

BOSTON COLLEGE LAW REVIEW

VOLUME XXVIII

MAY 1987

NUMBER 3

THE RESURGENCE OF MENS REA: II—HONEST BUT UNREASONABLE MISTAKE OF FACT IN SELF DEFENSE†

RICHARD SINGER*

I. MISTAKE IN THE EARLY COMMON LAW.....	461
II. THE COMMON LAW AFTER BLACKSTONE	465
A. <i>Mistake of Fact Generally</i>	465
B. <i>The Growing Requirement that Mistake Be Reasonable</i>	467
1. "Strict Liability" Crimes.....	467
2. "Sexual Activity" Crimes.....	469
C. <i>The Metamorphosis of Mistake Doctrine</i>	470
1. Joel Prentis Bishop	470
2. The Confusion in Nineteenth Century Self Defense Law.....	471
a. <i>The Pre-Nineteenth Century Understanding of Self Defense</i>	471
b. <i>The Nineteenth Century Cataclysm</i>	474
i. East.....	474
ii. Selfridge's Case	476
iii. The First Fifty Years of Self Defense in America	478
iv. <i>Shorter — The Revolution in Self Defense Law and Reasonable Mistake</i>	480
v. The Resolution of the Issue	482
III. THE MODERN LAW OF MISTAKE OF FACT.....	491
A. <i>The Change in American Law: Reasonability, Tort, and Crime</i>	491
1. The Subjectivization of the Reasonable Man.....	491
a. <i>Redefining the Reasonable Person</i>	491
b. <i>Making the Irrational Defendant Act Reasonably — The Saga of Bernhard Goetz</i>	493
c. <i>The Discovery of the Reasonable Woman and Social Acculturation</i>	498
2. <i>Reasonable People In Extremis</i>	500
3. Civil v. Criminal Negligence	502
B. <i>The Model Penal Code and Mistake of Fact</i>	502
1. Generally	502

† Copyright © 1987 Richard Singer.

* Professor and Dean, Rutgers-Camden Law School.

2. Self Defense and Mistake.....	503
C. <i>The British Commonwealth Experience</i>	507
IV. THE NORMATIVE ASPECTS OF MISTAKE OF FACT	510
A. <i>Mistake Generally</i>	510
B. <i>Mistake and Self Defense</i>	514

It is now twenty-five years since the promulgation of the Model Penal Code, which provided that an honest, although unreasonable, mistake of fact would negate criminal liability.¹ It is only ten years since the House of Lords, in a highly controversial decision,² held similarly that an honest, although unreasonable, mistake of fact as to the female's consent could negate a conviction for rape. Both of these developments, hailed as reinvigorating the criminal law's concern with the actual, subjective, state of mind of the offender, have been rebuffed, at least in part, since their promulgation.³

This struggle over the effect of a mistake of fact on criminal liability, and the ongoing debate over whether such a mistake should meet minimum requirements of objective reasonability before being recognized as a defense, is the subject of this article. Like the first in this series of articles,⁴ it finds that the common law changed drastically in the nineteenth century. Prior to that time, the law allowed any mistake of fact to exculpate. Nineteenth century writers and courts, however, distorted or ignored the prior law, adopting the objective test which many states now follow. This development was most obvious in, but not limited to, self defense law, and parallels manslaughter doctrine development,⁵ and can be explained in large part by the nineteenth century's embrace of utilitarianism as the hallmark of criminal theory. As with the doctrine of manslaughter,⁶ the mid-twentieth century has seen a move toward discarding the utilitarian-based, objective, mistake of fact tests and a resurgence of the early notion of moral culpability as the irreducible minimum requirement for criminal liability. The case of Bernhard Goetz, the New York City subway shooter,⁷ epitomizes the struggle which the courts have faced in this area, and that decision may well prove to be crucial for the future of the mistake of fact defense.

Part I of this paper traces the history of the common law subjective mistake of fact doctrine prior to 1800. Part II shows the nineteenth century modification of this law. This section sets the blame for these modifications, unlike in the manslaughter-provocation area,⁸ at the door of the courts, not the writers. Part III reviews the recent revival

¹ MODEL PENAL CODE § 2.04 (Proposed Official Draft 1962) (hereinafter MPC); see MPC § 2.04 commentary at 135-36 (Tent. Draft no. 4, 1955). This statement does not apply to criminal liability based upon negligence, but the MPC has very few crimes which can be so committed. See Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980).

² Director of Public Prosecutions v. Morgan, (1976) A.C. 182.

³ Cowley, *The Retreat From Morgan*, 1982 CRIM. L. REV. 198. As discussed *infra*, notes 235-236 and 248-60 and accompanying text, less than half the states have followed the MPC position on mistake generally, and even fewer have accepted its position on mistake in self defense.

⁴ Singer, *The Resurgence of Mens Rea: I-Provocation, Emotional Disturbance, and the Model Penal Code*, 27 B.C.L. REV. 243 (1986).

⁵ *Id.* at 244.

⁶ *Id.* at 288-304.

⁷ See *infra* part III. A. 1. b.

⁸ Singer, *supra* note 4, at 261-88.

of the "subjectivist bug" in the area of mistake of fact and focuses on the *Goetz* decision. Part IV examines retributivism and utilitarianism as they affect this particular debate and concludes that the subjective test is preferable to the objective rule courts embraced in the nineteenth century.

I. MISTAKE IN THE EARLY COMMON LAW

It is convenient to begin with Blackstone, the fount of much criminal law and certainly regarded as a reasonably accurate summarizer of the law as it stood at the outset of the nineteenth century. Categorizing mistake⁹ as a "defect of will," Blackstone declared that wherever there is a mistake, "the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act."¹⁰ Blackstone in this regard simply was reframing Sir Matthew Hale's argument that an act done in ignorance of the true facts is "morally involuntary."¹¹ Read literally, Blackstone appears to say that any mistake, reasonable or unreasonable, excuses.¹² This interpretation of his words, however, is not indisputable, and does not necessarily follow from the three sources which Blackstone cites: Hale, a case reported by Plowden, and *Levett's* case.

Blackstone's citation of *Levett's* case, the most frequently cited authority on whether mistake must be reasonable, is not particularly helpful in resolving whether Blackstone thought unreasonable mistake excuses. *Levett's* case, not really a reported case, is discussed in a dialogue among the judges in another case, *Cook's* case.¹³ As explained in that discussion, the facts of *Levett's* case are as follows. Levett, asleep in his bed, was awakened at midnight by his servant who told him she thought she had heard thieves breaking into the house. Levett snatched up his rapier, proceeded downstairs, and searched the house. His wife, accompanying him, saw hiding in the buttery a person she did not know and called out to her husband. Levett entered the buttery (in the dark it appears), poked about with his rapier, and thereby inadvertently stabbed, possibly in the heart, a friend of the servant whom the servant had hidden in the buttery. The friend was helping the servant with her household chores. Apparently charged with murder, Levett was acquitted of all criminal charges; yet there is virtually no discussion of the premises upon which the acquittal rested. There is certainly no suggestion in the brief discussion that the court found, as a fact, that Levett's mistake was reasonable.

Prima facie, it appears that Levett's mistake could be characterized as reasonable. After all, Levett was in his house, which certainly allows him substantial legal right to protect both himself and his family. Second, he was awakened at night and told that there might be thieves about. On the other hand, he entered the buttery with a drawn

⁹ Historically speaking, this comment must be limited to mistake of fact, since Blackstone, like others, took the view that mistake of law was irrelevant to mens rea. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (1776). That view has been consistently attacked, but persists nevertheless, although Blackstone's primary source for the rule was a misreading of Roman Law. See Ryu & Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421, 425 (1957). This article does not treat mistakes of law.

¹⁰ 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 27 (1776).

¹¹ 1 M. HALE, PLEAS OF THE CROWN 42 (1736).

¹² Both Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 77 (1908) and Howard, *Provocation and Homicide in Australia, Parts I & II*, 33 AUST. L.J. 323, 355 (1960), interpret Blackstone this way.

¹³ Cro. Car. 537, 538, 79 Eng. Rep. 1063, 1064 (1640).

rapier "and being in the dark and thrusting with his rapier before him,"¹⁴ killed the servant's friend. One might characterize such an actor as reckless, or at least, "criminally negligent."¹⁵ Thus, there is some room for dispute as to whether Levett was reasonable or not. Yet, so far as we can tell, this issue did not even occur to the *Levett* or *Cook* courts. Levett was acquitted straightaway, and his acquittal is applauded in *Cook's* case. This itself might support strongly the view that the law in the seventeenth century — and therefore Blackstone in commenting on that law — was relatively unconcerned with whether mistake was reasonable or unreasonable: if done under an honestly held mistake of fact, an act was not to be condemned simply because of unhappy results.

The picture becomes cloudier, however, when the facts in *Levett's* case are compared to the facts of *Cook*, in which *Levett* is discussed. In *Cook*, a homeowner, answering a rowdy bailiff sent to arrest him, shot and killed the bailiff. Agreeing that the bailiff was acting beyond the scope of his power, and that the slaying was therefore not murder, the court in *Cook* held that the slaying was nevertheless manslaughter even though there was no reason for Cook to realize that this was in fact a bailiff. The difference between *Cook* and *Levett*, opined the judges in *Cook*, was that Cook, unlike Levett, "seeing and knowing him, shot at him voluntarily and slew him."¹⁶ This distinction is certainly ambiguous, but it seems to suggest that Cook's act was different because it was unreasonable. The point appears to be that Cook, being able to see that the victim was not threatening force — this appears to be the only significance of the ability to see the victim — used excessive force. Thus, the unreasonableness of Cook's act went not to factual error as such, but to an error of law: how much force he could use to eject a rowdy intruder.¹⁷

Blackstone's citation of *Levett's* case thus arguably undercuts his unqualified statement of the law which, literally read, holds that both reasonable and unreasonable mistakes excuse criminal liability. If he had either cited or even hypothesized a case in which the mistake was clearly unreasonable, one could be sure that he meant *any* mistake excuses. But, because the mistake in *Levett* seems reasonable while that in *Cook* could be viewed as unreasonable, his statement is ambiguous at best.¹⁸

¹⁴ *Id.*

¹⁵ See East's discussion of the case, raising the same point, at E. EAST, *PLEAS OF THE CROWN* 274-75 (1803).

¹⁶ *Cook*, Cro. Car. at 539, 79 Eng. Rep. at 1064.

¹⁷ The case bears an uncanny resemblance to the facts in *State v. Cope*, 78 Ohio App. 429, 445-46, 67 N.E.2d 912, 920 (1946), three centuries later, in which the court required that the defendant reasonably believe that he was in imminent danger. See generally *infra* Part II. B. 2. b. iii.

¹⁸ As might be expected, virtually all the writers discussed *Levett's* case. 1 W. HAWKINS, *PLEAS OF THE CROWN* 73 (1716), seems to analyze *Levett* as a case of reasonable mistake, but is unclear about this. In his section on justifiable homicides, he notes that "it seemed that he may justify the Fact, inasmuch as it hath not the Appearance of Fault." *Id.* Though the sentence seems pregnant with the suggestion that if there had been fault there would have been no defense, this is not a necessary reading, because the discussion occurs in justifiable homicide. It is certainly possible that had Hawkins seen the case as one of reasonable fault it could have been excusable. See *infra* notes 85-86 and accompanying text for the discussion of the difference between excuse and justification. M. FOSTER, *CROWN LAW* 299 (1762) suggests that the court should have ruled the case manslaughter, opining that the court did not use due circumspection. 1 M. HALE, *supra* note 11, at 42 and E. EAST, *supra* note 15, at 274-75, however, suggest that the case was one of simple mistake of fact, an analysis acquiesced in by W. RUSSELL, *TREATISE ON CRIMINAL LAW* 792 (1st ed. 1824). None of

In addition to *Levett*, Blackstone cites Hale¹⁹ and Plowden.²⁰ The Hale cite is not really apposite although it does deal with accidental killings, such as the head of an ax flying off and killing someone. Hale describes two cases where mistakes were made and concludes only that mistake exculpated. It is unclear from these excerpts, however, whether Hale would insist upon the mistake being reasonable to exculpate. Intriguingly, Blackstone cites neither Hale's general discussion of mistake²¹ nor his discussion of *Levett's* case.²² A fair reading of Hale's discussion does not clearly resolve the issue of whether the mistake must be reasonable.²³

Blackstone's cite to Plowden is far off point. The case cited is *Brett v. Rigden*.²⁴ It is enough to say here that the case involved a dispute about property and estate law and was not a criminal case at all. Even more cogent, the cited page is to the argument of counsel, not even to the court's resolution. Finally, to find even an issue of mistake of fact in the situation stretches that concept almost to the breaking point. Thus, at best, both Blackstone and the authorities he cites are ambiguous on the question of the type of mistake of fact that will excuse.

Blackstone could have cited other available materials, but, perhaps because they too are ambiguous, he did not. Primary among these is the famous Doctor and Student's Dialogues, published circa 1528, which contain several long discussions of mistakes of fact and law. We find in the First Dialogue, within the context of a discussion of a criminal action concerning the recovery of good title and the restitution for the wrongful taking in a fee simple, that: "(Doctour) ignorance of the dede may excuse but ignorance of the law excusyth not but it may be inunyncyble."²⁵

One should wonder at the use of the adverb "may" here, which creates some sort of limitation on the excuse. Of course it could be that the "may" is not an adverb at all, but a replacement for "does." It can also be argued that the "may" either merely requires

these latter writers suggest that *Levett's* case is explicable on the grounds that *Levett's* mistake was "reasonable," instead they argue merely that a mistake was made.

In his first edition, Wharton merely recites the case, and does not characterize *Levett's* mistake as reasonable or unreasonable, simply saying that defendant killed her "taking her to be a thief." I F. WHARTON, CRIMINAL LAW 386 (1st ed. 1846). By the 1861 edition, however, Wharton cites the case for the proposition that "if the apprehension of an immediate actual danger to life be sincere, though unreal, it is in like manner a defence." 1 *id.* at 558 (5th ed. 1861). He does not indicate why his view of this case, much less of the principle for which he now says it stands, has changed. The remainder of his discussion suggests strongly that he disagrees with the principle which he says "should always be applied with extreme caution." 1 *id.* at 558-59. By the 1880 edition, however, his perception of the case has once again changed. Now the case is explained on the principle that "[a] bona fide belief that a felony is in the process of commission . . . makes the killing excusable homicide, though if such belief be negligently adopted by the defendant, then the killing is manslaughter." 1 *id.* at 445 (8th ed. 1880). Wharton now asserts that *Levett's* mistake was non-negligent. *Id.* There is, of course, no support for that interpretation (as there is equally none for the view that it was negligent, but that negligent mistake was irrelevant).

¹⁹ 1 M. HALE, *supra* note 11, at 39.

²⁰ 1 Plowden 343, 75 Eng. Rep. 516, 520 (1568).

²¹ 1 M. HALE, *supra* note 11, at 42-43.

²² *Id.* at 471-77. See *supra* note 14.

²³ On the issue of negligence as a predicate for criminal liability, see generally Robinson, *supra* note 1.

²⁴ 1 Plowden 343, 75 Eng. Rep. 516, 520 (1568).

²⁵ ST. GERMAN'S DOCTOR AND STUDENT 162 (Selden Society 1974).

that the mistake be honest or that one is not entitled to close one's eyes to create a mistake. Thus, the Dialogues at least arguably support the view that even unreasonable mistake will exculpate.

Another source which Blackstone might have consulted is the *Mirror of Justices*,²⁶ published in the 14th century. Although the *Mirror* is now thoroughly impeached and discredited, its discussion of mistake is nonetheless interesting. Within the context of a discussion concerning judges "who falsely adjudge a man to death,"²⁷ the *Mirror* extensively analyzes mistake of fact:

[W]e must distinguish, for one kind of ignorance is that of a thing that is unknown and not to be known, and this is an excuse; another is ignorance of a thing that is unknown but which is to be known though is not bound to know it, and this also is an excuse; but the third is ignorance of that which one is bound to know and this is no excuse. And note that ignorance in itself is no sin, but *neglect to know is a sin*; and the judge does not sin by not knowing the law, but he does sin if of his folly he undertakes to judge and does so foolishly or falsely.

And there is a fourth kind of ignorance which consists in thinking otherwise than is right of some matter, and *if this be ignorance of fact it excuses*, but if it be ignorance of law it is no excuse. Or put it thus: there is an ignorance that is superable, and that is no excuse; and there is an ignorance that is unsuperable, and that is an excuse, whether it arises from nature, as from excessive age, or from a malady, such as madness.²⁸

The *Mirror of Justices*, therefore, seems to reflect the view that all mistakes of fact excuse: "if this be ignorance of fact it excuses."²⁹

Blackstone's failure to cite any of the other early writers — Coke, Hawkins, or Foster — at first seems odd. But closer inspection of those writers demonstrates, again, the lack of concern with the "reasonableness" of the mistake as even relevant in criminal law.³⁰ Foster makes some mention of reasonableness,³¹ but it is only a passing reference, and at best he leaves the issue ambiguous.

The failure of Hale, Blackstone, Hawkins, and other writers even to hint at this issue strongly suggests that they did not think the question very important: if the defendant was in fact mistaken, reasonably or not, he or she was to be exonerated. This

²⁶ MIRROR OF JUSTICES (Selden Society 1893).

²⁷ *Id.* at 137.

²⁸ *Id.* at 137-38 (emphasis added).

²⁹ *Id.*

³⁰ It would be tedious to rehearse the movement of the focus away from subjective to objective criteria generally, or from "general" malevolence to "specific" malevolence to the extent the latter exists. See Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922) and Levitt, *Extent and Function of the Doctrine of Mens Rea*, 17 ILL. L. REV. 578 (1923). See also Brett, *Strict Responsibility: Possible Solutions*, 37 MOD. L. REV. 417, 431 (1974):

All these problems spring from the effort to set up a genus of fault, which is exhausted by the mutually exclusive species, intention, recklessness, negligence. They disappear if we treat the "general defences" as a series of disparate excuses, collectively grouped under the description "absence of *mens rea*," without seeking to isolate the common feature of all of them or supposing that one can be found. That was the tradition from Aristotle to Blackstone. Doubtless it is lamentably vague, and old-fashioned, and it is probably subversive of precise conceptual analysis.

³¹ M. FOSTER, *supra* note 18, at 273.

of course, coincides with the common law's focus upon the actor's actual malevolence where a concern with the defendant's "dangerousness," absent actual malice, was minimal.

In sum, reviewing the sources which Blackstone did or might have consulted in writing the Commentaries creates mild confusion. *Levett*, in which the mistake was probably reasonable and led to acquittal, and *Cook*, in which the mistake was arguably unreasonable and led to a manslaughter conviction, suggest that only reasonable mistake excused; yet the courts' and Blackstone's failure to discuss the reasonableness of the mistake implies that reasonableness was deemed either irrelevant or not considered at all.

II. THE COMMON LAW AFTER BLACKSTONE

A. Mistake of Fact Generally

The early American cases following the Revolution failed to alleviate the lack of certainty left by Blackstone as to whether mistake had to be reasonable to excuse. One of the first decisions involving mistake of fact was *Myers v. Connecticut*,³² where, on a Sunday, the defendant carriage owner leased a carriage to a ship's captain who claimed that there was an emergency in a distant town. In fact, there was no such emergency. The defendant was indicted for violating a statute prohibiting the leasing of carriages on Sunday except where necessary. The trial court instructed the jury that the only defense was that there had in fact been an actual emergency and that the defendant bore the burden of proof on this issue. In reversing the defendant's conviction, the Connecticut Supreme Court of Errors was impressively ambiguous. Chief Judge Swift declared that if the law did not allow a man's honest belief as a defense, "a man may be convicted of a crime, when he had no intent to violate the law, and when his object was to perform a deed of charity conformable to law."³³ Rejecting the utilitarian argument that mistake of fact should not be a defense because it could be feigned, Swift left to the good discretion of juries questions of credibility. Thus far, so good; the opinion appears to endorse the doctrine that any mistake of fact will exonerate because there is no need for credibility determinations if the test is objective. Unhappily, however, in articulating what can fairly be described as the court's view of its holding, Judge Swift muddled the waters irreparably by stating that the court below "should have directed the jury, if they found that the defendant had reasonable ground to believe . . . that the case of charity existed, . . . they ought to find him not guilty."³⁴ After paragraphs extolling a rule that subjective liability was critical to the criminal law, the court ambiguously dropped this "holding" in its last line.³⁵

Nor was the analysis clarified by the concurring opinion of Judge Gould. Citing Blackstone, and no other authority, Gould argued that any mistake would exonerate in criminal law, whereas only reasonable mistake would exonerate in civil cases.³⁶ This also seems to be the thrust of Judge Swift's opinion (except for the last line); yet none of the

³² 1 Conn. 502 (1816).

³³ *Id.* at 504.

³⁴ *Id.* at 504-05 (emphasis added).

³⁵ Of course, the actual holding was that the failure of the court to instruct on mistake as a possible defense at all, whether reasonable or unreasonable, was error.

³⁶ 1 Conn. at 505-06 (Gould, J., concurring).

nine judges concurred in Judge Gould's opinion, thereby strongly suggesting, though not demonstrating, that they did not agree that any mistake of fact could exculpate.³⁷

While *Myers* itself is ambiguous, later cases from the nineteenth century are less opaque. In *Commonwealth v. Power*,³⁸ for example, the Massachusetts court in 1844, per Chief Justice Shaw, held that the trial court erred in instructing the jury that even defendants' reasonable fear that the victims would create a riot on their train platform was not a defense to a charge of assault. The court added in dictum that an honest belief would itself exonerate: "[I]f Power believed that [the victim's] intention was to violate a subsisting reasonable regulation, then he and his assistant were justified in forcibly removing him from the depot."³⁹ Even if *Power* can be rationalized as a "claim of right" case involving specific intent,⁴⁰ that explanation would not apply to *Commonwealth v. Wood*,⁴¹ an 1873 decision, where the court expressly required that the jury consider the defendant's alleged inexperience and want of knowledge as to the proper course of action, thereby clearly establishing a subjective test for mistake of fact.⁴²

In fact, throughout the nineteenth century, when the case was not one of potential strict liability⁴³ or one involving sexual promiscuity,⁴⁴ most courts appeared to allow any mistake of fact to exculpate. In a string of "ineligible voter" cases, for example, early courts allowed exoneration on any mistake,⁴⁵ while later courts tended to require that

³⁷ *Myers* was not cited for over 30 years. The first citation is found in *Barnes v. State*, in which the court restricted *Myers* to a case where the statute itself established an exception to the prohibition. 19 Conn. 398, 404 (1849). The court did not elaborate on why this was a meaningful distinction. *Barnes* is the first American case even suggesting strict liability and involved sale of liquor to a "common drunkard." Even so, the language in *Barnes* supporting strict liability is dictum, because *Barnes* reversed the decision below because the trial court refused to allow the defendant to testify that the sale was made without his consent and contrary to instructions which he had given. Intriguingly, that same year the same court eschewed strict liability in a non-criminal case and cited *Myers*. *Selleck v. Selleck*, 19 Conn. 501, 503 (1849). Another half century passed before *Myers* was cited again; again the cite was in a potential strict liability case, and again the Connecticut Supreme Court of Errors rejected a strict liability reading of the statute involved. *State v. Nussenholtz*, 76 Conn. 92, 96, 55 A. 589, 590 (1926). See also *State v. Sul*, 146 Conn. 78, 86, 147 A.2d 686, 691 (1958). However few the citations, Connecticut courts consistently cited *Myers* as authority for the proposition that honest mistakes were sufficient to exonerate. See also *State v. Binders*, 24 Conn. Supp. 214, 216, 189 A.2d 408, 409 (1962).

³⁸ 48 Mass. (7 Met.) 596 (1844).

³⁹ *Id.* at 604. Accord *State v. McDonald*, 7 Mo. App. 510, 511 (1879).

⁴⁰ I do not wish to rehearse at great length the development of the doctrine of "specific intent" as a method of avoiding the common law's increasing objectivization during the nineteenth century. Suffice it to say here that the fiction is that some crimes, as defined, require that the prosecutor show not merely that the defendant performed a specific act, but also that he did so with a precise result (motive) in mind. The fiction then was that a number of conditions, including diminished capacity or intoxication, could negate this specific intent. One of the defenses involving a "specific intent" was a so-called "claim of right," which was a factual or legal delusion under which the defendant operated, but which led him to believe that he was legally entitled (not merely allowed) to act as he did. For a further explanation, see W. LAFAYE & A. SCOTT, *CRIMINAL LAW* 201-02 (1972).

⁴¹ *Commonwealth v. Wood*, 111 Mass. 408 (1873).

⁴² *Id.* at 411.

⁴³ See *infra* part II. B. 1.

⁴⁴ See *infra* part II. B. 2.

⁴⁵ *Commonwealth v. Bradford*, 50 Mass. (9 Met.) 268, 272-73 (1845); *Commonwealth v. Agler*, *Thatcher Cr. Cases* 412 (Mass. Mun. Ct. 1835); *State v. McGuire*, 26 Tenn. (7 Hum.) 39, 41 (1846).

the mistake be reasonable.⁴⁶ Courts reached similar results in cases where parents criminally charged for their children's deaths resulting from lack of medical care relied on honestly held religious beliefs to exculpate.⁴⁷

B. *The Growing Requirement that Mistake be Reasonable*

Due to the paucity of mistake of fact cases in the early nineteenth century, no clear articulation of the effect honest mistake of fact had on culpability emerged. Later in the century, developments in the area of strict liability crimes — and the related area of sexual activity crimes — compounded the lack of clarity on this issue. Finally, a misinterpretation by one of the leading commentators, Joel Prentice Bishop, further augmented the uncertainty about the effect of mistake of fact. This progression resulted in a growing requirement that in order for mistake of fact to exculpate, it must be reasonable.

I. Strict Liability Crimes

The growth of strict liability "crimes" during the nineteenth century is well-documented.⁴⁸ Suffice it to say that before the turn of the twentieth century, American legislatures adopted a strict liability standard primarily for "morals" offenses, and not very frequently for economic or industrial actions.⁴⁹ Thus, early statutes appeared to make selling liquor to a minor, or allowing a minor to be present when liquor was served or gambling occurred, strict liability "crimes." Nevertheless, many courts allowed at least reasonable mistake of fact as a defense, and some courts even allowed honest mistake of fact.⁵⁰

⁴⁶ *Gordon v. State*, 52 Ala. 308, 309-10 (1875); *State v. Boyett*, 32 N.C. (10 Ired.) 336, 346 (1849). *Gordon* cites *McGuire*, *Bradford*, and *Agler*, all cited *supra* note 45, as requiring reasonable mistake, but in fact those cases appear to allow any mistake to exculpate. It certainly cannot be said that they clearly preclude honest mistakes as a defense. *Gordon*, 52 Ala. at 310-11.

