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I. INTRODUCTION

The principle that a defense may be limited or denied because the actor has in some way brought about its conditions is followed in German as well as American Law. According to German systematization, defenses involving such a limitation fall into four categories: self-defense, justifying necessity, excusing necessity, and voluntary intoxication.

Other papers presented at the symposium have pointed out that the German concept of crime is based on three elements: definition of the offense, wrongfulness and culpability.[1] Self-defense precludes an act, which nominally meets the definition of an offense, from being considered unlawful. Necessity is a ground of justification if a crime is committed to protect superior interests (or to bring about a "lesser evil"). However, necessity is a ground of excuse if no superior interests are protected but the actor nevertheless cannot be expected to conform to the law. Voluntary intoxication, on the one hand, may negate an actor's culpability. On the other hand voluntary intoxication has itself been made an offense in Germany.[2] Discussing the four categories where an actor causes the conditions of his own defense provides a useful opportunity to deal with the three elements of the German concept of crime.

This paper will not only explain and discuss the solutions German law has to offer, it will in addition comment on Professor Robinson's admirable paper on the subject.[3] Professor

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1. *See, e.g.*, Hassemer, *Justification and Excuse in Criminal Law: Theses and Comments*, 1986 B.Y.U. L. Rev. 573. *See generally* Naucke, *An Insider's Perspective on the Significance of the German Criminal Thoery's General System for Analyzing Criminal Acts*, 1984 B.Y.U. L. REV. 305.

2. STRAFGESETZBUCH [StGB] § 323a (W. Ger.).

3. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Doctrine*, 71 VA. L. REV. 1 (1985).

Robinson has summarized and severely criticized the different approaches taken by American criminal law in dealing with an actor who creates the conditions of his own defense. He tries to make up for the discrepancies and the lack of consistency in American law by offering a comprehensive theory which provides general and consistent results. In a nutshell, Professor Robinson proposes to justify or to excuse the actor even though he has caused the conditions of his own defense, but to punish him for his conduct which caused such conditions.[4]

Professor Robinson's rigorous effort to achieve system and harmony is unusual in American criminal theory. It breaks away from the traditional common law method which tends to move from the particular to the particular and which is dominated by pragmatic and problem-oriented discussions. The search for generalization and systematization as demonstrated by Professor Robinson's theory is a characteristic feature of the German criminal law method. Following the civil law tradition, German legal thinking is typically centered around general principles and abstract concepts. However, it should be noted at the outset that in German criminal law no general theory exists concerning the treatment of the actor who has caused the conditions of his own defense. The problem is approached differently in each of the four categories where it arises. The idea that an actor should be punished for conduct that causes conditions which eventually justify or excuse his crime has been held to be the basis of criminal responsibility in some German cases, but this idea has never been developed to serve as a uniform theory, such as the theory suggested by Professor Robinson.

II. Provocation of Self-Defense

While modern American penal codes provide more or less detailed rules that limit or deny the right of self-defense in cases when the actor provoked the attack of the other party,[5] the German Criminal Code does not address the problem. According to the civil law tradition, the provisions of the German Criminal Code tend to be comparatively short, phrased in abstract and general language outlining only important legal concepts. Thus, the German provision on self-defense consists of no more than

4. Robinson, *supra* note 3, at 27.

5. See statutes cited by Robinson, *supra* note 3, at 4-8, 14-17.

thirty words.[6] This legislative technique allows for considerable freedom to interpret and extrapolate from the gist of the legal concept.

Even though provocation of self-defense is not covered by the German Criminal Code, there is no doubt that it is a ground for limiting or denying the defense. Generally, a distinction is made between a provocation when it is the actor's purpose to provoke an attack (*Absichtsprovokation*) and other kinds of provocation for which the actor must be held responsible (*schuldhafte Provokation*).

A. Provocation: Purposely Promoting an Attack

A person acts purposely with respect to a provocation if it is his object to bring about an attack by the other party involved. Courts and a number of legal scholars agree that such provocation precludes self-defense altogether, even in cases where the provoking conduct was not unlawful.[7] There are two main reasons for this limitation.

First, it is argued that an actor whose sole purpose is to provoke an attack does not have any intent to defend himself (*kein Verteidigungswille*).[8] In German criminal law, intent to defend is a necessary requirement of self-defense. According to the prevailing theory, the wrongfulness of a criminal act is expressed not only by the harm it causes (*Erfolgsunwert*), but also by the wrongful quality of the act itself (*Handlungsunwert*).[9] Part of the wrongfulness of the act is the actor's state of mind. The

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6. Section 32 of the German Criminal Code, StGB § 32 provides:

Sec. 32 Self-Defense

(1) Whoever commits an act required by self-defense does not act wrongfully.

(2) Self-defense is the defense necessary to prevent a present unlawful attack against oneself or against another.

7. *See* Judgment of Feb. 9, 1939, Reichsgericht, Ger., 9 DEUTSCHES RECHT 364 (1939); Decisions of the Bundesgerichtshof reported by Dallinger, *Aus der Rechtsprechung des Bundesgerichtshofes in Strafsachen,* 8 MONATSSCHRIFT FÜR DEUTSCHES RECHT 335 (1954) [hereinafter Dallinger, *Rechtsprechung des Bundesgerichtshofes*]; 1 R. MAURACH & H. ZIPF, STRAFRECHT: ALLGEMEINER TEIL § 26, Marginal No. 41 (6th ed. 1983); A. SCHÖNKE, H. SCHRÖDER, T. LENCKNER, P. CRAMER, A. ESER & W. STREE, STRAFGESETZBUCH: KOMMENTAR § 32, Marginal No. 54 (21st ed. 1982) [hereinafter A. SCHÖNKE & H. SCHRÖDER]; Roxin, *"Sozialethische Einschränkungen" des Notwehrrecht* 93 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 68, 85-86 (1981).

