Justified:
Reasonable Beliefs, True Beliefs, and Self-Defense

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Abstract

A defendant is charged with criminal battery and asserts self-defense at trial. The defense calls witnesses who would testify that, about ten minutes before the fight, the alleged victim said he was going to "find" the defendant and "end him." But the trial judge excludes the testimony because the threat, while heard by several witnesses, was not communicated to the defendant. Therefore, the judge says, the threat cannot be relevant in determining whether the defendant "reasonably believed" he was in imminent danger at that time.

This Article explores the theoretical foundation for this common ruling, and demonstrates why it is deeply flawed. For reasons that are philosophical, historical, and even scientific, a defendant must be allowed to prove that his or her belief of imminent danger was not just a reasonable belief, but also turned out to be accurate, i.e., was a true belief.

Fortunately for the defense, several existing legal doctrines also support the admission, at trial, of the alleged victim's threats and similar evidence not known to the defendant at the time of the incident. Specifically, such evidence (a) corroborates the defendant's testimony, (b) shows that the alleged victim was the first aggressor, (c) provides the necessary context for the jury, and (d) is central to the defendant's right of confrontation.

Finally, this Article combines the theoretical concepts with the legal doctrines to create something practical: a model brief which can be used to oppose a prosecutor's motion to exclude such evidence. Alternatively, the brief can be reformatted as a defense motion to preemptively seek the admission of such evidence.

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INTRODUCTION

A defendant may use force in self-defense or defense of others, provided the defendant "reasonably believes" such force is necessary to prevent an imminent, unlawful attack.[1] It is possible to reasonably believe an attack is imminent when, in fact, it is not. In a classic example, a defendant may feel threatened by a person believed to be a "club-wielding attacker," and may act in self-defense only to learn that the person "turns out to be a jogger carrying a flashlight whose bulb is out."[2] However, if the defendant's beliefs at the time were reasonable, then the defendant's conduct is justified—or at least excused—and the defendant is not guilty of battery or any other crime.[3]

This theory is called the "reasons theory of justification," and it serves as the foundation for most self-defense statutes in the United States.[4] As its name implies, the focus is on the defendant's *reasons* for acting. And applying the theory in reverse yields a predictable result: a defendant who has *bad intent* and attacks a person believed to be an innocent jogger will *not* be justified if that person was, unbeknownst to the defendant at the time, a "club-wielding attacker" about to attack an innocent third party.[5] At best, this defendant was "unknowingly justified" and cannot assert self-defense or defense of others—even though that was, in fact, the end result.[6]

As philosophy exercises go, that reverse-jogger scenario is interesting. But the problem for real-life defense lawyers is that judges are overly concerned with letting an "unknowingly justified" defendant escape conviction.[7] Consequently, judges often exclude defense evidence based on the reasons theory of justification: if the defendant

[1] *See infra* Part I.
[2] *See* id.
[3] *See* id.
[4] *See* id.
[5] *See infra* Part II.
[6] *See* id.
[7] *See* id.

didn't know about the evidence, then it could not have influenced his or her reasons for acting, and therefore it is not relevant.[8]

For example, assume that V tells W that he (V) is "fed up with D and I'm going over there right now to end him." Ten minutes later, V aggressively approaches D, and D thinks he is about to be attacked. D therefore punches V to protect himself. The prosecutor charges D with battery, and D asserts self-defense at trial. But the trial court rules that W *cannot* testify that, ten minutes before the incident, V said he was on his way to attack D. Why not? Because the threat, uncommunicated to D, could not have influenced D's reasons for acting. In statutory terms, whether D *reasonably believed* he was about to be attacked turns only on things known to him at the time.

Excluding an uncommunicated threat, or other evidence not known to the defendant at the time, is problematic. First, the reasons theory on which exclusion is based is deeply flawed.[9] While it has merit in some circumstances, there is no philosophical justification for using it to exclude such evidence when the defendant had independent reasons to reasonably believe an attack was imminent.[10] Second, at trial, the reasonableness of the defendant's beliefs is only relevant when those beliefs were mistaken.[11] The defendant must therefore be allowed to prove that his or her belief of imminent harm was also accurate, i.e., was a true belief.[12]

Fortunately, legal precedent exists for the use of uncommunicated threats and other evidence not known to the defendant at the time of the incident. First, because self-defense cases are credibility battles, the defense must be permitted to present evidence that corroborates the defendant's testimony and undermines the alleged victim's.[13] Second, because self-defense is not available to a defendant who provoked the attack against which he or she defended, the defense must be permitted to show that the alleged victim was the first aggressor—and evidence of intent to harm the defendant is relevant to that issue.[14] And finally, the presentation of such evidence provides the necessary context to paint a complete picture of the event,[15] and it is also necessary to satisfy the defendant's right of confrontation at trial.[16]

Part I of this Article explains the basic principles of self-defense and introduces the "reasons theory of justification" on which such laws are based. Part II introduces the concept of the "unknowingly justified" defendant, which preoccupies trial judges and causes serious problems for real-life defendants who claim self-defense or defense of others. Part III makes the case—philosophically, historically, and even scientifically—that defendants may use evidence, unknown to them at the time of the incident, to prove that their beliefs were not only reasonable but accurate, i.e., were true beliefs. Part IV outlines several existing legal doctrines that defense counsel might use to win admission of such evidence. Finally, Part V provides a model brief for defense counsel to use to

[8] *See* id.
[9] *See infra* Part III.A.
[10] *See* id.
[11] *See infra* Part III.B.
[12] *See* id.
[13] *See infra* Part IV.A.
[14] *See infra* Part IV.B.
[15] *See infra* Part IV.C.
[16] *See infra* Part IV.D.

oppose the prosecutor's motion to exclude such evidence; it could also be reformatted into a defense motion to affirmatively seek the admission of such evidence.

I. SELF-DEFENSE AND REASONABLE BELIEFS

The basic rule of self-defense is that "[a] person is entitled to defend himself against the immediate use of unlawful force."[17] And in most circumstances, a person is entitled to act "in defense of oneself *or another*."[18] At a jury trial, once some evidence of self-defense is introduced, the prosecution typically has the burden to prove "that the defendant did *not* act in reasonable self-defense."[19] Less commonly, the burden of proof rests with the defense.[20]

If the prosecution fails or if the defense prevails, then the defendant's conduct, which would otherwise have been criminal, is *justified*. Philosophically, "the principle of justification . . . serve[s] to limit the jurisdiction of the criminal law to acts deemed undesirable, or, more precisely, to consequences deemed harmful."[21] Another way of framing it is that, although a defendant who acts in self-defense does cause harm to the attacker, such harm "is outweighed by the avoidance of greater harm or by the advancement of a greater good. In other words, there is no *net* societal harm."[22]

Several issues can arise in a self-defense case, including whether the defendant used a reasonable amount of force,[23] had a duty to retreat before using such force,[24] or even lost the right of self-defense entirely by provoking the attack.[25] But perhaps the most commonly litigated issue is whether the defendant reasonably believed, at the time he claims to have acted in self-defense, that he was or was about to be under attack.[26] Importantly, a reasonable belief is not necessarily the same as a belief that turns out to be accurate, i.e., a true belief. As one state's jury instruction explains:

> A belief may be *reasonable* even though *mistaken*. In determining whether the defendant's beliefs were reasonable, the standard is what a person of

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[17] SIXTH CIR. J.I. CRIM. 6.06 (2) (2023).
[18] NINTH CIR. J.I. CRIM. 5.10 (2024) (emphasis added).
[19] Id. (emphasis added). However, the burden of proof, like the substantive self-defense law itself, varies by jurisdiction.
[20] *See, e.g.,* State v. Martin, 488 N.E.2d 166 (Ohio 1986) (Upholding the statute which "places the burden of proving an affirmative defense, by a preponderance of the evidence, on the accused.").
[21] Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 272 (1975) [hereafter "A Theory"].
[22] Paul H. Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in HARM AND CULPABILITY 45 (Simester & Smith eds., 1996) [hereafter "Competing Theories"].
[23] *See* SIXTH CIR. J.I. CRIM. 6.06 (2) (2023) ("[S]elf-defense is limited to using only as much force as reasonably appears to be necessary under the circumstances.").
[24] *See* Robert Stephens, *Life and Liberty: Seven Factors That Will Better Evaluate Self-Defense in Nevada's Common Law on Retreat*, 8 NEV. L.J. 649, 651-54 (2008) (discussing the "duty to retreat," the "stand your ground" principle, and the "castle doctrine.").
[25] *See* Joshua D. Brooks, *Deadly-Force Self-Defense and the Problem of the Silent, Subtle Provocateur*, 24 CORNELL J. L. & PUB. POL'Y 533, 537-44 (2015) (discussing the impact of different types of provocation on a self-defense claim).
[26] *See* WIS. J.I. CRIM. 800 (2023) (A self-defense claim can succeed only if, among other things, "the defendant believed that there was an actual or imminent unlawful interference with the defendant's person" and "the defendant's beliefs were reasonable.").

> ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. The reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts and not from the viewpoint of the jury now.[27]

When a defendant acts in self-defense because of reasonable but mistaken beliefs, the defensive action is still justified under the "reasons theory of justification," or simply the "reasons theory," which is illustrated by this classic example:

> [I]t is not uncommon that a person believes that his or her conduct is justified—believes that it will produce a net societal benefit—when in fact it is not and will not. The club-wielding attacker, when dragged to the street light, turns out to be a jogger carrying a flashlight whose bulb is out. Whether beating the jogger-mistaken-for-an-attacker is justified depends on whether the justification defense is given (1) because the conduct in fact is justified or (2) because the person acts for a justified reason. [28]

It is probably more accurate to say that a defendant's conduct, when based on a mistaken but reasonable belief, is *excused* rather than *justified*.[29] For now—at least for most purposes—that is arguably just "a labeling dispute."[30] But while the label itself is not always important,[31] there is a critical difference in the resulting harm, which is the philosophical basis underlying the very concept of justification.

More specifically, when a defendant acts in self-defense based on a true belief of imminent danger, i.e., when the defendant's belief turns out to be accurate, his or her conduct is justified as there is "no net societal harm."[32] Any harm suffered by the attacker "is outweighed by the societal value of the defensive force—in avoiding the threatened harm to the [defendant] and in condemning and deterring unjustified aggression generally."[33]

By comparison, when a defendant acts in self-defense based on a reasonable but mistaken belief of imminent danger, there *is* a net harm—e.g., to the innocent jogger that the defendant mistakenly thought was an attacker. This issue of harm is an important one that will be revisited later.[34] But for now, whether the defendant's conduct was justified or merely excused, the end result is the same: the defendant will be acquitted.

This scenario of the well-intentioned defendant, who acts on a reasonable but mistaken belief, is indeed an important one in both the philosophy and practice of

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[27] Id. (emphasis added).
[28] Robinson, "Competing Theories," *supra* note 22, at 46.
[29] *See* id. at 62 ("There can be little dispute that a mistaken belief in a justification operates as an excuse.").
[30] Paul H. Robinson, *The Bomb Thief and the Theory of Justification Defenses*, 8 CRIM. L. F. 387, 389 (1997).
[31] While the distinction is often lost today, for historical, philosophical, and sometimes even practical purposes, the label could be very important. *See* Robinson, "A Theory," *supra* note 21, at 276-79 (exploring "the problems created by mixing justification and excuse.").
[32] Robinson, "Competing Theories," *supra* note 22, at 45 (italics omitted).
[33] Id. at 46.
[34] *See supra* Part III.B.

criminal law. However, as the next Part explains, the inverse situation is perhaps even more interesting—and certainly has created a more difficult problem for defendants and defense lawyers.

II. THE UNKNOWINGLY JUSTIFIED DEFENDANT

Recall the previous scenario in which the defendant acted upon a mistaken but reasonable belief that he was about to be attacked by a "club-wielding attacker," but the person actually turned out to be an innocent "jogger carrying a flashlight whose bulb is out."[35] Now consider the inverse situation, which I'll call the reverse-jogger scenario: the defendant "mugs a jogger, only to find out that the [person] was a club-wielding attacker."[36] Although the defendant didn't realize it at the time, his attack, while motivated by criminal intent, actually saved an innocent third party from a mugging and beating. In other words, the defendant was "unknowingly justified" in attacking a person he thought was an innocent jogger.[37]

May the defendant use the defense of self-defense or, more precisely, defense of others? Under the reasons theory of justification, the answer is no. "[I]f the justifying circumstances do exist but the [defendant] is unaware of them and acts for a different purpose, the reasons theory denies a justification defense."[38] In other words, "[w]hile it might have been the right deed . . . it was for the wrong reason."[39]

That is also the majority view in the United States.[40] And to most of us it feels right—if not entirely, at least on some level. Even though the defendant's actions produced a net positive by saving an innocent person, the defendant acted with criminal intent. Yes, he got lucky by unknowingly attacking a maniac and would-be criminal instead of an innocent jogger. However, what he didn't know shouldn't shield him from conviction. His conduct should probably be punished and deterred—if for no other reason than to prevent a repeat performance that would almost certainly produce a less favorable net outcome.

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[35] Robinson, "Competing Theories," *supra* note 22, at 46.
[36] Id.
[37] Id. at 54.
[38] Id. at 47 (internal quote marks omitted).
[39] Id.
[40] Id. at 46 ("The 'reasons' theory of justification . . . is clearly dominant in the literature and the law."). A survey of state statutes reveals that, with regard self-defense and defense of others, the inquiry focuses on the *reasons* for the defendant's actions, not the net societal good that those actions might produce. *See, e.g.*, COLO. CRIM. CODE § 18-1-704 (allowing the defendant to use "force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force"); FLA. STAT. § 776.012 (allowing the defendant to use force "when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force."); NEB. REV. STAT. § 28-1409 (allowing the defendant to use force "when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force"); N.Y. PEN. CODE § 35.15 (allowing the defendant to use "force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person"); TEX. PEN CODE § 9.31 (allowing the defendant to use force when "the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force."); WIS. STAT. § 939.48 (allowing the defendant to use "force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person").

Of course, that bizarre reverse-jogger scenario is nothing more than a philosophical exercise. Aside from the extreme unlikelihood of something like that ever happening, even more unlikely is how anyone could, as a practical matter, ever extract the true facts and mental states from that situation. Nonetheless, it is that scenario, and in particular the unknowingly justified defendant, that has caused a great deal of angst and confusion for trial court judges in the real world. And that, in turn, creates problems for real-life defendants and their lawyers who assert self-defense or defense of others.[41]

To illustrate, consider a real-life case in which the defendant fired a gun from his vehicle into another vehicle ("the Charger") which was pursuing him at a high speed.[42] Given a very recent confrontation between the defendant and the driver of the Charger, and given how aggressively the Charger was chasing the defendant through city streets, the defense raised self-defense.[43] The state's position, of course, was that the defendant's belief that his life was in danger was not reasonable.[44] Fortunately for the defense, the Charger had a working dash-cam recorder that captured the occupants, clearly and repeatedly, stating their motive and intent to chase down and shoot the defendant.[45] Despite that, the state not only continued to prosecute the case, but also moved to exclude from trial all of the dash-cam-recorded statements that confirmed the defendant's belief about being in imminent danger.[46]

On what basis could a prosecutor possibly move to exclude evidence which proves that the defendant's belief was not only reasonable but also true, i.e., accurate? Other than the desire to win, a prosecutor's motion to exclude is rooted—albeit probably unknowingly—in the reasons theory of justification.[47] More specifically, just as the defendant in the reverse-jogger hypothetical shouldn't benefit from what he *didn't know*, i.e., that the person he attacked was actually a club-wielding maniac about to attack an innocent person, the defendant who shot into the Charger mustn't benefit from what *he* didn't know, i.e., that mere minutes before he fired at the Charger, its occupants were plotting to shoot and kill him.

In other words, under the reasons theory of justification, a defendant's reasons for attacking a jogger, shooting into a car, or doing any other act claimed to be in self-defense cannot include or be based on *what the defendant didn't know*.[48] Consequently, the argument goes, what the defendant didn't know is irrelevant and must be excluded.

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[41] This situation reminds me of the fictional philosophy professor who warned that "there's a difference between a theoretical world of philosophy bullshit, and real life, you know? Real, nasty, ugly life." IRRATIONAL MAN (Sony Pictures Classics 2015).

[42] Defendant's Response to State's Motions in Limine at 3, State v. Putala, 23-CF-1303 (Wis. Cir. Ct., Brown Cty., Mar. 30, 2025) (on file with the author).

[43] Id. at 6 (discussing "a disturbance from earlier" that occurred between the parties about ninety minutes before the shooting).

[44] Id. at 5.

[45] Id. at 6-7.

[46] Id. at 1.

[47] *See* Robinson, "Competing Theories," *supra* note 22, at 46.

