South Carolina Law Review

Volume 73
Issue 2 *WINTER 2021*

Article 4

2021

What U.S. Law Reformers Can Learn from Germany's Value-Explicit Approach to Self-Defense

T. Markus Funk
University of Colorado Law School

WHAT U.S. LAW REFORMERS CAN LEARN FROM GERMANY'S VALUE-EXPLICIT APPROACH TO SELF-DEFENSE

By T. Markus Funk, Ph.D.*

The exercise of self-preferential force to fend off an actual or perceived threat finds itself at the center of today's simmering criminal justice reform debate. Particularly in the wake of November 2021's Kyle Rittenhouse acquittal and the Travis and George McMichael convictions, never before has where—and how—to draw the boundary between governmental power and individual rights received so much attention. Unfortunately, the scholarship on this core criminal law topic has largely atrophied. We seem to be making little progress when it comes to gaining a better understanding of when, how, and why the state should authorize defensive force.

Sometimes a look beyond our own borders is needed to kick-start reform-minded thinking. Whether in the context of police use of force, battered intimate partner cases, or other defense of person or property situations, no group of scholars has given the critical value-judgments anchoring this "ancient civil right" more attention than those in Germany's legal academy. But despite a scholarly output on these topics that is unsurpassed in terms of both analytical depth and sheer volume, surprisingly little is known in the English-speaking world about Germany's unique approach to this contentious topic.

What makes this myopia particularly unfortunate is that, while legal commentators in the United States and elsewhere focus almost exclusively on the criminal law's outcome-driven "technical" aspects and rules, generations of German scholars have rooted out the complexities involved. For decades they have uniquely engaged in deep discussions over the bedrock values at play when a justice system authorizes one citizen to kill another in self-defense. This Article argues that U.S. scholars, policy-makers, judges, media commentators, and criminal law practitioners interested in

* T. Markus Funk, who serves as a Lecturer in Law at the University of Colorado, previously taught criminal law at the University of Oxford (where he also received his Ph.D.), the University of Chicago, Northwestern University, Loyola University (Chicago), and University of Denver. From 2000–10 he served as a federal prosecutor in Chicago, and as a Section Chief with the U.S. State Department–Balkans (Kosovo). He started his career as a law clerk to Judges Morris S. Arnold (U.S. Court of Appeals for the Eight Circuit) and Catherine D. Perry (U.S. District Court). A member of the American Law Institute and author of nine books, Markus's doctoral work at Oxford focused on self-defense law generally, and German self-defense law specifically. He presently serves as the Firmwide Chair of a global law firm's White Collar & Investigations Practice. Portions of this Article are adapted with permission from his book RETHINKING SELF-DEFENCE: THE "ANCIENT RIGHT'S" RATIONALE DISENTANGLED (2021).

meaningful criminal justice reform have much to gain by understanding Germany's transparent, value-driven approach.

The goal here, then, is both descriptive and proscriptive. It will provide the first fully comprehensive English-language analysis (and critique) of Germany's storied self-defense law. But more than that, it will put on firmer footing the means of analyzing self-defense's critical value-judgments that are all but ignored in the English-language literature.

This is among the most important times in recent history for our justice system to shore up its moral credibility. By following (and improving on) the German model's unique focus on the values grounding self-defense, rather than remaining fixated simply on rules and outcomes, we position ourselves to significantly reduce the corrosive role played by hidden normativity and buried baselines. This, in turn, will advance the type of transparent and democratic decision-making necessary for legislators in the U.S. and elsewhere to succeed in finally making thoughtful choices among available self-defense options.

I. INTRODUCTION

Cicero famously described self-defense, which he and his contemporaries prized as *the* ultimate pre-legal civil right, as a "universal natural moral law" (or, in the words of Austrian legal philosopher Hans Kelsen, a *Grundnorm*—a fundamental rule that serves as the basis of a particular legal system[1]).[2] As such, he said, it is timeless, lacks a history, and, consequently, is incapable of being abrogated or otherwise altered.

At first blush, this might sound persuasive enough; but upon closer examination, it becomes clear that self-defense, although certainly a foundational right, is not an unchanging monolith. After all, depending on how the defense is drafted and then applied, the real-world results can vary widely. The challenge in the United States, England, and elsewhere is that, despite self-defense being one of the most debated subjects, where personal (and largely hidden) value-judgments play an outcome-determinative role, it

1. HANS KELSEN, PURE THEORY OF LAW 208–09 (Max Knight trans., 1967); *see also* J. W. Harris, *When and Why Does the Grundnorm Change*, 29 CAMBRIDGE L.J. 103, 106–117 (1971).

2. CICERO, DE RE PUBLICA; DE LEGIBUS [ON THE REPUBLIC; ON THE LAWS] 211 (Clinton Walker Keyes trans., Harv. Univ. Press 1928). In truth, many have considered the right to exercise self-preferential deadly (and non-deadly) force a—or even *the*—foundational right. *See, e.g.*, GIOVANNI DA LEGNANO, TRACTATUS DE BELLO, DE REPRESALIIS ET DE DUELLO [TREATISE ON WAR, RETALIATION AND DUELING] 278 (Thomas Erskine Holland ed., James Leslie Brierly, trans., Oxford Univ. Press 1917) (1360) ("[S]elf-defense proceeds from natural law, and not from positive law, civil or canon."); David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 62 (2007) (discussing HONORÉ BONET, THE TREE OF BATTLES (G.W. Coopland trans., Harvard Univ. Press 1949) (late 14th century) and concluding that "the defense of the innocent needed no license from the sovereign"); Arrigo Cavaglieri, *Introduction* to PIERINO BELLI, DE RE MILITARI ET BELLO TRACTATUS [A Treatise on Military Matters and Warfare] 61 (Herbert C. Nutting, trans., William S. Hein 1995) (1563) ("Surely nature teaches us to oppose force with force, and arms with arms."); 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 403 n.3 (Richard Tuck ed., Liberty Fund 2005) (1625) ("In Reality, the Care of defending one's Life is a Thing to which we are obliged, not a bare Permission."); 2 SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS 198 (Basil Kennet trans., 1729) (1672) (claiming that "Defence is a Thing of more ancient Date than any civil Command," meaning no state can legitimately forbid self-defense); EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY 111 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758) ("Self-preservation is not only a natural right, but an obligation imposed by nature, and no man can entirely and absolutely renounce it."); JOHANN WOLFGANG TEXTOR, SYNOPSIS OF THE LAW OF NATIONS (Ludwig von Bar ed., John Pawley Bate trans., William S. Hein 1995) (1680) (describing as lawful the use of deadly force against deadly attack, rape, or "mayhem"); 2 JEAN-JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 446 (Petter Korkman ed., Thomas Nugent trans., Liberty Fund 2006) (1763) (concluding that all men have a "right of endeavoring to provide for their safety and happiness, and of employing force and arms against those who declare themselves their enemies"). *See also* Will Tysse, *The Roman Legal Treatment of Self Defense and the Private Possession of Weapons in the* Codex Justinianus, 16 J. FIREARMS & PUB. POL'Y 163, 165 (2004) ("Roman law was very protective of the individual's right to defend himself and his property from violence, whether offered by a thief on a darkened highway or a soldier in search of plunder.").

is commonly conceived of as little more than a collection of purportedly objective and neutral actions, circumstances, and (desired) outcomes.

Even a person entirely untrained in the law will have an opinion—often passionately held—about self-defense. For instance, an opinion as to whether the Wisconsin jury appropriately matched the facts with the law on November 19, 2021 when it acquitted Kyle Rittenhouse of all charges on the basis of self-defense, or if the Georgia jury was right to reject Travis McMichael's self-defense claims in its November 21, 2021 conviction of McMichael and two others.[3] At the risk of noting the obvious, both of these cases required the criminal justice system to resolve challenging questions of law, fact, and morality. Yet, in the U.S., legislators as a rule fail to take a closer look at the often nuanced value-judgments we all make when we think about a "just result" in these cases.

What we see is that, although Cicero (and many of those who followed) may conceive of the right to exercise self-preferential force as a static, pre-legal natural right, what that right in practice looks like—and, more importantly, *should* look like—has occupied lawmakers and lawgivers the world over for centuries. And no group of legal commentators has paid more attention to the problems of classification, arrangement, balancing, and justifying the law of self-defense than the Germans. Academics in the U.S. and England can point to a modest collection of scholarly works that touch on how *values*—or, more to the point, the accommodation between "competing" values—drive self-defense analysis.[4]

In contrast, in German scholarship,[5] we find hundreds of exceptionally nuanced discussions concerning when—and, critically, *why*—the state should

3. *See generally* T. Markus Funk, *The Rittenhouse Case—Misunderstanding When Provocative Acts Bar Self-Defense*, BOOMBERG LAW (fortcoming 2022; manuscript on file with author); Other examples abound: did Neighborhood Watch captain George Zimmerman have the right to shoot unarmed black teenager Trayvon Martin?; was Atlanta Police Officer Garrett Rolfe justified when he shot at the apparently fleeing Rayshard Brooks in an Atlanta parking lot?; did Louisville police officers act within their rights when their bullets hit medical worker Breonna Taylor?; should Markus Kaarma have been sentenced to seventy years' imprisonment for shooting a German high school exchange student who engaged in a local tradition of "garage hopping"?; and did retiree Joe Horn act lawfully when he used his shotgun to kill two men he suspected of burglarizing his neighbor's home?

4. *See, e.g.*, FIONA LEVERICK, KILLING IN SELF-DEFENCE 151 (2006); ROBERT F. SCHOPP, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 83–84 (1998); George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 968–71 (1985); Andrew .J. Ashworth, *Self-Defence and the Right to Life*, 34 CAMBRIDGE L.J. 282, 289 (1975).

5. By way of some background on the German system, the opinion—and in particular the majority or consensus opinion (*Herrschende Meinung*)—of German scholars is particularly important in Germany, where the courts, following the system of codification, do not follow *stare decisis* and routinely cite to such scholarly majority, minority, and growing minority positions. *See* Stefan Vogenauer, *An Empire of Light? Learning and Lawmaking in the History of German Law*, 64 CAMBRIDGE L.J. 481, 486 (2005). Reflective of the long historical link between academics and the

authorize deadly force in self-defense.[6] Consider by way of illustration Professor Volker Erb. In his 257-page section on self-defense, which is in the influential *Münchener Kommentar zum Strafgesetzbuch* (4th edition), he devotes eight full sections just to evaluating when, how, and why "man traps" (automatic defensive mechanisms, boards with nails, electric fences, pits, attack dogs, etc.) can qualify as legitimate defensive force.[7] Erb's section, far from a total outlier in terms of its nuance, contains 577 footnotes and totals over 152,000 words.

The leading textbooks in the U.S. and England, in stark contrast, devote, on average, a scant twenty-five pages or less to the "mechanics" of self-defense. They also almost never grapple with the much more important question of what values and value-judgments we ought to consider under different factual scenarios. Indeed, it is fair to say that an analysis as comprehensive as Erb's does not exist in the English language (and, again, though influential, he is but one of many prominent German scholars to examine this topic).

In sum, the perhaps immodest goal here is to inspire a fundamental rethinking, through the vehicle of Germany's past and present law, of how we approach self-defense. We then shine a critical light on the extent to which German legal analysis delivers on its key lauded benefit, namely, its value-explicit approach. Put another way, we want to see whether the German approach actually significantly facilitates transparent and democratic decision-making, and whether it results in more thoughtful choices among

---

bench, in the past, academic jurists and judges engaged in the practice of *Aktenversendung*, by which a court dispatched the whole written record of the case to a university law faculty and asked for its collective opinion on a particular legal question. *See id*.; Mathias Reimann, *Roman Law as a Political Agenda*, 89 MICH. L. REV. 1679, 1685 n.18 (1991).

6. *See generally* FUNK, *supra* note *, at 134–63. This is certainly nothing new for German legal scholars. Even outside of the study of self-defense law, German legal scholars have long had a reputation for being "intensely preoccupied with the idea of law as a science" and for refining the study of law "more highly than any other contemporary legal culture." Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 837–38 (1990). *See also* Robert C. Post, *Academic Freedom and Legal Scholarship*, 64 J. LEGAL EDUC. 530, 530 (2015) ("It is only when American scholars after the Civil War became infected with the German ideal of *Wissenschaft*, with the idea of systematizing and expanding knowledge, that American universities began to change their educational aspirations."); Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 NEW ENG. L. REV. 251, 274 (2004) (noting that German scholars are characterized by their use of the scientific method and "long hours in the library and absolute fidelity to source"). The result is that lawyers around the world have long considered German *Rechtswissenschaft* (literally "legal science," or "jurisprudence") both a reference point and a model.

7. Volker Erb, *Notwehr* [*Self-Defense*]*, in* 1 MÜNCHNER KOMMENTAR ZUM STRAFGESETZBUCH [MUNICH COMMENTARY ON TEH CRIMINAL CODE] (forthcoming 2021) (manuscript at side-notes 173–80) (on file with author) (Ger.). Note that German textbooks typically refer to "Vorbemerkung" and "Randnote"—the former refers to sections providing "introductory comment," and the latter to the "side-note" or "margin-note" accompanying the particular section; for consistency's sake, this Article will throughout refer to "Vorbemerkung" and "side-note."

available options, while concurrently limiting the corrosive role of hidden normativity and its undiscussed baselines.

II. UNDERSTANDING THE CHIEF PROMISE OF GERMAN SELF-DEFENSE SCHOLARSHIP: ITS CONSIDERATION OF *WHAT* VALUES MATTER (AND *WHY*)

As noted, the inspirational aspect of Germany's approach to self-defense law is that all law reform proposals are uniquely viewed through the lens of (1) how a particular proposed outcome accounts for, and responds to (2) a particular, agreed-upon set of values the German law deems important and seeks to protect. But although the German law is certainly successful in highlighting the importance of explicitly considering the role of bedrock values on self-defense decisions, as we shall see the law for no good reason omits other important values.

More specifically, I will compare Germany's value-centric approach with what I have introduced elsewhere as the "value-based model" of self-defense.[8] In broad terms, the value-based model's contribution is that it for the first time in a holistic manner considers the interplay between the values of: reducing overall societal violence; protecting the individual attacker's (presumptive) right to life; maintaining the equal standing between people; protecting the defender's autonomy; ensuring the primacy of the legal process; maintaining the moral legitimacy of the criminal law; and deterring attacks.[9]

A. Example #1: The German "Fruit Thief" Case

Let us begin our deliberations over the proper role of value-judgments in self-defense cases by considering the 1920s case involving a pair of German fruit thieves and their encounter with an orchard-owning farmer armed with a shotgun and accompanied by his dog.[10] This case, which most readers (whether trained in law or not) will have an intuitive reaction to, has been examined extensively in the German literature, yet remains almost unmentioned in the English-language scholarship. That is a shame because it offers a somewhat jarring introduction to how pre-World War II German

8. *See* FUNK, *supra* note 1, at 12–68, 93–132.

9. *See id.* at 12–74.

10. CARL-FRIEDRICH VON SCHERENBERG, DIE SOZIALETHISCHEN EINSCHRÄNKUNGEN DER NOTWEHR [THE SOCIOETHICAL RESTRICTIONS OF SELF-DEFENSE] 22–23 (2009) (discussing Reichsgericht [RG] [Reich Court of Justice] Sept. 20, 1920, 55 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 82, 83 (Ger.)); *see also* Erb, *supra* note 7, at side-note 217 (Ger.). German law has always interpreted the "self" to include property and other personal interests beyond mere bodily integrity.

scholars and courts approached self-defense cases and how that way of thinking changed over time.

In the case, the German Supreme Court faced a situation where the farmer, who interrupted thieves stealing fruit from his trees, realized that the thieves were running away with a bag of fruit. The farmer, having no way of catching the escaping fruit thieves, shot at them.

With these largely undisputed facts before it, the court ruled that the farmer, who shot and seriously injured one of the fleeing thieves, acted within his rights in defense of his property. According to the court, because the farmer used the only available means of ensuring the protection of a legally-recognized personal interest (his fruit), his actions fell within the penumbra of self-defense. More specifically, the court found that the farmer's use of potentially deadly force was justified because shooting the thieves was the only way the farmer could stop them from permanently dispossessing the farmer of his property.[11] Even though the tangible interest the farmer was protecting was nothing more than a bag of fruit, and the potential cost was the thieves' life, there is little dispute that the ruling was in line with the then-prevalent systemic value-judgment that a criminal should never be permitted to "get away" with his crime (by impermissibly forcing the "right" to "yield to" the "wrong").[12]

In so ruling, the German court endorsed the largely unbounded moral construct that a person, once he knowingly became a criminal "threat" of any kind, forfeited the full array of rights the justice system otherwise accorded him. Such a culpable actor, in turn, could not expect an innocent victim to subjugate his interests (no matter how trivial) to the "attacker's" physical welfare. Nor could the culpable actor expect the legal system to permit him to violate the law without state-sanctioned repercussion.

As the Court put it, "where the right is to be protected against the wrong, [it is inappropriate to ask the defender, acting in the urgency of the moment, to concern himself with avoiding disproportionate damage to the attacker's interests]."[13] The court doubled down on this hard-line reasoning by adding

11. RG Sept. 20, 1920, 55 RGST 82, 83–85 (Ger.).

12. *Id.* at 85–86. *See also* Henning Rosenau, *Notwehr und Notstand* [*Self-Defense and Emergency*], *in* 4 STRAFGESETZBUCH: KOMMENTAR [COMMENTARY ON THE CRIMINAL CODE] 279, side-note 2 (Helmut Satzger & Wilhelm Schluckebier eds., 2019) (Ger.); THOMAS FISCHER, STRAFGESETZBUCH [CRIMINAL CODE] § 32, side-note 2 (2019); Volker Erb, *Notwehr* [*Self-Defense*], *in* 1 MÜNCHNER KOMMENTAR ZUM STRAFGESETZBUCH [MUNICH COMMENTARY ON THE CRIMINAL CODE] § 32, side-notes 12–18 (Bernd von Heintschel-Heinegg ed., 2017). As will be explained in subsequent sections, this outcome is no longer possible under today's re-interpretation of the statutory German law of self-defense. Moreover, it would also likely violate Article 2 of the European Convention on Human Rights, which provides, among other things, that "[e]veryone's right to life shall be protected by law." Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, 213 U.N.T.S 221. *Cf.* Erb, *supra* note 7, at side-notes 19–24 (Ger.).

13. 55 RGST 82, 85–86 (Ger.).

that a contrary ruling would preclude all deadly force in defense of property—an outcome it apparently considered so obviously unacceptable that it did not merit any further discussion.[14]

The German court, in delivering this ruling, therefore explicitly rejected the notion that self-defense cases required any "weighing" of competing values. To the contrary, and reflecting strains of civic republican/communitarian thinking, it held that there was but *one* outcome-determinative systemic value or goal; namely, ensuring the primacy of the "'right' over the 'wrong'."[15]

Today's reader, whether in Germany, the U.S., or elsewhere, is likely to consider this ruling excessively harsh and difficult to justify.[16] The underlying reasons for this rejection, in turn, provide insights into the values, as well as their relative accommodation, that those reviewing the case consider prerequisite to justified self-preferential force.

For example, do you believe the ruling elevates the farmer's interests over those of the broader community to such an extent that individuals like him can be said to become alienated beings, lacking responsibilities or obligations to their fellow man (other than to avoid improperly invading another's personal sphere)?[17] Or do you agree with the German court that any contrary ruling would unjustifiably leave private property unprotected in the absence of law enforcement and, in so doing, would foster the tyranny of the "criminal class"? Your answer will reveal a great deal about your personal value-system.

As I will discuss, one of the overall benefits of the German value-focused approach is that it goes beyond reliance on mere intuitions when evaluating instances of purported self-defense. As Martin Golding put it aptly in a different context: "[i]f values enter into a judicial justification, they do not do so as personal predilections. The values must have some purchase in the community to which they are addressed."[18]

14. *Id.* at 85 (Ger.).

15. *Id*. at 86–87 (Ger.).

16. As noted, today's "socio-ethical limitations" would preclude such an outcome.

17. *See generally* John Rawls, *The Basic Liberties and Their Priority*, *in* 3 THE TANNER LECTURES ON HUMAN VALUES 1, 46–63 (Sterling M. McMurrin ed., 1982) (discussing the moral balance of exercising freedoms in a reasonable, or just, manner). *See also* Gregory S. Alexander, *Intergenerational Communities*, 8 L. & ETHICS HUM. RTS. 21, 29 (2014); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 15 (1996); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 742 (1994); Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371, 375–81 (1992).

18. Martin P. Golding, *A Note on Discovery and Justification in Science and Law*, *in* JUSTIFICATION: NOMOS XXVIII 124, 138 (J. Roland Pennock & John W. Chapman eds., 1986).

B. Example #2: Florida's George Zimmerman Case & Stand Your Ground

Stepping back a bit, we know that both "humanitarian" (roughly, pro-attacker) and "law-and-order" (roughly, pro-defender) perspectives have their passionate adherents. For a better sense of how such perspectives manifest themselves in the "real world," let us first consider the Zimmerman case.

That case began on a rainy February day in 2012, when 28-year-old Neighborhood Watch captain George Zimmerman shot and killed 17-year-old Florida teenager Trayvon Martin.[19] After informing the 911 operator that there was a "real suspicious guy" in his neighborhood (a neighborhood that had recently seen a spate of break-ins), Zimmerman began to chase the unarmed, but physically more imposing, Martin. Zimmerman ultimately fatally shot Martin in the ensuing scuffle. Zimmerman claimed he shot Martin in self-defense, invoking Florida's "Stand Your Ground" law.[20] Family and friends of the slain Martin, on the other hand, portrayed Zimmerman as a vindictive, racist man chasing the unrealized dream of being in law enforcement.[21]

Following a three-week trial, the jury acquitted Zimmerman of murder. The jury rejected the prosecutor's argument that "Zimmerman had deliberately pursued [] Martin" and "instigated the fight" in order to be able to claim self-defense.[22] The verdict sparked a national debate about both race and self-defense.[23]

Conspicuously absent from both the public debate and the court's legal analysis, however, was a discussion of how Zimmerman's apparent effort to instigate the confrontation affected the state's interest in protecting the equal concern and reciprocal respect among people. By way of comparison, although we today may agree that the German court got it wrong in the fruit-thief case, it at least discussed its ruling in a value-centric manner that allows us to more carefully pinpoint the basis of our disagreement beyond simply saying that it was "unjust."

---

19. Zimmerman v. State, 114 So.3d 446, 447 (Fla. Dist. Ct. App. 2013); Cynthia K.Y. Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1557 (2013).

20. *Zimmerman*, 114 So.3d at 447; Lee, *supra* note 19, at 1559.

21. *See* Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 93–94 (2014); Mary Anne Franks, *I Am/I Am Not: On Angela Harris's* Race and Essentialism *in Feminist Legal Theory*, 102 CAL. L. REV. 1053, 1062–64 (2014). As discussed later, the concept of "reasonable fear" is central in U.S. self-defense cases. In establishing his reasonable fear, Zimmerman was able to overcome two major challenges: he was carrying a firearm while Martin was unarmed, and he was trained in mixed martial arts.

22. Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, (July 13, 2013) https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html [https://perma.cc/XE86-S8PR].

23. *See* Lee, *supra* note 19, at 1567.

The court (and the legal commentariate), for instance, never discussed whether and how Zimmerman's conduct affected the state's interest in protecting Zimmerman's *and* Martin's individual autonomous rights; whether the ruling allowed self-defense to become a substitute for the legal process; whether the result from a collective perspective failed to properly protect the state's monopoly on force; and what specific or general deterrent impact Zimmerman's conduct might have. The system's failure to address these key issues is emblematic of the core concern that—by following the prevailing analytical practices—legislators, courts, and fact-finders are missing the opportunity to transparently reach more all-considerations-included outcomes. Or, in the words of Golding, they did not offer a value-based rationale that transcended "personal predilections."[24]

C. Example #3: Wisconsin's Rittenhouse Case & Legal Provocation

A similar failure to understand self-defense basics was in evidence in the Kyle H. Rittenhouse prosecution in Wisconsin. The Rittenhouse case launched a (long-overdue) national debate about the proper contours of self-preferential killing. That case, in tandem with the high-profile Georgia case of three men charged with the tragic February 23, 2020 videotaped shotgun murder of 25-year-old Ahmaud Arbery, focused the nations' attention on self-defense and the "provocation exception."

In *Rittenhouse*, both the prosecution team and the media misunderstood how engaging in provocative conduct can serve to conditionally bar a self-defense claim.[25] (Similarly off-the-mark were the repeated claims that US self-defense law is, by international comparison, uniquely "barbaric" and otherwise unduly permissive.)