⁴⁷ Thus, in *R. v. Felton*, noted in 12 HARV. L. REV. 428 (1898), defendants who acted in the honest belief that anointing their infant child in the name of the Lord would prevent death were held, as a matter of law and fact, not guilty of manslaughter. In *R. v. Wagstaffe*, the court instructed the jury that except in very rare cases, "[i]f a man did his best, according to his knowledge, with respect to food, it would be for a jury to consider whether this was gross negligence" leading to a manslaughter conviction. 10 Cox Crim. Cas. 530, 533 (1868). The jury acquitted. In *R. v. Downes*, the court applied a statute passed after the *Wagstaffe* cases, and found that the failure to provide food was, under the wording of the statute, culpable neglect, a misdemeanor, which then activated the misdemeanor-manslaughter doctrine. 1 Q.B.D. 25, 29-30 (1875). Neither case cited any useful precedents. See generally Book Note, 15 HARV. L. REV. 500 (1902) (reviewing Lee, 9 AM. LAW. 565 (1901)), summarizing the cases. Cf. *State v. Jackson*, 71 N.H. 552, 53 A. 1021 (1902).

⁴⁸ Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

⁴⁹ Strict liability was never embraced in England, and by the beginning of this century, reasonable mistake of fact was almost universally a defense. Indeed, it seems clear that in that country many of the "strict liability" statutes were in fact passed and enforced in a manner to avoid the "privity barrier" to compensation to injured private parties in commercial transactions. In this country, on the other hand, the application of strict liability to economic "offenses" was late in coming; strict liability was applied to the kinds of morals offenses listed in the text. See Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Liability* (forthcoming).

⁵⁰ Cases allowing reasonable mistake of fact as to age to be a defense include: *Bain v. State*, 61 Ala. 75, 79 (1878); *Moore v. State*, 65 Ind. 382, 383 (1879); *Faulks v. People*, 39 Mich. 200, 202 (1878). Cases allowing or appearing to allow any honest mistake as a defense include: *Adler v.*

Barnes v. State,⁵¹ an 1849 decision, is often cited as the first American strict liability case. *Barnes* involved a defendant convicted for violating a statute prohibiting liquor sales to any person addicted to habits of intoxication. The *Barnes* court reversed the conviction, holding that if the defendant gave express orders to his employee not to sell to habitual drunkards, or to the specific consumer in question, the defendant could not be convicted.⁵² The case thus involved vicarious, not strict, liability and the court essentially held that the defendant could not be held vicariously liable if he himself had not been reckless with regard to his employees' conduct.⁵³ Any language discussing strict liability was, therefore, dictum. Thus, the *Barnes* court in no way held that strict liability is applicable even in such situations although the court alluded to three other statutes which it said imposed liability without a defense of mistake.⁵⁴

The best that can be said of other cases of this ilk is that they were equivocal. The Indiana Supreme Court, for example, first held in 1865 that a mistake as to the age of a minor liquor consumer had to be reasonable to exculpate,⁵⁵ but within months the court embraced a "good faith" mistake as a sufficient defense.⁵⁶ A still later Indiana case announced that "[a] sale of intoxicating liquor to a minor under the belief, entertained in good faith, that he was an adult, is not within the statute."⁵⁷ The court stated no requirement that the belief be reasonable. In later cases, however, the Indiana court appeared to endorse a requirement of reasonableness⁵⁸ but cited the earlier decisions. Other states, in similar situations, are equally ambiguous.⁵⁹ But when prosecutors argued

State, 55 Ala. 16, 23-24 (1876); *Brown v. State*, 24 Ind. 113, 114-15 (1865). For a full discussion, see Singer, *supra* note 49.

⁵¹ 19 Conn. 398 (1849).

⁵² The *Barnes* court stated, "[b]ut the master is never liable criminally for acts of his servant, done without his consent, and against his express orders." *Id.* at 407. In light of both later English and American cases imposing vicarious liability in exactly such circumstances, *Barnes* hardly can be called a precursor to strict liability.

⁵³ *Id.* at 404-05. The court did, however, cite three statutes, involving seduction of a female under 21, adultery, and selling liquor to a minor. These, of course, soon became the typical "strict liability" crimes. *Barnes* itself, however, does not hold that strict liability applies in criminal situations, and it cites no authority for construing the three cited statutes as imposing such liability.

⁵⁴ The only other "sale to a drunkard" case had the same result. In *Smith v. State*, 55 Ala. 1 (1876), the trial court instructed the jury that if the defendant had good reason to know that the consumer was a known drunkard, he should be convicted. The Alabama Supreme Court reversed the conviction. *Id.* at 11-12.

⁵⁵ *Rineman v. State*, 24 Ind. 80, 80 (1865).

⁵⁶ *Brown v. State*, 24 Ind. 113, 114-15 (1865).

⁵⁷ *Goetz v. State*, 41 Ind. 162, 164 (1872).

⁵⁸ *Kreamer v. State*, 106 Ind. 192, 194, 6 N.E. 341, 342 (1886); *Hunter v. State*, 101 Ind. 241, 243-44 (1885); *Payne v. State*, 74 Ind. 203, 205-06 (1881). In *Kreamer*, the court found that the record showed, without conflict, that the defendant had exercised proper caution in determining the consumer's age and reversed the conviction. Unhappily, the court does not explicate the steps taken by the defendant. In *Hunter*, the court reversed a conviction because the instruction to the jury did not provide for the defense of reasonable mistake. *Payne*, like many other so-called strict liability cases, e.g., *United States v. Freed*, 401 U.S. 601 (1971), and *United States v. Balint*, 258 U.S. 250 (1922), was merely a challenge to the indictment for failure to allege scienter. The *Payne* court held merely that the defendant at least had to raise the issue of reasonable mistake and that it was not fatal to the indictment that it did not allege scienter. Such a holding does not make reasonable mistake irrelevant, nor even necessarily place the burden of proof on the defendant. Thus, the Indiana cases on one reading offer slight support for a requirement of reasonableness or, on another reading, appear to allow a defense of honest, even if unreasonable, mistake.

⁵⁹ Compare *Reich v. State*, 63 Ga. 616, 619-20 (1879) (defendant must exercise "special diligence"

for strict liability, defendants responded by arguing reasonable mistake. Almost by default, then, courts increasingly accepted reasonableness as an exculpatory factor in these cases; whether honest mistake alone would exculpate was not raised.

2. "Sexual Activity" Crimes

Of course, the most famous instances in which courts imposed strict liability in the nineteenth century — and where not even reasonable mistake of fact was a defense — were the "sexual activity" cases.⁶⁰ The most famous is the 1875 case of *Regina v. Prince*⁶¹ in which the English Court of Criminal Appeal, in a series of opinions enunciating a multitude of doctrinal explanations for the result, held that a defendant who took a girl out of her father's possession and care did so on the risk that she was under age sixteen.⁶² Although the jury expressly found the defendant's mistake as to her age to be reasonable,⁶³ the court held that no mistake of fact as to age, however reasonable, would be a defense.

Parliament rather rapidly overruled *Prince* by specifically making a reasonable mistake of fact as to age a defense under the statute involved in that case.⁶⁴ Nevertheless, the case echoed in England for two decades before it was effectively overruled. In a series of post-*Prince* cases, the English courts split over whether a bona fide, or even reasonable, belief was a defense to bigamy,⁶⁵ although earlier cases clearly had suggested that an unreasonable but honestly held mistake would be a defense.⁶⁶

The court cleared the air considerably when, in 1889, it decided *Regina v. Tolson*,⁶⁷ holding that a reasonable mistake of fact would be an excuse to a bigamy charge. Nevertheless, the *Prince/Tolson* line distracted the English courts for over twenty years and, moreover, miscast the question as whether even reasonable mistake would exculpate, rather than whether unreasonable mistake would exculpate. It is not surprising, then, that English courts thereafter, thinking that they were "liberalizing" the law of *Prince*, adopted reasonable mistake of fact as a defense, implying that unreasonable mistake would not be a defense.

to ascertain that drinker is not minor) with *Stern v. State*, 53 Ga. 229, 231-32 (1874) (allowing a minor to play billiards; court is unclear whether "honest mistake" or "due diligence" is required). See also *Louisville & N.R. Co. v. Commonwealth*, 126 Ky. 279, 287, 103 S.W. 349, 352 (1907) (defendant "must not shut [his] eyes, but must use ordinary circumspection"); *People v. Welch*, 71 Mich. 548, 550, 39 N.W. 747, 747-48 (1888) (defendant's good faith belief is sufficient to rebut state's prima facie case).

⁶⁰ I leave aside the so-called regulatory crimes. For an exploration of the origin and development of these crimes, see Singer, *supra* note 49.

⁶¹ 13 Cox Crim. Cas. 138 (1875).

⁶² *Id.* at 140-58.

⁶³ *Id.* at 156.

⁶⁴ Crim. Law Amendment Act, 1885, 48 & 49 Vict. ch. 69, § 7.

⁶⁵ Judge Denman, whose opinion in *Prince* was particularly damning and rigid on the question of mistake of fact, distinguished *Prince* in a bigamy case, arguing that "the thing done [in the bigamy case] was not unlawful," and allowed reasonable mistake of fact as a defense. *R. v. Moore*, 13 Cox Crim. Cas. 544, 546 (1877). On the other hand, in *R. v. Bennett*, the court excluded evidence that the defendant's first wife was dead, arguing that the defendant's belief could only go to the mitigation of punishment, not to exculpation. 14 Cox Crim. Cas. 45, 46 (1877).

⁶⁶ *R. v. Turner*, 9 Cox Crim. Cas. 145, 145 (1862). In *R. v. Horton*, defendant, convicted by a jury where his belief was unreasonable, was sentenced to three days imprisonment. 11 Cox Crim. Cas. 670, 671 (1871).

⁶⁷ 23 Q.B.D. 168, 183 (1889).

In the United States, the response to *Prince* followed a drastically different path. In statutory rape cases, courts universally held that a "defendant's knowledge of the age of the woman was not an essential element of the crime . . . and that therefore it was not a defense that the accused reasonably believed her to be of the age of consent."⁶⁸ Thus, in *State v. Houx*,⁶⁹ in 1891 the Missouri court refused to admit defendant's testimony that he had reason to believe that the prosecutrix was over the age of twelve. Similarly, in the 1895 case *Commonwealth v. Murphy*,⁷⁰ the Massachusetts court refused an instruction that the jury could not convict unless the defendant knew or had good reason to know that the girl was under sixteen.⁷¹ The rule has come under attack recently with the watershed 1964 case of *People v. Hernandez*,⁷² but clearly the law in the majority of states still refuses to recognize reasonable mistake as to the age of consent as a defense to statutory rape.⁷³

In bigamy cases the pattern was somewhat different. In some jurisdictions courts held that "the good faith of the defendant in contracting the second marriage in the belief that a former union had been terminated by divorce, when in fact no divorce had been granted, is not available as a defense to the charge of bigamy."⁷⁴ Many states, however, relaxed that rule, consistent with *Tolson*.⁷⁵ Again, unfortunately, the concern with whether even a reasonable mistake would exculpate totally overshadowed the question of whether an unreasonable but honest mistake should have that same effect.

C. The Metamorphosis of Mistake Doctrine

If the status of mistake of fact in the "strict liability" and "sexual activity" crimes appears to have been more uncertain than received wisdom has viewed it, how did courts by the beginning of the twentieth century come to accept the "rule" that mistake had to be reasonable? The answer can be found in the influence of the writings of Joel Bishop and the development of self defense case law.

1. Joel Prentis Bishop

One major source of the doctrine that mistake of fact generally must be reasonable appears to be Joel Bishop. The full statement on the issue, in the first edition of his

⁶⁸ Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 8 A.L.R.3d 1100, 1102 (1966).

⁶⁹ 109 Mo. 654, 661, 19 S.W. 35, 37 (1891).

⁷⁰ 165 Mass. 61, 70, 42 N.E. 504, 504-05 (1895).

⁷¹ This is the most universal rule today. See, e.g., *Territory v. Delos Santos*, 42 Haw. 102, 104-08 (1957); *Robertson v. State*, 51 Tex. Crim. 493, 495, 102 S.W. 1130, 1131 (1907). See generally Annotation, *supra* note 68.

⁷² 61 Cal. 2d 529, 535-36, 393 P.2d 673, 677-78, 39 Cal. Rptr. 361, 365 (1964).

⁷³ One other state has adopted an approach similar to *Hernandez*. See *People v. Plewka*, 27 Ill. App. 3d 553, 558, 327 N.E.2d 457, 460 (1975). The MPC also gives a defense of reasonableness if the age is above ten, but not if the age is lower. See MPC, *supra* note 1, at § 213.6(1).

⁷⁴ Annotation, *Mistaken Belief in Existence, Validity, or Effect of Divorce or Separation as Defense to Prosecution for Bigamy or Allied Defense*, 56 A.L.R.2d 915, 928 (1957). See *Eldridge v. State*, 126 Ala. 63, 68, 28 So. 580, 582 (1899); *Russell v. State*, 66 Ark. 185, 189, 49 S.W. 821, 822 (1899).

⁷⁵ See, e.g., *Alexander v. United States*, 78 App. D.C. 34, 35, 136 F.2d 783, 784 (D.C. Cir. 1943); *People v. Vogel*, 46 Cal. 2d 798, 803, 299 P.2d 850, 854 (1956); *Baker v. State*, 86 Neb. 775, 784, 126 N.W. 500, 303 (1910). Cf. *Robinson v. State*, 6 Ga. App. 696, 703-04, 65 S.E. 792, 796 (1909); *Coy v. State*, 75 Tex. Crim. 85, 87, 171 S.W. 221, 221 (1914).

powerfully influential treatise, is as follows: "the wrongful intent being the essence of every crime, it follows . . . that . . . when a party, without fault or carelessness, is misled concerning facts . . . he is legally, as he is morally, innocent."⁷⁶ The key words here are "without fault or carelessness," for it is through this language that the notion arises that the defendant's mistake must be reasonable. Yet, of the thirteen authorities which Bishop cites for this proposition, not one supports the view that the mistake must be "without fault or carelessness." Indeed, many of these cases fully support the subjective, rather than the objective, approach to mistake of fact.⁷⁷ Bishop nevertheless simply ignores both the holdings and implications of these cases and asserts that mistake must be reasonable to negate mens rea. Bishop's influence was so great, however, that courts readily accepted his implicit position that unreasonable mistake could not exonerate.

2. The Confusion in Nineteenth Century Self Defense Law

a. *The Pre-Nineteenth Century Understanding of Self Defense*

The most important influence of the pre-nineteenth century's use of a mistake of fact doctrine to exculpate was the change which took place in self defense law in the nineteenth century. To appreciate how the nineteenth century courts confused the law of self defense — and with it the law of mistake — it is necessary to rehearse briefly the law as it stood at Blackstone's time: a misreading of the older books appears to have affected the entire course of self defense. The confusion stems almost entirely from a failure, first, of the defense bar, then courts, and then the writers, to recognize that the common law had not one, but two, views on self defense.

For a killing to qualify properly as homicide *se defendendo*, the pre-nineteenth century common law required that the slaying defendant retreat to the wall, where possible,

⁷⁶ J. BISHOP, CRIMINAL LAW § 242, at 213 (1st ed. 1852).

⁷⁷ Several of the cases involve charges of fraud, where any mistake, however unreasonable, can negate the defendant's "specific intent." Thus, in *R. v. Parish*, the court instructed the jury that if defendant had fair grounds for believing that he had authority to sign for another, or that he acted bona fide and did not mean to defraud or injure anyone, the jury should acquit. 8 C. & P. 94, 97, 173 Eng. Rep. 413, 414 (1837). The *Parish* jury did acquit. This case can in no way be read to support Bishop's restriction that the mistake must be reasonable. This is also true of the following cases he cites: *R. v. Allday*, 8 C. & P. 136, 138, 173 Eng. Rep. 431, 432 (1834) (fraud; fraudulent intent required); *R. v. Forbes*, 7 C. & P. 224, 227, 173 Eng. Rep. 99, 100 (1835) (bona fide belief sufficient defense against fraud); *R. v. James*, 8 C. & P. 131, 132, 173 Eng. Rep. 429, 430 (1834) (workmen who acted under order of foreman to close up some airways had defense if they acted bona fide); *Commonwealth v. Powers*, 48 Mass. (7 Met.) 596, 604 (1844) (discussed *supra* note 39 and accompanying text, allowing belief as a defense); *R. v. Ricketts*, 3 Camp. 68, 69, 170 Eng. Rep. 1308, 1309 (1811) (defendant who was suddenly grabbed by victim turned out to be an officer of the law and had defense if he believed he was being attacked; no requirement of reasonableness). Possibly supportive of Bishop's statement is *R. v. Leggett*, where the defendants, believing that the victim seaman was feigning illness, ordered him to work. 8 C. & P. 191, 194, 173 Eng. Rep. 456, 457 (1838). The court found the defendants guilty of manslaughter, and some language in the opinion suggests that the defendants' actual beliefs were irrelevant because it was "apparent" that the victim was physically disabled. *Tom v. State*, 27 Tenn. (8 Hum.) 86, 88 (1847) is irrelevant to the question at hand, and *United States v. Pearl*, 27 Fed. Cas. 484, 485 (C.C.D.C. 1838) (No. 16,022), again lends some support to Bishop.

before using deadly force. Hale,⁷⁸ Hawkins,⁷⁹ Foster,⁸⁰ and Blackstone⁸¹ all agree on this rule. *Se defendendo*, however, dealt with a very specific and concrete factual setting: it applied *only* where A and B, during a quarrel, became engaged in mutual combat and one of them escalated the level of the fight by beginning to use deadly force. If, after such mutual combat in which both sides had access to deadly force, the killing occurred on the spot, it was homicide chance-medley, or manslaughter.⁸² If, however, one of the parties retreated before actually slaying, this was homicide *se defendendo*, in which case there was no conviction but only forfeiture of goods.

Different rules applied, however, where the ultimate slayer, far from participating in a "mutual combat," was the innocent and unprovoking victim of a violent assault or other crime, such as robbery. The rules of *se defendendo* did not cover this type of slayer. Rather, different rules of justifiable homicide — prevention of a felony — encompassed this type of slaying.⁸³ Here, the law did not require the victim-turned-slayer to retreat; indeed, because he or she was carrying out a public duty by preventing a felony, one could almost argue, as Beale later implied,⁸⁴ that the slayer had a duty not to retreat. Rather than seeking to *excuse* the slayer's behavior — as with the slayer *se defendendo* — the slayer in a "felony prevention" situation was attempting to *justify* his or her act, claiming that he or she was right in so acting.

In recent years, Professors Fletcher⁸⁵ and Robinson⁸⁶ have reemphasized the distinction between justification and excuse which was understood before 1800, and which underpinned the distinction between the two common law views on self defense. A person who seeks to justify her act is arguing not only that the act was not wrong, but that she did what the law, or the state, or morality, demanded of her, and indeed, that she should be applauded for her conduct.⁸⁷ The actor seeking an excuse, on the other hand, acknowledges that he should not have committed the act. The actor argues instead that for some reason peculiar to him, he should be neither blamed nor punished for acting in that manner.⁸⁸ In short, justification argues the act is not prohibited, while excuse acknowledges that the act was wrong but seeks to exculpate the actor. The difference can be seen by comparing the state executioner, who argues that the State required him to kill the sentenced convict, with the insane killer, who agrees that her victim had every right to live, but who argues that her mental state precluded her from having control over, or appreciating, her conduct.

⁷⁸ 1 M. HALE, *supra* note 11, at 481.

⁷⁹ 1 W. HAWKINS, *supra* note 18, at 75.

⁸⁰ M. FOSTER, *supra* note 18, at 275–78.

⁸¹ 4 W. BLACKSTONE, *supra* note 10, at 183–85.

⁸² See Singer, *supra* note 4, at 249–52.

⁸³ 4 W. BLACKSTONE, *supra* note 10, at 180; 1 M. HALE, *supra* note 11, at 445; 1 W. HAWKINS, *supra* note 18, at 7.

⁸⁴ Beale, *Retreat From a Murderous Assault*, 16 HARV. L. REV. 567 (1903).

⁸⁵ G. FLETCHER, *RETHINKING CRIMINAL LAW* 759–875 (1978).

⁸⁶ P. ROBINSON, *1 CRIMINAL LAW DEFENSES* 83–101 (1984).

⁸⁷ G. FLETCHER, *supra* note 85, at 759; P. ROBINSON, *supra* note 86, at 100–101.

⁸⁸ G. FLETCHER, *supra* note 85, at 759; P. ROBINSON, *supra* note 86, at 101. See also Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984); Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

One question dealt with by Robinson,⁸⁹ and which is philosophically important in determining the relationship of mistake to excuse and justification, is whether a mistake as to the existence of facts which would justify an act should result in calling the act "justified" or "excused." Some view a mistake which leads to what would be a justifiable act had the actor been correct as, nevertheless, a justified act,⁹⁰ apparently based on the notion that one should assess the moral worth of an act *ex ante*. Other writers, however,⁹¹ classify such a mistake as an excuse, apparently assessing the act *ex post* and determining that the actor has not in fact achieved a social good, which is required by the definition of a justified act. As these writers put it, the doctrine of justification looks solely at the act, never at the actor.

Whatever the resolution of this dispute, the distinction between justification and excuse, firmly understood before 1800, has been lost upon American and English courts and writers in the past century and a half.⁹² Ironically, it had its major procedural impact during the centuries prior to the American Revolution in the law of self defense. A homicide in the prevention of felony was justifiable and, hence, praiseworthy; a homicide *se defendendo*, however, was excusable⁹³ because the actor was at least partially to blame for the ultimate melee which resulted in death. Because it was merely excusable, homicide *se defendendo* still required, at least as a matter of form, forfeiture of all chattels of the excused defendant.⁹⁴ Thus, the common law of self defense graphically and tangibly reflected the philosophical distinction between excused and justified acts.

At about the turn of the nineteenth century, however, this tangible distinction disappeared. Although English courts only formally abolished forfeiture in 1828,⁹⁵ they rarely applied it in the prior decades and there is no indication that courts ever enforced forfeiture in the United States. This disappearance might have been uneventful, nevertheless, and there might still have been two "defenses," one called "felony prevention" and one called "*se defendendo*." Instead, it appears that the courts and the writers collapsed the distinction between justifiable self defense and excusable self defense into one doctrine of "defense."⁹⁶

⁸⁹ See 2 P. ROBINSON, *supra* note 86, at § 184.

⁹⁰ P. LOW, J. JEFFRIES, & R. BONNIE, CRIMINAL LAW 541-48 (1982).

⁹¹ E.g., P. ROBINSON, *supra* note 86, at 114-15.

⁹² See *supra* notes 85-86 and accompanying text. See also J. MAY, CRIMINAL LAW 65 (3d ed. 1905), in which the author notes that some of the states use different rules in self defense cases depending on different fact patterns, but shows no awareness that these different fact patterns in fact reflect the ancient distinction between *se defendendo* and prevention of a felony. The present article is concerned only with "excused" self defense and therefore does not enter the area of "justified" self defense, except to the extent that the doctrines appear to merge from time to time. For a striking analysis of justified killing, including those in self defense, see Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871 (1976).

⁹³ See 4 W. BLACKSTONE, *supra* note 10, at 183; 1 W. HAWKINS, *supra* note 18, at 72.

⁹⁴ Foster first clearly articulated the difference between justified and excused homicide. As he put it, the writers on the common law "have not treated the subject of self defense with due precision" and "do not in terms make the distinction I am aiming at . . ." M. FOSTER, *supra* note 18, at 273. He distinguishes between what he calls justifiable self defense (what other writers call justifiable homicide, he says) and what he calls "Homicide *Se Defendendo* upon Chance-Medley." *Id.* at 275. He then outlines the distinction noted above in the text.

⁹⁵ 9 Geo. 4, ch. 31, § 1 (1828).

⁹⁶ See *infra* part IV.

With this background, it is now possible to assess the position of the common law with regard to mistake of fact in *se defendendo* and prevention of felony cases prior to the nineteenth century. As with mistake of fact generally, the writers did not even discuss the effect of mistake in either justifiable or excusable self defense, much less the question of whether the mistake had to be reasonable in order to exculpate. Perhaps, however, this silence itself is instructive, particularly in light of the fact patterns which characterized the two situations.

In a *se defendendo* case, the actor could be seen as partially at fault for having engaged in the chance-medley. On the other hand, because there was some time lapse between the initial fight and the final slaying, the actor had some opportunity to assess his co-combatant's intent. Finally, because there was a requirement of retreat where possible, the slayer who did retreat was sure that the pursuing victim intended, at the very least, to continue to threaten him with a deadly weapon; as the slayer retreated, if the victim had given up pursuit, no death would have occurred. Thus, when a *se defendendo* killing occurred only after the defendant-slayer had retreated to the wall, pursued by the combatant-victim who was carrying a deadly weapon and had already attempted to use it, the likelihood that the defendant was mistaken about the victim's intent would be miniscule. At the very least, the facts would indicate that viturally every defendant-slayer in *se defendendo* was not merely reasonable but also accurate in concluding that the victim intended to kill him.

On the other hand, with the prevention-of-felony killing in self defense, in which the defendant-innocent was not required to retreat, there was at least the possibility that the innocent victim might misjudge the intensity of the aggressor.⁹⁷ Yet this did not seem to bother the writers, perhaps because the aggressor-victim had put himself in a position to be misconstrued. Additionally, because during the time these doctrines arose the primary weapons were knives, swords, poles, and the like, the fact patterns would require that the aggressor-victim intended to use the weapon. In such close settings, although mistakes about future intentions are always possible, a factual mistake is far less likely than it might be in the era of the gun, which does not require such proximity to be used. Thus, it may not be surprising that the seventeenth and eighteenth century writers do not speak of mistake in the context of self defense.

b. *The Nineteenth Century Cataclysm*

i. East

The first discussion of mistake as relevant to self defense, either justifiable or excusable, appears in East's treatise, *Pleas of the Crown*, published in 1803.⁹⁸ In discussing justifiable homicide, East declares that while there must be "apparent" necessity,

⁹⁷ Even Professor Kadish, in his otherwise remarkable article on self defense, makes the mistake of declaring that the common law permitted a person to hold his or her ground, failing generally to note the distinction between *se defendendo* and prevention of felony. Kadish, *supra* note 92, at 875. It is possible, however, that because Kadish was concerned primarily with justified slayings, he was restricting his comment to prevention of felony cases, although there is no direct indication of that in the material cited.

