Tulsa Law Review

Volume 39
Number 4 *Twenty-Five Years of George P. Fletcher's Rethinking Criminal Law*

Volume 39 | Number 4

Summer 2004

Proportionality and the Aggessor's Culpability in Self-Defense

Mordechai Kremnitzer

Khalid Ghanayim

PROPORTIONALITY AND THE AGGRESSOR'S CULPABILITY IN SELF-DEFENSE*

Mordechai Kremnitzer** and Khalid Ghanayim***

I. INTRODUCTION

This article addresses two subjects that have been treated at length by Professor Fletcher. The first is whether justified self-defense demands only the aggressor's anti-social conduct (an act that threatens harm to the victim's protected interest, with any mental element), or whether it also requires the aggressor's culpability. The second is whether or not justified self-defense requires proportionality between the harm prevented and the harm inflicted, in the sense that the prevention of harm cannot be achieved by causing harm that is completely disproportionate.

II. FLETCHER'S APPROACH

In *Rethinking Criminal Law*[1] ("*Rethinking*") Professor Fletcher presents three models of self-defense prevailing in Anglo-American and German law. The first model is that of self-defense as an excuse to criminal liability. This approach is based upon the rationale that the victim must act as he does in order to defend himself. In such a situation, a person has no choice but to act. The second model of self-defense is a variation upon the concept of the lesser evils where the aggressor's culpability is weighed against him. This is an accepted model in the Anglo-American system, in which self-defense is viewed as a justified defense. The third model of self-defense is that of protecting the victim's autonomy. This model is found in German law and also provides that self-defense is a justified defense.

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* The term "self-defense" refers to the defense of the legally protected interests of the actor and of others. *See* George P. Fletcher, *Rethinking Criminal Law* 855 (Little, Brown & Co. 1978). Fletcher calls this "necessary defense." [Editor's note: The editors of *TLR* are pleased to include this important contribution to our symposium issue. We note, however, that English translations of many foreign language sources were not obtainable, and several sources therefore have not been submitted to the normal cite checking procedure.]

** Professor of Criminal Law, Hebrew University of Jerusalem.

*** Dr., Lecturer of Criminal Law, Haifa University.

1. George P. Fletcher, *Rethinking Criminal Law* 855-64 (Little, Brown & Co. 1978).

Fletcher discussed these three models for self-defense in detail in an article published before *Rethinking*.[2] In that article, Fletcher adopts the self-defense model based on the protection of the victim's autonomy. According to this approach, self-defense does not require the aggressor's culpability, and in principle, it requires no proportionality. In making his case, Fletcher gives the example of a man riding in an elevator with a psychotic person.[3] Suddenly, the psychotic person "goes berserk and attacks the man with a knife."[4] The only way to avoid serious bodily harm is to kill the psychotic aggressor.[5] After Fletcher dismisses the possibility of a necessity defense, he classifies this case as self-defense by the process of elimination. The act of self-defense (averting a mortal threat) cannot fall within the scope of justifiable necessity, because that requires proportionality and the harm avoided not be significantly worse than the harm inflicted. Since all human life has equal value, the life of the psychotic aggressor is equal to that of the victim, and justifiable necessity is not a possibility.[6] If we were to examine the situation in terms of excusing necessity, we would find that an unrelated third-party would not be permitted to assist the victim, and the psychotic aggressor would enjoy the right to defend himself against his victim's attempt to ward off the attack. These are clearly absurd results, and therefore the situation must be one of self-defense.[7]

There are two models of self-defense.[8] The first model is self-defense as a variation of justificatory necessity:

> [This] model of necessary defense is founded on the principle that it is right and proper to use force, even deadly force, in certain situations. The source of the right is a comparison of the competing interests of the aggressor and the defender, as modified by the important fact that the aggressor is the one party responsible for the fight. This theory of the defense appears to be a straightforward application of the principle of lesser evils. The problem is that if we simply compared the interests of two parties, we should never be able to justify the defender's killing the aggressor – at least where only his life is threatened. If it is one life against one, it is hard to see why we should favor either party to the fray.[9]

However, in the typical case of a culpable aggressor, the aggressor's culpability is taken into account and is weighed against him. The interests of a culpable aggressor are granted less protection, but the situation is different in the case of a

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2. George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 Isr. L. Rev. 367 (1973).

3. *Id.* at 371.

4. *Id.*

5. *Id.*

6. *Id.* at 374; *see* Daniel Beisel, *Straf und verfassungsrechtliche Problematiken des finalen Rettungsschussess* [*Criminal and Constitutional Law Problems in the Context of Intentional Rescue-Killings*], 1998 JA 725; Theodor Lenckner, *Schoenke/Schroeder, Strafgesetzbuch Kommentar* [*Commentary on the German Criminal Code*], 25 Auflage 30, 34 (Muenchen 1997) (a situation involving a life for a life).

7. Fletcher, *supra* n. 2, at 375.

8. Fletcher, *supra* n. 1; Fletcher, *supra* n. 2, at 376. Fletcher also considers the possibility of excusing self-defense, but rejects it for the same reason as excusing necessity. *Id.*

9. Fletcher, *supra* n. 1, at 857-58.

psychotic aggressor. Since a psychotic aggressor is inculpable, any culpability cannot be held against him. Therefore, under this model there can be no justifiable self-defense against a psychotic aggressor. Because the victim's conduct is supposed to be justified, this model of self-defense as a variation of justifiable necessity is inappropriate.

The second model is that of protecting autonomy, which is not contingent upon proportionality:

> If a person's autonomy is compromised by the intrusion, then the defender has the right to expel the intruder and restore the integrity of his domain. The underlying image is that of a state of warfare. An aggressor's violation of our rights is akin to an intrusion of foreign troops on our soil. As we are inclined to believe that any community has the absolute right to expel foreign invaders, any person attacked by another should have the absolute right to counteract aggression against his vital interest.[10]

Under this theory, the aggressor's culpability is not relevant, that is, it does not affect the existence or the scope of self-defense. "[W]hat counts is the objective nature of the aggressor's intrusion.... Defending one's living space is not to punish the intruder for his culpable conduct, but to nullify an objectively hostile intrusion by an enemy."[11] The action of the defending victim—killing the inculpable aggressor—falls within the scope of justified self-defense. Therefore, according to Fletcher, the only proper rationale for self-defense is that of protecting autonomy, which does not require a culpable aggressor and is not contingent upon proportionality.[12]

III. CRITICISM OF FLETCHER'S APPROACH: DEFENSIVE NECESSITY

We disagree with Fletcher's conclusion that justifiable necessity must be ruled out. If we assume that necessity is the appropriate defense in Fletcher's example, and differentiate between justified necessity and excused necessity, our approach is that justified necessity is the appropriate defense. This is so because underlying the defense of justified necessity is the utilitarian rationale of the lesser evil, which is founded upon the duty of social solidarity.

Justified necessity derives from the utilitarian consideration of the lesser evil. Its scope is limited by the underlying duty of social solidarity.[13] In a situation of necessity, a utilitarian approach weighs all of the interests and considerations that may influence the balance between the harm inflicted and the harm prevented. The balance is one of competing interests rather than simply one of competing values, and the theory is that of balancing interests. The term "interest" is quite

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10. *Id.* at 860.

11. *Id.* at 862.

12. Fletcher, *supra* n. 2, at 381.

13. This consideration rules out the possibility of justifiable necessity where one life must be sacrificed in order to save many. In a life versus life situation, the balance is qualitative, not quantitative. Since a person cannot be forced to lay down his life, there can be no justifiable necessity in such a case. *See* George P. Fletcher, *The Psychotic Aggressor – A Generation Later*, 27 Isr. L. Rev. 227, 235 (1993).

broad.[14] The following considerations must be weighed in striking the balance between the harm inflicted and the harm prevented:

(1) the societal importance of the protected values (life versus freedom or property, physical integrity versus freedom or property, freedom versus property, etc.) as a central consideration in striking the balance;

(2) the concrete worth of protected interests (a work of art of acknowledged artistic or historic value as opposed to a work lacking recognized value, the value of a multi-storied residence or hotel as opposed to a private home or an individual apartment);

(3) the severity of the threat to the protected interest (concrete or abstract);

(4) the probability of the realization of the threat to the protected interest, and the probability of harm to another protected interest;

(5) the probability of saving the protected interest;

(6) the autonomy of the person who possesses the threatened interest (for example, the owner may not desire that the interest be defended);

(7) the source of the threat; and

(8) the consistence of protecting the interest of the legal order (the case of escape from legal custody).[15]

In the classic situation of justifiable necessity, the defensive conduct injures the protected interests of a third party who is not involved in creating the threat. Considerations of social utility require that the harm prevented significantly

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14. Ruediger K. Albrecht, *Zumutbarkeit als Verfassungsmassstab* [*Reasonable Expectation as Constitutional Standard*] 111 (Berlin 1995); Jeremy Bentham, *Of Laws in General* [*Principles of Legislation*], in *Collected Works of Jeremy Bentham* ¶ 12, 212-13 (J.H. Bruns & H.L.A. Hart eds., U. London Athlone Press 1970); Hans-Ludwig Guenther, *Strafrechtswidrigkeit und Strafunrechtsausschluss* [*Criminal Wrongfulness and the Negation of Criminal Wrongdoing*] 138 (Koeln 1985); Theodor Lenckner, *Der rechtfertigende Notstand* [*The Justified Necessity*] 123 (Tuebingen 1965); Joachim Renzikowski, *Notstand und Notwehr* [*Necessity and Self-Defense*] 34 (Berlin 1994); Andreas Meissner, *Interessenabwaegungsformel in der Vorschrift ueber den rechtfertigenden Notstand* [*Balancing of Interests in the Provision Regulating Justified Necessity*], 34 StGB 149 (Berlin 1990); Miriam Gur-Arye, *Should a Criminal Code Distinguish between Justification and Excuse?*, 5 Can. J.L. & Juris. 215, 217 n. 18 (1992).