[48] Legal philosophers might argue that it is not accurate to attribute all of the claims in the above sentence to the reasons theory of justification. Regarding "the Charger" car chase example, if a trial judge were to exclude the dash-cam recordings, legal philosophers might argue that it is more accurate to call that an *incorrect extension or misapplication of the reasons theory*. The same could be said of the real-life stabbing and shooting cases, and the hypothetical examples, subsequently discussed in this Part. While that

Such thinking is the norm for prosecutors and fairly common for trial court judges. For example, in a real-life stabbing case a defendant raised self-defense, claiming that the man he stabbed was the first aggressor.[49] In support, the defense tried to introduce testimony that, before the incident, the man told a third party "that he was getting tired of all the animosity. . . . And he said it's going to cause me *to have to kill the little son of a bitch* some day."[50] The prosecutor argued, consistent with the reasons theory, that to be admissible, "a threat . . . has to be communicated to the object of that threat and this was never communicated to [the defendant]."[51] The trial judge, apparently with little thought and even less of an explanation, excluded the threat: "The objection by the State is sustained. That comment may not be brought up in front of the jury."[52]

Similarly, in a real-life shooting case a defendant raised self-defense, claiming that the men he shot actually attacked him first—one "pulled out a gun" and the other "started rushing" the defendant.[53] At trial, the defense tried to introduce testimony that "two hours before the shooting" one of the men told third party witnesses: "There's [the defendant]. I'm going to get [him] because he's trying to talk to my girl."[54] And the other man concurred: "That's his girlfriend, we going to get him."[55] This evidence was excluded for a now-familiar reason: the defendant didn't know about it, so it couldn't have constituted his reason for shooting the men.[56] The trial court therefore prevented the third-party witnesses from testifying about "threats against defendant" because the threats were communicated only "to them, but not to defendant."[57]

And there even appears, at least at a superficial level, to be some legal support for the exclusion of such evidence. Many statutes on self-defense include language such as this: "[A] person is justified in using physical force upon another person in order to defend himself or a third person from what he *reasonably believes* to be the use or imminent use of unlawful physical force by that other person."[58] And, as jury instructions often explain, "[t]he reasonableness of the defendant's beliefs must be determined from the standpoint of the defendant at the time of the defendant's acts."[59]

If the reasonableness of the defendant's belief at the time of the alleged crime is the issue, then of what value is evidence, no matter how compelling, of which the defendant was unaware? Again, on some level, that is an appealing rhetorical question. But, on a different level, it seems absurd. A better rhetorical question is this: The defendant thought someone was going to kill him, but at trial the judge will prevent him from proving to the jury that someone was, *in fact*, going to kill him?

Hypothetical but realistic scenarios will demonstrate the absurdity of using the reasons theory to exclude the defendant's evidence. Assume the defendant shot and

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distinction is well-taken, for clarity I will continue to attribute such rulings simply to the reasons theory on which they are based, rather than to the misapplication of the reasons theory.

[49] Tate v. State, 981 S.W.2d 189, 190 (Tex. Crim. Ct. App. 1998).

[50] Id. (emphasis added).

[51] Id.

[52] Id.

[53] State v. Ransome, 467 S.E.2d 404, 406 (N.C. 1996).

[54] Id.

[55] Id. at 407.

[56] Id. at 406.

[57] Id.

[58] COLO. CRIM. CODE § 18-1-704 (emphasis added).

[59] WIS. J.I. CRIM. 800 (2023).

killed a person, allegedly in self-defense, because he thought that person was *pulling a gun* to shoot him first. It turns out the defendant was right. It was not a cell phone or some other object; rather, the police found an actual, loaded gun in the decedent's hand. That the gun was real and loaded was not known to the defendant at the time, so under the reasons theory it would be excluded from evidence. But why can't the defendant show that he was right, i.e., that his fears and beliefs turned out to be true?

Similarly, assume again that the defendant shot and killed a person, allegedly in self-defense, because he thought that person was *firing a gun* at him. The defendant would be allowed to testify, of course, that he heard what he thought were gunshots coming from the decedent, as that would be a reason for firing back in self-defense. But better still, it turns out the defendant was right: the police found bullets, which they matched to the decedent's gun, lodged in the wall right behind the defendant. This was not known to the defendant at the time, so under the reasons theory it would be excluded from evidence. But again, why can't the defendant show that he was right, i.e., that his fears and beliefs turned out to be true?

III. MAKING THE CASE FOR TRUE BELIEFS

There are philosophical, historical, and even scientific reasons why the defendant should be allowed to prove that he or she acted not just on reasonable beliefs, but on *true beliefs*, i.e., the defendant's beliefs about being in danger were correct.

A. *Problems with the Reasons Theory*

The entire basis for excluding the defendant's evidence—e.g., the decedent's loaded gun in hand or the bullets lodged in the wall behind the defendant[60]—is the reasons theory of justification.[61] For the purest form of the theory, recall the reverse-jogger scenario in which the defendant attacked a person he thought was an innocent jogger but who turned out to be a would-be attacker on the loose. The defendant therefore unknowingly saved an innocent person from attack. Yet, under the reasons theory, the defendant would have no defense; he would be convicted. There are at least three reasons why the reasons theory fails.

First, even in the extreme reverse-jogger scenario, why deny the defendant the right to claim self-defense or defense-of-others? Isn't the real issue whether the defendant inflicted a net harm?[62] And in this scenario, the defendant's actions created a net positive. An argument certainly could be made that *harm* should be the touchstone. After all, "[e]very known criminal law system gives significance in grading to whether a resulting harm or evil occurs."[63] Further, "[i]f the criminal law is extended to punish bad intent alone . . . it goes beyond its accepted role, appears unfair and overreaching, and ultimately loses its credibility and integrity."[64]

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[60] *See supra* Part II.
[61] *See* Robinson, "Competing Theories," *supra* note 22, at 46.
[62] *See supra* Part I.
[63] Robinson, "Competing Theories," *supra* note 22, at 68.
[64] Robinson, "A Theory," *supra* note 21, at 266 (quoting Justice Holmes that "the aim of the law is not to punish sins, but to prevent certain external results.").

Paul Robinson issued that warning fifty years ago, and since then the criminal law *has* been dramatically "extended" to include situations where there is no resulting harm,[65] and even situations where there is no resulting harm *and* no bad intent.[66] In some sense, then, Robinson's concern about the criminal law "overreaching" and losing "credibility and integrity" has already materialized and is therefore a moot point. But in another way, his claim that actual harm, and not bad intent, should be the touchstone is still valid. For example, "why not punish a man for having sexual intercourse with a twenty-two year old woman he reasonably believed to be under sixteen, since such conduct is similarly dangerous? We do not do so because *the harm requirement has not been met*."[67]

Second, the reasons theory is deeply flawed for yet another reason. It claims to require that the defendant have good reasons for acting in self-defense or defense of others, but it fails to produce results consistent with its rationale.

> Consider this hypothetical. Alphonse wishes to pummel his enemy, Buford, but has not done so for fear of being caught and punished. Alphonse lives in a rough neighbourhood. In the past, while sitting on his porch he has seen many people robbed and beaten but has never intervened on their behalf. One day, to his delight, he sees that Buford is one of several aggressors in a robbery. He immediately intervenes, beating attacker Buford. He is motivated not by a desire to protect the victim but rather by his desire to hurt Buford without risking liability. Does Alphonse deserve a justification defence under the rationale of the 'reasons' theory? Is his conduct 'morally proper'? Are his 'reasons' for pummelling Buford 'sound and good'? No. His reasons for acting are base indeed: his long simmering hatred. Yet, he nonetheless will get a defence under the typical 'believes' formulation of current law.[68]

At least one state has recognized this philosophical conundrum and has tried to account for it in its jury instruction, which states that "[a] battery is justifiable if the

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[65] For example, reckless endangerment statutes criminalize conduct that merely creates a risk of harm without any actual harm. *See, e.g.*, WIS. STAT. § 941.30 (2) ("Whoever recklessly endangers another's safety is guilty of a Class G felony."). Worse still, disorderly conduct statutes criminalize conduct that merely "*tends to* cause or provoke a disturbance," without any actual, resulting disturbance. WIS. STAT. § 947.01 (1) (emphasis added).

[66] *See* Michael Serota, *Strict Liability Abolition*, 98 N.Y.U. L. REV. 112, 117 (2023) (Explaining that "there is little reason to believe that strict liability promotes public safety.").