⁹⁸ E. EAST, *supra* note 15. Virtually all authorities agree that East is the originator of the reasonableness requirement. See, e.g., Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A.L. REV. 435, 443 (1981); Morris, *A New*

yet still if the party killing had reasonable grounds for believing that the person slain had a felonious design against him . . . although it should afterwards appear that there was no such design, it will only be manslaughter, or even misadventure, according to the degree of caution used, and the probable grounds for such belief.⁹⁹

In other words, if the mistake as to the necessity is reasonable, then the killing is non-culpable; if it is not reasonable, the killing will be manslaughter.¹⁰⁰

East's citations for the proposition that homicides committed as the result of an unreasonable mistake of fact constitute manslaughter are not persuasive. His first cite is to a case (suspiciously like *Cook's* case¹⁰¹) discussed in *Hale*,¹⁰² involving a defendant who, awakened in his bed one morning by a bailiff who failed to identify himself, killed the bailiff. East concludes from *Hale's* report of the case that the defendant's manslaughter conviction was due to his failure to take due care before stabbing the bailiff, that the mistake was therefore unreasonable, and that, as a result, the offense was manslaughter. *Hale's* report, however, is far less clear¹⁰³ and suggests that there was no argument over whether this was manslaughter but, rather, only over whether the case was covered by the Statute of Stabbing¹⁰⁴ — the court ultimately concluding that it was not. Because there was no debate (apparently) over whether the slayer was culpable at all, and certainly no debate over whether there was any mistake, much less reasonable or unreasonable, the case cannot directly support East's conclusion that all unreasonable mistakes in self defense result in a manslaughter conviction. Indeed, such a conclusion is itself fundamentally inconsistent with the doctrine of homicide *se defendendo*, in which the slayer is totally excused. The difficulty with the case, upon which East primarily relies for the doctrine that only reasonable mistake exculpates in self defense, is that neither *Hale* nor others discuss this case as one of self defense — either justified or excused — and that it does not appear that the issue of self defense was raised. Furthermore, the result in this case is certainly at odds with the result in *Levett's* case,¹⁰⁵ which involved a more culpable defendant than the sleeping defendant present in the case cited by East.

Qualified Defence to Murder, 1 ADEL. L. REV. 23, 28 (1960). Morris cites several earlier writers as "strands" which could support East, but none of these cites is very compelling. Donovan and Wildman argue that East actually mitigated the law, because they see the prior law as requiring actual necessity. This may have been true with regard to justifiable homicide, see *supra* text accompanying notes 83–84 and *infra* text accompanying notes 152–55, but it clearly was not the case with regard to excusable homicides; and these authors do not discuss, much less distinguish, the *Levett* case or other similar holdings. See *supra* text accompanying notes 18–20.

⁹⁹ E. EAST, *supra* note 15, at 273.

¹⁰⁰ This in itself is interesting, since many state courts during the nineteenth century held that an unreasonable mistake had no mitigating effect, holding the defendant guilty of murder. It was only with the generation of the doctrine of "imperfect self defense" that the twentieth century law adopted East's explicit doctrine of mitigation. See *infra* note 151.

¹⁰¹ See *supra* text accompanying note 16.

¹⁰² M. HALE, *supra* note 11, at 470.

¹⁰³ *Id.* The facts sound suspiciously like those in *Cook*, *supra* note 13, but neither *Hale* nor East gives a cite for the decision.

¹⁰⁴ 1 Jac. 1, ch. 3 (1606). The statute turned homicides which would have been manslaughter into murders if the deadly weapon was a knife, sword, etc., by removing benefit of clergy from such killers.

¹⁰⁵ See *supra* text accompanying notes 13–18.

Similarly doubtful is East's analysis of *Nailor's* case.¹⁰⁶ In *Nailor*, the defendant and his father engaged in a scuffle in their house, defendant getting the better of the father. Defendant's brother then intervened and beat defendant, whereupon defendant drew a penknife and killed the brother. In explaining the manslaughter conviction upon a murder indictment, East surmises that "there did not appear to be any *inevitable necessity* so as to excuse the killing in that manner . . . there must always appear to have been such a degree of necessity as may reasonably be deemed inevitable;"¹⁰⁷ again: "[there is no excuse] unless there were reasonable ground to apprehend that he would otherwise have been killed."¹⁰⁸

East's analysis of *Nailor's* case, however, is arguably incorrect for several reasons. First, none of the earlier writers had used the "reasonableness" formula, even if the cases are arguably consistent with such an analysis. More importantly, however, East's analysis of *Nailor's* case — one of his two premiere exhibits — is faulty because the case is easily explicable on typical chance-medley grounds: the defendant began the affray, failed to retreat, and, therefore, is unable to plead successfully *se defendendo*. Moreover, East's distinction would seem to require a holding that *Nailor* was guilty of murder; yet the court, per Chief Justice Holt, found the homicide to be manslaughter only, thus suggesting that it was not the reasonableness or unreasonableness of the defendant's beliefs, but the objective fact pattern which guided the court's decision.

ii. Selfridge's Case

Although the accuracy of East's reading and interpretation of the early cases are open to debate, his treatise, published in 1803, figured prominently in the first, and highly influential, American case dealing with the rules of self defense. Only three years after its publication, defense counsel quoted East's treatise at length in the *Selfridge* case,¹⁰⁹ where Judge Parker, without citing but obviously relying upon East, instructed the jury that only a reasonable mistake of fact could excuse in self defense.

Selfridge and Benjamin Austin had been involved in a dispute regarding statements published by Austin which Selfridge, a lawyer and aspiring politician, believed to be slanderous. Ultimately, Austin orally retracted the accusations but refused to print a retraction. Things escalated and Selfridge armed himself. At this point the facts become hazy; apparently Austin's son, Charles, became involved and, whether for protection or aggression, bought a "heavy walking stick which he proceeded to carry in place of a little one which he generally used."¹¹⁰ Charles Austin and Selfridge met on the street. The evidence thereafter is unclear. Some evidence was given that Selfridge began firing a gun immediately, hitting Austin;¹¹¹ yet other evidence indicated that the latter "*continued to strike Selfridge several more blows and then fell to the ground*" after which Selfridge shot Austin.¹¹² Soon thereafter young Austin died of the gunshot wounds.

¹⁰⁶ E. EAST, *supra* note 15, at 276–77. There is no official report of *Nailor's* case; East's summary appears to be the only one.

¹⁰⁷ E. EAST, *supra* note 15, at 277.

¹⁰⁸ *Id.* at 285.

¹⁰⁹ *Commonwealth v. Selfridge*, 2 Am. St. Trials 544 (1806).

¹¹⁰ *Id.* at 548. See also *id.* at 586.

¹¹¹ *Id.* at 570.

¹¹² *Id.* at 586, 590 (emphasis added).

After one hundred pages of counsel's arguments which, in the tradition of the day, were cited and quoted to the jury at great length from the previous cases and treatises,¹¹³ the report recites Judge Parker's famous instruction to the jury that a reasonable mistake of fact will excuse in a self defense case: "When . . . there is reasonable ground to believe that there is a design to destroy his life . . . then killing the assailant will be excusable . . . although it should afterwards appear that no felony was intended"¹¹⁴ At this point, Judge Parker hypothesized about a defendant who, faced with an opponent-victim who is waving a gun, kills the victim only to discover that the gun is filled with blanks and that the victim's sole intent was to scare defendant. Parker then continued:

Will any reasonable man say that A is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrines must require, that a man so attacked, must, before he strikes the assailant, stop and ascertain how the pistol is loaded.¹¹⁵

Much of the later self defense law was based upon this instruction. Indeed, the editor of *American State Trials*, writing in 1914, declares in somewhat but not entirely hyperbolic terms that *Selfridge's* case is "perhaps even at this day the leading American authority on the Law of Self-Defense."¹¹⁶

Yet later courts' reliance upon *Selfridge's* case for the rule of reasonableness is significantly weak. In the first place, *Selfridge* was indicted only for manslaughter, which made it difficult for the prosecutor to argue that if *Selfridge* acted upon an unreasonable mistake, his crime was murder.¹¹⁷ Second, the case was clearly not one of mistake. While the case might be viewed as one of mistake as to the degree of force necessary (excessiveness), there was no significant dispute that Charles Austin intended to harm the defendant. Thus, Judge Parker's hypothetical¹¹⁸ was off-point. Moreover, the cite is not probative on the question at hand: whether an unreasonable mistake will exculpate. The illustration and instruction merely demonstrate that a reasonable mistake will exculpate; there is no logical implication that an unreasonable mistake will not, and there is nothing in Parker's instruction to so indicate.

Perhaps most importantly from our viewpoint, however, it should be clear that the defendant in *Selfridge* was not raising a pure self defense argument at all. Rather than seeking to excuse his conduct on the premise that he was acting *se defendendo*, he was arguing instead that he had absolutely every right to use deadly force against Austin who, he alleged, was committing or about to commit a felonious assault intended to result in Austin's serious bodily injury or death; in short, he was arguing justifiable prevention of felony. *Selfridge*, therefore, is the first case — and certainly the first American case — to use the term "self defense" to describe what up until that point in legal history was characterized as a justifiable¹¹⁹ prevention of felony. In the process,

¹¹³ See, e.g., *id* at 581–82 (quoting E. EAST, *supra* note 15).

¹¹⁴ *Id.* at 692.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 549.

¹¹⁷ For examples of the dilemma, see the argument of prosecuting counsel that if the jury finds the killing to be murder, it can find that it was manslaughter. *Id.* at 555. This is not so, however, if manslaughter is defined as a non-malice slaying because murder requires malice aforethought. The prosecutor obviously is trying to avoid being hoisted on his own petard.

¹¹⁸ *Id.* at 692.

¹¹⁹ See *supra*, notes 83–94 and accompanying text.

both counsel and Judge Parker erroneously relied on East's discussion of *se defendendo*,¹²⁰ as well as his dubious conclusions as to the relevance of mistake in prevention of felony cases.

Thus, *Selfridge* should be understood in this context: the prosecutor was arguing that a killing would be *justified* only if there were *actual* necessity, whereas the defendant was arguing that even if the defendant was wrong, it was still justifiable prevention of felony. As a fall-back position only, however, he cited East's discussion of *excusable* slayings, arguing that *Selfridge*'s mistake was at least reasonable and therefore excusable. Later courts arguably misunderstood *Selfridge* and the earlier cases, but no one was arguing for the rule of total subjectivity — honest but unreasonable mistake as to justification or excuse as exculpatory — because no one thought that fact pattern to be involved.

Finally, one might have believed that *Selfridge* would be of absolutely no precedential value not only because the only "precedent" was limited to a trial judge's instruction to a jury, but also because that jury itself acquitted *Selfridge* of the only crime of which he was accused: manslaughter. Because the acquittal could have been based either upon the ground that *Selfridge* had a right to stand where he was — and mistake was, therefore, irrelevant — or upon the ground that *Selfridge*'s "mistake" was reasonable, the case has no clear "holding." Nevertheless, Judge Parker's charge influenced numerous later cases,¹²¹ and came to be accepted as a fixed authority for the proposition for which it clearly did not stand as a holding: that only a reasonable mistake would exculpate totally and an unreasonable mistake of fact in self defense rendered the defendant liable at least for manslaughter.

iii. The First Fifty Years of Self Defense in America

From 1800 to 1850, an astounding paucity of cases deal with the law of self defense as it developed in this country after *Selfridge*. A careful review of the reported cases in this period finds only a handful dealing even peripherally with self defense, and even fewer which actually confront the question of the effect of mistake, reasonable or otherwise, on the defense. The majority of these cases either contain only dictum on the question of reasonableness¹²² or do not address the issue at all.¹²³ Still others are simply reports of trial court instructions, with some resulting in acquittal and, therefore, of little precedential value,¹²⁴ although of some probity as to the assumed state of the law

¹²⁰ See, e.g., *Selfridge*, 2 Am. St. Trial at 561-64, 580-84, 600-01, 646, 657.

¹²¹ E.g., *State v. Chandler*, 5 La. 489 (1850).

¹²² E.g., *Pierson v. State*, 12 Ala. 149, 153 (1847); *People v. Austin*, 1 Parker 154 (N.Y. 1847); *People v. Rector*, 19 Wendell 569, 587 (N.Y. Sup. Ct. 1838) (*Rector* is glancingly relied upon in *Shorter v. People*, 2 N.Y. 193 (1849), see *infra* note 136); *State v. Scott*, 26 N.C. (4 Ired.) 409, 415 (1844).

¹²³ For example, often cited as relevant to the mistaken defense issue are *United States v. Vigol*, 2 Dallas 346, 347 (1795) (U.S.C.C. Pa.) (indictment for high treason during Shay's rebellion, in which the defendant argued only duress), and *United States v. Wiltberger*, 28 F. Cas. 727 (C.C.E.D. Pa. 1819) (No. 16,738) (no issue of mistake). Also cited is *Penn. v. Robertson*, 1 Add. 246 (Pa. 1794), in which the defendant was acquitted by the jury after a strong instruction on the necessity of retreat.

¹²⁴ This, of course, does not mean that such instructions, as in *Selfridge*, may not become cited as precedent, but merely that they are binding on no one and carry no substantial weight. This is particularly true when, as in *Selfridge*, 2 Am. St. Trials 544 (1806), and *Robertson*, Add. 246 (Pa. 1794), the jury acquits.

at the time. Of the cases that do actually raise the reasonableness question on the facts of the case, all but one either allow or require any mistake, reasonable or not, to establish self defense and exculpate the defendant.

The first relevant case appears to be *State v. Wells*, decided in 1790.¹²⁵ The facts are typical of self defense cases. The defendant and victim had been embroiled in disputes for several years. One day the two got into yet another quarrel and the victim pushed the defendant down; the defendant picked up a club which happened to be lying nearby, and hit and killed the victim. There was no evidence that defendant had planned this crime, and there was some evidence that there were deadlier weapons within reach which defendant could have used had he clearly intended to kill.¹²⁶ Defendant was charged with and convicted of manslaughter, and the trial judge certified the case to the New Jersey Supreme Court. The precise issue at hand appears to have been whether the trial judge erred in instructing the jury that the law of *se defendendo* required the defendant, having engaged in a mutual combat, to retreat as far as possible. Upholding the instruction and the conviction, the court relied on *Nailor's* case, although that case was readily distinguishable because the defendant in *Nailor* was the original aggressor. Having held that in accordance with well-settled law, retreat was necessary for full exculpation, the court opined in dictum that "no man is justified or excusable . . . unless the necessity for [using deadly force] is apparent as the only means of avoiding his own destruction or some very great injury, neither of which appears to have been *reasonably* apprehended in the present case."¹²⁷

The next American case is *Grainger v. State*,¹²⁸ decided forty years later. *Grainger* expressly and directly raised the issue of reasonableness as a limitation upon self defense and definitely rejected that limitation. Finding that the victim, Broach, had "displayed

¹²⁵ 1 N.J.L. 424 (1790).

¹²⁶ See *id.* at 424-26.

¹²⁷ *Id.* at 430 (emphasis added). A reasonableness instruction also was given in *Commonwealth v. Cary*, 2 Brews. 404, 406 (Phila. Oyer & Term 1879). A strong contrary English case is *R. v. Scully*, 1 C. & P. 319, 171 Eng. Rep. 1213 (1824). D, protecting his master's gardens, saw X on the garden wall. X, having seen D, then said to someone unseen by D, "shoot and be d[amne]d." D then shot at X, hitting V, who was X's accomplice. The court first announced the doctrine that deadly force could not be used in protection of property, and then instructed the jury that "if he considered his life in actual danger," they should acquit. *Scully*, 1 C.L.P. 319-20, 171 Eng. Rep. 1213. The *Scully* jury did acquit. *Id.* Nothing in *Scully* required that the defendant's belief be reasonable, and the language seems to stress the defendant's actual belief.

Two other Commonwealth sources are relevant to this issue, though the literature cites neither extensively. In *R. v. Mead and Belt*, 1 Lewin 1846, 168 Eng. Rep. 1006 (1823), the court appeared to adopt a "reasonableness" rule in self defense, but the case is so muddled that it is very unclear. D had informed on a number of smugglers, and they threatened him with retaliation. When one night they massed around his house shouting threats, he shot one. Holroyd, J., instructed the jury that if the victim merely had trespassed and there was no show of violence, defendant was guilty of murder because he had no reasonable ground for firing. On the other hand, he told the jury that if D was in fact attacked, then, nevertheless, he "w[as] perhaps justified in firing as he did — [if] you are of the opinion that the prisoner intended to fire over [the heads of the crowd] and frighten, then the case is one of manslaughter and not of self defense." *Id.* at 186, 168 Eng. Rep. 1006. A second source adopting reasonableness as the rule in self defense cases is McCauley, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONER § 76 (1837). The commentary, however, is not helpful and does not discuss the policy reasons behind this choice. These, and *Scully*, seem to be the only important English cites for the issue during the half century now under discussion.

¹²⁸ 13 Tenn. 459 (1830).

the traits of a reckless bully," the court further declared that the defendant had "behaved like a timid, cowardly man."¹²⁹ The court also concluded that it "is equally certain to our minds that Broach only designed to commit a trespass and battery to the body of Grainger, without intending to kill him."¹³⁰ Nevertheless, the court held that if Grainger himself thought that he was in danger, even if that was an unreasonable belief, the killing was in self defense. The court made clear that it was the defendant's mental state, and not that of a reasonable man — certainly not a reasonable timid coward — that was to be assessed. Mistake, and fear, were to be judged by a subjective test.¹³¹

Only one other case occurring between 1830 and 1850 is of any significance. In *Monroe v. State*,¹³² the court adopted a subjective test as to self defense, notwithstanding that the defendant's counsel had sought an instruction applying an objective test. Again, however, the adoption of this test was dictum, since the relevant issue on appeal dealt with the admissibility of evidence of prior threats and beatings which the victim had committed upon the defendant. *Monroe* is instructive also because it is the first clear instance of preemptive strike:¹³³ the defendant, having been threatened and beaten by the victim at an earlier time, simply lay in wait for the victim. The court held, nevertheless, that this could be self defense.¹³⁴

iv. *Shorter* — The Revolution in Self Defense Law and Reasonable Mistake

Within a few short years of the *Monroe* decision the law changed dramatically. The turning point of self defense and mistake occurred just at the mid-point of the century. The case, *Shorter v. People*,¹³⁵ emanated from a prestigious court — the New York Court of Appeals — and has been cited continuously ever since.¹³⁶ Yet it was scarcely the kind of case of which important precedents are usually made.

The *Shorter* facts were stark and hardly those which would generate any sympathy. The defendant, a fifteen year old black, aroused by a racial slur neither aimed at him nor intended to insult, attacked his victim, first with fists and then with a knife, stabbing him several times. No evidence indicated that the victim had any weapon, nor that the defendant had any fear — reasonable or otherwise — for his life or limb. Leaving aside the possibility of the racial slur as provocation,¹³⁷ the case is one where the defendant was the aggressor both as to the initial fight and the subsequent deadly force.

Moreover, the procedural issue at stake in *Shorter* skewed both the decision and the opinion. The trial judge had instructed the jury that the law required actual danger to the defendant to exculpate; the defense counsel merely sought an instruction that a

¹²⁹ *Id.* at 461-62.

¹³⁰ *Id.* at 462.

¹³¹ *Id.*

¹³² 5 Ga. 85, 136-37 (1848).

¹³³ See *infra* note 212.

¹³⁴ *Monroe*, 5 Ga. at 138. The court cited 7 BACON 211 as follows: "If a man, though in great danger of serious bodily harm, through fear, alarm or cowardice, kill another, under the impression that great bodily injury is about to be inflicted upon him, it is neither manslaughter nor murder, but self-defense." *Monroe*, 5 Ga. at 101. The court also relied upon *Grainger*, *supra*, note 128.

¹³⁵ 2 N.Y. 193 (1849).

¹³⁶ *Shorter* was the prime case used by Kadish and Paulsen to introduce first-year law students to self defense. S. KADISH & M. PAULSEN, CRIMINAL LAW 496 (3d ed. 1975); *id.* at 494 (2d ed. 1969).

¹³⁷ Words and insults are not — and were not then — generally considered "adequate" provocation to reduce a killing to manslaughter. See Singer, *supra* note 4, at 265.

reasonable apprehension of life endangerment was enough.¹³⁸ On the law as it existed at the time, of course, there was no doubt that the trial judge's instruction was wrong: no authority required that there actually be a murderous intent on the part of the victim. Because that was the only issue critical to reversal, or so it would have appeared, any further discussion was dictum.

Moreover, Shorter's counsel argued not that a slaying done under a reasonable mistake would be excused but, rather, that it would be justified. He obviously felt compelled to argue this ground because the New York statute in question provided expressly that a killing in self defense was "justifiable" only if there were reasonable ground for fear and apprehension.¹³⁹ Indeed, Judge Bronson made the same mistake in the majority opinion by dismissing any concern about whether the killing would be excusable by saying simply "our statute has placed killing in self defense under the head of justifiable homicide."¹⁴⁰ This, however, was only a half-truth. The statute said that a reasonable mistake as to self defense would make the killing justifiable; it did not specify the impact of an unreasonable mistake, and there was a residuum clause (not discussed by the majority) which made "every other killing of a human being, by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable . . . manslaughter in the fourth degree."¹⁴¹ A further provision of the New York Code declared that a killing "in the heat of passion, upon any sudden and sufficient provocation . . . without any undue advantage being taken, and without any dangerous weapon being used"¹⁴² was excusable. Arguably this provision, too, could be construed to imply negatively that a killing done upon insult, with a dangerous weapon but in the heat of passion, might fall within the residuum category. But these points were never argued nor discussed.

Furthermore, the main thrust of defendant's argument, and of the court's opinion, was to demonstrate that the trial judge's instruction was wrong; as Judge Bronson put it at the outset of the opinion, a requirement that there be actual danger "would lay too heavy a burden upon poor humanity."¹⁴³ Thus, the decision, and opinion, could have stopped with a mere declaration that consistent with both common law and statute, a reasonable mistake would exonerate, and that a new trial was therefore required because the instructions were in error. Whether it justified or "merely" excused would be irrelevant from the defendant's viewpoint. Instead, in strong dictum, the court rejected an argument that defense counsel never made: that the defendant would be justified if he believed, however unreasonably, that he was in danger. Having created its own straw man, the court then explicitly excoriated the subjective approach adopted by the *Grainger*¹⁴⁴ court as "going too far." It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief.¹⁴⁵ Having thus demonstrated that the trial judge's

¹³⁸ Shorter, 2 N.Y. at 195.

¹³⁹ Part IV, ch. 1, tit. 2, art. 1, § 3(2) (Revised Statutes of New York 1829) (A killing is justifiable "when there shall be reasonable ground to apprehend a design to . . . do some great personal injury and there shall be imminent danger of such design being accomplished . . .").

¹⁴⁰ Shorter, 2 N.Y. at 198.

¹⁴¹ N.Y. Penal Law § 19, part IV, ch. 1, tit. 1.

¹⁴² *Id.* at § 4(2).

¹⁴³ Shorter, 2 N.Y. at 198.

¹⁴⁴ See *supra* note 128.

¹⁴⁵ Shorter, 2 N.Y. at 201.

instruction was clearly inconsistent with every past authority, the court nevertheless affirmed the conviction on the ground that, on the facts of the case, even a properly instructed jury could not have found that Shorter had even an unreasonable but honest fear for his life.¹⁴⁶

Shorter was a formidable opinion primarily because it purported to review many of the earlier authorities, both writers and cases, to reach its conclusion.¹⁴⁷ In fact, however, most of the authorities cited support only the proposition that a reasonable mistake will exculpate; *Shorter* cites no authorities that sustain the court's repudiation, in dictum, of *Grainger's* position that unreasonable mistake will also excuse. Furthermore, for several reasons, the case was clearly not a holding that the common law required exculpatory mistake to be reasonable. First, the defendant had complained of the trial court's instruction to the jury that the law required actual necessity, thereby precluding even reasonable error as a defense. Second, defense counsel had never argued for a subjective test and had sought only an instruction incorporating the objective test. Third, a New York State statute explicitly required that the mistake be reasonable; otherwise the killing was not justifiable; it could, however, be argued that the killing might still be excusable under the "residuum" provisions of section nineteen. Even if *Shorter* is a "reasonableness" case, it is not a common law, but a statutory, holding. Finally, the Court of Appeals upheld the murder conviction, notwithstanding the error in the instruction, because no reasonable jury could have found that the defendant reasonably feared death or bodily harm. Yet, notwithstanding these patent distinguishing points, *Shorter* had a substantial impact on later common law development.

v. The Resolution of the Issue

If the first half century saw little development or analysis of the self defense question, the second half began with an explosion of statutes, case law,¹⁴⁸ and treatise

¹⁴⁶ *Id.* at 203.

¹⁴⁷ One year prior to *Shorter*, a trial court opinion embracing reasonableness appeared, but it never had the impact *Shorter* did, for obvious reasons. *People v. Austin*, 2 Ed. Selec. Cas. 54, 64-65 (N.Y. Oyer & Term 1849).