15. *See* Lenckner, *supra* n. 14, at 147; Theodor Lenckner, *The Principles of Interest Balancing as a General Basis of Justification*, in *Justification and Excuse I* 493, 519 (Albin Eser & George P. Fletcher eds., Freiburg 1987); Renzikowski, *supra* n. 14, at 31; Friedrich-Christian Schroeder, *Die Notstandsregelung des Entwurfs 1959 II* [*The Regulation of Necessity in the Draft of 1959 II*], in *Festschrift fuer Eb. Schmidt* 293 (Goettingen 1961); Hans-Joachim Hirsch, *Leipziger Kommentar-Grosskommentar* [*Leipzig Commentary-Great Commentary*], 11 Auflage 34, ¶ 52 (Berlin 1994); Volker Krey, *Der Fall Peter Lorenz-Probleme des rechtfertigenden Notstandes bei der Ausloesung von Geiseln* [*The Case of Peter Lorenz-Problems with Jusitifed Necessity when Freeing Hostages*], 1975 ZRP 97, 98; Wilfried Kueper, *Zum rechtfertigenden Notstand bei Kollision von Vermoegenswerten* [*On Justified Necessity in the Case of Conflicting Property Interests*], 1976 JZ 515; Mordechai Kremnitzer, *The Landau Commission Report – Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?*, 23 Isr. L. Rev. 216, 247 (1989); Guenther Jakobs, *Strafrecht Allgemeiner Teil* [*Criminal Law: The General Part*], 2 Auflage 419 (Berlin 1991); Meissner, *supra* n. 14, at 229; Claus Roxin, *Strafrecht Allgemeiner Teil* [*Criminal Law: The General Part*], 2 Auflage 610 (Muenchen 1994).

outweigh the harm inflicted,[16] as required by the rationale of the third-party's autonomy and that of social solidarity.

Social interests are not protected as abstract values (e.g., property as property), but as interests that serve a function (i.e., as social interest that promote the desired development of the individual). The personal sphere (autonomy) is a fundamental principle of criminal law. The principle of autonomy grants a person the social space in which to realize his interests without limitation or interference, as long as realizing those interests does not injure the interests of others.[17] In the classic situation of justifiable necessity, we are concerned with causing injury to the protected interests of a person who is not involved in creating the threat (i.e., a person acting within his autonomous sphere) and respecting the autonomy of others. Thus, an actor who injures another person's protected interest invades that person's personal space (autonomy) and does not respect it.

In this case of justifiable necessity, the actor injures the third-party's protected interest and his autonomy.[18] The autonomy of the individual is an important societal interest that must be considered in striking the balance between the two evils. In this classic situation, we are faced with causing harm to a third-party (injury of the protected interest as an abstract value) and infringing on his autonomy by preventing the harm that threatens another person. Harm to the third-party and infringement of autonomy rest on one side of the scales, while preventing injury to an individual rests on the other side. Since utility requires that the harm prevented exceed the harm inflicted, and because it weighs every interest that might affect the balance, the utilitarian argument justifies necessity only when the harm to be prevented significantly outweighs the harm that will be inflicted. Therefore, this requirement of significant relative weight is the result of weighing the principle of autonomy as an additional factor to that of the harm that will ensue.[19]

Moreover, in the classic case of justifiable necessity, we are concerned with requiring an unrelated third-party, who is under no statutory or contractual duty

16. The examination is performed ex ante, rather than ex post.

17. By autonomy, we do not mean "[f]reiheit zu eigenverantwortlicher sittlicher Entscheidung [freedom of internal moral decision-making]" as in Imannuel Kant, *Grundlegungen der Metaphysik der Sitten* 65 (Vorlaender ed., Hamburg 1952), but freedom from external actions that threaten the personal sphere.

18. *See* Lenckner, *supra* n. 14, at 111; Hans-Heinrich Jescheck & Thomas Weigend, *Strafrecht Allgemeiner Teil* [*Criminal Law: The General Part*], 5 Auflage 357 (Berlin 1996); Wilfried Kueper, *Grundsatzfragen der 'Differenzierung' zwischen Rechtfertigung und Entschuldigung* [*Fundamental Questions on the Distinction between Justification and Excuse*], 1987 JuS 81, 87; Guenter Stratenwerth, *Prinzipien der Rechtfertigung* [*Principles of Justification*], 68 ZStW 41, 50 (1956); Lenckner, *supra* n. 6, at ¶ 38, 34; Roxin, *supra* n. 15, at 608.

19. See Lenckner, supra n. 14, at 111; Renzikowski, supra n. 14, at 60; Lenckner, supra n. 15, at 520; Wilfried Kueper, *Differenzierung zwischen Rechtfertigungs-und Entschuldigungsgruende: sachgerecht und notwendig?* [*Distinction between Justification and Excuse: Is it Appropriate and Necessary?*], in *Rechtfertigung und Entschuldigung I* 311, 341 (Albin Eser & George P. Fletcher, eds., Freiburg 1987); Walter Perron, *Rechtfertigung und Entschuldigung im deutschen und spanischen Recht* [*Justification and Excuse in German and Spanish Law*] 193 (Baden-Baden 1988); Hans-Joachim Hirsch, *Anmerkung* [*Comment*], 1980 JR 115, 116; Meissner, supra n. 14, at 191; Roxin, supra n. 15, at 608; Guenter Stratenwerth, *Schweizerisches Strafrecht–Allgemeiner Teil I* [*Swiss Criminal Law: The General Part I*], 2 Auflage 50, 212 (Berlin 1996).

to protect the interest, to accept injury to his protected interest. Demanding that a person relinquish his own legally protected interests in favor of another person requires special justification. In principle, a person under threat has no right to divert the danger to someone else.[20] Since every person is entitled to enjoy and benefit from his legally protected interests, justice and fairness demand that he bear the burden of those interests. Diverting the burden to another person requires strong and special justification. This justification can be found in the duty of social solidarity that derives from the character of people as social beings and members of society. The duty of social solidarity is an exception to the normal character of criminal law,[21] and the special justification for diverting harm to another person exists only when the harm to be avoided is significantly greater than the harm that will be caused.[22] Thus, under the principle of solidarity, the condition of proportionality in the defense of justifiable necessity based upon utilitarianism (balancing interests) requires that the harm prevented significantly exceed the harm inflicted.[23]

In summary, in the classic situation of justifiable necessity, the defensive conduct infringes the legally protected interests of a third-party who was not involved in creating the threat. The principle of autonomy and the duty of social solidarity require that where necessity requires the infringement of the rights of an unrelated third-party, the harm to be prevented must significantly exceed the harm to be inflicted.[24]

However, when the source of the threat is the unlawful act of the victim, the balance between the harm inflicted and the harm prevented is different. As mentioned above, autonomy grants a person space in which to do whatever he pleases, as long as that act does not infringe or endanger the autonomy of another person. Intrusion or invasion into the sphere of another person does not form part of the scope of autonomy. Such a case is clearly different from that described by the classic situation of necessity. The victim (in the later stage of the event) infringes the autonomy of the actor in the initial stage of the event. Averting a

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20. *See* Kueper, *supra* n. 19, at 342; Lenckner, *supra* n. 15, at 520; Kueper, *supra* n. 15, at 517.

21. *See* Renzikowski, *supra* n. 14, at 179; Kueper, *supra* n. 19, at 341.

22. *See* Gerhard Dannecker, *Der Allgemine Teil eines europaeischen Strafrechts als Herausforderung fuer die Strafrechtswissenschaft* [*The General Part of a European Criminal Law: A Challenge for Criminal Law Theory*], in *Festschrift fuer H-J. Hirsch* 141, 161 (Berlin 1999); Karl Janka, *Der strafrechtliche Notstand* [*Necessity in Criminal Law*] 196 (Erlangen 1878); Guenther Jakobs, *Kommentar: Rechtfertigung und Entschuldigung bei Befreiuung aus besonderen Notlagen (Notwehr, Notstand, Pflichtenkollision)* [*Commentary Justification and Excuse in the Context of Rescue from Emergency Situations (Self-Defense, Necessity, Conflict of Duties)*], in *Rechtferigung und Entschuldigung IV* 143, 164 (Albin Eser & Haruo Nishihara, eds., Freiburg 1995); Kueper, *supra* n. 19, at 342; Lenckner, *supra* n. 15, at 520; Jakobs, *supra* n. 15, at 426; Kueper, *supra* n. 18, at 87; Kueper, *supra* n. 15, at 517; Stratenwerth, *supra* n. 18, at 52.