A short refresher may be helpful. Then-17-year-old Rittenhouse was charged with—and ultimately acquitted of—the August 25, 2020, shooting of three men, two of whom died. Central to Kenosha County District Attorney's Office Prosecutors Thomas Binger and James Kraus's murder case was the claim, reflected in the jury instructions, that Rittenhouse "provoked" the attacks. Had the jury agreed, Rittenhouse would have effectively been barred from cloaking himself in the "ancient right" of self-defense's protections, ensuring a conviction.

The State's provocation case, however, quickly derailed—but for reasons the media almost completely overlooked. The legal commentariat seemingly

24. Golding, *supra* note 18, at 138.

25. *See generally* T. Markus Funk, *The Rittenhouse Case—Misunderstanding When Provocative Actions Bar Self-Defense*, BLOOMBERG LAW (Jan. 14, 2022), https://news.bloomberglaw.com/white-collar-and-criminal-law/the-rittenhouse-case-misunderstanding-when-provocative-acts-bar-self-defense [https://perma.cc/KGU3-AJPP].

did not appreciate that for Rittenhouse to conditionally lose his ability to claim self-defense, his conduct had to be *both* (1) "unlawful" *and* (2) "of a type likely to provoke others to attack."[26] "Unlawful," in turn, is defined as "tortious or expressly prohibited by criminal law or both."[27]

Far more consequential (and, for that matter, unusual) than the media getting it wrong, the two prosecutors in their hours of opening statement, closing argument, and rebuttal argument inexplicably never once mentioned the word "unlawful," despite their having the burden of proving each element of provocation beyond a reasonable doubt,[28] and despite having argued this point to the judge during the jury instruction conference.[29]

The prosecution's puzzling failure to even try to articulate an appropriately fact-supported theory of Rittenhouse's "unlawfulness," in fact, raises the question of why Kenosha County Circuit Judge Bruce Schroeder included the instruction in the first place. In the final analysis, these material oversights needlessly injected error into the record and created a considerable risk of reversal in the case of a conviction.

Additionally, "unlawful" is a legal term of art that may not have been readily understood by non-lawyers (that a statutory definition is required underscores this point). For example, would it be obvious to the *Rittenhouse* jurors that under state precedent disorderly conduct could qualify as "unlawful" conduct for these purposes? The Wisconsin Pattern Jury Instructions, however, do not define this key term.[30]

That said, the Wisconsin jury instructions' introduction provides that they merely create "minimum standards" that should be "modif[ied] . . . to accommodate the facts of the case."[31] In short, Judge Schroeder would have been fully within his rights to define "unlawful"—had the prosecution actually articulated an evidence-supported theory of unlawfulness. Such a definition would have been helpful to the Rittenhouse jurors, yet Judge Schroeder did not include it.[32]

---

26. *See* Wisconsin Criminal Code § 939.48(2)*; see also* Wis JI–Criminal 341 (2021), https://www.perkinscoie.com/images/content/2/4/249315/Rittenhouse-Jury-Instructions.pdf [https://perma.cc/8P8Z-AWM2] (Rittenhouse Jury Instructions).

27. Wis. Criminal Code § 939.48(6).

28. *See* Funk, *supra* note 25.

29. *See generally* Kristen Barbaresi, *Attorneys in Kyle Rittehouse Case Battle Over Jury Instructions*, CBS NEWS (Nov. 12, 2021), https://www.cbs58.com/news/attorneys-in-kyle-rittenhouse-case-battle-over-jury-instructions [https://perma.cc/ZWG6-9M2W].

30. *See* Wis JI-Criminal 801, 815 (2020), https://wilawlibrary.gov/jury/criminal/instruction.php?n=0815 [https://perma.cc/PR7B-SB5Q].

31 *Wisconsin Jury Instructions*, WIS. STATE LAW LIBR., https://wilawlibrary.gov/jury/ [https://perma.cc/8368-ZWJB].

32. *See* Wis JI–Criminal 341 (2021), https://www.perkinscoie.com/images/content/2/4/249315/Rittenhouse-Jury-Instructions.pdf [https://perma.cc/8P8Z-AWM2] (Rittenhouse Jury Instructions).

Turning from the law of provocation to the prosecution team's efforts to establish this bar to self-defense, the prosecution team argued to the jury that Rittenhouse was "running around" with a gun; created a "danger"; "threatened other people's lives"; and never "dropped" his gun, "kicked [the attackers] in the testicles," or "surrendered." Even if entirely accurate, however, these factual claims of bad judgment and perhaps immoral or asocial conduct fall far short of establishing that Rittenhouse's actions were "criminal" or "tortious," which is what Wisconsin law explicitly demands.

The media, for its part, similarly made a hash of Wisconsin's law on provocation. Consider, for example, the representative comments of a prominent law professor interviewed on the day of the Rittenhouse jury verdict. He opined that "[o]ne could make the argument that by walking around with the gun in what many would call a provocative way should make Rittenhouse at least somewhat responsible for inducing others to challenge him."[33] This reasoning does track the arguments made by the Rittenhouse prosecutors. The problem with the analysis is that acting in a "provocative way," without more, has little to do with the "criminal" or "tortious" provocative conduct the statute requires. Wisconsin self-defense law, furthermore, does not allow for a defendant claiming self-defense to be "somewhat responsible."

Equally off the mark were commentators' repeated claims that Judge Schroeder's decision to dismiss the minor in possession of a dangerous weapon charges doomed the State's provocation argument.[34] Being underage with a firearm, after all, is not unlawful conduct "of a type likely to provoke others to attack." Stated differently, committing a regulatory offense, even

33. *See Stanford Criminal Law Experts David Alan Sklansky and Robert Weisberg on the Kyle Rittenhouse Acquittal,* STANDFORD LAW (Nov. 19, 2021), https://law.stanford.edu/2021/11/19/stanford-criminal-law-experts-david-alan-sklansky-and-robert-weisberg-on-the-kyle-rittenhouse-aquittal/ [https://perma.cc/KDM9-7DLL]("[O]ne could make the argument that by walking around with the gun in what many would call a provocative way should make Rittenhouse at least somewhat responsible for inducing others to challenge him."); Dahlia Lithwick, *When Everything is 'Self-Defense,'* SLATE (Nov. 16, 2021), https://slate.com/news-and-politics/2021/11/kyle-rittenhouse-trial-guns-self-defense.html [https://perma.cc/XR7P-SD6Q] (contending that Rittenhouse may have "provoked others to attack him by openly carrying his semi-automatic rifle at a mob scene"); *but see* Andrew C. McCarthy, *Ritttenhouse Misdemeanor Possession of Gun Charge Out of the Case*, THE NAT'L REV. CORNER POST (Nov. 15, 2021), https://www.nationalreview.com/corner/rittenhouse-misdemeanor-possession-of-gun-charge-out-of-the-case/ [https://perma.cc/HC4H-DZNS] (accurately summarizing the law of provocation in the context of the lawful carrying of a firearm).

34. *See generally* Lithwick, *supra* note 33. *See also* Noah Feldman, *How Guns Twist the Logic of Self-Defense Laws*, BLOOMBERG OP. (Sept. 10, 2020), https://www.bloomberg.com/opinion/articles/2020-09-10/kyle-rittenhouse-self-defense-argument-gets-help-from-twisted-gun-logic [https://perma.cc/T3CZ-KSQ5] (arguing that "[p]rovocation is in the eye of the beholder, and the beholders would have had no way of knowing that Rittenhouse was engaged in an illegal act (because of his age) rather than a protected act (which it would have been had he been a year older)").

under circumstances where an attack by the emotional crowd may have been foreseeable, cannot, without more, reasonably be said to "provoke" a person to commit a very violent act upon another. Any different construction threatens create a dangerous doctrine inconsistent with the criminal law's violence-reduction objectives.

There may, of course, have been a way of proving that Rittenhouse's conduct was, as a matter of law, provocative—but the prosecutors here never even argued as to the particular steps Rittenhouse took that were "expressly prohibited by criminal law" or "tortious." Considering that prepared prosecutors will have created pre-trial orders of proof and structure their closings around the elements they must establish, this is truly a perplexing oversight.

Viewed from a more macro, go-forward perspective, a value-explicit framework would enable a substantive and meaningful debate over the wisdom of Wisconsin's contemporary provocation law. For example, by requiring "unlawful" conduct, is Wisconsin appropriately balancing the state's systemic interest in violence reduction and protection of the "attacker" against the competing interests in safeguarding the defender's autonomy and deterring crime? And how does defending the primacy of the legal system and maintaining the legitimacy of the legal order fit in to this calculus? Unfortunately, the legislative history of Wisconsin's self-defense and provocation laws tell us little about what, if any, thought the Wisconsin legislators paid to these topics when they decided to require the provocative conduct relevant to the *Rittenhouse* case to have been "unlawful."

III. A BRIEF SUMMARY OF THE VALUE-BASED MODEL OF SELF-DEFENSE

Identifying the outer boundaries of when a person should be permitted (and, some would contend, even *encouraged*) to deploy deadly self-preferential force has long been the subject of heated discussion among legislators, academics, and the public. Today's law reform conversations about over-policing, violence, and self-preferential force have further amplified the challenges inherent in setting boundaries between the state's claimed "monopoly on force" and the individual's right to deploy defensive violence against an attacker.[35]

35. Our discussion will focus on self-preferential force to *kill* (rather than simply injure) the attacker. The use of deadly force, after all, involves the irremediable killing of another to save oneself and, therefore, is the most challenging type of defensive force to justify. If deadly defensive force can be justified in a particular circumstance, then, so too, can resorting to lesser levels of force. *See generally* LEVERICK, *supra* note 4, at 147, 155. And so we will focus on self-defense rather than defense of others—or private defense more generally—because self-preferential force is the most challenging in light of the inherent self-interest involved when one opts to save one's own life at the

The central point grounding this article is that we must do a better job recognizing and factoring in how bedrock value-judgments dictate our assessment of particular self-defense claims. Our failure to do so has unwittingly encouraged undemocratic legislative and judicial decisions, which have been reached using hidden normative judgments (that is, privately-held evaluative standards), as well as false dichotomies (claiming a stark choice between protecting the innocent or culpable defender and protecting the innocent or culpable attacker, when in fact the decision is much more nuanced and challenging).

I naturally recognize that this is not the first time anyone has said that "values matter" (surely, at some level, common sense teaches this). The challenge is that those who, in the past, have sought to tether their self-defense analyses on what they described as "values" almost exclusively limited themselves to only one or two values. Consider Fiona Leverick's narrow focus on the rather all-encompassing "right to life."[36] She uses this appealing, broad baseline to develop her argument that only those attackers threatening death may be met with justified deadly force. And so, even attackers threatening rape or other forms of serious bodily injury may never be met with deadly defensive force, regardless of necessity.[37]

In sharp contrast, Robert Schopp holds the autonomy of the defender to be so inviolate that he would permit deadly force as long as it is provably necessary to prevent the theft of property or to ward off even a fairly minor assault.[38] In the realm of application, legislators and other commentators in the public square who, like Schopp, advocate for more aggressive "stand-your-ground" and "castle doctrine" laws justify their positions on the rather blunt objective of protecting the autonomy of the individual person purportedly being threatened with attack.

Although both Leverick and Schopp deserve credit for tethering their respective self-defense analyses on important values, in the end they take an overly-narrow monistic approach. Of course, drawing the outer limits of the authorization has been an evergreen challenge to scholars, as well as to those legislators, jurists, and others who study their academic output. But, as I have detailed elsewhere,[39] a consideration of the values implicated in self-defense

expense of another's. That said, much of what is written here will also be generally useful as an analytical lens through which to assess a broader range of defensive force situations, including those situations in which the quantum of self-preferential force falls short of the deadly. In those situations, similar—though not necessarily overlapping or identical—value judgments will be implicated.

36. *See id.*

37. *See id*.

38. SCHOPP, *supra* note 4, at 83–88. For a criticism of this approach, see T. Markus Funk, *Justifying Justifications*, 19 OXFORD J. LEGAL STUD. 631 (1999).

39. *See, e.g.*, FUNK, *supra* note *, at 12–68; T. Markus Funk*, Understanding the Role Values Play (And Should Play) in Self-Defense Law*, 58 AM. CRIM. L. REV. 331, 333 (2021); T. Markus Funk,

scenarios going beyond the binary "protect the defender v. protect the attacker" approach is the most productive way forward. Such a more fulsome accounting includes: protecting the state's monopoly on force (value #1); protecting the individual attacker's (presumptive) right to life (value #2); maintaining the equal standing between people (value #3); protecting the defender's autonomy (value #4); ensuring the primacy of the legal process (value #5); maintaining the legitimacy of the legal order (value #6); and deterring attackers (value #7).

Two concessions may be helpful at the outset. First, the value-based approach summarized here for comparison purposes will not in all cases dictate a particular balance or accommodation between the values. Rather, the model will achieve its transparency-enhancing objective if it offers a reasonable, defensible starting point for determining what is, in fact, at stake in different self-defense scenarios. Second, the seven values discussed here could of course be organized differently. For example, reducing overall societal violence (value #1), ensuring the primacy of the legal process (value #5), maintaining the legitimacy of the legal order (value #6), and general deterrence (a component of value #7) could be grouped together because they tend to reflect broader collective/societal/humanitarian interests. On the other hand, protection of the attacker's individual (presumptive) right to life (value #2), maintaining the equal standing between persons (value #3), protecting the defender's autonomy (value #4), and specific deterrence (the other component of value #7) could be grouped together because they tend to safeguard personal/individual interests. Alternatively, the values could be grouped by those *authorizing* defensive force (primarily values #3, #4, and #7) and those tending to *restrict* defensive force (primarily values #1, #2, and #5); the focus of value #6 on maintaining the legitimacy of the legal order tends to function more like a "swing value," in that normative judgments to a greater extent will determine whether it authorizes or restricts force. Although such alternative groupings can be justified, the order selected here is defensible and serves our analytical and comparativist objectives.

Cracking Self-Defense's Intractable "Difficult Cases," 100 NEB. L. REV. 1 (2021); T. Markus Funk, Questions of Value: An Evaluative Study of Self-Defense Theory and Practice in Germany, England, and the United States (Ph.D. thesis, Oxford University) (available at https://ora.ox.ac.uk/objects/uuid:f794ea71-baf3-46fd-bf78-8533ba84e230 [https://perma.cc/A9V8-HH93]).

Value 1: Reducing overall societal violence by protecting the state's collective "monopoly on force."	
Justification for Inclusion	**Interaction with Other Values[40]**
Reducing overall societal violence, generally, and preventing unjustified attacks on peoples' rights, specifically, are twin goals of most modern criminal justice systems (though there can certainly be others, including punishing the deserving and instrumentally protecting the goals valued by the state). In that sense, then, value #1 recognizes the collective objective of seeking to minimize societal violence. The state, however, must also erect guardrails around its right (and, practically speaking, ability) to prevent actors from exercising self-preferential force. It in fact is entirely reasonable to say that a person's right to life is—and,	Reducing overall violence by protecting the state's monopoly on legitimate force, as defined here, is an inherently collective value that recognizes the systemic, societal interest in violence reduction and the state's role in achieving this end.[41] In contrast, value #2 (protecting the individual attacker's presumptive right to life) is an individual value focused on protecting the individual and personal rights not to be killed. The collective interest of the state reflected in value #1 in contemporary justice systems is omnipresent (in the sense that the modern state will, when able to do so, want to resolve disputes through its enforcement mechanisms—an interest also directly reflected by value #5—ensuring the primacy of the

40. An up-front concession might be helpful here. It is true that assigning any particular "relative weight" to competing interests is at bottom a normative judgment, rather than a quasi-scientific determination. The identified values, after all, do not have self-evident weights. Assigning any particular relative weight to competing interests, therefore, requires the application of imprecise normative judgments. In addition, there are some jurisprudential challenges whenever one attempts to balance basic individual human rights (such as the right to life) against more collective interests (such as reduction in crime). As Zedner puts it:

> Typically, conflicting interests are said to be "balanced" as if there were a self-evident weighting of or priority among them. Yet rarely are the particular interests spelt out, priorities made explicitly, or the process by which a weight is achieved made clear. . . . Although beloved of constitutional lawyers and political theorists, the experience of criminal justice is that balancing is a politically dangerous metaphor unless careful regard is given to what is at stake.

Lucia Zedner, *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*, 32 J. LAW & SOC'Y 510, 510–11 (2005); *see also* Jürgen Habermas, *Reply to Symposium Participants, Benjamin N. Cardozo School of Law* in MICHAEL ROSENFELD AND ANDREW ARATO, EDS., HABERMAS ON LAW AND DEMOCRACY CRITICAL EXCHANGES 430 (Berkeley, University of California Press, 1998), *discussed in* Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT'L J. CONST. LAW 572, 573 (2005); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1001–05 (1987). The fact that all "balancing" efforts are open to some level of critique is not, however, fatal to our undertaking.

41. *See generally* GEORGE BOWYER, COMMENTARIES ON UNIVERSAL PUBLIC LAW 232 (1854) ("[T]he law of society cannot justly prevent a man from defending and enforcing his own rights, unless society will undertake that task for him.").

Value 1: Reducing overall societal violence by protecting the state's collective "monopoly on force."	
Justification for Inclusion	**Interaction with Other Values[40]**
indeed, as a practical matter must be—conditioned on their conduct. More specifically, engaging in conduct that renders the person (particularly a fully culpable one) an "unjustified threat" to another limits the state's interest in fully extending all available legal protection to the attacker. This value, in contrast to some of the others that follow, is implicated to varying extents in virtually all self-defense cases. The extent to which this value-as-decision-ground lends weight to either the principle of protecting the defender or the principle of protecting the attacker, however, will be in large part determined by the weight accorded to the six other values discussed immediately below and on the evaluator's perspectives on the moral and functional legitimacy of the state's claimed monopoly on force. Those values and perspectives operate on a sliding scale, moderating the violence-reduction value, providing guidance concerning who should be protected in a conflict-of-rights situation.	legal process). By necessity, it, therefore, will tend to always function as a decision-ground that, all other things being equal, is antagonistic to the private use of force. As a consequence, it will most frequently find itself in direct tension with the more defender-focused values of maintaining the equal standing between people (value #3) and protecting the autonomy of the defender (value #4). On the other hand, the collective interests this value represents on balance finds support in value #5 (ensuring the primacy of the legal process) and value #6 (maintaining the legitimacy of the legal order). Whether protection of the individual attacker's presumptive right to life (value #2) or general and specific deterrence (value #7) are in tension, or aligned, with this collective state interest will largely depend on the particular factual scenario (and is particularly subject to normative weighting).[42]

42. One could, after all, reasonably take the position that the state's collective interest in violence reduction is not, in truth, antagonistic to the private use of force. Indeed, one can claim, as the German law does, that the private use of force in the absence of state protection actually is, through both general and specific deterrence (value #7), supportive of the state's collective interest in violence-reduction

Value 2: Protecting the attacker's individual (presumptive) right to life	
Justification for Inclusion	**Interaction with Other Values**
Value #1 concerned society's collective interest in minimizing interpersonal violence by protecting the state's monopoly on force. In contrast, value #2 focuses on the attacker's individual, personal right to life. The central (and largely uncontroversial) limitations on self-defense—namely, necessity, imminence, and proportionality—apply to both culpable and non-culpable attackers. These near-universally recognized restrictions demonstrate that protecting the attacker, even a culpable one, deserves treatment as an important stand-alone value. And although few values will generate as much disagreement as value #2, the very fact that different observers will want to add or take weight away from this value underscores how important the normative assessment of this value is to self-defense outcomes (and why a value-centric dialogue aids transparent, democratic decision-making).	The concept of protecting attackers (and, in particular, culpable attackers) is likely to generate disagreement between those who bring into the debate very different normative judgments about the extent to which defensive force should be authorized, generally, and to what extent culpable offenders deserve protection, specifically. Those who accord more weight to warding off the imputation of unequal standing between people (value #3), protecting the defender's autonomy (value #4), and deterrence (value #7) will be the most skeptical about the inclusion of this value as a stand-alone decision-ground. After all, they will contend, why should the culpable attacker acting outside of the law's bounds formally receive state protection? On the other hand, those like Leverick who focus more narrowly on reducing overall violence by protecting the state's monopoly on force (value #1) and ensuring the primacy of the legal process (value #5) will likely place more weight on this value when compared to the other more "pro-defender" values. Although we will discuss the value of protecting the defender's broad autonomy (value #4), the instant value's interest in protecting the attacker's presumptive "right to life" is framed in terms of protecting the attacker from death. This asymmetry (the defender's broader autonomy interests versus the attacker's narrower right to life) is intentional. It reflects that this article is explicitly focused on deadly self-

Value 2: Protecting the attacker's individual (presumptive) right to life	
Justification for Inclusion	**Interaction with Other Values**
	preferential force.[43] Additionally, it is consistent with the widely (though not universally) accepted position that culpable attackers are presumptively entitled to less relative protection than moral innocents.

Value 3: Maintaining the equal standing between people	
Justification for Inclusion	**Interaction with Other Values**
Though controversial in some circles, recent events have only highlighted the reality that an ordered society requires a citizenry having an equal concern, and reciprocal respect, for basic individual rights. Building on this foundation, culpable attackers, like criminals/ victimizers more generally, uniquely threaten not only to harm their victims, but they, through their threatened attack, additionally threaten their victims with a unique wrong. Specifically, they effectively disrespect the victim's right to equal standing in the public and private spheres. Particularly in cases involving culpable attackers, self-preferential force exercised in self-defense allows the defender to most immediately repel the attack (thwarting the threatened harm). The defender's force also puts himself in a position to maintain the equal standing between himself and his attacker by protecting his personal domain	Warding off the imputation of unequal standing inherent in culpable attacks can be understood as a value ancillary to protecting the defender's autonomy (value #4) that is also generally aligned with deterrence (value #7). On the other hand, violence reduction (value #1), protection of the attacker (value #2), and ensuring the primacy of the legal process (value #5) are, all other things being equal, generally antagonistic to this more defender-centric value. Maintaining the legitimacy of the legal order (value #6), moreover, finds itself in an unusual posture with respect to this value, because cases in which maintenance of equal standing is under- or over-weighted can yield results potentially threatening to the legal order's moral legitimacy. Given this value's focus on thwarting culpable attacks, it is not implicated in the case of non-culpable/innocent aggressors. This is so because, without a culpable attack, the attacker through his actions does not threaten to disrespect or discount the defender's right to equal standing. Such an attacker may threaten a *harm*, but is not threatening a *wrong*.

43. *See supra* note 35.

Value 3: Maintaining the equal standing between people	
Justification for Inclusion	**Interaction with Other Values**
(thwarting the threatened wrong). In this sense, then, self-defense permits individuals to be sovereign by allowing them to not only assert rights, but to also recognize those same rights in others. But self-defense concurrently renders them subject in the sense that they must obey the laws they, as a collective, impose on their fellow humans.	

Value 4: Protecting the defender's autonomy	
Justification for Inclusion	**Interaction with Other Values**
An individual's exercise of autonomous rights (including the right to self-directed action, to a personal sphere, and to own property) is fairly considered instrumentally, closely related to his pursuit of self-fulfillment. The personal sphere, in turn, allows one to develop one's personality. The modern liberal state accords free people equal standing in the public sphere (see value #3) and, relatedly, strives to ensure that people have a private domain of nonpublic life in which they are given the opportunity to exercise their own comprehensive moral doctrines, and to develop their own conceptions of the good.	Commentators like Schopp will argue that protection of the defender's autonomy arguably is the primary function of self-defense. That said, a defender's interest in protecting their autonomy is not absolute; it must at times yield to the competing interests of reducing overall societal violence by protecting the state's monopoly on force (value #1), protecting the attacker's presumptive right to life (value #2), and ensuring the primacy of the legal process (value #5). In contrast, maintaining the equal standing between people (value #3) and deterrence (value #7) tend to mutually support this value. Finally, maintaining the legitimacy of the legal order (value #6) can be negatively impacted by an under- or over-weighting of the instant value. Note, however, that protecting equal standing (value #3) is only implicated in the context of culpable attackers. In contrast, protecting the defender's autonomy (admittedly a bit of a catch-all term that is defined here as including the

Value 4: Protecting the defender's autonomy	
Justification for Inclusion	**Interaction with Other Values**
	defender's legally protected private sphere, personal sovereignty, personal domain, and right to non-interference) can apply to both culpable and non-culpable attackers.