8. D. KRATZSCH, GRENZEN DER STRAFBARKEIT IM NOTWEHRRECHT 39 (1968); Dallinger, *Rechtsprechung des Bundesgerichtshofes, supra* note 7, at 335.

9. H. JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 263 ff. (3d ed. 1978); R. MAURACH & H. ZIPF, *supra* note 7, § 25, Marginal Nos. 24-29.

wrongfulness of the act is of a different gravity when the actor kills someone intentionally than when he does so negligently. The same applies with respect to grounds for justification. To hold an act lawful (i.e., not wrongful) because of self-defense, it is not sufficient that causing the harm (considered without reference to the actor's mental state) is justified under the circumstances. It is necessary that the actor acts with the intent to defend himself.

However, the argument that the intent to defend is lacking when the actor purposely has provoked an attack may not be warranted. An actor who is attacked by the provoked aggressor may be quite willing to protect himself from the blows he receives.[10] Whether (and to what extent) the provoking actor, in addition to his intent to attack the person he has provoked, has an intent to defend himself against the provoked attack, obviously depends on the circumstances of the individual case—e.g., the force of the aggression and the strength of the actor.

Second, it is argued that to allow an actor to defend himself after he has acted with the purpose of provoking an attack would be an abuse of rights.[11] "Abuse of rights" (Rechtsmissbrauch) is a general concept of German law intended to limit or deny the exercise of rights in cases where they do not deserve protection.[12] It must be asked, however, whether an actor should be prohibited from defending himself against an attack that might seriously harm or endanger his life and that, in spite of having been provoked, is illegal.[13] If the provocation is a criminal act, e.g., an assault or a criminal libel, the actor can be punished for it. To remove his right of self-defense and thus hold him responsible for striking back would result in his being punished twice for the provocation.

It is interesting to note that some German scholars base the criminal responsibility of the actor, whose purpose it was to provoke an aggression, on a theory that closely resembles the one advocated by Professor Robinson. These scholars maintain that defense against a provoked attack is justified, but that the actor

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10. *See* Bertel, *Notwehr gegen verschuldene Angriffe*, 84 [ZStW] 1, 3 (1972); Bockelmann, *Notwehr gegen verschuldete Angriffe*, in FESTSCHRIFT FÜR RICHARD M. HONIG 19, 25 (B. Grossfeld ed. 1970).

11. Judgment of June 7, 1983, Bundesgerichtshof, Senat [Bundesgerichtshof], W. Ger., 3 NEUE ZEITSCHRIFT FÜR STRAFRECHT 452 (1983); J. WESSELS, STRAFRECHT: ALLGEMEINER TEIL 90 (14th ed. 1984).

12. G. FLETCHER, RETHINKING CRIMINAL LAW 873 (1978).

13. H. JESCHECK, *supra* note 9, at 278; Bockelmann, *supra* note 10, at 29.

is responsible for having provoked the attack.[14] According to German, or rather Latin, terminology, the actor's self-defense is *actio illicita in causa* (an act originating from an illegal cause).

This theory, which has not been adopted by German courts in cases involving provocation of self-defense, may be questioned from several points of view. In cases where the provocation itself is judged to be an illegal attack, the provoked party has a right of self-defense. The actor who has provoked the defense of the other party would not be justified in fighting back. Thus, it would not be necessary to make his provocation the basis of punishment. If, however, the provocation does not amount to an illegal attack, it seems questionable that it could be taken as a basis of punishment just because its purpose was to make a justified defense possible. In other words, the act justified by self-defense cannot become illegal only because the actor had it in mind when he provoked the attack of the other party.[15]

In addition, the *actio illicita in causa* theory can hardly be reconciled with the generally accepted distinction between unpunishable preparation and punishable attempt.[16] It would not make sense to hold that the actor's defense against the provoked aggression constitutes attempt, for this defensive act is justified according to the *actio illicita in causa* theory and thus cannot be punished. Thus, only the earlier provoking conduct could constitute an attempt.[17] Following this concept, a person who argues with and teases his opponent with the intent of killing him in self-defense as soon as the opponent loses his patience and begins a fight, must be held liable for attempted murder or manslaughter. However, in such a situation any violence depends on the opponent who is free to decide whether or not to engage in a fight. Therefore, classifying the teasing and arguing as attempt would hardly be compatible with the German theory of attempt which requires that a legally protected interest be placed in imminent danger.[18]

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14. *See* J. BAUMANN, STRAFRECHT: ALLGEMEINER TEIL 304 (8th ed. 1977); E. DREHER & H. TRÖNDLE, STRAFGESETZBUCH § 32, Marginal No. 23 (41st ed. 1983); A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 32, Marginal No. 57; Bertel, *supra* note 10, at 14 ff.

15. Bockelmann, *supra* note 10, at 26 ff.; Roxin, *Die provozierte Notwehrlage*, 75 ZSTW 541, 546 ff. (1963).

16. Roxin, *supra* note 15, at 553 ff.

17. *See, e.g.*, Bertel, *supra* note 10, at 21 ff.; Lenckner, *Notwehr bei provoziertem und verschuldetem Angriff*, GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 304 ff. (1961).

