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Abstract

Although it is an unavoidable aspect of any self-defense situation, risk is an underdeveloped concept in the self-defense literature. In this paper, I argue that the existence of objective risk can justify the use of self-defense, even in cases in which defensive action is not clearly necessary. To accomplish this, I first introduce the concept of risk, seeking a definition that incorporates both objective and subjective elements in a manner appropriate to a discussion of self-defense. In section two, I make a case for the appropriate way to carry out and apply risk analysis in self-defense situations, addressing questions of perspective, types of threats, and availability of alternatives to the use of defense of force. Based on this discussion, I will suggest that it is unjust to require a person to take on extra risk when that risk can be transferred to the person responsible for the creation of the risk. In section three, I discuss some significant implications the consideration of risk as suggested by my analysis has for current approaches to self-defense doctrine. Most importantly, my analysis indicates that self-defense can be justified even if using violent force against an aggressor is not strictly necessary.

Consider the following two scenarios:

> Case 1: Dr. Maleficus, an evil scientist, has forced Bill into a game of Russian roulette. Dr. Maleficus, being the brilliant scientist that he is, has created a gun that is bigger on the inside and has a thousand chambers, only one of which actually contains a bullet. Dr. Maleficus is about to pull the trigger. May Bill kill him in self-defense?[1]
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> Case 2: Westley has been captured by the Dread Pirate Roberts, who has the reputation of killing all his hostages without mercy. The Dread Pirate Roberts, however, being in an amiable frame of mind, has decided to let Westley live one more night. Before retiring, he says, "Good night, Westley. Sleep tight. I'll most likely kill you in the morning." During the night, Westley discovers that his door is unlocked and that the Dread Pirate Roberts carelessly left his sword lying on the deck. May Westley kill the Dread Pirate Roberts in self-defense?[2]

Does Bill or Westley have a higher chance of dying if he does not choose to act in self-defense? We do not have an exact numerical probability by which to estimate the chances that the Dread Pirate Roberts will kill Westley in the morning, but it is probably safe to assume that the probability is higher—indeed, significantly higher—than the one in one thousand chance of dying that Bill faces. Arguably, then, if Bill should be able to act in self-defense in Case 1, Westley should be able to act in self-defense in Case 2, given his chance of dying is much greater than Bill's. The problem, though, is that current self-defense doctrine as employed in many jurisdictions demands a different evaluation: according to the rule of self-defense, Bill may kill Dr. Maleficus, but Westley may not kill the Dread Pirate Roberts in self-defense.

In this paper, I will make the case for the claim that Westley should be able to employ self-defense against the Dread Pirate Roberts. In doing so, I will focus my discussion on a concept that has so far been underdeveloped in the self-defense literature: the concept of risk. I will argue that the existence of objective risk can justify the use of self-defense, even in cases in which the possibility of death or serious injury is not imminent and situations in which defensive action is not clearly necessary. To accomplish

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[1] Russian roulette cases crop up frequently in the self-defense literature. For an example of how a Russian roulette case can contribute to constructing a theory of self-defense, see Kimberly Kessler Ferzan, "Justifying Self-Defense," *Law and Philosophy* 24 (2005): 711-749.

[2] This case, in its essential features, is a slightly more theatrical version of Paul Robinson's hostage scenario. See Paul Robinson, *Criminal Law Defenses 2* (St. Paul: West Publishing Co., 1984): 77. Note that one way to accommodate the intuition that the hostage character should be able to act in self-defense in these sorts of cases is to claim that self-defense is being employed not directly against the threat of future death but rather against the ongoing harm resulting from loss of freedom and violation of rights. For this sort of response, see Onder Bakircioglu, "The Contours of the Right to Self-Defense: Is the Requirement of Imminence Merely a Translator for the Concept of Necessity?" *Journal of Criminal Law* 72 (2008): 161. Whether or not Bakircioglu is correct in his analysis, for the purposes of this paper I believe we can safely disregard this objection, as some real-life cases I will examine later on will make it clear this sort of analysis does not always solve the problem.

this, I will first introduce the concept of risk, highlighting the epistemic difficulties inherent in self-defense situations. In section two, I will make a case for the appropriate way to carry out and apply risk analysis in self-defense situations, suggesting a person should not be required to take on extra unjust risk when that risk can be transferred to the person culpable for the creation of the risk. In section three, I will discuss some significant implications the consideration of risk as suggested by my analysis has for current approaches to self-defense doctrine.

1. What is Risk?

Risk is most simply understood as a probability of harm.[3] When we engage in risky behavior, we understand we are creating the chance that a certain negative outcome will materialize as a result of our conduct.[4] Thus, in order to understand risk, we need to grasp its two main constituent concepts: probability and harm.[5] For the purposes of this project, we can treat harm as a fairly straightforward idea: anything that serves to provide a setback to a person's interests can count as a harm.[6] Probability is quite a bit more complicated. We need to distinguish between two different types of probability, and hence two different approaches to the notion of risk.