Value 5: Ensuring the primacy of the legal process	
Justification for Inclusion	**Interaction with Other Values**
Due process is the cornerstone of modern, pluralistic legal systems. And, as noted, self-defense must not become a substitute for the legal process, lest it undermine the primacy of the legal process. In the type of conflict-of-rights situation created in self-defense scenarios, therefore, the state should, if possible, determine guilt or innocence, administer punishment, and determine restitution. Consequently, instances of private use of self-preferential force should be carefully circumscribed.	This value supports the view that, all other things being equal, societies prefer to have disputes settled in court, rather than through the exercise of self-preferential force. As such, this value is most closely aligned with protection of the state's monopoly on force (value #1), protection of the individual attacker (value #2), and maintenance of the legitimacy of the legal order (value #6). Warding off the imputation of unequal standing (value #3), protection of the defender (value #4), and deterrence (value #7) are, all other things being equal, more likely to be antagonistic to, and therefore in tension with, this value. Consider also that this value is only implicated in cases where (1) resort to the legal process is a realistic possibility, and (2) the rights threatened are generally compensable. So in those cases where the attacker threatens death or serious bodily injury, resort to the legal process is unable to prevent or remedy the damage. In such cases, this decision-ground thus carries far less weight.

Value 6: Maintaining the legitimacy and creditworthiness of the legal order	
Justification for Inclusion	**Interaction with Other Values**
None of the values surveyed may be as timely in this era of doubts about the nature and purpose of our criminal justice system as the value of maintaining the legal order's moral legitimacy and creditworthiness. A functioning criminal justice system, after all, will (and, indeed, must) receive the respect of a populace that considers it legitimate. A functioning justice system must, therefore, embody broad and widely held moral standards of right and wrong. As procedural justice theory teaches, a justice system enjoying popular support and reflecting widely-held moral standards of right and wrong is able to more effectively draw on the stigmatic effect of conviction to reinforce basic moral standards and encourage compliance. To the extent the community perceives the law, both substantively and procedurally, to noticeably deviate from shared (and publicly recognized) conceptions of bedrock "justice," the law's moral credibility will consequently be undercut. The result is a diminution of the law's legitimacy (in the sense of moral authority) and, derivatively, its ability to effectively fulfill its crime-control and conduct-guiding functions. Stated differently, when the justice	Maintaining the legitimacy of the legal order is another value that can be viewed (and weighted) very differently depending on one's perspective. And so those who tend to place greater significance on the equal standing between people (value #3), protecting the defender (value #4), and deterrence (value #7) can be expected to object to outcomes that they consider too deferential toward collective violence reduction (value #1), protection of the attacker (value #2), and ensuring the primacy of the legal process (value #5). Of course, the same is true in the opposite direction. But although disagreement with outcomes is unavoidable, reaching results that shake people's fundamental confidence in the moral legitimacy of the legal order are the ones that implicate value #6. Note, however, that this decision-ground is only implicated in the relatively rare cases where the contemplated outcome is so at odds with broad public morality that it threatens to erode the criminal law's popular legitimacy. Unlike the other values, then, maintaining the legitimacy of the legal order is framed in terms of avoiding certain outcomes (that is, avoiding erosion of the justice system's popular authority).

Value 6: Maintaining the legitimacy and creditworthiness of the legal order	
Justification for Inclusion	**Interaction with Other Values**
system accepts laws or enforcement actions that corrosively clash with the fully expressed public morality on basic issues of right and wrong, the entire justice system may suffer.	

Value 7: Deterring (potential) attackers	
Justification for Inclusion	**Interaction with Other Values**
For good reason, systemically deterring crime is typically considered a central function of the criminal justice system. When a particular defender uses force to thwart an attack, she clearly imposes an immediate, and potentially significant, cost on the attacker that makes attacking riskier. The greater the scope of self-defense permitted against attackers, the higher the likelihood that potential (and, in particular, culpable) attackers will be deterred from engaging in the kind of conduct that authorizes defensive force.	Successful general deterrence tends to support value #1's interest in minimizing violence and protecting the state's monopoly on force. And authorizing deadly force to defend a culpable attack on a trivial interest might deter attacks (value #7), serve to provide maximum protection to the defender's autonomy (value #4), and ward off the imputation of lesser standing in the case of a culpable attacker (value #3). Disproportionate force, on the other hand, undermines the value of maintaining the primacy of the legal process (value #5), provides almost no protection for the attacker (value #2), and may yield results deemed unacceptable by the public so that it harms the legitimacy of the legal order (value #6). Note, however, that this value, like safeguarding the equal standing between citizens (value #3), is only implicated when the attacker is culpable at some level. Those operating under an honest and reasonable mistake, or otherwise not aware of the wrongful nature of their conduct, by definition cannot be deterred by the availability of self-

Value 7: Deterring (potential) attackers	
Justification for Inclusion	**Interaction with Other Values**
	defense. (If, in contrast, the attacker is not fully culpable but still is acting recklessly, carelessly, or negligently, then there is room for a deterrence-based argument).

This of course is a necessarily broad summary of the value-based model. That said, it provides enough detail to serve its purpose as a baseline of comparison to Germany's uniquely value-driven approach to self-defense. German scholars will for good reason note with pride that, in sharp contrast to the *ad hoc* development of self-defense law in the U.S., England, and elsewhere, German law reform proposals are assessed based on their congruency with the baseline values said to ground the state's authorization of self-preferential force. This, they will say, promotes consistency and predictability and allows for a more democratic and nuanced dialogue. What follows is a closer look both at how the German justice system in self-defense cases historically, and in the present day, has lived up to these value-centric goals.

IV. UNDERSTANDING THE LOGIC AND FUNCTIONING OF GERMANY'S SELF-DEFENSE REGIME

As we will see, the values said to ground German self-defense law largely anchor the law reform proposals, scholarly commentary, and court decisions. Consequently, scholars, judges, legislators, and laymen alike share a common analytical language they can use to approach disagreements or evaluate law reform proposals. It will be argued that the German courts and commentators, therefore, are better-positioned to evaluate whether and why reforms to, or adjustments of, self-defense doctrine are appropriate. By encouraging a procedurally more democratic discussion around jurisprudential matters of value, moral principles, and fundamental human rights, and, in so doing, leaving less room for hidden normativity, the quality of the German justice system's decision-making process (and outcomes) is, comparatively speaking, enhanced.

Although Germany's self-defense regime is exceptionally value-driven, its traditional conception of the implicated values has historically been so narrow as to produce results that a contemporary normative perspective finds challenging to accept. Even Germany's "softened" current self-defense law

continues to be uniquely permissive, in that it allows deadly force in defense of property, does not require retreat or avoidance of conflict except under certain circumstances, and generally rejects strict proportionality between the threatened harm and the defensive force needed to thwart the attack.[44]

German self-defense law is also unique in some other respects. The value-based model, not unlike the laws of the U.S., encompasses certain *functional* reasoning (principally, values #1—reducing overall societal violence by protecting the state's monopoly on force, #5—ensuring the primacy of the legal process, #6—maintaining the legitimacy of the legal order, and #7—deterring crime). In contrast, the German rulings and literature we will examine in the main have rejected the view that deterrence (*Abschreckung*)[45] and social cohesion are, or should be, recognized rationales for determining the scope of self-defense.[46]

A. A Primer on Self-Defense in Germany

The German law's foundation helps explain why the German approach to self-defense is so noteworthy. Self-defense is a justification that § 32 of the German Criminal Code (*Strafgesetzbuch* or "*StGB*") defines as:

---

[44] *See* Thomas Rönnau & Kristian Hohn, *§ 32 Notwehr* [*Self-Defense*], *in* 3 STRAFGESETZBUCH: LEIPZIGER KOMMENTAR [CRIMINAL CODE: LEIPZIG COMMENTARY], at side-notes 181–82 (Gabriel Cirener et al. eds., 2019) (Ger.); *see also* Rosenau, *supra* note 12, at side-note 1 (Ger.).

45. The minority view has its strong proponents. *See, e.g.*, Erb, *supra* note 7, at side-note 4 (Ger.); Claus Roxin, *Die "Sozialethische Einschränkungen" des Notwehrrechts* [*The "Socioethical Restrictions" on the Right to Self-Defense*], 93 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] [JOURNAL FOR THE FIELD OF CRIMINAL LAW] 68 (1981) (Ger.); Gerd Geilen, *Notwehr und Notwehrexzess* [*Self-Defense and Self-Defense Excess*], 1981 JURISTISCHE AUSBILDUNG [JURA] [LEGAL EDUCATION] 200, 200–10 (1981). In contrast, opponents of this position argue that this interpretation could result in every citizen becoming a "quasi-policeman." *See, e.g.*, Benjamin Vogel, *The Core Legal Concepts and Principles Defining Criminal Law in Germany*, *in* THE LIMITS OF CRIMINAL LAW: ANGLO-GERMAN CONCEPTS AND PRINCIPLES 39, 43–44 (Matthew Dyson & Benjamin Vogel eds., 2018); Heiko Lesch, *Die Notwehr* [*The Self-Defense*], *in* FESTSCHRIFT FÜR HANS DAHS [COMMEMORATION FOR HANS DAHS] 81, 86–87, 106 (Gunter Widmaier et al. eds., 2005) (Ger.). For a discussion of the deterrent impact of Germany's self-defense law, *see* Erb, *supra* note 7, at side-note 4 (Ger.).

46. *See, e.g.*, FISCHER, *supra* note 12, at side-note 2 (Ger.); Robert Pest, *Die Erforderlichkeit der Notwehrhandlung* [*The Necessity of Sef-Defense*], *in* DER ALLGEMEINE TEIL DES STRAFRECHTS IN DER AKTUELLEN RECHTSPRECHUNG [THE GENERAL SECTION OF CRIMINAL LAW IN CURRENT JURISPRUDENCE] 139 (Fabian Stam & Andreas Werkmeister eds., 2019) (Ger.); Rosenau, *supra* note 12, at side-note 2 (Ger.); Kristian Kühl & Martin Heger, *Notwehr und Notstand* [*Self-Defense and Emergency*] *in* STRAFGESETZBUCH: KOMMENTAR [CRIMINAL CODE: COMMENTARY] §§ 32 ff, side-notes 1–2 (2018) (Ger.); BERND HEINRICH, STRAFRECHT ALLGEMEINER TEIL, § 32, side-note 337 (2016) (Ger.); Roxin, *supra* note 45, at 70–77 (Ger.); Lesch, *supra* note 45, at 82, 88–89 (Ger.). *But see* Rönnau & Hohn, *supra* note 44, at side-notes 66–67 (Ger.); Erb, *supra* note 7, at side-note 4 (Ger.).

> (1) Whoever commits an act that is appropriate as self-defense does not act unlawfully.
>
> (2) Self-defense is that defense which is necessary in order to prevent a present unlawful attack on oneself or another. [47]

Only under the exigencies of a case meeting these broadly-worded criteria can a defender ignore the state's monopoly on force (*Gewaltmonopol*).[48] And so, if a defender's self-defensive conduct is justified (*gerechtfertigt*),[49] the defender need not absorb harm (*Duldungspflicht*) because she is acting lawfully.[50] The attacker, on the other hand, is required to absorb the damage

47. Strafgesetzbuch [STGB] [Penal Code], § 32 (Ger.), https://www.gesetze-im-internet.de/stgb/BJNR001270871.html [https://perma.cc/NWS4-EBQK]. This and all other translations in this Article are the author's.

48. *See generally* Erb, *supra* note 7, at side-notes 3, 31–33, 147–148; FISCHER, *supra* note 12, at side-note 35 (Ger.); Pest, *supra* note 46, at 137 (Ger.); Michael Pawlik, *Die Notwehr nach Kant und Hegel* [*Self-Defense According to Kant and Hegel*], 114 ZSTW 259, 278 (2002) (Ger.). *See also* Rönnau & Hohn, *supra* note 44, at side-notes 67, 73, 106, 120, 221 (Ger.).

49. *See generally* Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 8, 2020, 4 Strafrecht [StR] 288/20, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2020-9-8&nr=110663&pos=1&anz=22 [https://perma.cc/THG8-2TTJ]; Rosenau, *supra* note 12, at *Vorbemerkung* § 32, side-notes 1–3 (Ger.); Pest, *supra* note 46, at 139–40 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 114, 154 (Ger.); Vogel, *supra* note 45, at 51–52; KRISTIAN KÜHL, STRAFRECHT ALLGEMEINER TEIL [GENERAL PART OF CRIMINAL LAW] § 32, side-note 1 (8th ed. 2017) (Ger.); Kühl & Heger, *supra* note 46, at side-note 2 (Ger.); MARK DEITERS ET AL., 1 SYSTEMATISCHER KOMMENTAR ZUM STRAFGESETZBUCH [SK-STGB] [SYSTEMATIC COMMENTARY ON THE CRIMINAL CODE] § 32, side-note 1 (2017) (Ger.).

50. *See generally* BGH 4 StR 288/20 (Ger.); BGH June 26, 2018, 1 StR 208/18, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=87185&pos=0&anz=1 [https://perma.cc/FCV4-UJLY]; BGH June 9, 2015, 1 StR606/14, juris (Ger.) https://www.hrr-strafrecht.de/hrr/1/14/1-606-14.php [https://perma.cc/885H-SLNB]; BGH Jan. 23, 2003, 4 StR 267/02, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=25554&pos=0&anz=1 [https://perma.cc/RZA9-WBHU]; BGH Nov. 22, 2000, 3 StR 331/00, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=18356&pos=0&anz=1 [https://perma.cc/PE6D-VVFX]. *See also* Rosenau, *supra* note 12, at side-note 18 (Ger.); FISCHER, *supra* note 12, at side-note 22 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 154, 285 (Ger.); Luis Greco, *Notwehr und Proportionalität* [*Self-Defense and Proportionality*], Goltdammer's Archiv fur Strafrecht [GA] [German Journal for Criminal Law**],** 665, 670 (2018) (Ger.); Erb, *supra* note 7, at side-notes 3–4, 192 (Ger.) (arguing that it would be "naked cynicism" to force a defender to absorb harm in order to allow the legal system an opportunity to persuade the attacker to elect a more peaceful option and seek comprehensive avoidance of any violence); Volker Erb, *Notwehr als Menchenrecht—Zugleich eine Kritik der Entscheidigung des LG Frankfurt am Main im "Fall Daschner"* [*Self-Defense as a Human Right—At the Same Time a Criticism of the Decision of the District Court Frankfurt am Main in the "Daschner Case"*], 25 Neue Zeitschrift für Strafrecht [New Newspaper for the Criminal Code] [NStZ] 593, 595 (2005) (Ger.); Lesch, *supra* note 45, at 91 (Ger.).

without a right to exercise his own defensive force.[51] From a procedural perspective, moreover, only if the court determines that the elements of the defense are reasonably (that is, more likely than not, or on balance) established is the defendant entitled to the defense.[52]

§ 33, which addresses the excuse of excessive force, caveats those situations in which excessive force will not be criminally punished:

> The perpetrator will not be punished if he exceeds the bounds of self-defense because of confusion, fear, or fright.[53]

German law, relying on this rather terse language, historically justified the use of defensive force to defend a wide variety of interests, and with surprisingly little reference to proportionality between the harm inflicted and the harm threatened (*Güterproportionalität*).[54] Even today, the law views an attack on one person's individual rights as an attack on the entire legal order (*Rechtsordung*).[55]

---

51. *See generally* Rönnau & Hohn, *supra* note 44, at side-notes 154, 285 (Ger.); Lesch, *supra* note 45, at 91, 101 (Ger.).

52. *See* Erb, *supra* note 7, at side-note 257 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 289 (Ger.).

53. STRAFGESETZBUCH [STGB] [PENAL CODE], § 33 Überschreitung der Notwehr [Excessive Self-Defense], Bundesamt fur Justiz (Ger.), https://www.gesetze-im-internet.de/stgb/__33.html [https://perma.cc/L36A-KUL6]. *See generally* BGH Jun. 17, 2020, 4 StR 658/19, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=110943&pos=0&anz=1 [https://perma.cc/S53N-FXC6]; BGH Aug. 19, 2020, 5 StR 219/20, juris (Ger.) https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&nr=110036&pos=5&anz=671 [https://perma.cc/ZA4U-R29W]; BGH May 17, 2018, 3 StR 622/17, juris (Ger.) https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2018-5-17&nr=86251&pos=7&anz=34 [https://perma.cc/EX3Q-AXUM]; BGH Sept. 13, 2017, 2 StR 188/17, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86251&pos=0&anz=1 [https://perma.cc/7CM3-VBKE]; *see also* FISCHER, *supra* note 12, at § 33, side-notes 1–8 (Ger.); Rosenau, *supra* note 12, § 33 at side-note 1 (Ger.).

54. *See* Rönnau & Hohn, *supra* note 44, at side-note 225 (Ger.); Erb, *supra* note 12, at side-note 2 (Ger.); Roxin, *supra* note 45, at side-note 47 (Ger.); *see also* HELLMUTH MAYER, DAS STRAFRECHT DES DEUTSCHEN VOLKES [THE CRIMINAL LAW OF THE GERMAN PEOPLE] 258 (1936) (Ger.); MAX MAYER, DER ALLGEMEINE TEIL DES DEUTSCHEN STRAFRECHTS [THE GENERAL PART OF GERMAN CRIMINAL LAW] 280 (1923) (Ger.) (contending that, in the context of proportionality, "the wise may be able to suggest to the weak that he should cowardly yield to the wrong, but the state cannot reasonably demand this of the citizen, or else cowardice would be a legal requirement"); BGH June 21, 1968, 4 StR 157/68 (Ger.); BGH April 19, 1967, 2 StR 14/67 (Ger.); RG 1935, 69 RGST 308, 309–10 (Ger.); RG Nov. 24, 1890, 21 RGST 168, 168–70 (Ger.) (discussing attack on defender's honor by priest during religious sermon); RG Sept. 20, 1920, 55 RGSt 82, 85 (Ger.).

55. *See generally* Rönnau & Hohn, *supra* note 44, at side-note 66 (Ger.); Greco, *supra* note 50, at 667 (Ger.); Erb, *supra* note 12, at side-note 12 (Ger.).

The German metaphysics of rights has, thus, linked an attack on the rights of a defender to an attack on the broader legal order.[56] This unique relationship, as discussed below, provided German courts with the basis for claiming that defenders must be permitted to use whatever force is necessary to thwart or repel the attack, *regardless* of the damage to the defender resulting from the attack or the amount of harm threatened. And it is precisely this lack of proportionality, mentioned at the outset in our discussion of the "fruit thief case," that may prompt observers outside of Germany to consider even today's more moderate law as excessively permissive.

B. The Theoretical Foundations of Germany's Self-Defense Law

In comparison to the self-defense laws we see in the U.S., England, and elsewhere,[57] the German law is based on an articulated and value-explicit moral framework. This framework dictates when, why, and to what extent self-defense is authorized. Germany's system offers a contrast to the unpredictable, undulating development of self-defense in England and the U.S., which has been characterized by unarticulated public-policy considerations and, relatedly, hidden normative judgments.[58] The law's text and the overarching commitment to the values driving the maxim, first expressed in its present form by Professor Albert Friedrich Berner in 1898,[59] that the "right need not yield to the wrong," continue to guide German courts and commentators.

1. The Traditional Collectivist Justification for Self-Defense: Protection of the "Legal Order"

There has been a significant effort to ground the basis for self-defense exclusively on the concept that permitting self-preferential force against attackers serves to defend and protect the empirical inviolability of the legal order (the *Rechtsbewährungsprinzip*, which translates into "protection of the legal order justification").[60] On this view, every exercise of legitimate defensive force ensures that the collective legal order is protected and preserved, and that the "right need not yield to the wrong" (*das Recht muss*

56. *See generally* Lesch, *supra* note 45, at 86 (Ger.).

57. *See* FUNK, supra note *, at 166–85, 188–209.

58. *See id.* at 185–87, 208–18.

59. *See generally* Urs Kindhäuser, *Zur Genese der Formel "das Recht brauch dem Unrecht night to weichen"* [*To the Genesis of the Formula "the Right Needs to Give Way to Injustice"*], *in* Festschrift für Wolfgang Frisch [COMMEMORATION FOR WOLFGANG FRISCH] 493, 495 (2013) (Ger.).

60. *See generally* Pest, supra note 46, at 140 (Ger.); Greco, supra note 50, at 667 (Ger.); Erb, supra note 12, at side-note 18 (Ger.); Eberhardt Schmidhäuser, *Die Begründung der Notwehr* [*The Justification of Self-Defense*], GA 97, 101 (1991) (Ger.); HELLMUTH MAYER, *supra* note 54, at 254 (Ger.).

dem Unrecht nicht weichen).[61] Indeed, today's consensus view (*Herrschende Meinung*) is that German self-defense law's "harshness" (*Schneidigkeit* or *Schärfe*) is derived from this traditional collective legal order justification, pursuant to which an active attacker effectively placed himself outside of the law's protections.[62]

So whenever there was a conflict between an attacker and a defender, the importance of in this manner protecting the legal order was accorded primacy over the attacker's interests, including the attacker's right to life (value #2).[63] Under the traditional conception, then, the defender was authorized to exercise all force necessary to protect his autonomy (value #4) without regard for proportion. Put another way, the law paid no attention to any balancing of harms. Correspondingly, defenders (except under certain circumstances), much like in U.S. "stand-your-ground" states, had no duty to retreat or to request the help of third parties prior to exercising deadly defensive force.[64]

---

61. This grounding principle of German self-defense, which provides the foundation for the *Rechtsbewährungsprinzip*, is explicitly discussed in ALBERT BERNER, *DIE NOTWEHRTHEORIE*, *IN* ARCHIV DES CRIMINALRECHTS [THE SELF-DEFENSE THEORY IN ARCHIVE OF CRIMINAL LAW] 547, 557, 562 (1848) (Ger.); *see also* BGH Apr. 12, 2016, 2 StR 523/15, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=74901&pos=0&anz=1 [https://perma.cc/82MB-M4YN] (holding that the possibility of retreat does not vitiate the right to self-defense); RG Sept. 20, 1920, 55 RGSt 82, 83 (Ger.); RG Nov. 24, 1890, 21 RGST 168, 170 (Ger.); Erb, *supra* note 7, at side-notes 2, 13 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 4, 65–66 (Ger.); Pest, *supra* note 46, at 141 (Ger.); Kühl & Heger, *supra* note 46, at side-notes 15–16 (Ger.); Lesch, *supra* note 45, at 82 (Ger.); Theodor Lenckner, *§ 32 Notwehr* [*§ 32 Self-Defense*], *in* ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH [CRIMINAL CODE] 527 (25th ed. 1997); HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS Allgemeiner Teil [TEXTBOOK OF CRIMINAL LAW, THE GENERAL PART] 336–40 (5th ed. 1993) [hereinafter JESCHECK & WEIGEND, 5th ed.]; ALBERT BERNER, LEHRBUCH DES DEUTSCHEN STRAFRECHTES [TEXTBOOK OF GERMAN CRIMINAL LAW]107 (1989) (Ger.). *Cf.* Rönnau & Hohn, *supra* note 44, at side-note 66 n.174, 225 (Ger.).

62. *See generally* Erb, *supra* note 7, at side-note 2 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 66 (Ger.); Kühl & Heger, *supra* note 46, at side-notes 15–16 (Ger.); Erb, *supra* note 12, at side-notes 12–13 (Ger.); Vogel, *supra* note 45, at 43–44 (Ger.); Lesch, *supra* note 45, at 83 (Ger.); ROBERT HAAS, NOTWEHR UND NOTHILFE: ZUM PRINZIP DER ABWEHR RECHTWIDRIGER ANGRIFFE [SELF-DEFENSE AND EMERGENCY AID: ON THE PRINCIPLE OF DEFENSE AGAINST ILLEGAL ATTACKS] 144 (1978) (Ger.).

63. *See generally* Pest, *supra* note 46, at 140 (Ger.); HOLGER MATT AND JOACHIM RENZIKOWSKI, STRAFGESETZBUCH [GERMAN CRIMINAL CODE] § 32, side-note 3 (2013) (Ger.).

64. *See* BGH Sept. 8, 2020, 4 StR 288/20 (Ger.) (requiring retreat when the defender provoked the attacker); Landesgericht [LG] [Regional Court] Dortmund, June 29, 2016, 39 Ks 8/14, Justiz-Online (Ger.) http://www.justiz.nrw.de/nrwe/lgs/dortmund/lg_dortmund/j2016/39_Ks_8_14_190_Js_215_12_Urteil_20160629.html [https://perma.cc/ZVL6-CYDM] (requiring retreat because putative defender's right to self-defense was limited because the defender armed himself and knowingly entered into a group fight prior to stabbing the unarmed putative attacker); Rosenau, *supra* note 12, at side-notes 1, 25 (Ger.); FISCHER, *supra* note 12, at side-note 232 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 66, 157, 181–82 (Ger.) (discussing no retreat or avoidance of conflict required); Erb, *supra* note 50, at 593 (Ger.) (discussing no retreat requirement).