18. German theory is comparable to the American requirement that there must be a

Further difficulties arise with the *actio illicita in causa* theory in cases of complicity.[19] For example, an actor, who has sent a letter full of provocations and insults to an enemy, happens to meet an old friend. He tells his friend about the letter and asks him for a stick he can use "to defend himself" when he goes to visit the enemy. The friend gives him the stick. According to the *actio illicita in causa* theory, the actor and his friend will be justified if the actor beats the enemy with the stick while defending himself against the provoked attacks. The actor, of course, may be punished for having written the letter and thus having caused the situation which gave him a right of self-defense. The friend, however, who was an abettor in the fight, will escape punishment even though he may have acted with the same evil purpose as did the actor. This seems to be a preposterous consequence of the *actio illicita in causa* theory.

The criticism that has been leveled against the *actio illicita in causa* theory applies as well to Professor Robinson's theory. Professor Robinson did not address the problems of attempt and complicity in his paper. He also did not attempt to resolve his theory's contradictory treatment of the wrongfulness of defensive conduct against provoked aggression. The theory postulates that such conduct is justified (it is only causing the provocation that is wrongful). Yet the conduct is tainted by wrongfulness because it constitutes the consummation of the planned crime. As long as Professor Robinson states his theory in general language, it sounds plausible. However, once tested by asking how it helps to solve individual problems, its weaknesses become apparent.

Looking again at German law, it seems that neither the theory that the self-defense should be excluded in cases where it is the actor's purpose to provoke an attack nor the *actio illicita in causa* theory is convincing. Therefore, we must acknowledge a right of self-defense even though the actor purposely provoked the attack. This is the minority view among German legal scholars.[20]

While an actor whose has the purpose of provoking an attack is thus not entitled to a full justification, he may have a

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dangerous proximity to success. As to American law, see W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 432-38 (1972).

19. Roxin, *supra* note 15, at 551 ff.

20. H. JESCHECK, *supra* note 9, at 278; A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 32, Marginal Nos. 56 ff.; G. Spendel, in STRAFGESETZBUCH: LEIPZIGER KOMMENTAR § 32, Marginal No. 296 ff. (10th ed. 1982).

limited right to self-defense. Such a defense should be permitted only if there is no possibility of retreat (*Ausweichpflicht*). German law differs from the law of most American jurisdictions in that even in cases involving deadly force, retreat is not required before resorting to self-defense.[21] This comparatively rigid principle is justified by the argument that a person who defends himself protects not only his own interests but also protects the legal order as such against an illegal invasion.[22] If, however, someone has deliberately provoked an attack, he cannot properly claim he is defending law against lawlessness. In addition, his individual interests deserve protection only to a limited extent. Therefore, in cases where the actor has provoked the attack, it seems reasonable to establish a duty to retreat.[23] The questions remain, however, 1) whether the actor is required to evade the provoked attack only as long as it is safe to do so, and 2) whether he must retreat even if this appears to be disgraceful to him.

B. Provocation: Not Purposely Induced

The problem of provocation is not limited to cases in which it is the actor's purpose to provoke an attack. Provocation is also taken into consideration if it is caused by other means for which the actor should be held responsible. German courts and legal scholars are in agreement that in such cases the right to self-defense should be limited but not completely denied.[24] Again, the actor has a duty to retreat. Only if he cannot evade the attack may he defend himself against the aggressor, and he may only use moderate force in protecting his person. At first he should limit his defense to shielding his body against the attack even though he may suffer minor injuries. Only if he cannot manage to protect himself in this way may he resort to dealing

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21. As to the duty to retreat in American Law, see W. LAFAVE & A. SCOTT, *supra* note 18, at 395-96.

22. *See* H. JESCHECK, *supra* note 9, at 256; A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 32, Marginal No. 1; Eser, *Justification and Excuse*, 24 AM. J. COMP. L. 621, 632 (1976).

23. *See* H. JESCHECK, *supra* note 9, at 278; A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 32, Marginal No. 56.

24. Judgment of Dec. 12, 1975, Bundesgerichtshof, W. Ger., 26 BGHSt 256; Judgment of June 14, 1972, Bundesgerichtshof, W. Ger., 24 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 356; R. MAURACH & H. ZIPF, *supra* note 7, § 26, Marginal Nos. 46 ff; A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 32, Marginal Nos. 58 ff.

blows himself. Restricting the actor who is responsible for provoking the attack allows for flexible solutions to different situations by taking into account the seriousness of the actor's responsibility as well as the degree of force applied by the attacker.

The question of when an actor should be responsible for a provocation has stirred much controversy. In the past, courts have tended to restrict the availability of defenses in such circumstances by using a broad concept of responsibility. In several cases they have held that even lawful conduct may amount to a provocation for which the actor is responsible. A good example is the "barrack-case" decided by the Bundesgerichtshof in 1961.[25] In this case the defendant and another man (*M*), who occupied adjoining rooms in a temporary housing unit, had been involved in an altercation started by *M*. After the quarrel the defendant returned to his room, armed himself with a knife as protection against possible future attacks, and went out. Upon his return he was again attacked by *M* while trying to enter his own room and to protect himself he stabbed *M*. The Bundesgerichtshof held that because the defendant returned instead of waiting until *M* had left, he was responsible for having provoked *M*'s new attack. Therefore, the court denied the defendant the right to defend himself with a knife.