¹⁴⁸ Some courts cite or quote the statutes upon which they are relying. Thus, in *Monroe*, 5 Ga. 85 (1848), the court quoted section 13 of the Georgia Code as saying that "a bare fear of these offenses shall not be sufficient to justify . . . [a killing] It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing acted upon the influence of those fears, and not in the spirit of revenge." In *State v. Cadotte*, 17 Mont. 315, 42 P. 857 (1895), the court cited the Montana Penal Code of 1895, section 362, as declaring: "But the circumstances must be sufficient to excite the fears of a reasonable person" *Id.* at 320, 42 P. at 859. It is often not possible to trace the statutes relied upon in early cases. But there is at least some doubt as to the interpretation and application of these legislative acts. In 1914, O. WARREN ON HOMICIDE reprinted all then-existing state statutes relating to homicide, including those concerning self defense. Only 25 states appear to have dealt expressly with self defense, and the language in these jurisdictions is often not clear. Thus, Arizona (ARIZ. REV. STAT. § 4590), California (CAL. STAT. § 198), Idaho (IDAHO CODE § 17-1112), Montana (MONT. CODE ANN. § 10966), and Utah (UTAH CODE ANN. 103-28-10) had identical language, providing that homicide would be justifiable when (1) committed to prevent murder or other great harm; (2) committed to prevent a felony other than one involving great bodily harm or a felony against property; (3) committed to aid another from a serious assault. The statutes then continued: "A bare fear of the commission of any

of the offenses mentioned in subdivisions two and three hereof is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone." (Emphasis added) Thus, the implication was that as to killings committed to prevent murder or great bodily harm, a bare fear (subjective) would be sufficient. Yet, for example, that was not the holding in *Cadotte*, 17 Mont. 315, 42 P. 857 (1895).

Eight states — Arkansas (ARK. STAT. ANN. § 3000), Colorado (COLO. STAT., ch. 48, § 43), Georgia (GA. CODE § 26-1011), Mississippi (MISS. CODE § 988), Nevada (NEV. COMPILED LAWS § 10077), New York (N.Y. PENAL LAW § 1055), Texas (TEX. PENAL CODE ANN. § 1222), and Washington (WASH. CODE § 2406) — copied the "bare fear" language, without any indication that it was applicable only to some homicides sought to be "justified." On the other hand, 9 states simply allowed self defense without any apparent reasonable restriction. These were: Florida (FLA. COMPILED GEN. LAWS § 7135), Iowa (IOWA CODE § 12921), Kansas (KAN. GEN. STAT. ANN. § 21-404), Minnesota (MINN. STAT. § 35-315-318), North Dakota (N.D. COMP. L. § 9503), Oklahoma (OKLA. STAT. § 2237), Oregon (OR. CODE § 14-217), South Dakota (S.D. REVISED CODE ANN. § 4008), and Wisconsin (WIS. STAT. § 340.29). Illinois (ILL. STAT. § 37.288) appeared to require an absolute necessity.

Thus, at best, the legislation was mixed as to the issue of reasonable versus honest mistake of fact, and a fair reading indicates that the majority of states legislating on the subject allowed an honest mistake, even if unreasonable, to exculpate. Yet a number of state courts either misinterpreted these statutes, as in *Cadotte*, or interpreted open-ended statutes to require reasonableness, or applied the *Shorter* (statutorily-based) reasonableness requirement either in the presence of a contrary statute or in the presence of a less than fully clear statute.

As will be seen *infra* part III. A. 1, "reasonableness" can be measured in several ways: (1) by a purely objective standard, asking whether a reasonable person would have acted as the defendant did; (2) in a quasi-objective fashion, asking whether a reasonable person with characteristics like the defendant's would have reasonably believed deadly force was necessary; (3) by asking whether the defendant (with all of his or her characteristics) reasonably believed deadly force was necessary. It is arguable that the second and third are not "wholly" objective tests. But for the immediate purpose, states adopting any one of these approaches are considered "objective," "reasonableness" states; only states adopting a full subjective inquiry and asking only whether the defendant honestly believed deadly force was necessary will be classified as "subjective." Later, this article analyzes this issue more closely. See *infra* part III. A. 1.

By 1900, at least the following states had adopted an objective, "reasonableness" test:

Alabama

Keith v. State, 97 Ala. 32, 35, 11 So. 914, 915 (1892); Holley v. State, 75 Ala. 14, 19 (1883); Oliver v. State, 17 Ala. 587, 599 (1850). Alabama began, in *Oliver*, with the reasonableness standard and never altered course. The main source of the reasonableness standard adopted in *Oliver* was East's *Treatise*. *Oliver*, however, stated the rule as whether the *defendant* reasonably believed, and that rule appears to have been the rule at least until Hill v. State, 194 Ala. 11, 28, 69 So. 941, 942 (1915), where the court introduced the reasonable man standard for the first time.

California

People v. Donguli, 92 Cal. 607, 610 (1891); People v. Batchelder, 27 Cal. 69, 76 (1864); People v. Hurley, 8 Cal. 390, 391 (1857). *Hurley* and other early cases rejected defendant's attempt to use the subjective standard, and there is much language in the early cases that suggests that actual necessity is required. People v. Flahave, 58 Cal. 249, 251 (1881), however, expressly decided that actual necessity was not to be the law of the state. The *Donguli*, *Batchelder*, and *Hurley* cases cited the penal code, *supra* note 147, as supporting the reasonableness rule, notwithstanding the implication in the statute that in "murderous assault" cases, even a "bare fear" would exonerate. See, e.g., People v. Williams, 32 Cal. 280, 285 (1867); People v. Campbell, 30 Cal. 312, 315-16 (1866).

Florida

Gladden v. State, 12 Fla. 562, 575 (1869).

Georgia

Redd v. State, 99 Ga. 210, 210, 25 S.E. 268, 268 (1896). Monroe v. State, 5 Ga. 85, 136-37 (1848), appeared to approve a subjective approach, but in Teal v. State, 22 Ga. 75, 84 (1857), the court adopted the standard of a "reasonable man, reasonably courageous, reasonably self-possessed." Accord Golden v. State, 25 Ga. 527, 533 (1858).

Idaho

State v. McGreevey, 17 Idaho 453, 466-67, 105 P. 1047, 1051 (1909) ("reasonable person").

Illinois

Mackin v. People, 214 Ill. 232, 235 (1905); Campbell v. People, 16 Ill. 17, 19 (1854). The standard here appears to have always been "defendant reasonably believes." Compare, however, the Illinois statute, *supra* note 147, which seems to require absolute necessity. The court in Schnier v. People, 23 Ill. 17, 25 (1859), rejected absolute necessity, and appeared to have adopted a reasonable man standard, but later cases reaffirmed Campbell's "defendant reasonably believed" test. Adams v. People, 47 Ill. 376, 379 (1868); Maher v. People, 24 Ill. 241, 243 (1860).

Iowa

State v. Sterrett, 68 Iowa 76, 80, 25 N.W. 936, 938-39 (1885) (rejecting subjective test in unequivocal terms). See also State v. Towne, 180 Iowa 339, 345, 160 N.W. 10, 12 (1916).

Kansas

State v. Bohan, 19 Kan. 28, 55 (1877); State v. Howard, 14 Kan. 173, 174-75 (1875).

Kentucky

Cockrill v. Commonwealth, 95 Ky. 22, 26, 23 S.W. 659, 660 (1893); Rapp v. Commonwealth, 53 Ky. (14 B. Mon.) 615, 623 (1854) (defendant reasonably believes).

Louisiana

State v. West, 45 La. Ann. 14, 23, 12 So. 7, 10-11 (1893). The court in *West* adopted the reasonable man standard, although earlier cases could be read as using a defendant-reasonably-believed approach. See State v. Swift, 14 La. Ann. 827, 827 (1859); State v. Chandler, 5 La. Ann. 489, 490 (1850).

Minnesota

State v. Spaulding, 34 Minn. 361, 366-67, 25 N.W. 793, 796 (1885) ("as it would be regarded by a man of fair average intelligence, prudence and firmness"); State v. Shippey, 10 Minn. 223, 231 (1865).

Mississippi

Bang v. State, 60 Miss. 571, 574-75 (1882); Dyson v. Mississippi, 26 Miss. 362, 387 (1853) (dictum) (defendant reasonably believed).

Missouri

State v. Berkeley, 109 Mo. 665, 676, 19 S.W. 192, 195 (1891). An early examination of the subjective versus objective issue is State v. Shultz, 25 Mo. 128, 149-51 (1857), in which the court adopted the objective standard.

New Jersey

Brown v. State, 62 N.J.L. 666, 709, 42 A. 811, 825 (1899).

New York

Shorter v. People, 2 N.Y. 193 (1849).

North Carolina

State v. Bryson, 60 N.C. (2 Win. 86) 470, 471 (1864) ("He is judged by the rules which are applicable to men whose nerves are in an ordinarily sound and healthy state . . . whatever may be his personal apprehensions . . ."). A frequently cited case is State v. Scott, 26 N.C. (4 Ired.) 409 (1844). Although both the dissent and the majority in *Scott* agree that the rule is that the mistake must be reasonable, the question whether an unreasonable but honest mistake will exculpate was not raised, because counsel sought to justify the killing and argued that defendant was not mistaken.

Ohio

Marts v. State, 26 Ohio 162, 167-68 (1875).

Oregon

State v. Morey, 25 Or. 241, 250, 36 P. 573, 575 (1894) (dictum).

Pennsylvania

Commonwealth v. Cary, 2 Brews. 404, 406 (Phila. Oyer & Term 1868) ("defendant reasonably believed"); Logue v. Commonwealth, 38 Pa. 265, 268 (1861).

South Carolina

State v. Crosby, 88 S.C. 98, 101, 106, 70 S.E. 440, 441, 443 (1911), upholding the following instruction:

[T]he jury must come to the conclusion from the evidence that a person of ordinary firmness and reason would have been warranted in coming to that conclusion under

writing¹⁴⁹ which rapidly established the proposition, in a majority of states,¹⁵⁰ that only

the circumstances. That is the standard, not what any unusually brave, bold, daring person would do, nor what a timid, scared, cowardly person would do on the other hand, but what a person of ordinary firmness, reason and prudence in the opinion of the jury would have done under the circumstances.

Id. at 101, 70 S.E. at 441.

Tennessee

The law in Tennessee was unsettled at the turn of the century. *Grainger*, *supra* note 128, had been one of the foremost authorities adopting a purely subjective approach to self defense, and court opinions such as *Shorter*, as well as writers such as Wharton, criticized the approach roundly. On several occasions, the Tennessee Court appeared to restrict *Grainger*, but it never fully repudiated the result or standard used in that test. See *Rippy v. State*, 39 Tenn. 217, 219-20 (1858) (limiting *Grainger*, and using the term "sufficient grounds" for an honest belief); *Williams v. State*, 50 Tenn. (3 Heisk.) 376, 397 (1871) (adding "well founded" to an otherwise totally subjective test). In *Frazier v. State*, 117 Tenn. 430, 446, 100 S.W. 94, 98 (1907), the court rejected the purely objective standard of a person of ordinary prudence, caution, and courage, but without clearly embracing either a fully subjective or a "defendant reasonably believes" view. The court, however, concluded that this discussion was dictum, because the prosecution was arguing that there was no pretense of self defense and the defense was arguing that there had been actual necessity.

Texas

Nalley v. State, 28 Tex. Crim. 387, 391, 13 S.W. 670, 671 (1890) (defendant reasonably believed); *Jordan v. State*, 11 Tex. Crim. 435, 448 (1882) (applying statute requiring reasonableness); *Lander v. State*, 12 Tex. 462, 478 (1854).

Vermont

State v. Doherty, 72 Vt. 381, 396, 48 A. 658, 663 (1900).

Virginia

Field v. Commonwealth, 89 Va. 690, 691, 16 S.E. 865, 865 (1893) (charge of unlawful shooting); *Stoneman v. Commonwealth*, 66 Va. (25 Gratt.) 887, 900 (1874).

West Virginia

State v. Cain, 20 W. Va. 679, 710 (1882) (court states it is adopting subjective standard, but this requires that defendant have reasonable grounds for belief).

Wisconsin

Richards v. State, 82 Wis. 172, 182, 51 N.W. 652, 654 (1892).

¹⁴⁹ See *infra* text accompanying notes 164-78.

¹⁵⁰ Indiana appears to have approved the subjective test, but the cases are unclear. In *Fahnestock v. State*, 23 Ind. 231, 257 (1864), the court adopted a reasonableness standard, which it confirmed in *Creek v. State*, 24 Ind. 151, 153 (1865), after noting that the cases were split, and the "question is one concerning which much may be said on both sides that is plausible and difficult to answer." *Id.* In *Batten v. State*, 80 Ind. 394 (1881), however, the court appeared to embrace a totally subjective standard:

An ideal man is thus made the standard [in other states] by which the guilt or innocence of the accused is to be determined. Is this correct? Should not the standard be the man himself? Ought regard to be had to real things, the man, the situation, the surroundings, or should some imaginary person be taken as the guide? Our conclusion is that the question must be decided upon the appearances present to the eyes and mind of the accused himself and upon the belief actually and in good faith entertained by him [T]he court is not to set up, . . . as the belief tested, an ideal man. In cases involving life, actual, real things rather than ideal should be taken as standards and tests. It is much safer and better to take the real man, the actual situation, and the real surroundings.

Id. at 404-05. The court relied heavily on Wharton, § 494. See *infra* notes 153-74 and accompanying text. However, in *Duncan v. State*, 84 Ind. 204, 208 (1882), decided only one year later, the court seemed to revert to the objective test, citing *Batten* as well as *Wall v. State*, 51 Ind. 453 (1875), which was not directly on point because *Wall* rejected an instruction requiring actual necessity; *Runyan v. State*, 57 Ind. 80 (1877), which was not directly on point because *Runyan* involved the retreat rule;

a reasonable mistake as to the need to use deadly force would result in a self defense verdict, and that the unreasonably mistaken actor would suffer as a murderer.¹⁵¹ Within twenty years of *Shorter*, the doctrine of reasonableness was firmly established in American criminal law, rarely to be challenged.

This remarkable surge toward consensus was due to several factors. First, following statutory declarations that the distinction between justification and excuse was no longer procedurally relevant,¹⁵² many courts concluded, either consciously or otherwise, that this development required the collapse of the distinction for purposes of self defense law with regard to mistake. Thus, if, according to East and others,¹⁵³ only a reasonable mistake would "justify" a killing prior to the collapse, then only a reasonable mistake would be allowed to "excuse" a killing after the demise of the distinction. The abolition of the procedural effect of the excuse/justification dichotomy as to forfeiture, and the underlying differences in the substantive law of excuse (previously "*se defendendo*") and justification (previously "prevention of felony"), completely confused the courts who now often used the words excuse and justification interchangeably. Thus, the language used

and *West v. State*, 59 Ind. 113 (1877), which embraced the reasonable man standard, but in the context of rejecting an instruction requiring actual necessity. Thus, at the turn of the century, Indiana law was uncertain. That uncertainty has now been resolved by the legislature, which requires reasonable belief. IND. CODE ANN. § 35-41-3-2(a) (Burns Supp. 1982); *Weekly v. State*, 496 N.E.2d 29 (Ind. 1986); *Wade v. State*, 482 N.E.2d 704, 706 (Ind. 1985) (dictum); *Hinkle v. State*, 471 N.E.2d 1088, 1089 (Ind. 1984).

Michigan also used a subjective test. See *People v. Bennett*, 121 Mich. 241, 247, 80 N.W. 9, 11 (1899); *People v. Keuhn*, 93 Mich. 619, 621-22, 53 N.W. 721, 722 (1892). *People v. Lennon*, 71 Mich. 298, 298, 38 N.W. 871, 872 (1888), is the leading case, in which the court declared, *inter alia*, that "the fact that the accused is weak, timid and cowardly by nature is to be weighed in his favor and not against him." *Id.* at 301, 38 N.W. at 872. Other decisions equivocated, using language which could support either objective or subjective approaches. See, e.g., *Hurd v. People*, 25 Mich. 405, 418-19 (1872); *Pond v. People*, 8 Mich. 150, 174 (1860).

Michigan apparently is still unsure whether it follows an objective or subjective standard. The Model Jury Instruction adopts the subjective view, CJI 7:9:01:(3) and commentary at 7-191 through 7-194, but some courts have employed a reasonable belief standard. See, e.g., *People v. Green*, 113 Mich. App. 699, 703-04, 318 N.W.2d 574-79 (1982); *People v. Perez*, 66 Mich. App. 685, 692, 239 N.W.2d 432, 435-36 (1976); *People v. Shelton*, 64 Mich. App. 154, 156, 235 N.W.2d 93, 94 (1975). Most decisions, however, follow *Lennon* and use the subjective standard. E.g., *People v. Crow*, 340 N.W.2d 838, 840, 128 Mich. App. 473, 483 (1983); *People v. Robinson*, 79 Mich. App. 145, 158, 261 N.W.2d 544, 551 (1977); *People v. Burkard*, 374 Mich. 430, 438, 132 N.W.2d 106, 110 (1965). Even a recent student comment on the issue failed to resolve the problem; indeed, the author failed to see the problem. See Note, *Self Defense Under the Michigan Revised Criminal Code*, 14 WAYNE L. REV. 833, 839 (1968). The text reads that Michigan employs a "modified subjective test," but the author then says that this requires the circumstances to insure an "honest and reasonable" belief. The relevant footnote, however, quotes directly from *Lennon*. *Id.* at 839 n.4.

For a discussion of the uncertain law of Tennessee, see *supra* note 148.

¹⁵¹ In the early decades, a defendant who lost the defense of self defense was treated as a murderer in most jurisdictions. Only later did the notion of "imperfect self defense," classifying the honest but unreasonable killer as a manslaughterer, occur, see *infra* text accompanying notes 173-74, notwithstanding East's view that an unreasonably mistaken killer was only a manslaughterer, see *supra* text accompanying notes 99-100.

¹⁵² E.g., 3 LAWS OF NEW YORK, ch. 30, p. 669 (1796), reprinted in NEW YORK LAW REVISION COMMISSION, COMMUNICATION AND STUDY RELATING TO HOMICIDE 330 (1938); Ga. Penal Code, § 12 (c. 1848), cited in *Keener v. State*, 18 Ga. 194, 232 (1855).

¹⁵³ See *supra* note 98.

in the 1893 Louisiana case of *State v. West* is but one example of the language one frequently finds in decisions of the second half of the nineteenth century:

Homicide is *excusable* when committed in the actual and necessary defense of the life or person of the slayer, but in order to *justify* a homicide on the ground that it was committed in self defense it must appear that the defendant . . . was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased¹⁵⁴

Similarly, an 1878 Kentucky case stated that "[i]f . . . [the defendant] had no reasonable ground for believing he was then in danger, they will not *excuse* him on the ground of self-defense, although they may have *justified* him in believing he would be in such danger at some future time."¹⁵⁵ Perhaps the clearest example of the confusion, however, comes from the argument of a prosecutor in *Dawson v. State*:¹⁵⁶ "My reply is that threats *justify* an *excuse* only when certain other things are shown"¹⁵⁷

This failure to distinguish between justifiable and excusable homicide might not have been very significant except for a second confusion which appears to have plagued at least some courts. This confusion involved the question of when to require the defendant to retreat prior to turning upon and slaying the victim. As already pointed out, Blackstone's treatise distinguishes between two kinds of self defense killings: prevention of felony and *se defendendo*. These two separate kinds of self defense are discussed at different points in Blackstone's treatise, as indeed they are discussed at different points in earlier treatises. As already noted as well,¹⁵⁸ only a homicide *se defendendo* required retreat under Blackstone's analysis. Yet, by the middle portion of the nineteenth century, many American courts required retreat in cases which previously would have been characterized as prevention of felony, not *se defendendo*, situations. At least some of the courts which confused justification and excuse, and which confused prevention of felony with *se defendendo* — thereby requiring retreat with regard to both kinds of self defense homicides — cite only the portion of Blackstone which deals with homicides *se defendendo*. Some of these courts probably believed that only *se defendendo* killings were in "self defense"; if they were aware at all of the "justifiable prevention of felony" killing in self defense, there is no evidence of such awareness in the opinions. The confusion is certainly understandable since the very words Blackstone uses to describe excusable homicides — *se defendendo* — make the passage seem like the exclusive place where one would look for authority on self defense law. One almost can visualize the attorneys,

¹⁵⁴ *State v. West*, 45 La. Ann. 14, 19, 12 So. 7, 9 (1893) (quoting trial court instructions) (emphasis added).

¹⁵⁵ *Kennedy v. Commonwealth*, 77 Ky. (14 Bush) 340, 353 (1878) (emphasis added). See *Commonwealth v. Carey*, 2 Brew. 404, 406 (Phila. Oyer & Term 1868), where the court instructed the jury that "a man is not bound to stand and permit himself to be murdered or seriously injured; . . . [t]he attack must have been such as, in the belief of the prisoner, rendered it necessary for him to defend himself It would then be *excusable* homicide." (Emphasis in original) The fact pattern suggested by the court is the paradigm of *justifiable* prevention of felony in the eighteenth century. See *supra* notes 83–84 and accompanying text.

¹⁵⁶ 33 Tex. 492 (1870). But see *State v. Ferguson*, 9 Nev. 106, 113 (1874), where the trial court gave an instruction requiring actual necessity, and the Supreme Court, recognizing that this applied to justifiable self defense, reversed, saying that the fact pattern involved in the case raised excuse, and not justification, and that the defendant had never sought to justify.

¹⁵⁷ *Dawson*, 33 Tex. at 502 (emphasis added).

¹⁵⁸ See *supra* notes 78–81 and accompanying text.

clerks, and judges looking in the index to Blackstone's work, finding "*se defendendo*," and stopping their research.

Assuming that at least some jurists of the period — not all of whom were required to be lawyers, after all — thought that the rule of *se defendendo*, excusable self defense, applied to all cases where self defense was at issue, it is not surprising that they now focused on mistake; to them all such self defense pleas would imply some amount of fault by the defendant. These jurists would view a requirement that the partially culpable defendant be reasonable in her mistake regarding the victim's intentions as analagous to a requirement that she retreat, as they required in what previously would have been seen as *se defendendo* cases. Both of these requirements could be seen as acts of atonement. This approach, of course, would have hastened the universal adoption of the objective standard.

Another possible explanation for the adoption of the objective standard is the introduction of the gun. When the distinction between justifiable and excusable homicide was first established, most fights or killings involved either knives or swords, which could be effective only at close range. It would be difficult for a defendant in either a justifiable or excusable homicide setting to be mistaken as to the intent of his opponent, given these weapons, at least so far as reasonable or unreasonable mistake is concerned. Thus, for example, a person seeking to excuse her homicide due to a killing after a chance-medley in which she retreated to the wall, could hardly have been mistaken about the intent of her victim since the very requirement of retreat simultaneously would require that the victim pursue the defendant. Such pursuit hardly could be misinterpreted or, if it were misinterpreted, certainly would engender a reasonable misinterpretation. Thus, persons seeking to excuse, and clearly to justify, their homicides even if mistaken, would have been reasonably mistaken. In such a context, it may not be surprising that the common law writers, and the cases so far as we have them, do not focus on the question of reasonable versus unreasonable mistake. Yet the introduction of the gun during the nineteenth century, which could be deadly at much greater ranges, might have moved the courts to express the hither-to assumed test of reasonableness, and adopt the explicit requirement that mistake be reasonable.

Still another possible explanation for the adoption of the objective standard is the general rigidifying of legal doctrine into "rules" which occurred during the nineteenth century.¹⁵⁹ Grant Gilmore, who has focused on similar changes in the doctrine of contract law during this same period, has described that alteration in terms totally applicable here:

The effect of the application of the objective theory to such areas of the law as mistake was of course to narrow the range within which a mistake could be successfully pleaded as a defense. That is, it is no longer enough that I was subjectively mistaken, even with respect to a fundamental term of the contract . . . I must show that my mistake was justifiable or excusable in the light of the generally accepted standards of the community. Just as the Holmesian formulation of consideration had exploded "the vulgar error that any benefit or any detriment would do" as a consideration to support a contract, so the "objectivization" of the mistake cases exploded the equally vulgar error that any mistake . . . would do as an escape from contractual

¹⁵⁹ See Singer, *supra* note 4, *passim*.

liability. Now there are "mistakes" and "mistakes" and only some of them will do.¹⁶⁰

The possibility that the growing popularity of Utilitarianism in the law influenced the courts' development of self defense law, as it influenced other disciplines, cannot be discounted; indeed, some might argue it is self-evident. Holmes was only the culmination of a series of writers, of whom the most noteworthy is Jeremy Bentham, who supported an objective approach to the criminal law — as well as other law — in order to achieve the greatest good: deterrence of negligent and more culpable actors. Although there are no citations in any of the cases of the period to any philosophical works or even to secondary works which rely heavily upon utilitarian writings, judges could not have escaped the era's popular movement. As Gilmore has shown,¹⁶¹ this entire age — particularly in American law — may be seen as one of growing pragmatism as well as positivism in the law; understandably, and not surprisingly, the criminal law did not escape the trend.

It is also possible that in adopting the reasonable mistake of fact requirement the courts may have been reacting to prosecutorial tactics. As in *Shorter*, the prosecution in many reported cases asked for instructions that self defense was available only in cases of actual necessity, so that not even a reasonable belief would be exculpatory. Faced with this position, which the *Shorter* court said would be "monstrous,"¹⁶² defendants frequently asked for instructions allowing exoneration on reasonableness and never sought a purely subjective standard.¹⁶³

Furthermore, the writers of major criminal law treatises were of little help in clarifying the difficulties, much less suggesting sound solutions. Wharton, for example, was one of the first advocates of the objective approach. In the fourth edition of his treatise on evidence in 1857, he virtually quoted verbatim the entire *Shorter* opinion from New York,¹⁶⁴ while at the same time criticizing the *Grainger* case,¹⁶⁵ which took a subjective approach to the mistake inquiry. A number of early courts relied upon his view in adopting the objective test of mistaken self defense.¹⁶⁶ Yet Wharton's views actually changed rapidly. By 1861, he tentatively suggested that "when the defendant *honestly entertains* [mistaken fears] . . . [t]his does not differ much from the ruling in *Levett's* case . . ."¹⁶⁷ By the seventh edition in 1874, he argued that cowardice should lower the degree of the homicide and cited the *Shorter* case, among others, for adopting the subjective view.¹⁶⁸ By the eighth edition in 1880, he appears to have adopted the subjec-

¹⁶⁰ G. GILMORE, *THE DEATH OF CONTRACT* 44 (1974).

¹⁶¹ G. GILMORE, *THE AGES OF AMERICAN LAW* 41-67 (1976).

¹⁶² See *supra* note 143.

