THE POLICE ARE INNOCENT AS LONG AS THEY HONESTLY BELIEVE: THE HUMAN RIGHTS PROBLEMS WITH ENGLISH SELF-DEFENSE LAW

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INTRODUCTION

In 1999, Henry Stanley was carrying a broken table leg in a plastic bag when he was confronted and killed by a police officer in London, who genuinely believed he was in possession of a sawn-off shotgun.[1] The police officer was cleared of all charges in the *Sharman* case of 2005, having successfully pled self-defense, despite the fact that such a belief should have been found unreasonable by a vast majority of people.[2] In *Bennett*, a similar case decided in 2007,[3] a man who was carrying a cigarette lighter was shot dead by police officers who thought it was a gun.[4]

Self-defense is one of the oldest affirmative defenses in the common law, with roots in Roman Law principles.[5] Yet, due to its uncertain and contentious nature, it has been the target of many attempts at reform and much debate over the past few decades, especially in the United Kingdom.[6] One of the main criticisms of the law of self-defense in the United Kingdom is that it takes into account only the honest belief of the defendant when responding to a perceived threat, without regard to whether such a perception was reasonable.[7] This standard was originally established by the common

1. R (on the application of Sharman) v. HM Coroner for Inner North London [2005] EWCA (Civ) 967 [1]–[9], [2005] Inquest L.R. 168 (Eng.).

2. *Id.*

3. R (on the application of Bennett) v. HM Coroner for Inner South London [2007] EWCA (Civ) 617 [35]–[36], [2007] Inquest L.R. 163 (Eng.).

4. *Id.* at [10]–[11].

5. BRUCE W. FRIER & THOMAS A. MCGINN, A CASEBOOK ON ROMAN FAMILY LAW 193 (Joel Lidov ed., 2004).

6. *See generally* THE LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE 128 (2006), http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc304_Murder_Manslaughter_and_Infanticide_Report.pdf [https://perma.cc/65K5-PWKR] (noting the debate about the "need for the belief [of death or life-threatening harm] to be reasonably held"); Jonathan Rogers, *Culpability in Self-Defence and Crime Prevention*, *in* SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS 265–92 (2012).

7. Criminal Justice and Immigration Act 2008, c. 4, § 76 (Eng.); R v. Williams (Gladstone) [1987] 3 All ER 411, 411, 413 (Eng.).

law in the notable case of *Regina v. Gladstone Williams*,[8] but the courts have been demonstrably unwilling to raise the bar to a reasonable belief for criminal cases, choosing to restrict the "honest and reasonable belief" standard to self-defense within intentional torts only.[9] Furthermore, as of 2008, the standard of honest belief has been codified in Parliamentary legislation, which is the supreme form of law in the United Kingdom due to the lack of a formal written constitution and the traditional notion that Parliament, as the highest legislative body, is sovereign.[10] This legislation demonstrates further the United Kingdom's unwillingness to budge from this position, despite the seemingly unfair verdicts in which it has resulted—especially in the cases of police officers killing civilians on the basis of unreasonable beliefs, as seen above.[11]

This law has naturally resulted in human rights concerns, especially given that the United Kingdom is party to the European Convention on Human Rights (ECHR).[12] The right to life is recognized as a fundamental right.[13] The ECHR sets out this right in Article 2 of the Convention, which not only requires that signatory parties ensure that the state and its agents do not unnecessarily deprive individuals of life, but also imposes upon signatory parties a positive obligation to effectively protect individuals from being killed by third parties.[14] This includes enforcing legislation and setting out laws that sufficiently and effectively penalize people for the unnecessary deprivation of life.[15] With that in mind, this Note argues that the current U.K. laws that permit attackers, especially police officers, who made unreasonable mistakes about the victim being a threat to argue self-defense, constitute a blatant violation of Article 2 of the ECHR. It should have thus resulted in a ruling of the European

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8. Williams (Gladstone), 3 All ER at 411.

9. Ashley v. Chief Constable of Sussex [2008] UKHL 25, [2008] 1 AC 962 (appeal taken from Eng.).

10. Criminal Justice and Immigration Act 2008, c. 4, § 76 (Eng.).

11. R (on the application of Sharman) v. HM Coroner for Inner North London [2005] EWCA (Civ) 967 [1]–[9], [2005] Inquest L.R. 168 (Eng.).

12. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention].

13. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 3, U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 2 (Dec. 10, 1948).

14. ANDREW ASHWORTH, POSITIVE OBLIGATIONS IN CRIMINAL LAW 196 (2013) [hereinafter POSITIVE OBLIGATIONS].

15. ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 238 (6th ed., 2009) [hereinafter ASHWORTH].

Court of Human Rights requiring the United Kingdom to amend its laws of self-defense to satisfy its positive obligations under Article 2 when prompted to do so in 2016 in *Armani Da Silva v. United Kingdom*.

Part I of this Note will provide an overview of homicide crimes under the law of England and Wales and the defenses that are available, with a particular focus on self-defense as an affirmative defense that has oddly lenient requirements compared to other defenses to homicide under English law. It will also establish the United Kingdom's human rights obligations that ensure that the right to life of individuals within its borders be protected by laws that effectively punish unjustified homicide. Part II will identify the problems that currently exist with the United Kingdom's homicide laws and argue that the law of self-defense is unjust and does not effectively fulfill their ECHR obligation to protect the fundamental right to life. Part III will analyze potential solutions that can resolve this inconsistency and the likelihood of the adoption of these solutions in light of the existing legal and political climate in Europe.

I. BACKGROUND

A. Homicide in England and Wales

In England and Wales, homicide is mainly separated into two distinct groups: murder and manslaughter.[16] Murder is defined as unlawfully causing death, without justification or excuse, with "malice aforethought," under the King's peace.[17] "Malice aforethought" refers to the intention to cause either death or grievous bodily harm under U.K. case law.[18] "Unlawfully" here refers to a lack of justification or excuse, as a successful demonstration of any defense will either reduce a conviction of murder to one of manslaughter (in the case of a partial defense, such as diminished responsibility or loss of control), or quash it altogether (in the case of a general defense, such as self-defense).[19] A conviction for murder

16. *Id.* at 237–38.

17. SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWES OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 47 (1644).

18. R v. Cunningham [1982] AC 566, 574 (Eng.) (defining grievous bodily harm).

19. JAMES RICHARDSON, QC, ARCHBOLD CRIMINAL PLEADING, EVIDENCE AND PRACTICE (P.J. Richardson et al. eds., 2009).

carries with it a mandatory life sentence, which is now the most severe sentence that English criminal law can impose on an individual following the 1965 abolition of the death penalty.[20]

Manslaughter, on the other hand, covers a large range of different crimes of varying culpability.[21] There are several different ways an individual can be found guilty of manslaughter under English law, but for the purposes of the upcoming discussion, this Note will separate these groups into three distinct types: manslaughter by way of a partial defense to murder; manslaughter by unlawful and dangerous act; and manslaughter by gross negligence.[22] The first is commonly referred to as "voluntary manslaughter," while the latter two are termed "involuntary manslaughter." Considering the different levels of culpability involved in these distinct fact patterns, judges are given significant discretion in sentencing.[23]

Manslaughter by unlawful and dangerous act is also referred to as constructive manslaughter.[24] It refers to death that is caused by the commission of any crime that can be considered "dangerous."[25] The unlawful and dangerous act in question must be one that merits criminal, not civil, liability.[26] However, there is no requirement that the unlawful and dangerous act be directed at a person or persons.[27] An act is considered dangerous if it is one that all sober and reasonable people would inevitably recognize must subject the other person to at least the risk of some harm.[28] This manslaughter charge is one that is heavily based on constructive liability—referring to when a crime has a *mens rea* that only partially corresponds to the *actus reus*. This means that a person may be liable for any death that

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20. ASHWORTH, *supra* note 15, at 241, 250; Murder (Abolition of Death Penalty) Act 1965, c.71, § 1 (Eng.).

21. METRO. POLICE SENTENCING COUNCIL, SENTENCING FOR MANSLAUGHTER 1 (n.d.), https://www.sentencingcouncil.org.uk/wp-content/uploads/FINAL-Manslaughter-sentencing-leaflet-for-web1.pdf [https://perma.cc/W9KB-WYMB].

22. ASHWORTH, *supra* note 15, at 273–79.

23. METRO. POLICE SENTENCING COUNCIL, *supra* note 21, at 1–2.

24. "Constructive manslaughter" is the phrase used in DPP v. Newbury (1977) AC 500, 502–03 (Eng.); Mitchell C. Davies, *Constructive Manslaughter—A Not So Basic, Basic Intent Crime*, 58 J. CRIM. L. 398, 398–402 (1994).

25. With the exception of strict liability crimes; *see* Andrews v. Dir. of Pub. Prosecutions (1937) AC 576 (Eng.).

26. R v. Franklin (1883) 15 Cox CC 163 at 165 (Eng.).

27. R v. Goodfellow (1986) 83 Crim. App. 23 at 27 (Eng.).

28. R v. Church (1966) 1 QB 59 at 60 (Eng.).

results from the commission of a criminal act, provided that it is objectively dangerous, even if the person does not foresee that any serious harm would occur. Academics have suggested that the rationale behind this apparent harshness is that if a person commits an aggressive act, she should be fully liable for the consequences, as an "irrevocable evil" has occurred if her aggressive act caused death.[29]

Murder by gross negligence is a variety of manslaughter established in the nineteenth century that is rather exceptional in that it criminalizes the causation of death by an action or omission that grossly fails to reach the standard of a reasonable person, regardless of whether the individual in question is capable of reaching such a standard.[30] The elements for gross negligence manslaughter are: (1) the defendant breached her of duty of care towards the victim, (2) the breach of duty caused the death of the victim, and (3) this breach of duty was so "gross" as to merit criminal liability.[31] The last element is largely left to the jury, but the Corporate Manslaughter and Corporate Homicide Act of 2007 offers a loose guideline, defining it as behavior which falls "far below" what could reasonably be expected in the circumstances.[32] This charge is particularly unique as it can be satisfied with a *mens rea* that does address the subjective intention or recklessness of the defendant, but simply whether the defendant acted in a way that was reasonable.[33]

B. Self-Defense: A General Defense to Homicide

The doctrine of self-defense at common law in England and Wales removes the culpability of a person who has to use otherwise criminal force either to defend himself from an attack or to prevent the commission of another crime.[34] The defense is also available to a

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29. JONATHAN HERRING, CRIMINAL LAW: TEXTS, CASES AND MATERIALS 292 (6th ed. 2014).

30. ASHWORTH, *supra* note 15, at 273–79; R v. Adomako et al. (1995) 1 AC 171, 171 (Eng.); *see also* R v. Finney (1874) 12 Cox CC 625, 625 (using a test of gross negligence where an attendant at a mental hospital caused the death of a patient by releasing a flow of boiling water into a bath); R v. Bateman (1925) 19 Cr App R 8, 8 (doctor's causing the death of a woman was assessed to the standard involving "such disregard for the life and safety of others").

31. POSITIVE OBLIGATIONS, *supra* note 14, at 277.

32. THE UNION FOR PEOPLE IN TRANSPORT AND TRAVEL, GROSS NEGLIGENCE MANSLAUGHTER 2 (2013), https://www.tssa.org.uk/download.cfm?docid=6ED401FA-A5AE-4795-8EF637E78CAEE204 [https://perma.cc/V48S-MCE3].

