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### **Battered Women, Dead Husbands: A Comparative Study of Justification and Excuse in American and West German Law**

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Battered Women, Dead Husbands: A  
Comparative Study of Justification and  
Excuse in American and West  
German Law

SUNNY GRAFF\*

I. INTRODUCTION

With gun in hand, a distraught woman stood next to the bed where her husband of many years lay peacefully sleeping. She leveled the gun to his head, and fired repeatedly, killing him instantly. This time he would not awaken to carry out his threats of sexual torture and beatings.<sup>1</sup>

"Murder," said the prosecutor. "Justified," said feminist groups. "Not guilty," said the jury. "A Right to Kill"<sup>2</sup> and "When is Murder Justified?"<sup>3</sup> asked the media. The confusion indicated by the headlines has also swept the legal profession, as battered women<sup>4</sup> have

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\* LL.M., Columbia University, 1984; Jervy Fellow. 1983-1985, Parker School of Foreign and Comparative Law; Juris Doctorate, Capital University, 1979; currently working on a doctorate degree at Johann Wolfgang Goethe University in Frankfurt, West Germany. My thanks to Professor George Fletcher for his comments on an earlier draft of this article, and to Professor Winfried Hassemer and Dimitrius Pitsounis for their helpful critique and support.

1. A jury acquitted Deborah Davis who shot her sleeping husband after he told her he was going to sexually abuse and torture her (as he had done in the past) when he awoke. Kansas City Times, July 3, 1980, at A-1, col. 2, as reported in Creach, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615, 626 (1981-82) [hereinafter *Creach*].

2. *The Right to Kill*, NEWSWEEK, Sept. 1, 1975, at 69.

3. *A Case for Women Who Kill Their Abusers: When is Murder Justified?*, THE SEATTLE WEEKLY, Apr. 11, 1984, at 30. [hereinafter *When is Murder Justified?*].

4. Battered and sexually abused children often find themselves in a no way out situation with violent parents and some have resorted to killing to survive. The 1982 Wyoming case of Richard and Deborah Janke dramatically brought the problem of child abuse to the attention

taken their struggle into the courtrooms and demanded that the system that failed to protect them<sup>5</sup> from the violence of their mates<sup>6</sup> now validate their personal defensive actions. The "reasonable man" is being elbowed out as women compellingly challenge the sexist assumptions, social structures and mores which shaped the applicable law of self-defense—a law which fails to include women's experiences and perspectives.<sup>7</sup>

Until this decade, domestic violence against women had not been recognized as a social problem.<sup>8</sup> Criminal prosecutions often repre-

of the public. Richard, then 16, was convicted of manslaughter in the shooting death of his abusive father and Deborah, then 17, was convicted of aiding and abetting. After a lifetime of experiencing physical, emotional and sexual abuse of Deborah, Richard surprised his unsuspecting father in the garage with a shotgun blast which killed him instantly. Richard served 4 months in a psychiatric facility and 11 months in juvenile detention and Deborah served 22 months in a facility for disturbed teenagers before they were released by intervention from the governor. A. PRENDERGAST, *THE POISON TREE* (1986). For German cases, see *infra* notes 193 & 219.

5. Of 100 battered German women who sought help from the police, none received the requested help. Kappel & Lueteritz, *Wife Battering in the Federal Republic of Germany*, 5 *VICTIMOLOGY: AN INT'L J.* 225, 237 (1980) [hereinafter Kappel & Lueteritz]. Tracey Thurman, a Torrington, Connecticut woman who was partially paralyzed and heavily scarred in a knife attack by her husband while a police officer watched without intervening, won a landmark \$2.3 million judgement against the police department, in June 1985. She claimed denial of equal protection since the police treated her complaints less seriously than they would have if she had been attacked by a stranger. *Shattering Domestic Violence*, *VERMONT'S NEWS AND ARTS WEEKLY*, Oct. 6, 1985, at 10 [hereinafter *Shattering Domestic Violence*]. Women are discouraged from using the criminal justice system by being required to personally file against their spouses. See Herman, *Prosecution of Spouse Abuse: Innovations in Criminal Justice Response*, in 4 *RESPONSE TO VIOLENCE IN THE FAMILY*, WASHINGTON D.C.: CENTER FOR WOMEN'S POLICY STUDIES (1981). This requirement is de jure in Germany. See para. 232 of the German Criminal Code, *Strafgesetzbuch*, with introduction by H. H. Jescheck, 20 Auflage, Stand Dec. 1, 1981, Deutscher Taschen buch Verlag, Munich, in force since Jan. 1, 1975, [hereinafter *StGB*]. Conviction and punishment are rare and women are unprotected between arrest and trial. Cooper, *Duties and Enforcement Mechanisms for the Rights of Battered Women*, 16 *SUFFOLK U.L. REV.* 937 (1982).

6. A woman is beaten every 18 seconds in the United States, according to estimates based on FBI statistics. Wolfgang, *Violence in the Family*, in *VIOLENCE: PERSPECTIVES ON MURDER AND AGGRESSION* 245 (1978). Sixty percent of American families experience violence. *BATTERED WOMEN* 14 (D. M. Moore, ed. 1979). In Germany it is estimated that one in every five women are battered. Kappel & Lueteritz, *supra* note 5, at 234.

7. A husband's right to physically chastise his wife is a tenant of the common law. See generally W. BLACKSTONE, *COMMENTARIES*, in collected works by Christian, Chitty, Lee, Hovenden, and Ryland, at 366 (1864) [hereinafter *BLACKSTONE*]. Violence against women is sanctioned implicitly in interspousal tort immunity and explicitly in rape laws. In 27 states a man cannot be charged for raping his wife. *OFF OUR BACKS*, Feb. 1985, at 3; Paragraph 177 *StGB* defines rape as "ausserhelichen," outside of marriage.

8. Terms such as "domestic violence," "marital conflict," and "spouse abuse" have become popular with public agencies trying to diffuse criticism from the women's movement of

sent the final blow for battered women who kill their mates. Prisons<sup>9</sup> and mental institutions<sup>10</sup> are filled with women whose defensive actions have not been recognized for what they are. When defenses have been asserted for women who kill they generally have been those of an impaired mental state,<sup>11</sup> since their actions are so aberrant to traditional feminine norms that women defendants are readily perceived as insane.<sup>12</sup>

As the depth and horror of violence against women have come to light, the resistance of women has taken on a new validity. Women are pressing to have their actions viewed not as "insane," but as a rational response to continuous escalating violence in battering relationships.

The recent wave of battered women<sup>13</sup> who assert that the killing of their mates is justified has placed the traditional norms in question and forced re-evaluation of self-defense law. In the process, Anglo-American jurists have been confronted with the fundamental distinction between justification and excuse, a topic which, until the recent efforts of Professor George Fletcher,<sup>14</sup> has rarely captured the imagi-

their policies toward battered women. The terms are misleading in that they suggest mutual spats and obscure the reality that it is men who are beating women.

9. McAllister, *Women in Prison: Victims of Domestic Violence, Hearings on Battering and the Criminal Behavior of Women at Bedford Hills*, OFF OUR BACKS, Jan. 1986, at 17-18.

10. Psychologist Phyllis Chesler has documented a double standard of mental health for men and women. For a woman to be considered "healthy she must adjust to and accept the behavioral norms for her sex even though these kinds of behavior are generally regarded as less socially desirable." The consequences for women who engage in "male" activities include psychiatric commitment, ostracism, and punishment. P. CHESLER, *WOMEN AND MADNESS* (1972).

11. Researchers posit that female prisoners show a greater degree of psychiatric illness than male prisoners since crime is such an unusual activity for women that only those who are unusually high scorers on psychoticism scales overcome the social barriers which keep women in their place. Further, women murderers are judged to be more disturbed than their male counterparts since women's use of violence is a greater deviation from role norms than male violence. Women also have less social validation for their actions and hence may feel more disturbed. Blum & Fisher, *Women Who Kill*, in *VIOLENCE: PERSPECTIVES ON MURDER AND AGGRESSION* 193 (1978).

12. College students in a 1974 study were read violent murder cases in which the insanity plea was entered, with the sex of the hypothetical defendant varying. Female defendants were seen as "sick" more often than male defendants under the same fact pattern. Sex role expectations and biases influenced the observers designation of women murderers as disturbed and insane. *Id.* at 194.

13. For a listing of some of the earliest cases, see Schneider & Jordan, *Representation of Women Who Defend Themselves in Response to Rape and Sexual Assault*, 4 THE NAT'L J. OF CRIM. DEF. 141 [hereinafter Schneider & Jordan]; see also *Defending Battered Women Who Kill*, OFF OUR BACKS, Mar. 1983, at 26.

14. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative*

nation of the American legal community. A series of acquittals in sleeping husband cases has highlighted the lack of contour in our analysis of justification and excuse. A search for clarity in this area lends itself to a comparative discussion of West German law, in which the constructs of justification and excuse have been carefully clarified and refined by scholars for three-quarters of a century.<sup>15</sup>

Two fact patterns arise in battered women's cases which pose separate legal issues and find different solutions in the German and American systems. In the first scenario, women kill their abusive mates in response to an imminent or actual attack. In American law, the killing can be justified if the defense was both necessary (no lesser means available), and proportional (the harm caused by stopping the attacker not disproportional to the potential harm to be suffered by the defender). German law demands no proportionality per se, but rather requires a determination of whether the defender overstepped the "social-ethical" limits imposed by the courts on defense of one spouse against the other.

In the second and more difficult fact pattern, women kill their mates when there is no present attack and utilize men's inattention and helplessness to accomplish their goal.<sup>16</sup> According to criminologists, the physical disparity between women and men leads women to kill when their mates are asleep, drunk, ill or otherwise unable to resist.<sup>17</sup> The discussion has been lively in both systems as to whether either justified defenses (self-defense, preventative defense, self-defense analogous situations) or excuses (self-defense, necessity) offer an appropriate means of disposition of the "sleeping husband" cases. Attorneys representing battered women have been both creative and zealous in the use of existing legal tools,<sup>18</sup> while simultaneously pushing for the creation of alternatives. It is in this spirit that a defensive strategy known as battered women's self-defense or the battered women's defense<sup>19</sup> has arisen in American law as a mishmash of self-

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*Criminal Theory*, 8 ISRAEL L. REV. 367 (1973) [hereinafter Fletcher, *Proportionality*]; G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978) [hereinafter FLETCHER, *RETHINKING CRIMINAL LAW*].

15. For a short history of the development of German legal thought on the topic, see Eser, *Justification and Excuse, Symposium on the New German Penal Code*, 124 AM. J. COMP. L. 638 (1976) [hereinafter Eser].

16. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 646 (1980) [hereinafter Schneider].

17. C. SMART, *WOMEN, CRIME AND CRIMINOLOGY: A FEMINIST CRITIQUE* 18 (1977).

18. *WOMEN'S SELF-DEFENSE CASES: THEORY AND PRACTICE* (E. Bochnak, ed. 1981).

19. Schneider & Jordan, *supra* note 13. There is a great deal of confusion in the literature

defense, necessity and insanity. While I welcome the acquittals of battered women, I critique this inappropriate expansion of the law of self-defense in cases where there is no present attack.

I advocate instead that the defense of personal necessity be adopted and applied to excuse desperate killings by desperate women. This article is my contribution to the search for legal solutions for battered women which provide both greater clarity in the law and a formal recognition of our compassion for individuals who react in human ways to the inhumanity of oppression and other life-threatening circumstances.

We begin with an overview of justification and excuse, then briefly examine the development of self-defense as a male standard and the norms called into question by the introduction of women's perspective. We then analyze the actual basis of the battered women's defense—the excuse of personal necessity—and the problems resulting from its introduction in American law as self-defense, a justification. Finally, we examine the German approach to self-defense and necessity—an examination which raises as many questions as it seems to answer, but in the process provides us with some insights into our own system.

## II. JUSTIFICATION AND EXCUSE

The question of justification or excuse arises in those circumstances in which the actor's conduct satisfies the literal terms of a defined crime. In other words, a harm has been inflicted which the criminal law has endeavored to prevent, for example, homicide.

Despite the harm, there are situations in which the actor's conduct is not only deemed not to be wrongful, but is considered rightful behavior, that is, her conduct is justified. A police officer's fatal shooting of an armed and dangerous felon in the course of a kidnapping causes the harm (homicide) which the law seeks to prevent, but under circumstances which make it a socially approved choice of conduct.

Justified conduct is considered as the right and proper choice of action in a given situation, that is, preferable to all available alternatives. The focus in determining whether certain conduct is justified is on the act itself, not on the actor. Everyone in the same circum-

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as to whether there is a separate defense or that battered women's syndrome is merely an adjunct to a self-defense plea. The latter is the better view. Thyfault, *Self-Defense, Battered Woman's Syndrome on Trial*, 20 CAL. W.L. REV. 485, 495 (1984).

stances could act in the same manner with impunity.<sup>20</sup>

An acquittal based on justification carves out an exception to the prohibited conduct and generates a rule for future cases; behavior which is justified is rightful and lawful and hence does not warrant the interference or prohibition of the criminal law.<sup>21</sup> Excused behavior, on the contrary, is wrongful conduct. When an act lacks justification, the inquiry shifts to the actor to determine whether she should be held accountable for the wrong.<sup>22</sup> An excuse operates to relieve the actor from the criminal consequences of her act under circumstances in which the act cannot fairly be imputed to the character of the actor. If the circumstances or character of the actor are such that she could not fairly be expected to avoid committing the act, the law relieves her from responsibility, since there is no inference that can be drawn from the wrongful act as to the character of the actor.<sup>23</sup> Hence in circumstances of mistake, duress, necessity, and insanity, society is willing to tolerate and excuse wrongful conduct. An acquittal based on excuse leaves the substantive norm of the criminal law unaffected.<sup>24</sup>

Justification treats the act as objectively lawful, while excuse merely considers that subjectively the actor is not blameworthy.<sup>25</sup> This distinction has important implications. For the defendant, both excuse and justification preclude criminal punishment for an offense in West Germany and in most U.S. jurisdictions. However, special provisions may require hospital commitment in insanity cases.<sup>26</sup> Partial excuses, such as provocation, intoxication, and diminished capacity do not entirely exculpate the actor, but can lower the degree of gravity of the offense for which she'll be held accountable.

The victim's and third parties' right to resist or intervene without criminal consequences turn on whether the conduct is justified or

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20. Fletcher, *Proportionality*, *supra* note 14, at 373-75. For a complete discussion of justification and excuse, see FLETCHER, *RETHINKING CRIMINAL LAW*, *supra* note 14, at 759-875.

21. FLETCHER, *RETHINKING CRIMINAL LAW*, *supra* note 14, at 575-77.

22. Fletcher, *Proportionality*, *supra* note 14, at 373-75; FLETCHER, *RETHINKING CRIMINAL LAW*, *supra* note 14, at 798-885.

23. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1271 (1974) [hereinafter Fletcher, *Individualization*].

24. FLETCHER, *RETHINKING CRIMINAL LAW*, *supra* note 14, at 575-77; Robinson, *Criminal Law Defense: A Systematic Analysis*, 82 COLUM. L. REV. 199, 256 (1982) [hereinafter Robinson]. For a contrary view, see Hall, *Comment on Justification and Excuse, Symposium on the New German Penal Code*, 24 AM. J. COMP. L. 638, 644 (1976).

25. Eser, *supra* note 15, at 628.

26. *Id.* at 623.

merely excused.<sup>27</sup> Justified acts reflect a higher social interest and are encouraged as proper, not only for the actor, but generate a corresponding right of action and intervention for third parties. Excuses, on the other hand, are merely personal to the actor and confer no such privilege on third parties to assist in the wrongful act. Further, there is no right to resist a justified act, since it has the imprimatur of society. Excused conduct is concededly wrongful in nature and can be resisted by the victim or any third party acting to protect the victim.