[67] Robinson, "A Theory," *supra* note 21, at 269 (emphasis added). It is possible that a person could be convicted of an attempt crime in such a situation. However, whether that is even theoretically possible will vary greatly by jurisdiction, and might depend on the precise nature of the underlying crime allegedly attempted. *See., e.g.*, WIS. STAT. § 939.32 (1) ("Whoever attempts to commit a felony or a [specified misdemeanor] may be fined or imprisoned or both" as indicated by the statute.). Interestingly, "attempt" in this statutory scheme requires, among several other things, "that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor." *Id*. at (3). When applying this statute to Robinson's sex hypothetical, would the woman's age (22 years) have "intervened" to stop the defendant's commission of the crime even though he actually went through with the intended sexual act?

[68] Robinson, "Competing Theories," *supra* note 22, at 50. For examples of current law and the "believes" formulation of their statutes, *see supra* note 40.

defendant was acting in defense of another," but "[t]he defendant must have acted *only* in response to that danger and not for some other motivation."[69]

But despite that corrective effort, the instruction just creates the inverse problem. This is easily demonstrated by changing the above hypothetical only slightly. Assume that Alphonse, who "has seen many people robbed and beaten" in the past,[70] has *always* intervened to successfully defend the victim. But this time, when Buford is the attacker, Alphonse would *not* be legally entitled to defend the victim and must instead sit there and watch the robbing and beating of an innocent person. Why? Because he hates Buford and would enjoy striking him; Alphonse would therefore have mixed motivations for defending this particular victim. He would *not* be acting "only in response to that danger," but instead, at least in part, "for some other motivation,"[71] i.e., "his desire to hurt Buford."[72] The reasons theory (including and especially as expressed in the above, real-world jury instruction) would therefore deny Alphonse a legal defense. The deep flaws of the reasons theory are now apparent.

Third, and most significantly, while the reasons theory has merit when the defendant's beliefs of imminent danger turn out to be mistaken, it should not be applied to deny real-life defendants their right to prove the truth of their beliefs. In fact, there is a significant difference between the reverse-jogger scenario, which is closely associated with the reasons theory, and real-life cases.

To begin, in the reverse-jogger scenario, the defendant had bad intent as he had no reason to believe the person he was attacking was himself an attacker; rather, the defendant was intending to victimize an innocent person. In stark contrast stand all of the real-world examples discussed earlier: the defendant firing into the Charger automobile that was aggressively pursing him through city streets; the defendant stabbing a person who attacked him first; and the defendant shooting two men who drew a gun and charged at him.[73] In all of those real-life cases, and in two previous hypothetical shooting cases as well,[74] the distinguishing feature is that the defendant *had a reason to believe* he was under attack or was about to be attacked.

The key point is this: if there was no evidence for a defendant to reasonably believe he or she faced imminent danger, the trial court would never allow that defendant to raise self-defense in the first place.[75] And as an added layer of protection for the state,

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[69] IDAHO J.I. CRIM. 1517 (2024).
[70] Robinson, "Competing Theories," *supra* note 22, at 50.
[71] IDAHO J.I. CRIM. 1517 (2024) (emphasis added).
[72] Robinson, "Competing Theories," *supra* note 22, at 50.
[73] *See supra* Part II.
[74] *See* id.
[75] *See, e.g.,* State v. Loggins, 918 N.W.2d 644, ¶ 19 (Wis. Ct. App. 2018) (trial court properly "denied [defendant's] request for a jury instruction on self-defense" because, despite defendant's claimed belief of "imminent death or great bodily harm," he "did not satisfy his burden to produce 'some evidence' that this was a *reasonable belief*."); Barron v. State, 630 S.W.3d 392, 403 (Tex. Ct. App. 2021) ("[T]he defendant bears the burden to produce some evidence to support the claim."). In fact, judges can be way too eager to exclude self-defense evidence. *See* Anjali Pathmanathan, *Directing Unconstitutional Verdicts: When Judges Become Jurors on Self-Defense*, 3 GA. CRIM. L. REV. 1, 1 (2025) ("[S]ome trial judges are denying the accused's valid request to instruct the jury on their self-defense claim based on personal opinions, prejudices, and biases about the credibility of the accused's proof.").

reasonable belief requires, as the term implies, objective reasonableness.[76] Further, the defendant's proffered evidence of reasonable belief must, of course, be independent of the evidence that was, at the time, unknown to the defendant.[77] In other words, without such independent evidence showing the defendant's reasonable belief of imminent danger, the evidence (unknown to the defendant) of the alleged victim's stated intentions, e.g., "it's going to cause me to kill the little son of a bitch,"[78] or of the alleged victim's actions, e.g., possessing a loaded gun,[79] would be a moot point.

That is why the defendant in the reverse-jogger scenario would never be allowed to assert self-defense or defense of others to begin with. And that is why real-life defendants who *have* evidence of a reasonable belief of imminent danger must not be denied their right to prove that their belief was also true.

B. *The Hierarchy of Beliefs: Excuse v. Justification*

A defendant should also be allowed to prove, at trial, that his or her beliefs were true because acting on true beliefs is *justified*, whereas acting on mistaken beliefs is, at best, *excused*.[80] A defendant is justified when acting in true self-defense because there is no net harm; a defendant is excused when acting upon a mistaken but reasonable belief, even though there *is* a net harm.[81] Historically, the distinction was of tremendous significance.[82] Today, the end result is an acquittal regardless of whether the defendant was justified or merely excused. But philosophical and sometimes even legal distinctions certainly remain.

Philosophically, under the reasons theory of justification, recall that a defendant's actions may be justified "(1) because the conduct *in fact is justified* or (2) because the [defendant] acts for a justified reason," i.e., based on a reasonable but mistaken belief.[83] "There can be little dispute that a mistaken belief in a justification operates as an excuse."[84] And it is certainly better to be justified in fact than it is to be excused due to a mistake. Legally, while the excused defendant is acquitted, "[w]e would have preferred that the excused offender not engage in the conduct" and "we advise others not to engage in such conduct in the future."[85] And as factual scenarios become more complex, there

[76] *See, e.g.*, WIS. J.I. CRIM. 800 ("[T]he standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position . . .").
[77] *See, e.g.,* State v. Ransome, 467 S.E.2d 404, 408 (N.C. 1996) ("In this case, defendant relied on the theory of self-defense and presented sufficient evidence, *other than the testimony in question*, in support of the theory to warrant a jury instruction on self-defense.") (emphasis added).
[78] Tate v. State, 981 S.W.2d 189, 190 (Tex. Crim. Ct. App. 1998).
[79] *See supra* Part II.
[80] *See supra* Part I; *see also* Kenneth W. Simmons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51, 62-66 (2008) (distinguishing between justification and excuse).
[81] *See supra* Part I.
[82] *See* Robinson, "A Theory," *supra* note 21, at 275 ("A person with a defense of justification was acquitted as if the finding had been that he did not do the killing, while a person with a defense of excuse was given a sentence identical to what he or she would have received without the defense[.] . . . The excused defendant could, however, escape execution if pardoned by the Crown.") (internal punctuation and citations omitted).
[83] Robinson, "Competing Theories," *supra* note 22, at 42 (emphasis added).
[84] Id. at 62.
[85] Id.

may be tangential, but real-world legal issues as well: "We allow others lawfully to resist excused conduct" and "[w]e prohibit others from assisting excused conduct."[86]

To more simply explain the distinction, if a defendant's "act [was] justified, there would of course be nothing to excuse."[87] The hierarchy of self-defense (and defense of others) can therefore be expressed as follows:

Belief of Danger Belief is True, i.e., Accurate **JUSTIFIED**
Belief of Danger Belief is Mistaken but Reasonable **EXCUSED**
Belief of Danger Belief is Mistaken and NOT Reasonable **Criminally Responsible**
NO Belief of Danger (E.g., the Reverse-Jogger Scenario) **Criminally Responsible**

This hierarchy—which distinguishes between true beliefs on the one hand, and reasonable but mistaken beliefs on the other—is not just theoretical. It is also recognized in some modern self-defense statutes.