¹⁶³ E.g., *Keith v. State*, 97 Ala. 32, 33 (1882); *Redd v. State*, 99 Ga. 210, 210, 25 S.E. 268, 268 (1896); *Panton v. State*, 114 Ill. 505, 506 (1885); *Steinmeyer v. People*, 95 Ill. 383, 384-85 (1880); *West v. State*, 59 Ind. 113, 115 (1877); *Wall v. State*, 51 Ind. 453, 458 (1875); *State v. Howard*, 14 Kan. 173, 173 (1875); *Bang v. State*, 60 Miss. 571, 572 (1882); *Marts v. State*, 26 Ohio 162, 163 (1875); *Logue v. Commonwealth*, 38 Pa. 265, 266 (1861); *Jordan v. State*, 11 Tex. Crim. 435, 441 (1882).

¹⁶⁴ I F. WHARTON, *CRIMINAL LAW* 532, Note (4th ed. 1857).

¹⁶⁵ *Id.* at 531.

¹⁶⁶ E.g., *Oliver v. State*, 171 Ala. 587 (1850); *State v. Howard*, 14 Kan. 173 (1875); *State v. Skippey*, 10 Minn. 223 (1865).

¹⁶⁷ I F. WHARTON, *CRIMINAL LAW* 566-67 (5th ed. 1861) (emphasis added).

¹⁶⁸ 2 F. WHARTON, *CRIMINAL LAW* 95, n.4 (7th ed. 1874).

tive view entirely,¹⁶⁹ and by 1912¹⁷⁰ he clearly rejects the reasonable man standard as "impracticable,"¹⁷¹ stating that "[o]n principle, the test is the defendant's honest belief."¹⁷² On the other hand, he proffered the possible compromise view that the reasonably mistaken person should be exculpated while the unreasonably mistaken killer should be found guilty only of manslaughter, rather than be deprived of all mitigation.¹⁷³ Wharton's waffling is even more confusing because, like the courts who cited him,¹⁷⁴ he sometimes merged the two approaches, speaking indiscriminately and interchangeably of the "reasonable" and "honest" belief of the defendant as though these were the same test.

Bishop was similarly uninformative because he was not seriously interested in the question of mistake as it affects self defense; instead, his primary concern was in defining situations where the defendant did or did not have to retreat. Accurately summarizing the law,¹⁷⁵ he concluded that

The true distinction between cases in which what we call the right of perfect defense exists, and cases in which the right of defense is but partially allowable [is that] the perfect defense may be made whenever there is a duty to resist the aggressor; the imperfect defense [may be made,] in one degree or another, when there is no duty laid on one to defend, yet the law permits the defense, if he pleases to make it.¹⁷⁶

On the issue of reasonableness, he said little more than that the rule "is commonly stated in the American cases" to require reasonable perception of attack, and cited, among others, *Shorter* and *Holmes*.¹⁷⁷ His position did not change in later editions. Russell too early adopted the requirement of reasonableness and did not alter that view.¹⁷⁸

¹⁶⁹ 1 F. WHARTON, CRIMINAL LAW 448-49 (8th ed. 1880).

¹⁷⁰ *Id.* at 784 (11th ed. 1912).

¹⁷¹ *Id.* at 784-85.

¹⁷² *Id.* at 789.

¹⁷³ *Id.* at 784.

¹⁷⁴ See, e.g., *Oliver v. State*, 17 Ala. 587, 599 (1850); *Logue v. Commonwealth*, 38 Pa. 265, 268 (1861).

¹⁷⁵ J. BISHOP, *supra* note 76, at § 550.

¹⁷⁶ *Id.* at § 552.

¹⁷⁷ *Id.* at § 561, p. 360.

¹⁷⁸ Although Russell understood the difference between justifiable and excusable killing in self defense, he is one of the first sources to add, see *supra* note 18, in addition to the retreat requirement, the further criterion that, even after retreat, there must be "reasonable grounds to apprehend that he would otherwise have been killed himself." 1 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS 890 (4th London ed. 1865). For this proposition he cites Foster at 273, 275, and 289 and Blackstone at 184. Later, in discussing justifiable homicide, Russell makes the same assertion, citing only Hale. *Id.* at 896 (citing M. HALE, *supra* note 11, at 484). By Russell's ninth edition the requirement has become fixed, at least with regard to American cases: "To excuse homicide there must exist on the part of the slayer an actual necessity . . . or reasonable belief in his mind that such necessity exists." *Id.* at 888 n.1 (9th ed. 1877) (citing, inter alia, *Noles v. State*, 26 Ala. 31 (1855); *Shorter v. People*, 2 N.Y. 193 (1849) and *Holmes v. State*, 11 Hum. 200 (1853)). The objective standard was well in place by 1903, when Joseph Beale explicitly rejected the subjective test:

The question is not generally held to be, was the apprehension reasonable in such a man as the defendant, but was it such fear as a reasonable man would have felt under the circumstances; and therefore the jury cannot consider the peculiarities of the defendant, as that he was a coward or of immature judgment or of a nervous tem-

III. THE MODERN LAW OF MISTAKE OF FACT

A. *The Change in American Law: Reasonability, Tort, and Crime*

No sooner had the objective standard been entrenched firmly in the common law of this country — particularly in self defense cases — than it was whittled away by a series of decisions which, by the middle of this century, had already “resubjectivized” the law to a substantial degree. This return to mens rea, even though sometimes shrouded in objective language, reflects a basic discomfort with the notion that the criminal law should punish persons who are not morally blameworthy or, alternatively, should punish the negligent equally as the intentional actor.

I. The Subjectivization of the Reasonable Man

a. *Redefining the Reasonable Person*

The polar positions on reasonability are clear: a fully objective test asks whether “a reasonable person” would have made the mistake the defendant made; a fully subjective test asks whether the defendant honestly made the mistake he made, and considers irrelevant whether the mistake was in any sense objectively reasonable. A third, not principled position adopts a “quasi-objective,” “quasi-subjective” test, which asks whether a reasonable person with defendant’s characteristics would have so acted. This third position was the one applied by a number of courts in the early part of this century.

From the beginning of the twentieth century, American courts had trouble applying a fully objective standard in self defense cases. As a result, many courts injected the defendant’s subjective characteristics into the reasonable person standard. The phenomenon first occurred with regard to differences in size between the deceased and the defendant; the reasonable person quickly gained the physique of the defendant, and evidence as to the size of the victim became necessarily admissible to show the basis for the defendant’s purported fear.¹⁷⁹ By 1923 the rule was so well established that it was cited in the original *Corpus Juris*.¹⁸⁰

perament, nor can they consider the fact that he was drunk and acted under a drunkard’s imperfect apprehension.

Beale, *Homicide in Self-Defence*, 3 COLUM. L. REV. 526, 528 (1903) (footnotes omitted).

¹⁷⁹ One of the first instructions including size appears to have been *State v. Sterrett*, 80 Iowa 609, 614, 45 N.W. 401, 402–03 (1890). In *Hill v. State*, 94 Miss. 391, 49 So. 145 (1908), the court ruled that the trial judge erred when he instructed the jury that the defendant could not have a self defense instruction because great bodily harm could not be done with fists. Rather, the court stated, the rule is as follows: “It is doubtless true that one may not, ordinarily, repel the attack of an unarmed man . . . by killing him There may be many cases in which the disparity between the combatants is so overwhelming that the one of superior power may inflict great bodily harm” *Id.* at 394–95, 49 So. at 146. *Accord* *State v. Brown*, 5 Penne. 339, 343, 61 A. 1077, 1079 (Del. 1905); *Bitner v. State*, 130 Tenn. 144, 157–58, 169 S.W. 565, 568 (1914).

¹⁸⁰ 30 C.J. *Homicide* § 250 (1923). The rule continues unabated. *See* *People v. Giacalone*, 242 Mich. 16, 21, 217 N.W. 758, 760 (1928); *Hinson v. State*, 218 So. 2d 36, 39 (Miss. 1969); *Cook v. State*, 194 Miss. 467, 473, 12 So. 2d 137, 138 (1943); *State v. Jennings*, 96 Mont. 80, 91, 28 P.2d 448, 451 (1934) (deceased was 6 feet 1 inch, 200 pounds and “powerful and aggressive,” while defendant was 5 feet 6 inches, 155 pounds); *State v. Pearson*, 288 N.C. 34, 43–44, 215 S.E.2d 598, 605 (1975); *Easterling v. State*, 267 P.2d 185, 188 (Okla. Crim. 1954); *State v. Rader*, 94 Or. 432, 454, 186 P. 79, 86 (1919).

Twentieth century courts also introduced physical disability into the reasonable man standard. Although not as widely accepted as size or weight, some courts did allow the defendant to testify as to a disability, thereby endowing the reasonable person with a handicap. Thus, in *State v. Bartlett*,¹⁸¹ the Missouri Supreme Court in 1902 noted "the physical condition of the defendant; his badly ruptured state; the pooriness of his eyesight and his infirm health," and ruled that the defendant's ailments properly were considered at trial.¹⁸² And in 1943, in *Cook v. State*,¹⁸³ the court allowed the jury to consider that the defendant, in addition to being much smaller than the deceased, was also missing three fingers and had a bandage on his hand.¹⁸⁴ Still another fact injected into the ostensibly objective standard was the defendant's age.¹⁸⁵

In addition to adjusting for physical characteristics, the courts imbued the reasonable person with the knowledge which the defendant had about the deceased, such as the violent character of the victim, or evidence that the victim had previously beaten, or threatened to beat, the defendant.¹⁸⁶ In one interesting case, the defendant successfully introduced evidence that the particular place in which he found himself had a reputation as a "high crime area," thereby making him, and the so-informed reasonable person, more nervous than would otherwise be the case if there were no such knowledge.¹⁸⁷

¹⁸¹ 170 Mo. 658, 71 S.W. 148 (1902).

¹⁸² *Id.* at 669, 71 S.W. at 151.

¹⁸³ 194 Miss. 467, 473, 12 So. 2d 137, 139 (1943).

¹⁸⁴ See also *State v. Dunning*, 8 Wash. App. 340, 342, 506 P.2d 321, 322 (1973) (defendant was 62 years old, in poor physical condition, and feared that a second blow to stomach would be fatal).

¹⁸⁵ In *Lundy v. State*, 59 Tex. Crim. 131, 134, 127 S.W. 1032, 1034 (1910), the court measured the defendant's actions against a reasonable 65 year old man; a murder conviction was upheld.

¹⁸⁶ See Case Comment, *Admissibility of Evidence of a Homicide Victim's Character Where the Defendant Pleads Self-Defense*, 13 SUFFOLK U.L. REV. 1135, 1138 n.17 (1979), citing a number of cases allowing evidence of the deceased's violent character, if the defendant shows that he knew of that character. Citing: *State v. Padula*, 106 Conn. 454, 138 A. 456 (1927); *Jones v. State*, 13 Md. App. 677, 284 A.2d 635 (1971); *State v. Cloud*, 7 Wash. App. 211, 498 P.2d 907 (1972). See also *Marts v. State*, 26 Ohio St. 162, 168 (1875). It is also possible, of course, to introduce such evidence to show the state of the deceased's mind even if the defendant was unaware of the deceased's character. See *People v. Estes*, 127 Ill. App. 3d 642, 649, 469 N.E.2d 275, 281 (1984); *State v. Jacoby*, 260 N.W.2d 828, 837 (Iowa 1977); *Williamson v. State*, 25 Md. App. 338, 346-47, 333 A.2d 653, 657-58 (1975); *State v. Keaton*, 258 Minn. 359, 367, 104 N.W.2d 650, 656 (1960); *Commonwealth v. Amos*, 445 Pa. 297, 302-06, 284 A.2d 748, 751-52 (1971); *State v. Infantolino*, 116 R.I. 303, 313, 355 A.2d 722, 727-28 (1976). The law is still in great flux on this issue. See, e.g., *People v. Lynch*, 104 Ill. 2d 194, 199-200, 470 N.E.2d 1018, 1020 (1984), where the court held, for the first time, that evidence of the victim's prior violent acts was admissible, even if the defendant was unaware of them, to support the defendant's contention that the victim had been the aggressor. The *Lynch* court noted that this rule was close to the rule that allowed a victim's prior threats into evidence, even if defendant was not aware of them. A dissenting opinion noted that threats will not always be sufficient to establish that the victim was a person of a violent and aggressive character, but if defendant had heard of the threats, they will be admissible nevertheless to demonstrate defendant's state of mind.

Of course, not all types of evidence will be admissible to show violent character. Usually "reputation" testimony is the preferred method. See *Chapman v. State*, 469 N.E.2d 50, 55 (Ind. App. 1984). On the other hand, it is not unconstitutional for the state to prohibit evidence of the victim's past violent conduct, at least where the defendant did not know of that conduct. See *Lagasse v. Vestal*, 671 F.2d 668, 669 (1st Cir. 1982). See generally Annotation, *Admissibility of Evidence as to Other's Character or Reputation for Turbulence on Question of Self-defense by One Charged with Assault or Homicide*, 1 A.L.R. 3d 571 (1965).

¹⁸⁷ *State v. Tribett*, 74 Wash. 125, 129-30, 132 P. 875, 877 (1913).

b. *Making the Irrational Defendant Act Reasonably — The Saga of Bernhard Goetz*

This path of subjectivizing the objective reasonable man was recently taken, albeit under substantial judicial subterfuge, in the case of Bernhard Goetz, the notorious subway shooter. The procedural questions raised prior to Goetz's trial focused specifically on the question of the standard to be used in self defense cases. It is surprising that the issue was raised with such clarity in *Goetz*, since, as a general matter, if a defendant is acquitted, as was Goetz, the appellate courts have no opportunity to determine what the "proper" legal standard should have been. Even if a defendant is convicted, if there is sufficient evidence from which a jury could conclude that the defendant failed to meet the proper test, whatever it is, the appellate courts will not be required to address the larger question. Because of some peculiarities of New York procedure, however, the *Goetz* case raised the legal issues before, rather than after, the trial.

Goetz's case was brought before a Manhattan grand jury, which refused to indict. Under New York law, however, the prosecutor, with the permission of the trial court, sought a second indictment on the basis of allegedly new information. At that second grand jury proceeding, the district attorney instructed the jury that, under New York statutory law, Goetz would have no self defense claim unless his belief that he was in personal danger and about to be robbed was "reasonable." The term "reasonable" was left undefined at that point but a grand juror asked a critical question: how far was the jury to look into Goetz's mind?¹⁸⁸

The district attorney responded that "you should consider whether the defendant's conduct was that of a reasonable man in the defendant's situation."¹⁸⁹ This instruction, unlike the earlier one, clearly injected the reasonable person — a totally objective standard — into the determination of "unreasonableness." When Goetz subsequently was indicted, his attorney moved to dismiss the indictment on the ground that this direction to the grand jury was erroneous under New York law. The trial court agreed and dismissed the indictment,¹⁹⁰ a decision affirmed 3 to 2 by the appellate division,¹⁹¹ but reversed by a unanimous New York Court of Appeals.¹⁹²

The instruction given by the prosecutor seemed clearly consistent with prior New York law. As already seen,¹⁹³ it was New York that first embraced a fully objective standard in the *Shorter* case, and that standard had appeared to be employed in most subsequent decisions of the courts, as well as reconfirmed in several codifications of the principles of self defense. Indeed, the objective standard appeared to be endorsed yet again by the most recent revision of the New York Penal Code, sections 35.15(1) and 35.15(2), which twice referred to the defendant's "reasonable belief":¹⁹⁴

(1) A person may . . . use physical force upon another person when and to the extent he *reasonably believes* . . .

¹⁸⁸ The grand juror apparently had a potential issue of insanity in mind, but because the question was never finished — the assistant district attorney "jumped in" — we will never be sure. Some courts, however, allow psychiatric evidence to go to the issue of self defense. See, e.g., *State v. Kuntzelman*, 215 Neb. 115, 121, 337 N.W.2d 414, 418 (1983) (holding, however, that the testimony did not establish sufficient predicate for a self defense instruction).

¹⁸⁹ *People v. Bernhard Goetz*, 131 Misc. 2d 1, 5, 502 N.Y.S.2d 577, 580 (N.Y. Sup. Ct. 1986).

¹⁹⁰ *Id.* at 10, 502 N.Y.S.2d at 584.

¹⁹¹ *Goetz*, 116 A.D.2d 316, 321, 501 N.Y.S.2d 326, 329 (N.Y. App. Div. 1986).

¹⁹² *Goetz*, 68 N.Y.2d 96, 497 N.E.2d 41, 506 N.Y.S.2d 18 (1986).

¹⁹³ See *supra* note 135 and accompanying text.

¹⁹⁴ N.Y. PENAL LAW §§ 35.15(1), (2) (McKinney 1975) (emphasis added).

- (2) A person may not use deadly physical force upon another person . . . unless:
 (a) He *reasonably believes* that such other person is using or about to use deadly physical force

The commentary on this section¹⁹⁵ contrasted this language with that of the former penal law, which, ostensibly, applied not even the objective standard but rather, a requirement of actual assault.

Nevertheless, a series of decisions of the Second Department of the Appellate Division,¹⁹⁶ focusing on some possibly ill-considered words in a New York Court of Appeals case,¹⁹⁷ had rejected the reasonable person test and held that both the present wording of the Penal Code and the prior case law supported the use of the "quasi-objective, quasi-subjective" approach:¹⁹⁸ whether a person with the defendant's characteristics would have "reasonably" believed that the use of force was necessary. These opinions had been strained, and the opinion of the Court of Appeals in *Goetz* on this particular point is convincing. The court observed that the legislature expressly had refused to adopt the Model Penal Code's language allowing any defendant who "believes" (reasonably or not) that he must use deadly force to avoid a murder conviction;¹⁹⁹ neither the trial court nor the appellate division had explained convincingly this piece of legislative history.²⁰⁰

The Court of Appeals might have left the issue there; the legislature had articulated an objective standard which the prosecutor had used in instructing the grand jury. But instead, the Court of Appeals rejected both the fully subjective and the fully objective tests, and embraced the "quasi-objective, quasi-subjective" approach.²⁰¹

In actuality, virtually no one in the *Goetz* case had endorsed a fully objective test. The brief for the state in the appellate division, for example, in responding to Goetz's claim that a fully objective test would preclude evidence of Goetz's previous mugging, or of his knowledge of crime on New York City subways, admitted that the objective test "permits the trier of fact to consider an actor's background, physical attributes, knowledge and experience as well as the particular circumstances in which the peril arises Thus, there is not the slightest merit to the defendant's contention" ²⁰² Each of the dissenting appellate division justices picked up the same theme, agreeing that Bernhard Goetz's subjective characteristics would have to be incorporated into the reasonable

¹⁹⁵ *Id.* Hechtman, *Practice Commentaries*.

¹⁹⁶ *People v. Gutierrez*, 105 A.D.2d 754, 754, 481 N.Y.S.2d 405, 406 (N.Y. App. Div. 1984); *People v. Long*, 104 A.D.2d 902, 903, 480 N.Y.S.2d 514, 515 (N.Y. App. Div. 1984); *People v. Wagman*, 99 A.D.2d 519, 520, 471 N.Y.S.2d 147, 148 (N.Y. App. Div. 1984); *People v. Desmond*, 93 A.D.2d 822, 822, 460 N.Y.S.2d 619, 619-20 (N.Y. App. Div. 1983). *Cf.* *People v. Comfort*, 113 A.D.2d 420, 496 N.Y.S.2d 857 (N.Y. App. Div. 1985) and *People v. Comfort*, 113 A.D.2d 430, 496 N.Y.S.2d 863 (N.Y. App. Div. 1985).

¹⁹⁷ Reply Brief of the Appellant, State of New York, in *Goetz*, *supra* note 191, at 11-12 (No. 26219) [hereinafter Reply Brief].

¹⁹⁸ *See generally Goetz*, 116 A.D.2d at 321-32, 501 N.Y.S.2d at 329-36.

¹⁹⁹ 68 N.Y.2d at 110, 497 N.E.2d at 49.

²⁰⁰ Both Connecticut and Illinois, with the same statute as New York, adopt the objective view. *Connecticut*: CONN. GEN. STAT. § 53a-19(a), (b), (c) (1985); *State v. Corchado*, 188 Conn. 657, 663, 453 A.2d 427, 434 (1982). *Illinois*: ILL. REV. STAT. ch. 38, para. 7-1 (1972); *People v. Gossett*, 115 Ill. App. 3d 655, 665, 451 N.E.2d 280, 287 (1983).

²⁰¹ *See supra* notes 179-87 and accompanying text.

²⁰² Reply Brief, *supra* note 197 at 11-12.

person test. Thus, Justice Wallace stated that "the judge at trial . . . may well . . . be required to expand upon what 'defendant's situation' really was, particularly with reference to prior traumatic episodes of his life during which he was robbed and injured, as well as his close relationship with others who fell victim to savage street crime encounters."²⁰³ Similarly, Judge Asch, dissenting, declared that "the trier of fact is not foreclosed from considering the specific circumstances and the background and knowledge of the particular defendant."²⁰⁴ Thus, even the appellate dissents in *Goetz* rejected a purely objective, reasonably prudent person test.²⁰⁵

Although it reversed the judgment of the appellate division, the New York Court of Appeals opinion essentially agreed with all these views. In a very clear statement, the court emphasized that virtually every aspect of the defendant's actual background could be considered relevant at trial, concluding that the test includes "any relevant knowledge the defendant had about [the victim,] . . . the physical attributes of all persons involved, including the defendant . . . [and] any prior experiences [the defendant] had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him"²⁰⁶ And, to be sure that the point was not missed, the court stressed that an objective standard does not mean that the "background and other relevant characteristics of a particular actor must be ignored."²⁰⁷ Although this language is undoubtedly dictum, as shown below, it is nevertheless the patent "rule" of the case as to what matters inform the "reasonableness" standard.

Not surprisingly, it is difficult to know precisely what this "reasonableness" test means. The court's opinion allows evidence of the defendant's past experience with crime, and arguably his understanding of others' encounters with crime, but appears to preclude evidence of the defendant's present mental state with regard to those past events. Thus, the jury must ask itself whether the reasonable person who has been mugged several times, has heard of others being mugged, including close friends and acquaintances, and knows that both he and others have been seriously hurt on prior occasions, would react differently than the reasonable person who has not had such experiences; yet the mental state of this reasonable person must remain reasonable, even

²⁰³ *Goetz*, 116 A.D.2d at 344, 501 N.Y.S.2d at 343.

²⁰⁴ *Id.* at 337-38, 501 N.Y.S.2d at 340.

²⁰⁵ States continue to use the full objective standard, however. See, e.g., *Paul v. State*, 655 P.2d 772, 777 (Alaska Ct. App. 1982); *State v. Cannon*, 133 Ariz. 216, 219, 650 P.2d 1198, 1201 (1982); *State v. McGreevey*, 17 Idaho 453, 466, 105 P. 1047, 1051 (1909); *State v. Carter*, 103 Idaho 917, 919, 655 P.2d 434, 436 (1982); *State v. Boyce*, 284 Minn. 242, 253, 170 N.W.2d 104, 112 (1969); *State v. Chavez*, 99 N.M. 609, 611, 661 P.2d 887, 889 (1983); *Valentine v. State*, 587 S.W.2d 399, 401 (Tex. Crim. App. 1979).

Indeed, Kansas, noting that "this is the first time this precise issue has been raised," has recently adopted an objective rather than a subjective standard. See *State v. Simon*, 231 Kan. 572, 575, 646 P.2d 1119, 1122 (1982). The *Simon* court declared invalid a model jury instruction that appeared to use a subjective standard.

Missouri also requires reasonable belief. See *State v. Butler*, 676 S.W.2d 809, 816 (Mo. 1984). On the other hand, Missouri apparently allows testimony about the defendant's psychiatric condition. *Id.* The Idaho Code, as of 1969, as quoted in *State v. Rodriguez*, 93 Idaho 286, 291 & n.15, 460 P.2d 711, 716 & n.15 (1969), required that there be "reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished" This requirement of reasonableness was upheld in *State v. Baker*, 103 Idaho 43, 45, 644 P.2d 365, 367 (Idaho App. 1982).

²⁰⁶ *Goetz*, 68 N.Y.2d at 114, 497 N.E.2d at 52, 506 N.Y.S.2d at 29 (emphasis added).

²⁰⁷ *Id.*

though, arguably, any person would be more skittish after such experiences. Thus, even if one does not ask whether *Bernhard Goetz*, after being mugged three times (et cetera) did respond less reasonably than the reasonable person, the test approved by the New York Court of Appeals appears to ask whether a reasonable person, having been mugged three times (et cetera) *could* respond "less reasonably" than a reasonable person who has not been so mugged (et cetera). Although this is not a fully subjective standard, it is patently not the fully objective "reasonable man" standard that the prosecutor articulated in the *Goetz* instructions.

Ironically, however, while the Court of Appeals endorsed a less-than-fully-objective standard, it still reversed the appellate court which had endorsed essentially the same standard. The resolution of this paradox lies in the procedural posture of the case: the Court of Appeals relied upon the doctrine that in instructing a grand jury, the prosecutor need only be "essentially" accurate.²⁰⁸ The instruction, said the court, need not be precisely correct. Although the instruction given by the state's attorney was "not as complete as the court's charge on justification should be"²⁰⁹ at the trial, it was sufficient to give the grand jury a hint as to the outlines of self defense law. In short, if the trial judge on the *Goetz* remand had given that same charge to the petit jury, it would almost certainly have been reversible error; it is not permissible to use the unadorned and unexplained "reasonable person" standard in New York anymore, except in instructing the grand jury, where the key is the "thrust" of the instruction, rather than full accuracy.

In short, the New York Court of Appeals, in a decision understood by many as reaffirming the objective standard, actually jettisoned that long-standing test from New York law. Although the court did not adopt a totally subjective view, its position is far more subjective than its result suggests and clearly modifies the holding in *Shorter*. It is surely ironic that the court has twice, 130 years apart, gone far beyond what was necessary to the resolution of the procedural issue before it in order to express, in manifest dictum, new (and conflicting) standards for self defense law.

Even with its move toward subjectivism in the *Goetz* opinion, however, the Court of Appeals was clear that the test would not embrace the actual mental capabilities of the defendant, or whether the defendant was a coward or a brave person as a general matter.²¹⁰ Nevertheless, *Goetz* is likely to be one of the most important decisions on the question in this century. First, the decision is important because it comes from the New

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 115, 497 N.E.2d at 53, 506 N.Y.S.2d at 30.