33. R v. Adomako et al. (1995) 1 AC 171, 175 (Eng.).

34. R v. Williams (Gladstone) [1987] 3 All ER 411, 411 (Eng.).

defendant who mistakenly believes that he is under attack or is acting to prevent a crime.[35] This mistake does not have to be reasonable, provided that the defendant honestly believed that the circumstances constituted a threat.[36] The only exception arises where the mistaken belief arose as a result of voluntary intoxication.[37] This "honest belief" doctrine was first established in *Regina v. Gladstone Williams*, in which Lord Lane stated that the reasonableness of the defendant's belief is only "material to the question of whether the belief was held by the defendant at all," but "irrelevant" as to the defendant's guilt or innocence if it was in fact held.[38] This doctrine of self-defense, originally formed by judge-made common law, was subsequently codified in Parliamentary legislation through the Criminal Justice and Immigration Act of 2008.[39]

Once the jury determines that a defendant did hold an honest belief, he is to be judged on the facts as he believed them to be, notwithstanding that the belief may be mistaken and regardless of the fact that the mistake may not have been reasonable. With that said, when a person uses otherwise criminal force, the force itself must be deemed reasonable and proportionate in light of the threat that the defendant believed that he faced, and the assessment of this force is made objectively.[40] However, the Act also states that if the jury determines that the force was used "honestly and instinctively," it constitutes strong evidence that the act was reasonable.[41] Unlike many jurisdictions in the United States, there is currently no partial defense of imperfect self-defense in the United Kingdom.[42] This means that self-defense under English law can only ever act as a full defense to all charges—if any requirement of the defense is demonstrated not to have been met, the defense is not available at all.[43] The burden of proof, however, lies on the prosecution to adduce

35. *Id.*
36. *Id.*
37. Criminal Justice and Immigration Act 2008, c. 4, § 76(5) (Eng.).
38. R v. Williams (Gladstone) [1987] 3 All ER 411, 415 (Eng.).
39. Criminal Justice and Immigration Act 2008, c. 4, § 76(5) (Eng.).
40. *See* POSITIVE OBLIGATIONS, *supra* note 14, at 117; R v. Jones and Milling et al. [2006] UKHL 16, [24], [2007] 1 AC 136 (appeal taken from Eng.).
41. Criminal Justice and Immigration Act 2008, c. 4, § 76(7)(b) (Eng.).
42. U.S. jurisdictions with imperfect self-defense are California and Maryland. *See* People v. Humphrey, 921 P.2d 1, 6 (Cal. 1996); State v. Faulkner, 483 A.2d 759, 769 (Md. 1984). *See also infra* note 163 (citing *Humphrey* and *Faulkner*).
43. Partial self-defense was discussed by the Law Commission in 2004. *See* LAW COMM'N, PARTIAL DEFENCES TO MURDER: FINAL REPORT (2004),

sufficient evidence to satisfy a twelve-person jury beyond a reasonable doubt that the defendant was not acting in self-defense.[44]

The large amount of leeway given in self-defense doctrine is in stark contrast to the similar defense of duress by threat or circumstances.[45] When a person commits a crime under duress—such that the person reasonably anticipates death or grievous bodily harm and takes a reasonable and proportional action in response to that threat—they may be excused of the crime.[46] In contrast to self-defense, which only requires an honest belief, the doctrine of duress insists that the belief must be reasonable, the action taken must be reasonable and proportional, and, most importantly, a hypothetical person "of reasonable firmness" who would have acted in the same way as the defendant.[47] Furthermore, the courts have made it clear in several cases that the defense of duress is not available for murder, not even as a partial defense.[48] It is also not available to accomplices to murder, as seen in the unanimous House of Lords decision in *Regina v. Howe*.[49] Part II will discuss why this distinction is unsatisfactory and highlights a doctrinal problem in self-defense.

C. The European Convention on Human Rights and the European Union

The European Convention on Human Rights is an international treaty that came into force in 1953 to protect human rights and fundamental freedoms in Europe.[50] It established the European Court of Human Rights in Strasbourg (hereafter referred to as Strasbourg or the Strasbourg Court), which is the international

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http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc290_Partial_Defences_to_Murder.pdf [https://perma.cc/4EVF-M39Z].

44. *Self-Defence: Legal Guidance*, CROWN PROSECUTION SERV., https://www.cps.gov.uk/legal/s_to_u/self_defence/ [https://perma.cc/9TKZ-CDV8].

45. *See* R v. Hasan (Aytach) [2005] UKHL 22, [2005] 2 AC 467 (appeal taken from UK).

46. *See id.*

47. R v. Graham [1982] 1 W.L.R. 294 (UK); R v. Bowen [1997] 1 W.L.R. 372, [1996] 4 All E.R. 837 (UK).

48. *See* R v. Dudley and Stephens [1884] 14 Q.B.D. 273 (UK); R v. Howe [1987] 1 AC 417 (UK).

49. R v. Howe [1986] UKHL 4 (UK); R v. Howe [1987] 1 AC 417 (appeal taken from UK).

50. Note that the European Convention has no formal links to the European Union.

court responsible for ruling on cases involving Convention rights.[51] When an individual believes that her Convention rights are violated, she can submit an application against the state responsible for the violation to the Strasbourg Court, although only after exhausting all possible alternative remedies within domestic courts and tribunals.[52] The Strasbourg Court will determine whether the right has been breached and, if so, the judgment runs against the state itself, as the ECHR is meant to bind the signatory parties and to confer rights to individuals.[53] The remedies that the Strasbourg Court usually employs are to require the defendant state to pay compensation (also known as "just satisfaction"), to adopt general measures such as amendments to existing domestic legislation, and to adopt individual measures such as restitution or the reopening of the proceedings.[54]

1. Article 2 of the European Convention

Article 2 of the European Convention protects the "right to life."[55] Its position as the first right guaranteed by law demonstrates its importance as one of the most fundamental provisions in the Convention. The crucial nature of this obligation has been reiterated several times in cases brought before the Strasbourg Court.[56] Article 2 establishes that every natural person's right to life shall be protected by law and that no one shall intentionally be deprived of life.[57] There are only two exceptions to this law: first, the deprivation of life as a result of a capital sentence after conviction of a crime (Article 2(1)), and, second, the deprivation of life caused by the "use of force which is no more than absolutely necessary" in defense of a person from unlawful violence, to effect lawful arrest or to prevent the escape of a person lawfully detained, and under lawful action for the purpose of quelling a riot or insurrection (Article 2(2)).

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51. McCann v. United Kingdom, 21 Eur. Ct. H.R. 97 (1995); Pretty v. United Kingdom, 2002-III Eur. Ct. H.R. 155.

52. EUROPEAN COURT OF HUMAN RIGHTS, THE LIFE OF AN APPLICATION, http://www.echr.coe.int/Documents/Case_processing_ENG.pdf [https://perma.cc/Y5YF-WSL5].

53. COUNCIL OF EUROPE, FACTSHEET XV: RIGHT OF INDIVIDUAL APPLICATION TO THE EUROPEAN COURT OF HUMAN RIGHTS (2017), https://www.coe.int/en/web/echr-toolkit/le-droit-de-requete-individuelle [https://perma.cc/CYK8-387N].

54. *Id.*

55. European Convention, *supra* note 12, art. 2.

56. McCann v. United Kingdom, 21 Eur. Ct. H.R. 97 (1995); Hugh Jordan v. United Kingdom, 1998-III Eur. Ct. H.R. 323.

57. European Convention, *supra* note 12, art. 2.

Beyond merely prohibiting state agents from intentionally and unlawfully depriving a person of life, Article 2 also requires states to take an active stance in preventing deprivations by private persons—also known as positive obligations. This means that national governments are required under the Convention to protect the lives of individuals against the acts of third parties in an effective manner.[58] Essentially, Article 2 imposes an obligation on contracting states, including the United Kingdom, to protect the lives of the people present within its jurisdiction.[59] The Convention imposes other positive obligations in the criminal law field, such as an obligation to criminalize genocide.[60] Hence, Article 2 requires national legislation to impose a ban on murder and require criminal sanctions upon conviction thereof.[61] Since the ECHR chiefly imposes negative obligations, which forbid states from undertaking a direct action in violation of human rights obligations, the doctrine of positive obligations is significant as it can instead require the state to pass or amend legislation such that human rights are protected.[62] This can include requiring the state to criminalize certain actions or omissions or to exclude certain defenses, in order to comply with human rights obligations.[63]

One of the most famous cases where the Strasbourg Court ruled that the United Kingdom was in breach of its positive obligations to protect life is *McCann v. United Kingdom*.[64] A team of Special Air Service (SAS) soldiers, acting on instructions by the United Kingdom, shot and killed a group of suspected Provisional Irish Republican Army (PIRA) bombers.[65] The families of the deceased sought compensation for their deaths by appealing to Strasbourg after being denied a remedy by the courts in Northern

58. C. H. BECK, ET. AL., EUROPEAN CONVENTION ON HUMAN RIGHTS: COMMENTARY 21 (2014).

59. L.C.B. v United Kingdom, 1998-III Eur. Ct. H.R. 49; BECK, *supra* note 58, at 13.

60. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. 5, Dec. 9, 1948, 78 U.N.T.S. 277, implemented in English law by the Genocide Act 1969 and subsequently the International Court Act 2001; ASHWORTH, *supra* note 15, at 196.

61. BECK, *supra* note 58, at 13.

62. The ECHR chiefly imposes positive obligations to forbid states from passing certain laws or undertaking certain actions that would be in violation of their human rights obligations. POSITIVE OBLIGATIONS, *supra* note 14, at 196–97.

63. *Id.*

64. McCann v. United Kingdom, 21 Eur. Ct. H.R. 97 (1995).

65. *Id.* ¶ 141.

Ireland. The Court ruled, by a split vote of ten to nine, that the United Kingdom fell short in its control and organization of the operation and was thus required to pay compensation to the estates of the deceased.[66] In this case, the Strasbourg court ruled that a state and its agents do not breach Article 2 if otherwise criminal force was made in self-defense out of an honest belief, though that belief must be one that is borne of "good reason."[67]

Subsequently, the Strasbourg Court ruled in the 2016 case of *Armani Da Silva v. United Kingdom* that the existence of "good reasons" for the purpose of determining if self-defense can be granted as an affirmative defense should be determined purely by assessing the subjective belief of the defendant.[68] This case, where police officers who shot an innocent man after mistaking him for a suspected terrorist even though he did not resist orders, appears to be a regression of the *McCann* determination.[69] The Strasbourg Court did not recognize it as such and simply referred to it as an application of the objective *McCann* test.[70] Strasbourg subsequently concluded that there was no violation of Article 2, as the officers had fulfilled the self-defense requirements in U.K. domestic law. However, Strasbourg did not consider whether the U.K. domestic law was deficient in protecting the right to life, in breach of the United Kingdom's positive obligations to adopt a more rigorous set of self-defense laws that sufficiently and efficiently protects the right to life of innocent victims of fatal attacks by perpetrators who honestly and unreasonably believed that they were facing a threat to their person. This decision will be analyzed further in Part III.

2. Human Rights Act

As seen in the previous section, an application may be brought to the Strasbourg Court. The United Kingdom, however, has another method for an individual to assert their Convention rights before a court. The Human Rights Act, an Act of Parliament passed in

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66. *Id.* ¶¶ 55–56.

