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**REASONABLE PROVOCATION AND SELF-DEFENSE:
RECOGNIZING THE DISTINCTION BETWEEN ACT REASONABLENESS AND
EMOTION REASONABLENESS**

Cynthia Lee *

All of us can empathize with the individual who has just found out that his or her intimate partner has been unfaithful. Anger, outrage, sadness, a feeling of worthlessness, depression – all are understandable emotional responses to the betrayal of trust that comes with infidelity. It is eminently reasonable to feel these strong emotions. Provoked killers, however, go beyond *feeling* outraged. They *act* on their emotions in the most extreme way – by taking a human life. Most of us would not kill, even if we were extremely upset. Yet the provocation doctrine partially excuses an act of killing if the defendant’s emotional response is considered reasonable. If a reasonable person in the defendant’s shoes would have been provoked into a heat of passion, then the provoked killer is acquitted of murder and convicted of the lesser offense of voluntary manslaughter. The provoked killer receives this mitigation even if the reasonable person would not have acted the way he did because provocation doctrine does not require that his act be reasonable.

We can also empathize with the individual who is afraid of being physically harmed by another person. An individual can have differing degrees of fear depending on the situation. In *The Gift of Fear*, Gavin de Becker describes a woman with a gut feeling that the stranger who has offered to carry her groceries has an ulterior motive for being so nice.¹ It would be foolish if that woman ignored her gut feeling. Ignoring one’s intuition can place one in harm’s way. There is, however, a difference between preventive action, such as refusing the suspicious offer of assistance, and preemptive action, such as shooting the man. It would hardly be reasonable for the woman to take out a gun and shoot the stranger before he did anything to confirm her gut feeling.

As these examples suggest, there is a difference between reasonable emotions (fear, anger, outrage) and reasonable action. Even if a particular emotion is reasonable under the circumstances, this does not mean that acting on that emotion by using deadly force is also reasonable. It may be reasonable to feel anger at one’s unfaithful partner, but not reasonable to act on that anger by killing the partner. It may be reasonable to fear an attack, but if that attack is not imminent or if one can avoid that attack by running away or disabling the attacker, then killing may not be a reasonable response.

It makes sense to engage in separate inquiries regarding the reasonableness of a given action and the reasonableness of the emotions leading to that action. Yet jurors in provocation and self-defense cases are usually instructed to focus upon the reasonableness of the defendant’s emotions (or beliefs), and thus pay little or no attention to the reasonableness of the defendant’s acts.

* Cynthia Lee, Professor of Law, George Washington University Law School. This core text is based on CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* ch. 10 (2003).

¹ See GAVIN DE BECKER, *THE GIFT OF FEAR* 1-7 (1997).

I. Provocation

In modern jurisdictions, the key issue in a provocation case is whether legally adequate provocation was present. Legally adequate provocation is said to exist if the defendant was *reasonably* provoked into a heat of passion. One could interpret this ambiguous language as requiring what I call “act reasonableness,” a finding that a reasonable person in the defendant’s shoes would have responded or *acted* as the defendant did. An unscientific survey of model jury instructions used in the fifty states, however, indicates that only a few states require act reasonableness. Most states require what I call “emotion reasonableness,” a finding that the defendant’s *emotional* outrage or *passion* was reasonable. An example of “emotion reasonableness” is found in Illinois’ model jury instructions, which tell jurors that legally adequate provocation is “conduct sufficient to excite an intense *passion* in a reasonable person.”²

The reluctance to require “act reasonableness” stems from the belief that the act of killing in the heat of passion is never reasonable. I agree. The provoked killer’s actions are wrongful as a matter of law, which is why he does not receive a complete acquittal. We do not want others to emulate the behavior. We mitigate the charges only because we feel sympathy for the provoked killer. But requiring the jury to focus on the reasonableness of the defendant’s actions does not mean they must find it was reasonable for the defendant to kill. Rather, act reasonableness can be satisfied if the provoking incident would have provoked an ordinary person to violence.

Jeremy Horder provides a useful explanation of the difference between reasonable feelings of anger (reasonable emotions) and reasonable action in anger (reasonable acts). According to Horder, a reasonable *feeling* of anger means “being angered for the right reason, at the right time, to the right extent, and so on.”³ In other words, one’s emotional response is considered reasonable if one has the right amount of anger and outrage relative to the provoking incident. For example, if someone kidnaps your family and tortures them, a reasonable emotional response is to be very angry. If you are only moderately angry, your emotional response is not reasonable because it is too small. If, on the other hand, you feel violently outraged at a baby’s persistent crying, your emotional response would probably be perceived as unreasonable and excessive.

