

DEFENSE OF OTHERS: ORIGINS, REQUIREMENTS, LIMITATIONS AND RAMIFICATIONS

I. INTRODUCTION

"Since a time prior to the formation of our nation ... a homicide committed in self-defense simply has been no crime. Between the thirteenth and sixteenth centuries in England self-defense became in law a vindication of a killing."¹ This right, to kill in self-defense, eventually extended to killing in defense of one's family.² At common law, however, "the privilege of using [deadly] force ... did not include authority for intervenors to protect third persons who were strangers to the intervenor."³ This restriction slowly eroded, eventually allowing for the defense of strangers.⁴

The expansion of the "defense of others" to include strangers, carried with it the imposition of the "alter ego" rule.⁵ Under this rule, an intervenor who used deadly force to defend a person not entitled to use deadly force himself would be held criminally liable.⁶ For example, liability would arise when an intervenor was mistaken in his perception and defended the person who incited the fray.⁷

Even as recently as the 1980s, witnesses of violent attacks who, in good faith, intervened on behalf of another, still faced possible criminal prosecution if a homicide resulted from their intervention.⁸ Today, however, through surprisingly recent de-

1. Griffin v. Martin, 785 F.2d 1172, 1180 n.24 (1986) (citing Mullaney v. Wilbur, 421 U.S. 684, 692 (1975)).

2. See Alexander v. State, 447 A.2d 880, 882 (Md. Ct. Spec. App. 1982).

3. *Id.*

4. See *infra* notes 18-20 and accompanying text.

5. See State v. Chiarello, 174 A.2d 506, 510 (N.J. Super. Ct. App. Div. 1961).

6. *E.g.*, People v. Young, 229 N.Y.S.2d 1 (N.Y. 1962) (*per curiam*). For criticism of this decision, see *e.g.*, 31 FORDHAM L. REV. 206 (1962); 63 COLUM. L. REV. 160 (1963); 111 U. PA. L. REV. 506 (1963).

7. See, *e.g.*, People v. Young, 229 N.Y.S.2d at 1.

8. See Alexander v. State, 447 A.2d 880, 881 (Md. Ct. Spec. App. 1982) (where Judge Lowe stated that, "[e]ven if their hearts had been stout enough to enter the fray in defense of a stranger being violently assaulted, the fear of legal consequences chilled their better instincts").

velopments, the actual possibility of such criminal prosecution has been all but eliminated. Primarily due to the impact of the American Law Institute's Model Penal Code, which reflected a change in public sentiment, the laws now actually encourage intervention.⁹ A person may now be legally justified in killing to defend another, even if the intervenor acted under a mistaken belief as to who was at fault, provided his belief was *reasonable*.¹⁰

This survey provides coverage of the forty-one states which have a statute regulating the defense of others.¹¹ This article initially discusses the origins of defense of others, the alter ego rule, and the impact of the Model Penal Code. The remainder of the article focuses on the core requirements and limitations of the defense, particularly the issues of when deadly force may be used to defend a third person and the requisite standards of belief. The limitations discussion also details how the defense can be negated. Finally, this article examines who may be defended. This question carries with it important current legal and social

9. See e.g., *Alexander*, 447 A.2d at 880; *State v. Chiarello*, 174 A.2d 506 (N.J. Super. Ct. App. Div. 1961), cert. denied, 177 A.2d 343 (1962).

