The Case for Liberalizing the Use of Deadly Force In Self-Defense

John Q. La Fond*

I. INTRODUCTION

For at least a century the common law of Washington and of virtually every state in the United States has permitted a citizen to use deadly force in self-defense, but only if he was unlawfully threatened, or appeared to be threatened, with death or serious bodily harm.1 Despite growing public fear of violent crime2 and recent statistics which provide a strong empirical basis for that fear,3 almost no state has expanded the common law right to permit a citizen to use deadly force to resist unlawful violence to his person if he was not threatened with death or serious bodily harm.4 It is no longer clear that the common law's

* B.A., J.D., Yale. Professor of Law, University of Puget Sound School of Law. The author gratefully wishes to acknowledge the extraordinary generosity of his colleague, Professor George Nock, who unstintingly shared his extensive research for, and the manuscript of, his forthcoming book, Washington Criminal Law (an invaluable aid to the practitioner) scheduled for publication in 1983 by Butterworth Legal Publishing. The author also is indebted to the invaluable research assistance provided by Ms. Meg Jones-Shelton, J.D., 1982 University of Puget Sound.


3. From 1970 to 1979, according to the Federal Bureau of Investigation's Uniform Crime Reports, the rate of violent crime increased a little more than five percent a year on the average. From 1978 to 1979, the rate increased 10% and in the first half of 1980, it increased 10% over the same period of 1979. Even though the number of serious crimes reported to law enforcement agencies leveled off in 1981 and the crime rate for that year decreased two per cent, the number of violent crimes increased one per cent for that same year. N.Y. Times, August 27, 1982, at A8, col. 1.

4. But see infra note 196.
stringent rules limiting the use of deadly force to instances in which the victim's life may be at stake are in accord with a shifting public value system or are sufficiently protective of the individual in these increasingly violent times.

Recently, Washington courts have applied the traditional common law rules of self-defense in several provocative "hard cases" which test the logic and impact of the traditional rules at the margin and which thereby question the continued vitality of the common law formulation. In attempting both to preserve the formal doctrine of the law governing the use of deadly force in self-defense and to adjust to changing social conditions, these courts have resolved the tension between rule and reality in a very unsatisfactory manner. As a result of these decisions, the basic common law structure of the rules of self-defense remains formally intact, but the specific content and predictive application of those rules no longer make much sense.

This article will set forth the primary theories which might underlie the right of self-defense: necessity, duress, and personal autonomy. It will then examine the common law and the law of Washington governing the use of force in self-defense and demonstrate that both are grounded primarily in the utilitarian theory of necessity, which has as its primary objective the minimization of social loss even at the cost of harm to individual innocent victims. The article then will analyze the inadequate manner in which Washington courts are resolving difficult cases involving the use of deadly force in self-defense.

Finally, this article will argue that the law of self-defense ought to be grounded primarily in the theory of personal autonomy and, accordingly, that the law should be changed explicitly to permit recourse to deadly force by innocent victims against aggressors whenever necessary to defend effectively against unlawful violence. In addition, it will argue that such a shift in underlying theory and explicit reformulation is not necessarily inconsistent with utilitarian objectives and that, in any event and more importantly, such a shift is necessary to insure that the law is congruent with current public values and affords citizens reasonable assurance of preserving their bodily integrity.

II. Theories of Self-Defense

The right of a citizen to use force, including deadly force, in defense of self has strong historical antecedents in English common law. Commentators have noted that different rationales have been suggested to support the right of self-defense and the rules which govern it.

A. Necessity

Most commentators ground the right of self-defense in the common law principle of necessity. Though the common law did not articulate the rationale particularly well, necessity is a general authorizing principle which permits an individual under certain circumstances to do what he must, including intentionally causing harm, in order to avoid an even greater harm. Classic examples of this authorizing rationale abound in the literature. Thus, the common law at a very early date permitted individuals engaged in self-defense intentionally to cause harm to others in order to avoid the imposition of harm on themselves.

Since the doctrine of necessity was essentially based on a utilitarian theory of justice, its overriding objective was to minimize loss to society. This objective generated a subset of rules governing the use of force (particularly the use of deadly force) in self-defense that rigidly restricted the availability and the scope of the right.

At common law an individual could use force in self-defense if he reasonably perceived himself to be confronted with the threat of imminent, unlawful force being used against him. As a general proposition, he could not respond with deadly force if

he was confronted with nondeadly force. The rationale for this limitation was to be found in the rationale of necessity and its utilitarian objective. The common law would permit an innocent victim12 to inflict intentional harm on an aggressor13 but would not permit the purported victim to cause more harm than he himself might have suffered.14 This inherent limitation of a proportional response—i.e., proportional to the harm threatened—insured that no greater harm (such as the death of the aggressor) would be suffered by society than the harm actually threatened by the aggressor (a mere physical battery to the victim).

Common law courts essentially engaged in interest-balancing, weighing the respective interests at risk in confrontations involving force.18 Most courts generally concluded that when possible physical harm to an aggressor was weighed against possible physical harm to an innocent victim, the interest of the victim in physical security should be given preference because he was the "innocent" party.16 Courts in choosing between two interests of essentially equal value (i.e., bodily security of two individuals) weighed the aggressor's interest as of lesser value.17

12. An "innocent victim," as used in this article, refers to any individual who is confronted with unlawful force (whether nondeadly or deadly) and who was not at fault in initiating the violent confrontation.

13. An "aggressor," as used in this article, refers to any person who unlawfully initiates a violent confrontation with another person and unlawfully uses or threatens to use imminent force (whether deadly or nondeadly) against that person.


16. It may be that the common law permitted victims to resort to self-defense in such cases as a method of shifting the risk of harm to the aggressor, thereby reducing the aggregate harm that might otherwise occur if victims were limited to after-the-fact remedies of private tort actions and public criminal prosecutions.

17. Though the life of the aggressor superficially might be considered as valuable as the life of the victim, the process of interest-balancing is more complicated. As Fletcher puts it:

[Necessity as a justification] permits one to kill in the name of an interest less valuable than life by adding another factor to the balancing process. In the typical case of self-defence, the additional factor is the culpability of the aggressor. The culpability of the aggressor is used as a rationale for diminishing the interests of the aggressor relative to those of the victim. The argument would be that one simply cannot balance the life of a culpable aggressor against the life of an innocent victim on the assumption that the two combatants are equally situated. The man who chooses to start the fight is held to be entitled to lesser protection than the innocent victim. The problem of course is how significant the factor of culpability ought to be in diminishing the inter-
One strains hard to find much in the way of persuasive analysis by courts as to why the victim's interest in bodily security should be given preference, yet this result seems to be clearly in accord with prevailing social values.

The emphasis on minimizing social loss and its concomitant expression in rule form that an innocent victim threatened only with physical harm cannot resort to deadly force in self-defense necessarily allocated to the victim the risk that his limited response, though proportional, would not be effective. Thus, in order to maximize social gain by preserving the life of the aggressor, the innocent victim might be required to accept as a personal cost the infliction of physical harm. Distribution of this risk to any particular victim was perceived simply as the inevitable cost of minimizing the net social loss. Of course an innocent victim who suffered such a loss personally, though without an effective private remedy at that moment, did have the prospective (and contingent) public remedy of arrest and prosecution at a later time to vindicate, at least in part, his private interest.

---

est of the aggressor. This is the critical factor in deciding whether self-defense ought to be available to defend against rape, castration, maiming, and theft as well as against homicide. The more significantly one regards the culpability of the aggressor, the less significant the victim's interest has to be for the victim to have the right to use deadly force, if necessary, to repel the attack.

Fletcher, Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory, 8 Isr. L. Rev. 367, 377 (1973) [hereinafter cited as Fletcher, The Psychotic Aggressor]. Kadish, however, argues that the "balance of utilities" does not adequately explain why an innocent victim is permitted under specific conditions to kill his aggressor. He concludes that a theoretical explanation based on calculating social utilities violates the principle of equality which asserts that "the lives of all persons must be regarded as of equal value." Furthermore, he notes that the common law permitted a victim to take life even when lesser interests were threatened. Thus, a victim could kill to prevent rape or kidnapping. See Kadish, Respect for Life and Regard for Rights in the Criminal Law, 64 Calif. L. Rev. 871, 882 (1976) [hereinafter cited as Kadish, Respect for Life].

18. See R. Perkins, Criminal Law 996 (2d ed. 1969); Fletcher, The Psychotic Aggressor, supra note 17, at 367. An "effective" response in defense of self is used in this article to indicate protective measures taken in self-defense, including recourse to deadly force, which will enable a victim to repel successfully the unlawful application of violence to his person. For a specific application of this definition see infra notes 161-71 and accompanying text.

19. The common law considered human life as the supreme value and, consequently, subordinated most other interests in order to maximize the preservation of human life. For an excellent discussion of this priority, see Kadish, Respect for Life, supra note 17, at 878-81.

B. Duress

Other rationales have been offered to explain the availability of the right to use force in self-defense. Some commentators have suggested that it may be more properly grounded in the general principle of duress. 21 Duress under the common law was a doctrine which excluded a person from criminal responsibility for acts he committed as a result of some form of recognized compulsion which overcame his will. 22 An individual who acted under duress acted intentionally but did not make a "true choice" to act, given the pressure to which he was subjected. 23

Thus, intentionally using force to harm another human being in self-defense can be seen as responding under conditions of stress in which the threat to one's self-interest (life or bodily security) inevitably causes an individual to act in a predictable self-defensive fashion. Commentators have suggested that not only is the use of force in self-defense a predictable human response, it is also not deterrable. 24

Whether self-defense is grounded in the rationale of necessity or duress can have important theoretical as well as practical consequences. 25 Most importantly, this choice of grounding may determine whether the act of the victim was "justified" or "excused." 26 On the one hand, if the victim's act of self-defense

21. See H. Packer, THE LIMITS OF THE CRIMINAL SANCTION 114-18 (1968). But see Kadish, Respect for Life, supra note 17, at 881. Kadish claims that people in fact regard intentional killing of aggressors as "justifiable." Additionally, he argues that a theory of self-defense which rests on presumed compulsion does not explain all instances in which the law permits an individual to take intentionally the life of an aggressor. Specifically, it does not explain why the law permits a third party coming to the aid of an innocent victim to take, under specified circumstances, the life of an aggressor. Kadish seemingly concludes that the third party could be deterred by the threat of punishment not to kill the aggressor. Whether his conclusion would stand up when there is a "special relationship" between the victim and the third party (such as parent or spouse) is an interesting question as he admits. Id. at 881.

22. See W. La Fave & A. Scott, HANDBOOK ON CRIMINAL LAW 374-81 (1972). It is also possible to characterize this model as a form of "necessity" which functions as an excuse, not as a justification. In either case, this model essentially focuses on the inevitability that the victim will necessarily be compelled to kill the aggressor in order to preserve his own life. See Fletcher, The Psychotic Aggressor, supra note 17, at 376-77.

23. See G. Fletcher, RETHINKING CRIMINAL LAW 829-34 (1978); Fletcher, The Psychotic Aggressor, supra note 17, at 367-75.


25. See infra notes 26-27 and accompanying text. It should be noted that most commentators seemingly do not consider the doctrine of self-defense to be grounded primarily in the theory of duress.

26. Conduct that is "justified" can be considered broadly as conduct which is, under the particular circumstances, not unlawful and, consequently, no criminal responsibility
is grounded in necessity and thus is seen as justified, it is considered to be a correct and appropriate social response which society ought to permit, and even encourage. If, on the other hand, it is seen as grounded in duress, an act of violence to another in self-defense is considered as a personal excuse avoiding individual criminal responsibility because of the absence of a necessary condition for criminal responsibility, i.e., the opportunity for true choice.  

C. Vindication of Autonomy

A perceptive and influential contemporary scholar of criminal law has suggested that the right to use force in self-defense ought to be grounded not in necessity or duress but rather in the vindication of the victim’s interest in autonomy. Broadly stated, this principle holds that an aggressor’s unilateral act of aggression places him outside the protection of the law and, more importantly, constitutes a breach of the victim’s intimate zone of privacy and personal security. Both because the aggressor has by his own action forfeited consideration of his interests by the law and, more significantly, because the interest invaded is considered of absolute importance, the victim is authorized to take whatever steps are necessary to repel the intruder and to

may be imposed upon the individual defendant for behaving as he did. Conduct that is “excused” can broadly be described as unlawful but for which personal criminal responsibility cannot be imposed on the particular defendant. For a sophisticated analysis of these two concepts see G. Fletcher, Rethinking Criminal Law 759-817 (1978); Kadish, Respect for Life, supra note 17, at 874-77. See also Fletcher, The Psychotic Aggressor, supra note 17, at 373.