²¹⁰ Indeed most courts would not consider such characteristics even if they otherwise employ a subjective standard. At the actual trial, Judge Crane struggled to follow the Court of Appeals' opinion. His charge, and his two recharges, are replete with references to "reasonability." In addition, on at least one occasion, he referred to the "hypothetical" reasonable man, *see Goetz* transcript at 9353, *see also id.* at 9224, 9232, 9367, or to a "reasonable person in his shoes." *See id.* at 9219, 9352. (*See also id.* at 9358-59, "[t]he test is whether a reasonable person in the defendant's situation would have believed that it was a necessary act of self protection.") He also informed the jury on several occasions, however, that they could consider factors unique to *Goetz* in determining the make up of the reasonable man. In particular, they could consider "any prior experiences he had which would provide a reasonable basis for belief that another person's intentions were to injure him" *Id.* at 9219. Thus, Judge Crane appears to have leaned substantially toward interpreting the Court of Appeals' decision as strongly adhering to the purely hypothetical, objective standard, although recognizing that the court did permit *some* leeway for subjective characteristics. My own view is that this is a distortion of the Court of Appeals' opinion, which leans more toward the subjective view point than I believe Judge Crane's charge in the *Goetz* case did.

York Court of Appeals. Second, it comes from the court whose opinion, 135 years ago in *Shorter*, began the movement toward objectifying the self defense standard. Even though the Court of Appeals opinion goes no further than adopting a "quasi-subjective" view — and jettisons any notion of a totally objective standard — its decision is likely to affect many other states who have clung for many years to the *Shorter* dictum and the pure reasonable person standard.²¹¹ Of course the more characteristics that are taken from the defendant and added to the ordinary or reasonable person standard, the less objective and the more subjective the test becomes.²¹²

²¹¹ See, e.g., *Bartmess v. State*, 708 S.W.2d 905 (Tex. App-Tyler 1986). See also cases cited *supra* note 205.

²¹² A possible exception to this analysis would be the so called "preemptive strike" cases, where the defendant, threatened by the victim with death at some point in the future, and believing (and possibly reasonably believing) that the threat will be carried out, takes the first use of deadly force into his or her own hands. Typically, the defendant ambushes the threatener-victim. A number of cases in the nineteenth century allowed a preemptive strike, even if they otherwise required that there be a reasonable belief as to the threat's imminence. One of the most poignant adoptions of the preemptive strike notion is that found in *Carico v. Commonwealth* 70 Ky. (7 Bush) 124 (1870), in which the defendant, having been threatened by the deceased with death within a day, simply ambushed him. Said the court,

Why should he be required still to wait an assault and endure longer haunting and hazard when he might at any moment become the victim of his own forbearance, and when self defense might be impossible or unavailing? Why let the sword still hang over him? Why not remove it out of sight *when he may*, and not passively linger until it *unexpectedly* falls and strikes his heart unresisted? . . . This preventive principle will go hand in hand with civilization and philosophical jurisprudence as a *palladium* of personal security and social order and peace. Properly guarded, it may do more good than harm.

Id. at 128 (emphasis in original). Accord *Monroe v. State*, 5 Ga. 85, 107, 138 (1848); *Oder v. Commonwealth*, 80 Ky. 32, 37 (1882); *Kennedy v. Commonwealth*, 77 Ky. (14 Bush) 340, 350 (1878); *Phillips v. Commonwealth*, 63 Ky. (2 Duv.) 328, 331 (1865); *Williams v. State*, 50 Tenn. (3 Heisk.) 376, 399-400 (1871).

International law scholars have long wrestled with the problem of preemptive strikes under the general issue of just wars. American international law adheres to the doctrine of "aggressor-defender," which absolutely prohibits the use of preemptive force under any situation. See, e.g., P. RAMSEY, *THE JUST WAR, FORCE AND POLITICAL RESPONSIBILITY* 61-69 (1968) (condemning doctrine and endorsing preemptive strike in some situations). Because the issue is cast in terms of "just" wars, it appears that most writers have raised only questions of justification, rather than excuse, as to whether such a strike, or "preventive war," is supportable under any circumstances. Perhaps for this reason, the discussions generally sound in terms of either an actual and real necessity for the strike, or, at best, in reasonableness terms. There is little discussion of whether a state which honestly, though reasonably, believes itself in danger can legitimately wage a "preventive war."

The most recent example of a strike to be explained on the grounds of "preventive war," however, provides an interesting insight into the question of objective versus subjective standard. O'Brien calls the Israeli initiation of the six-day war in 1967 "a model case for anticipatory self defense . . ." W. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 133 (1981). O'Brien points out that before Israel struck Egypt and Syria, they had closed the Gulf of Aqaba to Israel and prohibited international traffic bound for Israel from using the Gulf. Moreover, there had been a "massing of troops on Israel's borders, heightened air reconnaissance activity, and the forcible ejection of the UN peace-keeping forces . . ." *Id.* This description alone might suggest that Israel could argue that its concern that there would be an invasion was, at least, reasonable. Nevertheless, after the war, and amid a growing clamor of criticism of its preemptive strike, some Israeli statesman pointed not to these objective criteria, but to the so-called "Holocaust syndrome." He argued that Israelis had suffered near annihilation during the Holocaust and were, therefore, more sensitive to threats of continued annihilation. See M. BRECHER, *DECISIONS IN ISRAEL'S FOREIGN POLICY* 133

c. *The Discovery of the Reasonable Woman and Social Acculturation*

Although far less nationally known than *Goetz*, certainly one of the most interesting recent cases in this field is *State v. Wanrow*²¹³ which introduced a totally new notion to the characteristics of the reasonable person. *Wanrow* involved a small woman who was on crutches because her foot had been broken and who shot a much larger male whom she believed to be threatening to sexually molest her children.²¹⁴ The first holding of

(1975). Although a number of Israelis repudiated this notion on the grounds that there was in fact neither an actual threat to the existence of the state of Israel nor an actual fear at the time that Israel would be overrun, *see id.*, quoting Deputy Chief of Staff Haim Bar-Lev, the mere fact that Israel relied not only on the objective facts but on the (alleged?) subjective concerns of their statespeople suggests that Israel, at least, supports a subjective approach to the doctrine of preventive war. That the critics of this approach do not argue that it is an invalid approach, but rather that there was no actual fear of annihilation, suggests that they too implicitly accept a subjective approach. For a discussion of whether Jewish law itself would allow preemptive strikes see Bleich, *Preemptive War in Jewish Law*, 21 *TRAD.* 3 (1983).

This analogy, however, could be irrelevant for it is not obvious that the international scene is an apt analog for the use of preemptive force, whether objectively or subjectively based, in municipal law. In municipal situations, for example, there are both courts and police to whom the putative victim can resort, a fact not generally true in international politics. It is possible to argue, however, that in at least some municipal settings, the Wild West perhaps, the state of law enforcement is little better than the state of law enforcement in international law, and that the analogy is, therefore, stronger than it might be in an urban setting. *Cf. State v. Gardner*, 96 Minn. 318, 322, 104 N.W. 971, 973 (1905), holding that under "facts peculiar to frontier life" the duty to retreat does not exist when two individuals, armed with guns, confront each other in an open space.

On the other hand, it is not clear that it is possible to "kill" a nation in the same sense that it is possible to kill an individual. Even if an individual could argue a first strike right, therefore, for a nation to argue that it would be "exterminated" unless it struck first may be stretching the analogy. (It may be that this is the reason that some Israelis relied on the "Holocaust syndrome," *see supra*, in explaining the six-day war.) Again, even if a nation were "dying" — either by nuclear attack which actually annihilates or through enslavement which effectively kills the nation — there is time to retaliate and, therefore, wreak vengeance upon the aggressor. This time factor, again, has no analogy to the domestic, municipal, scene.

It is intriguing that the American doctrine of the just war unequivocally condemns first strikes. R. TUCKER, *THE JUST WAR* 105 (1960), although scholars such as Francis Bacon, Thucydides, John Stuart Mill, and others have supported it. *Id.* at 116 n.8. Indeed, the American tenacity to this view is so strong that, in the bombing of Libya undertaken in April, 1986, the United States government refused to argue preemptive strike in a self defense context although some allies urged it to do so. Instead, the primary ground used to explain the strikes was retaliation for past offenses; the United States only secondarily, and belatedly, embraced prevention of future events.

²¹³ *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977).

²¹⁴ The facts of *Wanrow* are quite unclear and even bizarre. The victim had been invited into a house in which the defendant, Wanrow, was staying precisely because she was afraid of defendant. The ostensible purpose of the invitation was to straighten the victim out, but the two men who were to do this "straightening" were outside the house at the time, leaving Wanrow and her small children alone in the house with one other woman. It is clear that Wanrow had on her person a small pistol, with which she shot the victim. It is unclear, however, whether the victim was in fact making any movement toward either the defendant or her children, or even could be reasonably construed to be making advances. It somewhat staggers the imagination to believe that a putative child molester, called into a house at 5 a.m. in the morning, which he knew was surrounded by several men with weapons, would act in any way which would cause even suspicion upon him. Nevertheless the facts are, or must be taken to be, essentially that the victim was making some move in the direction of the defendant's children or in her direction, and that she believed that they were or she was in substantial danger of serious bodily harm or death. *See id.* at 224-26, 559 P.2d at 550-51.

Wanrow is somewhat unexciting. Where the defendant is a woman, the instruction to the jury should be couched in terms not of the reasonable man, but in terms of the reasonable woman; and rather than using the pronoun "he," the court should use the pronoun "she."²¹⁵ Although it appears that this holding is in and of itself new, the underlying philosophy is not; it could be read as merely an invitation by the court to the jury to reflect upon the actual facts of the case and the physical characteristics of the defendant and the victim. These were particularly relevant in *Wanrow* because the defendant was a very small woman, on crutches, and the victim was a sizeable male.²¹⁶

The fascinating aspect of *Wanrow* is its second holding, or at least its explanation of why gender was important in the instruction to the jury.²¹⁷ The court essentially took the view that women are acculturated not to use non-deadly force when they are threatened; rather, they are socially trained either to submit totally to a male, or to resort to deadly force.²¹⁸ Thus, the Washington Supreme Court's decision was based on the notion that a jury could conclude that while a "reasonable man" might have struggled or fought with the victim in the *Wanrow* case, a woman — no matter how large or how evenly matched physically with the victim — would not fight or struggle or engage in a fist fight, but would submit and allow the male to dominate either her or her children, or, unable to use non-deadly force because of her acculturation, would resort to deadly force. The introduction of social acculturation to the circumstances of the reasonable person adds a new element to that doctrine; it focuses on one aspect of the defendant's mental make-up and questions how that aspect played upon the facts of the case. While the test talks about the "ordinary" or "reasonable" woman, it is not concerned with the mental operations of the defendant at the time of the event, but rather with the mental attitudes and concerns the person brings with her to the situation. One can move from cultural socialization to other aspects of upbringing of either this particular defendant or of one of the class to which the defendant belongs. This notion is so close to the "class of cowards" concept that it seems to endorse and adopt the general (totally subjective) view of *Grainger*²¹⁹ that every defendant must be judged on his or her own subjective culpability. Thus, if followed by other courts, in many ways it would appear that the *Wanrow* case means the virtual end of an objective standard in self defense.²²⁰ The

²¹⁵ *Id.* at 240-41, 559 P.2d at 559.

²¹⁶ See also *Criminal Law: Self-Defense* — *State v. Wanrow*, 88 Wn. 2d 221, 559 P.2d 548 (1977), 13 GONZ. L. REV. 278, 283 (1977).

²¹⁷ Even if it was "simply" a case endorsing a "woman" standard per se, rather than a "socialization" standard, *Wanrow* would stand almost alone. Very few courts articulate that the instruction should consider gender. But see *Anderson v. State*, 117 Ga. 255, 258 (1903), in which the court ruled that "[a]mong the circumstances to be considered are the sex, strength, size and position" of the slayer, but that there was no error because the defendant had not asked for special instructions on her gender.

²¹⁸ *Wanrow*, 88 Wash. 2d at 239 & n.8, 559 P.2d at 558 & n.8.

²¹⁹ *Grainger v. State*, 13 Tenn. 459 (1830).

²²⁰ Washington previously had endorsed the quasi-subjective standard in normal self defense cases. See *State v. Tyree*, 143 Wash. 313, 316, 255 P. 382, 384 (1927):

The test in these cases is not what someone else would believe, but as to what belief was entertained by the appellant himself; and the amount of force which he had a right to use in resisting an attack upon him was not the amount of force which the jury might say was reasonably necessary, but what under the circumstances appeared reasonably necessary to the appellant.

Wanrow court, however, did not reach that conclusion; in its view, it merely added yet one more factor to the "circumstances" of the reasonable person. But this circumstance seems so overwhelming and so critical as truly to remove the reasonable person as an objective standard from self defense concerns.²²¹

2. Reasonable People *In Extremis*

The question of which characteristics are to be considered part of the "circumstances" in which the otherwise reasonable person operates has plagued of course not only criminal lawyers — as, for example, in the area of manslaughter — but others as well, tort lawyers in particular. In response, tort law, which often deals with calamitous situations, has developed the so-called emergency or discovered peril doctrine.²²² It is rather striking that neither the criminal law writers nor the courts deciding criminal cases have referred specifically to this civil doctrine although it might be said to be inherent in the factual settings and the tone of the instructions given to the jury. It is difficult to know precisely what to make of this "doctrine" but, essentially, it dictates that a reasonably prudent person finding himself in an emergency situation cannot be expected to act prudently at all, or at least, can be expected to act with bare minimal reasonability. In fact, in most of these cases, whatever a defendant does is deemed non-negligent in tort terms. Similarly, the defendant's conduct in emergency situations surely should be considered reasonable, or at least ordinary, within criminal law terms.

The leading tort case on the emergency doctrine is *Cordas v. Peerless Taxi Company*.²²³ In *Cordas*, the defendant taxi driver was confronted suddenly with a fleeing felon who jumped in his cab, put a gun to his head, and ordered the defendant to drive. After driving several blocks and making several turns in mid-New York City, the taxi driver suddenly leaped out of the car. The car, uncontrolled, proceeded upon a sidewalk where it struck several pedestrians — including the plaintiffs in the case — none of whom, fortunately, was seriously injured. In finding that the defendant acted reasonably, and therefore was not civilly liable, the court said:

There are those who stem the turbulent current for bubble fame, or who bridge the yawning chasm with a leap for the leap's sake, or who "outstare the sternest eyes that look, outbrave the heart most daring on the earth, pluck the young suckling cubs from the she-bear, yea, mock the lion when he roars for prey" to win a fair lady and these are the admiration of the generality of men; but they are made of sterner stuff than the ordinary man upon whom the law places no duty of emulation. The law would indeed be fond if it imposed upon the ordinary man the obligation to so demean himself when suddenly confronted with a danger, not of his creation, disregarding the likelihood that such a contingency may darken the intellect and palsy the will of the common legion of the earth, the fraternity of ordinary men²²⁴

Although more lyrical than most, in substance this quote is typical of the "emergency doctrine" cases in torts. Essentially, courts dealing with tort suits recognize the inexorable truth that persons faced with crises simply do not think and, therefore, cannot be

²²¹ See Donovan & Wildman, *supra* note 98.

²²² See W. PROSSER & P. KEATON, HANDBOOK ON TORTS 196 (5th ed. 1985).

²²³ 27 N.Y.S.2d 198, 200 (N.Y. Ct. Ct. 1941).

²²⁴ *Id.* at 200-01.

expected to think reasonably. Surely the taxicab driver in *Cordas* had time to think; indeed, it is apparent that after driving for several minutes he had been thinking about the time and place in which to jettison the car. And surely if there had been no emergency, the defendant clearly would have been negligent, for one can think of few more dangerous decisions than simply to leave the driver's seat of a car proceeding down a crowded street in New York City. Only the fact that there was an emergency, therefore, seems to exculpate totally the defendant. The quote from the *Cordas* case makes it clear that this is not a matter of empathy or sympathy for the defendant; it is a recognition that when persons are placed in such perilous and unexpected situations they simply do not act or respond as rational beings but, rather, as primordial beasts. Whether one views this response as involving thinking at all, or as viewing the defendant as in a state of nature, or whatever other metaphor one uses to describe the situation, clearly, it is not fair or just to require the defendant to act "reasonably." Thus, one could argue that no person is expected to "think reasonably" at all in an emergency situation.

If this analysis is accurate in tort law, then it certainly must be accurate when applied in criminal law. In tort law, after all, our main concern is compensation for the plaintiff-victim, not punishment for the defendant-actor. In this light, *Cordas* may be criticized for ignoring the equally non-culpable plaintiffs who for no reason had suffered actual loss. Such a criticism in criminal law would be inappropriate, however. In criminal law, where our sole concern must be with the impact of punishment upon the defendant — and for utilitarians, upon other potential defendants — the victim is irrelevant.²²⁵ Moreover, in such emergency situations, the law patently will not achieve deterrence and other utilitarian goals. As Justice Holmes said in the context of self defense, "[d]etached reflection cannot be expected in the presence of an uplifted knife."²²⁶ Equally, detached reflection cannot be expected in the presence of any emergency situation in which the defendant did not actually expect — or, if he did expect or anticipate the situation, could not be said to have appreciated — the full impact upon his physiology at the time of the event. Surely, at least, courts and writers discussing the criminal law application of the reasonable person doctrine should inform juries specifically that reasonable persons in emergencies are not to be considered as reasonable persons in non-emergency situations, nor are they to be judged by such standards.²²⁷

²²⁵ The recent spurt of statutory schemes to compensate victims of crime is inapposite here, since it is the state, and not the defendant, who compensates. While solicitous of the victim, these statutes do not increase the defendant's punishment as such.

²²⁶ *Brown v. United States*, 256 U.S. 335, 343 (1921).

²²⁷ Some cases contain some hint of the language that the court should tell the jury that they are to judge the defendant's acts not from their own viewpoint as jurors sitting in the courtroom but from the defendant's viewpoint and circumstances as they existed at the time. This instruction, of course, has some impact upon the jury, but it is probably not as direct as telling the jury that they should consider that the defendant was in an emergency situation and that people in emergency situations simply do not and cannot be expected to act reasonably. Indeed, if the true doctrine of "emergency cases" from tort were fully applied, as in the *Cordas* case, it is probably true that very few cases of self defense, and indeed very few cases of provocation, would get to the jury because in most situations the reasonable person would not think at all in a self defense setting and would merely react or respond. The argument that people do think in emergencies and do contemplate potential results of their actions does not necessarily undercut this view. Thus, the taxicab driver in *Cordas* surely "thought" about his actions and possibly about the results of his actions in leaving the cab, but the court's decision in *Cordas*, as in other emergency cases, strongly suggests that the mere opportunity to think for some short period of time is insufficient to catapult the petrified

3. Civil v. Criminal Negligence

The present criminal law's penalization of a person's negligent act in perceived self defense also fails because the penalty appears to be predicated upon the defendant's mere negligence. Thus, the jury is told that if the defendant's mistake is "unreasonable," he should lose the defense of self defense entirely.²²⁸ The jury easily can construe this instruction, without further elucidation, as requiring that the defendant act non-negligently in the traditional tort sense of that phrase. Yet, even those jurisdictions which are ready to hold defendants liable for "criminal negligence" recognize, in other contexts, that this negligence is much "higher" than tort negligence.²²⁹ Only in the context of self defense is the defendant in a criminal case actually, or at least potentially, held liable for mere civil negligence²³⁰ because courts do not instruct juries as to "how" unreasonable the mistake must be.

The difficulty is that the term "unreasonable" is too vague, at least in this context, covering both negligent and reckless mistakes. Throughout the nineteenth century, and well into the twentieth, virtually no court or writer dealing with criminal self defense clearly distinguished between these two types of unreasonable behavior. Yet the tort law concept of "criminal negligence" — whether using the terms "wanton" or "gross" negligence — is much the same as the criminal law concept of subjective recklessness; it goes beyond "mere negligence" and "unreasonableness." The appellate cases make this clear, but only when the question is put directly; otherwise, at least in self defense cases, they endorse the requirement that the defendant not act "unreasonably" without making clear that "unreasonably" in this context means "recklessly." Simply put, the line of cases defining "criminal negligence" never meets the line of cases allowing a defendant to be convicted of murder because she made an "unreasonable" mistake, even if that mistake was merely negligent and not reckless.

B. *The Model Penal Code and Mistake of Fact*

1. Generally

The second step in subjectivizing mistake was taken by the Model Penal Code (MPC), which rejected the common law's alleged²³¹ requirement that, to be a defense at all, a mistake of fact had to be reasonable. Thus, section 2.04 provides that "[i]gnorance or mistake as to a matter of fact . . . is a defense if: (a) the ignorance or mistake negatives

actor into the quietude of reasonability. Indeed, leaving aside the question of whether in fact people think "properly" under such conditions, or whether they simply think randomly, it is almost surely true that they do not think and deliberate sufficiently. If that is the conclusion of cases like *Cordas*, it surely ought to be the conclusion of cases in which our declared interest is in the defendant's actual state of mind, whether we are interested in that mental state for retribution purposes or for utilitarian purposes.

²²⁸ See *infra* text accompanying notes 249–60.

²²⁹ See, e.g., *Fitzgerald v. State*, 112 Ala. 34, 39, 20 So. 966, 967 (1896) ("[t]he carelessness must be aggravated").

²³⁰ G. WILLIAMS, *THE CRIMINAL LAW: THE GENERAL PART* 163 (1953) argues that English law which convicts an unreasonable killer of manslaughter is explicable on the grounds that manslaughter may be committed negligently, but he does not explore the question of whether an "unreasonable" mistake necessarily rises to the level of criminal negligence.

²³¹ See *supra* part II. B. 2.

the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense."²³² In a word, even an honestly held mistake is a defense to a crime which requires purpose, knowledge, or recklessness; the "unreasonable," that is, negligent, mistake is no defense only where the crime charged can be committed "negligently." The MPC's general reluctance to establish either negligent or strict liability crimes²³³ make the apparent compromise rather meaningless; for all practical purposes, an honestly but unreasonably mistaken actor is to be exculpated from all criminal liability.

It is unclear whether the MPC has had the impact its drafters had hoped in this regard. The 1985 commentary declares that twenty-one jurisdictions have adopted this provision,²³⁴ but this is misleading.²³⁵ Moreover, there appear to be no cases on point interpreting these provisions.²³⁶

2. Self Defense and Mistake of Fact

Because of the way in which the doctrine developed historically, a defendant who was unable to avail herself of the self defense claim was convicted of murder; no lesser included offense was thought to be proper since, as a matter of "logic," the defendant, shown to have committed intentional homicide,²³⁷ had shown no excuse or justification for that intentional killing. Since intentional homicide was murder, except when provoked,²³⁸ the defendant was guilty of murder. Moreover, since in many instances the killing was not merely intentional but premeditated, particularly in the strained meaning given to premeditation by nineteenth century courts,²³⁹ the homicide often was considered first degree murder.

A number of common law courts, repulsed by this logical result, created a "halfway house" doctrine by which the unreasonably mistaken defendant, rather than being

²³² MPC, *supra* note 1, at § 2.04.

²³³ *Id.* at § 2.05.

²³⁴ AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES § 2.04 (1985). Most of the states which have in fact adopted the MPC's provision follow its language rather closely. Typical, for example, is that of the Arizona Criminal Code: "Ignorance or a mistaken belief as to a matter of fact does not relieve a person of criminal liability unless it negates the culpable mental state required for commission of the offense." ARIZ. REV. STAT. ANN. § 13-204 (1978).

²³⁵ Three of the statutes cited by the Code commentary as adopting the Code's position explicitly reject it. Louisiana (LA. REV. STAT. ANN. § 14:16 (West 1986)); New Jersey (N.J. STAT. ANN. § 2C:2-4 (West 1982)); Texas (TEX. PENAL CODE ANN. § 8.02 (Vernon 1974)). These statutes expressly require that the mistake be reasonable to be a defense to any crime. Moreover, the commentary's cite here to North Dakota's Criminal Code Section 12.1-05-08 is confusing because that section deals with mistaken self defense, *see* State v. Leidholm, 334 N.W.2d 811 (N.D. 1983), and not with mistake generally. Furthermore, Alaska originally adopted a position similar to that of the Code, ALASKA STAT. § 11.81.630 (1978) allowing any mistake to negate culpability. In 1980, however, that provision of the Code was amended to allow explicitly only reasonable mistake to act as a defense. ALASKA STAT. § 11.81.620 (1983) (§ 28, ch. 102 SLA 1980).

²³⁶ A review of the annotations of the 18 codes which provide that any mistake will act as a defense if it negates the relevant culpability finds virtually no cases on point. Those cases that are cited in the annotations are concerned almost exclusively with mistake of law rather than mistake of fact. *See, e.g.,* IOWA CODE ANN. § 701.6 (West 1979); N.Y. PENAL LAW § 15.20 (McKinney 1975).

²³⁷ *But see infra* sources cited note 239.

²³⁸ The homicide was then manslaughter. Given the narrow doctrine of provocation, also a child of the nineteenth century, *see* Singer, *supra* note 4, at 304, however, this avenue of mitigation was available to few.

²³⁹ *See generally* Brenner, *The Impulsive Murder and the Degree Device*, 22 FORDHAM L. REV. 274 (1953); Knudson, *Murder by the Clock*, 24 WASH. U.L.Q. 303 (1939).

subject to a murder charge, would be found guilty of manslaughter. This doctrine, called "imperfect self defense,"²⁴⁰ had limited acceptance in the common law jurisdictions. The MPC, however, adopts the doctrine, although by intricate indirection.

At first blush, the MPC's provisions dealing with the use of force in self defense appear to embrace a totally subjective view. Section 3.04 provides that an actor is allowed to use deadly force if he "believes" that it is necessary; there is no requirement that the belief be reasonable.²⁴¹ This facial embrace of a subjective approach, however, is misleading. Section 3.09 provides that if the defendant has been reckless or negligent in reaching a conclusion about a set of facts, the defendant can be prosecuted for either reckless or negligent homicide.²⁴² While reckless homicide is equated with manslaughter, "negligent homicide," a new creation of the MPC, is punished less severely. The Code, therefore, takes a middle position with regard to "imperfect" self defense by allowing some prosecution of the defendant, but by dividing the notion of "unreasonability" into two separate subcategories of recklessness and negligence, a division which the common law courts typically did not make.²⁴³ Furthermore, under the MPC's basic culpability provisions,²⁴⁴ a defendant who has acted merely "negligently" has not committed even negligent homicide, for "negligence" requires that the defendant act in a way which is "grossly" deviant from the way in which a reasonable person would act.²⁴⁵

The MPC thus precludes murder liability on the part of any defendant who believes, reasonably or unreasonably, that deadly force is necessary. At the same time, it establishes some liability on the part of those actors whose beliefs are either reckless or grossly negligent. The MPC also underscores, however, the notion that criminal negligence is different from tort negligence, a conclusion not always apparent in the common law cases.