For example, one statute reads that self-defense is permitted "for the purpose of preventing or terminating what the person *reasonably believes* to be an unlawful interference with his or her person,"[88] and "'reasonably believes' means that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable *even though erroneous*." [89] This statute explicitly raises the issue of reasonableness only within the context of mistaken beliefs. This necessarily implies that, in the alternative, defendants may simply prove that their beliefs were, in fact, true.[90]

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[86] Id. *See also* Robinson, "A Theory," *supra* note 21, at 277-91 (discussing numerous legal problems that arise when erroneously blending excuse and justification).
[87] Robinson, "A Theory," *supra* note 21, at 275.
[88] WIS. STAT. § 939.48 (1) (emphasis added).
[89] Id. at § 939.22 (32) (emphasis added).
[90] The same state's statute on defense of others also recognizes the difference between true beliefs and mistaken but reasonable beliefs. *See id*. at § 939.48 (4) ("A person is privileged to defend a 3rd person from *real or apparent* unlawful interference by another under the same conditions and by the same means as those under and by which the person is privileged to defend himself or herself from *real or apparent* unlawful interference . . .") (emphasis added).

And that also makes perfect sense, as a true belief is also a reasonable belief—certainly for our purposes even if not necessarily so.[91]

Being permitted to prove truth of a thing, rather than the reasonableness of, or even the existence of, a belief in that thing, is not a novel concept nor is it unique to the self-defense and defense-of-others doctrines. In fact, it has long been recognized in criminal law and employed for the benefit of police and prosecutors.

> For example, [in] *Regina v. Clarke*, . . . Clarke was arrested for loitering with intent to commit a felony. He was deemed a "suspected person," as required for that offense, because of his previous convictions. Yet at the time of his arrest the police officers had been unaware of his previous convictions. His conviction was upheld because "knowledge [of the previous convictions] on the part of the police is irrelevant and certainly not essential." Analogous tort cases are found in the area of malicious prosecution. It is generally held that the bad faith initiation of prosecution is not tortious if the person who is the object of the prosecution is found guilty, even if the person responsible for prosecution had no knowledge of the plaintiff's guilt when he initiated the suit.[92]

In other words, an arrest based on previous convictions is justified even when the police had no reasonable belief, or any belief at all, that those convictions existed. And a prosecution is justified even when the prosecutor had no reasonable belief, or any belief at all, of the defendant's guilt. The determining factor, in both cases, turned out to be *the truth* of the matter: the defendant in fact had the convictions to justify the arrest, and the defendant in fact was guilty of the crime the prosecutor charged. Regarding the prosecution scenario, "[t]hat the accused is in fact guilty of the charges brought against him is a complete defense [for the prosecutor] to a malicious prosecution action," even when there was a "total want of probable cause" when the prosecutor filed the charges.[93]

By comparison, a defendant who claims self-defense or defense of others isn't even seeking that much leeway. Unlike the police or prosecutors in the above examples, a defendant must first produce evidence that he or she reasonably believed they were in imminent danger in order even to assert the defense at trial. However, once a defendant does so, at that point, they must be permitted to prove the truth of the matter: that they were, *in fact*, in imminent danger, i.e., that their beliefs were, in fact, *true*.

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[91] It is possible to hold a belief for the wrong reasons. For example, I may believe that person A wants to harm me for reason A, when in fact he wants to harm me for a completely different reason, reason B. But if I act in self-defense, that is a distinction without a difference; I should still be permitted to show the truth of my core belief, i.e., that person A intended to harm me. It is also possible to hold a core belief that turns out to be true, e.g., Planet A is made of green cheese, even though there was no reason whatsoever to believe that and, in fact, the known evidence at the time tended to make the claim *not* believable. However, we need not worry about that scenario for the reason discussed earlier, i.e., if the defendant does not have an *objectively reasonable* basis for belief of imminent danger at the time of the alleged crime, independent of the evidence at issue, then the defendant will not even be permitted to raise self-defense in the first place. *See supra* notes 75, 76, and 77.

[92] Robinson, "A Theory," *supra* note 21, at 290 (internal citations omitted).

[93] Robert G. Byrd, *Malicious Prosecution in North Carolina*, 47 N.C. L. REV. 285, 298 (1969).

C. *Support from Psychological Sciences*

In real life, a defendant who acts in self-defense often must make a split-second decision in a chaotic situation that emerges very suddenly. In fact, the defendant's response is probably better labeled a *reaction* than a decision. "In the suddenness of an attack, a private person might simply react, and might not actually form all the supposedly requisite beliefs about the extent of the threat . . ."[94] And the entire event, from start to finish, may be over in mere seconds.

Yet, the statutes require the jury to pretend to determine the defendant's subjective beliefs and the objective reasonableness thereof—as if he or she had time to reflect, weigh the evidence, and make an informed decision.[95] To put it kindly, the statutes and jury instructions on self-defense can be "excessively cognitive."[96] To be less kind, they can be detached from the real world[97]—more so than even the philosophically-based reverse-jogger scenario discussed earlier.

From a scientific perspective, "[d]ual processing theories of brain function suggest that many human actions involve, first, an immediate, unconscious 'System I' response, followed by a more considered, reflective 'System II' response which might (or might not) 'correct' the initial response."[98] And a defendant's "[a]ctions in response to a threat of violence certainly fit this general pattern."[99] Not surprisingly then, "there is evidence that fright . . . can trigger mental processing of which the actor *is not conscious*."[100]

Many jury instructions make an admirable attempt to resolve this problem. For example, one instructs that, when the jury decides whether the defendant's mistaken beliefs were reasonable, "[t]he reasonableness of the defendant's beliefs must be determined *from the standpoint of the defendant at the time of the defendant's acts* and not from the viewpoint of the jury now."[101] The problem, though, is that self-defense usually occurs in "highly emotional, stressful, or emergency situations"; consequently, given what we know about the human brain, "it is often both unrealistic and unfair to expect the actor to formulate beliefs" in the first place.[102] The jury instruction, therefore, will be self-contradictory when applied to many situations.

Given that the defendant isn't even aware of his thinking processes, the reasonableness of his or her beliefs is not really the relevant issue at trial. And more importantly for our purposes, given the lack of self-awareness, the defendant certainly

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[94] Simmons, *supra* note 80 at 53.
[95] Id. at 78 ("In the fast-moving context of a violent attack, it is often unrealistic to expect the person attacked to consciously and carefully evaluate the precise extent of a threat . . .").
[96] Id.
[97] For an example of something that is unlikely to happen in the real-world, yet is contemplated by a jury instruction, see WIS. J.I. CRIM. 815 ("A person who provokes an attack may regain the right to use or threaten force if the person in good faith withdraws from the fight and *gives adequate notice of the withdrawal to his assailant.*") (emphasis added).
[98] Simmons, *supra* note 80 at 76-77 (citing Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment,* in T. Gilovich, D. Griffin, & D. Kahneman eds., HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49 (Cambridge Univ. Press 2002)).
[99] Simmons, *supra* note 80 at 77.
[100] Id. at 78 (emphasis added).
[101] WIS. J.I. CRIM. 800 (2023) (emphasis added).
[102] Simmons, *supra* note 80 at 58-59.

would not be in a good position to explain his or her mental processes to a jury. While one author argues for a revision of the existing self-defense law to accommodate this reality,[103] a simpler, immediate reform would be to allow the defense to demonstrate to the jury that, rather than being reasonable, the defendant's beliefs about imminent danger were accurate, i.e., were true beliefs. Fortunately, as discussed in the next Part, some existing legal doctrines actually support this approach.

IV. TRUE BELIEFS AND EXISTING LEGAL DOCTRINES

The previous Part provided philosophical, historical, and scientific reasons for why a defendant must be permitted to prove that his or her beliefs, when acting in self-defense, were not just reasonable but true. Unfortunately, defense lawyers who cite such theoretical, non-binding authorities, no matter how persuasive, are unlikely to overcome a prosecutor and trial judge bent on conviction.[104]

Fortunately, existing legal doctrines also support a defendant's right to prove not only that his or her beliefs underpinning self-defense were reasonable but also true. These doctrines, in turn, are all rooted in the constitutional right to present a full and complete defense.[105] This constitutional right should be asserted along with any of the more specific legal doctrines discussed below.

A. *Corroboration Evidence*

In most cases, the defendant's "theory of self-defense [is] inherently a *credibility determination* for the jury to resolve."[106] This is obviously the case when the prosecutor specifically challenges the defendant's self-defense claim, thus leaving the jury to resolve conflicting theories and evidence. But it is also true when the prosecutor doesn't offer any specific, contradictory evidence at all.