67. ASHWORTH, *supra* note 15, at 125; McCann v. United Kingdom, 21 Eur. Ct. H.R. 97, ¶ 200 (1995).

68. Jan Hessbruegge, *ECtHR Armani Da Silva v UK: Unreasonable Police Killings in Putative Self-Defence?*, EJIL:TALK! (Apr. 14, 2016), http://www.ejiltalk.org/ecthr-armani-da-silva-v-uk-unreasonable-police-killings-in-putative-self-defence [https://perma.cc/C38A-JVGG] (last visited Feb. 26, 2018).

69. Armani Da Silva v. United Kingdom, App. No. 5878/08, ¶ 248 (Eur. Ct. H.R. Mar. 30, 2016), *available at* https://www.echr.coe.int.

70. *Id.*

1998, incorporates the ECHR into U.K. law and permits individuals to obtain remedies from public bodies for the breach of Convention rights.[71] Therefore, the Act brings into domestic legislation the rights and fundamental freedoms set out in Articles 2 to 12 and 14 of the Convention, as well as other protocols to the Convention ratified by the United Kingdom.[72] It obliges domestic courts to interpret Convention rights in light of the interpretations that Strasbourg has announced, and to interpret all primary and secondary legislation in a way that is compatible with Convention rights.[73] However, if and where primary legislation, which refers solely to an Act of Parliament, conflicts with Convention rights so extensively that the two cannot be reconciled, domestic courts are required to enforce the conflicting primary legislation instead, on the principle of Parliamentary sovereignty that an Act of Parliament is the highest form of law in England and Wales.[74] In such a situation, domestic courts still have the power to issue a declaration of incompatibility to announce that such a conflict has been found.[75] Although this Declaration has no legally binding power, it can serve as a strong political motivation for Parliament to resolve that incompatibility.[76]

The Act also states that the acts of public authorities are to be constituted as unlawful if they were performed in a manner incompatible with a Convention right. There are two exceptions, however: If there is primary legislation which is incompatible with Convention rights that commands the authority to act in a way that violates that right, or if there is no other way to enforce a provision of primary legislation that does not violate Convention rights, the authority's action will not be constituted as unlawful under the Human Rights Act.[77]

3. European Union Charter of Fundamental Rights

The United Kingdom, as a Member State of the European Union (EU), is *ipso facto* party to the EU Charter of Fundamental

71. DEP'T FOR CONST. AFF., *A Guide to the Human Rights Act 1998: Questions and Answers*, 5 (Oct. 2006), http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/peoples-rights/human-rights/pdf/act-studyguide.pdf [https://perma.cc/8GDG-UL53] (last visited Feb. 26, 2018).

72. Human Rights Act 1998, c. 42, § 1(1)(a) (UK).

73. *Id.* §§ 2–3.

74. *Id.* § 3(2).

75. *Id.* § 4.

76. *Id.*

77. *Id.* § 6.

Rights (EU Charter).[78] The EU Charter became binding on all EU institutions and member states in 2009, and includes all the rights and freedoms enshrined in the ECHR, rights found in the case law of the Court of Justice of the European Union, and other rights and principles arising from the common constitutional traditions of EU member states.[79] While the rights included in the EU Charter are consistent with those in the ECHR and are of equivalent scale and scope, the EU Charter applies only when EU member states adopt national law for the purpose of implementing an EU directive, or when national authorities apply an EU regulation directly.[80]

Therefore, as current U.K. self-defense law is based entirely on the common law and Parliamentary legislation that is unrelated to any EU regulation or directive, the Charter should not apply.[81] However, while the European Union cannot adopt a general criminal code that applies throughout the Union, it is possible for the European Union to adopt a directive requiring member states to adopt a minimum standard on the definition of criminal offences.[82] In such a case, if the member state fails to implement the directive or implements it insufficiently, it can face liability in suits brought by the European Union itself.[83] Individuals who have suffered a loss or whose rights have been infringed by the failure to implement the directive can also bring suit through the principle of state liability established in *Francovich v. Italy*, as long as the individual can prove that the directive conferred specific rights upon individuals and that there is a causal link between the state's failure to implement the directive and the loss suffered.[84]

In light of the results of the EU Referendum in 2016, where the popular vote reflected the majority's desire for the United Kingdom to leave the European Union, the United Kingdom's

78. *EU member countries in brief*, EUROPA, https://europa.eu/european-union/about-eu/countries/member-countries_en [https://perma.cc/YPD5-HRD9] (last visited Feb. 3, 2018).

79. Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT [https://perma.cc/ZM7F-9SAN] [hereinafter Charter of Fundamental Rights].

80. *Id.* at tit. VII.

81. *Id.*

82. *Id.*

83. *EU Acts Against Member States for Failure to Implement Directives*, OUT-LAW.COM (Jan. 7, 2003), http://www.out-law.com/page-3218 [https://perma.cc/74S3-K89Y]; Case C-6/90, Francovich v. Italy, 1991 E.C.R. I-5375.

84. Case C-6/90, Francovich v. Italy, 1991 E.C.R. I-5375.

departure from the European Union appears to be inevitable.[85] Thus, the EU Charter can no longer be a valid method of influencing changes in English self-defense laws. Despite that, the European Union's recognition and incorporation of ECHR standards does in fact demonstrate European countries' general respect for ECHR rights.

II. PROBLEMS

The current doctrine of English self-defense law is problematic for several reasons, particularly in that its requirement of "honest belief" has left many cases of police brutality, sometimes even resulting in fatalities, unprosecuted and unchecked. On a doctrinal level, this Note finds the current law to be lacking in legal certainty and fairness. It is also arguably contrary to the United Kingdom's obligations under the ECHR, though the Strasbourg Court has so far failed to require any change in English law.

A. "Honest Belief" and Police Brutality

The cases of *Sharman* and *Bennett* described in the introduction are far from the only cases in which police officers escaped criminal liability for acts of violence against innocent citizens on the basis of self-defense.[86] The fact that English law does not require an examination of the reasonableness of an officer's belief, as long as it is "honest," has also left many cases of police brutality to be unprosecuted. In 2005, Jean Charles de Menezes was fatally shot in the London Underground when the police mistook him for a suspected suicide bomber.[87] The Crown Prosecution Service did not prosecute the officers even though the Independent Police Complaints Commission (IPCC) recognized that the mistake made was arguably unreasonable, as the standard of "reasonable force" is assessed in

85. Alex Hunt & Brian Wheeler, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Jan. 30, 2018), http://www.bbc.com/news/uk-politics-32810887 [https://perma.cc/2VVS-U9GK].

86. *See* R (on the application of Sharman) v. HM Coroner for Inner North London [2005] EWCA (Civ) 967 [1]–[9], [2005] Inquest L.R. 168 (Eng.); R (on the application of Bennett) v. HM Coroner for Inner South London [2007] EWCA (Civ) 617 [35]–[36], [2007] Inquest L.R. 163 (Eng.).

87. JOHANNES KEILER & DAVID ROEF, COMPARATIVE CONCEPTS OF CRIMINAL LAW 146 (2015) [hereinafter COMPARATIVE CONCEPTS].

accordance with the "honest belief" of the defendant, regardless of how unreasonable that belief may be.[88]

The "honest belief" doctrine in the United Kingdom is exceptional. Many other states with long-established criminal legal systems, including those that were previous British colonies and whose laws derived significant inspiration from the English law, require that a mistaken belief must be reasonable for the purposes of self-defense. For instance, the general rule in the United States is that a person is only entitled to use force for the purpose of self-defense if it reasonably appears necessary to defend herself against an unlawful and immediate threat of violence.[89] When the use of force is fatal, the law more strictly requires a reasonable belief that force is required to prevent the infliction of grievous bodily harm or death.[90] Similarly, Singaporean law requires that one must reasonably apprehend death or grievous hurt in an assault to justify the use of deadly force in self-defense.[91]

Many other countries in Europe also require a standard of reasonable belief. For example, French law requires the defendant to have an honest and reasonable belief that an imminent threat exists.[92] The Strasbourg Court, through the case of *McCann*, has also ruled that police officers may only open fire against a person if they have reasonable grounds for believing that he or she is committing or about to commit an act which would endanger their lives or the lives of innocents and that the use of force is absolutely necessary.[93] German law is slightly less certain: A strict textual interpretation of the German Criminal Code section 32, which states that self-defense

88. Criminal Justice and Immigration Act 2008, c. 4, § 76 (Eng.); COMPARATIVE CONCEPTS, *supra* note 87, at 146; Armani Da Silva v. U.K., App. No. 5878/08, ¶ 251 (Eur. Ct. H.R. Mar. 30, 2016), *available at* https://www.echr.coe.int.

89. GEORGE E. DIX, GILBERT LAW SUMMARIES: CRIMINAL LAW XXXIII (18th ed. 2010); *see generally* DAVID C. BRODY & JAMES R. ACKER, CRIMINAL LAW (2014) (outlining the general approach to the self-defense defense in the United States).

90. RANETA LAWSON MACK, A LAYPERSON'S GUIDE TO CRIMINAL LAW 141 (1999).

91. *What Can I do to Protect Myself in Self-Defence in Singapore?*, SING. LEGAL ADVICE, https://singaporelegaladvice.com/law-articles/what-can-i-do-to-protect-myself-in-self-defence-in-singapore/ [https://perma.cc/5BTZ-APC9] (last visited Feb. 3, 2018); *see also* SING. PEN. CODE §§ 96–106 (providing Singapore's statutory provisions concerning the "[r]ight of private defence").

92. *See* Kenneth W. Simons, *Self Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51, 53 n.2.

93. McCann v. United Kingdom, 21 Eur. Ct. H.R. 97 (1995).

"means any defensive action that is necessary to avert an imminent unlawful attack," would mean that the threat must be genuine and no mistaken belief, even a reasonable one, will avail the private defense.[94] However, German self-defense law is known to be lenient when it comes to the force used in response to the threat, and the force used in self-defense is only unjustifiable when it is grossly disproportionate to the threat.[95] It is still unclear whether German law would accept a mistaken belief as sufficient grounds for self-defense.[96] Though, given the explicit distinction between justifications and excuses in German law, mistaken belief would likely be categorized as the latter.[97] Nonetheless, it appears that the English position of accepting mistaken beliefs as long as they are honestly perceived is an exceptional one.