Probability can be objective or epistemic. A common way of describing objective probability is the use of relative frequencies. On this view, the probability that an event will occur is determined by the rate at which the event occurs in similar situations.[7] This frequency is simply an objective fact about the world, independent of whether anybody can come to know that fact. On the other hand, epistemic conceptions of probability appeal to at least some degree of subjectivity when making probability assessments. Epistemic conceptions of probability fall on an objective/subjective spectrum, and the view of epistemic probability with which we will be concerned for this project combines objective and subjective elements. This view is what Stephen Perry calls the "reasonableness account" of epistemic probability, and he claims this account is grounded in two fundamental assumptions: first, relative frequencies as hypothesized by the purely

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[3] John Oberdiek, "Towards a Right Against Risking," *Law and Philosophy* 28 (2009): 369.
[4] Stephen R. Perry, "Risk, Harm, and Responsibility," in *Philosophical Foundations of Tort Law*, ed. David Owen (Oxford: Oxford University Press, 1995), 322.
[5] *Id*.
[6] This definition comes from Stephen Perry, *id*. Interestingly, on this definition, it seems that risk itself could be a harm, as being forced to live with risk could be a setback to a person's interests on many levels. Some scholars have made arguments that risk itself is a harm along these lines: for an argument based on the negative value of risk, see Vera Bergelson, "Self-Defense and Risks," in *The Ethics of Self-Defense*, ed. Christian Coons and Michael Weber (Oxford: Oxford University Press, 2016): 134-135; for an argument grounded in the concept of autonomy, see Oberdiek, "Towards a Right Against Risking," 367-392; for an argument centered on the claim that risk makes a person worse-off than he would have been otherwise, see Claire Finkelstein, "Is Risk a Harm?" *University of Pennsylvania Law Review* 151 (2003): 963-1001. If risk itself is a harm, this assertion might further support the claim that the existence of risk can legitimize the use of self-defense. This is a controversial stance, however, and so I will not make use of it in my own argument.
[7] Perry, "Risk, Harm, and Responsibility," 323.

objective account really do exist; second, people are capable of estimating those frequencies.[8] Thus, the reasonableness account of epistemic probability incorporates the objectivity of relative frequencies and a subjective assessment supported by those relative frequencies.

When applying these two conceptions of probability to the concept of risk, it becomes clear that we can approach our analysis of risk in two different ways. If we make use of the purely objective account of probability, then risk is a relative frequency calculated by the function of the number of times the risk is manifested in actual harm divided by the total number of relevantly similar situations. An epistemic conception of probability, on the other hand, will yield a conception of risk in which risk is a subjective estimation of the chance the harm threatened by the risk will come to fruition. Using a purely subjective epistemic account, risk is nothing more than what the person at risk believes it to be, but the reasonableness account of epistemic risk leads to a subjective but evidence-driven estimation of the relative frequencies posited by the objective view.

For the purposes of this project, we will be concerned with the reasonableness account of epistemic risk. Both the purely subjective epistemic version and the purely objective version include pitfalls that significantly undermine the concerns of the self-defense doctrine under consideration. When working with a purely subjective conception of risk, the chance the harm will materialize is divorced from reality. On the other hand, it seems questionable that we could ever achieve a useful assessment of risk that is purely objective—indeed, the very process of a person assessing the probability that a harm will materialize necessitates the inclusion of a subjective element.[9]

2. Assessing Risk for Self-Defense

Now that we have a grasp of the main features of risk, we can apply this concept to the theory of self-defense. An essential feature of self-defense situations is that, given our epistemic limitations, these situations always involve a certain degree of uncertainty, some more so than others.[10] We can never be sure whether self-defense is truly necessary or not.[11] As a result, every case of self-defense demands an evaluation of risk. Given this,

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[8] *Id.* at 325.

[9] Claire Finkelstein argues we do not ever have access to truly objective probabilities: "[T]here is no such thing as an objective probability. There are only degrees of belief or confidence about the likelihood of a certain event occurring … Thus although an agent's degree of belief will be based on real observations he can make, likelihoods cannot be a matter of objective facts." Finkelstein, "Is Risk a Harm?" 973. Larry Alexander and Kimberly Kessler Ferzan support a similar view. claiming that "objective probabilities are illusory." See Alexander and Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009): 31.

[10] As Larry Alexander observes with respect to self-defense, "Only God can see the future with absolute certainty." Larry Alexander, "A Unified Excuse of Preemptive Self-Protection." *Notre Dame Law Review* 74 (1999): 1478. Because we cannot see the future, self-defense is always preemptive, and as a result, uncertainty will always be present to some degree. See Bergelson, "Self-Defense and Risks," 132.

[11] This surety goes for the defender at the moment of self-defense as well as for the court after self-defense has taken place. In fact, the only situations in which it seems we can be sure that self-

it might seem surprising that risk has received relatively little attention within the context of self-defense.[12]

In section one, I explained the conception of risk this project will be utilizing. This explanation gives us a structure with which to proceed, but it does not tell us how we ought to go about assessing the level of risk present in a scenario on a practical level or how that risk should be employed when thinking about situations of self-defense.[13] From what perspective should we assess risk? What sort of threats should we take into account when estimating the level of risk? To what degree should we take into consideration alternatives that might allow the potential victim to dispel the risk? I will address each of these three questions in turn.