10. See, e.g., *Alexander*, 447 A.2d at 880; see generally *Chiarello*, 174 A.2d 506 (N.J. Super. Ct. App. Div. 1961).

11. Defense of others is codified in the following states: ALA. CODE § 13A-3-23 (1994); ALASKA STAT. §§ 11.81.340, 11.81.335 (1992 & Supp. 1993); ARIZ. REV. STAT. ANN. §§ 13-406, 13-404 (1989); ARK. CODE ANN. § 5-2-607 (Michie 1993); CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); FLA. STAT. ANN. §§ 776.012, 776.031 (West 1992); GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); HAW. REV. STAT. §§ 703-305, 703-304 (1985 & Supp. 1992); IDAHO CODE § 18-4009 (1987 & Supp. 1994); ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-Hurd 1993 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); IOWA CODE ANN. § 704.3 (West 1993); KAN. STAT. ANN. § 21-3211 (1988 & Supp. 1993); KY. REV. STAT. ANN. § 503.070 (Michie/Bobbs-Merrill 1990 & Supp. 1992); LA. REV. STAT. ANN. §§ 14:22, 14:20 (West 1986 & Supp. 1994); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); MD. ANN. CODE art. 27, § 12A (1992); MINN. STAT. ANN. § 609.065 (West 1987 & Supp. 1994); MISS. CODE ANN. § 97-3-15 (1972 & Supp. 1993); MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994); MONT. CODE ANN. § 45-3-102 (1993); NEB. REV. STAT. § 28-1410 (1989); NEV. REV. STAT. §§ 200.120, 200.160 (1991); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); N.M. STAT. ANN. § 30-2-7 (Michie 1994); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); N.D. CENT. CODE §§ 12.1-05-04, 12.1-05-05, 12.1-05-07 (1985 & Supp. 1993); OKLA. STAT. ANN. tit. 21, § 733, tit. 22, § 33 (West 1983 & Supp. 1994); OR. REV. STAT. § 161.209 (1993); PA. STAT. ANN. tit. 18, § 506 (1983 & Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 22-16-35, 22-18-4, 22-16-34 (1988 & Supp. 1994); TENN. CODE ANN. §§ 39-11-612, 39-11-611 (1991); TEX. PENAL CODE ANN. §§ 9.31, 9.32, 9.33 (West 1994); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994); VT. STAT. ANN. tit. 13, § 2305 (1974 & Supp. 1994); WASH. REV. CODE ANN. §§ 9A.16.050, 9A.16.020, 9A.16.110 (West 1988 & Supp. 1994); WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994). The nine remaining states (plus the District of Columbia) do not have a statute on defense of others, and thus, are outside the scope of this article: Massachusetts, Michigan, North Carolina, Ohio, Rhode Island, South Carolina, Virginia, West Virginia and Wyoming.

ramifications such as use of the defense by the killer of an abortion doctor.

II. DEATH TO THE ALTER EGO RULE

A. *Origins of "Defense of Others"*

Most of the case history indicates that the right to defend a third person arises from the right of self-defense. This common assumption is illustrated in *Adkins v. Commonwealth*¹² which stated:

The right to take a human life in one's self-defense, or apparently necessary self-defense, extends to acting in defense of another under the same circumstances; so facts which will excuse a killing in defense of self likewise will excuse a killing in defense of another, for it is a general rule that whatever a person may lawfully do for himself he may lawfully do for another.¹³

This theory fails to explain, however, why the common law right of defense of a third person only extended to an intervenor's family. William Blackstone theorized that the right actually arose out of the right to protect one's property.¹⁴ Blackstone noted that at common law, under the "English Rule," one's acquired rights of property encompassed his wife, child, parent, or servant.¹⁵

This same rule became ingrained into American jurisdictions as demonstrated in *Alexander v. State*,¹⁶ where the court reiterated that "[e]arly in this Court's judicial life, it carefully adhered to that narrow and restricted espousal of the right to aid third persons, limiting the beneficiaries of such right to relatives or close associates of the intervenor . . ."¹⁷ The Comments to the Model Penal Code also credit the English Rule for establishing that force could not be used to defend another unless the de-

12. 168 S.W. 2d 1008 (Ky. 1943).

13. *Id.*

14. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *3.

15. *Id.* (stating that "[i]n these cases, if the party himself . . . be forceably [sic] attacked on his person or property, it is lawful for him to repel force by force . . .") (emphasis added). See also R. PERKINS, CRIMINAL LAW 1018-1019 (2d ed. 1969).

16. 447 A.2d 880 (Md. Ct. Spec. App. 1982).

17. *Id.* at 882.

fended persons stood in a special relationship with their protectors.¹⁸

This American adaptation emphasized the requirement of a close or familial relationship between an intervenor and the person defended. Eventually it was supplemented by additional rules that would include, in some instances, preventing crime as a justification for homicide.¹⁹ Because intervening to interrupt an assault is an act preventing crime, "the practical effect in most [American jurisdictions] was to [now] allow strangers to be protected"²⁰

The same parameters that defined when one could act in self-defense were eventually extended to intervenors when they acted to protect strangers. In essence, "the right of one to defend another is coextensive with the right of the other to defend himself."²¹ The modern statutes clearly indicate this point. Of the forty-one states that have statutes concerning the defense of others, twenty-nine have incorporated them into the same statutes that cover self-defense.²² The remaining twelve states incorporate their self-defense statute into their defense of others

18. MODEL PENAL CODE § 3.05 cmt. 1 (1962 Proposed Official Draft with 1985 Revised Commentary).

19. *Id.*

20. *Id.* Most states' defense of others statutes no longer contain any familial restrictions. See *infra* note 270 and accompanying text.