Arguably English law has been reluctant to extend the requirement of reasonable belief for self-defense beyond the realm of civil lawsuits as it recognizes a need to separate criminal culpability from civil liability.[98] Civil liability is frequently grounded in negligence, whereas it is much less common for negligence, no matter how extensive, to form the basis of criminal liability.[99] For one to be culpable of a criminal offense, there is the notion that one must have performed a "morally undesirable" act, and that the defendant performing that act, not just the act itself, is especially blameworthy.[100] In English law, the idea of criminal culpability as a form of moral assessment is particularly prevalent; culpability thus requires that the defendant, in performing an act, disclose some "shortfall of character" or "deficiency of virtue."[101] Hence, a person's actions may be undesirable to others or to society as a whole, but that does not mean a person is necessarily culpable where the action taken does not reflect poor moral character on his part.[102] However, the person may still be liable in a civil case out of the simple reason that

94. COMPARATIVE CONCEPTS, *supra* note 87, at 136.
95. Simons, *supra* note 92, at 53.
96. *Id.*
97. Miriam Gur-Arye, *Should a Criminal Code Distinguish Between Justification and Excuse?*, 5 CAN. J.L. & JURIS. 215, 215 (1992).
98. For a discussion of culpability, see DENNIS J. BAKER & JEREMY HORDER, SANCTITY OF LIFE AND THE CRIMINAL LAW: THE LEGACY OF GLANVILLE WILLIAMS 178 (2015) [hereinafter SANCTITY OF LIFE].
99. GLANVILLE WILLIAMS, TEXTBOOK CRIMINAL LAW 91 (London: Stevens & Son. ed., 2d ed. 1983).
100. SANCTITY OF LIFE, supra note 98, at 179.
101. *Id.* at 180.
102. *Id.*

her actions are undesirable. In the case of English self-defense law, the difference is drawn in that a person is civilly liable in tort if he makes an honest but unreasonable mistake and uses force upon another as a result of it (as seen in *Ashley v. Chief Constable*), but he is not criminally culpable.[103] His act of unreasonably harming another person is not blameworthy, but it is socially undesirable.

A discussion of the doctrinal bases of drawing such a difference can be found in *Ashley v. Chief Constable*.[104] In *Ashley*, the House of Lords held that self-defense to a civil claim for tortious assault and battery, where the assailant had acted in the mistaken belief that he was in imminent danger of being attacked, required that such a mistaken belief must be honestly and reasonably held. Lord Scott, speaking for the majority, stated that as the function of the civil law of tort is different from that of the criminal law, the standard for one's state of mind in self-defense should differ.[105] Where the main function of criminal law is to "identify, and provide punitive sanctions for" behavior that is categorized as criminal because it is "damaging to the good order of society," the function of tort law is to "identify and protect the rights" of people, and to balance between these rights.[106] According to Lord Scott in *Ashley*, this distinction explains the difference in the elements of self-defense in criminal and tort law. This Note, however, finds flaws with this explanation.

While it is understandable that the English courts would want draw such a distinction, it is still problematic for many reasons. For one, the doctrinal basis of drawing such a formalistic distinction between self-defense in criminal law and self-defense in tort law based on an almost artificial notion is regrettable. While such a difference does exist, it is merely a guideline and should not be formed in absolutes. As a matter of fact, Lord Scott's explanation is not consistent with many English legal doctrines. Many doctrines in English criminal law are in fact meant to "identify and protect the rights" of people through a deterrent effect.[107] One such example

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103. Ashley v. Chief Constable of Sussex Police [2008] UKHL 25 (appeal taken from Eng.).

104. *Id.* at 96.

105. *Id.*

106. *Id.*

107. *Id.* (arguing that the main function of the civil law of tort "is to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others. The rights of one person, however, often run counter to the rights of others and . . . the law of tort[] must then strike a balance between the conflicting rights.").

would be the doctrine of gross negligence manslaughter, which brings the ordinarily tortious concept— breach of one's duty of care—into the criminal sphere for the policy-based purpose of upholding individuals' responsibility for the health and safety of others.[108]

The purpose of protecting individual rights is not exclusive to civil law. The existence of gross negligence manslaughter shows that English law does recognize that the criminalization of certain forms of unreasonable conduct is crucial to protect individual rights. The influential criminal law scholar, Glanville Williams, also acknowledged in 1983 that even though there is significant moral difficulty in punishing people for what they cannot help, negligence is still an appropriate ground of moral reproach.[109] In fact, criminal defenses especially are inextricably concerned with a balancing of rights between the perpetrator and the victim, and English judges have also recognized this concern in self-defense cases involving mistaken beliefs arising from voluntary intoxication.[110] Therefore, this artificial distinction is neither explainable nor desirable.

Lord Scott's reasoning also appears weak as a matter of principle. Lord Scott has recognized it himself, in *Ashley*, that the purpose of criminal law is to punish actions that are "damaging to the good order of society."[111] In stating so, he separates the purpose of criminal law from the civil law of tort, which is meant to balance between the rights of individuals.[112] However, there is little explanation as to how acting on a grossly unreasonable belief in attacking an innocent and not facing a criminal penalty is not "damaging to the good order of society." There is simply no explanation as to why English courts, and the legislature, are so unwilling to assess the reasonableness of a defendant's belief at all in the defendant's use of force against another person, when such a belief can constitute an incredibly significant aspect of the defendant's justification or excuse in a case where he has mistakenly thought he was under an imminent threat. As a result, as has already been asserted, many cases of police officers using deadly force against innocents are simply not prosecuted, or summarily dismissed, with little examination into the reasonableness of the police officer's beliefs.

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108. THE UNION FOR PEOPLE IN TRANSPORT AND TRAVEL, *supra* note 32, at 3.

109. WILLIAMS, *supra* note 99.

110. Regina v. O'Connor [1991] Crim. L.R. 135 (Eng.).

111. [2008] 1 AC 962, [17].

112. Ashley v. Chief Constable of Sussex Police [2008] UKHL 25 (Eng.).

This is concerning as police officers are by nature capable of wielding a drastic amount of force against civilians. It is thus crucial that this amount of capacity be justified. Police brutality on the basis of racial bias is especially concerning, and there is a disturbing trend of law enforcement officers viewing black citizens in particular as inherently threatening.[113] More black people are jailed in England and Wales proportionally than in the United States as of 2010.[114] Black people make up fifteen percent of the prison population in the United Kingdom, even though they constitute only 2.2 percent of the general population.[115] Police discrimination and violence against black people are also common in the United Kingdom.[116] There is an immense amount of evidence demonstrating that police racism commonly results in deaths of innocent black men and women who were seen as threatening simply by virtue of their race, though such incidents are more commonly reported in the United States than the United Kingdom.[117] Arguably, the only way to work to overcome this is to insist that unreasonable beliefs should no longer be tolerated as an excuse that avails an attacker, who intentionally harmed or even killed an innocent person on the basis of a racist belief, to a defense that rids him completely of any culpability.

B. Unreasonable Beliefs and Manslaughter

Another major problem in English self-defense law, in cases where a mistaken but genuine belief has resulted in the defendant's use of fatal force against the victim, arises from the fact that self-defense is available in its current form to all forms of homicide in a way that subverts the purpose of some homicide laws in the first

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113. Randeep Ramesh, *More Black People Jailed in England and Wales Proportionally than in US*, GUARDIAN (Oct. 10, 2010), https://www.theguardian.com/society/2010/oct/11/black-prison-population-increase-england [https://perma.cc/6GWJ-JZV5].

114. *Id.*

115. *Id.*

116. Siana Bangura, *We Need to Talk About Police Brutality in the U.K.*, FADER (Mar. 29, 2016), http://www.thefader.com/2016/03/29/police-brutality-uk-essay [https://perma.cc/CB2M-P933].

117. *Id.* ("The U.K. has a long history of state violence, however, compared to the U.S. there is much less visibility of this in mainstream media."). *See generally* Daniel Funke & Tina Susman, *From Ferguson to Baton Rouge: Deaths of Black Men and Women at the Hands of Police*, L.A. TIMES (July 12, 2016), http://www.latimes.com/nation/la-na-police-deaths-20160707-snap-htmlstory.html (on file with the *Columbia Human Rights Law Review*) (cataloguing murders of black men and women by police officers).

place. Specifically, the "honest belief" doctrine and its availability to defendants charged with manslaughter by gross negligence is completely contrary to the theoretical and practical purposes of this particular crime.

As stated in Part I, the crime of manslaughter by gross negligence is unique in that it punishes defendants for actions or omissions which caused death that were so unreasonable that they warrant criminal conviction.[118] It is a conviction that considers, on a purely objective basis, the reasonableness of the defendant's course of conduct rather than any subjective intention or recklessness.[119] This objective approach to *mens rea* in manslaughter by gross negligence is applied so strictly that English courts will not even consider, for the purposes of finding liability, any characteristics of the defendant that would cause them to be incapable of operating at the level of a reasonable person.[120] Defendants who were of low intelligence, blind, and partially deaf have been convicted on the basis that their course of conduct was grossly negligent by the standard of a reasonable person, such as in *Regina v. Stone & Dobinson*.[121] *Stone & Dobinson* involved an elderly couple—a widower John Edward Stone, who was blind, partially deaf, had no appreciable sense of smell, and was of low intelligence, and his mistress Gwendoline Dobinson, who was described as "ineffectual and inadequate" in her daily operations.[122] John Edward Stone's younger sister, Fanny Stone, who suffered from anorexia nervosa, came to live with them and occupied a small room. When she began to spend days at a time confined to her room and did not leave her bed, the defendant couple continued to try to take care of her by washing her, but failed to find a doctor for her. Fanny Stone subsequently died from toxemia. The couple was convicted on the basis that any reasonable person would be expected to summon help, and they owed her a duty of care as she lived under their roof. It did not matter, as far as gross negligence manslaughter was concerned, that the couple was not capable of operating at the level of a reasonable person.[123]

While this Note will not debate the merits of the existence of gross negligence manslaughter, it is important to recognize the existence of this crime that obliges people not to act in a way so

118. R v. Adomako et. al. [1995] 1 AC 171, 171 (Eng.).
119. *Id.* at 175.
120. *Id.* at 176.
121. R v. Stone & Dobinson [1977] 2 W.L.R. 169, 169 (Eng.).
122. *Id.*
123. *Id.* at 170.

contrary to the standard of a reasonable person that it results in the death of another person. Manslaughter by gross negligence is predicated on the idea that the defendant's course of conduct was grossly unreasonable, caused death, and she should hence be culpable for it. With that in mind, it is very odd that English self-defense can excuse this type of manslaughter, meaning that a defendant can be fully acquitted of gross negligence manslaughter when his grossly unreasonable—but genuine—belief had caused death. This leads to the absurd result that the elements that could prove a conviction of gross negligence manslaughter would instead prove the existence of self-defense acquitting a defendant of gross negligence manslaughter. It cannot be explained why a crime that specifically punishes a person for taking a completely unreasonable action can allow a full defense that is based on a completely unreasonable action. It bars the ability of the court to assess the reasonableness of the very basis of a potentially unjustified action that a person has taken which has caused the death of another.

As an illustration, we can examine the case of *Regina v. Adomako* in comparison with the cases of police brutality previously mentioned. In *Adomako*, an anesthetist's conviction of manslaughter by gross negligence was upheld on the basis that he had caused a patient's death by failing to notice a disconnection in his oxygen pipe, which was a gross breach of duty as it fell far below the standard of a reasonable doctor—which was a much higher standard than that of a reasonable person.[124] In contrast, the police officer in *Sharman* who fatally shot Stanley on the mistaken belief that the table leg he was carrying was a shotgun was not even held to the standard of a reasonable person, let alone that of a reasonable trained police officer, in the formation of that belief because of the nature of English self-defense law.[125] Therefore, even though he had caused death with an action taken in what was arguably a gross breach of his duty of care, he cannot be convicted of gross negligence manslaughter, or any other form of homicide. English self-defense law thus undermines the

124. R v. Adomako et. al. [1995] 1 A.C. 171 at 188 (Eng.); Ying Hui Tan, *Law Report: Anaesthetist's conviction for manslaughter upheld: Regina v Adomako - House of Lords*, INDEPENDENT (June 30, 1994), http://www.independent.co.uk/news/uk/law-report-anaesthetists-conviction-for-manslaughter-upheld-regina-v-adomako-house-of-lords-lord-1410881.html [https://perma.cc/AVN7-UVK6].