2.1 Perspective

I endorsed the "reasonableness" account of epistemic risk for two reasons: first, because it maintains a tie to objectivity in that it attempts to estimate accurately the important relative frequencies; second, because it recognizes the fact that whenever a person carries out a risk evaluation, that evaluation will be conducted from a certain perspective. The question at hand, then, is what perspective is the appropriate one to consider in self-defense scenarios. I want to evaluate three possible answers to this question, rejecting two and tentatively accepting the other. I will not consider the perspective of the aggressor, because considering this perspective ceases to assign meaning to the concept of risk in the first place: since the aggressor is in control of the situation, from his perspective the risk to the victim will essentially be either 100% or 0%, depending on whether or not he truly intends to kill.[14]

First, consider the perspective of the defender. In most situations, it seems that the defender will form a belief that he is at risk based on the presence of certain behaviors or threats manifested on the part of the aggressor. In other words, the defender's belief that he is at risk will not come out of thin air. But is this belief enough? Even if the defender forms his belief based on evidence that he is at risk, it seems that in many situations, such a belief will also be influenced—in fact, perhaps influenced even more greatly—by subjective factors such as fear or hate.[15] Human beings are emotional creatures, and as

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defense was necessary are situations in which the potential defender chose *not* to use self-defense and was afterwards killed by the aggressor.

[12] Bergelson observes that "the current law of self-defense seems to ignore the degree of risk that the target of an offense may be actually hurt." Bergelson, "Self-Defense and Risks," 141.

[13] Ferzan addresses this question, concluding the perspective of the defender is the only appropriate starting point from which to assess the risk present in a self-defense situation. See Ferzan, "Justifying Self-Defense," 739-748.

[14] I suppose it could be argued that the aggressor cannot know if he is about to suffer a fatal heart attack in the five seconds before he intends to pull the trigger, but I think that we can safely ignore this sort of objection here.

[15] People who have been under a great deal of stress or have dealt with abuse for a significant amount of time might be especially likely to estimate risk based on their subjective fears rather than objective evidence. For a discussion of how chronic pressure can affect people's judgment, see Richard

such, we are radically subject to distorted perceptions of reality. A potential defender will probably be able to discern that he is facing some sort of threat, but he might not be able to evaluate accurately the nature and degree of the riskiness in his situation. For this reason, I believe that making the defender's perspective the only one we take into consideration when evaluating risk is implausible.[16]

Next, consider the perspective of a "reasonable" defender. The "reasonable person" standard is incredibly muddled, and it seems no one really knows what it is supposed to mean.[17] For this project, though, consider the following scenario and the meaning of 'reasonable' it entails:

> Vulcan Bob has been incarcerated in a human prison for obnoxious theorizing. As is typical of a Vulcan, Vulcan Bob is extremely rational: his emotions do not lead him astray in his decision-making processes, and he is capable of accurately evaluating the probable outcomes of many situations. Unfortunately, Vulcan Bob has been placed in a cell with another prisoner, Evil Joe, who has a reputation for sexually abusing his cellmates – especially those with strangely shaped ears. Within the first day in the cell, Evil Joe begins to threaten to rape Vulcan Bob in the middle of the night. Vulcan Bob evaluates the risk he faces and calculates that there is (roughly) a 90% chance that Evil Joe will actually attempt to rape him within the next week.

In this scenario, Vulcan Bob is still assessing the risk from a subjective perspective; that is, he is assessing it based on the access he has to the evidence that he is indeed at risk. However, Vulcan Bob is assessing risk *purely* based on the objective data about this particular situation.[18]

The sort of risk assessment in which Vulcan Bob engages would probably be an excellent standard by which to evaluate risk. It is objective in that it is concerned with the available evidence, and it is subjective in that it is still conducted from a limited epistemic

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Lippke, "Chronic Temptation, Reasonable Firmness, and the Criminal Law," *Oxford Journal of Legal Studies* 34, no. 1 (2014): 75-96.

[16] Ferzan accepts the perspective of the defender as the proper perspective for assessing risk. However, she does so only after establishing that what she calls "objective triggering conditions" exist in the particular situation. On her view, once objective triggering conditions have been established, any possibility of risk is enough to merit self-defense on the part of the potential victim; as a result, it does not significantly matter whether or not the victim's perceptions are being distorted by emotional factors. My project is slightly different, in that I want to determine the correct perspective from which to decide whether the triggering conditions in fact create risk. For Ferzan's discussion of triggering conditions, see Ferzan, "Justifying Self-Defense," 733-738.

[17] For a brief overview of some of the approaches to the "reasonable person" and a discussion of the problems associated with the vagueness of the standard, see Andrew Ingram, "Parsing the Reasonable Person: The Case of Self-Defense," *American Journal of Criminal Law* 39 (2012): 430-433.

[18] For an argument in support of this sort of approach, see Michael J. Zimmerman, *Living with Uncertainty: The Moral Significance of Ignorance* (Cambridge: Cambridge University Press, 2008): ix-xi, 97-117. Vera Bergelson rejects this approach for practical reasons similar to mine: see Vera Bergelson, "Self-Defense and Risks," 137.

perspective. I believe, however, that this approach to risk assessment is also implausible, mainly because it is, arguably, impossible. No one, whether the defender or a third party, will be able to assess truly impartially the risk associated with an isolated situation. Vulcans, in real life, do not exist.