The decision was severely criticized for imposing upon the defendant a duty to yield to violence and terror.[26] Legal scholars justifiably advocated that the actor should be responsible for a provocation only if his conduct was illegal.[27] The Bundesgerichtshof has, to some extent, heeded this criticism in a series of more recent decisions that tend to liberalize the right of self-defense.[28] The court did not go so far as to restrict the concept of provocation to illegal conduct. But it took a step in the right

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25. Judgment of Aug. 1, 1961, Bundesgerichtshof, W. Ger., 15 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 308 (1962).

26. *See* Baumann, *Rechtsmissbrauch bei Notwehr,* 16 MONATSSCHRIFT FÜR DEUTSCHES RECHT 349 (1962); Bockelmann, *supra* note 10, at 21; Schröder, *Anmerkung,* 1962 JURISTISCHE RUNDSCHAU 187.

27. H. JESCHECK, *supra* note 9, at 278; A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 32, Marginal No. 59; Roxin, *supra* note 7, at 90; Schumann, *Zum Notwehrrecht und seinen Schranken,* 19 JURISTISCHE SCHULUNG 559 (1979).

28. Judgment of July 24, 1979, Bundesgerichtshof, W. Ger., 33 NJW 2263 (1980); Judgment of Jan. 12, 1978, Bundesgerichtshof, W. Ger., 27 BGHSt 336, 337; Judgment of Dec. 12, 1975, Bundesgerichtshof, W. Ger., 26 BGHSt 256, 257; Judgment of May 15, 1975, Bundesgerichtshof, W. Ger., 26 BGHSt 143, 145.

direction by holding that conduct conforming to generally accepted social standards (*sozialethisch nicht zu missbilligendes Vorverhalten*) does not constitute a provocation for which the actor should be held responsible.[29] This leaves open the question of the apporpriate treatment of provoking conduct which is neither illegal nor in conformity with generally accepted social standards.

The new development that carefully relaxes limitations on the right of self-defense may perhaps best be illustrated by two cases decided by the Bundesgerichtshof in 1978 and 1979. In the first case the court found the defendant, who had not paid a debt on time, was not responsible for having provoked a battery by the disappointed creditor.[30] The non-payment was certainly not in conformity with the law. The court reasoned, however, that the battery could not be considered a reasonable (*adäquate*) and foreseeable consequence of the non-payment.

In the second case the defendant, an eighteen-year-old high school student, was constantly harassed and beaten by an older and much stronger fellow student.[31] One day, when the defendant was again attacked and severely beaten, he killed the other student with a knife he was carrying in his pocket. The court below found the defendant guilty of negligent homicide. It denied self-defense with the interesting argument that the defendant had not provoked the attack but rather had provoked his own defense by carrying the knife although expecting further beatings.[32] The Bundesgerichtshof reversed and acquitted the defendant. It held that the court below had turned the concept of self-defense upside down when it required the defendant to leave the knife at home, thus restricting his role in the expected fights to that of a victim. The court further pointed out that the student could not have been obliged to retreat or to ask his teachers for help because this would have made him a coward in the eyes of his teachers and fellow students.

It could be argued that the liberalization of self-defense opens the door to an "ethic of homicide" (*Totschlagermoral*). Yet, such an argument would draw a distorted picture of the emotional state of the attacked person who, in spite of the pro-

29. Judgment of Jan. 12, 1978, Bundesgerichtshof, W. Ger., 27 BGHSt 336.

30. *Id.*

31. Judgment of July 24, 1979, Bundesgerichtshof, W. Ger., 33 NJW 2263 (1980).

32. *Cf.* A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 32, Marginal No. 61a (regarding the provocation of one's own defense).

voking conduct, might find himself in an emergency situation. Under such circumstances the attacked person should not be regarded as a subject whose conduct should be closely restricted by criminal law. He is in effect a victim deserving some freedom in defending himself against an attack that, notwithstanding the provocation, is unlawful. Today the principle of culpability (Schuldprinzip) generally serves to restrict criminal law and to make it more humane. It would be inconsistent with this general policy to construe provocation too broadly, thereby unduly expanding criminal responsibility.[33]

C. *Professor Robinson's Theory: A Comparison*

In comparing German law on provocation for which an actor may be held responsible with Professor Robinson's theory, an important difference emerges. German law takes a flexible approach to the provocation problem in that it requires the actor to retreat whenever possible and, if he cannot retreat, to exercise exceptional moderation in his defense. This is in contrast to Professor Robinson's theory, which gives the actor a full right of self-defense. While it is true that the right of self-defense in American law is also based on standards of moderation—i.e., the defense of the attacked person has to be reasonable, deadly force may be used only against an attack of deadly force, and the attacked person must retreat before he may defend himself with deadly force[34]—these standards are applied to both ordinary cases of self-defense and cases involving provocation.

German law takes a different approach by providing for additional requirements only if the actor is responsible for a provocation. It has already been pointed out that, in such cases, the actor may defend himself by fighting back only if shielding his body against the attack is not sufficient and he runs the risk of suffering other than minor injuries. Such a flexible approach seems preferable because it allows for a more careful balancing of the rights and obligations of both the actor, who should exercise special restraint because of the provocation, and the attacker, who deserves some sympathy because of the emotional response to the provocation. Professor Robinson, of course,

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33. Hassemer, *Die provozierte Provokation oder Über die Zukunft des Notwehrrechts*, in FESTSCHRIFT FÜR PAUL BOCKELMANN 225, 243 (A. Kaufmann, G. Bemmann, D. Krauss & K. Volk eds. 1979).

