

UNDERSTANDING THE ROLE VALUES PLAY (AND SHOULD PLAY) IN SELF-DEFENSE LAW

T. Markus Funk, Ph.D.*

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* The Author served as a federal prosecutor in Chicago; Section Chief with the U.S. State Department–Balkans; law clerk with a federal court of appeals and district court; and lecturer in law at, among other institutions, Oxford University, Northwestern University, Loyola University, the University of Colorado, and the University of Chicago. The Author in particular thanks Jonathan Herring for his patience and invaluable insights—and, of course, for supervising the Oxford University doctoral thesis that forms the basis for the instant Article; Jeremy Horder for agreeing to be the Author’s first Thesis Supervisor; and Andrew Ashworth, Andrew von Hirsch, Lucia Zedner, and Tatjana Hörnle for serving as the Author’s Thesis Examiners. For their exceptionally helpful comments on various drafts of the thesis, the Author also wishes to thank Andrew S. Boutros, Dominik Brodowski, Mark Dsouza, Joel Feinberg, George P. Fletcher, Robert Leider, Daniel Polsby, Paul H. Robinson, Claus Roxin, Boaz Sangero, Robert Schopp, Karl Sidhu, Eberhard Schmidhäuser, and Suzanne Uniacke. Finally, the Author expresses his gratitude to Hart Publishing for permitting portions of his forthcoming book *VALUING SELF-DEFENSE: THE “ANCIENT RIGHT’S” RATIONALE DISENTANGLED* to be adapted and previewed here. Per course, any remaining errors are the Author’s alone. © 2021, T. Markus Funk, Ph.D.

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INTRODUCTION

Self-defense is a right so fundamental that the scholarly literature regularly refers to it as *the ancient right* or *the first civil right*. But despite the right's bedrock status in criminal law, legislators, academics, and every-day citizens alike all have strongly held—and, in fact, often strongly divergent—opinions about when it is legally (and morally) appropriate to exercise self-preferential force. Some favor “tough-on-crime” approaches, according broader leeway to those defending themselves against attacks. Others advocate for a more “humanitarian” construction of the law, providing greater protections even to culpable attackers who threaten their victims with serious injury.

There have been many high-profile opportunities, ranging from the Ahmaud Arbery, Bernhard Goetz, Breonna Taylor/Kenneth Walker, and Trayvon Martin cases, to the proliferation of “stand-your-ground” laws and efforts to address tragic battered intimate partner situations, to explore self-defense's deeper rationale. Regrettably, self-defense analysis has nevertheless largely atrophied. What has been lacking, and what this Article will provide, is a common analytical language and framework from which to discuss cases involving the use of purportedly justified defensive force.

Tackling a topic that has bedeviled the law since before the carving of Hammurabi's Code is inherently ambitious. That said, the goal here is nothing less than to materially advance the patinaed and important self-defense debate. And essential to the objective of achieving a better understanding of self-defense law is the development of a comprehensive, value-based dialogue that applies to self-defense.¹

In Part I, we will discuss the challenge with the current legal vernacular and its near-exclusive focus on technical and instrumental legal arguments. More specifically, the perspective developed here is that self-defense scholars, judges, legislators, and other decision-makers and thought-leaders routinely (and, indeed, almost always) overlook the central, common-sense role bedrock value judgments play in how we assess self-defense claims. So, what we predictably are left with are undemocratic legislative and judicial decisions necessarily reached on the basis of hidden normativity and false dichotomies. This, it will be argued, not only prevents us from gaining a more profound and transparent understanding of where these differences come from, but also leads to unjust outcomes and an erosion of society's

1. And, as an added benefit, the same general approach can be adapted and deployed in other areas of criminal law, such as duress, necessity, arrest, and fleeing felon situations.

faith in the broader justice system because it is viewed as sociologically and psychologically uncreditworthy.

As examined in Parts II and III, how we in practice—whether consciously or subconsciously—weigh these competing interests leads to very different real-world outcomes. The same fact pattern will be lauded as justified self-defense in one legal culture, while derided as criminal, or even barbaric, in another.

The values proposed in Part III as offering a (although not necessarily *the only*) viable explanation for self-defense's rationale are: (1) reducing overall societal violence by protecting the state's collective monopoly on force; (2) protecting the attacker's individual right to life; (3) maintaining equal standing between people; (4) protecting the defender's autonomy; (5) ensuring the primacy of the legal process; (6) maintaining the legitimacy of the legal order; and (7) deterring potential attackers. The systematic, value-centric framework proposed here is designed to offer critical insights into the public's perception of what is a "right" or "just" outcome. But more importantly, it allows us to see more clearly the relative importance a given legal system places on the defender and the attacker's respective rights to autonomy and non-interference. In the context of today's widespread calls for criminal law reform and well-defined limits on state power, such transparency is particularly critical.

I explain in Part IV that, as we begin to develop a more plausible understanding of what actually drives the right to self-defense, we promote a long-overdue, explicit discussion about the core values a society can—and should—accept as justifications for this most basic defense against criminal charges.

As noted, at no time in our history has it been more important for the justice system to persuasively explain why it is doing what it is doing, thereby shoring up the public's trust and support. As the searing, challenging debate about "just outcomes," procedural and distributional fairness, due process, and state power dominates the public discourse, it is high time that we better understand the rationale underpinning one of our justice system's—and, indeed, one of humanity's—most fundamental rights.

I. THE SCHOLARLY COMMUNITY'S SURPRISING NEGLECT OF VALUES AS SELF-DEFENSE DECISION-GROUNDS

Despite the countless books, chapters, and articles about the theoretical underpinnings of the right to self-defense, scholarship to date has, to a surprising extent, glossed over the importance of understanding how and why values provide the underlying rationale for the right. Indeed, to the extent that values as decision-grounds are discussed at all in mainstream scholarship,² they are typically framed very generally as a broad struggle or clash between the criminal justice system's

2. Note that the following discussion largely focuses on the scholars who have developed the most comprehensive theories of self-defense. That said, none of the discussed (and undiscussed) commentators' treatments consider the full range of values discussed here.

(1) obligation to safeguard the (generally undefined) “autonomy” of the defender, and (2) the interest in protecting broader welfarist concerns, typically, the attacker’s right to life.³ As we will discuss, scholars such as Andrew Ashworth, George Fletcher, Robert Schopp, and Fiona Leverick, in their comprehensive theories of self-defense, recognize that “values matter” but nevertheless tend to ground their individual analyses on only one or two values.⁴

The prevailing value-dichotomous (defender’s autonomy versus attacker’s right to life) discussion is, in fact, a natural starting point for a value-centric dialogue about self-defense. But a genuine understanding of the moral, ethical, and public policy underpinnings of self-defense theory requires a far more in-depth, value-centric discussion. It is hoped that this Article’s proposed value-based model, by offering a reasonable accounting of the values that, depending on the circumstances, become self-defense decision-grounds, provides the vehicle for such a discussion.

Consider, by way of example, the relatively short shrift values-as-decision-grounds receive in even some of the most comprehensive scholarly accounts of self-defense, such as Leverick’s effort to discuss values in the context of “avoiding trouble.”⁵ Leverick, in her analysis of when a person might have to stay away from a place where she knows an attack will, or is likely, to occur, mentions: (1) freedom of movement (encompassed in Value #4—protecting the defender’s autonomy)⁶ and (2) the duty to avoid violent conflict that might result in the loss of life.⁷ In so doing, Leverick refers to violence reduction and protection of the attacker’s right to life. But she does not engage in a searching analysis of when and why these values are salient, how they interact with each other, or whether there are other values that should also be considered (the position taken below is that there are).

Fletcher, despite adopting certain aspects of the German law of self-defense, ultimately champions, like Leverick and Ashworth, a more pacifist conception of self-defense.⁸ Although one may expect to see his scholarship employ a value-centric approach (given his interest in the heavily value-driven German approach to self-defense), Fletcher’s focus instead is on what he considers “logical consequences”—technical legal questions, such as the applicability of the “incompatibility thesis”

3. See generally Heiko Lesch, *Die Notwehr*, in *FESTSCHRIFT FÜR HANS DAHS* 81, 82 (Gunter Widmaier, Heiko Lesch, Bernd Müssig & Rochus Wallau eds., 2005) (discussing the balancing of interests inherent in self-defense analysis).

4. See, e.g., Thomas Rönnau & Kristian Hohn, *Notwehr*, in 3 *STRAFGESETZBUCH: LEIPZIGER KOMMENTAR* 216 § 32 side-note 226 (Gabriele Cirener, Henning Radtke, Ruth Rissing-van Saan, Thomas Rönnau & Wilhelm Schluckebier eds., 2019) (focusing on the value of presumed consent in the context of a breach of trust).

5. FIONA LEVERICK, *KILLING IN SELF-DEFENCE* 127–28 (2006).

6. See *infra* Part III.

7. See LEVERICK, *supra* note 5, at 126–27.

8. See GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 33 (1988) (arguing that the individualist theory “ignores our interdependence, both in shaping our sense of self and in cooperating in society for mutual advantage”); A. J. Ashworth, *Self-Defence and the Right to Life*, 34 *CAMBRIDGE L.J.* 282, 289–91 (1975) (discussing a social point of view that requires a proportionality rule sensitive to the competing interests in the life of the aggressor).

(that there cannot be two mutually justified defenders) and the related requirement that defenders be both internally and externally justified.⁹

The closest Fletcher comes to a value-centric analysis is when he considers the role humanitarian grounds might play in the state's effort to reduce overall societal violence (Value #1).¹⁰ That said, Fletcher also concedes that requiring proportionate force may conflict with the "absolute" right to defend one's autonomy.¹¹ But in the end, he only goes so far with his consideration of values and the tension between them. What is absent from his extensive self-defense scholarship is a deeper discussion of what actually makes his defender's purportedly justified acts so "right," even though the normative distinction between justified (right) and excused (wrongful but acceptable) conduct anchors his work.¹² Fletcher, then, ultimately focuses on "logical consistency" as the "overriding legal value."¹³

Schopp, like Leverick, anchors his analysis on a near-singular focus on autonomy, but in sharp contrast to Leverick's aggressor-centric approach, Schopp focuses on the defender's autonomy.¹⁴ Schopp's all-or-nothing approach, however, places outsized importance on protecting the defender's interest in his individual autonomy (thus Schopp would permit a defender to use deadly force against a culpable attacker threatening to steal a trivial material possession). For no good reason, Schopp ignores other competing values and legitimate collectivist or welfarist goals. For example, Schopp does not address the danger that, in according defenders near-unlimited discretion to use defensive force, he might increase overall societal violence by paying insufficient attention to the state's monopoly on force (Value #1), and he essentially invalidates any right to life the attacker might have (Value #2). Similarly, Schopp's detailed writings do not address whether, and

9. George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 971–80 (1985) (analyzing the theoretical problems presented by the case of "putative self-defense," where someone reasonably but mistakenly believes he is being attacked and responds with force, to explore the limits of the "incompatibility thesis"); George P. Fletcher, Commentary, *Should Intolerable Prison Conditions Generate a Justification or an Excuse For Escape?*, 26 UCLA L. REV. 1355, 1358 (1979) (explaining why there cannot be two mutually justified defenders); George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1264 (1985) [hereinafter Fletcher, *Paradoxes*] (advocating for the importance of developing consistent, non-paradoxical logical structures in systems of legal thought). On the incompatibility thesis, Fletcher appears to have been inspired by Immanuel Kant. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 60 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797) ("It is evident that were there such a right the doctrine of Right would have to be in contradiction with itself.").

10. See, e.g., George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 559–60 (1996) [hereinafter Fletcher, *Domination*]; George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367, 371–80 (1973) [hereinafter Fletcher, *Proportionality*].

11. Fletcher, *Proportionality*, *supra* note 10, at 376–80; see also Rönnau & Hohn, *supra* note 4, at side-notes 68, 113.

12. See Fletcher, *Domination*, *supra* note 10, at 559–60.

13. See Fletcher, *Paradoxes*, *supra* note 9, at 1264–65.

14. See ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 83–84 (1998); see also Don B. Kates, Jr. & Nancy Jean Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873, 879–85 (1982) (defending the right to use deadly force to defend against rape by presenting victim-centered theories focused on the defender's autonomy).

how, his conception of justified self-defense can be squared with the primacy of the legal process (Value #5). They also leave unexamined whether the harsh self-defense outcomes flowing from his theory threaten to undermine the moral legitimacy of the legal order (Value #6).

In short, scholars like Schopp, Ashworth, and Leverick recognize, at least on some level, that certain values should matter in the analysis. But they differ markedly on which ones and why, and none engage in a sustained, comprehensive, value-centric examination. By contrast, Victoria Nourse, who has become one of the leading commentators on self-defense in the context of battered intimate partners, rejects the way in which scholars have studied the values underlying self-defense to date.¹⁵ She believes that the analysis of a right to self-defense must proceed “in a different key, not as a set of values or functions or end-states but as a question of the key relationships involved between citizens and between citizens and state.”¹⁶

Setting aside for now Nourse’s debatable distinction between “values” and “key relationships involved between citizens and between citizens and state,” there is another difficulty with her approach. She conceptualizes the justice system as being designed to serve the “demands of majorities and the state.”¹⁷ This bedrock claim is of course debatable in the context of liberal democracies. Even if, moreover, this perspective, if accurate, could be labeled as descriptive, it explicitly forgoes a discussion over what values and interests might drive these majoritarian state interests. In other words, even if Nourse is correct that the justice system is, in reality, just a means of enforcing certain “key relationships” (i.e., the demands of the majority and the state) this does not necessarily mean that these relationships are any less driven by values.

Turning to Suzanne Uniacke, she, in her comprehensive work, argues that an individual’s rights—including, most fundamentally, the right to life—are limited from the outset: “Our possession of the right to life is conditional, the condition relevant to the justification of self-defence being that we not be an unjust immediate threat to another person.”¹⁸ Uniacke and others focus on double effect¹⁹ and the incompatibility thesis (also known as the “paradox of unknowing justifications”),²⁰

15. See V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1274 n.200 (2001).

16. *Id.*

17. V.F. Nourse, *Reconceptualizing Criminal Law Defenses*, 151 U. PA. L. REV. 1691, 1726 (2003); see also Janine Young Kim, *The Rhetoric of Self-Defense*, 13 BERKELEY J. CRIM. L. 261, 288 (2008) (discussing Nourse’s theory).

18. SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE 197 (1994) [hereinafter UNIACKE, PERMISSIBLE KILLING].

19. The double effect doctrine claims that “although private persons are not permitted to engage in intentional killing, under specified conditions they can permissibly act for some good end foreseeing that someone’s death will result, provided they do not intend this effect.” Suzanne Uniacke, *Self-Defense and Natural Law*, 36 AM. J. JURIS. 73, 77 (1991).

20. The incompatibility thesis holds that if one party to a conflict is justified, then the other party necessarily cannot be justified. See Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 42 (2003); B. Sharon Byrd, *Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction*,

and her normative theory based on a person not becoming an “unjust immediate threat” to another,²¹ like Fletcher’s approach, advances a juridical conception of criminal defenses premised largely on logical expedience and consistency. She does not, however, pursue the additional step of engaging in a more searching analysis of the underlying values that might, for example, support her forfeiture theory.²² Had she done so, she could have fortified her conception of an “unjust threat” by injecting it with more analytic content.

Helen Frowe takes a different approach to self-defense. She broadly divides moral theorists into objectivists, who, following consequentialist approaches, are most concerned with “how the world really is,” and subjectivists, who are most concerned with “how the world appears.”²³ According to Frowe, most accounts of self-defense have an “objectivist slant” because attention is focused on what a person *should* be permitted to do in light of various possible outcomes.²⁴ Self-defense doctrine, she argues, should not be constructed around knowledge that a defender cannot have because, given less-than-perfect knowledge, self-defense cannot be conduct-guiding.²⁵ Although Frowe’s account is focused on advancing the broad position that self-defense should be “practical,” in the sense of action-guiding, she, like Uniacke, does not analyze the values that would make certain self-preferential actions more acceptable than others.

Mark Dsouza’s conception of the social and political context of blame and his reliance on fact-finders assessing morality on a case-by-case basis in a sense is built on the concept of jury nullification.²⁶ Dsouza cleaves conduct he characterizes as “existentially immune,”²⁷ grounded in criminal law’s moral judgments (basically, excusatory defenses), from justificatory defenses, including self-defense, that society deems moral, and thus unpunishable, on a case-by-case basis.

Dsouza dedicates a lengthy subchapter to his model’s implications for persons contemplating defensive action.²⁸ But other than distinguishing between two broad categories of rights (inherent “constituent” rights versus “posited” rights),²⁹ he does not examine the role values play in determining when and why a state ought

33 WAYNE L. REV. 1289, 1333–34 (1987); *see also* Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 PAC. L.J. 1233, 1245–47 (1993) (explaining the specifics of the incompatibility thesis and its criticisms).

21. UNIACKE, PERMISSIBLE KILLING, *supra* note 18, at 196.

22. For more on forfeiture theory—and recommendations on how its shortcomings can be overcome—see *infra* Part IV.

23. Helen Frowe, *A Practical Account of Self-Defence*, 29 LAW & PHIL. 245, 245–46 (2010).

24. *Id.* at 249.

25. *Id.* at 250, 257 (noting that self-defense accounts must take into consideration that defensive actions are taken under conditions of particular epistemic limitations and typically must be performed urgently).

26. *See* Caisa E. Royer, Note, *The Disobedient Jury: Why Lawmakers Should Codify Jury Nullification*, 102 CORNELL L. REV. 1401, 1404–15 (2017) (explaining the mechanics and history of jury nullification in American criminal law).

27. MARK DSOUZA, RATIONALE-BASED DEFENCES IN CRIMINAL LAW 51, 58–61 (2017).

28. *Id.* at 138–65 (discussing the implications for persons contemplating defensive action).

29. *Id.* at 47.

to permit citizens to resort to self-preferential force. By not grappling with these challenging questions, Dsouza creates dissonance with his book's stated purpose of disentangling the "moral norms relevant to defensive actions."³⁰ Additionally, although Dsouza acknowledges that there may be a hierarchy of rights, and that "the right to possess purposive agency" may be the "most important right," his analysis ultimately stops short of sketching the contours of the right to "possess purposive agency."³¹ Nor does he specify what rights are included in his hierarchy of rights.

In contrast to his peers, Boaz Sangero has taken the step of developing a self-defense theory animated by a balancing of multiple values, namely, the autonomy of the person attacked (his crucial factor), protection of the socio-legal order, and the "legitimate" interest of the attacker.³² According to Sangero, these "abstract interests" must be "placed on the scales" and evaluated by the fact-finder using a "lesser evils" framework.³³ From Sangero's perspective, then, unlawful attack not only threatens injury to the defender but, in line with the position advanced by German theorists for generations, also constitutes a harmful and malicious attack on the broader social-legal order.³⁴

According to Sangero, his model's main innovation is that it seeks to integrate "*all the important factors* in justifying private defense."³⁵ And Sangero does indeed recognize the importance of protecting the social-legal order. He does so by adopting the German perspective that the defender's conduct must ensure that the wrong not triumph over the right.³⁶ Self-preferential force helps ensure that, in the absence of police assistance, the person threatening the (culpable) wrong cannot get away with it.³⁷

But Sangero does not consider whether transforming citizens into de facto law enforcement officers, animated by the more collective objective of protecting the broader legal order, threatens to devalue the "self" in self-defense. Furthermore, even his more value-centric analysis does not address the collectivist interests in reducing violence by protecting the state's monopoly of force (Value #1), ensuring the primacy of the legal process (Value #5), and maintaining the legitimacy of the legal order (Value #6). And although he recognizes that an attacker's culpability should play a role in determining when, and to what extent, defensive force ought to be authorized,³⁸ Sangero does not treat protecting the defender's equal standing (Value #3) or deterrence (Value #7) as independent decision-grounds.