125. R (on the application of Sharman) v. HM Coroner for Inner North London [2005] EWCA (Civ) 967 [1]–[9], [2005] Inquest L.R. 168 (Eng.).

purpose of gross negligence manslaughter entirely, and generates results that are noticeably unfair.

C. An Artificial "Reasonableness" Element

On the discussion of the "honest belief" doctrine, we must still note that English courts have not, in fact, completely dismissed all honest beliefs as justified. While there is no reasonableness element in assessing whether an honest belief is justified, legislation and past case law has established that there is one type of mistaken belief that cannot be justified as an "honest belief" that can avail the defendant of the justification of self-defense.[126] The only situation in which the "honest belief" doctrine does not apply on its face is if the mistaken belief was caused by the intoxication of the defendant at the time of the act, even if that belief could be considered reasonable, provided that the defendant would not have had that belief if he were sober.[127] This rule was codified in the Criminal Justice and Immigration Act in 2008, but its history dates much longer than that.[128] While self-defense was still a common-law defense, several Court of Appeal cases have firmly held that a defendant's drunken belief can never be relied on for the purpose of self-defense.[129] In *Regina v. O'Grady*, a case decided about 30 years before legislative codification of this doctrine, Lord Chief Justice Lane stated that the rationale for barring drunken beliefs was to balance between the "competing interests" of the defendant and the victim. He thus concluded that the defendant deserves a conviction, because the fault in such a case would lie mainly on the defendant, rather than the victim who suffered "through no fault of his own" as a result of the defendant's "drunken mistake."[130] Interestingly enough, this statement essentially rejects the opinion of Lord Scott more than 30 years later in *Ashley*, that the courts should only balance interests between individuals when in the realm of tort law.[131]

Apart from the exclusion of situations involving voluntary intoxication, which has been rooted in the common law for decades

126. Director of Public Prosecutions v. Majewski [1977] AC 443, [1976] UKHL 2 (appeal taken from Eng.).

127. Criminal Justice and Immigration Act 2008 c.4, § 76 (Eng.).

128. *Id.*

129. R v. O'Grady [1987] 1 QB 995 (Eng.); R v. O'Connor [1991] Crim LR 135 (Eng.); R v. Hatton [2006] 1 Cr. App. R 16 (Eng.).

130. R v. O'Grady [1987] 1 QB 995 (Eng.).

131. Ashley v. Chief Constable of Sussex Police [2008] UKHL 25, [18] (appeal taken from Eng.).

and subsequently expressly codified by legislation, the courts have recently also excluded beliefs that arise from a delusional state of mind. In the 2013 case of *Regina v. Oye*, the defendant mistakenly thought, while in a delusional state of mind, that he was under threat of attack by police officers.[132] He perceived the officers as evil spirits and spontaneously assaulted them.[133] At trial, the Crown found that since his belief was a genuine one that did not arise from voluntary intoxication (the "honest belief" requirement in §76(4)), and the use of force was reasonable in the circumstances as he mistakenly perceived them to be (the "reasonable force" requirement in §76(6)), he should be acquitted on the basis of self-defense.[134] The Court of Appeal reversed the decision on the basis that an insane person cannot set the standard of reasonableness as to the degree of force used by reference to his own insanity.[135] It added that it would make "little sense" for the jury to put themselves into the shoes of a "reasonable lunatic."[136] Therefore, the force used cannot possibly be "reasonable" for the purposes of the objective requirement of reasonable force. In deciding the ruling, Lord Justice Davis pointed out that the trial court's holding was concerning because allowing the defense would mean "the more insanely deluded a person may be in using violence in purported self-defence the more likely that an entire acquittal may result."[137] This statement demonstrates the policy decisions behind this ruling and the idea that English courts are still, to some extent, willing to bar the defense to honest but delusional beliefs, even though it is not stated in legislation.[138]

Furthermore, while English law employs a subjective test for the defendant's belief in the existence of an imminent threat, it applies an objective test for whether or not the defendant's use of force is reasonable given the belief that the defendant has in mind.[139] This demonstrates a certain awareness on part of the legislature and judiciary to impose some form of a reasonableness element to prevent self-defense from being used to completely absolve someone of culpability when he has acted with grossly disproportionate force.

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132. R v. Oye [2013] EWCA Crim 1725, [2014] 1 W.L.R. 3354, [2] (Eng.).
133. *Id.* at [19].
134. *Id.* at [46]–[48].
135. *Id.* at [47].
136. *Id.*
137. *Id.* at [45].
138. R v. Oye [2013] EWCA Crim 1725, [2014] 1 W.L.R. 3354, [56] (Eng.).
139. Criminal Justice and Immigration Act 2008, c.4, § 76(4)(b) (Eng.).

However, while it is respectable that the English law has accepted that there ought to be certain "honest beliefs" which are so unreasonable or unjustified that they cannot be relied on by defendants who seek to plead self-defense, and does attempt to add a layer of reasonableness through the requirement "reasonable force," this Note finds that the rigid nature and legal uncertainty of these rules have generated further problems for English self-defense law.

First, the rigid nature of the two blanket exclusions is unfair and neglects underlying problems. These attempts to narrow the excessively broad nature of the "honest belief" doctrine result in the exclusion of drunken and deluded beliefs on the basis that they are automatically unjustifiable or unreasonable. This is simultaneously over-inclusive and under-inclusive. It is under-inclusive as it does not include other forms of unreasonable beliefs such as racist beliefs, or unreasonable police brutality. It is over-inclusive as it presumes that all intoxicated beliefs are per se unreasonable—for example, as pointed out by Dr. Jonathan Rogers, an intoxicated woman who is walking home at night would not be able to plead self-defense to instinctively pepper-spraying a person whom she mistakenly believed was following her.[140] If we consider the purpose of criminal law to deter the commission of societally undesirable acts, and also as a method of ascribing moral blame to someone, both are left unsatisfied. It is first unclear, from a Benthamite perspective of criminal law as influencing societal behavior, what this is meant to deter. While one could say that it is meant to deter people from walking home alone at night while drinking (which is absurd), or to prevent people from acting on their honest and instinctive impulses to defend themselves against perceived threats when drunk (which negates the purpose of self-defense in the first place and can cost people their lives), neither make much sense as a policy measure. There is also much less moral blame we can ascribe to a person who acts on her impulses to defend herself when intoxicated, compared to one who makes automatically racist beliefs when sober, but the latter will be allowed the full defense and the former nothing. The simultaneously over-inclusive and under-inclusive nature of the current law results in a situation wherein an intoxicated woman walking home would not have a defense when she instinctively pepper-sprays a person whom she thought was following her—whereas a person who is naturally racist would get off scot-free as

140. Jonathan Rogers, *Let the drunkard lie!*, 1555(7204) NEW L.J. 1892, 1892–93 (2005).

long as he was sober, or even if he was drunk but would have made the same mistake if he were sober.[141]

A greater concern arises where mistaken beliefs are created with little regard as to whether they are true. Many cases involving police officers who have become used to the violence possibly inherent in their line of duty do in fact create beliefs that individuals are about to use violence against them or others as well, with mostly indifference as to whether these beliefs are true. In *Lindley v. Rutter*, a policewoman was not prosecuted after forcibly searching a female prisoner and removing her brassiere, although there was no reason to believe that the prisoner was at risk of committing suicide.[142] The action appeared to have been performed mostly out of routine and with little to no effort taken to ascertain the truth of that belief.[143] It is concerning that many state agents do in fact demonstrate such an attitude of indifference in forming such beliefs, possibly deriving from the thought that they are effectively immune from investigation as long as they can say that their beliefs are honest.[144]

The artificial cognitive separation of "belief" and "force," with English law ascribing a reasonableness element only to the latter and not the former, is also undesirable. First, it is unclear why a person who acts on an unreasonably mistaken belief with reasonable force would be allowed a full defense while a person who acts on a correct factual belief with excessive force would be granted no defense whatsoever. Second, the human cognitive thought process simply cannot be categorized in such a manner, and the existing legislation has caused much confusion and uncertainty. A person, when acting in self-defense, can have a range of beliefs that he is considering before acting—for example, the woman who suspects she is being followed in the example above may have a variety of likely threats she is considering in her head before she chooses to make a pre-emptive strike to guarantee her own safety. It is hence unclear which "belief" the courts will find to be genuine and use as the basis for assessing reasonable force, and has led to much judicial uncertainty.

This problem subtly arose in the *Oye* case mentioned above, in which it was so difficult to specifically pinpoint what the exact "threat" the defendant perceived himself to be facing was, that the

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141. SEEKING SECURITY, *supra* note 6, at 273.

142. Lindley v. Rutter [1981] QB 128 (Eng.); SEEKING SECURITY, *supra* note 6, at 290.

143. SEEKING SECURITY, *supra* note 6, at 290.

144. *Id.* at 289.

court simply held that the standards of reasonableness could not be set and disallowed the defense. While the ruling was understandable, it generates much legal uncertainty, as the way the judges made the ruling in *Oye* was through a convoluted reinterpretation of legislation that was clearly contrary to its wording.[145] A similar problem arose in *R v. Martin*, in which a man, suffering from paranoid personality disorder and believing two burglars were going to attack him, shot one of the burglars and was found to have used unreasonable force. The court failed to take into account his increased perception of risk as a result of his disorder, likely due to the vague nature of "risk" in ascertaining a particular belief.[146] Hence, if the purpose of the current law is to increase legal certainty, it has clearly failed to do so as the cognitive compartmentalization of "belief" and "force" into separate categories has contributed unnecessary complexity which seldom mirrors actual circumstances.

The 2008 legislation included additional clarification as to what constitutes "reasonable force," possibly to counter the undesirable cognitive separation in the common law.[147] It states that where a person acts in a way that he "honestly and instinctively thought was necessary," this fact serves as "strong evidence" that the force used was reasonable.[148] This is, once again, problematic for similar reasons as those mentioned previously. A person who is "honestly and instinctively" violent will be held to have reasonable force, even though one would not consider an inherent predisposition towards violence to be a mitigating factor in any way.

The excessively inclusive nature of self-defense as a complete defense to any form of homicide is particularly noticeable when held in comparison with other common defenses that are similar. Unlike self-defense, which appears unjustly broad, the defense of duress is unjustly narrow and oddly so—it does not extend to charges of murder, requires the defendant to be held to a strictly reasonable standard, and also the defendant will not be able to plead duress where there are alternatives to the criminal act, even if the defendant

145. *See* R v. Oye [2013] EWCA Crim 1725, [2014] 1 W.L.R. 3354, [2] (Eng.); Andrew Turnbull, *Delusions and Self-Defence: Implications of the Decision in R v Oye [2013] EWCA Crim 1725*, CHARTER CHAMBERS (Oct. 25, 2013), http://www.charterchambers.com/news/2013/10/25/delusions-and-self-defence-implications-of-the-decision-in-r-v-oye-2013-ewca-crim-1725-by-andrew-turnbull/ [https://perma.cc/2UJW-UBFT].

146. *See* R v. Martin [2001] EWCA Crim 2245 (Eng.).