27. Characterizing exculpatory claims either as issues of justification or of excuse may have practical consequences. Arguably, the government might be required to negate claims of justification while defendants might be required to establish claims of excuse. See infra notes 93-159 and accompanying text.

28. See G. Fletcher, Rethinking Criminal Law 860-75 (1978); Fletcher, The Psychotic Aggressor, supra note 17, at 378-79.

29. Fletcher, The Psychotic Aggressor, supra note 17, at 379-80. According to Fletcher, John Locke considered an aggressor to be in a state of war with the victim, thereby breaching an implied contract among autonomous agents to respect each other’s personal living space. Id. at 380. Kadish rejects this argument, asserting that it is merely a legal conclusion which does not adequately explain why an aggressor should forfeit any protection under the law and that it does not explain all cases of self-defense, specifically those involving nonculpable aggressors such as children or the insane. See Kadish, Respect for Life, supra note 17, at 883-84.

30. G. Fletcher, Rethinking Criminal Law 860-75 (1978); Fletcher, The Psychotic Aggressor, supra note 17, at 378-79. This theory does not rest on a conflict of interests which requires weighing by the law. Rather, it postulates an absolute right to repel aggression to a vital personal interest.
restore the sanctity of his personal domain. This theory of self-defense is dominant in both German and Soviet criminal law.

Needless to say, this theory of self-defense does not depend on interest-balancing nor does it have as its objective the minimization of social loss. Rather its goal is to preserve and protect for each individual a private sphere of personal safety. As a consequence, effectiveness of response is its overriding first principle of authorization. There is no overriding principle of limitation, such as proportionality, which would impose an absolute limit on the victim’s response in order to protect a countervailing interest of the aggressor.

III. THE LAW OF SELF-DEFENSE

Washington’s law of self-defense is, with minor adjustments, essentially that of the common law. Though statutory in form,

31. The primary concern of this theory of self-defense is the nature of the interest invaded. Fletcher puts it this way: “The focus is not upon the culpability of the aggressor, but rather on the autonomy of the innocent agent. The assumption is that an innocent agent has a right to prevent encroachment upon his autonomy.” Fletcher, The Psychotic Aggressor, supra note 17, at 379. Kadish adopts a theoretical justification for self-defense that is very similar. He grounds the doctrine in the right of the individual to resist aggression personally as deriving from the individual’s right to the law’s protection which is not surrendered by the establishment of the state’s authority. Kadish, Respect for Life, supra note 17, at 884-86. It is likely that most citizens today would prefer the vindication of autonomy rationale and the rules generated by it. See infra notes 182-97 and accompanying text.

32. Fletcher, The Psychotic Aggressor, supra note 17, at 379.

33. Id. at 381-87. This theory does not require an assessment of the culpability or blameworthiness of the aggressor in intruding upon the personal autonomy of the victims. Rather it focuses on the act of intrusion and the right to repel or nullify such hostile intrusion. See G. Fletcher, RETHINKING CRIMINAL LAW, 863-64 (1978). Consequently, this theory would permit an innocent victim to use deadly force with its concomitant risk of death to repel an aggressor who only threatens the victim with nondeadly force or with less than grievous bodily harm even if the aggressor could not be held criminally responsible for his acts of aggression.

34. Washington’s statutory law purports to regulate the lawful use of force and to define justifiable or excusable homicide. The current statutory scheme has not changed significantly since first enacted in 1909. The relevant statutes are:

Definitions. In this chapter, unless a different meaning is plainly required:

“Necessary” means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended.


Use of Force—When lawful. The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

(1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting him and acting under his direction;
Washington courts have made it clear in recent cases that the

(2) Whenever necessarily used by a person arresting one who has committed a felony and delivering him to a public officer competent to receive him into custody;

(3) Whenever used by a party about to be injured, or by another lawfully aiding him, in preventing or attempting to prevent an offense against his person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his possession, in case the force is not more than is necessary;

(4) Whenever reasonably used by a person to detain someone who enters or remains unlawfully in a building or on real property lawfully in the possession of such person, so long as such detention is reasonable in duration and manner to investigate the reason for the detained person's presence on the premises, and so long as the premises in question did not reasonably appear to be intended to be open to members of the public;

(5) Whenever used in a reasonable and moderate manner by a parent or his authorized agent, a guardian, master, or teacher in the exercise of lawful authority, to restrain or correct his child, ward, apprentice, or scholar;

(6) Whenever used by a carrier of passengers or his authorized agent or servant, or other person assisting them at their request in expelling from a carriage, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force used is not more than is necessary to expel the offender with reasonable regard to his personal safety;

(7) Whenever used by any person to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing an act dangerous to himself or another, or in enforcing necessary restraint for the protection of his person, or his restoration to health, during such period only as is necessary to obtain legal authority for the restraint or custody of his person.


Homicide—When excusable. Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.


Justifiable homicide by public officer. Homicide is justifiable when committed by a public officer, or person acting under his command and in his aid, in the following cases:

(1) In obedience to the judgment of a competent court.

(2) When necessary to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty.

(3) When necessary in retaking an escaped or rescued prisoner who has been committed, arrested for, or convicted of a felony; or in arresting a person who has committed a felony and is fleeing from justice; or in attempting, by lawful ways or means, to apprehend a person for a felony actually committed; or in lawfully suppressing a riot or preserving the peace.


Homicide—By other person—When justifiable. Homicide is also justifiable when committed either:

(1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer
legislature, in enacting the current statutory scheme, intended to confirm the common law rules of self-defense.\textsuperscript{85}

Like the common law,\textsuperscript{86} Washington distinguishes between the victim's right to use nondeadly force and deadly force.\textsuperscript{87} Which force, deadly or nondeadly, a victim can use in self-defense depends on the nature of the harm threatened.\textsuperscript{88} As a practical matter, however, this principle frequently (though not always\textsuperscript{89}) limits a victim to respond in kind to the force used or

or to any such person, and there is imminent danger of such design being accomplished; or

(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is.


35. State v. Fischer, 23 Wash. App. 756, 598 P.2d 742 (1979); State v. Bailey, 22 Wash. App. 646, 591 P.2d 1212 (1979). Most courts have reached this conclusion in a rather perfunctory manner, relying on inferred "legislative intent" from enactment of the statutory provisions. This finesses has permitted courts to avoid confronting the fact that the clear language of the relevant Washington statutes creates an extraordinarily generous right of self-defense. \textbf{Wash. Rev. Code} § 9A.16.050(2) (1981), for example, would, if not limited by the common law, permit a victim to take human life in resisting a felony committed by an aggressor in his presence. \textit{See supra} note 34.


37. Deadly force may be defined as force (a) which its user uses with intent to cause death or serious bodily injury to another or (b) which he knows creates a substantial risk of death or serious bodily injury to the other. The definition thus focuses on the objectives of the user to cause serious harm or on the probability that such harm might occur rather than on whether it actually did occur. \textit{See W. La Fave \& A. Scott, Handbook on Criminal Law} 392 (1972); \textit{Model Penal Code} § 3.11(2) (Proposed Official Draft 1962).

"Great bodily harm" is defined in \textit{Wash. Pattern Jury Instructions-Criminal} § 2.04 (1980) as any serious hurt or injury that is seriously painful or hard to bear. Occasionally trial courts have been reversed for giving a misleading definition of "great bodily harm." \textit{E.g.}, State v. Painter, 27 Wash. App. 708, 620 P.2d 1001 (1980) (trial court reversed for instructing jury that "great bodily harm means an injury of a more serious nature than an ordinary striking with the hands or fist" even though this instruction appears to state accurately the common law rule). The plain meaning of the words suggests that the aggressor's conduct must threaten an injury which could result in death, thus preserving the interest-balancing analysis and minimization of the loss of life implicit in the common law defense. Yet there is some flexibility in the definition permitting factfinders to determine that threatened harm less serious than death might justify the use of deadly force in self-defense. \textit{Cf.} Cook v. Gislar, 20 Wash. App. 677, 582 P.2d 550 (1978) (court held that a threatened sadistic sexual assault by a husband upon his wife could constitute a threat of great bodily harm); State v. Lewis, 6 Wash. App. 38, 491 P.2d 1062 (1971) (court defined "grievous bodily harm" as an injury of a graver and more serious nature than an ordinary battery with the fist or pounding with the hand; an injury of such a nature as to produce severe pain, suffering or injury). "Nondeadly" force is, in effect, a residual concept. It refers to force that is not likely to cause death or great bodily harm. \textit{See W. La Fave \& A. Scott, Handbook on Criminal Law} 392 (1972).

38. \textit{See infra} notes 40-44 and accompanying text.

threatened by the aggressor.

It is useful at this juncture to set forth the law of self-defense as understood by Washington courts. There are several elements that must be satisfied to claim the right to use nondeadly force intentionally against another person in self-defense.

The victim must have an honest\(^{40}\) and reasonable\(^{41}\) belief based on appearances that another person is threatening him with the imminent application\(^{42}\) of nondeadly force to his person and that recourse to nondeadly force is necessary in order to avoid the harm threatened.\(^{43}\) In order to use deadly force against an aggressor, a victim must have an honest and reasonable belief based on appearances that another person is threatening him with imminent death or great bodily harm and that it is necessary to resort to deadly force in order to avoid the serious harm threatened.\(^{44}\)

The requirement that the unlawful force or harm threatened by the aggressor be "imminent" serves an important

---

40. In order to qualify as "honest" the actor himself must subjectively have believed that he was threatened. The focus is on the actual state of mind of the actor at the time of the incident. Cf. State v. Fischer, 23 Wash. App. 756, 598 P.2d 742 (1979) (trial court reversed for failing to give a self-defense instruction that made "the subjective standard manifestly apparent to the average juror." Id. at 759).

41. The concept of "reasonable belief" introduces an objective standard into the jury's determination. The factfinder must determine that the actor's perception was congruent with that of the so-called "reasonable person" under the same circumstances at the time of the confrontation. This insures that the actor's behavior was consistent with a community standard of behavior applicable to all members of society. It also protects against feigning by persons who kill or harm another knowing they are not threatened but who intend to prevaricate in order to avoid criminal responsibility. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 33 (2d ed. 1978). See also infra note 89 and accompanying text. Recently, this concept has been badly handled by several Washington courts. See infra notes 162-68 & 173-80, and accompanying text. See also State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977), State v. Hill, 76 Wash. 2d 557, 458 P.2d 171 (1969); State v. Tyrer, 143 Wash. 313, 255 P. 382 (1927); State v. Miller, 141 Wash. 104, 250 P. 645 (1926); State v. Dunning, 8 Wash. App. 340, 506 P.2d 321 (1973); 3 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 12 (1883).

42. "Imminent" requires the jury to find that the victim honestly and reasonably believed that the aggressor intended to inflict serious bodily injury in the very near future. If the threatened violence is more remote in time, the victim may have an alternative course of action (other than intentionally causing death or serious bodily injury) to avoid the threatened harm. See generally W. LA FAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 394 (1972).


function.\textsuperscript{45} This element establishes that a choice between two evils (harm to the aggressor or harm to the victim) was in fact necessary, and that there was an occasion which actually required the individual (and society) to minimize loss. Of course, one difficulty generated by this requirement is the disadvantage it imposes on the victim by effectively delaying a self-protective response until the aggressor has explicitly initiated the violent confrontation. The aggressor has thereby gained the advantage of choosing the place and the time for violence and, perhaps, also achieved the benefit of surprise. In this sense, the requirement also limits the effectiveness of a victim’s response.\textsuperscript{46}

The rules governing the use of force in self-defense are straightforward and comprehensible. It is, however, important to analyze the theoretical bases which seemingly underlie these rules.

