TILL DEATH DO US PART: A COMPARATIVE LAW APPROACH TO JUSTIFYING LETHAL SELF-DEFENSE BY BATTERED WOMEN

B. Sharon Byrd* **

I. INTRODUCTION

"The supreme tragedy of life is the immolation of woman."[1] Judith has been denied food, beaten, kicked and prostituted by her captor. He has crushed glass in her face, extinguished cigarettes on her body and poured boiling liquid over her. She has tried to escape several times only to be found, dragged back to captivity and brutally beaten. Her captor has threatened to maim and kill her, and her situation is worsening by the day. Finally, she has the opportunity to take and conceal a gun. She waits until her captor is caught off guard and shoots him in the back, ending his reign of terror over her.

If this were a description of "the dehumanization process suffered by prisoners of war under the Nazis during the Second World War"[2] or of "the brainwashing techniques of the Korean War,"[3] is there any doubt that Judith would be considered justified in killing her captor? Would it matter that she got the opportunity to kill him while he was sleeping? Would anyone judging her actions express reservations about justifying her actions because she did not wait until her captor awakened and resumed his acts of terror over her? Would judging the reasonableness of her act require a psychiatric examination to determine whether she had

* Instructor of Law, Friedrich-Alexander University, Erlangen-Nürnberg and University of Augsburg, Germany. BA 1969, Smith College; JD 1972 University of California, Los Angeles; 1972. Alexander von Humboldt Fellowship; LLM 1987, Columbia University. This article was submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law, in the Faculty of Law, Columbia University. I would like to thank the members of my doctoral committee, Professor Meir Dan-Cohen, Professor George P. Fletcher, Professor R. Kent Greenawalt and Professor Andrezej Rapaczynski for the valuable assistance they gave me during the preparation of this article. I am also indebted to Professor Joachim Hruschka, Professor Jan C. Joerden and Gregory Silverman for their moral and intellectual support. My thanks also go to members at the University of Texas-Austin who very kindly invited me to discuss this paper as a part of their colloquium series.

** All English translations of German texts are by the author.

1. *State v Wingler*, 184 NC 747, 115 SE 59, 61 (1922), cited by Justice Martin in his dissenting opinion in *State v Norman*, 324 NC 253, 378 SE2d 8, 21 (1989).

2. *State v Norman*, 324 NC 253, 378 SE2d 8, 17 (1989) (dissenting opinion by Judge Martin citing psychiatric evaluation of treatment received by Judy Norman from her husband).

3. Id; see also *State v Hundley*, 236 Kan 461, 693 P2d 475 (1985).

suffered from some syndrome caused by the inhumane treatment to which she was subjected? Obviously not.

But the description above is not of a prisoner of war, it is the description of a prisoner of marriage, the narrative of a battered wife, Mrs. Judy Norman, during the last thirty-six hours of her marriage. The saga of Judy Norman does not end, however, with the death of her conjugal torturer. When she was brought to account for this "crime of self-defense"[4] the North Carolina trial court refused to instruct the jury on the law relevant to self-defense.[5] The North Carolina Court of Appeals granted her a new trial, considering this refusal to be reversible error.[6] The Supreme Court of North Carolina reversed and upheld the trial court's omission,[7] holding that the evidence failed to show that the defendant could have reasonably believed that she faced an imminent threat of serious bodily harm or death.[8] Thus the story of Mrs. Judy Norman ends like so many stories similar to her own, with a housewife and mother serving years of imprisonment to which she was sentenced for voluntary manslaughter of her loving husband.

Did the trial court err or did it reach the proper conclusion on a highly charged and emotional issue? The purpose of this article is to consider this question and explore the possibilities of justifying the battered woman who kills her sleeping spouse. This particular task has been selected because it represents a combination of extremes and thereby seems to be the most difficult case to defend. On the one hand, justifying the battered woman's lethal response is the most favorable treatment that a court could give, because that would mean that the woman had a right to kill her husband.[9] On the other hand, affirming this right against a sleep-

4. George Fletcher describes the deeds of Bernhard Goetz in this way in *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (The Free Press, 1988).

5. *Norman*, 378 SE2d at 9 (cited in note 2).

6. *State v Norman*, 89 NC App 384, 366 SE2d 586 (1988).

7. *Norman*, 378 SE2d at 8 (cited in note 2).

8. Id at 15.

9. This article assumes that a difference exists between *justifying* and *excusing* conduct. If conduct is justified it is legally correct conduct; therefore, the actor has a right to engage in it, anyone can rightfully assist him, and no one may rightfully prevent him from engaging in it. If conduct is excused it is wrongful, but because of the particular circumstances or the actor's individual weaknesses it is not punishable. Since it is wrongful no one may assist an excused actor, and anyone may prevent him from carrying out his deed. This distinction has received considerable attention in the scholarly literature, see George Fletcher, *Rethinking Criminal Law* §§ 10.1-10.5 at 759-875 (Little, Brown, 1978); Paul Robinson, 1 *Criminal Law Defenses* §§ 24-25 at 83-101 (West, 1984), and Glanville Williams, *Textbook of Criminal Law* (Stevens & Sons, 1978) and has also enjoyed some judicial discussion of an academic nature, see *State v Leidholm*, 334 NW2d 811 (ND 1983). Its practical relevance for Anglo-American law has been questioned, however, and the argument has been made that the rights of third parties do not always correlate with whether an actor is justified or excused. See Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum L Rev 1897, 1918-27 (1984).

ing spouse is the most difficult case that a court could confront, because at the moment of the killing the victim is totally helpless.[10]

Battering has become a serious and wide-spread problem in the United States.[11] Attorneys have presented evidence of the "battered woman syndrome" to mitigate the degree of the offense charged,[12] to excuse the defendant's conduct on the basis of insanity or diminished capacity,[13] and to justify acts undertaken in self-defense.[14] United States courts disposed to justifying the battered woman's spousal killing have turned to self-defense for the solution.[15] Although in some instances, unlike the *Norman* case, higher courts have upheld this application of self-defense,[16] its use raises certain theoretical problems inherent to the defense.[17] Perhaps for this reason many courts have been unwilling to adopt it.

Part II of this article will discuss the problems with applying the traditional defense of self-defense in battered woman cases. One of these problems, which relates to a much broader range of criminal law cases, is the objectivity or subjectivity appropriate for interpretation of the reason-

10. Although this article focuses on one extreme, it does not exclude other possible defenses. Depending upon the facts of any particular case, the appropriate judgment could range from first degree murder to justified homicide including all forms of mitigation and excuse as intermediate solutions to the case under consideration.

11. See Murray Straus, Rirchard Gelles and Suzanne Steinmetz, *Behind Closed Doors: Violence in the American Family* (Anchor Press/Doubleday, 1980); Lenore Walker, *The Battered Woman Syndrome* (Springer, 1984); F. Lee Bailey and Henry Rothblatt, *Crimes of Violence: Homicide and Assault* (Lawyers' Co-op, Supp 1990).

12. See Maria Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 Cal L Rev 1657, 1718-23 (1981); Comment, *Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defense*, 33 UCLA L Rev 1679 (1986).

13. See Marcus, 69 Cal L Rev at 1711-18 (cited in note 12).

14. *State v Norris*, 279 SE2d 570 (NC 1981); *Leidholm*, 334 NW2d 811 (cited in note 9); *State v Gallegos*, 719 P2d 1268 (NM App 1986); *State v Wanrow*, 559 P2d 548 (Wash 1977); *State v Crigler*, 23 Wash App 716, 598 P2d 739 (1979).

15. See *Ibn-Tamas v United States*, 407 A2d 626 (DC 1979); *People v Reeves*, 47 Ill App 3d 406, 362 NE2d 9 (1977); *State v Hodges*, 239 Kan 63, 716 P2d 563 (1986); *Hundley*, 693 P2d 475 (cited in note 3); *State v Kelly*, 97 NJ 178, 478 A2d 364 (1984); *Gallegos*, 719 P2d 1268 (cited in note 14); *Norman*, 366 SE2d 586 (cited in note 6) (overruled, *Norman*, 378 NE2d 8 (cited in note 2)); *State v Norris*, 279 SE2d 570 (cited in note 14); *Leidholm*, 334 NW2d 811 (cited in note 9); *State v Allery*, 101 Wash 2d 591, 682 P2d 312 (1984); *Crigler*, 598 P2d 739 (cited in note 14); *Wanrow*, 559 P2d 548 (cited in note 14).

16. See *Leidholm*, 334 NW2d 811 (cited in note 9); *Wanrow*, 559 P2d 548 (cited in note 14); but see *Moran v Ohio*, 1983 WL 2712 (Ohio App) cert denied 469 US 948, 105 S Ct 350 (1984) (Justices Brennan and Marshall dissenting) (no published prior history).

17. See Sunny Graff, *Battered Women, Dead Husbands: A Comparative Study of Justification and Excuse in American and West German Law*, 10 Loyola LA Intl & Comp L J 1 (1988); Cathryn Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 Am U L Rev 11 (1986); Note, *Battered Woman Syndrome: The Killing of a Passive Victim—A Perfect Defense or a Perfect Crime? State v Norman*, 11 Camp L Rev 263 (1989) ("Note, *The Killing of a Passive Victim*"); Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 Stan L Rev 615 (1982); Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 Va L Rev 619 (1986) ("Note, *A Legal and Empirical Dissent*").

ableness standard. Part II also analyzes the reasonableness standard and offers possible solutions to the problems inherent to the self-defense justification, some of which come from solutions offered to similar problems within the German criminal legal system. Part III of this article examines necessity as a justification and as an excuse as these defenses have developed in German case law and theoretical literature. Additionally, Part III discusses some aspects of modern German theory regarding two different forms of justified necessity, namely aggressive and defensive necessity, and uses them to analyze cases also atypical for application of the self-defense justification. Part IV of this article suggests that defensive necessity lends itself particularly well conceptually as a justification for some of the battered woman cases. Part IV proposes model codifications for this defense and the complementary aggressive necessity justification. Since the legal concepts involved, however, are also inherent to the common law and available to U.S. courts independent of any legislative changes, perhaps they can offer a practical solution for courts as yet unwilling to justify the battered woman's response as an act in self-defense.

II. UNITED STATES LAW

A. Self-Defense as an Objective and Subjective Issue

United States courts that give consideration to a justification for the battered woman's spousal killing do so under the requirements of self-defense. The traditional, objective elements of self-defense are (1) an imminent attack, (2) a threat of death or serious bodily injury, (3) the impossibility of retreat and (4) a limitation to only that force necessary to ward off the attack.[18] Objectively, all four of these requirements are problems in the type of battered woman case under consideration. If the spouse is sleeping at the time of the defensive action, then the imminence of the attack requirement must include the threat of future harm. In battering cases that requirement may be appropriate. Evidence of the battering relationship usually gives ample reason to assume that the spouse's attack will continue after he awakens. In addition, the woman most often is physically inferior to her mate, so that waiting for the attack to resume will mean sacrificing the possibility of defending herself. The Model Penal Code definition of self-defense is in fact more favorable than traditional self-defense provisions with regard to the imminence requirement, since it provides that the force must be immediately necessary to protect

18. See Fletcher, *Rethinking Criminal Law* at 855-75 (cited in note 9); Wayne LaFave and Austin Scott, *Criminal Law* 391-97 (West, 1972); Paul Robinson, 2 *Criminal Law Defenses* § 131(b)-(d) at 73-88 (West, 1984).

oneself on the present occasion.[19] This formulation is broader than one requiring that the attack be imminent.

If the attack is not imminent, both the seriousness of the harm threatened and the necessity of the defense employed are objectively indeterminable. In cases in which the woman kills her sleeping spouse, it is impossible to know whether he would have posed a threat of death or great bodily harm upon awakening. Deadly force self-defense, however, presupposes an attack of this nature. Clearly, evidence of the victim's past violence and the type of injuries he had caused his spouse indicate the type of injuries he would most likely have inflicted had he awakened and resumed the battering. But even in cases in which the defendant had been disfigured in the past, courts have been reluctant to assume as an objective matter that her spouse threatened great bodily harm on the particular occasion.[20] Furthermore, since the confrontation never occurred, one also cannot determine whether killing the victim was the necessary defense. The amount of force necessary to repel an attack depends upon the situation and the means available to the defendant at the time. Objectively, this determination is difficult to make in the absence of any real attack. The woman's comparative physical weakness can be the basis of an argument asserting that no means short of actually killing the batterer would secure her physical integrity. But even if one were prepared to relax both of these requirements in favor of the battered woman, their relaxation within the confines of the self-defense justification would stretch the defense far beyond its traditional scope.[21]

The retreat rule would also not seem to be satisfied in cases in which the spouse was asleep at the time of the defensive action.[22] In a society in which divorce is an easily available alternative, the wife's presence seems to be purely voluntary. Often the wife has been abused over a period of

19. Model Penal Code § 3.04(1) ("MPC"); see also MPC § 3.04(1) (Comments Tent Draft 1958); Robinson, 2 *Criminal Law Defenses* § 131(c)(2) at 78-79 (cited in note 18).

20. *Norman* 378 SE2d at 15 (cited in note 2); see also text accompanying notes 27-34.