For example, assume the defendant asserts self-defense, presents "some evidence to support it" including his own testimony, and "no evidence was offered by the State to show that he did not act reasonably under the circumstances."[107] Even in this situation, the jury is still free to reject the defense and convict the defendant. "[T]he jury [is] not required to accept [the defendant's] claim and version of events as true[.] . . . Rather, the jury [is] free to judge the credibility and weight of all of the evidence presented."[108] And after evaluating the entire case, "[t]he jury [is] entitled to disbelieve [the defendant's] version of events."[109]

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[103] *See* id. at 80 (arguing that the proper test for self-defense should be whether the actor "demonstrates a reasonable degree of self-control" or possibly whether, due to the suddenness of the event, the actor is "reasonably ignorant about the facts"). The author contends that the second formulation, i.e., reasonable ignorance, "is often sensible" but overall is "inadequate" when compared with the "reasonable degree of self-control" test. *Id*.
[104] *See* Pathmanathan, *supra* note 75 at 1.
[105] *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006); Crane v. Kentucky, 476 U.S. 683, 690 (1986).
[106] Barron v. State, 630 S.W.3d 392, 404 (Tex. Ct. App. 2021) (emphasis added).
[107] Id.
[108] Id.
[109] Id. at 405.

A defendant must therefore be allowed to present evidence to corroborate his or her testimony.[110] Returning to the two earlier, realistic hypotheticals,[111] when a defendant testifies that he shot the decedent because he thought he saw the decedent pulling a gun, the jury is free to disbelieve him and convict, even if no witness expressly contradicts that testimony. And because the case hinges on the credibility of the defendant's testimony, the defense must be allowed to show that the decedent did, in fact, have a loaded gun in his hand when the defendant shot him. That is, the defendant's claim that he honestly thought the decedent was pulling a gun becomes "more . . . probable than it would be without the evidence" of the decedent's loaded gun in hand.[112]

Similarly, when a defendant claims that he shot the decedent because he heard gunshots coming toward him from the direction of the decedent, the jury is free to disbelieve him and convict, even if no witness specifically contradicts that testimony. Given that this situation, too, hinges on credibility, the defendant must be allowed to show that the decedent did, in fact, fire at him. How? By presenting evidence of the bullets lodged in the wall behind him. Again, the defendant's testimony that he honestly heard gunshots coming toward him is "more . . . probable than it would be without the evidence" of the bullets in the wall.[113]

This evidence—the loaded gun-in-hand in the first example and the bullets lodged in the wall in the second example—corroborate the defendant's testimony about what he claims to have seen (the decedent pulling a weapon) and heard (actual gunfire). The evidence tends to show that the defendant was not lying about his experiences. Evidence that corroborates the defendant's testimony is an essential part of the right to present a defense in any case that hinges, as nearly all do, on the credibility of witnesses, including the defendant-witness.[114]

In fact, jury instructions on credibility determinations specifically state as much. For example, one instruction tells jurors that "you may have to decide which testimony to believe and which testimony not to believe."[115] In so deciding, the instruction continues, "you may take into account . . . the reasonableness of the witness's testimony *in light of all the evidence*."[116] Certainly, the defendant's testimony that he saw the decedent pulling something that appeared to be a gun would be far more reasonable in light of the evidence that the decedent, in fact, had a loaded gun in hand.

Similarly, another instruction tells jurors that during their deliberations they should ask themselves: "Does the witness's testimony *agree with* the other testimony and *other evidence* in the case?"[117] Certainly, the defendant's testimony that he believed he was actually under fire would "agree with" with the "other evidence" of the bullets lodged in the wall behind him.[118] In fact, because jurors would expect to see such

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[110] *See* Chambers v. Mississippi, 410 U.S. 284 (1973) (reversing the defendant's conviction because he was prevented from presenting evidence that corroborated his defense).
[111] *See supra* Part II.
[112] FED. R. EVID. 401 (a) (2011).
[113] Id.
[114] *See Chambers*, 410 U.S. at 284.
[115] NINTH CIR. J.I. CRIM. 1.7 (2019).
[116] Id. (emphasis added).
[117] FLA. CRIM. J.I. 3.9 (2013) (emphasis added).
[118] Id.

evidence, excluding it would render the defendant's testimony incredible and probably unbelievable, thus infringing on the right to present a full and complete defense.[119]

B. *The First Aggressor*

In self-defense cases, situations in which one person randomly attacks another without reason or motivation are relatively rare. Rather, in most cases of combat, the underlying incident was a two-way street. That is why the law often bars defendants from asserting self-defense if they provoked the attack. One jury instruction, for example, reads: "You should also consider whether the defendant provoked the attack. A person who engages in unlawful conduct of a type likely to provoke others to attack, and who does provoke an attack, is not allowed to use or threaten force in self-defense against that attack."[120]

In a prime example of an "excessively cognitive" jury instruction,[121] it then goes on to list ways by which the defendant may, under some circumstances, regain the right of self-defense after provocation.[122] But that part of the instruction is convoluted and unrealistic. The reality is, if the defendant provoked the attack against which he or she defended, the jury will probably (and usually should) convict.[123] For that reason, it is incredibly important that the defendant be allowed to prove that the alleged victim was the first aggressor, i.e., that the defendant did not provoke the attack.

In a real-life example, a few days before the defendant shot the decedent, the decedent told a third party that "she was going to get rid of that son-of-a-bitch one way or another," specifically referring to the defendant, and flashed "a white-handled .22 caliber pistol."[124] The appellate court held that the threat, though unknown to the defendant, was admissible "to explain the conduct of the deceased in establishing who was the aggressor."[125] Such evidence, which tends to prove the defendant did not provoke the attack, is highly relevant to a self-defense claim.[126]

Similarly, consider the facts of another case discussed earlier: about two hours before the defendant shot the two decedents, those two men had told a third party that they were going to attack the defendant because he had been "trying to talk to" one of their girlfriends.[127] The appellate court held that their threat, though not communicated to the defendant, was admissible to show "their intentions to be aggressors in a

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[119] The analysis of such evidence may also need to be tied to the specific rules of evidence to win admissibility. These may include, depending on the type of evidence the defense seeks to admit and the surrounding facts, statutory exceptions to the hearsay rule, the relevancy statute, or, if the evidence is distant in time and place, the statute on "other crimes, wrongs, or acts." *See supra* note 134.
[120] WIS. J.I. CRIM. 815 (2020).
[121] Simons, *supra* note 80, at 53.
[122] WIS. J.I. CRIM. 815 (2020) ("A person who provokes an attack may regain the right to use or threaten force if the person in good faith withdraws from the fight *and gives adequate notice of the withdrawal* to his assailant.") (emphasis added).
[123] *See* id.
[124] State v. Butler, 626 S.W.2d 6, 11 (Tenn. 1981).
[125] Id.
[126] Id. at 12 ("'[W]e agree with the Court of Criminal Appeals that Mr. Butler was entitled to show the state of mind of the deceased so the jury could determine who was the true aggressor.").
[127] State v. Ransome, 467 S.E.2d 404, 406 (N.C. 1996).

confrontation with the defendant."[128] Conversely stated, "[o]ne element of self-defense is that defendant was *not* the aggressor in the confrontation."[129] A substantively identical way of framing it is that the defendant did not "provoke[] the attack," and therefore was entitled to act in self-defense.[130]

A defendant must therefore be allowed to show that the decedent—or merely the complaining witness, as the vast majority of self-defense cases do not result in death—was the first aggressor. Returning to the earlier example in which the defendant fired into the Charger automobile that had followed him through city streets, recall that the dash-cam video in the Charger recorded the occupants saying they were going to chase down and kill the defendant with their gun.[131] This evidence would be admissible to show that the occupants of the Charger, and not the defendant, were the first aggressors.[132] In other words, the evidence the prosecutor was seeking to exclude would show what the defendant is permitted, or even legally obligated, to demonstrate: that he did not "provoke[] the attack,"[133] and was therefore entitled to defend himself.[134]

C. *Context and Panorama Evidence*

When a defendant asserts self-defense, the prosecutor would ideally limit the evidence to a single snapshot of the defendant's aggressive act—whether shooting, punching, kicking, or something similar—without any context whatsoever. If jurors were presented with such a narrow view, they would be more likely to convict. But once the lens with which jurors view the case starts to widen, a fuller, more accurate picture emerges.

For example, returning to the defendant who fired into the Charger automobile,[135] the prosecutor wants the jury to hear only about the moment of the shooting. If the jury hears about the Charger recklessly pursuing the defendant through city streets, the prosecutor's case starts to show some cracks in its foundation. Worse yet for the prosecutor, if the jury hears the dash-cam recording in which the occupants are planning to shoot the defendant with their loaded gun, the prosecutor's case would probably collapse under its own weight.

