Self-Defense, Reason and the Law

Chapter 2: The Distinction Between Subjective and Objective Standards in the Criminal Law

I. Introduction

Several years ago I had the good fortune to receive a fellowship that enabled me to study law for a year.¹ My focus was criminal law, and it did not take long to see that the concept of the reasonable plays a major role in statutes and rulings, and in the underlying criminal law doctrines.² The word 'reasonable' often precedes the word 'belief,' and even more often 'person'; often it serves to constrain a defense (self-defense and the heat of passion defense, among others). It is also frequently the locus of philosophically fascinating controversy. Sometimes the pivotal question is whether a belief should have to be reasonable to exculpate; famously, this was the case in Morgan.⁴ The jury instruction had specified that a belief that the complainant was consenting negates the mens rea for rape only if the belief was reasonable; the defendants appealed, challenging the restriction; the House of Lords ruled that the instruction was erroneous. That is, they ruled that a belief ("honest belief," as they put

¹ I am grateful to the University of Illinois at Urbana-Champaign College of Arts and Sciences for awarding me the fellowship, and to the many law professors at UIUC Law School who not only permitted me to audit their classes but also met with me to discuss the issues further. I am especially indebted to Kit Kinports, now at Penn State University Law School, for her excellent lectures on criminal law.

² The notion of the reasonable plays a part in other areas of the law besides criminal law, but it is important not to assume that the same notion of the reasonable is needed or operative (not necessarily the same thing!) in various areas of the law.


it)\(^5\) that the complainant was consenting negates the mens rea and thus is a complete defense\(^6\) whether or not the belief was reasonable.\(^7\)

Sometimes the locus of controversy is not whether there should be a requirement of reasonableness, but how the term 'reasonable' should be understood. This is the way the debate about self-defense has proceeded in the US over many decades. To be acquitted on self-defense grounds, the defendant had to have believed \(p\) (at the time she committed the act in question) and the belief, moreover, had to be reasonable. (I use '\(p\)' rather than spell out the content of the belief, so as to focus on the question at hand and not be distracted by the details of what exactly \(p\) is, important though they are, but the basic idea is that a serious enough threat has been posed, and that the use of self-defensive force is necessary to prevent that threat.)\(^8\) But just how the term 'reasonable' should be understood was, and continues to be, a matter of considerable debate.

The options for understanding 'reasonable' in the reasonable belief requirement for self-defense are commonly referred to as the \textit{objective standard} and the \textit{subjective standard}. There is no clear consensus on just what either of these is. Nor is there

\(^5\) This is a common qualification, though one wonders what work 'honest' is doing. I see two possibilities: it can mean simply that the person really does believe it; alternatively, one could use 'honest belief' to mean that the person arrived at the belief honestly, not by purposely silencing her doubts (in, say, the manner of Clifford's ship-owner in Clifford, "The Ethics of Belief") or by other means of self-deceiving. The latter is more interesting, for then 'honest' is doing some real work; however, it seems generally to be used in the criminal law only to mean that the person really does believe it. I have never seen a case where it was argued that although the defendant believed \(q\), e.g. that the complainant was consenting, he did not have an honest belief that \(q\). Where a mere "honest belief" can exculpate, the word 'honest' thus seems not to play any role. [\textit{Readers: please let me know if you are aware of any such cases}.]

\(^6\) Technically it isn't a defense, since it simply negates the mens rea; for my purposes, however, the reasons against calling it a defense are not relevant. For an explanation of why negating the mens rea is not technically a defense, see Joshua Dressler, \textit{Understanding Criminal Law} 7th ed. (Lexis-Nexis, 2015), Chapter 16.

\(^7\) The defendants' conviction was not affected, however, because it was considered harmless error. It was apparent that the jurors thought the defendants were lying in saying that they believed the victim was consenting. The law in the UK has long since changed. For the current law in England, Northern Ireland, and Wales, see http://www.legislation.gov.uk/ukpga/2003/42/part/1; for the current law in Scotland, see http://www.legislation.gov.uk/asp/2009/9/part/1.

\(^8\) Summary borrowed from Kenneth W. Simons, "Self-Defense: Reasonable Beliefs or Reasonable Self-Control?" \textit{New Criminal Law Review} 11 (2008), p. 52. The use of lethal force requires more, usually that the threat posed was (reasonably believed to be) death or serious bodily harm. See Chapter 5, below, for an explanation of just what it is one has to believe, according to self-defense law in most jurisdictions of the US, and a discussion of whether one important component, the imminence requirement, should be significantly revised. [Chapter 5 is a revised version of my "Self-Defense: The Imminence Requirement" in \textit{Oxford Studies in the Philosophy of Law}, edited by Leslie Green and Brian Leiter (OUP, 2011): 228-266.]
adequate recognition that ‘objective’ and ‘subjective’, and likewise ‘objective standards’ and ‘subjective standards’, are used in conflicting ways. In fact we use the terms in a number of ways, and the different ways we contrast the objective and the subjective are not equivalent.

My first project in this chapter is to sort out various ways in which we contrast the objective to the subjective, with particular—but not exclusive—attention to distinctions between the objective and the subjective drawn in the criminal law and in criminal law theory. I’ll then note some consequences of a failure to keep these distinctions distinct. Conflation of various senses of ‘objective’ (or sometimes simply a failure to remember that the contrast between the subjective and the objective is drawn in several different ways) gives rise to claims to the effect that we cannot say X without giving up on an objective standard, claims that are in turn relied on to argue against proposals to modify or expand a defense. Or, they are relied on to conclude that we will have to adopt a subjective standard. Later in the chapter I focus on self-defense and the issue of whether the reasonable belief requirement should be understood as a subjective or as an objective standard.

I have four interrelated aims: (1) to draw attention to some pernicious false dichotomies, and in particular, the assumption that unless a standard is subjective, it cannot take into account relevant particulars; and (2) to probe that assumption, considering whether some underlying view(s) of objectivity perhaps can explain it. In addition, (3) I am interested in ascertaining the outer limits of an objective standard. What puts a putatively objective standard over the limit, so that it ceases to qualify as objective? (4) Finally (but it will take Chapter 3 to accomplish this), I aim to show that an objective standard of reasonableness, suitably understood, and without being stretched so far that it no longer has any claim to qualifying as an objective standard, is able to accommodate cases that are thought to call for a subjective standard. More broadly, I aim to defend it against what I take to be the strongest objections (and when needed, I rehabilitate them so as to defend objective standards at their best against the strongest possible objections).

The objections to, or misgivings about, objective standards are not always easy to separate from general (trendy?) misgivings about objectivity. It is not my aim here to
address the latter misgivings except indirectly by showing that at least some pitfalls thought to be inevitable if we opt for an objective standard in fact are not inevitable, and (somewhat more directly) by shedding a bit of light on the notion of objectivity. I also hope that my discussion will show that even if, as Victoria Nourse has claimed, the subjective/objective distinction is an utter mess in the law,\(^9\) we need not react by giving up on it.\(^{10}\) Instead, we can strive to clarify it, by which I mean not only getting clear on the different ways we use the terms, but also learning to keep these various ways of contrasting the objective and the subjective distinct in scholarly writings, judicial rulings, policy proposals, and law school classes. Doing so should pave the way to thinking more productively about the theoretical, doctrinal, legislative and judicial options.

II. Eight Ways the Objective and the Subjective are Contrasted

The first three items form a cluster and serve as a backdrop to (4), (5), and (7), which are of greater importance for my purposes than the first three. I differentiate (1)- (3) not in order to highlight the differences between them but rather to bring out more sharply the differences between, on the one hand, (1) and (2), and on the other, (4), and more generally, to attune our ears to the differences in the way the contrast is drawn.

1. 'Objective' is sometimes used in ordinary discourse to mean *how it actually is*. The basic idea in this way of distinguishing the objective from the subjective is that the objective is the way things really are, and the subjective is the way things seem to the perceiver.

2. Only slightly different from (1): 'objective' is used, again in ordinary discourse and in a wide array of contexts, to point to *what actually happened*, and 'subjective' to point to

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\(^{10}\) That said, I am not invested in retaining it. But I believe it need not be pernicious as long as we attend to these distinctions. In any event, even if we were to find our way to jettisoning the distinction, it is important to attend to the various ways it is used since the distinction is omnipresent in legal writings that we cannot ignore.
the subject's experience of the thing in question (and sometimes to the thing in question as experienced by the subject).

3. A similar and potentially confusing contrast—or more accurately, pair of contrasts—is drawn in discussions of criminal attempts. 'Objective' is used in discussions of criminal attempts to highlight either what actually happened or what the agent in fact was doing. 'Subjective' is used to draw attention to what the agent aimed to do or (and this will sometimes be different) to what she thought she was doing. (This is a more technical use of the terms than in (1) and (2), not one that tracks ordinary language.)