21. See *State v Mize*, 316 NC 48, 340 SE2d 439 (1986) (rejecting the defendant's argument that shooting was in self-defense eight hours after victim's threats to get revenge against defendant, and on a separate encounter in which defendant went to victim's dwelling and awoke victim). The *Mize* case involved an altercation between two men of comparable physical strength.

22. Generally, one need not retreat from one's own dwelling before exercising deadly force self-defense. Disagreement seems to exist, however, on whether one must retreat from one's own dwelling when the assailant resides there as well, see Robinson § 131(d)(3), 2 *Criminal Law Defenses* 86-87 (cited in note 18), text cited in notes 59-62. In the eighth tentative draft of the Model Penal Code the relevant provision was: "(1) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor [or is assailed by another person whose dwelling or place of work the actor knows it to be]. . . ." MPC § 3.04(2)(b)(iii)(1) (Comments Tent Draft 1958). The bracketed language was still in debate at the time the draft was published, see id. The proposed official draft requires retreat from a common workplace but not from a common dwelling, see MPC at § 3.04(2)(b)(ii)(1) (cited in note 19).

years, which is sometimes interpreted as indicating her consent to the battering relationship.[23] The retreat rule, although intended to avoid the unnecessary taking of human life, does not require that one do so unless possible with complete safety. Battered women often resort to the police or other institutional help to no avail.[24] Women who simply flee from battering relationships often meet with even more brutal treatment when they are found and forced to return to the batterer, and with threats of death if they ever try to escape again.[25] In some cases even efforts toward relocation[26] or divorce[27] have not prevented her continued harassment. In fact, most courts denying the right to exercise self-defense never reach the issue of retreat. Instead they generally rule out self-defense because no imminent attack occurred.[28]

Subjectively, the defendant must have believed that the objective circumstances required for exercising self-defense actually existed. In addition, her beliefs must have been reasonable.[29] In the United States, the defendant's beliefs, or his or her reasonable beliefs, are usually incorporated into the actual definition of self-defense. Thus, the Model Penal Code defines self-defense as justifiable "when the actor believes that such force is immediately necessary."[30] Other formulations require that the actor reasonably believe that the force was necessary.[31] If the defendant

23. See Marcus, 69 Cal L Rev at 1677-79 (cited in note 12), (consent, even if given, cannot free the attacker from prosecution for serious physical injury); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 Wash L Rev 267, 279-85 (1985).

24. See Marcus, 69 Cal L Rev at 1687-704 (cited in note 12); Waits, 60 Wash L Rev at 279-85 (cited in note 23); Note, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 Hastings L J 895, 895-917 (1981).

25. See *Hodges*, 716 P2d 563 (cited in note 15) (victim beat defendant until she was unconscious breaking her jaw, because she had left him and threatened to kill her if she ever left again); *Kelly*, 478 A2d 364 (cited in note 15) (victim beat defendant threatening to kill and dismember her if she ever left him); *Gallegos*, 719 P2d 1268 (cited in note 14) (victim held loaded gun to defendant's head and threatened to shoot defendant if she ever left him); *Norman*, 378 SE2d at 8 (victim found and beat defendant for leaving him) (cited in note 2); Dell Martin, *Battered Wives* at 76-79 (Glide, 1976); Waits, 60 Wash L Rev at 283 (cited in note 23).

26. See *Hundley*, 693 P2d 475 (cited in note 3).

27. See *Allery*, 682 P2d 312 (cited in note 15) (victim entered defendant's house in violation of divorce related restraining orders).

28. See *State v Stewart*, 763 Kan 639, 763 P2d 572 (1988) (no imminent attack from sleeping spouse); *Norman*, 378 SE2d at 8 (cited in note 2).

29. In *Norman*, the court defined self-defense in part as follows: "(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness ...." (citing *State v Gappins*, 320 NC 64, 357 SE2d 654, 659 (1987)). *Norman*, 366 SE2d at 590 (cited in note 6).

30. MPC § 3.04(1) (cited in note 19).

31. See Robinson, 2 *Criminal Law Defenses* § 184 at 395-420 (cited in note 18).

does not believe, or does not reasonably believe, that defensive force is necessary, then the defense fails entirely.[32] If the defendant reasonably believes that the force is necessary, then the action is justified even though the objective requirements for self-defense are not fulfilled.[33] It is on this basis that courts permit a self-defense claim on behalf of battered women who kill their sleeping husbands.[34] If, because of the battering relationship, the defendant perceived herself to be imminently[35] threatened with great bodily harm or death and saw no other means to avoid that threat, then she may be justified if the jury decides that her belief was reasonable. This standard, while obviating the need to fulfill the objective requirements of self-defense,[36] depends on the standard of

32. The Model Penal Code cites the inclusion of reasonableness in self-defense definitions as excluding the defense and making the mistaken actor liable for the intentionally consummated offense even though his mistake was negligent. To avoid that result, the Model Penal Code includes only the requirement that the actor believe that the defensive force was necessary, MPC § 3.04(1) (Comments Tent Draft 1958). If the actor is mistaken, then he may still be liable for the recklessly or negligently committed offense depending upon whether his mistake was reasonable, MPC at § 3.09(2) (cited in note 19). What the Model Penal Code overlooks is that the unknowingly justified actor should perhaps also not be held responsible for the fully consummated offense. If the actor's conduct is objectively correct, he does not in fact cause the harm that is sought to be prevented by the criminal norm in question. If the mistake relates to elements of the offense definition (the actor thinks he is shooting at a person but in fact he shoots a mannequin), then we hold him responsible for attempted and not consummated murder. The issue is whether the same evaluation should be made when the actor does not know that he is being attacked and kills the aggressor, thus saving his own life, see Paul Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L Rev 266 (1975); George Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L Rev 293 (1975); B. Sharon Byrd, *Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction*, 33 Wayne L Rev 1289, 1310-32 (1987).

33. If one adheres to the doctrine that justified action is legally proper behavior that can be assisted by third parties and that cannot be interfered with, then the objective requirements of the defense also must be fulfilled, see Fletcher, *Rethinking Criminal Law* at 762-69 (cited in note 9); Robinson, 1 *Criminal Law Defenses* § 27(e) at 114-15 (cited in note 9); Robinson, 2 *Criminal Law Defenses* § 121(c) at 7-9 (cited in note 18); id § 122(c) at 18-19.

34. See *Gallegos*, 719 P2d at 1271 (cited in note 14), citing *State v Roybal*, 33 NM 187, 262 P 929 (1927): "The defendant must show that she was in fear of an apparent or immediate danger. The defendant, however, need not prove that she was in actual danger."

35. "Imminently" must include the threat of future harm. This interpretation seems justified in cases in which waiting would mean sacrificing the possibility to defend altogether. If the battered woman cannot defend herself after the spouse has awakened, she should be able to react before that point in time. Since the point in time at which one awakens is indeterminable, the attack would be imminent under this broader interpretation at any time while the spouse was still asleep.

36. The standard itself is problematic. If one accepts the "incompatibility thesis": "(I)n any situation of physical conflict, where only one party can prevail, logic prohibits us from recognizing that more than one of the parties could be justified in using force," and the party acting in putative self-defense is justified, then the putative attacker would have no right to defend even though he was not the initiator of the original attack. George Fletcher, *The Right and the Reasonable*, 98 Harv L Rev 949, 975 (1985). For arguments questioning the appropriateness of the incompatibility thesis, see Kent Greenawalt, 84 Colum L Rev at 1922-25 (cited in note 9); Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 UCLA L Rev 61, 86-88 (1984).

reasonableness adopted by the courts. Indeed, the reasonableness standard seems responsible for the wide latitude in treatment of battered women.

B. The Standard of Reasonableness

The problem posed by the reasonableness requirement is whether an objective or subjective standard of reasonableness applies[37] when judging the actor's behavior. The objectivity or subjectivity of the reasonableness standard, however, should not be seen as merely a two-pronged issue but rather as a question of degrees of objectivity or subjectivity. How objective or subjective the standard should be depends upon what one is attempting to decide. A completely objective standard is appropriate only for defining norms of conduct and making factual determinations but never is appropriate for judging the actor's responsibility for objectively determined wrongs.[38] A completely objective standard, therefore, may be relevant in deciding whether the battered woman's conduct was wrongful in some abstract sense, but not in deciding whether that wrongful conduct can be attributed to her as her responsibility. For this reason, evidence of the battering relationship and its effect on the defendant is always relevant to some issue of responsibility, and its exclusion or the failure to instruct the jury on its relevance should constitute reversible error.

In Section 1, different types of judgments inherent to the criminal law provide a background for an analysis of the reasonableness standard. Section 2 proposes a four-level approach to reasonableness, differentiated according to degrees of objectivity and subjectivity, each level relating to a particular type of determination relevant to the criminal law. The simple objective approach is insufficient for judging individual responsibility; Section 3 illustrates how courts have erred. One such error lies in discontinuing the inquiry entirely after the objective standard has been applied in a self-defense case. Section 4 offers a German solution to this type of restrictive analysis of self-defense. Section 5 reviews another error of slipping from an "objective" standard that is relevant for some issues of individual responsibility to one that is so abstract it distorts the responsibility issue all together. In contrast, courts that apply the so-called "subjective"

37. Some authors refer to the actor's actual belief as the "subjective standard," and to the subjective standard of the reasonableness of the actor's actual beliefs as the "subjective standard," see Note, *The Killing of a Passive Victim*, 11 Camp L Rev at 272-73 (cited in note 17). Here, "subjective standard" refers only to the subjective standard of the reasonableness of the actor's actual beliefs. The requirement that the actor actually believe in circumstances that must exist for self-defense to be an issue is here the "belief requirement."

38. See Byrd, 33 Wayne L Rev at 1301-32 (cited in note 32); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv L Rev 625 (1984).

standard allow for a more differentiated approach to the mistaken actor in self-defense cases. Section 6 discusses the advantages of this mixed approach. Section 7 seeks to justify the battered woman's defensive action under the common law of self-defense.

1. *General Structure of Criminal Law Judgments.* There are four different types of determinations that are actually included in a final judgment to punish a criminal wrongdoer. Two of them are objective: one abstract, and one concrete. The other two relate to attribution, one of the act to the actor and the other of blame to the actor for that act, and depend upon the actor's subjective state.

Under the principle *nulla poena sine lege*, one may not punish someone for conduct that has not been expressly designated as criminally wrongful. Since criminal norms must guide conduct, a potential actor must have fair warning that certain conduct is impermissible so that he has an opportunity to act accordingly. The first necessary component of a punishment judgment, therefore, is the definition of the criminal offense. Very similar to this determination is one that defines certain exceptions to the criminal norm, or justifications for otherwise prohibited conduct. Killing another human being is prohibited, but it may be the correct response to an attack on the life of the actor. Taking someone else's car may be criminally prohibited behavior, but doing so with the owner's consent or, even without the owner's consent, to rush a dying patient to the hospital may be completely appropriate behavior. Determinations of offense definitions and their exceptions are nomothetic. They do not depend on the actual occurrence of specific events and do not relate to a particular actor. Instead they are abstract hypothetical descriptions addressed to society generally or to each individual as a potential actor.

The first concrete decision in a criminal case concerns objective reality. It too is independent of a particular actor. Whether the victim was killed or died of natural causes determines whether the criminal justice system is an appropriate forum for proceeding with what society considers to be an undesirable result, namely the death of a human being. Still objective and concrete is the determination that a certain actor caused the victim's death and similarly that the victim was attacking the actor with deadly force at the time of the killing. A causal evaluation does not include considerations of individual responsibility, since it says nothing more than that certain physical occurrences are related to each other in a specific way. Thus a person may cause the death of another by accidentally falling out of a window onto the victim below without being any more responsible for the victim's death than a falling rock.

The first consideration of individual responsibility regards the attribution of an act to an actor.[39] Whether the actor actively killed the victim depends upon whether the actor was in control of his bodily movements and knew of all the facts connecting him to the victim's death. If the actor served tea to a guest without knowing that it was laced with poison, then he may have objectively caused the victim's death, but he did not "kill" the victim in any meaningful sense.[40] The actor's subjective beliefs, therefore, are central to associating him with certain harms that objectively occurred.

A second issue of individual responsibility concerns the attribution of blame to an actor for his wrongful conduct.[41] Responsibility presumes an objective determination of wrongdoing attributed to a certain person as his act. Even though an actor may be responsible for wrongdoing, he or she still may not be blameworthy. Not blaming an actor for wrongful conduct is usually a recognition of the fact that he or she was in some way unable to conform his or her conduct to the criminal law norm, either because of the particular situation or because of a temporary or permanent inability to appreciate the wrongful nature of that conduct. The wrongdoing, therefore, does not reflect disrespect for the criminal law nor provide any indication of how he or she would act if not in the debilitating situation or state. Blaming someone for conduct in situations in which the average person could not do better would be contrary to the notion of condign punishment in a criminal justice system.