Because the German criminal law's traditional focus was not on welfarist interests and rejected the concept of weighing of harms, the German law historically rejected the concept of "trading off" autonomy by measuring it on a balance of utilities. This explains why the defender was justified not only in defending against the attack (*Schutzwehr* or *Gegenwehr*),[65] but also at times in using offensive force to neutralize or limit an attack (*Trutzwehr*).[66]

2. The Emerging Justification for Self-Defense: Protecting the Individual

Those championing the protection of the legal order justification of self-defense are chiefly concerned with safeguarding the respect for, and authority of, the legal system. That said, an increasingly vocal segment of contemporary German scholars, including Erb,[67] has begun to echo U.S. and English commentators in arguing that self-defense can, in fact, only be justified as a means of protecting the particular individual who is being attacked from harm (this is the *Individualrechtliche begründung*—the "personal protection justification").[68] This personal protection justification broadly aligns with values #3—equal standing and #4—protection of the defender's autonomy.

65. *See generally* Rönnau & Hohn, *supra* note 44, at side-note 176 (Ger.); Erb, *supra* note 12, at side-note 120 (Ger.); Erb, *supra* note 50, at 593 (Ger.).

66. *See generally* BGH Aug. 28, 2018, 4 StR 107/18, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2018-8-28&nr=87580&pos=6&anz=27 [https://perma.cc/B8LK-DLJ7]; Pest, *supra* note 46, at 141–42 (Ger.); FISCHER, *supra* note 12, at side-note 23 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 158 (Ger.); Alan Reed & Michael Bohlander, *When the Bough Breaks—Defences and Sentencing Options Available to Battered Women and Similar Scenarios Under German Law*, *in* LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES 250 (Alan Reed & Michael Bohlander eds., 2016); Roxin, *supra* note 45, at side-note 70 (Ger.).

67. Erb, *supra* note 7, at side-notes 18, 209, 224, 248 (Ger.) (contending that allowing a defender to use necessary defensive force permits the defender to thwart the attacker's *de facto* efforts to impart unequal standing—upsetting of the *Gleichordnung* or "equal ordering").

68. *See generally* Erb, *supra* note 12, at side-note 18 (Ger.); Erb, *supra* note 50, at 601 (Ger.). *See also* Rosenau, *supra* note 12, at side-note 2 (Ger.); JOACHIM HRUSCHKA, STRAFRECHT NACH LOGISCH-ANALYTISCHER METHODE [CRIMINAL LAW ACCORDING TO THE LOGICAL AND ANALYTICAL METHOD] 142 (1988) (Ger.). Others view protection of the broader legal order at the heart of self-defense. *See, e.g.*, Eberhard Schmidhäuser, *Über die Wertstruktur der Notwehr* [About the Value Structure of Self-defense], *in* FESTSCHRIFT FUR RICHARD M. HONIG [COMMEMORATION FOR RICHARD M. HONIG] 193 (1970) (Ger.); *see also* Erb, *supra* note 7, at side-note 11 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 336–37 (Ger.); Peter Klose, *Notrecht des Staates aus staatlicher Rechtsnot* [*Emergency Law of the State Due to State Legal Necessity*], 89 ZSTW 61, 86 (1977) (Ger.).

3. Today's Consensus Position on the Purpose of Self-Defense: Protecting Both the Legal Order and the Individual

Although the above-described monistic views have received their fair share of scholarly support, contemporary commentators on the whole endorse a dualistic position (*dualistische Begründung*). This approach finds the law's basis *both* in the protection of (1) the individual (*Individualinteresse,* also referred to as the *Schutzprinzip*), *and* (2) the broader legal order (*Rechtsbewährungsprinzip*).[69] As the *Bundesgerichtshof* (the Federal Court of Justice, which is the highest court in the system of ordinary jurisdiction) put it, self-defense "does not only serve to protect the person being attacked, but also *concurrently* protects the legal order."[70]

This modern view is not universally endorsed in the German scholarship, however. Erb, for example, argues that the current focus on collective, societal, and welfarist interests in protecting even culpable attackers ignores the concrete interests of the individual defender, and, in so doing, violates the defender's human rights.[71]

---

69. *See generally* Erb, *supra* note 7, at side-note 12 (Ger.); FISCHER, *supra* note 12, at side-note 2 (Ger.); Pest, *supra* note 46, at 139 (Ger.); Rosenau, *supra* note 12, at side-note 2 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 64–68 (Ger.); Kühl & Heger, *supra* note 46, at side-notes 1–2 (Ger.); AXEL MONTENBRUCK, DEUTSCHE STRAFTHEORIE [GERMAN CRIMINAL THEORY] 233 (2018) (Ger.); HEINRICH, *supra* note 46, at 337; 1 CLAUS ROXIN, STRAFRECHT: ALLGEMEINER TEIL [CRIMINAL LAW: GENERAL PART] § 15, 650, 650–57 (4th ed. 2006) (Ger.) [hereinafter ROXIN, 4th ed.]; Lesch, *supra* note 45, at 82, 88–89 (Ger.). *See also* BGH Jun. 14, 1972, 2 STR 679/71, Wolters Kluwer (Ger.) https://research.wolterskluwer-online.de/document/3ef82a74-9060-447e-b626-1ae0185e9c41 [https://perma.cc/WZL6-24SY]; Lenckner, *supra* note 61, at 527 (Ger.); CLAUS ROXIN, STRAFRECHT, ALLGEMEINER TEIL [CRIMINAL LAW, GENERAL PART] 551–52, 527 (3d ed. 1997) (Ger.) [hereinafter ROXIN, 3d ed.]; REINHART MAURACH & HEINZ ZIPF, STRAFRECHT, ALLGEMEINER TEIL [CRIMINAL LAW, GENERAL PART] 354 (1992) (Ger.); Klaus Bernsmann, *Überlegungen zur tödlichen Notwehr bei nicht lebensbedrohlichen Angriffen* [*Fatal Self-Defense Considerations for Non-Life-Threatening Attacks*], 104 ZStW 290, 291 (1992) (Ger.); Günter Spendel, *§ 32 Notwehr* [*§ 32 Self-Defense*] *in* STRAFGESSETZBUCH: LEIPZIGER KOMMENTAR [CRIMINAL CODE: LEIPZIG COMMENTARY] 15-16 (Burkhard et al. eds., 11th ed., 1992) (Ger.). But this view has its critics. *See, e.g.*, Erb, *supra* note 12, at side-note 202 (Ger.); MATT & RENZIKOWSKI, *supra* note 63, at § 32 n. 3 (Ger.); LESCH, *supra* note 45, at 88–89 (Ger.); PAWLIK, *supra* note 48, at 261 (Ger.). Some contend that the individual's "subjective" act to defend herself is simply part and parcel of protecting the legal order (which, after all, is focused on protecting individual rights); viewed this way, the individual and collective justifications collapse into one. *See* RÖNNAU & HOHN, *supra* note 44, at side-notes 66–69 (Ger.); LESCH, *supra* note 45, at 85 (Ger.).

70. BGH Jun. 14, 1972, 2 StR 679/71 (Ger.) (emphasis added); *see also* Walter Kargl, *Die Intersubjektive Begründung und Begrenzung der Notwehr* [*The Intersubjective Justification and Limitation of Emergency Defense*], 110 ZSTW 38, 38–39 (1998) (Ger.). Günter Warda, *Die Geeignetheit der Verteidigungshandlung bei der Notwehr Strittiges in der aktuellen Diskussion* [*The Controversy in the Current Discussion Regarding Suitability of Defense Methods During Self-Defense*], GA 405, 406 (1996) (Ger.); Schmidhäuser, supra note 69, at 101 (Ger.).

71. Erb, supra note 41, at 600 (Ger.) (rejecting claim that focus on the individual/victim is part of a fundamentalist ideology); *see also* Rönnau & Hohn, *supra* note 44, at side-note 64 (Ger.) (noting increasing popularity of view according more weight to the individualistic justification); Greco, *supra* note 50, at 677–78 (Ger.) (self-defense at bottom is grounded on protection of the individual).

Some German scholars, including influential German criminal law scholars Thomas Rönnau and Kristian Hohn, have begun to consider the role of the unique violation of equal standing (*Störung des Gegenseitigkeitsverhältnises*—roughly in accord with value #3) that accompanies culpable attacks.[72] They maintain that self-defense at its core is a right grounded in the attacker's (knowing and intentional) refusal to respect the equality of his victim and to follow legal norms.[73]

Although differences of opinion persist, it is fair to say that when an individual today claims self-defense, the court will consider not only whether the act served to protect the *individual* defender from a threat (values #3 and #4), but also whether it served to protect the wider *legal order*. In short, the dualistic position presently wields the balance of power.

It is hoped that the benefits of this unique type of (generally) explicit value-ordering are coming into focus. Instead of simply announcing *ad hoc* changes to the rules of self-defense, the German courts, and the scholars that so heavily influence them, pay a great deal of attention to at least some of the competing values implicated in law reform proposals.[74] This, in turn, results in a more nuanced, incremental, and all-things-considered dialogue.

C. The Introduction of "Socio-Ethical" Limitations on Defensive Force to Provide Some Protection for the Attacker

Following World War II, and in particular during the past half century or so, the so-called "socio-ethical limits" (*sozialethische Einschränkungen)* on self-defense have gained prominence within Germany's legal framework.[75]

72. *See, e.g.*, Rönnau & Hohn, *supra* note 44, at side-notes 64, 68–73, 226 (Ger.) (also conceding that a determination of "relative weights" is not testable).

73. *Id*. (Ger.); *see also* Erb, *supra* note 7, at side-notes 18, 209, 224, 248 (Ger.) (noting the importance of maintaining the *Gleichordnung* ("equal ordering") of *Rechtssubjecten* ("legal persons")).

74. *See* FUNK, *supra* note *, at 163–65; *see also* MATTHEW DYSON & BENJAMIN Vogel, THE LIMITS OF CRIMINAL LAW: ANGLO-GERMAN CONCEPTS AND PRINCIPLES 567–68 (Matthew Dyson & Benjamin Vogel eds., 2018) (noting that the purpose of German criminal law doctrine is to "provide a coherent set of reasons for why specific conduct is criminalized and punished" and that "the need to give reasons for criminalization and punishment is rarely questioned by German constitutional law or academics").

75. *See, e.g.*, Oberlandesgericht [Higher Regional Court] [OLG] Zweibrücken Oct. 18, 2018, 1 OLG 2 Ss 42/18 (Ger.); BGH Apr. 12, 2016, 2 StR 523/15 (Ger.); BGH Sept. 9, 1995, 4 StR 294/95, Wolters Kluwer (Ger.) https://research.wolterskluwer-online.de/document/0a087251-dda6-4aaa-8fa5-eeb238a289fc [https://perma.cc/4H56-5285]; *see also* Rönnau & Hohn, *supra* note 44, at side-notes 226, 242–44 (Ger.); Greco, *supra* note 50, at 667; Erb, *supra* note 7, at side-notes 201–07 (Ger.); DENNIS BOCK, STRAFRECHT ALLGEMEINER TEIL [CRIMINAL LAW GENERAL PART] 289–90 (2018) (Ger.); BURKHARD JÄHNKE ET AL., STRAFGESETZBUCH (LEIPZIGER KOMMENTAR) [CRIMINAL CODE BOOK (LEIPZIGER COMMENTARY)] 147 (2018) (Ger.); VON SCHERENBERG, *supra* note 10, at 76 (Ger.) (noting that the term is not provided for in the statute and is a largely contentless term in that it only

The appearance of these "humane" bounds reflected a growing skepticism about individual self-help and a feeling that attackers—even culpable ones—deserve some level of protection other than "necessity." That is, these limitations represented an emerging sense that the *Schneidigkeit* or *Schärfe* ("severity" or "harshness") of Germany's self-defense law went too far. The feeling was that Germany's hard-edged approach ignored, or at least undervalued, the "minimal solidarity" (*Mindestsolidarität*) between people, as well as the related humanitarian expectation that citizens exhibit some level of tolerance toward each other (*Pflicht zur Rücksichtsnahme* or *Nachsicht gegenüber Rechtsgenossen*).[76] It was argued that such restrictions were also in accord with the high regard for human life reflected in Articles 1 and 2 of the German Constitution.[77] Finally, these new limitations were characterized as being consistent with the "relatively tolerant approach of [German] society with regard to slight deviations [from the law]."[78]

becomes relevant in the most extreme situation that for other reasons would likely not be deemed self-defense); MICHAEL KOLLER, NOT KENNT KEIN GEBOT [EMERGENCY KNOWS NO COMMANDMENT] 196 (2006) (Ger.) (contending that the necessity of the defensive force must also be viewed in the context of protecting the legitimacy of the criminal justice system); Lesch, *supra* note 45, at 82, 106 (Ger.). This concept of lenity has also variously been described as arising out of "socio-ethics considerations," the "humane nature of criminal law," and the "duty of social solidarity." *See, e.g.*, Mordechai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor's Culpability in Self-Defense*, 39 TULSA L. REV. 875, 894 (2004). But consider that even in the late 1800s, German scholars noted how the distinction between innocent and knowing attackers impacted the "gap" between the state-sanctioned, "energetic" right of self-defense, on the one hand, and the "barriers to its exercise required by custom." HANS TOBLER, DIE GRENZGEBIETE ZWISCHEN NOTSTAND UND NOTWEHR [THE BORDER AREAS BETWEEN EMERGENCY AND EMERGENCY DEPARTMENT] 62 (1894) (Ger.).

76. *See generally* Rönnau & Hohn, *supra* note 44, at side-notes 70, 226–27 (Ger.); Erb, *supra* note 12, at side-note 214 (Ger.); Lesch, *supra* note 45, at 92–93, 106–09 (Ger.); Kargl, *supra* note 70, at 39 (Ger.); Kristian Kühl, DIE GEBOTENE VERTEIDIGUNG GEGEN PROVOZIERTE ANGRIFFE. ÜBERLEGUNGEN AUS ANLASS DER NEUSTEN RECHTSPRECHUNG DES BUNDESGERICHTSHOFS ZUR NOTWEHRPROVOKATION [THE REQUIRED DEFENSE AGAINST PROVOCATED ATTACKS. CONSIDERATIONS ON THE OCCASION OF THE LATEST JURISDICTION OF THE FEDERAL COURT ON EMERGENCY DEFENSE], *in* JOACHIM SCHULZ & GUNTER BEMMANN, FESTSCHRIFT FÜR GÜNTER BEMMANN [JOACHIM SCHULZ & GUNTER BEMMANN, FESTIVAL FOR GUNTER BEMMANN] 194 (1997) (Ger.); ROXIN, 3d ed., *supra* note 69, at 575–77 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 344–49 (Ger.); Burkhard Koch, *Prinzipientheorie der Notwehreinschränkungen* [*Pinciple Theory of Emergency Defense Restrictions*], 104 Zeitschrift für die gesamte Strafrechtswissenschaft [Journal for the Entire Field of Criminal Law] 785 (1992); SPENDEL, *supra* note 69, at 15–16 (Ger.) Schmidhäuser, *supra* note 68, at 123–24 (Ger.) (arguing that the state monopoly on force is not challenged by self-defense because the right to self-defense is not delegated by the state); Roxin, *supra* note 45, at 68 (Ger.). *See also* KOLLER, *supra* note 75, at 196 (Ger.).

77. *See generally* Rönnau & Hohn, *supra* note 44, at side-note 226 (Ger.); Kühl & Heger, *supra* note 46, at side-note 16 (Ger.).

78. Kargl, *supra* note 70, at 38 (Ger.). Article 1 of the German Constitution speaks of the dignity of man and human rights, whereas Article 2 addresses the citizens' right to life and bodily integrity. *See generally* HANS D. JARASS & BODO PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [BASIC LAW FOR THE FEDERAL PUBLIC OF GERMANY] 36, 49 (4th ed. 1997) (Ger.)

A survey of public attitudes in Germany toward self-defense law interestingly also revealed that the broader public neither knew of, nor agreed with, the old-line "harsh" aspects of German self-defense (primarily the lack of any proportionality requirement—as in the case of the youthful fruit thief, if deadly force was necessary to prevent a matchbook or umbrella from being stolen, then such force was legally authorized).[79] As Rönnau and Hohn framed their support for the criticism of Germany's absolutist approach, the public's sense of justice shows that Germany's very permissive, pro-defender self-defense law is, by international comparisons, an outlier that is neither "desired nor justified" by the public.[80] In fact, even with these added socio-ethical restrictions in place, in the "typical" case (*Normalfall*), German self-defense still grants defenders remarkably wide latitude.[81]

Erb is among the minority of German scholars who have pushed back against such "humanitarian" restrictions. According to Erb, any additional limitations ignore that self-defense at its core is a natural right, and that, as such, any state limitations of it require "special legitimation."[82] As a matter of public policy, moreover, he contends that calls for strict proportionality have a tendency to harm the comparatively weaker and more defenseless who are less able to rely on non-deadly means.[83]

From a more macro, non-collectivist perspective, moreover, Erb points out that it was the Nazi regime that first began the process of restricting the citizens' ability to exercise defensive force. The Nazi regime sought to justify the new limits by claiming that "communal interests" must trump individual interests or rights, and that limits on an individual's ability to use self-preferential force were part of a "healthy" public perspective.[84] This, of course, was also in line with the Nazi movement's broader, corrupt collectivist calls for Germans to subordinate their personal desires to the purported interest of the national community (*Volksgemeinschaft*).[85]

Although they are now a firm part of Germany's self-defense framework, the introduction of these socio-ethical limitations, and attempts to broaden them, have triggered significant debates over the textual foundation justifying

79. *See* Rönnau & Hohn, *supra* note 44, at side-notes 72–73 (Ger.).

80. *Id*. (Ger.); *see also* Erb, *supra* note 7, at side-note 9 (Ger.).

81. *See* Pest, *supra* note 46, at 665–83 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 226–27 (Ger.)*; see also* Clemency Wang, *The Police Are Innocent as Long as They Honestly Believe: The Human Rights Problems with English Self-Defense Law*, 49 COLUM. HUM. RTS. L. REV. 373, 388 (2018) ("German self-defense law is known to be lenient when it comes to the force used in response to the threat, and the force used in self-defense is only unjustifiable when it is grossly disproportionate to the threat.").

82. Erb, *supra* note 7, at side-notes 5, 9 (Ger.).

83. *Id*. at side-note 9 (Ger.).

84. *Id.* at side-note 5 (Ger.).

85. *See generally* Moritz Föllmer, *Was Nazism Collectivistic? Redefining the Individual in Berlin, 1930–1945*, 82 J. MOD. HIST. 61 (2010).

such limits on the historically rigid and unforgiving § 32.[86] Such a textual basis is, indeed, compelled.[87] For by limiting the scope of the self-defense justification, the German justice system necessarily is criminalizing otherwise justified conduct.[88]

More specifically, Article 103(2) of the German Constitution forbids any expansion in the scope of criminal activity without prior legal enactment under the "*Legalitätsprinzip*" principle of *nulla poena sine lege*. Limiting a defense through interpretation, rather than statutory revision, has, therefore, understandably been characterized as problematic.[89]

Moving from the general to the specific, this ongoing textual debate has focused on whether the claimed humanitarian or empathy-based limits are authorized by the "appropriate" (*geboten*) language in § 32(1),[90] whether they instead derive from the "necessary" (*erforderlich*) language in § 32(2),[91] or whether both terms actually mean the same thing.[92] The majority opinion, and one endorsed by the Bundesgerichtshof,[93] is that the *erforderlich* language asks whether the defender has a normative right to self-defense at all,[94] whereas *geboten* is descriptive in that it refers to the type and manner of appropriate defensive conduct. The argument, therefore, is that the *geboten* language is the source for most limitations (*Schranken*) on defensive conduct (e.g., distinguishing attacks by fully culpable individuals from attacks by moral innocents, such as young children and those laboring under a reasonable mistake) and also justifies denying self-defense in cases of gross disproportion

86. *See generally* Rönnau & Hohn, *supra* note 44, at side-note 76 (Ger.).

87. *See* Erb, *supra* note 50, at 596 (Ger).

88. *See id.* at 596 (Ger.).

89. *See id*. (Ger.); Erb, *supra* note 7, at side-note 5 (Ger.); DIETRICH KRATZSCH, GRENZEN DER STRAFBARKEIT IM NOTWEHRRECHT [LIMITATIONS OF CRIMINALITY IN EMERGENCY DEFENSE LAW] 29 (1968) (Ger.). For the argument that Article 103 is not infringed by § 32, *see* Rosenau, *supra* note 12, at side-note 30 (Ger.); JOHANNES WESSELS & HELMUT SATZGER, WESSELS/BEULKE: STRAFRECHT—ALLGEMEINER TEIL [WESSELS/BEULKE: CRIMINAL LAW- GENERAL PART] (2018) (manuscript at side-note 522) (Ger.); ROXIN, 3d., *supra* note 69, at 576 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 344 (Ger.). *See also* Rosenau, *supra* note 12, at side-notes 11–12 (Ger.).

90. *See, e.g*., Rönnau & Hohn, *supra* note 44, at side-note 228 (Ger.); Rosenau, *supra* note 12, at side-notes 30, 32 (Ger.); WESSELS & SATZGER, *supra* note 89, at side-note 520 (2018) (Ger.); Kühl & Heger, *supra* note 46, at side-note 13 (Ger.); ROXIN, 3d ed., *supra* note 69, at side-note 47 (Ger.).

91. *See* Erb, *supra* note 7, at side-note 129 (Ger.); JOACHIM RENZIKOWSKI, NOTSTAND UND NOTWEHR [EMERGENCY AND SELF-DEFENSE] 303 (1994) (Ger.).

92. *See generally* BGH May 17, 2018, 3 StR 622/17 (Ger.) (finding that a knife attack to ward off insults "exceeded the limits of what is appropriate [for self-defense]"). *See also* Rönnau & Hohn, *supra* note 44, at side-notes 76, 166–67, 180, 228 (Ger.); Erb, *supra* note 12, at side-note 205 (Ger.); DIETER DÖLLING ET AL., GESAMTES STRAFRECHT [ENTIRE CRIMINAL LAW] 375–99 (4th ed. 2017) (Ger.); Pest, *supra* note 46, at 137, 142–43 (Ger.).

93. *See, e.g.*, BGH Sept. 8, 2020, 4 StR 288/20 (Ger.).

94. *See* Erb, *supra* note 7, at side-note 131 (Ger.); Kühl & Heger, *supra* note 46, at side-note 9 (Ger.).

(*krasses Missverhältnis*).[95] Whether a defender armed herself prior to the confrontation (even if doing so violated weapons laws), moreover, has been deemed irrelevant to the question of whether the defensive conduct was appropriate.[96]

As touched on above, the introduction of humanitarian and welfarist socio-ethical limitations on the right to self-defense, and the emerging focus on the principle of protecting the attacker,[97] has certainly received its share of criticism. For example, Lenckner maintains that the limitations threaten to "devalue" self-defense,[98] and Erb has commented that justifying these limitations has been "seriously difficult" for their proponents.[99] Similarly, Schmidhäuser has commented that the limitations are the result of a "contemporary German vanity" whereby the professors who urge these new limitations are virtue-signalling and like to think of themselves as being in

95. *See generally* BGH Aug. 15, 2018, 4 StR 242/18, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=87382&pos=0&anz=1 [https://perma.cc/A3SX-6AYS]; BGH Sept. 13, 2018, 4 StR 214/18, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=90581&pos=0&anz=1 [https://perma.cc/HWM4-VLFU]; BGH Dec. 7, 2017, 2 StR 252/17, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=83059&pos=0&anz=1 [https://perma.cc/JZ6J-HNDL]; Amtsgericht [AG] [District Court] Bensberg Oct. 25, 1965, Neue Juristische Wochenschrift [NJW] [New Legal Weekly] 733, 735 (1966) (Ger.); FISCHER, *supra* note 12, at side-note 39 (Ger.); Pest, *supra* note 46, at 137 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 76, 225–26, 228, 230 (Ger.); Rosenau, *supra* note 12, at side-notes 34–35 (Ger.); Kühl & Heger, *supra* note 46, at side-notes 13–14 (Ger.); WESSELS & SATZGER, *supra* note 89, at side-note 524 (Ger.); Erb, *supra* note 12, at side-note 212 (Ger.); CHRISTIAN RÜCKERT, EFFECTIVE SELBSTVERTEIDIGUNG UND NOTWEHRRECHT [EFFECTIVE SELF-DEFENSE AND EMERGENCY DEFENSE RIGHTS] 5, 13 (2017) (Ger.); ROXIN, 3d ed., *supra* note 69, at side-notes 83–85, 575–77 (Ger.); Erb, *supra* note 50, at 593 (Ger.); Lenckner, *supra* note 61, at 544 (Ger.); KÜHL, *supra* note 76, at 197 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 344–45 (Ger.); Spendel, *supra* note 69, at 124–25 (Ger.); Schmidhäuser, *supra* note 68, at 133–34 (Ger.); Ulrich Schroth, *Notwehr bei Auseinandersetzungen in Engen Persönlichen Beziehungen* [*Self-defense During Close Personal Relationship Disputes*], NJW 2562, 2562–63 (1984) (Ger.); Volker Krey, *Zur Einschränkung des Notwehrrechts bei der Verteidigung von Sachgütern* [*Restriction of the Right of Self-defense in the Defense of Property*], 34 JuristenZeitung [JZ] [LegalJournal] 702, 710 (1979) (Ger.); Theodor Lenckner, *"Gebotensein" und "Erforderlichkeit" der Notwehr* [*"Requirement" and "Necessity" of Self-Defense*], GA 1, 7 (1968) (Ger.); Klaus Himmelreich, *Erforderlichkeit der Abwehrhandlung, Gebotensein der Notwehrhandlung; Provokation und Rechtsmissbrauch; Notwehrexzeß* [*Necessity of Defensive Acts, Necessity of Self-defense Acts; Provocation and Abuse of Rights; Excessive Self-defense*], GA 129, 129 (1966) (Ger.).