34. *See* W. LAFAVE & A. SCOTT, *supra* note 18, at 391-97.

could argue that he takes into consideration the actor's guilt in causing the provocation when meting out punishment. Yet, he neglects the attacker who remains exposed to the unrestricted defensive actions of the initial actor. Provisions on self-defense and provocation would help not only to set limits of criminal responsibility but would also define the rights and duties to be observed in conflicts between private citizens. It should be added, though, that Professor Robinson can hardly be blamed for not taking a more flexible approach that is carefully gauged to cases involving a provocation since such an approach seems to be unknown in American law.

Some German scholars advocate that the *actio illicita in causa* theory be followed in cases where the actor can be held responsible for having caused a provocation.[35] While major deficiencies in this theory have already been mentioned above, further criticisms exist. The theory allegedly bases the actor's responsibility solely on the provocation. But to evaluate the provocation, the seriousness of the provoked attack and the action taken during the defense must be taken into account. Only by balancing the attack, the defense, and the provocation can the actor's responsibility be properly discerned. Keeping this in mind, it appears a somewhat forced approach to view this problem only through the mirror of the actor's preceding conduct—the provocation—rather than to balance all three factors when deciding upon the actor's available defenses.

III. Justifying Necessity

In German law the problem of an actor creating the conditions of his own justifying necessity is of much less importance than an actor's provocation of self-defense. Like provocation of self-defense, it is not covered by the Criminal Code.[36] There is general agreement that the problem should be solved with the help of principles similar to those used to handle provocation of self-defense.

A. Provoking Conditions of An Emergency

If it was the actor's purpose to "provoke" the conditions of an emergency—certainly a very rare occasion—he is not justified

35. E. Dreher & H. Tröndle, *supra* note 14, § 32, Marginal No. 24; A. Schönke & H. Schröder (T. Lenckner), *supra* note 7, § 32, Marginal No. 60.

36. *See* StGB § 34.

in protecting his own interests by harming those of someone else.[37] Whoever has purposely endangered his own interests cannot at the same time claim that he deserves better protection than others affected by his action. It will be remembered that in cases involving self-defense the actor whose purpose is to provoke an attack does not lose his defense.[38] The different approach taken to cases where the actor purposely creates the conditions of a necessity seems justified since the actor in a situation of necessity does not have to cope with an attack, i.e., an act of another person. Instead, he can steer the course of events without intervention by a third party.

B. Responsibility for Necessity When Conditions are Not Purposely Caused

Except for unusual cases involving a purposely provoked emergency, the defense of justifying necessity is available to the actor who has brought about its conditions in a way for which he can be held responsible.[39] It would be wrong to assert, as with self-defense, that the actor has forfeited the protection of his interests or that he is under a duty to suffer the risk and danger he has caused.[40] For example, a mountaineer cannot be forbidden to protect himself against a sudden snowstorm by breaking into a cabin because he had carelessly disregarded prior warnings concerning changing weather conditions.[41] To hold otherwise would require the actor to sacrifice his life because of his carelessness. However, the actor's responsibility for causing the conditions of his defense is a factor to be taken into account when balancing his interests against those of the other party involved.[42] The more serious the actor's responsibility, the more

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37. E. DREHER & H. TRÖNDLE, *supra* note 14, § 34, Marginal No. 6; W. KÜPER, DER "VERSCHULDETE" RECHTFERTIGENDE NOTSTAND 32-33 (1983); R. MAURACH & H. ZIPF, *supra* note 7, § 27, Marginal No. 47; A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 34, Marginal No. 42.

38. *See supra* text accompanying note 20.

39. Judgment of March 11, 1927, Reichsgericht, Ger., 61 Entscheidungen des Reichsgerichts in Strafsachen [RGSt] 255; Judgment of Jan. 27, 1976, Bundesgerichtshof, W. Ger., 29 NJW 680 (1976); E. DREHER & H. TRÖNDLE, *supra* note 14, § 34, Marginal No. 6; H. JESCHECK, *supra* note 9, at 291-92; R. MAURACH & H. ZIPF, *supra* note 7, § 27, Marginal No. 47; A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 34, Marginal No. 42; *see also* G. FLETCHER, *supra* note 12, at 798.

40. *See, e.g.*, 1 K. BINDING, HANDBUCH DES STRAFRECHTS 778 (1885); Traeger, *Die strafbare Handlung*, 92 DER GERICHTSSAAL 322 (1926).

41. *See* T. LENCKNER, DER RECHTFERTIGENDE NOTSTAND 104 (1965).

42. W. KÜPER, *supra* note 37, at 32 ff; Dencker, *Der verschuldete rechtfertigende*

moderation and restraint he must exercise in defending his interests.

C. Actio Illicita In Causa

Some German legal scholars have based the responsibility of the actor who created the conditions of a justifying necessity on the *actio illicita in causa* theory.[43] Accordingly, it is argued that the conduct creating the conditions of the necessity rather than the act committed in necessity should be the foundation of the actor's responsibility. A few German courts have followed this theory when dealing with necessity.[44]

The *actio illicita in causa* theory, however, encounters the same difficulties in cases involving justifying necessity as it did in cases involving provocation of self-defense. Again, it must be asked whether the approach taken by this theory is necessary or advisable. The main question to be answered when deciding the actor's responsibility is how the conflicting interests are to be balanced. It is unclear what would be achieved by shifting the main focus onto the actor's preceding conduct rather than dealing directly with these questions.