This convoluted path may be seen as a compromise between those who sought totally to subjectivize the law, as in section 3.04,²⁴⁶ and those who wished to see some form of objectivization remain in the criminal law. To the extent that one can accept

²⁴⁰ See W. LAFAYE & A. SCOTT, *supra* note 40, at 397; R. PERKINS & R. BOYCE, *CRIMINAL LAW* 1137-41 (3d ed. 1982). See ILL. ANN. STAT. ch. 38, § 9-2(b) (1979); *People v. Lickett*, 82 Ill. 2d 546, 554-55, 413 N.E.2d 378, 382 (1980); *State v. Owens*, 60 N.C. App. 434, 435, 299 S.E.2d 258, 259 (1983).

On the other hand, the Alaska legislature, after first adopting the view that imperfect self defense could be manslaughter, repealed that statute and provided that unreasonable self defense was murder. ALASKA STAT. § 11.41.115(d) (repealed 1980). See *Balentine v. State*, 707 P.2d 922, 929-30 (Alaska Ct. App. 1985), where the court refused to reinstate imperfect self defense as a common law doctrine.

²⁴¹ MPC, *supra* note 1, at § 3.04.

²⁴² *Id.* at § 3.09.

²⁴³ See *supra* text accompanying notes 228-30. Section 3.09 provides that if an actor has been negligent or reckless in reaching the mistaken belief that deadly force is necessary, he or she may be convicted of any crime for which negligence or recklessness is a proper predicate. Reckless homicide is manslaughter in the MPC under section 210.3. Section 210.4 of the MPC creates a new crime, negligent homicide, which essentially replaces involuntary manslaughter. Negligence is defined in the MPC § 2.02(d), however, as requiring more than civil negligence. See MPC, *supra* note 1, at § 2.02(d). Thus, to qualify the actor for negligent homicide, a mistake must be so unreasonable as nearly to make the actor actually reckless.

²⁴⁴ MPC, *supra* note 1, at § 2.02.

²⁴⁵ *Id.* at § 2.02(2)(d).

²⁴⁶ *Id.* at § 3.04.

either negligence or recklessness as a predicate for criminal liability,²⁴⁷ it is certainly more appropriate to visit upon the negligent or reckless actor a punishment proportionate to that culpability rather than simply to obliterate the defense, thereby relegating the defendant to a first or second degree murder charge, as the common law did.

Although the MPC generally has had a substantial impact on the criminal law in this country,²⁴⁸ its effect upon the law as to this issue seems small. The Commentary to the MPC declares²⁴⁹ that nine states have adopted the MPC's approach to unreasonable mistake in self defense, but in fact this comment is inaccurate. While, as indicated by the Commentary, Arkansas, Maine, New Jersey, and Hawaii do adopt the general position of section 3.09,²⁵⁰ each of these states confusingly provides in the sections on self defense that the mistake must be reasonable.²⁵¹ In addition, the Nebraska courts have interpreted that state's statute so as to require reasonableness, even though the word is not present in the statute.²⁵²

²⁴⁷ See *infra* text following note 260.

²⁴⁸ The impact of the MPC is hard to overestimate, even if on specific matters it is not followed. The MPC is the first major successful attempt to codify American criminal law, and has been adopted in a majority of states, each with some modification. The most sweeping documentation of the MPC's acceptance is, of course, the six-volume work published by the American Law Institute entitled *MODEL PENAL CODE AND COMMENTARIES* (1985). Robinson's monumental work, *supra* note 86, is also in many ways a careful review of the impact of the MPC. Additionally, many law review student works or articles were written when the proposed MPC revision was pending in a given state. See, e.g., Cosway, *The Revised Washington Criminal Code's Vital Structure; The Burden of Proof, Felony, Murder, and Justification Provisions*, 48 WASH. L. REV. 57 (1972); Darrah, *The Revised Washington Criminal Code: A Defense Perspective*, 48 WASH. L. REV. 111 (1972); Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968); Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167 (1981); *Student Symposiums: The Proposed Ohio Criminal Code — Reform and Regression*, 33 OHIO ST. L.J. 351 (1972); *Symposium on the Proposed Michigan Revised Criminal Code*, 14 WAYNE L. REV. 832 (1968). Additionally, see, e.g., Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122 (1975); Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975).

²⁴⁹ *MODEL PENAL CODE AND COMMENTARIES*, *supra* note 234, at § 3.09, at 153 n.11.

²⁵⁰ ARK. STAT. ANN., § 41-514(1) (1977); ME. REV. STAT. ANN. tit. 17-A, § 101(3) (1983); 2C N.J. STAT. ANN., § 3-9(b) (1982); HAW. REV. STAT., § 703-310(1) (1976).

²⁵¹ ARK. STAT. ANN. § 41-507 (1977); 2C N.J. STAT. ANN. § 2C 3-4(2) (1982); ME. REV. STAT. ANN. § 108(1). Hawaii's statute is more complicated but reaches the same result. Although section 703-304(2) of that state's statute provides that "[t]he use of deadly force is justifiable under this section if the actor believes" that such force is necessary, section 703-300 provides that the term "believes" means "reasonably believes." The Hawaii Supreme Court has affirmed this reading in *State v. Riveira*, 59 Haw. 148, 154, 577 P.2d 793, 797 (1978). See also *State v. Casipe*, 5 Haw. App. 7752, 686 P.2d 28, 36 (1984); *State v. Realina*, 1 Haw. App. 167, 173, 616 P.2d 229, 232 (1980).

²⁵² Although Nebraska's legislation does in fact provide that any mistake in self defense is initially exculpatory whether reasonable or not, the Nebraska Supreme Court effectively has nullified that provision. In *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978), the court interpreted the "clear intent of the legislature" and held that only a reasonable mistake would exculpate:

There is no reason to believe [the legislature] intended that the doctrine of justification would be good no matter what the circumstances of which the accused had knowledge or even if his belief in the necessity of using force was wholly unreasonable There is nothing in the justification of force act which appears designed to change the ancient common law rule that in order to justify the defense of self defense the belief that the use of force is necessary must be reasonable and in good faith.

Id. at 209-10, 266 N.W.2d at 757. Of course, as this article hopefully has shown, the common law rule referred to was neither clear nor "ancient."

In fact, only two states of the cited states — Kentucky and Delaware — actually have adopted and continue to follow the MPC's provision that any mistake will negate liability for anything greater than negligence.²⁵³ Moreover, the few cases in these two states which have applied the MPC provisions are unilluminating. Thus, for example, while the Delaware Supreme Court has acknowledged that the new State Criminal Code has changed the standard from objective reasonableness to subjective honesty,²⁵⁴ the leading decision does not discuss the facts of the case, and so cannot clearly be said to have changed the law.²⁵⁵ Similarly, the fact patterns in the Kentucky cases have been such that the jury easily could have found the mistake reasonable, if properly instructed; so while the court has stated that the statute has changed the law by allowing unreasonable mistake as a defense to either murder or manslaughter, this is not obvious from the fact patterns available.²⁵⁶

A major case affirming a subjective standard in light of the legislature's adoption of a new penal Code based on the MPC, though the state is not cited by the commentary, is the North Dakota decision of *State v. Leidholm*,²⁵⁷ a battered wife case. In *Liedholm*, the

²⁵³ The Code commentary lists Massachusetts as having proposed adoption of the code position, but Massachusetts never, in fact, enacted this provision. The closest support for the proposition in Massachusetts seems to be *Commonwealth v. Martin*, 369 Mass. 640, 651 & n.13, 341 N.E.2d 885, 891 & n.13 (1976), in which the court approvingly cited the MPC, including section 3.04. *Martin* itself, however, affirmed an instruction, in a defense-of-third-party case, which required reasonableness, and the court said that this was "roughly" the law in Massachusetts. 369 Mass. at 646, 341 N.E.2d at 890. Reasonableness has been the Massachusetts standard at least since *Commonwealth v. Crowley*, 168 Mass. 121, 125, 46 N.E. 415, 417 (1897) (official report's syllabus quotes trial court instructions which were upheld). The other commentary cite is to the proposed code in Vermont which, at least as far as I have been able to ascertain, was not adopted. Thus, of the nine states cited by the Code Commentary as adopting the MPC's position, at least five in fact continue to follow the prior common law, either expressly or as a matter of judicial construction, and two more have not in fact adopted the MPC position. Thus, only two states cited by the Code Commentaries have actually followed, or at least now follow, the "honest belief" standard without qualification. In addition, Pennsylvania, which has otherwise adopted many of the provisions of the MPC, requires reasonableness in self defense. See *Commonwealth v. Presogna*, 221 Pa. Super. 431, 433, 292 A.2d 476, 477 (1972).

²⁵⁴ *Coleman v. State*, 320 A.2d 740, 743 (Del. 1974).

²⁵⁵ *Id.* In dissent, Justice Carey argued that the facts depended solely on resolution of credibility, and if the defendant's version was believed, the act was fully justified, not merely excused, whereas if the victim was not believed, "there was no justification whatever." *Id.* at 743 (Carey, J., dissenting). Assuming Carey meant justified, and not excused, this would suggest that the fact pattern was fairly clear.

²⁵⁶ For example, in *Baker v. Commonwealth*, 677 S.W.2d 876, 877-78 (Ky. 1984), the defendant and his former wife had an argument and she then ran toward her purse, where, to his knowledge, she had a gun. He shot her first. A jury easily could conclude that this was a reasonable decision, even if she did not in fact intend to use the gun. Similarly, in *Blake v. Commonwealth*, 607 S.W.2d 422, 423 (Ky. 1980), the defendant saw the victim lean down toward a spot in which there was, as a matter of common knowledge, a shotgun. Moreover, the victim and defendant had long been enemies and the victim had recently beaten the defendant and threatened to kill him. In each of these cases, the report does not repeat the actual instruction under the Kentucky equivalent of section 3.09 of the MPC. It is ironic that Kentucky has adopted the fully objective standard because Professor Moreland, who taught at the University of Kentucky Law School for many years and was one of the leading experts on both the MPC and homicide law generally, was a staunch proponent of a modified objective standard. See generally R. MORELAND, *THE LAW OF HOMICIDE* (1952); Moreland, *A Re-examination of the Law of Homicide in 1971: The Model Penal Code*, 59 KY. L.J. 788 (1971).

²⁵⁷ 334 N.W.2d 811 (N.D. 1983). The court argued that it was "reaffirming" the earlier decisions of *State v. Hazlett*, 16 N.D. 426, 113 N.W. 380 (1907) and *State v. Jacob*, 222 N.W.2d 586 (N.D. 1974). *Liedholm*, 334 N.W.2d at 817.

trial judge instructed the jury that it should use the reasonable person standard in assessing the wife's homicidal act. In reversing, the North Dakota Supreme Court carefully explored the differences between excuse and justification and the tension between using an objective or subjective standard.²⁵⁸ While recognizing that the state code permitted an unreasonably mistaken actor to be punished for either negligent homicide or manslaughter, as the facts warrant, the court opted for an entirely subjective standard in assessing the liability of the defendant for murder because "it [was] more just than an objective standard":

The practical and logical consequence of this interpretation is that an accused's actions are to be viewed from the standpoint of a person whose mental and physical characteristics are like the accused's and who sees what the accused sees and knows what the accused knows. For example, if the accused is a timid, diminutive male, the factfinder must consider these characteristics in assessing the reasonableness of his belief. If, on the other hand, the accused is a strong, courageous, and capable female, the factfinder must consider these characteristics in judging the reasonableness of her belief.²⁵⁹

Leidholm stands as one of the few leading cases to adopt a fully subjective approach, while recognizing the MPC's and common law's compromise on negligent and reckless homicide.²⁶⁰

In short, the MPC's impact is mixed. In general mistake of fact situations, it appears that a sizeable number of jurisdictions have accepted the view that any mistake, reasonable or not, should exculpate. There are, however, few cases to verify this view. As to self defense, the evidence is far less encouraging: a small number of jurisdictions have accepted the view that any belief should exculpate so far as murder is concerned, leaving the defendant to be prosecuted for either reckless or negligent homicide.

C. The British Commonwealth Experience

The leading recent case in Great Britain on the question of mistake of fact, reasonable or unreasonable, is *Director of Public Prosecutions v. Morgan*.²⁶¹ In *Morgan*, three defendants charged with rape argued that they had been told by the woman's husband that she actually wished the sexual intercourse, but that she would protest during the act, because this was the way in which she would enjoy the act most. The facts, of course, were different and the woman prosecuted. The defendants argued that sexual intercourse was not rape if the defendants actually believed, reasonably or not, that she consented. The trial court initially instructed the jury that any mistake would negate culpability, but in the closing instruction it ordered the jurors to acquit only if they found the mistake reasonable.

²⁵⁸ *Id.* (citing *Hazlett*, 113 N.W. at 380-81).

²⁵⁹ *Id.* at 818.

²⁶⁰ Ohio also follows a subjective standard. *State v. Sheets*, 115 Ohio St. 308, 309-10, 152 N.E. 664, 664 (1926); *State v. Thomas*, 13 Ohio App. 3d 211, 212-13, 468 N.E.2d 763, 764-65 (1983). As the court put it in *Nelson v. State*, 42 Ohio App. 252, 254, 181 N.E. 448, 449 (1932): "[G]uilt is personal, and . . . the conduct of any individual is to be measured by that individual's equipment mentally and physically A nervous, timid, easily frightened individual is not measured by the same standard that a stronger, calmer, and braver man might be." In *Thomas*, the court held that, in accordance with this standard, psychiatric evidence that the defendant has a "paranoid personality, who viewed everything negatively . . ." was erroneously excluded by the trial court. *Thomas*, 13 Ohio App. 3d at 213-14, 468 N.E.2d at 765.

²⁶¹ (1975) 2 All E.R. 347.

A three to two majority of the Law Lords agreed with the defendant's position and declared that an honest, even though unreasonable, mistake as to whether a woman was consenting would negate liability for rape.²⁶² The opinions in the case took different positions as to the breadth of the mistake of fact doctrine. All three opinions on the majority agreed that any mistake negates intention, and that, as to rape, there is a clear requirement of intent. The opinions differed substantially, however, in determining whether the doctrine applies to other crimes. Thus, for example, Lord Hailsham limited the applicability of the *Morgan* decision by distinguishing *R. v. Tolson*²⁶³ on the following grounds:

[Tolson is] a narrow decision based on the construction of a statute, which prima facie seemed to make an absolute statutory offence The judges in *R. v. Tolson* decided this was not reasonable, and, on general jurisprudential principles, imported into the statutory offense words which created a special defense of honest and reasonable belief²⁶⁴

Similarly, Lord Fraser declared:

[If rape is nonconsensual intercourse] then the logical difficulty of requiring a belief in the woman's consent to be based on reasonable grounds arises sharply. If the effect of the evidence as a whole is that the defendant believes, or may have believed, that the woman was consenting, then the Crown has not discharged the onus of proving commission of the offence as fully defined²⁶⁵

As for *Tolson*, Lord Fraser continued, "[t]he main argument in *Tolson* . . . was concerned with the question whether a mistaken belief could be a defense to a charge of bigamy at all, and comparatively little attention was given to the subsidiary point of whether the belief had to be based on reasonable grounds."²⁶⁶

It is, therefore, unclear whether *Morgan* was intended to apply simply to rape,²⁶⁷ or to establish a more general adoption of the subjective viewpoint as regards the effect of mistake. That the Lords even addressed the substantive issue — while affirming the conviction on the ground that no reasonable jury could find that the defendants actually believed that the woman was consenting — suggests that *Morgan*, however narrowly delivered, was intended to have a substantial impact upon the English law in all crimes.

Whether it is having such an effect, however, is difficult to determine. The very few cases citing *Morgan* as even peripherally relevant have tended either to restrict it to rape cases or, at least, not to extend it to other categories of crimes. Thus, for example, in *R. v. Phekohe*,²⁶⁸ the court restricted *Morgan* to rape indictments and held that only a reasonable belief that certain persons were squatters, and not entitled to be in the defendant's premises, would be a defense to harassing them intentionally to make them leave. Because the trial court had instructed the jury that no belief, however reasonable

²⁶² *Morgan*, (1975) 2 All E.R., 361-62.

²⁶³ See *supra* note 67 and accompanying text.

²⁶⁴ *Morgan*, (1975) 2 All E.R. at 362.

²⁶⁵ *Id.* at 382.

²⁶⁶ *Id.*

²⁶⁷ One year after *Morgan*, Parliament specifically endorsed the result in that case. Sexual Offences (Amendment) Act 1976 §§ 1, 2.

²⁶⁸ (1981) 3 All E.R. 84 (Court of Appeals, Crim. Div.).

as to that issue, would be a defense, the decision only required an overturning at that instruction. In dictum, however, the court analogized the crime to other "regulatory type" offenses, where reasonable mistake had been viewed as both necessary and sufficient to establish a defense.²⁶⁹ Indeed, in light of *Phekooh* and other cases, some writers have spoken of a "retreat from *Morgan*."²⁷⁰

As to self defense law, the impact of *Morgan* is even less apparent. As already seen,²⁷¹ the prior law in England on self defense was very unclear.²⁷² In *Albert v. Lavin*²⁷³ the court divided on the issue of whether mistake of fact in resisting arrest had to be reasonable, or whether any mistake would do. In dictum, the court cited several self defense cases²⁷⁴ which allegedly held that the mistake must be reasonable; but in fact only one of those cases was involved directly with self defense.²⁷⁵ Because the *Albert*

²⁶⁹ See, e.g., *Sweet v. Parsley* (1969) 1 All E.R. 347, 349-50. These offenses are referred to sometimes as "strict liability" offenses in the United States. For nearly a century, and arguably more, reasonable mistake has been a defense even in these cases, notwithstanding the American view that no mistake is a defense. See Singer, *supra* note 49. In *Pigg* (1982) 2 All E.R. 591, the Court applied the alternative holding of *Morgan*, that a defendant could be guilty of rape if he were reckless as to whether the woman was consenting or not.

²⁷⁰ See Cowley, *supra* note 3.

²⁷¹ See *supra* text accompanying notes 78-96.

²⁷² G. WILLIAMS, *supra* note 230, at § 71, collects the cases on reasonableness of mistake of fact in England and concludes that there was a conflict as of 1961. Indeed Williams, in discussing the applicability of reasonable mistake to self defense, can cite very few English cases and relies substantially upon American decisions. *Id.* at § 73. See also Note, 59 AUST. L.J. 644 (1985) (citing and discussing *Viro v. The Queen*, (1978) 141 C.L.R. 88, for proposition that Australia uses the "defendant reasonably believes" standard). Brett, *Strict Responsibility: Possible Solutions*, 37 MOD. L. REV. 417 (1974), argues that the English cases never embraced a requirement of reasonableness but only used reasonableness "as a factor for testing whether the belief was in fact held as alleged." *Id.* at 428.

²⁷³ (1981) 1 All E.R. 628, *aff'd on other grounds* (1981) 3 All E.R. 878. The House of Lords expressly did not reach the question of reasonableness.

²⁷⁴ E.g., *R. v. Rose*, 15 Cox Crim. Cas. 540 (1884); *R. v. Chisam*, 47 Cr. App. R. 130 (1963); *R. v. Weston*, 14 Cox Crim. Cas. 346 (1879); *Owens v. H.M. Advocate*, 1946 J.C. 119. *Rose* and *Chisam* both involved the use of force in defense of another. Defense of other cases, at least in the United States, often has required a higher standard of care because the so-called "alter ego rule," applicable in a number of states, W. LAFAVE & A. SCOTT, CRIMINAL LAW 398 (1972), allows the intervenor no more force than the putative victim would have been justified, not excused, in using. Thus, they are clearly distinct from the true self defense case.

²⁷⁵ Only *Owens* is a true self defense case. See Williams, *Offences and Defences*, 2 LEGAL STUD. 233, 243 (1982). Williams strongly endorses the view that the test should be subjective, as do most others. KENNY'S OUTLINE OF CRIMINAL LAW 59-60 (19th ed. 1966); J. SMITH & B. HOGAN, CRIMINAL LAW 328-29, 364-65 (4th ed. 1978); Smith, *Note on Morgan*, 1975 CRIM. L.R. 40. Ashworth, *Self Defense and the Right to Life*, 34 CAMB. L.J. 282, 304 (1975) argues that, on the basis of *Morgan*, the standard should be an honest mistake of fact, but it is not clear that he normatively would embrace that standard. The Criminal Law Revision Committee of England also endorsed the subjective standard, but explicitly noted that the reasonableness of the belief was a factor which the jury could consider. OFFENCES AGAINST THE PERSON, ¶¶ 72(a), 72(e) (1980, Cmd. 7844). Although no American court yet has taken the position taken by the House of Lords in *Morgan*, there is a small but noticeable trend among judicial decisions in this country to at least ameliorate, if not totally erase, the harshness of the common law decisions with regard to sexual offenses. Thus, the California Supreme Court has held that a reasonable mistake of fact as to the age of a female will be a defense to a charge of statutory rape. *People v. Hernandez*, 61 Cal. 2d 529, 536, 393 P.2d 673, 644, 39 Cal. Rptr. 361, 365 (1964). See generally 8 A.L.R. 3d, *supra* note 68. *Accord* *State v. Guest*, 583 P.2d 836 (Alaska 1978). In addition, those states adopting the MPC provisions with regard to sexual offenses

opinion — which discusses unreasonable mistake in the self defense context — is a lower court decision and hardly binding on anyone, the situation in England is, at best, muddled. It generally is accepted by the writers, however, that, even though most favor the subjective standard, the reasonableness standard is applicable.²⁷⁶

IV. THE NORMATIVE ASPECTS OF MISTAKE OF FACT

A. Mistake Generally

There are several grounds for arguing that negligence generally should be a sufficient basis for criminal liability, but none of these will stand inspection, except possibly the argument from deterrence, and that argument is only persuasive in a limited number of cases.

The first argument against the subjective standard stems from the viewpoint of deterrence: by punishing criminally negligent actors, we will force all actors to re-think their view of the facts, and thus deter precipitous, wrong, acts. Initially, however, the possibility of actually deterring a mistaken actor seems low, because an actor who honestly believes she is correct will always act on that "correct" belief. As Glanville Williams puts it, "the threat of punishment would have no effect on her."²⁷⁷ But this may not always be true. If belief is a matter of degree, and time for reflection is likewise a matter of degree, it is possible that in some cases, if the defendant has sufficient time to reconsider or to investigate the factual predicate of her act, she may be moved to further inquiry by the realization that if she is unreasonably wrong she will not be exculpated. This possibility, however, requires that the actor have both sufficient time to reflect upon the possibility that she may be wrong with regard to a fact which appears to her to be correct, and posits that she will reconsider a fact of which she is already convinced. This is a slim basis on which to erect a structure of mistake requiring reasonableness in every instance. And, of course, it means that no matter how deeply the defendant believes the facts to be other than they were, she will be constantly open to criminal liability for not having carried the investigation forward to the "final" step, at which point she would have realized her mistake.

Take, for example, a bigamy defendant such as Ms. Tolson.²⁷⁸ As Williams argues, if she "had been warned of the law of bigamy at the time of her second marriage . . . [s]he surely would have replied: 'I am not committing bigamy, because my husband is

similarly have provided that a mistake of fact with regard to age is a defense where the age is 16 or older and that a defendant who is no more than four years older than the putative victim in a statutory rape case will have a full defense. *Cf.* *People v. Plewka*, 27 Ill. App. 3d 553, 558-59, 327 N.E.2d 457, 460 (1975). These changes in statutory and common law treatment of sexual offenses are hardly a landslide; and it may be true that they represent not a rethinking of substantive criminal law in general so much as rethinking of sexual offenses. But they are nevertheless available to suggest a move toward further subjectivity in the criminal law with regard to mistake of fact.

²⁷⁶ *Cf.* *State v. Harris*, 46 N.C. (1 Jones) 190 (1853), which rejected the subjective standard because it is impossible to disprove: "The prisoner says he believed his life was in danger. Who can look into his heart? If the law allow him to judge, who can contradict him? The circumstances are nothing; it is his belief that justifies him." *Id.* at 195 (emphasis in original). This, of course, is wrong on several counts. First, juries are asked to perform this function almost daily. Second, his belief does not "justify" him, but only excuses him.

²⁷⁷ G. WILLIAMS, *supra* note 230, at 205.

²⁷⁸ See *supra* note 67.

dead."²⁷⁹ Ostensibly, since she honestly believed him to be dead, nothing would have persuaded her to continue the inquiry. But assume that for some reason she had so continued it, and discovered that her husband's ship had sunk. She would have further evidence to support her conclusion that he was dead. The firmness of her firmly held belief — although wrong as it turned out — would not really have been strengthened at all: she honestly, but wrongly, still would have believed him to be dead. Although it is possible to argue that this mistake would have been more reasonable than one where she had made no inquiry, that is not the issue here; it is whether the threat of criminal liability in the presence of a factual belief of reasonableness will encourage such an inquiry. There is little to suggest that Ms. Tolson would have needed the encouragement of the criminal law or would have been aware of its encouragement in any event. Further, if she had been deterred by the first warning as to bigamy, it is surely possible that she would continue to be deterred, and would never marry again, a result which would be undesirable in the event that her husband were truly dead. In that case, in short, we would over-deter. Thus, it is possible that the deterrent effect in this situation, if it has impact at all, may chill people from taking action which we all consider good without much apparent benefit.

A second, incapacitationist, argument for requiring mistakes to be reasonable is that persons who act unreasonably — and particularly those who use deadly force unreasonably — are dangerous and will not be adequately restrained by the non-criminal law.²⁸⁰ But this concern is not limited to mistake of fact; it applies to all possible defenses where a dangerous person might be exculpated and in fact forms the ultimate basis for the argument that we simply should eliminate mens rea from the criminal law entirely, lest the dangerous go free.