In a possible self-defense case, the actor's subjective state of mind becomes relevant after two objective determinations have been made. First of all, the actor's behavior must be criminally prohibited and self-defense must be a recognized exception to that prohibition. Second, there must be a causal relationship between the actor and the prohibited harm, and there must be objective proof of the occurrence of the prerequisites of self-defense. After making these objective determinations, one must examine the actor's subjective beliefs to determine whether one may attribute the prohibited but justified harm to him as his actions.[42] It is at this point that the reasonableness standard commonly comes into play. Assuming, as in the battered woman case under consideration, that the defendant knew she was killing her husband, the issue is whether one can attribute a killing in self-defense to her.[43] This question depends upon

39. See Joachim Hruschka, *Imputation*, 1986 BYU L Rev 669, 682-84 (1986).

40. Whether the actor perhaps was reckless or negligent with respect to the contents of his tea raises the relevant question for the purposes of this article. See notes 79-83 and accompanying text.

41. See Hruschka, 1986 BYU L Rev at 676-80 (cited in note 39).

42. See note 40 and accompanying text.

43. If she was mistaken, the objective determination for self-defense has not been made. Still, what she thought she was doing is relevant to what may be attributed to her, just as what the actor

her beliefs with respect to the necessity of the defensive action. If she was mistaken, then it becomes important whether her beliefs were "reasonable."

2. *Subjectivity and Objectivity in the Reasonableness Standard.* In addition to what actions the defendant in any possible self-defense case actually believed was necessary defense,[44] one can consider: (1) the defendant's psychological condition, and decide what would have been reasonable for that particular defendant, with all of his or her individual psychological quirks, to have believed. In a battering case, if the battered spouse has become psychologically debilitated through the relationship, one must decide what would be reasonable for someone with that debilitation to believe; (2) the defendant's personal condition and decide what would have been reasonably believed by anyone who had actually experienced what the defendant experienced. In a battering case, if the defendant has been beaten often in the past and has developed excessive fear of any type of threat, one must determine what would be reasonable for someone with that fear to believe; (3) the defendant's knowledge broadly conceived and question what would have been reasonably believed by anyone who knew, but had not experienced, all of the facts that were available to the defendant, both prior to and at the time of the act. In a battering case, if the defendant has been subjected to severe mistreatment over a period of years, has recognized that her spouse tends to go through phases during which he is more likely to react with violence, knows that one of these phases is in progress, knows that he has threatened to beat and kill her, knows that he tends to be violent after awakening from an afternoon nap, and knows that he is now sleeping, one must determine what would be reasonable for someone with that knowledge to believe; (4) the defendant's knowledge narrowly conceived and ask what would have been reasonably believed by anyone who knew only the facts available to the defendant at the time he acted, but none of the surrounding facts. In a battering case, if the defendant knows only that the victim is asleep, one must determine what would be reasonable for someone with that knowledge to believe.

---

serving tea with poison thought he was doing is relevant to what act may be attributed to him. One, however, would refer to the mistaken self-defender as acting in putative self-defense.

44. The defendant's actual belief fulfills the belief requirement, see note 37, but the reasonableness standard conceivably could be totally subjective and therefore satisfied by actual belief. The problem with equating actual belief with reasonable belief is that one no longer has a "standard" for judging behavior, see Fletcher, *Bernhard Goetz and the Law on Trial* at 41-62 (cited in note 4). Fletcher seems to favor an "objective" standard of reasonableness, which is not a necessary conclusion from the need to have a standard for judging behavior.

Each of these levels represents a different degree of subjectivity-objectivity and each is relevant to some form of decision within the criminal justice system.

The first two levels are pertinent to the attribution of blame to an actor. The first level, concerning the defendant's psychological condition, represents what is relevant in excusing a defendant. It focuses on the defendant's individual quirks and recognizes that although the particular response was not reasonable for the average person, it was reasonable or understandable for someone suffering from the defendant's debility. Excuses corresponding to this level of subjectivity are insanity, infancy and intoxication.[45] The second level, concerning the defendant's personal condition, also relates to excusing a defendant. It requires recognition that although the defendant is not handicapped in his general ability to conform his actions to the law, in the particular situation he was pressured beyond what any reasonable person probably could have withstood.[46] Excuses corresponding to this level of subjectivity are duress and necessity,[47] and the German excuse for certain actions exceeding the limits of self-defense.[48] Determinations on both levels one and two recognize

45. Although most United States courts do not recognize intoxication, or at least voluntary intoxication, as an excuse, such an excuse is recognized in Germany. If the intoxication was voluntary, but to such a degree as to negate the intent necessary to commit the crime or negate the defendant's ability to appreciate the wrongfulness of his actions, he would be acquitted of the crime he committed but possibly would be convicted of the separate crime of "total intoxication." A condition precedent for conviction of this offense is that the defendant, while in the intoxicated state, committed a crime for which he cannot be convicted because of the effects of the intoxication. See Strafgesetzbuch § 323a ("StGB"). According to MPC § 2.08 (cited in note 19), intoxication is a defense if it negates an "element of the offense." An "element of the offense" includes the culpability requirements of purpose and knowledge for purposes of the intoxication defense. Id §§ 2.08(2) and 2.02(2).

46. Kant, in discussing necessity and the case in which a drowning man pushes another off a life-supporting plank, arguably recognizes excuses as those cases in which the law cannot have the required deterrent effect since "the punishment threatened by the law cannot be greater than the loss of life threatened. Such a criminal law can never have the intended effect since the threat with an evil that is uncertain (death penalty through court judgment) cannot outweigh the fear of an evil that is certain (namely drowning)." Immanuel Kant, *Die Metaphysik der Sitten*, reprinted in Königlich Preuische Akademie der Wissenschaften, ed, 6 *Kant's gesammelte Schriften* 203, 235 (de Gruyter, 2d 1922); see B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 L & Phil 151, 189 (1989). In those cases in which the criminal law cannot deter, one cannot execute the threatened punishment, id at 190-91. In Judy Norman's case the facts seem to correspond to the type of situation Kant was describing. At trial, in answer to the question of why she killed her husband, she testified, "Because I was scared of him and I knowed when he woke up, it was going to be the same thing. . . . I just couldn't take it no more. There ain't no way, even if it means going to prison. It's better than living in that. That's worse hell than anything." *Norman*, 378 SE2d at 11 (cited in note 2).

47. Necessity here is meant as an excuse, namely when the actor out of fear violates the criminal law but does not save an interest of higher value than the interest he damages (as in the plank example cited in note 46).

48. StGB § 33 (cited in note 45); see notes 58-63 and accompanying text.

that the defendant's conduct was wrongful, thereby presupposing the attribution of a wrongful act to the defendant. Nonetheless, they exclude the possibility of treating him in the same way that one would treat another person who was not suffering from the debility or unusual pressure that confronted the particular defendant.

The third level, the defendant's knowledge broadly conceived, excludes consideration of the personal agony the defendant experienced, but includes knowledge of all of the facts preceding the prohibited conduct. It is relevant to attributing both a proscribed harm and a possible justification for this harm to a defendant. In a self-defense case it concerns the defendant's correct interpretation of available data and the "objectively" reasonable response to the particular situation. Finally, the fourth level, the defendant's knowledge narrowly conceived, represents complete objectivity because of its total abstraction from the individual situation. It is relevant, not to judging an individual for his conduct, but rather to defining what type of conduct reasonably can and should be prohibited or justified.

If one superimposes these four levels of subjectivity-objectivity in the reasonableness standard on those battered woman cases in which the jury could decide that the defendant actually believed[49] that the defensive response was necessary, the first three levels relate to her responsibility for killing her spouse. A battering relationship could be so serious that it affects the psychological balance of the defendant to the extent that it distorts either her ability to perceive what she is doing or to appreciate the wrongfulness of her conduct.[50] If so, evidence of the relationship and its psychologically debilitating effects would be relevant, on the first level of subjectivity, to determining the validity of an insanity or diminished capacity defense. In other battering relationships, the woman's psychological balance may not be disturbed to the extent that an insanity or diminished capacity defense would be appropriate. Self-defense may also be inappropriate because an action short of actually killing the spouse may have provided sufficient protection. The defendant, however, may have overreacted out of extreme fear and pressure brought on by the situation. In such cases, one must determine whether a person of reasonable firmness could have lived with the relationship as the defendant experienced it, or whether he too could have exceeded the limits of the defense

49. Actual belief is equal to satisfying the belief requirement, see note 37.

50. Apparently that was not true in the Norman case although the psychiatric expert testified that the treatment Judy Norman received from her spouse was similar to the "brainwashing techniques of the Korean War," see *Norman*, 378 SE2d at 17 (Martin dissenting) (cited in note 2); but see *Leidholm* 334 NW2d at 822-23 (cited in note 9) in which the issue had been raised at trial but according to the Supreme Court insufficiently to support the defendant's motion for acquittal.

necessary for his own protection because of momentary fear.[51] Reasonableness on the second level of subjectivity would be appropriate in these cases. The third level, knowledge broadly conceived, is relevant for the judge or jury in deciding what can be attributed to the defendant as her actions. This determination depends on what the defendant actually believed and on what the objectively reasonable person, embodied in the judge or jury, would have believed. In a case in which the defendant believes she is being attacked, the issue under level three reasonableness is whether the average person knowing everything the defendant knew also would have concluded that she was being attacked. If so, and if an attack was in fact in progress at the time of the defensive action, one can say that the defendant was subjectively and objectively justified. If an attack was not in progress but the average person would have assumed that it were, then one could conclude that the mistake was not negligent in an objectively reasonable sense. The fourth level, knowledge narrowly conceived, relates to the individual case only in that it provides the norms for subsumption of the objectively determined facts and a means of determining these facts.

3. *Objective Standard and Premature Discontinuation of the Inquiry.* One problem that arises in jurisdictions which adopt the so-called "objective" standard is that the courts prematurely interrupt their analysis of individual responsibility. Section 4 will consider a German solution to this problem.

In cases applying level three reasonableness, when the defendant's beliefs do not meet this criterion, the correct conclusion should be that the defendant made an objectively unreasonable mistake. The question then should be whether she is to blame for that mistake. Applying both level one and level two reasonableness will determine her culpability. Many courts simply conclude that the level three standard of reasonableness in exercising self-defense is not fulfilled, ignore other possible total mitigation based on an excuse[52] and affirm the conviction. This problem can be illustrated quite well in the case of Judy Norman. The North Carolina Supreme Court in that case apparently decided that the defendant had been mistaken in her evaluation of the need to exercise deadly force

51. It is here that expert testimony of the type offered by Walker on the "learned helplessness" acquired by women who are battered may be appropriate. Walker, *The Battered Woman Syndrome* (cited in note 11); but see Note, *A Legal and Empirical Dissent* at 630-43 (cited in note 17), for a critical examination of the validity of this type of evidence.

52. Total mitigation means acquitting the defendant entirely, for example, excusing the mistake; partial mitigation means reducing the gravity of the offense charged, for example, from murder to manslaughter.

self-defense and insisted that the third level of reasonableness was appropriate for perfect[53] self-defense in North Carolina:

> It is far from clear in the defendant's poignant evidence that any abuse by the decedent had ever involved the degree of physical threat required to justify the defendant in using deadly force, even when those threats were imminent. The use of deadly force in self-defense to prevent harm other than death or great bodily harm is excessive as a matter of law.[54]

Accordingly, even assuming that Judy Norman's husband had been awake and in the process of battering her rather than sleeping at the time she killed him, the court clearly ruled out self-defense as a justified response. Similarly, in *Regina v. Dudley and Stephens*,[55] in which the defendants were lost at sea for twenty-one days with almost no food and drink and killed a young boy to sustain themselves, the Queen's Bench ruled out necessity as a justified response to the situation facing the two defendants. Still the issue of excuse clearly remained open. Indeed, the Queen pardoned them six months later.[56] An excuse based on necessity recognizes that although the defendant's reaction to the extraordinary situation was not reasonable in the sense of level three objectivity it was an understandable response, which any person of reasonable firmness in the defendant's shoes might have made. In battering cases in which a court might decide that the self-defense justification is inapplicable as a matter of law, evidence of the battering relationship, like evidence of the necessity facing Dudley and Stephens, could certainly be relevant to an excuse for the defendant's conduct.[57]

---

53. In North Carolina "perfect" self-defense is justified and depends on the "objectively" reasonable belief in the necessity of the defensive action to save oneself from imminent death or great bodily harm in situations in which the defendant was not the original aggressor and the harm inflicted was not excessive. "Imperfect" self-defense is not justified but operates to mitigate the offense, that is, from murder to voluntary manslaughter. It comes into play when the defendant, without murderous intent, used excessive force in defending against the attack or was the original aggressor, see *Norman*, 366 SE2d at 590 (cited in note 6).

54. *Norman*, 378 SE2d at 15 (citing *State v Hunter*, 315 NC 371, 338 SE2d 99 (1986)) (cited in note 2).

55. *Regina v Dudley and Stephens*, [1884] 14 QBD 273.

56. This case is cited among scholars of criminal law as indicating the need to distinguish justifications from excuses. See Fletcher, *Rethinking Criminal Law* at 823-27 (cited in note 9); Hans-Heinrich Jescheck, *Lehrbuch des Strafrechts, Allgemeiner Teil* 175 (Duncker & Humblot, 4th ed 1988). Since the distinction had been lost in the common law at the time *Dudley and Stephens* was decided, the English court could not both decide that the killing was wrongful (not justified) and not punishable (excused). The same result is reached, of course, but with less theoretical consistency, by convicting the defendants and pardoning them shortly thereafter.