30. *Id.* at xiii.

31. *Id.* at 74.

32. See BOAZ SANGERO, *SELF-DEFENCE IN CRIMINAL LAW* 67–73 (2006) (discussing values needing to be balanced when analyzing self-defense theory and different approaches to balancing those values). Sangero also mentions deterrence in the context of describing Kremnitzer's approach. *Id.* at 68–69.

33. *Id.* at 73–77.

34. See Boaz Sangero, *A New Defense for Self-Defense*, 9 *BUFF. CRIM. L. REV.* 475, 521–31 (2006).

35. *Id.* at 558 (emphasis added).

36. See *id.* at 542–58.

37. *Id.*

38. *Id.*

As this survey demonstrates, most of the leading self-defense scholars recognize what is difficult to deny, namely, that at least on some level, values inform the underlying rationale of self-defense. By articulating what values they think are implicated in different self-defense scenarios, moreover, these scholars appear to agree, at least implicitly, that engaging in a value-centric dialogue is important. This fairly broad consensus among scholars can, therefore, be said to support the theory that a broader consideration of the values implicated when a person elects to engage in the self-preferential use of force improves the transparency of decision-making and, relatedly, reduces the role of hidden normativity. Nevertheless, only Sangero comes close to developing a truly value-centric analysis. And, in contrast to the value-based model proposed here, even Sangero's effort falls short by not accounting for *all* key values that underly the rationale for self-defense.

II. SETTING THE ANALYTICAL STAGE

Self-defense, which has long been characterized as *the* foundational “ancient right,”³⁹ is one of the evergreen subjects of both popular and political debate precisely because it offers a social, pre-legal conception of moral rights that derives from the basic right to life and moral agency. Put another way, one need not be a legal “scholar” to understand why this right is important and to have strongly held views about when self-preferential force should be authorized.

Even our foregoing short overview of the academic community's varying perspectives serves to highlight the deep schisms that divide the competing factions. As we saw, some scholars, including Schopp, Erb, Engberg, and Kates, have advocated what can be fairly characterized as “tough on crime” approaches that broadly authorize deadly force in defense of one's “personal domain.”⁴⁰ And so even the

39. Nicholas Johnson describes the right of self-defense as “undergird[ing] our basic thinking about fundamental rights and duties,” a “building block of our culture,” and “part of the backstop of our civilization.” See Nicholas J. Johnson, *Self-Defense?*, 2 J.L. ECON. & POL'Y 187, 196 (2006); see also Benjamin Porat, *Lethal Self-Defense Against a Rapist and the Challenge of Proportionality: Jewish Law Perspective*, 26 COLUM. J. GENDER & L. 123, 124–25 (2013) (noting that the right to defend oneself with deadly force “has been accepted in Jewish law from time immemorial”); *McDonald v. Chicago*, 561 U.S. 742, 767 n.15 (2010) (noting that Blackstone cited Roman, Greek, and Jewish law for his proposition that using deadly force in self-defense is worthy of praise); Moses F. Wilson, *System of Self-Redress*, 7 AM. L. REC. 577, 583 (1879) (“Ancient right authorized a proprietor to kill . . . the nocturnal thief, even when he is not armed, and when he does not put himself on his defense.”); PLATO, *Laws*, in THE COLLECTED DIALOGUES OF PLATO 1429 (Edith Hamilton & Huntington Cairns eds., A.E. Taylor trans., Princeton Univ. Press 1961) (c. 360 B.C.E.) (“If brother slay brother in a faction fight or some like case, and the act be done in self-defense and the slain man the aggressor, he shall be clear of guilt . . . [and] the same shall hold in such case for slaying of citizen by citizen, or alien by alien.”).

40. Note that the focus here is largely on using self-preferential force to *kill* the attacker. This limitation was selected because the use of deadly force involves the irremediable killing of another to save oneself. It is, therefore, the most challenging type of defensive force to justify. And so, if deadly defensive force can be justified in a particular circumstance, then so, too, can resorting to lesser levels of force. See LEVERICK, *supra* note 5, at 4. This Article will also focus on *self*-defense, rather than defense of *others*—or private defense more generally—because self-preferential force is the most problematic in light of the inherent self-interest involved when one opts to save one's own life at the expense of another's. That said, much of what is written here will also be generally useful as an analytical lens through which to assess a broader range of defensive force situations,

potential theft of property with trivial value may be countered with deadly force. On the other extreme of this debate stands the balance of prominent contemporary academics, including Ashworth, Fletcher, and Leverick, who call for a more “pacifist” and “humanitarian” account of self-defense. They, for example, would deny a victim the right to use deadly force to ward off the threat of “mere” serious bodily injury at the hands of a fully culpable attacker.⁴¹ And somewhere in the middle we find the law of self-defense as the majority of jurisdictions enforce it, and as most laymen likely find consistent with their own moral standards and expectations.⁴² There obviously is considerable normative and moral distance between these positions. But understanding the origin of these divisions and engaging in the related logical analysis of these divisions has long proved elusive.

To help better conceptualize the diametrically opposed perspectives, an important foundational assumption is that value judgments, whether expressed or implicit, permeate self-defense doctrine in general, as well as the specific self-defense decisions reached by the police, judges, legislators, and jurors. At first blush, this may strike the reader as self-evident. Surprisingly, however, the extensive scholarship on the subject has largely overlooked the central role that value judgments play in determining whether specific instances of self-preferential force should be lauded, accepted, or criminalized.

In fact, it is the absence of a more transparent, democratic, and comprehensive value-centric approach to the subject of self-defense that informs the hypothesis at the heart of this Article.⁴³ More specifically, the position advocated here, and admittedly from a conceded Anglo-American perspective, is that a broader and

including those situations in which the quantum of self-preferential force falls short of the deadly. In those situations, similar—though not necessarily overlapping or identical—value judgments will be implicated.

41. See, e.g., *id.* at 45 (arguing that only when a defender’s right to life is threatened can the defender use deadly force and deprive the attacker of his right to life); ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* 237 (7th ed. 2013) (“The harm caused by homicide is absolutely irredeemable, whereas the harm caused by many other crimes is remediable to a degree. Even in crimes of violence which leave some permanent physical disfigurement or psychological effects, the victim retains his or her life and, therefore, the possibility of further pleasures and achievements, whereas death is final.”); Ashworth, *supra* note 8, at 289–91, 297 (contending that, “out of respect for the attacker’s right to life and physical security,” defenders must always avoid conflict, seek to retreat, use an amount of force that is strictly proportionate to the amount of harm threatened, and never use deadly force to defend property).

42. As discussed here, today’s pacifist-leaning position, close to representing today’s scholarly orthodoxy, diverges significantly from the law in the subject jurisdictions and elsewhere (though, oddly, that reality is rarely recognized in the literature). Deviating from the mainstream among self-defense theorists, most jurisdictions, for example, do not require a “wrongful” attack, but strictly require retreat, or limit self-defense to deadly threats. See Nourse, *supra* note 15, at 1272–73. The “libertarian” position, on the other hand, is also in tension with what is seen in the “real world.” For example, most jurisdictions require citizens to defer to public authorities for their protection when possible and forbid deadly force in defense of property. See *id.* at 1273–74. “[N]either the libertarian nor the pacifist can claim to have won the debate about self-defense. Neither theoretical position actually describes the law of self-defense.” *Id.* at 1272.

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

more explicit consideration of the values implicated when a person elects to engage in the self-preferential use of force will improve the transparency and quality of the judicial, prosecutorial, and legislative decision-making, and, relatedly, will reduce the corrosive and undemocratic role of hidden normativity. Furthermore, democratic transparency will enhance the community's acceptance of the decision-making and overall faith in the criminal justice system.⁴⁴

At this point, a few additional words on nomenclature are appropriate. When this Article assesses decision-making “quality,” it does not rely on individual normative evaluations of end-states or social outcomes, nor does it require universal convergence on the seven values that will be discussed. Rather, the inquiry concerns whether developing a common analytical and value-explicit language in the realm of self-defense rules encourages and facilitates more nuanced, focused decision-making. If such a value-explicit approach permits a justice system to reach self-defense decisions in a more democratic, logical, and policy-based manner—and, relatedly, to identify and narrow areas of dispute, leaving less room for hidden normativity—then the “quality” of the decision-making has been increased.

Further, even though there inevitably will be disagreement about what values should be included, and what relative weight each value should be accorded, that does not reveal a deficiency with the proposed approach. To the contrary, it reaffirms the importance of initiating such value-focused discussion. Like virtually everything else in the law—from debates about eminent domain and cyberstalking, to abortion rights, war crimes, and drug legalization—disagreement about the relative weight that should be accorded to competing values is an integral part of legal discourse and legal decision-making. So why should self-defense be any different? But what is needed to make such a debate valuable is a shared analytical language as a point of departure. Otherwise, those involved in the discussion will miss the opportunity for a productive exchange; they will instead fall prey to the tendency to speak at, and past, each other.

Finally, I note that in the academic literature, the terms “principles” and “values” are often conflated.⁴⁵ That conflation is, in fact, understandable, as the two terms share much in common. The decision here is to default to the term “value,” however, because it has become a legal colloquialism used by commentators (though some alternatively refer to “self-defense factors”).⁴⁶

44. A government's openness and accessibility are said to be essential elements of liberal democratic theory. Openness and accessibility, moreover, are consistent with modern Western political values. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 894–902 (2006) (noting that open and accessible governments serve “modern Western political values [more] than the alternative of secret government” and discussing the benefits of transparency); JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 26–29 (Erin Kelly ed., 2001) (discussing public justification in support of the idea that the public must be aware of a clear, widely accepted standard of justice).

45. See Peter A. Alces, *Regret and Contract “Science”*, 89 GEO. L.J. 143, 156–61 (2000) (explaining the difficulty but importance of differentiating between “principles” and “values”).

46. See, e.g., Christopher Kopacz & Elena Penick, *The Double-Edge Sword of Victim Survival: Imperfect Self Defense*, 29 CHI. BAR ASS'N REC. 32, 34 (2015).

Stepping back a bit, and to illustrate why it is so detrimental to ignore whether, when, and how values function as decision-grounds for justifying self-defense,⁴⁷ let us consider a series of illustrative examples: first, one from 1920s Germany, followed by several more contemporary cases.

A. *The German Fruit Thief*

To begin to frame what it means to engage in a “value-centric” analysis, let us first turn to a 1920s case involving a young German fruit thief and an old farmer armed with a shotgun.⁴⁸ The German Supreme Court ruled that the farmer, who shot and seriously injured the young man as he was fleeing with a bag of the farmer’s fruit, acted properly in self-defense.⁴⁹ The court justified its decision by noting that the farmer was protecting a legally-recognized personal interest (his ownership right in the fruit) and that this was enough to bring the farmer’s actions within the penumbra of the right of self-defense.⁵⁰ More specifically, the court found that the farmer’s conduct was lawful because shooting the young man was the only way the farmer could stop him from permanently dispossessing the farmer of the fruit.⁵¹

Even though the interest protected was ownership of only a bag of fruit, and the farmer put the thief’s life at risk, the court’s ruling was consistent with the then-prevalent German value judgment that a criminal should never be permitted to “get away” with his crime.⁵² The holding, moreover, reflected the notion that once

47. The term “decision-ground,” as used here, distinguishes values actually implicated in a particular self-defense scenario (“value-based decision-grounds”) from those that are not. Put another way, when a value provides a reason for deciding a self-defense case one way or the other, it becomes a “decision-ground.”

48. Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 20, 1920, 55 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 82, 83 (Ger.).

49. *Id.*

50. It is noteworthy that the German law has always interpreted the “self” to include property and other personal interests beyond mere bodily integrity. For example, self-defense in Germany has long been thought to include the right to defend interests such as one’s freedom and honor, see, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] May 17, 2018, 3 StR 622/17 (Ger.) (noting that, because a person’s honor is a legally protected interest, defensive force can be used to protect it); Bundesgerichtshof [BGH] [Federal Court of Justice] July 9, 1935, 69 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 265, 268 (Ger.) (attack on soldier’s honor); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 24, 1890, 21 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 168, 168–70 (Ger.) (attack on defender’s honor by priest during religious sermon); property, see, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] June 11, 1926, 60 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 273, 277 (Ger.); right to hunt, see, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 11, 1906, 35 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 403, 407 (Ger.); right to be free from excessive noise, see, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 24, 1992, Neue Juristische Wochenschrift [NJW] 1329 (1992) (Ger.); and right to engage in religious services, see generally Henning Rosenau, *Notwehr und Notstand*, in 4 STRAFGESETZBUCH: KOMMENTAR § 32 (Helmut Satzger & Wilhelm Schluckebier eds., 2019).

51. 55 RGSt 82, 83–84 (Ger.).

52. *Id.* at 85–86; see also Rosenau, *supra* note 50, at side-note 2 (noting that self-defense is justified even where certain requirements are not met); THOMAS FISCHER, 10 STRAFGESETZBUCH MIT NEBENGESETZEN § 32 side-note 2 (2019) (same); Volker Erb, *Notwehr und Notstand*, in 1 MÜNCHNER KOMMENTAR ZUM STRAFGESETZBUCH § 32 side-notes 12–18 (Bernd von Heintschel-Heinegg ed., 2017) (same). This outcome is no

a person knowingly becomes a criminal threat, that person forfeits all the rights and protections the justice system otherwise would have accorded him.⁵³ Such a culpable actor, the argument goes, cannot expect an innocent victim to subordinate his interests, no matter how trivial, to the perpetrator's physical welfare.

The court further ruled that the perpetrator cannot expect the legal system to permit violation of the law without repercussion. In the words of the court, "where the right is to be protected against the wrong," the legal system cannot ask the defender, acting in the urgency of the moment, to be concerned with avoiding disproportionate damage to the perpetrator's interests.⁵⁴ The court finally contended that a contrary ruling would preclude all deadly force in defense of property, an outcome the court apparently considered untenable because property, to the court's thinking, is an extension of the "self."⁵⁵

Viewed through the prism of the comprehensive value-centric analysis advocated here, the German Supreme Court's ruling explicitly rejects the notion that self-defense cases require any substantive weighing of competing values. To the contrary, and reflecting strains of civic republican/communitarian thinking, the court's ruling provides that there is only one value or goal worth considering, namely, protecting both society and the individual by ensuring the primacy of the "right" over the "wrong."⁵⁶

longer possible under today's reinterpretation of the statutory German law of self-defense and its "socio-ethical limitations." See generally Oberlandesgericht [OLG] [Higher Regional Court] Oct. 18, 2018, 1 Rechtsprechung der Oberlandesgerichte in Strafsachen [OLGST] 2 Ss 42/18 (Ger.) (holding that defendant acted improperly by hitting plaintiff with his car in response to plaintiff confiscating defendant's handbag); Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 12, 2016, 2 StR 523/15 (Ger.) (stating that if the act of self-defense is clearly disproportionate, the right of self-defense will be restricted and that there are a group of personal relationships that lead to "socio-ethical" restrictions on the right of self-defense); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 9, 1995, 4 StR 294/95 (Ger.) (discussing the modern prerequisites for justifying a claim of self-defense). This limitation reflects an emerging sense that the "severity" or "harshness" (*Schneidigkeit* or *Schärfe*) of Germany's self-defense law went too far and ignored, or at least undervalued, the "minimal solidarity" (*Mindestsolidarität*) between people and the related expectation that citizens exhibit some level of tolerance toward each other (*Pflicht zur Rücksichtnahme* or *Nachsicht gegen über Rechtsgenossen*). It, moreover, would also likely violate Article 2 of the European Convention on Human Rights, which provides, among other things, that "[e]veryone's right to life shall be protected by law." Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; *McCann v. United Kingdom*, App. No. 18984/91, ¶¶ 148–49 (Sept. 27, 1995), <http://hudoc.echr.coe.int/eng/?i=001-57943> (ruling that Article 2 allows for exceptions to the right to life only when "absolutely necessary," a term indicating "that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is 'necessary in a democratic society' under paragraph 2 of Articles 8 to 11 . . . of the Convention"); *Öneryildiz v. Turkey*, App. No. 48939/99, ¶¶ 107, 165 (Nov. 30, 2004), <http://hudoc.echr.coe.int/eng/?i=001-67614> (finding that Article 2 imposes a positive obligation on states to take appropriate steps to safeguard the lives of those within their jurisdiction). But see Rosenau, *supra* note 50, at side-note 37 (contending that, because Article 2 limits state power (rather than citizens' use of force), German law's permission of deadly force against property is not implicated by the Article); FISCHER, *supra*, at side-note 39 (same).

53. 55 RGST 82, 85–86 (Ger.).

54. *Id.*

55. *Id.* at 85.

56. *Id.* at 86–87.

Let us use the German Supreme Court's value-monistic approach to set up a short thought experiment to demonstrate the importance of values as to how we think about self-defense cases. Looking back, as you read about the German Supreme Court's ruling, what was your visceral response? Did the decision strike you as fair, or unfair?

My best guess based on discussing this case with students and peers is that most readers intuit that the court got it wrong. But either way, on what do you base your belief? Can you list the core reasons for why and how you reached the conclusion you did? Phrased differently, *what specifically* makes the German farmer's conduct right or wrong?

I think it is fair to assume that most readers will have noted a number of reasons that reflect their personal value judgments, many of which can be slotted under some or all of the seven values discussed below. What is more, the near-certainty that there will be distance between different readers' responses simply serves to underscore the near-universal truth that self-defense assessments, like assessments in all other areas of the law, require us to deploy our own moral and ethical compasses, largely informed by our upbringings and life experiences. And those moral compasses, of course, are not always calibrated identically.

This brief exercise has hopefully nudged the reader to accept the view that most of us can, with relative ease, rely on our intuitions to evaluate the justness of purported instances of self-defense. And that, of course, is what legislators, scholars, judges, and law enforcers already do, and not only in the context of self-defense cases. As Judge Posner, one of the most-cited legal scholars of the twentieth century (and one of the most influential judges) candidly put it when explaining his own approach—and likely the approach of many of his peers, though few of them will so readily admit to it—to judicial decision-making:

"I pay very little attention to legal rules, statutes, constitutional provisions," Judge Posner said. "A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?" The next thing, he said, was to see if a recent Supreme Court precedent or some other legal obstacle stood in the way of ruling in favor of that sensible resolution. "And the answer is that's actually rarely the case," he said. "When you have a Supreme Court case or something similar, they're often extremely easy to get around."⁵⁷

The obvious challenge is that such intuitions are inherently personal, residing largely in our unexpressed subconscious, and in the main, resulting from one's own life experiences and perceptions. And this is precisely the problem that the value-based model seeks to overcome. To be understood, and to facilitate a rational discussion, the basis for a person's intuition must be explained and justified. And

57. Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html>.

this becomes even more true as the particular facts become more morally complicated.

Armed with a better understanding for why this Article is so focused on the centrality of values in self-defense cases, we can now return to the case of the German farmer. On a macro-morality level, and as we will discuss in detail later, the German Supreme Court's ruling can be said to elevate the farmer's interests over those of the broader community to such an extent that the farmer becomes an alienated being, lacking responsibilities or obligations to his fellow man, other than the obligation not to invade another's personal sphere without justification.⁵⁸ Of course, some may argue to the contrary and say that the court got it right—that any contrary ruling would unjustifiably leave private property largely unprotected in the absence of law enforcement, and would thereby foster the tyranny of the criminal class.