Finally, I want to consider the third-party perspective. Vera Bergelson argues for the use of what she calls a "contemporaneous objective standard" when evaluating the degree of risk present in a situation.[19] The key question for this approach is this: "What is the likelihood that, *in the ordinary course of things*, this risk will materialize?"[20] This approach combines both objective and subjective elements in a way that seems to fit well with the purpose of the self-defense doctrine. On the one hand, it accounts for the limited epistemic perspective of the person assessing the risk, as such a person must try to answer the key question based on whatever evidence he has about the situation, and similar situations, at that time. It also recognizes the difficulty of precisely assessing the degree of risk when human agents are involved.[21] On the other hand, it makes use of the concept of relative frequency by use of the notion of "the ordinary course of things."[22] Despite our limited epistemic perspective, we can still access statistical information that will help us estimate the likelihood that a risk will come to fruition.[23]

There is an objection to this approach that is worth considering. The contemporaneous objective standard demands that we compare the current situation with other similar scenarios. The problematic question is as follows: what counts as the set of similar scenarios? This question is a generality problem, a problem of reference class. It seems we could infinitely redraw the relevant reference class by specifying different levels

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[19] Bergelson, "Self-Defense and Risk," 137.

[20] *Id*. Note also that either the defender or the trier of fact could ask this question, but doing so would involve a detached, third party perspective in either case.

[21] This is the case even in instances of Russian roulette, when we can calculate some portion of the probability with complete precision. If we know how many chambers the gun has and how many bullets are in the chambers, then we can calculate the exact probability that the victim will be killed if the gun is fired. But it does not tell us anything about the probability that the gun will, in fact, be fired: "To be clear, this approach does not allow for the precise calculation, mainly because of the difficulty in predicting the choice of a free moral agent, particularly the choice to act wrongfully; however, it gives us at least a general sense of high and low probability and it does so from the objective perspective required by the justificatory nature of self-defense." *Id*. at 137-138.

[22] The phrase, "in the ordinary course of things," is, admittedly, a bit vague. A comment in *Roy v. U.S.* clarifies what Bergelson means by this phrase in the context of the contemporaneous objective standard: "The phrase "in the ordinary course of things" refers to what may reasonably ensue from the planned events, not to what might conceivably happen, and in particular suggests the absence of intervening factors." *Roy v. U.S.*, 652 A. 2d 1098, 1105 (D.C. Ct. App. 1995).

[23] Christopher Schroeder suggests that statistical evaluation, when applied to a large enough sample, can give us an excellent estimate of the chance that risky behavior will result in harm: "Once the probability of harm associated with a risky action can be gauged, an axiom of statistical theory holds that a sufficient number of repetitions of that action practically guarantees that the harm actually will occur." See Christopher Schroeder, "Rights against Risks," *Columbia Law Review* 86 (1986): 500. Given the difficulty of predicting the behavior of human agents, this claim might be overly optimistic, but it seems that statistical information certainty can help us make accurate estimations of risk.

of generality for the similarity requirement.[24] To illustrate this problem, at this point it will be helpful to introduce a few real-life cases that will continue to form a basis for this discussion. These cases are all concerned with threats of death or serious bodily harm in prison contexts.[25]

> *State v. Schroeder*: Schroeder shared a cell with Riggs, who had a reputation for violence and forcing sex upon fellow inmates. For a while, Riggs had been coercing Schroeder into gambling with him, and, as a result, Schroeder owed Riggs a large debt, which Riggs had been threatening to collect in the form of homosexual favors. On the night in question, before going to sleep, Riggs said that he might "collect some of this money I got owed me tonight." While Riggs was asleep, Schroeder stabbed him in the back with a table knife.[26]
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> *U.S. v. Haynes*: Haynes, an inmate at a federal prison, was convicted of assault after he poured scalding oil on the head of a fellow inmate, Nelson Flores-Pedroso, while Flores-Pedroso was sitting in the prison cafeteria. Flores-Pedroso had a reputation for coercing weaker inmates, and for about a month prior to this assault, Flores-Pedroso had been threatening Haynes with forced homosexual acts if Haynes did not use his position as a member of the food preparation staff in the kitchen to do favors for Flores-Pedroso.[27]
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> *U.S. v. Bello*: Bello, an inmate who was working in the food line at the prison cafeteria, denied second helpings to the victim Santana-Rosa as not all the prisoners had been served yet. Santana told Bello that he was going to "crack open [Bello's] head," and after the meal was over another inmate came up and told Bello

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[24] John Oberdiek observes that if we can infinitely redraw the reference class and have no guidelines as to how to specify the correct reference class, an objective account of probability becomes every bit as indeterminate as a subjective account. See Oberdiek, "Towards a Right Against Risking," 368.

[25] It is worth noting that the question of whether prison inmates should be able to plead self-defense at all has been answered in different ways. A negative answer to the question might be motivated by the intuition that, as prison inmates are responsible for ending up in prison in the first place, they are indirectly responsible for the threat that motivates acting in self-defense. As a result, they should not be able to plead self-defense at all. For example, in *Rowe v. Debruyn*, Rowe was denied self-defense as a complete defense by prison officials at a disciplinary hearing after having been involved in a brawl with another inmate, Michael Evans. Evans, who occupied the cell next to Rowe, made sexual demands upon Rowe, and the morning after making these demands, Evans entered Rowe's cell and attempted to rape him. Rowe responded by striking Evans on the head with a pot. The circuit court held that the prison officials did not violate Rowe's due process rights under the Fourteenth Amendment by not allowing him to plead self-defense as a complete defense. See *Rowe v. DeBruyn*, 17 F.3d 1047 (7th Cir. 1994). For an argument in support of the right of prison inmates to employ self-defense in general, see Anders Kaye, "Dangerous Places: The Right to Self-Defense in Prison and Prison Conditions Jurisprudence," *University of Chicago Law Review* 63, no. 2 (1996): 693-726.

