AUTHOR'S PROOF!

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# JUSTIFICATION DEFENSES IN SITUATIONS OF UNAVOIDABLE UNCERTAINTY: A REPLY TO PROFESSOR FERZAN

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## I. THE INSIGHT: ONE MAY HAVE TO SPECULATE AS TO SOME FACTS RELEVANT TO WHETHER CONDUCT IS JUSTIFIED

Professor Ferzan's paper highlights an important insight regarding self-defense: that the operation of the defense is necessarily speculative. The actor cannot know with certainty what in fact will happen if she does or does not act; she can only act with regard to the facts as she knows them. But this aspect of Professor Ferzan's insight only restates the obvious reason for having a mistake-as-to-a-justification excuse (MAJ): in order to insure that an actor's blameworthiness is ultimately judged by the culpability, if any, inherent in the decision she makes. The MAJ doctrine is similar in operation to the operation of culpability requirements in offense definitions: the objective elements may define the prohibited conduct, but liability does not follow upon that showing alone but only upon a showing of culpability as to those objective elements.

But Professor Ferzan's insight goes further, and has special implications for self-defense: *even for the adjudicator*, self-defense is necessarily a speculative business. That is, *even in a world of perfect evidence gathering and event reconstruction*, the decision-maker cannot know the facts needed to determine with certainty the essential elements of self-defense, such as whether the force used was really necessary to prevent an attack. For example,

* I would like to thank the organizers of the conference, chief among them Professor Ferzan, for their efforts in convening such an interesting and useful forum. I have been asked to comment on Professor Ferzan's paper.

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when the hostage acts upon an opportunity on Tuesday to kill the kidnapper who has threatened death at the end of the week, we can never know whether the kidnapper would have changed his mind, making the killing unnecessary.

This distinguishes the self-defense situation from the offense definition situation: an effective fact-finding tribunal typically can determine with some certainty whether the objective offense elements are satisfied, that is, whether an injury was caused, whether a partner was underage, whether the property belonged to another, etc. But the same tribunal can only speculate about whether the objective elements of self-defense existed.

It may be true that this typically is not a problem of practical significance. Complete and absolute certainly may not be possible but the actual level of uncertainty typically is trivial. An angry attacker is swinging her arm to stab you in the chest. It is conceivable that, for reasons unknown, she might change her mind in the next moment, but such an event would be quite rare in the course of human events. We tend not to take seriously the purely theoretical existence of uncertainty. But there are a few scenarios where the uncertainty cannot be ignored, as is the case with the abductor who threatens to kill at the end of the week. While it may not be likely, it is in fact conceivable that something – a change of mind, intervention by police, etc. – may intervene to avoid the need for the killing by the hostage.

## II. DOES THE INSIGHT MEAN THAT JUSTIFICATIONS MUST NECESSARILY BE SUBJECTIVE?

From her insight, Professor Ferzan draws the conclusion that self-defense is necessarily, unavoidably subjective and, therefore, that we must jettison the objective 'deeds' theory of justification in favor of the subjective 'reasons' theory.

I admire the insight but disagree with the conclusion.

Professor Ferzan's insight leads to her conclusion along this simple path:

if the actor cannot know the actual future, her blameworthiness can only be judged by the culpability of her belief, that is, judged by the reasonableness of her prediction of the future that she cannot know. To judge her otherwise – for example,

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according to purely objective criteria – is unjust both because she cannot know the facts and, worse, even the adjudicator cannot know the facts. The only available criteria by which her blameworthiness can fairly and feasibly be judged is subjective.

I agree with this entire line of reasoning. My point is only that it has nothing to do with the objective 'deeds' theory of justification and its advantages over a subjective "reasons" theory (that is, the advantages of segregating the issue of objective justification from the issue of MAJ).