In contrast, reasonable *action* in anger means proportional retaliation against the person who has wronged you. “For men of honour . . . , to *act* justly in the face of an affront or other injustice is to inflict proportional requital, retaliation of the correct amount, on the perpetrator of the injustice.”⁴ In other words, reasonable action in provocation means action which is proportionate to the provocation. For example, if V slaps D for no reason at all and D responds by hitting V once or perhaps even twice, one can say that D’s response is proportionate to the initial wrong, and therefore reasonable. If D were to instead take out a knife and stab V to death, his response would likely be deemed unreasonable because a fatal stabbing is grossly disproportionate to a slap.

Under a proportionality principle, the reasonableness of the provoked defendant’s action depends on the type of force and degree of force used in relation to the triggering

² Illinois Pattern Jury Instructions (Criminal), No. 7.03 (4th ed. 2000) (emphasis added).

³ JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 44 (1992).

⁴ *Id.* at 51.

provocation. Proportionality does not mean that the provoked defendant must respond with force equal to the force used by the provoker as provocation doctrine partially excuses the use of deadly force even when the provoker does not use any force at all. The defendant's act, however, must be seen by the jury as commensurate with the wrong inflicted by the provoking party.

Some would reject a proportionality requirement in provocation doctrine on the ground that once a person has been provoked into a heat of passion, he cannot control the mode or degree of force he uses to retaliate against his provoker. This criticism might be persuasive if the presence of passion completely obliterated the ability to control one's actions. The law, however, assumes that there are degrees of loss of self-control. If the provoked killer completely lacked the capacity to control his acts, then it would not be just to punish him at all. But we do punish provoked killers, albeit less severely than murderers. The treatment of provocation as only a partial defense reflects the assumption that the provoked killer's loss of self-control is not complete.

Act reasonableness does not mean the defendant's response must be strictly proportionate to the alleged provocation. Proportionality is merely suggested as a tool to help jurors think about whether the defendant's acts should be deemed reasonable.

II. Self-Defense

A similar distinction between emotion reasonableness and act reasonableness exists in the self-defense arena. Even though act reasonableness is implied in self-defense doctrine's proportionality requirement, jury instructions on self-defense tend to focus only on emotion (or belief) reasonableness. Jurors are instructed to find that the defendant reasonably *believed* (or reasonably feared) deadly force was necessary to counter an imminent threat of death or grievous bodily injury. Jurors are not instructed to separately find that the defendant's *act* of shooting or stabbing or beating the victim was reasonable.

This focus on reasonable beliefs reflects the presumption that a defendant who reasonably fears imminent death or grievous bodily harm acts reasonably when he resorts to deadly force. In most cases, a correlation between reasonable fears and reasonable acts will exist. However, just because someone has a reasonable belief that another poses an imminent threat of death or serious bodily injury does not *necessarily* mean a particular action leading to death is reasonable.

For example, in *State v. Dill*,⁵ two men in the parking lot of a bar a little before midnight were having trouble getting their truck to start because of a low battery. One of the men, Terry Greenwood, walked over to another car in the lot and asked the three occupants whether they could give him a jump. One of the passengers in that car offered to give Greenwood a jump for \$5.00. Offended that the men would not help him for free, Greenwood began to argue loudly with the passenger and then walked towards the driver's side of the car. Defendant Dill was sitting in the driver's seat with the window down. Suddenly, Dill saw Greenwood lunge toward the open car window with a knife. Dill responded by reaching for a loaded gun from between the seats of the car. He opened the car door, and shot Greenwood in the head. Greenwood died a short time later.

Dill was charged with Greenwood's murder. At trial, Dill argued he shot

⁵ *State v. Dill*, 461 So. 2d 1130 (La. App. 1984).

Greenwood in self-defense. Like most self-defense statutes, Louisiana's statute focused exclusively on the reasonableness of the defendant's beliefs, providing that a homicide is justifiable "[w]hen committed in self-defense by one who *reasonably believes* that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself from that danger . . ."⁶ Rejecting Dill's claim of self-defense, the jury found Dill guilty of manslaughter.