23. *See* Joachim Hruscka, *Extrasystematische Rechtfertigungsgruende* [*Extra-Systematic Grounds of Justification*], in *Festschrift fuer E. Dreher* 189, 209 (Berlin 1977); Jakobs, *supra* n. 22, at 164; Wilfried Kueper, *Grund- und Grenzfragen der rechtfertigenden Pflichtenkollision im Strafrecht* [*Basic and Limiting Questions on Justified Conflict of Duties in Criminal Law*] 93 (Berlin 1979); Lenckner, *supra* n. 15, at 520; Lenckner, *supra* n. 14, at 111; Kueper, *supra* n. 18, at 87; Renzikowski, *supra* n. 14, at 241; Stratenwerth, *supra* n. 18, at 41, 52.

24. The examination is performed ex ante, rather than ex post.

threat deriving from the act of a psychotic aggressor does not infringe his autonomy. Averting the aggressor constitutes returning the aggressor to his own autonomy. In such a case, autonomy—as a consideration in assessing the balance—weighs in favor of the defending actor, and not in favor of the "victim."[25] The addition of protection to the autonomy of the injured party as a consideration in his favor leads to the result that the harm inflicted can exceed the harm prevented. In this exceptional case, killing a person who commits an unlawful act—as a last resort in defense of life or even physical integrity—falls within the scope of justifiable necessity. Therefore, killing an inculpable psychotic aggressor in order to defend one's self is rightly viewed as justifiable necessity.

This conclusion can also be grounded upon the duty of social solidarity. As previously noted, in the typical situation of justifiable necessity the underlying utilitarian considerations require a foreign third-party to acquiesce to the infringement of his rights in favor of another person. The consideration of social solidarity, which plays an exceptional role in criminal law, imposes the conclusion that the utilitarian considerations of justifiable necessity require that the harm prevented significantly exceed the harm inflicted. In such a situation a person whose protected interests are threatened may demand that another person acquiesce to an infringement of his protected interests. However, where the threat derives from unlawful, albeit inculpable conduct, as in the case of the psychotic aggressor, the situation changes.

In such a case, we are confronted with defensive necessity, and the person whose interests are threatened has the right to fend off the danger and defend his protected interests. We are concerned here with a person who has not invaded anyone else's personal space, who respects the legal order, and who wishes to defend his own personal space by restoring the legal situation. Since justifiable necessity creates a duty of social solidarity, the threatened person is under a very limited duty of solidarity that requires acquiescence to competing social values only when the harm he will inflict will greatly exceed the harm he intends to prevent. In our case, there is no such relationship between the two injuries. Moreover, because the psychotic aggressor is the source of the threat, he has no right to demand that his victim acquiesce to a severe infringement of his protected rights, and thus surrender those rights. As the source of the threat, the psychotic aggressor has no right to demand that the defending victim lay down his life, and the duty of social solidarity cannot require him to acquiesce in order to spare the life of the inculpable aggressor.[26]

From the above examination, it would appear that if we adopt the view that we are concerned with the necessity defense, then killing the inculpable aggressor falls within the purview of justifiable necessity. Therefore, Fletcher's argument

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25. *See* Hirsch, *supra* n. 15, at 34.

26. See Claus Roxin, *Der durch Menschen ausgeloeste Defensivnotstand* [*Defensive Necessity*], in *Festschrift fuer H-H. Jescheck* 457, 472 (Berlin 1985); Jakobs, supra n. 15, at 431; *Ortrun Lampe, Defensiver und aggressiver uebergesetzlicher Notstand* [*Defensive and Aggressive Extra-Statutory Necessity*], 1968 NJW 88; Michael Pawlik, *Der rechtfertigende Defensivnotstand im System der Notrechte* [*Justified Defensive Necessity in the System of Defenses*], 2003 GA 12.

does not necessarily require that we view killing the psychotic aggressor as an instance of self-defense in order to deem it justified. The question of the appropriate defense—self-defense or necessity—will be examined in the next section.

IV. THE AGGRESSOR'S CULPABILITY AS A REQUIREMENT IN SELF-DEFENSE

The killing of the psychotic aggressor who endangers the victim's life is justified. As we have seen, such a protected act can be done under justified necessity. The next question, however, is whether the protected act can be done under self-defense. If killing the psychotic aggressor is justifiable as a form of self-defense, the question will be which defense is more appropriate, self-defense or necessity?

This question should first be examined in terms of the rationales for self-defense. Our approach is that self-defense has a twofold rationale: defending autonomy and defending the legal order. There are four reasons for this view.

First, the autonomy of the person is infringed in several situations, even when the source of the threat to the person's legally protected interests derives from an "act" in physical involuntariness, or one performed without any mental element. If it is clear that we cannot speak of self-defense in such circumstances, as is Fletcher's view,[27] then personal autonomy cannot be the sole rationale for self-defense.[28]

Second, self-defense involves fending off an unlawful attack, that is, the prevention of attack that infringes the legal order. As opposed to necessity, self-defense permits harm only to the aggressor, and is intended to reinforce the legal order by nullification of the injustice. Self-defense is intended to strengthen public trust in the efficacy of the legal order. Therefore, protecting the legal order forms one of the rationales for self-defense. Self-defense is "defending the victim's legal interests within the legal order."[29]

Third, if self-defense were based exclusively upon the rationale of the individual's autonomy, that is protection of his legitimate interests, which requires an individual to take reasonable measures, then retreat must be the means for warding off an attack, whenever possible. Therefore, there should exist a very strong duty of retreat.[30] Nevertheless, as a rule, if there is any duty of retreat associated with self-defense, it is quite limited. Any other approach would grant an unlawful aggressor an advantage over his victim, and could encourage violence.

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27. Fletcher, *supra* n. 1, at 802, 853.

28. *See* Andreas Hoyer, *Das Rechtsinstitut der Notwehr* [*The Legal Instrument of Self-Defense*], 1988 JuS 89; Mordechai Kremnitzer, *Proportionality and the Psychotic Aggressor: Another View*, 18 Isr. L. Rev. 178, 184 (1983); Guenter Spendel, *Leipziger Kommentar – Grosskommentar* [*Leipzig Commentary – Great Commentary*], 11 Auflage 32, ¶¶ 27, 38 (Berlin 1992). Spendel is of the opinion that in cases where the source of the danger is a reflexive action, or from a sleeping assailant, or even an attack by an animal, it is still a situation of self-defense.

29. Burkhard Koch, *Prinzipientheorie der Notwehreinschraenkungen* [*Theory of the Principles of Limitations on Self-Defense*], 104 ZStW 785, 790 (1992); *see* Kremnitzer, *supra* n. 28, at 183.

30. *See* Claus Roxin, *Sozialethische Einschraenkungen des Notwehrrechts* [*Socio-Ethical Limitations on Self-Defense*], 93 ZStW 68, 71, 76 (1981).

A strong duty of retreat must, therefore, be rejected.[31] The significance of this approach to the duty of retreat is that defending the legal order is a rationale of self-defense.

Fourth, were self-defense solely an expression of autonomy, we would find that when applied to a case of *actio illicita in causa*,[32] it would yield one of two possible results for a person who places himself in a situation of self-defense: either he would have no right of self-defense whatsoever, or he would have an unrestricted right of self-defense. However, a person who places himself in a situation requiring self-defense (*actio illicita in causa*) enjoys only a limited form of self-defense or loses his right, in accordance with his degree of culpability. For example, where a person intentionally places himself in the situation, he is deprived of any right of self-defense, while doing so negligently results in a narrow right of self-defense. What this means is that the law governing the case of a person who places himself in a situation of self-defense supports viewing the legal order as one of the rationales of self-defense.[33]

Self-defense, therefore, has a twofold rationale: protection of autonomy and protection the legal order. Thus, the justification for self-defense, and its conditions, must not only be consonant with those rationales, they must be expressions of those rationales.[34]

The first rationale of self-defense is that of protecting autonomy, which is the defending of personal legitimate interests of the victim. Protecting the autonomy of the individual does not require a culpable aggressor. The second rationale is the protection of the legal order. Clearly, an attack that warrants a response that constitutes self-defense must be act that infringes the legal order. Self-defense is not a substitute for punishment. Therefore, from this perspective, the attack need not constitute a criminal offense. Protection of the legal order means, first and foremost, preventing the commission of a wrongful act. Therefore, we require a human voluntary act.

Physical involuntariness does not produce an act, and therefore, there can be no self-defense. Likewise, there can be no self-defense in cases where the danger derives from a person but not from human conduct, as in the case of separating Siamese twins that requires allowing one to die in order that the other might live. In such a case, there can only be a defense of necessity.[35] The mental element is a necessary condition for establishing the wrongful nature of the act,[36] and as a result, preventing the commission of a wrongful act in defense of the legal order

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31. *See* Koch, *supra* n. 29, at 796; Kristian Kuehl, *Notwehr und Nothilfe* [*Self-Defense of Others*], 1993 JuS 177, 181; Roxin, *supra* n. 30, at 76.

32. *Actio illicita in causa* is a criminal law doctrine (theory) which, translated into English, means "causing the conditions of one's own defense."

33. *See* Roxin, *supra* n. 30, at 76, 85; Stratenwerth, *supra* n. 19, at 237.

34. *See* Juergen Schwabe, *Grenzen des Notwehrrechts* [*Limitations on Self-Defense*], 1974 NJW 670; Roxin, *supra* n. 30, at 70.