Professor Ferzan appears to begin with an assumption that the purpose of the justification defense is to assess the actor's blameworthiness. At one point she notes, for example: "The deeds theorist must grant Harry the right to act at a time of uncertainty, while simultaneously *condemning him* if he guesses wrong."[1] At another point she complains that the objective view is "unfair to. . .agents."[2]

But as I have argued in *Structure & Function*,[3] I think the justification defense is better formulated to serve a different function than the adjudication-of-blameworthiness function that she assumes it must have. I suggest that it is best seen as serving the *ex ante* function of announcing the rules of (future) conduct, rather than as serving the *ex post* adjudication function, which I think is more than adequately served in this context by the MAJ excuse. But having started with the assumption that the justification defense serves the blameworthiness-adjudication function, Professor Ferzan then shows, persuasively and conclusively, that the objective formulation has problems and that the subjective formulation must be used. The move is analogous, I suggest, to that in Kent Greenawalt's well-known piece in which he misconceives justification defenses to include the MAJ excuse then, not surprisingly, finds the borders of justification and excuse to be "perplexing."[4]

Of course, Professor Ferzan is not alone in her assumption that justification defenses *must* be seen as adjudicators of blameworthiness. I am no scholar of the philosophy literature

[1] [at the bottom of page 3].
[2] [page 4 text after fn18 ].
[3] Paul H. Robinson, Structure and Function in Criminal Law ?? (1997).
[4] Kent Greenawalt, The Perplexing Borders of Justification and Excuse, ??.

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but my limited exposure suggests to me that this is the well-worn standard line. I don't think most such scholars *even see an issue* on a matter on which I think they are wrong, so I must ask myself why so much difficulty on this point? Why is this assumption – that justification defenses must be about blameworthiness assessment – so hard to think differently about?

I don't have an answer, but here is a bit of very raw speculation, which touches on the distinction between philosophers and lawyers: most philosophers (but not all[5]) seem to see criminal law doctrines as independent pieces, each of which they take to be a test of blameworthiness in a particular set of cases: self-defense cases, omission cases, complicity cases, causation cases, attempt cases. Lawyers – at least modern lawyers – see *the criminal code as a whole* as being the only entity that addresses the ultimate issue of blameworthiness; all of the provisions in the code are just cogs in the larger machine, each cog doing its small part toward the ultimate determination.

Certainly some of the cogs seem to come close to dealing with the ultimate blameworthiness issue – offense culpability requirements and excuse defenses in particular are of this sort – but even this perception is an illusion. Note that culpability requirements and excuse defenses are different from one another, in other words they are different cogs performing different functions toward the ultimate end. And even these two cogs only pick up where dozens of other cogs have left off. The cogs defining prohibited conduct, causation, complicity, etc have already done their work, or soon will. The notion that justification defenses *must* be formulated to make a blameworthiness assessment simply misconceives how modern criminal law works. (Of course, legal philosophers are free to make up any conceptualizations they wish, even those that bear no relation to the structure and practical challenges facing law, but then they ought not make claims that their conclusions have meaning for law and they ought not criticize existing law based upon their conceptualizations).

[5] Michael Moore does not seem to take this view, ??, and there may well be others.

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My specific point here is that justification defenses need have no more to do with an ultimate blameworthiness assessment than do the objective requirements of offense definitions – indeed the two are similar in that both set the rules of conduct for future action. We do not conclude that the objective requirements are somehow immoral because they ignore blameworthiness; we know they will be modified by a host of other doctrines in the blameworthiness machine, including the offense culpability requirements. We can have the same assurance with regard to an objective justification defense: it serves its purpose of setting the rules for (future) conduct, but is only one cog in the blameworthiness machine; the results of the justification defenses will be cranked though other provisions, including the MAJ rules.[6]

## III. THE SIGNIFICANCE OF THE NECESSARILY-SPECULATIVE INSIGHT FOR AN OBJECTIVE THEORY OF JUSTIFICATION

Let me return to Professor Ferzan's necessarily speculative insight. If Professor Ferzan had conceived of the 'deeds' theory of justification as serving a rule-articulation function, rather than an adjudication function, her insight might have let her to put this criticism: while it may be irrelevant to the "deeds" theory that this actor and the adjudicator both must speculate about what would have happened if this actor had not used her defensive force, the necessarily-speculative nature of self-defense does create a problem for the rule-articulation function. Specifically, should not an effective set of conduct rules tell future actors what risks they can and cannot take in the face of the unavoidable uncertainty that some self-defense situations may present? Should not the rules of conduct give the imprisoned hostage some guidance as to when she can kill the abductor who threatens death at the end of the week?