First, the common law frequently casts the rules in terms of the force threatened or used by the aggressor and not in terms of the harm threatened or likely to occur. Implicit in the common law’s verbal formulation is the strong presumption that only deadly force threatened by an aggressor is likely to cause death or serious bodily injury. Put conversely, the common law rules seem to assume that an aggressor who does not explicitly threaten deadly force or is not armed with a deadly weapon will not cause death or serious bodily injury.\textsuperscript{47} Thus, as a practical matter, the law permits a victim to meet nondeadly force only with nondeadly force. Only if the aggressor is armed with a deadly weapon or if the victim can otherwise demonstrate that he honestly and reasonably believed that the aggressor intended

\begin{itemize}
\item[45.] See supra note 42.
\item[46.] Of course, the requirement of “imminent” also functions to minimize “mistakes” by requiring the victim to perceive behavior which manifests a threat to his personal security. See supra notes 28-33 and accompanying text. For a provocative and lively debate of an analogous problem in the definition of criminal attempt, see G. Fletcher, Rethinking Criminal Law 115-235 (1978); Weinreb, Manifest Criminality, Criminal Intent, and the “Metamorphosis of Larceny,” 90 Yale L.J. 294 (1980).
\item[47.] Washington courts have defined “great bodily harm” to mean “any serious hurt or injury or one that is seriously painful or hard to bear.” State v. Painter, 27 Wash. App. 708, 620 P.2d 1001 (1981); Wash. Pattern Jury Instructions-Criminal § 2.04 (Supp. 1982). It should be noted that at common law a person could be convicted of murder if he only intended to cause serious bodily injury to his victim but in fact caused death. The rationale of this formulation is clear: there is always a substantial risk that death may occur because such conduct is very dangerous. See W. La Fave & A. Scott, Handbook on Criminal Law 540-41 (1972). Thus, permitting a victim to respond with deadly force when threatened with great bodily harm is, in effect, authorizing him to take life lest his own life be put at risk.
\end{itemize}
to use force in a manner which risked death or great bodily harm is he permitted to respond with deadly force.\textsuperscript{48}

Washington, however, makes the kind of force a victim is permitted to use in self-defense dependent on the nature of the harm threatened by the aggressor. Thus, a victim can use deadly force in self-defense if the aggressor threatens him with death or great bodily harm.\textsuperscript{49} If the aggressor's threat does not rise to that level of violence, a victim can only use nondeadly force in self-defense. Until recently though, it was not unusual for trial courts in Washington to instruct the jury that a mere battery inflicted by fists could not constitute a threat of serious bodily harm.\textsuperscript{50}

These rules have built into them the same "balancing-of-interests" or "choice-of-lesser-evils" principle which is at the heart of the utilitarian theory of necessity.\textsuperscript{51} That is, a victim may cause physical harm to avoid physical harm. He may use deadly force, however, with its high risk of loss of human life or serious bodily injury only to avoid a loss of equal magnitude, i.e., death or great bodily harm to himself. Consequently, the law of Washington, like the common law of other jurisdictions, makes proportionality the overriding principle governing resort to force by victims. Effectiveness of a victim's response is subordinated to proportionality in order to minimize social loss.\textsuperscript{52}

One inevitable consequence of these rules is that innocent

\textsuperscript{48} There is a certain tautological quality to the definition of "deadly force." It is in fact not defined in terms of its own inherent nature or capacity to cause harm (such as a firearm) but rather in terms of the actor's intention to cause serious harm or his awareness of risk that its use will cause serious harm. See supra note 37. Thus, conceivably an unarmed aggressor who is large and powerful and who intends to inflict serious bodily injury on his victim with his fists can be considered to be using deadly force. However, a victim who responds with deadly force to an aggressor not armed with a weapon is at significant risk since he must persuade the jury that he was threatened with serious bodily injury in order to be subsequently vindicated for his actions. If he fails, his exposure includes the possibility of conviction for first or second degree murder.

\textsuperscript{49} WASH. PATTERN JURY INSTRUCTIONS-CRIMINAL § 16.02 (Supp. 1982). Washington cases, however, tend to find that an aggressor did not threaten to cause death or great bodily harm unless the aggressor used deadly force. Cf. State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977) (jury seemingly rejected female defendant's claim of self-defense when much larger male aggressor was unarmed and defendant used deadly force); State v. Painter, 27 Wash. App. 708, 620 P.2d 1001 (1981) (jury seemingly rejected female defendant's claim of self-defense when defendant used deadly force against unarmed male aggressor).

\textsuperscript{50} See, e.g., State v. Lewis, 6 Wash. App. 38, 491 P.2d 1062 (1971).

\textsuperscript{51} See supra notes 7-20 and accompanying text.

\textsuperscript{52} See supra notes 18-20 and accompanying text.
victims when confronted with nondeadly force by an aggressor generally may not use deadly force in self-defense even in cases in which it is clear that deadly force would probably be the only effective force they could use. This limitation on the private remedy of self-defense compels many victims by threat of criminal prosecution to accept their individual loss of physical harm or worse in order to minimize possible social loss of death or serious injury to the aggressor. In effect, it requires the victims to be satisfied with the contingent public remedy of arrest, prosecution, conviction, and punishment as the involuntary quid pro quo for foregoing effective private self-help.

The law of self-defense appears to be founded on another curious factual assumption: that aggressors and victims alike enjoy rough parity in strength. Common law rules which may have had primary application in violent confrontations between mature males may make less sense when, increasingly, victims include females, senior citizens, and children. It seems fair to assume that in most cases these kinds of victims will be unable to defend themselves against any unlawful violence by mere physical force.

Another implicit premise of the common law rules of self-defense is that the nature of the harm sought to be avoided by the victim can be gauged accurately by examining the nature of the force threatened or used by the aggressor. Thus, the com-

53. The victim is generally relegated to attempting to persuade the jury that he honestly and reasonably feared death or great bodily harm at the hands of the aggressor. Cf. State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977) (diminutive female claimed she feared great bodily harm at the hands of large, intoxicated male who allegedly accosted her in the company of three of her friends, two male and one female). State v. Painter, 27 Wash. App. 708, 620 P.2d 1001 (1980) (female victim claimed she feared serious bodily injury at hands of her unarmed stepson).

54. Some commentators have explicitly acknowledged this consequence. Perkins states in his treatise: "Deadly force is not privileged in defense against nondeadly force [footnote omitted]. For example, one must submit to a box on the ear and seek redress in the courts if he is unable to prevent it by means other than resort to deadly force." R. Perkins, CRIMINAL LAW 996 (2d ed. 1969).

55. See supra notes 12-14 and accompanying text; supra note 54.

56. See supra cases cited note 53. See also Elderly Shoppers, Leave Fears at Home, N.Y. Times, Apr. 1, 1981, at B1, col. 1. For an interesting survey of recent Washington cases in which women resorted to deadly force to defend themselves against male aggressors see Brown, In Self-Defense: Prejudice Impedes Justice for Women Who Kill to Save Their Own Lives, Seattle Post-Intelligencer, Nov. 14, 1982, at B1, col. 3. The outcomes in the numerous cases cited by the author appear to be inconsistent and unpredictable. See also Crime and the Elderly—What Your Community Can Do, Hearings Before the Senate Special Committee on Aging, 96th Cong. 1st Sess. (1980).
mon law seems to presume that an aggressor who does not use or threaten to use a deadly weapon does not intend or will not cause death or serious bodily injury.\textsuperscript{57} Washington law does not create a presumption to this effect, but it effectively casts on the victim the difficult burden of persuading the jury that an unarmed aggressor threatened (or appeared to threaten) death or great bodily harm.\textsuperscript{58} As will be discussed,\textsuperscript{59} it may not be possible to gauge either as a matter of law\textsuperscript{60} or of fact\textsuperscript{61} the intention of today's violent criminals or the probable outcome of violent confrontation by ascertaining whether aggressors are armed with deadly force.

\section*{IV. Subsidiary Rules of Self-Defense}

There are additional rules governing the right of self-defense in Washington.

\subsection*{A. No Duty to Retreat}

In Washington an innocent victim is under no duty to retreat even if he knows that he could do so with complete impunity.\textsuperscript{62} Failure to require a victim to exercise this alternative remedy if available is actually inconsistent with the utilitarian goal of minimizing social loss.

The drafters of the Model Penal Code reached a contrary conclusion with respect to the use of deadly force, concluding that most citizens would, in a moment of quiet reflection subsequent to the violent confrontation, prefer to have suffered the temporary ignominy of retreating rather than to have taken a human life.\textsuperscript{63} To this extent, Washington's failure to impose a

\footnotesize
\begin{itemize}
\item \textsuperscript{57} As noted earlier, deadly force is not defined explicitly in terms of deadly weapon or instrumentality, but rather in terms of the user's intention or awareness of its dangerousness. Thus, to limit a victim's ability to respond with deadly force to instances in which he is threatened with deadly force may require him to assess accurately the user's intention—a very difficult task. See supra note 37.
\item \textsuperscript{58} See supra notes 48 & 53 and accompanying text.
\item \textsuperscript{59} See infra notes 192-93 and accompanying text.
\item \textsuperscript{60} See supra note 47-49 and accompanying text.
\item \textsuperscript{61} See supra note 53 and accompanying text.
\item \textsuperscript{62} State v. Meyer, 96 Wash. 257, 164 P. 926 (1917); State v. Lewis, 6 Wash. App. 38; 491 P.2d 1062 (1971).
\item \textsuperscript{63} Model Penal Code § 3.04(2)(b)(iii) comment at 24-25 (Tent. Draft No. 8 1958). The Code does not, however, require a victim to retreat from his dwelling place or place of work. Nor need he retreat if he is assaulted in his dwelling by another person whose dwelling it is also. In part, the drafters of the Code concluded that the duty to retreat in all cases but those just mentioned (if retreat is available and without risk to the victim)
duty to retreat can be seen as adopting in part the preservation of autonomy rationale which has been suggested as the underlying rationale of self-defense. A victim will be permitted to stand his ground and defend his personal zone of privacy and security rather than yield it to a violent, intruding aggressor even if standing one's ground and keeping intact one's zone of personal autonomy results in the loss of human life.

B. Use of Deadly Force Versus Outcome

Like the common law, the law of Washington does not let the privilege of using deadly force in self-defense turn on the outcome of its use in any particular case. Thus, an innocent victim may use deadly force under specified conditions. The privilege to use such force will not depend on whether its use in fact took human life or caused serious bodily injury.

This approach makes sense since the outcome of using deadly force in any specific instance is not predictable because it is dependent on too many variables including, among others, marksmanship, range, and movement of the participants. Moreover, a primary purpose of the law is to specify in advance of

is consistent with the utilitarian theory of minimizing loss since it is not necessary for the victim to injure his attacker if he can avoid the harm to himself by retreating. See also 4 W. Blackstone, Commentaries on the Laws of England 179, 185 (Oxford 1769).

64. Washington courts have not provided a satisfactory explanation of why a victim is under no duty to retreat before using force. Probably the best attempt at such an explanation is set forth by the court in State v. Meyer, 96 Wash. 257, 164 P. 926 (1917):

[T]he ancient doctrine of the common law, that the right of self-defense did not arise until every effort to escape had been resorted to, even to the point of retreating until an impassable barrier was reached, has been supplanted in many of the American states, including the state of Washington, by the more reasonable doctrine and the one more in keeping with the dictates of human nature, to the effect that, when one is feloniously assaulted in a place he has the right to be and is placed in danger, either real or apparent, of losing his life or of suffering great bodily harm at the hands of his assailant, he is not required to retreat or to endeavor to escape, but may stand his ground and repel force with force, even to taking the life of his assailant if necessary, or in good reason apparently necessary, for the preservation of his own life or to protect himself from great bodily harm.

Id. at 264, 164 P. at 928 (emphasis added). The court also may have considered self-defense to be based on the concept of excuse rather than justification since it seemed to conclude that most people would in fact defend themselves rather than retreat. Arguably, this type of stress may exert irresistible pressure on humans to act in a self-defensive manner. See supra notes 21-27 and accompanying text.

65. Not requiring a victim to retreat can also be explained by utilitarian objectives. Arguably, a victim can increase his disadvantage and the risk of harm to himself by retreating, rather than engaging in self-defense.
conduct when risk-creation is permissible.\textsuperscript{66} To impose liability on the basis of the subsequent result violates our intuitive sense of the prohibition against \textit{ex post facto} law.\textsuperscript{67} It also might excessively inhibit the resort to deadly force, further vitiating any meaningful right to defend oneself by deadly force.

\section*{C. Mistakes and the Justificatory Effect of Appearances}

A pervasive problem in substantive criminal law in general, and in the law of self-defense in particular, is that of mistakes.\textsuperscript{68} The generic problem arises when appearances are not in fact congruent with reality. Yet the law must permit and encourage citizens to respond appropriately to their environment as it is generally perceived.\textsuperscript{69} The problem is particularly acute in cases of self-defense because the time for decision is often very brief, limiting the opportunity for further inquiry and clarification. Also the consequence of action or inaction can be grave.

The dilemma posed is whether, subject to the rules discussed earlier, the right to use either deadly or nondeadly force in self-defense should be permitted \textit{only} in cases in which an aggressor is \textit{in fact} threatening harm to the victim. Like the common law, Washington does not so limit the privilege.\textsuperscript{70} Rather, it permits a victim to use force in self-defense if he honestly \textit{and} reasonably believes that an aggressor is threatening him. The requirement that the victim's belief be honest imposes on him the duty that he sincerely believes he is acting in self-defense. The requirement that the belief be reasonable (and thus conform to an objective standard) helps insure that the victim was not feigning his claim of self-defense and that his response was in fact generated by the external world.\textsuperscript{71} It also


\textsuperscript{68} La Fave and Scott state: "No area of the substantive criminal law has traditionally been surrounded by more confusion than that of ignorance or mistake of fact or law." W. La Fave & A. Scott, Handbook on Criminal Law 356 (1972).