35. See the position of Re Brook L.J. in 4 All E.R. 1051 (2000) (case involving children who were conjoined twins).

36. *See* Fletcher, *supra* n. 1, at 476, 554; Albin Eser, *Justification and Excuse*, 24 Am. J. Comp. L. 621, 626 (1976).

means preventing the commission of an act performed with a mental element, including negligence. Inasmuch as justificatory defenses negate the wrongful character of an act, self-defense is possible when the attack does not qualify for a justificatory defense. When the attack falls within the scope of a justificatory defense, an excusing defense may be a possibility in exceptional circumstances.

The next important issue is whether the aggressor must also be culpable. It can be said that defending the legal order as a rationale for self-defense means preventing a wrongful act, but not necessarily a wrongful act attended by culpability. Culpability is blaming the actor for his wrongful act. Thus, culpability assumes the fulfillment of a wrongful act. While culpability can influence the severity of the wrongfulness of the act, it cannot negate it. Culpability has but one function in regard to an offense, and that is the justification of punishment. According to this argument, the aggressor's culpability is not a necessary precondition to self-defense. In self-defense, the right is manifested against the wrong (*In Notwehr wird das Recht gegenüber dem Unrecht behauptet*).[37]

Such an approach is possible and is required in the absence of an alternative like justifiable necessity. Consider, for example, English and Canadian law which remain unable to recognize justifiable necessity as a defense in criminal law.[38] Under English and Canadian law, self-defense requires only an unlawful act; it is possible even when the act lacks any mental element whatsoever, including negligence, as well as in the absence of culpability.[39] In the case of conjoined twins, Ward L.J. went so far as to state that an operation to separate the twins fell within the scope of self-defense: "Mary uses Jodie's heart and lungs to receive and use Jodie's oxygenated blood. This will cause Jodie's heart to fail and cause Jodie's death as surely as a slow drip of poison. How can it be just that Jodie should be required to tolerate that state of affairs?"[40] According to the approach of Ward L.J., the connection between the twins that threatens the life of one of them constitutes an unjust attack upon the other's life. Since there was no "act" by the sister whose connection threatens her twin, the significance of the position is that self-defense does not even require an act. This approach views the situation from the perspective of protecting the injured party. It categorizes any situation that threatens legitimate interests of another as falling within the scope of self-defense.[41]

As stated, this approach might be logical—and perhaps even required—when the legal system does not recognize justifiable necessity as a defense. In such a case, self-defense fulfills its characteristic role, as well as the role of

37. *See* Roxin, *supra* n. 15, at 535-39, 558.

38. On English law, see London Borough of Southwark v. Williams & another, 2 All E.R. 175 (C.A. 1971). On Canadian law, see Perka et al. v. The Queen, 14 C.C.C. (3d) 385, 397 (1985); R. v. Ruzic, 153 C.C.C. (3d) 1 (2001).

39. On English law, see John C. Smith & Brian Hogan, *Criminal Law* 258 (9th ed., London 1999). On Canadian Law, see Don Stuart, *Canadian Criminal Law* 475 (4th ed., Scarborough 2001).

40. Re A, 4 All E.R. 961, 1016 (2000) (involving conjoined twins).

41. *See* Jonathan Rogers, *Necessity, Private Defence and the Killing of Mary*, 2001 Crim. L. Rev. 515, 525.

justifiable necessity. In other words, self-defense comprises the defense of justifiable necessity. However, given the possibility of an alternative that recognizes justifiable necessity as a defense in criminal law, a different approach might be appropriate.

Self-defense protects the legitimate interests of the victim and defends the legal order, while the necessity defense protects only the legitimate interests of those endangered. Therefore, cases in which there is no real protection of the legal order fall within the scope of necessity as the residual defense framework. The conditions of self-defense must be examined not only in terms of the externalities of the situation (one person attacking another), but in accordance with its true, overall nature, including the internal factors of the aggressor, from the perspective of protecting the legal order. The starting point is, therefore, a comparison and contrast between the characteristic case of self-defense, in which we are concerned with protecting the legitimate interests of the victim, as well as the legal order (fending off an attack by a culpable aggressor), and a case of protecting only endangered legitimate interests (fending off an attack by an inculpable aggressor). In the typical case of self-defense, there is not only the prevention of an unlawful attack, but a message to the aggressor and to potential aggressors that in the absence of law enforcement authorities, any person is empowered to repel the aggression.

> [The] deterrent function of self-defense is dual in nature: on the one hand, the individual criminal is effectively deterred from carrying out his intention by the repulsion of his attack, and on the other, potential criminals are thereby made to realize that their aggressive intentions may be foiled not only by the legal authorities, who naturally cannot always be everywhere that crimes are committed, but also by the victim of their attack, who usually is at the scene of the crime, and by anyone else who may happen to be there.[42]

Of course, it can be argued that an absence of culpability does not negate the wrongful character of the act, but culpability is a necessary precondition to criminal liability as grounds for punishment. Criminal punishment is not without purpose. Its purpose is individual and general deterrence.[43] It is doubtful that the public interests in deterring the specific aggressor and potential aggressor in general are in any way served by the prevention of an unlawful attack by an inculpable aggressor.[44] Moreover, the extent of the violation to the legal order is far less in the case of an inculpable aggressor, like psychotics. A psychotic's dissociation from normative reality in regard to his act gives his actions a completely different significance than those of a sane actor in terms of the harm inflicted upon the legal order. An act by a psychotic aggressor is more like an act

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42. Kremnitzer, *supra* n. 28, at 190.

43. Even Kant, who is considered the founding father of the theory of retribution in punishment, recognized the general deterrence of penal norms.

44. *See* Christian Bertel, *Notwehr gegen verschuldete Angriffe* [*Self-Defense against Culpable Attacks*], 84 ZStW 1, 11 (1972); Kremnitzer, *supra* n. 28, at 195; Jescheck & Weigend, *supra* n. 18, at 345.

performed without any mental element. The rationale of protecting the legal order is thus not fully realized by preventing an inculpable act. Since self-defense is possible only when both rationales are fully met,[45] self-defense cannot apply in the case of an inculpable aggressor. Any other approach would require artificial distinctions.

Consider, for example, the case of an irresistible impulse that can, at times, negate the existence of an act, at other times deny the actor the capacity to form a mental element, or may at times render the actor culpable. From the substantive perspective of the event (we are concerned with a situation that is manifested in the actor in a variety of ways that are closely related and similar in significant ways), and from the point of view of protecting the legal order, we are concerned with very similar situations that should be treated alike. Therefore, just as self-defense is inappropriate in situations in which there is no act, or the act is unaccompanied by any mental element—which is Fletcher's view[46]—it is logically consistent to adopt the same approach in the third situation in which the actor's culpability is negated. Since self-defense is applicable only where both rationales are fully realized, and protecting the legal order in particular, the actor's culpability is a precondition to creating a situation of self-defense. In the absence of culpability, we can speak only of necessity, not of self-defense.

In summary, self-defense requires a culpable aggressor. Self-defense can be considered only in regard to acts that fully violate the legal order—cases in which there is a public interest in deterring both the individual aggressor and all potential aggressors. Therefore, in a situation of self-defense, the victim's course of action is not limited to means that will definitely protect him (*Schutzwehr*); he may employ means that will provide reasonable protection, including forms of defense that may constitute a counter-attack (*Trotzwehr*).[47]

Additionally, as a rule, there is no duty of retreat in cases of culpable aggression, since self-defense is intended to deter potential aggressors. Viewing retreat as a form of self-defense—for example, requiring that the victim back away—means granting criminals an unlawful right to take over certain areas and deny entry to law-abiding citizens, which would not be consistent with the criminal law's purpose of ensuring peace and tranquility.[48] This explains the broad scope of self-defense, which is the least restricted of the three "compulsion" defenses, the other two being necessity and duress.

As opposed to requiring the culpability of the aggressor, the alternative approach extends the scope of self-defense to include fending off an inculpable aggressor, and the only justification for self-defense is that of defending autonomy

45. *See* text accompanying *supra* n. 34.

46. *See* text accompanying *supra* n. 27.

47. *See* Jakobs, *supra* n. 15, at 392; Jescheck & Weigend, *supra* n. 18, at 343.

48. *See* Andrew J. Ashworth, *Self-Defence and the Right to Life*, 1975 Cambridge L.J. 282, 284; Kremnitzer, *supra* n. 28, at 178-79 n. 3; Roxin, *supra* n. 15, at 553. Where the attack is the result of negligence, or where the aggressor's culpability is less (but present), the violation of the legal order is not as great. Ashworth, *supra*, at 284. In such cases, the scope of self-defense is more limited, both in terms of proportionality and the duty of retreat. *Id.*

(protecting the victim's interests, like in necessity). If that is the case, a more limited scope of self-defense is required, at least in regard to an inculpable aggressor. In such cases, a victim must choose defensive means that constitute *Schutzwehr, nicht Trotzwehr.* In other words, he must act in a manner that definitely protects his legitimate interests.[49] Thus, in defending himself against an inculpable aggressor, the victim should be required to relinquish interests that are of lesser value. For example, he should stand aside to allow the aggressor to pass, and should even acquiesce to a minor injury, like being pushed. In addition, a strong requirement of retreat would not be out of place, not as a form of refraining from self-defense, but as a reasonable means for counteracting the danger. The victim should be required to withdraw when retreat would not endanger his life or limb.[50] Under this approach, the scope of the right to defend oneself in the framework of self-defense is not uniform, but changes in accordance with the situation. In the case of a culpable aggressor, the scope is very broad, and there is no duty to retreat,[51] as opposed to the more narrow scope of self-defense, and a duty of retreat in the case of an inculpable aggressor.