We will take a closer look at both sides of this debate. But central to our present undertaking is a recognition that, by merely proclaiming a categorical rule (“the right need never yield to the wrong”) and then strictly applying that rule to the facts of the case, the German court without explanation or justification failed to consider other equally important value-based grounds for decisions. By way of recap, these grounds, more exhaustively summarized and defended in Part III, include: (1) the collective interest in reducing overall violence and protecting the state's monopoly on force; (2) protecting the attacker's individual right to life on humanitarian grounds; (3) safeguarding the equal standing between the farmer and the fruit thief; (4) protecting the defender's autonomy; (5) ensuring the primacy of the legal process; (6) avoiding decisions that could lead to an erosion of the criminal justice system's moral credibility, and thus, legitimacy; and (7) deterrence of crime.

*B. Controversial Contemporary Cases*⁵⁹

Let us now apply these abstract concepts to contemporary cases. The division of public sentiment regarding self-defense's core function was on display when, on a rainy February day in 2012, twenty-eight-year-old Neighborhood Watch Captain

58. See John Rawls, *The Basic Liberties and Their Priority*, in 3 THE TANNER LECTURES ON HUMAN VALUES 46–55 (Sterling M. McMurrin ed., 1982) (discussing methods to balance competing individual liberties in a “fully adequate scheme” that fosters a well-ordered society); see also Gregory S. Alexander, *Intergenerational Communities*, 8 LAW & ETHICS HUM. RTS. 21, 29 (2014) (noting that members of communities have obligations to fellow members as part of membership in such community); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 15 (1996) (examining how various moral philosophies conceptualize intra-community obligations, rights, and liberties).

59. As a former prosecutor myself who has also handled many defense cases and has written books on victims' rights, I of course am mindful of the dangers inherent in rushing to judgment, rather than letting the legal proceedings play out. Here, many of the cases I discuss are, as of this writing, still in the courts. I, therefore, attempt to limit my analysis to what appear to be largely undisputed facts and endeavor to steer clear of making too many assumptions or delivering “verdicts” on the matters. Nevertheless, it is helpful in an undertaking like this to discuss these high-profile cases and to examine them based on what appears at present to be the best available evidence, even if some of the facts currently believed to be established may later be considered questionable.

George Zimmerman shot and killed seventeen-year-old Florida teenager Trayvon Martin.⁶⁰ After informing the 911 operator that there was a “real suspicious guy” in his neighborhood—one that had recently experienced a spate of break-ins—Zimmerman chased the unarmed, but physically more imposing, Martin, ultimately fatally shooting him in the ensuing scuffle.⁶¹

Zimmerman, following his arrest, claimed he shot Martin in self-defense and invoked Florida’s Stand Your Ground law.⁶² Family and friends of Zimmerman tried to prevent his portrayal as a vindictive, racist man who had been chasing the unrealized dream of being a law enforcement officer.⁶³

Following a three-week trial, the jury acquitted Zimmerman of murder. In so doing, the jurors rejected the prosecution’s argument that Zimmerman had deliberately pursued Martin and instigated the fight in order to be able to claim self-defense.⁶⁴ The shooting, highly-publicized trial, and verdict sparked a national debate about both race and the appropriate use of self-preferential force.⁶⁵ But notably absent from both the public debate and the court’s legal analysis was a discussion of how Zimmerman’s asserted effort to instigate the confrontation should impact the state’s interest in protecting the below-discussed value of equal concern and reciprocal respect among people. Similarly undiscussed was whether and how Zimmerman’s conduct should influence the state’s interest in protecting Zimmerman’s and Martin’s individual autonomous rights; whether the ruling

60. See *Zimmerman v. State*, 114 So. 3d 446, 447 (Fla. Dist. Ct. App. 2013) (referencing Zimmerman’s self-defense claim); *Trayvon Martin Shooting Fast Facts*, CNN (Oct. 19, 2020), <https://www.cnn.com/2013/06/05/us/trayvon-martin-shooting-fast-facts/index.html>; Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1557–59, 1567 (2013).

61. Lee, *supra* note 60, at 1557–58.

62. *Zimmerman*, 114 So. 3d at 446; Lee, *supra* note 60, at 1559. In general terms, “stand your ground” schemes abrogate the traditional duty to retreat prior to being authorized to use deadly self-preferential force. See Christine Catalfamo, *Stand Your Ground: Florida’s Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL’Y 504, 504–05 (2007) (finding that Florida’s Stand Your Ground law aligns with the moral requirements of necessity and proportionality); Michelle Jaffe, *Up in Arms Over Florida’s New Stand Your Ground Law*, 30 NOVA L. REV. 155, 175–77 (2005) (providing analysis of Florida’s Stand Your Ground law and its effect on the “duty to retreat”).

63. See Lee, *supra* note 60, at 1562, 1577; Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL’Y 23, 93–94 (2014); Mary Anne Franks, *I Am/I Am Not: On Angela Harris’s Race and Essentialism in Feminist Legal Theory*, 102 CALIF. L. REV. 1053, 1062 (2014) (“Zimmerman viewed himself as . . . standing up against social disorder and violence—particularly male violence, and particularly the violence of black men.”). The concept of “reasonable fear” is central in U.S. self-defense cases. See, e.g., *United States v. Waldman*, 835 F.3d 751, 755 (7th Cir. 2016). Zimmerman carrying a firearm while Martin was unarmed and Zimmerman’s mixed martial arts training were major challenges Zimmerman was able to overcome in the courtroom, arguing that he had reasonable fear. See Yamiche Alcindor, *Trayvon Martin’s Dad Says He Heard Son’s Screams*, USA TODAY (July 8, 2013), <https://www.usatoday.com/story/news/nation/2013/07/08/george-zimmerman-trayvon-martin-trial/2498167/>.

64. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 14, 2013), <https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html>.

65. See Krissah Thompson & Jon Cohen, *Trayvon Martin Case: Poll Finds Stark Racial Divide*, WASH. POST (Apr. 10, 2012), https://www.washingtonpost.com/politics/trayvon-martin-case-poll-finds-stark-racial-divide/2012/04/10/gIQAETX8S_story.html.

allowed purported “self-defense” to become a substitute for the legal process; whether the result failed, from a collective perspective, to properly protect the state’s monopoly on force; and the specific or general deterrent impact derived from the state’s handling of the case. Given that these questions were not addressed in the jury instructions, it is fair to assume that the jurors, and perhaps even the judge, never even thought that their fact-finding and adjudicative tasks involved grappling with these issues.

The failure to examine these values more closely is not surprising, given that the jury was simply applying the unnuanced jury instructions to the facts as it found them. Addressing and assessing questions of value, however, is something that should take place not only in legislatures, when statutes are being written, but also in jury rooms, something that could be facilitated by including such considerations in jury instructions.

The criminal justice system’s broader failure to discuss these key issues in similar cases is emblematic of the core problem that, by following the prevailing analytical practices, legislators, courts, and fact-finders miss the opportunity to reach more all-considerations-included outcomes. Such a deeper, value-centric discussion would minimize the impact of hidden and undemocratic individualized normativity that otherwise could undermine transparency and the rule of law, and that would in many cases be outcome-determinative.

In another highly charged case, Ahmaud Arbery, a twenty-five-year-old Black man, was chased by two white armed residents of a South Georgia neighborhood, Gregory McMichael and his son Travis McMichael.⁶⁶ In the video that appeared prior to the arrest of the McMichaels, the unarmed Arbery can be seen ducking to the right when he sees Travis McMichael aim his shotgun at him after McMichael had exited his white pickup truck and tried to effect an apparently defective citizen’s arrest. Arbery comes around the passenger side of the truck and is moving toward McMichael when McMichael shoots Arbery twice, killing him. Under Georgia law, there is a sound argument that Arbery’s effort to disarm McMichael was justified self-defense.⁶⁷ In the media furor that followed the tragic shooting, Arbery’s apparently lawful exercise of self-defense was almost treated as an afterthought. Rather, the wisdom of Georgia’s citizen arrest law tended to receive the most attention. Indeed, as of this writing, it is the McMichaels who are claiming self-defense against Arbery, even though Georgia law generally prevents the initial wrongful aggressor from appealing to this justification.⁶⁸

66. See Griff Witte & Michael Brice-Saddler, *Georgia Grand Jury Indicts Three Men in Killing of Ahmaud Arbery*, WASH. POST (June 24, 2020), https://www.washingtonpost.com/national/georgia-ahmaud-arbery-indictment-murder/2020/06/24/e9aac6bc-b668-11ea-aca5-ebb63d27e1ff_story.html; Ross Barkan, *Deadly Force*, 106 A.B.A. J. 14, 14 (2020) (discussing facts of the Ahmaud Arbery case).

67. See T. MARKUS FUNK, *RETHINKING SELF-DEFENCE: THE “ANCIENT RIGHT’S” RATIONALE DISENTANGLED* 8–10 (2021).

68. See GA. CODE ANN. § 16-3-21(b)(1)–(3) (2020) (“A person is not justified in using force [in self-defense] if he: (1) [i]nitially provokes the use of force against himself with the intent to use such force as an excuse to

The death of medical worker Breonna Taylor, who was shot and killed by Louisville police officers attempting to effectuate an early-morning raid on her apartment, also resulted in wide-spread outrage and debates over when self-defense should be authorized.⁶⁹ The specific question was whether Detective Brett Hankison, lacking a line of sight, was justified when he fired into a sliding glass patio door covered with blinds after Taylor's boyfriend, Kenneth Walker, opened fire on what he said he believed were unlawful intruders breaking into the home.⁷⁰ As we will discuss, whether Walker genuinely (that is, subjectively) believed he was acting in justified self-defense should play a key role in the analysis of whether he should receive the legal justification. For while Walker may have threatened *harm* to the officers, if he genuinely believed the defensive force to be necessary and was acting reasonably, he did not threaten to *wrong* them (which, as we will see, is a distinction with an important difference).

Similarly, under the value-based model, the fact that Detective Hankison and his colleagues in the crossfire “mistakenly” (and, in Detective Hankison’s case, apparently recklessly) shot and killed Taylor, who nobody claims was herself posing a threat, would preclude them from claiming self-defense, even though other excuse defenses might still be available depending on each officer’s specific circumstances. The reason, as we shall see, is that to qualify as justified self-defense, the defender must be both externally *and* internally justified. Here, Taylor objectively posed no threat; so, no matter how reasonable and internally justified the officer’s mistake, taking her life “by accident” could never qualify as a positively lawful exception to the offense description.

Consider also the case of U.S. “subway vigilante” Bernhard Goetz. When the U.S. Congress argued that Goetz was “the victim and the symbol of twin horrors in this Nation: rampant crime in the cities and gun control laws which do not allow the innocent to protect themselves,”⁷¹ they failed to explain the value judgments driving their views. Rather, the implicit assertion, highlighting our concerns about hidden normativity, was that drafting more permissive self-defense laws, or more laxly enforcing the existing defensive force authorizations, would deter criminal attacks.

For a final stage-setting illustration of our underlying assumption that hidden normative judgments actually drive self-defense decisions, consider the highly publicized English case of Norfolk farmer Tony Martin, who was convicted of

inflict bodily harm upon the assailant; (2) [i]s attempting to commit, committing, or fleeing after the commission or attempted commission of a felony; or (3) [w]as the aggressor . . .”).

69. See Richard A. Oppel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html>.

70. *Id.*

71. See *Gun Control and Rampant Crime in New York City*, 100 CONG. REC. 11,134 (1987) (describing Goetz as a victim exercising “self-defense”).

murder and given a life sentence in the Crown Court at Norwich.⁷² Martin had used an illegally possessed pump-action shotgun to shoot and kill unarmed sixteen-year-old burglar Fred Barras and to seriously injure Barras's accomplice, Brendan Fearon.⁷³

The fact that Martin's attackers had extensive criminal records caused politicians—echoing the type of public sentiment expressed in the Trayvon Martin case—to advocate for reform of England's self-defense law.⁷⁴ The suggestion was that, because an after-the-fact analysis of Barras's background established that Barras was a "career criminal," his right to life deserved less legal protection.⁷⁵ This argument, however, sounds less in self-defense and more in punishment or societal vengeance. There is no recognition that Martin's decision not to retreat and not to avoid conflict implicated a broader, more comprehensive array of values than articulated in the public discourse, legal commentary, or judicial decision-making.

These real-life examples provide insights not only into the public's perception of what a "right" or "just" outcome is, but also into how different value-informed assessments can yield different results. For example, although the English legal system jailed the English farmer for using excessive force to protect his property, the German Supreme Court lauded the German farmer as a protector not only of his property, but of the entire legal order.

III. ADVANCING THE DEBATE THROUGH A MORE VALUE-CENTRIC DIALOGUE— INTRODUCING THE SEVEN DECISION-GROUNDS

Did the young subway riders by whom Bernard Goetz felt threatened, or the German thief who attempted to steal the farmer's fruit, simply forfeit their right to have their lives legally protected? Did they, through their culpable conduct, remove themselves from the law's protection? Did Martin, Arbery, or Taylor not deserve the full protection of the law just because others claimed to subjectively believe that they posed a threat, even though such subjective belief may be either mistaken or unreasonable? As we recognized above, advancing a particular position, for example, that the principle of protecting the innocent defender in these cases outweighs the principle of protecting the culpable attacker, means little without supporting analysis.⁷⁶

72. See Ian Dobinson & Edward Elliot, *A Householder's Right to Kill or Injure an Intruder Under the Crime and Courts Act 2013: An Australian Comparison*, 78 J. CRIM. L. 80, 83–84 (2014). Martin's conviction was subsequently reduced to manslaughter on appeal because of Martin's purported diminished capacity. See *R v. Martin* [2001] EWCA (Crim) 2245 [79]–[82], [2003] QB 1 (Eng.).

73. *Martin*, EWCA (Crim) at [12], [18].

74. See Clare Dyer & Alan Travis, *Hague's Law: The Whole Truth and Nothing But?*, GUARDIAN (Apr. 26, 2000), <http://www.guardian.co.uk/martin/article/0,2763,214670,00.html>.

75. *Id.*

76. See M. P. Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 40–41 (1963) (identifying the characteristics of principled decision-making); see also David Sandomierski, *Tension and Reconciliation in Canadian Contract Law Casebooks*, 54 OSGOODE HALL L.J. 1181, 1230–32 (2017) (discussing the relationship between policy goals and the law).

According to the approach developed here, the two principles⁷⁷ said to be in tension in self-defense cases are only given meaning by the values that inform them. And, of course, once these seven values are identified, determining their relative priority is, as we will discuss, an even greater challenge.

A. Value #1: Reducing Overall Societal Violence by Protecting the State's Collective Monopoly on Force

Summary Justification for Including this Value:

Reducing overall societal violence, generally, and preventing unjustified attacks on citizens' rights, specifically, are the twin goals of most modern criminal justice systems. In that sense, then, Value #1 recognizes the collective objective of ceding to the state the use of legitimate violence when such state actors (and actions) are reasonably available.

It is assumed that all citizens, including culpable attackers, have a right to life, and that when possible and appropriate, the organs of the state should ensure that this right is protected. Relatedly, and from a more collectivist perspective, in a modern, pluralistic society, the state is thought to reduce interpersonal violence through its default monopoly on legitimate force.

The state, however, must also erect guardrails around its right to prevent actors from exercising self-preferential force. Indeed, it is entirely reasonable to say that a person's right to life is—and, indeed, as a practical matter must be—conditioned on his conduct. More specifically, engaging in conduct that renders the person an “unjustified threat” to another should limit the state's interest in fully protecting the attacker. And this, it will be argued, is even more so when the person's conduct is culpable (rather than merely unjustified, which includes the morally innocent attacks discussed below).

The approach outlined here, however, treats only serious conduct as justifying the state's decision to effectively suspend a defender's basic right to be free from intrusion into his personal sphere and to subject that person to self-preferential violence (such intrusions including, at the extreme end, death and serious bodily injury) unless and until that person no longer poses such a serious and unjustified threat.⁷⁸

Tension with, or Support for, the Other Values:

Reducing overall violence by protecting the state's monopoly on legitimate force is a collectivist value that recognizes the societal interest in violence reduction and the state's role in achieving this end. In contrast, Value #2 (protecting the individual attacker's presumptive right to life) is an individualist value focused on protecting an individual's right not to be killed. Because the collective interest of the state reflected in Value #1 is omnipresent, it tends to

77. For a short comment on terminology, see *supra*, Part II.

78. Note that Part IV explains why it is reasonable to accept the position that by becoming an “unjustified threat,” the “attacker” to some extent correspondingly “forfeits” her right to non-interference.

always function as a decision-ground that is antagonistic to the private use of force. It, for example, will most frequently find itself in direct tension with the more defender-focused values of maintaining equal standing between people (Value #3) and protecting the autonomy of the defender (Value #4). On the other hand, the collective interests this value embodies tend to find support in Value #5 (ensuring the primacy of the legal process) and Value #6 (maintaining the legitimacy of the legal order). Whether protection of the individual attacker's presumptive right to life (Value #2) or general and specific deterrence (Value #7) are in tension with this collective state interest will largely depend on the particular factual scenario, and is particularly subject to normative balancing—after all, one could reasonably take the position that the state's collective interest in violence reduction is not antagonistic to the private use of force. Indeed, one could argue, as German law does, that the private use of force in the absence of state protection actually supports the state's collective interest in violence-reduction by providing deterrence (Value #7).

Limitations:

This value is implicated, to some degree, in virtually all self-defense cases. But the extent to which this value as a decision-ground lends weight to either the principle of protecting the defender or the principle of protecting the attacker will largely be determined by the weight accorded to the six other values discussed immediately below and on the evaluator's perspectives on the moral and functional legitimacy of the state's claimed monopoly on force because those values and perspectives moderate the violence-reduction value, providing guidance about who should be protected in a conflict-of-rights situation.