The subjective/objective contrast drawn in discussions of attempts should be understood differently depending on the type of attempt, and how the attempt fails. Consider a pair of examples from Antony Duff: "Subjectively, John shoots Pat (for that is what he intends or expects to do); objectively, his shot misses her. Subjectively, Ms Ryan handled stolen goods (that was what she believed she was doing); objectively, she handled non-stolen goods."¹¹ In the first case, the contrast is between what John intended and what happened. In the case of the supposedly stolen goods, the contrast is a bit harder to articulate, but it is not between what she intended and what happened;

¹¹ R.A. Duff, Criminal Attempts (OUP 1996, p. 194). In borrowing his examples, I am not signing on to what he does with them. He claims that in the law of attempts, there is a "second kind" of objectivity, which concerns what a reasonable person "would believe or expect, as distinct from what this particular agent (perhaps unreasonably) believed or expected. Subjectively, the would-be killer by witchcraft is trying to kill; objectively, he is not, since any 'reasonable person' would know that this is not a possible method" (p. 194). This parallels the contrast I draw below between the sense of 'objective' in (4) and that in (1)-(3), although because of the intricacies in attempts—in particular, the variety in the ways one's attempt, despite one's earnest efforts, may fail—the objective/subjective contrast is rather different here, and the contrast Duff draws is less sharp than the contrast I draw between 'objective' in (4) and 'objective' in (1)-(3). Compare the application of the objective/subjective distinction to S's attempt to kill using witchcraft with its application to S's failed attempt to fatally shoot someone (failed because S's shot misses him). In each case the contrast is between what S aims to do and what in fact happens. In each case S tried to kill someone and failed. I am not convinced that the fact that in the first instance S chose a method that could not possibly work (or rather, could not work unless S's actions so frightened the person that it was the catalyst to a heart attack) calls for a different way of contrasting the subjective and the objective. In other words, it is not clear that it involves, as Duff says it does, a second kind of objectivity. Nor is it clear that there is any need to make reference to what a reasonable person would have believed. Not, that is, if we are only trying to capture the differences between the two failed attempts. Duff makes reference to it in the service of explaining competing views concerning criminal liability for attempts. The role of the reasonable person in this context is quite different from the role played in self-defense, provocation, and in definitions of recklessness and negligence.
the gap is not (at least not only) between intention and result, but between her construal of the action and what the action in fact was. Hence it is more perspicuous to subdivide (3) so as to reflect two different subjective/objective contrasts:

3a: ‘Objective’ points to what in fact happened, and ‘subjective’ to what the agent intended;
3b: ‘Objective’ points to what the action in fact was, and ‘subjective’ to how the agent construed it (to what she thought she was doing).

Note that the nature of John’s failed attempt to shoot Pat matters. Had he failed to shoot Pat not because he missed but because what he shot at (and succeeded in hitting) was a dummy she left in her bed to trick him, a dummy he mistakenly thought was Pat, we might say—at least a legal theorist might say—that subjectively John shot Pat but objectively he shot a dummy. If we said this, we would be drawing a rather different subjective/objective contrast than in the case where he aimed at Pat but missed. It would be a case of 3b. (It could count as a case of 3a as well, but a special kind of case; 3b is critical to understanding it.) The contrast in the revised case, where he shot a dummy but thought that he shot Pat, is less like the contrast where he aimed but missed, and more like that in the case of the supposedly stolen goods.

I won’t be discussing attempts, and bring them up only to differentiate the uses of 'objective' and 'subjective' in the context of attempts from the deceptively similar uses of the terms in other criminal law contexts, hopefully thereby forestalling confusion.

4. Another way of contrasting the subjective and the objective understands ‘subjective’ roughly as in (1) and (2), but means by ‘objective’ something importantly different. To tease this out, consider the division of the elements of a defense, for example, the traditional heat of passion defense, into the subjective and the objective elements. The subjective element of the heat of passion defense is the requirement that "provocation by the victim caused the accused temporarily to lose self-control." The defense also requires that "a reasonable person…similarly situated may also have been caused temporarily to lose self-control," and this is routinely referred to as the “objective element" or "objective test."12

12 I’ve taken this from Dennis Klimchuk, "Outrage, Self-Control, and Culpability," University of Toronto
The contrast here is between on the one hand, *something that happened to the defendant or something the defendant experienced* (and it could, in a different context, be something the defendant believed or thought or feared), and on the other, *what a reasonable person would, or might, have experienced* (or believed or thought or feared). The contrast is not between what the defendant experienced (or felt or thought) and what *actually was the case* (or actually did happen). Rather, it is between the former and what a reasonable person in the same situation would or might have experienced, thought, feared, etc.

Although there are subtle differences in 'objective' in (1), (2), and (3), the basic idea is the same, and sharply different from that in (4). I emphasize the difference because sometimes the standard of the reasonable person is construed as if it involved absence of error, as if the standard were one of perfection. Clearly, this would render the standard unhelpful for purposes of the criminal law. I suspect that conflation of 'objective' in (4) and 'objective' in (1), (2) or (3) underlies this unhelpful construal.

It is noteworthy that in (1), (2) and (3), the objective viewpoint is the viewpoint of no one. The subjective viewpoint in (1), (2) and (3) is someone’s viewpoint; it is how it seemed to someone, how she construed it, what she intended. It contrasts not with another viewpoint but with what is in fact the case, how things really are, or what happened. In contrast to the objective in (1), (2), and (3), the objective in (4) *is a viewpoint, a viewpoint of a reasonable person.* It is not, as it is in (1) - (3), what is in fact the case, how things really are, or what happened. This is an important difference between the objective/subjective distinction in (1) – (3) and that in (4).

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13 It is more common to say simply *would* and to say *what the reasonable person would have experienced* (etc.). Klimchuk does not, and I think it important not to do so. See note 32, below.

5. A different way of distinguishing between 'objective' and 'subjective' is evident in the applications of these terms, in criminal law and legal scholarship, to standards or principles, or to reasonableness as determined by a standard or principle. Note that whereas in (4), the terms 'objective' and 'subjective' refer to the content of requirements for a particular defense (and one could use them to refer likewise to the content of principles), the idea here is different: the standard itself, not what it is about, is said to be either objective or subjective. I'll be exploring in Sects. V-VII how best to make sense of this distinction, applied to standards, and especially to reasonableness as measured by those standards.

6. 'Objective' and 'subjective' are also used (and in a wide variety of contexts) in a way that is pointedly evaluative. 'Objective' and ‘objectively’ can signify 'without bias' or 'without regard to one's own interests'. 'Subjective' and 'subjectively' signify 'biased' and operate as terms of negative appraisal. The bias can be in favor of one's own interests (or those of one's company or another group of which one is a member), or the interests of particular others. We may also say of someone that she is biased when we think that her likes or dislikes, or her political or religious or other views, inappropriately shape her research, or assignments of grades to her students, or (if she is a judge) her verdicts.¹⁵

7. Different from (1)-(6) is the following sense of 'objective': that a standard is objective is held to preclude taking into account certain particulars of the situation and especially of the defendant, and sometimes is assumed to preclude taking any of the defendant’s personal characteristics into account at all.

   The latter assumption is implausible but by no means unusual. It is in evidence in the following statement by Joshua Dressler, in an explanation of the heat of passion defense: "As in other areas of the criminal law...there is a movement to subjectivize the standard, i.e., to include at least some of the defendant's personal characteristics...in the 'ordinary/reasonable person' standard."¹⁶ The claim that this amounts to

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¹⁵ We might also say of her research or evaluations of her students or judicial decisions that it or they are biased.

¹⁶ Joshua Dressler, Understanding Criminal Law, p. 534.
"subjectivizing" presupposes that if any of the defendant's personal characteristics are included, the standard is not objective, at least not fully objective.\textsuperscript{17}

Similarly, an objective standard of reasonableness is explained as follows in \textit{State v. Leidholm}:

An objective standard of reasonableness requires the fact-finder to view the circumstances surrounding the accused at the time he used force from the standpoint of a hypothetical reasonable and prudent person.... Ordinarily, under such a view, the unique physical and psychological characteristics of the accused are not taken into consideration in judging the reasonableness of the accused's belief.\textsuperscript{18}

It is not unusual for such statements as the one from \textit{Leidholm} to include the word 'fully' or 'thoroughly' (or a similar qualifier) in front of 'objective', thus treating objectivity and subjectivity as scalar notions. There is merit in viewing them as scalar, but it is a mistake to suppose that the more personal characteristics\textsuperscript{19} we allow as relevant—the more that can permissibly be taken into account in applying the standard—the less objective the standard. Nor is it the case that a standard is automatically less than fully objective if any particulars are allowed to factor in.

A more moderate position is far more plausible, namely, that some particulars of the defendant (or the situation)\textsuperscript{20} are such that taking them into account is incompatible with a standard being objective. The interesting question then is which particulars fit this description. I'll explore this shortly.

8. Worth bearing in mind is a rather different sense of 'objective' from those in (1) - (7). The idea is that if something is objective—as when people speak of "objective facts"—it

\textsuperscript{17} Although I have followed Dressler and others in using the word 'personal', I am not sure what work that word is doing, and so do not know whether, on Dressler's conception of subjectivizing, there are characteristics of the defendant that can be included consistent with the standard being objective. My guess is that 'personal' is meant to exclude generic qualities that persons in general have.

\textsuperscript{18} \textit{State v. Leidholm} 334 N.W.2d (N.D. 1983), p. 817. As with 'personal' in the quote from Dressler, I am not sure what 'unique' is supposed to add, but here too the idea is probably to differentiate generic human characteristics from those specific to that individual. I don't think the idea is that they have to be unique.

\textsuperscript{19} Or: the more particulars.

\textsuperscript{20} I include 'or the situation' because although the quotations from Dressler and \textit{Leidholm} concern only particulars about the person, it is not unusual to think that the particulars of the situation are not to be taken into account.
is a matter on which disagreement, when everyone looks or reflects with care, should not persist. When disagreement does persist, and we think it is for reasons other than obstinacy, we speak of there being an element of subjectivity.\textsuperscript{21} The dimensions of an object would be classified under ‘objective’; its attractiveness, under ‘subjective’. It is probably this sense of ‘objective’—that the matter is something on which disagreement, when everyone looks or reflects with care, should not persist—that underlies a distinction sometimes (over)drawn between “objective” evidence and “subjective” evidence. What is important, for my purposes, is that it fuels a very unfortunate assumption that if the reasonable person standard is an objective standard, there is no room for disagreement, or different reactions, among reasonable persons.

