

A New Defense for Self-Defense

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ABSTRACT

Private defense, like self-defense, has been virtually undisputed both in the past and present and even taken for granted, and perhaps particularly for this reason, sufficient attention has not always been given to the rationale underlying private defense. As a result, the legal arrangements set for private defense in the different legal systems are deficient, inconsistent, and, at times, replete with internal contradictions. This article seeks to propose a sound rationale for the concept of private defense. It begins by attempting to clearly and precisely delineate the scope of the defense and weed out cases that are occasionally (and, I maintain, mistakenly) included in the framework of its scope by means of two general and imperative distinctions: between justification and excuse and between the definitive components of offenses and those of defenses. With regard to the first distinction, I consider the validity of its application and its possible implications for private defense. Since the validity of the second distinction is undisputed as an empirical fact (at least formally) in all modern penal codes, the question raised is whether there is a significant difference between the definition of offenses and the definition of defenses. The answer to this question is relevant to a number of issues, and of particular relevance to private defense are its implications for the application of the principle of legality and with regard to the mental element that should be required of the actor in such situations. Next I embark on a discussion of the

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various theories competing for predominance as elucidations of private defense. These theories and this discussion then serve as the background and foundation for the construction of the article's proposed rationale for private defense. The novelty of this rationale is in its integrative approach, melding a number of the proposed justifications for self-defense, rather than taking the traditional path of espousing one all-excluding rationale.

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INTRODUCTION

The term “private defense”¹ encompasses various concepts from Anglo-American law, including “self-defense,”² “defense of another,”³ “defense of property,”⁴ “defense of another’s property,”⁵ and “defense of one’s dwelling,”⁶ all of which have the common denominator of a defense carried out by the individual, as distinguished from the institutionalized defense provided by the state. Private defense exempts from criminality acts that, had they been committed under normal conditions, would have imposed criminal liability on their perpetrators.⁷ Moreover, private defense is clearly justificatory in nature: in the special

1. The traditionally accepted term is “self-defense,” which is commonly used in current criminal codes. However, this term does not encompass defense of another or defense of another’s property and probably not defense of property or defense of one’s dwelling—hence the preferability of the term private defense. See Glanville Llewelyn Williams, *Textbook of Criminal Law* 501 (2d ed. 1983) [hereinafter Williams, *Textbook*]; Glanville Williams, *The Theory of Excuses*, 1982 *Crim. L. Rev.* 732, 738 [hereinafter Williams, *The Theory of Excuses*]; Helen Silving, *Constituent Elements of Crime* 587 (1967). The term “private defense” (attributed by Williams, *The Theory of Excuses*, *supra*, at 738, to Winfield), is also prevalent in tort law. An additional advantage to the term private defense is the prevention of confusion (at least for the layman) with self-defense due to the prevalent use of the latter. A distinction must be made between a purely factual description of the defensive act itself and the legal determination exempting the behavior from being considered a criminal act.

2. The application of force by a person being attacked against her attacker, in order to protect her life, bodily integrity, or freedom.

3. The application of force by a third party against someone who attacks another person, in order to protect the life, bodily integrity, or freedom of the latter.

4. The application of force by the owner or holder of property against an aggressor who endangers the property, in order to protect and prevent harm to the property.

5. This version of private defense is a hybrid composed of two of the other defenses within its scope: defense of another person and the defense of property.

6. The application of force by a resident of a dwelling against an aggressor who carries out his or her attack within the area of the dwelling, whether in defense of property or bodily integrity. This defense recognizes (perhaps principally) the very unique immunity of a dwelling as the safe haven of those who reside within it.

7. The underlying presumption is that all the elements of an offense exist, including the factual and mental components.

circumstances, the perpetrator is considered devoid of any moral flaw in performing an act that under normal circumstances would be regarded as morally reprehensible. This justificatory quality is of great significance, both from the perspective of morality and values as well as in terms of legal theory and practice.

Alongside duress and necessity, private defense is one of three exceptions to criminal liability in circumstances of compulsion. It is accepted that the common circumstance activating the exceptions of compulsion is the presence of immediate danger to a legitimate interest, which forces the actor to harm another interest in order to safeguard the former. However, in addition to this common basic situation, private defense is unique in that it implies *the application of vital and reasonable defensive force against the aggressor conducting the illegitimate attack, in order to repel the attack and neutralize the risk of anticipated injury to a legitimate interest*. Thus private defense is unique in that it refers to force and injury directed at a human source of danger: the perpetrator of the illegitimate attack. In contrast, the source of the danger in the case of necessity is generally not a person, and with duress, although there is a human source of danger (the person making the threat), no harm is caused to the aggressor making the threat, but rather to an innocent third party.⁸

There are two fundamental conditions for private defense to be justified: the existence of *necessity* to exert defensive force and the existence of *proportionality* in the use of force. The requirement of necessity entails that the act was necessary to achieve the legitimate goal of private defense. Thus, if a weak aggressor could have been resisted, for example, by pushing him away or lightly striking him, private defense will not justify shooting and

8. On the distinctions between private defense and duress and necessity, see Jerome Hall, *General Principles of Criminal Law* 434-36 (2d ed. 1960); Miriam Gur-Arye, *Should a Criminal Code Distinguish between Justification and Excuse?*, 5 *Canadian J.L. & Jurisprudence* 215, 217-18, 226-27 (1992); but compare Glanville Llewelyn Williams, *Criminal Law: The General Part* 732-33 (2d ed. 1961).

killing him, for only the minimal necessary force can be justifiably used. However, the requirement of necessity is not sufficient in itself to set the boundaries of legitimate and justified use of force against aggression. When a lethal attack, with intent to murder, is launched, there is no doubt that the exertion of great defensive force, even deadly force, is justified in order to repel the aggressor. But when the attack is not lethal—say, when someone breaks into a car to steal the car radio—is it justified for the victim to kill the aggressor? In modern legal systems, this is determined through the application of the second requirement—the existence of a certain degree of proportionality, i.e., a reasonable correlation between the force of attack and the force of defense, between the expected injury to the person attacked, if prevented from defending herself, and the anticipated injury to the aggressor if defensive force is applied.

These two fundamental requirements raise questions as to other necessary conditions or circumstances that should or do circumscribe the boundaries of private defense. For example, is a *duty to retreat* borne by the person attacked? Say a person threatens to attack you with a knife and is standing approximately thirty feet from you. You have two possible paths: to stop him with a fatal shot of your gun or to safely retreat.⁹ Do you bear a duty to retreat before resorting to the use of perhaps deadly defensive force?

Raskolnikov threatens Smerdiakov that he will kill him the next time they meet. Is Smerdiakov permitted not to wait and to immediately kill Raskolnikov? Or should there be an additional requirement of *imminence of danger*, so that private defense is contingent on the existence of a state of compulsion? And if so, what should the parameters of this requirement be?

And what about the *innocent aggressor*, say, someone suffering from psychotic delusions, who is not responsible

9. This presumes that you run much faster than the aggressor and that there is no reason to believe that retreat will endanger you in any way.

for his aggressive actions? Should private defense apply to the same extent in the case of such an aggressor as for the aggressor who is responsible for his actions, or perhaps should enhanced duties be imposed on the person allegedly defending himself, such as safe retreat from the scene of the event, in order to protect the innocent aggressor?

John sees Richard, whom he detests, and shoots him dead. In retrospect, it becomes clear that Richard, who likewise detests John, had arrived on the scene with the intention of murdering John and was carrying a gun for just this purpose. From an objective stance, all the conditions for private defense arise here: John's shooting of Richard was necessary and proportional to the threat. However, from a subjective perspective, John had no knowledge of the fact that Richard had intended to murder him. John's intention was not to defend himself, but to commit murder. Should or does private defense apply in such circumstances? Are the objective circumstances sufficient to justify John's action or should there be a *mental element* of subjective awareness of these circumstances? Moreover, should there be a requirement that the actor's action was performed with the (positive) purpose of defending himself?

An actor's mistake may work in the opposite direction. For example, upon leaving his home one evening, a man gave his gun to his wife so that she could defend herself against intruders. At midnight she was woken by the sound of knocking at the door, and received no reply to her question "Who is there?" She then heard someone at the window trying to open the shutters. Greatly alarmed and believing that a stranger was trying to break into her house to rape her, she fired three lethal shots through the shutters. It was later revealed that the intruder had been none other than her husband, who had returned home inebriated and simply been trying to get into the house.¹⁰ In such circumstances should the wife be exempted from criminal liability, when she mistakenly believed that she

10. CA 54/49 Attorney General v. Assla, 4 P.D. 496 (Isr.).

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was being attacked and performed what is known as *putative defense*? And if so, must the mistake be reasonable or is it sufficient that it was genuine?

Say Michael is strolling innocently down the road and is attacked by Mary, who is armed with a knife and attempts to stab him, and Michael is not strong enough to defend himself. Is the action of Alice, a third party who comes to Michael's rescue and harms Mary, justifiable under private defense? And under what conditions should *defense of another* be contingent to be justified?

Of course, many possible additional conditions for private defense can be raised, each accompanied by many thorny questions, both in terms of the scope of the requirement and with regard to the meaning attributed to it. How can we answer these many questions, which combine weighty value judgments with practical considerations? Most legal systems have adopted the approach of relating to each issue in a discrete and autonomous way, providing independent solutions for each issue. Indeed, conflicting practices often exist within the same legal system. Although there is general consensus as to the existence of a right to private defense, there are many serious disputes concerning the conditions for this right. In the absence of agreed-upon criteria for solving these disputes, the result is an ambiguous legal state replete with internal contradictions. An alternative, and, to my mind, preferable, approach is to uncover the rationale justifying private defense and then apply it to resolve each of the issues in a unified and coherent fashion—in other words, to answer the question of why society justifies actions that in effect constitute violations of prohibitions under law.

Strong tension exists between the centralized power of the state and the authorization of self-administered justice embodied in private defense. Yet self-defense has enjoyed virtually undisputed acceptance both in the past and present.¹¹ However, even though the matter seems to be

11. "The justification of self-defense is an ancient, yet unsettled, area of

taken for granted, or perhaps precisely for this reason, the rationale supporting private defense has not always received sufficient attention.¹² Several theories to be presented in this article have been offered to explain the rationale of private defense. All legal systems have steered clear of determining which theory is the ideal one, and hence the inconsistent approach to the many issues that arise in the context of private defense.

This article seeks to propose a sound rationale for the concept of private defense. The main thesis is that the starting point for any serious treatment of the subject must be the definition of its underlying rationale and that this rationale will dictate the solutions for each of the specific issues raised. As we shall see below, this is not only a theoretical matter, but a practical one as well: the choice of a theory has important practical implications for the scope of private defense and its conditions.¹³ The search for such a rationale should, of course, not be confined to prevailing positive law, but, rather, its chief objective should be identifying desirable law. To this purpose, it is important to clearly and precisely delineate the scope of private defense and weed out cases that are occasionally (and, it is maintained, mistakenly) included in the framework of its scope.¹⁴

criminal law." Seth Diamond, *Criminal Law: The Justification of Self-Defense*, 1987 *Ann. Survey Am. L.* 673, 673. See, for example, Albin Eser, *Justification and Excuse*, 24 *Am. J. Comp. L.* 621, 631 (1976).

12. See Judith Jarvis Thomson, *Self-Defense and Rights*, in *Rights, Restitution and Risk: Essays in Moral Theory* 33, 48 (William Parent ed., 1986).

13. In Dressler's words, "Which deontological theory explains or ought to explain, self-defense? The question is important. Too few modern lawyers and criminal law scholars seem interested in such a fundamental question." Joshua Dressler, *New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking*, 32 *UCLA. L. Rev.* 61, 86 (1985). On the importance of identifying the rationale, see Nancy M. Omichinski, *Applying the Theories of Justifiable Homicide to Conflicts in the Doctrine of Self-Defense*, 33 *Wayne L. Rev.* 1447, 1465, 1468-69 (1987); George P. Fletcher, *Rethinking Criminal Law* 855, 874 (1978). During the 1980s, a relatively great number of philosophers addressed this subject, and this body of work will be relied upon extensively in the analysis presented in this article.

14. Such cases would include, for example, those that warrant exemption from criminal liability, in suitable circumstances, on the basis of the excuses of

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Before examining the theories that attempt to elucidate private defense, the article presents two general and imperative distinctions that are highly relevant to the discussion and formulating a rationale for private defense. The first distinction is between justification and excuse; the second between the definitive components of offenses and those of defenses, in general, and of justification, specifically. With regard to the first distinction, I consider the validity of its application, questioned by some, and its possible implications for private defense. In contrast, the validity of the second distinction is undisputed as an empirical fact (at least formally) in all modern penal codes. The question raised in the context of this distinction is whether there is a significant difference between the definitive elements of an offense and those of a defense. The answer to this question is relevant to a number of issues, primarily with regard to the requirement of awareness of the objective circumstances of the defense, the requirement of reasonability of the mistake in putative defense, the burden and extent of proof, and the application of the principle of legality, with the last issue of particular importance, since it has far-reaching implications for judicial authority to interpret and create new defenses and for the adaptation of vague concepts such as reasonability to criminal defenses.

Having established the two general distinctions, they will be considered in the context of private defense, in the framework of the discussion of the various theories competing for predominance as explanations of private defense. These theories and this discussion will serve as the background for the rationale of private defense proposed in this article.¹⁵ But before embarking on our analysis, one important qualification must be made: It is

necessity or putative defense.

15. In *Self-Defence in Criminal Law*, I address the various issues raised by the subject of private defense and propose solutions in line with the rationale presented here, drawing inspiration from the different solutions applied for each issue in various legal systems. Boaz Sangero, *Self-Defence in Criminal Law* (forthcoming 2006).

important to note that the restriction of the discussion of private defense to homicide offenses alone, so prevalent in the literature, is both mistaken and misleading—mistaken because private defense applies also to other offenses, such as simple assault, and misleading because concentrating solely on situations of “a life for a life” distorts the picture—despite their obvious importance—and makes it more difficult to formulate the most appropriate rationale and determine the suitable legislative practice. Therefore, the article addresses private defense in its full scope in substantive criminal law.

I. THE DISTINCTION BETWEEN JUSTIFICATION AND EXCUSE

Of great importance in the search for an appropriate rationale for private defense is the matter of the distinction between defenses that justify a normally criminal act—“justifications”—and defenses that excuse such an act—“excuses.”¹⁶ Hart’s formulation of the distinction is the most familiar:

In the case of “justification” what is done is regarded as something which the law does not condemn, or even welcomes. But where killing . . . is excused, criminal responsibility is excluded on a different footing. What has been done is something which is deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals.

16. For comprehensive discussions of this distinction, see Fletcher, *supra* note 13, at 759-875; Paul H. Robinson, *Criminal Law Defenses* §§ 24-25 (1984) (and 2002-2003 Supplement) [hereinafter Robinson, *Criminal Law Defenses*]; Dressler, *supra* note 13; Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 *Colum. L. Rev.* 1897 (1984); Eser, *supra* note 11; Jerome Hall, *Comment on Justification and Excuse*, 24 *Am. J. Comp. L.* 638 (1976); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 *UCLA L. Rev.* 266 (1975) [hereinafter Robinson, *A Theory of Justification*]; George P. Fletcher, *The Right and the Reasonable*, 98 *Harv. L. Rev.* 949 (1985); Miriam Gur-Arye, *Should the Criminal Law Distinguish between Necessity As a Justification and Necessity as an Excuse?*, 102 *L.Q. Rev.* 71 (1986); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 *Am. U. L. Rev.* 11 (1986).

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This is a requirement of fairness or of justice to individuals¹⁷

Thus, for example, we excuse the insane actor from criminal responsibility, since we understand his situation and forgive him, but we do not justify his action, which constitutes a criminal act and it obviously would have been preferable had he not committed the act. In contrast, when a policeman fulfills his duty by arresting a criminal, we not only excuse him from responsibility for false arrest, but we even justify his action. Justification is a legal implication of a moral and value decision, under which, in the special circumstances in which the offense (as defined by law) occurs, the action is no longer bad, but good. In contrast, in the case of excuse, the act is still perceived by society to be reproachable, even under the special circumstances that give rise to the excuse: excuse is based on understanding and forgiveness, not on moral justification.

Fletcher, foremost among those calling for the adoption of this distinction in Anglo-American law, describes it as follows:

Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor. A justification speaks to the rightness of the act; an excuse, to whether the actor is accountable for a concededly wrongful act.¹⁸

Although old English common law distinguished between killing that was justified and killing that was excused,¹⁹ it was not identical to the distinction currently in use, and it

17. H.L.A. Hart, *Punishment and Responsibility* 13-14 (1968).

18. Fletcher, *supra* note 13, at 759.

19. See, e.g., 4 William Blackstone, *Commentaries on the Laws of England* 177 (1779) (1769); Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 *Harv. L. Rev.* 567, 573 (1903); 1 William Oldnall Russell, *Russell On Crime* 454 (J.W. Cecil Turner ed., 12th ed. 1964); Rollin M. Perkins, *Self-Defense Re-Examined*, 1 *UCLA L. Rev.* 133, 133, 141-43 (1954).

is in any event no longer accepted in Anglo-American law. It is generally agreed that Stephen's assertion that the common legal distinction between justification and excuse "involves no legal implications" is still valid today,²⁰ and as Fletcher makes clear,²¹ the frequently used "reasonable man" in Anglo-American law has replaced the precise distinction between justification and excuse.²²

But the debate over the existence of a theoretical distinction is relatively minor. The thornier disputes revolve around the implications of the distinction. Radbruch,²³ Fletcher's predecessor in his approach to the distinction and its ramifications, enumerated four of its principal implications: 1) there is no right to self-defense against a justified act, but such a right does arise against an excused act; 2) a factual mistake in the circumstances of justification can give rise to a defense, but such an error in the context of excuse cannot; 3) an act by an accomplice to an offense is punishable even if the principal offender's act is excusable, but not if it is justified (i.e., excuse has personal application only, whereas justification is universal); and 4) civil compensation for damages may be claimed from a person who enjoys an excuse defense, but not from someone whose action can be justified. Other scholars have suggested additional or alternative implications, principally: 1) a third party has the right to

20. 3 James Fitzjames Stephen, *A History of the Criminal Law of England* 11 (1883); see also Eser, *supra* note 11, at 621. Partial adoption of the distinction can be found in the Model Penal Code (Proposed Official Draft 1962) and the Working Papers of the National Commission on Reform of Federal Criminal Laws relating to the Study Draft of the New Federal Criminal Code (1970). In England, the distinction was rejected by several legislative committees, see Gur-Arye, *supra* note 16, at 75. One phenomenon still present in Anglo-American law is the interchangeable use of the terms justification and excuse. See, e.g., 1 Wayne R. La Fave & Austin W. Scott, Jr., *Substantive Criminal Law* ch. 5 (1986) ("Justification and Excuse").