\textsuperscript{69} See G. Fletcher, Rethinking Criminal Law 707-13 (1978).

\textsuperscript{70} See Wash. Rev. Code § 9A.16.050 (1981); W. La Fave & A. Scott, Handbook on Criminal Law 393 (1972); 3 J. Stephen, A History of the Criminal Law of England at 12 (1883). Cf. State v. Penn., 89 Wash. 2d 63, 568 P.2d 797 (1977) (one is justified in going to the defense of another whom he reasonably believes not to be the aggressor even though the belief subsequently turns out to be erroneous).

\textsuperscript{71} See G. Fletcher, Rethinking Criminal Law 707-13 (1978).
serves as a generalized standard of lawful behavior permitting the factfinder to conclude that most citizens would have responded to the situation as the victim did.

**D. The Aggressor's Right of Self-Defense**

Like the common law, Washington confers on the aggressor a qualified right to use force in his own self-defense. To enjoy this right, however, an aggressor must in good faith abandon the conflict, endeavor in good faith to withdraw from it, and attempt to communicate his withdrawal to the victim. If these requirements are met, an aggressor who initiated a conflict with nondeadly force may subsequently be privileged to use nondeadly force if the victim persists in continuing the conflict. Presumably, the same result would obtain even if the aggressor used deadly force initially. The rationale of conferring the limited right of self-defense on an aggressor who withdraws is probably derived from the concept of necessity. Once the aggressor has withdrawn, or attempted to, the necessity which justified the victim's use of force ceases to exist.

An aggressor who initiated a conflict with nondeadly force also would have under the common law, and presumably under Washington law, a privilege to use deadly force if his victim responded unlawfully with deadly force. Assumedly, the scales of justice weighing the respective interests shift suddenly in the aggressor’s favor because of the unlawful (i.e., non-proportional) response of the victim which threatens a more important interest, the life of the aggressor, than the interest initially threatened.

**E. Allocation of the Burden of Proof**

There continues to be controversy over whether the state

---


73. It should be noted that if the changes in the law of self-defense proposed herein were adopted, an aggressor who uses nondeadly force against an innocent victim and is met with deadly force could not in turn respond with deadly force. Thus, he may be limited to retreat.

74. See supra notes 7-20 and accompanying text.

75. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 395 (1972); R. PERKINS, CRIMINAL LAW 998 (2d ed. 1969).

76. There is no reported Washington case involving this situation. See supra note 75. But see supra note 73.
must bear the burden of proof and establish beyond a reasonable doubt the absence of self-defense or whether the defendant may be required to establish the defense by a preponderance of the evidence.77 The controversy arises both as a matter of federal constitutional law78 and as a matter of state statutory interpretation.79 The question also has important implications for the theory of substantive criminal law.

At early common law self-defense was considered an affirmative defense which the defendant had to establish by a preponderance of the evidence.80 This scheme reflected the "negativist" theory of criminal law which held that a person who intentionally caused harm to another was guilty unless he could bring himself within a recognized exception to the rule prohibiting this type of behavior.81 Thus, the state had to prove as material elements of its case in chief that the defendant intentionally killed another human being or caused him harm. If those facts were established, the defendant would then have to bear the burden of persuading the jury that he had acted in self-defense. Such a claim by the defendant was in effect an exculpatory explanation of his behavior: what is normally considered a crime, killing another human being or causing injury, was under the special circumstances of his case an appropriate and, therefore, lawful act.82 The common law allocated this burden of persuasion to defendants who claimed self-defense in part because, based on common human experience, it presumed that such behavior was

77. See infra notes 78-79.
80. See Patterson v. New York, 432 U.S. 117 (1977), in which Justice White said:

In determining whether New York's allocation to the defendant of proving the mitigating circumstances of severe emotional disturbance is consistent with due process, it is therefore relevant to note that this defense is a considerably expanded version of the common-law defense of heat of passion on sudden provocation and that at common law [sic] the burden of proving the latter, as well as other affirmative defenses—indeed, "all . . . circumstances of justification, excuse or alleviation"—rested on the defendant.

Id. at 202 (citations omitted). See also 3 J. Stephen, A History of the Criminal Law of England 36 (1883).
82. Id.
in most cases unlawful.\textsuperscript{83} Also, defendants were considered to have better access to any evidence which would demonstrate why it was not unlawful under the particular circumstances.\textsuperscript{84}

The allocation of burdens of proof reflects several important concerns in the criminal law. Of paramount importance is the role the burden of proof plays in preserving our accusatorial system of justice.\textsuperscript{85} Requiring the state to prove all material elements of a crime insures that the defendant will be entitled to exercise his fifth amendment right not to incriminate himself.\textsuperscript{86}

Any human factfinding endeavor is capable of error. The formulation and allocation of burdens are also designed to insure that, if some mistakes are inevitable, they will probably be consistent with whatever policy goals the legislature or court deem paramount. Allocating the burden of persuasion in cases of self-defense to criminal defendants reflects the social policy objective that, in close cases, any uncertainty in factfinding involving persons who cause intentional harm to others should be resolved in favor of criminal responsibility.\textsuperscript{87} Thus, error (or, more precisely resolving uncertainty in close cases) is resolved against this class of defendants.

Resolving close cases against criminal defendants is also perceived as reflecting serious concern about the possibility of feigning by criminal defendants. Making claims of self-defense more difficult to sustain can be seen as exercising a form of general deterrence, dissuading those who might wrongfully inflict intentional harm on others and then hope to avoid criminal responsibility by falsely claiming the right to use force in self-defense.\textsuperscript{88}

In addition to influencing outcomes in particular cases, the allocations of the burden of proof have serious theoretical implications. If self-defense is seen as justified behavior which citi-

\textsuperscript{83} Id.
\textsuperscript{85} An accusatorial system of justice requires the police to gather evidence against an accused without requiring the accused to give testimonial evidence himself. See Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).
\textsuperscript{86} The fifth amendment assures that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. Requiring a criminal defendant to explain why he acted as he did could undermine the privilege against self-incrimination.
\textsuperscript{88} See supra note 41.
zens are entitled to engage in, and if self-defense is perceived either as the choice of lesser evils or as the vindication of personal autonomy and security, then the defendant's act is the appropriate and desirable social response under the circumstances. Arguably, then, the state ought to bear the burden of proof in negating a claim of self-defense since the intentional causation of harm to another under these circumstances is not only lawful but desired social behavior. 89

If, on the other hand, self-defense is grounded in the doctrine of duress, then arguably it is a claim that the individual defendant lacked a true choice and should not be considered personally responsible. 90 Since such a claim clearly focuses more on the will of the defendant than on the conduct he engaged in, 91 a good case can be made that defendants should be required to carry the burden of proof.

Of course, procedural concerns, such as error and feigning, may be in conflict with substantive theory. Absent constitutional limitations, 92 the legislature is free to override the logic of substantive theory by insuring that its procedural concerns are solved by appropriate procedural devices such as burdens of proof.

The United States Supreme Court has recently confronted analogous issues. In the recent cases of Mullaney v. Wilbur 93 and Patterson v. New York, 94 the Court grappled with the proper allocation of the burden of proof in state prosecutions for homicide. In Mullaney, 95 the Court held that the state could not dispense with its constitutional burden of proving all elements of a crime by conclusively presuming that one element had been established once it had proven a different element. Nor could it require a defendant in a criminal prosecution to establish the nonexistence of any statutory element. 96 In Patterson, 97 the Court concluded that the state could require the defendant to bear the burden of proof of an affirmative defense, provided the state clearly denominated it as such in its statutory scheme. In

89. See supra notes 25-27 and accompanying text.
90. Id.
91. See supra notes 21-24 and accompanying text.
92. See infra notes 93-98 and accompanying text.
96. Id. at 686-87, 703-04.
addition, the Court noted that the defense provided by New York's statutory scheme was more favorable to the defendant than previously available defenses. At the moment there is no Supreme Court case which explicitly requires the state to disprove the traditional common law claim of self-defense.

In the 1977 case of State v. Roberts the Washington Supreme Court held that the state had to disprove beyond a reasonable doubt the existence of self-defense once the defendant had introduced some evidence tending to establish the claim. The court essentially concluded that the state homicide statute in effect at that time specified that the absence of either "justification or excuse" was a material element set forth on the face of the homicide statute. Thus, under Mullaney, the state had to negate all "elements" of the crime including the possible "facts" of self-defense which, if present, would have constituted "justification."

Since the Roberts case, the Washington legislature has changed the homicide statute. The words "without justifica-

98. Id. at 202-09. It is not clear, however, whether this fact was essential to the Court's holding.

99. Critics of the Patterson case maintain that the analysis used by the majority simply requires state legislatures to draft criminal statutes with care and precision. They claim that state legislatures are free to allocate to criminal defendants the burden of proof in establishing the claim of self-defense provided the statute clearly labels self-defense as an affirmative defense and that it does not draw any inference concerning the presence or absence of other enumerated material elements. See, e.g., Patterson v. New York, 432 U.S. 197, 221-23 (1977) (Powell, J., dissenting).

100. 88 Wash. 2d 337, 562 P.2d 1259 (1977).
101. Id. at 343-44, 562 P.2d at 1262.
103. In enacting WASH. REV. CODE §§ 9A.32.030, .050 (1981), the legislature had deleted the words "unless it [killing another human being] is excusable or justifiable," definitional terms which arguably cast on the prosecution the burden of proving the absence of self-defense. See State v. Takacs, 31 Wash. App. 868, 645 P.2d 1109 (1982). Section 9A.32.030 currently defines first degree murder as follows:

Murder in the first degree. (1) A person is guilty of murder in the first degree when:
(a) With a premeditated intent to cause the death of another person, he causes the death of such person or of a third person; or
(b) Under circumstances manifesting an extreme indifference to human life, he engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person; or
(c) He commits or attempts to commit the crime of either (1) robbery, in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first degree, or (5) kidnapping in the first or second degree, and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under
tion or excuse” have been deleted. This statutory revision raised the interesting question of whether the state still must disprove the claim of self-defense or whether defendants can now be required to establish the defense as required under common law.

Currently, Washington courts are wrestling with this question. In several recent cases, the courts have demonstrated their own confusion and are making serious mistakes in their analyses of the problem.

In State v. Hanton, the Washington Supreme Court confronted the question of whether the defendant would be required to carry the burden of establishing self-defense in a prosecution for manslaughter in the first degree. The trial court rejected a requested defense instruction which would have explicitly imposed on the state the burden of proving the absence of self-defense beyond a reasonable doubt. Instead, it gave a jury instruction effectively casting on the defendant the burden of establishing self-defense.

The Washington Supreme Court reversed the conviction concluding that, in a prosecution for first-degree manslaughter,

this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and
(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the first degree is a class A felony.


106. The trial court gave the following instruction:

When a defendant claims he killed another in defense of his person or property, the burden is upon that defendant only to produce some evidence tending to prove that the homicide was done in self-defense. It is not necessary for the defendant to prove this to you beyond a reasonable doubt, nor by a preponderance of the evidence. The defendant sustains this burden of proof, if from a consideration of the evidence in the case you have a reasonable doubt as to whether or not the killing was done in self-defense.

Id. at 131, 614 P.2d at 1281.
the state has the burden of negating a claim of self-defense (presumably beyond a reasonable doubt).\textsuperscript{107} The basic structure of the court's analysis was to focus exclusively on the elements of the specific crime charged to ascertain what mental state element the statute required the prosecution to establish. The first-degree manslaughter statute required the state to prove that the defendant "recklessly caused the death of another human being."\textsuperscript{108} "Recklessly" was further defined by statute as occurring when a person "knows of and disregards a substantial risk that a wrongful act may occur."\textsuperscript{109} The court concluded that self-defense was not a "wrongful act" within the meaning of this statutory definition and that a claim of self-defense was, therefore, inconsistent with the element of "recklessness." Consequently, it determined that the state would have to bear the burden of negating such a claim.

In an extraordinary leap of logic, however, the court also concluded that no instruction allocating the burden of establishing or negating the claim of self-defense to either party had to be given since the government had the ultimate burden of establishing that the defendant's act was "reckless."\textsuperscript{110} The court decided that a jury would comprehend that the instruction requiring the government to establish that the defendant acted "recklessly" would also effectively inform the jury that it should resolve any uncertainty concerning the presence or absence of self-defense against the government.