III. Connections

First, a comment on (6). Clearly there is a strong connection between this sense of objectivity and impartiality. When we disparage something as subjective or having been done subjectively or emphasize the need to be objective, usually the idea is that impartiality is called for, i.e., that one is not to allow partiality to oneself or to particular others to affect one’s judgment. But not always. If someone asks, regarding a third party’s judgment that \( q \), “How objective is that?”, their worry might not be exactly that the person was failing to be impartial (at least in the sense just indicated), but rather that he employed, in arriving at \( q \), a rather relaxed standard of evidence in order to facilitate concluding what he was hoping to conclude. Or (not quite the same, but similar), we may worry that he discounted or dismissed some evidence in order to avoid reaching the conclusion to which the evidence pointed.\textsuperscript{22} In both of these scenarios, he need not

\textsuperscript{21} In a review of Kent Greenawalt’s \textit{Law and Objectivity} (OUP, 1992), Neil MacCormick writes that Greenawalt concludes that “on any fine point of balancing, reasonable people can differ. These differences are not objectively corrigible. To that extent, there remains an element of apparently irreducible subjectivity in the inevitable leeways of legal judgement” (1575). Neil MacCormick, “Reasonableness and Objectivity,” \textit{Notre Dame Law Review} 74 (1998-99): 1575-1604.

\textsuperscript{22} I don’t mean to include here cases of straightout fraud, such as that of Diederik Stapel who, with full awareness of what he was doing, discarded evidence that didn’t support the conclusion that he planned to claim to have reached (and fabricated evidence, as well). (Yudhijit Bhattacharjee, “The Mind of a Con Man,” \textit{New York Times} April 26, 2013. http://www.nytimes.com/2013/04/28/magazine/diederik-stapels-audacious-academic-fraud.html?pagewanted=all&_r=0) When we say the judgment was subjective and
have been favoring himself or anyone else.

What connections are there between ‘objective’ in sense (6) and ‘objective’ in the other senses? On the whole, (6) is quite different from the others in being firmly evaluative. But there is one connection worth mentioning. Because ‘objective’ in sense (6) requires setting certain considerations to one side, there is common ground between ‘objective’ in sense (6) and ‘objective’ in sense (7), especially in its moderate form. “Try to be objective in grading the papers/rendering a verdict/judging the debate” means “Try not to let extraneous factors influence your judgment.” Note that just as it is a mistake to think that being impartial involves ignoring all particulars, as if to be impartial we have to view people impersonally, purely abstractly, likewise it is a mistake to think that objectivity requires ignoring all particulars. But at the same time, in each case it is important that only relevant particulars be taken into account.

More important for my purposes is a connection between (4) and (5). Wariness about objectivity of the sort we see in (4) provides momentum for a subjective standard of reasonableness. Some have grave doubts about holding people to a reasonable person standard and for that reason, if there is a requirement of reasonableness, they champion what they speak of as a subjective standard of reasonableness. (And of course defense attorneys have reason to champion it to help the defendant.) In that way, they can dilute the force of the requirement considerably, in effect rendering it toothless. More on subjective standards shortly.

IV. Conflations

Each of (1)-(8) captures something about objectivity. But it is not the case that for something to be objective, it has to be objective in all of these senses. What objectivity requires will vary from one context to another, depending on which sense of ‘objective’ is (or which senses are) apt for the particular purposes at hand.

I emphasize this because too often in discussions in criminal law, it is claimed that to allow A would be to give up on an objective standard. Or it is claimed that to

intend it as a criticism we are not, as a rule, questioning the person’s sincerity or honesty.
adhere to an objective standard precludes taking $b$ into account, where $b$ is some highly relevant particular. A failure to take into account the particulars of the situation, or the history of the relationship between the assailant and the victim, is often glossed as a failure to employ a subjective standard.\textsuperscript{23}

It is not clear why this is so common. Perhaps it is thought that because objective standards cannot be idiosyncratic, taking into account any feature of the person that differentiates him or her from many or most others is at odds with objectivity. Yet in holding that they cannot be idiosyncratic, we mean only that the standard should not be tailored to each particular person’s idiosyncrasy, and that insofar as feature $F$ counts in circumstances $C$ as relevant, it has to count as relevant for all who have that $F$ in $C$ (where $C$ includes relevant past as well as present circumstances).

Another possible explanation is a tacit assumption that because in some contexts, objectivity requires $X$, objectivity always requires $X$. I don’t mean that if asked, many people would be likely to affirm this. Whatever they would say if asked, it may happen that they latch onto a particular sense of the word ‘objective’ or ‘objectively’ (or an amorphous blend of various senses) and without thinking about it, suppose that objectivity invariably is like that. They then implicitly treat as a test for objectivity something that is in fact not suitable for that context.

Whether or not it is common to assume that because in some contexts, objectivity requires $X$, objectivity always requires $X$, it is common to latch onto one sense of ‘objective’ and forget about the others. Authors claim objectivity to be on their side when it is only in one sense of the term that it is on their side, even though in an equally important (but, at least at that moment, overlooked) sense of the term, objectivity is on the (or an) opposing side.

The next section will provide an extended illustration of this phenomenon. Before embarking on that discussion, I offer a more concise (and quite different) illustration.

It is fairly common to hold that mistaken self-defense can at best be excused, never justified, even when the mistake is a reasonable one. This (along with the underlying view of justification according to which justification requires truth) is sometimes defended by pointing out that to allow that mistaken self-defense is justified

\textsuperscript{23} See for example \textit{State v. Wanrow}, 88 Wash. 2d 231 (1977), which I discuss in Ch. 3.
as long as the mistake is reasonable would entail that A could be justified in attacking B in self-defense yet at the same time, B is justified in using force to thwart A’s attack. Yet, it is claimed, clearly they cannot both be justified. They can both be excused, or one can be justified and the other excused, but they cannot both be justified. Why not? Because justification is objective, and ‘objective’ entails that there is no room for disagreement.

But does it? Certainly there is a sense of ‘objective’ in which ‘objective’ does entail that, but why assume that justification is objective in that sense? If we focus not on the no-room-for-disagreement sense of ‘objective’ (sense 8) but on the reasonable person sense (sense 4), there is no barrier to holding that justification is objective while at the same time not ruling out the possibility that A could be justified in attacking B in self-defense and B could be justified in using force to defend himself against A’s attack. More generally, that justification is objective does not favor the view of justification as requiring truth over the view that requires only reasonable belief, unless one opts to focus on the no-room-for-disagreement sense of ‘objective’ (or on senses (1) or (2), where ‘objective’ is understood as how things really are, or what really happened).

What I described concerning the dispute about whether justification requires truth may in some instantiations reflect a broader problem: accepting (8) as a requirement for objectivity-in-general leads people to neglect, misread, or underappreciate the importance of the notion of objectivity in (4) and sometimes to either dismiss it or read into the notion in both (4) and (5) the sense of objectivity that we see in (1). That is, there is a tendency to suppose that ‘objective’ in the sense of ‘what a reasonable

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24 I discuss the claim at greater length in my “Justifications and Excuses,” Ohio State Journal of Criminal Law 2 (Spring 2005): 387-413, esp. sect. VIII.

25 Other reasons might also be proffered. One might ask, for instance: If they are both attacking each other, yet both are justified, doesn’t this mean that the police may not intervene? The question rests on a confusion. With the arrival of the police (and barring police misconduct), the situation becomes one in which neither party is justified in attacking the other. Both should stop because there is no longer a need for the use of self-defensive force. If one or both parties do not stop, intervention on the part of the police is in order. It is important to bear in mind that on the reasonable belief view of justification, that S had a reasonable belief at t₁ that the use of force against T was necessary does not entail that at t₂ her use of force against T is justified. If at t₂ it is evident, and should be evident to S, that there is no need to use force, the justification that S had at t₁ for the use of force is no more.

One might raise a similar question about third party intervention, without specifying intervention by the police. Although it is common to speak as if third party intervention is permitted when and only when the use of force that the third party is intervening to stop is not justified, that is an oversimplification. See J.J. Thomson, “Self-Defense,” Philosophy and Public Affairs 20 (1991).
person might judge/feel’ or ‘how a reasonable person might react’ entails ‘free of error’. The contrast between how things actually are and how they might seem to the perceiver in (1) is read into (4), with the result that one may fail to bear in mind that a reasonable person is sometimes in error. This pertains in particular to self-defense. Likewise with respect to (5): it is all too often forgotten that meeting an objective standard does not require that one not be in error.26

It is time to take stock. I began by saying that I wanted to look at various ways in which we contrast the objective to the subjective, and I had in mind both how this is done in the criminal law and in criminal law scholarship and how it is done outside of criminal law, in ordinary discourse. My interest in this stems from my puzzlement over some common claims concerning objective and subjective standards. I suspected that various senses of ‘objective’ are conflated, with the result that something is thought to be at odds with objectivity or an objective standard, when in fact it is not. The defense, discussed above, of the position that mistaken self-defense can never be justified is one illustration of such conflations.

I turn now to People v. Goetz. Intriguing for its discussion of the difference between objective and subjective standards, Goetz will be helpful for reflecting on the question of what features of the situation, or the relevant parties, are such that taking them into account is incompatible with an objective standard, and on what the outer limits of an objective standard are.