21. Fletcher, *supra* note 16, at 958-61.

22. The distinction between justification and excuse is well accepted in the German system. The historic development of the distinction there was strongly linked to the structure of criminal liability in German law. See Eser, *supra* note 11, at 627-29.; George P. Fletcher, *Basic Concepts of Criminal Law* 101-02. (1998).

23. G.L. Radbruch, *Jurisprudence in the Criminal Law*, 18 *J. Comp. Legis. & Int'l L.* 212, 218-19 (1936); see also Hall, *supra* note 8, at 233-34.

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protect a person whose act is justified (and is even encouraged to do so) and the latter's action will be justified as well, but she is prohibited from coming to the aid of a person whose act is only excused;²⁴ 2) an actor's prior culpability in creating the situation precludes the application of excuse to his action, but not justification;²⁵ 3) different burdens of proof should be imposed for justification and excuse;²⁶ and 4) excuse, as opposed to justification, generally requires that the actor undergo some form of subsequent treatment for the problem that triggered the behavior entailing excuse.²⁷

The criticism and opposition to the distinction and/or its implications focus on two problems. The first is the difficulty of categorization. As many critics note, there are defenses that cannot easily be categorized either as a justification or as an excuse, since they are actually a hybrid of the two.²⁸ The second and more central difficulty is the question of the accuracy of the implications of the distinction and of the supposition that they are desirable. Leading the opposition is Hall, who, already in his 1960 book, first voiced vociferous criticism of some of the implications of the distinction listed by Radbruch.²⁹ He was

24. Robinson, *A Theory of Justification*, supra note 16, at 279.

25. Gur-Arye, supra note 16, at 76-79.

26. Dressler, supra note 13, at 61-62 n.2. There are those who suggest that there should be an exception to the general rule that the burden of proof beyond a reasonable doubt in criminal cases lies solely with the prosecution, such that it holds only for the negation of justification, whereas excuse should have to be proved by the accused by a balance of probabilities. See, e.g., Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 *Colum. L. Rev.* 199, 256-62. (1982); Alex Stein, *After Hunt: The Burden of Proof, Risk of Non-Persuasion and Judicial Pragmatism*, 54 *Mod. L. Rev.* 570 (1991); Alex Stein, *Criminal Defenses and the Burden of Proof*, 28 *Coexistence* 133 (1991).

27. Robinson, *A Theory of Justification*, supra note 16, at 279 n.52.

28. The best illustration of this approach is in Greenawalt, supra note 16. Using vivid imagery, he succeeds in creating a certain degree of perplexity for the reader, mirrored in the article's title, *The Perplexing Borders of Justification and Excuse*. See also Mordechai Kremnitzer, *Proportionality and the Psychotic Aggressor: Another View*, 18 *Isr. L. Rev.* 178, 196-99. (1983), and Fletcher's consideration of Greenawalt's arguments in George P. Fletcher, *The Psychotic Aggressor—A Generation Later*, 27 *Isr. L. Rev.* 227, 241 (1993).

29. Hall, supra note 8, at 232; see also Hall, supra note 16.

joined in this sharp criticism by other scholars,³⁰ who also pointed to the undesirable results of automatic adoption of the various implications attributed to the distinction.

As far as classic private defense is concerned, almost no objection can be raised to defining it as justification.³¹ Any doubts arise in the context of a specific class of cases that in fact do not fall within the bounds of private defense, including putative private defense, which correctly should be categorized as an excuse based on factual error; cases in which the aggressor does not bear criminal culpability, which should be included within the framework of necessity; and cases that do not meet the prerequisites of private defense.

It is my opinion that, first, there is indeed room to distinguish between justification and excuse and, second, private defense should unequivocally be classified under justification. Moreover, in the context of our discussion of private defense, there is no need to contend with all the valuable arguments raised against the validity of the distinction and its implications. Instead, the following premises are sufficient for the purposes of our examination: First, even the greatest critics of the distinction and its implications fully concur that it is of enormous moral-value importance. Furthermore, the majority criticize not the distinction, but its definition and the implications attributed to it by its proponents. Thus, for example, Dressler wraps up his sharp criticism of Fletcher's words concerning the distinction: "The lines between justified . . . and . . . [excused] behavior are morally significant. If morally significant distinctions exist, it should matter to those concerned with the criminal law to find and draw

30. See especially Dressler, *supra* note 13; Greenawalt, *supra* note 16; Gur-Arye, *supra* note 8; Gur-Arye, *supra* note 16.

31. See Fletcher, *supra* note 16, at 958; Robinson, *A Theory of Justification*, *supra* note 16, at 284. Hart, explaining the importance of the distinction, wrote, "Killing in self-defence is an exception to a general rule making killing punishable; it is admitted because the policy or aims which in general justify the punishment of killing . . . do not include cases such as this." Hart, *supra* note 17, at 13.

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those lines.”³² Second, it is necessary to distinguish between the question of whether a distinction should be drawn between justification and excuse and (assuming the answer to the first question is yes) the question of whether the various implications attributed to this distinction should be accepted. With regard to the former, there appears to be near-consensus that it is both desirable and fitting to make such a distinction. Even though the accused is exonerated in both justification and excuse, a distinction should nevertheless be made between the two types of acquittals and a more complex message than just guilty or innocent should be transmitted to the public: someone who is innocent because her act was desirable and morally justified (justification) should be distinguished from someone who is innocent because she was “forgiven” for her act due to the absence of culpability (excuse). This distinction gives a clear signal to the public as to how they should relate to an acquittal and offers clarity and guidance regarding desirable behavior.³³ The absence of such a distinction leads to an undesirable result, such as the disgrace of a person unjustifiably maligned from the perspective of social values or the more far-reaching consequence that the court, unwilling to convey the wrong message (that the action of the accused is acceptable), may convict the accused when she should rightfully be acquitted under a defense of excuse.³⁴

With regard to the difficulty in categorizing specific defenses in line with the dichotomy of the distinction, there are possible solutions to this obstacle, at least in the context of private defense. To begin with, the mere difficulty of categorization need not, in itself, negate the validity of the distinction. Modern criminal law cuts other

32. Dressler, *supra* note 13, at 99. Greenawalt concludes his interesting article on “the perplexing borders” between justification and excuse with the assertion that the distinction “is very important for moral and legal thought.” Greenawalt, *supra* note 16, at 1927.

33. See, in a similar spirit, Greenawalt, *supra* note 16, at 1904-05.

34. See Robinson, *A Theory of Justification*, *supra* note 16, at 277 n.45; Peter D.W. Heberling, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 *Colum. L. Rev.* 914, 921 (1975).

difficult distinctions, such as between an act and an omission, and discarding them because of their grey zone would be as unthinkable as discarding the distinction between day and night because of twilight. Moreover, for our purposes, it is sufficient to acknowledge that private defense is obviously justificatory in character: it applies to actions that are justified and free of moral reproach.

As was already noted, the majority of criticism is directed not at the distinction *per se*, but, rather, at the different ramifications its proponents have attributed to it. Indeed, some of these claimed ramifications should be rejected—for example, the oft-discussed implication (which is accepted in German law and was adopted by the Model Penal Code section 3.11(1)) that private defense is permissible even against an excused attack, and is not permissible only against a justified attack. As we will see further on, repelling an attacker whose action is exempt from criminal liability (such as the mentally insane attacker) falls, in accordance with the circumstances, under necessity or putative defense, not in the realm of private defense. At this stage, it is important to emphasize that rejecting this implication of the distinction, as with any of its implications, does not entail the abandonment of the distinction itself.

Some of the variations in scholars' conceptions of justification should be noted. One major dispute is between Robinson and Fletcher. Robinson³⁵ regards justification as an act that society wishes to be performed for purely utilitarian considerations—namely, that no societal harm is caused by the act under circumstances of justification. Fletcher's claim is that, in order for an act to be justified, it must be morally right, in addition to the utilitarian considerations.³⁶ A second major dispute, which in part

35. Robinson, *A Theory of Justification*, *supra* note 16.

36. See George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 *UCLA L. Rev.* 293 (1976); Fletcher, *supra* note 16. It is important to stress that this aspect to justification does not mean that inappropriate acts are artificially assigned moral justification, but rather that acts lacking moral justification are excluded from the scope of justification.

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overlaps with the first, exists between Fletcher and Dressler.³⁷ In the latter's opinion, Fletcher's perception of justification is too narrow, since justification should cover not only morally "good" behavior, but also neutral or "tolerable" behavior. Fletcher, after grappling with the concept in his writings,³⁸ unequivocally adhered to the view of justified behavior as "right," as opposed to Dressler's insistence on including behavior deemed "permissible" as well.³⁹

It is far beyond the scope of this article to delve deeply into these interesting disputes. Thus for the purposes of our discussion, I adopt Fletcher's narrower characterization of justification, as relating to behavior that is morally justified, which will enable us to derive the greatest substantive benefit and information from the distinction.

The benefit of classifying private defense as a justification is immense, since it is far more informative of the overall nature of the defense than the mere fact that it is an exemption from criminal liability, and it enables the sifting out from private defense of cases that are sometimes mistakenly included in its scope and lead to confusion. It should be noted that the importance of the moral and justificatory character of an act's falling within the scope of private defense notwithstanding, its classification as justification does not provide an immediate solution to all the issues arising in the context of private defense. The categorization in itself does not elicit definitive implications, and each issue must be examined, first and foremost, in light of the rationale deemed most appropriate for the defense.

37. See Dressler, *supra* note 13.

38. See George P. Fletcher, *The Right to Life*, 13 *Georgia L. Rev.* 1371 (1979). See also Dressler, *supra* note 13, at 71-76.

39. See George P. Fletcher, *Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?*, 26 *UCLA L. Rev.* 1355 (1979); Dressler, *supra* note 13, at 77-98.

II. THE DISTINCTION BETWEEN DEFINITIVE ELEMENTS OF AN OFFENSE AND A DEFENSE

No less important for our discussion is the distinction between the definitive elements of an offense and those of a defense.⁴⁰ Having established private defense as falling under the classification of justification, I shall concentrate on defenses that are justifications.

The classification problem entailed in the distinction between justification and excuse is, in my estimation, less acute in the context of the distinction between offenses and defenses. The main reason for this is that whereas the law does not usually establish the first distinction and, instead, its interpreters are left to define it, the second distinction is quite clearly determined by the legislator. Regardless of any difficulties faced by the legislator in deciding which components to include in the definition of an offense and which in the definition of a defense, from the moment that a criminal code is passed, most of the details of the distinction are available to us in the code itself. Thus, at least from a formal normative perspective, criminal codes distinguish clearly between offenses and defenses.⁴¹

40. This distinction also warrants a comprehensive examination, something that is outside the scope of this article. Nevertheless, it is important to explain the principles of this distinction because of its great relevance to the discussion of private defense. See, e.g., Fletcher, *supra* note 13, at 552, 579; Fletcher, *supra* note 38, at 1383, 1388; Robinson, *A Theory of Justification*, *supra* note 16; Fletcher, *supra* note 36 (responding to Robinson); Marianne Giles, *Self-Defence and Mistake: A Way Forward*, 53 *Mod. L. Rev.* 187 (1990); Stanley M.H. Yeo, *The Element of Belief in Self-Defence*, 12 *Sydney L. Rev.* 132 (1989); N.J. Reville, *Self-Defence: Courting Sober but Unreasonable Mistakes of Fact*, 52 *J. Crim. L.* 84 (1988); Russell L. Christopher, *Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defence*, 15 *Oxford J. Legal Stud.* 229 (1995); Fletcher, *supra* note 22, at 93-110.

41. Specific difficulties in classification are raised by some expressions included in the definitions of certain offenses, such as "illegal" and "unlawful." One possible approach is to accord minimal significance to these archaic expressions or even to ignore them. See, e.g., Williams, *supra* note 8, at 27-30. Alternatively, we could decide that any such circumstance included in the definition of an offense subsumes the relevant defense within the offense, together with all its components (including any mental element that may be required for the establishment of the defense). See, for example, Leigh's opinion in Giles, *supra* note 40, at 194 n.63. See also the English rule that was set in

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There is great variance amongst scholars with regard to the distinction and its implications.⁴² Just as the wide consensus vis-à-vis the importance of the distinction between justification and excuse does not prevent dispute regarding its implications, so too are the implications of the distinction between offenses and defenses subject to debate, with the opinions of the scholars clearly divided. The implications of this distinction are of crucial importance for four principal issues: the burden of proof for establishing defenses; the mental element required for establishing defenses; the reasonability of the mistake that gives rise to a putative defense; and, of particular relevance to our discussion, the applicability of the principle of legality to defenses.

The principle of legality is a fundamental principle in criminal law. Under this principle, an offense and punishment for an offense can be set only and solely by law or pursuant to the law and punishment cannot be administered retroactively.⁴³ The legality principle has a number of cumulative rationales. One is the objective of giving fair warning to the individual, facilitating her freedom of action based on her knowledge of the law at the time of her action. Other central explanations of the principle relate to the need for stable social norms, equal enforcement of the law, and separation of powers and the distribution of authority amongst them.

Albert v. Lavin, [1981] 1 All E.R. 628. However, if we give content to “unlawfully” and the defense accordingly becomes an integral part of the definition of the offense itself, then the distinction between the offense and defense becomes significantly blurred, the implications of which are not theoretical alone. For example, in both Regina v. Williams, [1987] 3 All E.R. 411, and Beckford v. The Queen, [1987] 3 All E.R. 425, it was held that, just as with a mistake with regard to an element in the definition of the offense, a mistake with regard to a defense is not subject to the requirement of reasonability, a ruling based on the word “unlawfulness,” although it could also be justified on grounds of principle. For a detailed discussion of these court-generated rules, see Reville, *supra* note 40, and Giles, *supra* note 40.

42. See, e.g., Fletcher, *supra* note 13, at 545-46.; Williams, *The Theory of Excuses*, *supra* note 1, at 741; 2 Robinson, *Criminal Law Defenses*, *supra* note 16, at 7-29.

43. On the legality principle, see, e.g., Joshua Dressler, *Understanding Criminal Law* 39-48 (3d ed. 2001).

It is indisputable that in current modern criminal law, the principle of legality reigns supreme, at least regarding offenses. But the point of interest in our context is whether it applies to defenses too. There are two principal aspects to the answer to this question: the clarity of the criminal norm and judicial authority. I shall address the latter first: How should the court interpret an existing defense that is determined by law, and is the court authorized to create new defenses of its own initiative? Of relevance to the interpretation of existing defenses is the accepted criminal law “rule of strict interpretation,” that criminal norms should be strictly interpreted in a way that restricts the scope of the criminal prohibition.⁴⁴ In other words, between two *reasonable* interpretations of a norm, the one narrowing the scope of the offense should be preferred or, to phrase this more generally to encompass defenses, the interpretation that leads to a greater reduction of the scope of criminal liability (and thus causes less restriction of individual liberty). As was clarified by Robinson, who supports the application of the rule to defenses as well, the outcome would be a wide interpretation of the scope of defenses, since this would narrow the scope of the criminal prohibition. Accordingly, he suggests using the term “interpretation in favor of the accused” instead of “strict interpretation.” In his opinion, the annulment of a defense or its narrow interpretation (which would broaden the scope of the criminal norm) would constitute a clear and forbidden infringement on the right of the individual under the principle of legality to receive fair warning prior to the

44. On the logic that underlies this basic rule of criminal law, see Boaz Sangero, Interpretational Acrobatics in Criminal Law and a Quiet Death to the Rule of Restrictive Interpretation? (More on “With Intent to Injure” in the Offense of Defamation), 29 *Mishpatim* 723 (1998) (Hebrew); Boaz Sangero, Will the “Purposes” in Criminal Offenses Become “Motives”? And Is the “Dolus Indirectus” Moving in a New Direction? (More on “With Intent to Injure” as an Element of the Criminal Offense of Defamation and on the Interpretation of the Criminal Law), 18 *Mishpatim* 337, 339-43 (1988) (Hebrew) [hereinafter Sangero, Will the “Purposes” in Criminal Offenses Become “Motives?”]; Boaz Sangero, Broad Construction in Criminal Law?! On the Supreme Court Chief Justice as a Super Legislator and Eulogizing the Strict Construction Rule, 3 *Alei Mishpat* 165 (2003) (Hebrew).

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imposition of punishment.⁴⁵ This is essentially the prevalent view among scholars.⁴⁶

Another approach, accepted by only a few scholars, restricts the application of the principle of legality to the interpretation of offenses.⁴⁷ Under this school of thought, the general norms in the criminal code and the defenses in particular are not part of the guiding message of criminal law intended to direct individual behavior, but, rather, are meant solely to direct court rulings.

But I submit that there is a third possibility: to distinguish between defenses that are justificatory and those that excuse.⁴⁸ Such a distinction can be based on the claim that excuses are not part of criminal law's guiding message, whereas justifications are intended to direct behavior alongside criminal offenses: just as an offense set by law directs individuals to avoid certain behavior, so individuals are similarly instructed by a legal justification that, in the set circumstances, it is desirable that they perform the *prima facie* prohibited act. In contrast, excuse defenses do not direct individuals to commit the prohibited act: they are applied retroactively and direct the judge not to convict the accused because society understands the difficult situation in which the accused found herself and forgives her. Under this distinction between justification and excuse, the "interpretation in favor of the accused" rule should apply only to behavior-directing justifications, in order to prevent any infringement of the right to fair warning, and not to excuses, which are not forward-looking.

With regard to judicial authority to create new defenses, there is a great deal of dispute. One approach

45. 1 Robinson, *Criminal Law Defenses*, *supra* note 16, at 159-60.

46. See, e.g., Rollin Morris Perkins & Ronald N. Boyce, *Criminal Law* 1143 (3d ed. 1982); Perkins, *supra* note 19, at 161.

47. See the approach under German law as described in Fletcher, *supra* note 13, at 574-79.

48. My suggested distinction is inspired by the famous distinction made by Dan-Cohen between "decision rules" and "conduct rules" in criminal law. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *Harv. L. Rev.* 625 (1984).

stresses the distinction between creating new offenses and creating defenses that are not mentioned in the law. Recognizing judicial authority to create offenses would violate the principle of legality. The individual whose liberty is at stake has the right to have the basis for any denial of her freedom predefined in the law. But recognizing judicial authority to create defenses would not violate this basic principle, for, rather than cause harm to the accused, it actually would benefit her.⁴⁹ In contrast is the approach unequivocally supporting the applicability of the principle of legality to negate judicial authority to create new defenses. Proponents of this approach have maintained that the principle requires not only that prohibitions and punishments be set only by the legislator, but that also, and to the same extent, defenses be set forth only in law. This view therefore attributes tremendous significance to limiting interpretation and has been called the “other face” of the principle of legality in the criminal law.⁵⁰ This assertion of the applicability of the principle of legality does not rest on the fair-warning rationale, but, rather, on rationales relating to the need for stable social norms, separation of powers, and also perhaps to impartiality in enforcement of the law. Thus, in my opinion, the force of the principle of legality in the context of judge-made defenses is weaker than in the context of judge-made offenses.