\textsuperscript{107} Id. at 131-34, 614 P.2d at 1281-83.
\textsuperscript{108} The relevant statutory provision is:

\textbf{Manslaughter in the first degree.} (1) A person is guilty of manslaughter in the first degree when:
(a) He recklessly causes the death of another person; or
(b) He intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.
(2) Manslaughter in the first degree is a class B felony.
\textsuperscript{109} Wash. Rev. Code § 9A.08.020 (1981) (emphasis added). That section, which provides general definitions of culpability or \textit{mens rea}, defines "recklessness" as follows:

"(c) Reckless: A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from the standard of care that a reasonable man would exercise in the same situation." \textit{Id.} (emphasis added).
\textsuperscript{110} 94 Wash. 2d 129, 134, 614 P.2d 1280, 1282 (1980). The court, without explicitly stating the proposition, must have concluded that a general instruction requiring the state to prove each element of the offense beyond a reasonable doubt adequately instructed the jury how to resolve any doubt concerning the presence or absence of claimed self-defense.
Frankly, if the court was confident that its analysis was correct (i.e., that a claim of self-defense was logically inconsistent with acting recklessly), it should have required the trial court to give an instruction which would make clear to the finders of fact the logic of their factfinding task. If self-defense is logically inconsistent with a reckless act, and if the government must establish that the defendant acted “recklessly,” an instruction requiring the prosecution to negate a claim of self-defense beyond a reasonable doubt should be given to insure that the jury fully comprehends its difficult task. Failure to do so may well give the government the benefit of implied linkage or presumption of elements or of an improperly allocated burden of persuasion. These are precisely the shortcomings criticized by the United States Supreme Court in *Mullaney*.

A more fundamental question, however, is whether the court was essentially correct in its analysis. To be sure, the court’s analysis was not without some support, given the Washington statute defining “recklessness.” The intriguing inquiry is whether the legislature truly intended to pack into the statutory definition of “recklessly” either the common law defense of self-defense or the broader common law defense of mistake of law. For this was essentially what the court concluded. The court seemingly has decided that not only must the defendant have been reckless as to whether his action might cause harm, but he also must have acted disregarding the risk that his act might also be “wrongful.” It is very unlikely that the legislature intended to impose on the government the burden of establishing beyond a reasonable doubt, in every case in which a defendant recklessly kills or harms another human being, that he acted with conscious awareness of the risk that he might be committing a “wrongful act.” Such an interpretation, in effect,

111. See supra note 95. But see infra notes 145-46 and accompanying text.
112. See supra notes 95-96 and accompanying text.
114. The Model Penal Code defines an actor as acting “recklessly” in similar situations if “he consciously disregards a substantial risk that the material element exists or will result from his conduct, “in this case the death of a human being.” *Model Penal Code* § 2.02 (Proposed Official Draft 1962).
requires the state to establish that each defendant acted with awareness that he might be breaking the law. Surely, the maxim that everyone is presumed to know the law is still valid in this state and generally under the common law.\textsuperscript{115}

There is absolutely no indication that the legislature intended to change the fundamental architecture of the homicide statute from a "descriptive" theory\textsuperscript{116} of criminal law to a "normative" theory.\textsuperscript{117} Such a change could require the state to prove in all homicide prosecutions (except for second-degree manslaughter) that the defendant acted with actual awareness that his conduct might be against the law. If the court's analysis is correct, will any justificatory claim (such as necessity) or any exculpatory claim (such as mistake of fact or of law) suffice to cast on the government the burden of disproving the claim?\textsuperscript{118}

Moreover, the net result of the opinion is to dispense with the requirement that the defendant have a reasonable belief that the elements of self-defense are met.\textsuperscript{119} The court would permit

\textsuperscript{115} See W. La Fave & A. Scott, Handbook on Criminal Law 356-69 (1972).

\textsuperscript{116} A descriptive theory describes similarities in statutes but draws no inferences other than the fact that the similarities exist. Consequently, a descriptive theory does not serve as a basis for further legislation because it does not infer any principles from existing laws. Descriptive theorists strive to minimize the normative content of the criminal law in order to render it "precise and free from the passions of subjective moral judgment." Consequently, descriptive rules specify proscribed behavior in rather simple, straightforward terms that do not invite subjective assessments of moral blameworthiness. See G. Fletcher, Rethinking Criminal Law 396-401 (1978).

\textsuperscript{117} A normative theory infers from similarities in statutes the standards of conduct that are present in communities. Thus, a normative theory serves as a basis for future legislation because it infers principles from existing laws. Normative theorists seek to keep the language of the criminal law "close to the daily problems of assessment and blame that infuse the criminal process." Consequently, normative rules specify proscribed behavior in value-laden terms that invite subjective assessments of moral blameworthiness. See G. Fletcher, Rethinking Criminal Law 396-401 (1978).

\textsuperscript{118} In State v. Hanton, 94 Wash. 2d 129, 614 P.2d 1280, cert. denied, 449 U.S. 1035 (1980), the defendant's claim was self-defense and the court concluded that such a claim was inconsistent with acting in disregard "of a substantial risk that a wrongful act may occur . . . ." Id. at 133, 614 P.2d at 1282. But the variety of explanations offered by future defendants may not be so limited. One could easily imagine justificatory claims like "national security," see United States v. Barker, 514 F.2d 208 (D.C. Cir. 1975), or defense of property against trespass. See State v. Griffith, 91 Wash. 2d 572, 589 P.2d 799 (1979). In effect, a claim by the defendant that he honestly believed his conduct to be "lawful," and thus not "wrongful," would establish that he was not acting "recklessly." Under the court's analysis, the government would have to prove beyond a reasonable doubt that the defendant did not believe that his reasons for acting made his conduct lawful.

\textsuperscript{119} Assumedly, in Hanton, if the jury finds that the defendant honestly but unreasonably believed in the need to take human life in self-defense, it should not convict the defendant of first-degree manslaughter because such honest belief is inconsistent with
a defendant to intentionally inflict harm on another and cause death even though his behavior did not measure up to the community standard. If the court's analysis is correct, and the statutory scheme of self-defense set forth in sections 9A.16.050(1) and (2) of the Washington Code in fact accurately states the law of self-defense, then other cases decided since Hanton may have been incorrectly decided.

What is more troubling, however, is that the court's decision effectively created a strong possibility that Washington will recognize the defense of "imperfect self-defense," a reductive defense not previously permitted. A defendant who honestly but unreasonably believes he is entitled to take human life in self-defense cannot be convicted of first-degree manslaughter.

The court in Hanton did not consider whether the prosecution had to carry the burden of proof in negating a claim of self-defense in a prosecution for first- or second-degree murder. However, the question did arise three years later. In State

recklessness or conscious awareness of the risk that self-defense might not be necessary. The Model Penal Code may support the approach taken by the court in Hanton. The Code simply treats the actor's belief in the necessity of self-defense as a material element which must be assessed in light of the degree of culpability specified in the statute. Thus, the Code suggests that an actor cannot be convicted of reckless homicide even if he intentionally takes human life unless he was reckless in deciding that the use of deadly force in self-defense was necessary. See Model Penal Code § 2.02 comment at 131-32 (Tent. Draft No. 4 1955). The Code approach has had very little impact on state criminal legislation. See Note, Justification: The Impact of the Model Penal Code on State Law Reform, 75 Colum. L. Rev. 914, 920 (1975).


123. See supra note 119. The proper charge would probably be manslaughter in the second degree since that crime simply requires the government to prove that the defendant acted negligently.

124. For the text of the first-degree murder statute see supra note 103. The statutory definition of second-degree murder is as follows:

Murder in the second degree. (1) A person is guilty of murder in the second degree when:
(a) With intent to cause the death of another person but without premeditation, he causes the death of such person or of a third person; or
(b) He commits or attempts to commit any felony other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:
(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
v. McCullum,\textsuperscript{125} the court held that, under the current criminal code of Washington, the state must prove beyond a reasonable doubt the absence of self-defense in a prosecution for first degree murder.\textsuperscript{126} The court's analysis was somewhat more complicated than the analysis it used in Hanton.\textsuperscript{127} In McCullum it concluded that the fourteenth amendment as interpreted in the recent United States Supreme Court cases of Mullaney\textsuperscript{128} and Patterson\textsuperscript{129} required the prosecution to prove every element of a crime beyond a reasonable doubt. It then determined that the legislature, in revising the definition of first degree murder, had not intended to delete the absence of self-defense (i.e., without justification) as an element of the state's case.\textsuperscript{130} Therefore, the court decided that the due process clause of the fourteenth amendment required the prosecution to prove every statutory element of the crime of first degree murder, including the absence of self-defense.

Truly amazing is the court's conclusion that the legislature did not intend to classify self-defense as an affirmative defense as opposed to an element of the crime when it deleted the specified clause\textsuperscript{131} from the definitional part of the homicide statute and placed the self-defense provision in the statutory section entitled "Defenses." It seems that nothing short of a specific statutory revision labelling self-defense as an affirmative defense

\footnotesize{
(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and
(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

125. 98 Wash. 2d 484, 656 P.2d 1064 (1983).
126. Id. at 494, 656 P.2d at 1071.
127. See supra notes 108-23 and accompanying text.
130. The court said:
By removing the words "unless it is excusable or justifiable" from the definition of homicide and including self-defense under the provisions of RCWA 9A.16, entitled "Defenses", the Legislature merely relieved the State of the time-consuming and unnecessary task of alleging and proving negative propositions which may not be involved in each case. Once the issue of self-defense is properly raised, however, the absence of self-defense becomes another element of the offense which the State must prove beyond a reasonable doubt.
131. Id.
}
which the defendant must establish by a preponderance of the evidence will manifest legislative intent with sufficient strength and clarity.

Not content with ignoring the more likely inference of legislative intent based on the revision of the criminal code, the court attempted to bolster its decision by parsing the language of the first degree murder statute in the same manner as it had parsed the first degree manslaughter statute in Hanton.\(^\text{132}\) It determined, correctly, that “intent to cause the death of another person” is an element of first degree murder under Washington law.\(^\text{133}\) The court then examined the concept of “intent” as set forth in the general definitional terms of the criminal code.\(^\text{134}\) Quoting the statute, the court said a person acts with “intent” when “he acts with the objective or purpose to accomplish a result which constitutes a crime” (emphasis in the original).\(^\text{135}\) Since killing in self-defense is explicitly made “justifiable” under Title 9A, section 16.050 of the Washington Code, a person cannot be acting with the “intent” required by the same title in section 08.010(1)(a).\(^\text{136}\) This is so, evidently, even though the section governing self-defense is contained in the section captioned as “Defenses.”

Again, the court, as it did in Hanton,\(^\text{137}\) comes perilously close to torturing language in a literal, mechanical, and selective fashion to ascertain legislative intent. The court intimates in its opinion that an individual cannot act with the requisite criminal intent unless he intends to act unlawfully. *Mirabile dictu*, the court may well have imported into a rather straightforward,

---


133. 98 Wash. 2d 484, 495, 656 P.2d 1064, 1071 (1983). It should be noted that “intent to cause the death of another person” is also an element of intentional homicide in second degree murder. See *supra* note 124. Thus, the holding in *McCullum* will probably require the prosecution to negate a claim of self-defense beyond a reasonable doubt in a prosecution for second-degree murder.

134. This is essentially the same approach the court took in *Hanton* when it parsed the meaning of “recklessly.” See *supra* notes 108-10 and accompanying text.


136. *Wash. Rev. Code* § 9A.16.050 (1981); § 9A.08.010(1)(A). Thus, the court intimates that in order to convict a defendant of first degree murder the prosecution must prove not only that a person intentionally killed another human being, but that he did so intending that it be an unlawful killing, i.e., without justification or excuse.

137. *See supra* notes 108-18 and accompanying text.
descriptive first degree murder statute a requirement that the government establish that a defendant acted with the purpose of committing a crime.

However, it is clearly not a requirement for criminal responsibility that a person must act with the intent to commit a crime. The specific language of the murder statute simply requires the prosecution to prove that the defendant "intended to cause the death of another person" together with the other elements not at issue here. A general definitional term of "intent" ought not to convert the mens rea requirement, specified in the murder statute itself, into the more demanding requirement that the prosecution establish beyond a reasonable doubt that every deliberate killing of another human being is also unlawful or constitutes a crime. Nor does characterizing a killing in self-defense as "lawful" necessarily resolve which party should bear the burden of proof as to the presence or absence of self-defense.