There is still another hurdle the *actio illicita in causa* theory must pass when justifying necessity is involved. As has been demonstrated with provocation of self-defense, the conduct creating the justifying conditions would appear to constitute an attempt of the intended crime.[45] This may entail an expansion of criminal liability. The tank truck case, decided by the High State Appellate Court of Bavaria in 1978, illustrates that similar problems exist if the *actio illicita in causa* theory is followed in cases involving justifying necessity.[46]

In that case a tank truck carrying fecal matter entered a dirt road. When the driver recognized that the road was too narrow for the heavy vehicle and that it was about to slide into an adjacent ditch, he emptied the tank by pumping its contents

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Notstand: BayObLG NJW 1978, 2046, 19 JURISTISCHE SCHULUNG 779, 780 (1979).

43. W. KÜPER, *supra* note 37, at 42 ff.; A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 34, Marginal No. 42; Dencker, *supra* note 42, at 781 ff.

44. Judgment of May 26, 1978, Bayerisches Oberstes Landesgericht, 31 NJW 2046 (1978); Judgment of Feb. 26, 1970, Oberlandesgericht, Hamm, 17 VERKEHRSRECHTLICHE MITTEILUNGEN 86 (1970); *see also* Judgment of Oct. 10, 1968, Bundesgerichtshof, W. Ger., 36 VERKEHRSRECHTLICHE SAMMLUNG 23 (1969).

45. *See supra* text accompanying note 17.

46. Judgment of May 26, 1978, Bayerisches Oberstes Landesgericht, 31 NJW 2046 (1978).

onto nearby fields. Thus managing to save the truck. The court held that the driver had intentionally violated a provision of the Waste Disposal Act, but that the violation was justified by necessity because the damage caused to the fields was minor in comparison to the potential danger of losing an expensive truck. The driver, however, was found guilty of having negligently deposited waste.[47] The court followed the *actio illicita in causa* theory by holding the driver responsible for having disregarded the risk he was going to cause to the nearby fields when he entered the dirt road with a truck that was too heavy.

At first glance the reasoning of the court is plausible. Upon closer scrutiny, however, it becomes apparent the court has expanded criminal responsibility. It could not be argued in this case that entering the dirt road amounted to an attempt to deposit waste and that the Court simply replaced punishment for an attempt by punishment for negligence. First, under the circumstances of the case an attempt to deposit waste outside a licensed dumping ground was not punishable. Second, even if an attempt were punishable, the entering on the dirt road could hardly be considered an attempt to dump the fecal matter. The Bavarian Court stated in its opinion that such dumping was legal as long as the driver had the permission of the owner of the field. Since the driver was looking for such a field, it cannot be said that the entering on the dirt road amounted to an attempt. Thus, by holding the driver responsible for negligence the Court considerably expanded criminal responsibility with the help of the *actio illicita in causa* theory. This does not seem desirable, especially if one considers that in German law slight negligence is a sufficient basis for criminal responsibility.

Again, these criticisms of the *actio illicita in causa* theory made in connection with justifying necessity are also relevant to Professor Robinson's theory. It would be interesting to learn whether he intends to expand criminal responsibility with the help of his theory, or if not, how he will manage to avoid undesired expansions. As long as he states his theory in general terms, these questions can only be asked, not answered.

IV. Excusing Necessity

Unlike provocation of self-defense and creating conditions of justifying necessity, the problem of causing the conditions of

47. *Id.*

excusing necessity is explicitly dealt with by the German Criminal Code. This difference is a consequence of historical development.

The Criminal Code denies excusing necessity if the actor has caused present and otherwise unavoidable danger to his life, limb, or liberty and if he could expect to cope with that danger (*Zumutbarkeit*).[48] To deny the excuse because the actor has created its conditions is in obvious contrast to the rule followed in cases involving justifying necessity when the actor has not acted purposely.

This difference may be justified by the different considerations upon which grounds for justification and grounds for exculpation are based. In cases involving justifying necessity the main focus is always on the balancing of interests even though the actor may be held responsible for having brought about the conditions of his defense. This balancing of interests is an approach that is typical of grounds for justification.[49] The actor's responsibility for having caused the conditions of his defense is only of secondary importance. Grounds for exculpation, on the other hand, are based on the idea that the actor is under such exceptional emotional pressure that it is impossible for him to conform to the law.[50] If, however, an actor is responsible for having caused the conditions of a ground of exculpation, it can be argued that he should feel less serious pressure to avoid the danger.[51] To put it in moral terminology, the actor who is not free from responsibility does not deserve to be excused.[52] Therefore, the Criminal Code properly provides that the actor who has brought about the danger to his life, limb, or liberty shall not be exculpated by excusing necessity. The Code allows, however, for considerable mitigation of punishment because the actor who caused the conditions of an excusing necessity may still have been in an extraordinary psychological condition.[53]

The Criminal Code denies excuse whenever the actor has simply "caused" the danger. However, strict construction of this concept may lead to undesirable results. An actor might pur-

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48. *See* StGB § 35(1)2.

49. H. Jescheck, *supra* note 9, at 261; R. Maurach & H. Zipf, *supra* note 7, § 25, Marginal Nos. 7 ff.; Eser, *supra* note 22, at 630.