The second aspect of the question of the applicability of the legality principle to defenses is the clarity of the criminal norm. One of the implications of the principle of legality is the requirement for detailed and clear definition of prohibitions, which also serves the principle of fair warning. This requirement carries great weight in legal

49. See, e.g., 1 Robinson, *Criminal Law Defenses*, supra note 16, at 159-60; J.C. Smith, *Justification and Excuse in the Criminal Law* 126 (1989).

50. S.Z. Feller, *Application of the “Foundations of Law Act” in Criminal Law*, in *Essays in Honour of Justice Zussman* 345, 351 (1984) (Hebrew). Silving asserted the danger of judicial abuse of authority in renewing defenses, as thwarting the instruction of the legislator. 1 Helen Silving, *Criminal Justice* 386-87. (1971).

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systems with a constitution that allows the courts to repeal legislation that does not conform to this requirement. Such authority exists in the American system, with regard to which Robinson suggests applying the principle to vague defenses as well.⁵¹ In contrast, Fletcher suggests distinguishing in this context between offenses and defenses and allowing greater vagueness in the latter.⁵² The accepted rationale offered for this stance rests primarily on the constraints of reality: defenses are usually⁵³ general and therefore vague relative to offenses, since there is no reasonable possibility of predicting all the types of cases that will fall within their scope. This stance is based also on the rare incidence of the elements constituting defenses and on the fact that it is possible to restrict the principle of fair warning to the typical instances of the prohibition. Indeed, terms such as “reasonability” and “necessity,” which are by nature vague, appear as part of defenses and not offenses. This situation is preferable to including terms such as “lack of reasonability” and “lack of necessity” in the definition of an offense.

But I propose returning to the distinction suggested between justification as behavior directing and excuse as non-directing. I submit that neither Fletcher’s view nor Robinson’s should be adopted. Rather, it is my view that the rule rejecting the vague formulation of prohibitions should be applied to justification defenses but not to excuses, for only with regard to the former does a valid fear arise of violating the individual’s right to fair warning. But in contrast to the obvious logic in allowing courts to repeal a vague offense, no such logic exists as far as a vague justification defense is concerned, and the only option that remains is for the courts to interpret such a defense as broadly as possible.

51. See 1 Robinson, *Criminal Law Defenses*, supra note 16, at 159-60.

52. See Fletcher, supra note 13, at 561-79.; Fletcher, supra note 36, at 312-18.

53. There are defenses, such as the defense of justification relating to performance of a law or complying with an order of an authorized authority, that can be defined as precisely as offenses.

The dispute between Robinson and Fletcher goes beyond this and leads us to the important question of whether there is any substantive value difference between an element included in an offense and that element when it is included in a justification. This question has significant ramifications for two issues central to substantive criminal law: the mental element required to establish a justification defense and the requirement of reasonable mistake in putative defense. Robinson's approach is that there is no significant distinction between the two, whereas Fletcher holds that the two are substantively distinct. According to Robinson, criminal law strives to avoid harmful consequences more than it desires to punish non-harmful bad intentions.⁵⁴ The legislature determines generally what constitutes harm, and the courts complete this task. Since criminal law cannot—if only from a practical point of view—prescribe correct behavior in every possible situation (both because it must generalize and because human moral decisions may be simply too complex), it settles with defining behaviors that usually cause damage (criminal offenses) and behaviors that, in the general balance, do not cause damage (justifications). In Robinson's opinion, even though a justification is labeled a "defense," it is preferable substantively to understand it as a negative element of the relevant offense.

Fletcher prefers to focus on wrongdoing rather than harm.⁵⁵ In his view, the crucial difference is between harm that is not the concern of criminal law (such as killing a fly, which does not fall within any legal prohibition) and harm that is a justified exception to a certain offense (such as the exception of private defense for the offense of causing another's death). Under this approach, claims of justification, unlike an offense, assume an admirable purpose. Fletcher suggests distinguishing between the

54. Robinson presented his approach comprehensively, particularly in his article *A Theory of Justification: Societal Harm As a Prerequisite for Criminal Liability*, *supra* note 16; see also 2 Robinson, *Criminal Law Defenses*, *supra* note 16, at 7-9.

55. Fletcher, *supra* note 36.

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question of the essence of the distinction between an offense and a justification and the matter of drawing the boundaries between the two. Once again, the fact that classification can be problematic (for example, deciding where the victim's consent falls) cannot negate the distinction itself. For from both social and moral perspectives, we sense a difference between regular, routine, and accepted behavior (outside the scope of criminal prohibitions) and behavior that is *prima facie* or *a priori* "wrong." The latter can be considered "right," but only when accompanied by "good reasons." An illustrative example of the moral-social importance of the distinction is the choice between determining that abortion is not an offense at all and the determination that it is sometimes justified: abandonment of the distinction between an offense and a justification would lead to abortion being considered identical to killing a fly.⁵⁶

This returns us to the varying perceptions of the nature of justification: Robinson's perception of justification as an act that society wants to be performed under utilitarian considerations (absence of societal harm); Fletcher's position that the justified act must also be justified morally (good and correct behavior). Between the two, I prefer, as noted, the latter approach. Thus, for example, in my opinion, a condition for the establishment of self-defense should be that the actor was aware of the objective circumstances giving rise to the need for self-defense when she acted and that her purpose was to defend herself; for if not, she would actually be exploiting the situation that has been created and, therefore, her action should not be justified. As will be shown below, this approach better suits the general character of private

56. Another consideration in determining whether a given element should be included in the offense or in the justification (a determination made by the legislator of course) is probability. For example, with respect to the prohibition on unreasonable driving, probability considerations dictate (under the factual assumption that the majority of driving "behavior" is reasonable) that the element of non-reasonability should be included in the definition of the offense, since it would seem odd, at the very least, to generally prohibit driving and then allow a justification for reasonable driving.

defense. It also appears that Robinson stands almost alone⁵⁷ in his radical stance that there is no substantial difference between an offense and a justification. The decisive majority of scholars differ.⁵⁸

III. RATIONALES FOR PRIVATE DEFENSE

A. *Private Defense As Excuse*

One possible way of explaining private defense is to relate to it as an excuse. Indeed, this was its status and character in many legal systems in the past: an excuse at best and sometimes only a pardon, but definitely not a justification.⁵⁹

Under the (no longer accepted) approach that views private defense as solely an excuse,⁶⁰ the defensive act is

57. Similarly, Williams took the laconic position that there is no theoretical abyss between elements of offenses and defenses, a statement he apparently did not further develop in writing. Williams, *The Theory of Excuses*, supra note 1, at 734.

58. Greenawalt, for example, bases his opposition to Robinson's approach on a strong feeling that "justification" in law must correspond to a moral evaluation. See Greenawalt, supra note 16, at 1928. Even Dressler, who opposes Fletcher's perception of justification, holds that the distinction between an offense and a defense is very important from a moral viewpoint and should be taken into consideration in criminal law. See Dressler, supra note 13, at 98.

59. The classical example of this is the concept of *se defendendo* in medieval English law: According to Blackstone's classification in his historical survey, "excusable homicide," as opposed to "justified homicide," included two cases: "homicide per infortunium, or misadventure," and "homicide in self-defence, or *se defendendo*" (or "chance-medley"). 4 Blackstone, supra note 19, at 182-83. Thus, self-defense—*se defendendo*—was classified as merely "excuse" and not as "justification." However, as noted by Russell, supra note 19, at 435-36, Blackstone's explanations are far-fetched, and in fact the source of the law of *se defendendo* was the ancient rule of strict liability. The assumption regarding the *se defendendo* was that the defender actually had no real choice in how he acted because of the survival instinct, an assumption that constituted a possible rationale for a real excuse, which is exempt from punishment. However, since taking the law into one's hands was contrary to society's needs in the Middle Ages (or, at least perceived as such), such an act could only be pardoned.

60. See George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 *Isr. L. Rev.* 367, 376-77. (1973); Fletcher, supra note 13, at 856-57; Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 *Cal. L. Rev.* 871, 881-82 (1976); Williams, *The Theory of Excuses*, supra note 1, at 738-39; 1 Robinson, *Criminal*

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not justified. Rather, society “forgives” the actor and does not punish her for her action, in view of the special circumstances of her situation. This approach, which focuses on the person who is attacked and not on the aggressor, rests on the accepted view that a person sometimes has no alternative but to defend herself, even by means of deadly force. Although the situation is not such that the requirement for a voluntary act is not satisfied, because the actor does have an (objective) choice of alternative behavior, her freedom of choice is nonetheless restricted. In the difficult situation in which the actor finds herself, the survival instinct is very powerful. This is human nature.

Understanding the law as forgiving the accused in such situations is analogous to considering the necessity excuse and even approaches the excuse of duress (threats). Under this approach, although there is moral fault in the act, there is no point in punishing the accused. The non-utility of punishment in these circumstances is explained principally⁶¹ by its lack of effectiveness. Hobbes considered⁶² deterrence from the perspective of the actor who finds himself in a situation of compulsion: if I do not act, I will die immediately; if I act, I will die later. I would take this even further and submit that from the (subjective) viewpoint of the actor, the dilemma is often even simpler: if I do not act, I will die or be injured immediately; if I act, perhaps I will die later (and, currently in most legal systems, the assumption is almost certainly perhaps I will be imprisoned later). As Bentham and Holmes noted, a person will always choose to live, even if he is compelled to take the life of an innocent person in

Law Defenses, *supra* note 16, at 109-10; Russell, *supra* note 19, at 435-36; Susan Levine, The Moral Permissibility of Killing a “Material Aggressor” in “Self-Defense,” 45 *Phil. Studies* 69 (1984); 4 Blackstone, *supra* note 19, at 186-88; Philip Shuchman, Ethics and the Problem of Necessity, 39 *Temple L.Q.* 279 (1966); Rosen, *supra* note 16; Dressler, *supra* note 43, at 210-14 (noting three non-utilitarian moral theories of excuse).

61. The rehabilitation of the offender is also not a relevant purpose, see Arnold N. Enker, *Duress and Necessity in the Criminal Law* 6 (1977) (Hebrew).

62. Thomas Hobbes, *Leviathan* pt. 2, ch. 27 (1651).

order to do so, and there is therefore no point in punishing him for doing so.⁶³ Even Kant did not dispute this, although he claimed that the actor should be subject to moral reprobation.⁶⁴ In this context, Levine's stance is noteworthy: the rationale for necessity in general and private defense in particular is the existence of a person's moral right to prefer that which is most important to him—his own survival.⁶⁵ But the generally accepted approach is that the granting of an excuse constitutes the law's conscious detachment from the purely moral aspect of the matter; it does not emanate therefrom.

What are the principal implications of viewing private defense as an excuse? To begin with, such a theory would limit private defense to only the most important interests (such as in one's life and bodily integrity) that individuals "must" protect.⁶⁶ It would require that the actor "retreat to the wall" before she defends herself, since it is only then that she can be said to have no alternative (under the common assumption that she should not be required to surrender herself to the aggressor's attack).⁶⁷ An ancillary central implication—held by many scholars to be the theory's central and decisive deficiency⁶⁸—would be that a third party cannot intervene to assist the person under attack. As such, the excuse rationale would fail to provide an adequate explanation for a broad branch of private defense: defense of another person. Although it can be used to explain certain instances of defense of another, in order for the grounds for excuse to arise, especially lack of effectiveness of punishment for the defense of another person, there must be a severe restriction of the circle of

63. 1 Jeremy Bentham, *The Works of Jeremy Bentham* pt. II, ch. IV, § III (John Bowring ed., 1843); Oliver Wendell Holmes, *The Common Law* 38 (Mark DeWolfe Howe ed., 1963).

64. Immanuel Kant, *The Philosophy of Law; An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* 52-53 (W. Hastie trans., 1887).

65. See Levine, *supra* note 60.

66. See, e.g., Fletcher, *supra* note 60, at 376.

67. See, e.g., Fletcher, *supra* note 13, at 857.

68. See, e.g., Kadish, *supra* note 60, at 881-82; Fletcher, *supra* note 60, at 377.

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people who can be protected, presumably to the narrow sphere of those closest to the actor. This restriction, which was common in various legal systems in the past, would be totally unacceptable in modern criminal law. An additional implication of the excuse rationale is that, as in the case of necessity, the focus is on the person defending herself and it is not necessary for the aggressor to bear any culpability for his attack on the former. This provides an explanation for the common test case of scholarly discussions (both philosophical and legal) of the rationale of private defense: the case of the innocent aggressor in general and the psychotic aggressor in particular. However, private defense should not be twisted to fit the mold of an excuse simply because of the inability of private defense as justification to explain this particular case. Indeed, as will be shown in the next section, a comprehensive solution for this case can be found in the framework of necessity and putative defense.

It should be noted that almost all scholars who accept the possibility of private defense as excuse prefer to classify it as justification.⁶⁹ Rosen stands alone in holding that private defense should be characterized as excuse.⁷⁰ She presents the classic claims against private defense as justification in her effort to characterize private defense in all its forms as excuse alone, claiming that the latter characterization will provide a better response to the needs of criminal law and society as a whole: preservation of the sanctity of human life and discouragement of taking the law into one's hands. But as I show in the next section, the theories supporting categorizing private defense as justification provide a response to these two considerations. Rosen comes to the hasty conclusion that there is no sufficient rationale for private defense as justification and that its classification as such is no more than a "historic accident." Her central argument, that self-defense is not socially desirable, but is rather "permissible and tolerated," completely overlooks the fact that private defense is also

69. See Omichinski, *supra* note 13, at 1468.

70. See Rosen, *supra* note 16.

applied as an exception to offenses other than homicide. The taking of human life is, obviously, very problematic. However, this does not entail negating the justificatory nature of private defense.⁷¹ As we shall see below, it appears that most—if not all—of the doubts about the character of private defense⁷² do not relate to its central, classic cases, but to special cases that, for the most part, should be excluded from private defense and considered in the frameworks that are more suited to them, such as necessity and mistake.

In sum, the approach that holds private defense to be solely an excuse should be rejected. It contradicts the strong intuitions of the law-abiding citizen⁷³ and the conception of private defense in modern law.⁷⁴ Private defense has a prominent quality of justification, and its classification as excuse tells us too little about its true character, in binding it to the two other compulsion defenses, necessity (circumstances) and duress (threats). This restricts its understanding to the (relatively low) common denominator of the three concepts and ignores the culpability of the aggressor and even the attack itself. In fact, in light of the existence of the defense of necessity, private defense as excuse is completely superfluous. Finally, this approach fails to provide a satisfactory explanation for the well-founded right in modern criminal law to defend another person, any other person.

71. Sufficient solutions can be found for this, such as imposing a burden to show no possible retreat to safety before resorting to lethal force.

72. See 1 Robinson, *Criminal Law Defenses*, supra note 16, at 109-10; Dressler, supra note 13, at 68, 80, 84; Robinson, *A Theory of Justification*, supra note 16, at 275, 284; Marilyn Finkelman, *Self-Defense and Defense of Others in Jewish Law: The Rodef Defense*, 33 *Wayne L. Rev.* 1257, 1285 (1987); Fletcher, supra note 13, at 767.

73. See Kadish, supra note 60, at 881; Omichinski, supra note 13, at 1468 n.106.

74. For American law, see Kadish, supra note 60, at 881; for English law, see Williams, *The Theory of Excuses*, supra note 1, at 739; for German law, see Silving, supra note 50, at 392.

B. Private Defense As Justification

Rather than presenting private defense as justification as preferable to the alternative of private defense as excuse by way of elimination, I attempt here to establish affirmatively its justificatory nature: based on a compelling rationale with strong moral foundation. As mentioned, most principal modern legal systems and legalists and philosophers⁷⁵ regard private defense as justification. However, as Hall, a great opponent of the distinction between justification and excuse, noted, “We must ask, *Why justified?*”⁷⁶ Why is it that, although a given act would generally be prohibited, in special circumstances the same act is not only permissible but even desirable? This weighty question is what, in my opinion, lies at the heart of the issue of private defense.

This section discusses the principal accepted approaches to the rationale of private defense as justification, relating, amongst other things, to the common test case of the innocent aggressor. But before proceeding, there is a crucial preliminary question that must be contended with: What is the implication of the right to life—especially if perceived as an absolute right—for the use of deadly defensive force? The right to life is indisputably considered one of the supreme fundamental human rights in all legal systems and by all legal scholars of our generation. However, rights and values sometimes clash with one another, and they must be balanced. Yet the right to life is also claimed to be an absolute right, meaning that it cannot be infringed in any circumstance and, *inter alia*, that the life of another cannot be taken in war (even if defensive), in revolution (even if against an oppressive and

75. See, e.g., Williams, *The Theory of Excuses*, *supra* note 1, at 739; Omichinski, *supra* note 13, at 1447; Richard Card, Rupert Cross & Philip Asterley Jones, *Criminal Law* 624 (14th ed. 1998); David Wasserman, *Justifying Self-Defense*, 16 *Phil. & Pub. Aff.* 356, 356 (1987); Phillip Montague, *Punishment and Societal Defense*, 2 *Crim. Justice Ethics* 30, 31-32 (1983); C.S. Nino, *Does Consent Override Proportionality?*, 15 *Phil. & Pub. Aff.* 183, 185 (1986). See also references at *supra* note 74.

76. Hall, *supra* note 16, at 645.

tyrannical regime), or in private defense. This line of pacifism is consistent, but cannot reasonably be accepted.

Kadish discusses this issue extensively.⁷⁷ Following a discussion of the immense importance of the right to life, he notes that every society has to cope with the difficult decision of determining when the lives of some individuals must be superseded by the important interests of others. He also notes that there are exceptions based on value judgments making intended killings “right” in certain situations: the death penalty, law enforcement by authorized bodies, and private defense. Kadish posits that the principle of the sanctity of life is not always the crucial factor, and he bases this on a weaker understanding of the principle: not an absolute preference for life and not a total prohibition of intentional killing, but an assumption that exists in favor of life and against killing.⁷⁸

As Gorr notes, “Extreme pacifists aside, virtually everyone agrees that it is sometimes morally permissible to engage in . . . ‘private defense’”⁷⁹ Even Ryan, admittedly a pacifist, asserts that the claims of pacifism do not negate the possibility that there is justification for private defense by lethal force; rather, they only dispute the validity of certain justifications proposed for it.⁸⁰ Thus,

77. See principally his interesting article, *Respect for Life and Regard for Rights in the Criminal Law*, in Kadish, *supra* note 60, at 871, 871-81.

78. Ashworth goes even further than this assumption, stating that not only does the right to life not negate the right to private defense, it actually strengthens it: “If a legal system is to uphold the right to life, there must be a liberty to use force for the purpose of self-defence.” A.J. Ashworth, *Self-Defence and the Right to Life*, 34 *Cambridge L.J.* 282, 283 (1975). However, in philosophical literature, the idea that the right to life directly creates a right to private defense has been generally rejected, see, e.g., Wasserman, *supra* note 75, at 362. Gorr suggests that rather than regarding the right to life as a right from which other rights are derived, these other rights (including the right to self-defense) should be seen as creating together the right to life. See Michael Gorr, *Private Defense*, 9 *Law & Phil.* 241, 268 (1990). Thomson, too, relates to this issue, rejecting the claim that the right to life is absolute, pointing to the existence of instances in which “a right may be infringed without being violated.” Thomson, *supra* note 12, at 41.