57. See Graff, 10 Loyola LA Intl & Comp L J 1 (cited in note 17), who argues for necessity as an excuse in battered woman cases. Graff bases her arguments on her interpretation of German law, but see text cited in notes 90-144 for an argument for necessity as a justification, based on the author's interpretation of German law.

4. *German Approach to Self-Defense and Excessive Self-Defense.* In Germany, section 32 of the Strafgesetzbuch provides a justification for self-defense.[58] For the provision to apply, the defendant's response must in fact have been necessary to ward off the attack, and a false belief will not support a self-defense justification. German law also mitigates punishment when the defendant kills in the heat of passion.[59]

What German law includes that U.S. law does not is an excuse for using what might be called "excessive self-defense." Section 33 of the Strafgesetzbuch provides: "If the actor exceeds the limits of self-defense because of confusion, fear, or fright he is not to be punished." The section is interpreted to require that the defendant found herself in a situation that would justify a self-defensive response[60] but that the amount of force exercised was excessive. Section 33 provides for acquittal rather than mitigation of punishment[61] as in cases of heat-of-passion manslaughter. Furthermore, it offers an excuse rather than the justification afforded for "perfect" self-defense. In addition to convicting a defendant for consummated murder or manslaughter,[62] German courts thus can react to three different types of battered-woman cases.[63] If they find that the de-

58. "Self-defense. (1) One who commits an act that is required by self-defense does not act wrongfully. (2) Self-defense is the defense required to ward off a present, wrongful attack from oneself or another." StGB § 32 (cited in note 45). A closer translation of the German term "Notwehr" is "necessary defense" rather than "self-defense" since StGB § 32 applies both to the defense of self and defense of others.

59. StGB § 213 provides: "If, through no fault of his own, the manslaughterer was enraged through the victim's mistreatment or serious defamation of the defendant himself or of a relative and thereby immediately aggravated to act . . . punishment of between six months and five years shall be imposed." Id (cited in note 45) (instead of the minimum of five years for voluntary manslaughter, StGB § 212).

60. Section 33 does not apply if the defendant was mistaken as to whether he was being attacked. There are several theories in Germany on the effect of this type of mistake. Some scholars argue that putative self-defense is an excuse. Others treat the false assumption of circumstances that would justify the defendant's action if they in fact existed as negating the intent required for the offense. The question then is whether the defendant was negligent in making the mistake. Under the former theory, the defendant will be punished only if he could have avoided the mistake. Under the latter, he will punished only if the negligent commission of the offense is punishable. See StGB §§ 16 and 17 (cited in note 45).

61. Since StGB § 33 provides for acquittal it is not to be equated with imperfect self-defense which only reduces the level of the offense from murder to manslaughter. Id (cited in note 45); see also *Norman*, 378 SE2d at 12-13 (cited in note 2).

62. StGB § 212 provides: "Manslaughter. (1) One who kills a human being but is not a murderer shall be punished as a manslaughterer with imprisonment for a term not less than five years. (2) Life imprisonment shall be imposed in particularly serious cases." Murder is distinguished from manslaughter through accompanying aggravating circumstances such as "greed" or "in order to conceal another crime" and is punished with life-imprisonment, see StGB § 211 (cited in note 45).

63. All of the responses are independent from the possible reactions a court may have in cases in which the defendant was mistaken as to some fact relevant to the offense definition, the justification or the excuse. If the mistake cases are added, the range of possible reactions to the defendant's action are increased considerably.

fendant was in imminent danger of a wrongful attack and that the force she used to ward off the attack was necessary they can justify her action and acquit her. If they find that she was in imminent danger of a wrongful attack but that the force she used was excessive, they can excuse her action and still acquit her. If they find that she was not in imminent danger of a wrongful attack, but rather reacted out of rage at the victim's provocation, they can mitigate the punishment to that appropriate for voluntary manslaughter. The message the courts give to the public in each of these cases is significantly different. In the first case, the courts indicate that individuals in the defendant's situation may rightfully kill an aggressor. In the second case, the courts suggest that it was wrong to kill the aggressor in a situation similar to that of the defendant's. Still they may recognize that the defendant is not blameworthy. The defendant's fearful response, "reasonable" in the sense of level one or two in the above analysis, in situations in which her assailant is physically superior to herself can be a reason to have compassion for her because of her individual situation. Finally, the courts can hold that it was wrong to kill the aggressor and that the defendant is blameworthy for her action, but that the killing probably would not have occurred had the victim not provoked the defendant. Punishment can be reduced because the danger the defendant presents generally is minimal or even non-existent and she seems less worthy of punishment than one who kills when not aggravated.

The excuse of excessive self-defense would seem to be a positive addition to the common law defenses in more than just battered wife cases. In the *Goetz* case,[64] Bernhard Goetz was charged with the attempted murder of four subway assailants, who Goetz claimed attempted to rob him. Goetz pleaded self-defense, and under New York law deadly force is a permissible response to a robbery. Goetz was acquitted of all charges except illegal possession of a weapon. The case was highly debated across the country, most significantly because Goetz was acquitted even though he fired a final shot at one of the assailants after he had been hit once and had fallen to the floor. Self-defense as a justification cannot apply to that final shot, since the aggressor was already incapacitated. If one applied a reasonableness standard with level two subjectivity to self-defense, namely what was reasonable for someone with the defendant's experiences, however, one could arrive at the conclusion that Goetz acted in self-defense. The level of subjectivity appropriate for the reasonableness standard under the New York law of self-defense was at issue during the indictment proceedings before the Grand Jury and during trial. The experiences pos-

64. *People v Goetz*, 131 Misc 2d 1, 502 NYS2d 577 (1986); *People v Goetz*, 68 NY2d 96, 497 NE2d 41 (1986); *People v Goetz*, 116 AD2d 316, 501 NYS2d 326 (1986); Fletcher, *Bernhard Goetz and the Law on Trial* at 39-62 (cited in note 4).

sibly relevant to level two subjectivity in the Goetz case were those that Goetz had acquired as a victim of two other robberies, one of which occurred in a subway station. The fearful response, which perhaps was excessive for a person who had never been robbed, could have been seen by the jury as reasonable for someone with Goetz's past. If level two subjectivity were appropriate to judge the reasonableness of the defendant's response for the self-defense justification, then Goetz would have been justified. However, if justification means that the defendant's conduct was an appropriate response, then it seems strange that shooting a wounded and fallen assailant should be justified. The last shot seems significantly different from the first four. Applying the German excuse of "excessive self-defense" to the case would permit a differentiation between the first four shots and the final one, the first four being justified as the reasonable response on the third level of subjectivity and the final shot excused as the reasonable response on the second level of subjectivity. Acquittal is also possible in a legal system without this excuse, but at the cost of lowering the standard of reasonableness to the level of subjectivity appropriate for an excuse. The message to the public as it is transferred through the judgment, however, cannot be as lucid as it could be if both self-defense as a justification and "excessive self-defense" as an excuse were available. One other way the differentiation would be available under the common law would be necessity as an excuse with respect to the last shot, a solution that is certainly similar to the German solution.

In Judy Norman's case, the jury, which did not have the benefit of considering self-defense, convicted her of voluntary manslaughter. Since she was charged with first degree murder, the verdict indicates the jury's willingness to mitigate punishment because of the battering relationship. They were not instructed, however, on either perfect or imperfect[65] self-defense or on any excuse that would have freed the defendant from punishment entirely. If individuals are to be punished according to their level of responsibility for causing criminally prohibited harms, the jury should be instructed on the difference between voluntary manslaughter, often committed in the heat of rage,[66] and excused homicide, committed in a state of complete anxiety and hopelessness, a situation in which "the law can never have the intended effect."[67]

65. In North Carolina, the availability of imperfect self-defense also would only have reduced the conviction from murder to voluntary manslaughter. The failure to instruct on this defense, therefore, did not have any affect on the result in this case, as the North Carolina Supreme Court pointed out, *Norman* 378 SE2d 8 at 12-13 (cited in note 2).

66. See Comment, 33 UCLA L Rev 1679 (cited in note 12).

67. See note 46 and accompanying text.

5. *Excessive Objectivity in Judging Individual Responsibility.* Another problem that arises in jurisdictions employing the objective standard of reasonableness is that they apply level four reasonableness, which is too abstract for judging individual responsibility. They employ the argument that if the defendant were acquitted entirely, then all defendants similarly situated would have a license to kill their spouses. Again, this problem can be illustrated by the *Norman* case.

The dissenting opinion in *Norman* provides a fair statement of an "objective" standard of reasonableness in the sense of level three, stressing that the defendant's beliefs and not only objective occurrences are relevant:

> Properly stated, the second prong of the question (whether the circumstances as the defendant saw them were sufficient to create such a belief in the mind of a person of ordinary firmness) is not whether the threat was *in fact* imminent, but whether the defendant's belief in the impending nature of the threat, given the circumstances as she saw them, was reasonable in the mind of a person of ordinary firmness.[68]

The third level of objectivity, knowledge broadly conceived, emphasizes that the "objective" test of reasonableness must include all of the knowledge acquired by the defendant both before and at the time of the killing, and not merely the information available at the moment she acted, the latter being relevant to the abstract level four standard, knowledge narrowly conceived. As a practical matter, the difference between level three and level four is the difference between knowledge of the battering relationship and knowledge only of the fact that the batterer is asleep at the moment. With level four reasonableness, the question becomes: "Is it reasonable to assume that someone who is sleeping presents an imminent threat of death or grievous bodily harm?" With level three reasonableness the question instead in the *Norman* case would be: "Is it reasonable to assume that someone who has battered the defendant over a course of years, has thereby inflicted grievous bodily harm upon her, has been in the process of battering her for the past thirty-six hours, has threatened to kill her, has the propensity to resume battering after sleeping off an excessive amount of alcohol and is currently sleeping after having consumed an excessive amount of alcohol, presents a threat of serious bodily harm or death if he awakens?" Level three is objective because it does not consider the emotional effects of the battering relationship on the defendant, as does level two, the defendant's personal condition. It, however, is not totally abstracted from the actual situation in which the defendant finds herself, as is level four reasonableness. The dissent here

68. *Norman*, 378 SE2d at 19 (Judge Martin dissenting) (cited in note 2) (parenthetical information added but quoted from the dissent, id at 17).

criticizes the majority for applying this latter standard. In discussing the "imminence" requirement the majority states:

> Such reasoning proposes justifying the taking of human life not upon the reasonable belief it is necessary to prevent death or great bodily harm—which the imminence requirement ensures—but upon purely subjective speculation that the decedent probably would present a threat to life at a future time and that the defendant would not be able to avoid the predicted threat. . . . Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution to this problem.[69]

Leaving aside the dubious conclusion of the majority that the inflicting of bodily harm in the form of crushing glass in the defendant's face and leaving permanent scars is not "great bodily harm," there are two serious problems with the majority's reasoning. A belief is always based upon speculation since it is formed in the absence of actual knowledge of that which is believed. Regardless of what standard of objectivity one adopts for reasonable belief, that belief is *per se* speculative. It is for the jury to decide whether such speculation is reasonable, as the dissent in the *Norman* case points out.[70] In addition, the majority rejects evidence of the battering relationship as a possible basis for reasonable belief in the necessity of using deadly force. Accordingly, it raises the objectivity level of reasonable belief to that of level four, one completely inappropriate for judging responsibility.[71] In the absence of knowledge of the battering relationship in the Norman case, the question posed would be whether killing someone who is sleeping is justifiable homicide. That question is like the abstract question of whether killing someone should be criminally prohibited. For the purpose of formulating general norms of conduct, this level of objectivity is appropriate, but for the purpose of determining whether a particular case can be subsumed under one of these general norms, one must know more. That the majority is operating on this level of objectivity is even more apparent from the following:

> The relaxed requirements for perfect self-defense proposed by our Court of Appeals *would tend to categorically legalize the opportune killing of*

69. *Norman*, 378 SE2d at 15 (emphasis added) (cited in note 2). One might add that if the state continues to be unwilling to interfere in family disputes, thereby offering no protection to the battered spouse, homicidal self-help may not only be the easiest and most effective but also the only available solution to the problem. See Marcus, 69 Cal L Rev at 1668-75, 1687-92 (cited in note 12), for an extensive report on police inactivity in battering cases.

70. *Norman*, 378 SE2d at 16-17 (Martin dissenting) (cited in note 2).

71. See *Wanrow*, 559 P2d at 555-56 (cited in note 14) (rejecting the trial court's instruction to the jury that it should "consider only those acts and circumstances occurring at or immediately before the killing. . . ." Id at 555). The court emphasized that all of the circumstances surrounding the defendant's action should be considered, including those that might have predated "the killing by weeks and months. . . ." Id at 556 (citing *State v Ellis*, 30 Wash 369, 70 P 963 (1902)) or those that existed "long before the killing." Id (citing *State v Tribett*, 74 Wash 125, 132 P 875 (1913)).

> *abusive husbands by their wives* solely on the basis of the wives' testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands.[72]

Justifying Judy Norman's killing of her sleeping spouse is not categorically legalizing killing in battering cases any more than justifying Goetz's first four shots is categorically legalizing subway shootings. Submitting the issue to the jury means no more than permitting them to decide whether Judy Norman's belief that she was in danger of serious bodily harm or even death was warranted based on the evidence available to her at the time she shot her husband. If the jury finds that the evidence warranted her beliefs, it means (1) if one is in imminent danger of serious bodily harm or death through an aggressor, one may kill the aggressor, and (2) Judy Norman was in that situation. The first statement is the law of self-defense, the second the application of that law to Judy Norman's individual case. Any categorical legalization involved here is merely the statement of the already existing norm on self-defense as a justification.