26 A striking instance of this appears in a lower court ruling on Bernhard Goetz’s appeal of his indictment for attempted murder (discussed below). Endorsing Goetz’s position that the instruction to the Grand Jury was in error in relying on an objective standard, the Court cites the following from an earlier ruling to show that the law in New York requires a subjective standard: “[I]t is not essential that an actual felony should be about to be committed in order to justify the killing.” [Brackets in People v. Goetz, 131 Misc. 2d (1986); case cited is Shorter v People, 2 NY2d, p. 199.] The Court comments: “That court, thus, stressed the circumstances as they appeared even though they proved to be false” (People v Goetz, p. 7). That the Court takes this to show that a subjective standard of reasonableness is required shows that it takes ‘objective’ in “an objective standard of reasonableness” to be ‘objective’ in the first sense of those I listed. The Court assumes that on an objective standard of reasonableness, a defendant cannot be deemed to have reasonably believed that an attack was about to happen unless it really was about to happen.
V. Goetz and the Adverb ‘Reasonably’

In 1985 Bernhard Goetz, a Caucasian man, shot four young African American men when they asked him, in a subway car in New York City, for $5. Goetz was indicted for (among other things) attempted murder. He challenged the indictment, claiming that the instruction given to the Grand Jury concerning what is meant by ‘reasonably’ was erroneous.27 Let’s look into this claim.28

The NY statute on self-defense states that "a person may...use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person."29 The instruction to which Goetz objected was provided in reply to a juror's request for clarification of the term 'reasonably believes.' The instruction was “to consider the circumstances of the incident and determine ‘whether the defendant’s conduct was that of a reasonable man in the defendant’s situation’. " Goetz claimed that the response provided was erroneous and that "the introduction of an objective element will preclude a jury from considering factors such as the prior experiences of a given actor and thus, require it to make a determination of 'reasonableness' without regard to the actual circumstances of a particular incident." According to Goetz, a proper instruction would be to consider not “whether the defendant's conduct was that of a reasonable man in the defendant's situation" but "whether a defendant's beliefs and reactions were 'reasonable to him'."30 The lower courts sided with Goetz. The highest court of the state rejected his argument and reinstated the indictment.

There is little, if anything, to say in favor of the standard Goetz proposed. Understood as he proposes, the word ‘reasonably’ adds virtually nothing. Insofar as it

27 He challenged it on other grounds as well, but this is the one that is relevant to my discussion.
28 In doing so I set to one side the many other matters one could discuss concerning the case, including Goetz's statement to the police (recorded with his permission) that "If had had more [bullets], I would have shot them again, and again, and again." People v Goetz, 497 N.E.2d 41, 44 (N.Y. 1986).
29 NY Penal Law §35.15 (1). Quoted in People v. Goetz. There are further restrictions on the use of deadly force: it is impermissible unless “He reasonably believes that such other person is using or about to use deadly physical force...or...is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery” NY Penal Law §35.15 (2).
provides a test at all, the test is merely whether he found his beliefs and reactions reasonable. It is not clear what exactly that amounts to or what would count as evidence against it (other than his saying he found them not to be reasonable), and, crucially, seems not at all to the point. If we think that more should be required than merely that he did indeed believe \( p \), that his belief seemed reasonable to him surely will not provide what is missing.

That said, the failings of the standard that Goetz proposed do not doom subjective standards, and I'll consider in Chapter 4 whether there might be a more plausible subjective standard. Here I focus on Goetz's argument against the jury instruction.

We can see in Goetz's argument the notion of 'objective' in (7): objectivity is thought to be at odds with taking into account various particulars (here, the prior experiences of the person, and the actual circumstances of the incident).

Why might one think these are at odds? There appears to be a background assumption that taking an objective view means taking a highly abstract view. Thomas Nagel wrote in *The View from Nowhere*:

> [T]he distinction between more subjective and more objective views is really a matter of degree, and it covers a wide spectrum. A view or form of thought is more objective than another if it relies less on the specifics of the individual's makeup and position in the world, or on the character of the particular type of creature he is. The wider the range of subjective types to which a form of understanding is accessible—the less it depends on specific subjective capacities—the more objective it is. A standpoint that is objective by comparison with the personal view of one individual may be subjective by comparison with a theoretical standpoint still farther out. The standpoint of morality is more objective than that of private life, but less objective than the standpoint of physics. \(^{31}\)

This way of thinking about objectivity is by no means implausible. But what Nagel says concerns a standpoint (or a view or "form of thought"). It does not plausibly carry over to standards. The sense in which the jury instruction in *Goetz* is putting forward an

\[^{31}\] Thomas Nagel, *The View from Nowhere*, p. 5.
objective standard is that articulated in (4) above, not the one articulated by Nagel. It seems likely that a failure to differentiate various senses in which we call something ‘objective’ underlies the assumption that I noted above in discussing (7) and that is at the heart of Goetz’s claim, namely that a standard is objective to the extent that it abstracts from the particulars.

Still, (7) is not irrelevant to (4), and the moderate position that some particulars of the defendant or the situation are such that taking them into account is incompatible with a standard being objective is needed in order to make sense of the idea of a reasonable person standard. A reasonable person standard asks us to consider whether a reasonable person in the defendant's situation might have acted as the defendant did;\textsuperscript{32} but what counts as the defendant's situation? If we include as part of the situation everything that is true of the defendant, the standard does little more than ratify whatever the defendant did. (Might a reasonable person who was exactly like the defendant have acted as the defendant did? Of course!) The reasonable person standard has to treat as \textit{not} part of the situation \textit{some} of the defendant's qualities. But which ones?

The New York Court of Appeals spoke to this issue.\textsuperscript{33} Rejecting Goetz’s argument and reinstating all counts of the indictment, the court wrote that his argument falsely presupposes that an objective standard means that the background and other relevant characteristics of a particular actor must be ignored. To the contrary, we have frequently noted that a determination of reasonableness must be based on the 'circumstances' facing a defendant or his 'situation' [...]. Such terms encompass more than the physical movements of the potential assailant. [...They] include any relevant knowledge the defendant had about that person--including, for example, any information the defendant had concerning the assailant's prior acts of violence or reputation for violence. They also necessarily bring in the

\textsuperscript{32} Not that everyone sees (or at least puts) it this way. I have argued elsewhere that it is important to understand it as asking what a reasonable person might (well) have done, not what “the” reasonable person would have done. Admittedly, the modality is a challenge: it shouldn't be 'would have', but 'might have' is too capacious. For more on this, see my "The Standard of the Reasonable Person in the Criminal Law."

\textsuperscript{33} At least, they spoke to what should be included.
physical attributes of all persons involved, including the defendant.
Furthermore, the defendant's circumstances encompass any prior
experiences he had which could provide a reasonable basis for a belief
that another person's intentions were to injure or rob him or that the use of
deadly force was necessary under the circumstances.34

I think the New York Court of Appeals had the right idea. The objectivity of a standard is
not impugned if we take into account prior experiences that gave the defendant reason
to believe that the person intended to injure or rob him, or that retreat would not be safe
and that it would be necessary to use force to thwart the attack. Likewise, there is no
reason to think that an objective standard, in virtue of being an objective standard, rules
out treating as part of the "situation" or "circumstances" the size and weight of the
apparent assailant (hereafter A) relative to those of the defendant (hereafter D), and
information that D had about A's prior acts of violence. This is an important corrective.
There is no reason to think that a standard is less objective if it allows us to take these
features into account.

But other features are presumably ruled out, and the NY Court of Appeals hints by
omission at what these are: "non-physical" attributes of the defendant, e.g., D's attitudes;
and prior experiences of D's that do not provide a reason to believe that A intends to
injure her and that it is necessary to use force to thwart the attack. Although the Court
does not explicitly state that a standard cannot count as objective if it treats these as
part of D's situation, this clearly is the suggestion.

In thinking about which prior experiences of D's are supposed to count and which
are not, we need to grapple with an unclarity in the ruling. "The defendant's
circumstances encompass...prior experiences..."--how? Framed differently, how exactly
does the last sentence in the indented quote bear on how we are to picture a
reasonable person in the defendant's circumstances? I see two ways, although in
twenty years of thinking about this ruling, I had until quite recently noticed only one. The
one I had always taken to be clearly the idea is: we picture a reasonable person who
has all the information that the defendant would have from these experiences. But there

34 People v. Goetz, p. 52.
is another way one might take it: we picture a reasonable person who has *had* those experiences.

The difference is important. On the second reading, a reasonable person might be traumatized by the experiences, with the result that he is far below average in ability to size up a danger without grossly exaggerating the risks or to notice alternatives to using violence. (If I am in an elevator with someone whose manner makes me very uneasy, I know—or at least assume—I can exit at the next floor. By contrast, someone afflicted by a post-traumatic stress disorder who, perhaps because of the disorder, has opted to carry a handgun because otherwise she is afraid to leave home, might see immediate danger and shoot the person rather than simply exiting the elevator as soon as it reaches the next floor.) Of course living through the experiences might not leave one traumatized, or might leave one traumatized in ways that do not render one more likely to respond to perceived danger with violence. But it might.