96. *See* Erb, *supra* note 7, at side-note 138 (Ger.).

97. A principle that broadly aligns with values #1—reducing overall societal violence and maintaining the state's monopoly on force; #2—protecting the attacker's right to life; #5—ensuring the primacy of the legal process; and #6—avoiding harsh outcomes that could undermine the law's legitimacy.

98. *See* Lenckner, *supra* note 61, at 545 (Ger.).

99. Erb, *supra* note 7, at side-notes 9, 201–02 (Ger.).

solidarity with the attacker, whom they not infrequently view as a "victim of society."[100]

Whatever the merits of these critiques, the socio-ethical limitations are now firmly part of Germany's self-defense law. And the German law, by introducing an element of concern for the welfare of the attacker, is now also more in line with the value-based model and the attention it pays to according appropriate value to all lives, including to those who become the lawful object of defensive force.[101]

D. Application of Germany's Self-Defense Law

Having ploughed this analytically dense ground, we can now take a closer look at the outcomes the contemporary German approach yields.

1. The Attack

a. All Legally Protected Interests Can be Protected by Self-Defense

There was a time when German self-defense law only applied to physical attacks. But by 1870, the law was interpreted as permitting defensive force to protect against *all* threats to a defender's legally protected interests.[102] As of this writing, § 32 continues to permit self-defense to protect against attacks on any legally protected interests a defender may have.[103] Self-defense can therefore be used to defend interests such as one's freedom and honor,[104]

100. Schmidhäuser, *supra* note 68, at 137 (Ger.)*; see also* Spendel, *supra* note 69, at 147–55 (Ger.).

101. *But see* Erb, *supra* note 50, at 598 (contending that the BGH "corrected" the "questionable tendency" toward an overbroad expansion of the limitation).

102. *See* FRIEDRICH SCHWARZE, DAS STRAFGESETZBUCH FÜR DEN NORDDEUTSCHEN BUND [THE CRIMINAL CODE FOR THE NORTH GERMAN FEDERATION] 15 (1870) (Ger.); *see also* FRANZ LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS [TEXTBOOK OF GERMAN CRIMINAL LAW] 122-23 (10th ed. 1900) (Ger.) (stating that, during the Middle Ages, self-defense was limited to defense of a person from physical attack); Erb, *supra* note 7, at side-notes 84–100 (Ger.).

103. *See* Rosenau, *supra* note 12, at side-note 7 (Ger.); FISCHER, *supra* note 12, at side-note 8 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 78–79 (Ger.); Erb, *supra* note 12, at side-notes 83–99 (Ger.); ROXIN, 3d ed., *supra* note 69, at side-note 30 (Ger.).

104. *See, e.g.*, BGH May 17, 2018, 3 StR 622/17 (Ger.) (noting that a person's honor is a legally protected interest and that defensive force can be used to protect it); RG July 9, 1935, 69 RGST 265, 268 (Ger.) (attack on soldier's honor); RG Nov. 24, 1890, 21 RGST 168, 168–70 (Ger.) (attack on defender's honor by priest during religious sermon); *see also* Erb, *supra* note 7, at side-note 85, 88 (Ger.); Kühl & Heger, *supra* note 46, at side-note 3 (Ger.).

life,[105] non-deadly assaults,[106] property,[107] marriage and engagement,[108] the right to hunt,[109] the right to engage in religious services,[110] home ownership rights,[111] a person's right to privacy (e.g., persons threatened by an intrusive photographer, "peeping Tom," or a drone),[112] and the right to be free from excessive noise.[113]

Section 32 does not, however, allow for the protection of relative rights, such as contract rights. A contrary outcome would lead to a situation where every creditor, for example, could use force to extract the money owed him by debtors.[114]

Attacks on the "public order," or the legal order in general, similarly do not constitute "attacks" under § 32 based on the theory that only the state (generally consistent with collective value #1) is authorized to defend against attacks that do not harm any individually recognizable interest of the defender.[115] A different outcome, it is said, would turn each citizen into a "quasi-policeman."[116] Individuals are consequently not permitted to, say, remove pornographic material from a newsstand because the individual believes the material offends the "public morality."[117]

---

105. *See, e.g.*, BGH July 1, 2014, 5 StR 134/14, juris (2014) (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=68426&pos=0&anz=1 [https://perma.cc/4D69-NQ6Q]; Rosenau, *supra* note 12, at side-note 7.

106. *See, e.g.*, BGH Apr. 17, 2019, 2 StR 363/18 (Ger.).

107. *See, e.g.*, RG 1926, 60 RGST 273, 277 (Ger.); Erb, *supra* note 7, at side-note 89 (Ger.); ROXIN, 3d ed., *supra* note 69, at side-note 87 (Ger.).

108. *See* Erb, *supra* note 7, at side-note 91 (Ger.); Gerhard Erdsiek, *Umwelt und Recht* [*Environment and Law*], NJW 2240, 2240 (1962) (Ger.)

109. *See, e.g.*, Rönnau & Hohn, *supra* note 44, at side-note 86 (discussing RG Oct. 14, 1902, 35 RGST 403, 407 (Ger.)); RG Oct. 21, 1920, 55 RGST 167 (Ger.); *see also* Erb, *supra* note 7, at side-note 90 (Ger.); Erb, *supra* note 12, at side-notes 83–99 (Ger.).

110. *See generally* Rosenau, *supra* note 12, at side-note 7 (Ger.); Lenckner, *supra* note 61, at 529 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 339 (Ger.); HANS-HEINRICH JESCHECK, LEHRBUCH DES STRAFRECHTS, ALLGEMEINER TEIL [TEACHING MANUAL OF CRIMINAL LAW, GENERAL PART] 304 (4th ed. 1988) (Ger.); LISZT, *supra* note 102, at 125 (Ger.); SCHWARZE, *supra* note 102, at 15 (Ger.).

111. *See* Lenckner, *supra* note 61, at 529 (Ger.).

112. OLG Düsseldorf Oct. 15, 1993, NJW 1971 (1994) (Ger.); *see also* Bayerisches Oberstes Landesgericht [BayObLG] [Bavarian Higher Regional Court] June 26, 1962, NJW 1782, 1782–83 (1962) (Ger.); Erb, *supra* note 7, at side-note 93 (Ger.); Kühl & Heger, *supra* note 46, at side-note 3 (Ger.).

113. *See, e.g.*, OLG Karlsruhe Jan. 24, 1992, NJW 1329 (1992) (Ger.).

114. *See generally* Rosenau, *supra* note 12, at side-note 8 (Ger.); Kühl & Heger, *supra* note 46, at side-note 3 (Ger.); Lesch, *supra* note 45, at 93 (Ger.).

115. *See* Erb, *supra* note 7, at side-notes 100–01 (Ger.); FISCHER, *supra* note 12, at side-note 10 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 79 (Ger.); Erb, *supra* note 12, at side-note 100 (Ger.); BGH April 15, 1975, NJW 1161, 1162–63 (1975) (Ger.); OLG Stuttgart Dec. 8, 1965, NJW 745, 748 (1966) (Ger.); BGH Oct. 2, 1953, 3 StR 151/53 (Ger.).

116. *See* BGH April 15, 1975, NJW 1161, 1162 (1975) (Ger.).

117. BGH 3 StR 151/53 (Ger.).

b. The Attacker's Conduct Need Not be Criminal

The "unlawful attack" (*Rechtswidriger Angriff*) that § 32 allows defensive force against does not refer to the legal guilt of the defender. Instead, it simply describes the objective nature of the act.[118] This explains why one may lawfully defend against the attack of a child,[119] a drunk,[120] a madman,[121] or a person acting under a mistake who may be legally excused from criminal liability.[122] The traditional definition of an "unlawful attack" under § 32, therefore, refers to an attack on a person's legally protected interests that she is not obligated to tolerate.[123]

Consistent with the value-based model, contemporary scholarship has increasingly—though for markedly different reasons[124]—taken the culpability of the attacker into account. It distinguishes between the traditional "sharp" or "robust" self-defense available to ward off attacks by culpable attackers, and the "small" or "limited" self-defense available against young children, the mentally incompetent, innocently mistaken attackers, and other moral innocents. In such less-culpable or non-culpable attack situations, the defensive force does not "protect the legal order" in the same degree as with

118. *See generally* BGH June 17, 2020, 4 StR 658/19 (Ger.); BGH Sept. 8, 2020, 4 StR 288/20 (Ger.); Erb, *supra* note 7, at side-notes 35–40 (Ger.); FISCHER, *supra* note 12, at side-notes 5, 21 (Ger.); Kühl & Heger, *supra* note 46, at side-note 5 (Ger.); ROXIN, 3d ed., *supra* note 69, at side-note 14 (Ger.); Erb, *supra* note 50, at 595 (Ger.); Lesch, *supra* note 45, at 94–96 (Ger.); Lenckner, *supra* note 61, at 528 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 341 (Ger.); Spendel, *supra* note 69, at 19 (Ger.); REINHARD FRANK, DAS STRAFGESETZBUCH FÜR DAS DEUTSCHE REICH [THE CRIMINAL CODE FOR THE GERMAN REICH] 159–61 (1931) (Ger.).

119. *See, e.g.*, BayObLG Feb. 28, 1991, NJW 2031, 2031–32 (1991) (Ger.).

120. *See, e.g.*, BGH June 3, 2009, 2 StR 163/09 (Ger.).

121. *See, e.g.*, RG Feb. 19, 1895, 27 RGST 44, 45–47 (Ger.).

122. *See generally* BayObLG, Feb. 28, 1991, NJW 2031 (1991) (Ger.); Kühl & Heger, *supra* note 46, at side-note 5 (Ger.); Lesch, *supra* note 45, at 101–04 (Ger.).

123. *See* BGH Sept. 8, 2020, 4 StR 288/20 (2020) (Ger.); RG Feb. 19, 1895, 27 RGST 44, 45–46 (Ger.); RG Nov. 24, 1890, 21 RGSt 168, 171 (Ger.)*; see also* FISCHER, *supra* note 12, at side-note 21 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 109 (Ger.) (describing change in predominant view); Kühl & Heger, *supra* note 46, at side-note 5 (Ger.) (describing change in predominant view).

124. Reasons advanced include absent/limited deterrent value and interest in protecting the legal order or reduction in the relative interest in protecting the defender. Lesch, *supra* note 45, at 103–04 (Ger.). Because the value-based model's respect for the equal standing of the defender is not considered in German law, that interest is not discussed. The prevailing position is that the socio-ethical limitations on self-defense take into consideration that a defender has (or should have) greater human solidarity with an innocent attacker. *See generally* Kühl & Heger, *supra* note 46, at side-note 5 (Ger.); Lesch, *supra* note 45, at 103 (Ger.).

morally culpable attacks,[125] nor, per Erb, does it to the same extent threaten the defender's equal standing.[126]

A minority of commentators would even go so far as to permit the use of self-defense only against fully culpable (criminal) attackers.[127] But even if that position is rejected, an emerging position seeks to constrain the "attack" against which self-defense applies to situations where the attacker at a minimum is subjectively negligent (even if not fully culpable) in creating the need for the defensive force. Previously, in contrast, the sole focus was on the objective threat regardless of whether culpable, blameworthy, or innocent.[128]

German law, in line with the laws in the U.S. and England, as well as the value-based model, therefore, holds that attacks need not be criminal or culpable (that means, they do not need to threaten a wrong or implicate corresponding value #3—equal standing) to justify defensive force. That said, the trend in contemporary German self-defense scholarship is to add to the analysis the normative responsibility of the attacker for the attack.[129]

It is, therefore, fair to say that the German legal system is beginning to consider protection of the defender's equal standing and its related focus on harming versus wronging (value #3) as part of its calculus. At the same time, it is placing greater emphasis on safeguarding the attacker's presumptive right to life (value #2).

Though the German justice system has yet to articulate the changes quite in this way, it has demonstrated adaptability in terms of considering additional values, changing the weight given to already-considered values, and employing a common value-centric language to perform the analysis. This

125. *See, e.g.*, Erb, *supra* note 7, at side-notes 60–61 (Ger.); FISCHER, *supra* note 12, at side-note 37 (Ger.); Rosenau, *supra* note 12, at side-note 32 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 66–67, 225 (Ger.); Kühl & Heger, *supra* note 46, at side-note 14 (Ger.); Erb, *supra* note 12, at side-note 212 (Ger.); ROXIN, 3d ed., *supra* note 69, at side-note 61 (Ger.); Lesch, *supra* note 45, at 102–04 (Ger.); *see also* Hans Kudlich, *Praxiskommentar* [*Practice Commentary*], 39 NSTZ 599–600 (2019) (Ger.) (contending that the BGH is more likely to reach "self-defense friendly" decisions than the lower courts because the BGH judges reach their rulings based on the written record and do not hear testimony from or otherwise meet the individuals against whom potentially deadly defensive force has been used).

126. Erb, *supra* note 7, at side-note 209 (Ger.).

127. *See, e.g.*, GÜNTHER JAKOBS, STRAFRECHT: ALLGEMEINER TEIL [CRIMINAL LAW: GENERAL PART] 14–20 (2011) (Ger.); *see also* Rosenau, *supra* note 12, at side-note 19 (Ger.).

128. *See* Erb, *supra* note 7, at side-note 61 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 109 (Ger.); Kühl & Heger, *supra* note 46, at side-note 5 (Ger.); Erb, *supra* note 12, at side-notes 35–41 (Ger.); Lesch, *supra* note 45, at 94–98 (Ger.); *see also* BGH Sept. 8, 2020, 4 StR 288/20 (Ger.) (holding that retreat may be required if the defender provokes the attacker).

129. *See* Lesch, *supra* note 45, at 94–98 (Ger.). For the minority view, *see* Günther Jakobs, *Kommentar: Rechtfertigung und Entschuldigung bei Befreiungaus besonderen Notlagen (Notwehr, Notstand, Pflichtenkollision)* [*Commentary: Justification and Excuses for Release for Special Emergencies (Self-defense, State of Emergency, Conflict of Duties*)], *in* IV RECHTFERTIGUNG UND ENTSCHULDIGUNG [Justification and Apology] 143, 148 (1993) (Ger.) (seeking to limit self-defense to cases of "blameworthy" attacks).

supports the view that a broad and systematic consideration of values improves transparency, reduces hidden normativity, and in so doing, facilitates better decision-making.

c. Special Rules for "Attacks" on and by the Police

Self-defense is typically unavailable against the exercise of force by German state agents, such as the police or prison guards, acting in the line of their duty.[130] In stark contrast to the U.S. position, which on balance provides the police *greater* latitude to exercise defensive force, German regulations on the police (collectively, *Hoheitsträger*) impose *added restrictions* so that the police officer's ability to deploy deadly defensive force can be subject to disciplinary sanction even when it is deemed lawful.

The prevailing view among scholars, however, is that a police officer acting in the course of her duties can rely on self-defense if the facts support such a claim.[131] Some have staked out the position that the nature of policing mandates that officers who engage in a good-faith mistake of fact as to the circumstances cannot be legally subjected to self-defensive force (that is, that the availability of self-defense against the police should be restricted).[132] In recent years, however, those in the mainstream supporting what has been derisively termed the "State's privilege to make mistakes" have been the subject of extensive criticism aimed at, among other things, the claim that it improperly elevates the rights of the state over that of the individual citizen (an issue that for historical reasons carries particular weight in Germany).[133] The majority view, however, rejects these criticisms on public policy grounds. The prevailing position is that those officers who make serious, obvious mistakes are already acting outside of the law and, therefore, can be lawfully met with defensive force.[134]

A minority considers self-defense a "private right" of citizens that, generally consistent with value #1, limits the state's monopoly on force (and is, therefore, not something police officers can claim when acting in an official capacity). The logic is that when the authorities intrude in citizens' activities

130. This is because their actions, even if wrongful, were generally not considered as a matter of law to be unlawful. But if a police officer does not follow the basic requirements set out by the law (*wesentliche Förmlichkeiten*), her actions can constitute an "attack" and provide a basis for self-defense. *See generally* STGB [Penal Code] §113, para. 1, https://www.gesetze-im-internet.de/stgb/__113.html (Ger.); BGH June 9, 2015, NJW 3109 (2015) (Ger.); FISCHER, *supra* note 12, at side-notes 12–12a (Ger.); LISZT, *supra* note 102, at 123 (Ger.).

131. Kühl, *supra* note 49, § 7, side-note 153 (Ger.); *see also* BGH July 8, 1958, NJW 1405 (1958) (Ger.); BayObLG Dec. 13, 1990, JZ 936 (1991) (Ger.); Peter Kasiske, *Begründung und Grenzen der Nothilfe* [Justification and Limits of Emergency Aid], 2004 JURA, 832–39 (1981) (Ger.).

132. *See generally* Erb, *supra* note 7, at side-notes 74–82, 188–97 (Ger.).

133. *See id*. at side notes 76–81 (Ger.).

134. *See id*. at side note 80 (Ger.).

(*hoheitlicher Eingriff*),[135] they are doing so under the color of law. The officers are acting pursuant to the public law's (*öffentliches Recht*) legal permissions, as reflected in the state-specific laws governing the police and policing (*Polizeirecht*). The "attack" is, thus, rendered justified.[136]

Under the *Spaltungslösung*—"solution through cleaving"[137]—an officer could face discipline and requests for compensation when she exceeds the authority provided by police regulations.[138] That said, some German commentators have objected to such limitations, arguing that they could lead to the public losing faith in the state's ability to effectively exercise its monopoly on force (implicating values #1 and #6).[139] But, as noted above, although the officer using excessive force may not be subject to criminal penalties, under the *Spaltungslösung* she could still face discipline and demands for compensation if she exceeds the authority provided by police regulations.[140]

d. Passive Conduct Can Constitute an "Attack"

Although a minority of today's scholars disagree,[141] the prevailing view is that physical action is not required for an "attack" under German self-defense law.[142] A man passively and without permission sitting on Victor's bench in Victor's garden is, therefore, deemed to be "attacking" Victor's legally protected interests in his property for the purposes of § 32.[143] Courts have similarly ruled that, if an individual standing in a parking spot refuses to move because she is unlawfully trying to hold the spot for a friend, the driver of a car may use "defensive force" to protect his right to the parking spot.[144]

Not all passive actors are treated the same, however. The consensus view is that a passive actor can only be considered a § 32 "attacker" when the *law requires* him to behave in a certain way. This outcome is at odds with the

135. *See* Rönnau & Hohn, *supra* note 44, at side-notes 216–24 (Ger.).

136. *See generally id.* at side-note 117 (Ger.); Kurt Seelmann, *Grenzen Privater Nothilfe* [*Limits to Private Emergency Aid*], 89 ZSTW, 36, 49 (1977) (Ger.); JAKOBS, *supra* note 127, § 12, at side-note 41 (Ger.).

137. In the context of excessive force, this prevents officers acting pursuant to police law from being found liable, but nevertheless leaves open the possibility of discipline and requests for compensation when the officer exceeds the authority provided by police law/regulations.

138. *See generally* Rönnau & Hohn, *supra* note 44, at side-notes 216–20 (Ger.).

139. *See, e.g.*, VON SCHERENBERG, *supra* note 10, at 248–49 (Ger.).

140. *See generally* Rönnau & Hohn, *supra* note 44, at side-notes 216–20 (Ger.).

141. *See, e.g.*, Walter Perron, *§ 32, in* SCHÖNKE/SCHRÖDER: STRAFGESETZBUCH [CRIMINAL CODE], side-note 10 (Albin Eser et al. eds., 30th ed. 2019) (Ger.) (requiring active conduct).

142. *See generally* Rosenau, *supra* note 12 (Ger.), at side-notes 4–6; FISCHER, *supra* note 12, at side-note 5a (Ger.); Roxin, *supra* note 69, at side-note 11 (Ger.).

143. *See* RG Jan. 20, 1938, 72 RGST 57 (Ger.)*; see also* FISCHER, *supra* note 12, at side-note 5a (Ger.).

144. *See* BayObLG Jan. 22, 1963, NJW 824, 824–25 (1963) (Ger.), *discussed in* Rönnau & Hohn, *supra* note 44, at side-note 90 (Ger.).

value-based model's approach, which would permit self-defense against a passive actor who, *without objectively good reason*, is threatening the defender's right to life.[145]

Under the consensus view, Andrew would, therefore, not be justified in pushing Victor out of his way in order to escape from a burning house if Victor was not purposefully blocking Andrew's escape. Under such a scenario where Victor is acting lawfully, Victor would not be considered an "attacker." Andrew, however, would not be without options; he would likely be able to claim necessity pursuant to § 34.[146]

e. Imminence

i. The General Rule

German self-defense law has always required that the attack be temporally imminent or present (*gegenwärtig*).[147] The common definition of imminence (in agreement with the value-based model's approach) is, in turn, pegged to the question of whether a later use of defensive force will, objectively speaking, be futile or more problematic (invoking the *Effizienzlösung*).[148] It, moreover, is not simply the *harm* stemming from the attack that must be imminent under German law. Rather, the *danger* of harm must be close at hand, which is consistent with the value-based model's approach .[149]

145. *See* Erb, *supra* note 7, at side-notes 113–14 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 100–01 (Ger.); Lenckner, *supra* note 61, at 534 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 339 (Ger.); MAURACH & ZIPF, *supra* note 69, at 356 (Ger.); JESCHECK & WEIGEND, 4th ed., *supra* note 110, at 304 (Ger.). *But see* ROLAND FELBER, DIE RECHTSWIDRIGKEIT DES ANGRIFFS IN DEN NOTWEHRBESTIMMUNGEN [THE ILLEGALITY OF THE ATTACK IN THE EMERGENCY DEFENSE REGULATIONS] 195 (1979) (Ger.) (stating attack requires action, not *in*action).

146. *See* Erb, *supra* note 50, at 595 (Ger.); Otto Lagodny, *Notwehr gegen Unterlassen* [*Self-Defense Against Omission*], GA 300, 303 n. 15 (1991) (Ger.). In such a case, the accused would have to claim that, under § 34, there was a justifying necessity (*rechtfertigender Notstand*), however.

147. *See generally* BGH Sept. 8, 2020, BGHST 4 StR 288/20 (Ger.); BGH Sept. 13, 2017, 2 StR 188/17 ("An attack is imminent when the conduct of the attacker can immediately turn into a rights-violation, so that a delay in engaging in defensive force can reduce the chances of it being successful or risks significant injury to the defender.") (Ger.). *See also* BGH Jan. 25, 2017, 1 StR 588/16 (Ger.); Erb, *supra* note 7, at side-notes 103–09 (Ger.); FISCHER, *supra* note 12, at side-notes 16–18 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 140 (Ger.); Rosenau, *supra* note 12, at side-note 12 (Ger.); Kühl & Heger, *supra* note 46, at side-note 4 (Ger.); Erb, *supra* note 12, at side-note 103 (Ger.); ROXIN, 3d ed., *supra* note 69, at side-note 21 (Ger.); Erb, *supra* note 50, at 601 (Ger.).