The battering relationship,[73] therefore, is always relevant to the issue of responsibility. Depending upon what relevance it has, namely what level of subjectivity in the reasonableness standard is required to evaluate its effects, the battering relationship may indicate that the defendant should be excused on the basis of insanity and perhaps confined for treatment, excused on the basis of necessity, or the German type of "excessive self-defense" excuse, or justified on the basis of self-defense.[74] Even in jurisdictions which require a reasonable belief for the application of self-defense and which apply an objective level three standard of reasonableness to that defense, the implications of the battering relationship regarding level one and level two subjectivity could support an excuse and not merely a reduction of the offense from murder to voluntary manslaughter.[75] Courts that slip into an excessively objective approach (level four) abrogate their duty to judge individual responsibility. Cases in which the court claims to be applying a subjective standard, but in reality applies a mixed standard illustrate the advantages of considering the entire spectrum of reasonableness. It is to such a decision that I will now turn.

---

72. *Norman*, 378 SE2d at 15 (emphasis added) (cited in note 2).

73. An actual battering relationship is meant here. If the victim hit the defendant once in twenty-five years of marriage, ten years before the killing, then evidence of the "battering relationship" is not relevant because there was no "battering relationship." Still the issue is one of fact and should be decided by the jury.

74. Or justified on the basis of "defensive necessity," see notes 90-144 and accompanying text.

75. The court in *Norman*, 378 SE2d at 12-13, considered only perfect and imperfect self-defense (cited in note 2). Perfect self-defense justifies the defendant and results in acquittal. Imperfect self-defense reduces the gravity of the offense from murder to voluntary manslaughter.

6. *Advantages of a "Mixed" Approach.* Justice Vande Walle provides an interesting twist to the treatment of mistaken actors, and one that is more in accord with German law, in his lucid decision in *State v. Leidholm*.[76] Janice Leidholm, a battered spouse, appealed from a verdict of murder for killing her sleeping husband. The trial court's instruction to the jury expressly excluded gender in determining what the reasonably prudent person would believe. The Supreme Court, in reversing and remanding, adopted a completely subjective standard (level one) for reasonableness:

> Hence, a correct statement of the law of self-defense is one in which the court directs the jury to assume the physical and psychological properties peculiar to the accused, namely, to place itself as best it can in the shoes of the accused, and then decide whether or not the particular circumstances surrounding the accused at the time he used force were sufficient to create in his mind a sincere and reasonable belief that the use of force was necessary to protect himself from imminent and unlawful harm.[77]

The court also noted that a justification for an actor's conduct is based upon objective facts and that an excuse relates to the actor's particular perceptions:

> A defense of justification is the product of society's determination that the *actual existence* of certain circumstances will operate to make proper and legal what otherwise would be criminal conduct. A defense of excuse, contrarily, does not make legal and proper conduct which ordinarily would result in criminal liability; instead, it openly recognizes the criminality of the conduct but excuses it because the actor believed that circumstances actually existed which would justify his conduct when in fact they did not. . . . In the context of self-defense, this means that a person who believes that the force he uses is necessary to prevent imminent unlawful harm is *justified* in using such force if his belief is a *correct* belief; that is to say, if his belief corresponds with what actually is the case. If, on the other hand, a person *reasonably* but incorrectly believes that the force he uses is necessary to protect himself against imminent harm, his use of force is *excused*.[78]

The court accepted the full implications of the justification-excuse distinction, namely that justified conduct is objectively proper conduct, whereas excused conduct is of its nature wrongful conduct for which we do not attribute blame to the actor. In addition the court recognized, in contrast to the Model Penal Code,[79] that a mistaken belief can never be the basis of a justification, since a mistaken belief cannot be any indication of objectively correct conduct. In fact, by its nature it must be objec-

76. *Leidholm*, 334 NW2d 811 (cited in note 9).

77. Id at 818.

78. Id at 814-15.

79. See note 32 for the MPC treatment of mistaken acts in self-defense.

tively wrongful. On the basis of this understanding, it is not surprising that the court adopted a reasonableness standard geared to judging the blameworthiness of the particular actor. Once it is understood that excuses relate to blameworthiness rather than to standards of behavior, it is also clear that the actor's fault, and not some abstract model citizen's, is at issue. Unlike the reasonable man standard of tort theory, which defines acceptable standards of behavior, the reasonable man of criminal law must represent what reasonably could have been expected from the particular defendant in the situation as he experienced it.

Under German law, if self-defense is raised in a criminal trial, the court must first make an objective determination of whether the prerequisites for this defense were fulfilled. If not, the actor's honest belief in circumstances that would fulfill these prerequisites is still relevant. If the court decides that the defendant sincerely believed in the existence of circumstances that would have justified the use of defensive force, if in fact they had existed, then the issue is whether the mistaken actor "could have"[80] avoided the mistake. The first judgment applies a standard similar to what has been described here as level four objectivity, relevant to making factual determinations. The second issue concerns the belief requirement. The third question involves personal responsibility, and is answered on a purely individual, subjective basis similar to the level one standard of reasonableness.[81] Since the German system has traditionally separated objective determinations of fact from subjective determinations of personal responsibility, it does not have difficulty in acquitting a defendant even though the act in question was wrongful, if the defendant, in light of his individual abilities in the concrete situation, could not help making the mistake.

The court in Leidholm did not decide whether the defendant's use of force was justified or excused.[82] In fact, the court pointed out that with respect to the result, namely avoiding punishment, it did not matter whether the defendant's belief was correct and therefore justified, or incorrect but reasonable and therefore excused. If the belief were unreason-

80. The full test is whether the actor "could and should have known" what in fact was happening. The "should have" element is not relevant to the discussion at hand.

81. "Culpability in cases of negligence . . . depends upon whether the actor according to his own personal abilities . . . was capable of recognizing and fulfilling the duty of care imposed upon him. . . ." Adolf Schönke and Horst Schröder, *Strafgesetzbuch, Kommentar* § 15 at 245 (Beck, 23d ed 1988) ("*Kommentar*"). "[T]he requirement of blameworthiness for punishment is only fulfilled if the principle—recognized by the courts and in the literature—is taken seriously that a subjective standard is to be employed in determining whether the actor culpably did not observe the duty of care he owed. That means that the actor, according to his individual abilities, strengths, experiences and recognitions, in the critical situation could have avoided the negligent act and its consequences." Id.

82. *Leidholm*, 334 NW2d at 823 (cited in note 9). The court reversed the trial court's conviction based on the faulty instruction and remanded for a new trial.

able, however, the defendant would be guilty of either manslaughter or negligent homicide depending upon whether the mistake was reckless or negligent. The real issue then was whether the belief was sincere[83] and whether that sincere belief was reasonable, according to a subjective standard. Thus, although the jury's general verdict remains undifferentiated, the subjective standard of reasonableness, combined with the further distinction between recklessly and negligently held unreasonable beliefs, permits it to find the defendant guilty of murder, manslaughter or negligent homicide or to find the defendant not guilty because justified or not guilty because excused either in the sense of a handicap excuse (level one) or in the sense of a pressure-of-the moment excuse (level two). The jury may then consider evidence of the battering relationship as relevant to the entire spectrum of levels of responsibility for prima facie criminal conduct. A court that adopts an objective standard, such as the court in *Norman*, excludes consideration of at least two relevant levels of responsibility for wrongful acts. In combination with the legislative determination that unreasonable beliefs in the necessity of using defensive, deadly force leads to a conviction for voluntary manslaughter regardless of whether the mistake was reckless or negligent, the court's standard means that the defendant can only be guilty of murder or manslaughter, or not guilty because justified. Such standards automatically excluded other relevant standards for attributing blame, and one no longer can speak meaningfully of just deserts.

7. *An Argument for a Self-Defense Justification Under the Rationale of the Leidholm Decision and Within the Confines of the Self-Defense Justification.* Although the *Leidholm* court dismissed the relevance of the justification-excuse distinction to the issue of punishment,[84] it indicated that a correct belief would justify the defendant's act. In battering cases in which the defendant has killed her sleeping spouse, one can never know whether her belief in the necessity of the defense was correct or not. Indeed, this uncertainty is perhaps the reason why traditional definitions of self-defense include the requirement that the attack be imminent.

The Model Penal Code explicitly excludes the imminence of the attack requirement and instead requires that the force employed to protect oneself be imminently necessary.[85] In a jurisdiction in which the attack need not be imminent for purposes of the self-defense justification and

83. Whether the belief was sincere raises the issue of the belief requirement, see note 37.

84. "The distinction is arguably superfluous because whether a person's belief is correct and his conduct justified, or whether it is merely reasonable and his conduct excused, the end result is the same, namely, the person avoids punishment for his conduct." *Leidholm*, 334 NW2d at 815 (cited in note 9).

85. See note 19 and accompanying text.

the accuracy of the defendant's beliefs cannot be determined, level three objectivity in the standard of reasonableness would seem appropriate for making that factual determination.[86] If evidence of the battering relationship is such that a hypothetical reasonable person would conclude that the defendant was in danger of death or great bodily harm, then certainly the objective prerequisites of self-defense exist. Since the answer to this question is necessarily one of probability, any reasonable doubt should be resolved in favor of the defendant under the principle of *in dubio pro reo*.

It is understandable that some courts err in selecting the appropriate level of objectivity in the reasonableness standard. If the objective requirements for a self-defense justification are not clearly fulfilled, as is always the case when the victim is sleeping, then certainly this determination must apply the objectivity inherent to level three reasonableness. If these requirements are not fulfilled, but still the defendant honestly believed in facts that would have justified her had they actually existed, one may not discontinue the inquiry. The issue then becomes one of the defendant's blameworthiness for her mistake. At this point it is no longer interesting to consider what the objective reasonable man would have thought, and in fact applying that standard at this level of the inquiry would be a self-fulfilling prophecy. Now the defendant's individual abilities are at issue, because it is the defendant and not some hypothetical individual whom we are blaming and punishing for the mistake. The tendency of some courts to mix objective determinations of fact with subjective determinations of guilt collapses these two very different questions, and thereby abrogates the duty to treat every individual justly.

Before turning to German law, it would be appropriate briefly to review the arguments regarding U.S. law. If the trier of fact determines the defendant was not in imminent danger of death or grievous bodily harm at the time she killed her spouse, then the inquiry must continue regarding her blameworthiness for making the mistake. At this point, applying an objective standard of reasonableness fails to give due regard to factors relevant to just punishment. Furthermore, there is the pitfall of slipping to excessive objectivity in defining the reasonableness of a defendant's belief that the attack is imminent. Knowledge of the entire battering relationship, and not only knowledge of the facts at the time of the defensive action, is relevant even under an objective standard of reasonableness. Courts that apply the subjective standard avoid both of these problems and permit juries to reach not guilty verdicts based on a range of factors relevant to just desert. Additionally, the imminent attack requirement common to traditional definitions of self-defense assumes that attacker

86. Level three objectivity is relevant to making concrete factual determinations, see notes 37-49 and accompanying text.

and defender are equally matched. This requirement is impossible to fulfill as an objective matter and difficult to argue with respect to the defendant's actual beliefs when the batterer is asleep. This hiatus in an extreme phase of the battering relationship, however, may be the only possible moment for the physically inferior spouse to save herself from grievous bodily harm or even death should the violent spouse awaken in a fit of momentary rage and lack of self-control. A standard such as the one adopted by the Model Penal Code, requiring that the defensive action be imminently necessary, avoids the unjust treatment inherent to the traditional standard. The Model Penal Code standard may justify the battered woman based on the type of objective standard of reasonableness that gives regard to all of the defendant's knowledge at the time of the defensive action.

Admittedly, problems exist with the self-defense justification in battered women cases. The remainder of this article considers German legal theory to justify the battered woman's defensive response under a theory of necessity rather than self-defense. I first will provide some background information on why the German courts have turned to necessity rather than self-defense in battering cases.[87] I then will consider two types of necessity justifications, aggressive and defensive necessity, as they have been developed in the scholarly literature and applied to cases in which the requirements of self-defense are not fulfilled.[88] Defensive necessity is an ideal justificatory defense for the battered woman.[89] Although all of the concepts required for a defensive necessity approach are inherent to the common law, I also will provide model codifications for this defense and the complementary defense of aggressive necessity.

III. GERMAN THEORY

A. Development of the Necessity Defense Approach

German courts have taken a different route from U.S. courts in providing the battered woman with a defense to a criminal charge. Whereas U.S. courts have tended toward acquittal based on some version of self-defense or toward punishment mitigation based on heat of passion, German courts have been more favorable to the defense of necessity in battered woman cases. Self-defense is problematic in these cases, since usually the victim is not attacking at the moment the defendant acts.[90] In many U.S. jurisdictions a prerequisite of perfect self-defense is the victim's

87. See notes 90-107 and accompanying text.
88. See notes 108-39 and accompanying text.
89. See notes 140-44 and accompanying text.
90. See notes 19-36 and accompanying text.

reasonable belief that he is being attacked. Under German law, self-defense is the response to a "present, wrongful attack."[91] Rather than expand upon the concept of an "attack" to include a general danger of a future attack, the courts have viewed the situation created by the victim as an "ongoing danger"[92] that the defendant can repel even in cases in which the victim's life is at stake. This Part examines the development of German law and legal theory on this issue and considers whether it can provide some insight for U.S. courts in battered woman cases.