Consider how the experience of (longstanding) domestic violence factors in on each reading. On the first reading, asking what a reasonable person in the defendant's circumstances might do would involve factoring in everything the defendant knows about the abuser from previous experiences of being battered by him. It would factor in such information as that when he looks at her this way, violence usually follows; that doing such-and-such can sometimes calm him down, but not when his voice is like this; and so on. It would also factor in knowledge of what he has done when she tried to flee. On the second reading, all this would be included, but so would the effects of having experienced the violence and having lived through trying to flee and consequently being stalked and punished with greater violence.\(^\text{35}\)

It seems to me that for what the *Goetz* Court called an 'objective standard' to be an objective standard, the only option is the first reading. If we were to go for the second reading, the standard would bend too much to take into account the defendant's particular take on the world. The 'reasonable person' part of the sketch of what we are to imagine needs to be a fixed point—or rather, since there is no one reasonable person, a set of fixed points—where what varies are the circumstances in which the reasonable

\(^{35}\) I say 'the effects' but lest this mislead, I reiterate that the effects of a given traumatizing experience will vary from one person to the next.
person is placed.

A clarification is in order here: it is only with respect to the defendant's relevant prior experiences that the reasonable person should be thought of not as having experienced them, but only as having learned from them certain skills and information. With regard to the immediate situation facing the defendant, the reasonable person needs to be thought of as truly in the situation. The idea should not be that the reasonable person is detached (calm, dispassionate, unfazed by the terrifying circumstances); he or she is in the circumstances, as a human being. Reasonable people in terrifying circumstances may well be terrified. But I take it that although fazed as virtually anyone would be by the immediate circumstances, the reasonable person should not be imagined for purposes of the reasonable person standard to be similarly affected by the defendant's relevant prior experiences.

Which of the two readings better fits the text? That is not clear. "[T]he defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief [that p]" does not say 'and only insofar as they do so'; but it is plausible to figure that they are relevant precisely because they provide a reasonable basis for a belief that p. And so at least to that extent the natural reading is that the experiences are to be taken into account not for their emotional impact on D, but insofar as they provide a reason to believe p. But this is by no means decisive, and perhaps the Court did not think through in exactly what way the experiences were to be factored in.

I will assume throughout this work that an objective standard is to be understood as indicated: relevant past experiences enter in for the information that a reasonable person who had lived through them would glean.\footnote{A complication needs to be noted: what I learn from an experience is affected by what cues I pick up on, and how. So when we imagine a reasonable person in the defendant's situation as having the information and skills one would acquire from such experiences, we have to recognize that reasonable people might not all acquire the same skills and the same information. (I am assuming that we should not aim to imagine the reasonable person as picking up on cues in exactly the way the defendant does.)} I turn now to the question of what it should take for a prior experience to count as relevant.

VI. Delving Deeper into How the Goetz Standard Should Be Understood
The Goetz Court suggests that prior experiences count as relevant—i.e., qualify as part of the defendant’s situation (or circumstances)—insofar as they “provide a reasonable basis for a belief that another person’s intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.” Clearly there is room for disagreement concerning what sorts of experiences do provide that basis. For we can differ on what ‘that basis’ is, as I’ll explain shortly.

My view is that experiences of having been the victim of a crime on a previous occasion (even a victim of a crime in similar circumstances, e.g., while in a subway train) would not generally provide a reasonable basis for the belief that this person was about to attack or rob one. Sometimes they would. They would if the person who attacked one before is the same person who is acting suspiciously towards one now (depending of course, on what ‘acting suspiciously’ amounted to), or is affiliated in some significant way with that person (e.g. is hired by the other person to carry out violent actions on his or her behalf). In addition, they might provide a basis—less of a basis, but nonetheless some—in the absence of such a connection (or perceived connection) if the prior experiences taught one something about how these attacks are often carried out. But if we bracket cases where the same person (or an agent of the person) who subjected one to violence before is now (at least seemingly) attacking one or threatening to attack, prior victimization generally does not provide a rational basis for a belief that p.

The first point is straightforward. If Harold has struck Gwen in the past, often very soon after accusing her of smiling flirtatiously at another man, if he tends to strike her especially violently when drunk, sometimes then hiding her insulin when she is unconscious, once thereby causing her to go into a diabetic coma, and if he now is

37 I find ‘reasonable’ a slightly odd choice of word here; ‘rational’ seems more apt. I will henceforth use ‘rational basis’ instead of ‘reasonable basis’, not because I think ‘rational’ and ‘reasonable’ generally interchangeable—I certainly don’t—but because here it seems more apt, and because I doubt that there is something the Goetz court was trying to capture by using ‘reasonable’ that is obscured by ‘rational’. See Postscript to this chapter for a way one might understand ‘reasonable basis’ that is different from ‘rational basis’.

38 And they would even if in fact it was not that person, or an agent of that person, if there was very good reason to think it was.

39 For a case where the abuse included hiding insulin, see State v Hundley, 693 P.2d 475 (Kan. 1985). I discuss the case in Chapter 5.
angrier than she has ever seen him and is threatening to kill her, undeniably her prior
experiences with him give her added reason to think that her life is in danger if he is
now drunk and accusing her of smiling flirtatiously at another man. These experiences
(both of having been the victim of his violence before, and specifically having been
repeatedly victimized by him in circumstances relevantly similar to those she is in now)
provide a rational basis for a belief that she needs to use physical force against him to
save her life. So do other experiences with him that equip her to judge how violent an
expression his anger is likely to take. (How strong a basis they provide depends on
additional factors, among them, her options of safe flight. If they are getting a divorce,
and not against his wishes, and if—-atypically for abusive men—he just wants to wash
his hands of her and will gladly let her disappear from his life, perhaps she can safely
flee. But typically, flight from a violent, abusive partner only intensifies his anger, putting
one at increased risk. Also relevant, obviously, are their relative size and fighting
abilities.)

The second point—that prior victimization (by someone other than the putative
aggressor) generally does not provide a rational basis for a belief that p—is more
complicated. Suppose Gwen succeeds in leaving Harold. Several months later, she is
accused by Isaac, her new partner, of flirting with another man. Isaac is angry. He
glowers at her, and she smells alcohol on his breath. He has never struck her or been
violent towards her in any other way; he does not threaten her now; she has never
heard that he has a tendency to be violent. Gwen is in the kitchen when he accuses her;
he is larger than she is; he is between her and the only exit; she feels trapped. She
grabs a large knife that is at hand and stabs him. Does the experience of being abused
by Harold provide a rational basis for her belief (or perhaps a more apt word is ‘feeling’
or ‘sense’) that she is in danger now and needs to use lethal force against Isaac to

40 And of course the evidence doesn't have to be this strong for her prior experiences to constitute a
rational basis for a belief that she needs to use lethal force; even if he is merely as angry as he was on
prior occasions when he struck her violently and then hid her insulin so that after she emerged from her
coma she couldn't find her insulin, the experiences would constitute a rational basis for that belief.
41 See, inter alia, Mahoney 1991. One might also question whether she should be expected to flee if there
is no applicable retreat requirement. For discussion of the discrepancy between retreat expectations for
battered women and retreat expectations for others, see Richard A. Rosen, “On Self-Defense,
5, below.
protect herself? No. It renders it far more understandable than it would otherwise be, and has some exculpatory significance. It would certainly be relevant to bring up at sentencing, and ideally there would be an excuse defense to which it would be relevant (a partial excuse, rather than one that would result in acquittal). But it does not provide a rational basis for her belief.

Could any experience of prior victimization provide a rational basis for a belief that \( p \), other than when the current (apparent) attacker is the same person as the previous attacker, or a close associate of that person? Not often. But it might, at least if the approach (gestures, words used, positioning of the persons approaching \( D \)) is so similar to that of the aggressor(s) who attacked \( D \) before, and so out of the ordinary (except as part of a strategy of attack), that it seems clear that they are employing the same methods.

Consider the following example (put to me as evidence that prior victimization can indeed provide a rational basis for a belief that \( p \)). Two years ago, \( D \) was asked in a relatively empty subway car for money by a young man accompanied by three others, none of whom \( D \) knew; \( D \) tried to appease them by handing them a few dollars, but to no avail; they attacked \( D \), causing moderate though not grave harm. Thereafter \( D \) carried a loaded gun when he rode the subway. Now he is again approached by young men who ask him for money. Does the prior experience provide a rational basis for his belief that he needs now to use (lethal) force to protect himself?

I imagine that many people would reply, 'Of course!'. But that the prior experience provides a rational basis for his belief is far from obvious (even if we remove from the question the parenthetical 'lethal'). After all, we all know that a group of young males asking for money in such a situation might be planning to attack (or have in mind that they may well attack) the person. We do not need to have experienced an attack to know that. We also all know that they might leave one alone if one gives them even just

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42 In some places there is. The partial defense of imperfect self-defense is available in some states in the US. In England, Wales and Northern Ireland, the heat of passion defense has been replaced with a defense that might arguably apply to this sort of case. See http://www.legislation.gov.uk/ukpga/2009/25/sections/54-56, in particular 55 (3).

43 I am grateful to Gabe Mendlow and his Fall 2014 seminar students at the University of Michigan Law School for stimulating discussion of a version of this example (based loosely on the Goetz case) put to me by Mohammed Alharoun, in comments he wrote on an earlier version of this chapter. Special thanks to Alharoun, but thanks to all the law students who provided me with comments.
a very small amount of money, but on the other hand might not; we also know that they might leave one unharmed even if one gives them nothing. What does the experience of victimization add to one’s knowledge?

Arguably it adds something in some circumstances. We can imagine that $D$ learned from police to whom he reported the crime that the way the assailants positioned themselves was a common strategy of attack; and $D$ may then have been able to recognize the same strategy employed when two years later he was again asked by a group of young men for money in a similar situation. But it is a stretch to say that in this scenario the experience of victimization provides a rational basis for $D$’s belief, since what $D$ learned from the police is doing most of the work. More important, having been victimized seems at least as likely to lead one to misread a situation as dangerous as it is to equip one to read it more accurately than would those who had not been victims of violent crimes. (It is especially likely to contribute to a misreading when racism or another prejudice that has the effect of priming one to expect the worst is a factor, as it so often is.)