147. Criminal Justice and Immigration Act 2008, c.4, §76(7)(b) (Eng.).

148. *Id.*

is for any reason incapable of identifying or using such alternatives.[149] This is likely a result of the preconceived idea that duress is naturally an excusatory defense, whereas self-defense is a justification. However, self-defense based on a mistaken belief is also an excuse. It is thus important to note that self-defense does not simply act as a justification and allow it a broad spectrum of effect as a result, and recognize that the excusatory nature of mistaken self-defense warrants that it should be an area that is relatively restricted like the defense of duress is.

D. An Obsolete Basis

Finally, the United Kingdom's unwillingness to budge from this position is particularly odd given the fact that its basis was in a case that had already been overruled in 2003. As stated in Part I.B, the honest belief doctrine of English self-defense law can be attributed to *Gladstone Williams*.[150] In *Williams*, a man (known only as M in the judgment) saw a youth robbing a woman in a street. M tried to catch the youth, who broke free from his grasp, so M knocked him to the ground. The defendant then arrived at the scene and only witnessed the later stages of the accident.[151] M told the defendant, untruthfully, that he was a police officer who was arresting the youth for robbing the woman. The defendant asked M to show him a warrant card, which he could not produce.[152] They got into a struggle, during which the defendant punched M in the face.[153] The defendant was charged with assault occasioning actual bodily harm under the Offences Against the Person Act § 47.[154] At trial, the judge directed the jury that the availability of the defense should be determined by whether the defendant had an honest belief, based on reasonable grounds, that M was acting unlawfully.[155] As the jury found the defendant's belief unreasonable, the defendant was convicted. He appealed on the basis that the judge had misdirected the jury.[156]

The Court of Appeal subsequently held that the trial judge should have directed the jury to find the defendant's state of mind

149. *See* R v. Hudson and Taylor [1971] 2 QB 202 (Eng.).
150. R v. Williams (Gladstone) [1987] 3 All ER 411 (Eng.).
151. *Id.*
152. *Id.*
153. *Id.*
154. Offences Against the Person Act 1861, 24 & 25 Vict. c. 100, § 47 (UK).
155. R v. Williams (Gladstone) [1987] 3 All ER 411 (Eng.).
156. *Id.*

with regards to his honest belief, and not consider whether or not it is reasonable except for the purpose of determining if he held that belief at all. In determining this standard, Lord Chief Justice Lane mainly applied the principle in *Director of Public Prosecutions v. Morgan*, where the House of Lords decided that a man who engaged in sexual intercourse with a woman who did not consent was not guilty of rape as long as he honestly believed that she consented, irrespective of whether that belief was reasonable.[157] The shocking decision in *Morgan* has thankfully been overruled upon the enactment of the Sexual Offences Act 2003, which required one to have an honest and reasonable belief in consent to be acquitted of a sexual crime.[158] The doctrine of honest belief for cases of self-defense, however, remained.

Hence, the arguable origin of the "honest belief" doctrine in self-defense had little reason behind it apart from the application of a superior court's holding which has long been overruled. Therefore, this Note asserts that the doctrine should be reconsidered, in light of its inherent problems, doctrinal uncertainty, and failure to reflect important social developments.

III. POTENTIAL SOLUTIONS

A. An Honest and Reasonable Belief

A simple solution to the above problems would naturally be to change the standard of belief that a defendant must have in cases of mistaken belief in self-defense to an honest and reasonable one similar to the standard in English tort law established in *Ashley*.[159] While it is certainly not true that adding the requirement of reasonable belief will stop all cases of unreasonable police brutality or racist beliefs from avoiding conviction, as demonstrated in the extremely controversial New York case of *People v. Goetz*, such a requirement would still at the very least allow for the defendants' beliefs to be scrutinized on an objective level before the jury.[160]

Naturally, requiring a standard of honest and reasonable belief for cases of mistaken belief in self-defense could pose certain

157. Director of Public Prosecutions v. Morgan [1975] UKHL 3, [1976] AC 182 (appeal taken from U.K.).

158. Sexual Offences Act 2003, c. 42, § 1(1) (U.K.).

159. Ashley v. Chief Constable of Sussex [2008] UKHL 25, [2008] 1 AC 962 (appeal taken from Eng.).

160. People v. Goetz, 68 N.Y.2d 96, 113 (N.Y. 1986).

issues, such as hindsight bias. A twelve-member jury made up of calm and composed individuals not facing a situation involving potential threat and looking in hindsight at the situation may have little sympathy for the defendant in deciding whether or not the belief that the defendant had formed in a high-tension situation was in fact "reasonable." In order to resolve this potential problem, the reasonableness standard for finding "honest and reasonable belief" should focus on whether or not the way in which the belief was formed was reasonable, rather than the belief itself.

Using the standard of an honest belief with a "reasonable basis" for establishing said belief is beneficial in three ways. First, it allows the jury flexibility while minimizing the hindsight bias that would naturally be pervasive in an assessment of the belief itself, by allowing the jury to scrutinize the thought process that went behind the belief. Such a method will also consume limited resources, as the jury can simply make use of the defendant's testimony of their perception at the time and the corroborating evidence to come to a determination of its reasonableness. Second, this allows for police officers to be held to a higher standard of reasonable belief without creating a different set of standards for police officers on duty entirely, as the jury would take into account the police officer's training and experience in determining whether the belief made had a reasonable basis. If the jury finds that the defendant had created such a belief with reckless indifference as to whether or not it is true, as is a problem that commonly plagues cases of unreasonable brutality, such a belief shall not be found to be reasonable.[161] Finally, it allows the judges a certain amount of discretion and control in deciding cases by giving them the ability to instruct the jury as to what kinds of bases should or should not be considered "reasonable," which can influence a new series of case law setting forth what constitutes a reasonable basis for belief.

The Parliament and English courts have made a good attempt at punishing defendants in situations where their beliefs were made in a way that was potentially more culpable, by denying defendants the defense where their mistaken beliefs were a result of an intoxicated state of mind, where the intoxication was voluntary.[162] However, a blanket ban of the defense on all cases involving mistaken beliefs arising from voluntary intoxication is premised on the assumption that when a person is voluntarily intoxicated, any

161. As suggested in SEEKING SECURITY, *supra* note 6, at 291.
162. *See* Criminal Justice and Immigration Act c.4, § 76(5) (Eng.).

mistaken belief arising from it is automatically unreasonable, no matter how sympathetic the situation may be. Yet, the fact that the courts are willing to deny the defense on the basis of an unreasonable belief—even if they define unreasonableness as simply any belief arising from voluntary intoxication—shows that the English courts are not automatically predisposed against incorporating the idea of denying the defense on the basis of an honest but unreasonable belief. Therefore, it may not be so unlikely for the courts to reject this rigid definition of unreasonableness and adopt a reasonableness standard that gives more discretion to the jury's assessment of the circumstances of the case, while still controlling a few factors that the jury must consider.

B. Abolishing Affirmative Defense to Manslaughter

Alternatively, if such a change is not feasible at this point in time, it may still be possible to ensure that cases of self-defense in which a mistaken belief in a threat caused death are properly scrutinized on the level of reasonableness by excluding self-defense from being pled entirely for manslaughter by gross negligence. When a person acts in legitimate or reasonable self-defense, they would simply not fulfill the elements of gross negligence manslaughter anyway, as their actions would not have been considered by a reasonable jury to have been in gross breach of duty. There is thus little reason for an affirmative defense of self-defense to be available to a charge of gross negligence manslaughter, and the only purpose it does serve is to provide people who grossly and unreasonably believed they had to use fatal violence against an innocent person to be excused entirely from being convicted of any form of homicide.

As of 2017, there has yet to be direct authority in which a defendant who kills another as a result of an honest but unreasonable belief is either convicted or acquitted of a gross negligence manslaughter charge. When such a case arises, this Note implores that the English courts set a precedent to deny the defense altogether for charges of gross negligence manslaughter.

C. Partial Defense of Excessive Self-Defense

We have discussed in Part II the problematic nature of separating "belief" and "force" into separate cognitive categories and ascribing the stringent requirement of reasonableness only to the latter. A major problem with English self-defense law is that it operates in an "all-or-nothing" manner—a defendant is either

absolved of all liability, or is convicted with full culpability. In cases of self-defense, this means that where the defendant acted on a grossly unreasonable mistaken belief with what might be considered "reasonable force" in light of that mistaken belief, causing death, he will be allowed to plead a full defense, whereas a defendant who acted on a correct belief but used excessive force given that belief, causing death, will be convicted of murder.

There is, again, little reason why this is the case, and this once again demonstrates the undesirably absolute and formalistic distinctions prevalent in English criminal law. Imperfect self-defense exists as a partial defense in many sophisticated jurisdictions around the world, including Commonwealth countries which have based their self-defense laws on English law yet departed since. Many states of the United States, such as California and Maryland, recognize the doctrine of imperfect self-defense at common law.[163] Two European countries also recognize self-defense through the use of excessive force as a defense in itself. The German Criminal Code provides in § 33 that if a defendant uses more force than necessary out of "confusion, fear or fright", a full defense of "self-defense-excess" is still available.[164] In the Netherlands, the Dutch Criminal Code also excuses excessive force if the force arose as the result of a "strong emotion brought about by the attack."[165] Australia recognizes, in statutory form, a partial defense to murder that reduces the offence to manslaughter if the defendant used disproportionate force that resulted in death.[166]

It is potentially arguable that such a partial defense has already been covered by the now statutory defense of "loss of control" in English criminal legislation.[167] The Coroners and Justice Act 2009 allows a partial defense to a person who kills another to have their conviction reduced to one of manslaughter provided that the crime was committed in loss of self-control, with a "qualifying trigger," and with a "normal degree of tolerance and self-restraint."[168] A "qualifying trigger" is defined as either a fear of "serious violence" (which overlaps with self-defense), or anything done or said that constituted circumstances of "an extremely grave character" that caused the

163. State v. Humphrey, 921 P.2d 1 (Cal. 1996); State v. Faulkner, 483 A.2d 759, 769 (Md. 1984).

164. COMPARATIVE CONCEPTS, *supra* note 87, at 147.

165. *Id.*

166. Criminal Law Consolidation Act 1935 (SA) s 15 (Austl.).

167. Coroners and Justice Act 2009, c. 25, § 54(1) (Eng.).

168. *Id.*

defendant to have "a justifiable sense of being seriously wronged."[169] However, such a defense is insufficient as it still subjects the use of force by the defendant to a reasonableness requirement that is not explicitly stated to be one. By holding the defendant to the standard of a person with a "normal degree of tolerance and self-restraint," the court has barred the defense from people who fail to reach such a standard. While it may be understandable for courts to be reluctant to extend a partial defense to someone who knowingly killed another after being provoked when no reasonable person would, it is less understandable why a full defense can be granted where the unreasonableness was in the mistaken belief rather than the force used. The best way to smooth out this undesirable cognitive distinction would be to include a reasonableness requirement for both the "belief" and "force" assessments, and include a partial defense if either requirement fails to reach the "reasonableness" threshold.

A concern about having a partial defense was raised in Australia in *Zecevic v. Director of Public Prosecutions*, a case that abolished the defense at common law, though it was subsequently implemented statutorily. The concern was that it would confuse juries to be asked to consider both questions of "full" and partial self-defense in a way that might increase the risk of juries agreeing on partial self-defense as a compromise verdict when in fact none believed in it.[170] The problem of compromise verdicts is often faced in many criminal charges involving several crimes of varying levels of severity—such as murder and manslaughter, and crimes which constitute misdemeanors and felonies in the United States. The way to solve this problem, however, is through better jury instructions rather than abolishing the principle of having different charges and defenses for different situations.