21. *Lovejoy v. State*, 270 So. 2d 300 (Ala. Ct. App. 1943); cf. *Commonwealth v. Colantonio*, 577 N.E.2d 314, 319 (Mass. App. Ct. 1991) (repeating that "[t]he trend . . . has been to interweave closely the justification of defense of a third person with self-defense") (citing *Commonwealth v. Martin*, 369 Mass. 640, 650 (1976)); NOLAN & HENRY, CRIMINAL LAW § 680 (2d ed. 1988).

22. The following states have a single statute applicable to both defense of others and self-defense: ALA. CODE § 13A-3-23 (1994); ARK. CODE ANN. § 5-2-607 (Michie 1993); CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); FLA. STAT. ANN. § 776.012 (West 1992); GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); IDAHO CODE § 18-4009 (1987 & Supp. 1994); ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-Hurd 1993 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); IOWA CODE ANN. § 704.3 (West 1993); KAN. STAT. ANN. § 21-3211 (1988 & Supp. 1993); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); MD. ANN. CODE art. 27, § 12A (1992); MINN. STAT. ANN. § 609.065 (West 1987 & Supp. 1994); MISS. CODE ANN. § 97-3-15 (1972 & Supp. 1993); MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994); MONT. CODE ANN. § 45-3-102 (1993); NEV. REV. STAT. § 200.160 (1991); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.M. STAT. ANN. § 30-2-7 (Michie 1994); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); OKLA. STAT. ANN. tit. 22 § 33 (West 1983 & Supp. 1994); OR. REV. STAT. § 161.209 (1993); S.D. CODIFIED LAWS ANN. § 22-16-35 (1988 & Supp. 1994); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994); VT. STAT. ANN. tit. 13, § 2305 (1974 & Supp. 1994); WASH. REV. CODE ANN. § 9A.16.050 (West 1988 & Supp. 1994); WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994).

statute by reference.²³ Because self-defense and the defense of others have been treated as coterminous, intermingling of the defenses was inevitable. The alter ego rule is a product of this fusion. As this rule matured, it governed and restricted the application of the defense of others justification.

B. The "Alter Ego" Rule

While many of the states followed the modern trend by removing the class distinctions concerning whom one could defend, the alter ego rule continued as a viable part of the law. The rule held that a person coming to the aid of another "stepped into the shoes" of the person defended, in effect becoming their alter ego.²⁴ The alter ego rule was based on the premise that one can not justify the use of deadly force in self-defense if he is at fault.²⁵ Therefore, if the defended person was at fault in any way, a legal fiction "imputed" knowledge of that fault to the intervenor.²⁶ If the defended person, by his own actions, lost the right of self-defense, then consequently, the intervenor's right to argue justifiable homicide was also negated.²⁷ While the rule was not totally without its dissenters,²⁸ it became an entrenched precedent in American jurisprudence.²⁹

23. ALASKA STAT. §§ 11.81.340, 11.81.335 (1992 & Supp. 1993); ARIZ. REV. STAT. ANN. §§ 13-406, 13-404 (1989); DEL. CODE ANN. tit. 11, §§ 464, 465 (1987 & Supp. 1992); HAW. REV. STAT. §§ 703-305, 703-304 (1985 & Supp. 1992); KY. REV. STAT. ANN. §§ 503.050, 503.070 (Michie/Bobbs-Merrill 1990 & Supp. 1992); LA. REV. STAT. ANN. §§ 14:20, 14:22 (West 1986 & Supp. 1994); NEB. REV. STAT. §§ 28-1409, 28-1410 (1989); N.J. STAT. ANN. §§ 2C:3-4, 2C:3-5 (West 1982 & Supp. 1994); N.D. CENT. CODE §§ 12.1-05-03, 12.1-05-04 (1985 & Supp. 1993); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994); TENN. CODE ANN. §§ 39-11-611, 39-11-612 (1991); TEXAS PENAL CODE ANN. §§ 9.31, 9.33 (West 1994).