### III. NECESSARY DEFENSES: SELF-DEFENSE AND NECESSITY

The defenses most applicable to our discussion of battered women's cases are necessity and self-defense. An overview<sup>28</sup> is in order before we turn to their specific utility in America and West Germany. The defense of necessity is triggered when natural conditions converge to force an actor to engage in conduct which otherwise fulfills the elements of a criminal offense. The defense can operate as either a justification or an excuse. A justification is applicable when the actor responds to the necessity situation by choosing the lesser of evils presented. The competing interests are simply compared. If the actor's choice represents the better right in that particular situation, her action is justified. A classic example is the intentional dynamiting of a house which stands in the path of an approaching fire in order to stop the fire's spread and save an entire town from destruction.

For our purposes, a balancing test of necessity affords no justification where the harm threatened (for example, rape or beating) is less than the harm caused (the death of the attacker). The balancing of interests could never result in a justification for homicide even in a "kill or be killed" situation since presumably the lives of both parties are of equal value.<sup>29</sup> In any event, the certainty of the victim's death is generally posited against the lesser probability of the actor's. This is definitely the situation in the sleeping husband cases since the man's death is certain while the women's is merely speculative.

When the objective balancing of interests fails to tip the scales in favor of the defendant, her conduct can not be justified under the necessity (lesser evils) standard as rightful conduct. When the important interests of life, limb, and liberty of the defendant are

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27. FLETCHER, *RETHINKING CRIMINAL LAW*, *supra* note 14, at 760.

28. Fletcher, *Individualization*, *supra* note 23, at 1276.

29. *Id.* at 1278.



endangered, the West German system also recognizes necessity as an excuse and focuses on the culpability of the defender for her wrongful act.<sup>30</sup>

The excuse extends to protecting the important interests of relatives or other persons close to the defendant. If a mother attempts to save her child from a burning theater and in the process causes two others to be trampled to death, she has committed a wrongful act. But her conduct is not blameworthy since one could hardly expect her to act otherwise and watch her child die.<sup>31</sup> If the convergence of circumstances under which the defendant acted exerted sufficient pressure to deprive her of her ability to refrain from the wrongful conduct, the necessity of acting will excuse her conduct even in cases where she kills to protect her own vital interests.

The common law assessment of necessity as a defense goes no further than a balancing of interests. Anglo-American jurists, who hesitate to leave unpunished the concededly wrongful conduct of defenders weighing in on the light side of the scale, have failed to appreciate or apply necessity as an excuse.<sup>32</sup> Despite the convergence of circumstances which account for the defender's shortcomings, Anglo-American judges pragmatically rule out compassion and instead choose to punish even "involuntary" actors to prevent what they characterize as a legitimization of homicide.

Since under the standard of necessity, sleeping husband homicides can neither be justified, nor—in American law—excused, attorneys who represent battered women are left with few possibilities other than insanity defenses<sup>33</sup> and self-defense. Self-defense has been the preferred choice since it justifies a woman's actions and requires no hospital commitment. Attorneys have attempted to elasticize the

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30. Eser, *supra* note 15, at 636-37.

31. Schmidhaeuser, *Strafrecht Allgemeiner Teil*, 2 Auflage, Tuebingen, 1975, at 463.

32. Fletcher, *Individualization*, *supra* note 23, at 1278-88; Wasik, *A Case of Necessity?*, 1984 CRIM. L. REV. 544 (Summer).

33. The first battered women's murder case brought to the attention of the public was that of a Michigan mother of four, Francine Hughes, who on March 9, 1977, set her husband's bed on fire as he lay sleeping. Although feminists who rallied to her cause insisted that she acted in self-defense, her attorney preferred to base his case on tried and true legal doctrines. Hughes, who had been severely battered for 12 years, was acquitted on grounds of temporary insanity. Her story received national attention with a major TV film, *The Burning Bed*, starring Farrah Fawcett-Majors. For a new twist to an old defense, see Randolph, *The Diminished Capacity Defense for Battered Women: An Alternative Political Approach*, 70 WOMEN LAW. J. 23 (1984).

requirements of self-defense to provide a legal way out for their clients.

Self-defense has aptly been described as a part of the law of necessity with fixed rules. The common law of self-defense has evolved from the 13th century excuse of *se-defendo* into a present day justification. Under a strict balancing of interests (lesser evils) approach, a person forced to take a life even to save her own from deadly attack could not be justified. Historically, killings even in self-preservation were merely excused. *Se-defendo*, or excused self-defense, excused a killing when the actor had no other means to save herself. Although largely influenced by the circumstances of a life-threatening assault, the killing was considered a wrongful act, leaving the culpable actor subject to a forfeiture of goods.<sup>34</sup> It was unimportant who the initial aggressor in the fray was, so long as the actor retreated to the wall and was left with no other choice but to kill or be killed.

*Se-defendo* is similar to the excuse of personal necessity, in that life-threatening circumstances rob the defender of the voluntariness of her conduct. In short, the hand that pulls the trigger is forced by the situation, not the free will of the actor, who under normal circumstances would not kill.

The common law of self-defense has since evolved into a justification which alters the strict "lesser evils" standard required for a necessity justification. It allows the scales in an equipoised life versus life situation to be tipped in the defender's favor by factoring in the culpability of the aggressor. This diminution of the aggressor's interests suffices to provide a justification for killing not only to protect life, but also for other weighty interests, as for example, to prevent serious physical harm, or rape.<sup>35</sup>

German law also justifies self-defense, but under a different theory. This justification rests on the dual premises of vindication of the personal autonomy of the defender and the defense of the legal order.<sup>36</sup> While in theory, the aggressor's interests play no role in the determination of justified conduct, in practice, the courts in recent years have begun to balance the interests of attacker and defender. As we will see in the final section on West German law, the underlying

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34. Fletcher, *Proportionality*, *supra* note 14, at 376-80; Robinson, *supra* note 28, at 235.

35. Fabricant, *Homicide in Response to a Threat of Rape; a Theoretical Examination of the Rule of Justification*, 11 GOLDEN GATE U.L. REV. 945 (1981); Kates & Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873 (1982).

36. H. JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 270 (1978); see *infra* notes 101 & 131.

theories of self-defense create different tensions and provide different resolutions in each legal system.

#### IV. AMERICAN LAW

##### A. Women's Self-Defense Cases

Self-defense laws developed at a time when women had no independent legal status and were protected and controlled by fathers and husbands. The law allowed men to correct and physically chastise their wives.<sup>37</sup> As William Blackstone wrote in *Commentaries On The Law Of England*, although a man who killed his spouse might be charged with murder, a wife who killed her husband faced the additional charge of petit treason for rebelling against her husband's authority and the authority of the state. She faced being burned at the stake for violating God's ordained natural order.

The law presupposed that women had no right to exercise violence on their own behalf.<sup>38</sup> Self-defense law developed in this context as an exclusively male standard. Violence exercised by men to protect their property and honor,<sup>39</sup> bar room brawls and "chance medleys," provided the back drop for the crystallization of traditional norms.<sup>40</sup> Many decades of "reasonable men" shooting, stabbing and clubbing each other to death produced a common law of self-defense which adequately speaks to men's needs.

The male character of the law<sup>41</sup> and sexual stereotypes have traditionally prevented judges and juries from appreciating the circum-

37. W. BLACKSTONE, *supra* note 7, at 366; noting the connection between a husband's former right to chastise his wife (*Zueschtigungsrecht*) and the current limitation on spousal self-defense in Germany is Geilen, *Eingeschraenkte Notwehr unter Ehegatten?*, JURISTISCHE RUNDschau 314, 317 (1976) [hereinafter Geilen].

38. On the other hand, in keeping with their role of nurturer, women were allowed and expected to use violence to protect their children. The law still allows women more leeway when they are acting on behalf of their children than when they are defending themselves. For example, see the recent decision of the German Supreme Court, *infra* note 186.

39. The protection of male honor, even at the cost of human life, has played an important role in shaping self-defense law and is reflected in the "true man" doctrine which allows a defender to kill rather than retreat. For the German sentiment that no one is duty bound to cowardly retreat, especially in the company of a woman, see BGHSt, *Goldammer's Archiv fuer Strafrecht* at 147 (1965).

40. R. PERKINS, CRIMINAL LAW AND PROCEDURE 1113-43 (3d ed. 1982).

41. In some cases the law is explicit in its exclusion of women, as in the paramour laws which permitted a husband, but not a wife, to kill a person caught "in flagrante delicto" with his spouse. Schneider & Jordan, *supra* note 13, at 150. In general, the exclusion is implicit in the terms and standards embodied in the law. "[I]n all [the] mass of authorities which [bear] upon this branch of the law there is no single mention of a reasonable woman . . ." A. HERBERT, MISLEADING CASES IN THE COMMON LAW 13 (4th ed. 1928).

stances of women's acts of self-defense. In the past decade defense attorneys have attempted to incorporate women's experiences and perspectives into existing concepts of self-defense law to offset its male orientation.

In a landmark decision reversing Yvonne Wanrow's 1975 murder conviction for killing a child molester, the Supreme Court of Washington held that comparing the defendant's behavior to that of a "reasonable man"<sup>42</sup> violated her right to equal protection of the law.<sup>43</sup> The court approved as the standard of self-defense, that the reasonableness of a woman's actions be judged "in light of her own perceptions of the situation, including those perceptions which [are] the product of our nation's long and unfortunate history of sex discrimination."<sup>44</sup>

The Washington Supreme Court affirmed women's right to defend themselves, at the same time recognizing the socialization which impedes their ability to do so. The court acknowledged that when the defendant is female, there are special circumstances which the jury must be told about in order to be able to evaluate the reasonableness of her beliefs and actions. Depending on the individual defendant, this may include her lack of self-defense or other physical skill training, her socialization into a submissive role, passivity, and helplessness, and her previous experience with violence.

The approach taken by the defense in *Wanrow* has been a model for other women's self-defense cases. In particular, it has been used

42. The instruction not only establishes an objective standard, but through the persistent use of the masculine gender leaves the jury the impression the . . . standard to be applied is that applicable to an altercation between two men. The impression created—that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable—constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law. The respondent was entitled to have the jury consider her actions in light of her own perceptions . . . .

*State v. Wanrow*, 88 Wash. 2d 221, 240, 559 P.2d 548, 558-59 (1977).

43. Until such time as the effects of . . . history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination. To fail to do so is to deny the rights of the individual woman involved to trial by the same rules which are applicable to male defendants.

88 Wash. 2d at 240-41, 559 P.2d at 559. Arguing to the contrary that the fourteenth amendment prohibits the battered women's defense as invidious gender based sex discrimination, see Rittenmeyer, *Of Battered Wives, Self-defense, and Double Standards of Justice*, 9 J. CRIM. JUST. 389 (1981) [hereinafter Rittenmeyer].

44. *Wanrow*, 88 Wash. 2d at 221, 559 P.2d at 548.

with a measure of success in cases of battered women who kill their attackers. Often referred to as the battered women's defense, this approach is characterized by the attempt to expand the relevant time period in self-defense cases from a single moment of attack and defense to include a history of long-term escalating violence.<sup>45</sup> The defense often relies heavily on the use of expert testimony on the Battered Women's Syndrome<sup>46</sup> to explain a woman's inability to leave a battering situation and to offset sexist stereotypes about battered women which place the blame for violence on the victim, rather than the batterer.

### 1. The Killing of Attacking Men

If the facts presented at trial show that a woman was being attacked at the moment she killed, a court should merely move on to consider the necessity for and the reasonableness of the defensive force used. Yet even in the straightforward attack/defend cases, prejudice against battered women and sexist assumptions about the nature of battering relationships combined with the male bias of the law often leave female defendants at a disadvantage in the court's consideration of such factors as the duty to retreat and proportionality.

### 2. The Duty to Retreat

The retreat rule requires that before resorting to deadly force, a defender must make every reasonable attempt to flee.<sup>47</sup> The origins of this rule lie in *se-defendo*—where killing to save oneself was excused only if it was a last resort.<sup>48</sup> The common law's self-defense variation of lesser evils leads to the same result since the loss of honor to the defender who retreats is minimal in comparison with the loss of life to the aggressor. The well recognized exception is that a person is under no obligation to flee from their own home, even when the attacker also lives there.<sup>49</sup> Recently, however, courts are balking at the traditional exception and imposing a duty to retreat when one is attacked

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45. Vaughn & Moore, *The Battered Spouse Defense in Kentucky*, 10 N. KY. L.J. 399, 411 (1983) [hereinafter Vaughn & Moore].

46. Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1 (1982) [hereinafter Walker, et. al.].

47. W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 395 (1975).

48. For an interesting discussion of the retreat rule, its origins, and its compatibility with various theories of self-defense, see Fletcher, *supra* note 14, at 864-68.

49. W. LAFAVE & A. SCOTT, *supra* note 47, at 395-96.

by a co-resident.<sup>50</sup>

The retreat rule may have a major impact on the cases of battered women who kill. Battered women are often blamed for staying in abusive relationships with the result that judges and jurors feel they are at fault for the beatings, enjoy them, or at least get what they deserve for not leaving.

Retreat presupposes women have somewhere else to go. The few existing women's shelters—overcrowded and underfunded<sup>51</sup>—cannot provide a realistic alternative for every woman. Many women are simply too frightened to leave,<sup>52</sup> are unaware of their options, or refuse to abandon their children to violent men.<sup>53</sup> Others have attempted leaving in the past but were unsuccessful or forcibly dragged back by their husbands.<sup>54</sup>

As the battered women's defense attempts to expand the relevant time frame in self-defense from a single moment of attack to include the entire long-term violent relationship, apparent opportunities for leaving may be revealed. This is particularly true in sleeping husband cases where walking out the door seems to be an obvious alternative to killing. Expert testimony on Battered Women's Syndrome can assist the jury in understanding the women's inability to leave and her actual or perceived lack of options.<sup>55</sup>

### 3. Degree of Force

According to traditional formulations, in a self-defense situation, the amount of force a defender is privileged to use must be commen-

50. Simonton, *Criminal Law: Privilege of Non-retreat in the Home not Applicable if Victim and Accused Co-occupy Dwelling*, 35 U. FLA. L. REV. 167 (1983).

51. For a scathing attack on United States funding agencies' policies, see DOBASH, EMERSON & EMERSON, *VIOLENCE AGAINST WIVES* (1980), reviewed by Fields, 6 WOMEN'S RTS. L. REP. 227 (1980). For the German experience, see Metz-Goeckel, *Strukturelle und Personale Gewalt gegen Frauen und die Schwierigkeit ihrer Aufhebung*, DAS VERBRECHEN'S OPFER, Studienverlag Dr. Norman Brockmeyer Bochum 415 (1979) [hereinafter Metz-Goeckel].

52. Fear is the biggest reason women stay with or return to a batterer. Other reasons are fear of losing their children, a desire to preserve the marriage, emotional attachment and psychological approval. Meyers, *Battered Women, Dead Husbands*, Mar. 1978 STUDENT LAW. MAG. 48.

53. Women have good reason to be afraid of leaving. Ninety-nine out of 100 cases in which men beat, shot, choked, stabbed or burned their mates to death, the woman was attempting to break out of the relationship. *Bis der Tod Euch scheidet*, EMMA, Jan. 1980, at 22.

54. Schneider, *supra* note 16, at 633.

55. Note, *Battered Women Syndrome: Admissibility of Expert Testimony for the Defense*, 47 MO. L. REV. 835 (1982).

surate with the threatened harm. The law allows the use of deadly force only to prevent the infliction of unlawful death or serious bodily harm. Deadly force is not privileged in response to non-deadly force.<sup>56</sup>

Women's self-defense cases often involve the use of deadly force against weaponless attackers. Proportionality standards which presuppose equal combatants and fail to account for the differences in socialization, physical size and skill training between women and their attackers, can be especially damaging. Men can and regularly do kill women with their bare hands, a feat which few women can accomplish.