In our opinion, self-defense should be characterized by a more clear-cut definition that would comprise the patent cases of injury to the legal order, and which would account for the less restricted character of self-defense. Such an unambiguous definition of self-defense would be preferable to different types of self-defense. Such a definition sends a very clear message to the victim about the broad scope of his right to fend off an attack,[52] and to the aggressor as to the practical legal ramifications of his aggression. Moreover, there is a strong similarity between an actor who lacks the requisite mental element (e.g., due to unawareness of a circumstance or the possibility of the realization of the result) and the inculpable aggressor. In a sense, if we do not deem the latter to harm the legal order, then *a fortiori* an actor who, due to illness, is unable to appreciate the significance of his conduct should not be deemed to harm the legal order. Certainly, these two are far more alike than are the culpable aggressor and the inculpable aggressor.[53] The principle that like cases should be treated alike is appropriate here, and it requires viewing the two as instances of necessity, rather than self-defense. Moreover, if we view fending off an insane aggressor as a case of necessity, the law of necessity can be applied unchanged (especially the victim's "lack of reasonable alternative"),[54] and would be more appropriate. The necessity

49. Jescheck & Weigend, *supra* n. 18, at 343, 345.

50. *See* Roxin, *supra* n. 15, at 532, 539, 558.

51. Therefore, the conclusions of Fletcher's approach—no proportionality and no duty of retreat—give self-defense a very broad scope that should require the aggressor's culpability.

52. Of course, this is subject to the demands of proportionality.

53. *See* Roxin, *supra* n. 15, at 540 (according to whom the scope of self-defense in the case of an inculpable aggressor is very similar to the scope of necessity in the case of an aggressor who lacks any mental element).

54. *See* Koch, *supra* n. 29, at 794; Eberhard Schmidhaeuser, *Die Begruendung der Notwehr [Principle of Self-Defense]*, 1991 GA 97, 102.

defense is a residual framework that is appropriate for treating situations that are not entirely appropriate to self-defense.

V. THE APPLICATION OF KANT TO OUR SITUATION

Fletcher supports an approach to self-defense that does not require the culpability of the aggressor. In order to illustrate his point, he uses Kant's "plank case." Fletcher writes:

> Excuses are a relatively recent development on the stage of legal thought. In the eighteenth century, even the most advanced thinkers, such as Immanuel Kant, sought to solve the problem of responsibility not by applying excusing conditions but by limiting the scope of the relevant norms. . . .
>
> [In the plank case] [o]ur intuitions tell us that we should not punish this person who acted in order to save his own life. The question is why. Kant writes:
>
> > [T]here can be no *penal law* that would assign the death penalty to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself. For the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not save the effect intended, since a threat of an evil that is still *uncertain* (death by a judicial verdict) cannot outweigh the fear of an evil that is certain (*drowning*).
>
> . . .
>
> Though the life-saving act of the shipwrecked sailor is wrong, the actor enjoys a subjective or personal immunity from punishment. [According to Fletcher,] thus the life-threatening situation comes into relief [in modern law] as a basis for excusing conduct in the same way that the inner compulsion of the psychotic aggressor renders his conduct wrongful but excused.
>
> . . .
>
> Kant argued that the first occupier should have a right not merely of personal necessity but of self-defense against a wrongful aggress[or]. The difference, as he perceived it, was that while the shipwrecked sailor acts out of personal necessity, his aggression against the first occupier is nonetheless wrongful, a violation of his rights, and thus the first occupier is entitled to defend himself.[55]

Fletcher's Kantian approach can be summed up as follows: the person who pushes another off the plank, after he has grabbed hold, and thus kills him, enjoys a subjective defense, which is the defense of excusing necessity in modern law. A person does not have the right to save himself at the expense of the life of the person who grabbed the plank first, who is not a wrongful assailant. However, the person who grabbed the plank first and saved himself can claim the right of self-defense to prevent the other, who is a wrongful assailant, from grabbing on to the plank, and thus causing his death. Since, according to Fletcher, the situation of insanity is equivalent to a situation of necessity in which the actor saves his life at

55. Fletcher, *supra* n. 13, at 231-35.

the expense of another. Therefore, a person who defends himself against an attack by a psychotic (inculpable) assailant enjoys the right of self-defense.

We disagree with Fletcher's understanding of Kant, and indeed, we believe that Kant's approach does not support Fletcher's view of self-defense. On the contrary, Kant can be understood as requiring the culpability of the aggressor. It should first be pointed out that in his lectures,[56] Kant distinguishes between the case in which one person has already grabbed the plank and taken hold of it, and the case where two people are approaching the plank. Kant wrote:

> [T]he existence of a permissive law, in the case where preservation of life for two people would depend on possession of a thing. Can the other deprive a man who is already in possession of the thing, to ensure his own survival at the price of the other's life? By right of nature this is never so, precisely because the one to be despoiled already has possession, and is thereby protecting his life; the other's need can never give a coercive right, insofar as the ground of the action did not already rest beforehand on the legally valid right to coerce; for otherwise the other would already have had to possess the coercive right, and this is impossible. But the case is altered, if neither of the two was yet in possession of the thing, and both were endeavoring to seize possession of that whereby the life of one of them can be saved. In that case, no right subsists between them, whereby one could be coerced by the other, nor is there any means of preventing the natural urge to use force; if no concession is made, both lose their lives, whereas by the universal law the life of at least one of them should have been preserved; it is impossible, though, for either one to decide on employing the means to act in accordance with the principle; so force must be permitted, in order thereby to institute a right to preserve life. Here, too, therefore, the underlying maxim is that to institute a right, might precedes right, in accordance with a permissive law.[57]

However, the first case, in which one person has already grabbed hold of the plank, does not appear in *The Metaphysics of Morals*,[58] nor *In the Common saying, "This may be true in Theory, but does not apply in Practice."* The accepted understanding of Kant's approach to the first case is that a person has no right to save his own life by pushing off a person who already possesses the plank[59] and the defense of necessity.[60]

In regard to necessity (*ius necessitates*), Kant rejects the approach that grants legal right and license to a person under threat to save his own life at the expense of the legitimate interests of another. Taking a life is against the law. "For the issue here [referring to the case of the shipwrecked sailor] is not that of a wrongful

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56. Immanuel Kant, *Part IV. Kant on the Metaphysics of Morals: Vigilantius's Lecture Notes*, in *Lectures on Ethics* 279-80 (Peter Heath & J.B. Schneewind eds., Peter Heath trans., Cambridge U. Press 1997).

57. *Id.*

58. Imannuel Kant, *The Metaphysics of Morals* 60 (Mary Gregor ed. & trans., Cambridge U. Press 1991).

59. *See* Wilfried Kueper, *Immanuel Kant und das Brett des Karneades* [*The Plank of Carneades*] 36-43 (Heidelberg 1999).

60. *Id.*

assailant upon my life whom I forestall by depriving him his life."[61] However, a person cannot be required to refrain from saving his own life, as that would mean certain death. Therefore, he cannot be held criminally liable.

The reason for not imposing criminal liability is the ineffectiveness of the norm. The norm (the prohibition of killing) has no deterrent effect upon a person who faces certain death. The taking of a life is a wrongful and culpable act, but it is not punishable: "[T]he deed of saving one's life by violence [the violent act of self-preservation] is not to be *inculpable* (*inculpabile*) but only *unpunishable* (*impunibile*)."[62] The reason for freeing the actor from criminal liability does not derive from an excusing defense. The concept of "subjective excuse" according to Kant does not refer to an excusing defense that negates culpability. The concept of excuse was well known to eighteenth century philosophy,[63] and Kant was acquainted with it.[64] Kant's works expressly professed that killing is a culpable act (*straeflich*, culpable). In the case where death is an immediate certainty, no law can force a person not to save his own life "because there can be no law that might enjoin omission of the action *cum effectu*."[65] In other words, it is impossible for the actor to obey the law. The accepted understanding of Kant's approach is that in a situation of necessity the actor meets all of the elements of the offense, including culpability, but he is not held liable because the norm is without deterrent effect. The threat of punishing a potential actor is based upon general deterrence, which does not form part of the Kantian retributive punishment theory.[66]

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61. Kant, *supra* n. 58, at 60.

62. *Id.*

63. *See* Joachim Hruschka, *On the History of Justification and Excuse in Case of Necessity*, in *Festschrift Summers* 337, 341 (1994); Jan C. Joerden, *Wahlfachklausur – Rechtsphilosophie: Das Notrecht* [*Exam on the Subject of Legal Philosophy*], 1997 JuS 726; Wilfried Kueper, *Toetungsverbot und Lebensnotstand* [*Prohibition on Killing and Endangering Life Situations*], 1981 JuS 785, 786.

64. *See* Immanuel Kant, *Part II. Moral Philosophy: Collins's Lecture Notes*, in *Lectures on Ethics* 86-87 (Peter Heath & J.B. Schneewind eds., Peter Heath trans., Cambridge U. Press 1997); Paul Menzer, *Eine Vorlesung Kants ueber Ethik* [*A Kantian Lecture on Ethics*] 81 (Berlin 1924). Kant also employs the term "Entschuldigung," which means "excuse." In the translation of Vigilantius, the term "Entschuldigung" is imprecisely translated as "exculpation." Kant, *supra* n. 56, at 323.