But let’s grant that sometimes the particular experience of victimization improves one’s ability to discern whether the present situation requires the use of self-defensive force because one learns from it more than one would normally know about strategies of attack commonly used in such crimes. In such cases, $D$ may have a rational basis for her belief that $p$ that she would not have had were it not for the previous experience of victimization.44

Apart from that, I don’t see that the experience of victimization provides one with more by way of a rational basis for a belief in the need to use self-defensive force than one would otherwise have. It explains why the danger was so very salient to $D$, and helps to explain why $D$ shot the four youths, but it is not evident that it provides more by way of a rational basis for his belief that $p$ than he would have had in the absence of prior victimization. We might say, too, that prior victimization gives one a more vivid knowledge. But rendering something more salient, or yielding more vivid knowledge, is not the same as providing a rational basis for a belief.

44 I am assuming throughout this paragraph and the next that the supposed attacker is neither the same person (or close associate) of the previous attacker, nor believed to be so by $D$. 

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Not that the prior victimization is irrelevant to culpability. We understand why someone who had been the victim of a crime would now see first and foremost *this* possibility—though we may be suspicious of the role of racism in his readiness to see these youths as of the same ilk as those youths. At least in cases where racism is clearly not involved, we are more forgiving of someone with a terrible history of victimization not only because we feel sorry for him but because it makes sense that the possibility of an attack by the angry-looking man he sees coming towards him is particularly salient. In addition, after the prior attack he may have thought, "Had I only recognized earlier what was happening I could have done X" where 'done X' stands not for 'fled' but 'attacked him by...'. Given such regrets he might now be too quick to use force. We understand; we see the exculpatory force of the explanation (though we may well deem it to exculpate only partially). But the explanation doesn't show that it was reasonable to believe that the person approaching him was about to attack him, or that insofar as it looked as if he was, it was reasonable to believe that this degree of force was needed to repel the anticipated attack.45

**VII. A Different Take on the Objective Standard?**

My view on prior victimization is at odds with that of at least some of the judges ruling against Goetz's appeal. Commenting on the Grand Jury instruction to consider "whether the defendant’s conduct was that of a reasonable man in the defendant’s situation," Judge Wallach, in his dissent from a lower court ruling (a ruling in favor of Goetz), indicated that while adequate as an instruction to a Grand Jury, the instruction would not be adequate at trial. "In all likelihood," he wrote,

this truncated caveat fell far short of what will be demanded of the Judge at trial, who in instructing the petit jury may well, depending upon the evidence adduced, be required to expand upon what ‘defendant’s situation’ really was, particularly with reference to prior traumatic episodes

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45 For a different view, see the concurring opinion by Sandler, J.P to *People v Montanez* (499 N.Y.S.2d 689, 1986).
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. Such evidence, if offered, will of course be germane not only to defendant’s perception of his peril, but also to what a person with defendant’s background and experience would reasonably perceive and do.46

I take issue with both his claim that such evidence is germane to reasonableness and his gloss on the reasonableness required for self-defense. That gloss is perplexing. Why would the question be what a person with the defendant’s background and experience would reasonably perceive and do? And what does that mean? Hopefully not what it sounds like: it sounds as if the question is what the defendant would be likely to perceive and do, given his background and experience. The idea would then be that if, given one’s background and experience, he would be likely to perceive things as he in fact did, he is justified in acting as he did. That would be absurd.47 The fact that, given his background and experience, he would be likely to perceive things as he did might (partially) excuse. But it does not justify.

We can hope that this is just a case of poor wording, and that he meant something along the lines of ‘would perceive and do, and with good reason’ or ‘would perceive and do, and would not be unreasonable in so doing’. The problem is that it does not tally with his indication that in its direction to the trial jury, the judge would need to draw attention to the relevance of Goetz’s prior traumatic episodes to an assessment of reasonableness. For surely it is unreasonable to judge that A is about to do one harm just because one was once harmed by B, if there is no connection between A and B (other than that they are both young and both male…and both African American).

The role that reasonableness is playing in Judge Wallach’s statement--or perhaps


47 Just imagine (assuming the point is a general one about justification, not specific to self-defense): if given D’s background, D is likely to perceive a woman’s acceptance of an invitation to have a drink with him in his apartment as consent to sex and to perceive her ‘No’, when he initiates sexual activity, as mere game-playing (since, after all, she did accept the invitation to his apartment), on this view he would be justified in believing that she consented to sex and in acting on that belief. The belief would count, on that view, as reasonable.
not so much the role as the notion of reasonableness at work—is mysterious, reminiscent of the odd wording in the Model Penal Code’s extreme emotional disturbance defense48 (put forward as a replacement for the heat of passion defense). The requirement of reasonableness, such as it is,49 is that there be a "reasonable explanation or excuse"50 for the "extreme mental or emotional disturbance" in order for that "explanation or excuse" to render what would otherwise be murder, manslaughter.51

As long as self-defense is a justification rather than an excuse—and indeed, as long as the standard of reasonableness is to be objective—surely the role of reasonableness in self-defense should not be that there is a “reasonable explanation” for the defendant's having believed p.

In its ruling (overturning the lower court rulings), the New York Court of Appeals, like Judge Wallach, notes that the instruction to the trial jury would need to say more than was said in the Grand Jury instruction. The Grand Jury did not "elaborate on the meaning of ‘circumstances’ or ‘situation’ and inform the grand jurors that they could consider, for example, the prior experiences Goetz related in his statement to the police. We have held, however, that a Grand Jury need not be instructed on the law with the same degree of precision as the petit jury...."52

I can see that the trial jury would need to be informed that any prior experiences of

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48 Clarification for the technically minded: It is not presented as a defense, exactly; rather, it is part of the definition of manslaughter. Model Penal Code 210.3(1)(b).
49 It is an illusion to see reasonableness as playing a role here; a 'reasonable explanation' is simply a good or at least plausible explanation; the notion of reasonableness does not enter in.
50 The notion being mysterious, yet relied on by the Model Penal Code, we may want to look at rulings that sought to shed light on it. The most helpful ruling I am aware of is Casassa, where the murder conviction was upheld in the face of an appeal that Cassasa killed "under the influence of 'extreme emotional disturbance'". The Court ruled that the trial court properly applied the statute, having found that his "claimed mental disability" was an "excuse so peculiar to him that it was unworthy of mitigation" [People v. Casassa, 404 N.E.2d 1310, * (N.Y. 1980)]. The most helpful, I say, but not very helpful. It is hard to see why an excuse of being so smitten with someone that he goes crazy when she rejects him is "peculiar to him"; certainly we are not unfamiliar with the phenomenon of being deeply distraught, and destabilized, over unrequited love. But I don't mean to find fault with Casassa; the problem lies with the EMED defense.
51 Model Penal Code 210.3(1)(b). It may be that acceptance of the position that there is an objective standard at work in EMED facilitated the thought that prior traumatic experiences can properly factor into an objective standard of reasonableness in self-defense, and specifically that they can provide a "reasonable basis" for a belief that p through leading the person to exaggerate the likelihood of an attack and the need to use lethal force to thwart it. The blurring of the understandable and the reasonable in the EMED may have spilled over into thinking about reasonableness in self-defense.
52 People v. Goetz, pp. 52-53.
Goetz's that were mentioned at trial and that the jury believes provide a rational basis for a belief that $p$ should be taken into account in assessing reasonableness. If by ‘could consider’ the judge meant only that jurors could consider whether they are relevant in this way, I am in agreement with the judge. But given what the experiences were, I would hope the judge was not suggesting that the experiences probably should count as providing a rational basis for a belief that $p$. Goetz was injured in a mugging in 1981, after which he purchased a handgun, and twice between 1981 and 1984 he successfully warded off assailants by displaying the handgun. It seems clear that this set of experiences does *not* constitute a rational basis for thinking that he was about to be attacked and that he could thwart the attack only by using force (let alone that it was necessary to use deadly force). If anything, it would give him reason to think that he could simply display his handgun.

It is curious that, in taking a stand in support of an objective standard and offering a very helpful gloss on how the standard should be understood, the Court then suggests that it is compatible with an objective standard to count those experiences as relevant to the question of reasonableness. This may simply reflect the fact that the Court wanted to make it clear that the instruction to the trial jury would have to specify that they were to consider as part of the defendant's situation any experiences of the defendant's that they believe provide a rational basis for the belief that he was about to be attacked (or robbed) and needed to use (lethal) force to thwart it. But it may reflect more than this: perhaps the Court thinks these experiences are plausibly viewed as providing such a basis. Relatedly, it may be--referring now to the ambiguity I noted in Sect. V--that the Court takes prior experiences to be relevant to the reasonableness of the defendant's belief not merely (as I proposed) insofar as they yield information that forms part of a rational basis for a belief that $p$, but also as experiences that have taken their toll on the defendant, and understandably so.