[26] *State v. Schroeder*, 199 Neb. 822 (1978).

[27] *U.S. v. Haynes*, 143 F.3d 1089 (7th Cir. 1998).

> that Santana planned to assault him in the recreational yard later on. Later, during the recreational period, Bello attacked Santana, who was playing dominoes, with a broom handle and gave him a serious concussion.[28]

These cases have many similarities: all involve verbal threats, all involve a fellow inmate with whom the potential victim had some prior contact, etc. But significant differences exist as well. Schroeder and Riggs were cellmates. In *Bello*, the threat was reiterated through another individual, which was not the case in *Schroeder* or *Haynes*. Schroeder and Haynes both faced repeated threats, whereas Bello's situation seemed to be a one-time occurrence. So, what should the criteria be for determining the relevant reference classes for these situations?

One approach might be to make the reference class as narrow and specific as possible, thereby restricting the question of what might happen in the ordinary course of things to cases with essentially all the same features. This approach, however, seems to be unhelpful in that it simply does not give us enough comparative information, as the variation between cases will be great enough to restrict the reference class to an extent that will make it useless. In fact, if the reference class were restricted far enough, the meaningfulness of the objective contemporaneous standard would dissipate. Rather than focusing on the minute details of the case, I suggest that the appropriate way to establish the reference class is with broader criteria, using essential features as the means by which to include similar cases. So, in the above three cases, it might be appropriate to separate *Schroeder* and *Haynes* from *Bello*, as in the former two cases, the defendant faced repeated threats that were backed by the reputation of the aggressor. It is unrealistic to assume that we can establish indubitably clear lines for reference classes, but I believe that we are capable of distinguishing enough relevant similarities between cases to render the concept a useful tool.

2.2 Types of Threat

We have established that an objective contemporaneous standard for assessing risk is the best one we have at our disposal. Next, we must determine what the appropriate inputs are for this method of assessment. In other words, what sort of things should we consider when determining whether relevant risk exists in a self-defense situation?

Some of the most important indicators of risk, at least for situations of self-defense, are threats. A threat is something that indicates the possible existence of future harm.[29]

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[28] *U.S. v. Bello*, 194 F.3d 18 (1st Cir. 1999).

[29] Within the context of war and international self-defense, Dapo Akande and Thomas Lieflander define a threat in the following way: "A threat is a situation where a causal chain can lead from the status quo (no attack) to an undesired future (attack)." See Akande and Lieflander, "Necessity, Imminence, and Proportionality in the Law of Self-Defense," *American Journal of International Law* 107, no. 3 (2013): 564. At least in the context of domestic self-defense, it might be more appropriate to think of a threat as an *indication* of a situation that could lead to the realization of harm. Ferzan provides a definition to this effect: "[T]hreats are actions that appear to present a risk of harm." Ferzan, "Justifying Self-Defense," 736. When an aggressor holds a gun to a victim's head, that situation itself does not cause the future harm; rather, the situation indicates that the future

Given this definition, threats are closely tied to risk assessments, as threats are the means by which a potential defender can evaluate the degree of risk he faces. Generally, however, the only sorts of threat that have consistently been given weight in self-defense cases are ones that involve immediate physical violence. Examples of such threats might be an aggressor putting a loaded gun to a victim's head or an aggressor advancing upon a victim with an arm poised to strike.

One type of threat (interestingly, the type of which we often think when using the word "threat" in everyday language) has been almost entirely excluded from self-defense: verbal threats.[30] This restriction is understandable: we do not want to broaden the type of threat considered legitimate to the extent that a joking or impulsive utterance of, "I'm going to kill you!" should justify someone in employing self-defense. Mere utterances, most of the time, will not be enough to make a potential aggressor liable to defensive harm.[31] In light of the discussion of risk in which we have been engaged, though, I suggest that it is appropriate to push back against this restriction as it stands. In doing so, we need to distinguish between two different types of situations: ones in which a verbal threat is the *only* indication of the existence of risk, and ones in which the risk evidenced by a verbal threat is confirmed by other information.

Consider the cases of *Schroeder* and *Bello*. Recall that, in *Bello*, the facts of the case report that the reason Bello thought he was in danger was because Smith had verbally threatened him. In *Schroeder*, the defendant also faced verbal threats from an aggressor, Riggs, but this threat was not the only reason Schroeder considered himself to be at significant risk. Rather, Schroeder had both the evidence of the verbal threats and of the fact that Riggs had a reputation of abusing fellow inmates the way he was threatening to abuse Schroeder. Thus, in Schroeder's case, Riggs's utterances were confirmed by excellent evidence that Riggs was not simply making idle verbal threats; in fact, even without the direct verbal threat, it does not seem completely unreasonable for Schroeder to have considered himself in danger. So, for Schroeder, verbal threats confirmed what already would have been likely when evaluated under the contemporaneous objective standard: similar situations involving the very same aggressor indicated that Schroeder truly was in danger.

An objection to this approach is that it seems unfair to the aggressor: should a person really be liable to defensive harm even without engaging directly in physically

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harm is likely by conveying the intentions of the aggressor and providing the means by which the aggressor can act on those intentions.