It is a relatively uncontroversial idea that the state has a legitimate interest in taking steps to reduce overall violence. Relatedly, it is a relatively uncontroversial proposition that it is important to protect, at least to some degree, the state's default monopoly on legitimate force.⁷⁹ Indeed, reducing interpersonal violence in this

79. See Robert Pest, *Die Erforderlichkeit der Notwehrhandlung*, in DER ALLGEMEINE TEIL DES STRAFRECHTS IN DER AKTUELLEN RECHTSPRECHUNG 137 (Fabian Stam & Andreas Werkmeister eds., 2019); Luís Greco, *Notwehr und Proportionalität*, in GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 665, 670 (Ralf Eschelbach, Michael Hettinger, Wilfried Küper & Jürgen Wolter eds., 2018) (defining self-defense as an exception to the State's monopoly on force ("Gewaltmonopol")). The citizen who defends the legal order is thus operating as a surrogate of the state. See Lesch, *supra* note 3, at 81, 87. Max Weber advanced the position that the state alone has the right to use or authorize the use of physical force, and that this represents a defining characteristic of the modern state. See MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 77–78 (H. H. Gerth & C. Wright Mills eds. & trans., Routledge 1991) (1948). That said, some scholars have diverged from Weber, following the tradition set by Thomas Hobbes and arguing that the ideal of the monopoly of violence concerns not only its control, but also its use. Viewed from this perspective, the state alone can legitimately wield violence *except* in cases of immediate self-defense. See Ralf Poscher, *The Ultimate Force of the Law: On the Essence and Precariousness of the Monopoly on Legitimate Force*, 29 *RATIO JURIS* 311, 313–14 (2016) (discussing the "ultimate," but "precarious" nature of the state's monopoly on the use of force).

manner ensures certain fundamental human rights,⁸⁰ most prominently, the presumptive right to life.⁸¹ Although this value, therefore, may be less controversial, it still must be examined to ensure that it ought to be treated as a decision-ground in specific self-defense cases.⁸²

Self-defense as an appropriate exception to the state's monopoly on force derives from the belief that citizens have a right against the state to be protected from wrongful aggression.⁸³ (Though the counterargument, discussed in particular in the context of Value #4, is that this analysis turns self-defense upside down; self-defense, some might contend, is in fact a non-derivative "inherent human right" deriving from natural law, rather than something the state "grants" its citizens.)⁸⁴ Citizens collectively give up the right to use force as they wish in return for the state's protection. Because of the practical difficulties in providing around-the-clock protection, the state must grant citizens the right of self-defense when state protective force is unavailable.⁸⁵ As Sanford Kadish frames it, "The individual does not surrender his fundamental freedom to preserve himself against aggression by the establishment of state authority [for such a surrender would only be rational if it] yields a quid pro quo of greater, not lesser, protection against aggression than he had before."⁸⁶ The necessity, imminence, and proportionality requirements become the state-imposed demarcations of when self-preferential force

80. With regard to the fundamental human rights that will be discussed here in the context of each of the seven articulated values, this Article will, in the main, focus on specific articles in the 1948 United Nations Universal Declaration of Human Rights. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter U.N. Declaration]. This Article also considers specific articles and protocols in the 1953 (effective date) European Convention on Human Rights. ECHR, *supra* note 52.

81. See U.N. Declaration, *supra* note 80, art. 3; ECHR, *supra* note 53, art. 2; KRISTIAN KÜHL & MARTIN HEGGER, *Notwehr* § 32 side-note 11a, in STRAFGESETZBUCH: KOMMENTAR (2018); CLAUDIUS ROXIN, 1 STRAFRECHT ALLGEMEINER TEIL: GRUNDLAGEN. DER AUFBAU DER VERBRECHENSLEHRE § 15 side-note 4 (2006); Erb, *supra* note 52, at 1596–97. *But cf.* U.N., Hum. Rts. Council, Sub-Comm'n on the Promotion and Prot. of Hum. Rts., Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, at 9, U.N. Doc. A/HRC/Sub.1/58/27 (July 27, 2006) (discussing how the right to life is a universally recognized right, but the right to self-defense is not universally recognized).

82. Although the "system" has an overall interest in reducing all kinds of violence (through, say, policing, education, judicial reform, etc.), the state's monopoly on force as discussed here is focused more narrowly on minimizing acts of inter-personal violence. See WEBER, *supra* note 80, at 77–78 (defining the state as "a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory"). *But see* CHRISTOPHER W. MORRIS, AN ESSAY ON THE MODERN STATE 288–95 (2002) (arguing that states neither have nor seek a monopoly on legitimate force because they authorize a wide range of private violence both for personal reasons, including self-defense, and on behalf of the state, such as to prevent crime).

83. See James Q. Whitman, *Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 39 TULSA L. REV. 901, 903 (2004) (discussing the difference between the social contract theory and the monopoly of violence theory in respect to self-defense).

84. See David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 44 (2007) (contending that self-defense is an inherent human right long recognized under international law).

85. See Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CALIF. L. REV. 871, 883–85 (1976).

86. *Id.* at 885.

has gone too far.⁸⁷

The principle of protecting even the fully culpable attacker is one of the most persuasive examples of criminal law's desire to reduce *all* violence.⁸⁸ For if the law concerned itself solely with protecting the defender's autonomy (Value #4), then even the most trivial infringement would authorize the defender to use all defensive force, up to and including deadly force, necessary to ward off the threat.

The apparent tension between the state's monopoly on force and the value of protecting the individual defender's autonomy is eased when one properly understands self-defense as a *back-up* or *fail-safe* to state power, available where protection by the state authorities is not reasonably and equally accessible. Setting aside those situations in which the state authorizes private citizens to use force on its behalf, for example, the *posse comitatus*,⁸⁹ the private use of force is secondary to the state's use of force through the police apparatus; only when the police are unavailable does self-preferential force become an exception to the state's monopoly on force.⁹⁰ The state's obligation to protect individual rights thus creates a default priority for state force as a means of thwarting attacks.⁹¹ The value, therefore, is opposed to private punishment, but not the lawful defense of private interests. As Nourse puts it:

This is manifested nowhere more clearly than the standard requirement of defenses that the state be unavailable—a requirement that demands deference to the state's monopoly on violence. For example, the doctrine of self-defense insists that the threat be so imminent as to prevent lawful recourse and often emphasizes this fact by requiring retreat.⁹²

In fact, limiting defensive force to that which is necessary under the facts, and that which is not disproportionate considering the totality of the circumstances, is arguably part and parcel of basic human solidarity. At the same time, these requirements also preserve the collectivist interest of ensuring that self-preferential force

87. See Daniel Sweeney, *Standing Up to 'Stand Your Ground' Laws: How the Modern NRA-Inspired Self-Defense Statutes Destroy the Principle of Necessity, Disrupt the Criminal Justice System, and Increase Overall Violence*, 64 CLEV. ST. L. REV. 715, 727 (2016) (discussing how the common law limited self-defense by incorporating the elements of necessity, proportionality, and imminence); Donald L. Creach, Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615, 627–29 (1982) (discussing how self-defense doctrine reflects society's interest in limiting vigilante action); see also DSOUZA, *supra* note 27, at 53 (“[C]onstituent elements [including the right to protect one's life] mark the boundaries of the positive guidance that can be given by any moral criminal law.”).

88. See Erb, *supra* note 52, at 1593–94; see also FISCHER, *supra* note 52, at side-notes 13–15b (rejecting state-sanctioned torture even in extreme cases in the name of protecting the legal interest in life and human dignity).

89. See JENNIFER K. ELSEA, CONG. RSCH. SERV., R42659, *THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 18–19* (2018) (discussing situations in which the authorities use civilians to keep the peace or otherwise enforce the law).

90. See Rönna & Hohn, *supra* note 4, at side-notes 183–84.

91. See *id.*; KÜHL & HEGER, *supra* note 81, at side-note 11a.

92. Nourse, *supra* note 17, at 1725.

does not become an alternative to the state's default obligation to protect its citizens.⁹³

A few words on "legal violence" may be in order at this point. The criminal justice system's common response to unjustified private violence is the application of force against those who transgress criminal proscriptions.⁹⁴ This legal violence, then, is fundamentally anti-violent because its ultimate aim is to reduce the level of overall violence in society.⁹⁵ In this respect, law has a negative relation to violence; by countering violence, law contributes to social order.⁹⁶

Schopp and other skeptics of this collectivist position may counter that the attacker, particularly the culpable attacker, deserves no protection. Echoing the German Supreme Court's position discussed above, the claim is that the criminal law should not concern itself with protecting a culpable attacker.⁹⁷ Rather, the argument goes, the focus must be on whether the defensive force was in fact necessary to thwart the threat.⁹⁸

Assume, for example, that Andrew knowingly takes Victor's matches from a restaurant table and is about to drive away. A self-defense law grounded exclusively on the principle of protecting the defender's interests would permit Victor to use deadly force if that were the only way to ensure the safe return of his property.⁹⁹ But even supporters of such an uncompromising position likely agree that there must be *some* limits to the right to self-defense. Whether these limits are based on the law's recognition of empathy and of basic human solidarity, on the notion that unfettered defensive force amounts to an abuse of the right, or on more functional limiting concepts such as "necessity" and "proportionality," there is general agreement that some boundaries on defensive force are both appropriate and required.¹⁰⁰ By developing these boundaries,¹⁰¹ the right of self-defense functions as a means of allocating the permission to use violence between the state

93. See DETLEF MERTEN, *RECHT UND STAAT IN GESCHICHTE UND GEGENWART: RECHTSSTAAT UND GEWALTMONOPOL* 34 (1975) (tracing the development of the self-defense principle and the state's monopoly on the use of force through German history).

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

95. See Harry Schwirck, *Law's Violence and the Boundary Between Corporal Discipline and Physical Abuse in German South West Africa*, 36 *AKRON L. REV.* 81, 81 (2002); see also Liudmyla Sytnichenko, *Otfried Höffe's Theory of Social Justice*, 44 *POLISH POL. SCI. Y.B.* 23, 28 (2015) (analyzing how an effective justice system prevents society from descending into "pure violence").

96. See Guyora Binder, *Victims and the Significance of Causing Harm*, 28 *PACE L. REV.* 713, 727 (2008) (finding that retributive punishment enhances popular acceptance of a justice system and thereby reduces private acts of vengeance).

97. See SCHOPP, *supra* note 14, at 84.

98. See *id.* For an analysis and criticism of this approach, see T. Markus Funk, *Justifying Justifications*, 19 *OXFORD J. LEGAL STUD.* 631 (1999). See also Erb, *supra* note 52, at 1596–97 (noting the normative difference between innocent and culpable attackers).

99. See SCHOPP, *supra* note 14, at 83–84.

100. See Rönnau & Hohn, *supra* note 4, at side-notes 225–29.

101. See Creach, *supra* note 87, at 628.

and the individuals who comprise it.¹⁰²

B. Value #2: Protecting the Attacker's Individual (Presumptive) Right to Life

Summary Justification for Including this Value:

Value #1 concerns society's collective interest in minimizing interpersonal violence by protecting the state's monopoly on force. Value #2, in contrast, focuses on the attacker's individualized right to life. The central, and largely uncontroversial, limitations on self-defense—namely necessity, imminence, and proportionality—apply to situations involving both culpable and non-culpable attackers. These almost universally recognized restrictions demonstrate that protecting the attacker—even a culpable one—is an important stand-alone value. And although few values will generate as much disagreement as this one, the very fact that different people weigh this value differently underscores how important the normative assessment of this value is to self-defense outcomes, and why the proposed value-centric dialogue aids transparent decision-making.

Tension with, or Support for, the Other Values:

The concept of protecting attackers—particularly culpable attackers—is likely to generate disagreement between those who bring to the debate differing normative judgments about the extent to which defensive force should be authorized, and to what extent culpable offenders deserve protection. Those who accord more weight to countering an imputation of unequal standing between people (Value #3), protecting the defender's autonomy (Value #4), and deterrence (Value #7) will be the most skeptical about the inclusion of this value as a stand-alone decision-ground. After all, why should the culpable attacker acting outside of the law's bounds be protected by the state? On the other hand, those who focus more narrowly on reducing overall violence by protecting the state's monopoly on force (Value #1) and ensuring the primacy of the legal process (Value #5) will presumably place more weight on this value when compared to the other more "pro-defender" values.¹⁰³

Limitations:

The instant value's interest in protecting the attacker's presumptive "right to life" is framed in terms of protecting the attacker from death. The diametrical opposition between this and the value of protecting the defender's broad autonomy (Value #4) reflects that we are focused on deadly self-preferential

102. See Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 461 (2008) (understanding self-defense as "a device for allocating the right to use violence between citizen and state"); see also Whitman, *supra* note 83, at 903 (discussing the tension between the criminal law doctrine and vengeance); Kadish, *supra* note 85, at 884 (deriving the right of self-defense from a right against the state).

103. See *infra* Section III.G.2 for a discussion concerning how the values might alternatively be grouped as tending to protect the attacker versus the defender.

force.¹⁰⁴ Additionally, it is consistent with the position (discussed in the forfeiture context in Part IV) that culpable attackers are presumptively entitled to less relative protection than moral innocents.

As Leverick puts it, “in a legal system that holds the equality of lives to be a fundamental value, the aggressor has a right to life just as her victim does.”¹⁰⁵ And this claim is surely defensible as far as it goes. Protecting the attacker—even the culpable one—is, in fact, part and parcel of modern self-defense law.¹⁰⁶

The doctrinal limitations of necessity and imminence help make this point. These limitations, as noted above,¹⁰⁷ help preserve the state’s monopoly on force and are central to self-defense laws. Additionally, and unless overridden or outweighed by other values, these limitations on the right to use self-preferential force also help secure the individual attacker’s right to due process of law.¹⁰⁸ For, wherever one believes the line must be drawn, few are likely to disagree that the law must also consider, at some level, the well-being of the attacker.¹⁰⁹ In fact, notions of basic human solidarity and respect for fundamental human rights arguably compel this conclusion.¹¹⁰

Some may argue that there is no such thing as a legally or morally recognized interest in protecting the attacker; or that describing this interest as a “value” overstates the case. The weakness of such positions, as examined in Part IV, *infra*, is that there are persuasive value-based arguments for protecting even culpable attackers. Even the culpable attacker’s welfare must be considered, because even the culpable attacker is a human who does not, on account of his behavior, automatically forfeit his entitlement to human concern and respect. As Dan Kahan and Donald Braman, discussing the contemporary law’s humanist commitment, frame it: “The self-conscious refusal of contemporary doctrine to license deadly force to

104. See *infra* Section III.D.

105. LEVERICK, *supra* note 5, at 44 (citing Cheyney C. Ryan, *Self-Defense, Pacifism and the Possibility of Killing*, 93 ETHICS 508, 510 (1983)).

106. See F. Patrick Hubbard, *The Value of Life: Constitutional Limits on Citizens’ Use of Deadly Force*, 21 GEO. MASON L. REV. 623, 646 (2014) (noting that the right to self-defense does not allow the defender to use deadly force against a “law break[ing]” attacker threatening less serious harm); Stephen E. Henderson & Kelly Sorensen, *Search, Seizure, and Immunity: Second-Order Normative Authority and Rights*, 32 CRIM. JUST. ETHICS 108, 114 (2013) (recognizing that attackers possess an inherent right to life that is only forfeited when they pose a lethal threat).

107. See *supra* Section III.A.

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

109. See Hubbard, *supra* note 106 (“[T]he right to self-defense does not empower a defendant to use force that is so out of proportion to the threat that the attacker’s fundamental right to life becomes so devalued that it is worth virtually nothing.”).

110. See U.N. Declaration, *supra* note 80, art. 1 (“All human beings are born free and equal in dignity and rights . . . endowed with reason and conscience and should act toward one another in a spirit of brotherhood.”); *id.* art. 2 (equal rights and freedoms for all); *id.* art. 3 (equal right to life, liberty, and security); *id.* art. 6 (equal recognition as person before the law); *id.* art. 7 (right to equality and equal protection); ECHR, *supra* note 52, art. 5 (right to liberty and security of person).

protect nonvital affronts . . . expresses the ‘supreme value of human life’ recognized by ‘[a]ny civilized system of law.’”¹¹¹

The modern democratic tradition presumes that ethical, social, and political thought are anchored to the idea of equality of people, even criminals, under the law.¹¹² This position is based on the assumption that, all other things equal, two human lives, as human lives, are similarly valuable.¹¹³ If this were not so, then all culpable attacks, regardless of how trivial, could be met with deadly force. But this is not the law in any contemporary jurisdiction. That said, and as discussed in Section III.C, *infra*, what most of the scholarship concerning itself with the defender’s right to life largely ignores is that this is, and must be, a presumptive right. And, as we shall see, there are other considerations that favor authorizing deadly force against an attacker who threatens “mere” serious bodily injury than Leverick and others acknowledge.

C. Value #3: Maintaining Equal Standing Between People

Summary Justification for Including This Value:

Though controversial in some circles, an ordered society requires an equal concern, and reciprocal respect, for rights between and among citizens. Building on this foundation, culpable attackers threaten not only to harm their victims, but they effectively disrespect the victim’s right to equal standing in the public and private spheres. Particularly in cases involving culpable attackers, self-preferential force exercised in self-defense most immediately allows the defender to thwart the threatened harm, but it also puts the defender in a position to maintain equal standing between himself and his attacker by protecting his personal domain. In this sense, then, self-defense permits individuals to be sovereign by allowing them to not only assert rights but to also recognize those same rights in others. But the law of self-defense also renders them subject, for they must obey the same laws they, as a collective, impose on their fellow humans.

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

112. See Brian-Vincent Ikejiaku, *International Law, the International Development Legal Regime and Developing Countries*, 7 LAW & DEV. REV. 131, 139–40 (2014) (describing the prescriptions of the Western legal system, including “equal application of the law”); John Delaney, *Towards a Human Rights Theory of Criminal Law: A Humanistic Perspective*, 6 HOFSTRA L. REV. 831, 855–56 (1978) (explaining the modern democratic idea that “our rights flow from our common status as human beings”).

113. See IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 162–63 (1989) (“The modern humanistic and democratic tradition in ethical, social, and political thought is based on the idea that all human beings are equal.”); see also Hubbard, *supra* note 106, at 646 (noting that the analysis of the right to self-defense requires the realization that both the attacker and the defender possess a fundamental right to life).

Tension with, or Support for, the Other Values:

Warding off the imputation of unequal standing inherent in culpable attacks can be understood as a value ancillary to protecting the defender's autonomy (Value #4) and is also generally aligned with deterrence (Value #7). On the other hand, violence reduction (Value #1), protection of the attacker (Value #2), and ensuring the primacy of the legal process (Value #5) are, all other things being equal, generally antagonistic to this more defender-centric value. Maintaining the legitimacy of the legal order (Value #6), moreover, finds itself in an unusual posture with respect to this value, because cases in which maintenance of equal standing is under- or over-weighted potentially threaten the moral legitimacy of the legal order.

Limitations:

This decision-ground is necessarily based on the thwarting of a culpable attacker's attempted imposition of unequal standing. As a result, it is not implicated in cases involving non-culpable aggressors, because, as we will see, non-culpable attackers do not threaten to disrespect or discount the defender's right to equal standing. Such attackers may threaten harm but do not threaten a wrong.

The value of ensuring equal standing between people is less self-explanatory than some of the other values. Indeed, for some, it will be the most controversial of the values, in part because it stands in tension with most of the other values and protects an interest that not everyone assigns the same weight.

Some of the other values tend to limit a defender's exercise of self-preferential force. This value, in contrast, tends to expand a defender's autonomy (and the corresponding right to self-defense). That said, and as with the other values, its individual impact on whether defensive force should be justified must be measured on a sliding scale. As discussed in Sections III.A and B, controlling social harm and evaluating conduct on the basis of relative culpability (that is, at least in part based on how much of an imposition of unequal standing the attacker intends) can, in fact, be said to be the criminal law's central organizing principles.¹¹⁴

We assume general, though not universal, agreement for the proposition that the criminal law furthers the preservation of fundamental human rights¹¹⁵ by requiring individuals to maintain relationships of restraint.¹¹⁶ As a result, the criminal law

114. See JEREMY HORDER, *ASHWORTH'S PRINCIPLES OF CRIMINAL LAW* 1–3, 53–58 (8th ed. 2016) (describing the use of coercion to make people contribute to public goods); ANDREW SIMESTER & ANDREAS VON HIRSCH, *CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION* 3–31 (2011) (noting that in criminalizing an activity, a state declares the activity is morally wrong and imposes sanctions that reflect the blameworthiness of the conduct).