At any rate, in endorsing the *Goetz* standard for reasonableness, I endorse it only with a narrower reading than Justice Wallach's of what prior experiences of the defendant's can be counted as part of the defendant's situation and thus be deemed relevant to reasonableness, and with the narrower reading adumbrated above as to how the prior experiences factor in (not for their effects on one's psychology, but for the
information one has gleaned from them). I think it important that the prior experiences that can count as part of the defendant's situation be carefully circumscribed, lest 'reasonable' be treated as equivalent to 'understandable'. And indeed this is a helpful way to think about what is key to objective standards: they are about reasonableness, and they treat the reasonable as importantly different from the (merely) understandable. They do not bend to take into account factors such as a history of victimization that has led to being deeply mistrusting, angry, or fearful. Such factors are relevant to assessing blameworthiness, but not to assessing whether one has acted reasonably.53

Or so I think. In the next section, I draw upon an article by Sarah Buss to consider how one might defend the position that prior victimization can provide, in ways beyond those just delineated, a rational basis for a belief that $p$.54

VIII. Reconsidering

I stand by my claim that the Court cannot endorse an objective standard while allowing that Goetz's prior experiences as a victim of violence can count as part of his situation, i.e., as providing a rational basis for a belief that $p$. But I am less sure about the deeper question: Can prior experiences provide a rational basis for a belief that $p$ in some way other than those I explained above? In her “Justifying Wrongdoing,” Sarah Buss provides a line of argument that yields an affirmative answer. An affirmative answer entails that an objective standard, drawn up as the Goetz Court articulated it (and as quoted above in Sect. V) need not treat as irrelevant as much as I have suggested does need to be so treated. (It would not, however, lend support to the claim that Goetz's experiences of prior muggings or attempted muggings could provide a rational basis for a belief that $p$.)

Buss's focus is on agents whose childhoods involve deprivation (and given her descriptions, I'd say they involve severe deprivation). She aims to establish “the

53 Prior victimization may also be relevant in another way, if the repeated victimization is due in part to a failure on the part of the state to provide equal protection. Arthur Ripstein suggests that arguably the State lacks standing to punish someone in such circumstances. But exactly what counts as "such circumstances" takes more than a footnote to explain. I say a little more about this in Chapter 4, but for the full (and fascinating) story, see Arthur Ripstein, “Self-Defense and Equal Protection,” University of Pittsburgh Law Review 57 (1996): 685-724.
plausibility of the claim that deprived agents have a special justification for wrongdoing.”
A “deprived childhood” can “provide someone with a good reason for doing the wrong thing.”

Buss’s approach to justification is unusual, different not only from mine but also from the approach of those who deny that mistaken self-defense can be justified. The sense of 'justification' in which she claims that deprived agents have a special justification for wrongdoing is simply that they are blameless. Since I don’t want to contest the claim that the agents are blameless but don't want to allow that if they are blameless they should count as justified, I will set aside her claims about justification. I’ll focus instead on her position that a deprived childhood can provide someone with a good reason for doing the wrong thing.

How can a deprived childhood do this? Imagine that the “vast majority of people with whom X came in contact as a child either beat him, supported those who beat him, or completely ignored his misery. The beatings were usually preceded by taunts.” Now imagine that “Y says something hostile to X, something resembling [those taunts]… X responds to the taunts by hitting Y.”

X has, on Buss’s view,
good reason for holding the false belief that his victim is probably in every relevant respect just like the many people who have consistently neglected and abused him, and who therefore constitute a persistent threat to his well-being, and who therefore get what’s coming to them when he finally retaliates with his fists.

I want to bracket the last conjunct; ‘get what’s coming to them’ injects a complicating feature. It is not as if the fact that S has z coming to him entails the permissibility of inflicting z on S. Retaliatory force, unlike self-defensive force, is not a strong candidate for permissibility. But we can ignore that and still consider the possibility that X has a rational basis for believing that Y is a danger to him in these circumstances.

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55 Buss, p. 362. In fact she takes an even bolder stand: “Insofar as a person’s deprived background affects his moral status, it does so by giving him a sufficient reason for what he does” (p. 338). I will limit myself to her claim that it gives him a good reason.
56 Not that I affirm it, but it is not my concern here to contest it, and I think it far more plausible than the claim that they are justified.
57 Buss, p. 345.
Is Buss’s point simply that inductive reasoning would naturally lead X to the conclusion that Y is just as rotten (and will be just as rotten to X) as the many, many awful people X has known? Some of what she says suggests that, but her view is more subtle. She emphasizes that “in speaking of what the deprived wrongdoer has reason to ‘believe,’” she means “to refer to his way of perceiving, or experiencing, the situation in which he finds himself.” So it is not so much—or not only—that he is justified in inferring that because most others he has encountered have been cruel or at best uncaring, this person also will be; rather, it is that because this is what he has encountered, he perceives the present situation differently than it would (most likely) be perceived by someone whose interactions with fellow humans have been more pleasant. Moreover, his perception is, given his earlier experiences, reasonable. His “conditioning has taken the form of experiences from which he has good reason to draw the conclusions that underlie his abnormal (in)sensitivity.” Imagine that he “grew up in a hostile environment,” was “surrounded by people who used violence to settle disputes,” was “raised on a steady dose of verbal abuse, much of it aimed at himself, and a considerable portion of it followed by kicks, punches, and slaps.” “Given all this,” Buss asks, “why would he infer that…the hostile people he is likely to encounter in the future are not, in all relevant respects, just like the hostile people he knows so well? Does he have good reason for reaching this conclusion? No more, I think, than the person who has been bitten repeatedly by growling dogs has good reasons for concluding that the growling poochy in her path is all bark and no bite.”

Setting aside Buss’s argument to show that wrongdoing can be justified by these beliefs (beliefs that are false but justified “in terms of the norms of inductive reasoning”), I think her claims plausible. Someone with the background she describes has no more reason to think that the somewhat hostile person he has just met

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59 Buss, pp. 348-49.
60 Buss, p. 349
61 Buss, p. 354.
62 Buss, p. 354.
63 Buss, p. 350. I set it aside because I don’t accept the position that “from a single point of view,” “some actions of deprived wrongdoers are both justified and unjustified” (350). Buss holds that they are justified by the wrongdoer’s past circumstances, yet are wrong (350).
64 Specifically, those claims quoted in the previous paragraph and summarized in the next two sentences of this paragraph.
will be less awful than the other hostile people he has known than to think that he or she will be every bit as awful. In addition, given the broader point about perceiving the situation at hand differently than would someone whose interactions with others have on the whole been much more positive, he has more reason than they do to interpret ambiguous behavior as hostile. (Of course, before the use of force could be justified, more would be needed than merely this; from the description, it appears that nothing was said or done to indicate that self-defensive force is called for at this time.)

Just to be clear: in saying that I think these two claims plausible, I don't mean to be endorsing them. (At this point I'm undecided.) But they are a great help in making sense of something that I find otherwise difficult to make sense of: how prior experiences of victimization might be able to provide a rational basis for a belief that \( p \), other than in the ways I explained earlier. I see this as a possibility only in extreme cases. The two claims do not support the position that Goetz's experiences provide a rational basis for a belief that he is about to be attacked and needs to use lethal force to thwart it; nor do they support the claim that Gwen's experiences of being attacked by Harold provide a rational basis for a belief that Isaac is about to attack her and that she needs to use force to prevent herself from being seriously harmed. But in cases where, as in Buss's examples, the agent has known only cruelty or indifference (or was sexually molested throughout childhood and as an adult was battered by each man with whom she was intimate), the prior experiences might be able to provide a rational basis for a belief that this hostile remark or angry accusation is going to be followed by violence.

Allowing that they can would amount to expanding what can be taken into account in applying an objective standard. It would warrant allowing not only (a) that prior experiences can count as providing a rational basis for a belief that \( p \) in the circumstances I indicated, i.e., when the apparent assailant is (or there is good reason to believe he or she is) either someone who attacked one before or threatened to attack one, or is an agent of that person), or (b) that they can so count when the prior experience enables one to recognize signs that others would not recognize (signs that this is not just a request for money but the start of a serious attack, for example); it would also allow that (c) long-standing victimization of the sort Buss describes, where there is little to give one any basis for trust of any humans, may provide a rational basis
for a belief that this person, who taunts one or yells at one, is about to unleash a vicious attack.

Should we grant this? My leaning is to say 'no' (which would also mean refraining from endorsing the two claims I said I found plausible but had not yet decided whether to endorse). The temptation to grant (c) is due to equating two things that arguably need to be distinguished. The first is something's being a rational basis for a belief that \( p \), where this means that it provides a good reason for believing that \( p \)--and not only against the backdrop of a skewed sample. The second is something's being a rational basis for S's believing \( p \), where the idea is that the something--here an experience--shows (or tends to show) that S's believing \( p \) is (despite initial appearances) not irrational.

If the distinction is granted, let's see where this leaves us with regard to the Goetz standard for 'objectively reasonable'. The best way to flesh out the Goetz standard, as I see it (even if its authors may not have seen it this way), is to say that an experience counts as part of the situation insofar as it provides a rational basis for a belief that \( p \), in the sense described above. Experiences that merely show \( D \)'s believing \( p \) not to be irrational should not count as part of the situation. An objective standard should count as part of the situation experiences that provide a rational basis for a belief that \( p \), but experiences that merely help render the agent's viewpoint understandable should not so count, and experiences that go one step further (if this is one step further), showing the agent's take on the situation not to be irrational, should also not count.

IX. Conclusion

There is another reason why I am opting not to treat as compatible with an objective standard allowing a history of victimization to be part of the defendant's situation other than when (a) or (b) obtain (i.e., when it is the same assailant, or when the prior experience enabled one to recognize signs that an attack is imminent). Even if I were somewhat inclined to regard it as compatible, it would be unwise for me to do so because it would make my task too easy. I am, after all, trying to defend objective
standards of reasonableness against objections (not of course objective standards as such, but objective standards at their best). A very interesting and promising objection against objective standards is precisely that they cannot allow us to treat as relevant the defendant’s prior experiences of victimization except in the ways I indicated earlier (i.e., when (a) or (b) obtain).