The concern that dangerous individuals who use deadly force unreasonably will not adequately be controlled is similar to a third argument against the subjective test: that a subjective approach would encourage, or at least not discourage, precipitous action. As the New York Court of Appeals once put it, a subjective test might invite the use of deadly force in reaction to nothing more than "mere fear or fancy or remote hearsay information or a delusion pure and simple and not rationally supported by any action or conduct of the [victim]."²⁸¹ Whatever the merits of this view, it is surely weakest where it is asserted most: in cases of self defense where the actor is by hypothesis *in extremis* and unlikely to think at all.²⁸² Moreover, it is really nothing more than the converse argument of the first concern that we may frighten people into thinking longer about actions which they honestly believe to be reasonable. The arguments that stem from deterrence, therefore, seem weak, although plausible in those cases where the defendant truly has time to think and may for some reason consider the criminal law and its doctrine.

The incapacitationist might argue that a person who has made an unreasonable mistake once is likely to continue to make the same mistake — taking innocent lives — and that it is, therefore, necessary to confine such a person. I leave aside the dubiety,

²⁷⁹ G. WILLIAMS, *supra* note 230, at 167.

²⁸⁰ This seems to motivate Professor Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of A Doomed Marriage*, 77 COLUM. L. REV. 827 (1977), as well as Dame Wooton, B. WOOTON, *CRIME AND THE CRIMINAL LAW* 43-51 (1963).

²⁸¹ *People v. Lumsden*, 201 N.Y. 264, 269, 94 N.E. 859, 860 (1911).

²⁸² See *supra* part III. A. 2.

both moral and pragmatic, of confining a person based upon predicted dangerousness,²⁸³ for that issue is too broad to deal with here. But there is a two-fold response to this "necessary confinement" argument. First, if the person is so unreasonable as to see continuous threats where there are none, the civil system of commitment is available as an alternative to the distortion of the criminal law's primary concern with moral blame. Secondly, if the person is not that unstable, the likelihood that he will continue to encounter situations where he sanely but unreasonably believes that there are threats is so low as to require that we not take action against him until, as noted above, he demonstrates that his mental stability is so diminished as to make him a candidate for civil commitment. In short, the incapacitacionists, to carry the day, must demonstrate not only that the unreasonable actor needs to be confined, but that that confinement must be achieved through the criminal justice system. Even if this showing could be made, the resulting confinement would entail a distortion of the criminal justice system's primary concern of assessing moral blame.

Finally, the utilitarian who fears deceitful abuse of the excuse will object to the exculpation of the unreasonably mistaken defendant.²⁸⁴ But because this objection goes to every excuse, and would leave the criminal justice system without any tools by which to grade culpability, these concerns can be rejected.

Any utilitarian approach to criminal law, however, misses the critical point: that the engine of the criminal law is to be ignited primarily for imposing blame,²⁸⁵ and an actor who honestly believes the facts allow her to act legally, is not blameworthy, however badly mistaken.²⁸⁶ For at least three hundred years the criminal law exonerated those who acted upon mistakes of fact, reasonable or unreasonable. Neither Hale's

²⁸³ See A. VON HIRSCH, *PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS* (1985).

²⁸⁴ Any defense, of course, can be faked; objective qualification on the defense makes this less likely. Concern with the insanity and diminished capacity defense has led, in recent years, to substantial cutbacks in the scope of these "defenses." The most obvious of these results is the removal, by referendum, of the diminished capacity defense in California and the post-Hinckley return to the McNaughten rules of the past century.

²⁸⁵ Actually, the utilitarian really disagrees with this point rather than misses it. The difficulty with almost all utilitarian arguments, in my view, is that they treat the criminal law, and the criminal justice system, as simply another method of social control. But this totally fails to explain why we, and virtually every other culture, have set the criminal system apart from the civil system, both in terms of the sanctions to be imposed and the procedures to be followed. If criminal confinement does nothing more than civil confinement, then it is surely noneconomic to impress the criminal system with the panoply of procedural burdens through which the prosecutor must toil. We all agree, to some extent, that it is better that nine (or ninety, or nine hundred) guilty go free than one innocent be punished; yet we might also similarly agree that it is not better that nine dangerous, uncontrollable, mentally ill, go unconfined than one sane be confined. This suggests that the critical distinction between criminal law and other systems of confinement or regulation is that the criminal sanction carries with it something more — the stigmatization of moral blameworthiness. And if that is the distinguishing characteristic of the criminal law, then the doctrines of the criminal law should reflect and be based upon that distinction.

²⁸⁶ Some writers argue that negligent mistake is blameworthy because the defendant is at "fault," at least if the defendant had the capacity to pay attention, and thereby avoid the mistake, and failed to do so. See, e.g., H. L. A. HART, *PUNISHMENT AND RESPONSIBILITY* 145-57 (1968); G. FLETCHER, *supra* note 85, at 687-91. Most, however, believe that if the defendant does not actually understand the risk of harm or illegality involved there is no true moral blameworthiness. See J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 371-72 (1960); G. WILLIAMS, *supra* note 228; A. Smith, *Rethinking the Defense of Mistake*, 2 OXF. J. LEGAL STUD. 429, 437-38 (1982).

explanation²⁸⁷ that an act done in mistake is "morally involuntary" nor Blackstone's conclusory declaration²⁸⁸ that an act done in mistake is done "without a will" is helpful in terms of explanatory force. Yet each suggests a widely held consensus that people who act while mistaken are not to be treated equally with those who act while they are not mistaken, who know precisely what they are doing, and understand precisely the implications and potential results of their acts. The mysticism that is continued into the nineteenth and twentieth centuries by the metaphor which "explains" that mistake of fact "negates criminal intent"²⁸⁹ is no more helpful, but again encompasses the view that unless people understand and appreciate the consequences of their acts and the context in which they are acting they are not to be held *morally* accountable.

If, as I believe, moral stigma is not merely relevant but indeed the only distinguishing factor of the criminal law from civil law, it follows that any mistake of fact, no matter how unreasonable, should exculpate. Since, by definition, a person who makes even an unreasonable mistake of fact is not as culpable as one who makes no mistake of fact but who understands precisely what he is doing, the criminal law should visit upon the unreasonably mistaken actor a penalty less severe than that visited upon the knowing actor and, indeed, should visit upon him no criminal penalty at all. One of the weaknesses of self defense law in the nineteenth and twentieth centuries has been that frequently persons who are unreasonably mistaken are treated as though they were knowing actors and are punished accordingly.²⁹⁰ A careful criminal law based upon moral culpability would not make that error. As Professor Keedy put it:

Must the mistake be reasonable? An act is reasonable in law when it is such as a man of ordinary care, skill, and prudence would do under similar circumstances. To require that the mistake be reasonable means that if the defendant is to have a defence, he would have acted up to the standard of an average man, whether the defendant is himself such a man or not. This is the application of an outer standard to the individual. If the defendant, being mistaken as to material facts, is to be punished because his mistake is one which an average man would not make, punishment will sometimes be inflicted when the criminal mind does not exist. Such a result is contrary to fundamental principles and is plainly unjust, for a man should not be held criminal because of lack of intelligence. If the mistake, whether reasonable or unreasonable, as judged by an external standard, does negative the criminal mind, there should be no conviction.²⁹¹

²⁸⁷ M. HALE, *supra* note 11, at 14-15, 42.

²⁸⁸ W. BLACKSTONE, *supra* note 10, at 21. The use of the metaphor of will, both because it is customary and because it does seem to describe inner mental states, continues. Consider this version enunciated by Dixon, J., in *Thomas v. King* (1937) 57 C.L.R. 179, 299:

Whenever a legal standard of liability includes some exercise or expression of the will, some subsidiary rules of law must be adopted with respect to mistake. States of volition are necessarily dependent upon states of fact, and a mistaken belief in the existence of circumstances cannot be separated from the manifestation of the will which it prompts. Whether consent, intention, or motive, is the element which a legal criterion of liability includes, it is undeniable that a misapprehension of fact may produce a state of mind which though apparently of the required description is yet really of an entirely different quality.

Id.

²⁸⁹ *State v. McDonald*, 7 Mo. App. 510, 511 (1879).

²⁹⁰ See *supra* note 151.

²⁹¹ Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 84-85 (1908). There

Yet there is an uneasiness in equating the negligent actor with the non-negligent actor by exonerating both equally. This moral tension has led Joshua Dressler to suggest recently the creation of an intermediate category, below justification, but above excupation, to house the unreasonable actor.²⁹² In terms of the self defense law of the pre-nineteenth century, this level would be "excusable" self defense, which resulted in no imprisonment penalty, but would result in forfeiture of goods and property.²⁹³ Similarly, it has been suggested that to equate the honest yet unreasonable self defender — who, after all, allegedly shoots with the intention of killing — with the negligent driver who accidentally kills, is also oversimplistic.

This confusion should be eliminated by the simple expedient of recognizing that an honestly mistaken actor, even in non-self defense cases, should be relieved of liability by a valid excuse.

B. Mistake and Self Defense

If it is difficult to support the requirement that an actor's mistake be reasonable in order to exonerate in normal circumstances, it is virtually impossible to understand the requirement in a self defense or other exigent situation. Aside from the observations already made with regard to the fluidity of the notion of the reasonable person in such circumstances, even in tort law,²⁹⁴ the fact is that wherever we give excuse we are, in the

are of course, many other doubts about the use of an objective standard. Professor Brett, for example, has written:

It can be argued that what we are concerned with is what was in the accused's mind, and that whether or not there were reasonable grounds for its being there is quite irrelevant. I think this is true, but there is another and, to my mind, more formidable reason for declining to make the existence of reasonable grounds an independent factor. It is that to do so enables the judge to direct the jury to find the accused guilty. He does so by saying that the existence of reasonable grounds is a question of fact, and that there is no evidence from which the jury can infer their existence. Thus the issue is withdrawn from the jury.

Reasonableness is, however, not a matter of objectively ascertainable fact. It is a matter of opinion, and it is intolerable that a man should be in peril of going to gaol because a judge differs from the jury as to what can be considered reasonable. Our constitutional system gives the controlling voice in these matters to the jury, and the introduction of a so-called objective test of this kind operates simply as an effort to fetter the jury, and deprive them of one of their functions.

Brett, *Strict Responsibility: Possible Solutions*, 37 MOD. L. REV. 417, 434 (1974).

²⁹² Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L. REV. 61 (1984). See also Morawetz, *Reconstructing the Criminal Defenses: The Significance of Justification*, 77 J. CRIM. L. & CRIMINOLOGY 277 (1986). See also *supra* note 151 and text accompanying notes 146-47 regarding adoption of view that unreasonable self defender should be guilty of manslaughter not murder.

²⁹³ See *supra* note 94 and accompanying text. The issue has a converse side as well, which was explored in depth by Fletcher and Robinson in a series of articles. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 292 (1975); Robinson, *A Theory of Justification: Societal Harm As a Pre-Requisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975). The issue there is whether, from an objective viewpoint, the clear malevolent intent of the actor nullifies the justifiable nature of an act. For example, John steals what he "knows" to be James' car, with full intent to deprive James of the vehicle. Unknown to John, James has only moments before deeded the car to John as a gift. Although the actor is culpable, the act is not a crime. The same tension arises in attempt and particularly in attempting the impossible.

²⁹⁴ See *supra* text accompanying notes 222-27.

words of George Fletcher, aware that the defendant has been caught in a "maelstrom of circumstance."²⁹⁵ This excuse, however, does not mean that mistake of fact, even if unreasonable, is allowed as a defense or a mitigation solely or even primarily because of sympathy with the defendant. Instead, it means that both doctrinally and with regard to the purposes of punishment, there is no warrant to impose a criminal sanction.

Perhaps one of the most striking aspects of the interrelationship of the self defense and mistake doctrines is that there rarely has been any consideration of the general doctrines of mistake when self defense has been raised. That is to say, according to even the most doctrinal of courts or writers, mistake — even unreasonable mistake — negates intent;²⁹⁶ yet in virtually every self defense case, the killing is viewed as "intentional," with self defense going to some other aspect of culpability. This seems palpably wrong for several reasons.

First, the state's *prima facie* case for murder must demonstrate that the defendant either intended to inflict serious bodily harm or death or was at least highly reckless as to the possibility of this harm. Yet, although I cannot offer "proof" for this assertion, it seems very likely that the person killing in self defense actually has neither state of mind. If there is any state of mind at the time, it is probably that the defendant seeks merely to achieve in whatever way possible the termination of the threat to his life. If the aggressor-victim were simply to walk away, the slayer-defendant would probably be just as happy. To say, then, that the typical self defender "intends" or "purposes"²⁹⁷ death is a fiction; at the very least, and possibly in a more moderate tone, it is certainly within the jury's ken to find that a typical self defender did not intend (purpose) a killing.²⁹⁸

More debatable, however, is whether a defendant in a typical self defense situation is reckless as to the possibility of death or serious bodily harm, another mental state which also will render her *prima facie* liable for second degree murder. Here, however,

²⁹⁵ G. FLETCHER, *supra* note 85, at 808.

²⁹⁶ See McDonald, 7 Mo. App. at 511.

²⁹⁷ This is the MPC's term to replace "intentionally." MPC, *supra* note 1, at § 2.02.

²⁹⁸ Kadish, *supra* note 92, at 879 contends that the argument that a person killing in self defense does not usually intend to kill resembles the "double effect principle" advanced by Saint Thomas Aquinas and other Catholic theologians. The principle, as he correctly suggests, states that one may have a "primary" and a "secondary" goal or purpose and that the secondary goal cannot be called an intent. Thus, according to this principle, "the intended effect is to remove the threat and no more. The defender . . . is not choosing the death of his attacker . . . but is choosing the only means available to counteract the threat, though aware it will result in the assailant's death." *Id.* Kadish then rejects this distinction as "so alien to our intuitive common sense as to seem sophistical. For if I shoot a man between the eyes because he is assailing me with upraised dagger, it seems strange to allow me to say I did not choose to take his life . . ." *Id.* at 879-80. But Kadish has begged the question, or at least a large part of it. Surely it is true that if I shoot a man "between the eyes," and that is where I aimed, and I intended the bullet to enter that part of his body, I have "purposed" his death. But few self defense cases resemble such a straightforward fact pattern; the defendant is in a crisis situation and has little time to aim, much less to aim straight, at the most vulnerable part of the body. This is not to deny that such cases can and probably do arise. But in the vast majority of the cases this is not true: the victim-defendant shoots in the direction of the aggressor, but the effect is, almost surely, fortuitous. Moreover, if one asked the victim-defendant what his purpose (intent, aim, goal) was he would probably not respond "to kill A at all costs," but rather "to get A off my back, and stop him from killing me." This distinction between this statement and the aim of the aggressor, which is to kill the defendant, is striking. And once understood, it is a distinction which permeates all so-called intentional killings which occur during emotional turbulence, including killings done "in the heat of passion."

it is critical to remember that recklessness requires that the actor actually perceive a substantial, probable risk of death or serious bodily injury and consciously disregard that risk.²⁹⁹ At the very least, it is not clear that an actor who finds herself in the "maelstrom of circumstance" that constitutes the setting for most self defense killings thinks consciously about the possibility that the aggressor-victim may die; instead, it is at least as arguable that the defendant pays no attention to that risk, being concerned primarily with the risk to her own life. The implication of this, I believe, is that the "defense" of self defense is not accurately described as a defense at all, but as an attempt to negate the mens rea element of the crime of murder.³⁰⁰ And if that is the case, then, as with any other denial of intent, any mistake should negate recklessness because it means, by definition, that the defendant was unaware of the risk that the result would occur.³⁰¹

In part, this is due to the failure of the courts in this country to retain the distinction between excuse and justification. For example, focusing on whether the act was justified tends to suggest an objective inquiry to the detriment of the subjective one. This can be critical in a case like that of Bernhard Goetz where, at least according to one version of the facts, Goetz first shot at each of the four youths once, and then, after several seconds, fired a fifth shot into one of the youths who appeared not to be seriously hurt, saying words to the effect of "you don't look so bad." If one is concerned with whether self defense is justified, one's vision is on the facts as they were, in which case it is virtually impossible to "justify" the fifth shot. If, however, excuse focuses on the mind of the actor who kills in craven fear, even Goetz's fifth shot could be found by a jury to have emanated from a swirl of anxiety and loss of control which continued far after the last shot.³⁰² The

²⁹⁹ This is the language of the MPC, § 2.02(2)(c). Similar language was used a century ago to describe essentially the same phenomenon. See *R. v. Faulknor*, 13 Cox Crim. Cas. 550, 553 (1877). It was also inherent in the "depraved mind" language of the common law. See *Banks v. State*, 85 Tex. Crim. 165, 168, 211 S.W. 217, 218 (1919). It is important, I believe, to recognize that in virtually all of the examples given of the depraved mind murder of shooting into a populated, confined area, the writers and courts state — although they do not stress — that the defendant knew that there were people in the room, train, house, etc.

³⁰⁰ This, of course, means that the prosecution should carry the burden of proof on this issue. See *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). But see 2 P. ROBINSON, *supra* note 86, at 99–100.

³⁰¹ Cf. *Morgan*, (1975) 2 All E.R., 361–62. There, the court held open the possibility that the defendants could be reckless to the absence of consent by the victim. But if they honestly believed she was consenting, it is highly unlikely that they adverted to, and then consciously disregarded, the risk that their honest belief was wrong. It is possible, but unlikely.

³⁰² At the trial, the defense introduced testimony that in such circumstances, a person may actually lose control and "go on automatic pilot," such that he is unable to cease shooting for several seconds. During the first charge, the court glancingly referred to this testimony, but in a recharge expressly mentioned it. See transcript of *People v. Goetz*, p. 9258, 9316–19, 9371, and 9383ff for a discussion of this theory of the case. Intriguingly, there is a nearly parallel case in New York. In *People v. Ligouri*, 284 N.Y. 309, 31 N.E.2d 37 (1940), the defendant was confronted by deadly force. He testified that "I just put [my gun] up, shot once and kept shooting." *Id.* at 313, 31 N.E.2d at 38. The deceased had nine bullets in his body, three in his back. The court reversed a conviction due to an error in the instruction on retreat; but it is at least possible to read *Ligouri* as standing for the proposition that one who is in a self defense situation cannot simply turn off the terror after one or several shots have been fired. *Ligouri* did, in dictum, approve the reasonable prudent man standard in assessing acts in self defense, the issue in *Goetz*, see *supra* notes 189–92 and accompanying text, but the court was apparently willing to conclude that a reasonable person might continue shooting even after his "aggressor" was objectively in no condition to carry out further threats.

state's brief in *Goetz* clearly demonstrates the problem. In rejecting the excuse aspect of self defense, the state confused excuse with justification: "That the defendant may have been 'out of control' and not in possession of his 'rationalizing faculties' when he shot Cabey does not, as he implies . . . excuse that assault. To the contrary, it only confirms the total absence of justification."³⁰³ This leads to an unqualified call for the totally subjective standard in self defense, with the understanding that for those who think that negligence can form the predicate for criminal liability, and who think that the honestly mistaken self defender can be proven to be "criminally negligent," there is the possibility of "negligent homicide." Concern that such a standard would lead to rampant vigilantism — attempting to disguise itself as honest mistake — is not persuasive, as the experience of some states in this country and of many other countries demonstrates. As already indicated,³⁰⁴ several states in this country now use a totally subjective standard, and there is no indication that an unseemly number of self defense claims arise in those jurisdictions. Moreover, other countries have embraced a subjective standard for decades without apparent inconvenience or catastrophe. The Norwegian Penal Code, for example, has provided for over eighty years, at least, that "[a]nyone who has exceeded the limits of self defense is nevertheless not to be punished if the excess is due solely to emotional upset or derangement produced by the attack."³⁰⁵ Similarly, Germany's Penal Code of 1871 had provided that excessive self defense was not punishable if done "by reason of consternation, fear or fright."³⁰⁶ And Greek law provides for total exculpation if the excess of force is "the result of fear or the confusion of the attack . . ."³⁰⁷ In short, a number of other countries, as well as states within the common law tradition, have found it possible to adopt a totally subjective test for self defense and mistake generally. It is difficult, in light of their experience, to credit the arguments against the subjective standard based on fear of vigilantism.

This analysis also applies to what, under the common law, would be called "general intent," "malice," or "depraved mind"³⁰⁸ or, in the less colorful language of the Model Penal Code, "extreme reckless,"³⁰⁹ murder. In the language of the older cases, a defendant whose mind was "regardless of human life"³¹⁰ was guilty of murder "malice aforesaid," even if there was no intent to kill; in those jurisdictions using the distinction, this was second degree, and therefore non-capital, murder. It is readily apparent that such a "mind" or "heart" requires at least an awareness on the part of the defendant that death could probably result from his action, and that he simply does not care, and takes no precautions against death ensuing. The Model Penal Code more precisely

³⁰³ Reply Brief, *supra* note 197, at 19.

³⁰⁴ See *supra* note 150 and accompanying text.

³⁰⁵ AMERICAN SERIES OF FOREIGN PENAL CODES, THE NORWEGIAN PENAL CODE § 48 (1961).

³⁰⁶ AMERICAN SERIES OF FOREIGN PENAL CODES, THE GERMAN PENAL CODE OF 1871, § 53 (1961). The Code was recently amended substantially, but an English version is not yet available. Nevertheless, I have been informed that the new Code has not altered this point.

³⁰⁷ AMERICAN SERIES OF FOREIGN PENAL CODES, GREEK PENAL CODE art. 23 (1973). See also AMERICAN SERIES OF FOREIGN PENAL CODES, THE PENAL CODE OF THE RUMANIAN SOCIALIST REPUBLIC tit. 2, ch. 5, art. 44 (1976) ("whoever exceeds, due to fear" has self defense); AMERICAN SERIES OF FOREIGN PENAL CODES, AUSTRIAN PENAL ACT, § 2 (1966) (actor has self defense if he exceeds limits of real defense "only because of panic, fear, or fright").

³⁰⁸ See Gegan, *A Case of Depraved Heart Murder*, 49 ST. JOHN'S L. REV. 417 (1975).

³⁰⁹ MPC, *supra* note 1, § 210.2.

³¹⁰ *People v. Ludkowitz*, 266 N.Y. 233, 194 N.E. 688 (1935).

requires actual knowledge that there is a "substantial and unjustifiable risk" that death will ensue.³¹¹

In short, both under the common law and the Model Penal Code, a defendant must subjectively be aware that death is a likely result of the actions he takes before he can be guilty of murder. The typical acts of shooting into a crowded room, or a railroad train,³¹² or throwing a bomb into a crowd demonstrate such "wanton disregard" of human life. But a defendant caught in the middle of an onslaught in which he mistakenly believes he may be killed can hardly be said to be subjectively aware of these risks. Even if he is aware that there is a risk of death, his subjective realization must also, under the Code, reach to the point that he realizes that it is "substantial" that the risk is "unjustifiable." Because, by definition, his mistake goes to the very issue of justification, his mistake cannot be "substantial," and he cannot therefore be guilty of murder, or, under the Code³¹³ even of manslaughter, which requires recklessness.

In short, even a doctrinal analysis of the "mens rea" of a person mistakenly killing in self defense leads to the conclusion that he cannot be guilty of murder. Yet there is virtually nowhere in the cases that this kind of analysis is undertaken; it is assumed that anyone shooting (or stabbing) in putative self defense is acting recklessly without parsing the liability to determine whether, under the usual definitions of recklessness, the defendant would otherwise be held.

CONCLUSION

The law concerning the effect of a mistake of fact, and whether it must be reasonable in order to exculpate, was initially quite straightforward: any mistake would exculpate in any situation — and most assuredly in self defense — because an actor who was honestly mistaken was not morally blameworthy. Doctrinally, that conclusion was easy to understand. Also easy to understand was the purpose behind the doctrine: the criminal law was concerned with punishing the morally blameworthy, not with dealing with persons based on their dangerousness.

During the nineteenth century, however, this doctrine changed substantially. In part, this was due to a simple misunderstanding of the law as it was received from England.³¹⁴ In part, it was a result of the embracing of an objective standard by the writers.³¹⁵ And in part it simply may have been yet another consequence of the increasing use of utilitarianism which pervaded so much of the learning, legal and otherwise, in the nineteenth century. These doctrinal changes, however, were ameliorated in a large number of states³¹⁶ because of their clash with the underlying notion that the basic purpose of the criminal sanction is to impose blame.

In the latter part of the twentieth century, the criminal law both in this country and in England has moved slowly but noticeably back to the early common law,³¹⁷ prompted

³¹¹ MPC, *supra* note 1, § 2.02(2)(c).

³¹² E.g., *Banks v. State*, 85 Tex. Cr. R. 165, 211 S.W. 217 (1919).

³¹³ MPC, *supra* note 1, § 210.3.

³¹⁴ See *supra* part II. B. 2.

³¹⁵ See *supra* text accompanying notes 164–78.

³¹⁶ See *supra* notes 148, 125.

³¹⁷ Of course, just 15 years ago, Professor Moreland asserted that the subjectivist view "is gradually losing [the] battle, [and] the law is moving perceptively toward the Holmes objective position, as one who reads current cases and commentators discovers." Moreland, *A Re-examination*.

in substantial part by the Model Penal Code, but also by what genuinely may be characterized as a mounting subjectivism³¹⁸ concerned with retribution.³¹⁹ *Morgan*, in England, and a spate of cases in this country, herald this reassessment. Whether these are indeed bellweathers, or whether they are merely "derelicts on the waters of the law"³²⁰ remains to be seen.

supra note 256, at 824. Perhaps the trend of case law is, like beauty, in the eye of the beholder. Certainly, however, the trend of the writers in recent years has accentuated the subjective approach.

³¹⁸ See Wells, *Swatting the Subjectivist Bug*, 1982 CRIM. L. REV. 209.

³¹⁹ In the past decade or so, a number of writers suddenly have revived the idea that the basis of criminal liability is the moral blameworthiness of the individual's act, as well as the mental state with which the act was done. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (1952), and G. WILLIAMS, *supra* note 230, previously had espoused this view, but to little avail. Suddenly, with the appearance of a book on sentencing, A. VON HIRSCH, *DOING JUSTICE* (1976), which urged that "desert" be the primary basis of allocating and determining punishment, the idea has taken root. Among works supporting the approach are G. FLETCHER, *supra* note 85, P. ROBINSON, *supra* note 86, and R. SINGER, *JUST DESERTS* (1979). There are as well innumerable law review articles taking this view, as well as many opposing it. Recent sentencing schemes to restrict judicial discretion often reflect at least the partial influence of this neo-retributivist school.

³²⁰ Justice Frankfurter's famous, and accurate, description of the probable fate of *Lambert v. California*, 355 U.S. 225, 232 (1958) (Frankfurter, J., dissenting).