65. Kant, *supra* n. 56, at 347.

66. *See* Sharon B. Byrd, *Strafgerechtigkeit bei Kant* [*Criminal Justice in Kant's Philosophy*], in *Festschrift fuer Lampert* 137 (St. Ottilien 1990); Allen D. Rosen, *Kant's Theory of Justice* 90, 104 (Cornell U. Press 1993); Wolfgang Schild, *Anmerkungen zur Straf- und Verbrechensphilosophie Immanuel Kant* [*Comments on Criminal Law Philosophy in Kant's Writing*], in *Festschrift fuer Gitter* 831, 834 (Wiesbaden, 1995); Sharon B. Byrd, *Kant's Theory of Punishment: Deterrence in its Threats, Retribution in its Execution*, 8 L. & Phil. 151, 180 (1989); Thomas E. Hill, *Kant on Wrongdoing, Desert, and Punishment*, 18 L. & Phil. 407 (1999); Thomas E. Hill, *Kant on Punishment: A Coherent Mix of Deterrence and Retribution?*, 5 Jahrbuch fuer Recht und Ethik 291 (1997); Dennis Klimchuk, *Necessity, Deterrence, and Standing*, 8 Leg. Theory 339, 345 (2002); Heinz Koriath, *Ueber Vereinigungstheorien als Rechtfertigung staatlicher Strafe* [*On the Unified Penal Theory as Justifying State Punishment*], 1995 Jura 625, 632 (expressing the opinion that Kant's theory of punishment does not rule out preventive aspects); Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. Rev. 621, 633 (2002); R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. Rich. L. Rev. 271, 285-89 (2002).

Professor Hruschka was a leading voice among those who argued that Kant viewed the plank case as one of excusing necessity. *See* Joachim Hruschka, *Zur Interpretation von Pufendorfs Zurechnungs und Notstandslehre in der Rechtslehre der Aufklaerung* [*On the Interpretation of Pufendorf's Theory of Imputation and Necessity in the Age of Enlightenment*], in *Die Hermeneutik im*

According to Kant, the situation of self-defense grants an objective right to act. In discussing the dual significance of the right, Kant juxtaposes the use of force with objective right and use of force without objective right. This is the sentence that juxtaposes self-defense, considered by Kant to be man's "sacred right,"[67] with necessity, which does not provide an objective right to use force. The distinction between self-defense and necessity derives from Kant's Doctrine of Right. According to Kant, the right is "the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom."[68] According to Kant, "choice" as a free act is expressed in the uniting of two elements, which are the capacity and the action. In Kant's words:

> The capacity for desiring in accordance with concepts, insofar as the ground determining it to action lies within itself and not in its object, is called the capacity for *doing or refraining from doing as one pleases.* Insofar as it is joined with one's consciousness of the capacity to bring about its object by one's action it is called the *capacity for choice.*[69]

In other words, when the action is the result of choice.[70] In this sense, the aggressor in the plank case also acts out of "choice," and is culpable.[71]

Kant's approach can, therefore, be understood as requiring the aggressor's culpability. According to Kant, in the plank case, the person who saves himself at the expense of another person's life fulfills all of the material elements of the offense, including culpability. Such a person is a wrongful assailant, and self-defense can be used against him as a "sacred right." This does not mean that Kant would endorse self-defense against an inculpable assailant, but quite the contrary. Since Kant did not recognize justifiable necessity, it can be argued that he would recognize the victim's right to defend himself, but by means of a special defense that would not be self-defense as a "sacred right."

Zeitalter der Aufklaerung 181, 193 (M. Beetz & G. Cacciatore eds., Koeln 2000); Joachim Hruschka, *Zurechnung und Notstand: Begriffsanalysen von Pufendorf bis Daries* [*Imputation and Necessity: An Analysis from Pufendorf to Darias*], in *Entwicklung der Methodenlehre in Rechtswissenschaft und Philosophie vom 16. bis zum 18. Jahrhundert* 163, 174 n. 62 (J. Schroeder ed., Stuttgart 1998); Hruschka, *supra* n. 63, at 342; Joachim Hruschka, *Verhaltensregeln und Zurechnungsregeln* [*Conduct Rules and Decision Rules*], 22 Rechtstheorie 449 (1991). Professor Hruschka, however, has recently changed his view and now believes that in the plank case the actor fulfills all of the elements of the offense, including culpability, but due to the ineffectiveness (of prevention) of the norm, no punishment is imposed. *See* Joachim Hruschka, *Die Notwehr im Zusammenhang von Kants Rechtslehre* [*Self-Defense in the Context of Kant's Legal Theory*], 115 ZStW 201, 218 (2003).

67. Wilfried Kueper, *Es kann keine Not geben, welche, was unrecht ist, gesetzmaessig macht* [*There could be no necessity that would make what is unlawful conform with law*], in *Festschrift fuer E.A. Wollf* 285, 289 n. 13 (Berlin 1998).

68. Kant, *supra* n. 58, at 56.

69. *Id.* at 41-42.

70. *See* Michael Pawlik, *Die Notwehr nach Kant und Hegel* [*Self-Defense According to Kant and Hegel*], 114 ZStW 259, 274 (2002).

71. It can be argued that Kant could accept, or at least does not deny, the position that the actor has a right to defend himself, perhaps by means of a special defense, but not by self-defense as a "sacred right." *See id.* at 275 n. 78.

VI. THE RATIONALES OF SELF-DEFENSE AND THE REQUIREMENT OF PROPORTIONALITY

The disagreement with Fletcher as to proportionality can also be explained according to a different view. As stated, it is Fletcher's opinion that the only rationale for self-defense is the protection of autonomy, which does not require proportionality. Autonomy is a person's private sphere in which he is free to do as he pleases on the condition that his actions do not endanger the sphere (legitimate interests) of others. According to this traditional view, which Fletcher accepts, and which derives from Kant, autonomy is an absolute right, and as the rationale of self-defense, it does not require proportionality.

However, truth be told, rejection of proportionality is not contingent upon viewing autonomy as the basis for self-defense. Even the traditional view of protection the legal order, in the sense of *Das Recht braucht dem Unrecht nicht zu weichen* ("Right need never yield to wrong"), is not contingent upon proportionality. If the defender must refrain from protecting his legitimate interests because of a lack of proportion, then that would mean that he is obligated to give way to the force of wrong (*Unrecht*). However, that sense of protecting the legal order is not accepted in modern law, and rightly so.

Protecting the legal order is not limited to preventing wrongful acts but comprises protecting all of society's legitimate interests, including those of the assailant. The theory of forfeiture of rights is no longer accepted, and the assailant does not lose all of his rights in a situation of self-defense.[72] The legitimate interests of the assailant, including his life, are granted legal protection, and defending the legal order means protecting those interests, as well. This sense of protecting the legal order also derives from the relationship between self-defense and the necessity defense.

Self-defense requires an unlawful attack, and it places the protection of the autonomy (legitimate interests) of the victim and the protection of the legal order against the infringement of the autonomy (legitimate interests) of the assailant. As opposed to self-defense, necessity—in its typical case—does not require an unlawful attack, and it places the protection of the defender's autonomy (legitimate interests) against the infringement of the victim's autonomy (legitimate interests) and injury to the legal order (since the victim is not a wrongful aggressor). If the victim in a case of necessity must give up his legitimate interest (in order to save an interest that is of significantly greater importance), then that means that the legal order does not provide absolute protection for autonomous spheres. If protecting the legal order meant absolute prevention from infringement of autonomy, then the defense of justifiable necessity—at least in the typical case—would not be recognized as a defense to criminal liability.[73] Moreover, the weight of the violation of the legal order is not uniform, but

72. *See* Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 Cal. L. Rev. 871, 883 (1976).

73. This is similar to the view of Kant.

changes in accordance with the weight of the threatened interest. Giving up the threatened interest (when the cost of saving it is enormous) does not bring down the legal order.

On the other hand, injuring a vital interest for the sake of preventing unlawful harm to a minor interest disrupts the legal order, as it expresses disdain for the vital interest. The rationale of protecting the legal order thus requires proportionality in self-defense. It would, therefore, appear that self-defense is founded upon two rationales: protecting autonomy, which does not require proportionality, and protecting the legal order, which requires proportionality.[74] Self-defense therefore requires proportionality. This approach is consistent with the universal view of the proportionality requirement, as found in English law,[75] American law,[76] Canadian law,[77] French law,[78] Swiss law,[79] Spanish law,[80] Austrian law,[81] Norwegian law,[82] and Finnish law.[83] This view of proportionality in self-defense has been accepted by Fletcher:

> Suppose that a liquor store owner has no means of preventing a thief from escaping with a few bottles of scotch except to shoot him. Most people would recoil from the notion that protecting property justifies shooting and risking the death of escaping thieves. It is better from a social point of view to suffer the theft of a few bottles of liquor than to inflict serious physical harm on a fellow human being.[84]

In our opinion, the logic of this view extends well beyond a few bottles of liquor, and applies to most cases of unlawful harm to property.

In general, killing an assailant in order to protect property is unjustified. This can be illustrated in a case from another perspective as well. Every person in society is under a duty of social solidarity. Of course, the duty of social solidarity

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74. *See* Roxin, *supra* n. 30, at 77.

75. *See* Smith & Hogan, *supra* n. 39, at 252.