In affirming Dill's conviction, the Louisiana Court of Appeals found that even though Dill's *belief* in the need to act in self-defense was reasonable, his *act* of shooting Greenwood was not. The court explains why Dill's fear was reasonable in the following passage:

There is no question that the two men were engaged in a heated argument at the time of the shooting. The victim approached the car during the encounter to continue the altercation. From the relative sizes of the two men it appears that Dill (5'4, 145 lbs.) would have received the worst end in a fight, even if the victim (6'0, 200 lbs.) had been unarmed. *Accordingly, [Dill's] apprehension of receiving great bodily harm could be deemed reasonable.*⁷

Even though Dill's *fear* of bodily harm was reasonable, the appellate court affirmed Dill's conviction because Dill's *act* of shooting Greenwood in the head at close range was not reasonable. In drawing this conclusion, the court pointed to several less fatal alternatives Dill might have employed to avoid the threatened harm.

In the present case, it would appear that the trier of fact could readily conclude that the defendant possessed the ability to retreat or withdraw from the impending conflict. He was in an automobile. It was possible to have driven off or at the very least, rolled up the window to prevent any attack by the victim . . . it was likewise evident that deadly force was not mandated by the situation. By the defendant's own admission he issued no warning to the victim. Nor, apparently when firing at a close range did he aim for a less vital area than the head.⁸

State v. Garrison likewise illustrates the difference between reasonable fear of great bodily harm and reasonable action in self-defense.⁹ Jessie Garrison went to visit his sister at her apartment. Jeremiah Sharp, his sister's former boyfriend, showed up drunk and belligerent and began arguing with Garrison's sister. Garrison intervened, and his sister left the room. During the argument, Sharp reached for a pistol in his waistband. Because of Sharp's intoxicated state, Garrison was able to remove the pistol from Sharp's waistband. Sharp then grabbed a steak knife and advanced towards Garrison with the knife raised high. Garrison backed up and, using the pistol he'd just retrieved from Sharp, fired at Sharp's left ankle. Garrison then fired one more shot which killed Sharp.

⁶ *Id.* at 1133 (emphasis added).

⁷ *Id.* at 1137 (emphasis added).

⁸ *Id.* at 1138.

⁹ *State v. Garrison*, 525 A.2d 498 (Conn. 1987).

Garrison was charged with manslaughter in the first degree with a firearm. At trial, Garrison argued that he acted in self-defense. The trial court could have found that Garrison's *fear* of grievous bodily harm was reasonable since Sharp was advancing towards Garrison with a knife. Nonetheless, the court rejected Garrison's self-defense argument on the ground that Garrison's *act* of shooting Sharp was unreasonable. According to the trial court, Garrison's act of shooting was unreasonable because less drastic alternatives were available to avoid the threatened harm. Garrison could have retreated or he could have again disarmed Sharp, especially after Sharp was shot in the left ankle.

A person who honestly and reasonably *fears* imminent death or great bodily harm does not necessarily *act* reasonably if he uses deadly force in self-defense. The type and degree of force used by the defendant to ward off the threat may or may not be reasonable depending upon the gravity of the threatened harm and whether less deadly alternatives were available to deal with the threatened harm. Recognizing the distinction between reasonable beliefs and reasonable acts would go a long way towards ensuring that outcomes in self-defense cases reflect appropriate judgments about the use of deadly force.

III. Conclusion

With respect to self-defense, what I propose is not a radical reform of current doctrine. Self-defense doctrine already includes a reasonable act requirement. The defendant's response to the aggressor's threat must be reasonably necessary to avert that threat, and it must be proportionate to that threat. Implicit in both the necessity and proportionality requirements is the notion that the defendant's acts must be reasonable in light of the threat. The problem is that most model jury instructions on self-defense fail to tell jurors that they should scrutinize the reasonableness of the defendant's actions. My proposal would simply make explicit that which is implicit in current self-defense doctrine.

With respect to provocation, only a few jurisdictions currently require jurors to consider the reasonableness of the defendant's acts. Therefore, unlike self-defense doctrine, which already includes a reasonable act requirement, requiring act reasonableness in provocation doctrine would constitute a departure from current practice in most jurisdictions. This departure is well worthwhile. Requiring act reasonableness in the form of relative proportionality serves to remind jurors that one who takes a human life and claims he was reasonably provoked should expect some scrutiny of his or her claim of reasonableness.