D. Inspiring Reform: The European Court of Human Rights

Many methods of reform in English self-defense law have been debated and discussed in the past, but this has yet to lead to any changes in English self-defense law that can better protect the rights of innocent individuals not to be attacked by police officers or other civilians who have unreasonably or indifferently believed that they were threatening. Now that the doctrine of self-defense has been fully set out in Parliamentary legislation rather than just the common law,

169. *Id.* § 55.

170. Zecevic v. Director of Public Prosecutions [1987] HCA 26; (1987) 162 CLR 645; (1987) 71 ALR 641; (1987) 61 ALJR 375 (Austl.).

the job of the courts to amend it has become much more difficult. Hence, I believe that currently the most effective way to stimulate any reform in self-defense law today would be for the Strasbourg Court to decide that English law, as it stands, is incompatible with the ECHR and require that the United Kingdom change the existing laws through the doctrine of positive obligations.

Taking into account the language used in Article 2, and the position of the Strasbourg Court in *McCann v. United Kingdom* and other related cases, it does appear that English law—which in its current state fails to convict police officers who kill innocents with reckless indifference—is a violation of Article 2. The Article states that deprivation of life is always a violation unless it is done so with the "use of force which is no more than absolutely necessary."[171] In *McCann*, the Strasbourg Court interpreted that provision of Article 2 to mean that where state actors use lethal force against an innocent without reasonable belief in the existence of a threat, such action constitutes a violation of the state's obligations under Article 2. In *Angelova and Iliev v. Bulgaria*, the Strasbourg Court stated that the core of Article 2(1) requires states to put into place "effective criminal law provisions to deter the commission of offences against the person."[172] With that in mind, the fact that English self-defense law allows unreasonable belief to justify taking the life of another insufficiently protects potential victims—which the United Kingdom has a positive obligation to do under Article 2—means that it can be established that U.K. law does not sufficiently deter people from hurting others on an unreasonable belief in a threat. The Strasbourg Court has yet to make such a judgment, but if it ever rules that the English law is incompatible with the United Kingdom's positive obligations under the ECHR, the United Kingdom will be obliged under international law to abide by the ruling and amend its laws.[173]

Similarly, the domestic U.K. courts can influence Parliament to reform existing self-defense laws through the Human Rights Act 1998, which is a way for the English courts to enforce human rights law of the ECHR.[174] Given the specificity of section 76 of the Criminal Justice and Immigration Act and the principle of Parliamentary sovereignty, the courts do not have the power to interpret a

171. European Convention, *supra* note 12, art. 2.

172. Angelova and Iliev v. Bulgaria, App. No. 55523/00, ¶ 93 (Eur. Ct. H.R. July 26, 2007), available at http://www.echr.coe.int.

173. European Convention, *supra* note 12, art. 2.

174. Human Rights Act 1998, c. 42 (UK).

"reasonable belief" requirement into the existing law of self-defense against the text of the legislation, as this power is neither inherent in the courts nor conferred upon them by legislation.[175] Nonetheless, the courts can still issue a Declaration of Incompatibility under section 4 of the Human Rights Act, which can politically pressure Parliament into amending its existing legislation.

However, this is more easily said than done. The relationship between the United Kingdom and the Strasbourg Court has been noticeably strained in the past decade, resulting in a situation where Strasbourg has refrained from putting excessive pressure on the United Kingdom. There have been increasing accusations within the United Kingdom of the Strasbourg Court acting as "mission creep," meaning that Strasbourg is deliberately creating excessive rights that infringe upon the sovereignty of the United Kingdom to determine its own standard of human rights protection.[176] As a result, the United Kingdom has demonstrated some reluctance in enforcing the Strasbourg Court's judgments that it deems excessive, such as in the case of *Hirst v. United Kingdom*, where Strasbourg held that the legislative ban in the United Kingdom against allowing convicted prisoners to vote was a violation of Article 3 of Protocol 1 of the ECHR (right to free elections).[177] It has been over a decade since that judgment, and the United Kingdom has still not amended its laws to implement the ruling in *Hirst*.

The Conservative Party, which is the current ruling party, has also threatened (and recently committed) to replace the Human Rights Act 1998 with a "British Bill of Rights" of an undecided character.[178] It is hence likely that Strasbourg is concerned that further attempts to pressure the United Kingdom would result in the United Kingdom withdrawing from the ECHR or ignoring Strasbourg

175. For more information on the doctrine of Parliamentary sovereignty, see *Parliamentary Sovereignty*, UK PARLIAMENT, https://www.parliament.uk/about/how/role/sovereignty/ [https://perma.cc/QXF4-NT3P].

176. The Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws*, https://www.conservatives.com/~/media/files/downloadable%20files/human_rights.pdf [https://perma.cc/CZ7K-SD5W].

177. Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. 187; Ed Bates, *The Continued Failure to Implement Hirst v UK*, EJIL: TALK! (Dec. 15, 2015), http://www.ejiltalk.org/the-continued-failure-to-implement-hirst-v-uk/ [https://perma.cc/F7KU-8JTB].

178. *Will the Human Rights Act be Scrapped?*, THE WEEK (Jan. 25, 2017), http://www.theweek.co.uk/63635/will-the-human-rights-act-be-scrapped [https://perma.cc/9YM8-WFPM].

jurisprudence entirely. However, even if the United Kingdom does repeal the Human Rights Act, it will still be subject to Strasbourg jurisprudence as long as it remains signatory to the ECHR, from which Prime Minister Theresa May has pledged that it will not withdraw.[179] Additionally, there has not been any complaint regarding Strasbourg's "mission creep" where its decisions regarding Article 2's right to life is concerned. We should thus proceed on the basis that Strasbourg still does and will continue to have influence in enforcing the Articles of the Convention that are most closely related to English self-defense law—Articles 2 and 3.

1. The Importance of Positive Obligations in the ECHR

As stated in Part I, the "right to life" under the ECHR not only imposes a negative obligation upon signatory states to refrain from infringing upon individual rights, but also a positive obligation to enforce laws that protect the rights of individuals within their borders.[180] This means that when police officers, who are state agents, act in their course of duty in a manner that unnecessarily deprives individuals of their right to life, there are two different ways for Strasbourg to assess the case as a violation of the Convention.[181] First, the Strasbourg Court can assess if the police action taken was in breach of the state's *negative* obligation not to unnecessarily deprive a person of their right to life. In other words, this would be an examination into whether the state's executive action was a violation of the state's negative obligation. This was the assessment made in *McCann* and in most cases involving actions involving police brutality that were brought before Strasbourg.[182]

However, it is also possible for Strasbourg to assess the state's potential violation of its positive obligations in terms of either a failure to prosecute the crime, or the failure to implement a sufficiently rigorous set of laws that would prevent or deter the unnecessary deprivation of human life. In *Makaratzis v. Greece*, the Grand Chamber of Strasbourg ruled that signatory states have a positive duty to incorporate an appropriate legal framework defining

179. Adam Wagner, *BREAKING: Theresa May Will NOT Try to Take UK Out Of European Convention on Human Rights*, RIGHTSINFO (June 30, 2016), http://rightsinfo.org/breaking-theresa-may-will-not-try-leave-european-convention-human-rights/ [https://perma.cc/2CPF-B68D].

180. POSITIVE OBLIGATIONS, *supra* note 14, at 203.

181. European Convention, *supra* note 12, art. 10.

182. *See* Bubbins v. United Kingdom, 2005-II (extracts) Eur. Ct. H.R. 171.

clearly the limited circumstances in which the police and other law enforcement officers may use firearms.[183] In the case of self-defense, I find that it is particularly important for Strasbourg to assess the laws of signatory states in line with the positive obligations enshrined in Article 2, simply because self-defense is a private defense available to all individuals, not just police officers acting on behalf of the state. The problem with the subjective test in English law far exceeds cases of violence used by state parties, but also encompasses the use of force by private persons.[184] If Strasbourg only assesses individual cases of state party action through the view of negative obligations, it cannot influence any change in U.K. domestic legislation that can protect the lives of individuals from the use of violence by private persons.

In many cases, Strasbourg has shown a demonstrated assertiveness in enforcing the notion of positive obligations to implement adequate criminal laws on signatory states. Apart from the *Makaratzis* case mentioned above, Strasbourg held in the notable case of *M.C. v. Bulgaria* that states have a positive obligation to protect victims of rape by extending criminal liability to defendants in cases where the victim did not face direct physical force but coercion or threats of a different kind.[185] Strasbourg hence found that Bulgaria's failure to prosecute was a violation of Article 8 of the ECHR (right to private and family life), on the basis that Article 8 imposes a positive obligation upon states to deter "grave acts such as rape, where fundamental values and essential aspects of private life are at stake".[186]

It is therefore regrettable that Strasbourg has constantly demonstrated confusion and avoidance around the issue of whether the subjective test in English self-defense law is a violation of positive obligations. The Strasbourg court has very rarely assessed self-defense laws from the perspective of positive obligations, and has never addressed the doctrine of "honest belief" in self-defense laws. One of the most notable examples of Strasbourg intervention in cases

183. Makaratzis v. Greece, 2004-XI Eur. Ct. H.R. 195; POSITIVE OBLIGATIONS, *supra* note 14, at 204.

184. POSITIVE OBLIGATIONS, *supra* note 14, at 206.

185. M.C. v. Bulgaria, 2003-XII Eur. Ct. H.R. ¶¶ 180–87.

186. European Convention, *supra* note 12, art. 8; M.C. v. Bulgaria, 2003-XII Eur. Ct. H.R. ¶ 150; Jonathan Rogers, *Fundamentally Objectionable,* NEW L.J. (Sept. 14, 2007), https://www.newlawjournal.co.uk/content/fundamentally-objectionable [https://perma.cc/DH6Y-BJ4L]; POSITIVE OBLIGATIONS, *supra* note 14, at 206.

of self-defense in relation to positive obligations is *Grămadă v. Romania*, wherein Romania's failure to sufficiently investigate the circumstances of an excessive but non-fatal police shooting and the domestic courts' subsequent acquittal of the police officer on the basis of self-defense was a violation of Article 3 of the ECHR (prohibition of inhuman or degrading treatment).[187] However, it was unclear in the judgment whether, had there been an adequate investigation and the defendant still acquitted, Strasbourg would still find a violation of Article 3. It is also unclear whether the violation of the positive obligations in Article 3 was a result of a failure to investigate, or the potentially excessive nature of Romanian law's definition of self-defense that may fail to adequately protect the rights of victims. Hence, Strasbourg's decision in *Grămadă* once again skirted a full assessment of the adequacy of domestic self-defense law itself.