[6] The better analogy here might be of two machines: the rule-articulation machine whose cogs are the doctrines that serve the rule-articulation function, standing next to and feeding its output into the blameworthiness-adjudication machine. The first requirement for blame is a violation of the rules of conduct; then followed by a determination as to whether that violation deserves punishment. I have identified which criminal law doctrines serve which function in Structure & Function, ??.

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I would answer: Yes, such guidance would be useful. Thus, I must ask: how justification's rules of conduct should take account of the necessarily speculative nature of some facts relevant to justification? That is a fair question, which I will address, but before doing so let me note a preliminary point.

The issue that the necessarily speculative point raises here is *not one that involves the objective vs subjective justification dispute*. The risk to be defined here is not the *ex post* adjudication of risk-taking by which blameworthiness is judged. It is not a "subjective" issue at all, taking "subjective" to refer to some particular actor's actual awareness of risk in her mind at some given moment. Rather, the issue is one of the *ex ante* objective definition of prohibited risks. That is, it involves defining *in objective terms for all actors* a rule to guide future actors in self-defense situations. It has nothing to do with a particular actor's subjective awareness of risk and everything to do with society's balance of competing interests. How much should society value the certain loss of life of the abductor as against the risk of death of the hostage? Where on the continuum of risk is the point beyond which a self-defender cannot go? Thus, there is nothing in the necessarily speculative insight that undercuts an objective theory of justification.

It is true that the objective theory must deal with an *uncertainty*, specifically our inability to know at the moment of action what the world would be like in the case of inaction. One could even say that this uncertainty means that there exists at the moment of decision a "risk." But as I have argued elsewhere,[7] there is a difference between a particular actor's subjective risk-taking and the existence of objective *ex ante* uncertainties. In deciding what to do when facing an uncertainty, a specific actor may engage in subjective risk-taking, something that is highly relevant – but only to criminal law's the adjudication function, and in particular to assessing the MAJ excuse. The objective justification defense is interested only in the *ex ante* objective risk, from the perspective of what is knowable and not from the perspective of what a particular actor knows. (Again, there is no need to define

[7] Paul H. Robinson, [Risk??], ?? Theoretical Inquires in Law ?? (??).

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justification defenses to hinge upon what a particular actor "believes.")

Now to the question of what the rules of conduct should say as guidance to future actors about the inevitable uncertainty of that could exist in a self-defense situation. What guidance can the law give?

Notice first that the criminal law's rule of conduct must be just that: a legal *rule* of conduct, not a particular statement of disposition like "give this hostage a defense." Similarly, the rule must have some breadth; it cannot be a special rule for the hostages-threatened-with-death-at-the-end-of-the-week-who-have-a-chance-to-kill-on-Tuesday cases. If the rule-of-conduct function is to be served, the rule must be stated in a form that will give guidance in the infinite variety of situations in which self-defense may arise. And this necessarily presents real limitations on what the rule should and can say.

This point may help explain the seemingly inevitable awkwardness in conversations between those who support an objective theory of justification because such a formulation best serves the rules-of-conduct function and those who support an objective theory because it "reflects some greater truth about the nature of justifications." The latter group really do care about resolving every bizarre hypothetical that the ingenious professorial mind can create. The former group – "group" here being used in a somewhat grandiose manner to refer to what I fear may be a count of 1 – finds such exercises irrelevant, entertaining, or hilarious, depending upon the immediate history of alcoholic intake. I can probably develop an answer in each bizarre case as to how, if I were dictator of the world, I would balance the interests in conflict and, therefore, as to whether I would judge conduct in the hypothesized case as justified, but such analyses have little to do with how justification defenses in law should be formulated. This is the difference between being interested in philosophy for what it can do to improve law and being interested in philosophy for its own sake.