In a 1926 case, the Reichsgericht[93] affirmed the decision of a lower court in acquitting[94] the defendant for killing his father in a battering case. In that case, the defendant's mother had a serious heart condition and the family doctor had warned the defendant that extreme emotional upheaval could result in either the mother's having a stroke or committing suicide. Twenty hours before the defendant's act, his father had seriously mistreated the defendant's mother and sister and shortly before had threatened to repeat the mistreatment of the day before, "but twice as bad."[95] The defendant shot and killed his father while he was still in bed playing with the family dog.

At the time of this case neither the Strafgesetzbuch nor the courts clearly distinguished between necessity as a justification and as an excuse, although the distinction was not foreign to the German literature.[96] The court considered three possible defenses provided for in the old version of the Strafgesetzbuch:

> (Duress):
> A punishable act does not exist if the actor was coerced to commit the act through irresistible force or through a threat that involved a present and otherwise unavoidable danger for the life or limb of the actor or of one of his relatives. . . . [97]
> (Self-defense):
> A punishable act does not exist if the act was required in self-defense. Self-defense is the defense that is necessary to ward off a present, wrongful attack from oneself or another. Excessive self-defense is not

91. For the definition of self-defense under German law, see note 58.

92. "Dauergefahr" in German.

93. Reichsgericht judgment of July 12, 1926 ("RG *12 July 1926*"), 60 Reichsgericht in Strafsachen 318 (1927) ("RGSt").

94. Under German law the prosecutor in a criminal case may generally appeal an acquittal both on the basis of factual as well as legal error. In this sense, the double jeopardy guarantee is not provided as it is under the United States Constitution.

95. *RG 12 July 1926*, 60 RGSt at 320 (cited in note 93).

96. See I. von Olshausen, *Kommentar zum Strafgesetzbuch für das Deutsche Reich* § 54, Comment 3 at 284 (Vahlen, 11th ed 1927) ("*StGB Kommentar*").

97. Strafgesetzbuch (old version) § 52 ("Reichsstrafgesetzbuch" or "RStGB"), reprinted in Olshausen, *StGB Kommentar* at 267 (cited in note 96).

> punishable if the actor exceeded the limits of defensive action in a state of consternation, fear or fright.[98]
> (Necessity):
> A punishable act does not exist if the act, in a case other than self-defense, was committed during a state of necessity for which the actor was not responsible and which could not have been avoided otherwise and in order to save the life or limb of the actor or one of his relatives from a present danger.[99]

The court rejected duress since it required that the defendant be coerced by another individual through a threat or through force to commit a criminal act and that the coercion be exerted at the time of the act. It also rejected self-defense because it required that the defendant be responding to an immediate attack by the victim. The court referred to both of these defenses as requiring "dangers of the moment,"[100] as opposed to necessity which also included "situations of longer duration."[101] On appeal, the prosecutor had argued that necessity was inapplicable, since it required dangers caused by natural events.[102] The court explicitly rejected this argument: "[T]he dangerous state—be it of a momentary or lasting nature—can have its basis in the blameworthy . . . conduct of humans, indeed in their generally existing dangerousness for those around them."[103]

Another issue raised on appeal was that the danger presented by the victim was not imminent, since the last harm had occurred twenty hours before the defendant's act, and at the time of the act the victim was lying in bed. This question is of considerable relevance in battering cases because usually the victim is physically stronger than the defendant. If so,

---

98. RStGB § 53, reprinted in Olshausen, *StGB Kommentar* at 275 (cited in note 97).

99. RStGB § 54, reprinted in Olshausen, *StGB Kommentar* at 284 (cited in note 97). All three of these sections merely stated that the defendant was "not punishable" ("unstrafbar") if the defense applied to the case, but at that time the scholarly literature and the courts clearly viewed self-defense as a justification and duress as an excuse although they were divided on the issue regarding necessity. In 1927 the Reichsgericht introduced the defense of "extra-statutory justified necessity" thus settling the question. The modern Strafgesetzbuch includes both duress and necessity as excuses (§ 35) and as justifications (§ 34) depending on whether the value saved is of essentially more value than the value sacrificed, self-defense as a justification (§ 32), and excessive self-defense as an excuse (§ 33).

100. "Exactly herein lies the essential difference between the danger inherent to a state of necessity and the dangers inherent to the moment as covered by RStGB §§ 52 and 53 (cited in note 97). The concept of "state of necessity," as its name implies, includes both situations of longer duration as well as those of the passing moment. *RG 12 July 1926*, 60 RGSt at 321 (cited in note 93). The German word "Notstand" literally means "necessity state" and of course lends itself better to the analysis given it here by the court than its simple translation "necessity" (as a defense to a criminal charge) in English.

101. Id.

102. See Robinson, 1 *Criminal Law Defenses* § 27(b) at 108 (cited in note 9), for a discussion and rejection of the distinction between duress and necessity as one of humanly, as opposed to naturally, caused danger.

103. *RG 12 July 1926*, 60 RGSt at 319 (cited in note 93).

waiting for the next attack means sacrificing all possibility of self-defense. The court dismissed this argument, saying that the imminence of the danger is neither to be judged by the initiation of the actual attack nor directly prior to it, but rather in light of an ongoing danger that could erupt at any time and that then could no longer be avoided.[104]

Today the Strafgesetzbuch provides a justification for otherwise wrongful acts undertaken in a state of necessity.[105] The justification applies if the interest saved substantially outweighs the interest harmed, and the threat to the interest saved was otherwise unavoidable. The code also provides an excuse for individuals who have saved their own interests in a necessity situation, or those of a relative or close friend, regardless of the comparative value of the interests involved.[106] In addition, a new justificatory defense for criminal acts, referred to as "defensive necessity," has found its way into the leading theoretical literature on criminal law. It is this defense that offers a possible alternative to self-defense in battering cases. Although it is codified in the Bürgerliches Gesetzbuch,[107] the scholarly literature has discussed extensively its applicability in the criminal law.[108] To understand the real nature of the interrelationship between a traditional lesser evils defense, referred to as "aggressive" necessity, and the German variation embodied in "defensive" necessity, it is necessary to examine the relevant codifications.

B. Aggressive and Defensive Necessity

The German Bürgerliches Gesetzbuch includes two sections on necessity. Section 904, corresponding to the traditional lesser evils defense in the criminal law, reads as follows:

> (Necessity) The owner of property is not justified in prohibiting another person from interfering with that property if that interference is necessary to avoid a present danger and the harm avoided thereby is disproportionately large in relation to the damage suffered by the owner of the property. The owner can demand restitution for the damage suffered.[109]

---

104. Id at 320-21.

105. StGB § 34 (cited in note 45).

106. StGB § 35 (cited in note 45). Although the relative value of the interests is not a factor considered under § 35, only certain interests, namely life, limb or personal freedom, can be saved for the actor to be excused under this section.

107. See Bürgerliches Gesetzbuch ("BGB") § 228.

108. See Joachim Hruschka, *Strafrecht nach logisch-analytischer Methode* 68-91, 100-17, 131-48 (de Gruyter, 2d ed 1988) ("*Strafrecht*"); Ortrun Lampe, *Defensiver und aggressiver übergesetzlicher Notstand*, 21 Neue Juristische Wochenschrift 88 (1968) ("NJW"); Claus Roxin, *Der durch Menschen ausgelöste Defensivnotstand* ("*Defensivnotstand*"), in Theo Vogler, ed, *Festschrift für Hans-Heinrich Jescheck zum 70. Geburtstag* 457 (Duncker & Humblot, 1985).

109. See BGB § 904 (cited in note 107):

Although this section defines the situation in which the property owner is not justified, the German courts interpret it as a justification for the party causing the damage. The duty to restore the owner to his or her original position or, under U.S. tort principles, to pay damages does not undercut the justification but rather is the *Vincent v. Lake Erie Transportation Co.*[110] addition to the decision in *Ploof v. Putnam*.[111]

The § 904 defense is an "aggressive" necessity defense, since it justifies damaging the interest of an uninvolved third party to save one's own interest. The paradigm case is *Ploof v. Putnam*.[112] In order to save a ship from destruction in a sudden storm, the plaintiff attempted to moor the ship at the defendant's dock. The danger threatening the ship was not caused by the defendant nor did it emanate from the defendant's property but rather from natural causes. Still the court held that the plaintiff had a right to moor the ship and damage or destroy the defendant's dock, just as § 904 of the German Bürgerliches Gesetzbuch provides a justification for an individual to damage someone else's property even though that property is not causing the threatened danger.

The complementary defense is contained in § 228 of the Bürgerliches Gesetzbuch:

> (Necessity) One who damages or destroys another's property in order to avert a danger emanating from it to oneself or another does not act wrongfully if the damage or destruction is necessary to avoid the danger and is not disproportionate thereto. If the actor is responsible for the danger, he is liable for the damages.[113]

The § 228 defense refers to "defensive" necessity. This justification permits one to damage another's property in cases in which the danger is

---

(Notstand) Der Eigentümer einer Sache ist nicht berechtigt, die Einwirkung eines anderen auf die Sache zu verbieten, wenn die Einwirkung zur Abwendung einer gegenwärtigen Gefahr notwendig und der drohende Schaden gegenüber dem aus der Einwirkung dem Eigentümer entstehenden Schaden unverhältnismäßig groß ist. Der Eigentümer kann Ersatz des ihm entstehenden Schadens verlangen.

The "restitution" available under U.S. law would be money damages, whereas the primary remedy available under German law is "natural restitution." This distinction relates to the difference between German and U.S. remedies and is irrelevant to the present discussion.

110. *Vincent v Lake Erie Transportation Co*, 109 Minn 456, 124 NW 221 (1910).

111. *Ploof v Putnam*, 81 Vt 471, 71 A 188 (1908).

112. In *Ploof*, the court held that the defendant, whose servant released the plaintiff's ship from its moorings from the defendant's dock during a violent storm to avoid damage to the dock, was liable in tort for the loss of the ship. Id. In *Vincent*, the court held that the defendant who moored his ship at the plaintiff's dock was liable in tort for the damage to the dock. (cited in note 110). *Vincent* does not undercut the justification provided in *Ploof*, but rather requires the party whose interest is being saved at the cost of the other party's interest to pay for the damage caused.

113. See BGB § 228 (cited in note 107):

> (Notstand) Wer eine fremde Sache beschädigt oder zerstört, um eine durch sie drohende Gefahr von sich oder einem anderen abzuwenden, handelt nicht widerrechtlich, wenn die Beschädigung oder die Zerstörung zur Abwendung der Gefahr erforderlich ist und der Schaden nicht außer Verhältnis zu der Gefahr steht. Hat der Handelnde die Gefahr verschuldet, so ist er zum Schadensersatze verpflichtet.

caused by that property. If the *Ploof v. Putnam* facts were altered such that the ship were a mere boat that was already docked at defendant's wharf when a sudden storm arose, and the boat was causing damage to the dock, the defendant would be justified under defensive necessity in releasing the boat from its moorings and thereby destroying it to avert damage to the dock. Although one might see this defense as a version of self-defense (defense of property) rather than necessity, such an interpretation would be fallacious. The primary difference between the two defenses[114] is that self-defense is triggered by a present attack whereas defensive necessity is triggered by an imminent danger.

A closer look at aggressive and defensive necessity also reveals the complementary nature of the standards employed for balancing the interests involved. In cases of aggressive necessity, the actor may justifiably damage the property of an uninvolved third party only in cases in which the interest thereby saved is of disproportionately greater value than the interest damaged. In cases of defensive necessity, the actor is justified in damaging the danger-causing property in all cases except when the value of that property is disproportionately high in comparison to the value of the property saved. Thus in the case of *Ploof v. Putnam*, the ship owner may damage or destroy the dock to save the ship under an aggressive necessity theory in cases in which the ship is of much greater value than the dock, whereas the dock owner may damage or destroy the boat to save the dock under a defensive necessity theory in cases in which the boat is not of much greater value.

C. Application of the Defensive Necessity Defense

Because of the theoretical advantages in distinguishing between cases of aggressive and defensive necessity, this distinction has become part of the leading theory in Germany.[115] Part IV argues that it provides an ideal justification for the battered woman.

1. *Fleeing Aggressors.* Generally, self-defense is limited to warding off an attack. Once the attack has stopped, the right to exercise self-defense no longer exists.[116] Any after-the-fact "defense" is viewed as pos-

114. The BGB in fact provides separate defenses for self-defense (§ 227) and defense of property (§ 228). Id.

115. See Hruschka, *Strafrechtt* at 100-17, 131-48 (cited in note 108); Lampe, 21 NJW at 88-93 (cited in note 108) (both deriving the defense directly from BGB § 228). But see Karl Lackner, *Strafgesetzbuch mit Erläuterungen* § 34 at 217-18 (Beck, 18th ed 1989) ("*StGB Erläuterungen*"); Roxin, *Defensivnotstand* (cited in note 108); Schönke and Schröder, *Kommentar* § 34 at 504-05 (cited in note 81) (all employing the criminal law provision on aggressive necessity but altering the balancing test provided in that section for cases of defensive necessity).