148. *See* BGH Feb 1, 2017, 4 StR 635/16 (Ger.); BGH Mar. 21, 2017, 1 StR 486/16 (Ger.); BGH Sept. 13, 2017, 2 StR 188/17 (Ger.); BGH Nov. 24, 2016, 4 StR 235/16 (Ger.); RG Oct. 10, 1933, 67 RGST 337, 339–40 (Ger.); RG Oct. 23, 1918, 53 RGST 132, 133 (Ger.); *see also* Rönnau & Hohn, *supra* note 44, at side-notes 145–46 (Ger.) (stating attack is imminent when it is in the "narrow final phase of the preparation").

149. *Compare* BGH Feb. 1, 2017, 4 StR 635/16 (Ger.); *and* BGH Mar. 21, 2017, 1 StR 486/16

So, when three men, in the course of ejecting a belligerent and previously insult-hurling New Year's Eve partygoer caused him injury, they were not justified by self-defense because the partygoer was not insulting anyone *at the time* of the physical attack.[150] The attack would, however, be considered imminent or present under German law if at the time it was objectively reasonable for the defender to fear a renewed attack (or, in the context of the party-goer, impending additional insults).[151] Put another way, the focus is on an objective evaluation of the attacker's intention and the danger he presents.[152]

Consider by way of further illustration a 2017 case in which the defender, who was physically weaker than the putative neighbor-attacker, armed himself with a modified handgun with a screwed-on silencer loaded with tear-gas cartridges prior to knocking on the neighbor's apartment door and asking the neighbor to turn his music down.[153] The neighbor opened the door and in an intimidating fashion walked towards the defender, causing the defender to walk backwards to the top of a flight of stairs. With the neighbor less than six feet away, the defender shot the neighbor in the abdomen; the defender was later charged with attempted murder.

The court ruled that "imminent," as used in § 32, includes situations where there has not yet been a violation of the defender's rights, but where delaying the use of defensive force could limit its effectiveness or result in additional risk to the defender.[154] The court emphasized, moreover, that the question of whether the attack was imminent was to be determined objectively, rather than being based on the subjective perception of the

(Ger.); *and* BGH Apr. 13, 2017, 4 StR 35/17 (Ger.); *and* BGH 4 StR 235/16 (Ger.); *and* BGH Dec. 11, 1991, 2 StR 535/91 (Ger.); *and* BGH Nov. 7, 1972, NJW 255 (1973) (Ger.); *and* RG Feb. 28, 1927, 61 RGST 216, 217 (Ger.); *and* RG Oct. 23, 1918, 53 RGST 132, 133 (Ger.); *and* BGH Nov. 15, 1994, NJW 973 (1995) (Ger.), *with* RG Feb. 17, 1931, 65 RGST 159, 160 (Ger.); BGH May 15, 1978, NJW 2053 (1979) (Ger.) (holding that defender's use of deadly force against the fleeing intruder failed to satisfy imminence requirement). *See also* Rönnau & Hohn, *supra* note 44, at side-note 140 (Ger.); FISCHER, *supra* note 12, at side-note 5 (Ger.). *But see* Helmut Frister, *Die Notwehr im System der Notrechte* [*Self-defence in the System of Emergency Rights*], GA 291, 302 (1988) (Ger.) (the attack, rather than the danger flowing from it, must be temporally imminent).

150. BGH Jan. 22, 2019, 1 StR 585/18 (Ger.).

151. *See* BGH 1 StR 588/16 (Ger.); BGH Aug. 9, 2005, 1 StR 99/05 (Ger.).

152. *See* BGH 4 StR 288/20 (Ger.); BGH Jun. 22, 2016, 5 StR 138/16 (Ger.) (finding that uncertainty about the facts cannot adversely impact the defendant).

153. BGH 4 StR 635/16 (Ger.); *see also* 67 RGST 337, 339–40 (Ger.).

154. BGH Feb. 1, 2017, 4 StR 635/16 (Ger.)*; see also* BGH Jan. 25, 2017, 1 StR 588/16 (Ger.); BGH Mar. 21, 2017, 1 StR 486/16 (Ger.); BGH 1 StR 99/05 (Ger.); Pest, *supra* note 46, at 144 (Ger.). In this context, commentators have discussed how effective particular defensive measures (knife versus gun, for example) are to stop/immobilize the attacker (*Mannstoppwirkung*). *See id.* at 159 (Ger.).

defender.[155] And so an attack is considered imminent or ongoing until the objectively unlawful threatened action is abandoned or has failed, or until the damage has been done.[156]

ii. Imminence is Objectively Evaluated

Some German commentators, as noted, have asserted that it is unclear whether German law requires an actor's beliefs about the elements of self-defense to be both honest and reasonable.[157] In the main, however, German law treats the imminence requirement as part of "justifying necessity."[158] As such, and considering that both the text of § 32 and the scholarly consensus are in agreement that the relevant justificatory circumstances must objectively exist before a defender can claim self-defense,[159] it follows, consistent with the value-based model's approach, that imminence is also evaluated objectively (i.e., based on the facts as they actually were).[160]

---

155. BGH 4 StR 635/16 (Ger.) (citing BGH Apr. 18, 2002, 3 StR 503/01(Ger.), *and* BGH Oct. 28, 2015 5 StR 397/15 (Ger.)*; see also* BGH Jan. 25, 2017, 1 StR 588/16 (Ger.); BGH Mar. 21, 2017, 1 StR 486/16 (Ger.); BGH Nov. 24, 2016, 4 StR 235/16 (Ger.); BGH 1 StR 99/05 (Ger.).

156. *See* BGH Sept. 13, 2018, 5 StR 421/18 (holding that the defender may use whatever defensive means are available to immediately stop the threat and need not deploy less-certain, but also less-damaging, defensive means) (Ger.)*; see also* BGH Apr. 16, 1998, 4 StR 114/98 (Ger.); RG Sept. 20, 1920, 55 RGST 82, 83–84 (Ger.); Erb, *supra* note 50, at 598–99 (Ger.).

157. *See* Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control*, 2 NEW CRIM. L. REV. 51, 53 (2008) (citing GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 159 (1998)).

158. *See generally* MARKUS D. DUBBER & TATJANA HÖRNLE, CRIMINAL LAW: A COMPARATIVE APPROACH 444 (2014).

159. *See, e.g.*, BGH Mar. 21, 2017, 1 StR 486/16 (Ger.); BGH Mar. 21, 2001, 1 StR 48/01 (Ger.); RG Apr. 3, 1930, 64 RGST 101, 102 (1930) (Ger.); RG Dec. 2, 1890, 21 RGST 189, 190 (Ger.); BayObLG Jan. 9, 1985, NJW 2600, 2601 (1985) (Ger.); BayObLG Jan. 22, 1963, NJW 824, 825 (1963) (Ger.); ROXIN, 3d ed., *supra* note 69, at 557–58 (Ger.); JESCHECK, 5th ed., *supra* note 61, at 338 n.7 (Ger.); Spendel, *supra* note 69, at 109 (Ger.); MAURACH & ZIPF, *supra* note 69, at 373 (Ger.); JESCHECK & WEIGEND, 4th ed., *supra* note 110, at 308 (Ger.); HANS WELZEL, DAS DEUTSCHE STRAFRECHT [THE GERMAN CRIMINAL LAW] 86 (11th ed. 1969) (Ger.).

160. *See generally* BGH Jun. 8, 2016, 5 StR 564/15, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=75271 [https://perma.cc/RU24-FRM6]; BGH Aug. 21, 2013, 1 StR 449/13, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=65773 [https://perma.cc/Z9MQ-VKF4]; BGH Nov. 21, 2012, 2 StR 311/12, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=7ee2a44f3f492d263fe4f66dc480ddd1&nr=62664 [https://perma.cc/2T8Q-ZG9L]; BGH Sep. 27, 2012, 4 StR 197/12, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=62154 [https://perma.cc/Z6LE-6G3E]; BGH Feb. 28, 1989, 1 StR 741/88, Wolters Kluwer (Ger.), https://research.wolterskluwer-online.de/document/2c4f6bab-eb7a-4649-b88a-66c4d628990e [https://perma.cc/H429-L6EY]. *See also* Erb, *supra* note 8, at side-note 62 (Ger.); *id.* at side-note 104 (Ger.); Klaus Bernsmann, *Private Self-Defence and Necessity in German Penal Law and in the Penal Law Proposal—Some Remarks*,

f. German Law's Treatment of Battered Intimate Partner Syndrome

The German case law addressing battered intimate partner situations is surprisingly sparse. That said, the seminal 2003 *Bundesgerichtshof* "family tyrant/house tyrant" case (*Haustyrannenfall*) has yet to be abrogated.[161] In that case, Germany's highest court addressed a situation involving a woman who killed her sleeping, abusive husband.[162]

The facts of the case were largely undisputed. The husband (an "outlaw" biker gang member) for over a decade regularly exposed the defendant and her two minor daughters to considerable physical violence and psychological torture.[163] On the day of the homicide in September of 2001, the deceased came home from a bar and proceeded to once again assault his wife and threaten the children. Around noon that day, the defendant, who had for some months contemplated killing her husband, fired six shots from her sleeping husband's .22 caliber handgun, hitting him twice and killing him.[164]

The court, noting the defendant's three failed suicide attempts, agreed that the defendant at the time of the shooting subjectively believed she had "no way out." The court further observed that the defendant honestly believed leaving her victimizer and moving to a women's shelter was not a viable option. The court reached this decision because, during a prior visit to the women's shelter, the deceased reportedly told her he would harm her and their children if she ever left him again (and claimed he could do also so through his confederates if he was ever incarcerated).[165]

In its ruling, the Federal Court of Justice noted the trial court's conclusion that the defendant killed her husband "by stealth" (*mit Heimtücke*) because he was sleeping at the time of the attack, and that she "exploited" the defendant's defenselessness.[166] As a consequence, the defendant in the lower court was convicted of aggravated murder as dictated by § 211 of the StGB. Germany's highest court, however, interestingly left open the possibility of a § 35(1)

30 ISR. L. REV. 171, 179 (1996) ("Justification of [Self-Defense] requires the presence of a subjective element in addition to the presence of an objective element. An actor must know that he is acting in a situation giving rise to a right to [Self-Defense]; he must, for example, be aware of the imminent attack.").

161. BGH Mar. 25, 2003, 3 StR 483/02, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=26147 [https://perma.cc/2NZX-DF64].-DF64].

162. *Id.* (Ger.); *see also* Rosenau, *supra* note 12, at side-note 17 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 146 (Ger.).

163. BGH Mar. 25, 2003, 3 StR 483/02 (Ger.).

164. *Id.* at 7–9 (Ger.).

165. *Id.* at 7–8 (Ger.).

166. *Id*. at 9–10 (Ger.) (commenting that the defendant had claimed she only shot her husband after he woke up, but that the forensic evidence and testimony from a cellmate proved he was sleeping at the time he was shot).

"excusable necessity" (*entschuldigenden Notstand*) claim because the purportedly defensive act was motivated by the defendant's belief that shooting her husband was the only way to avoid future violence.[167] The court observed that, although self-defense requires an immediate *attack* (*Angriff*), excusable necessity only requires an immediate *danger* (*Gefahr*). The court went on to comment that the defendant and her children were in a perpetual state of ongoing fear of danger, including the fear of being killed by the defendant's husband.[168]

Despite expressing sympathy for the defendant's position, the court ultimately concluded that the defendant did, in fact, have "other options" for avoiding the danger. The court, among other things, found that the defendant could have moved to a shelter with her children or called the police.[169] The court went so far as to *prospectively* observe that

> the ongoing danger caused by the reoccurring and significant violence on the part of a "Family Tyrant" is always avoidable by means other than killing the "Tyrant," including by seeking the help of third parties, and, specifically, the state authorities.[170]

It is difficult, however, to distinguish the battered partner's situation from that of a bar owner who, late one night, overhears two patrons discussing their plan to break into the bar after closing time and, therefore, mixes sedatives into their beer. Historically, both cases would have qualified as anticipatory self-defense (*Präventiv-Notwehr*).[171] Today, on the other hand, it appears a defendant at best will have her *non*-lethal defensive conduct against a sleeping or incapacitated intimate partner classified as an instance of justifying necessity (*rechtfertigender Notstand*) under § 34,[172] or as an excusable necessity under § 35(1).[173] The state's argument will be that other options, such as calling the police or retreating, have been judicially determined to be available.[174]

---

167. *Id.* at 13–14 (Ger.).

168. *Id.* at 13 (Ger.).

169. *Id.* at 15–16 (Ger.).

170. *Id.* at 17 (Ger.).

171. *See* BGH June 14, 1960, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [DECISIONS OF THE FEDERAL COURT OF JUSTICE IN CRIMINAL MATTERS] [BGHST] 358, 361 (Ger.).

172. *See generally* Rosenau, *supra* note 12, at 1–43 (Ger.).

173. *See generally id*. at 1–24 (Ger.).

174. *See generally* BGH Mar. 25, 2003, 3 StR 483/02 (Ger.). Although § 34 also provides the defender with a justification that indicates the legal order's acceptance of the conduct, § 34, unlike § 32, offers less protection to the defender in that it, *inter alia*, requires that the harm cannot be averted by any other means, and that the potential harm defended against must be greater than the harm inflicted (*Prinzip des überwiegenden Interesses*).

Nevertheless, commentators, including Erb, may have paved the way for a potential reconsideration of this position. They assert that the government only has a "monopoly on force" to the extent that it is able to provide equal or better protection to the individual than offered by otherwise appropriate defensive force; Erb also vocally endorses the court's reliance on subject experts when appropriate.[175]

g. A New Definition of "Attack"?

At the outset, I noted that an emerging line of scholarly thought would disallow § 32 force against an attacker who is behaving with care (i.e. non-negligently/non-culpably).[176] To qualify under this modern trend as an "unlawful attack" justifying self-defense, the behavior at issue must, therefore, not only result in an unjust outcome (*Erfolgsunrecht*), but it also must result from *wrongful behavior* (*Handlungsunrecht*). The argument advanced in support of this modern trend claims there is no need to use defensive force to vindicate the legal order when the attacker is blameless and is trying to conform his behavior to the strictures of the law. This argument finds support in the value-based model's analysis of values #2 (protection of the attacker's presumptive right to life) and #3 (safeguarding of equal standing). In such a case, then, the defender's behavior is to be judged by the requirements corresponding to "justifying necessity" under § 34.[177]

Recall, however, that German self-defense law is not punitive. There has never been an effort to justify self-defense by arguing that the attacker needs or deserves to be punished. Therefore, justified § 32 defensive force can still be exercised against morally innocent "attackers," such as children and madmen (though it is not unreasonable to predict that, consistent with the value-based model and the overall trend in German self-defense law away from "harshness," this position will, supported by considerable value-centric dialogue, shift in the next decade or so).[178]

175. *See* Erb, *supra* note 7, at side-notes 147–48, 259 (Ger.). That said, Erb takes the position that, although calling the police or seeking help in a battered spouse shelter may not conclusively prevent the attack, such options in most—but not all—cases reduce the likelihood of attack to such a level that killing the spouse should not be justified as self-defense. *Id.* at side-notes 234–36 (Ger.).

176. *See, e.g.*, Rönnau & Hohn, *supra* note 44, at side-note 109 (Ger.); Kühl & Heger, *supra* note 46, at side-note 5 (Ger.); Erb, *supra* note 12, at side-notes 35–41 (Ger.); Lesch, *supra* note 45, at 94–98 (Ger.). *But see* Erb, *supra* note 12, at side-notes 244–51 (Ger.).

177. *See, e.g.*, Christian Bertel, *Notwehr Gegen Verschuldete Angriffe* [*Self-defense Against Culpable Attacks*], 84 ZSTW 1, 12 n.41 (1972) (Ger.); *see also* ROXIN, 3d ed., *supra* note 69, at 558 (Ger.); Roxin, *supra* note 45, at 82–83 (Ger.). *But see* Erb, *supra* note 12, at side-notes 209–38, 244–51 (Ger.).

178. *See* BGH Oct. 25, 2017, 2 StR 118/16, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=80762 [https://perma.cc/U8JG-WNVD]; BGH Nov. 21, 2012, 2 StR 311/12 (Ger.). *See, e.g.*, Erb, *supra* note 13, at side-note 209

2. The Purportedly Justificatory Circumstances Must Objectively Exist for a Self-Defense Claim to Survive

The text of § 32, the overwhelming German scholarly consensus, and the relevant case law all support an interpretation that the relevant justificatory circumstances must objectively exist before a defender can claim self-defense.[179] This formulation, which is consistent with the "incompatibility thesis" (i.e., there cannot be two mutually justified defenders),[180] prevents situations in which self-defense can be used against self-defense.[181] And so defensive action is evaluated based on the facts as they actually are. This is consistent with the value-based model's approach, (and is consistent with the U.S. approach[182]—but notably at odds with the contemporary English approach).[183]

As discussed more fully below, the only subjective justificatory requirement in German self-defense law is that the defender possess the necessary "defensive will" (*Verteidigungswillen*), requiring connection between the defensive will and the defensive action (*motivitionaler*

(Ger.). *Compare* ROXIN, 3d ed., *supra* note 69, at 559 (Ger.) (arguing that "unlawful" § 32 behavior must, at a minimum, evidence an objective lack of care), *and* Roxin, *supra* note 45, at 82–83 (Ger.), *with* Spendel, *supra* note 69, at 19–20, 32–36 (Ger.).

179. *See, e.g.*, BGH Jun. 17, 2020, 4 StR 658/19 (Ger.); BGH Sep. 8, 2020, 4 StR 288/20 (Ger.); BGH Apr. 13, 2017, 4 StR 35/17 (Ger.); BGH Nov. 24, 2016, 4 StR 235/16 (Ger.); BayObLG Jan. 9, 1985, NJW 2600, 2601 (1985) (Ger.); BayObLG Jan. 22, 1963, NJW 824, 825 (1963) (Ger.); RG Apr. 3, 1930, 64 RGST 101, 102 (Ger.); RG Dec. 2, 1890, 64 RGST 101, 102 (Ger.); Rosenau, *supra* note 12, at side-note 26 (Ger.); FISCHER, *supra* note 12, at side-note 4 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 94, 154 (Ger.); Pest, *supra* note 46, at 143–44, 166–67 (Ger.); Kühl & Heger, *supra* note 46, at side-notes 6, 10 (Ger.); Lenckner, *supra* note 61, at 536–37 (Ger.); ROXIN, 3d ed., *supra* note 69, at 557–58 (Ger.); JESCHECK & WEIGEND, *supra* note 61, at 338 n.7 (Ger.); Spendel, *supra* note 69, at 109 (Ger.); MAURACH & ZIPF, *supra* note 69, at 373 (Ger.); WELZEL, *supra* note 159, at 86 (Ger.).

180. *See generally* George P. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse For Escape?*, 26 UCLA L. REV. 1355, 1358 (1979); George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1264 (1985). Fletcher's take on the incompatibility thesis appears to have been inspired by Immanuel Kant. *See* Immanuel Kant, *The Doctrine of Right*, in THE METAPHYSICS OF MORALS 60 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797) ("It is evident that were there such a right the doctrine of right would have to be in contradiction with itself.").

181. *See generally* Erb, *supra* note 7, at side-notes 1, 49 (Ger.); Rosenau, *supra* note 12, at side-note 18 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 113 (Ger.). That said, earlier commentators would allow self-defense against self-defense. *See, e.g.*, WOLFGANG FRISCH, VORSATZ UND RISIKO [INTENTION AND RISK] 424 (1983) (Ger.); Armin Kaufmann, *Zum Stande der Lehre vom personalen Unrecht* [*On the State of the Doctrine of Personal Injustice*], *in* FESTSCHRIFT FÜR HANS WELZEL ZUM 70. GEBURTSTAG AM 25. MÄRZ 1974 [COMMEMORATION FOR HANS WELZEL ON HIS 70TH BIRTHDAY ON MARCH 25, 1974] 393, 400 (1974) (Ger.).

182. *See* FUNK, *supra* note *, at 169–71.

183. *See id.* at 190–95.

Zusammenhang).[184] In short, the defender must (1) be aware of the justificatory circumstances, *and* (2) act, at least in part,[185] with defensive intent.[186] That said, a considerable (and growing) minority view holds that the defender's mere knowledge or awareness of the justificatory circumstances should suffice.[187]

A small minority of commentators have also argued for a position mirroring England's, pursuant to which self-defense is available to persons who honestly, though inaccurately (and perhaps objectively unreasonably), believe defensive force is necessary.[188] The overwhelming scholarly consensus, however, continues to reject this controversial contemporary English position. Opponents note that such a subjective approach is incompatible with the text of § 32 and is unduly disadvantageous to the person mistakenly identified as an "attacker."[189]

184. *See generally* BGH June 17, 2020, 4 StR 658/19 (Ger.); BGH Jul. 24, 2019, 1 StR 363/18 (Ger.); FISCHER, *supra* note 12, at side-note 25 (Ger.); Erb, *supra* note 7, at side-notes 240–41 (Ger.); Erb, *supra* note 12, at side-notes 239–43 (Ger.).

185. The defensive intention need not be the only motivator (*Motivbündel*); others may also be present. *See* FISCHER, *supra* note 12, at side-note 26 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 267 (Ger.); Kühl & Heger, *supra* note 46, at side-note 3 (Ger.).

186. *See* BGH Oct. 27, 2015, 3 StR 199/15, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=73184 [https://perma.cc/58G4-N7AH]; BGH Apr. 25, 2013, 4 StR 551/12, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=64311 [https://perma.cc/SY4X-BG8N]; *see also* Landgericht [LG] [District Court] Münster Jan. 21, 2019, 1 KLs-30 Js 123/18-22/18, juritz (Ger.), https://www.justiz.nrw.de/nrwe/lgs/muenster/lg_muenster/j2019/1_KLs_30_Js_123_18_22_18_Urteil_20190121.html [https://perma.cc/SY4X-BG8N]; OLG Zweibrücken Oct. 18, 2018, 1 OLG 2 Ss 42/18 (Ger.); BGH Oct. 2, 1953, 3 StR 151/33 (Ger.); RG Dec. 19, 1919, 54 RGST 196, 199 (Ger.); FISCHER, *supra* note 12, at side-notes 25–27 (Ger.); Rosenau, *supra* note 12, at side-note 49 (Ger.); Kühl & Heger, *supra* note 46, at side-note 7 (Ger.); ROXIN, 3d ed., *supra* note 69, at side-note 129 (Ger.); Lenckner, *supra* note 61, at 551 (Ger.); MAURACH & ZIPF, *supra* note 69, at 362 (Ger.); WELZEL, *supra* note 159, at 86 (Ger.). *But see* Spendel, *supra* note 69, at 72–73 (Ger.) (arguing that the consensus view is incorrect). Note, however, that the text of § 32 does not necessarily compel this subjective element. *Cf.* Rönnau & Hohn, *supra* note 44, at side-notes 262–63, 266 (Ger.) (disagreeing with the consensus view and denying the necessity of a defensive will).

187. *See, e.g.*, FISCHER, *supra* note 12, at side-note 25 (Ger.); Rosenau, *supra* note 12, at side-note 49 (Ger.); Kühl & Heger, *supra* note 46, at side-note 7 (Ger.); Erb, *supra* note 12, at side-notes 41, 241 (Ger.); ROXIN, 3d ed., *supra* note 69, at side-note 130 (Ger.).

188. *See, e.g.*, Warda, *supra* note 70, at 419 n.29 (Ger.) (discussing the "new direction in the literature" toward a subjective standard).

189. *See, e.g.*, Erb, *supra* note 12, at side-note 246 (Ger.). *See generally* BGH Apr. 13, 2017, 4 StR 35/17 (Ger.); BGH Nov. 24, 2016, 4 StR 45/17 (Ger.); Rosenau, *supra* note 12, at side-note 26 (Ger.); FISCHER, *supra* note 12, at side-note 4 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 94, 154 (Ger.); Pest, *supra* note 46, at 143–44, 166–67 (Ger.); Kühl & Heger, *supra* note 46, at side-notes 6, 10 (Ger.); Lenckner, *supra* note 61, at 537 (Ger.); ROXIN, 3d ed., *supra* note 69, at 557–58 (Ger.); JESCHECK & WEIGEND, 5th ed.,, at 338 n.7 (Ger.); Spendel, *supra* note 69, at 109 (Ger.); MAURACH & ZIPF, *supra* note 69, at 373 (Ger.); JESCHECK, 4th ed., *supra* note 110, at 308 (Ger.).