115. See U.N. Declaration, *supra* note 80, arts. 1–2, 7, 12, 17, 21–22, 29; ECHR, *supra* note 52, arts. 2, 5, 13.

116. See Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99, 124 (1996) (explaining that criminal law's enforcement of relationships of

can be said to be concerned with punishing and deterring those who knowingly violate these relationships of restraint.¹¹⁷ Put another way, and assuming the accuracy of these foundational assumptions (which, it is conceded, are not accepted by all theorists), the criminal law, at its core, focuses on the attitudes a criminal defendant expresses toward rights and related proscriptions.¹¹⁸ A person who controls her conduct in a manner designed to avoid violating rights and proscriptions conveys *respect* for those rights, whereas a person who does not conveys *disrespect* for those rights.¹¹⁹ In this sense, then, respecting rights and proscriptions means according another person's rights sufficient value when compared to one's own interests, and taking the steps necessary to avoid engaging in self-interested actions that are likely to violate another's rights.

These are basic, and perhaps even *minimal*, expectations we can fairly impose on others in a civilized society. Anthony Bottoms and Justice Tankebe, writing in the context of procedural justice, put it this way: “[C]itizens who have deliberately chosen the path of obedience might well be resentful if and when they observe a blatant lack of obedience to law, or an absence of self-restraint.”¹²⁰ Erb similarly comments that attacks by innocents, such as children or individuals operating under a mistake, do not knowingly elevate their interests over those of their victims. Culpable attackers, in contrast, threaten to impose what effectively is unequal standing on their victims.¹²¹

restraint requires all individuals in a community to “refrain from engaging in avoidable conduct that wrongfully imposes control over the rights of others by injuring those rights in pursuit of our own interests” (citation omitted); Benjamin B. Sendor, *Restorative Retributivism*, 5 J. CONTEMP. LEGAL ISSUES 323, 363 (1994) [hereinafter Sendor, *Restorative Retributivism*] (“The law requires us to refrain from fairly controllable conduct that imposes or attempts to impose control over the rights of others by violating those rights.”).

117. See Sendor, *Restorative Retributivism*, *supra* note 116; Benjamin B. Sendor, *Mistakes of Fact: A Study in the Structure of Criminal Conduct*, 25 WAKE FOREST L. REV. 707, 727 (1990) (stating that “criminal law operates by condemning and prohibiting violations of rights that are committed with disrespect for the violated rights”); Rönnau & Hohn, *supra* note 4, at side-notes 66–68, 71.

118. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.01(B) (2d ed. 1995) (explaining that criminal law focuses on punishing those who “freely choose to harm others”); Benjamin B. Sendor, *Crimes as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1393 (1986) (“[T]he distinctive character of mental illness with respect to criminal responsibility is the incapacity of a mentally ill person to guide his conduct according to the myriad of legally and morally relevant factors that can deter other people—‘normal’ people—from committing crimes.” (citation omitted)).

119. See Sendor, *Restorative Retributivism*, *supra* note 116, at 328 (explaining how a person conveys respect—or disrespect—for another person's rights by controlling—or failing to control—one's own conduct); Rönnau & Hohn, *supra* note 4, at side-notes 66–68, 71; see also Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252, 261 (1994) (contending that culpable attackers are liable to more defensive harm).

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

121. See Erb, *supra* note 52, at side-note 209; see also Kates & Engberg, *supra* note 14, at 886–906 (discussing unique threat to “honor” of victim and the attacker's threatened “intrusion of mind and body”). But see Rönnau & Hohn, *supra* note 4, at side-note 72 (describing recognition of reciprocity in the context of equal standing—*störung des Gegenseitigkeitsverhältnisses*—as dangerous, and commenting that, while it may be a justifiable consideration in the context of intentional attacks, self-defense is also available for unintentional and morally involuntary attacks).

Laws embodying what later will be described as the “fully expressed public morality,”¹²² therefore, not only enable individuals to make universal demands, but also carry with them corresponding reciprocal obligations. My demand that I not be harmed carries with it the obligation that I not harm anyone else.¹²³ Rousseau articulated a similar notion of reciprocity, stating, “[I]t is in order that we may not fall victims to an assassin that we consent to die if we ourselves turn assassins.”¹²⁴ The rights one recognizes in others one can demand in others; but we cannot demand from others what we refuse to respect. It is a practical impossibility.

When other competent individuals with claims to similar rights to absolute ends recognize one’s equal standing (and right to non-interference that is equal to theirs), then that right becomes an objective reality, as opposed to a mere subjective claim.¹²⁵ Leoni, defending Rousseau’s position, observed:

[I]t is no nonsense to presume that every criminal would admit and even request condemnation for other criminals in the same circumstances [because] there is a ‘common will’ on the part of every member of a community to hinder and eventually punish certain kinds of behavior that are defined as crimes in that society.¹²⁶

122. The use of the term “public” morality here is meant to recognize that, while most people have their own private morality, the *malum in se* (i.e., wrong because morally blameworthy) core of democratic criminal justice systems, as applied by the courts and police, is the product of *society* acting out of broad social consensus to criminalize conduct that threatens harm to others and is “substantially wrongful.” See Federico Picinali, *Innocence and Burdens of Proof in English Criminal Law*, 13 *LAW PROBABILITY & RISK* 243, 256 (2014); see generally Alden D. Miller, *Two Theories of Criminal Justice*, 79 *MICH. L. REV.* 904 (1981) (discussing theories on the role of morality in law that conclude the criminal justice system should only enforce society norms with a broad consensus). But see Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 *MICH. L. REV.* 259, 281–83 (2018) (discussing mass incarceration and the criminal justice system’s role in oppressing the poor).

123. See Erb, *supra* note 52, at 1595–96 (contending that culpable individuals “choose” to expose themselves to defensive force). Put another way, the term refers to the moral and ethical standards enforced in a society, whether through law enforcement, social pressure, or otherwise. See Robert P. George, *The Concept of Public Morality*, 45 *AM. J. JURIS.* 17, 19 (2000); H. L. A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 *U. CHI. L. REV.* 1, 4–8 (1967) (discussing theories of morality and their relation to societal construct); Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 *SOC. PROBS.* 175, 175–88 (1967) (explaining how perceptions of those who deviate from social norms can change over time). Several academics have discussed the concept of violations of criminal law reflecting successive levels of substantive and procedural societal condemnation. See e.g., SCHOPP, *supra* note 14, at 29–31 (discussing the “fully-articulated conventional public morality”). But for a view that the criminal law is best envisioned as being a branch of public or administrative law lacking such a distinct moral basis, see, e.g., Vincent Chiao, *Ex Ante Fairness in Criminal Law and Procedure*, 15 *NEW CRIM. L. REV.* 277, 279–90 (2012); Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 *YALE L.J.* 1070, 1097–1109 (2008); Terry Skolnik, *Homelessness and the Impossibility to Obey the Law*, 43 *FORDHAM URB. L.J.* 741, 744–48 (2016) (explaining why certain laws are nearly impossible for individuals experiencing homelessness to abide by and arguing for their appeal). But see Stephen B. Young, *The Moral Basis of American Law: An Hypothesis*, 82 *U. DET. MERCY L. REV.* 649, 651–55 (2005).

124. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 30 (George D. Cole, trans., E.P. Dutton & Co. Inc. 1938) (1762).

125. BRUNO LEONI, *FREEDOM AND THE LAW* 139–41 (3d ed. 1991).

126. *Id.* at 136.

We can thus say that individuals are sovereign in the sense that they are able to assert rights and recognize the same rights in others. But individuals are also subject in the sense that they must obey the laws that they collectively make and cannot fairly complain if and when they are held to account for their failure to do so. In fact, lessons learned in everyday life teach that a person can, to varying levels, show direct or implied hostility toward a particular right by intentionally, recklessly, carelessly, or negligently violating it, or by otherwise disregarding it. By so doing, that person communicates that he does not consider others' rights to be sufficiently important, when compared to the person's own competing interests.

Consider something as relatively benign as being cut off in morning traffic by a reckless driver. For many, this triggers anger and frustration that cannot be explained by any concrete delay or other quantifiable injury. Rather, the source of the anger is that the reckless driver has demonstrated disrespect for other drivers by elevating his own interests in getting through traffic above everyone else's decision to patiently wait.¹²⁷

Consider further that when Andrew intentionally hits Victor with a bat as part of a robbery, Andrew conveys disrespect for Victor's legitimate, legally recognized interests in his physical integrity, his right to be free from pain, and his interest in maintaining equal standing. Through his conduct, Andrew knowingly and predictably subjects himself to criminal sanction. On the other hand, if Andrew intentionally hits Victor with a bat because Andrew reasonably, but incorrectly, believes Victor is about to launch an attack on him, then Andrew's act does not signal the same disrespect for Victor's rights. If, however, Andrew is acting recklessly with his bat and accidentally hits Victor, then Andrew's reckless conduct still conveys a lack of respect for Victor's interests.

Finally, in jurisdictions that reject the criminalization of negligent conduct, if Andrew hits Victor with a bat out of mere negligence, he will not be viewed as having behaved in a way that exhibits the amount of disrespect for Victor's rights that justifies a criminal conviction. In practical terms, Andrew likely could defeat criminal charges by showing the absence of the required mens rea.

127. See generally *id.*; see also Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1535–44 (1992) (discussing the interpretation of breached moral norms in relation to affirmative defenses); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1666 (1992) (“[S]ome moral actions violate [moral] standards in a particular way insofar as they are also an affront to the victim's value or dignity.”); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 35, 122–43 (1988) (determining that retributive punishment symbolizes correction of the relative value between the wrongdoer and the victim); NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 23 (1988) (explaining the need for punishment to remove the offender's unfair advantage of fulfilling choices forbidden to others); HERBERT MORRIS, *Persons and Punishment*, in ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 48 (1976) (explaining that a just punishment system is one that punishes those who deviate from the norm of general adherence to the rules).

After all, without a violation of norms, traditional or “core” criminal liability cannot exist.¹²⁸ The criminal justice system expresses condemnation by punishing wrongdoers and allows society to enjoy practical benefits from doing so. These practical benefits include the communicative value of sanctions (moral condemnation signaled by a criminal conviction, which may lead to general deterrence), as well as potential criminal confinement (resulting in specific deterrence and incapacitation).¹²⁹

And so a person can show hostility or disrespect toward another’s right by intentionally, recklessly, or carelessly violating, or by otherwise disregarding, the right.¹³⁰ In so doing, that person communicates that he does not consider others’ rights to be sufficiently important when compared to the person’s own competing interests.¹³¹ Thus, when a given legal system defines certain knowing and intentional physical contact, such as assault or battery, as morally blameworthy, it simultaneously finds that the conduct signifies a substantive break in the relationship of restraint described above.¹³² Consequently, a system focused on maintaining equality in this sense will tend to permit a person facing such a criminal attack to repel it with appropriate defensive force. This is because after-the-fact punishment through the criminal justice system is ill-suited to undo an imposition of unequal standing occurring at the time of the attack.¹³³

128. Note that most contemporary criminal justice systems contain thousands of “regulatory” criminal proscriptions that have little or nothing to do with willed anti-social conduct (to wit, “wronging”), but rather are aimed at changing conduct for other instrumental reasons. For a comprehensive critique of the trend of over-criminalizing conduct for regulatory reasons, see Andrew Ashworth, *Is the Criminal Law a Lost Cause?*, 116 L. Q. REV. 225 (2000).

129. See JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 29 (1992). For the English translation, see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996) (providing a sociologically informed conceptualization of law and basic rights, explaining how societal values are reflected in the administration and execution of law).

130. See Rönnau & Hohn, *supra* note 4, at side-notes 70–71.

131. See Peter Ramsay, *The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State*, 69 MOD. L. REV. 29, 45 (2006) (explaining that punishment is imposed when the offender denies the victim equal status of civil citizenship by showing disrespect for the victim’s freedom of choice); Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES L. 1, 29 (2000) (arguing that restitutionary damages ought to be available only to the extent the defendant’s conduct denies the normative significance of the plaintiff’s right); Rosa Eckstein, *Towards a Communitarian Theory of Responsibility: Bearing the Burden for the Unintended*, 45 U. MIA. L. REV. 843, 844–48 (1991) (arguing for a communitarian-based notion of defendant’s responsibility and rejecting the court’s liberal conception of justice, which focuses too narrowly on the defendant’s actions as an individual, ignoring how the conduct creates structural issues in the larger community).

132. See Rönnau & Hohn, *supra* note 4, at side-notes 64, 68–73.

133. Character theorists, in fact, would contend that such an insufficient concern for the interests of others is in itself a blameworthy character trait. Consider in this context the choice-based theories proposed in Claire Finkelstein, *Responsibility for Unintended Consequences*, 2 OHIO ST. J. CRIM. L. 579, 593 (2005) (arguing that criminal liability should reflect judgments of responsibility by attaching to conduct in which the defendant was aware he or she was engaging in prohibited conduct or was aware of the risk caused by such conduct). See also Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence*, 5 CRIM. L. & PHIL. 147, 171 (2011) (summarizing theorist discourse surrounding the

With this foundational discussion in place, we can now close the loop on culpability and equal standing. Assume a legal system defines certain knowing and intentional physical contact, such as battery, as morally blameworthy or criminal. Such a system must necessarily also conclude that this conduct signals a substantive break in the above-described relationship of restraint. Therefore, the legal system necessarily will permit a person threatened with such a criminal attack to seek to repel or minimize it by using necessary and appropriate defensive force.¹³⁴ In contrast, some attacks, such as those committed by mental incompetents or by individuals operating under a reasonably mistaken belief that they are acting properly, do not signify a break in the relationship of restraint and do not threaten the equal standing of the defender and the attacker.¹³⁵

Adapting a line of argument developed by Dsouza, and consistent with Lockean notions about the conduct-guiding norms underlying the criminal law,¹³⁶ the primary difference is between defective “norm-reasoning” (a disregard for the normative guidance provided by the criminal law) and defective “functional reasoning,” which concerns a person’s ability to observe facts, and to reach reasoned factual

justification for punishing individuals for exhibiting unfortunate character traits). *But see* R. A. Duff, *Choice, Character, and Criminal Liability*, 12 *LAW & PHIL.* 345, 363, 380 (1993) (arguing a “character” theory of criminal liability and explaining how criminal liability attaches to wrongful conduct that reflects an inappropriate attitude toward the law and the values it protects). And so innocent actors merely err as to the scope of the victim’s rights, whereas culpable aggressors who threaten a wrong deny victims their right to respect. *See* Alan Brudner, *Agency and Welfare in the Penal Law*, in *ACTION AND VALUE IN CRIMINAL LAW* 21, 23 (Stephen Shute, John Gardner & Jeremy Horder eds., 1996). Innocent attackers, in short, do not break the relationship of restraint and do not threaten the equal standing between the defender and the attacker. *See* Rönnau & Hohn, *supra* note 4, at side-notes 66–68, 71; Robert F. Schopp, *Reconciling “Irreconcilable” Capital Punishment Doctrine as Comparative and Noncomparative Justice*, 53 *FLA. L. REV.* 475, 516 (2001) [hereinafter Schopp, *Reconciling*] (arguing that to maintain equal standing of citizens under the law, defendants cannot be sentenced based on the moral principles endorsed by the jury as these are not established societal standards); Stephen R. Munzer, *Introduction*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 7 (Stephen Munzer ed., 2001) (discussing the equal standing of all people within a community in terms of property rights); *see also* Robert F. Schopp, *Multiple Personality Disorder, Accountable Agency, and Criminal Acts*, 10 *S. CAL. INTERDISC. L.J.* 297, 319 (2001) [hereinafter Schopp, *MPD*] (“The criminal justice system of a liberal society protects equal standing and individual self-determination by proscribing and punishing conduct that violates protected rights and interests.”). *Cf.* HELEN FROWE, *DEFENSIVE KILLING* 1–2 (2014) (discussing a view that permits the use of force against innocent threats). Put another way, by engaging in criminal behavior, the individual differentiates himself from the social group; by wronging others, the criminal implies superiority over the other members of the group. No longer an equal, he subjugates his victims, while elevating himself. “The rights one recognizes in others one can demand in others; but we cannot demand from others what we refuse to respect. It is a practical impossibility.” GEORGE H. MEAD, *MIND, SELF, AND SOCIETY* 381 (Charles W. Morris ed., 1967).

134. *See* R. A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* 11, 51–52 (2007) (explaining that defensive force may be recognized if it is necessary and proportionate in response to the harm); Anthony Duff, *Punishment, Citizenship and Responsibility*, in *PUNISHMENT, EXCUSES AND MORAL DEVELOPMENT* 17, 23–24 (Henry Tam ed., 1996) (contending that punishment should aim to alter the moral sentiments of offenders, rather than simply giving offenders an external/prudential reason for desistance).

135. *See* SCHOPP, *supra* note 14, at 71–83; Schopp, *Reconciling*, *supra* note 133, at 516; Munzer, *supra* note 133, at 167; Schopp, *MPD*, *supra* note 133, at 319.

136. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 136–37, 141, 154–55 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

conclusions and judgments.¹³⁷ A person who acts pursuant to poor norm-reasoning acts either because she has inculcated contrary normative values or because she simply opts to ignore the normative values adopted by society. Either way, she invites blame because she displays an inappropriate attitude toward society's normative guidance.¹³⁸

If, as argued here, the mutual recognition and acceptance of individual rights is a prerequisite for a functioning legal system and the development of personal identity and self-fulfillment, then self-defense, along with law enforcement protection, serves to safeguard the individual by preventing unjustified threats against, or intrusions into, his personal domain. The personal sphere, after all, allows one to develop one's personality, and it is believed that individuals develop basic human faculties, such as choice and reasoned decision, only through the exercise of their own autonomy.¹³⁹ The right to be free from attacks, then, is central to a liberal society and to the individual's personal development, and self-defense law recognizes and protects such freedom in the absence of police protection or other means of avoiding the attack. To the extent that a legal order deemphasizes and disregards the importance of the citizens' personal domain, that order can be expected to more strictly limit the availability of self-defense.

In short, it can be said that a society without a right to self-defense would effectively make the abstract ordering of legal possessions impossible, for the propriety of all actions within the personal domain would largely be conditioned on whether someone else has a greater interest in, and the ability to simply take, the object or benefit. By denying the conceptual basis of rights and of personality as an end, the wrongdoer denies his *own* right to respect, and threatens a unique type of damage to the victim that precludes him from demanding a precisely proportionate response.

There, in fact, is a near-universal feeling among crime victims that they have not only been physically injured or deprived of their property, but that they have also in a sense been emotionally "violated" because another person intentionally dishonored the victim's personal domain and disrespected the victim's equality

137. See DSOUZA, *supra* note 27, at 24–33. For a more instrumental account of the criminal law that is not based on public condemnation or wronging, but, rather, on the criminal law's constitutive function to condemn structural inequality—described as “character flaws” of given communities—such as racist violence, “gay-bashing,” etc., see Michelle M. Dempsey, *Public Wrongs and the “Criminal Law’s Business”*—*When Victims Won’t Share*, in CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTHONY DUFF 269–70 (Mark R. Reiff, Matthew H. Kramer & Rowan Cruft eds., 2011) (defining “wrongs” as actions that “the polity must condemn if it is to *transform* itself”).