79. Gorr, *supra* note 78, at 241.

80. Cheyney C. Ryan, *Self-Defense, Pacifism, and the Possibility of Killing*, 93 *Ethics* 508, 508, 520 (1983).

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we can reasonably hold that the right to life does not negate the possibility of lethal defensive force as part of the framework of private defense, but it is sufficiently compelling to greatly restrict the justified use of such force. It therefore reinforces the requirements of proportionality and necessity and entails a separate consideration of deadly defensive force.

1. The Aggressor's Culpability

The classic and most prevalent theory in Anglo-American law is that the aggressor's culpability is the basis for justifying private defense.⁸¹ The approach focuses on the rights of the aggressor, with its starting point the general right to life.

One understanding of this theory is that the aggressor, through his culpable act, loses his right to life, or, at least, right to claim this right.⁸² The common description is of a "moral forfeiture of the right to life": even though the right to life is traditionally considered nontransferable, it can be forfeited.⁸³ However, this version of the theory is wide open to criticism and has been generally rejected.⁸⁴ The preferable and more compelling version of the theory for our purposes posits that the aggressor does not lose his rights, but, rather, his culpability results in a certain reduction in the value of his interests when balanced with

81. As Fletcher notes, this theory gained support in Germany, England and the United States, but only became dominant in the common law. See Fletcher, *supra* note 60, at 377.

82. See Kadish, *supra* note 60, at 883-84.

83. See, e.g., Omichinski, *supra* note 13, at 1449-50; and see *id.* nn.19-20 for references to Locke, Blackstone, and Feinberg.

84. For example, the assumption that the aggressor has agreed to forfeit his right is a fiction, because it probably never even occurred to him as a possibility. Kadish, *supra* note 60, at 883. Fletcher, *supra* note 38, at 1380-83, criticizing this theory, claims a close affinity between the term "forfeiture" and the original conception of the "outlaw," who forfeits his rights in relation to everyone—even those who know nothing of the forfeiture. Thus any person is entitled to kill him, without any requirement of positive purpose or awareness of the forfeiture. This however stands in opposition to the accepted minimum requirements for establishing private defense.

competing interests. This is, in effect, a variation on the justified necessity defense known also as the “lesser evil” defense.⁸⁵ A person who chooses to start a conflict is entitled to less protection relative to the innocent victim. This reduction in the value of the aggressor’s interests is not valid in rem with regard to everyone, but solely vis-à-vis the interests of the person he attacks.

This brings us to the question of the dominant factor in the rationale: the aggressor’s culpability, the mere fact of the attack, or both? In the legal literature, at times there is mention of the aggressor’s culpability alone and at times of the culpability inherent in the wrongful act.⁸⁶ In the philosophical literature, the dispute over this issue reaches its peak in the exchange between Montague and Wasserman.⁸⁷ Montague bases the rationale for private defense on the fact that the aggressor forces a choice between lives by his very attack and on the (in his opinion) more important factor of the aggressor’s culpability. Wasserman claims that Montague overemphasizes the aggressor’s culpability and fails to consider the tremendous inherent importance of the attack from a moral standpoint.

It is my contention that both the attack and the aggressor’s culpability are of crucial moral value. Great moral significance should be attributed to the fact that defensive force is directed at the aggressor himself (giving significant expression to the importance of the aggressor’s culpability) as well as to the fact that the aggressor has the ability to terminate his attack and render the defense unnecessary (giving significant expression to the importance of the attack itself). In fact, a central

85. See, e.g., 2 Robinson, *Criminal Law Defenses*, supra note 16, at 70.

86. See Kadish, supra note 60, at 883 (“by his culpable act”); Williams, supra note 8, at 26 (the aggressor’s culpability); Fletcher, supra note 36, at 305 (“wrongful conduct”); 3 *Encyclopedia of Crime and Justice* 944 (Sanford Kadish ed., 1983) (both the aggressor’s culpability and the wrongdoing); Omichinski, supra note 13, at 1450 (“fault or misconduct”).

87. Phillip Montague, *Self-Defense and Choosing between Lives*, 40 *Phil. Stud.* 207 (1981) [hereinafter Montague, *Self-Defense and Choosing*]; Wasserman, supra note 75; Phillip Montague, *The Morality of Self-Defense: A Reply to Wasserman*, 18 *Phil. & Pub. Aff.* 81 (1989).

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uniqueness of private defense is that it comprises both these components. The attack as a factor is taken as a given in the legal literature and constitutes an integral definitive component of the circumstances of private defense, to the point that scholars do not always bother to discuss it and, thus, focus is sometimes placed solely on the aggressor's culpability.

There are two primary implications of the approach focusing on the aggressor's culpability: 1) a relatively strong requirement for proportionality between the anticipated injury to the person being attacked if private defense is not performed and the force used in performing private defense (i.e., the injury to the aggressor within the framework of the defensive action), since the aggressor's interests are only reduced in value, not totally invalidated; and 2) private defense cannot be used against an innocent aggressor. For Dressler,⁸⁸ an important implication of this theory is that it undercuts the position that the act of private defense is "right" (i.e., that the assaulted person has a strong right to use defensive force) and only supports the determination that the behavior is tolerable. The person being attacked is allowed to defend himself because the aggressor has lost her right, but nothing is said as to his inherent right to defend himself. Of course, this holds only if we accept the forfeiture version of the theory, but not if we favor the balance of interests in the "lesser evil" framework.

Opponents of the theory of the aggressor's culpability as the rationale for private defense have raised several principal arguments.⁸⁹ One counterargument is that the theory does not explain why, although the aggressor loses her right to live during her attack, it is nevertheless forbidden to use defensive force against her after she has ceased her attack, assuming the customary requirements

88. Dressler, *supra* note 13, at 85-87.

89. For additional (in my opinion, secondary) counterarguments, see Omichinski, *supra* note 13, at 1465-66; Kadish, *supra* note 60, at 884; Wasserman, *supra* note 75, at 358-59; Gorr, *supra* note 79, at 266; Ryan, *supra* note 80, at 511.

for the necessity of the defensive force and the presence of danger. Thomson suggests three independent possible solutions for this:⁹⁰ 1) for utilitarian reasons, society prohibits the person under attack to kill his aggressor after the attack has ended; 2) the termination of the attack demonstrates in retrospect that, in the specific circumstances, it was never necessary at any stage to kill the aggressor; and 3) once she has ceased her attack, the aggressor regains the right she lost during the attack. With regard to the third solution, Thomson notes that the aggressor can be said to only temporarily lose her right during the attack. Another possible solution is to say that the aggressor's right retreats in the face of her victim's right due to her culpability, contingent on certain cumulative conditions, one of which is the existence of (present) necessity.

Another principal counterargument, mentioned above, is that the theory deals only with the *freedom* of the person attacked to kill the aggressor and not with any sort of *right* to do so. Thus, Kadish claims that a legal prohibition of the use of lethal defensive force would perhaps be unjust, but not contradictory to the theory of forfeiture.⁹¹ However, these two claims seem relatively weak in light of the alternative understanding of a reduction in the value of the aggressor's interests.

The prominent counterargument presented in the literature, both legal and philosophical, is that the entire theory collapses when we consider the case of the innocent aggressor, since it is clear that in such a circumstance it is impossible to justify private defense by basing it on the aggressor's culpability, which is nonexistent here. This is regarded by scholars as the central and decisive deficiency of the theory and is the often-exclusive basis to its rejection. In Fletcher's words,

Thus it seems that Self-defence II [based on the aggressor's culpability] may provide a perfectly sound rationale of self-

90. Thomson, *supra* note 12, at 34-37.

91. See Kadish, *supra* note 60, at 884.

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defence in the typical case, but it fails to give an account of our intuition in the case in which the aggressor's conduct is excused by reason of insanity or by other acknowledged excusing conditions.⁹²

However, in my opinion, the case of the innocent aggressor does not in any way preclude the rationale focusing on the aggressor's culpability, for the simple reason that the case does not fall within the bounds of private defense. Because of the tremendous significance attributed to the case—indeed, it is the paradigmatic test case for the rationale of private defense in the literature—it is dealt with extensively in the next section. At this stage, I will relate to the other facet of Fletcher's statement: that if not for the difficulty presented by the case of the innocent aggressor, the aggressor's culpability would be an adequate rationale for private defense. My position, presented below, is that, despite the great moral and legal importance of the aggressor's culpability, to base the rationale for private defense on this factor alone would be to miss a substantial part of its essence. There are additional, extremely significant factors that should be taken into account. Accordingly, the aggressor's culpability, while an essential factor in justifying private defense, is not sufficient a factor in itself.⁹³

2. The Innocent Aggressor As a Test Case

The central test case in the literature in considering the various rationales for private defense is the case of the innocent aggressor, its principal application being to refute

92. Fletcher, *supra* note 60, at 378. For similar expressions by other scholars, see, e.g., Kadish, *supra* note 60, at 884; Michael S. Moore, *Torture and the Balance of Evils*, 23 *Isr. L. Rev.* 280, 321 (1989); Thomson, *supra* note 12, at 36; Ryan, *supra* note 80, at 511.

93. To eliminate all doubt, although this discussion (following the legal and philosophical literature) has related principally to lethal defensive force against a lethal attack, the aggressor's culpability rationale is also applicable to cases of more moderate attack and defensive force, for a rationale justifying the former will a fortiori justify the use of more moderate defensive force.

the rationale based on the aggressor's culpability. As indicated, my opinion is that this culpability has significant importance that extends beyond the context of the innocent aggressor paradigm, for eliminating it as a requirement would undermine the very substance of private defense and would be waiving a substantial part of its uniqueness as compared to other criminal law compulsion defenses.

The view that even defensive force against an innocent aggressor falls within the boundaries of the justification of private defense is generally accepted among many of those who support the distinction between justification and excuse: while there is no right to private defense against a justified attack, it is justified against an attack that is only excusable.⁹⁴ Thus, for example, although a person has no right to private defense against a policeman's "attack" in legally and justifiably arresting her, under this approach, there is a right to private defense against a psychotic aggressor, who has no justification for his action and is only excused within the framework of the insanity defense. This approach is expressed, *inter alia*, in the German Penal Code,⁹⁵ the American Model Penal Code,⁹⁶ and the proposed English Penal Law,⁹⁷ and there are those who view it as the most important implication of the distinction between justification and excuse.⁹⁸

There is almost unanimous concurrence among scholars on the following two points. First, when an aggressor's attack is justified, the person under attack is

94. See, e.g., Dressler, *supra* note 13, at 62; 1 Robinson, *Criminal Law Defenses*, *supra* note 16, at 165-67.

95. Section 32 of the German Penal Code allows private defense against assault that is "wrongful," and assault in a situation of excuse is indeed "wrongful." *Strafgesetzbuch* [StGB] § 32.

96. The definition of "unlawful force," against which private defense is permitted, also includes various cases in which the aggressor lacks culpability due to excuse. Model Penal Code § 3.11(1) (Proposed Official Draft 1962).

97. In its broad definition of a "criminal act," against which private defense is allowed, section 27(3) of the English bill includes various cases where the defense of excuse applies to the aggressor. The Law Commission No. 218, *Legislating the Criminal Code: Offences against the Person and General Principles* (1993) (U.K.).

98. See, e.g., Gerald H. Gordon, *The Criminal Law of Scotland* 423 (2d ed. 1978).

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not “justified” in exercising private defense. Second, even those who reject the right to private defense against an innocent aggressor do not usually claim that the attacked person should succumb to the aggressor. However, it is absolutely possible that the victim of the attack will be acquitted on the basis of another, excuse defense, such as putative defense (if she was unaware of the factual basis of the aggressor’s excuse) or necessity.⁹⁹ But even when the assaulted person who injures the innocent aggressor should rightfully be acquitted, we cannot rest with the mere fact of acquittal: it is vital to explore the basis for the acquittal—justified private defense or only excuse?

Fletcher’s approach to this issue is especially noteworthy. His analysis, set forth in his innovative article “Proportionality and the Psychotic Aggressor,”¹⁰⁰ focuses on the specific case of an aggressor who is innocent due to excuse—the psychotic aggressor—and uses it as a test case to examine the various theories of private defense and necessity. He explains this choice by the fact that, in all legal systems, insanity is an excuse, not a justification.¹⁰¹ Fletcher’s basic assumption is that, as intuition would dictate, we should permit defense against an aggressor who acts in circumstances of excuse.¹⁰² He rejects the possibility that the solution to the problem can be found within the framework of the justified necessity defense (the “lesser evil” defense), since this would pit the life of one person against the life of another.¹⁰³ He also rejects the option of an excusatory necessity defense as the solution to the problem, on the basis of the undesirable results he attributes to such a solution: 1) a third party would be prohibited from intervening to assist the assaulted person; 2) the aggressor will have the right to self-defense, since

99. The classification of such a case as necessity and not private defense has important practical implications, such as the imposition of a strong duty to retreat, a more rigid requirement of proportionality, and a restriction of the right of third parties to intervene.

100. Fletcher, *supra* note 60.

101. See *id.* at 371.

102. *Id.* at 378.

103. *Id.* at 373-74.

any defensive act to repel the attack within the framework of necessity as an excuse will be considered a wrongful act; and 3) if force is used by the person attacked, a third party will in fact be entitled to intervene to assist the aggressor.¹⁰⁴

At this juncture it should be noted that Fletcher's reasoning in rejecting excused necessity as a solution is not only unconvincing, it is inaccurate: First, although intervention by a third party to assist the person being attacked probably would not fall under justification,¹⁰⁵ excuse might be applicable, for example, if the person being attacked is her relative. Second, the aggressor can, indeed, defend himself against the defensive act, but only within the framework of excuse, not justification. Accordingly, Fletcher's assertion that a third party would be particularly entitled to intervene to help the aggressor is unfounded.

Hence, Fletcher asserts that necessity (both as justification and as excuse) is not a suitable solution to the case of the psychotic aggressor, since the theory of necessity ignores the important feature of this case: the fact that one of the sides in the confrontation attacks, while the other defends himself.¹⁰⁶ However, as mentioned earlier, the uniqueness of private defense in comparison to necessity does not derive from the mere fact of the attack, but from the addition of the aggressor's culpability. Although the typical case of necessity entails sacrificing a third-party interest (in the context of private defense—the aggressor's interest), in the typical case of private defense the aggressor can cease his attack. This is not the case with an aggressor who acts in a situation of excuse, in particular, the psychotic aggressor, since he cannot control the cessation of the attack or at least can do so only to a lesser extent.¹⁰⁷ Therefore, an excuse defense (such as

104. *Id.*

105. It would, however, fall under justification if it is within the "lesser evil" scope, though this is only a remote possibility.

106. Fletcher, *supra* note 60, at 376.

107. Although this does not involve a lack of "volition" (lack of control; no

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necessity) is actually more suited to this context, as it imposes limitations on the attacked person, because of the special situation of the aggressor, such as a strong duty to retreat or a relatively rigid requirement of proportionality.

Fletcher easily negates the private defense rationale based on the aggressor's culpability as a suitable solution to the case of the psychotic aggressor, since it obviously does not meet the basic definitive requirement: culpability.¹⁰⁸ He also rejects the suitability of private defense as an excuse as a solution, for the principal reason that he rejects excused necessity: a third party choosing of her own free will to intervene to assist the person under attack would not enjoy this defense.¹⁰⁹ It should be noted, however, that if, indeed, there are no circumstances in which excuse would apply for such a third party, such as putative defense (if she did not know that the aggressor bore no culpability) or necessity (based on her relationship with the person attacked) or "lesser evil" justification (a remote possibility), then there is no reason to encourage her to defend the person being attacked by injuring the innocent aggressor.¹¹⁰

Fletcher then arrives at the one and only solution in his opinion: the theory rationalizing private defense based on the autonomy of the person attacked. This theory posits that defensive behavior against the aggressor is indeed included within the framework of private defense. In the section below, I address the theory at length and show it to present an unsuitable and undesirable rationale for private defense. In this context, however, it will suffice to point to one central deficiency of the rationale, conceded by Fletcher himself: the lack of a requirement of proportionality between the anticipated danger to the person attacked if

objective-physical option to choose alternative behavior), yet in situations of an excuse the actor's freedom of choice is extremely restricted.

108. Fletcher, *supra* note 60, at 377.

109. *Id.*

110. In addition to asserting our "strong intuition" that a person attacked by a psychotic aggressor should be allowed to defend himself, Fletcher notes our intuition that third-party intervention to assist the person attacked should be justified. See *id.* at 378. However, this latter intuition is questionable.

she refrains from using defensive force against the aggressor and the anticipated danger to the aggressor if the attacked person injures him (or the actual injury to the aggressor). As will be shown, the requirement of proportionality is central, crucial, and desirable—morally, legally, and practically—in any order of private defense.¹¹¹

Fletcher's article received great scholarly attention.¹¹² Due to this article, amongst others, it eventually became acceptable in the literature to reject the rationale based on the aggressor's culpability, on the grounds of its incompatibility with the case of the innocent aggressor.¹¹³ However, this approach does have its critics, notably Kremnitzer in his detailed response to Fletcher's article.¹¹⁴

Kremnitzer maintains that the case of the psychotic aggressor should not be classified within the scope of private defense, but, rather, under the necessity defense

111. In his article, *id.*, Fletcher compares the German legal system's treatment of the psychotic aggressor and the Anglo-American treatment. He claims that the German system chose the autonomy rationale, thereby creating the problem of lack of proportionality, whereas the Anglo-American system simply opted to ignore the issue of the psychotic aggressor, but solved the problem of proportionality. Fletcher praises the former for providing a solution to the psychotic aggressor and criticizes the latter for its failure to do so. This stance is odd, even if we accept Fletcher's description (which I maintain is inaccurate), as the psychotic aggressor is a rare and marginal problem, whereas proportionality is of utmost importance in all instances of private defense.

112. In later writings, Fletcher seemed to actually retreat slightly (and not wholeheartedly) from the decisiveness of his original stance. For example, in his well-known book *Rethinking Criminal Law*, *supra* note 13, at 865-66, he discusses the approach according to which the attack performed by a madman, a minor, or an innocent aggressor does not undermine the legal order, and therefore repelling such an attack is classified as necessity and not as private defense ("necessary defense" in his words). Fletcher notes the difficulty in classifying the case and points out that the pure theory of private defense, which is also based on legal order, is valid only if the aggressor is responsible for his actions. Expressions such as this cannot be seen as indication of a total revision of his opinion, however, since even in later writings, he still holds autonomy to be the preferable rationale for private defense. For Fletcher's own doubts concerning his view, see Fletcher, *supra* note 22, at 145 ("If the wrongful nature of the attack, whether by a psychotic or a culpable actor, proves to be a less-compelling rationale for self-defense, then necessity might indeed be the better way to justify the use of force against a psychotic aggressor.")

