial *excuse*, an exemption or mitigation of punishment.

Furthermore, in cases where the aggression is inexistent *ex post,* but one can rationally, reasonably, and objectively presume its *ex ante* existence,[51]

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50. See Dressler, supra note 3, at 263–65; State v. Norman, 378 S.E. 2d 8, 21 (Judith Norman Case) and commentary by Fletcher, supra note 39, at 132; Luis Ernesto Chiesa, Mujeres maltratadas y legítima defensa, in 20 Revista Penal 50 (2007). About the situation of this problem in Spanish criminal law, see Iglesias Rio, supra note 47, at 421; Elena Larrauri Pijoan, Violencia doméstica y legítima defensa (1995).

51. This "*ex ante*" evaluation is accepted by most German scholars. See, e.g., Claus Roxin, Strafrecht, supra note 13, at 659, who admits a full right to self-defense (*volles Notwehrrecht*) when someone kills another who is threatening him with a toy gun and he does not know that the gun is a toy. Nevertheless, Roxin, id. at 662, does not admit self-defense, but necessity, when someone after having carefully examined the situation believes that he is in danger of an imminent attack that really does not exist (see cases in section III of this article). In this case Roxin shifts from the risk that the actor took to the invasion of

we should conclude that the actor's defensive response falls within the range of legally acceptable courses of action. Thus, such conduct should not be considered wrongful and should not generate penal or civil liability both in the case of the actor who defends himself and in the cases of third parties who come to his aid.

However, in cases where one cannot *ex ante* reasonably presume the existence of an aggression, we should conclude that the actor's defensive response does not constitute a legally permissible course of action. Consequently, even if the actor could end up being *totally or partially excused* in light of his personal circumstances,[52] his act remains wrongful and he can be held liable for the damages caused in a civil action. Furthermore, third parties could be held criminally liable for aiding the defensive response of the actor.

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the victim's interest; for him, only the innocent victim and not the "putative" defender has the right to self-defense. By doing so, he avoids the contradictory conclusion that both parties are acting in self-defense, but he does not negate that both parties of the conflict are justified (of the same opinion as well is Maria Conceicao Valdagua, supra note 13). However, the problem is that both parties are equally wrong, and thus arises the problem of incompatible justifications. Vera Bergelson, Rights, Wrongs and Comparative Justifications, 28 Cardozo Law Review 2503 (2007), says: "In a conflict between two incompatible justifications, one side may be more right than the other." But who? For Vera Bergelson, id., "the lowest priority belongs to the defense of necessity, which, by design, may involve violation of rights of innocent, unoffending individuals," The problem is the "innocent" victim is not always so innocent, because he can have provoked the mistake of the "putative" defender, for instance, by joking around. In such cases I don't see why his right has a priority over the right of the "putative" defender. In any case, the relationship between necessity and self-defense has always been troublesome. As Fletcher (Basic Concepts, supra note 3, at 145) has stated: "The future boundary between self-defense and necessity will depend in large part on how important the distinct rationales of the two defenses remain in our legal consciousness. The collective, utilitarian argument for balancing competing interests is well grounded in modern legal thought, and therefore we can assume that the defense of necessity will remain a powerful argument. Whether self-defense flourishes as a theoretically distinct defense depends largely on the political future of libertarian thinking" (about the different approaches to "political theory" and their influence on the theory of criminal law, see as well Fletcher, Grammar, supra note 40, at 81).

52. That is the position of the so-called culpability theory (see supra, note 31), but this theory considers that "reasonable" mistakes are excuses and not justifications. This is also Fletcher's position, in Basic Concepts, supra note 3, at 162. The Model Penal Code Section 3.09(2), provides that in such cases the defendant should be convicted of a reckless or negligent offense if the defendant's mistake was due to recklessness or negligence. This is the position of the "negative elements of the offense theory" or of the "limited culpability theory" (supra note 31). Dressler (supra note 3, at 273) also agrees with this outcome. In my

A properly limited right of self-defense is fundamental to the configuration of a civilized citizen who is mindful of legal rules. In the current times of increasing feelings of insecurity that sometimes yield an unjustified call for phony "avengers of justice," social action groups, and citizens who are willing to become the "county sheriff" that defends the defenseless against those who have been assaulted by a group of bandits, it is important to demarcate with precision the limits between the justified and the wrongful, the legal and the illegal.

There surely are particular circumstances in which recourse to violence in order to repel an aggression is more than justified. It is also obviously the case that the streets of Medellin, Caracas, or New York City are not as calm as those of a provincial Swiss town. However, the ways of the old American west of taking justice into one's own hands, the disgraceful attempts to do justice by lynching, and the maxim of "an eye for an eye, a tooth for a tooth"[53] must be overcome if we are to avoid falling into a spiral of violence that will transform our city streets into jungles of steel and asphalt in which the "dialectic of fists and guns" will always have the last word.

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opinion, this solution confuses mistake of facts with mistakes about a factual element of a claim of justification. Art. 14 of the Spanish Penal Code distinguishes between (i) mistake about the fact constitutive of the crime, and (ii) mistake about the wrongfulness of the conduct. This distinction corresponds to the distinction between "Tatbestands-und Vorbotsirrtum" in sections 16 and 17 of the German Penal Code. The first kind of mistake (mistake of fact)—whether reasonable or unreasonable, avoidable or unavoidable—negates the required intent for the offense, and if the charged offense cannot be construed as having been committed negligently, it categorically bars the possibility of a conviction. The second kind of mistake (mistake of law) only negates culpability if it is reasonable (i.e., unavoidable), but if it is avoidable it leads to conviction for the offense charged with a mandatory mitigation of punishment (in the German Penal Code the mitigation is discretional). In my opinion, the latter solution (treating mistakes about factual elements of justification as *excusable* mistakes of law) is the best way to deal with unreasonable mistakes about factual elements of claims of justification that are the product of duress or of an extreme emotional disturbance provoked by fear or terror (see Muñoz Conde & García Arán, Derecho penal, supra note 10, at 385).

53. There is no doubt that sometimes claiming self-defense is a way of seeking vengeance. However, the mission of a modern democratic state is to avoid acts of private vengeance by providing legal means for solving the conflict. See James Q. Whitman, Between Self-Defense and Vengeance/Between Social Contract and Monopoly of the Violence, 39 Tulsa L. Rev. 901.