It simply describes the legal consequence once a particular fact (or set of facts) has been determined. Moreover, as at common law, deliberately taking the life of another human being is presumptively proscribed unless the defendant can explain why the killing is within a recognized exception to the general proscriptive rule against taking human life intentionally.

In McCullum, the court did not consider whether the defense of "imperfect self-defense" would now become available to defendants charged with first or second degree murder. It seems unlikely that this defense should be permitted since the statutory definition of "intent" (unlike the statutory definition

138. There is no evidence that the legislature, in revising the criminal code, intended to shift from a descriptive theory of criminal law to a normative theory. See supra notes 117-18 and accompanying text. Moreover, the statutory language defining "intent" in the first and second degree murder statutes is far less capable of sustaining within its meaning additional normative content such as "awareness of wrongdoing" than is the statutory language defining manslaughter in the first degree. See supra notes 113-15 and accompanying text. The linguistic analysis used by the court utterly fails to convince the careful reader that the legislature intended to pack into the concept of "intent" the general concepts of "lawful" or "justified" conduct or the specific legal doctrine of self-defense.

139. Even the court tacitly recognized this in its opinion in McCullum by noting that the criminal code requires defendants to bear the burden of certain defenses as to certain crimes or to rebut certain inferences. State v. McCullum, 98 Wash. 2d 484, 492-93, 656 P.2d 1064, 1070 (1983).

140. See supra notes 34-58 and accompanying text.

141. 98 Wash. 2d 484, 656 P.2d 1064 (1983).

142. See supra notes 122-23 and accompanying text.
of "recklessly" as interpreted in Hanton\textsuperscript{143}) does not refer to the defendant's belief about the "wrongfulness" of his conduct.\textsuperscript{144} It would be anomalous to permit imperfect self-defense to be available in a prosecution for first degree manslaughter but not in a prosecution for first or second degree murder. Nonetheless, it seems very unlikely that it would be available to defendants charged with either first or second degree murder. If this is the case, then prosecutors need only charge first or second degree murder in order to avoid the defense of imperfect self-defense.

Having decided that the state must prove the absence of self-defense beyond a reasonable doubt, the court had the courage of its conviction sufficient to require that a specific jury instruction to this effect should be given. It modified State v. Hanton\textsuperscript{145} and other cases\textsuperscript{146} which had not required a specific jury instruction allocating to the prosecution the burden of negating a claim of self-defense, so long as the instructions had permitted defense counsel to argue that theory.

It should be noted, however, that at its core, McCullum is a case that turns solely on legislative intent. Despite the constitutional analysis contained in the opinion, it seems almost certain that the opinion does not preclude the legislature from treating self-defense as an affirmative defense and allocating the burden of persuasion to the defendant, provided such legislative intent is made manifestly clear.\textsuperscript{147} The constitutional problems noted by the court arose only after the court concluded the legislature intended to make the absence of self-defense an element of homicide and that the definitional terms of homicide necessarily incorporated the absence of self-defense as an element.

As it did in Hanton,\textsuperscript{148} the court took the most narrow analytical approach available. It focused exclusively on the specific statute defining the offense charged, and its parsing of the elements contained in the statute determined the allocation of the burden of proof in a claim of self-defense. There was no attempt

\textsuperscript{143} 94 Wash. 2d 129, 614 P.2d 1280, cert. denied, 449 U.S. 1035 (1980).
\textsuperscript{144} See supra notes 106-09 and accompanying text.
\textsuperscript{145} 94 Wash. 2d 129, 614 P.2d 1280, cert. denied, 449 U.S. 1035 (1980).
\textsuperscript{147} The court in McCullum said: "Since the Legislature has not clearly imposed the burden of proving self-defense on criminal defendants, we conclude the obligation to prove the absence of self-defense remains at all times with the prosecution." 98 Wash. 2d 484, 494, 656 P.2d 1064, 1071 (1983).
\textsuperscript{148} 94 Wash. 2d 129, 614 P.2d 1280, cert. denied, 449 U.S. 1035 (1980).
in the majority opinion to consider self-defense as an integrated common law doctrine, analyzing the issues in a comprehensive and cohesive manner in light of the substantive policies and procedural concerns underlying the doctrine. Certainly, the Supreme Court did not intend, as it made clear in *Patterson*, to impose doctrinal straight-jackets on state legislatures as they confront difficult policy choices in criminal law nor to reduce state supreme courts to the exclusive role of technicians charged with construing criminal codes.

The court's decisions in *State v. Hanton* and *State v. McCullum* are at best plausible results and, at worst, illogical and incorrect results. It is not clear that *Mullaney* required the results reached in these cases since in fact neither the elements of first-degree murder nor the elements of first-degree manslaughter refer explicitly to self-defense. Nor is there on the face of the statute impermissible linkage or presumptive findings of material elements. The court would have been better off addressing the issue by analyzing either the general intent of the legislature in revising the murder and manslaughter statutes or, preferably, by examining the common law of self-defense as an integrated defense applicable to all homicide charges.

Indeed, the court's analysis may well lead to selective and different outcomes in the allocation of burdens dependent on the crime charged when self-defense is raised. This result can be seen in *State v. Takacs*. In that case the court, using the architectonic analysis set forth in *Hanton*, concluded that the claim of self-defense was not logically inconsistent with the mental state required for assault in the second degree (namely, "knowledge" and "intent") and, accordingly, the state did not have to bear the burden of proof in negating a claim of self-defense.

The Washington Supreme Court, in trying too hard to thread its way through *Mullaney*, *Patterson*, and *Sand-

---

149. See *supra* notes 7-33 & 89-91 and accompanying text.
150. See *supra* notes 80-88 and accompanying text.
153. 98 Wash. 2d 484, 656 P.2d 1064 (1983).
155. This decision may no longer be correct in light of *McCullum*.
strom, took the narrowest path available. Unfortunately, it is a path that may branch quickly into myriad directions depending on the mental states contained in the particular crime charged. It would then have been far preferable had the court treated the claim of self-defense as an integrated common law doctrine, analyzing the issue in a comprehensive and cohesive manner in light of the policies underlying the right of self-defense.

V. SOME "HARD CASES" OF SELF-DEFENSE

As noted earlier the current law governing the right of self-defense may be under tremendous pressure to change. Violent crimes are increasing, and the public's fear of crime is pronounced. Washington courts have recently encountered claims of self-defense that illustrate this tension. Unfortunately, the courts are simply not resolving them in a satisfactory manner.

Perhaps the most celebrated Washington case involving the claim of self-defense is that of State v. Wanrow. The defendant was convicted of second-degree murder and first-degree assault despite her claim of self-defense. The defendant was a 5' 4" female who at the time of her alleged confrontation with a violent aggressor had a broken leg and was using a crutch. Using a pistol, she shot and killed her alleged assailant, a large man who was visibly intoxicated, while in the home of her friend. The defendant claimed that she felt threatened with great bodily harm, and consequently, her use of deadly force in self-defense was justified.

The trial court instructed the jury that the defendant could kill in self-defense if she honestly and reasonably believed, based on facts or circumstances immediately preceding her use of deadly force, that the victim intended to kill her or inflict great bodily harm on her. The jury convicted Wanrow despite her claim of self-defense.

The Washington Supreme Court reversed Wanrow's conviction on several grounds, including the improper instructions by the trial court on self-defense. According to the court, the

159. See supra notes 7-33 and accompanying text.
160. See supra notes 1-5 and accompanying text.
161. See supra notes 2-3.
162. 88 Wash. 2d 221, 559 P.2d 548 (1977).
163. Id. at 234, 559 P.2d at 555.
instructions were erroneous because they limited the basis on which the victim feared harm to those facts and circumstances occurring "immediately prior to or during" the violent confrontation.\textsuperscript{164} More significantly, the court criticized the trial court's use of masculine pronouns in the jury instructions. The court determined that gender specific pronouns contained in the instructions required the jury to measure the reasonableness of the defendant's recourse to force by considering what a reasonable male might do under the circumstances.\textsuperscript{165}

Unfortunately, the majority opinion was not satisfied with insuring that the law acknowledge the differential physical characteristics of males and females by taking them into account in the formulation of the objective standard. In further analysis, which can only be described as obtuse and even incomprehensible, the court suggested that the jury should only determine if this particular defendant actually feared death or serious bodily harm at the hands of her purported aggressor, even if her fear was unreasonable.\textsuperscript{166} As indicated earlier,\textsuperscript{167} the common law has always insisted that the use of force in self-defense be reasonable, that is, that the perception the defendant has of the threat which confronts him or her must coincide with what the so-called reasonable person as the representative of society would perceive under the same circumstances. Thus, \textit{Wanrow} can only be read intelligently (and perhaps in a corrective fashion), as permitting the jury to invest the reasonable person with the same characteristic of gender as the defendant. In subsequent cases Washington courts have indicated that this is what the court really meant in \textit{Wanrow}.\textsuperscript{168}

The tragedy of the \textit{Wanrow} case is the Washington Supreme Court's failure to confront the basic unfairness which

\begin{footnotes}
\item \textsuperscript{164} \textit{Id.} at 234-36, 559 P.2d at 555-56.
\item \textsuperscript{165} \textit{Id.} at 239-41, 559 P.2d at 558-59.
\item \textsuperscript{166} The court stated that "the defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable." 88 Wash. 2d 221, 240, 559 P.2d 548, 558 (1977). The defendant may also have argued in the alternative that she shot the victim reflexively when he surprised her. Arguably, this claim is very similar to that put forth by the defendant in State v. Adams, 32 Wash. App. 393, 641 P.2d 1207 (1982). \textit{See infra} note 167 and accompanying text.
\item \textsuperscript{167} \textit{See supra} note 41 and accompanying text.
\item \textsuperscript{168} \textit{See, e.g., State v. Penn}, 89 Wash. 2d 63, 568 P.2d 797 (1977). However, in other cases courts have seemingly been influenced by this aspect of the \textit{Wanrow} decision. \textit{Cf.} Cook v. Gisler, 20 Wash. App. 677, 582 P.2d 550 (1978) (jury must view the circumstances as they reasonably might have appeared to the defendant at that time).
\end{footnotes}
the current law of self-defense imposes on most females and on many other victims of violence. Under the current law,\textsuperscript{169} it may be possible to take into account the characteristics of a defendant (such as gender, size, or injury) in deciding what type of harm the victim reasonably feared. But so long as the law insists that a victim, however weak or otherwise physically disadvantaged, respond to the threat of nondeadly force (and the presumed harm of only a battery) with nondeadly force, these victims will in the vast majority of cases, be condemned to suffer a beating without hope of any effective right of self-defense. Their sole recourse is the contingent remedy of public arrest and prosecution at a later date.\textsuperscript{170} In other words, the right to respond only with force which is proportional to the force threatened is an illusory right for many victims. The law in practice denies them any effective right of self-defense.

The facts of the Wanrow case pose the dilemma poignantly.\textsuperscript{171} Yvonne Wanrow was not confronted with deadly force by her aggressor. Therefore, it is submitted that it would be very unlikely for any jury to conclude that she reasonably feared death or great bodily harm at his hands.\textsuperscript{172} Thus, under common law doctrine as traditionally applied by Washington courts, Wanrow was virtually condemned to lose in her confrontation with violence unless she could use deadly force—the only force which could compensate for her extreme physical limitations. This violent confrontation was a classic case of a proportional response insuring an ineffective response.

In a more recent Washington case, State v. Adams,\textsuperscript{173} the court of appeals reversed a conviction for second-degree manslaughter and remanded the case with instructions that the defendant should be permitted to place his theory of self-defense before the jury even though it was virtually certain

---

\textsuperscript{169} See supra note 44 and accompanying text; infra note 172.

\textsuperscript{170} See supra note 55 and accompanying text.

\textsuperscript{171} See supra notes 156-57 and accompanying text.

\textsuperscript{172} Since the definition of deadly force focuses on either the intent of its user or the probable result of its use, counsel for defendants such as Ms. Wanrow can always argue to the jury that the defendant reasonably feared death or great bodily harm even if the aggressor was not armed with a deadly weapon or instrument or did not verbally threaten such harm. Such an argument may be difficult to carry successfully since the objective facts (other than perhaps the disparity in size or past experience of the participants) are not likely to persuade a jury that the defendant reasonably feared death or great bodily harm. See supra notes 47-48; supra note 57 and accompanying text.