3. Mistakes of Fact

A small group of scholars have claimed that "[i]t is still unclear whether German law would accept a mistaken belief as sufficient grounds for self-defense."[190] And although German scholars have advanced various competing theoretical approaches for addressing mistakes concerning the justificatory circumstances, the one that has received the preponderance of scholarly and judicial support is the "theory of limited guilt" (*eingeschränkte Schuldtheorie*).[191] § 16, which addresses mistakes of fact relating to the elements of the offense (*Tatbestandsirrtümer*), provides:

> (1) Whoever in committing an act is mistaken about the existence of facts which are part of the statutorily defined constituent elements of a crime does not act intentionally. The possibility of imposing criminal punishment for negligent conduct remains unaffected.
>
> (2) Whoever in committing an act mistakenly assumes the existence of circumstances which would form part of the statutorily defined constituent elements of a lesser offense can only be punished for intentional conduct in accordance with the statute defining the lesser offense.[192]

Section 16's text addresses mistakes relating to the *elements* of the offense. But the theory of limited guilt has been applied by analogy to § 16 cases involving mistakes concerning justificatory facts (*Erlaubnistatbestandsirrtümer*).[193] The theory is that the defender acting under a mistake concerning the actual facts wants to follow the law, but fails

190. Wang, *supra* note 72, at 388. *But see* BGH July 8, 2020, 3 StR 154/20, juris (Ger.) (no self-defense when putative defender at the time of the action was "delusional and therefore imagined a non-existent situation requiring defensive force") http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=109952&pos=0&anz=1 [https://perma.cc/BYV2-Y4B3].

191. *See generally* Erb, *supra* note 13, at side-note 246 (Ger.); Joachim Hruschka, *Der Gegenstand des Rechtswidrigkeitsurteils nach heutigem Strafrecht* [*The Subject of the Illegality Judgment According to Today's Criminal Law*], GA 1, 20 n.48 (1981) (Ger.); Friedrich Schaffstein, *Putative Rechtfertigungsgründe und finale Handlungslehre* [*Putative Justifications and Final Doctrine of Action*], 5 MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] [MONTHLY REPORT FOR GERMAN LAW] 196, 200 (1951) (Ger.). *Cf.* Johann Andreas Dieckmann, *Plädoyer für die eingeschränkte Schuldtheorie beim Irrtum über Rechtfertigungsgründe* [*Plea for the Limited Theory of Guilt Regarding Reasons for Justification in the Event of Errors*], 4 JURA 178, 179 (1994) (Ger.).

192. STGB, § 16 Irrtum über Tatumstände [Mistake of Fact], Bundesamt fur Justiz (Ger.), https://www.gesetze-im-internet.de/stgb/__16.html [https://perma.cc/693G-T2MQ]; *see also* Kühl & Heger, *supra* note 37, § 16 at side-note 3 (Ger.); Reed & Bohlander, *supra* note 57, at 249; BGH StR 154/20 (Ger.).

193. *See* Rönnau & Hohn, *supra* note 44, at side-note 281 (Ger.); FISCHER, *supra* note 12, at side-note 51 (Ger.).

to do so because of a good-faith mistake concerning the facts. Under these circumstances, § 16 applies to him.[194]

Putative excessive force (*Putativnotwehrexzess*), in turn, involves cases in which the defender objectively errs both about the existence of an attack *and* about the amount of force necessary to repel the attack.[195] § 33, which addresses cases of excessive force during self-defense (*Notwehrexzess),* and is discussed in greater detail below, notably does not apply to cases of *putative* excessive force.[196] The prevailing view holds that in cases of putative excessive force, there actually was no § 32 "attack" that was reacted to in an excessively forceful manner.[197] Such a putative defender will instead be treated under the general rules relating to mistakes of fact dealt with in § 16.[198]

4. Unknowingly Justified Defenders

The once-dominant German scholarly view was that, contrary to the principle announced in the English *Dadson* case,[199] an actor was always justified if the *objective facts* (even if *unknown* to her) provided her with a justification.[200] Today's German scholars and the courts take the position that the actor's defensive will forms the basis of self-defense, that there is no "present and unlawful" attack if the attacker is justified by self-defense, and that self-defense accordingly cannot be exercised against self-defense (*Notwehr gegen Notwehr*).[201] Self-defense is, by its very nature, said to

194. *See generally* BGH Mar. 3, 1968, GA 117, 118 (1969) (Ger.); RG June 1, 1926, 60 RGST 261, 262 (Ger.); OLG Düsseldorf Oct. 15, 1993, NJW 1971, 1972 (1994) (Ger.); Peter Cramer, *§ 16 Irrtum über Tatumstände [Errors Regarding Circumstances during Crimes], in* ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH [CRIMINAL CODE] 282, 285–86 (25th ed., 1997) (Ger.); Warda, *supra* note 70, at 418–19 (Ger.).

195. *See generally* BGH Jan. 25, 2017, 1 StR 588/16 (Ger.); BGH Oct. 27, 2015, 3 StR 199/15 (Ger.).

196. *See generally* FISCHER, *supra* note 13, at § 33, side-note 5 (Ger.).

197. *See generally* BGH Jan. 25, 2017, 1 StR 588/16 (Ger.).

198. *See* BGH July 8, 2020, 3 StR 154/20 (Ger.); LG München Nov. 11, 1987, NJW 1860, 1861 (1988) (Ger.); BGH June 12, 1968, 2 StR 109/68, NJW 1885 (1968) (Ger.); BGH Aug. 1, 1961, NJW 308, 309 (1962) (Ger.); *see also* Rönnau & Hohn, *supra* note 44, at side-note 281 (Ger.); Lenckner, *supra* note 52, at 555 (Ger.); Spendel, *supra* note 69, at 181–82. (Ger.) (§ 16, rather than § 33, applies in such a case.). *See generally* FISCHER, *supra* note 12, at § 16 (Ger.).

199. *See* R v. Dadson (1850) CLXIX Eng. Rep. 407 (appeal taken from UK) (UK) (holding that a defendant must be aware of, and in truth act because of, the justificatory circumstances).

200. Spendel was among the few who, in the recent past, supported this position. *See* Spendel, *supra* note 69, at 72–73 (Ger.) (citing to sources supporting his view).

201. BGH Jan. 17, 2019, 4 StR 456/18, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=93657&pos=0&anz=1 [https://perma.cc/6QAZ-RBVM]; FISCHER, *supra* note 12, at § 32, side-note 22 (Ger.); Erb, *supra* note 12, at side-note 49 (Ger.).

require that the defender be aware of, and in fact believe in, the justificatory circumstances.[202]

But "defensive will" need not be the only, or even the primary, motivator for the use of force.[203] Additional motives, such as hate and revenge, may all play a role in a defender's conduct,[204] provided that there is sufficient evidence to establish the concurrent presence of defensive intention.[205] In the final analysis, however, an unknowingly justified actor will be convicted of no greater crime than impossible attempt.[206]

5. Defensive Conduct

a. Necessity

The term "necessary" in § 32 refers solely to the defensive *means* selected.[207] § 32's necessity requirement, moreover, follows the "principle of

202. *See, e.g.*, BGH Jan. 17, 2019, 4 StR 456/18 (Ger.) (citing BGH June 7, 1983, 4 StR 703/82, Wolters Kluwer Online (Ger.) https://research.wolterskluwer-online.de/document/7ab0850a-c1bd-44f7-baa8-0d553d9638a1 [https://perma.cc/Q4FQ-W3SN]); BGH Sept. 27, 2012, 4 StR 197/12 (Ger.); BGH Feb. 12, 2003, 1 StR 403/02, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=25812&pos=0&anz=1 [https://perma.cc/HRX7-W3MB]; BGH Nov. 22, 2000, 3 StR 331/00 (Ger.); BGH May 13, 1980, 1 StR 176/80 NJW 1806 (1980) (Ger.); BGH July 27, 1971, 1 StR 104/71, Monatsschrift für Deutsches Recht [MONTH FOR GERMAN LAW] [MDR] 16 (1972) (Ger.); RG June 1, 1926, 60 RGST 261, 262 (Ger.); RG Dec. 21, 1921, 56 RGST 259, 268 (Ger.); RG Dec. 19, 1919, 54 RGST 196, 199 (Ger.); ROXIN 3d ed., *supra* note 69, at 539 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 342–43 (Ger.); Bernd Schünemann, *Die deutschsprachige Strafrechtwissenshcaft nach der Strafrechtsreform im Spiegel des Leipziger Kommentars und des Wiener Kommentars* [*German Criminal Law Studies After the Criminal Law Reform as Reflected in the Leipzig Commentary and the Vienna Commentary*], GA 341, 371 (1985) (Ger.); Cornelius Prittwitz, *Zum Verteidigungswillen bei der Notwehr* [*The Will to Defend in Self-defense*], GA 381, 381 (1980) (Ger.) (arguing that issue has been settled since 1963).

203. *See* OLG Zweibrücken October 18, 2018, 1 OLG 2 Ss 42/18 (Ger.); BGH Apr. 25, 2013, 4 StR 551/12 (Ger.); BGH Oct. 2, 1953, 3 StR 151/53 (Ger.); RG June 1, 1926, 60 RGST 261, 261–62 (Ger.); RG Dec. 19, 1919, 54 RGST 196, 199 (Ger.).

204. *See, e.g.*, RG June 1, 1926, 60 RGST 261, 262 (Ger.) (holding that wife's motive for exercising her right to self-defense is irrelevant); *see also* Erb, *supra* note 12, at side-note 240 (Ger.).

205. *See generally* BGH Sept. 4, 1979, GA 67, 68 (1980) (Ger.); Rosenau, *supra* note 12, at side-note 43–49 (Ger.); Erb, *supra* note 12, at side-note 240 (Ger.).

206. A line of reasoning aligned with that of Robinson. *See generally* Rönnau & Hohn, *supra* note 44, at side-note 270 (Ger.); Lawrence Crocker, *Justification and Bad Motives*, 6 OHIO ST. J. CRIM. L. 277, 278 (2008) (citing PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 111 (1997).

207. *See generally* LG Muenster Jan. 21, 2019, 1 KLs-30 Js 123/18-22/18 (Ger.); BGH Nov. 15, 1995, NJW 973 (1995) (Ger.); RG Jan. 20, 1938, 72 RGST 57, 58 (Ger.); FISCHER, *supra* note 12, at side-note 28 (Ger.); JESCHECK & WEIGEND, *supra* note 61, at 343 (Ger.). Although the literature and the case law in the U.S. and England often confuse the respective definition(s) of necessity, this approach is consistent with those U.S. jurisdictions that define self-defensive force as being that force which is "necessary to prevent an imminent harm." In these jurisdictions, imminence is treated as an

the most gentle available treatment of the attacker" (*Grundsatz der möglichsten Schonung des Angreifers*).[208] The defender must select the *least harmful* defensive means (*mildeste Mittel* or *mildeste Abwehrmittel*) available to him, so long as opting for such means does not, all things considered, increase the risk of harm to him or his property.[209]

This evaluation is to be conducted from an objective, *ex ante* perspective.[210] In situations where it will not reduce the defensive effectiveness, the armed defender should, prior to deploying his deadly weapon, first threaten its use, and then fire a warning shot. Only if that fails or is not available, may the defender resort to a potentially lethal shot (if attacker is unarmed these non-deadly defensive precursor activities will be particularly important).[211]

For instance, the experienced boxer should not throw punches at the attacker's head when a simple punch to the stomach would be equally effective.[212] And a counter-attack (*Trutzwehr*) is impermissible where purely defensive force (*Schutzwehr*) would suffice.[213] These limitations are

---

independent requirement, in that the means of force selected must be necessary given the circumstances, and the unlawful harm must be immediately forthcoming. In the jurisdictions that require force to be "immediately necessary," in contrast, imminence is treated as a factor regarding necessity.

208. *See generally* Pest, *supra* note 46, at 142 (Ger.). *See also* BGH Sept. 8, 2020, 4 StR 288/20 (Ger.).

209. *See* BGH Sept. 8, 2020, 4 StR 288/20 (Ger.); BGH Apr. 17, 2019, 1 StR 363/18 (Ger.). *See generally* LG Muenster Jan. 21, 2019, 1 KLs-30 Js 123/18-22/18 (Ger.); BGH Sept. 13, 2018, 5 StR 421/18 (Ger.); BGH May 24, 2017, StR 219/16, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=78999&pos=0&anz=1 [https://perma.cc/W8KK-JB9T]; BGH Sept. 13, 2017, 2 STR 188/17 (Ger.); BGH Oct. 25, 2017, 2 StR 118/16 (Ger.); BGH June 8, 2016, 5 StR 564/15 (Ger.); BGH June 22, 2016, 5 StR 138/16 (Ger.); BGH July 1, 2014, 5 StR 134/14 (Ger.); BGH Dec. 19, 2013, 4 StR 347/13, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=66461&pos=0&anz=1 [https://perma.cc/W8GF-K6S5]; BGH Apr. 16, 1998, 4 StR 114/98 (Ger.); BGH Mar. 21, 1996, 5 StR 432/95 (Ger.); BGH Feb. 28, 1989, NJW 3027 (1989) (Ger.); BGH June 14, 1972, 2 StR 679/71 (Ger.); BGH June 21, 1968, GA 23, 24 (1969) (Ger.); BGH May 26, 1964, GA 147, 148–49 (1965) (Ger.); 72 RGST 57, 58–59 (Ger.); RG Sept. 20, 1920, 55 RGST 82, 85 (Ger.) *see also* Rosenau, *supra* note 12, at side-note 21 (Ger.); Pest, *supra* note 46, at 145 (Ger.); FISCHER, *supra* note 12, at side-note 30 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 75, 172 (Ger.); Erb, *supra* note 12, at side-notes 129, 185 (Ger.); ROXIN, 3d ed., *supra* note 69, at side-note 42.

210. *See* BGH Apr. 17, 2019, 1 StR 363/18 (Ger.); BGH Sept. 13, 2017, 2 StR 188/17 (Ger.); BGH Oct. 25, 2017, 2 StR 118/16 (Ger.); Erb, *supra* note 12, at side-note 208 (Ger.).

211. *See* BGH Apr. 17, 2019, 1 StR 363/18 (Ger,); BGH Sept. 13, 2017, 2 StR 188/17 (Ger.); BGH Oct. 25, 2017, 2 StR 118/16 (Ger.); Pest, *supra* note 46, at 146–47, 149–52 (Ger.); FISCHER, *supra* note 12, at side-notes 33–35 (Ger.).

212. *See* BGH Mar. 7, 2002, 3 StR 490/01, juris (Ger.), https://rewis.io/media/law/sentence/Io5bXpACTKy6Le646Enafw.pdf [https://perma.cc/K28C-JDY4]; BGH Nov. 22, 2000, 3 StR 331/00 (Ger.).

213. *See* BGH Mar. 7, 2002, 3 StR 490/01 (Ger.); BGH Nov. 22, 2000, 3 StR 331/00 (Ger.); BGH June 14, 1972, 2 StR 679/71 (Ger.); *see also* Erb, *supra* note 7, at side-notes 120, 163 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 158 (Ger.).

consistent with the logic of the rule discussed above, pursuant to which a defender armed with a gun or knife should draw the attacker's attention to them prior to using such defensive means, provided that such a "warning" does not objectively increase the risk to the defender, and the defender has sufficient time to appropriately evaluate the situation.[214]

Whether defensive force is necessary in a particular case will thus be evaluated based on the objective circumstances. Considerations include how the conflict came to be, the strength and dangerousness of the participants, and the defensive options open to the defender.[215] In this, the German law is in accord with the value-based model and the laws of the U.S. and England.

Consider an illustrative case in which the worried defender called the police. But prior to their arrival, the belligerent attacker living in the same homeless shelter repeatedly beat him. The court ruled that the defender, who had his head pressed against a window while armed with a kitchen knife, was not required to first stab his attacker in the arms or legs.[216] As the court put it,

---

214. *See* BGH Feb. 1, 2017, 4 StR 635/16 (Ger.); BGH May 24, 2017, 2 StR 219/16 (Ger.); BGH June 8, 2016, 5 StR 564/15 (Ger.); BGH June 22, 2016, 5 StR 138/16 (Ger.); BGH Mar. 25, 2014, 1 StR 630/13, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=67486&pos=0&anz=1 [https://perma.cc/HF3N-T7Z4]; BGH July 1, 2014, 5 STR 134/14 (Ger.);BGH Aug. 21, 2013, 1 STR 449/13 (Ger.); BGH Dec. 19, 2013, 4 StR 347/13 (Ger.); BGH Nov. 21, 2012, 2 StR 311/12 (Ger.); BGH June 7, 2017, 4 StR 197/17, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=79202 [https://perma.cc/AG47-2BTZ]; BGH Aug. 11, 2010, 1 StR 351/10, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=53656&pos=0&anz=1 [https://perma.cc/GX8K-ASBB]; BGH Mar. 13, 2003, 3 StR 458/02, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=25740&pos=0&anz=1 [https://perma.cc/4R7P-KDQ9]; BGH Mar. 21, 2001, 1 StR 48/01 (Ger.).

215. *See* BGH June 7, 2017, 4 StR 197/17, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=79202&pos=0&anz=1 [https://perma.cc/YBY2-LE6J]; BGH Apr. 13, 2017, 4 StR 35/17 (Ger.); BGH Jan. 29, 2003, 2 StR 529/02, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=25395&pos=0&anz=1 [https://perma.cc/6YVL-UEVY]; BGH Nov. 19, 1992, 4 StR 464/92, Wolters Kluwer (Ger.), https://research.wolterskluwer-online.de/document/006f815c-8896-4ec5-be07-e8799ea8a8aa [https://perma.cc/LE5S-ZTZ9].] BGH ; BGH Nov. 5, 1982, 3 StR 375/82, Wolters Kluwer (Ger.), https://research.wolterskluwer-online.de/document/679cb464-4691-40be-947f-81ebf3f5a4cb [https://perma.cc/QBC6-7HR4]; *see also* BGH Sept. 13, 2017, 2 StR 188/17, juris (Ger.) (citing BGH July 25, 2015, 3 StR 84/15, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=72132&pos=0&anz=1 [https://perma.cc/N2GQ-4KSH]); Rönnau & Hohn, *supra* note 44, at side-note 177 (Ger.); Rosenau, *supra* note 12, at side-note 27 (Ger.); KÜHL & HEGER, *supra* note 46, at side-note 9 (Ger.). In the context of the use of firearms, this expectation of, when possible, using escalating force is called "*Stufenlehre*." *See* Pest, *supra* note 46, at 163–64 (Ger.).

216. BGH June 8, 2016, 5 StR 564/15 (Ger.); *see also* BGH Sept. 13, 2017, 2 StR 188/17 (Ger.) (citing BGH Nov. 2, 2011, 2 StR 375/11, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=58793&pos=0&anz=1 [https://perma.cc/Q4MW-U49X]).

"[c]onsidering the difficulty in calculating the risk of making a bad self-defense decision, expecting the defendant to, in a moment of stress (*zugespitzte Situation*), first threaten the use of the knife or use the knife in a less deadly way is asking too much."[217] Under the German law, moreover, the selected means of defense must, viewed from an *ex ante* perspective, also have the possibility of preventing, weakening, postponing, or otherwise interfering with the attack.[218]

b. Proportionality and Excessive Force

i. The Traditional Rule

We already saw that Germany's self-defense law traditionally rejected attempts to require that the defensive force employed be proportional to the harm threatened by the attacker (*Güterproportionalität* or *Abwägung der betroffenen Rechtsgüter*).[219] Consider a 1923 textbook which noted rather dramatically that "[o]ne can shoot an attacker to defend one's ownership of a match as long as this action is in accordance with the severity of the attack."[220] Mayer, in 1936, similarly criticizing the suggestion that there be proportionality between the harm done and the threat averted (and in so doing invoking values #3—equal standing and #4—defender's autonomy), opined:

> It is understandable that an era which only half-heartedly fights criminality would want to rid itself of the severity of the law of self-defense. But it is obvious that, if proportionality were required, the struggle between the attacked and the criminal would then be destined to be a losing one [for the attacked].[221]

217. BGH June 8, 2016, 5 StR 564/15 (Ger.); *see also* BGH June 22, 2016, 5 StR 138/16 (Ger.); Erb, *supra* note 7, at side-note 3 (Ger.) (discussing that the necessity of self-defense can be viewed as a failure of the legal order to protect the defender).

218. *See* OLG Düsseldorf 1994, NJW 1971 (1994) (Ger.) (holding that defender's otherwise legitimate use of force against an intruding photographer was not necessary under § 32 because the photographer did not have any film in his camera); *see also* LG München Nov. 11, 1987, NJW 1860, 1861 (1988) (Ger.); BayObLG Jan. 9, 1985, NJW 2600, 2601 (1985) (Ger.); Kühl & Heger, *supra* note 46, at side-note 10 (Ger.); Erb, *supra* note 12, at side-note 208 (Ger.).

219. *See generally* Pest, *supra* note 46, at 138–39, 141 (Ger.); FISCHER, *supra* note 12, at side-note 31 (Ger.); Kühl & Heger, *supra* note 46, at side-note 11 (Ger.); ROXIN, 3d ed., *supra* note 69, at side-note 4 (Ger.); Erb, *supra* note 50, at 593 (Ger.). *See also* MATT & RENZIKOWSKI, *supra* note 63, at § 32, side-note 10 (Ger.); RG 1935, 69 RGST 308, 310 (Ger.).

220. M. MAYER, *supra* note 54, at 280 (Ger.); *see also* DEUTSCHER BUNDESTAG, ENTWURF EINES STRAFGESETZBUCHS 16, 156–57 (1962) [DRAFT CRIMINAL CODE] (Ger.); https://dserver.bundestag.de/btd/04/006/0400650.pdf [https://perma.cc/RCC5-M6G7]; RG 1935, 69 RGST 308, 310 (Ger.); Kühl, *supra* note 76, at 195–96 (Ger.); LISZT, *supra* note 102, at 125–26 (Ger.).

221. M. MAYER, *supra* note 54, at 258 (Ger.).

Necessity was, therefore, historically the *only* requirement that limited the use of defensive force.

ii. The "Grossly Disproportionate Force" Exception

Today's overwhelming consensus view continues to reject a general requirement of strict proportionality between the competing interests (*Abwägung der betroffenen Rechtsgüter*).[222] As part of the socio-ethical limitations, however, an exception to this rule was developed for cases of "gross disproportion" (*großes* or *krasses* or *unerträgliches Missverhältnis*) between the harm threatened and the defensive force used.[223] In cases of relatively trivial threats, for example, it is said that neither the interest in protecting the individual nor the interest in protecting the legal order is implicated.[224]

Contemporary German law, therefore, makes self-defense unavailable when the interests being defended are grossly disproportionate to the defensive force used (and so deadly force would be unavailable to, for example, protect against the theft of a bag of fruit).[225] Viewed from the value-based model's vantage point, because the defender's personal protection justification (from the value-based model's perspective, roughly values #3 and #4) is said to carry diminished weight in cases of trivial or relatively minor harm, self-defense will be unavailable if the force used is grossly disproportionate to the harm sought to be averted.[226]

222. *See generally* LG Münster Jan. 21, 2019, 1 KLs-30 Js 123/18-22/18 (Ger.); BGH June 25, 2010, 2 StR 454/09, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=52999&pos=0&anz=1 [https://perma.cc/6TU9-PDCJ]; BGH June 14, 1972, 2 StR 679/71 (Ger.); BayObLG Jan. 22, 1963, NJW 824, 825 (1963) (Ger.); Greco, *supra* note 50, at 667 (Ger.); Erb, *supra* note 50, at 593 (Ger.); Lesch, *supra* note 45, at 84 (Ger.); Lenckner, *supra* note 61, at 539 (Ger.); ROXIN, 3d ed., *supra* note 69, at 572–73 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 343 (Ger.); Spendel, *supra* note 69, at 111 (Ger.); MAURACH & ZIPF, *supra* note 69, at 363 (Ger.).

223. *See* OLG Zweibrücken Oct. 18, 2018, 1 OLG 2 Ss 42/18 (Ger.) (citing BGH Feb. 12, 2003, 1 StR 403/02 (Ger.)); Erb, *supra* note 7, at side-notes 214–15 (Ger.); Rosenau, *supra* note 12, at side-note 34 (Ger.); Greco, *supra* note 50, at 667 (Ger.).

224. *See generally* Rosenau, *supra* note 12, at side-note 34 (Ger.). *See also* FISCHER, *supra* note 12, at side-note 39 (Ger.); Greco, *supra* note 50, at 667 (Ger.).

225. *See generally* Rosenau, *supra* note 12, at side-note 34 (Ger.).