138. DSOUZA, *supra* note 27, at 26.

139. See Walter Kargl, *Die Intersubjektive Begründung und Begrenzung der Notwehr*, 110 ZEITUNG DER ALLGEMEINEN DEUTSCHEN STRAFRECHTSWISSENSCHAFT 38, 57–60 (1998); FRIEDRICH A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 62–64 (1988) (discussing the impact of the state's respect for the personal domain); see also LEONI, *supra* note 125, at 93 (exploring the historical roots of individual freedom in Western countries).

and right to non-interference.¹⁴⁰ In fact, considerable empirical evidence establishes that, once victimized, individuals tend to feel vulnerable and become particularly fearful of future victimization, lending additional support for the claim that culpable attacks pose a unique threat.¹⁴¹

But a word of caution is in order. It is important to reiterate that, although an attacker's culpability has the above-stated normative significance, the mere presence of culpability does not allow the victim to "punish" or exact his "revenge," either for himself or on behalf of society.¹⁴² Rather, an attacker's culpability is relevant only in the sense that it changes the basic nature of the threat; in essence, the culpable attacker is threatening a harm and is also threatening the defender with a wrong that (1) reduces the criminal law's interest in protecting the attacker from a subsequent intrusion into the attacker's personal domain, and (2) increases the law's interest in protecting the defender.¹⁴³ By threatening such a unique wrong, the morally culpable attacker poses a threat to the equal standing of his

140. See Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond Empty Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19, 23 (1998) (advancing a model of toleration as respect that promotes autonomy, moral independence, and diversity while also seeking to assure mutual respect and civility); Axel Honneth, *Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition*, 20 POL. THEORY 187, 189–91 (1992) (discussing victims' physical and emotional injuries resulting from disrespect and denial of recognition); see generally Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387 (1985) (exploring the relation between proportionality and equality rights and arguing that the right to equal treatment is a comparative right because it is interpersonally dependent and stipulates a relation of equality).

141. See Katie Rhoades, *Choice & Trafficking*, 64 ST. LOUIS BAR J. 30, 35–36 (2018) (discussing the long-term impact of sex trafficking on victims); Michael Coyle, *The Transformative Potential of the Truth and Reconciliation Commission: A Skeptic's Perspective*, 95 CAN. BAR REV. 767, 769, 780 (2017); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 957 (1985) ("The intrusiveness of [core] crimes threatens and denies a victim's 'personhood,' subjecting the victim to devastating psychological consequences."); BRUNO BETTELHEIM, *SURVIVING AND OTHER ESSAYS* 28 (1979) (describing Holocaust survivors' different types of long-term responses to the trauma that they experienced); KENNETH F. FERRARO, *FEAR OF CRIME: INTERPRETING VICTIMIZATION RISK* 120 (1995) (discussing the link between perceived risk and fear of crime and the differences between how people assess their risk of victimization compared to crime's eventualities). For some of the long-term effects of criminal victimization, see generally Arthur J. Lurigio & Patricia A. Resick, *Healing the Psychological Wounds of Criminal Victimization: Predicting Postcrime Distress and Recovery*, in 25 VICTIMS OF CRIME, PROBLEMS, POLICIES, AND PROGRAMS 50, 57 (Arthur J. Lurigio, Wesley G. Skogan & Robert C. Davis eds., 1990), for a discussion of studies on burglarly victims showing that the victims had a greater tendency to report vulnerability, fear, sleep disturbances, and repetitive thoughts about the victimization.

142. Pest, *supra* note 79, at 144; Rocio Lorca, *The Presumption of Punishment: A Critical Review of Its Early Modern Origins*, 29 CAN. J.L. & JURIS. 385, 398 n.57 (2016) (arguing that societies do not have their own rights but are rather "conventional constructions created to protect the rights of individuals within" and that "any attempt to provide societies with the moral attributes of individuals seems to take us in a dangerous path").

143. The mens rea justifying criminal punishment under the paradigm advanced here, therefore, is intentional or reckless advertence to the excessive risk. While negligent individuals may be liable in tort, they are inappropriate for criminal liability because they cannot be said to have disrespected another's equal standing or to have imputed inequality. See Rönnau & Hohn, *supra* note 4, at side-notes 66–68, 71. This threatened wrong, moreover, lends weight to the argument that third parties have a corollary right to get involved and use force against the attacker in order to protect the defender; that said, and as noted at the outset, the exercise of force to protect third parties is outside the scope of this undertaking.

putative victim, which, in turn, shifts the relative, sliding-scale balance of interests and more broadly authorizes the use of self-preferential defensive force.¹⁴⁴

D. Value #4: Protecting the Defender's Autonomy

Summary Justification for Including this Value:

The value of protecting the defender's autonomy is related to the concept of safeguarding the equal standing between people.¹⁴⁵ An individual's exercise of autonomous rights, including the right to self-directed action, to a personal sphere, and to private property, can be closely related to his pursuit of self-fulfillment. The personal sphere, in turn, allows for the development of one's personality. The modern liberal state accords free people equal standing in the public sphere (see Value #3) and, relatedly, strives to ensure that people have a private domain of nonpublic life in which they are given the opportunity to exercise their own comprehensive moral values, and to develop their own conceptions of the good.

Tension with, or Support for, the Other Values:

Protection of the defender's autonomy arguably is the primary function of self-defense. That said, a defender's interest in protecting her autonomy is not absolute and must sometimes yield to the competing interests of reducing overall societal violence by protecting the state's monopoly on force (Value #1), protecting the attacker's presumptive right to life (Value #2), and ensuring the primacy of the legal process (Value #5). In contrast, maintaining the equal standing between people (Value #3) and deterrence (Value #7) tend to support this value. On the other hand, giving it too much or too little weight can have a negative impact on the maintenance of the legitimacy of the legal order (Value #6).

Limitations:

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

144. See *id.* at side-notes 226–27 (discussing advantages—and disadvantages—of a “flexible” approach to identifying the limits of self-defense).

145. In fact, some could argue that the discussion of protecting the autonomy of defenders should be subsumed within the preceding approach toward safeguarding the equal standing of citizens, see *supra*, Section III.C, since individual autonomy can be said to be part and parcel of equal standing. While that argument has some appeal, the decision made here is to give them separate treatment since protection of the defender's autonomy can be said to be a sufficiently distinct value as to justify such individualized treatment.

The term *self*-defense itself implies that the right to self-defense is grounded in the protection of the defender's autonomy.¹⁴⁶ But, as recognized both by the violence-reducing function of self-defense (Value #1) and the understanding that even culpable attackers have a right to life (Value #2), life in modern society requires citizens to sometimes tolerate intrusions on their autonomy to advance broader welfarist objectives.¹⁴⁷ If, as argued here, the mutual recognition and acceptance of individual rights is a prerequisite to a functioning legal system, then self-defense must safeguard the individual by preventing unjustified (as determined by weighing this value against the others) threats against, or intrusions into, his personal domain, when equally effective state protection is unavailable.¹⁴⁸

1. The Personal Domain is Important . . .

Continuing the discussion started in Section III.C with Value #3 (ensuring equal standing among individuals), an ordered, modern society must afford some room for individual expression within each person's personal domain.¹⁴⁹ Without such a protected personal domain, "we are thrown back on the sort of structure found in the mob, in which everybody is free to express himself against some hated object of the group."¹⁵⁰ Joseph Raz agrees that "the promotion and protection of personal autonomy [are] the core of the liberal concern for liberty."¹⁵¹ The U.N. has in fact long recognized personal autonomy as a fundamental human right.¹⁵²

146. See SANGERO, *supra* note 32. As noted, while the value-based model has broad application and could be used to address defense-of-others situations, a full analysis of defense of others is outside the scope of the instant undertaking.

147. See Erb, *supra* note 52, at side-note 87; Robert M. Ackerman, *Communitarianism and the Roberts Court*, 45 FLA. ST. U. L. REV. 59, 87 (2017) (advocating for a balanced approach that allows minor intrusions on personal liberty to avoid larger dangers to the community); Fletcher, *Domination*, *supra* note 10, at 556 (arguing that a victim's use of deadly force against an abuser is only justified if it meets the requirements of self-defense).

148. See George P. Fletcher, *The Nature of Justification*, in ACTION AND VALUE IN CRIMINAL LAW 175, 179, 181 (Stephen Shute, John Gardner & Jeremy Horder eds., 1993) (noting that in order to best preserve self-defense, the concept cannot be vaguely defined and must rely on principles of reasonableness and proportionality); George P. Fletcher, *Punishment and Self-Defense*, 8 LAW & PHIL. 201, 210, 213–15 (1989) (describing how the principle of proportionality in self-defense cases can weigh against a defender who inflicts harm on an aggressor).

149. Cf. Richard Washburn, *The Decline of Authority*, 32 COM. L. LEAGUE J. 229, 230–31 (1927) (noting that unfettered personal expression is incompatible with punishment for crime).

150. MEAD, *supra* note 133, at 221.

151. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 203 (1986).

152. See U.N. Declaration, *supra* note 80, arts. 12–13, 20, 22, 29; ECHR, *supra* note 53, arts. 1, 8, 11; Kargl, *supra* note 139, at 57–60; WILHELM VON HUMBOLDT, *THE LIMITS OF STATE ACTION* 12 (J.W. Burrow ed., 1993) (stating that "the whole greatness of mankind ultimately depends" on "individuality of energy and self-development"); HAYEK, *supra* note 139, at 62–64 (discussing the impact of the state's respect for the personal domain); LEONI, *supra* note 5, at 93 (describing individual freedom as essential to the political and legal systems of many Western countries in both ancient and modern times); MEAD, *supra* note 133, at 221 (noting that societies must design social structures that enable self-expression).

Robert Nozick posits that only a person who can shape his own life in accordance with some overall plan has—or can strive for—a meaningful life.¹⁵³ A liberal state must, therefore, accord free people generally equal standing in the public sphere (Value #3), but as reflected by Value #4, must also ensure that people have a private, autonomous domain of nonpublic life.¹⁵⁴

My description of this value, and its focus on the defender’s personal autonomy, is not meant to devalue the attacker’s legitimate interests. Instead, the value more narrowly focuses on safeguarding the defender’s rights.¹⁵⁵ One impact of unjustified attacks (whether culpable or non-culpable) is that they breach the sphere of autonomy enjoyed by everyone—and culpable attacks, as noted above, also uniquely threaten the broader legal order.¹⁵⁶

2. . . . But Autonomy Cannot Be Absolute

The position just advanced is that a person’s autonomous sphere has value and therefore is something the criminal law must protect. That said, like all rights, the right to autonomy is not limitless.

Raz has noted the difficulties with the positions taken by “pure individualists,” such as Immanuel Kant and Nozick, who he believes ignore reasonable limitations on autonomy.¹⁵⁷ The U.N. in its Universal Declaration of Human Rights has similarly observed that, in the context of developing one’s personality, “[e]veryone has duties to the community.”¹⁵⁸ Indeed, paying taxes, driving the speed limit, appearing for jury duty, and countless other restrictions on our autonomy demonstrate that, in modern, liberal democracies, our individual desires must frequently yield to broader societal interests.¹⁵⁹

153. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 31–32 (1974); Rönnau & Hohn, *supra* note 4, at side-note 64.

154. See Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2070 (1996); see also JOHN RAWLS, *A THEORY OF JUSTICE* 139 (1971) (noting that the “veil of ignorance” principle is key to ensuring that “the information available [to an individual] is relevant [and] at all times the same”); BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 347, 369 (1980) (recognizing the importance of “respect for the autonomy of the persons” and that ultimately, “the substance of individual rights is constructed through a social dialogue”).

155. See Schopp, *supra* note 154, at 2070; see also JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 19–27 (2013) (describing the harm that follows from human interconnectedness); JOEL FEINBERG, *HARM TO SELF* 52–70 (1986) (surveying various conceptions of personal sovereignty and describing how these principles affect a person’s individual rights).

156. See Colton Fehr, *Self-Defence and the Constitution*, 43 *QUEEN’S L.J.* 85, 96–97 (2017); Rönnau & Hohn, *supra* note 4, at side-notes 64–66; Sangero, *supra* note 34, at 552–53 (emphasizing that protecting an individual’s autonomy is the primary justification for private defense, for “the absence of injury or danger to the attacked person’s autonomy undermines the basis for an exception of any kind of self-defense”).

157. RAZ, *supra* note 151, at 273–74; see also ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 1–29 (2009) (providing an overview of Kant’s position on law and justice).

158. U.N. Declaration, *supra* note 80, art. 29.

159. See Cynthia V. Ward, *Restoring Fairness to Campus Sex Tribunals*, 85 *TENN. L. REV.* 1073, 1104–08 (2018) (arguing that the law creates a strong presumption against state intervention and punishment in personal relationships, unless behaviors clearly violate another’s physical autonomy); Erb, *supra* note 52, at side-note

Indeed, it would be odd if self-defense were the only area of human endeavor where a person was permitted to act in a purely self-interested manner without regard for the external costs of such action.¹⁶⁰ Stated differently, although self-defense obviously plays an important role in ordered society, the criminal law must provide even the fully culpable attacker's autonomy with *some* level of protection because the law concerns itself with protecting the well-being of *all* people.¹⁶¹ That said, there undoubtedly will be disagreement on precisely where the boundary should be drawn, and indeed, the resolution of this core challenge is what the value-based model seeks to make more explicit. As the thematic literature review in Part I illustrates, even though the value of protecting the defender's autonomy is almost universally recognized, there is far less agreement on how it should function when in tension with competing values.

E. Value #5: Ensuring the Primacy of the Legal Process

Summary Justification for Including this Value:

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

Tension with, or Support for, the Other Values:

This value supports the proposition that, all other things being equal, societies prefer to have disputes settled in court, rather than through the use of self-preferential force. As such, this value is most closely aligned with protection of the state's monopoly on force (Value #1), protection of the individual

215; Tsilly Dagan, *The Currency of Taxation*, 84 *FORDHAM L. REV.* 2537, 2558–59 (2016) (describing the role of taxation in democratic societies). Cf. JOHN STUART MILL, *ON LIBERTY AND UTILITARIANISM* 143–50 (Bantam Books 1993) (1859) (noting that Mill recognized that “individual autonomy [is] not limitless” in circumstances when an individual’s behavior “directly impacts others,” and especially when that behavior is harmful to others).

160. See Steven D. Smith, *Is the Harm Principle Illiberal?*, 51 *AM. J. JURIS.* 1, 4–14 (2006) (contending that the harm principle has been extended to regulate conduct that is apparently harmless); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 *U. CHI. L. REV.* 1159, 1167–70 (2003) (discussing the problems humans encounter when given the freedom to make decisions for themselves); JOHN STUART MILL, *ON LIBERTY AND OTHER WRITINGS* 11 (Stefan Collini ed., 1989) (discussing how law imposes, for general observance, the preferences of society rather than the preferences of an individual).

161. See LEVERICK, *supra* note 5, at 3; Erb, *supra* note 52, at side-notes 217–23. Cf. Creach, *supra* note 87, at 627 (“Self-defense represents legally sanctioned vigilante action.”).

attacker (Value #2), and maintenance of the legitimacy of the legal order (Value #6). Warding off the imputation of unequal standing (Value #3), protection of the defender (Value #4), and deterrence (Value #7) are, all other things being equal, more likely to be antagonistic to, and therefore in tension with, this value.

Limitations:

This value is only implicated in cases where (1) resort to the legal process is a realistic possibility, and (2) the rights threatened are generally compensable. That is, in those cases where the attacker threatens death or serious bodily injury, resort to the legal process cannot prevent or remedy the damage. In such cases, therefore, this decision-ground carries far less weight.

As observed with Value #1 (violence-reduction/monopoly on force), in a liberal society, law and private violence are often presumptively antagonistic.¹⁶² Law serves to minimize societal violence while at the same time striving to be no more coercive than necessary.¹⁶³ Unjustified and unsanctioned violence, on the other hand, is disruptive and undermines organized society and threatens the legal order. This is one reason that having the ability to resort to the available legal process to resolve disputes is considered a fundamental human right, and it is why necessity should not be the only limitation on a defender's right to exercise self-preferential force.¹⁶⁴ This value, like the collective interest in minimizing violence (Value #1) and the individual attacker's right to life (Value #2), is, therefore, in tension with the immediately preceding value's focus on the defender's autonomy (Value #4). For if defender autonomy were the only salient interest, a defender would be permitted to use *all* force necessary to prevent *any* intrusion into it.

Based on the foregoing discussion, I assume relatively broad, general agreement for the proposition that society has a powerful collective interest in thoughtfully circumscribing the situations in which citizens are permitted to use private violence against each other. The criminal justice system, for example, must delicately balance a citizen's right to safety and the citizen's right to protect that citizen's autonomy (Value #4), against its commitment to maintaining a stable society that punishes only after due process, and that does not tolerate vigilante law

162. See Kim, *supra* note 17, at 290 (discussing the sacrifice to the state of the natural right of self-defense through the social contract); Whitman, *supra* note 83, at 902–03 (discussing the tension between criminal law doctrine and vengeance); Austin Sarat & Thomas Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, in THE FATE OF LAW 209, 212 (Austin Sarat & Thomas R. Kearns eds., 1991) (arguing that legal theory is inattentive to law's violence); Schwirck, *supra* note 96, at 81 (explaining that under the general view of "law and violence as antagonistic," law contributes to social order by countering violence). For a discussion on why the value-based model does not treat protection of the socio-legal order as a stand-alone value, see *supra* Section III.C.

163. See Schwirck, *supra* note 96, at 81.

164. See generally U.N. Declaration, *supra* note 80, arts. 6–8, 11 (affirming universal rights to legal remedies); ECHR, *supra* note 52, arts. 1, 13 (affirming the right to legal remedies).

enforcement or acts of revenge that threaten to undermine the legitimacy of the legal order (generally, Values #5 and #6).¹⁶⁵

To the extent possible, then, the justice system must promote the resolution of disputes in the courts. Vigilantism and similar unauthorized crime-control options seek to wrest from the state the authority to punish and condemn. To many, this threatens to incrementally push society toward non-democratic lawlessness.¹⁶⁶

F. Value #6: Maintaining the Legitimacy of the Legal Order

Summary Justification for Including this Value:

A frequently discussed objective of a functioning criminal justice system is that the populace respects it and considers it legitimate. A system's proscriptions and defenses can, at least from a sociological point of view, be fairly described as the formal embodiment of a set of elementary moral values in an official edict. These values, in turn, are reinforced with exceptions (defenses) and official penal sanctions. A functioning justice system must, therefore, embody widely held moral standards of right and wrong; that is, it must reflect—or at least come close to reflecting—what has already been termed the “fully expressed public morality.” As procedural justice theory teaches, a justice system that enjoys this type of popular support is able to more effectively draw on the stigmatic effect of conviction to reinforce basic moral standards and encourage compliance.

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

Applying these more generalized observations to the self-defense framework, to maintain the criminal law's moral authority and its corresponding popular legitimacy, the justice system's range of permissible uses of defensive force must not drastically deviate from the community's perceptions of “just

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

166. See Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 33 (2012); Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1100–01 (2007) (noting that there are “vast swaths of criminal behavior where the State systematically relaxes its punishment monopoly” and permits (or even requires) victims to engage in certain amounts of self-help); William Gossett, *The Rule of Law or the Defiance of Law*, 55 A.B.A. J. 823, 824 (1969) (discussing the danger in wiping out the rule of law in favor of insurrection and repression to achieve political and social goals); Uniacke, *supra* note 19, at 73, 80 (discussing the duty in civil society to seek security through a “common rule” rather than through “self-defensive violence”).

results.” For even though political liberalism may be premised on a plurality of reasonable moral doctrines, there is a limit to what a free democratic regime bound by the majority principle can tolerate.

Tension with, or Support for, the Other Values:

Maintaining the legitimacy of the legal order is another value that can be viewed very differently depending on one’s perspective. Those who tend to place greater significance on equal standing between people (Value #3), protecting the defender (Value #4), and deterrence (Value #7) can be expected to object to outcomes they consider too deferential to the goals of collective violence reduction (Value #1), protection of the attacker (Value #2), and ensuring the primacy of the legal process (Value #5). Of course, the same is true in the opposite direction. But although disagreement with specific outcomes is inevitable, reaching results that shake people’s fundamental confidence in the moral legitimacy of the legal order are the ones that implicate Value #6.