50. H. Jescheck, *supra* note 9, at 386; Eser, *supra* note 22, at 636.

51. H. Jescheck, *supra* note 9, at 392; A. Schönke & H. Schröder (T. Lenckner), *supra* note 7, § 35, Marginal No. 25.

52. G. Fletcher, *supra* note 12, at 798.

53. *See* StGB § 35(1)2.

posely expose himself to danger for reasons not considered morally reprehensible, e.g., enter a burning house to rescue someone. Therefore, courts and scholars have construed the concept of causation to require that the actor could have realized the danger he was going to cause (*Vorhersehbarkeit*), and that his conduct was inconsistent with a legal duty (*Pflichtwidrigkeit*).[54]

The phrase "not conforming to a legal duty" is not always easy to define. A prison escape case decided by the Bundesgerichtshof in 1957 is a good illustration of what difficulties a definition may cause. The case concerned a defendant who returned to the German Democratic Republic (East Germany) although he knew that he was wanted by its authorities for an economic crime committed there. He was arrested while crossing the border. After being detained for some time he managed to escape by killing a warden. The Bundesgerichtshof held that the defendant was not excused by necessity. First, he could have realized that upon his return he might be arrested by East German authorities and exposed to danger of life or limb. Second, he had no legal duty to return to East Germany. Of course, the Court did not intend to impose the duty upon the defendant not to return to East Germany. "Duty" in this context rather means a duty the defendant owed to himself: he should have avoided exposing himself to an unreasonable risk. Therefore, the court reasoned, he should have avoided crossing the border.

The above analysis is in conformity with the Criminal Code which provides that excusing necessity is denied if the actor could be expected to cope with the danger he has caused. The actor who has exposed himself to an unreasonable risk can be expected to tolerate it.

There remains the application of Professor Robinson's theory to excusing necessity. No one in Germany has advocated that an actor be excused, even though he has caused the conditions of an excusing necessity and instead to hold him responsible for his preceding conduct. There was no reason for developing such a theory because the German Criminal Code provides for the alternative approach of directly limiting the concept of excusing necessity. Thus, Professor Robinson's theory cannot be reconciled with the approach taken by the German Code. There

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54. Judgment of Oct. 29, 1957, Bundesgerichtshof, W. Ger., 2 RECHT IN OST UND WEST 33, 34 (1958); Judgment of June 14, 1938, Reichsgericht, Ger., 72 RGSt 249; H. JESCHECK, *supra* note 9, at 392; A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 35, Marginal No. 26.

also seems to be no need for such a theory in German law because the concept of excusing necessity has obviously been limited in a satisfactory way.

V. Voluntary Intoxication

There are considerable differences between German and American law concepts of voluntary intoxication. In the United States voluntary intoxication is a defense if it negates an element of the offense, such as intent, premeditation, or negligence.[55] In Germany, in contrast, intoxication is a defense if it negates the actor's capacity (*Schuldfahigkeit*).[56] The amount of alcohol required to establish incapacity depends on the circumstances of the individual case. German courts tend to consider a blood-alcohol level of about 0.3 percent sufficient.[57]

According to the German approach, an actor lacking capacity due to intoxication who shoots someone cannot be held responsible for the killing. In contrast to the treatment of self-defense and necessity, no mechanism has been devised to preclude a finding of incapacity when the actor has voluntarily caused his condition. However, two other approaches have been developed to hold an actor responsible in spite of his intoxication.

A. Actio Libera In Causa

One approach, *actio libera in causa* (a state resulting from voluntary action), is similar to the theory offered by Professor Robinson. According to this theory the actor is held responsible for voluntarily intoxicating himself and thus, for causing his incapacity.[58] The *actio libera in causa* theory is structured in the same manner as the already mentioned *actio illicita in causa* theory, however, the two theories are not identical. While the *actio illicita in causa* theory emphasizes the wrongfulness of the preceding conduct, the decisive point of the *actio libera in causa*

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55. W. LaFave & A. Scott, *supra* note 18, at 341-51.

56. H. Jescheck, *supra* note 9, at 356; A. Schönke & H. Schröder (T. Lenckner), *supra* note 7, § 20, Marginal Nos. 16-17.

57. Judgment of Dec. 4, 1964, Bundesgerichtshof, W. Ger., 28 Verkehrsrechtliche Sammlung 191 (1965); A. Schönke & H. Schröder (T. Lenckner), *supra* note 7, § 20, Marginal No. 16.

58. Judgment of May 7, 1957, Bundesgerichtshof, W. Ger., 10 BGHSt 247, 251; Judgment of Nov. 23, 1951, Bundesgerichtshof, W. Ger., 2 BGHSt 14, 17; R. Maurach & H. Zipf, *supra* note 7, § 36, Marginal Nos. 54 ff.; A. Schönke & H. Schröder (T. Lenckner), *supra* note 7, § 20, Marginal Nos. 33 ff.

theory is the actor's responsibility in bringing about his incapacity. Unlike the *actio illicita in causa* theory, the *actio libera in causa* theory should be considered an officially recognized principle of German criminal law. The German Criminal Code does not provide for it, but courts and scholars have adopted it.[59]

An *actio libera in causa* offense can be committed either intentionally or negligently.[60] For an actor to be held responsible for an intentional *actio,* he must act intentionally with respect to his intoxication as well as to the contemplated offense. When he commits the contemplated offense, he again must act intentionally. The actor is responsible for negligence if he causes his intoxication intentionally or negligently and if he realizes or could have realized the risk that while in such a condition he might commit an offense.

Professor Robinson obviously follows the same line of analysis. As to particular aspects, however, he sometimes takes a different approach. In his hypothetical, involving a man who gets drunk with the intent to beat his wife to death but while intoxicated kills her without being "aware of the risk that his conduct would kill his wife," Professor Robinson thinks a conviction of murder appropriate.[61] This implies that Professor Robinson is in favor of a murder conviction even though at the time of the beating the man does not have an intent to kill. If the man is not "aware of the risk" he causes to the life of his wife, it cannot be argued that he acts with an intent to kill when he is beating her.