To address an objection by affirming, “No problem! Objective standards can embrace that, too!” is, if not cheating, a way of avoiding the real issues. If there is clearly no incompatibility between taking X into account and objectivity, fine. But with this one—severely deprived backgrounds that arguably render it rationally justified that one see the situation in a certain way—I have serious doubts. And this provides for a richer discussion, because it provides motivation for preferring a subjective standard.

To clarify, and provide a partial summary: that an objective standard cannot allow us to treat Goetz’s prior experiences of victimization as relevant to his claim to have acted reasonably does not seem to be a shortcoming. That it does not allow us to treat Gwen’s experiences as a victim of Harold’s violence as relevant to an assessment of whether she acted reasonably in attacking Isaac also does not seem to me be a shortcoming. By contrast, consider Gina, whose circumstances are like Gwen’s except that Gina was sexually molested throughout childhood and as an adult was battered in all of her heterosexual relationships apart from her current one. If an objective standard cannot treat Gina’s history as relevant to an assessment of whether she acted reasonably in attacking a new (and so far non-violent) boyfriend who behaved towards her as Isaac behaved towards Gwen, this may be found more worrisome, and provides motivation for favoring (some version of) a subjective standard. In the next two chapters I consider how worries about an objective standard (if understood without the Buss extension, and without the capacious "psychological" reading of the Goetz standard, and thus in the narrower way I favor) can be addressed. In the next chapter I’ll take a close look at a case sometimes cited as showing the importance of embracing a subjective standard, *State v. Wanrow*, and consider to what extent it provides reason

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65 [Cite casebooks and other works that do this.]
for giving up on objective standards, and in Chapter 4 I'll return to the case of Gina.\textsuperscript{66}

**Postscript: Reasonable vs. Rational Basis for a Belief that p**

I noted in a footnote that I find 'reasonable' a slightly odd word choice in the Goetz court's statement that "the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances," and in discussing what prior experiences should so count, I used the term 'rational'. Is the substitution less innocuous than I thought?

Of course I don't think the terms are in general interchangeable; I substituted 'rational' because I couldn't see anyway to understand 'reasonable basis' in the quote other than as 'rational basis'. But perhaps there is some way to understand 'reasonable basis for a belief' that I was missing when I understood it to mean 'rational basis'. This postscript is an attempt to figure out what that might be...and most of all to invite help from readers.

As explained in Chapter 1, the key difference between 'reasonable' and 'rational', reflected in ordinary language, is that 'reasonable' is not primarily an epistemic notion. It has a clear ethical component, at least when we are talking about a person or her conduct (understood broadly to include her reactions, her judgment, her policy or position on certain matters, as well as her actions) being reasonable. Being reasonable at a given time, with respect to x, is incompatible with being selfish at that time, with respect to x. The same is not true if we substitute 'rational' for 'reasonable'. I can be acting rationally in a particular decision yet selfishly. I can't be acting reasonably yet selfishly. Someone who treats others' interests as of no consequence and her own as paramount is unreasonable; she may also be irrational, but the factors that determine her action to be unreasonable do not show it to be irrational. Whether she is irrational hinges on whether her actions will help or hinder her pursuit of her aims.\textsuperscript{67}

\textsuperscript{66} Earlier versions of parts of this chapter were presented at the Colloquium for Legal, Political and Social Philosophy at New York University (2016); to the Edinburgh Legal Theory Research Group (University of Edinburgh, 2015); at the 37th International Wittgenstein Symposium, Kirchberg am Wechsel, Austria (2014); to my seminar students at Indiana University (2015), and to Prof. Gabe Mendlov's seminar at the University of Michigan (2014). I am grateful to discussants at each of these events, to Mark Kaplan, Fred Schmitt, and Ryan Scott for helpful discussion, and to Gabe Mendlov and his students for incisive written comments. My greatest debt is to Liam Murphy who presented an introduction to my paper at the NYU colloquium; special thanks are also in order to Jeremy Waldron for his comments at NYU.

\textsuperscript{67} This is well explained by W.M. Sibley in "The Rational Versus the Reasonable," Phil. Review 62:4 (1953): 552-560, and picked up on and developed by John Rawls in *A Theory of Justice* and *Political*
One might contest the distinction, holding that morality and rationality are more tightly linked than this recognizes. But there is at least a very standard use of 'rational' according to which they are not so tightly linked. As Scanlon observes, this conception of rationality "is so familiar that it is what any unqualified use of the term is likely to call to mind" (192).

Does the distinction provide a way to make sense of 'reasonable basis for a belief that \( p \)' as meaning something different from 'rational basis for a belief that \( p \)'? My initial answer was 'No'. 'Rational basis for a belief that \( p \)' in no way suggests a means-ends notion of rationality. The idea, rather, is that if something is a rational basis for a belief that \( p \), it counts in favor of \( p \) or, put differently, tells in favor of \( p \)'s being true. I took it that 'reasonable basis for a belief that \( p \)' would have to mean the same thing.

However, there is a hint of a possibility in the fact that 'reasonable' has an ethical dimension that 'rational' doesn't have. If we don't focus on the particular contrast noted above, but instead on the more general point that 'reasonable' has an ethical dimension, we might be able to come up with a way of understanding 'reasonable basis' that is different from 'rational basis'. The idea could be that a reasonable basis is an appropriate basis. Just how this can be cashed out is no yet clear to me, but a first stab goes as follows: something is a reasonable basis for a belief in \( p \) if and only if it is a consideration that both helps to make it understandable that \( D \) thought \( p \) and is in no way inappropriate to take into account or allow to shape one's thinking. I take my cue from the following, from Antony Duff:

[S]omeone who is approached by a group of young black men asking him for money might, given what he thinks he knows about black youths, interpret their behaviour as an attack, and use what he therefore takes to be defensive violence against them: what makes his belief that they are about to attack him unreasonable is not (merely) the epistemic inadequacy of its grounds, but the way in which basing a belief that is to warrant my use of violence against a person on my assumptions about the typical behaviour of a racial group to which he belongs constitutes an insulting failure to see or treat him as a moral agent and fellow citizen. Given D's views about black youths, that 'they are black' or 'they are young black men'

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*Liberalism.* See also T.M. Scanlon, *What We Owe to Each Other* (Harvard University Press, 1998).

68 My colleague Allen Wood, a more fully committed Kantian than I, objects to this distinction between 'reasonable' and 'rational' for precisely this reason.

(or, I would add, 'they are young black men, just like the guys who attacked me once before') helps make it understandable why he thought p; but it is a consideration that it is inappropriate to allow to shape one's thinking. (Note: there is some unclarity about what counts as 'the consideration' here. Since 'they are young black men' doesn't help make it understandable without D's views about black youths being factored in, presumably we need to understand 'the consideration' to include his views about black youths, e.g. that they are usually criminals.)

Consider by contrast Buss's example. It is without a doubt understandable that if the vast majority of people with whom X came into contact as a child either beat him, supported those who beat him, or ignored his misery, and he is now a young adult for whom things have gone no better, this would shape his thinking, including in particular his sense of danger. (Note: we do not have to add 'given X's views about...' as we did in discussing the example drawn from Duff's remarks.) In addition, it is in no way inappropriate that he allow his history to shape his thinking (even though it would be wonderful if he were somehow to keep it from doing so).

If this is right, perhaps we have a different way of fleshing out the Goetz court's objective standard, one according to which X might indeed count as having a reasonable belief that this person acting in a hostile manner poses a lethal danger, against which lethal force is needed, even though someone without X's history could not so count. The same would arguably be true of Gina.

I am inclined to think this effort at an alternative understanding of the standard rather too far-fetched, but am interested in hearing what readers think. I plan to take it up in Chapter 4 where I consider how one might come up with a carefully constrained subjective standard. It seems better located under that heading than thought of as providing a way to understand 'objectively reasonable'.

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Eight ways the objective and the subjective are distinguished (a list provided to save you time as you read Baron, "The Distinction between Subjective and Objective Standards in the Criminal Law"):

1. Objective: how it actually is  
   Subjective: how it seems to the perceiver.

2. [Barely different from 1]  
   Objective: what actually happened  
   Subjective: the subject's experience of the thing in question (and sometimes the thing in question as experienced by the subject).

3. In discussions of criminal attempts:  
   (3a) Objective: what in fact happened  
   Subjective: what the agent intended  
   (3b) Objective: what the action in fact was  
   Subjective: what the agent thought she was doing

4. Objective: what a reasonable person in the same situation would or might have felt, thought, feared, or believed, or how such a person might have reacted  
   Subjective: what the person in question (e.g. the defendant) actually felt, thought, feared, believed, or how he or she reacted

5. ‘Objective’ and ‘subjective’ are applied in the philosophy of criminal law to standards; the defendant’s conduct (or belief) is said to be subjectively reasonable if it meets a subjective standard of reasonableness, and objectively reasonable if it meets an objective standard of reasonableness.

6. Objective(ly): without bias, or without regard to one’s own interests.  
   Subjective(ly): biased.

7. Objective [standard]: precludes taking into account some of the particulars of the situation and especially of the defendant, and sometimes is assumed to preclude taking into account any of the defendant’s personal characteristics.  
   Subjective [standard]: does not preclude this.

8. Objective: something on which disagreement, when everyone looks or reflects with care, should not persist; when it does, someone is being obtuse or not looking at things correctly.  
   Subjective: a matter on which disagreement (“an element of irreducible subjectivity”) may persist.