Limitations:

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

Trust and legitimacy, both central to ensuring the moral authority of the law,¹⁶⁷ dominate contemporary discussions of procedural justice.¹⁶⁸ Social psychology

167. See Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 356 (2016) (discussing the importance of trust and legitimacy in effective procedural justice).

168. See Stephen Cody & Alexa Koenig, *Procedural Justice in Transnational Contexts*, 58 VA. J. INT’L L. 1, 8–11 (2018) (investigating the perceived fairness and legitimacy of the legal system based on participants’ input); Kristina Murphy, Ben Bradford & Jonathan Jackson, *Motivating Compliance Behavior Among Offenders: Procedural Justice or Deterrence?*, 43 CRIM. JUST. & BEHAV. 102, 102–03 (2016) (noting that law-abiding citizens are often motivated by their belief in the legitimacy of the laws); Bottoms & Tankebe, *supra* note 120, at 120 (explaining that “the dominant theoretical approach to legitimacy . . . is that of ‘procedural justice’”); JONATHAN JACKSON, BEN BRADFORD, BETSY STANKO & KATRIN HOHL, *JUST AUTHORITY?: TRUST IN THE POLICE IN ENGLAND AND WALES 1* (2012) (providing an empirical review of public trust and police legitimacy). Perceived “procedural injustice,” in contrast, has been said to contribute to increased public support for violent self-help mechanisms, including vigilante violence. See Justice Tankebe, *Self-Help, Policing, and Procedural Justice: Ghanaian Vigilantism and the Rule of Law*, 43 LAW & SOC’Y REV. 245, 253–54, 260 (2009) (arguing that people who perceive the police as trustworthy are less likely to support vigilante violence). Note that the

has produced an extensive literature on the central concept that, to be considered *legitimate*, the public must collectively believe that “authorities, institutions, and social arrangements are appropriate, proper, and just.”¹⁶⁹ To be *effective*, on the other hand, “legal rules and decisions must be obeyed.”¹⁷⁰ The procedural justice perspective is that, when compared to punishment, deterrence, or other external incentives, internalized feelings of legitimacy and trust are more potent and longer lasting.¹⁷¹ As Tom Tyler frames it, the public’s “law-related behavior [is] powerfully influenced by people’s subjective judgments about the fairness of the procedures through which the police and the courts exercise their authority.”¹⁷² And so, when a system is viewed as achieving unfair results, “[t]his undermines [the system’s] legitimacy.”¹⁷³

Identifying an agreed-upon definition of “legitimacy” is challenging.¹⁷⁴ Sociologists and psychologists focus on people’s attitudes toward authority.¹⁷⁵ From this perspective, legitimacy, rather than being dictated by a single transaction, “is more like a perpetual discussion, in which the content of the power-holders’ later claims will be affected by the nature of the audience response.”¹⁷⁶

Normative legitimacy, on the other hand, is a moral and political concept. It is intertwined with the idea that the legal authority has a right—indeed, a moral

term “procedural justice” is a broad concept that encompasses both the quality of decision-making and outcomes, as well as the more process-based quality of treatment. See Bottoms & Tankebe, *supra* note 120, at 145. This Article focuses on the former (outcomes) more than the latter (procedure).

169. Tom Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 376 (2006); see also Cody & Koenig, *supra* note 8, at 9–11 (noting that a person’s willingness to accept judicial outcomes largely depends on their view of the court’s procedural fairness); Miranda Boone & Mieke Kox, *Neutrality as an Element of Perceived Justice in Prison: Consistency Versus Individualization*, 10 UTRECHT L. REV. 118, 118 (2014) (defining legitimacy as “the belief that authorities, institutions, and social arrangements are appropriate, proper, and just”); Ian Loader & Richard Sparks, *Unfinished Business: Legitimacy, Crime Control, and Democratic Politics*, in LEGITIMACY AND CRIMINAL JUSTICE: AN INTERNATIONAL EXPLORATION 105–26 (Justice Tankebe & Alison Lieblich eds., 2013) (exploring the concept of legitimacy as it relates to crime control); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 265 n.213 (2004) (cataloging various studies on perceptions of procedural justice).

170. Tom Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 856 (1998).

171. See Miller, *supra* note 167, at 356; Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 283–85 (2003) [hereinafter Tyler, *Procedural Justice*]; see also Matthew Dyson & Benjamin Vogel, *Reflections on Criminal Law in England and Germany*, in THE LIMITS OF CRIMINAL LAW: ANGLO-GERMAN CONCEPTS AND PRINCIPLES 551, 563–64 (Matthew Dyson & Benjamin Vogel eds., 2018) (discussing the prevalence of shared values and trust in English law).

172. Tyler, *Procedural Justice*, *supra* note 171, at 284.

173. *Id.* at 287; see Bottoms & Tankebe, *supra* note 120, at 120–21 (citing RICHARD SPARKS, ANTHONY BOTTOMS & WILL HAY, PRISONS AND THE PROBLEM OF ORDER 2 (1996)).

174. DAVID BEETHAM, THE LEGITIMATION OF POWER 34 (2013) (discussing differences between the legal, philosophical, and sociological meanings of “legitimacy”); see also Bottoms & Tankebe, *supra* note 120, at 124–32 (discussing definitions of “legitimacy”); JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 128 (2009); MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 53–56, 215 (Guenther Roth & Claus Wittich eds., 1978).

175. See Bottoms & Tankebe, *supra* note 120, at 129; BEETHAM, *supra* note 174, at 20; Tyler, *Procedural Justice*, *supra* note 171, at 307–08; WEBER, *supra* note 174, at 31–36.

176. Bottoms & Tankebe, *supra* note 120, at 129.

right—to regulate conduct or issue directives, and it “requires that processes are (morally or politically) fair or just or lawful.”¹⁷⁷ Legal legitimacy, which can be considered a species of normative legitimacy, requires that authority be exercised according to legally valid rules.¹⁷⁸ Finally, democratic legitimacy requires an authority that allows its subjects to participate in the decision-making process and that also is genuinely responsive to their interests.¹⁷⁹

Procedural justice, as discussed here, primarily concerns itself with sociological and psychological creditworthiness, that is, how people *feel* about authorities and the broader criminal justice system, rather than democratic or normative legitimacy, which focuses on whether the authority’s actions are, in fact, lawful or responsive or justified. Social science research has, in fact, raised doubts about the once-popular notion that legislators can effectively deter crime purely by manipulating the universe of criminal proscriptions or by increasing punishment.¹⁸⁰

Value #6’s more modest goal, then, is to avoid results in self-defense cases that discourage three desirable and interlinked behaviors among the public—namely, compliance with the law, cooperation with legal authorities, and support for the empowerment of the law.¹⁸¹ And, to this point, research has consistently demonstrated that “[t]he loss of popular legitimacy for the criminal justice system produces disastrous consequences for the system’s performance. If citizens do not trust the system, they will not use it.”¹⁸²

In short, perceived injustice in the outcome of a self-defense case can seriously, though typically only incrementally, undermine the perceived trustworthiness of the broader criminal justice system.¹⁸³ And this can lead to the justice system

177. Miller, *supra* note 167, at 358; Joseph Raz, *Legitimate Authority*, in *THE AUTHORITY OF LAW* 3, 3–4 (2009); Bottoms & Tankebe, *supra* note 121, at 131–32.

178. See Miller, *supra* note 167, at 356.

179. See *id.* at 357.

180. See EVAN OSBORNE, *SELF-REGULATION AND HUMAN PROGRESS: HOW SOCIETY GAINS WHEN WE GOVERN LESS* 13–37 (2018).

181. See Tyler, *Procedural Justice*, *supra* note 171, at 290, 310–18.

182. *Id.* at 291 (citation omitted); see also Bottoms & Tankebe, *supra* note 120, at 154–55, 160–68 (discussing legitimacy studies and calling for more empirical work); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 *HASTINGS L.J.* 127, 134–37 (2011) (canvassing procedural justice research); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 *J. DISP. RESOL.* 1, 3–4 (2011) (examining research about the effects of people’s perceptions of procedural justice); John Darley, Tom R. Tyler & Kenworthy Bilz, *Enacting Justice: The Interplay of Individual and Institutional Perspectives*, in *THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY* 458, 464–65 (Michael A. Hogg & Joel Cooper eds., 2003) (discussing how a system’s loss of legitimacy can lead to disobedience); BEETHAM, *supra* note 174, at 35 (“Legitimate power . . . is limited power; and one of the ways in which it loses legitimacy is when the powerful fail to observe its inherent limits.”); Martin Hoffman, *Moral Internalization: Current Theory and Research*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 85, 85–133 (Leonard Berkowitz ed., 1977) (stating that “moral internalization” becomes important in a society that fails to consistently reward correct behavior and punish deviation).

183. Cody & Koenig, *supra* note 168, at 24; David De Cremer & Tom R. Tyler, *The Effects of Trust in Authority and Procedural Fairness on Cooperation*, 92 *J. APPLIED PSYCH.* 639, 640 (2007); Maarten Van Craen

finding itself unable to safeguard the fundamental human rights discussed throughout this Article.¹⁸⁴

G. Value #7: Detering Potential Attackers

Summary Justification for Including this Value:

For good reason, systemically deterring crime is generally considered a central function of the criminal justice system. When a person uses force to thwart an attack on herself, she clearly imposes an immediate, and potentially significant, cost on the attacker that makes wrongdoing riskier. The greater the scope of permitted self-defense, the higher the likelihood that potential attackers will be deterred from engaging in the kind of conduct that authorizes defensive force.

Tension with, or Support for, the Other Values:

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

Limitations:

This (in some circles) controversial decision-ground, like safeguarding equal standing between citizens (Value #3), is only implicated when the attacker is culpable. If, on the other hand, the attacker is not culpable because she, for example, is operating under an honest and reasonable mistake, then the attacker by definition cannot be deterred by the availability of self-defense. Of course, if the attacker is acting recklessly, carelessly, or negligently, the analysis might change.

The final value is deterrence.¹⁸⁵ Indeed, this value in many ways can be viewed as buttressing the other values and the fundamental human rights they represent and protect.¹⁸⁶

& Wesley G. Skogan, *Trust in the Belgian Police: The Importance of Responsiveness*, 12 EUR. J. CRIMINOLOGY 129, 145 (2015).

184. See, e.g., U.N. Declaration, *supra* note 80, arts. 1–3, 6–8, 10–13, 17, 20, 22, 29; ECHR, *supra* note 52, arts. 2, 5–6, 8, 11, 13.

185. See Rönna & Hohn, *supra* note 4, at side-notes 66–67; Erb, *supra* note 52, at side-note 4; Daniel M. Farrell, *The Justification of General Deterrence*, 94 PHIL. REV. 367, 369–73 (1985) (characterizing indirect self-defense as a person's right to threaten harm in order to deter an aggressor). *But see* Dennis P. Rosenbaum,

Broadly speaking, deterrence is divided into two categories.¹⁸⁷ General deterrence is indirect, in that it focuses on general prevention of crime by sending a “message” to the universe of potential bad actors.¹⁸⁸ Specific deterrence, in contrast, focuses on the individual in question; its intent is to discourage her from future criminal acts by inculcating her with an understanding of the adverse consequences of criminality.¹⁸⁹ So, although general deterrence strategies focus on future group behaviors by impacting potential criminals’ rational decision-making processes, specific deterrence focuses on directing the threat of punishment or negative consequences to known individuals in order to prevent those persons from committing crimes in the future.¹⁹⁰

1. General Deterrence and Self-Defense

When applied to self-defense, the theory grounding general deterrence leads to the reasonable assumption that more permissive self-defense laws will generally deter crime.¹⁹¹ The logic is that individuals will more likely think twice before engaging in criminal conduct that could trigger the right of the victim to exercise self-defense.¹⁹² Thus, there is a claimed benefit when self-defense laws cause a

Community Crime Prevention: A Review and Synthesis of the Literature, 5 JUST. Q. 323, 336 (1988) (“Clearly, deterrence (whether specific or general) and self-defense are separate objectives.”).

186. Both general and specific deterrence, for example, can be said to protect the right to life and the equality between people. See U.N. Declaration, *supra* note 80, arts. 1, 3, 29; ECHR, *supra* note 52, arts. 2, 5.

187. See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 992–99 (2003) (discussing three factors to consider in improving the deterrent effect of punishment—certainty of punishment, its delay, and its severity); Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521, 535 (1973) (distinguishing between the deterrent and preventative effects of punishment, with the latter referring to the inability of offenders to commit crimes while imprisoned).

188. Athula Pathinayake, *Should We Deter Against General Deterrence?*, 9 WAKE FOREST J.L. & POL’Y 63, 78 (2018); see also Mirko Bagaric & Peter Isham, *A Rational Approach to the Role of Publicity and Condemnation in the Sentencing of Offenders*, 46 FLA. ST. U. L. REV. 239, 247–48 (2019) (explaining how the message that would be sent to the public was a factor considered by the judge in sentencing former U.S. Rep. Anthony Weiner).

189. See Mirko Bagaric, Gabrielle Wolf & Peter Isham, *Trauma and Sentencing: The Case for Mitigating Penalty for Childhood Physical and Sexual Abuse*, 30 STAN. L. & POL’Y REV. 1, 43 (2019) (defining specific deterrence and presenting empirical data suggesting that it is an ineffective form of deterrence).

190. See Robert E. Wagner, *Corporate Criminal Prosecutions and Double Jeopardy*, 16 BERKLEY BUS. L.J. 205, 218 (2019) (discussing the application of general and specific deterrence in the context of corporate criminal liability); see also Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 203 (2011) (arguing that deterrence is achieved through the norms articulated by the common law system rather than through standards, rules, or guidelines); Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1, 61 (2007) (discussing perceptual deterrence—the notion that the deterrent effect of punishment will vary between individuals based on their personal experiences and the corresponding experiences of their acquaintances).

191. It must be conceded that this proposition, to the best of the Author’s knowledge, has not been (and perhaps cannot be) empirically verified with reliable or conclusive results. See Raymond Paternoster, *Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective*, 23 LAW & SOC’Y REV. 7, 8 n.1 (1989) (noting that the deterrent effect of delays in punishment has received “scant research attention”).

192. See Rönnau & Hohn, *supra* note 4, at side-notes 66–67.

potential criminal to worry that his criminal behavior is likely to result in tangible and immediate negative consequences.¹⁹³

But do criminals in fact act in a sufficiently rational manner to make the deterrence argument salient? There is substantial support for the view that criminals, as a group, do not typically engage in highly rational future planning.¹⁹⁴ Instead, research has shown that criminals generally tend to act impulsively and opportunistically; in fact, violent attackers in particular tend not to carefully weigh the pros and cons of their attacks.¹⁹⁵ As the court quoted in *United States v. Gullely*, “[M]any of the offenders that we see commit what we would consider almost irrational crimes. They’re impulsive, they have difficulty controlling their impulses, and they exercise poor judgment. That’s a characteristic of their lives.”¹⁹⁶ Of course, there are still those who advance the contrary idea that criminals generally do act rationally from an instrumental perspective.¹⁹⁷

But in the final analysis, harboring some doubts about the precise efficacy of both specific and general deterrence does not negate the value. For there is scant support for the proposition that loosening restrictions on self-defense has no

193. See Jennifer Garcia, *Defending Self-Defense: Why Florida Should Follow the Eleven States That Already Allow for Campus Carry*, 31 ST. THOMAS L. REV. 89, 103–05 (2018) (discussing how allowing faculty and students to carry concealed weapons would make it less likely that shooters would target their campus because of the anticipated resistance); Orrin G. Hatch, *The Brady Handgun Prevention Act and the Community Protection Initiative: Legislative Responses to the Second Amendment*, 1998 BYU L. REV. 103, 121–22 (1998) (arguing that right-to-carry laws can help deter violent crime because some offenders choose not to commit certain crimes for fear that their potential victims are armed); John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-To-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 64 (1997) (finding that “allowing citizens . . . to carry concealed handguns deters violent crimes”). *But see* Lesch, *supra* note 3, at 86–87, 106 (taking the position that deterrence should not play a role in self-defense analysis).

194. See Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 178–81 (2004) (reviewing evidence that suggests that criminals do not behave rationally). *Cf.* Charles N. W. Keckler, *Life v. Death: Who Should Capital Punishment Marginally Deter?*, 2 J.L. & ECON. 51, 77 n.61 (2006) (contending that “even highly abnormal offenders act rationally to avoid arrest”).

195. See Edward J. Latessa & Myrinda Schweitzer, *Community Supervision and Violent Offenders: What the Research Tells Us and How to Improve Outcomes*, 103 MARQ. L. REV. 911, 937 (2020) (“The problem is that most street-level criminals act impulsively; have a short-term perspective; are often disorganized and have failed in school, jobs, and relationships; have distorted thinking; hang around with others like themselves; use drugs and alcohol; and are not rational actors.”); *see also* Warren Brookbanks & Richard Ekins, *The Case Against the “Three Strikes” Sentencing Regime*, 2010 N.Z. L. REV. 689, 708 (2010) (discussing how the effectiveness of a warning system on crime deterrence depends on offenders’ capacity to think rationally); T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 929 (1996) (discussing results of studies showing that when criminals decide to commit crimes, they adopt an opportunistic attitude); *United States v. Reynolds*, 235 U.S. 133, 150 (1914) (Holmes, J., concurring) (explaining that impulsive people may not fully consider the consequences of committing crimes).

196. *United States v. Gullely*, 29 F. App’x 228, 230 (6th Cir. 2002) (quoting the trial court judge’s comments about the rationality of some defendants).

197. *See, e.g.*, Anna Driggers, *Raj Rajaratnam’s Historic Insider Trading Sentence*, 49 AM. CRIM. L. REV. 2021, 2036 (2012); Keckler, *supra* note 194, at 77 n.61; *see also* Lucian E. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargain, and the Loss of Innocence*, 101 KY. L.J. 723, 739–40 (2013) (noting that the likelihood of apprehension and conviction deters criminal behavior).

deterrent effect. And if this were ever to change, a system can simply decide to accord less weight to the value of deterrence.

Turning to this value's limitations, here, too, the culpability of the attacker plays a crucial role in determining whether the value can serve as a decision-ground. If an individual is not culpable (that is, not following an intentional and voluntary action-plan that either involves posing a criminal threat to someone, or, alternatively, that demonstrates disregard for another's rights via recklessness, carelessness, or perhaps even negligence), then changing the nature or amount of defensive force available can be expected to have little or no impact on that attacker's behavior.¹⁹⁸ A young child or a mentally incompetent attacker who mistakenly thinks that the person he is attacking is a tree will not change his conduct, regardless of the amount of defensive force he potentially faces.

2. Specific Deterrence and Self-Defense

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

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

With an eye on re-emphasizing, along with the promise of this approach, it will be readily conceded that the seven values just discussed could be organized differently. For example, reducing overall societal violence (Value #1), ensuring the primacy of the legal process (Value #5), maintaining the legitimacy of the legal order (Value #6), and general deterrence (a component of Value #7) could be grouped together as tending to reflect broader *collective or societal* interests. On the other hand, protection of the attacker's individual (presumptive) right to life (Value #2), maintaining the equal standing between persons (Value #3), protecting the defender's autonomy (Value #4), and specific deterrence (the other component of Value #7) could be grouped together as tending to safeguard *personal or individual* interests. Alternatively, the values could be grouped by those *authorizing* defensive

198. See Rönnau & Hohn, *supra* note 4, at side-notes 66–67; Michelle Y. Ewert, *One Strike and You're Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violated Due Process and Fair Housing Principles*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 57, 77 n.130 (2016) (stating that strict liability is unlikely to have a deterrent effect if the person is unaware of the criminal nature of an act).

force (primarily Values #3, #4, and #7) and those tending to *restrict* defensive force (primarily Values #1, #2, and #5; Value #6's focus on maintaining the legitimacy of the legal order tends to function more like a "swing value" in that normative judgments will impact whether it authorizes or restricts defensive force). That said, the position taken here is that, even though such alternative groupings can be justified, the order selected defensibly serves its hypothesis-testing function.