From a German point of view, two objections can be raised against this approach. First, it must be asked whether the absence of an intent to kill at the time of the beating should subject the actor to something like strict liability. Is it really justifiable to say that the actor's culpability is the same regardless of whether he beats his wife with or without an intent to kill? As indicated above, in German law the intoxicated actor can be held responsible for an intentional *actio libera in causa* only if he acts with an intent to kill while he is beating his wife.[62]

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59. Krause, *Probleme der actio libera in causa,* 2 JURISTISCHE AUSBILDUNG 169 (1980).

60. H. JESCHECK, *supra* note 9, at 360 ff.; A. SCHÖNKE & H. SCHRÖDER (T. Lenckner), *supra* note 7, § 20, Marginal Nos. 33 ff.

61. Robinson, *supra* note 3, at 35-36.

62. Judgment of Nov. 23, 1951, Bundesgerichtshof, W. Ger., 2 BGHSt 14, 17; H. JESCHECK, *supra* note 9, at 361.

Second, Professor Robinson obviously makes drinking with intent to kill the basis of the murder conviction. Consequently, he must consider the drinking to amount to attempted murder. He cannot regard the beginning of the beating an attempt to kill because at that time the actor does not have the required intent. On the other hand, to hold someone who is drinking with intent to kill responsible for attempted murder may be inconsistent with the generally accepted distinction between preparation and attempt.[63] Whether the drinking amounts to an immediate danger to the victim depends upon the facts of the individual case.

B. Voluntary Intoxication as an Independent Offense

As has been indicated, German Law also takes another approach to the problem of holding actors responsible for self-induced incapacity. Intoxication has been judged to be so dangerous that it has been made an offense. The German Criminal Code provides that an actor who intentionally or negligently intoxicates himself so that he lacks capacity shall be punished by imprisonment of up to five years if he commits a wrongful act, in that condition.[64]

The offense of intoxication (*Vollrausch*) is distinguished from *actio libera in causa* offenses in that the act of becoming intoxicated constitutes the crime. If the actor intentionally or negligently becomes intoxicated, he is held responsible for placing himself in a condition where he might pose a danger to others.[65]

Critics have pointed out that this is a vague rationale because the danger posed by the actor may be remote and the actor may not even be aware of any danger he might cause.[66] As a consequence of this criticism, some courts and scholars reason that an actor should be held responsible for intoxication only if he could have anticipated that he might become a risk to others.[67] The actor should not be held responsible if he has

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63. H. JESCHECK, *supra* note 9, at 425; A. SCHÖNKE & H. SCHRÖDER (A. Eser), *supra* note 7, § 22, Marginal No. 55; J. WESSELS, *supra* note 11, at 106.

64. *See* StGB § 323a; *see also* G. FLETCHER, *supra* note 12, at 847.

65. Judgment of May 2, 1961, Bundesgerichtshof, W. Ger., 16 BGHSt 124, 125; H. JESCHECK, *supra* note 9, at 363.

66. A. SCHÖNKE & H. SCHRÖDER (P. Cramer), *supra* note 7, § 323a, Marginal No. 1; 2 R. MAURACH & F.-CH. SCHROEDER, STRAFRECHT: BESONDERER TEIL 304 (6th ed. 1981).

67. Judgment of May 7, 1957, Bundesgerichtshof, W. Ger., 10 BGHSt 247; A. SCHÖNKE & H. SCHRÖDER (P. Cramer), *supra* note 7, § 323a, Marginal No. 1.

taken measures to prevent himself from committing an offense while intoxicated. However, this opinion, which tends to prune the offense of intoxication to reasonable proportions, has not been generally accepted.

Finally, it can be argued that the German provision on intoxication is but another instance where the actor is held responsible for causing the conditions of his own defense. To that extent the German approach is not fundamentally different from Professor Robinson's theory. However, the German provision on intoxication differs in that it bases responsibility on the intoxication and the actor's state of mind with respect to that intoxication. Because of this relatively rigid approach, punishment is limited to five years imprisonment.

VI. Conclusion

The comparison of Professor Robinson's theory with German law has revealed interesting similarities in the treatment of methodological problems and practical questions. At the same time, however, differences between the two approaches have become apparent. German law aims at achieving carefully balanced solutions to what are often intricate problems. Professor Robinson places much emphasis on general and consistent answers.

What price must Professor Robinson pay for his theory? The discussion of the multifaceted approach of German law has made it apparent that there are a number of practical and theoretical problems which, as far as could be ascertained, his theory cannot easily solve.

There is still another observation to be made. As pointed out above, Professor Robinson emphasizes generalization and systematization. In his paper, however, he asked whether a jury would be able to understand judicial instructions based on his theory.[68] Professor Robinson answered in the affirmative. Another question, however, is to what extent a jury will actually follow his theory and derive the clear-cut solutions he suggests. Empirical research by Kalven and Zeisel has proved that jurors tend to be very sensitive to the particular facts of individual cases and that jury sentiments play an important role—especially in cases involving self-defense and intoxication.[69] Thus, Professor Robinson's theory would most likely en-

68. Robinson, *supra* note 3, at 54.

69. H. Kalven & H. Zeisel, The American Jury 223-26, 334-38 (1966).

counter difficulties and be watered down when tested in jury trials. It has always been a problem, though, to adapt criminal law to the requirements of the machinery of criminal justice.