226. *See* OLG Stuttgart Feb. 7, 1995, NJW 2646 (1995) (Ger.) (threatening to drive into pedestrian who was holding parking space for friend excessive); BayObLG Aug. 5, 1964, MDR 65, 65 (1965) (Ger.); BayObLG Jan. 22, 1963, NJW 824, 825 (1963) (Ger.) (holding that physical harm to woman who refused to move from parking space was abuse of right to self-defense); Kühl & Heger, *supra* note 46, § 33, at side-note 14 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 348 (Ger.); Spendel, *supra* note 69, at 151 (Ger.); Burkhard Koch, *Prinzipientheorie der Notwehreinschränkungen* [*Principle Theory of Self-defense Restrictions*], 104 ZSTW 785, 785 (1992) (Ger.); Krey, *supra* note 95, at 711 (Ger.).

Turning to what happens when an individual who is justified in using self-defense *exceeds* the boundaries of self-defense, § 33 provides that a defender will not be criminally liable "if he exceeds the bounds of self-defense because of confusion, fear, or fright."[227] § 32 or § 33 do not define what these "limits" are. They must, therefore, be determined based on the facts of the specific case.[228]

c. Duty to Retreat and Avoid Conflict

i. The General Rule

As far back as the Middle Ages, the defender was, consistent with the value-based model's approach, required to (if possible) retreat before he could use defensive force.[229] Today, in contrast, defenders are not bound to retreat before using defensive force (German law has, therefore, broadly adopted a variant of the "stand your ground" position often hotly debated in the United State).[230] That said, some fairly narrow exceptions to the no-duty-to-retreat rule have emerged.[231]

The subsections immediately below detail the developing view that retreat—like avoiding conflict[232]—should be required in some cases of attacks by innocents, such as madmen, children, and those laboring under a known mistake.

227. STRAFGESETZBUCH, *supra* note 53. *See generally* BGH May 17, 2018, 3 StR 622/17 (Ger.) (holding that the putative defender's reaction was excessive when he inflicted multiple stab wounds on person who insulted him.). *See also* BGH June 17, 2020, 4 StR 658/19 (Ger.); Pest, *supra* note 46, at 137–38 (Ger.); RÜCKERT, *supra* note 95, at 1 (Ger.).

228. *See* Pest, *supra* note 46, at 137–38 (Ger.).

229. 1 RUDOLF HIS, DAS STRAFRECHT DES DEUTSCHEN MITTELALTERS 99 (1964) (Ger.); *see also* Jens Bülte, Der Verhältnismäßigkeitsgrundsatz im deutschen Notwehrrecht aus verfassungsrechtlicher und europäischer Perspektive [The principle of proportionality in German self-defense law from a constitutional and European perspective], GA 145, 149 (2011) (Ger.).

230. *See* Erb, *supra* note 7, at side-note 1 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 66 (Ger.) (noting that, pursuant to the prevailing opinion, the interest in protecting the legal order is "immeasurably high").

231. *See generally* Erb, *supra* note 12, at side-notes 119–21 (Ger.). *See also* BGH Aug. 19, 2020, 1 StR 248/20, juris (Ger.), http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=110393&pos=0&anz=1 [https://perma.cc/PK73-XMEN].

232. *See generally* Michela D'Angelo, Merkmal Der Gegenwärtigkeit in Notwehrrecht Bei Neuen Konfliktmustern Aus Rechtsvergleichender Sicht [Characteristics of New Conflict Patterns in Self-Defense Law from a Comparative Law Perspective] 187 (Mar. 6, 2017) (Ph.D. dissertation, Università degli Studi di Padova [University of Padua, Italy] and Albert-Ludwigs-Universität Freiburg [Albert Ludwigs University, Freiburg, Germany]) (Ger.), https://freidok.uni-freiburg.de/data/11175 [https://perma.cc/QR4J-PH9H].

(a) *Socio-ethical Limitations and the Duty to Retreat and Avoid Conflict*

Retreat, and avoiding conflict by not going to places where the defender knows the attacker frequents, are, in line with the socio-ethical limitations on self-preferential force, increasingly required before fending off attacks by close relatives, such as a spouse, and in cases where the defender provoked (*provoziert*) the attack.[233] Some scholars have taken the more novel position that § 32 should be *entirely* unavailable in cases where the defender is set upon by an innocent, such as a child, a madman, or a person laboring under a mistake, because these moral innocents are not threatening an "attack" as defined by § 32.[234] Whatever the merit of this position, it appears that, at a minimum, retreat and avoiding conflict are now required in many situations, where fifty years ago they were not.[235]

(b) *Retreat when Attacked by "Innocents"*

We have seen that in cases involving morally innocent attackers, the defender is now likely required to retreat if practicable. The motivation for this position is the lack of the attacker's moral responsibility (adding weight to value #2, and de-emphasizing values #3 and #7, as well as arguably #4).[236] Where retreat is not a viable option, moreover, the defender may even have to accept slight injury or damage before resorting to defensive force.[237] This requirement of "risky care" (*riskante Schonung*) is narrowly limited,

233. *See generally* BGH Sept. 8, 2020, 4 StR 288/20 (Ger.) (finding a duty to avoid conflict in a case where a drunk man was injured when his friend attempted to remove him from a public area); BGH June 17, 2020, 4 StR 658/19 (Ger.) (deciding that retreat was required when defender provoked attacker); BGH Aug. 19, 2020, 1 StR 248/20 (Ger.). (finding that retreat was required when defender, who was engaging in an illegal drug deal with the attacker, insulted attacker); LG Dortmund June 29, 2016, 39Ks 8/14 (Ger.) (holding that retreat is required when defender is armed with a deadly weapon and intentionally engages in fight—engages in "disapproved prefatory activity" (*misbillingendes Vorverhalten*) with drunk, unarmed attacker). *But see* Rosenau, *supra* note 12, at side-note 40 (Ger.); Kühl & Heger, *supra* note 46, at side-note 14 (Ger.) (asserting that retreat is only required when provoking behavior is unlawful); GEORG FREUND, STRAFRECHT: ALLGEMEINER TEIL [CRIMINAL LAW: GENERAL PART], § 3, at side-note 117 (2008) (Ger.).

234. *See, e.g.*, F.-W. Krause, *Zur Einschränkung der Notwehrbefugnis* [*To Restrict the Power of Self-Defense*], GA 329, 335–36 (1979) (Ger.); Bertel, *supra* note 177, at 11 n. 41 (Ger.); BGH Aug. 1, 1961, Juristische Rundschau [JR] [Legal Review] 186, 187 (1962) (Ger.). *But see* BGH Aug. 1, 1961, NJW 308, 332 (1962) (Ger.). This contention lacks merit, however, because § 32 allows defensive force to be used against "unlawful attacks," rather than just against "criminal attacks."

235. *See generally* Erb, *supra* note 12, at side-notes 116–21 (Ger.). *See also* BGH Aug. 19, 2020, 1 StR 248/20 (Ger.).

236. *See generally* Erb, *supra* note 12, at side-notes 212, 247 (Ger.). *See also* Ellen Schlüchter, *Kein Recht zur Beweisvernichtung nach einem potentiellen Selbstbedienungsladendiebstahl* [*No Right to Destroy Evidence After a Potential Self-service Shop Theft*], JR 309, 310 (1987) (Ger.); BGH May 29, 1974, 3 StR 117/74, MDR 194, 195 (1975) (Ger.).

237. *See* Lenckner, *supra* note 61, at 546 (Ger.); *see also* Roxin, *supra* note 45, at 81 (Ger.).

however.[238] Under German law, as under the value-based model, a person cannot be legally compelled to take a serious beating from, say, a legally innocent juvenile or madman.[239]

(c) *Attacks by Close Family Members*

As in the case of attacks by innocents, it has been argued that there is less interest in protecting the legal order when close family members, such as husband and wife or close personal friends, are attacking each other.[240] In those cases, the defender is to some extent said to be the guarantor of the attacker (this is, depending on the context, known as the *Garantenpflicht* or *Garantenstellung*), obligating the defender to exercise special care and consideration (*Rücksichtsnahmeverpflichtung*).[241] A defender consequently may not use potentially lethal force to prevent slight discomfort or a minor physical injury resulting from a familial attack, regardless of whether such force may be authorized if the culpable attack was by a stranger.[242]

Particularly relevant to battered intimate partner cases, however, the consensus view is that this limitation is abandoned in cases where the defender runs the risk of serious physical injury requiring medical care if she does not defend herself. Similarly, there is no requirement of "heightened care" where, for example, the spouse is subjected to ongoing, though not necessarily always very violent, mistreatment that takes away her dignity and makes her the object of her husband's will.[243]

---

238. *See generally* Erb, *supra* note 12, at side-note 211 (Ger.).

239. *See id*.

240. *See generally* Erb, *supra* note 7, at side-notes 219–21 (Ger.).

241. *See generally* BGH Apr. 12, 2016, 2 StR 523/15 (Ger.); BGH July 24, 2003, 3 StR 153/03 (Ger.); BGH Jan. 11, 1984, NJW 986 (1984) (Ger.); BGH Sept. 25, 1974, NJW 62 (1975) (Ger.); BGH Feb. 26, 1969, NJW 802 (1969) (Ger.); Erb, *supra* note 7, at side-notes 219–21 (Ger.); FISCHER, *supra* note 12, at side-note 5a (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 238–41 (Ger.); Kühl & Heger, *supra* note 46, at side-note 14 (Ger.); ERB, *supra* note 12, at side-note 71 (Ger.); ROXIN, 3d ed., *supra* note 69, at side-note 93 (Ger.); Lesch, *supra* note 45, at 82–93, 104–05 (Ger.); Bernsmann, *supra* note 160, at 298–99 (Ger.); Schroth, *supra* note 95, at 2563 (Ger.); Roxin, *supra* note 45, at 100–01 (Ger.). BGH Sep. 25, 1974, 3 StR 159/74, JR 335, 335–36 (1976) (Ger.); BGH Mar. 20, 1968, 3 StR 64/68, GA 117, 117–18 (1969) (Ger.); Gerd Geilen, *Eingeschränkte Notwehr unter Ehegatten*? [*Limited Self-defense Among Married Couples*], JR 314, 315-16 (1976) (Ger.).

242. BGH Jan. 11, 1984, 2 StR 541/83, JR 113, 115 (1985) (Ger.); Günter Spendel, *Besprechungsaufsatz* [*Judicial Hearing Commentary Essay*], *Keine Notwehreinschänkung unter Ehegatten* [*No Self-defense Restrictions Among Married Couples*], *commenting on*, BGH Jan. 11, 1984, 2 StR 541/83, JZ 507 (1984) (Ger.); BGH NJW 986, 986–87 (1984) (Ger.); BGH NJW 62, 62–63 (1975) (Ger.); *see also* Rönnau & Hohn, *supra* note 44, at side-notes 238–41 (Ger.); Erb, *supra* note 12, at side-note 71 (Ger.).

243. *Compare* BGH NJW 802 (1969) (Ger.) (holding that a wife should not have used deadly force against her husband, even though less-harmful force may not have repelled the attack, because he was unarmed and they had engaged in similar physical arguments before), *with* BGH NJW 62 (1975) (Ger.) (finding no self-defense in husband–wife conflict), *and* BGH Jan. 11, 1984, JZ 529,

ii. Intentionally Provoked Attacks and Other Blameworthy Conduct on the Part of Defenders

Absichtsprovokation refers to intentional, calculated provocation by the defender solely for the purpose of later being able to claim self-defense after the attacker "rises to the bait."[244] *Vorsatzprovokation*, in contrast, describes situations, such as those involving recklessness, that have not yet crossed over to the level of *Absichtsprovokation,* but where a person considers it to be possible that a situation of self-defense may follow from his actions, and accepts that.[245] Some German commentators argue that self-defense should be entirely unavailable in cases of *Absichtsprovokation* (and in some cases *Vorsatzprovokation*) because there is no—or at least a far more limited—interest in protecting the legal order.[246] Others have taken the position that, unless the intentional provoker is engaging in a positively *unlawful* attack, his defensive options should remain entirely unchanged.[247] Others, still, contend that such purposeful provokers lack the genuine "defensive will" the German law requires.[248]

The contemporary majority view preserves the self-defense option for the provoking defender, provided that he first retreats and accepts the risk of slight injury.[249] If retreat is not possible, the provoking defender facing serious harm

529–30 (1984) (Ger.) (distancing itself from previous holdings). *See also* Erb, *supra* note 50, at 597 (Ger.) (noting the difficulty of "retreating" from an aggressive partner); Lesch, *supra* note 45, at 104–05 (Ger.); Roxin, *supra* note 45, at 101–03 (Ger.) (arguing that limitation on the right to self-defense does not apply to situations where partner routinely mistreats the other).

244. *See generally* Erb, *supra* note 7, at side-notes 226–30 (Ger.).

245. *See* BGH Jan. 17, 2019, 4 StR 456/18 (Ger.) (denying self-defense to attacker who intentionally provoked defendant in order to claim the justification and noting the absence of "defensive will"); LG Münster Jan. 21, 2019, 1 KLs-30 Js 123/18-22/18 (Ger.) (citing BGH Nov. 2, 2005, 2 StR 237/05 (Ger.)); *see also* BGH Oct. 25, 2017, 2 StR 118/16 (Ger.); BGH June 3, 2015, 2 StR 473/14 (Ger.); BGH Mar. 25, 2014, 1 StR 630/13 (Ger.); FISCHER, *supra* note 12, at side-note 42 (Ger.); Rosenau, *supra* note 12, at side-notes 43–44 (Ger.); Kühl & Heger, *supra* note 46, at side-note 14 (Ger.); Erb, *supra* note 12, at side-note 226 (Ger.).

246. *See, e.g.*, WESSELS & SATZGER, *supra* note 89, at side-note 534 (Ger.); Roxin, *supra* note 45, at 85–86 (Ger).

247. *See, e.g.*, Rönnau & Hohn, *supra* note 44, at side-notes 190, 245–60 (Ger.) (asserting that intentional provocation does not limit defensive force, unless unlawful).

248. *See* BGH Oct. 25, 2017, 2 StR 118/16 (Ger.); BGH June 3, 2015, 2 StR 473/14 (Ger.); BGH Mar. 25, 2014, 1 StR 630/13 (Ger.); BGH Nov. 2, 2005, 2 StR 237/05 (Ger.); WESSELS & SATZGER, *supra* note 89, at side-note 534 (Ger.); *see also* Rönnau & Hohn, *supra* note 44, at side-note 251 (Ger.).

249. *See* BGH Aug. 19, 2020, 1 StR 248/20 (Ger.); BGH Sept. 27, 2012, 4 StR 197/12 (Ger.); BGH Oct. 26, 1993, NJW 871, 872 (1994) (Ger.); BGH Oct. 26, 1993, BGHST 374, 378–79 (Ger.); BGH Oct. 5, 1990, NJW 503, 505 (1991) (Ger.); BGH June 14, 1972, 2 StR 679/71 (Ger.); Erb, *supra* note 12, at side-note 227 (Ger.); Lenckner, *supra* note 61, at 547–48 (Ger.); Kühl, *supra* note 76, at 200–01 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 346–47 (Ger.); JESCHECK & WEIGEND, 4th ed., *supra* note 110, at 311 (Ger.); *see also* Wolfgang Mitsch, *Nothilfe gegen provozierte Angriffe* [*Self-defense against provoked Attacks*], GA 533, 544 (1986) (Ger.) (arguing that the provoking attacker should retain full right to self-defense).

is permitted to act in self-defense because it is thought that putting an individual in a situation where he has to choose between giving up his physical safety to the attacker or being exposed to criminal liability is untenable.[250]

In 2019, for example, the court was faced with a situation in which a drunk defender acted as a lookout while his girlfriend relieved herself in a train station waiting area.[251] A man walking by pointed out that the waiting area was not a bathroom, which resulted in a verbal altercation between the drunk boyfriend and the man. The boyfriend, after verbally challenging the man, pulled out a hunting knife. When the man approached the boyfriend to hit him, the boyfriend stabbed the man in his left side to ward off the attack. The court remanded the matter for additional fact-finding concerning to what extent the boyfriend provoked the attack, and, therefore, should be restricted in terms of his defensive options.[252]

Although it is clear that provocation under some circumstances limits one's ability to use self-defense, disagreements persist over what behavior amounts to "provocation" and how self-defense can as a matter of legal theory be restricted.[253] Must the provoking activity be positively unlawful, or is it sufficient for the activity to be rude, annoying, or otherwise socially unacceptable (*sozialethisch zu missbilligen*)?[254] And should such asocial conduct be measured on the basis of intent, recklessness, negligence, or some other basis?[255]

Though subject to vigorous ongoing debate,[256] today's majority view requires the behavior to be positively unlawful before the defender's ability to use self-defense is curtailed. That is, provided the defender is not engaging in unlawful conduct, he is able to resort to defensive force even if he knows or must have known that his provoking conduct is likely to result in an attack.[257] As Kühl and Heger frame it, self-defense does not apply to cases of attacks that merely resulted from conduct that can be "*disapproved* of for legal

250. BGH Oct. 26, 1993, NJW 871, 872 (1994) (Ger.); BGH Oct. 26, 1993, BGHST 374, 378, 379 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 346–47 (Ger.); Rosenau, *supra* note 12, at side-notes 39–45 (Ger.); JESCHECK, 4th ed., *supra* note 110, at 311 (Ger.).

251. BGH Jan. 17, 2019, 4 StR 456/18 (Ger.).

252. *Id.*

253. *See generally* Kühl & Heger, *supra* note 46, at side-notes 14–15 (Ger.) (surveying the breadth of the disagreements).

254. *See generally* BGH Aug. 19, 2020, 1 StR 248/20 (Ger.).

255. *See generally* Erb, *supra* note 7, at side-note 41 (Ger.); Rönnau & Hohn, *supra* note 44, at side-notes 190, 245–60 (Ger.); FISCHER, *supra* note 12, at side-note 44 (Ger.).

256. *See generally* Erb, *supra* note 7, at side-note 234 (Ger.); Kühl & Heger, *supra* note 46, at side-note 14 (Ger.).

257. *See* BGH Jan. 17, 2019, 4 StR 456/18 (Ger.); BGH June 26, 2018, 1 StR 208/18 (Ger.); BGH Sept. 27, 2012, 4 StR 197/12 (Ger.); BGH Nov. 10, 2010, 2 StR 483/10 (Ger.); BGH Sept. 1, 1993, 3 StR 354/93 (Ger.); BGH Jan. 17, 1989, 4 StR 2/89 (Ger.); BGH June 14, 1972, 2 StR 679/71(Ger.); Kühl & Heger, *supra* note 46, at side-note 14 (Ger.); ROXIN, 3d ed., *supra* note 69, at 584 (Ger.); JESCHECK & WEIGEND, 5th ed., *supra* note 61, at 347 (Ger.) (arguing that one must tolerate lawful, but provoking, behavior without resorting to physical violence).

or socio-ethical reasons."[258] This approach is also consistent with the "three-level-progression theory" (*Dreistufenlehre* or *Dreistufentheorie*) when it comes to provoked attacks (first seek to flee; then seek to deflect the attack (*Schutzwehr*); then deploy affirmative force to neutralize the attack (*Trutzwehr*)).[259]

V. CONCLUSION

The question posed at the outset was whether, and how, a broader, explicit consideration of the core values implicated when a person elects to engage in the self-preferential use of force will improve the transparency of decision-making and, relatedly, reduce the role of hidden normativity. I discussed the value-based model's value-explicit approach. I then examined Germany's unique approach to determine (1) whether the German legal system's approach to self-defense is sufficiently value-centric, and (2) whether such an approach produces results in a more transparent and democratic fashion.

What we saw is that the level of attention German commentators pay to oft-intertwined subtle questions of criminal law theory, moral philosophy, and public policy is unparalleled (even though we may of course disagree with where they came out on key issues, such as proportionality, retreat, and provocation). Likewise, what has remained a constant is that debates surrounding calls for law reform in Germany are based on a shared dialogue around self-defense's core purpose—namely, ensuring that the "right" not yield to the "wrong"—while concurrently recognizing that some of the harsh results coming from a strict interpretation of this maxim can be avoided by the introduction of "socio-ethical limitations." These values, in turn, are applied to determinations of whether, within a particular set of facts, the outcome (1) protects the autonomy of the individual, and (2) vindicates the legal order.

The law reform discussions in the U.S. and England, in contrast, routinely proceed on the basis of the type of free-wheeling public policy debate that results in opaque, *ad hoc* changes. England's abrupt switch to evaluating self-defense purely on the basis of the defender's subjective perceptions, no matter how flawed or objectively unreasonable, stands out as a prime example.

Framed in terms of the value-based model, what we see in Germany is a debate about how each proposed change in the law of self-defense implicates the (1) values of maintaining the equal standing between people, (2)

258. Kühl & Heger, *supra* note 46, at side-note 14 (Ger.). *But see* BGH Mar. 21, 1996, NJW 2315 (1996) (Ger.), *discussed in*, Erb, *supra* note 8, at side-note 234 (Ger.).

259. *See generally* FISCHER, *supra* note 12, at side-note 45 (Ger.); Rönnau & Hohn, *supra* note 44, at side-note 256 (Ger.); WESSELS & SATZGER, *supra* note 89, at side-note 530 (Ger.); Kühl & Heger, *supra* note 46, at side-note 14 (Ger.).

protection of the defender's autonomy and legal rights, and in modern times, (3) protection of individual attacker's (presumptive) right to life. Stated slightly differently, the German approach to self-defense law uniquely, among known legal systems, employs an explicit and transparent system of value-ordering, both when discussing self-defense doctrine and at the level of specific application. That said, we have also seen that other values, including seeking to reduce overall societal violence, ensuring the primacy of the legal process, maintaining the moral legitimacy of the criminal law, and deterring attacks, have for no good reason been left out of the discussion.

Issue	Germany	U.S.
Does self-defense function as a justification or an excuse?	Justification.	Justification.
Must circumstances be both internally *and* externally justified to qualify as self-defense?	Yes.	Yes.
Do even reasonable mistakes of fact make self-defense unavailable?	Yes.	Yes.
Is self-defense available against innocent "attackers"?	Yes.	Yes.
Can an unknowingly justified defender claim self-defense?	No.	No.
Must the attack be criminal?	No.	No.
Can deadly force be used to protect property?	Yes.	No.
Can deadly force be used to ward off trivial threats?	No.	No.
Can passive conduct constitute an "attack" authorizing self-defense?	Yes.	Yes.
Is imminence of the threat objectively evaluated?	Yes.	Yes.

Issue	Germany	U.S.
What is the relationship between imminence and necessity?	Imminence is part of "justifying necessity."	Imminence means "about to occur." Imminence and necessity are separate concepts (force must be "necessary" to respond to imminent harm).
Can a "battered woman" rely on anticipatory self-defense?	No.	No.
Are there special rules for "attacks" by the police?	Yes.	No.
Does objectively disproportionate defensive force preclude a self-defense justification?	Yes.	Yes.
Is there a strict duty to retreat?	No, unless defender knows attack is by an "innocent" or family member.	Generally, yes (if outside of the home and not in a stand-your-ground state).
Is there a strict duty to avoid conflict?	No, unless defender knows attack is by an "innocent" or family member.	No.

German self-defense doctrine in many respects provides answers similar to the value-based model. The most significant deviation is in the area of what in particular can be defended. German law is much more permissive, providing for deadly force in defense of all legally recognized rights, including property and honor. In the U.S. and England, in contrast, the amount of force authorized in Germany to defend such rights would be considered dramatically disproportionate to the harm threatened. Also, although the value-based model would make defensive force available when "immediately necessary," German law treats imminence as part of "justifying necessity."

The German self-defense law is thus still notably "pro-defender." That said, it has witnessed, in a gradual and very transparent manner, significant changes opening the door for possible future restrictions on the right to self-defense. And these changes, thanks to the more value-centric style of the German debate, have largely come about in a logically incremental, predictable, transparent, and justifiable way. What once were minority positions concerning proposed law reform, for example, have over time, and through extensive analysis and debate, become part of the positive law of Germany. All sides of the debate are generally aware of the core issues about which there are disagreements, what values are implicated, how these values are said to have been affected by this law reform, and what future reform proposals may logically follow. By encouraging more thoughtful choices among the various available perspectives and narrowing the areas of dispute, the German value-centric approach drives out much of the hidden normativity that inherently and corrosively influences the decision-making seen in the U.S. and England.

I hope that this first in-depth, English-language examination of how Germany's storied self-defense law operates provides observers with an appreciation for how—and why—a value-centric dialogue drives normative questions out of hidden baselines, while expanding the range of perspectives represented in the debate and facilitating more thoughtful choices among available options. At the risk of stating the obvious, during no time in our recent criminal justice history has the need for such a shift towards greater transparency been more urgently needed.