Most philosophers – even those who are law professors – don't seem to care about how the legal rule is formulated, thinking such matters off the point. (Recall Mitch Berman's

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refusal to answer my simple question about whether he thought the "believes" language should be in included in a justification defense). On the other hand, we in the "group" who see justification defenses as articulation of the rules of conduct don't care much about matters *other than* formulation issues; the theorizing is important only for what it tells us about proper formulation. With those seemingly mutually exclusive areas of interest, engaged conversation tends either to be short or to be long and awkward.

One further point regarding how rules of conduct should take account of the self-defense inevitable-uncertainty problem: the rule-articulation function must face the realities of the world. I don't want to make too much of this; the law ought to strive for the ideal, even if it is not always obtainable. But it ought not overreach, because doing so can undermine its goal of conveying rules of conduct. Self-defense rules are already highly *unrealistic* about what guidance the rules of conducts can provide to the self-defender. To illustrate with one small piece of the standard self-defense rules: one can use force to defend against an unjustified attack, but not deadly force, unless threatened with serious bodily injury, in which case one can use deadly force, unless one can safely retreat, unless one's own place of work, unless it is also the attacker's place of work. As I have suggested elsewhere, it is quite silly for the law to think that these conduct rules really could be used to guide a self-defender's conduct. They effect may be more likely to obscure what guidance rules might well be conveyed. (Such detailed rules might be useful to increase uniformity in adjudication, which is why have urged a separate code of code and a code of adjudication, so the former does not get obscured by the latter.[8])

What guidance is realistic to expect the law to give with regard to the society's balance of interests arising from the uncertainty of self-defense, such as the proper balance between apparently certain death of the abductor (if the hostage kills now) as against a risk of death for the hostage (if the hostage delays killing)?

[8] Structure & Function, ??.

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This is a hugely complicated calculation. In practice, I think the law may do now by way of guidance most of what I think it is realistic to do: it tells the hostage that the use of defensive force must be "necessary," which has a temporal aspect (as well as its amount-of-force aspect). Indeed, it does more; in the context of self-defense, it tells the actor that the force must be "immediately necessary," thereby emphasizing the temporal aspect. What more could we realistically expect it to do? Perhaps there are some good suggestions out there. I would be interested to hear them.[9]

But even if more guidance were possible, I think it doubtful that the law should aim to provide guidance in the kind of bizarre professorial hypotheticals that dominate this area. These hypotheticals by their nature are the cases in which the balance of competing interests and the justified nature of the conduct is at its most ambiguous – that is the point in the construction of the hypothetical. (That is similarly the point of Professor Ferzan's highlighting the inevitably-speculative point and the situations in which it can become significant.) But all these cases, upon which the professors are so focused, are just the cases *that are least useful in serving the rules-of-conduct education function*. They are the last cases that a legal system would want to use as vehicles to convey the rules of conduct. (It would be like using the special relativity principle to teach introductory principles of physics. The former is of interest *specifically because* it seems inconsistent with the rules of the latter.)

To conclude, Professor Ferzan's insight regarding the inevitable uncertainty of some facts relevant to justification is to my mind most interesting, but I can see no reason why that uncertainty should cause anyone to reject the objective theory of justification in favor of a subjective theory. Yes, the deeds theory ideally ought to give actors as much guidance as is feasible in conforming to society's rules of conduct, and the inevitably-speculative insight shows just how challenging that

[9] This is little different from the situation in offense definitions, which similarly do give people much specific guidance as to the kind of apparent risks that are forbidden. But in this context, there is room for improvement and I have made some specific suggestions. See Structure & Function, ??.

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task can be. But there is nothing in the insight that suggests any advantage to defining justification defenses not as objective inquiries but as focusing upon whether a particular actor "believes" certain facts at a certain moment. That subjective formulation of justification creates a long list of serious difficulties that I have recounted elsewhere,[10] and nothing in Professor Ferzan's insight either eliminates those difficulties or gives reason to suffer them.

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[10] Structure & Function, ??.

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