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[128] Id. at 408.
[129] Id. (emphasis added).
[130] WIS. J.I. CRIM. 815 (2020).
[131] *See supra* Part II.
[132] *See* State v. Butler, 626 S.W.2d 6, 11 (Tenn. 1981); State v. Ransome, 467 S.E.2d 404, 406 (N.C. 1996).
[133] WIS. J.I. CRIM. 815 (2020).
[134] As briefly discussed in note 119, the defense may have to tie the evidence into specific rules of evidence to win admission. For example, while *Butler* was incredibly straightforward and merely discussed how the excluded evidence was relevant, *Ransome* was more methodical and discussed how the threats excluded by the trial court (a) were hearsay, (b) but satisfied an exception to the hearsay rule, and (c) also satisfied the relevancy statute. The court also discussed the elements of the defense of self-defense. Further, depending on the lapse of time between the decedent's or complaining witness's threat and the charged incident, it might also be necessary to address the relevant statute on "other crimes, wrongs, or acts." *See, e.g.*, FED. R. EVID. 404 (2011) (allowing the admission of other acts provided they prove something, such as intent, other than the decedent's or complaining witness's character). Using other acts, or general reputation evidence, to prove character is also a possibility, but poses additional hurdles and risks and is beyond the scope of this Article. *See, e.g.,* Barron v. State, 630 S.W.3d 392, 413-15 (Ct. App. Tex. 2021) (discussing first aggressor evidence, character evidence, and the methods of proof).
[135] *See supra* Part II.

The defendant, on the other hand, wants the jury to view the case through a wider lens. And the law often supports a wider view of the evidence. An event "cannot be viewed frame-by-frame if the finder of fact is to arrive at the truth."[136] Instead, if evidence is used in "establishing context and providing a full presentation of the case," then "it is admissible when analyzed as 'part of the panorama of evidence' surrounding the offense."[137] The test is whether the evidence involves "the principal actors" and "travel[s] directly to" a party's "theory" of the case.[138] Put another way, evidence may be admissible "if it is part of the panorama of evidence needed to completely describe the crime that [allegedly] occurred and is thereby *inextricably intertwined* with the [alleged] crime."[139]

In the Charger case, its aggressive pursuit of the defendant, and its occupants' possession of a loaded gun and their stated intention to shoot the defendant, would be admissible "panorama" evidence or "inextricably intertwined" evidence.[140] It establishes the necessary "context" for the shooting, and provides a "full presentation" of the case.[141] It involves the "principal actors"—the defendant and the alleged victims in the Charger—and travels to the defendant's "theory" that he was under attack and fired in self-defense.[142] To present only the defendant's act of shooting, without the context of what the Charger was doing and what its occupants intended, would be an artificial, "frame-by-frame" presentation that would suppress, rather than reveal, the truth.[143]

As final examples, returning to the two hypothetical scenarios discussed earlier—the shootings in which the police found a loaded gun on the decedent in one case, and found bullets lodged in the wall behind the defendant in the other[144]—such evidence would be "part of the panorama of evidence needed to completely describe" the event; in fact, it is "inextricably intertwined" with the event.[145] The presentation of such evidence is needed if the jury is "to arrive at the truth."[146]

D. *Confrontation and Impeachment*

Finally, the vast majority of self-defense cases involve the defendant's use of non-lethal force. After all, charges of battery-related crimes will overwhelmingly outnumber charges of homicide in every state. In most cases, therefore, no one has died and the complaining witness will testify at the defendant's trial. The complaining witness will likely deny wrongdoing and claim innocent intent; otherwise, the prosecutor wouldn't have much of a case against the defendant to begin with. And in addition to the

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[136] State v. Jensen, 794 N.W.2d 482, 501 (Wis. Ct. App. 2010) (overruled on other grounds).
[137] Id. at 502 (citing *State v. Johnson*, 516 N.W.2d 463 (Wis. Ct. App. 1994)).
[138] Id.
[139] State v. Dukes, 736 N.W.2d 515, 524 (Wis. Ct. App. 2007) (emphasis added) (citing Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 NW. U. L. REV. 1582, 1606 (1994)).
[140] Id.
[141] *Jensen*, 794 N.W.2d at 502.
[142] Id.
[143] Id. at 501.
[144] *See supra* Part II.
[145] *Dukes*, 736 N.W.2d at 524.
[146] State v. Jensen, 794 N.W.2d 482, 501 (Wis. Ct. App. 2010) (overruled on other grounds).

constitutional right to present a complete defense,[147] the defendant also has the constitutional right of confrontation.[148]

Confrontation of a witness serves many purposes, including "testing the recollection and sifting the conscience of the witness" and allowing the jury to decide "whether he is worthy of belief."[149] The goal of confrontation "is to ensure reliability of evidence."[150] However, this constitutional right "is a procedural rather than a substantive guarantee. It commands . . . that reliability be assessed in a particular manner: by testing in the crucible of cross examination."[151]

When cross-examining a complaining witness, few things are as important as impeachment with prior statements or physical evidence that contradicts their in-court testimony. This is so basic that it is already baked into some evidence codes, as a complaining witness's previous threats against the defendant, and a vast array of physical evidence, would be admissible under several different rules. For example, "[f]or the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible."[152] Further, such "bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely."[153] And few things are as probative of bias, prejudice, and motive as the witness's prior threat against the defendant.

Most significantly, when a complaining witness testifies at trial about their innocent intent, defense counsel should confront the witness with their prior threat against the defendant to specifically impeach their in-court testimony. While evidence codes vary by jurisdiction, often "[a] statement is not hearsay if" it is a "[p]rior statement by [the] witness" who "testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is: [i]nconsistent with the [witness's] testimony."[154] Then, if the witness still denies making the statement, counsel may prove it through extrinsic evidence by calling the person who heard the threat to testify and repeat it. "Extrinsic evidence of a prior inconsistent statement by a witness is . . . admissible" if "[t]he witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement."[155]

Of course, physical evidence that shows the complaining witness's bias, prejudice, or motive—or factually contradicts the witness's in-court testimony—is also admissible under the right of confrontation. Such evidence can be used to test the witness's recollection, sift their conscience, and determine their believability.[156] Confronting the witness with physical evidence also tests the reliability of the state's case.[157] In fact,

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[147] *See* Holmes v. South Carolina, 547 U.S. 319, 324 (2006); Crane v. Kentucky, 476 U.S. 683, 690 (1986).
[148] *See* U.S. CONST. amend. VI.
[149] Mattox v. United States, 156 U.S. 237, 242–43 (1895).
[150] Crawford v. Washington, 541 U.S. 36, 67–68 (2004).
[151] Id. at 68.
[152] WIS. STAT. § 906.16.
[153] State v. Williamson, 267 N.W.2d 337, 343 (Wis. 1978); *see also* Davis v. Alaska, 415 U.S. 308, 316 (1974) ("We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.").
[154] WIS. STAT. § 908.01 (4).
[155] Id. at § 906.13 (2).
[156] *See* Mattox v. United States, 156 U.S. 237, 242–43 (1895).
[157] *See* Crawford v. Washington, 541 U.S. 36, 67–68 (2004).

challenging the state's evidence in "the crucible of cross examination" is the very foundation of a criminal trial.[158]

V. LITIGATING TRUE BELIEFS: A SAMPLE BRIEF

How can defense counsel marshal the legal principles from Part IV, and even some of the broader, philosophical concepts from Part III, to defeat the prosecutor's attempts to exclude relevant evidence because it was unknown to the defendant at the time of the alleged crime? This section provides a model brief in reply to a prosecutorial motion to exclude such evidence. If defense counsel thought it necessary to raise this issue preemptively, the substance of the brief, below, could be reformatted to a motion to introduce evidence, either as a stand-alone motion or as part of a motion in limine.

This model brief is merely an example or starting point. Counsel must carefully consider the facts of each case and the law of the relevant jurisdiction when deciding the content, form, and timing of any brief or motion. Regarding content, the relevant sources of law may include statutes, case law, state constitutions, and jury instructions. (The brief below relies heavily upon pattern jury instructions, to which trial judges, at least in my experience, tend to give great deference.[159]) Additionally, regarding form and timing, local court rules or court-specific scheduling orders should also be consulted. Finally, to the extent that counsel decides to use any portion of the document below, he or she must ensure that all sources cited therein are accurate, applicable, and have not been explicitly overruled or even merely superseded by more recent law.

Because self-defense and defense-of-others defenses are largely governed by state law, the following brief relies heavily upon the authorities from a single state—I have selected Wisconsin, where I practice criminal defense—and would, of course, have to be reworked for use elsewhere. The model brief also addresses a specific, hypothetical fact pattern involving simple self-defense, the most common form of the defense, rather than the defendant's use of deadly force. The facts, too, must of course be modified to conform to the facts of any real-life case.