76. *See* Ronald N. Boyce & Rollin M. Perkins, *Criminal Law and Procedure* 930 (8th ed., Found. Press 1999).

77. *See* Stuart, *supra* n. 39, at 475.

78. Under French law, self-defense does not permit protection of property by inflicting loss of life or serious bodily harm.

79. *See* Stratenwerth, *supra* n. 19, at 235. Under Swiss law, self-defense does not permit protection of property by inflicting loss of life or serious bodily harm.

80. Enrique G. Ordeig, *Rechtfertigung und Entschuldigung bei Befreiung aus besonderen Notlagen (Notwehr, Notstand, Pflichtenkollision) im spanischen Strafrecht [Justification and Excuse in the Context of Rescue from Emergency Situations]*, in *Rechtfertigung und Entschuldigung III* 71, 73 (Albin Eser & Walter Perron eds., Freiburg 1991).

81. *See* Egmont Foregger & Ernst E. Fabrizy, *Strafgesetzbuch Kurzkommentar [Short Commentary on Criminal Code]*, 7 Auflage 3 (Wien 1999).

82. *See* Johannes Andenaes, *Rechtswidrigkeit als Strafbarkeitsvoraussetzung [Wrongfulness as Condition of Criminal Liability]*, in *Rechtfertigung und Entschuldigung I* 437, 443 (Albin Eser & George P. Fletcher eds., Freiberg 1987).

83. See Tapio Lappi-Seppaelae, The Doctrine of Criminal Liability and the Draft Criminal Code for Finland, in Criminal Law Theory in Transition 214, 236 (Raimo Lathi & Kimmo Nuotio eds., Helsinki 1992).

84. George P. Fletcher, *A Crime of Self-Defense* 24 (Free Press 1988); *See* Jescheck & Wiegend, *supra* n. 18, at 348.

does not directly derive from the rationales of self-defense.[85] However, the duty does constitute a legal policy consideration deriving from the nature of criminal law as humane law. The demand for proportionality in self-defense is necessitated by the humane nature of criminal law. Thus, a humane criminal law cannot permit killing (or endangering) a thief. Any other approach would be inhumane, as it would not grant appropriate weight to the value of human life and would comprise the dangerous implication that property can be preferred over human life. Right (*Recht*) must sometimes retreat before wrong (*Unrecht*) in order to prevent bloodshed. As part of a humanistic approach to life, every life, even that of an assailant, is a person created in God's image. The aggressor is a human being, and he does not lose the protection of the law by his wrongful aggression. Every person, even the aggressor, has a legal right to the protection of his interests. A humane criminal law protects the life of the aggressor, and can allow killing him only when the threatened protected interest is of an existential nature. Therefore, the law of self-defense allows deadly force in order to prevent death or rape, but not simple assault or theft. The duty of social solidarity that leads to the narrowing of the scope of self-defense (e.g., by requiring proportionality) expresses social-ethics considerations and principles of a humane criminal law that apply to self-defense.[86]

In our opinion, this approach contributes to the consistency of the legal system, inasmuch as it is fully consonant with the rationales grounding justifiable necessity. This can be illustrated by the approaches of Kant and Hegel to self-defense and justifiable necessity.

As already stated, Kant did not recognize utilitarian justifiable necessity as a defense to criminal liability. In a situation of necessity, the actor's attack is wrongful, even where we are concerned with saving a life at the expense of damaging property. Kant states: "'Necessity has no law' (*necessitas non habet legem*). Yet there could be no necessity that would make what is wrong conform with law."[87]

Kant also does not recognize the duty of social solidarity that obliges every person to assist a person who is in danger. In a situation of necessity, the duty of solidarity (i.e., the duty to aid a person in danger) derives from moral theory. Such an obligation is not legally enforceable.[88] As for the moral duty, Kant is of the opinion that if a person "lets his maxim of being unwilling to assist others in turn when they are in need become public, that is, makes this a universal permissive law, then everyone would likewise deny him assistance when he

85. *See* Klaus Bernsmann, *Ueberlegungen zur toedlichen Notwehr bei nicht lebensbedrohlichen Angriffen* [*Thoughts on Deadly Self-Defense in Cases of Non-Lethal Attacks*], 104 ZStW 290, 310 (1992); Pawlik, *supra* n. 70, at 264; Renzikowski, *supra* n. 14, at 108-10.

86. *See* Koch, *supra* n. 29, at 785. See generally English, American, French, Swiss, and Belgian law, in which self-defense does not permit causing death or serious bodily harm for the purpose of protecting property.

87. Kant, *supra* n. 58, at 60.

88. 88.Kueper, *supra* n. 59, at 12; *see* Leslie A. Mulholland, *Kant's System of Rights* 188 (Colum. U. Press 1990); Ernest J. Weinrib, *Poverty and Property in Kant's System*, 78 Notre Dame L. Rev. 795, 799 (2003); Wright, *supra* n. 66, at 307-13.

himself is in need, or at least would be authorized to deny it."[89] Indeed, if we do not recognize social solidarity as a legal duty, then it follows that we cannot recognize justifiable necessity based upon social solidarity.

Kant views self-defense as a "sacred right,"[90] and as an objective right that grants the victim the right to employ force. The right to self-defense is connected with an authorization to use coercion. According to Kant, retreat is a form of relinquishing and negating self-defense. Therefore, a defender is not required to retreat.[91] The right to self-defense is not conditional upon proportionality; that is, it cannot be lessened due to considerations of proportion. If the legislature does so, the narrowing of the defense is unjustified. Kant replaced the term, then common for self-defense, *inculparae tatelae moderatio*, with the term "*ius inculpatae tatelae*."[92] The dropping of the word *moderatio* can be understood as expressing the utter rejection of proportionality in self-defense. Self-defense exists even when the relationship between the harm to be prevented and the harm caused is disproportional. It may be that Kant's position in regard to proportionality is tied to the fact that he does not recognize a legal duty of social solidarity. Just as Kant views social solidarity to be a moral duty, so he views consideration for the assailant to be a matter of moral theory. Thus, a "recommendation to show moderation (*moderamen*) belongs not to [r]ight but only to ethics."[93]

Hegel accepts the duty of social solidarity imposed upon every citizen, and therefore, Hegel recognizes justifiable necessity. Hegel considers the case of harming property as a means of avoiding a threat to life:

> The particularity of the interests of the natural will, taken in their entirety as a single whole, is personal existence or life. In extreme danger and in conflict with the rightful property of someone else, this life may claim (as a right, not a mercy) a right of distress, because in such a situation there is on the one hand an infinite injury to a man's existence and the consequent loss of rights altogether, and on the other hand only an injury to a single restricted embodiment of freedom, and this implies a recognition both of right as such and also of the injured man's capacity for rights, because the injury affects only *this* property of his.[94]

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89. Kant, *supra* n. 58, at 247.

90. *See* Keuper, *supra* n. 67.

91. *See* Kant, *supra* n. 58, at 253 (noting that self-defense is not merely a right but a duty).

92. *See id.* at 60.

93. *Id.* It should be noted that Kant's *Gesammelte Schriften* rejects the idea that the legislature can limit the scope of self-defense in cases of protecting life. Kant is of the opinion that:

> If my life is possibly but not certainly endangered, the state cannot enact a moderating law [a law that forbids me to protect my life] because 1) the most severe punishment that the state can impose is not greater than the present evil. The law cannot prevent me from protecting my life. Such a law would be absurd. 2) Such a law would be unjust because if the state cannot protect me then it cannot issue commands.

XXV 2.2, 1374 (Naturrecht Feyerabend) (translated into English from German).

94. George Wilhelm Friedrich Hegel, *Philosophy of Right* 85-86 (T.M. Knox trans., Oxford U. Press 1952).

Because Hegel views man as a social being who is under a legal duty of social solidarity, the demand for proportionality in self-defense (or at least the option of state imposition of such a limitation) is consistent with his approach, even if he does not say so explicitly.[95]

The following picture arises from examining the views of Kant and Hegel: Kant does not recognize a duty of social solidarity as a general legal obligation (but only as a moral obligation). Therefore, Kant does not recognize necessity based upon utilitarian considerations as a justificatory defense, nor does he recognize any proportionality requirement in self-defense. In opposition to Kant, Hegel recognizes a general legal duty of social solidarity. Therefore, he recognizes justifiable necessity as a defense to criminal liability and opens the door to limiting self-defense by a proportionality requirement. We hypothesize, based on both views, that if Kant had recognized social solidarity as a general legal duty (and not merely a moral duty), he would have recognized justifiable necessity, and may even have accepted proportionality as a limitation upon justifiable self-defense. Moreover, as stated, Kant recognizes a moral, rather than a legal obligation of social solidarity because he assumes the perspective of a rational and intelligent person, who willingly helps his fellow. In other words, there is no need for a legal duty of social solidarity because a person voluntarily fulfills his moral duty of social solidarity. Kant's perspective is that of the ideal man, which does not reflect actual man. We believe that Sir Isaiah Berlin was correct in pointing out that "this is a counsel of perfection";[96] that is, an unattainable ideal.