(despite the appellate court's conclusion to the contrary) that
the requisite elements of self-defense were not present. In this
rather bizarre case, the defendant was nearby while two burglars
were breaking into and entering a trailer which belonged to a
neighbor who lived next door to the defendant. Apparently the
burglars, one of whom was carrying a loaded shotgun stolen from
the trailer, were not aware of the defendant's presence. Accord-
ing to the defendant's testimony, he was "very scared . . . in
fear of my life" and he unintentionally fired a single round
which struck the victim in the back, killing the burglar who was
carrying the weapon.174

The trial court had refused to give a self-defense instruction
despite defendant's request because, in its opinion, "there is no
evidence whatever of any assault or intended assault or
attempted assault on his person."175 Essentially, the trial court
had determined that no reasonable person in the defendant's
situation would have believed he was threatened with imminent
death or great bodily harm. The appellate court disagreed and
decided that there was sufficient evidence for the defendant to
place this defense before the jury for its determination.

Based on the facts presented in the appellate court opinion,
this conclusion is rather extraordinary. The defendant evidently
did not indicate in his testimony that the victim or his compan-
ion even knew of his presence or that he believed the burglars
knew of his presence. Nor did he set forth any facts which indi-
cated that the aggressor, though armed with deadly force,
intended to use it against the defendant or anyone else.176

What is even more startling, and is not even discussed by
the appellate court, is the defendant's own testimony that he
fired his weapon unintentionally.177 At its core, the claim of self-
defense is a claim that, under the circumstances as the defen-
dant perceived them, his use of force (deadly or nondeadly) was
deliberate and appropriate.178 It strains both the credulity of

175. Id. at 395, 641 P.2d at 1209.
176. There were additional facts which the court relied on in concluding that the
defendant had adduced sufficient evidence to place his claim of self-defense before the
jury. These included: the neighbor whose house was being burglarized had shot at one of
the burglars a week earlier; the incident occurred in a remote area in the evening and
there was no telephone nearby; the defendant did not know where one of the burglars
was at the time of the shooting.
178. See supra notes 7-20; supra notes 28-33 and accompanying text. It should be
factfinders and the theory of self-defense to rest the justification of self-defense on accident. Put differently, the fundamental substance of the claim of self-defense is that the defendant intentionally responded with force to avoid harm or because of his lack of free will or to preserve his personal zone of security. The accidental or unintentional use of deadly force is inconsistent with any theory of self-defense which must take as its primary objective the deliberate preservation of life or limb or security. It is difficult to understand how accidental use of force promotes or advances those objectives.

There is no doubt that the Adams case posed serious questions for the appellate court. How imminent or explicit must the threat of deadly force or serious bodily harm be before the victim will enjoy the right of self-defense? When a defendant is confronted by multiple aggressors, is the presence or threatened use of deadly force a necessary condition for lawful resort to deadly force by the victim? And, perhaps, most important, given a state of extreme uncertainty as to the aggressor’s intention, the precise nature of the force threatened and the harm the victim may suffer, should the law place on innocent victims the burden of further inquiry to ascertain the “true” state of affairs? Rather than confront these questions and the more difficult questions of whether the law governing the use of deadly force should be changed, the appellate court effectively preserved the formalism of the present law while deliberately inviting jury nullification of this formal law at another trial. A better course for the court would have been to face these tough questions forthrightly; instead, it was satisfied with a procedural sidestep.

Rather than confront the difficult question of whether the law of self-defense in its present form is viable in today’s violent

---

179. See supra notes 7-33 and accompanying text.
180. See supra notes 7-33 and accompanying text.

---

noted that, according to the court, Wanrow testified that she shot her alleged aggressor “in what amounted to a reflex reaction.” 88 Wash. 2d at 226, 559 P.2d at 551. It may be that a victim can shoot reflexively and still be acting in self-defense. But see Annot., 15 A.L.R. 4th 983 (1982).

society, Washington courts have chosen to make ad hoc adjustments to specific components in order to soften the impact of the rules in particular cases. It is time to confront the difficult question.

VI. A CRITIQUE OF THE LAW GOVERNING THE USE OF DEADLY FORCE IN SELF-DEFENSE

The common law as understood by most courts, including Washington courts, permits the use of deadly force in self-defense but rigidly subordinates that right to the overriding, limiting principle of proportionality. As noted earlier, the common law authorizes a victim to respond only with force that is proportional to the force used by the aggressor even though in many instances it will clearly be ineffective to protect the victim. Washington permits a victim to use deadly force only if he is threatened with death or great bodily harm. The law can thus be perceived as granting, in many violent confrontations not involving threatened deadly force, death or great bodily harm, an illusory right of self-defense; that is, as a practical matter, no right at all. The public may well react adversely to this hypocrisy in the law, considering it of minimal help at best and at worse debilitating.

Insisting that a citizen threatened “only” with physical force or a “mere” battery forego the immediate private right of effective self-defense in exchange for a deferred public remedy of criminal prosecution may have made more sense in an era in

181. See supra notes 36-39 and accompanying text.
182. It should be noted that the law of Washington, the common law, and the law of other states permit use of deadly force by citizens in situations other than the defense of personal bodily integrity. The law will permit persons to use deadly force to prevent certain felonies. For example, Wash. Rev. Code § 9A.16.050 (1981), in effect purportedly permits the use of deadly force by a citizen “in the actual resistance of an attempt to commit a felony upon the sleeper, in his presence, or upon or in a dwelling, or other place of abode, in which he is.” See supra note 34. This statute has been construed by prosecutors to preclude prosecution of persons who kill criminals during the course of an actual burglary of their homes (Personal conversation with David Boerner, former chief criminal deputy, King County Prosecuting Attorney, Oct. 12, 1982). This statutory formulation, however, still leaves difficult questions unresolved. For example, it is not clear what should be the result if the sleeper honestly and reasonably but mistakenly believed that the person slain was committing a felony such as burglary in his dwelling, or if the person slain was within the home but had not committed a further act which would constitute a burglary or an attempted burglary in the sleeper’s home while the sleeper was present. Cf. State v. Griffith, 91 Wash. 2d 572, 589 P.2d 799 (1979) (court held that unlawful trespass into the dwelling of another does not, by itself, constitute such felonious activity or threat of danger as will justify use of deadly force against trespasser).
which subsequent arrest and successful prosecution of the aggressor were more likely. Given the increased violence of our times and the statistical likelihood that a majority of violent aggressors will in fact not be successfully apprehended and punished,\(^\text{183}\) many victims will be without any remedy, private or public. The better social policy is to recognize the extremely contingent nature of the public remedy and to increase the availability and efficacy of private remedies authorized by the law, lest unlawful violence continue without any effective restraint, private or public.

The present formulation of the law of self-defense, in its attempt to minimize social loss, has adopted a utilitarian scheme of justice without explicitly acknowledging its underlying philosophic premise.\(^\text{184}\) Adopting this premise condemns many individual victims to bear the primary cost of minimizing social loss. Maximizing the preservation of human life by inexorably distributing a significant personal burden of physical harm and psychic scarring to many innocent citizens chosen at random by violent aggressors may no longer accord with society's sense of social good. The abstract goal of preserving human life must be tempered with the recognition that the people whose lives are being protected by the law are frequently violent criminals who are thus free to prey again on society.

Even if one accepts this utilitarian premise, it is not clear that society currently agrees with the answer generated many years ago by the common law's reckoning on the utilitarian calculus. It is submitted that society today would not choose to preserve the lives of violent aggressors at the expense of physical and psychic harm to innocent victims. Interest balancing always contains a large degree of subjective value preference and courts may not be the institution best suited to gauge society's preferences. In any event, it seems quite clear that the legislature can reach a different conclusion in measuring the utilitarian prefer-

\(^{183}\) The chances of being caught and imprisoned for a crime are very slight. Eighty percent of those who commit crimes are not caught. L. Forer, THE DEATH OF THE LAW 191 (1975). For example, there are roughly 130,000 felony arrests in New York State each year. Approximately 8,000 of those arrested go to prison. In 1979, the national arrest rates for selected violent crimes were: 73% for murder; 53% for aggravated assault; 48% for rape; 25% for robbery; 15% for burglary. Why the Justice System Fails, TIME, March 23, 1981, at 22. Crimes committed by strangers have grown far more rapidly than crimes committed by acquaintances. Thus, police have been able to make proportionally fewer arrests. C. Silberman, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 219 (1978).

\(^{184}\) See supra notes 7-20 and accompanying text.
ences of society.

There are other cogent criticisms that can be made of the limitation on the use of deadly force in self-defense. As observed previously, limiting the right to use deadly force to instances in which deadly force is threatened may insure an ineffective response to violence. The victim may, once subjugated, only suffer physical harm together with the psychic scarring which usually accompanies such violence. It is also possible, however, that the aggressor will proceed to inflict even more serious damage on a victim once subjugation is complete and the possibility of resistance has been terminated. Indeed, the very helplessness of the victim may invite further aggression since there is virtually no present risk of resistance and harm to the aggressor. This fear is not unfounded. For, it is precisely the random and unpredictable nature of violence, the possibility of unforeseen shifting aggressor objectives, and escalation in the level of aggressor violence after the initial confrontation that are so bewildering today. It is not unusual to read about purse snatchings, muggings, and other crimes initially involving nondeadly force that result in appalling harm to the victim including death. If initial aggressor threats of mere physical harm in fact frequently explode unpredictably into instances in which aggressors cause death or serious bodily harm, then even utilitarian objectives may not be furthered by the present law.

In its current formulation, the law of self-defense effectively creates a strong evidentiary presumption about the nature of the harm threatened to the victim based on the nature of the force threatened by the aggressor. As a practical matter most juries are unlikely to conclude that a victim reasonably feared death or serious bodily injury at the hands of the aggressor unless the aggressor was armed with a deadly weapon or other deadly force. This inference of fact seems both unnecessarily rigid

185. See supra notes 53-55 and accompanying text.
187. See authorities cited supra note 186.
188. See authorities cited supra note 186.
189. See supra notes 57-61 and accompanying text.
190. See supra note 172.
and incongruent with experience. Predicting violence is at best a difficult task. Predicting the level of violence or the outcome of a violent confrontation is no easier. Nor is there any necessary logical correlation between what harm an aggressor intends to inflict and the force he has at his disposal. Certainly, the actual threat or use of deadly force ought to permit the victim reasonably to fear that the aggressor intends to inflict death or serious bodily harm on him. It is not clear, however, that the presence of deadly force is a necessary factual predicate for such fear. Rather the presence, use, or threat of deadly force ought simply to be one fact among others for the jury to consider in determining what the victim reasonably feared.

Violent confrontations normally occur under conditions of uncertainty. Frequently they are of short duration and without warning. They may also occur in situations in which the victim may be at an extreme disadvantage in gauging the level of violence or harm threatened or the intention of the aggressor.

Perhaps the paradigm case testing whether the current law of self-defense makes sense is the nighttime burglary of a residence when the lawful occupants do not know whether the intruder is armed or what his objective is in entering the home. It makes no sense to have rules of self-defense which impose the drastic disadvantage generated by the uncertainty of the confrontation on innocent parties. Yet the current rules of self-defense may do just that. In Washington, for example, occupants of a home may use deadly force if they are imminently threatened with death or bodily harm or if the aggressor attempts to commit a felony on the victim or in their home.

191. See supra note 186.
193. See supra notes 37, 48.
194. It is precisely because the stakes for victims are extraordinarily high, and the opportunity for decision and action usually so minimal, that legal rules governing victims' responses must be fairly simple yet comprehensible.
195. See supra note 182.
196. See supra note 182. Delaware has just passed legislation which seems to strike
These rules may require the lawful occupants to make factual inquiry, once an intruder has been detected in the house, sufficient to ascertain the aggressor's objectives.

Since he has created the potentially violent confrontation fully aware of his intention and his capability for violence, the aggressor is not so disadvantaged. Moreover, he has chosen to intrude into the home, the most personal zone of autonomy and security each citizen enjoys in our society. The abstract objective of preserving human life does not seem sufficiently persuasive to justify limiting the victim's resort to deadly force only to those instances in which he has clarified the facts and knows that the intruder is armed with deadly force or is threatening death or serious bodily injury or intends to commit a felony on the victim or in his home. Requiring further factual inquiry on the part of the victim may well disadvantage him even more and shift the odds enormously in favor of the aggressor.

With the possible exception of the problem of mistakes, no compelling argument can be offered that would justify requiring the victim to bear the risk of uncertainty generated by the aggressor's unlawful conduct. The aggressor has initiated the violent confrontation and the concomitant uncertainty. It is difficult to accept the logic and value of rules which, most citizens probably believe, generate an intolerable allocation of risk to innocent citizens in such paradigmatic cases. It seems far more preferable that all disadvantages which flow from such uncertainty should be allocated to the person who has caused the situation to occur.