113. See, e.g., Moore, *supra* note 92, at 321; Ryan, *supra* note 80, at 511; Thomson, *supra* note 12, at 36; Kadish, *supra* note 60, at 884.

114. Kremnitzer, *supra* note 28.

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and that the requirement of proportionality (even within the framework of private defense) should not be waived. He rejects the autonomy rationale as a solution, but does not limit himself to this. Kremnitzer points out that no one, not even Fletcher, would dispute that private defense cannot be applied against an aggressor who acts without volition (control) or against an aggressor lacking the mental element required for the offense and that it is reasonable to hold similarly with regard to an insane aggressor or a minor. The weakness of Fletcher's distinction between the lack of volition in an aggressor's action (which negates the right of the person under attack to private defense) and an aggressor's insanity (which does not negate the right) is most prominent in the case of uncontrollable impulses—instances in which insanity causes a lack of volition.¹¹⁵ In Kremnitzer's opinion, the rationality and humanity that characterize modern law mandate rejecting the application of private defense in cases of insanity or in an absence of culpability.¹¹⁶

A very important factor in the justification of private defense is the social-legal order. Kremnitzer explains that, as distinct from defensive action against a sane adult aggressor that in effect protects the social-legal order, defensive action against an insane aggressor does not have this effect, since, due to his lack of culpability, the injury the latter causes to the social-legal order is no greater than that of a wild beast.¹¹⁷ Kremnitzer asserts that the description of a person as not guilty of committing an offense and, at the same time, an enemy of society¹¹⁸ is an intolerable contradiction; moreover, resistance to a psychotic person does not constitute a "police action" of crime prevention, since its preventative and deterrent

115. *Id.* at 187-88.

116. *Id.* at 188-89.

117. Hall, *supra* note 8, at 436 n.85, compares a "madman's" attack to attack by a wild animal. In his opinion, the cases are identical in substance—action against a force of nature—and he suggests that resistance to the act of the madman fits the necessity defense. *Cf.* Fletcher, *supra* note 28, at 229-31.

118. Such a description appears in Fletcher, *supra* note 60, at 389.

value is doubtful.¹¹⁹ In effect, in all cases of an innocent aggressor (minor, lacking volition, absence of mental element, etc.), the dual character of private defense does not arise in any resistance mounted against him: the protection of the legitimate interest of the person attacked and the protection of the social-legal order.

Following his refutation of the compatibility of the private defense to the case of the innocent aggressor, Kremnitzer states that the necessity defense is the appropriate solution when an aggressor acts in circumstances of excuse.¹²⁰ In order to arrive at this conclusion, he calls for the abandonment of the distinction between justified necessity and excused necessity. My objections to this move aside (the case under discussion can be attributed only to excused necessity), it is my opinion that necessity provides the suitable framework for this case. As Kremnitzer notes, classifying repelling the psychotic aggressor as necessity is consistent with the accepted definition of the difference between necessity and private defense: the latter relates to an illegal attack, whereas the former arises when the danger emanates from the circumstances. Further evidence that the innocent aggressor case is suited to necessity and not private defense can be found in Kremnitzer's examination of the characteristic requirements of the necessity defense¹²¹ (principally, the duty to retreat and the relative rigidity of the proportionality requirement) and their suitability to the case of the psychotic aggressor. Thus, for example, even in legal systems where there is no duty to retreat as a general rule, it is nevertheless imposed on someone taking private defensive action when the aggressor is innocent.¹²²

119. Kremnitzer, *supra* note 28, at 194-95.

120. *Id.* at 196-97.

121. *Id.* at 206-07.

122. See *id.* at 207; Perkins & Boyce, *supra* note 46, at 1117; Fletcher, *supra* note 13, at 865; Klaus Bernsmann, Private Self-Defence and Necessity in German Penal Law and in the Penal Law Proposal—Some Remarks, 30 *Isr. L. Rev.* 171, 175, 178 (1996). For an exceptional opinion on this matter, see Smith, *supra* note 49, at 125.

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Cases in which the person being assaulted does not know that the aggressor is psychotic (and therefore innocent) appear to fall under the category of putative (private) defense. Kremnitzer proposes the interesting possibility that putative defense is essentially the explanation for the mistaken classification of repelling a psychotic aggressor as private defense.¹²³

In the philosophy literature, an unexplained assumption exists that the case of the innocent aggressor falls within the parameters of private defense, and this case is applied to refute the rationale based on the aggressor's culpability. However, doubts are also expressed concerning the morality of injuring an innocent aggressor. Thus, for example, Levine suggests that it is unjust for the assaulted person to kill the innocent aggressor, since the aggressor will be harmed purely by coincidence.¹²⁴ She makes the similar argument that there is no morally relevant difference between the aggressor and the person who is attacked. Alexander maintains the moral importance of the fact that the psychotic aggressor (in contrast to the ordinary aggressor) does not attempt to exploit the situation of the attacked person for the improvement of his own position, and thus the threat that he poses is similar to a threat emanating from a natural source.¹²⁵ In his opinion, it is possible to feel sympathy for

123. Fletcher's later writings contain arguments that can in fact be used to counter his approach to the subject of our discussion. For example, in an article in which he inquires into the appropriate rationale for the exception allowing escaping from legal custody in intolerable conditions of imprisonment, Fletcher bases his classification of the exception as excuse on the reasoning that claims of justification cannot be applied against innocent people (he discusses the possibility of the escapee using force against innocent people during the escape, such as the guards). Fletcher, *supra* note 39, at 1368. In the same article, Fletcher also refers to the sense of remorse felt by the killer of an innocent person in a situation of putative private defense as indication that putative defense is not justification but excuse. *Id.* at 1363. It seems to me that anyone with a conscience would feel similar remorse if he or she were to kill an innocent aggressor (while aware of the source of this innocence, such as insanity) without first exhausting all alternatives, such as retreat.

124. Levine, *supra* note 60, at 69-70.

125. Laurence A. Alexander, *Justification and Innocent Aggressors*, 33 *Wayne L. Rev.* 1177, 1185-89. (1987).

the person attacked and to recognize excuse in her circumstances, but definitely not to say that her action is “right,” since she faces no “wrong” as in a case of private defense. Accordingly, Alexander concludes that action against an innocent aggressor will almost always fall solely under excuse and only rarely under justification.¹²⁶ Montague¹²⁷ also distinguishes between the responsible aggressor—against whom the person under attack has a full right and justification to defend herself and a third party has the right to assist her—and the non-responsible aggressor—against whom no such right exists (although the person attacked need not sacrifice her life).

A closely related issue, which has received almost no consideration, is the repelling of a negligent aggressor.¹²⁸ Is his (not sizeable) guilt, manifested in his negligence, sufficient basis to justify repelling him in private defense? The answer is no. This case is similar in substance to the case of the innocent aggressor: here, too, we find missing the feature (that is present in private defense) that the aggressor can cease his attack at any point and render the act of self-defense against him unnecessary. Moreover, the harm, if any, that this aggressor causes to the social-legal order is not sufficiently great to provide the basis for justifying private defense. Accordingly, repelling a negligent aggressor should also be classified under excuse, primarily as either putative defense or necessity, as the case may be.¹²⁹

126. My only reservation is with regard to the recognition, without any stated reasoning, of the (“rare”) possibility of justification.

127. Montague, *supra* note 75, at 31.

128. There are, of course, offenses for which negligence suffices as the mental element.

129. A possible practical solution to the problem of the negligent aggressor is that the person being attacked (or another person who is present) could inform the negligent aggressor that his act is endangering the person under attack. Following such a warning, the aggressor could either cease his attack or choose to continue. If he opts for the latter, the attack will no longer be negligent, but, rather, will become intentional (or at least accompanied by awareness) and defensive action against it will therefore be completely justified. Although there could be cases in which it is not possible to warn a negligent aggressor, it appears that this would be the exception. The same practical solution may also fit the

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In sum, as noted, it is my opinion that the correct exception for the case of defensive force against an innocent aggressor is either necessity or, alternatively, in light of the attacked person's error, putative private defense. However, in a legal system where the necessity defense is extremely restricted, as in English law, a person attacked by an innocent aggressor may be left stripped of any legal protection of any kind. Hence, there was a strong tendency to expand private defense so that it may also encompass this "stepchild."¹³⁰

3. The Autonomy of the Person Being Attacked

In the previous two sections, I described the legal and philosophical literature's use of the test case of the innocent aggressor both to refute the aggressor's culpability as the crucial factor in rationalizing private defense and to establish the autonomy of the person being attacked as the correct rationale. This section examines the theory that the underlying rationale to private defense is the autonomy of the attacked person. The essence of this theory is that private defense as a justification is based on the absolute right of the victim of the attack to defend her personal legitimate interests—her autonomy—against the attack. There are those who ground this in the individual's right to life and autonomy, to some a natural right, to others a consensual right. Simply put, this is the minimum requirement to preserve life that has value.

Under this theory, individual autonomy and the right to defend it together constitute the essence of private defense. All that is required to justify acting in private defense is a certain type of aggression against an innocent

problem of an innocent aggressor who attacks due to a mistake, without knowing the real situation (i.e., that he is not in real danger at all).

130. It is noteworthy that this restriction of necessity that appears in English Law caused one author to call for the application of private defense not only against the innocent aggressor but also in the absence of any attack—against natural dangers. See D.W. Elliot, *Necessity, Duress and Self-Defence*, 1989 *Crim. L. Rev.* 611, 618.

person, the condition being that the aggressive behavior be wrongful. Even if the aggressor acts in a situation of excuse (as distinct from justification), his attack falls within the bounds of a wrongful act and private defense is justified. The focus is not on the guilt of the aggressor, therefore, but, rather, on the autonomy of the innocent victim, with the assumption being that the latter has the right to prevent infringement of his autonomy. The frequently applied adage for this set of circumstances is “Right should never give way to Wrong.”¹³¹

In Fletcher’s opinion, under this theory, the aggressive action removes the aggressor from the scope of the law’s protection. Locke asserted that the aggressor is in “a state of war” with the defender, and, as Fletcher notes, when a person is at war, he is only interested in fending off the enemy’s attack, not in a possible excuse for it. Another explanation, attributed to the Kantian tradition, is that the attack breaches the implied contract existing between autonomous individuals, by which each one must respect the living space of the other.¹³²

The central characteristic of private defense according to this theory is the absolute nature of the right to autonomy and, consequently, the rejection of any limiting requirement of proportionality. Kadish notes that the unrestricted nature of the right under this theory (which he does not support) emanates from the principle of autonomy, according to which no one should be exploited as an instrument for the purposes of another: the essence of a physical attack is that the aggressor seeks to abuse the life of the victim (in the broader sense of the latter’s personality).¹³³ Under this principle, the price paid by the aggressor is not a factor: it suffices that the defensive force—as great as it may be and for the prevention of a

131. Or in other accepted formulations, “Right should never yield to Wrong” and “Law does not have to yield to Lawlessness.” Fletcher attributes the saying to either Berner, Fletcher, *supra* note 60, at 379 n.34, or from a slightly earlier period, Fletcher, *supra* note 16, at 968 n.88.

132. See Fletcher, *supra* note 60, at 380.

133. Kadish, *supra* note 60, at 886-87.

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danger as minimal as may be—is necessary to protect the autonomy of the person being attacked. Subjecting the defensive force to a requirement of proportionality will produce situations where the victim is obliged to endure exploitation for another's benefit, against her will. Thus the elimination of the principle of proportionality is the central implication of the private defense rationale based on autonomy, for autonomy and proportionality are incompatible with one another.

A classic—and shocking—example of the consequences of such an approach is a 1920 German Supreme Court decision in which it upheld the acquittal of the owner of an apple orchard who shot some youths trying to steal apples, severely wounding one of them. In its decision, the court invoked the rule “Right must never yield to Wrong,” ruling that, subject (only!) to the requirement of necessity, in such an instance it is permissible to shoot with lethal intent.¹³⁴ It is noteworthy that in this particular case, it was only property that was being defended, and of negligible value at that. Interestingly, most of the German scholars endorsed this decision.¹³⁵

Kremnitzer, for his part, maintains that the rights of the individual are relative and not absolute as they are represented within the framework of the autonomy theory. He points to the inapplicability of the comparison between private defense and war, as distorting the true nature expressed in the term's name: an act of defense. In fact, the nature of private defense is better expressed as contrasted to war: the law provides protection to the person forced to defend himself, not to the warrior who uses private defense as a pretext for his belligerent actions. The comparison to war also obscures the important restriction of the right to private defense to cases of illegal attack only. If private defense were, in fact, analogous to a state of war, legal systems would not restrict it (as they all do at present) with the requirement of necessity of the defensive force to repel

134. Eser, *supra* note 11, at 633.

135. See Fletcher, *supra* note 16, at 954-55; Fletcher, *supra* note 60, at 381-82.

the attack, since this implies consideration for the aggressor. It is precisely this same consideration that leads to the important restriction of proportionality in the use of force, and not just necessity.¹³⁶

It is my unequivocal stance that, in light of the tremendous importance of proportionality for all modern legal systems, any theory leading to its rejection must be rejected, for this reason alone. It is actually possible to draw strong criticism of the lack of a requirement of proportionality from Fletcher's words—despite his support for the autonomy rationale. He writes that this theory provides a sort of paradoxical view of aggression: on the one hand, it relates to the aggressor as a participant in the legal system and, on the other hand, it relates to the attack that the aggressor perpetrates as negating the foundation for treating him with care and compassion.¹³⁷ The aggressor is protected by the legal conditions set for the exercise of defensive force, but his interests are considered irrelevant! He is therefore simultaneously both within the legal framework and outside it, concurrently a peer and an outlaw. Fletcher also notes that, under the autonomy rationale theory, everything has become black and white with the elimination of shades and nuances.¹³⁸ In effect, I would add, the reliance on “right” and “wrong” as exclusive categories represents a disregard for any gradation—which is very significant from a moral perspective—of the various types of attack. Elsewhere, Fletcher writes that, in its pure form, private defense constitutes the dehumanization of the aggressor and a lack of consideration for matters of justice.¹³⁹ Finally, in one of his later writings, Fletcher describes the struggle in the historical transition of the law from “passion” to “reason”—from vengeance against the aggressor to justification based on the autonomy of the

136. Kremnitzer, *supra* note 28, at 184-85.

137. Fletcher, *supra* note 60, at 380-81.

138. *Id.* at 381.

139. George P. Fletcher, *Punishment and Self-Defense*, 8 *Law & Phil.* 201, 208-09. (1989).

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defender.¹⁴⁰ It is possible and imperative to ask: Why stop at this point on the scale and not come even closer to “reason” by considering, among other things, the interests of the aggressor and the social-legal order?

Other implications of the autonomy rationale can also be shown to be its deficiencies. First, it is very difficult to explain the right of a third party to defend the person under attack on the basis of this rationale. Thus, Fletcher, in a long discussion of private defense based almost exclusively on the autonomy of the person attacked, had no choice but to bring in the consideration of preservation of the legal order to explain this case.¹⁴¹ Moreover, this theory narrows the area of values and interests that can be defended within the framework of private defense. As Kadish notes (not in criticism of the theory, but merely as description), the principle of autonomy only creates a right to resist threats to a person’s body and other close interests.¹⁴² Indeed, there is no valid foundation for such a restriction of the range of protected interests.

The theory of the autonomy of the person under attack as the rationale for private defense has undergone a certain amount of honing and refinement over time, due to the great difficulty inherent in the absence of a requirement for any degree of proportionality. In order to contend with this difficulty in extreme cases of the exercise of lethal force for defense against a minor attack, the doctrine of abuse of right (whose origins are in the civil law) is used to reject private defense.¹⁴³ As Fletcher explains, this system is not “flat” but “complex”: the existence of an absolute norm (the right to private defense) and, only at a later stage, exceptions to restrict it. With regard to the restrictions

140. See George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (1988).

141. Fletcher, *supra* note 13, at 869.

142. Kadish, *supra* note 60, at 886.

143. See, e.g., Fletcher, *supra* note 60, at 385-86; Fletcher, *supra* note 16, at 955-56. (relating especially to German law). In my opinion, such a restriction, set by the court, in effect constitutes an expansion of criminal liability and thus raises significant questions regarding the principle of legality. See discussion at *infra* Section II.

scholars have imposed on the right to private defense based on the doctrine of “abuse of right,” Fletcher claims these to be part of the “modern conception of ‘right’” that leads to results that are more compatible with the requirement of proportionality.¹⁴⁴ In a similar vein, Ashworth supports an approach whereby the rationale of autonomy should only be accepted in cases not involving deadly force.¹⁴⁵ This demonstrates that the theory in its basic form leads to intolerable results and must be overhauled.

Before concluding, it is necessary to note three advantages attributed to the autonomy rationale for private defense. One is that this is the best explanation for the action of the defender, since he is acting in consideration of his own autonomy.¹⁴⁶ Second is the “trans-positivistic value of autonomy” under this theory.¹⁴⁷ To counter the first advantage, even if it is valid, the point in question is not the action of the defender but the fact that society justifies his action. With regard to the second advantage, it is dubious whether there is any kind of value in solemnly declaring any sort of right—including the right to autonomy—an absolute right, when this is incorrect. At best, this is mere semantics, at worst, this might produce (even if only indirectly) very undesirable practical outcomes, such as the rejection of the proportionality requirement. A third advantage, which is weighty relative to the first two, is that the autonomy rationale leads to the highest protection of the rights and liberties of law-abiding citizens.¹⁴⁸ However, protection of this maximum extent is not socially desirable, neither from the perspective of values and morality nor from a practical perspective.

Thus, the approach claiming the autonomy of the person being attacked is the crucial factor in rationalizing private defense must be rejected on the basis of the various considerations presented above, particularly because of the

144. Fletcher, *supra* note 16, at 980-81.

145. Ashworth, *supra* note 78, at 306.

146. Omichinski, *supra* note 13, at 1466.

147. Fletcher, *supra* note 13, at 862.

148. Ashworth, *supra* note 78, at 290.

entailed negation of the requirement of proportionality and in light of the entailed forfeiting of the culpability of the aggressor, crucially important elements of private defense from a moral and legal perspective. This notwithstanding, the autonomy of the attacked person, while not a conclusive or sufficient factor, is very significant and necessary in explaining the rationale of private defense.

4. Protection of the Social-Legal Order

Under this modern theory, the justification of private defense is both derived from the legitimate interests of the person being attacked and founded on the social interest in protecting the public order in general and the legal system in particular, as the social-legal order is shaken by the maliciousness inherent in the illegal action of the aggressor. Preservation of the social-legal order is not generally considered the exclusive rationale of private defense, but rather, as an additional consideration alongside protection of the legitimate interest of the person attacked. Be this as it may, the great significance of the preservation of the social-legal order in justifying private defense is patent from the fact that there are legal systems in which it constitutes a completely independent factor in allowing the use of force under the prevention of a crime defense.