It further is conceded that assigning any particular "relative weight" to competing interests is inherently a normative judgment, rather than a quasi-scientific determination. The identified values, after all, do not have self-evident weights. As such, any "balancing" of values is inherently challenging. In addition, there are some jurisprudential challenges implicated when seeking to balance basic individual human rights (such as the right to life) against more collective interests (such as reduction in crime). As Zedner puts it:

Typically, conflicting interests are said to be 'balanced' as if there were a self-evident weighting of or priority among them. Yet, rarely are the particular interests spelt out, priorities made explicit, or the process by which a weighting is achieved made clear Although beloved of constitutional lawyers and political theorists, the experience of criminal justice is that balancing is a politically dangerous metaphor unless careful regard is given to what is at stake.¹⁹⁹

The fact that all "balancing" efforts are open to some level of critique is, however, far from fatal to the present undertaking.

H. Why Protection of the "Legal Order" Is Not Treated as a Separate Value

Some readers may wonder why we do not treat "protection of the legal order" as an independently cognizable value. It is true that several scholars, including Sangero, Mordechai Kremnitzer, and Khalid Ghanayim, have followed the German approach of treating protection of the legal order as an independent factor, value, or principle. Sangero, for example, echoes the German approach in that he believes that "the justification of private defence . . . is based on the social interest of protection of the public order in general and the legal system in particular."²⁰⁰ Kremnitzer and Ghanayim phrase it this way:

199. Lucia Zedner, *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*, 32 J.L. & SOC'Y. 510, 510–11 (2005) (footnote omitted); see also Jürgen Habermas, *Reply to Symposium Participants*, Benjamin N. Cardozo School of Law, in HABERMAS, ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 430 (1998) (arguing that the balancing of values gives courts overly broad discretionary power); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1001–05 (1987) (explaining that the balancing of interests may not be useful in constitutional adjudication because interests noticed by legislative policymakers are not necessarily constitutional concerns).

200. SANGERO, *supra* note 32, at 67. This perspective finds support in communitarian and civic republican literature (two closely related, though not entirely overlapping, schools of thought), which emphasize that civic virtue is a republic's lifeblood; without a citizenry that is ready and willing to take an active part in defending the government (and, relatedly, the rule of law), even a mixed constitution will fail. See Richard Dagger, *Communitarianism and Republicanism*, in HANDBOOK OF POLITICAL THEORY 67, 170–71 (Gerald F. Gaus &

As opposed to necessity, self-defense permits harm only to the aggressor, and is intended to reinforce the legal order by nullification of the injustice. Self-defense is intended to strengthen public trust in the efficacy of the legal order. Therefore, protecting the legal order forms one of the rationales for self-defense. Self-defense is “defending the victim’s legal interests within the legal order.”²⁰¹

Although I am certainly not taking the position that protection of the legal order is irrelevant, I maintain that this concept of protecting “the law” is already sufficiently accounted for by other values. Specifically, the interest in protecting “the law” is already embedded in the value of warding off the imputation of lesser standing (Value #3). Additionally, Value #1 seeks to promote collective violence-reduction by limiting the right of self-defense to those cases in which the state is unable to protect the person being attacked.²⁰² Furthermore, Value #4 authorizes force to protect the defender’s legally recognized right to autonomy,²⁰³ Value #6 seeks to avoid outcomes that could undermine the perceived moral legitimacy of the legal order,²⁰⁴ and Value #7 concerns deterring future violations of the law.²⁰⁵ Thus, the interests reflected in these four free-standing values infuse the concept of “protection of the socio-legal order” with their substance.²⁰⁶ Although I, therefore, recognize that it is possible to try to unify these different legal-order-protecting interests under one umbrella term, the position advanced is that those interests are dispersed throughout these different values. Including “protection of the socio-legal order” as a separate value is therefore redundant.

I. Why Ensuring the Primacy of the Legal Process and Maintaining the Legitimacy of the Legal Order Are Not Coextensive Values

One may also wonder why ensuring the primacy of the legal process (Value #5) is not subsumed within the decision-ground of maintaining the legitimacy of the legal order (Value #6). The answer is that the value of maintaining the legitimacy of the legal order, as we have defined it, is only implicated in cases in which the defensive conduct under consideration, or the proposed limitation of such conduct, is so far outside the bounds of the fully-expressed public morality that it threatens the

Chandran Kukathas eds., 2014) (discussing the communitarian focus on protecting community standards and cohesion).

201. Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor’s Culpability in Self-Defense*, 39 TULSA L. REV. 875, 882 (2004) (citation omitted).

202. See *supra* Section III.A.

203. See *supra* Section III.D.

204. See *supra* Section III.F.

205. See *supra* Section III.G. While, as noted, Values #2, #3, and #4 concern private or relational harm against the victim, society’s more general right to remain free from violence is most directly addressed in this value (Value #7) as well as in Value #1.

206. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 869 (1978) (“[T]he autonomy of the individual is identified with the sanctity of the Legal Order.”); see also SANGERO, *supra* note 32, at 68 (discussing self-defense’s impact on “detering offenders and preventing offences”).

law's very moral authority by undermining the public's respect for the law.²⁰⁷ Such cases ought to be relatively rare. Nevertheless, it is a particularly important value to consider in self-defense cases given the unusually intense amount of public scrutiny they often receive.²⁰⁸

Ensuring primacy of the legal process seeks to reasonably avoid self-help options by presumptively relying on the judicial forum to adjudicate disputes, to address losses to person or property, and to impose punishment. In this sense, this value is in most direct tension with the value of protecting defender autonomy (Value #4). Thus, if the above-described German farmer recognized the fruit thief or otherwise could use legal process to seek the return of, or compensation for, the stolen fruit, then his decision to shoot the thief to protect his apples would be further undermined. Because in liberal democracies the criminal justice system is responsible for punishment,²⁰⁹ instances of claimed self-defense must be carefully scrutinized to confirm that legal process options were not reasonably available.

IV. THE VALUE-BASED MODEL AND THE FORFEITURE OF RIGHTS

Central to the value-based model is that it uniquely distinguishes between culpable and innocent threats by cleaving wrongs implicating waiver from harms implicating forfeiture. The basis for the differentiation is found in the normative and qualitative differences between these two types of threats. Explicitly drawing this distinction allows us to overcome the long-standing deficiencies inherent in conceptions of a morally undifferentiated "aggressor" posing an "unjust and immediate threat" and thus resulting in the aggressor "forfeiting" his rights.

In fact, to date the discussion over how it is that a person can exercise defensive force against another has always focused on whether, when, and how an attacker can be said to have "forfeited" her right to non-interference. This, in turn, caused

207. See Steven E. Clark, Molly B. Moreland & Raket P. Larson, *Legitimacy, Procedural Justice, Accuracy, and Eyewitness Identification*, 8 U.C. IRVINE L. REV. 41, 61–66 (2018) (arguing that while certain identification procedures may lead to correct identifications, if such procedures use deception or coercion they would not promote the legitimacy of the legal system and thus should be discouraged); Tom Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 233 (2008) (hypothesizing that people's views about the institutional legitimacy of the law influences their willingness to cooperate with law enforcement); Tyler, *Procedural Justice*, *supra* note 171, at 283–357; Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 377–78 (2001) (explaining that people are more likely to trust law enforcement if they evaluate law enforcement and its procedures as fair); TOM TYLER, *WHY PEOPLE OBEY THE LAW* 20–26, 161–65 (1990) (explaining the importance of legal authority's perceived legitimacy to obtaining compliance with laws from citizens).

208. See Mary E. Castillo, *Florida's Stand Your Ground Regime: Legislative Direction, Prosecutorial Discretion, Public Pressures, and the Legitimization of the Criminal Justice System*, 42 J. LEGIS. 101, 101–02 (2016) (highlighting how highly publicized cases should affect prosecutorial decision-making).

209. See Angela E. Addae, *Challenging the Constitutionality of Private Prisons: Insights from Israel*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 527, 549–52 (2019); Markel, *supra* note 166, at 38–43; Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1089–90 (2010).

some commentators to note that “forfeiture” implies a knowing abdication of protection, and that few attackers (in particular, innocent attackers) can be said to have knowingly given up their right to legal protection.²¹⁰ To bridge this analytical gap we have developed the concept of “waiving” the right to non-interference (implying an unintentional relinquishment which can apply to moral innocents) as a counterpoint to the long-standing notion that an attacker “forfeits” her right to non-interference (implying an intentional or knowing relinquishment as a result of some level of moral culpability). This Article’s position is that there is a crucial distinction between forfeiture and waiver, and that this distinction is valuable in helping to overcome the long-standing criticisms of “forfeiture theory.”

Several commentators, including Leverick, Sangero, Uniacke, and Judith Jarvis Thomson, have endorsed the view that a person’s right to life is ultimately conditioned on conduct. But this common-sense observation merely initiates the analysis because, in order to infuse the position with content, one must understand, at a minimum, what types of conduct create what kinds of limitations on a person’s conditional right to life.

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

It is acceptable to kill an aggressor because the aggressor, in becoming an unjust immediate threat to the life of another that cannot be avoided by reasonable means, *temporarily forfeits her right to life*, at least as long as these conditions remain in force.²¹¹

Leverick’s quasi-Hohfeldian “claim-right” point of departure,²¹² however, is considerably hampered by the bluntness of the term “forfeiture.” Under the orthodox view, an attacker forfeits his rights as a result of his wrongful conduct, which implies a form of punishment or penalty.²¹³

Uniacke, for her part, hinges her analysis on life being conditional in the sense that it can be extinguished if a person (whether morally innocent or culpable) becomes an “unjust immediate threat to another person’s life or proportionate interest.”²¹⁴ Or as Jeremy Horder, relying on Uniacke, put it:

[A] right not to be harmed—including, in appropriate circumstances, a right not to be killed—depends on one’s conduct, including more broadly one’s

210. LEVERICK, *supra* note 5, at 213; SANGERO, *supra* note 32, at 39–44, 88; UNIACKE, *supra* note 18, at 213; Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 299 (1991).

211. LEVERICK, *supra* note 5, at 2 (emphasis added); *see also* Thomson, *supra* note 210, at 299 (contending that all that is necessary for self-defense to be available is that another threatens your life unless you kill them first). By contending that self-defense is available against “threats” as well as attackers, Thomson removes culpability from the calculus. *Id.*

212. *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 16–59 (1913) (discussing that all legal relationships can be described with only eight terms, the last of which is “no right”).

213. *See* Thomson, *supra* note 210, at 300; LEVERICK, *supra* note 5, at 67; Whitley Kaufman, *Is There a Right to Self-Defense?*, 23 CRIM. JUST. ETHICS 20, 25–29 (2004); SCHOPP, *supra* note 14, at 75–76.

214. UNIACKE, *supra* note 18, at 196.

involuntary conduct and what is happening to one. Whilst one is posing an unjust threat, a gap opens up in one's right not to be harmed, that instantly closes the moment one ceases to pose such a threat. The existence of that gap is what makes it possible to say that the self-preferential use of force to ward off a threat does not violate rights, so long as the force is directed only at negating the threat itself, and takes the form only of necessary and proportionate steps towards that end

The main point of using the language of forfeiture, in this context, is to press home one simple point about the luckless person who becomes an unjust threat willy-nilly, like the man thrown down the well. One may forfeit rights through no fault of one's own The point is that to say that the luckless person who becomes an unjust threat willy-nilly has lost his right not to be harmed, in so far as harm is a necessary and proportionate means of negating the threat, is not an argument weakened by that person's lack of fault or voluntary conduct. Simply becoming an unjust threat may open up a gap in certain of one's rights, just as simply having failed to apply for something in time may lead to the complete extinction of other rights.²¹⁵

The position proposed here seeks to overcome the moral and evaluative bluntness of the term "forfeiture" by replacing the notion of blanket forfeiture with a more refined analysis that distinguishes between intentional and unintentional actors.²¹⁶ This approach uses this distinction to blunt, and perhaps overcome, the traditional arguments advanced against the concept of forfeiture of rights.

It has been recognized that there can be a "conditional forfeiture" or a "temporary suspension of rights," either of which apply to innocent attackers who, because they pose unjust threats of *harm*, forfeit their right to non-interference for as long as they continue to pose a threat.²¹⁷

Building on this concept of forfeiture conditioned on conduct, we introduce the concept of "conditional waiver" to describe culpable attackers who knowingly pose a threat of both harming and *wronging*, thereby waiving their right to non-interference.²¹⁸ Although Simons contends that self-defense "involves (involuntary) forfeiture,"²¹⁹ (presumably in the sense that the forfeiture being imposed is unchosen by the attacker), the position developed here is that knowing and intentional attackers

215. Jeremy Horder, *Redrawing the Boundaries of Self-Defence*, 58 MOD. L. REV. 431, 438 (1995).

216. Erb, for example, recognizes this distinction in the self-defense context, contending that the "duty of interpersonal solidarity" is greater with innocent attackers. Erb, *supra* note 52, at 1596.

217. One way of conceptualizing this is thinking of the waiver or forfeiture as opening a gap in the attacker's otherwise inviolable personal domain. This gap remains open so long as the individual continues to pose such a threat, and, because the availability of self-defense is limited by the value-based model's decision-grounds, the gap, once created, does not result in unconditional and open-ended forfeiture. See Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 621-49 (1996).

218. The notion that the normative culpability/responsibility of the attacker is relevant to the defender's ability to exercise defensive force (and what amount of defensive force the defender can utilize) finds support in some German scholarship. See, e.g., Lesch, *supra* note 3, at 91.

are, in fact, morally blameworthy.²²⁰ The natural consequence of launching a morally blameworthy attack is that the conduct gives the defender the right to lawful defensive force, which, in turn, justifies imputing the intent to conditionally *waive* the attacker's right to non-interference.²²¹

The decision to bifurcate the traditional term “forfeiture” in this manner also responds to critics such as Tziporah Kasachkoff by recognizing the considerable normative asymmetry between those who threaten to merely harm, and those who threaten to both harm *and* wrong.²²² And so although “forfeiture” traditionally refers to the simple loss of a particular right,²²³ waiver includes knowledge and intentional relinquishment or abandonment (actual or imputed) of a known right.²²⁴ When an individual criminally attacks another person, she knows (or can be imputed to know) that she, through her conduct, has relinquished her right to non-interference in her autonomous sphere of self-determination.²²⁵ Innocent attackers, in contrast, do not know of the wrongfulness of their conduct. Therefore, at most, they can be said to forfeit some of their ability to claim an absolute right to non-interference because the defenders cannot be expected to always subjugate their own substantive interests to those of the attacker.

Moving from the general to the specific, although threats of harm from innocents threaten defenders with concrete losses (see Value #4), threats of wrong posed by culpable attackers also threaten to impute lesser standing to the defender (Value #3). Similarly, the concept that all individuals owe each other a basic obligation of “human solidarity” can reasonably be interpreted more strictly in the context of morally innocent attackers who do not threaten the imputation of lesser standing

219. Kenneth W. Simons, *The Relevance of Victim Conduct in Tort and Criminal Law*, 8 BUFF. CRIM. L. REV. 541, 544 n.9 (2005).

220. Cf. Karen L. Bell, *Toward a New Analysis of the Abortion Debate*, 33 ARIZ. L. REV. 907, 927 (1991) (hypothesizing that blameworthiness of the victim is the differentiating factor between self-defense and necessity in an intentional killing). See Robert E. Wagner, *Corporate Criminal Prosecutions and the Exclusionary Rule*, 68 FLA. L. REV. 1119, 1123 (2016) (noting that the purpose of criminal law is the punishment of those who are morally blameworthy).

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

222. See *supra* Section III.C.

223. David Alm, *Self-Defense, Punishment and Forfeiture*, 32 CRIM. JUST. ETHICS 91, 99 (2013) (discussing the circumstances in which forfeiture occurs and rationales for such occurrences).

224. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see also Luis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture*, 19 U. PA. J. CONST. L. 1111, 1159 (2017) (noting that waiver of constitutional rights must be “voluntary, know[ing], and intelligent”); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (stating that there is a presumption against the waiver of constitutional rights and that waivers must be intentional and knowing).

225. See Rose, *supra* note 221, at 293–94.

(Value #3).²²⁶ Parting from Uniacke's approach, then, the theory introduced here draws a sharp distinction between culpable and innocent threats—that is, between wrongs implicating waiver and harms implicating forfeiture—on the basis of their normative and qualitative differences. These differences, in turn, affect the relative weights accorded to the value-based model's decision-grounds that provide content to the principles of “protecting the defender” and “protecting the attacker.” This distinction between waiver and forfeiture of an attacker's rights allows us to meaningfully distinguish between culpable and non-culpable threats, thereby overcoming the deficiencies in Uniacke's, Thomson's, Leverick's, and others' conceptions of the morally undifferentiated “aggressor” posing an “unjust and immediate threat.”

CONCLUSION

As we have seen, values play a crucial role in the realm of self-defense law, both doctrinally and in practice. We all, in fact, subconsciously think about self-defense outcomes through the prism of value judgments that inform our intuitions. But despite the role that values play in providing the rationale for self-defense, the academic and legal communities have largely failed to grapple with the foundational questions of *what* values matter in self-defense cases, and *why* they matter. This is a serious mistake. Arriving at a detailed accounting of the underlying values that constitute self-defense's analytical and moral foundation will significantly improve the transparency and quality of decision-making. Relatedly, it will also help uproot the corrosive impact of hidden normativity that threatens to undermine the rule of law.

At its core, then, the ambition here was to introduce a plausible analytical framework that treats values as decision-grounds so that the criminal justice system can minimize the hidden normativity that characterizes much of the past and present self-defense debate. To the extent that future observers conclude that this value-based model overlooks certain values, inappropriately includes others, or fails to propose a persuasive hierarchy of these values and their relative weights, such criticisms do not undermine the value-based model. To the contrary, they validate the reason for constructing such a model in the first place. For such unclouded and pellucid disagreements inherently proceed on a value-centric footing. And so, it does not worry me that others may point out errors in my approach, as long as they concede that a proper and full accounting of implicated values is crucial to the proper analysis of self-defense.

But recognizing the importance of a value-centric dialogue is only the beginning. The next step, addressed in my recently published book as well as future articles, is to detail *how* the competing values cataloged here might be balanced

226. See *supra* Section III.C; Lesch, *supra* note 3, at 103–04 (noting that retreating and avoiding conflict, and absorbing minor harm, is appropriate in such cases, and contending that resulting damage to a defender's property must be covered by the state).

and prioritized, and to evaluate how different value-based approaches influence how we approach answering self-defense's most thorny theoretical questions, including how to address passive threats and mistakes, and how to define "necessity" and "proportionality." This, in turn, will put citizens and lawmakers in the best position to achieve results in self-defense cases that are both clearly articulated and just, and that thereby minimize the incidence of self-defense rulings that threaten to undermine the public's perception of the legal order's moral legitimacy.