Ineffective resistance by a woman may incite an attacker to greater,<sup>57</sup> even murderous, violence. Since many women are unable to muster any form of unarmed defense, their only hope of stopping an attack requires the use of weapons. The courts have tended to view women's resort to deadly force as unacceptable under traditional standards, which equate appropriate behavior with that of a "reasonable man."<sup>58</sup>

### B. *The Killing of Non-Attacking Men*

Rarely do battered women kill at the precise moment of attack. Dr. Lenore Walker, a psychiatric expert who has done extensive research on battering relationships, describes a cycle of violence known as the "Battered Women's Syndrome." This syndrome helps to explain the victimization of women by their husbands, including their helplessness and inability to leave the battering situation.<sup>59</sup> The cycle consists of three stages—tension building, the explosive battering incident,<sup>60</sup> and the loving, apologetic calm period following a beating.<sup>61</sup>

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56. W. LAFAVE & A. SCOTT, *supra* note 47, at 393.

57. Two-thirds of the battered women in a 1979 study at the Berlin Women's Shelter indicated they had attempted self-defense, which generally resulted in more intense beatings. Kappel & Lueteritz, *supra* note 5, at 235.

58. In *Wanrow*, the use of a reasonable man proportionality standard was held violative of equal protection guarantees. *State v. Wanrow*, 88 Wash. 2d 221, 240, 559 P.2d 548, 559 (1977). Arguably, even reference to a reasonable person would unduly prejudice women. Chesler found that there are different expectations of behavior for "women," and "persons," the latter being equivalent to expectations for male behavior. P. CHESLER, *supra* note 10, at 86.

59. Walker, et. al., *supra* note 46, at 1-14.

60. Rather than a momentary loss of control, the beatings are frequently prolonged and sadistic. In [a] Michigan study, for example, of twenty abused wives, six were beaten severely enough to require hospitalization. In that study alone there were four concussions, four miscarriages, one fractured jaw, one dislocated shoulder, one

The violence escalates in frequency and intensity over time.<sup>62</sup> Most women, according to Walker, kill during the first of the three stages that comprise a battering incident.<sup>63</sup> When the tension in this stage has mounted to a point beyond which violence is inevitable, many women act to avoid being beaten. Walker's research established that battered women often know when a beating is coming because of signals from the batterer. Walker indicates that this occurrence is quite common, although the precise sign varies.<sup>64</sup> A battered woman, whose security and survival hinges on her ability to read her husband's signals, becomes adept at recognizing the immediacy of impending beatings.<sup>65</sup>

Similarly, a number of women kill their attackers during a hiatus in the beating or immediately after the episode of violence subsides.<sup>66</sup> Battered women live with the realization that they are powerless to stop their mates from killing them at whim. The aftermath of a beating intensifies women's perceptions of the precariousness of their situation. Each increasingly violent act provides further evidence of their vulnerability and heightens their fear and distress.

The violence in battering relationships is so severe, escalating and inevitable that the aftermath of one beating is equally the prelude for

broken and one set of cracked ribs. One woman was burned on her breasts by a lighted cigarette . . . . None of the wives report that the beatings were of the one punch variety. The beatings lasted anywhere from five or ten minutes to over an hour.

Yankowski, *Wife Abuse*, 3 FEMINIST ALLIANCE AGAINST RAPE NEWSL., Spr. 1976 at 13 [hereinafter Yankowski], citing Eisenberg & Patricia, *The Assaulted Wife: Catch 22 Revisited* (unpublished study at the University of Michigan Law School, Nov. 1, 1974).

61. Walker, et. al., *supra* note 46, at 4.

62. The short term effect on men of beatings is to reduce the tension and provide emotional release. But to the extent the tension release is produced by violence, this immediate effect is likely to powerfully reinforce the violence which preceded it. S. STEINMETZ & M. STRAUSS, *VIOLENCE IN THE FAMILY* 16 (1975).

63. Walker, et. al., *supra* note 46, at 4.

64. Leavitt & Abrams, *Cassandra Peten: Judge Rejects Battered Woman Defense*, 10 CONSPIRACY Mar. 1 (1979).

65. In the first case in federal court in which testimony on battered women's syndrome was ruled admissible, Mary Louise Player was convicted of second-degree murder for shooting her husband after a severe rape and beating. Although she shot him while he was lying down, her attorney argued self-defense, contending that a battered woman can perceive an imminent threat of violence from her husband—which may be imperceptible to outsiders—because of his movements or words. Player received a three-year sentence. OFF OUR BACKS, Mar. 1983 at 27.

66. See, e.g., *State v. Anaya*, 8 A.2d 392 (Me. 1981). The possibility of a self-defense justification was recognized by the court although the defendant stabbed her boyfriend in the back following a beating. The woman was convicted of manslaughter on retrial. *State v. Anaya*, 456 A.2d 1255 (Me. 1983).



the next. The cycle of abuse, dubbed "murder by installment,"<sup>67</sup> often culminates in severe bodily harm or death to the woman.<sup>68</sup> An analogy can be made to slow poisoning where death is the cumulative effect of many doses although no individual dose is lethal. A woman's life may be as seriously jeopardized by a long-term relationship of violent abuse as it would be in a one time deadly attack which justifies an equivalent deadly force defense.

This newest research on battered women has lead defense attorneys to argue that a lower threshold of instant aggression may justify the defensive actions of a battered woman in cases where the aggressor has a history of abusive behavior.<sup>69</sup> When there is no imminent attack, which triggers the right to self-defense, the dangerousness of the attacker's conduct and the impending threat of physical harm that would allow a deadly force response can only be seen through the eyes of the battered woman. To an outside observer the woman's physical integrity might not appear immediately threatened.

In numerous cases involving battered women defendants, attorneys have attempted to offer expert testimony on the Battered Women's Syndrome to show that, considering the cycle of violence in abusive relationships and the specific dynamics of battering, the belief of a battered woman that she was in a situation where she must defend herself was indeed reasonable.

"Individualization" is the key, according to Elizabeth Schneider, a pioneer in women's self-defense cases.<sup>70</sup> She posits that the social conditioning of a female defendant may cause her to reasonably perceive imminent, life-threatening danger in situations in which a man might not. This reasonable belief would justify her recourse to deadly force, just as it would for a man who perceived such threatening circumstances.<sup>71</sup> Schneider advocates that the jury be presented with all the individual differences, characteristics and capacities of the defendant when deciding whether her actions constituted self-defense.

The success of a self-defense plea often directly hinges on the defense's ability to introduce expert testimony on the Battered Women's Syndrome.<sup>72</sup> State supreme courts have gone both ways on the

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67. Eisenberg & Seymour, *The Self-Defense Plea and Battered Women*, 14 TRIAL 41 [hereinafter Eisenberg & Seymour].

68. *Id.* at 41.

69. *Id.*

70. Schneider, *supra* note 16, at 639.

71. Schneider & Jordan, *supra* note 13, at 144.

72. Experts are not always necessary when the woman is capable of articulating her own

admission of expert testimony.<sup>73</sup> While the admission of expert testimony is no guarantee for acquittal, this strategy has led to a surprising number of acquittals even in cases where there is not even a hint of an attack. Acquittals under these circumstances amount to nullification of traditional self-defense requirements.

*C. Reasonable Belief: Conceptual Problems with the Battered Women's Defense*

Present day statutes treat self-defense as a justification, representing society's interest in combating unwarranted physical aggression and interference with bodily integrity and security. The focus in determining justified conduct is on the act itself, which either does or does not meet objective requirements. The objective requirement in self-defense is wrongful aggression and the inquiry into the defendant's personal situation is narrowly limited to the issue of whether she acted with the will to defend herself.<sup>74</sup>

The determination of justified conduct logically precedes an inquiry into the defendant's personal situation which can at best offer an excuse for an unjustified act. It cannot transform an unjustified act into a justified one, no matter how reasonable the defendant's perceptions or compassion worthy her situation.

The individualized inquiry advocated by Schneider, which underlies battered women's self-defense, is based on a theory most fully developed by George Fletcher.<sup>75</sup> Fletcher posits that to receive a fair trial the defendant's particular circumstances must be fully considered by the trier of fact. The important point that Schneider overlooks is that Fletcher's plea for individualized treatment relates to excusing conditions, not a determination of justifying circumstances. To consider a personalized inquiry into subjective excusing factors, before determining whether or not a wrong has been committed, is putting the cart before the horse.<sup>76</sup>

To a large extent, the battered women's defense capitalizes on the

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experience and should be used with caution lest they encourage sexual stereotyping and alienate the jury. Schneider, *supra* note 16, at 646.

73. Kass, *The Admissibility of Expert Testimony on the Battered Woman Syndrome in Support of a Claim of Self-Defense*, 15 CONN. L. REV. 121 (1982); Thar, *The Admissibility of Expert Testimony on Battered Wife Syndrome: An Evidentiary Analysis*, 77 NW. U.L. REV. 348 (1982).

74. Fletcher, *Proportionality*, *supra* note 14, at 768.

75. Fletcher, *Individualization*, *supra* note 23.

76. Hassemer, *Justification and Excuse in Criminal Law: Theses and Comments*, 1986 B.Y.U. L. REV. 573 [hereinafter Hassemer, *Justification and Excuse*]. For an article discuss-

confusing formulation of self-defense law which allows a "reasonable belief" in imminent danger of bodily harm to suffice for justification.<sup>77</sup> The common law has had a difficult time sorting out just what the mixture of objectivity and subjectivity in self-defense should be. "Belief" is an entirely subjective experience. "Reasonable" is an attempt to objectify an otherwise totally permissive standard.

If there is an actual attack, the question of the reasonableness of the defender's belief does not arise. A correct belief corresponds with an actual objective state of affairs and will always be reasonable. A reasonable belief, on the other hand, will not always be a correct belief.<sup>78</sup> When the defender's belief is incorrect we are then dealing with a question of mistake and the issue of reasonableness relates to the culpability of the actor in making that mistake. A reasonable mistake as to the existence of an attack may indeed excuse an actor, but could never justify wrongful conduct.

According to the "reasonable belief" definition self-defense is justified not only in response to a present or imminent attack, but also when the defender believes there is an attack although none actually exists. This situation is called putative self-defense. When a defender injures or kills an aggressor in the mistaken belief she was being attacked, her mistaken defense, according to the common law, can be justified to the same extent as if an attack actually had taken place.

Variations of this formulation of self-defense can be found in the Model Penal Code and states which have conformed their codes to its example.<sup>79</sup> Most states require that the defendant's mistake be reasonable, but the Model Penal Code, going one step further, does not,

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ing this and other papers presented at the 1984 Freiburg Criminal Theory workshop, *see infra* note 102.

77. He who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.

It may be reasonable to use non-deadly force against the adversary's non-deadly attack (i.e., one threatening only bodily harm), and to use deadly force against his deadly attack (an attack threatening death or serious bodily harm), but it is never reasonable to use deadly force against this non-deadly attack.

There is a dispute as to whether one threatened with a deadly attack must retreat, if he can safely do so, before resorting to deadly force, except that it is agreed that he need not retreat from his home or place of business.

W. LAFAVE & A. SCOTT, *supra* note 47, at 391.

78. Comment, *Criminal Law—Self-Defense Jury Instructions Given on Subjective Standard of Reasonableness in Self-Defense Do Not Require a Specific Instruction on Battered Woman Syndrome*, 60 N.D.L. REV. 141 (1984).

79. "[T]he use of force upon or toward another person is justified when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use

although unreasonable actors may be liable for offenses capable of negligent commission, such as manslaughter.<sup>80</sup> The problems arising from the equation of a mistaken defense with an actual defense can best be seen by way of the following example. Donald has had his life repeatedly threatened by violent opponents of his radical political activity. Coming out of a political meeting one night, a stranger comes running toward him in the dark with a shiny object in his hand. Donald shoots and kills. The "knife-wielding" attacker, John, turns out to be a jogger, armed only with a flashlight.

The death of John, an innocent victim, is a wrong which society seeks to prevent, not promote. Under the Model Penal Code type of analysis, if Donald reasonably believed he was under attack by John, then the deadly force he used to counter the putative attack is "justified" force, even though there was not actual wrongful aggression. To determine if Donald gets the benefit of the justification despite this lack, one must switch gears and move to a level of subjective inquiry to determine if his mistake was indeed reasonable. To make this determination, one must shift the focus of inquiry from the objective act to the specific individual actor, Donald. If Donald had defended in response to an actual knife attack, this inquiry would be superfluous. One needs only to ask if there was an attack and if the defender responded with reasonable force and the will to defend himself, because anyone under the circumstances would have the same right to defend.

A mistake, however reasonable, cannot justify wrongful conduct. At best, a reasonable mistake provides a basis for excusing Donald's actions. Donald's erroneous but reasonable interpretation of the situation which triggered the shooting tells us that perhaps this is not the kind of act that the law set out to punish. If we cannot blame Donald for reacting to the deceptive appearance of an attack, then it corresponds with our sense of justice and compassion to excuse his wrongful killing of John.

Consider the consequences to the rights of the victim and third parties when, as under the self-defense analysis of the Model Penal Code, an objective element of wrongful aggression is not required for self-defense. To John and bystanders, Donald's justified defense looks like, and is, an unprovoked attack. If John sees it coming, one would certainly expect him to defend himself and one would want to en-

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of unlawful force by such other person on the present occasion." MODEL PENAL CODE § 3.04 (1980); DEL. CODE ANN. tit. 11 (1975).

80. Fletcher, *Rethinking Criminal Law*, *supra* note 14, at 689-90.

courage others to intervene to stop the life-threatening attack. Interference with, or resistance to, Donald's justified force is not allowed, however, since justified actors have society's stamp of approval. The implication of labeling Donald's force "justified" is that we strip others of the right to oppose it, which in the case of putative self-defense seems an entirely unsatisfactory solution. Were one to give John an equally compelling right to resist his own death, one would have justified force battling justified force. That both combatants could "rightfully" be using deadly force against each other is at best an awkward result, and at worst a logical impossibility.<sup>81</sup>

If, on the other hand, Donald were not "justified," but merely excused for his mistaken belief, then his deadly force against John would not be rightful and immune from interference, but would constitute wrongful aggression against John. This objective criterion would trigger John's right to self-defense and allow others to intervene on his behalf.

The unfortunate equation of putative self-defense with actual self-defense has injected an excuse theory—the reasonableness of mistakes—into the determination of justified conduct. Wrongful aggression then is not the criterion for self-defense; a simple reasonable belief in wrongful aggression suffices. It seems unlikely that we as a society really want to justify and encourage mistaken behavior.

Given the murky structure of present law, Schneider cannot be faulted for attempting to ensure that mistaken women defendants have every right to present their cases in a manner which substantiates their beliefs as reasonable men who mistakenly defend themselves. However, the replacement of objective with subjective factors in the determination of justified conduct<sup>82</sup> has opened the door for attorneys of battered women to advocate an inquiry into all the pressures and circumstances acting upon the defendant—including everything from previous incidents of violence to whether she suffered from premenstrual syndrome or alcoholism—in determining whether she acted in self-defense.<sup>83</sup>

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81. For the opposite view, see Greenwald, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

82. Schneider, *supra* note 23, at 640.

83. The confusion about the nature of the battered women's defense is illustrated by two commentators who go so far as to claim that the defense allows the defendant "the benefit of the insanity defense without exposing her to the danger of involuntary commitment to a mental institution for a justifiable, albeit intentional act." Vaughn & Moore, *supra* note 45, at 419 (emphasis added).

It is not too far a leap from a reasonable mistake sufficing for a justification to the entirely subjective theory of self-defense, advocated by some commentators for battered women's cases.<sup>84</sup> This paradigm is the attempt to bring sleeping husband cases under the rubric of self-defense although there are absolutely no objective criteria of a present attack. The subjective approach focuses only on the reasonableness of the woman's belief that killing the abusive spouse was the only way out of her precarious situation.<sup>85</sup>

"The key to women's self-defense lies in the definition of what would be reasonable for a female victim of violence," according to two commentators<sup>86</sup> who claim that the most important word in self-defense is "self."<sup>87</sup> Clearly, if the standard of self-defense were defined by the characteristics of the defendant and viewed from her perspective, her act would have to be deemed reasonable.<sup>88</sup>

"Reasonable" and "right" are not one and the same.<sup>89</sup> A justification which affects the rights of the victim and third parties calls for an objective standard of wrongful aggression, not a personal standard of desperation. Although its proponents are forced by a lack of options in the United States legal system into peddling it as justified self-defense, in reality, the battered women's defense simply offers an excuse.