Kremnitzer gives detailed consideration to this rationale, deeming the protection of the social-legal order an important factor in rationalizing private defense.¹⁴⁹ He stresses that it underlies the uniqueness of private defense relative to necessity, in that in the former, the source of danger is an *illegal* attack and that the response is directed against a culpable aggressor who bears criminal responsibility. Under this theory, the person under attack acts as the representative and protector of society, the public order, and the legal system since his actions are directed at neutralizing a violation of the law. This is a

149. Kremnitzer, *supra* note 28, at 181-83, 189-96, 209, 214.

“policing action” as well, because if the police were present at the time of the event, they would act precisely as did the victim of the attack. Moreover, the act of the attacked person serves the public interest by deterring offenders and preventing offenses. This deterrent effect is twofold: the individual aggressor is effectively deterred by the repelling of his attack and potential offenders are deterred because they know that their plans may be frustrated not only by the police (who are not always at the scene of an event) but also by the victim (who is usually present at the event) or any other person who happens to be in the vicinity (in the framework of “defense of another”).¹⁵⁰ Furthermore, the knowledge that the preservation of the social-legal order is in the hands of all citizens strengthens the sense of security of the law-abiding public. The key to understanding private defense and the distinction between private defense and necessity is, therefore, the comparison between the justifications for each defense. The common factor is that both defenses stem from the need to protect a legitimate interest that is in immediate danger (i.e., a situation of compulsion). They diverge vis-à-vis the source of the danger: private defense—another person’s illegal act; necessity—the result of circumstances (usually natural). Hence, in private defense there is the additional, social interest of protecting the public order and legal system. In contrast, in the context of necessity, the injuries to the public order and the legitimate interest of another person (who is not a culpable aggressor) stand in opposition to the protection of the legitimate interest that is endangered.

I agree with Kremnitzer that the protection of the social-legal order is immensely important for the justification of private defense. However, the equation above describing

150. Other scholars have referred to these functions of deterrence of aggressors (see, e.g., Nino, *supra* note 75, at 185) and private policing (see, e.g., Miriam Gur-Arye, *Actio Libera in Causa in Criminal Law* 98 (1984); Silving, *supra* note 50, at 392; Gordon, *supra* note 98, at 754-55.). Thus, for example, Williams notes that a rule that permits defensive actions works to suppress aggression, or at least reduce it, while a rule that prevents defensive actions encourages aggression. Williams, *The Theory of Excuses*, *supra* note 1, 739.

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private defense is incomplete, for it must also include additional factors, especially the interests of the aggressor. Although a certain reduction of these interests can and should be made in light of the aggressor's culpability, they should be expressed to some extent.¹⁵¹ It is indeed possible to try to sneak these interests in through "the back door" of the social-legal order consideration and assert, for example, that excessive injury to the aggressor harms this order.¹⁵² However, just as it is not acceptable to include the attacked person's interests in the framework of preservation of the social-legal order, so we must give these other factors autonomous expression in the equation, vital for both declarative and practical reasons, especially with as regards proportionality, necessity, and retreat.

What are the main implications of the rationale of the protection of the social-legal order? Eser notes that the combination of individual defensive action with social maintenance of law and order leads, on the one hand, to the expansion of private defense and, on the other hand, to its restriction.¹⁵³ It is broadened by the rationale's provision of a basis both for the defense of another (any other) person and for the protection of the public interest. The restriction stems from the fact that the rationale leads to the perception of the right to private defense as a non-absolute, relative right that endures only so long as the social function that it fulfills exists. This perception, in Eser's opinion, supports the imposition of a number of requirements, such as a certain duty to retreat, certain limitations on a defender who causes the defensive situation by his own guilt, and proportionality.

It should be noted that no agreement exists among scholars concerning this rationale's implications. Kremnitzer relates to the rationale three implications: 1. a weakening force (compared to necessity) on the duty to retreat, since it

151. The minimal expression of the aggressor's interests is that unnecessary force will not be used against him to repel his attack. See Ashworth, *supra* note 78, at 289.

152. Kremnitzer, *supra* note 28, at 193-94, attempts to do this.

153. Eser, *supra* note 11, at 631-32.

entails not only the retreat of the individual, but also the retreat of law and order;¹⁵⁴ 2. easing the requirement for proportionality, since not only the interest of the person who is attacked is weighed against the aggressor's interest, but also that of the social-legal order;¹⁵⁵ and 3. operating to temper the harsh treatment of the individual who caused the situation of defensiveness through his guilt. With regard to the requirement of proportionality, the social-legal order rationale may operate dialectically to restrict the use of force, since excessive force violates this order. Indeed, excessive injury to the aggressor also causes injury to the social-legal order. Thus, an additional implication of the rationale is that private defense does not apply in the case of an innocent aggressor, since, in the absence of criminal liability, the aggressor's action is not in any way antisocial in nature and, accordingly, does not cause any (significant) harm to the social-legal order.¹⁵⁶

As mentioned, it is not commonly accepted to consider protection of the social-legal order as the exclusive justification for private defense. Accordingly, given the consensus regarding its capacity as a justifying factor, it is important to determine the scope of its operation and to establish its co-justifying factors in forming the foundation of the rationale for private defense. In any given case, the weight of the social-legal order consideration, in my opinion, is directly proportionate to the weight of the given endangered interest¹⁵⁷ and to the degree of the aggressor's culpability (as an expression of the antisocial element embodied in his action). Thus, for example, the injury to

154. Kremnitzer, *supra* note 28, at 191-92. A similar opinion was expressed in Joachim Hermann, *Causing the Conditions of One's Own Defense: The Multi-Faceted Approach of German Law*, 1986 *BYU L. Rev.* 747.

155. A similar opinion was expressed in Gur-Arye, *supra* note 16, at 82, and Gur-Arye, *supra* note 8, at 227.

156. See Kremnitzer, *supra* note 28, at 194-95; Fletcher, *supra* note 13, at 865-66; Gur-Arye, *supra* note 16, at 82; Gur-Arye, *supra* note 8, at 227. As Gur-Arye notes, for the same reason that the society excuses this aggressor, it must also negate the justification of using private defense against him.

157. This weight is expressed, for example, in the measure of protection provided by the law for the protected value: the greater the weight, the more severe the penalty for its violation, signifying enhanced protection by the law.

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the social-legal order will be especially great in the case of an intentional attack that jeopardizes the life of the person attacked.

To conclude, it is important to stress, on the one hand, the importance of not underestimating or overlooking the social-legal order as a factor in justifying private defense but, on the other hand, the fact that private defense cannot be explained by this consideration alone. Rather its rationale must also be founded on additional factors, particularly the autonomy of the person attacked and on the culpability of the aggressor, while also taking into account the interests of the aggressor. One possible framework for incorporating the social-legal order as a factor, alongside other important factors, into the rationale of private defense is discussed in the next section: a balancing of interests (including abstract interests) and a choice of the lesser evil.

5. Balancing Interests and Choosing the Lesser Evil

This rationale is not exclusive to private defense, but, rather, relates to a general theory of justification and is commonly applied in the context of necessity as justification. The general idea of this rationale is that the expected injury to legitimate interests if the actor does not act must be weighed against the expected injury to legitimate interests as a result of the actor's action, and the lesser of the two (inevitable) evils must be chosen.¹⁵⁸ Proponents of this rationale assert that the principle should also be applied to private defense.

158. For example, a "choice of evils" defense was set in the American Model Penal Code in § 3.02. Model Penal Code § 3.02 (Proposed Official Draft 1962). In Fletcher's opinion, the MPC approach is that all the justifications in effect constitute variations of the principle of the lesser evil. See 3 Encyclopedia of Crime and Justice, supra note 86, at 944. He deduces this in particular from the expression "justification generally," which the drafters used for the justificatory necessity. See also Fletcher, supra note 22, at 142. In terms of terminology, there is a multitude of terms used to express the "lesser evil" notion, including: "balance of utilities," "necessity," "superior interest," "choice of evils," "greater benefit than loss," "balance of interests," etc.

Robinson is a great supporter of this rationale as a general theory that fits all justification defenses. Under his theory, all justifications involve injury that is generally acknowledged by the law as harm. However, where circumstances of justification exist, even when there is injury, it is still preferable to another, greater injury.¹⁵⁹ If the physical evils alone are compared (as is common with the defense of necessity), we will often arrive at an even balance, such as in the case of the life of one person versus the life of another. In order to break this deadlock, abstract interests must be taken into account and placed on the scales.¹⁶⁰

But what are these “abstract interests” that must be weighed? The most commonly considered abstract factor is the degree of the aggressor’s fault in creating the conflict,¹⁶¹ with the accepted way of calculating it into the equation being to apply it to reduce the value of the aggressor’s interests.¹⁶² Other important abstract interests that, in my opinion, must not be ignored are the autonomy of the victim of the attack and the protection of the social-legal order. Common to all these factors is, of course, the fact that they work in favor of the person attacked and against the aggressor. As noted by Wasserman,¹⁶³ under this theory, what distinguishes private defense from the defense of necessity is that whereas with regard to the latter, the court must make ad-hoc determinations of the lesser evil, in the former, the legislator has already predetermined a substantial part of this decision.

Indeed, Ashworth has termed the lesser evil approach “the human rights” approach.¹⁶⁴ According to him, the approach takes into account the opposing interests of the

159. 1 Robinson, *Criminal Law Defenses*, supra note 16, at 83, 90.

160. 2 Robinson, *Criminal Law Defenses*, supra note 16, at 71.

161. For a consideration of this factor in particular and of the lesser evil rationale in general, see Omichinski, supra note 13, at 1453; Fletcher, supra note 60, at 377-78; Wasserman, supra note 75, at 357-58; Fletcher, supra note 13, at 857-60.

162. See, e.g., Fletcher, supra note 60, at 378.

163. Wasserman, supra note 75, at 358.

164. Ashworth, supra note 78, at 288-89.

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parties to the conflict: the bodily integrity of the victim of the attack, on the one hand, and, on the other hand, the right of the aggressor that no unnecessary force will be used to repel his attack. This approach also serves important social values: preservation of human life, reduction of violence, and suppression of private clashes.

What are the practical implications of this theory? The central implication is the requirement for proportionality that exists by definition in the framework of this approach. Although it is not required that the physical evil that is averted be greater or even equal to the physical evil that is created (given the abstract values hanging in the balance), some sort of correlation between the extent of the physical evils is absolutely mandated.¹⁶⁵ Additional practical implications of the theory include the requirement for necessity, a certain duty to retreat, non-application of private defense against an innocent aggressor, and a relatively broad third-party right to defend another person.¹⁶⁶

This theory has not been spared its share of criticism. The difficulty that many of the critics point to is that many established instances of private defense involve evenly balanced physical evils; sometimes the physical evil that is created even exceeds the physical evil prevented.¹⁶⁷ For example, it is generally accepted that it is justified to exert defensive force, even lethal, not only to save life but also to prevent rape. There is also general concurrence that a lone person who is attacked is entitled to use lethal defensive force against a group of aggressors. But even when the price of saving the life of the person being attacked is the loss of a single aggressor's life, it is sometimes claimed that the principle of equality between human beings entails that

165. See, e.g., *id.* at 297 (commenting especially on the limitation of lethal force); Fletcher, *supra* note 60, at 378.

166. See, e.g., Ashworth, *supra* note 78, at 288-89, 293-97 (necessity and proportion); Fletcher, *supra* note 13, at 857-58. (proportion and retreat); Omichinski, *supra* note 13, at 1455-62 (proportion, necessity, retreat, defense of another person, innocent aggressor).

167. See Wasserman, *supra* note 75, at 357-58; Kadish, *supra* note 60, at 882.

neither of the parties to the dispute be preferred to the other. It is also argued that giving weight to the factor of probability further increases the difficulty, since the person defending himself, who faces the (mere) risk of death, creates certain death via his behavior.¹⁶⁸ Fletcher, one of the chief critics of this theory, comments that although there are moral factors (such as the aggressor's culpability) that tip the scale and provide solutions to the abovementioned difficulties, in his opinion, this theory is restricted, since these factors do not enter in the balance of evils.¹⁶⁹ Similarly, Thomson, relating solely to the physical evil, altogether rejects a theory that is based on utility.¹⁷⁰

The answer to these points of criticism is that, within the framework of the balancing of interests, not only the physical evils should be considered, but also the abstract interests. Some of the critics ground their criticism on a shallow presentation of the theory, as though it refers solely to physical injury. Other critics, although they do relate to the abstract interests, identify only a single central abstract interest, usually the aggressor's culpability.¹⁷¹ This line is compelling in that it refrains from considering the culpability of the aggressor (or any other single factor) as the sole decisive factor, but it loses its force when a more complex picture is considered.¹⁷²

168. Fletcher, *supra* note 13, at 858 n.10.

169. See 3 *Encyclopedia of Crime and Justice*, *supra* note 86, at 944.

170. Thomson, *supra* note 12, at 42-43. It is interesting that after rejecting the theory on this ground, Thomson searches for a stronger right of the person attacked (in comparison to the right of the aggressor) as the rationale for private defense and finds it in his right to defend himself. It seems to me that this is mere tautology, since the basic question is, of course, what is the source of the right of the person being attacked to defend himself. Dressler is also dubious of the suitability of a utilitarian theory to explain private defense and our intuition regarding it. Dressler, *supra* note 13, at 89 n.157. In his opinion, "deontological reasoning" is necessary to explain private defense and "teleological reasoning" to explain necessity.

171. See, e.g., Kadish, *supra* note 60, at 882.

172. A relatively complex picture is presented by Wasserman, *supra* note 75, who considers two variations of the lesser evil principle: "the act version" versus "the rule version." The first relates to the physical evils, and the second to the possible benefit to society from the rule permitting private defense. But my question is why must we content ourselves with ruling out each of these

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Furthermore, with regard to the claim about the increased difficulty entailed by including the factor of probability, it seems to me that this will usually be a matter of the wisdom of hindsight after the event (the defensive act), when the injury to the aggressor is already known and the injury to the person who was attacked remains—due to his defensive action—only mere possibility. By the same logic, it can be argued that if the person attacked were to refrain from defending himself, then the injury to him would be the known factor and the injury to his aggressor a mere possibility. Accordingly, if we seek to know as much as possible prior to the defensive act, we must consider the probabilities of each of the possible injuries from that act, and these probabilities must be weighed in the process of estimating the evils, along with the remaining factors.¹⁷³

Finally, with regard to the duty to retreat, Fletcher's assertion that the lesser evil theory necessarily leads to the clear and unambiguous conclusion that there is a strong duty to retreat rests, in my opinion, on an inaccurate balancing of interests. On the one side, Fletcher places the honor of the person under attack and the increased risk of injury to him (the loss that he will suffer if required to retreat) and, on the other side, the life of the aggressor (his gain from the retreat). He thus, on the one hand, ignores the damage to the social-legal order caused by retreat and, on the other hand, adds the apparent weight of increasing

variations as though they are mutually exclusive, rather than painting the entire picture in its full colors?

173. Fletcher presents criticism of a different sort. First, he claims that including the autonomy of the person attacked as a factor in the balance of interests means overlooking the absolutist tendency of the principle of autonomy and betraying the individual's honor. Fletcher, *supra* note 13, at 771. Yet, as stated, it is my position that there are no absolute rights, and autonomy should not be regarded as the only factor in justifying private defense. Second, Fletcher finds deficiencies in the three implications of the lesser evil theory—the requirement for proportionality, the duty to retreat, and the non-application of private defense against an innocent aggressor, which lead him to the conclusion that the theory should be rejected. Fletcher, *supra* note 60, at 378; Fletcher, *supra* note 13, at 771, 858-59. In my opinion, these implications are not deficiencies at all, but rather constitute advantages in a modern and civilized society.

the risk of injury—“apparent” because no one suggests requiring retreat that will endanger the person being attacked.

A possible deficiency in the lesser evil theory, observed by Omichinski,¹⁷⁴ is that the theory requires a very complex balancing that sometimes includes weighing a person’s life—a balancing that is beyond even the capability of philosophers and scholars. Accordingly, in her opinion, the ordinary person whose life is endangered should not be expected to properly calculate this balance, nor can a third party who comes to her assistance. However, this argument is weak and non-compelling, for it is doubtful whether there is any rationale that can provide any clearer an explanation (in a significant manner) for private defense and whether the other criminal law defenses are intended to direct behavior and are capable of doing so. In addition, it is possible that part of the balance should be performed at the general normative level by the legislator.

The above brief analysis of the duty to retreat leads us to the central question of the lesser evil theory: What are the abstract interests that must be considered within the balancing framework and what weight should be given to each? The choice of the word “framework” is not mere coincidence. I submit that, although the lesser evil theory is generally acceptable, it does not provide an explanation for private defense. It merely provides a framework that must be filled with content—content that will include not only the relevant physical evils but also the relevant abstract interests. With regard to the latter, no one single factor should have decisive weight; rather all the important factors should be given equal consideration, these being the autonomy of the person attacked, the culpability of the aggressor, and the social-legal order.

174. See Omichinski, *supra* note 13, at 1466.

2006] *A NEW DEFENSE FOR SELF-DEFENSE* 5376. The Attacked Person's "Right against the State to Resist Aggression"¹⁷⁵

This theory is attributed in the legal and philosophical literature to Kadish, since he is its main proponent and established a suitable theoretical foundation for the analysis of the issue. Accordingly, it is appropriate that the discussion begin with Kadish's description of the theory.¹⁷⁶ Having negated the theory based on the culpability of the aggressor as the rationale for private defense, Kadish suggests the rationale for the freedom of the person being attacked to kill his attacker as based on the right that person has against the state. This right, enjoyed by every individual, is the right to the law's protection against the lethal threats of others. In order to give substantial content to this right, the legal freedom to oppose lethal threats by all necessary means, including the killing of the aggressor, must be established. Kadish states that this right is not his innovation: its source is in the fact that all individuals have a fundamental right to protect themselves against attack and they did not lose this freedom with the establishment of the state. This liberty is required under most theories of the legitimacy of the state, with all positing that the submission of the individual to the prerogative of the state produced a greater right to protection against aggressors than existed prior to the establishment of the state. Kadish labels this liberty to oppose a lethal attack by lethal force and the moral right vis-à-vis the state from which it is derived "the right to resist aggression."¹⁷⁷ In his opinion, this theory explains the law that justifies killing an aggressor better than other theories that he has examined.¹⁷⁸ Among its advantages, he enumerates the rationale's suitability even

175. The right was termed so by Kadish. Kadish, *supra* note 60.

176. *Id.* at 884-88.

177. Indeed both the legal and philosophical literature follow Kadish's seminal article, *id.* at 885, and refer to the theory by this name. See, e.g., Wasserman, *supra* note 75, at 362-63; Omichinski, *supra* note 13, at 1451-52.