Finally, an organized police force and the other apparatus of public security are simply not adequate by themselves to the tasks of controlling violent crime and of protecting ordinary peo-

a more reasonable balance between imposing a risk of harm on the lawful occupant and requiring him to clarify the factual situation before using deadly force in self-defense. A new section of the Delaware Code provides:

_Same—Person Unlawfully in a Dwelling._ In the prosecution of an occupant of a dwelling charged with killing or injuring an intruder who was unlawfully in said dwelling, it shall be a defense that the occupant was in his own dwelling at the time of the offense, and: (a) the encounter between the occupant and intruder was sudden and unexpected, compelling the occupant to act instantly; or (b) the occupant reasonably believed that the intruder would inflict personal injury upon the occupant or others in the dwelling; or (c) the occupant demanded that the intruder disarm or surrender, and the intruder refused to do so.

ple. Enhancing the ability of the private citizen to engage in effective self-defense will help provide the means of assuring personal security that the state can no longer insure. 197

VII. THE PROPER FORMULATION OF THE RIGHT OF SELF-DEFENSE

The private right of self-defense should be grounded primarily in the theory of personal autonomy. 198 The utilitarian theory of self-defense as a form of necessity 199 should continue to be relevant to the scope of the right but only as a subordinated principle of limitation.

Accordingly, the private right of self-defense should be carefully expanded in order to permit innocent victims to respond effectively to unlawful violence against their persons. At the very core of the proposed change is the premise that effectiveness of response should be the paramount principle of authorization rather than proportionality. This change will acknowledge that an innocent victim need not endure unlawful violence to his person (with all its attendant risk of unknown outcome, including his possible death) in exchange for the forlorn hope of subsequent arrest and successful prosecution of the aggressor at some unknown time in the future.

There are, then, two essential substantive adjustments that should be made in the right of self-defense. First, the rule should focus on the threat to the victim and not on the instrumentality used by the aggressor. Thus, the right to use deadly force in self-defense ought to arise whenever an innocent victim honestly and reasonably believes that he is threatened with unlawful violence. There is no compelling reason why the right of self-defense and, more importantly, the scope of the right should depend on the nature of the force (deadly or nondeadly) used by the aggressor or be limited to instances when the victim appears to be threatened with death or great bodily harm. This limitation creates a strong presumption about the aggressor's intention and capability (and therefore, about the likely outcome) based on the armament of the aggressor. 200 It also imposes on the innocent victim the risk of ascertaining whether the

197. See supra note 29.
198. See supra notes 28-33 and accompanying text.
199. See supra notes 7-20 and accompanying text.
200. See supra notes 47-50.
aggressor is using or threatening deadly force or is threatening to kill or inflict great bodily harm under very difficult and rapidly changing circumstances. Even more importantly, the rule which limits victims to nondeadly force when the aggressor uses nondeadly force or does not appear to be threatening death or serious bodily injury imposes a drastic disadvantage on victims who are physically weaker than their aggressors.

Second, the rules governing self-defense should be changed to permit the victim to respond only with that force which he honestly and reasonably believes to be necessary and effective to repel the aggressor and to prevent the infliction of unlawful violence on himself. On the one hand, this rule, as stated, maintains the principle of proportionality. That is, the victim cannot use greater force than is reasonably required to repel the aggressor and to avoid the harm threatened.\textsuperscript{201} On the other hand, it does not limit the level of force available to the victim and does not, thereby, require weaker victims to suffer gratuitous beatings. It is a principle both of authorization and of limitation.

The proposed substantive changes can be articulated in a variety of ways. The following formulation seems an appropriate point of departure for purposes of initiating discussion and change:

(a) Self-defense. In any prosecution for using, or attempting to use, force against the person of another, it shall be an affirmative defense that the defendant acted in self-defense.

(b) A person acts in self-defense when he honestly and reasonably believes that: (i) he is imminently threatened by another with unlawful physical violence to his person; and (ii) such force, including deadly force, is necessary to protect himself effectively.

These changes, it is submitted, are in accord with society's attitudes about unlawful personal aggression. They permit innocent victims to preserve their personal autonomy and bodily integrity if threatened with unlawful aggression. They permit victims to do what is necessary—but no more than what is necessary—to protect themselves. And, consistent with the long-standing common law tradition, by imposing the standard of

\textsuperscript{201} Thus, for example, a victim confronted by an aggressor who resorts to deadly force in self-defense may be required to warn his aggressor, if feasible, that he is prepared to use deadly force in self-defense. Such a requirement would help insure that loss of life would not occur unless really necessary.
reasonableness these proposed changes require all citizens to abide by a standard of common social responsibility applicable to all.

Giving primacy to the personal autonomy theory of self-defense and formulating the substantive rules of self-defense accordingly will simply recognize that, in these violent times, an individual ought to be entitled to take whatever steps are necessary to defend his zone of personal security and to preserve intact his bodily integrity. However, the revision is not necessarily incompatible with the utilitarian theory of justice underlying the traditional common law formulation of self-defense. The traditional cost/benefit assessment of the common law assumed that an aggressor not armed with deadly force did not intend to, and generally would not, kill his victim or inflict serious bodily harm. That assumption is open to serious doubt today. Moreover it also assumed a pattern of violent confrontation between participants of rough physical parity. Again, that is no longer the case, as increasingly victims are drawn from physically disadvantaged classes. Our contemporary concern with equality militates in favor of legal rules which adjust for disadvantage rather than preserving inequality which flows from characteristics of gender or other attributes beyond an individual’s control.\(^{202}\)

Furthermore, it is no longer clear that society regards preserving the life or limb of violent criminals as a value superior to preserving the physical integrity and psychological health of innocent victims. In fact, a good case can be made that striking the balance in favor of violent criminals increases the general disrespect for criminal law which seems to be increasing.\(^{203}\)

Finally, this view of the right of self-defense and the broad scope of authorization which is thereby created may enhance the general deterrent impact of permitting victims to use force

\(^{202}\) There is some evidence that females suffer from cultural bias which is exacerbated by the current law whenever they seek to use deadly force in self-defense. Brown, *A Double Standard at Work in Self-Defense Cases, Too*, Seattle Post-Intelligencer, Nov. 14, 1982, at B1, col. 1. The proposed changes do not require gender-specific rules of self-defense. Rather, they permit the jury to consider the defendant’s physical ability to respond effectively to aggression. Personal characteristics of victims thus are made relevant by the proposed rule change, but there is no need to pack such characteristics into statutes.

against aggressors.\textsuperscript{204} Aggressors, put at greater risk by this particular concept of self-defense and the rules implementing it, may be more reluctant to resort to violence to effectuate their unlawful desires once they become aware that they do so at greater personal risk.\textsuperscript{203} If this were the case, then expanding the right to use deadly force in self-defense might result in less loss of life or other physical harm generally as aggressors become less emboldened.\textsuperscript{206}

Since these proposed changes in the substantive rules governing self-defense would expand the right and scope of the privilege of self-defense, it seems appropriate to treat the doctrine as an affirmative defense imposing on victims the burden of producing evidence and the burden of ultimate persuasion.\textsuperscript{207} This structure of criminal law recognizes, as does the common law, that the intentional infliction of harm on another human being is, based on general experience, presumptively proscribed behavior.\textsuperscript{208} Therefore, one who acts in such a manner had better have a good reason for causing such harm in order to avoid personal criminal responsibility. Treating self-defense as an affirmative defense also acknowledges that the defendant has better access to evidence concerning his motivation which is the

\textsuperscript{204} G. Fletcher, RETHINKING CRIMINAL LAW 860-75 (1978).

\textsuperscript{205} Whether expanding the right of victims to resort to effective force, including deadly force, will in fact deter aggressors from initiating violent confrontations is an empirical question that can only be answered with any certainty by accurate social science techniques. Kadish apparently rejects this rationale for self-defense though his arguments do not appear persuasive. See Kadish, Respect for Life, supra note 17, at 882-83. But Weschler and Michael, in their important early work on homicide, considered this objective an important and valid consideration in the formulation of the rules of self-defense. They concluded: "Given the choice that must be made [between saving the life of the aggressor or that of the innocent victim], the only defensible policy is one that will operate as a sanction against unlawful aggression." Weschler & Michael, A Rationale of the Law of Homicide, 37 COLUM. L. REV. 701, 737 (1937).

\textsuperscript{206} This assumes that aggressors, before initiating violent confrontations, engage in rational decisionmaking, which would include an assessment of the nature and degree of resistance the victim is likely to offer. This assumption may be more valid when the aggressor plans his violent conduct (e.g., in mugging or in burglary) than when the aggressor acts with minimal forethought (e.g., in bar room brawls or in domestic disputes). Even the drafters of the Model Penal Code concluded that the use of deadly force in self-defense is a private sanction that might operate as a deterrent to aggressors though they generally preferred public sanctions. See Model Penal Code § 3.04 comment at 24-25 (Tent. Draft No. 8 1958).

\textsuperscript{207} See supra notes 77-103 and accompanying text. It should be noted that the proposed formulation of the right of self-defense is an expanded version of the common law version and thus should clearly fall within the rationale of Patterson v. New York, 432 U.S 197 (1975). See supra notes 97-98 and accompanying text.

\textsuperscript{208} See supra notes 81-82 and accompanying text.
crucial inquiry in self-defense. This allocation of the burden of proof also properly takes into account the concern society has with making mistakes in legal adjudication and in deterring feigning.\textsuperscript{209}

VIII. MEETING COUNTER ARGUMENTS

Are there compelling counter-arguments that should persuade us not to make the changes recommended here?

Perhaps the most difficult counter-argument is that the proposed expansion of the right of self-defense will generate "hard cases" of another kind; namely, that the law would authorize victims to take human life when in fact they were threatened with a very slight, unlawful physical force such as a push or a shove. The use of the term "violence" in the proposed formulation is intended to make clear that more than minimal unconsented touching would normally be required before the right to self-defense arose. Moreover, it is likely that juries will in fact interpret the statutory rule in a common sense fashion on the facts of each case.\textsuperscript{210}

It also may be argued that these changes in the law would cause an escalation of violence with increased loss of life or serious bodily harm. Obviously, this is an empirical question which cannot be answered solely by intellectual analysis. On the one hand, expanding the right of victims to respond with deadly force and self-defense may increase the loss of life or serious bodily harm. On the other hand, expanding this right might increase general deterrence against violent assaults by criminals, thereby actually reducing violence and its accompanying potential for death or injury.\textsuperscript{211} Even if the deterrent effect does not materialize, adjusting the law as suggested at least effectuates a more desirable allocation of risk of harm between aggressor and victim.

An argument also can be made that any change in the law which may increase the potential for loss of life or serious injury cheapens the value society places on human life and bodily integrity. Though plausible enough, this argument fails to take

\textsuperscript{209} See supra notes 41, 88 and accompanying text.

\textsuperscript{210} Juries are frequently required to engage in "factfinding" on matters which are not susceptible of empirical proof. Rather, they involve issues of community judgment such as "reasonableness" or "substantiality." Cf. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part).

\textsuperscript{211} See supra notes 204-06 and accompanying text.
into account the damage done to the social fabric by laws that seriously disadvantage innocent victims and allocate to them significant risks of bodily injury and even death. If the law is perceived as confirming disadvantages and as protecting criminal aggressors, it should come as no great surprise that society would consider it as enslaving rather than as protective and, therefore, not worthy of respect.²¹²

Arguably, the changes will be seen as a confession that the apparatus of public order is not working and that the law, in expanding the private right of self-help, is tacitly admitting the failure of public systems of social order. It also may reinforce the "seige mentality" that unfortunately permeates society today. Frankly, this may well be the case. However, it seems preferable to conform the law to reality rather than to preserve a false facade of social order.

IX. CONCLUSION

The majesty of the common law has been its ability to adapt to changing social conditions. Unfortunately, there is an increase today in violent crimes against the person and a concomitant inability of the social apparatus of law enforcement to cope with this phenomenon. In order to insure that innocent citizens have a meaningful right to life and bodily integrity and that society has some minimal confidence in the law as the protector of individual rights and public order, the law of self-defense should be changed by the legislature to permit an innocent victim to use whatever force he honestly and reasonably believes is necessary to protect himself effectively against unlawful violence to his person.

²¹². It should be emphasized that the expanded right of self-defense espoused here is limited to instances in which the victim is seeking to protect himself by preventing unlawful violence to his person by an aggressor. It is not intended to authorize vigilantism; i.e., using deadly force as retributive punishment to execute or maim persons who have already committed violence against others. See 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 179, 184 (Oxford 1769). There is some evidence in the popular culture which suggests that law-abiding citizens are increasingly enamored of the avenging hero. See Trombetta, Criminals, Beware: The Screen Avengers are Coming!, L.A. Times, July 12, 1981, (Calendar) at 1, col. 1.