[STATE] and [COUNTY]

[PEOPLE] or [COMMONWEALTH] or [STATE] v. [DEFENDANT]

[CASE NUMBER]

DEFENDANT'S BRIEF OPPOSING THE PROSECUTOR'S MOTION TO EXCLUDE EVIDENCE

The following facts are undisputed and are taken from the prosecutor's own complaint: the complaining witness (CW) approached the defendant; the defendant punched the CW, knocking him temporarily unconscious; and the defendant left the scene. Also according to the complaint, the CW told police that the defendant attacked him for no reason; the

[158] Id. at 68.

[159] *See* Michael D. Cicchini, *Criminal Jury Instructions: A Case Study*, 84 ALBANY L. REV. 579, 579 (2020-21) ("Courts treat the jury-instruction committee's words as gospel, often praising the member-judges for their 'highly qualified legal minds.'") (quoting *State v. Harvey*, 710 N.W.2d 482, 487 (Wis. Ct. App. 2006)).

defendant told police that "I was defending myself" because the CW "first came at me and swung," and then "I saw him reaching for something in his pocket that I thought was a weapon, so I floored him."

The prosecutor charged the defendant with substantial battery, and has now filed a motion to exclude certain evidence at trial **relying on the theory that, because such evidence was not known to the defendant at the time, it cannot be used to prove that the defendant's beliefs "at the time of the alleged offense" were "reasonable."** WIS. J.I. CRIM. 800 (2023).

The evidence the prosecutor seeks to keep from the jury is: (A) the CW's statement to a witness, less than one hour before the fight, that "I am going to find [the defendant] and end him"; and (B) physical evidence, i.e., the knife the police found on the CW after he regained consciousness. This court must deny the prosecutor's motion and protect the defendant's right to present a full and complete defense. *See generally Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). More specifically, the following legal doctrines mandate the admissibility of the above evidence:

1. Reasonable Beliefs v. True Beliefs. Whether the defendant's beliefs are "reasonable" is only an issue when the defendant was *mistaken*. "'Reasonably believes' means that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable *even though erroneous*." WIS. STATS. § 939.22 (32) (emphasis added). The defendant is also allowed to prove—and the evidence at issue tends to prove—that he was *not* mistaken. That is, the CW's verbal threat and possession of the knife tend to prove that the defendant's belief of being in imminent danger was accurate, i.e., was *true*. Jurors are even instructed that "you are to search for the truth." WIS. J.I. CRIM. 140 (2024). The defendant is not obligated to concede, contrary to the evidence, that his belief of imminent danger was mistaken; he may also prove it was true.

2. Corroboration. Self-defense hinges on credibility. The jury instruction even reads: "In determining the credibility of each witness . . . consider . . . all other facts and circumstances . . . which *tend either to support or to discredit* the testimony." WIS. J.I. CRIM. 300 (2023) (emphasis added). In our case, the CW's threat one hour before the fight that "I am going to find [the defendant] and end him," *tends to support* the defendant's testimony that the CW was aggressive and the defendant honestly believed he was under attack, and *tends to discredit* the CW's claim of innocent intent. Similarly, evidence that the CW had a knife in his pocket *tends to support* the defendant's testimony that he saw the CW was reaching for something he thought was a weapon, and *tends to discredit* the CW's claim of innocent intent. It is not necessary that the defendant knew this evidence at the time; rather, it is admissible because it will "support" the defendant's testimony and "discredit" the CW's. *Id*.

3. The First Aggressor. The CW told police that the defendant attacked him, and the CW tried to fight back. If the defendant "provoked the attack," he "is not allowed to use or threaten force in self-defense." WIS. J.I. CRIM. 815. The defendant must therefore be allowed to prove that the CW *was the aggressor*. This is not unique to Wisconsin. Other states agree on the fundamental rule that evidence not known to the defendant, including an "uncommunicated" threat, is admissible to "explain the conduct of the [CW] in establishing *who was the aggressor*." *State v. Butler*, 626 S.W.2d 6, 11 (Tenn. 1981) (emphasis added). Similarly, because "[o]ne element of self-defense is that the defendant was not the aggressor," the CW's threat, even when "uncommunicated" to the defendant, "tends to make the existence of the fact that the

[CW was] the aggressor[] . . . more probable than it would be without the evidence." *State v. Ransome*, 467 S.E.2d 404, 408 (N.C. 1996). In addition to the CW's verbal threat, carrying a weapon when approaching the defendant has similar evidentiary value.

4. Context and Panorama Evidence. If the court were to suppress the evidence and the jurors were to hear, without any context, that the defendant punched the CW, they would see only a single snapshot of a larger event. But an event "cannot be viewed frame-by-frame if the finder of fact is to arrive at the truth." *State v. Jensen*, 794 N.W.2d 482, 501 (Wis. Ct. App. 2010) (overruled on other grounds). Instead, the CW's verbal threat and possession of the weapon are necessary for "establishing context and providing a full presentation of the case." *Id*. Such evidence involves "the principal actors," supports the defendant's "theory" of the case, and is therefore "admissible when analyzed as 'part of the panorama of evidence' surrounding the offense." *Id*. at 502 (citing *State v. Johnson*, 516 N.W.2d 463 (Wis. Ct. App. 1994)).

5. Confrontation and Impeachment. In our case, the CW told police that the defendant attacked him for no reason, and will so testify at trial. The defendant has the constitutional right of confrontation, which equates to "testing in the crucible of cross examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The defense is entitled to cross-examine him about his prior, inconsistent statement that "I am going to find [the defendant] and end him," and his possession of a weapon, both of which contradict his claim of innocent intent and further demonstrate his bias and motive. These lines of cross-examination are not only guaranteed by the constitution, but also by state law. *See, e.g.*, WIS. STAT. § 908.01 (4) (prior inconsistent statement not hearsay); WIS. STAT. § 906.16 ("evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible."); *State v. Williamson,* 267 N.W.2d 337, 343 (1978) ("bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to prove that a witness has a motive to testify falsely.").

Consequently, pursuant to the defendant's constitutional right to present a full and complete defense, including presenting evidence pursuant to the above legal doctrines, this court must deny the prosecutor's motion and allow the jurors "to search for the truth." WIS. J.I. CRIM. 140 (2024).

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CONCLUSION

When a defendant asserts self-defense or defense of others, the defense may seek to introduce evidence, at trial, that was unknown to the defendant at the time of the incident.[160] For example, the defense may call a witness who heard the alleged victim say, ten minutes before the incident, that he was going to "find" the defendant and "end him."[161] But trial judges often exclude such testimony because the threat, although heard by a witness, was not communicated to the defendant.[162] Therefore, the judicial

[160] *See supra* Part II.
[161] *See* id.
[162] *See* id.

reasoning goes, the threat is not relevant in determining whether the defendant "reasonably believed" he was in imminent danger when he struck the alleged victim.[163]

The theoretical foundation for that decision is called the "reasons theory of justification."[164] That is, the defendant didn't know about the threat, and therefore it couldn't have influenced his reason for acting.[165] However, the reasons theory is deeply flawed.[166] For philosophical, historical, and even scientific reasons, a defendant must be allowed to prove that his or her belief of imminent danger was not just reasonable, but was also accurate, i.e., was a true belief.[167]

Fortunately, several existing legal doctrines are useful to the defense in seeking the admission, at trial, of the alleged victim's threats and other evidence not known to the defendant at the time of the incident.[168] Specifically, evidence that proves the defendant's beliefs at the time of the event were not just reasonable, but also true, corroborates the defendant's testimony,[169] shows that the alleged victim was the first aggressor,[170] provides the necessary context for the jury,[171] and is a central part of the defendant's constitutional right of confrontation.[172]

In order to aid defense counsel in representing clients who assert self-defense or defense of others, this Article draws from the relevant theories and legal doctrines to provide a sample brief opposing a prosecutorial motion to exclude such highly relevant evidence from trial.[173] If defense counsel deems it necessary, the brief can also be transformed into a motion to proactively seek admission of such defense evidence.[174]

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[163] *See* id.
[164] *See* id.
[165] *See* id.
[166] *See supra* Part III.
[167] *See* id.
[168] *See supra* Part IV.
[169] *See supra* Part IV.A.
[170] *See supra* Part IV.B.
[171] *See supra* Part IV.C.
[172] *See supra* Part IV.D.
[173] *See supra* Part V.
[174] *See* id.