116. LaFave and Scott, *Criminal Law* at 395 (cited in note 18).

sible revenge on the part of the original victim. One recognized exception to this rule concerns the thief trying to escape with the goods he has just stolen. Under U.S. law, the victim may be justified in exercising something short of deadly force to hinder the escape and thereby defend his property. The relevant attack, however, is characterized as "unlawfully carrying away" the defender's property and is, therefore, even though the thief is fleeing, imminent.[117] Under German law, the problem is solved by distinguishing between "consummated" and "completed" attacks.[118] Although for the purposes of the escaping thief's criminal liability, theft is consummated at the time of the taking,[119] for the purposes of the self-defense or defense of property justification, the attack has not as yet been completed and, therefore, is still in progress.

An interesting twist to this problem, and one that could not be solved through analogy to the escaping thief situation, was presented by a 1979 case considered by the Bundesgerichtshof.[120] The attack in that case came from an intruder into a family dwelling at night. The victims of the intrusion were awakened on several occasions to find the violator standing silently in their bedroom. On several other occasions, the intrusion was hindered in the middle of the night by the sounding of an alarm system that was installed to detect the invader. Since these invasions occurred over some period of time, the residents became more and more wary of leaving the house at night for fear that the intruder could present a real threat to their children. Although they had reported the problem to the police, they too had been unsuccessful in apprehending the invader. On the final occasion, the intruder again was discovered in the middle of the night silently standing in the bedroom. The defendant immediately arose, loaded a gun from his night table and chased after the intruder. The intruder escaped the house and was running down the street when the defendant, after making several demands that the intruder stop or he would shoot, shot the intruder.

The lower court found the defendant guilty of aggravated battery and appeal was taken to the Bundesgerichtshof. The German High Court, although admitting that a great deal could be said for necessity as a justification, held that the issue was not worthy of consideration because

117. See Robinson, 2 *Criminal Law Defenses* § 134 at 107 (cited in note 18); LaFave and Scott, *Criminal Law* at 399-400, 402 (cited in note 18).

118. See Schönke and Schröder, *Kommentar* § 32 at 470 (cited in note 81); Günter Stratenwerth, *Strafrecht, Allgemeiner Teil I* 135, 189 (Heymanns, 3d ed 1981).

119. If theft were not consummated at the time of the taking, then a successful defense of the property by stopping the escaping thief would mean that he could be charged only with the attempted offense.

120. Bundesgerichtshof judgment of May 15, 1979 ("*BGH 15 May 1979*"), 32 NJW 2053 (1979); Joachim Hruschka, *Rechtfertigung oder Entschuldigung im Defensivnotstand?*, 33 NJW 21 (1980).

the defendant was excused, and therefore not punishable, under a theory of necessity as an excuse.[121] This decision is somewhat surprising for a legal system that clearly distinguishes justifications from excuses. The court recognized that self-defense was not applicable to the case, since under any interpretation the attack had ceased, and the attacker was fleeing. The court, however, considered only aggressive and not defensive necessity as a possible justification.

Considering the problems inherent in applying aggressive necessity to the facts of that case one can understand the decision somewhat better. The interests involved are the intruder's right to physical integrity versus the defendant's family's right to privacy. Clearly an invasion of one's right to privacy does not represent harm to an interest of much greater value than the interest of the intruder in his physical well-being. For this reason alone, aggressive necessity would be unavailable as a justification for the defendant's conduct. Defensive necessity, on the other hand, does not require that the right to privacy being protected greatly outweigh the right to physical integrity being harmed, but that the right to physical integrity not greatly outweigh the right to privacy. That the danger source should bear the greater burden of possible damage when it conflicts with an interest it is endangering is intuitively appealing from a moral standpoint, particularly in the type of case when the danger is caused intentionally.

Although the German High Court ruled out self-defense because the intruder was fleeing rather than attacking, and did not consider defensive rather than aggressive necessity, it did excuse the defendant on a necessity theory. The court thereby affirmed that even though there was no present attack, the intruder presented an imminent danger. An imminent danger can exist over an extended period of time, thereby including a situation of longer duration rather than only a momentary threat.[122]

2. *Abortion.* Although in the United States a woman's right to obtain an abortion has been based on her constitutionally protected right to privacy,[123] German courts have struggled with the problem within the

121. *BGH 15 May 1979*, 32 NJW at 2053-54 (cited in note 120); see also Hruschka, 33 NJW at 21 (cited in note 120).

122. In its interpretation of "imminent danger", the Bundesgerichtshof followed *RG 12 July 1926* (cited in note 93) in the battered woman case, see text cited in notes 93-104. This interpretation is generally accepted in Germany today. Lackner, *StGB Erläuterungen* § 34 at 214 (cited in note 115), defining the danger as "an unusual situation, which according to normal experience can change at any time as a result of its natural development and cause damage, or when the occurrence of damage is certain or highly probable if defensive measures are not soon employed; Schönke and Schröder, *Kommentar* at 498-99 (cited in note 81), stating the requirement that "the danger threatening situation of longer duration can at any time, that is soon, result in damage."

123. *Roe v Wade*, 410 US 113 (1973).

confines of the criminal law. In fact, the first judicial recognition of necessity as an extra-statutory ground for justification was made by the Reichsgericht in a 1927 abortion case.[124] At the time that case was decided only one provision on necessity was contained in the Reichsstrafgesetzbuch,[125] and the courts did not always carefully distinguish between cases of justification and excuse under that provision.[126] The provision itself was not clear, since it merely said that "a punishable act does not exist" in necessity situations without specifying whether the act was not punishable because it was justified or because it was excused. The Reichsgericht had recognized that an act in necessity could be justified and that justification depended upon whether the higher-valued interest was saved as early as 1892.[127] Since the 1892 case involved an attack on property rather than on personal interests such as life and limb, it did not provide the last word on the issue for the abortion decision.

In the abortion case, the court indicated that before the Reichsstrafgesetzbuch[128] had been enacted, German scholars justified the doctor in performing an abortion to save the life or health of the mother under a theory of defensive necessity since the danger was emanating from the interest damaged.[129] Since the subsequently adopted Reichsstrafgesetzbuch only excluded punishment without specifying whether the exclusion was based on a justification or an excuse, and since it provided the exclusion only to the person endangered and his or her relatives, German scholars no longer knew how to treat the doctor, who was neither in danger nor protecting his family members from any danger by performing

124. Reichsgericht judgment of March 11, 1927 ("RG *11 March 1927*"), 61 RGSt 242 (1928).

125. RStGB § 54 (cited in note 97).

126. See note 96 and accompanying text.

127. Reichsgericht judgment of May 5, 1892 ("RG *5 May 1892*"), 23 RGSt 116 (1893). This case is interesting in itself, if for no other reason than to realize how important the justification-excuse distinction has been under German law. The defendant here was a bar owner, who when a brawl broke out in his bar tried to prevent certain patrons from using his beer mugs to protect themselves. Since these patrons were the ones initially attacked by other bar guests, they were defending themselves and justified in relation to their attackers under a theory of self-defense. Since the bar owner, however, was not one of the original attackers, they were not thereby justified in relation to him. The court pointed out that they would be justified under a theory of necessity if the interest they were saving was of essentially greater value than the interest sacrificed. If they were justified in damaging the beer mugs then the bar owner could not be justified in preventing them from doing so (that is, the "incompatibility thesis," see note 36). If they were only excused in damaging the beer mugs, the bar owner could be justified in preventing them from doing so. The court stated that the interests to be balanced were the lives of the patrons versus the value of the mugs and since the former interest was clearly of much greater value, the patrons were justified under the defense of necessity in relation to the bar owner.

128. The Reichsstrafgesetzbuch came into effect in 1876.

129. *RG 11 March 1927*, 61 RGSt at 248 (citing BGB § 228 on defensive necessity) (cited in note 124).

the abortion.[130] The court held that the doctor was justified because loss of the mother's life, as a life in being, or significant damage to the mother's health was a greater loss than the loss of the life of the fetus. The court adopted the standard appropriate for aggressive necessity, but explicitly stated that its holding was in line with the interpretation of abortion as defensive necessity.[131]

Defensive necessity as a justification for abortion is conceptually more satisfying than aggressive necessity or lesser evils. Under aggressive necessity the interest sacrificed must be of less value than the interest saved. In order to justify taking the life of the fetus to save the life of the mother, one must discount one life to tip the scales in favor of the other. To justify saving the mother's health, the life of the fetus must be discounted even more. No doubt the current U.S. abortion law permits discounting the life of the fetus. What the future state of the law will be in the United States in light of impending challenges to *Roe v. Wade*[132] remains to be seen.[133] The issue of whether the fetus is or is not a human life loses relevance if defensive necessity is considered the appropriate defense in these cases. Since the danger emanates from the fetus, the only issue would be whether the fetus's interests are greater, or under the German standard disproportionately greater, than the mother's interests. Even without discounting the life of the fetus one may say that one person's interest in life is not greater than another person's interest, and one person's interest in life is not disproportionately greater than another's interest in health.[134]

3. *Preemptive Attacks.* Another problem with applying a traditional self-defense justification to some threatening situations appears when the victim must attack preemptively in order to defend himself.

130. That the mother was not punishable was clear even under the then existing necessity provision of RStGB § 54. But if the mother were justified, then anyone could assist her in warding off the danger. If she were merely excused, then only she and her relatives could be excused, but not a third party who was not personally affected by the danger.

131. *RG 11 March 1927*, 61 RGSt at 248 (cited in note 124).

132. *Roe v Wade*, 410 US 113 (cited in note 123).

133. In West Germany before unification, abortion was generally prohibited, see StGB § 218 (cited in note 45). However, StGB § 218a includes exceptions for cases of prenatal deformation and for cases in which the mother was the victim of a sexual offense or in cases of danger for the life or physical or emotional health of the mother. In East Germany, abortion during the first twelve weeks of the pregnancy was generally permitted, see StGB (E Ger) § 153, Gesetzblatt (GBl) I, No 5, 89 (1972), GBl II, No 12, 149 (1972). According to the Unification Treaty, the prohibition against abortion under German law does not apply to the area of former East Germany; see Einigungsvertrag, Anlage I, Kapitel III, Abschnitt I, No 1.

134. Today's Strafgesetzbuch, see StGB § 218a (cited in note 45), essentially incorporates the defensive necessity standard for the first trimester of pregnancy; see Hruschka, *Strafrecht* at 168-69 (cited in note 108); see also Lampe, 21 NJW at 90-91 (cited in note 108).

The Model Penal Code definition of self-defense[135] anticipates this problem,[136] and requires only that the actor believe that the force is immediately necessary to protect himself on the present occasion. Similarly, the Code also omits the imminence requirement for the defense of lesser evils.[137] In Germany, and under the common law and the existing law of many United States jurisdictions, however, the attack which triggers self-defense must be present. Any preemptive attack used as a defensive measure would thereby be excluded from the self-defense justification.

In 1959 the Bundesgerichtshof reversed a conviction for false imprisonment in a case concerning a preemptive attack as a defensive measure.[138] In that case the mother of one of the defendants suffered from paranoic schizophrenia. During her sporadic attacks, she believed that she was being threatened by devils and even feared that she would be poisoned by her daughter. To avoid this imagined danger she poured holy water throughout her room until the floor of the room was completely soaked and often fled half-undressed from the common dwelling to seek help at a children's home. In response, the defendants began locking her in her room when the first symptoms of one of her periodic attacks became noticeable. The lower court convicted the two defendants of false imprisonment and the appeal was taken to the Bundesgerichtshof.

Viewed under a theory of aggressive necessity, false imprisonment cannot be justified in this case. The interests to be balanced are the mother's personal freedom to move about as she pleases against her daughter's and her husband's property interest that was damaged by the water the victim poured on the floor. In addition, self-defense or defense of property cannot justify the defendants' actions, since the defensive measure was employed preemptively before the victim began to cause any property damage. The German High Court still reversed the conviction.

---

135. MPC § 3.04(1) (cited in note 19).

136. "Nor does the draft limit the privilege of using defensive force to cases where the danger of unlawful violence is 'imminent,' as many formulations of the rule now do. . . . There would, for example, be a privilege to use defensive force to prevent an assailant from going to summon reinforcements, given belief and reason to believe that it is necessary to disable him to prevent an attack by overwhelming numbers—so long as the attack is apprehended on the 'present occasion'." MPC § 3.04, (Comments Tent Draft No 8, Art 3, 1958).

137. MPC § 3.02 (cited in note 19). See also Kent Greenawalt, *Conflicts of Law and Morality* at 291-92 (Oxford Press, 1987): "Section 3.02 does not include a requirement found in many formulations that the evil to be avoided must be imminent. . . . If Vicki, sharing a two-week vacation with Fred at a remote mountain cabin, learns that Fred plans to kill her in six days, she may take Fred's car now if that promises to be the only way to escape safely. Although the evil is not imminent, taking the car is a necessary last resort for Vicki and should be privileged."