178. Noticeably absent from Kadish's discussion is the rationale relating to the protection of the social-legal order.

in cases of multiple aggressors and that the problematic notion of the aggressor's loss of rights does not have to be accounted for in the framework of the rationale, since under this theory, the aggressor has no rights whatsoever vis-à-vis the victim.¹⁷⁹ Thus, under Kadish, the aggressor has no right to life (a right that, in his opinion, would conflict with the liberty to kill him); all he has is the right to resist an attack on his life—a right that is not infringed by the victim who ultimately is only defending himself. This line of reasoning is strange to say the least, and it is very similar to the well-known notion of “double effect,” according to which a distinction is drawn between intention to kill and foreseeing killing and which was dismissed, *in limine*, by Kadish himself as fictitious.¹⁸⁰ An additional advantage that Kadish ascribes to this theory is that it is consistent with the right of a third party to intervene, i.e., the right to defend another person. According to Kadish, in such a case, the basic right does not belong to the third-party defender but to the victim; the right of the victim to protection under the law would be infringed if the third party is denied the freedom to intervene and defend the victim, just as it would be infringed by denying the victim the freedom to defend himself.¹⁸¹

179. An additional advantage Kadish noted, that in my view is actually a deficiency, is the applicability of the theory to the case of the innocent aggressor.

180. See Kadish, *supra* note 60, at 879-80, where he rejects the “double effect” doctrine, which is attributed to Aquinas, according to which the taking of life is justified only when the actor did not intend to kill, even if he foresaw the killing. Thus, when the attacked person who defends himself kills his attacker, the effect is not intended, but only foreseen, since the intended effect is the removal of the threat and no more. The defender does not choose the death of the aggressor as a means of saving his own life, but, rather, chooses the only possible means for the removal of the threat, despite his awareness that this may lead to the death of the aggressor. Today, the accepted rule of foreseeability (“*Dolus Indirectus*”; practical certainty), under which a person's awareness of the near certain possibility that her action will produce a certain result is equivalent, both morally and legally, to intention to cause that result, makes the doctrine of double effect, in my opinion, even more problematic. Sangero, Will the “Purposes” in Criminal Offenses Become “Motives,” *supra* note 44, at 345-48, n.49. Finally, this doctrine does not provide us with a rationale for private defense, but, rather, is restricted to a (weak) undermining of the argument negating lethal force in private defense.

181. I have reservations regarding this claim of equality between the

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A central point in Kadish's theory is his own restriction of its application to cases of threats of lethal force alone. With regard to the remaining cases (which are of greater importance, in my view, than accorded them in the literature), Kadish suggests the application of two conflicting principles: the principle of autonomy and the principle of proportionality. He does not provide an explanation as to why these principles do not apply to lethal threats and why "the right to resist aggression" does not apply when a milder threat is involved. His concentration on homicide can perhaps be explained by the fact that the focus of his article is the right to life.¹⁸² This aside, in his opinion, insofar as lethal threats are involved, his theory constitutes the best explanation for the law that governs the killing of aggressors. Moreover, with regard to his limiting his discussion to the positive law, I prefer to seek the suitable rationale for private defense also (and even principally) by considering the theoretically desirable law.

A number of scholars have noted the close affinity between this theory and the theory focusing on the individual's autonomy and his right to defend it. Enker notes that the right to resist aggression is, to a large extent, based on the idea of the individual's autonomy.¹⁸³ As with the right to preserve that autonomy, the right to resist aggression is also focused on the rights of the person under attack. The difference is that while the former right is directed at the aggressor, the latter is directed at the state. There are those who conceive this right to resist aggression as based on the following idea: since the state is responsible for protecting the individual and since it does not always succeed in bearing this responsibility (for purely practical reasons), it grants the individual the right to protect her life against attack in those cases where it has failed in this capacity. Under this approach, the granting of this right

infringements of the victim's rights.

182. Kadish, *supra* note 60.

183. Enker, *supra* note 61, at 239. See also Rosen, *supra* note 16, at 49 n.205 (describing the theory as the "right of autonomy and [to] protection by the state").

emanates from practical considerations: the ineffectiveness of society and its laws in certain situations.¹⁸⁴ Others have expressed the opinion that this right rests on the individual's natural right, which not only remained in force with the establishment of the state, but also cannot be revoked under any circumstances.¹⁸⁵ In Blackstone's words, "Self defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by law of society."¹⁸⁶

Enker has levied in-depth and detailed criticism at the right to resist aggression as the rationale for private defense.¹⁸⁷ His central and convincing argument is that the right presented by Kadish is in effect a right vis-à-vis the state alone and it is difficult to accept the idea that such a right authorizes a pursued person to kill another person.¹⁸⁸ An additional argument he makes is based on the fact that the theory does not explain the right of a third party to intervene and assist the person attacked by means of injury to the aggressor. Enker stresses the fact that Kadish himself states only that the theory is consistent (and no more than this) with the third-party right, and he expresses doubt as to whether even such consistency exists.¹⁸⁹ Moore goes even further in his rejection of the right-to-resist-aggression rationale, claiming that it is almost tautological in nature, for all that this rationale tells us is that it is not "wrongful" to kill the aggressor because there is a right to kill him.¹⁹⁰ Fletcher, a great proponent of autonomy, claims that Kadish's theory amounts to a rescinding of personal autonomy and leads to the undesirable (in his eyes) solution of balancing of interests.¹⁹¹

184. See Ashworth, *supra* note 78, at 282-83; Omichinski, *supra* note 13, at 1451-52; Fletcher, *supra* note 13, at 867.

185. See, e.g., Fletcher, *supra* note 16, at 982.

186. 3 Blackstone, *supra* note 19, at 4.

187. Enker, *supra* note 61, at 235-39.

188. *Id.* at 237.

189. *Id.* at 237 n.9 and accompanying text.

190. See Moore, *supra* note 92, at 321 (calling this rationale "agent-based account").

191. See Fletcher, *supra* note 13, at 867.

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What are the central accepted implications of the adoption of the right-to-resist-aggression rationale? On this matter, Kadish himself noted only that, in his opinion, the rationale is consistent with “the lapse of the right to kill after the threat has ceased” and “the legal right of a third person to kill the aggressor.” He also noted the applicability of this rationale in cases of an innocent aggressor.¹⁹² A number of scholars have claimed that the requirements of proportionality, necessity, and retreat are derived from this theory, relying particularly on the line of reasoning that since it is the state that grants the right to private defense, it also can set the exceptions, and since it is desirable to make such exceptions, this is done in practice.¹⁹³ Although this reasoning is commensurate with the approach that the granting of the right derives from practical considerations, it does not conform with the more prevalent view that at stake is a (natural) right of the individual, which the state cannot restrict under any circumstances. In its purest form, the theory of the right to resist aggression revolves around a right that is derivative (from a right of the state) and not a right that is conferred (by the state). Accordingly, the aforementioned approach is problematic in terms of the theory’s implications. In my estimation, adopting this theory would have effects very similar to those of the rationale of autonomy, a rationale that is very close to it substantively.¹⁹⁴

192. Kadish, *supra* note 60, at 885-86.

193. See Omichinski, *supra* note 13, at 1455 (proportionality), 1456 (necessity), 1458 (retreat), 1467 (evaluation of the theory); see also Fletcher, *supra* note 13, at 867 (retreat and a hint of proportionality).

194. An interesting but strange attempt to derive implications from the theory of the right to resist aggression was conducted by Dressler. In his consideration of putative private defense, he notes that if we accept the underlying rationale as a right vis-à-vis the state to resist aggression, then the (incorrect, in my opinion) determination that putative private defense is a justification (as opposed to an excuse) can be grounded on the fact that when people organized as a society they did not relinquish the right to oppose putative aggression. Dressler, *supra* note 13, at 94 n.176. It would appear that extending the scope of the right reserved by individuals with the establishment of the state could lead to innumerable additional implications, as diverse and as strange as can be imagined.

In conclusion, although the right vis-à-vis the state to resist aggression should not be accepted as the rationale for private defense, it is a factor that almost converges with the consideration of the autonomy of the victim of the attack and has a certain influence on the suitable rationale for private defense. Under the assumption that the autonomy consideration is a central factor in justifying private defense, this right to resist aggression serves to strengthen that consideration or at least counter the claim that the attacked individual's autonomy was greatly weakened with the establishment of the state.¹⁹⁵

IV. A NEW RATIONALE FOR PRIVATE DEFENSE

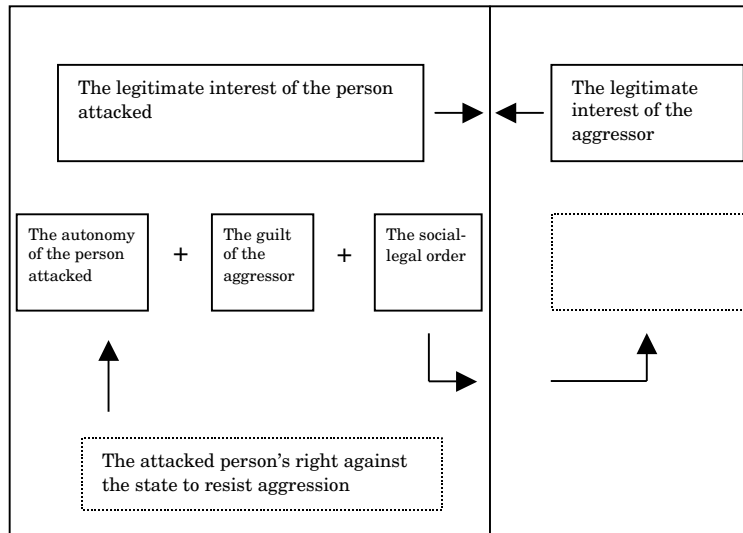
The way is now open to constructing a rationale whose principles are drawn from the theories and approaches discussed in the preceding parts: One, the framework of the lesser-evil balance of interests should be adopted, and the contents filling this framework should include not only physical evils, but also relevant abstract interests. Two, none of these interests alone are sufficient in themselves, but, rather, all important factors are equally essential and all must be taken into account, with the autonomy of the

195. Other rationales have been proposed as justifying private defense: (1) the need to punish the aggressor, see, e.g., Finkelman, *supra* note 71, at 1281; Fletcher, *supra* note 139; (2) the duty of the attacked person towards society to defend himself and prevent a crime, see, e.g., Omichinski, *supra* note 32, at 1448-49; (3) random chance, see, e.g., Levine, *supra* note 60; Gorr, *supra* note 78, at 243-45; (4) the very fact of the culpable attack, see, e.g., Montague, *Self-Defense and Choosing*, *supra* note 87, at 209-11; (5) personal and limited justification of self-defense, see, e.g., Alexander, *supra* note 125, at 1188-89; (6) the consent of the aggressor to the normative results of his action, see, e.g., Nino, *supra* note 75, at 185; (7) the "moral specification" and "factual specification" rationales, see, e.g., Thomson, *supra* note 12, at 37-42; and (8) the "object theory," see, e.g., Eser, *supra* note 11, at 629-30. These approaches have in common the fact that they all miss the target of uncovering a suitable and sufficient explanation for private defense and most are too abstract to be useful. Their principal value is in the theoretical insights that can be derived from their negation. See also Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (1994); Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 *Va. L. Rev.* 999 (2005).

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person attacked, the aggressor's culpability, and protection of the social-legal order of particular importance.

Consider the following diagram, illustrating the proposed rationale:



I shall begin with three preliminary clarifications with regard to the framework of balancing interests and choice of the lesser evil. First, despite the common use of the expression “the lesser evil,” private defense should not be viewed as an evil, not even a lesser one, but, rather, as the “best possible good.” It rests on a desirable, just action, devoid of any moral fault; it is not merely a permissible action, the fruit of a narrow utilitarian calculation alone. Hence, private defense should be perceived as a “strong” criminal law defense, with significant moral justification relative to, *inter alia*, the defense of necessity.

Second, two points must be made with regard to the physical injuries level of the balancing process, which is expressed in the legitimate interest of the person attacked (not to be injured) as opposed to the legitimate interest of the aggressor (not to be injured). To begin with, contrary to the view of quite a few scholars, I maintain that the aggressor has a legitimate interest not to be injured,

although it does not, of course, encompass the illegitimate interest to continue with the illegal attack. Indeed, the aggressor has a significant right to life and bodily integrity. Although the aggressor's interests are reduced in value to a certain extent (due to his guilt in creating the situation), the very fact that it is possible to make such a reduction is proof of the existence of these interests. A central advantage to the recognition of the aggressor's rights is the accompanying requirement for some proportionality between the interest (of the person attacked) that is imperiled and the interest (of the aggressor) that is sacrificed in the framework of private defense. The general acceptance of the proportionality requirement is evidence of a certain consideration, whether conscious or unconscious, of the rights of the aggressor.¹⁹⁶

The third clarification is that we should not follow in the footsteps of a number of scholars and stop at the initial balancing level of physical injuries, but, rather, we should and must proceed to the second level of the important abstract factors.

With regard to this second level, deeper discussion is warranted. *First*, beyond the three main considerations (the autonomy of the person attacked, the culpability of the aggressor, and the social-legal order) weighed, a (in my opinion) secondary factor to be considered is *the attacked person's right vis-à-vis the state to resist aggression*. This right negates the argument that the right of the individual to defend her autonomy by herself was greatly weakened with the creation of the state. Consequently, this factor does not necessarily have to be included in the balance as an independent consideration, and it is sufficient to be

196. Arguably, the requirement of proportionality can be based on the need to maintain the social-legal order, without any need for reliance on rights of the aggressor: excessive injury to the aggressor will not only fail to protect the social-legal order, it will even harm it. However, in my opinion, the (relatively) slight restriction (with regard to proportionality) mandated by this consideration is insufficient, and the aggressor's rights must be considered to arrive at a more significant standard of proportionality—the most desirable restriction in all civilized societies.

aware of the real strength of the factor of the autonomy of the person attacked.

Second, some clarification is necessary regarding the consideration of *the social-legal order*. To begin with, a precise definition of the social-legal order consideration is warranted. In my opinion, “social-legal order” is not a purely objective term, and it is not sufficient that protected social values are objectively endangered. The concept of the social-legal order suited for the justification of private defense not only expresses society’s cost-and-benefit balancing in light of a given act of private defense, but also reflects a more far-reaching view, one that is forward-looking into the future. The purpose of this view is, *inter alia*, to strengthen the law-abiding public’s sense of confidence and trust in the legal system and the rule of law and order.

Private defense’s protection of the social-legal order has an important function in the justification of the defense. Yet it is also possible that this factor will appear on the aggressor’s side of the balance, illustrated as the broken box in the diagram above: Private defense entails, *inter alia*, the repelling of an aggressor, prevention of his committing an offense, and deterrence. It also ensures the (empirical) force of the specific norm “attacked” by the aggressor and of all punitive norms in general. It thus provides extremely efficient protection of the social-legal order. When this factor appears on the side of the victim of the attack in the balance, it will often have positive values and will serve to justify private defense. However, it can also serve to set limitations to the defense. For example, when the response of the attacked person significantly exceeds the conditions of private defense, deviating significantly from the requirement of proportionality and causing injury to the aggressor that is far greater than what was anticipated based on the aggressor’s attack, this response in fact undermines the social-legal order rather than protecting it. It therefore seems undisputable that using lethal defensive force to repel an aggressor who pushes the attacked person standing in line for the bus does not serve the social-legal order but, rather, gravely

harms it. In such instances, the factor of the social-legal order will operate against the response of the attacked person, which will not meet the requirements of private defense.

Moreover, as we have seen, there are various different perceptions of the content and nature of the social-legal order. Thus, for example, it may be attributed contents that make consideration of all the other abstract interests in the balancing process redundant: a sweeping definition of the social-legal order would accommodate both the attacked person's autonomy and the aggressor's culpability. My reservations regarding such a definition are based on the immense burden that it would place on one single factor and on its effective devaluation of the other main factors, especially the two just noted ones. Due to their fundamental significance, the autonomy and culpability factors must be accorded independent, primary status and should not be subsumed into the concept of the social-legal order.

The social-legal order is also perceived as bearing relative force. The weight of the social-legal order in a given case is proportionate to the infringement on the autonomy of the person attacked, where the extent of the infringement is a (directly proportionate function) of the weight of the endangered legitimate interest. The weight of the social-legal order is also in direct proportion to the extent of the aggressor's culpability as an expression of the anti-social aspect that is embodied in his action. Thus, the injury to the social-legal order will be especially great in the case of a deliberate attack directed at an existential value, such as endangering the life of the individual attacked. The correlation between the infringement on the autonomy of the individual and the injury to the social-legal order gives social significance to the individual's injury: a breach of a individual's rights causes harm not only to him but also to the rights of the public at large, since a stable social-legal order is required to maintain a normal social life—i.e., to protect the basic rights of individuals. It is important to stress that the existence of reciprocal influences amongst the various factors in the

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balance, especially the impact of the autonomy and culpability factors on the factor of the social-legal order, does not negate the distinct nature of each of the factors.

The issue of the mental element required in private defense illustrates the nature of the social-legal order consideration and its implications. Consider, for example, circumstances where the actor is entirely unaware of the fact of the existence of the objective conditions for private defense and he exerts force against the aggressor and commits a criminal offense due to negative motives and for the purpose of achieving negative goals: his action cannot be claimed to serve the social-legal order. On the contrary, it causes harm to it. A purely objective perception of the nature of the social-legal order might support this actor's action and regard it as justified, since, in practice, he repelled a malicious attack. However, more far-reaching and deeper scrutiny of the action and its influence on the public's sense of confidence and trust in the legal system will lead to the conclusion that this type of activity cannot be justified. Such an actor is not only incapable of defending the social-legal order; he in fact harms it.

The issue of proportionality also can be used to illustrate the nature of the social-legal order factor and its implications. To return to the line for the bus, *A* is standing behind *B*, and *A*, trying to get on the bus first, pushes *B*. *B* then uses lethal defensive force against *A*. This force is necessary in the circumstances to repel *A*, the aggressor, and protect *B*'s right to board the bus first, because *B* is weaker than *A* and cannot overcome him except by lethal means, say, firing a gun. Under a short-term perception of the social-legal order factor, *B*, the actor, would be considered to be protecting the social-legal order against *A*'s illegal act. However, in light of the severe lack of proportionality in *B*'s use of lethal force against only a very mild attack, his action should be seen as harming the social-legal order and shaking law-abiding citizens' sense of confidence and trust in the legal system. In light of the educational, guiding, and declarative aspects of private

defense, the taking of another's life in order to repel a slight shove does not constitute a justified act.¹⁹⁷

Finally, the social-legal order factor serves to expand the scope of private defense to encompass also the defense of another (any other) person and perhaps also the protection of a state or social interest. It also circumscribes the parameters of the defense and its conditions, including those with regard to the requirements of the necessity of the defensive force and immediacy of the danger and rules that relate to the actor responsible for creating the situation in which he must defend himself.