From the average person's point of view, who is not necessarily rational and ideal, a minimal obligation of social solidarity should be recognized as a general legal obligation, and thus utilitarian-based necessity and proportionality in self-defense should be recognized.[97] This approach is consistent with John Rawls's theory of the "veil of ignorance," which relies upon Kant's moral theory, particularly in regard to the moral duty to help others.[98]

The citizens stand behind the "veil of ignorance." If the citizens have to agree upon binding rules of conduct, it may be assumed that they would consent to subject themselves to a duty of rescue, even if only on the basis of mutual insurance, which also arises from Kant's statement above.[99] Rawls's "veil of ignorance" theory allows us to recognize justifiable necessity and the requirement of proportionality in self-defense.[100]

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95. See Pawlik, *supra* n. 70, at 282 (discussing self-defense according to Hegel).

96. Isaiah Berlin, *Four Essays on Liberty* 153 (Oxford U. Press 1969).

97. *See* George P. Fletcher, *The Right and the Reasonable*, in *Justification and Excuse* vol. 1, 67, 95 (Albin Eser & George P. Fletcher eds., Freiburg 1987); Jakobs, *supra* n. 15, at 401, 409 (presenting the duty of social solidarity as a justification for justifiable necessity based upon utilitarianism, and for the proportionality requirement in self-defense); Kremnitzer, *supra* n. 28, at 184, 188.

98. John Rawls, *A Theory of Justice* 136 (Harv. U. Press 1971).

99. *See* text accompanying *supra* n. 88.

100. *See* Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 Yale L.J. 247, 266 (1980) (presenting Kant's moral theory as a basis for justifying a legal duty to help others).

As previously mentioned, both Kant and Fletcher view man as autonomous, and Fletcher likens this to the sovereignty of states.[101] This view is not entirely compatible with the concept of a person as a citizen of society, and with the role of the law. The role of the criminal law is to ensure the communal life of free people. Society is the shared life of all the individuals. The central principle upon which communal life is founded is that of autonomy, but it is not the only principle. A degree of social solidarity is also required, or there could be no organized community. Social solidarity allows a certain measure of infringement on the legitimate interests of the individual, and in exceptional cases, obligates the individual to relinquish his legitimate interests in order to preserve the legitimate interests of others. If we expect a member of society to risk his life in battle—or in the words of Hegel, "if the state claims life, the individual must surrender it"[102]—then society is not quite a federation of independent "entities."

At the base of our concept of the law stands the recognition of man as a free creature, who develops his body and mind as he chooses, but who does so within the social framework to which he is connected and upon which he depends. A person does not live on a remote island, but in society and as part of society. It is precisely because liberal society views the protection of fundamental rights of individuals to be one of the primary functions of the state that makes it unjustified for an individual to be hostile to society or to try to free himself of it. As stated, there are grounds for imposing a minimal duty of social solidarity.

No comparison can be drawn between a person and a sovereign state, or between self-defense and states at war. If self-defense really were like war, it would not be limited by a condition of the necessity for defensive force.[103] Moreover, if we view people as analogous to sovereign states, it is questionable whether self-defense could allow a person to come to the aid of another to defend him from attack.[104]

When the modern criminal law recognizes utilitarian-based necessity as a defense to criminal responsibility, as is Fletcher's view,[105] it only follows that we recognize a legal duty of social solidarity as the basis and justification for proportionality in self-defense. The law recognizes the tremendous difference between the right to property and the right to life, and thus justifies obliging a person to acquiesce to damage to his property in order to save a life. It is difficult to understand why that same principle should not be expressed in the opposite case, so that protecting property against an unlawful attack should not justify taking the life of the assailant.

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101. *See* Fletcher, *supra* n. 84, at 32; Fletcher, *supra* n. 2, at 387; Pawlik, *supra* n. 70, at 227 (discussing Kant's view).

102. Hegel, *supra* n. 94, at 241.

103. *See* Jescheck & Weigend, *supra* n. 18, at 337.

104. *See id.*; Kremnitzer, *supra* n. 28, at 183 n. 12.

105. Fletcher, *supra* n. 1, at 774.

VII. PROPORTIONALITY AND CONSTITUTIONAL LAW

The demand for proportionality can also be premised upon constitutional considerations.[106] In modern law, particularly the states that have adopted modern constitutions in the twentieth century, fundamental human rights are not limited to negative rights. Modern constitutions also grant positive rights, in the sense that a person can demand that the state guarantee his fundamental rights, and the state is obliged not only to respect those rights, but also to actively protect them.[107] The more important a fundamental right, the more comprehensive the protection of that right.[108] An assailant does not lose his fundamental rights in a situation of self-defense. The assailant is entitled to the constitutional protections offered by the state.[109]

In a case of self-defense, we are therefore concerned with fending off the assailant's unlawful attack, that is, the prevention of an unlawful injury to the legitimate interests of the victim by means of harming the interests of the assailant. From this standpoint, and from that of the state, self-defense presents a conflict between the state's duty to protect the legitimate interests of the victim and its duty to protect the interests of the assailant.[110] Therefore, the right of the victim to defend himself, as a right derived from the state's duty to protect the legitimate interests of individuals,[111] cannot be unlimited.

The choice presented by the state's duty must find its expression in a compromise intended to supply reasonable protection of the legitimate interests of both the assailant and his victim (with consideration given to preserving the legal order). In terms of the actual constitutional protection of fundamental rights, it makes no difference whether we are looking at the assailant or the victim.[112] However, the scope of protection differs. Since the assailant is the one who unlawfully endangers the interests of the victim, and the victim is only warding off

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106. See the discussion in Andrew J. Ashworth, *Principles of Criminal Law* 139 (3d ed., Oxford U. Press 1999); Bernsmann, *supra* n. 85 (on limiting the scope of self-defense by means of a requirement of proportionality by the European Convention on Human Rights and the German Constitution); and Ashworth, *supra* n. 48, at 282.

107. *See* Kadish, *supra* n. 72, at 871; Fiona Leverick, *Is English Self-Defense Law Incompatible with Article 2 of the ECHR?*, 2002 Crim. L. Rev. 347, 349.

108. *See* 39 BVerfG 1, 47 (1975) (decision of the German Constitutional Court); Ashworth, *supra* n. 106, at 140.

109. *Andronicou & Constantinou v. Cyprus*, 25 Eur. H.R. Rep. 491 (1998); *see* Ashworth, *supra* n. 106, at 69, 140; Andrew J. Ashworth, *Commentary on Human Rights*, 1998 Crim. L. Rev. 823, 824; Bernsmann, *supra* n. 85; Koch, *supra* n. 29, at 807.

110. We cannot accept the argument of John C Smith, *Surgical Separation: Case Comment on Re: A (Children)*, 2001 Crim. L. Rev. 400, 403; and Jescheck & Weigend, *supra* n. 18, at 349 (according to which the European Convention of Human Rights applies to states but not to individuals in self-defense cases, or that it does not apply because self-defense is not an instance of "intentionally killing"; the very justification for the existence of the state is the protection of the legitimate interests of individuals, particularly that of life). *See* McCain et al. v. U.K., 21 Eur. H.R. Rep. 97 (1996); A v. U.K., 27 Eur. H.R. Rep. 611 (1999); Ashworth, *supra* n. 106, at 62, 69; Francis G. Jacobs & Robin C.A. White, *The European Convention on Human Rights* 18 (2d ed., Oxford U. Press 1996); Leverick, *supra* n. 107, at 350, 358.

111. *See* Koch, *supra* n. 29, at 789.

112. *See* Bernsmann, *supra* n. 85, at 290, 292, 302.

the assault (i.e., protecting his interests or the interests of another and returning the assailant to the proper legal status), the unlawful attack is a consideration that weighs against the assailant. However, a consideration to the assailant's detriment does not translate into a total abandonment of proportion that grants the victim an unlimited right to protect his interests, regardless of the cost to the assailant. Self-defense requires proportionality in the sense that the harm caused must not be disproportional to the harm prevented. Where we are considering endangering the assailant's life, we are concerned with preventing harm to the life or physical or sexual integrity of the victim. The demand for proportionality thus derives from the reasonableness requirements of a society's constitution.[113]

Moreover, self-defense is intended to preserve the legal order by granting every person the right to fend off unlawful attacks. Protecting the legal order is, first and foremost, the role of the state, by means of its law enforcement agencies. This derives from the state's absolute monopoly over the use of force. The right to employ force under conditions of self-defense is a right that is derived from the state's right and duty to preserve the legal order. It is an exception to the prohibition upon the use of force by individuals. A person acting in self-defense is a "substitute policeman." Therefore, if the authority of state agencies to employ force in situations of self-defense is limited by the requirement of proportionality—which is generally agreed to be the case[114]—then the right of an individual to employ force must similarly be limited in situations of self-defense. Inasmuch as an individual's right to self-defense forms an exception to the state's monopoly on the use of force, it would not be proper for the scope of an individual's right of self-defense to exceed that of the state.[115]

113. *See* Ashworth, *supra* n. 106, at 69, 142; A.P. Simester & G.R. Sullivan, *Criminal Law* 630 (2d ed., Oxford U. Press 2003).

114. *See* Jochen Abr. Frowein, *Im Zweifel fuer den vielleicht toedlichen Schuss? [In Dubio Pro Potentially Deadly Shot]*, in *Festschrift fuer P. Schneider* 112 (Frankfurt 1990); John C. Smith, *Using Force in Self-Defence and the Prevention of Crime*, 1994 C.L.P. 101.

115. *See* Friedrich-Christian Schroeder, *Die Notwehr als Indikator politischer Grundanschauungen [Self-Defense as Indicator of Political Stance]*, in *Festschrift fuer R. Maurach* 127, 138 (Karlsruhe 1972).