[30] For a court decision reflecting this view, see *People v. Lucas*: "[T]hreats alone, unaccompanied by some act which induces in defendant a reasonable belief that bodily injury is about to be inflicted, do not justify a homicide." *People v. Lucas*, 160 Ca. App. 2d 305, 310 (1958). It is safe to assume that the wording of the opinion in this case meant "verbal threats" when referring to "threats."

[31] Liability is a complicated topic that has attracted tremendous scholarly attention in recent years. Two primary accounts of liability frame the debate: internalism, on which a person is liable to defensive harm only if such harm is necessary; and externalism, on which a person can be liable to defensive harm even if such harm is not necessary. I believe that externalism is a better approach. For a defense of a version of externalism, see Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014): 88-120. Rather than focusing on the internalism/externalism debate, though, my question deals with what sorts of things can make someone liable to defensive harm.

abusive action? I suggest that the right answer to this question is "yes." At least in the sorts of situations we are discussing, it seems undeniable that most aggressors are aware that their verbal threats will place their victims in a difficult situation; in fact, this is probably exactly why they choose to make the verbal threats. So, liability is still being assigned based on the choice of the aggressor to initiate a game of risk.[32] If anything, it seems unjust to the potential victim to force him to assume that the aggressor might not have meant what he said.

This distinction between a threat that consists *only* of words and a verbal threat that is confirmed by other evidence gives us a tool with which to allow consideration of verbal threats while at the same time preserving reasonable restrictions on the type of threat that legitimizes self-defense. The existence of verbal threats creates risk, and this risk is often not negligible. Considering some verbal threats in addition to physical threats allows us to treat risk assessment with a greater level of seriousness and concern.

2.3 Availability of Alternatives

Another concern that often arises in self-defense situations is whether the defender had other alternatives to employ besides violent self-defense. If a person can choose a course of action that can dispel the risk he faces and does not involve harming somebody else, that person should act in the non-harmful manner, even if the person against whom he is defending himself is fully culpable and liable to defensive harm.[33] One of the ways this idea has been most clearly articulated is in the duty to retreat that is often demanded of potential self-defenders.[34] I agree that, if safe retreat is an option, that option should be the most preferable one for the potential defender to use; however, in some situations retreat is not an option, and one of the reasons I have been considering prison violence cases is for that very reason. So, the question becomes whether a person must seek alternative methods of averting the threat and dispelling the risk even when retreat is not an option.

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[32] Ferzan emphasizes the importance of the choice of the aggressor when defining what she thinks are appropriate "triggering conditions" for the use of self-defense: "Now, it is true that we are allowing preemptive action based on prediction, but we are also allowing preemptive action based on the *aggressor's prior choice*. The aggressor controls whether she will decide to injure another person and she controls whether she will act on that intention. At that point, the game is on. It is a game of risk, and a game of prediction. But the person who culpably initiates the situation can hardly be heard to complain that the other actor takes her at her word." Ferzan, "Justifying Self-Defense," 731.

[33] There are ways to affirm the wrongness of inflicting harm on an aggressor even if that aggressor is culpable and liable. See Frowe, *Defensive Killing*, 89.

[34] The duty to retreat entails that if a person has a way to retreat from the violent situation in safety, he has an obligation to do so rather than use self-defense. The Model Penal Code reflects this requirement, stating that an actor may not justifiably use deadly force if he "knows that he can avoid the necessity of using such force with complete safety by retreating." MPC § 3.04(2)(b)(ii).
The duty to retreat has been questioned on several different levels: exceptions include the so-called "castle doctrine" and "stand your ground" legislation. For a recent argument in defense of the "stand your ground" approach, see Heidi Hurd, "Stand Your Ground," in *The Ethics of Self-Defense*, ed. Christian Coons and Michael Weber (Oxford: Oxford University Press, 2016): 254-273.

In the prison violence cases under discussion, all three of the defendants were convicted. Two of them were condemned on the grounds that they did not seek assistance in their respective situations.[35] Theoretically, there was an alternative way for each of them to dispel the risk they faced rather than preemptively taking action and attacking their aggressors: each could have sought help, reported the abuse, or simply waited things out.[36] *Theoretically*, there was an alternative, but consideration of the reality brings risk into play again. In many situations involving prison violence, inmates are reluctant to report abuse for several reasons, including fear of retaliation from the aggressor, being labeled a "snitch" by fellow inmates, which would very likely lead to a higher level of abuse, or the belief (and very likely a justified one) that no help would be given even if requested.[37] Thus, even though these are alternatives to self-defense, they are not alternatives that unquestionably serve to avert the threat or dispel the risk—in fact, it is arguable that reporting abuse could actually increase the level of risk a person faces. We do not demand fulfillment of the duty to retreat unless the person can do so in safety. Why, then, do we always require the pursuit of alternatives to self-defense when doing so sometimes carries with it a risk of decreasing rather than increasing safety?

I suggest that requiring a person to take on additional risk as an alternative to employing self-defense is unjust. The person who should bear additional risk in a violent situation is not the victim of the situation, but rather the person who culpably creates the situation.[38] When possible, risk should be transferred to the person responsible for the creation of that risk. If safe alternatives exist, the potential defender should pursue those alternatives, but if those alternatives themselves are risky, he should not be required to do so.