Third, a number of clarifications are necessary with regard to *the autonomy of the person attacked*, which concern her right to protect her legitimate personal interests against attack—i.e., her right to prevent intrusion and invasion into the sphere of her autonomy. This sphere is the individual's living space, which encompasses, first and foremost, her life, bodily integrity, liberty and property, and perhaps additional, less important, personal interests such as her honor. Thus the legal and moral basis for this supremely important factor is the claim that the individual's right to autonomy, be it natural or consensual, is the minimum requirement for a meaningful life.

The discussion of the necessity defense in the literature is enlightening with regard to the great significance attributed to individual autonomy. The situation classically discussed involves *A*, of a rare blood type, who is in immediate need of a blood transfusion to save his life, and *B*, who is the only person who can save *A*, but she refuses to give blood. The physical injury to *B* if the blood were to be forcibly taken from her is not great, certainly not in comparison to *A*'s possible loss of life.

197. A unique and distinct case is that in which the aggressor uses force in the framework of an exception to criminal liability in the form of justification, for example, a police officer making a legal arrest. In such a case, the justified action of the aggressor does not harm the social-legal order, and accordingly, any (defensive) force used by the person under attack against the aggressor will not protect the social-legal order. Quite the contrary: it will in fact cause harm to it, and thus it does not fall within the scope of private defense.

Nevertheless, the accepted approach is that the necessity defense does not allow a penetration into an unwilling donor's sphere of autonomy to forcibly extract blood.

In the philosophical literature, the importance of individual autonomy is discussed in various contexts. For example, Nozick commented that modern society recognizes the vital importance of an individual's zone of autonomy: an area of activity within whose framework she can choose to act as she wishes and is free of external coercion.¹⁹⁸ The recognition of such an area of activity and the respect for it constitute a suitable response to the acknowledged desire of human beings for self-esteem. The existence of a zone of autonomy that is acknowledged and respected by all enables (objectively) the individual's self-actualization, providing her with the self-confidence necessary to achieve this.

Thus, individual autonomy serves to provide maximal protection of the rights and liberties of law-abiding citizens. However, it is important to recall that we concluded that this factor does not enjoy exclusivity in explaining private defense. Rights, including that of the person attacked to protect his autonomy, are relative, not absolute. Consequently, this factor alone is not sufficient; it is one of the factors weighed in the balance. Moreover, the factor of the attacked person's autonomy does not justify private defense to an equal degree in all cases, for its weight is directly contingent on the weight of the legitimate interest that is endangered.¹⁹⁹

Fourth, it is important to note *the essentiality of all the three noted abstract interests*. The establishment and justification of private defense will always entail consideration of the aggressor's culpability, the autonomy

198. Robert Nozick, *Philosophical Explanations* 501-04, 551, 555-66 (1981).

199. Thus, for example, it is accepted that, as a rule (though of course subject to exceptions), the infringement of the autonomy of the person attacked is greater (and, accordingly, the weight of the factor of autonomy in justifying private defense) when there is a risk to her life, as compared to a risk to her bodily integrity or liberty, while the infringement on her autonomy in the face of the latter risk is greater compared to when her property is at risk.

of the person attacked, and the social-legal order. Thus: *private defense is concurrently the defense of the autonomy of the person attacked and the defense of the social-legal order, by means of using force against an aggressor who is criminally responsible for his attack.*

However, if the defense of an interest of the state or society is recognized as included in the justification of private defense, there may be cases in which private defense (of that interest) will be justified despite the lack of *direct* infringement on the autonomy of the individual. In such a case, the state's interest can be perceived as replacing the individual's autonomy as a factor, just as the state (or society) takes the individual's place as the potentially attacked and injured entity. Another option is to view the injury to the state or society as an *indirect* infringement on the autonomy of its individuals, since the modern state provides most of the protection of the individual's autonomy.²⁰⁰

The indispensability of each and every one of the three factors in justifying private defense can also be understood by examining all possible combinations of the factors as though they are three independent elements. There are eight such possible combinations (2^3), which are demonstrated in the table below. The "+" symbol signifies the presence of a factor in a scenario and the "-" symbol signifies the absence of a factor.

200. In any case, it is important to emphasize that private defense of an interest of the state or society is the exception, and in all the remaining cases, the rule that applies provides that all three of the noted factors are essential, cumulative, and supplementary in justifying private defense.

| Case Number | Autonomy of the Person Attacked | Social-Legal Order | Aggressor's Culpability |
|-------------|---------------------------------|--------------------|-------------------------|
| 1 | + | + | + |
| * 2 | + | + | - |
| * 3 | + | - | + |
| 4 | + | - | - |
| * 5 | - | + | + |
| 6 | - | + | - |
| 7 | - | - | + |
| 8 | - | - | - |

The three cases in which only one of the factors is absent (cases number 2, 3 and 5) are of particular interest, for they can be used to draw conclusions a fortiori with regard to the four cases in which more than one factor is missing.²⁰¹

Case number 2, where the factors of the attacked person's autonomy and the social-legal order exist but there is a lack of the factor of the aggressor's guilt, was dealt with extensively in the framework of the discussions of theories resting on the aggressor's culpability and on the test case of the innocent aggressor.²⁰² Case number 3, which is missing the factor of the social-legal order but contains the factors of the attacked person's autonomy and the aggressor's culpability, is prima facie almost an impossibility: if the aggressor is culpable and bears criminal responsibility for his attack, his act constitutes not only an injury to the autonomy of the individual attacked but also, concurrently, to the social-legal order. However, we must examine not only the effect of the attack on the

201. Case number 1, in which all three factors are present, is, of course, the paradigmatic case that this article assumes.

202. My stance was that waiving the aggressor's culpability as a factor would erode the substance of private defense and constitute a forfeiture of a significant part of its uniqueness. In practice, I believe that case number 2 is a rare occurrence, since when the aggressor lacks criminal liability, in many cases there is also no harm caused to the social-legal order.

social-legal order, but also the impact of the act of private defense on that order. In this context, the special case of an individual's resistance to an illegal arrest by an agent of the state is relevant. In such a case, it is possible that despite the aggressor's culpability and the patent infringement of individual autonomy, not only does the factor of preserving the social-legal order not operate to support private defense, it in fact invalidates it, in order to protect the social-legal order.²⁰³

In case number 5, the factors of the aggressor's culpability and the social-legal order are present, but the factor of the attacked person's autonomy is absent. Two typical cases follow this pattern. The first is a case in which an interest of the state or society requires protection, and it has just been addressed. The second case is where the attacked person himself gave his prior consent to the attack against him, but his consent does not negate the illegitimacy of the aggressor's attack under the definition of the specific offense. But I submit that when the victim gives his prior consent to the attack, his autonomy cannot be described as infringed as a result of the attack she agreed to, at least not substantially. Consequently, and also in consideration of the harm to the social-legal order resulting from any injury to the aggressor by the person he attacked, it is desirable and appropriate to rule out private defense in such a case, at least in the sense of self-defense (as distinct from the defense of another person). It can be rejected on the basis of the necessity requirement as well as the attacked person's ability to withdraw her consent; alternatively, such a case can be treated the same as cases in which the attack is the result of the fault of the person attacked.

The essentiality of each of the three factors in the rationale of private defense also provides a solution to the question of *the relative weights of the various factors*. If the rationale for private defense comprised various alternative factors, where the presence of only some would be

203. This is so as long as the policeman does not use excessive force.

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sufficient, an applicable accompanying formula would have to be devised to measure the relative weights of the various factors so that the rationale could hold in cases where one or more of the factors are absent. However, since in my theory of private defense, all the three factors are essential, there is no need to determine an order of preference amongst them, since the absence of any one of them amounts to absolute negation of private defense. These factors can be analogized to vectors with force and direction: private defense only arises when all three work in the same direction, namely, of justification. Thus, our rationale is interested only in the cumulative force of the three factors combined, not any relative and partial force that may emerge from a comparison among them.

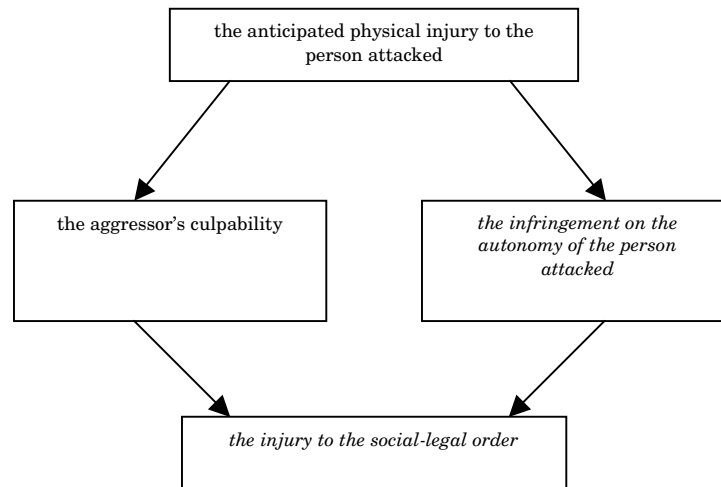
This notwithstanding, if some determination of *the relative weights of the various factors* is nonetheless deemed necessary, then, in my opinion, the primary focus of the justification of private defense is autonomy. My view rests on a perception of private defense as *private* in the fullest sense of the word: it is not only a defense performed by a *private individual* (as distinct from institutionalized state defense), but it is also the defense of *the private person* attacked—of her autonomy. This can explain why certain scholars regard private defense (that includes self-defense at its core) as a natural right. Although the protection of the social-legal order involved in an act of private defense constitutes an important and necessary element in justifying private defense, the autonomy of the individual attacked functions as an even more important factor: the absence of injury or danger to the attacked person's autonomy undermines the basis for an exception of any kind of self-defense, whether justification in nature or only excuse. The relevant criminal law defense in such a situation is the use of force to prevent a crime, where the protection of the social-legal order is the central objective. Indeed, this case does not involve private defense in the usual sense of the term, but, rather, as the prevention of an offense by an individual.

As far as the aggressor's culpability is concerned, the principal importance of this factor for the justification of private defense is in providing a moral and legal foundation for the preference of the interest of the person attacked over that of the aggressor. In any event, this factor is less important and powerful than the autonomy of the attacked individual. A lack of injury to her autonomy makes redundant a priori any question of the aggressor's culpability, since private defense's primary objective is protection of autonomy, not punishment of the aggressor.

This is the outcome that results when private defense is examined in isolation. If we look for its uniqueness as compared to the two other criminal law defenses of compulsion—necessity and duress—the social-legal order and the aggressor's culpability take precedence.

In order not to leave this discussion of the individual force of the various factors with an incorrect and misleading impression of a possible hierarchy amongst them in the context of our rationale, I shall stress again the absolute necessity of each of the three factors in justifying private defense. As noted, private defense constitutes the defense of both an individual attacked and the social-legal order in the very specific (and restricted) way of using force against an aggressor who bears criminal responsibility for his attack.

Finally, it is necessary to consider the *internal influences of the various factors that act concurrently to justify private defense*. Some of these influences were already mentioned above, and here I shall attempt to present the full picture:

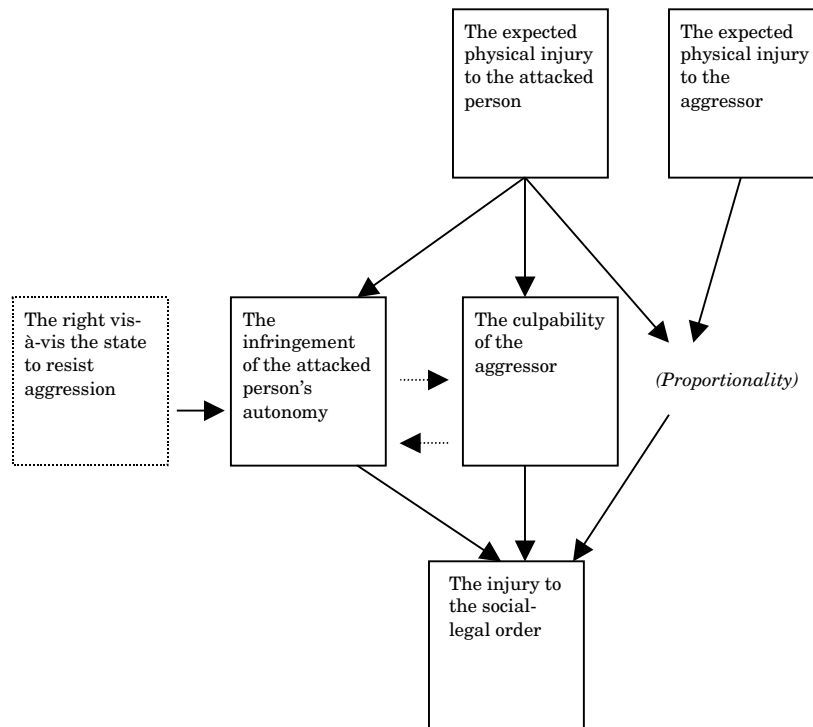


*The arrows express the existence of any sort of impact and their length is insignificant.

To begin with, a few clarifications are in order. Regarding the influence of the severity of the anticipated injury to the person attacked on the factor of the aggressor's culpability, what is relevant is the extent of the aggressor's culpability in the specific situation. If his culpability is to be the basis of a reduction in the value of the aggressor's interests, it is essential to take the nature and extent of that culpability into full account, including the aggressor's consideration of the objective components of the attack: the same rule will not be applied for a deliberate slap on the cheek as for a deliberate lethal shooting. Furthermore, there is a direct correlation between the anticipated injury to the attacked person and the infringement of her autonomy. Clearly, an attempt to cause severe physical injury to her infringes on her autonomy more significantly and seriously than an attempt to slightly scratch her. Similarly, an attempt to inflict a long series of blows to her impairs her autonomy more than an attempt to push her out of line. Finally, the above diagram demonstrates how the anticipated physical injury to the person attacked translates, by way of the factors of the autonomy of the person attacked and the aggressor's culpability, into an additional important factor—injury to

the social-legal order. If there were no injury to the autonomy of the person attacked and no culpability on the part of the aggressor, the physical injury to the person attacked might have stood alone and isolated. However, in modern society it is regarded as a definite interest of society as a whole, and this lies at the foundation of viewing the attack as an injury to the public interest, of protection of the social-legal order.

The above diagram must be completed with the addition of two more factors: the anticipated physical injury to the aggressor (as the result of an act of private defense) and the secondary factor of the attacked person's right vis-à-vis the state to resist aggression.



*No significance to the length of the arrows.

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As mentioned, the right vis-à-vis the state to resist aggression serves to reinforce the consideration of autonomy. The anticipated physical injury to the aggressor (if defensive force is used against him), alongside the anticipated physical injury to the attacked person (if defensive force is not exerted), impacts the social-legal order consideration via the requirement for proportionality: a non-proportionate injury to the aggressor not only fails to protect the social-legal order, it actually significantly harms it.

In addition to these primary influences between the various factors, other interconnections also exist, including the reciprocal relationship between the autonomy of the person attacked and the aggressor's culpability (indicated by the broken arrows in the diagram above). The greater the aggressor's culpability, the greater the infringement of the autonomy of the person attacked. Even when the aggressor acts inadvertently, without culpability on his part, the autonomy of the person attacked is infringed. This injury increases in seriousness commensurate with the mental state of the aggressor: from negligence, to awareness, to intention. For the infringement of the attacked person's autonomy is not only generated by the objective physical injury she sustains: the individual's sense of security is also a factor in the infringement, and it diminishes in direct correlation to the gravity of the mental state of the aggressor, reaching rock bottom with an aggressor who intends to kill the person he is attacking. Recalling the moral significance of recognizing individual autonomy—namely, that no person (the person attacked) should be exploited by another person (the aggressor) in order to achieve the latter's goals—obviously the exploitation increases in accordance with an increase in the severity of the mental attitude of the exploiter (the aggressor). And vice versa: the attacked person's autonomy has an effect on the aggressor's culpability. The greater the aggressor's infringement on the victim's autonomy (with the infringement measured in a direct relation to the anticipated physical injury to the latter), the greater the

aggressor's extent of culpability, contingent on his awareness (or intention to perpetrate) such infringement.²⁰⁴

CONCLUSION

The rationale for private defense proposed in this article incorporates and rests on all of the following rationales justifying private defense: defense of the attacked person's autonomy (which encompasses her right vis-à-vis the state to resist aggression); consideration of the aggressor's culpability; preservation of the social-legal order; and the framework of the balance of interests and choice of the lesser evil (or, more appropriately, of the best possible good). Private defense encompasses both the defense of the autonomy of a person under attack and the protection of the social-legal order, by means of allowing the use of force against an aggressor who is criminally responsible for his attack. The main innovations of this rationale stem from both the integration of all the important factors in justifying private defense and the structure of this integration. The theoretical foundations and detailed reasoning for the rationale are set forth in the discussions of the different theories as independent rationales. Moreover, the general discussions of the distinctions between justification and excuse and between an offense and a defense also offer significant support for the proposed rationale.

This proposed rationale provides a useful tool and foundation not only for legislating new, better law, but also for interpreting existing law. Private defense is typically considered to be a general norm, applicable to a large number of specific norms—namely, the various offenses. By its very nature as a general norm, it cannot be formulated on the basis of specific and rigid components. It requires a general foundation with flexible content and conditions,

204. The reference here is not to culpability in the narrow, technical sense of the mental element of the criminal offense, but in the broader sense of responsibility that serves as both a moral and legal foundation for a reduction in the value of the aggressor's interests.

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exemplified by the concepts of necessity, proportionality, and reasonability. Such concepts leave broad discretion to the courts when deliberating on the merits of a case. Therefore, not only must these norms be formulated as law, it is also vital to analyze and inquire into their foundations and underlying rationales. Such in-depth analysis, as a sort of detailed “commentary,” assists the courts in giving meaning to these norms and perhaps even the public at large in deciding on courses of action. In the final analysis, the true test of the rationale is the quality of the solutions it supplies for the different issues that arise in the context of private defense, and this rationale can produce good and viable solutions.²⁰⁵

Arguably, the disadvantage of the proposed rationale is that it is complex and complicated relative to the alternatives. Indeed, a complex rationale cannot provide unambiguous and clear solutions to all the issues of private defense, as do the simpler rationales that have been presented. However, it should nonetheless be preferred, for its precision, its faithful reflection of the true nature of private defense, and its ability to lead to desirable legal results for the characterization of private defense. Contending with difficulties in formulating a legal solution, or even the complete lack of a decisive answer for a particular issue, is preferable to arriving at an easily-produced, clear but mistaken answer.²⁰⁶ In the balance of simple and mistaken, complicated and correct—correct must prevail.

205. A discussion of these solutions is beyond the scope of this article, but in my forthcoming book, *Self-Defence in Criminal Law*, supra note 15, I develop and discuss in detail the solutions reached under this rationale (inter alia: necessity, proportionality, immediacy, retreat, mental element, defense of another, defense of property, defense of the dwelling, putative self-defense, excessive self-defense, earlier guilt, battered women, etc.).

206. Justifying the shooting of a child in order to save the apples he was stealing is an example of such a clear but mistaken answer.