Killings which occur before or after a beating simply cannot measure up to a justification standard. Under a strict balancing of interests test, the life of the batterer is presumed equal to that of the woman, despite his clearly reprehensible conduct. On the whole, the batterer's death cannot be considered a reflection of the greater good.

84. *Id.*

85. "The abused spouse defense . . . deals with the peculiar facts and background, including mistreatment, which make it impossible for her to survive without killing." *Id.* at 411.

86. *Id.* at 410 n.5.

87. The SELF in self-defense is a most important word because self-defense is a subjective notion for most people and most people are prone to be subjective, rather than objective when judging others. Each individual perceives the right to use self-defense within the framework of his or her own life, standards, experiences, morals, prejudices, religion, background . . . .

*Id.* at 409-10.

88. Creach argues this point, but pushes for a compromise solution of manslaughter, which I find wholly unacceptable. Under the circumstances of most battered women homicide cases, a manslaughter conviction would amount to punishing the victim one more time. Creach, *supra* note 1.

89. Using self-defense as an example, Fletcher analyzes the differences in styles of legal thinking represented by the common law's use of "reasonableness" as a standard of conduct as opposed to the German's emphasis on "right," followed by questions of responsibility. Fletcher, *The Right and The Reasonable*, 98 HARV. L. REV. 949 (1985).

Unless he is immediately engaged in wrongful aggression, his interests are not diminished under the common law self-defense standard.

To accept the battered women's defense is to entirely replace the concept of "imminent attack" with "reasonable belief in a present attack" or even "certainty of a future attack." The difference is substantial in terms of whether the killing is necessary to protect one's life. In an imminent attack situation there is no time for detached reflection or resort to lesser alternatives—the defense must be instantaneous. Where an attack is inevitably impending in the future, there are lesser alternatives which could ameliorate the situation. The women could leave, go to a women's shelter, or call the police.<sup>90</sup> To recognize that there are better alternative courses of action than killing is not synonymous with blaming the women for not taking them. Because of their lack of finances, dependence, isolation, shame, and overwhelming fear—in short, because of their victimization—it is entirely understandable why women cannot conceive of, or exercise, these options. The inability to find another way out does not justify the killings, it only explains them.

Although the killing of sleeping husbands cannot be justified, given the historical failure of the legal system to provide women protection or redress from violent men, we can certainly sympathize with the plight of a woman trapped in a situation from which she saw no escape short of killing. The battered women's defense speaks eloquently to the question of the blameworthiness of the woman for her conduct. It explores the dynamics of battering relationships which explain the woman's perception, fears, and actions. The battered women's defense requires a shift in focus from the act in the abstract to the issue of imputing culpability to a particular defendant for a human response to the overwhelming pressures of a dangerous situation. To exculpate her for killing in life threatening circumstances, from which she perceived no means of escape, is very different from labeling the resulting homicide right and proper.

If it were recognized as a defense in the United States, personal necessity could excuse the defendant. When the convergence of circumstances under which the defendant acted exerted sufficient pressure to deprive her of her ability to refrain from the wrongful

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90. These options are realistically limited. All 53 women in a 1977 Cook County Jail study of convicted mate-killers had called the police for protection from their spouses at least five or six times previous to the date of the homicide. Twenty-seven claimed the beatings became more severe after each arrest and consequently they stopped calling. MCCORMICK, *BATTERED WOMEN—THE LAST RESORT* 8 (1977).

conduct, then no inference could be drawn from the wrongful act as to the character of the defendant.<sup>91</sup> Can we blame her for an understandable human response to unbearable pressure? Should she be punished for an action to save herself?

Juries in battered women's cases have begun to do precisely what the courts have refused, namely, to show compassion for women who kill in order to save themselves in circumstances in which we could hardly blame them. In sleeping husband cases where the jury is presented with the Hobson's choice of conviction or acquittal on justification grounds,<sup>92</sup> the acquittal amounts to jury nullification of traditional self-defense requirements.<sup>93</sup> The repeated jury nullification in battered women's cases clearly signals that something is amiss in our system of justice. Because we refuse to openly accept the excuse of personal necessity, we lack an appropriate legal avenue through which we can express compassion for individuals who succumb to human weakness and commit wrongful acts under circumstances in which we would probably do the same. The simple concession to the weakness of human character involved in the adoption of the defense of excused necessity would be far less disruptive to our legal system than jury nullifications which lead to "justifying" the killing of sleeping husbands.<sup>94</sup>

Because the Anglo-American system has failed to make a clear and hierarchical distinction between justification and excuse, the theory under which an acquittal is gained may seem to be of little import to the freed defendant.<sup>95</sup> However, the rights of the victim to resist, and of third parties to intervene, turn on the characterization of the act. Acquittals on justification grounds for killings in circumstances

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91. The defense is a recognition that the defendant had very little control over the circumstances in which she was forced to act. FLETCHER, *RETHINKING CRIMINAL LAW*, *supra* note 14, at 801.

92. Although in many cases the conduct of the victim might be sufficient provocation to reduce the degree of the offense from murder to manslaughter, defense attorneys generally prefer to force the choice if they have an extremely sympathetic defendant or a plausible claim of self-defense.

93. Creach, *supra* note 1, at 626-27.

94. A common result in these cases is that the defendant is convicted and placed on probation. This is in my opinion also an unacceptable solution, because the woman ends up branded a murderer. Harriette Davis shot her husband as he slept after a long battering incident. She was convicted of murder and placed on five years probation in Alameda County, California. *OFF OUR BACKS*, Mar. 1983.

95. Although in either case the defendant is freed, there is a difference between being told "You're not guilty because what you did is the right thing," and "We forgive you for your wrongful act." Hassemmer, *Justification and Excuse*, *supra* note 76, at 582.



where less drastic means were available to ameliorate the situation highlight the problem.<sup>96</sup>

Consider the case of the battered woman acquitted of murder in the shooting death of her sleeping husband who had threatened to beat and sexually assault her when he awoke, as he had done during their marriage numerous times before.<sup>97</sup> While the jury's compassion for the woman's plight was evidenced by an acquittal, the implications of labeling her conduct "justified" are disturbing. Since justified conduct is encouraged by society, any third party stranger could have put the gun to the sleeping man's temple and blown his brains out with impunity. Had the husband awakened in mid-attack, he would have had no right to resist his own killing since his wife's conduct was justified. Under the same rationale, a third person who saw the wife putting the gun to the head of her sleeping husband would also have no right to intervene to prevent the killing.

In many cases, these derivative rights and consequences appear to be wrong and bolster the contention that it is faulty to characterize the battered women's defense as justified. If the woman's conduct in this situation were merely excused due to circumstances which deprived her of the ability to act otherwise, the defense would be personal and generate no right for others to engage in the same action. Similarly anyone, including her husband, could resist or intervene to prevent the shooting.

While an excuse is highly personal to the defendant, an acquittal on the basis of a defense of justification creates an exception to the rules of intentional homicide which affect future cases.<sup>98</sup> It is not surprising that a string of acquittals in similar cases has caused the commentators to decry the battered women's "license to kill."<sup>99</sup> In some circumstances this has led to a backlash against women asserting the defense.<sup>100</sup>

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96. A young woman was acquitted on self-defense grounds of shooting her unarmed husband who stood several yards away from her, taunting her. Although he had beaten her three days earlier, he did not touch her on the night of the killing. *Commonwealth v. Phillips*, unreported Kentucky Circuit Court case available from the Office for Public Advocacy, State Office Building Annex, Frankfurt, Kentucky 40601, as reported by Vaughn & Moore, *supra* note 45, at 425.

97. See Creach, *supra* note 1.

98. Certainly women defendants prefer to narrowly focus the court's attention on the trauma of their personal circumstances rather than factor in the future social impact of an acquittal on justification grounds.

99. Rittenmeyer, *supra* note 43, at 393.

100. Psychologist Leonore Walker indicates there are about twenty-five percent fewer ac-

The introduction into American law of the defense of necessity as an excuse would resolve the illogical consequences which flow from the injection of excuse into the theory of justification and offer a vehicle through which juries could express compassion and understanding of the battered women's desperate actions without condoning the killings themselves. The German system provides a model of necessary defenses worthy of note.

## V. GERMAN LAW: INTRODUCTION

We begin with a brief overview of the charges that women who kill their mates are likely to face. We turn then to possible defenses available in the Strafgesetzbuch (StGB), the German Criminal Code.<sup>101</sup> The highly conceptual general part of the code sets out a framework of defenses which clearly differentiates between justification and excuse.<sup>102</sup> While the structure of the law is clear, hierarchical, and logical, the actual practice of the courts in limiting the theoretically unlimited use of force in self-defense (Paragraph 32 Notwehr) has fudged the edges of the scheme and kept legal commentators busy trying to keep the system dogmatically tidy. We will examine this broader German version of self-defense, how married women's right to self-defense has been seriously curtailed by judicial action, and the legal and social consequences of the limitation.

Turning to sleeping husband cases, we analyze the German law of necessity, which captures both dimensions<sup>103</sup> of justification (Paragraph 34 Rechtfertigender Notstand)<sup>104</sup> and excuse (Paragraph 35

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quittals now than there were in the past, despite the efforts of psychologists, lawyers and women's rights advocates. *When is Murder Justified?*, *supra* note 3.

101. The newest draft has been in force since January 1, 1975.

102. For a discussion of the differences in American and German legal thinking on criminal defense theory, see Fletcher, *The Right and the Reasonable*, *supra* note 89; see also Fletcher, *Criminal Theory as an International Discipline: Reflections on the 1984 Freiburg Workshop*, CRIMINAL JUSTICE ETHICS 60 (Winter-Spring 1985) [hereinafter Fletcher, *Criminal Theory*].

103. Paragraph 54 of the 1871 Criminal Code, "Necessity," provided that there was no criminal act if the defendant acted in a state of necessity "in order to rescue the actor or one of his relatives from an imminent, otherwise unavoidable danger to life and limb." STGB 54.

104. Paragraph 34 "Necessity as a Justification" provides that whoever in a situation of imminent, otherwise unavoidable danger to life, limb, liberty, property or another legal interest commits an act in order to ward off the danger to himself or to another, does not act wrongfully provided that in weighing the conflicting interests, namely, the legal interests involved and the degree of the dangers threatening them, the interest protected substantially outweighs the interest impaired. This provision applies, however, only so far as the act is an appropriate means for warding off the danger. STGB 34.

Entschuldigender Notstand).<sup>105</sup> As in American law,<sup>106</sup> Paragraph 34 justifies an actor in circumstances of imminent danger, who, by violating a statutory prohibition to save a protected legal interest, has chosen the lesser evil. Paragraph 35 requires no strict balancing of interests and will excuse even persons who act in a state of necessity and cause a greater harm, but only when the important legal interests of life, limb and liberty of the actor or a close friend or relative are endangered. We will review the few cases in which this excuse, which American courts have refused to accept, has been used to exculpate actors who kill to end longstanding abuse.<sup>107</sup>

Considering the court's newest restriction on women's right to defend against even attacking spouses, it is not surprising that women who kill sleeping husbands face an uphill battle in the courts, and have virtually no chance of having their actions justified. While the German Criminal Code offers the theoretical possibility of excusing killings as necessity, very few battered women in recent years have been able to convince the courts to apply the excuse in their cases. German courts, like their American counterparts, have preferred to convict and then mitigate the sentence in those cases where compassion for the defendant is warranted.<sup>108</sup>

In the final section, I critique the efforts of one commentator to include preventative defense as a justifiable necessary defense in Paragraph 32. I conclude with a brief look at several other legal scholars' contributions to the search for sound compassionate legal solutions in the borderline cases of persons who kill to end longstanding tyranny and in other circumstances of life threatening danger and conflict.

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105. Paragraph 35 "Necessity as an Excuse" provides:

(1) Whoever, in a situation of imminent, otherwise unavoidable danger to life, limb or liberty, commits a wrongful act in order to avert the danger from himself, a relative or other person close to him, acts without culpability. This provision does not apply insofar as the actor could fairly be expected under the circumstances—namely if he caused the danger himself, or if he stands in a special legal relationship—to put up with the danger; however, the penalty may be mitigated pursuant to Paragraph 49(1) when the perpetrator was not required by the existence of a special legal relationship to put up with the danger. (2) If in committing the act, the actor mistakenly assumes the existence of circumstances that would excuse him according to part (1) of this provision, he is to be punished only if he could have avoided making the mistake. The punishment should be mitigated according to Paragraph 49(1).

StGB 35.

106. Fletcher, *Individualization*, *supra* note 23, at 1287.

107. See *infra* text accompanying note 215.

108. Many of the sentences are mitigated because of diminished capacity. For example, a woman who strangled her sleeping husband after twenty-five years of sexual torture and abuse was convicted of murder and the sentence mitigated to the minimum of three years. Frankfurter Rundschau, Feb. 28, 1985, at 9; see also *infra* note 197.

### A. *The Killing of Abusive Men*

It is impossible to talk about defenses without an introductory remark about the charges women who kill their husbands are likely to face. Simply reading the StGB gives one a structure of homicide offenses that could easily lead to false impressions. The case law which has developed gives an entirely different meaning to the framework. According to some commentators, sex-specific interpretation by the courts has led to entirely separate standards of law for women and men.<sup>109</sup>

The interpretation of malice (*heimtueck*) which, among other characteristics, distinguishes Paragraph 211 *Mord* (equivalent to first-degree murder), from Paragraph 212 *Totschlag* (equivalent to second-degree murder), is a prime example.<sup>110</sup> Malice is defined as consciously and willfully exploiting the naivete (un-suspecting of an attack) and defenselessness of the victim. The physical disparity between women and men combined with sex-role stereotyping in the court's interpretation of this requirement, has resulted in the exceptional cases of women killing men being deemed murder, whereas the usual killing of women by men is not.

Due to men's physical advantage, most women can only kill when men are inattentive, and since men do not reckon with an attack from a woman (naivete), the requirements are fulfilled. The same advantage allows men to openly attack and kill women, who, conversely, can suspect violence from men and hence lack the naivete which would make the killing malicious. The defenselessness of the victim must be as a result of the naivete;<sup>111</sup> the total physical defenselessness of most women—even those who can see an attack coming—is not sufficient exploitation to make a killing malicious.<sup>112</sup>

The usual victims of ill treatment—women—would appear to find some recognition of their dilemma in Paragraph 213. It provides for substantially lesser penalties for less serious cases of manslaughter

109. Junger, *Geschlechtsspezifische Rechtsprechung beim Mordmerkmal Heimtuecke*, 2 STREIT: FEMINISTISCHE RECHTSZEITSCHRIFT 35 (1984) [hereinafter Junger]; Burgsmueller, *Anmerkung zum BGH Urteil vom 28. 7. 1983*, 7 STRAFVERTEIDIGER 340 (1981); Strobl, *Notwehr=Mord?*, EMMA, Feb. 1984, No. 2, at 24-25.

110. In the rule, one who kills a sleeping person, acts with malice. Decision of the Bundesgerichtshof, Oct. 8, 1969, BGH 23, 119; Hassemmer, *Die Mordmerkmale, Insbesondere 'Heimtueckisch' und Niedrige Beweggruende*, 12 JURISTISCHE SCHULUNG 626 (1971).

111. Eser, *Heimtuecke auf Hoehstrichterlichem Pruefstand: Chance einer Wende in der Mord-Rechtsprechung*, 5 JURISTISCHE RUNDSCHAU 177 (1981).