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[35] In *Bello*, the opinion stated, "Bello could have reported the incident to the guards and requested the protection they were required to provide." See *U.S. v. Bello*, 194 F.3d 18, 27 (1st Cir. 1999). This reasoning was based off of the court's decision in *U.S. v. Haynes*, in which the opinion claimed that "absence of lawful alternatives is an element of all lesser-evil defenses, of which self-defense is one." See *U.S. v. Haynes*, 143 F.3d 1089, 1091 (7th Cir. 1998). Interestingly, though, in the case of *U.S. v. Biggs*, the circuit court ruled as follows, in opposition to the decisions in *Bello* and *Haynes*: "Evidence that a defendant had no reasonable opportunity to avoid the use of force is relevant only to a defense of justification, whether labeled duress, coercion or necessity, and is not an element of a claim of self-defense." See *U.S. v. Biggs*, 441 F.3d 1069, 1071 (9th Cir. 2006). This opinion demonstrates that there is some hesitancy regarding the requirement that all available alternative must be exhausted before self-defense becomes a legitimate option.

[36] Some scholars suggest that the "wait and see" course of action is the appropriate one, because something might change that would render the use of self-defensive force superfluous. See Bakircioglu, "The Contours of the Right to Self-Defense," 161. I think this approach places an unjust burden on the potential victim.

[37] For example, in *Haynes*, the aggressor had slammed the defendant down to the floor in front of a prison guard, and the guard had ignored the violence. See *U.S. v. Haynes*, 143 F.3d 1089, 1090 (7th Cir. 1998). In Schroeder, the defendant had requested that Riggs be moved to a different cell several days before, but no action was taken. See *State v. Schroeder*, 199 Neb. 822, 824 (1978).

[38] Richard Rosen also argues for this claim in "On Self-Defense, Imminence, and Women Who Kill Their Batterers," *North Carolina Law Review* 71, no. 2 (1993): 390-411.

3. Implications for Self-Defense Doctrine

Throughout this paper, I have tried to avoid appealing to discussions about two of the central elements of the traditional (and still widely accepted) doctrine of self-defense: imminence and necessity.[39] I deliberately avoided invoking these two features of the self-defense doctrine, as doing so would have brought the argument to an abrupt halt. Starting with imminence and necessity severely limits the range of discussion possible. Yet, the latter two issues considered above—types of threats and availability of alternatives—are grounded in concerns about these two main features of most self-defense doctrines.[40] Now that I have established methods for thinking about types of threats and availability of alternatives in light of risk assessments, we are in a position to confront the requirements of imminence and necessity, examining what the implications for these two features of self-defense might be given the conclusions reached above.

First, consider imminence. When we take risk assessments into account, it is clear that substantial risk can exist even when the danger to the potential victim is not imminent. Why, then, should we refuse to include these assessments of risk in our evaluation of the legitimacy of self-defense? Defenders of imminence might answer that the imminence requirement serves two purposes with respect to risk: to help provide a truly accurate assessment of risk, and to help ensure that the level of risk is high enough to merit self-defensive action. [41] I will consider the former response first. True, in most situations, it will be easier to assess risk with confidence that our assessment is accurate when imminence is present; after all, the shorter the time frame between the birth of the threat and the expected manifestation of that threat, the less we have to worry about factors that might intervene during that time frame. I think this point would not be easy to dispute, and I will not attempt to do so; however, this, in itself, provides little reason to reject other valuable methods of risk assessment. The contemporaneous objective standard explored above, in many situations, could yield an accurate assessment of risk even when the threatened harm is in the future.

Turn next to the latter objection on the part of the imminence defender: imminence helps ensure that a very high level of risk is present. The problem with this response is

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[39] As an example, here is Illinois's statute: "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." 720 Ill. Comp. Stat. Ann. 5/7-1 (West 2014).

[40] The imminence requirement has been under fire in recent years. For example, see Rosen, "On Self-Defense," 371-411. Reflecting these concerns, some jurisdictions have done away with the imminence requirement. For example, see Texas's self-defense statute: "[A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." Tex. Penal Code Ann. § 9.31 (West 2007).

[41] Anthony Sebok suggests the belief that the level of risk cannot be high enough without physical confrontation is what motivated the decision in *Schroeder*: "[Judges] ultimately do not believe the probability of the infliction of a φ is ever as high in a nonconfrontational circumstance as it is in a confrontation." Anthony Sebok, "Does an Objective Theory of Self-Defense Demand Too Much?" *University of Pittsburgh Law Review* 57 (1996): 741.

twofold. First, given our discussion of risk, it seems we can reasonably claim that a very high level of risk is present in a situation even when imminence is absent. Second, this objection seems to be assuming that only an extremely high level of risk—one approaching a certainty of harm—is sufficient to merit self-defensive action. Imminence gives the benefit of the doubt to the aggressor rather than the defender, thereby shifting the burden of risk further into the defender's court.[42] But, given the above conclusion that the burden of risk should be shifted to the person responsible for the creation of the risk, this approach seems faulty. As a result, imminence is a questionable requirement to put on the use of self-defense.

Many scholars have suggested that the real reason imminence is generally considered to be important is because it shows us when self-defense is truly necessary.[43] This point brings us to another foundational element of self-defense doctrine. The necessity prong of traditional self-defense doctrine says that a person may act in self-defense only when defensive action is necessary to avert the harm in question.[44] Now, as noted above, necessity is never absolute, because our limited epistemic position makes it impossible for us ever to be completely sure that defensive force is the only way a threat can be averted. Nevertheless, we strive to as close an approximation of necessity as possible, and it continues to serve as the measuring stick by which we evaluate claims to self-defense. [45] Despite recognition of the fact that necessity cannot, practically, be absolute, I suggest self-defense doctrine has still failed to appreciate fully the difficulties posed by our limited epistemic status at the expense of many potential victims in threatening situations.