In *R (Collins) v. Secretary of State for Justice*, the domestic High Court of the United Kingdom was tasked to consider whether U.K. self-defense law, which allowed householders to employ excessive force against an intruder, was a violation of Article 2 of the ECHR.[188] While this was not a Strasbourg case, the domestic courts of the United Kingdom had the power, through the Human Rights Act 1998, to issue a declaration of incompatibility if it found that the current law as it stood constituted a violation. The High Court held that section 43 of the Crime and Courts Act of 2013, which inserted a provision within section 76 of the Criminal Justice and Immigration Act that householders are allowed to use excessive force provided that it is not "grossly disproportionate," is not incompatible with Article 2. Section 2 of the Human Rights Act provides that where domestic courts are determining a question related to the ECHR, they must "take into account" any relevant Strasbourg jurisprudence and case law.[189] The High Court thus took into account Strasbourg jurisprudence, such as *Angelova and Iliev v. Bulgaria* (where Strasbourg stated that states must comply with Article 2 by putting in place measures that "effectively deter" the commission of offences against the person), and concluded that domestic criminal law does

187. Grămadă v. Romania, App. No. 14974/09, ¶¶ 73–75 (Eur. Ct. H.R. May 11, 2014), *available at* http://www.echr.coe.int.

188. R (on the application of Collins) v. Secretary of State for Justice [2016] EWHC (Admin) 33 (Eng.).

189. Human Rights Act 1998, c. 42, §2 (UK); Helen Fenwick, *What's Wrong with S.2 of the Human Rights Act?*, UK CONST. L. BLOG (Oct. 9, 2012), https://ukconstitutionallaw.org/2012/10/09/helen-fenwick-whats-wrong-with-s-2-of-the-human-rights-act/ [https://perma.cc/6EYF-Q5EL].

"effectively deter" the commission of offences against the person—in this case, murder and manslaughter. As this decision reflects, current law still does punish householders for using *grossly* disproportionate force, but juries have leeway in deciding whether disproportionate force was reasonable in a householder case.

Despite the fact that neither *Grămadă* nor *Collins* resulted in a judgment declaring that domestic laws were incompatible with the ECHR, these cases still inspire optimism as they signal that both Strasbourg and the U.K. courts (while the Human Rights Act remains in existence) are in fact willing to discuss whether domestic self-defense laws satisfy the positive obligations of states to protect human rights. Strasbourg jurisprudence is nevertheless more important—if Strasbourg does not assess the adequacy of English self-defense law, the domestic courts will not be able to do so either. Apart from the fact that the Human Rights Act is facing imminent repeal, the English courts have also determined through Lord Bingham's principle in *R (Ullah) v. Special Adjudicator* that the duty of national courts is to keep pace with Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.[190] In the 2016 case of *Armani Da Silva v. United Kingdom*, Strasbourg was finally presented with the question of whether U.K. law is adequate to protect individuals' right to life under Article 2.

2. The Curious Case of *Armani Da Silva* in 2016

In *Armani Da Silva*, mentioned briefly in Part I and II, a Brazilian national named Jean Charles de Menezes was shot dead in a London Underground station by two special firearms officers after being mistakenly thought to be a suicide bomber.[191]

The facts of the case are as follows: On July 21, 2005, four explosive devices were found in rucksacks on the London transport network, two weeks after four suicide bombers detonated explosions in a separate incident that resulted in increased police vigilance. The United Kingdom launched a police manhunt for the failed bombers, and the police were informed by intelligence that a man named Hussain Osman who lived at 21 Scotia Road, London, was a suspect. Jean Charles de Menezes lived at 17 Scotia Road. On July 22, 2005,

190. R (ex parte Ullah) v. Special Adjudicator [2004] UKHL 26, [2004] 2 A.C. 323 (appeal taken from UK).

191. Armani Da Silva v. United Kingdom, App. No. 5878/08, ¶ 248 (Eur. Ct. H.R. Mar. 30, 2016), *available at* https://www.echr.coe.int.

police officers stationed around the road identified de Menezes as a person who had a "good possible likeness" to Osman. Several police officers followed him to Stockwell London Underground station. At this point, there were conflicting accounts on whether they had made a positive identification, with some officers stating that he was not identical to Osman, while on the other hand another officer said that "it was definitely our man, and that he was nervous and twitchy."[192] At this point, eyewitness accounts of what happened exactly were unclear, but the IPCC Stockwell One Report stated that de Menezes sat down in one of the coaches of a stationary train. One of the surveillance officers then shouted to the other police officers that de Menezes was there. de Menezes then stood up, arms down, and was pinned down by two officers. According to one witness, de Menezes might have moved his hand towards the left-hand side of his trouser waistband, and two police officers (known for the purposes of the operation as Charlie 2 and Charlie 12) immediately shot him in the head, killing him.[193]

After this tragic incident, the Independent Police Complaints Commission (IPCC) stated in its "Stockwell Two" report that Mr. de Menezes "did not refuse to obey a challenge and was not wearing any clothing that could be classed as suspicious."[194] The IPCC Stockwell One report also admitted that the briefings made to the officers were faulty, as they did not state that they must not confront the suspect until they were sure the suspect's identity was Osman. After this unfortunate shooting occurred in 2005, the IPCC concluded that the unfortunate killing was a result of mistakes that could and should have been avoided.[195] The report also identified a number of potential offences that Charlie 2 and Charlie 12, as well as the other officers involved, might have committed, including murder and gross negligence manslaughter.[196] However, the Crown Prosecution Service did not prosecute, on the basis that there was no realistic prospect of a conviction, as it would be difficult to prove beyond reasonable doubt that the police officers did not genuinely believe they were facing a

192. Richard Edwards, *Jean Charles De Menezes Inquest: Timeline*, TELEGRAPH (Sept. 22, 2008), http://www.telegraph.co.uk/news/3046015/Jean-Charles-De-Menezes-inquest-Timeline.html (on file with the *Columbia Human Rights Law Review*).

193. Armani Da Silva v. United Kingdom, App. No. 5878/08, ¶¶ 12–19, 35–36 (Eur. Ct. H.R. Mar. 30, 2016), *available at* https://www.echr.coe.int.

194. *Id.* ¶ 18.

195. *Id.* ¶ 30.

196. *Id.* ¶ 30.

lethal threat.[197] Subsequently, the victim's cousin, Armani Da Silva submitted a complaint to Strasbourg alleging that the United Kingdom had violated Article 2 by failing in its state duty to prosecute the police officers, and also submitted that the definition of self-defense in the United Kingdom was inadequate as it does not require an honest and reasonable belief.[198]

The Grand Chamber in *Armani Da Silva* held that there was no duty for the Crown Prosecution Service to prosecute the case, as the current state of English self-defense law was that an honest and genuine belief and there was insufficient evidence to persuade a jury that there was no such honest belief.[199] It also ruled, as mentioned in Part I, that U.K. self-defense law is similar to the standard used by Strasbourg in *McCann*.[200]

This is a very problematic decision. Strasbourg was requested to consider whether self-defense law in the United Kingdom was inadequate, and it failed to do just that. In making this ruling and dismissing the case on the basis that the Crown Prosecution Service had no duty to prosecute, Strasbourg took domestic English law as it stands, with little analysis into whether the law itself was effective enough to satisfy the positive obligations in Article 2 of the ECHR.[201] While there was a brief discussion on the law itself, it was done through an incorrect interpretation of the previous ruling in *McCann*, without assessment into whether English law served as an effective deterrence and was consistent with Article 2.[202] As mentioned previously, in *McCann*, Strasbourg indicated that lethal force used by state agents must be based on an "*honest belief* which is perceived, *for*

197. *Id.* ¶ 35.

198. Armani Da Silva v. U.K., App. No. 5878/08, (Eur. Ct. H.R. Mar. 30, 2016), *available at* https://www.echr.coe.int.

199. Human Rights Europe, *United Kingdom: Court Ruling on Jean Charles de Menezes Fatal Police-Shooting Complaint*, COUNCIL OF EUROPE (Mar. 30, 2016), http://www.humanrightseurope.org/2016/03/united-kingdom-court-ruling-on-jean-charles-de-menezes-fatal-police-shooting-complaint/ [https://perma.cc/LKV9-HL6J].

200. *See generally* McCann v. United Kingdom, 21 Eur. Ct. H.R. 97 (1995) (finding that the principal question to be addressed is whether the person had an honest and genuine belief that the use of force was necessary); *see also supra* Part I.

201. *See generally* Armani Da Silva v. U.K., App. No. 5878/08, (Eur. Ct. H.R. Mar. 30, 2016), *available at* https://www.echr.coe.int (finding that the UK authorities had not failed in their procedural obligations under Article 2 of the Convention to conduct an effective investigation into the shooting).

202. *Id.*

good reasons, to be valid at the time"—which clearly means that the Court is employing a "honest and reasonable" test. The Court in *Armani Da Silva* applied the test in *McCann*, but interpreted it as a "honest and genuine" belief that was completely contradictory with its original textual conception—stating that the "existence of 'good reasons' should be determined subjectively"—and subsequently concluded that the "honest belief" doctrine in English law was not significantly different from the test applied by Strasbourg in *McCann*. At no point was the *Angelova and Iliev v. Bulgaria* assessment—the test of whether existing law would be an effective deterrence—employed, and Strasbourg failed to make a proper assessment as to whether the United Kingdom has met its positive obligations under Article 2 to implement laws sufficient to protect the right to life of individuals within its jurisdiction even when expressly asked to make this assessment.[203]

As seen from the facts, *Armani Da Silva* was an opportunity for Strasbourg to finally analyze the sufficiency of the "honest belief" doctrine in U.K. self-defense law and whether it effectively deters unnecessary deprivations of life that would be in violation of Article 2. The fact that it did not is very regrettable.

CONCLUSION

In conclusion, there are many ways in which English self-defense law is problematic and in clear need of reform. Its "honest belief" doctrine creates serious unfairness that cannot be justified, authorizes and encourages instinctive violence based on racist beliefs, and is also doctrinally inconsistent with the existing laws of homicide. Despite this, the United Kingdom has yet to make any changes and even legislative codification in 2008 simply upheld the existing common law on a document that had supremacy over subsequent common law developments.[204] However, the United Kingdom cannot ignore the ECHR forever, as a state that tries to keep up its reputation as an "upholder and promoter of fundamental rights."[205] A

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203. Angelova and Iliev v. Bulgaria, App. No. 55523/00, ¶ 93 (Eur. Ct. H.R. July 26, 2007), available at http://www.echr.coe.int..

204. Criminal Justice and Immigration Act 2008, c.4, § 76 (Eng.) ("The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be . . . .").

205. London School of Economics European Institute, *The Implications of Brexit for Fundamental Rights Protection in the UK* 1, 5 (Feb. 25, 2016),

Strasbourg judgment that finally answers the question of whether U.K. law is a violation of the ECHR can be the trigger for Parliament to make the legislative changes that the United Kingdom needs. It seems very likely that English law as it stands is in fact inconsistent with the United Kingdom's positive obligations under Article 2, as it does not serve as an effective deterrent for police officers to act on grossly unreasonable beliefs or reckless indifference. Ultimately, whether or not U.K. self-defense law is incompatible with the positive obligations within the ECHR should be a decision made by Strasbourg, not this Note. However, the fact remains that Strasbourg should *make* that decision, especially given that it has been prompted to do so, instead of deliberately avoiding the question as it did in *Armani Da Silva*. We do not know when the next case will occur that will bring the same question on the adequacy of English self-defense law before Strasbourg once again, but when it does, this Note finds it crucially important that the question be addressed.[206]

http://www.lse.ac.uk/europeanInstitute/LSE-Commission/Hearing-6---The-implications-of-Brexit-for-fundamental-rights-protection-in-the-UK.pdf [https://perma.cc/A62B-LFLA].

206. *Id.*