112. Junger, *supra* note 109, at 41.

where the actor, through no fault of her own, is driven or provoked on the spot to kill, as a result of the deceased's mistreatment or serious insult inflicted on the actor or a relative. Yet in the area of intimate relationships between women and men, it is almost exclusively men who benefit from the reduced penalty.<sup>113</sup> With regularity, men who kill women with whom they have a relationship are charged under the less severe dictates of Paragraph 213. Just as regularly, the dead women have attempted to break out of the relationship and leave the men. This "provocation" and women's insults and criticism are sufficient to substantially reduce the severity of the crime for men who respond by killing.<sup>114</sup>

Paragraph 213, which takes into consideration the wrongful conduct of the victim prior to the act would seem more appropriately applied to battered women's cases. Since few women—however angry or provoked—are capable of killing on the spot, they rarely benefit from the reduced charge. The participation of the tyrannical man in creating the unbearable circumstances which result in his own killing are treated in a different light and the usual sleeping husband case is charged as murder. Although court decisions contain full histories of violent relationships, including a plethora of detailed episodes of beatings and sexual torture, the legal issue is often narrowly focused on whether the actions of a woman who kills an inattentive tyrant constitutes murder according to the statutory definition. Commentators have routinely criticized this tendency, since such desperate actions by abused women and children lack the reprehensibility which murder—with its mandatory life sentence—represents.<sup>115</sup>

### B. *The Law of Necessary Defense*

*Notwehr*, (Paragraph 32)<sup>116</sup> which translates as "necessary defense" and operates as a justification, is considerably broader than the mere right to "self" (life and limb) defense. It includes the right to protect other legal interests such as property and honor which Anglo-American lawyers are unaccustomed to thinking of in terms of justi-

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113. Geilen, *Provokation als Priviligierungsgrund der Toetung? Kritische Betrachtungen zu 213 StGB*, DREHER FESTSCHRIFT 357 (1977).

114. Junger, *supra* note 109, at 40.

115. In extraordinary cases, the BGH has come up with a way to mitigate the mandatory sentence. See *Strafzumessungsloesung*, 9/10 STRAFVERTEIDIGER 519 (1981).

116. Paragraph 32 "Necessary Defense" provides: "(1) Whoever commits an act required as necessary defense, acts not-wrongfully. (2) Necessary defense is the defense necessary to avert an imminent wrongful attack from oneself or another." STGB 32.

fied defense. Unlike American law, which treats self-defense as derivative of the state's power to keep peace when there is no opportunity to resort to law, German necessary defense is generally viewed as an inherent natural right of the individual to protect her autonomy and vindicate her rights.<sup>117</sup>

A second underpinning of necessary defense is that every unlawful attack on personal autonomy is an attack on the entire legal order.<sup>118</sup> Viewed from this perspective, every act of self-defense is a vindication of the social structure. The objective rightness of protecting society affords third party interveners an independent right to act on behalf of the victim in attack situations (*Nothilfe*).<sup>119</sup>

The threshold act which triggers the defender's justified response is any "*rechtswidrig*" attack, roughly translated as unlawful, or contrary to right.<sup>120</sup> Yet "*rechtswidrig*" is more expansive than its English equivalent since it also embodies the notion of attacks by non-culpable actors, such as children and psychotic aggressors.<sup>121</sup> An actual attack is required to justify necessary defensive force. Mistakes about the existence of an attack (putative self-defense) are handled by an analogous application of Paragraph 16, "Mistake about the Circumstances of the Act."<sup>122</sup> A separate provision, Paragraph 33, covers cases in which the justified defender oversteps the limits of the defense, since the use of excess force cannot be considered justified conduct. If the excess is attributable to confusion, fear or alarm arising out of the attack situation, the defender will be excused.

The "*rechtswidrig*" requirement of an attack eliminates the appli-

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117. Roxin, *Sozial-Ethische Einschraenkung des Notwehrrechts*, 93 ZEITUNG FUER DIE GESAMTE STRAFRECHTSWISSENSCHAFT 68, 77 (1981) [hereinafter Roxin]. The strongest point of controversy in the last ten years in German law is the extent of the right to *Notwehr* and permissibility of limitations on that right. Various schools of thought depend on which of the two roots—personal autonomy or defense of the legal order—is emphasized. Maurach & Heinz, *Strafrecht Allgemeiner Teil*, Teilband I, 6 Auflage, C. F. Mueller, Heidelberg/Karlsruhe, 1983, Para. 26 I, Rn. 1-7, at 335-37.

118. H. JESCHECK, *supra* note 36, at 270.

119. *Id.* at 280.

120. Fletcher, *The Right and The Reasonable*, *supra* note 89, at 967.

121. Stratenwerth, *Strafrecht Allgemeiner Teil I*, 1981 ACADEMIA JURIS 137 [hereinafter Stratenwerth]; Fletcher, *Proportionality*, *supra* note 14.

122. Paragraph 16 covers cases in which an actor fails to recognize a fact which is an element of the statutory definition of the crime. In this case the specific intent is lacking and the liability can only be for an offense for which negligence suffices as the requisite intent. Although the case of Putativnotwehr is highly debated, the majority view follows the "limited culpability" theory and applies Paragraph 16 analogously in the case of the erroneous assumption of facts which would support a justified defense. If error was avoidable, the defendant could be punished for negligence. H. JESCHECK, *supra* note 36, at 374.

capability of the defense in situations where the aggressor's acts are themselves justified. For example, the object of a valid arrest warrant has no right to resist the assertion of lawful authority.<sup>123</sup> Paragraph 32 characterizes acts committed in necessary defense as not "*rechtswidrig*," implying there is no right to resist a justified necessary defense. The text of Paragraph 32 embodies no words of limitation on the magnitude of allowable immediate defensive force. Unlike Anglo-American law, where proportionality of force is an inherent concept since the attacker's interests are included in the societal interests to be protected, German law demands no such consideration for the attacker. The premise that "*Das Recht braucht dem Unrecht nicht zu weichen*" (Right need never yield to wrong),<sup>124</sup> indicates that violators of the legal order stand outside of, and are unprotected by, the social order they are transgressing. Any violation of protected rights can be justifiably countered with any degree of defensive force.

Despite the obvious impracticality of living in a society which theoretically permits the shooting of petit thieves,<sup>125</sup> parking space violators,<sup>126</sup> and attacking children, the Germans have been reluctant to adopt any comprehensive limits on force, since proportionality runs counter to their basic premise of necessary defense.<sup>127</sup> Despite encouragement from many prominent legal commentators, the legislature passed up the opportunity to comprehensively limit necessary force in the new 1975 code. Although the law continues to reflect, virtually unchanged, its 1871 standard of unlimited force, in practice the use of force has been seriously limited. The limitations have emerged on an ad hoc basis,<sup>128</sup> as courts and commentators have carved out a number of areas in which there is consensus for a rule of proportionality,<sup>129</sup> although the proffered rationales have varied.<sup>130</sup>

While most of the so called "social-ethical" limitations are in-

123. Blei, *Strafrecht I Allgemeiner Teil*, 18 Auflage 152 (1983) [hereinafter Blei].

124. H. JESCHECK, *supra* note 36, at 269.

125. Decision of Sept. 20, 1920, 55 RGSt 82. This is the classic case in which the shooting of a thief escaping with stolen apples was held justified.

126. Decision of Jan. 22, 1963 Overlandesgericht, Bavaria, NJW 824, (1963). Deadly force against a parking space violator was considered necessary defense, but not justified since it represented an abuse of rights.

127. Despite decades of discussion with many commentators urging reform, no rule of proportionality was enacted in the 1975 revision of the German Criminal Code.

128. Stratenwerth, *supra* note 121, at 133.

129. The limitations are: 1) the infringement is so slight that members of a society are reasonably expected to tolerate it; 2) the harm threatened is grossly disproportionate to the amount of force necessary to prevent it; 3) the defender provoked the attack; 4) the attacker is a non-culpable actor (child, insane); 5) the parties stand in a close relationship/are married to

deed desirable in a civilized society, grafting a rule of proportionality on a system premised on the vindication of “*Recht*” (right) over “*Unrecht*” (wrong) via selective cases has led to confusion, inconsistency and illogical results. The most recent limitation by the Bundesgerichtshof (BGH), the German Supreme Court, on married persons’<sup>131</sup> right to defend against their attacking spouses is illustrative.

### C. *The Spousal Limitation*

In 1969 and 1976, the court upheld the convictions for battery with deadly consequences<sup>132</sup> of two women who killed their husbands in self-defense. Although when killed, both men were attacking their wives—concededly “*rechtswidrig*”—which should justify any measure of defensive force, the court ruled that a blow on the head with an umbrella,<sup>133</sup> and a knife stab to the heart<sup>134</sup> were impermissible defenses against spouses.

In the second decision which upheld and expanded the rationale of the first, the BGH opined that the deadly force defense is not permissible because married persons<sup>135</sup> share a personal relationship and are bound together in a close life-sharing manner.<sup>136</sup> The one who is attacked must settle for a milder means of self-defense, even if it only represents a strong possibility of success, as opposed to complete certainty.<sup>137</sup>

Both of the particular assaults which prompted the women’s deadly force defenses, were just two of many which had occurred during the marriages. In the first case, “years of experience with her hus-

each other. Courakis, *Zur sozioethischen Begründung der Notwehr*, NOMOS VERLAGSGESELLSCHAFT (1978).

130. Eser, *supra* note 15, at 633-34.

131. Although the decisions carefully speak of “spouses,” it is women, the usual victims of violence, who will suffer from this decision.

132. Para. 226 StGB.

133. Decision of Feb. 26, 1969, BGHSt, NJW 802 (1969).

134. Decision of Sept. 25, 1974, BGHSt, NJW 62-63 (1975).

135. The scope of the court’s decision is unclear. Marriages which exist only on paper, or are in the process of being dissolved, embody no close relationship which would warrant a limitation on the full right of self-defense. Indeed, in the course of divorce, violence often soars to its highest levels. Similarly, many persons who live together in close bonded relationships which include care and consideration are not married. See also Marxen, *Die Grenzen der Notwehr bei Auseinandersetzungen in der Ehe*, 1980 VON NUTZEN UND NACHTEIL DER SOZIALWISSENSCHAFTEN FUER DAS STRAFRECHT 63, 70-71 [hereinafter Marxen, *Die Grenzen*].

136. The court built off an older case restricting the force allowable between persons in a close relationship. 1 W. DALLINGER, MONATSSCHRIFT FUER DEUTSCHES RECHT 13 (1958).

137. See *supra* note 134, at 62.



band's behaviour" and previous "hefty, violent confrontations" were viewed by the court as grounds for expecting that the wife use lesser means of self-defense.<sup>138</sup> In assessing the appropriate degree of defense, the court focused on the defendant's marital commitment to understanding tolerance of their mates and held that the wives should be expected to endure beatings rather than resort to potentially deadly means to end them. Only if a husband intended to kill his wife would deadly force be justified.<sup>139</sup>

This newest BGH limit on the "unlimited" right to defend one's personal autonomy has met with both praise<sup>140</sup> and sharp criticism.<sup>141</sup> Advocates of the court's action argue that the limitation on spousal defense promotes marital harmony and decreases violence within the family.<sup>142</sup> Further, the institution of marriage is protected by the denial of the deadly force defense to spouses. The limitation is legitimized by some commentators who argue that the rationale for unlimited force is inapplicable within the family setting since marital disputes do not threaten the social order to the same degree as other types of attacks.<sup>143</sup>

Critics of the court's decision argue that the limitation denies wives any effective protection from their unarmed husbands since few women are able to defend themselves without weapons. The court seems to suggest that the more extensive the pattern of previous violence, the greater the duty to tolerate further violence, despite the intensification of violence in battering relationships over time. The implication is that the wife would be in a better position legally if she kills her husband the first time he attacks.<sup>144</sup> Some commentators

138. *Id.* at 63.

139. *Id.*

140. Authors basically accepting the court's limitation, although not necessarily its rationale: Blei, *supra* note 123, at 151; P. BOCKELMANN, STRAFRECHT ALLGEMEINER TEIL 96 (1975); Geilen, *supra* note 37; Roxin, *supra* note 117; A. SCHOENKE & H. SCHROEDER, STRAFGESETZBUCH (1982) [hereinafter A. SCHOENKE & H. SCHROEDER]; H. JESCHECK, *supra* note 36, at 278.

141. Kratzsch, *Das (Rechts-) Gebot zu sozialer Rücksichtnahme als Grenze des strafrechtlichen Notwehrrechts-BGH*, NJW 1975, 62, 7 JURISTISCHE SCHULUNG 435 (1975) [hereinafter Kratzsch, *Das (Rechts-) Gebot*]; Zenz, *Notwehr unter Ehegatten-psychodynamische Aspekte, VOM NUTZEN UND NACHTEIL DER SOZIALWISSENSCHAFTEN FUER DAS STRAFRECHT* 77 (1980) [hereinafter Zenz].

142. Are there really happy marriages which need the protection of such a norm? Zenz, *supra* note 141, at 79.

143. There is a reduced need for protection of the legal order, but not when it involves regular beatings. Roxin, *supra* note 117; A. SCHOENKE & H. SCHROEDER, *supra* note 140.

144. Geilen, *supra* note 37, at 316.

have gone so far as to argue that a wife who has been unable to defend herself and has been forced to passively endure beatings for years has a duty to warn her abuser before she engages in a defense against him!<sup>145</sup>

The court imposed duty of a wife to tolerate beatings<sup>146</sup> denies the brutality of domestic violence against women and gives it the imprimatur of the state. The tacit acceptance by the legal system of male violence in marital relationships is psychologically devastating to the victims. It confirms their trapped, helpless feelings and inability to turn to social institutions for help and protection.<sup>147</sup> It is inconceivable that the court would ever similarly expect a man to tolerate daily abuse and beatings, for example, from a co-worker or boss.<sup>148</sup>

### 1. Constitutional Objections to the Spousal Limitation

In addition to the serious political and social implications of the limitations on spousal defense, critics raise a constitutional objection, which applies equally to all the court's limitations on self-defense. This judicial action violates the legality principle, "*nulla poena sine lege*." Article 103(2) of the Grundgesetz, which functions as the German Constitution, and Paragraph 1 StGB express that an act can be punished only if it was an offense against the law before it was committed.<sup>149</sup> By limiting married women's right to self-defense, the court has criminalized and punished behaviour which had previously been justified. The BGH has ignored the constitutional issue.

Many commentators support the judicially imposed limitations on necessary defense. They take a highly restrictive position on the principle of legality and argue that the constitutional provision is in-

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145. Montenbruck, *Anmerkung zum Urteil der BGH von 11. 1. 1984*, 3 JURISTISCHE RUNDSCHAU 116 (1985). The BGH's latest spouse self-defense case seems to offer support for this argument. See *infra* note 186.

146. Rejecting the duty to tolerate the attack of a spouse, see Geilen, *supra* note 37, at 317; Zenz, *supra* note 142.

147. Vaughn & Moore, *supra* note 45.

148. The BGH did not expect a teenage boy to endure daily beatings from a schoolmate. They acquitted the defendant of fatally stabbing the other youth on grounds of self-defense. 41 BGHSt, NJW 2263-64 (1980). In another case in which a battered woman killed her sleeping mate, the court noted that in addition to kicking the woman in the stomach in an attempt to abort her suspected pregnancy, the man continued to beat, threaten and insult her "apparently without reason," implying that there might be a good reason for a man to beat and threaten a woman. Decision of June 16, 1981, 5 StrR. 143/81, *Stragverteidiger*, 523, 523-24 (1981).

149. Compare with the Nazi legal thought, "No crime without punishment." H. JESCHECK, *supra* note 36, at 104.

applicable to justification grounds.<sup>150</sup> The constitutional mandate is satisfied when statutory prohibitions against various forms of assault and homicide existed at the time of the act in question. Further, these prohibitions remain intact regardless of whether the court affirms or rejects a justification.<sup>151</sup>

Dietrich Kratzsch has led the critique of this restrictive approach, soundly arguing that the "*nulla poena sine lege*" principle is violated when the *ex post facto* judgment of a court limits self-defense and leaves a defendant subject to criminal punishment for an act which was privileged at the time it was committed.<sup>152</sup> The *ad hoc* judicial limitations on necessary defense are in conflict with basic constitutional rights. Legal order demands that citizens conform their behavior to the norms of the criminal law. It is the right of citizens to know what these norms are in order to act accordingly and avoid the risk of punishment.<sup>153</sup> Moreover, self-defense rules must be simple and clear enough to be applied by lay people in emergency situations.<sup>154</sup>

The legality principle is a rule of fair warning, assuring that persons will be criminally punished only when at the time of their acts the legal consequences were foreseeable. The freedom of citizens to act without fear of criminal consequence are protected when the borders of criminal conduct are exactly formulated and narrowly circumscribed. Finally, Kratzsch argues, the legality principle protects a citizen from later shifts of public opinion and judicially imposed arbitrary punishment for acts which were not punishable at the time they were committed.<sup>155</sup>

Although Kratzsch himself approves of the limitations on necessary defense based on social considerations, he acknowledges that it is the role of the legislature, not the judiciary, to make the law.<sup>156</sup> The

150. *Id.* at 276. In favor of a less strict application of the *nulla poena sine lege* principle is Claus Roxin. C. ROXIN, KRIMINALPOLITIK UND STRAFRECHTSSYSTEM 31 (1983).