In most of the prison violence cases we have been considering, it would be a stretch to say that the use of self-defensive force was truly necessary. The exception to this statement might be *Schroeder*: since the defendant had already sought help, to no avail,

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[42] This reading is how Ferzan interprets the role of the imminence requirement: "Importantly, the imminence requirement, or absence thereof, shifts the risk of harm between the aggressor and the defender." Ferzan, "Justifying Self-Defense," 719.

[43] This is a very common view of the role of imminence in the self-defense doctrine; scholars often refer to imminence as a "proxy" for necessity. See Richard Rosen, "On Self-Defense," 380. Ferzan, however, defends the imminence requirement with different reasoning, claiming that getting rid of imminence leads to a failure to separate acts of self-defense from acts of mere self-preference and that imminence is not merely a proxy for necessity but serves an independent purpose—to determine when aggression is actually present. See Kimberly Kessler Ferzan, "Defending Imminence: From Battered Women to Iraq." *Arizona Law Review* 46 (2004): 213-262. Ferzan's account of aggression seems to indicate that only physical attack can function as aggression, but I think verbal threats, at least when backed by known reputation, should count as aggressive action as well.

[44] Or when a person "reasonably believes" the action is necessary. As we are trying to work within an objective framework, I will simply deal with an objective necessity requirement here.

[45] For example, Stephen Morse suggests using an extremely close approximation to necessity: "If death or serious bodily harm in the relatively near future is a virtual certainty *and* the future attack cannot be adequately defended against when it is imminent *and* if there really are *no* reasonable alternatives, traditional self-defense doctrine ought to justify the pre-emptive strike." See Stephen Morse, "'New Syndrome Excuse' Syndrome," *Criminal Justice Ethics* 14 (1995): 12. I believe, however, this level of "virtual certainty" is still unrealistic and is therefore unjust to the potential victim.

we might be comfortable with asserting that Schroeder had no other option open to him and that the risk was high enough (in that it was a close enough approximation to necessity) to legitimize self-defense when the necessity requirement is in place. In the other cases, however, the defendants could have sought help, reported the threats, or simply waited things out to see what would happen. But, as discussed above, requiring the defendants to follow any of these other paths arguably would have exposed them to an even higher level of risk than they already were facing. If we want to maintain that it is unjust to force a person who is already a victim to take on additional risk in order to protect the person responsible for imposing risk, then we must say that such persons should not be forced to absorb any additional risk when doing so could be avoided. And, if the only way to avoid absorbing additional risk is to transfer that risk to the aggressor, then we must say that the victim should transfer the risk to the aggressor. And if the only way to transfer the risk to the aggressor is to act in preemptive self-defense, then the victim should be able to act in preemptive self-defense, *even if such self-defense is not clearly necessary*.

This train of reasoning makes it clear that my analysis of risk assessment carries with it a major implication for self-defense doctrine: it seems there are some situations in which a person should be able to act in self-defense even if we conclude self-defensive action did not really seem necessary. In the prison violence cases described above, we cannot be sure that self-defensive action was necessary, but our level of confidence is even less when we consider whether the potential victim could have pursued an alternative course of action without thereby incurring a greater level of risk. This undermining of necessity is a serious consequence, and it might be that it is a cost too great to justify using risk assessments in the way I have suggested. Addressing this difficulty, however, is beyond the scope of this project, so I will consider it sufficient to point out the problem and leave the weighing of the costs and benefits for another time. From this discussion, however, it is clear that taking risk seriously in self-defensive situations has deep consequences for self-defense doctrine as it is currently written and generally accepted.

4. Conclusion

Let us return to the pair of cases that motivated this exploration of the concept of risk. Recall that in Case 1, Dr. Maleficus was playing Russian roulette with Bill, holding a gun with one thousand chambers to Bill's head. In Case 2, the Dread Pirate Roberts had threatened to kill Westley in the morning, but during the night Westley had a chance to kill the Dread Pirate Roberts first. Current self-defense doctrine would be able to absolve Bill but not Westley, and I suggested this outcome seems wrong.

Given my argument regarding the proper application of risk analysis to cases of self-defense, we now have the tools to make a case for the claim that Westley should also be able to act in self-defense. Westley faces risk of death, and as judged by a contemporaneous objective standard, that risk is significant. The threats of the Dread Pirate Roberts have been given in verbal form, and as of yet, he has not physically threatened Westley; however, those verbal threats contain a high level of credibility given the other evidence Westley has about the merciless history of the pirate. Westley, arguably, has some alternatives he could pursue rather than acting in self-defense: he could simply wait things out, he could try to escape on a lifeboat, or he could hide someplace on the ship and

hope he is not discovered before the ship reaches the next port. But, even if any of these alternatives have a chance of success, they all require Westley to absorb additional risk. Given these considerations, it seems that the level of risk Westley faces is sufficient to merit him acting in self-defense, despite the facts that the threat he faces is not imminent and that it is not clear that acting in self-defense is truly necessary. Thus, if Bill is justified in killing Dr. Maleficus, despite the low level of risk Bill faces, Westley should be able to kill the Dread Pirate Roberts in self-defense.

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