138. Bundesgerichtshof judgment of June 16, 1959, 13 BGHSt 197 (1960).

The scholarly literature explains this case in terms of defensive necessity.[139] Under a theory of defensive as opposed to aggressive necessity, the defendant's interest must not greatly outweigh that of the victim for the defendant to be justified in causing the victim harm. Instead the defensive measure is justified if it does not harm an interest of much greater value than it saves. In the case under consideration, it is not true that the victim's interest in freedom of movement while suffering from her sporadic attacks is of considerably greater value than the defendants' interest in avoiding permanent damage to their property through continued inundation. Since the victim was the source of the danger, the defensive action would be justified. Under a theory of defensive necessity as opposed to self-defense, the danger to the defendant need not proceed from a present attack. Instead the victim must be the source of imminent danger to the defendant. A situation of imminent danger can be ongoing and the defense thereby available at the time necessary to avoid the threatened harm. Accordingly, preemptive attacks, if necessary to avoid future harm, are justified. In the present case the defendants were familiar with the victim's cycle of schizophrenic attacks during which she presented a real danger to them. Rather than require the defendants to wait until the damage is in progress, as would be necessary under a theory of self-defense, defensive necessity permits preemptive action to avoid certain future harm.

These are but a few of the cases in which a theory of defensive necessity provides a consistent solution to problems that cannot be solved adequately through either aggressive necessity or self-defense. As a justification it is applicable in any case in which an imminent danger threatens legally protected interests. The danger does not have to be present as does an attack for the self-defense justification, but rather can be ongoing or intermittent. The defense justified thereby can be exercised peremptorily or at any time necessary to discontinue the danger threatened. Since the danger is emanating from the victim, the balancing tests inherent to the lesser evils or aggressive necessity defense is inverted, permitting damage to interests of equal, or slightly disproportionate, value.

IV. THE DEFENSIVE NECESSITY SOLUTION

The last part considered German legal theory to elucidate defensive necessity as a justificatory defense in cases in which self-defense is inappropriate. In addition, lesser evils or aggressive necessity, although per-

139. See Hruschka, *Strafrecht* at 131-35 (cited in note 108); Lampe, 21 NJW at 90-91 (cited in note 108).

haps conceptually closer than self-defense to providing a solution in these cases, also are inappropriate because of the relative weight of the interests involved. Although defensive necessity is complementary to the common law lesser evils defense, it has not as yet appeared in U.S. case law nor developed in the theoretical literature. This justificatory defense is ideally applicable to the case in which the battered woman kills her sleeping spouse. Since this defense compliments the common law necessity or lesser evils defense, it applies to battered woman cases in the U.S. today without any need for prior legislative action. For the sake of conceptual clarity, however, two model code provisions also distinguish the requirements for aggressive and defensive necessity.

A. The Defensive Necessity Argument

The major problem with applying self-defense to the battered woman case in which the defendant killed her sleeping spouse is that traditionally self-defense is the response to a present wrongful attack. Including the killing of an aggressor while he is sleeping within self-defense thereby extends the justification far beyond its conceptual origin. However, some cases exist in which the battered wife's response seems every bit as justified as the response of one acting in self-defense. The fact that U.S. courts are prepared to consider self-defense as a justification for the killing indicates a willingness to justify the battered woman that is perhaps completely appropriate but conceptually unclear. Rather than base the defense on the objective existence of an attack, the courts must rely upon the defendant's beliefs in the necessity of using defensive force. In determining whether those beliefs are reasonable, a subjective standard must be applied in the total absence of any attack. Although the subjective standard of reasonableness is completely appropriate for determining the defendant's blameworthiness for making a mistake as to the necessity of using defensive force, it is not a substitute for determining whether the objective elements of a justification are fulfilled in the particular case. For this reason alone, many courts may be unwilling to apply the subjective standard.

The necessity or lesser evils defense generally requires not a present attack but a situation of imminent danger. It is exactly this distinction that separates the battered woman case from the typical self-defense case.[140] Even though it is very difficult to maintain that the defendant in these cases was being attacked, the fact that her spouse has placed her in a general situation of danger is more plausible. A dangerous situation can

140. See Graff, 10 Loyola LA Intl & Comp L J at 14-17, 21 (cited in note 17) for a discussion of the problem with extending the self-defense justification to include non-attacking husbands.

be ongoing and need not represent a sudden threat posed by another's voluntary, aggressive conduct. If the spouse's slumber is merely a momentary pause in a battering relationship that threatens great bodily harm or death, then an imminent danger, though not a present attack, can exist objectively. Courts, therefore, do not have to rely on purely subjective evaluations in affirming the dangerous situation. The first step in a battered woman case should be to show a situation of necessity rather than self-defense.

The traditional necessity situation is one in which there is an imminent danger that can be avoided only through harming another uninvolved individual's interests. Taking someone else's car to drive an accident victim to the hospital or breaking into someone's cabin to gain shelter from a blizzard are typical examples of the type of case in which the defense is appropriate. In these cases the danger emanates from some extraneous source and the rights of an uninvolved third party are violated to save one's own or someone else's interests. Since the defensive measure is essentially an attack on a third party's interests, German literature refers to it as "aggressive" necessity. A violation in aggressive necessity is justified only if an interest of more, or considerably more,[141] value is saved than harmed. Therefore, one cannot take another person's car to get to a business appointment on time or break into another person's cabin to relax from a strenuous hike. In battering cases, if the woman's life is in danger and she can avoid the danger by doing something less harmful than killing her husband, such as fettering him for several hours, then she would be justified under a theory of aggressive necessity in taking the lesser measure. If the only possibility of avoiding a future, threatened attack on her life is to kill her husband, however, then she could not be justified under aggressive necessity since the two values, her life versus his, are equal.

However, defensive necessity turns the balancing test around in cases in which the danger emanates not from some extraneous source, but rather from the individual who is harmed by the defensive action.[142] The fact that the individual harmed causes the danger provides a sound reason for inverting the interest balancing test, particularly in cases in which the danger is intentional. Thus although one may not take another person's car to avoid being late for a business appointment, if the car owner has intentionally kept the other person from being on time, perhaps to secure the advantages of the business deal for himself, then the defensive action seems more reasonable. If the cabin owner has immobilized the hiker's

141. The German standard of "considerably" or "much" more value permits greater differentiation in discussing the relative interests involved and, therefore, will be used in the analysis.

142. See notes 114-15 and accompanying text.

only means of transportation, perhaps in the hopes that he will be injured leaving the mountainous area after dark, then breaking into the cabin to rest before continuing the journey the next day is also more understandable.

In the battered woman cases, clearly a danger emanates from the batterer. He has created a general situation of danger that, upon his awakening, can result in serious bodily harm or death for his spouse. In addition, the danger created for the woman is a product of her husband's voluntary actions. In such cases, the battered woman should be justified under a defensive necessity theory in acting before the actual attack takes place, particularly when waiting would mean that she no longer would be able to respond effectively. The law cannot legitimately require an individual to risk serious injury or death at the hands of someone who is intentionally creating the relevant ongoing danger. Under a theory of defensive necessity, the test is not whether the woman's interest is greater than that of her husband's, but rather only whether his interest is disproportionately large in comparison to hers. In life versus life cases it is not greater, and the battered woman would be justified in sacrificing his to avert an imminent danger to hers.[143]

One final requirement of either type of necessity defense is that the danger be otherwise unavoidable. The U.S. law of self-defense refers to this requirement as the retreat rule.[144] Under German law, an individual does not have to retreat before using deadly force when exercising self-defense, but must retreat from a danger if possible before damaging another person's interests in a situation of necessity. The reason for this distinction lies in the attitude expressed by the victim, or initial aggressor, in a self-defense case, of disrespect for the individual rights of the defender. The attack not only creates a danger for the self-defender but also represents an affront to his personal integrity. Requiring the individual attacked to flee rather than stand up for his rights would deny this integrity. In a necessity situation, however, the danger-causing party does not express this disregard. The focus, therefore, is upon salvaging rightful interests and minimizing losses. If retreat is possible, then both the interests of the actor and the victim can be saved. Since under U.S. law retreat is also required before employing deadly force in self-defense, this distinction between the two types of defensive force defenses is irrelevant to the instant analysis.

143. One author who accepts the justification-excuse distinction has been willing to sacrifice the justification defense for battered women, among other reasons because the woman's interest in her life is equal to the man's interest in his, see Graff, 10 Loyola LA Intl & Comp L J at 21-22 (cited in note 17).

144. See notes 27-34 and accompanying text.

In a battered woman case, arguably the woman could have fled, thereby avoiding the danger, rather than take her husband's life. In cases in which she could have taken this measure, it would be appropriate to deny her the defensive necessity justification. Retreat is necessary under both legal systems, however, only when it can be undertaken with complete safety. If the battered woman fears for the safety of her children when left alone with the batterer or exposes herself to similar or greater danger through fleeing, then she should not be required to retreat before exercising defensive force. Evidence of previous attempts to flee with the result of being followed and more brutally beaten by the batterer or of unsuccessful efforts to obtain police intervention would indicate the exact nature of the particular situation. Usually the battered spouse does not turn to deadly force upon the first confrontation, has been exposed to so many repeated beatings over years of marriage to the batterer that the situation is characterized by its cyclic nature. Adequate evidence of the problems with retreat, therefore, is generally available for the judge or jury to determine as an objective matter whether it was a feasible alternative or not. If it were not objectively possible, it still may be the case that the battered woman, because of what is described as "learned helplessness," did not recognize the viability of this course of action. In such cases a subjective standard of reasonableness should be applied to determine her culpability for incorrectly evaluating the situation.[145]

B. Model Codifications of Aggressive and Defensive Necessity

Defensive necessity is appropriate, for the same arguments that have been given in the battered woman case, whenever in which the actor is being wrongfully endangered, albeit not presently attacked by another individual. Although one may argue a defensive necessity theory independent of any legislative enactment, one must do so by tipping the scale under the lesser evils defense in favor of the non-danger causing party. It would be conceptually clearer to enact two separate, complementary defenses such as the following:

Aggressive Necessity

An actor is justified in causing harm to another individual if

1) the harm is necessary to protect the actor or any other party from imminent danger,

2) the harm avoided by the act is (considerably) greater than the harm caused thereby, and

3) the harm avoided was not avoidable through otherwise available less harmful alternatives.

Defensive Necessity

145. See notes 1-17 and accompanying text.

An actor is justified in causing harm to another individual if

1) the harm is necessary to protect the actor or any other party from imminent danger unjustifiably caused by the individual harmed,

2) the harm caused by the act is not (considerably) greater than the harm avoided thereby, and

3) the harm avoided was not avoidable through otherwise available less harmful alternatives.

The possible inclusion under (2) of the requirement that the harm avoided through aggressive necessity be "considerably greater than" the harm caused and that the harm caused through defensive necessity not be "considerably greater than" the harm avoided would permit more case differentiation than the Model Penal Code requirement of simply "greater than." In a battered woman case it also would permit the defendant to exercise deadly force to prevent grievous bodily harm. If she were limited to not causing harm simply greater than the harm she is avoiding through the defensive action she would only be able to exercise deadly force in cases in which her life is in danger. Including the possibility of preventing serious bodily harm through exercising deadly force, however, is not novel to accepted standards under the U.S. law of self-defense, and therefore should not present any problems under the present suggested codification.

V. CONCLUSION

Battered women in the United States are given a wide variety of treatment under the criminal law, ranging from conviction for first degree murder to justification in self-defense. This article has attempted to solve some of the problems raised by the arguably unfair treatment some U.S. courts have given the battered spouse. In particular, a subjective standard of reasonableness should be applied to the determination of the defendant's culpability for her mistaken belief in the need to exercise defensive force. An objective standard, on the other hand, although appropriate for determining whether an actual self-defense situation existed, is not relevant to the issue of culpability in these, or in any other, mistake cases. Courts using an objective standard tend to ignore important issues of individual responsibility thereby excluding possible acquittal based on an excuse. Sometimes they even apply an excessively objective standard that is inappropriate for consideration of the self-defense justification. In addition, an argument for justifying the battered woman under a self-defense theory has been advanced using the Model Penal Code requirement that the defensive force be imminently necessary rather than that the actual attack be imminent in the traditional sense. Finally, German law and legal theory have been examined in the hopes of finding some solution to these cases that perhaps raises less theoretical problems than the self-de-

fense justification. Defensive, as opposed to aggressive, necessity has been suggested as an alternative.

A legal system that imposes punishment upon individuals subjected to the type of terrorization typical of some battering relationships, and at the same time provides no meaningful assistance prior to the fateful event, undercuts the respect appropriate for its criminal norms and abrogates its duty to protect individuals through application of these norms. It is not surprising that Judy Norman preferred punishment to a continued existence with a man who had gravely mistreated her over the years. It is surprising that a society feels justified in imposing punishment in that case, because punishment could have no possible deterrent effect, because Judy Norman does not represent a continuing threat to society, and one cannot point to viable alternatives to her action. Is it perhaps thought that her husband's death, which put an end to years of violent treatment, requires vindication? I doubt that one would feel the necessity to vindicate the death of the Nazi or North Korean captor of our posited prisoner of war, Judith. I would suggest that some battered women share a similar fate.