151. See H. JESCHECK, *supra* note 36, at 276.

152. Kratzsch, *Paragraph 53 StGB und der Grundsatz nulla crimen sine lege*, GOLDHAMMER'S ARCHIV 65 [hereinafter Kratzsch, *Der Grundsatz*]; D. KRATZSCH, GRENZEN DER STRAFBARKEIT IM NOTWEHR, 30-31 (1968).

153. Kratzsch, *Der Grundsatz*, *supra* note 152, at 68; see Robinson, *supra* note 24, at 272.

154. Hassemer, *Die provozierte Provokation oder ueber die Zukunft des Notwehrrechts*, FESTSCHRIFT FUER BOCKELMANN 225 (1979) [hereinafter Hassemer, *Provokation*].

155. See Kratzsch, *Das (Rechts-) Gebot*, *supra* note 141, at 441.

156. Engels, *der partielle Ausschluss der Notwehr bei taetlichen Auseinandersetzungen zwischen Ehegatten*, 3 GOLDHAMMER'S ARCHIV FUER STRAFRECHT 109 (1982) [hereinafter Engels].

legislature, as evidenced by its failure to reform Paragraph 32 in the last revision of the StGB, seems content to abdicate its authority to the court to decide the structure of necessary defense. Kratzsch's position, which has gained considerable support, has prompted his colleagues to "solve" the legality problem by finding an existing statutory basis for the court's limitation on necessary defense.

Various authors have proposed that the limitations are inherent in the text of Paragraph 32. They argue for restrictive interpretation of the words "necessary" and "permitted."<sup>157</sup> Older cases applied a civil law doctrine pertaining to abuse of rights (*Rechtsmissbrauch*) to legitimate the restrictions.<sup>158</sup> All these approaches have been criticized as improper interpretation or analogy which also fall within the scope of, and are forbidden by, the legality principle.<sup>159</sup>

## 2. The Attempt to Legitimize the Spousal Limitation

In defense of the spousal limitation, the commentators have taken a different legitimization avenue by anchoring the limitation in Paragraph 13 StGB,<sup>160</sup> which deals with "commission by omission." Klaus Marxen, the chief proponent of this approach, argues that a woman's use of deadly force in necessary defense is a breach of her duty to protect and care for her husband which arises out of their close relationship.<sup>161</sup> Paragraph 13, which criminalizes certain types of omissions within the scope of close relationships, provides the rationale for penalizing the wife's deadly force defense.

The omissions penalized in Paragraph 13 are termed "*unechte Unterlassungsdelikte*," which translates roughly as "non-genuine omission offenses." The characterization of "non-genuine" is used to distinguish the Paragraph 13 catch-all category of omissions from instances in which the law creates an actual duty and penalizes the mere failure to comply (*echte Unterlassungsdelikte*) regardless of a damag-

157. J. BAUMANN & U. WEBER, STRAFRECHT ALLGEMEINER TEIL 301-03 (1985); cf. Kratzsch, *Der Grundsatz*, *supra* note 152, and Engels, *supra* note 156.

158. BGH, NJW 308 (1962).

159. See Kratzsch, *Der Grundsatz*, *supra* note 152.

160. Paragraph 13, "Commission through Omission" provides:

(1) Whoever omits to avert a result from occurring when that result represents the element of a definition prohibited by statute, will be subject to punishment pursuant to this law only if he was legally responsible for preventing the result from occurring, and if the omission corresponds to the realization of the legal elements of the case by commission.

StGB 13.

161. K. MARXEN, DIE SOZIALETHISCHE GRENZEN DER NOTWEHR 27 (1979) [hereinafter K. MARXEN]; see Geilen, *supra* note 37; Roxin, *supra* note 117, at 101.

ing or harmful consequence.<sup>162</sup> Harm, on the contrary, is the trigger for liability under Paragraph 13.<sup>163</sup> If the omission does not result in harm, (despite the parent's failure to rescue, the child doesn't drown), there is no liability<sup>164</sup> for a completed act, although there may be liability for attempt. Similarly, the omission must be causal in the sense that intervention would have prevented the harmful consequences (no liability if the child would have drowned anyway).<sup>165</sup>

Paragraph 13 embodies no test of duty, but merely dictates that under particular circumstances there is a requirement to act which has legal, as opposed to moral, compulsion due to the relationship of the parties. The task of defining the particular circumstances which trigger legal liability has been left by the lawmakers to the courts, who must narrow the multitude of potentially liable persons down to those who have a legal duty to act.

Paragraph 13 liability covers only those parties who are closely bound to one another in a position of responsibility relative to a particular risk, termed "*Garantenstellung*" which makes the actor into a guarantor that the harm will not occur.<sup>166</sup> While family is the classic example of a special relationship, the courts have also recognized a duty in jointly undertaken adventurous projects (mountain climbing, sailing expeditions) and doctor-patient relationships.<sup>167</sup>

Marxen argues that the wife's position of responsibility vis-a-vis her husband requires her to relinquish or limit her right to defend herself from his attacks. This argument is flawed on a number of levels.

Paragraph 13 is an innovation of the 1975 criminal code which crystallized in statutory form a century of judicial practice extending liability for omissions to various classes of guarantors. To the extent that it was added as a concession to the principle of legality, it fails to remedy this basic problem. Until the court speaks, it is impossible to know whether under any particular fact pattern one's failure to act is tantamount to the commission of a criminal offense. The ad hoc judicial determination of legal duties fails to satisfy the requirements of fair warning, at least in cases of first impression. Considering Para-

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162. Fletcher, *Criminal Omissions: Some Perspectives Symposium on the new German Criminal Code*, 24 AM. J. COMP. L. 703, 712 (1976) [hereinafter Fletcher, *Omissions*].

163. *Id.* at 712.

164. *Id.* at 713.

165. *Id.* at 712.

166. *Id.* at 716.

167. Entscheidung des Reichsgerichts in Strafsachen, 21 RGSt 168, at 170.

graph 13's own legality problems, it is ironic that commentators rely on it for support to get around the same constitutional objections regarding the exclusion of certain self-defense justifications.

Aside from this irony, the concept of a duty to act arising from a special relationship of the parties, which may in certain circumstances generate a duty to prevent a particular harm and generate liability for an omission, has nothing to do with affirmative acts of self-defense.<sup>168</sup> The omissions in Paragraph 13 must be the moral equivalent of committing the harm. To fit within the parameters of Paragraph 13, the wife's act of self-defense must be viewed as an omission, i.e., a failure to act to prevent the harm, which is equated with an act causing harm. In other words, by defending herself with deadly force, the wife violates her duty to protect her husband from the harm caused by her own self-defense. In addition to being circular, this approach to criminal liability fails to reflect the concepts of justice and support of the legal order which have characterized previous cases in which the courts recognized a legal duty to act.

Two decisions within the family circle line of cases are worthy of note. In separate cases a wife who failed to intervene when she saw her husband in the act of committing suicide,<sup>169</sup> and a son who failed to prevent or warn his father of a plan for the father's murder<sup>170</sup> were both held accountable for the resulting deaths. The courts opined that the close relationship generated a responsibility to act, the breach of which was the moral equivalent of bringing about the harmful consequence.

While marriage certainly embraces both moral and legal<sup>171</sup> duties of consideration and protection, the rationale of the above cases is ill-

168. Marxen argues unpersuasively to the contrary, and relies for support on crimes in the specific part of the code for which the guarantor principle has intrinsic meaning. His reasoning is flawed on two levels: his enumeration of StGB paragraphs (ex. 174, 203, 221, 223) clearly show that when the legislature wants to make an act criminal because of a certain relationship between victim and actor, they know how to write it to satisfy the legality principle. Secondly, in the examples he gives, the stronger party has no duty to actively protect the weaker party, but must only refrain from exploiting the power advantage implicit in their relationship. K. MARXEN, *supra* note 161.

169. Decision of Feb. 12, 1952, 2 BGHSt 150.

170. Decision of Nov. 29, 1963, 19 BGHSt 167. Recently a forty-five year old homemaker from Eschau was sentenced to life imprisonment for failing to intervene as her 19 year old son shot and killed her abusive husband, who had terrorized the family for years. The State Court in Aschaffenburg also sentenced the son to four years under juvenile law for murder and the woman's stepfather who had financed the gun's acquisition to 13 years. EMMA, Jan. 1986, at 9.

171. The German Civil Code, *Buergerliches Gesetzbuch* (BGB) Paragraph 1353, Section II.

fitting when one guarantor attacks the other. The duty invoked in previous guarantor cases required one party to protect the other from a harm external to the relationship, for example, a self-imposed injury, murder by a third party, the consequences of a mountain slide, a shipwreck, or a fatal disease. While the court might reasonably require a mountain climber to assist her clinging partner to safety after a dangerous fall, it does not follow that they would also limit a climber's right to self-defense when attacked by a fellow mountaineer. It is equally unlikely that a doctor would be required to tolerate a beating from her patient.<sup>172</sup>

In these examples, no limitation on the forcefulness of the defense would arise from the nature of the particular relationship because force and aggression are beyond the scope of the bond.<sup>173</sup> The same should follow for the marriage relationship: a commitment to share a life together binds two people, each to protect the other from harm threatened by any force external to the relationship. Marriage embodies neither a license to beat nor the assumption of the risk of the other's violent conduct.

It is unfair to use the marital bond to put the victim in the role of protecting the attacker.<sup>174</sup> The marriage relationship embodies mutual duties and, by repeatedly assaulting their wives, men certainly disregard their duty to protect their mates from harm.<sup>175</sup> Because of the close bond and mutual dependence of married people, an assault by one against the other is all the more insidious since it is also a breach of the fundamental trust relationship. While taking precautions against assaults by strangers, people in close relationships let down their guard with those they trust and are extremely vulnerable to attacks by their "protectors."<sup>176</sup>

The StGB recognizes this principle in Paragraph 223 II (higher

172. For the view that "*Garantenstellung*" has no application to the self-defense situation of spouses, see Engels, *supra* note 156, at 113.

173. Roxin would strictly limit the scope of self-defense not only in a "*Lebenskreis*" as the BGH opined, but in all "*Garantenstellnugen*" in the sense of Paragraph 13. Roxin, *supra* note 117, at 101-02.

174. The husband's blameworthiness isn't any less because of his marital status; the wife's should not be any greater because of hers. Deubner, *Urteilsanmerkung zu BGH*, 18 NJW 1184 (1969).

175. The BGH failed to mention in either case the marriage regulating paragraph of the German Civil Code (BGB). One partner is freed from the marital duty of consideration when the other commits a severe violation of his duty, including physical abuse. Kratzsch, *Das (Rechts-) Gebot*, *supra* note 141, at 436.

176. Between two and four thousand women are beaten to death by lovers or husbands every year. *Shattering Domestic Violence*, *supra* note 5, at 10.

penalty for assault on family members) and Paragraph 46 II (the severity of the violation of duty is reflected in the degree of punishment). Similarly, if one party violates his duty and attacks the one he is supposed to be protecting, the self-defense right should not be limited because of the social relationship, but should be exercised to the fullest degree for the protection of the victim.<sup>177</sup>

In any case, the responsibilities created by a special relationship such as marriage are not absolute, but can be negated by superior social interests such as lawful public authority or necessary defense. A wife could not intervene to prevent the harm of a lawful arrest or to stop another person from defending himself against the husband's wrongful aggression. In all but the marital violence situations, the legal order abrogates the wife's duty to protect her husband where he is a wrongful aggressor. By his actions the husband places himself outside the protection of the legal order and any individual is justified in using force to defend against him. It is absurd to insist that, although in the status of outlaw to the entire society, he remains in the good graces of his wife—particularly when she is the one he attacks!<sup>178</sup>

In addition to the devastating impact of the necessary defense limitation on women,<sup>179</sup> the rights of third parties to intervene are also affected. Can a stranger use deadly force to stop a husband from beating his wife when she herself is not justified in using such force? Unlike in many American jurisdictions where the actor steps in the victim's shoes and acquires only the same (here limited) right to defend, the German institution of "*Nothilfe*," necessary defense assistance, is not derivative.

Paragraph 32 specifically generates a right to ward off an unlaw-

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177. Marxen, echoing the BGH's opinion, argues in the opposite direction: when a special relationship exists between the parties which requires mutual consideration, the one attacked cannot just fight off the other with the same unlimited force as if they were any attacker. Rather, because of the relationship, the victim must take care not to harm the aggressor. The father/son example he uses to support his argument is inapplicable to the situation between husband and wife in a patriarchal society. K. MARXEN, *supra* note 161, at 42-43.

178. Another example of the institution of marriage having priority over women's personal autonomy is seen in the spousal exclusion of Paragraph 177 StGB, the rape provision. The decisions of the BGH would appear to limit a wife's defense against rape to non-deadly force, unless her husband also meant to kill her. Compare the Model Penal Code, where, although the rape provision, Section 213.1(1) contains a spousal exclusion, there is no such limitation in the definition of sexual intercourse in Section 213.0(3). The self-defense provision of the Model Penal Code allows deadly force to defend against forced sexual activity.

179. For a discussion of the increased vulnerability of women to the violence of their husbands as a result of the BGH's limitation on self-defense, see Geilen, *supra* note 37.



ful attack from "one's self or another." This provision accords with the German theory that an attack against a protected legal interest is an attack against the entire legal order. It affords an independent right to third parties to defend and uphold the interests of society.<sup>180</sup> Hence, the shooting of a wife-beating husband by a stranger falls within the parameters of justified defense. This analysis leads to the illogical yet inescapable conclusion that a wife's use of deadly force against her husband in her own defense could lead to criminal prosecution, whereas a stranger's defense of her would be justified.<sup>181</sup>

According to the court's spousal limitation on necessary defense, a wife who uses deadly force to stop her husband's unarmed beating will only be justified if on that particular occasion he intended to kill her. If a wife responds to an assault with what the court considers to be excessive defensive force, the provisions of Paragraph 33 might come into play to relieve her of criminal liability. Paragraph 33 precludes punishment for excessive force in necessary defense if the actor exceeds the limits of necessary force when acting out of confusion, fear, or alarm, if the mistake about the extent of the force necessary in response to an attack is based upon an unavoidable misconception of the severity and strength of the attack.<sup>182</sup> Thus, the actor's conduct is wrongful, but the actor is excused.

If the wife's use of force exceeds the limits imposed by the court, the defense would be wrongful vis-a-vis her husband, generating a right for him to necessary defense against her wrongful aggression. Although justified, his defense would be limited by his own status as a provocateur.<sup>183</sup> The third party is justified in using deadly force to defend the wife unless, and until, the wife uses deadly force on her own behalf. This uncertainty may lead to an even greater hesitancy on the part of strangers to intervene in "domestic affairs."<sup>184</sup>

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180. Eser, *supra* note 15, at 632.

181. Were the helper also to be limited in his defense to the same extent as the wife, he would have to ask, "Are you married?" before intervening to defend a woman being beaten. If he defended without asking, he would probably have an excuse for mistakenly assuming she was a normal person entitled to defend herself; very little has been written about the effect of the necessary defense limitations on third parties who assist in a defense (*Nothilfe*). See Seelmann, *Grenzen Privater Nothilfe*, ZEITSCHRIFT FUER DIE GESAMTE STRAFRECHTSWISSENSCHAFT 36-60 (1977). It is an open question whether a wife could justifiably intervene on the victim's behalf with deadly force against her husband if he was beating a third party.

182. Although the provision is not labeled, it is treated as an excuse.

183. Since he created the dangerous situation, he must now attempt to avoid, ward off, or endure her reaction.

184. Three psychologists from Michigan State University staged a series of fights to observe the reaction of bystanders. Men came to the assistance of male victims attacked by either

### 3. Retreat from the Limitation on Necessary Defense for Spouses?

The latest decision by the BGH<sup>185</sup> involving a self-defense knife killing of an attacking husband expressly left open the question of whether the right to necessary defense between spouses is actually limited or not. Although the court overturned the conviction of the wife, it did so without specifically rejecting its previous necessary defense decisions regarding spouses.

In the newest case, the court appeared to rely for support on the fact pattern itself. The husband, a drug user who had previously taken some of his wife's savings, returned home to take the rest. To prevent him from leaving the apartment the wife locked the door and put the key in her pocket. As the husband hit and kicked her, a male friend unsuccessfully tried to cool down the fight, then gave up and went into another room. As the husband renewed his aggression, the woman picked up a knife and threatened to use it. When her husband attacked again, she struck him once in the heart. That the woman was pregnant at the time of the attack and lost the baby a few days later, appears to have been the actual grounds for the court's opinion in this case, since it carefully expresses its decision in terms of "pregnant women."<sup>186</sup>

The court went on to clarify several important issues. The BGH declared that a woman's right to defense is not limited simply because on previous occasions she had not suffered severe injuries from her husband's beating. The court also recognized, in direct contrast to its earlier decisions, that aiming a slash at the attacker's arms is a difficult task to demand in a self-defense situation and could in fact infuriate the attacker and increase the intensity of the attack. The first BGH spouse's self-defense decisions demanded that in all cases the wife must first use the deadly weapon in a non-lifethreatening manner against the extremities. Although the newest decision was carefully limited, it did spark hope that the BGH is responding to its critics and slowly backing away from its initial hardline limitation on necessary defense for spouses.

Having seen the court's limitation on women's rights to defend against attacking spouses, we turn to the cases in which there is no

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a man or a woman; they helped a woman attacked by another woman, but not one single man intervened when a man attacked a woman. (Straus 1976, at 177) *reported in Metz-Goeckel, supra* note 51, at 416.

185. Decision of Jan. 11, 1984, BGHSt, 17 NJW 986 (1984).

186. *Id.* at 986.

present attack, the sleeping husband cases. Several theories have been offered by legal scholars to acquit women for killing in these extraordinary situations. We begin with a look at the leading defense of excused necessity contained in Paragraph 34 StGB.

#### D. *Excused Necessity*

The Germans have developed a full range of excuses which recognize the frailties of human character and leave unpunished actors whose violation of the law cannot be viewed as entirely voluntary. When the defendant's actions are so clearly dictated by overwhelming circumstances that it cannot be fairly expected of her to refrain from the wrongful conduct, then she acts blamelessly. The German concept of *Zumutbarkeit*, a notion of imputability, captures this dimension of compassion. If a person cannot be fairly expected to conform her behavior to the dictates of the criminal law, as when she kills in a necessity situation out of self-survival instincts, her conduct lacks the personal reproachability required for punishment.

The concept of *Zumutbarkeit* is the basis of Paragraph 35 "Excused Necessity,"<sup>187</sup> which excuses an actor who commits unlawful acts in order to save herself, a relative, or close friend from a present danger to life, limb, or freedom which is otherwise unavoidable. The second clause of the paragraph expresses the other aspect of *Zumutbarkeit*, namely, those cases in which the actor can be fairly expected to put up with the danger, either because she caused it, or because she has a legal duty to assume a higher risk of danger, as in the case of fire fighters or police officers.

In contrast to justified necessary defense, where all legal interests are protectable, only a threat of the most important legal interests support the underlying contention of the excuse—that the defendant could not help but to act in their defense. The excused necessity actor is not furthering the greater good, but rather selfishly protecting her own interests at the expense of the interests of others. While the "involuntariness" of the defender's conduct is a function of the value of the competing interests, the interest the defender saves may well be lesser than or equal to the interest harmed. The unusual circumstances of a danger to life, limb or freedom do not foreclose the ability of the actor to act in accordance with the law, but they do make it unlikely that she will do so. The question is whether under the circumstances the defender can be blamed for acting as she did.

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187. See *supra* note 105.

By its terms, excused necessity is available as a defense only to the endangered person, and a circumscribed circle of family and friends. There is no allowable supportive role for detached third parties, whose participation lacks the compulsion of those whose interests are immediately affected. Actions committed in necessity, though excused, are wrongful transgressions of legally protected interests and fulfill the elements of statutorily prohibited conduct. Supporters would be liable for prosecution as accessories.

Although excused, the actions of the necessity actor constitute wrongful aggression against the victim. The wrongful attack sparks a right under Paragraph 32 for the victim to respond in justified necessary defense. Under the same paragraph, anyone who intervenes on behalf of the victim is justified (*Nothilfe*).

While jealously guarding the strict temporal restrictions of "present" attack in justified necessary defense, beginning in the 1920's the courts have expansively defined the "present" danger required to excuse one acting in necessity. Despite criticism of its irreconcilable interpretations of "present," the courts have periodically reaffirmed their initial position regarding necessity and continue to offer the possibility of excusing actors who end longstanding victimization by killing their oppressors.

As early as 1926, the Reichsgericht declared that the killing of a non-attacking tyrannical father was an act of necessity.<sup>188</sup> The court upheld the acquittal of a young man for fatally shooting his father in order to protect his mother and sister from continuous violence and abuse. The last incidence of violence had occurred 20 hours prior to the killing.

The court made several important clarifications about necessity, then Paragraph 54.<sup>189</sup> First, that not just natural forces, but also the culpable behavior of a person could produce a necessity situation.<sup>190</sup> Secondly, ongoing, threatening circumstances could create a present necessity danger. The court declared that the killing of a person who presented a lasting danger could be viewed as acting in necessity, even if at the time of the killing the victim was not engaged in, or threatening, imminent violent behavior.<sup>191</sup>

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188. Decision of July 12, 1926, 60 RGSt 318.

189. See *supra* note 103.

190. The new formulation of the law has collapsed both situations of duress and necessity into the single excuse in Paragraph 35.

191. Decision of Jan. 23, 1925, 59 RGSt 69.

The court built on an earlier decision in which the defendant was acquitted for burning down her badly deteriorated house after repeated attempts to persuade the housing authority to give her a better living situation were ignored. Both cases are significant in that the court declared ongoing circumstances to be sufficient to create a present necessity. Just as striking, however, is that the court upheld such drastic actions as killing and arson without questioning the availability or suitability of lesser means to avert danger.<sup>192</sup>

In 1966 the BGH adopted the Reichsgericht interpretation which holds that in certain situations, necessity justifies violent actions by family members who are threatened by dangerous husbands or fathers. The BGH recognized that where the police have been called in the past and have failed to intervene energetically enough against a tyrannical father/husband who is dangerous, and whose inhumane behavior was known to them, the lack of official help could create a necessity situation for the threatened family members.<sup>193</sup> A fifteen year old girl hit her stepfather from behind with a frying pan, and as she went to get the police, he was again struck in the head by the mother. The girl was convicted of murder in juvenile court; the mother for manslaughter as a result of the step-father's ensuing death. The girl's conviction was reversed on other grounds but the court pointed out that in the event of a new trial, the lower court should carefully consider two factors. First, the court should consider whether the family members were in a situation of necessity, and second, the court should question whether the young girl could be excused for her actions because the lesser available means—appeals to her weak, oppressed mother, as well as to the police authorities—had proved useless. The court further noted that the trial court had erred in numbering among the lesser alternatives available to the mother (who did not appeal) that she procure a divorce or commit her husband to an institution because of his alcoholism. The mother could not be expected to endure the inhumane behavior of her husband until sometime in the future when and if the action had success. The court

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192. The availability of lesser means was precisely the reason the claim of necessity of a woman who killed her tyrannical husband with an axe as he lay in bed was rejected in 1949 by the Supreme Court for the postwar British zone. While in theory accepting the reasoning of the previous cases, the court refused its application to the case at hand, noting that the defendant could have avoided her husband by staying in another room, leaving the house, or calling the police as she had done on previous occasions. Decision of Mar. 15, 1949, OBERSTEN GERICHTSHOF FUER DIE BRITISCHE ZONE IN STRAFSACHEN 369 (1949).

193. BGH, NJW 1823 (1966).

concluded that necessity excuses even drastic acts of a person which save their own and their family member's lives and limbs if the danger cannot be overcome immediately and finally in other ways.<sup>194</sup>

In 1979, the BGH gave its most recent approval to the concept of "lasting danger" which triggers necessity. It reversed convictions for assault and weapons law violations of a man who shot a fleeing empty-handed intruder after his home's seventh night burglary in roughly seven months.<sup>195</sup> Burglar alarms, the police and warning shots had all failed to prevent reoccurrences of the break-ins. The court noted that when ongoing danger is so pressing that at any time it can produce damage, even if there is a time gap between the damaging occurrences, a necessity situation is created.<sup>196</sup> The court held that a lasting danger is a unified entity and cannot be divided into present and future parts.<sup>197</sup>

However sparingly the courts have applied Paragraph 35 to excuse victimized family members who kill, this solution is accepted by the vast majority of commentators and jurists as the appropriate legal response to a tragic situation. The victim and interveners are protected in their right to resist, and the killing is deplored, but the killer is compassionately excused.

Despite the well established distinction between wrongfulness and blame in German law, battered women's homicide cases represent the difficulty in drawing the fine line between right and wrong conduct. Unsatisfied with merely excusing battered family members, some commentators urge justifying their acts instead. In many cases both factors of diminished wrongfulness and diminished culpability combine to make neither a justification nor an excuse a totally desirable or satisfactory result. The next section will examine briefly several competing theories which attempt to establish the line of justification to include battered women's killings, or which offer new schemes to

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194. *Id.* at 1824.

195. BGH, NJW 2053 (1979).

196. Hassemer, *Notstandslage bei Dauergefahr*, 1 JURISTISCHE SCHULUNG 69 (1980) [hereinafter Hassemer, *Notstand*].

197. This has not stopped the commentators from noting the similarity between ending a lasting danger and preventative defense, a concept which has generally been rejected within the confines of Paragraph 32. For a discussion of this defense, see *infra* note 198. Hruschka would solve this case with an extra-statutory defensive necessity justification analogous to Paragraph 228 BGB. Hruschka, *Rechtfertigung oder Entschuldigung im Defensivnotstand?*, 1/2 NJW 21-23 (1980) [hereinafter Hruschka, *Defensivnotstand*]. For a discussion of this defense, see *infra* note 214.

deal with conduct which falls within the gray area between right and wrong.

*E. Justification: Lack of Criminal Wrongfulness,  
or Lack of Responsibility?*

The right to Paragraph 32 necessary defense is sparked by a present wrongful attack (*gegenwaertiger rechswidriger Angriff*). "Present" in this context means actual or imminent, specifically, that any hesitation on the part of the victim would substantially decrease her ability to defend.<sup>198</sup> When the danger to the protected legal interest is long-term rather than instantaneous, as in the case of ongoing domestic violence, a "*notwehraehnliche Lage*"<sup>199</sup> results, that is, a situation similar to those which generate a right to necessary defense. The classic and most debated case is blackmail, where the threat to honor—a legal interest capable of necessary defense protection—is ongoing and capable of erupting into harm at any moment.<sup>200</sup>

The question is whether and when such a threat fulfills the requirements of "present attack" in the sense of Paragraph 32 which would justify unlimited force in necessary defense against the blackmailer. The commentators who have addressed the issue generally feel that some sort of defensive action short of killing may be justified. This includes making a secret tape recording, or in some cases even robbery or burglary to retrieve incriminating evidence in the hands of the blackmailer. The discussion has been kept alive by occasional references by the BGH in civil matters that the illegal secret tape recording of conversations to protect other interests may be justified.<sup>201</sup>

The concept of a distinct justification ground for preventative necessary defense has been rejected by many scholars who, while justifying some types of preventative action, prefer to see these situations regulated by Paragraph 34 "Justified Necessity." Paragraph 34 is favored for its stricter weighing of interests requirement.<sup>202</sup> Since the interests protected in justified necessity must "substantially outweigh"

198. See *supra* note 196.

199. H. SUPPERT, *STUDIEN ZUR NOTWEHR UND NOTWEHRAEHNLICHEN LAGE* 368 (1973).

200. Haug, *Notwehr Gegen Erpressung*, 7 *MONSCHRIFT FUR DEUTSCHES RECHT* 548 (1964); H. WELZEL, *DAS DEUTSCHE STRAFRECHT* 87 (1969).

201. Decision of Feb. 21, 1964, 19 BGHSt 325, 332; Decision of June 14, 1960, 14 BGHSt 358, 361.

202. A. SCHOENKE & H. SCHROEDER, *supra* note 140, Par. 34, Rdnr. 30-31; Roxin, *Die Notstandaehnliche Lage—ein Strafunrechtsausschliessungsgrund?*, *FESTSCHRIFT FUER DIE-TRICH OEHLER* 181 (1985) [hereinafter Roxin, *Notstand*]; Schaffstein, *Der Masstab fuer das*

the interests infringed upon by the defense, killing is not among the actions which could be justified.

Hartmut Suppert,<sup>203</sup> the leading advocate of preventative necessary defense, believes even killing, under certain circumstances, is justifiable. He proposes the extension by statute of Paragraph 32 to include preventative defense for situations of ongoing violence where a threat of future violence exists. In support of his argument, he relies on the case of a young boy excused by the Reichsgericht in 1926 who shot his tyrannical father as he lay in bed playing with the dog in order to protect the family from further violence.<sup>204</sup>

Merely excusing "wrongful" behavior is not a satisfactory solution for Suppert, who, preferring to solve the case at the justification level of legal analysis<sup>205</sup> denies any wrongfulness in the survival actions of tyrannized family members. The advantages he sees as treating such cases as preventative necessary defense as opposed to excused necessity are threefold: the legal interests capable of being defended are greater in necessary defense (all legal interests) than in excused necessity (only life, limb and liberty); the victim has no right to resist, nor can anyone lawfully aid the victim; preventative necessary defense would justify all third party helpers who assist in the killing, whereas necessity excuses only the battered party, her immediate family and close friends, leaving others liable for prosecution as accessories.

In order to reach this result, Suppert urges that the expanded definition of "present" in "present danger" in excused necessity—the solution to the tyrannical father case reached by the Reichsgericht—be carried over to expand "present attack" in necessary defense to include ongoing violent situations and concrete threats of future harm.<sup>206</sup> To the contrary, the courts and commentators have seen from early on a clear distinction between "present danger," which can

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*Gefahrurteil beim rechtfertigenden Notstand*, 1978 Festschrift fuer Hans-Juergen Bruns 89.

203. H. SUPPERT, *supra* note 199, at 368-87.

204. See *supra* note 188.

205. The German system of analysis of a criminal act (*Straftatsystem*) proceeds in the following manner: 1. was there a human act? (*Handlung*), 2. did it fulfill the definition of a criminal statute? (*Tatbestandsmassigkeit*), 3. is it justified? (*Unrecht*), 4. is the actor excused? (*Schuld*), 5. are there any personal reasons to forego or exclude punishment? (*Strafaufhebungs- und Strafausschliessungsruende*). The system is heirarchical; each level presupposes the previous ones. See W. NAUCKE, STRAFRECHT: EINE EINFUEHRUNG 219 (1977); W. HASSEMER, EINFUEHRUNG IN DIE GRUNDLAGEN DES STRAFRECHTS 188 (1981).

206. H. SUPPERT, *supra* note 199, at 379.



include an ongoing dangerous situation capable of erupting into harm at any time and the instantaneous moment of "present attack" where the defender is forced to react with the same speed to protect herself.<sup>207</sup> Suppert's critics maintain that the sleeping tyrant is neither attacking, nor—because he has threatened to attack—attacking "analogously."<sup>208</sup>

Suppert argues that the victim should have no right to resist his own death because the legal system should stand fully on the side of RIGHT (the actor who seeks to free himself from oppressive circumstances) rather than with the victim, who threatens to effectuate his illegal intentions. The tyrannical victim loses his right to resist not only against those he tyrannized, but against all those friends, neighbors and strangers who assist the abused woman in the justified killing. Suppert applauds this result as well as the extension of a privilege to all third parties who help in the killing.

Desperate actions which society may be willing to tolerate from the immediate victims of long term abuse lose their tolerable character when done by someone unconnected with the personal tragedy. A killing in self-preservation by a terrorized women has an entirely different quality than a killing done by a postman who just wants to help out. If society condones the killing as right and proper, it should not make a difference if the battered woman, the postman, or a visiting social worker from the battered woman's shelter pulls the trigger. The same is true if there were a present attack on the wife which would justify immediate defense; it would not matter.

Both necessary defense and necessity are part of the law of emer-

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207. As recently as 1983, the BGH reversed the murder conviction of a woman who used a mallet to bash in her sleeping husband's head to end the years of tyranny and abuse she and her son had faced, and to ward off a threatened attack on her son. Given the woman's oppressive circumstances, the trial court had not clearly enough grounded its verdict against her. Specifically, the BGH directed the trial court to examine the factual prerequisites for murder and carefully consider justified necessary defense and excused necessity as well as the possibility that the defendant had erred over the circumstances which are preconditions for these defenses, in which case the degree of offense could be lowered from intentional to negligent or the punishment mitigated. BGH Decision of Aug. 2, 1983. 5 StR. 503/83. 11 STRAFVERTEIDIGER 458 (1983).

What is interesting about this case is that the BGH considered necessary defense worthy of discussion, let alone careful consideration. Given the factual background—previous abuse combined with the threat of future harm—combined with the lack of a present attack at the moment the sleeping man was killed, leads to the conclusion that a preventative necessary defense situation is implied or at least not totally excluded. On retrial the woman was convicted of manslaughter and sentenced to two years probation. EMMA, Apr. 1985, at 7.

208. T. Hillenkamp, VORSATZ—OPFERVERHALTEN 113, 117 (1981).

gency situations. An act justified or excused in an emergency can lose its privileged/excused character when timely help arrives and the danger is abated.<sup>209</sup> The isolation of the woman and her inability to seek the help of others are factors producing the necessity which may excuse killing. The very presence of detached third persons prepared to offer help to the woman, should substantially ameliorate the crisis situation which could, under Suppert's analysis, justify a killing in preventive necessary defense.

Although Suppert's preventive necessary defense solution for this group of cases has been rejected by most commentators as being too broad and drastic,<sup>210</sup> the points he raises are not so lightly dismissed. While it is the tragic personal quality of these hopeless situations which causes us to seek an acceptable legal solution for trapped family members forced to kill to survive, to speak only of their lack of culpability for wrongdoing (as in the prevailing theory of excused necessity) doesn't seem to do complete justice to the situation. Because of the similarity to a self-defense situation, the wrongful character of the act itself is substantially diminished. The diminished wrongfulness is the reason some commentators favor excusing the woman.<sup>211</sup>

Yet if we are to reproach the woman for acting wrongfully, then we must be prepared to answer the question, what in this situation is right? A legal system which has turned its back on the plight of abused family members, yet stands prepared in full measure to vindicate the rights of the dead oppressor has, at best, skewed priorities. In a true life versus life dilemma with no way out for the woman but killing, to argue hypothetical options (calling unresponsive police; going to non-existent shelters; leaving home with children to care for, no money, and no place to go) is about as persuasive as saying that the famous Karneadis' plank problem—two shipwreck survivors struggling over a board capable of supporting only one of them—could best be solved by a rescuing ship.<sup>212</sup>

However, no lesser solution seems completely adequate. The shipwrecked sailors' struggle to survive illustrates the difficulty of line

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209. Hassemer, *Justification and Excuse*, *supra* note 76, at 607.

210. Roxin, *supra* note 117; H. JESCHECK, *supra* note 36, at 275; A. SCHOENKE & H. SCHROEDER, *supra* note 140, Par. 32, Anm. 17.

211. Eser, *supra* note 15, at 636.

212. For a discussion of this famous hypothetical of the Greek philosopher Karneades (214-129 B.C.), which has plagued legal scholars for years, see Kaufmann, *Rechtsfreier Raum und eigenverantwortliche Entscheidung usw*, Festschrift fuer Reinhart Maurach 327, 327-29 (1972) [hereinafter Kaufmann].

drawing and labeling. Except in the case of self-defense, when life is pitted against life in a competition for survival, the law takes a position of neutrality. Human lives cannot be simply weighed against each other. Every life is unique and presumptively of equal value regardless of age, sex, health, social status, or moral worth. When two lives hang equally in the balance, society reaps no benefit in saving one at the expense of the other. There can be no justification on a lesser evils theory. Yet excusing the surviving sailor on a theory of excused necessity means conceding that his survival actions were wrongful.<sup>213</sup>

The life versus life dilemma of battered women and their husbands has another dimension. Namely, the responsibility for creating the life threatening situations lie with the abusive men who brutally tyrannize their wives. This responsibility factors into the justification analysis of the women's actions in a competing theory offered by Joachim Hruschka. He reaches a solution similar to Suppert's by means of an extrastatutory justification analogous to Paragraph 228 of the German Civil Code.<sup>214</sup>

This Paragraph, termed defensive necessity, justifies the destruction of objects when a risk to the actor emanates from the object itself, and the harm caused by destroying the dangerous object is not too disproportionate to the harm avoided. The Paragraph would justify the shooting of a vicious attacking dog, or the bombing of a beached tanker when the leaking oil threatened to destroy a bathing beach in the area.<sup>215</sup>

Hruschka wants the defensive necessity privilege applied not only to objects but also to persons, in the same way that the Reichsgericht in the tyrannical father case recognized that persons can be a source of danger. Hruschka contends defensive necessity is needed to

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213. While this is the prevailing solution, it is not without its theoretical problems, including giving each the right to justified necessary defense against the other, a non-sequitor in German legal thought. *Id.* at 328. No excuse of necessity would be available, however, if the prevailing sailor had himself caused the necessity situation, by, for example, causing the shipwreck to settle a grudge against the owner. Paragraph 35 denies the excuse to actors who should be fairly expected to put up with the danger since they caused it themselves, or because they stand in a particular legal relation to the danger (for example, firefighters). This condition does not weaken the premise that both lives are of equal value, it simply makes the killing of one at the expense of the other punishable when the survivor by his actions or omissions caused the necessity or had a particular duty to assume a higher degree of danger.

214. Hruschka, *Extrasystematische Rechtfertigungsgruende*, 1977 FESTSCHRIFT FUER DREHER 189, 203-06 [hereinafter Hruschka, *Rechtfertigungsgruende*]; Hruschka, *Defensivnotstand*, *supra* note 198.

215. H. JESCHECK, *supra* note 36, at 285.

fill the gap left by Paragraph 34 of the German Criminal Code, which could never justify the killing of even a dangerous person because the interests of one person cannot be seen as having "substantially" greater value than those of another, as required by the statute.<sup>216</sup> Paragraph 34 of the German Criminal Code offers no support for Hruschka's view that in certain cases the interests of a person who is the cause of danger to another must take a back seat to the interests of the person endangered. Defensive necessity, on the other hand, provides for a different standard of comparison when the interests which stand to be hurt by the defense are themselves the source of the danger.

The actor in defensive necessity need not promote the greater good, she simply cannot cause harm substantially disproportionate to the value of the interests she protects. Even assuming lives of equal value, the result is an even trade. Sacrificing his life to save hers does not cause substantially disproportionate harm, and under this analysis, the battered woman could be justified in killing her tormentor.

Hruschka's critics argue that rules developed for property cannot simply be applied to people, whose interests must be treated with utmost consideration, so long as they are not engaged in wrongful aggression against another.<sup>217</sup> Further, the defensive necessity actor is allowed virtually the full scope of the Paragraph 32 "Necessary Defense" despite the non-existence of a "present attack." Hruschka's justified defensive necessity solution produces the same problematic consequences in terms of resistance, support and intervention as in Suppet's preventative defense.

An early theory by Reinhard Maurach of "*Tatverantwortung*,"<sup>218</sup> responsibility for the act, was an attempt to find a more satisfactory solution to the borderline cases when exceptional circumstances force the actor's conduct. He introduced another level of accountability between wrongfulness (*Unrecht*) and blame (*Schuld*). This prerequisite level of responsibility for the act would have to be met before any assessment of culpability could be made. A reproach of blame should be inferred from the individual character of the defendant, not the pressure of extraordinary circumstances. Maurach's theory applies to those cases in which there is no justification, but if there is not responsibility for the act, the actor is not merely excused, she is not held

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216. Hruschka, *Rechtfertigungsgruende*, *supra* note 215.

217. Roxin, *Notstand*, *supra* note 202.

218. Maurach & Zipf, *supra* note 117, § 32, at 411-15.

accountable.<sup>219</sup>

The theory of "*Tatverantwortung*," while generally rejected with the reasoning that general grounds of excuse are adequate to relieve the actor from the unwarranted reproach of blame,<sup>220</sup> shows a certain dissatisfaction with the sharpness of the distinction between justified and excused behavior. It has sparked others to search for a middle-ground solution for cases which do not fit neatly on either side of the border. Hans-Ludwig Guenther<sup>221</sup> has labeled these "*notstandsaehnliche Lage*" situations similar to necessity. These are cases which fit the essential description of Paragraph 34 "Justified Necessity," but in which there can be no actual justification because the legal interest defended is not "substantially" greater than the legal interest harmed by the defense. In the "*notstandsaehnliche*" cases the interest saved through the defense may be only slightly greater or even slightly less than the harm caused.

Guenther includes in his analysis cases of conflict of duty, acts done under duress, preventative necessary defense and overstepping the social-ethical limits of necessary defense. He would differentiate between simple wrongfulness (*Rechtswidrigkeit*) and "criminal" wrongfulness (*Strafrechtswidrigkeit*), which is a higher degree of wrong. The "criminal" wrongfulness of an act is eliminated not only by a justification ground, but at an even earlier stage of legal analysis if it lacks the higher degree of wrongfulness.

Applying this theory to battered women's cases, the act of killing a tyrannical husband could lack "criminal" wrongfulness, although it is not justified. Participation in a killing which lacks "criminal" wrongfulness would not be subject to prosecution because the "*rechtswidrig*" act in the definition of accessories (Paragraphs 26 and 27 StGB) should be read to require participation in a "criminally" wrongful act.<sup>222</sup> On the other hand the act remains "*rechtswidrig*" in the same sense of Paragraph 32 so that the victim has a right to a necessary defense against it.<sup>223</sup>

Arthur Kaufmann handles the same group of cases by proposing a "*Rechtsfreieraum*," a law free area where the legal order steps back and declines to regulate the competition of interests, because there is

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219. Kaufmann, *supra* note 212.

220. H. JESCHECK, *supra* note 36, at 285.

221. H. GUENTHER, STRAFRECHTSWIDRIGKEIT UND STRAFUNRECHTSAUSSCHLUSS (1983).

222. *Id.* at 390.

223. *Id.* at 380.

no acceptable measure by which to judge.<sup>224</sup> In life versus life necessity situations and conflict of duty cases (father can only save one of two drowning children) Kaufmann proposes the law simply remain silent. Participation in a non-regulated act would not be punishable. As for necessary defense or help against a non-regulated act, Kaufmann suggests that since there is no way morally or legally to determine who has the better right, the actor or the defender, the law would decline to regulate.<sup>225</sup>

## VI. CONCLUSION

The existing, narrow juristic concepts are simply inadequate to deal with the enormity of domestic violence against women. The rules we have developed to divide freedom between private individuals involved in physical confrontation (self-defense, necessary defense) are based on one time encounters between strangers and are inadequate to regulate the sphere of action between persons involved in long-term intimate relationships.<sup>226</sup> The law has failed to adequately distinguish between instant aggression and the more insidious continuous escalating domestic violence. Should a family or marital bond bestow greater privileges or place greater restraints on a defender? Should the one instant in which the victim of long-term violence finally acts to save her own life be isolated and judged by rules which would cast her in the role of aggressor? Can we blame a battered woman for responding to unbearable dangerous circumstances by killing?

The problems presented in women's self-defense cases are twofold. First, women's socialization, experience and perspective have not been included in the consideration of self-defense requirements. Consequently, women who defend their lives are at a disadvantage in persuading an almost exclusively male judiciary of the validity of their claims. The difficulties are particularly acute when the 'attacker is a husband. Society accepts a marital relationship in which men are in a position of power and control, and women in a position of dependence. Each individual defendant deserves to have her claim to self-defense evaluated free from the sexual biases of the law, society, and the judiciary.

Self-defense is a hard and cutting right which could have deadly

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224. Kaufmann, *supra* note 212, at 328.

225. *Id.*

226. Hassemmer, *Provokation*, *supra* note 154, at 225-44.

consequences for an attacker. It is important that the prerequisites for its exercise are clearly laid out and rigorously maintained. The killing of another should not be justified except in the exceptional cases where there is an imminent attack and no lesser available means to save the defender.

It is one thing to maintain a rigorous standard for the exercise of the self-defense right, and another to arbitrarily remove a class of people from the category of justified defenders. In its limitation on the right to necessary defense for spouses, the German Supreme Court has failed to consider or appreciate the situation of millions of married women who are constantly abused and victimized by their husbands. The prevalence of male violence against women and children within the family is the reason that the right to necessary defense should not be limited, but allowed in full measure against attacking spouses.

The second challenge is to find a just and orderly solution for the extreme cases of long-term mistreatment where women in a desperate struggle to survive are driven to kill non-attentive abusers. While it is contrary to our sense of justice to convict in these cases, it is equally detrimental to our system of justice to acquit on grounds of self-defense. The illogical consequences of labeling as "justified" a defense based on a mistaken assessment of the situation or on the desperate coerced actions of abused family members must be appreciated and the structure of the law changed to eliminate them.

American law, failing to provide a plausible excuse theory, has felt the impact of jury acquittals in sleeping husband cases on the institution of self-defense, where the present attack requirement is repeatedly being nullified. In the unlikely event that American law is indeed ready to embrace a theory of preventative self-defense, then the adoption should be conscientious and prerequisites, limits and consequences of the defense systematically analyzed.

A better solution, which the Germans adopted half a century ago, is for American law to recognize and apply the defense of personal necessity as an excuse. If the repeated acquittals in battered women's cases are any indication, then the public appears ready to show human compassion for its fellow citizens caught up in a maelstrom of violence and abuse. While we have achieved the same result in indirect ways, the Germans, by recognizing the excuse of personal necessity, have a better legal basis for their acquittals of actors who wrongfully kill another in self-preservation.

The recognition of a full range of excuses does not change the normative order of society in the way in which the recognition of justifications provides exceptions in certain cases to the statutorily prohibited conduct. Excuses merely change the requirements that the society places upon violators of the legal norms.<sup>227</sup> A humane and compassionate legal order should be able to take in stride the occasional transgressions of infants, insane and mistaken actors, actors giving in to the overwhelming pressure of necessity or duress situations, and those overreacting in attack situations out of fear or confusion.

The long term solution is for society to recognize the survival struggles of battered women and send the rescuing ship. Survival killings will continue until society is prepared to offer women real alternatives. Patriarchal notions of power and control over women must be replaced with new norms of respect and independence for women. The system that stands prepared to support women's quest for physical integrity and independence will not need to sort out the legal consequences of its failure to do so.

In the meantime, legal scholars need to continue the arduous task of hair splitting, making the ever finer distinctions which lead to just solutions in difficult, borderline cases. In this process, it is clear we have much to share with our German counterparts.

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227. Hassemer, *Justification and Excuse*, *supra* note 76, at 597.