24. See, e.g., *State v. Chiarello*, 174 A.2d 506, 511 (N.J. Super. Ct. App. Div. 1961) (holding that when one acts to defend another, "he stands in the same shoes") (quoting BURDICK, LAW OF CRIME § 437 at 136-77 (1946); *Thompson v. State*, 70 So.2d 282 (Ala. Ct. App. 1954); *Kilpatric v. State*, 59 So. 2d 61 (Ala. 1952); cf. *Pacheco v. People*, 43 P.2d 165 (Colo. 1935); *State v. Best*, 113 S.E. 919 (W. Va. 1922).

25. See *State v. Chiarello*, 174 A.2d 506, 511 (N.J. Super. Ct. App. Div. 1961) (holding that "a homicide is not justified in such a case if the defender . . . is at fault in occasioning the difficulty . . .").

26. E.g., *Alexander v. State*, 447 A.2d 880, 882-83 (Md. Ct. Spec. App. 1982) (holding that "[the intervenor's] . . . protection from criminal charges depends not on what appears to him when he intervenes, but rather upon the rights of the person whom he has succored").

27. See, e.g., MODEL PENAL CODE § 3.05 (1962 Proposed Official Draft with 1985 Revised Commentary).

28. A few jurisdictions, opposing the alter ego rule, held that a reasonable mistake would exonerate the intervenor. See, e.g., *State v. Menilla*, 158 N.W. 645 (Iowa 1916);

In *Lovejoy v. State*,³⁰ the Alabama Court of Appeals pronounced the rule:

[A]s a general proposition, a person is justified or excused in killing in defense of another person when, *and only when*, the circumstances are such that the latter would be justified or excused if *he* had committed the homicide in his own defense. A person interfering in a difficulty in behalf of another simply steps in the latter's shoes; he may lawfully do in another's defense what such other might lawfully do in his own defense *but no more*; he stands on the same plane, is entitled to the same rights and is subject to the same conditions, limitations, and responsibilities as the person defended; and his act must receive the same construction as the act of the person defended would receive if the homicide had been committed by him.³¹

The court then stated that one's right to defend others is coterminous with that of self-defense, and therefore, "if [an intervenor] strikes in defense of one not free from fault in bringing on the difficulty [he also cannot be free from fault]."³² Consequently, it was explicitly clear that anyone venturing to render assistance in the defense of a third person did so "at his [own] peril."³³

The alter ego rule can attribute its longevity to being founded on seemingly sound jurisprudential reasoning. The rationale for the rule was that "acquitt[ing] a defendant who at the time of the occurrence had a reasonable belief that the seeming victim was without fault might, in [some] instances, result in the killing of an innocent man without any criminal liability of the killer."³⁴

One forceful argument, found fault with the rule because "it force[d] a Good Samaritan to gamble not only with his health but with his freedom and reputation, and overlook[ed] the likelihood that the intervenor might have actually acted entirely without

State v. Mounkes, 127 P. 637 (Kan. 1912); *Mayhew v. State*, 144 S.W. 229 (Tex. Crim. App. 1912).

29. See *supra* note 24. In *Chiarello*, the court notes that, while prior New Jersey decisions declared the alter ego rule to be the majority, in actuality, the rule has "split the American jurisdictions which have ruled on the matter substantially equally." *Chiarello*, 174 A.2d at 509-10.

30. 15 So. 2d 300 (Ala. Ct. App. 1943).

31. *Id.* at 301 (citing 30 C.J. 79).

32. *Id.*

33. *Alexander v. State*, 447 A.2d 880, 882 (Md. Ct. Spec. App. 1982) (where the court explicitly cautions that "one goes to the aid of another at his peril . . .").

34. *State v. Chiarello*, 174 A.2d 506, 510 (N.J. Super. Ct. App. Div. 1961).

mens rea, and perhaps with the highest sense of duty. It [treated] the defender as if he [was actually a] willing participant to a brawl"³⁵

Nonetheless, the alter ego rule held on tenaciously. As recently as 1982, some state courts, in response to legislative inaction, targeted its demise through judicial decisions.³⁶ In *Alexander v. State*,³⁷ a case from the Court of Special Appeals of Maryland, Judge Lowe summarized his frustration with the alter ego rule. In harshly criticizing the rule, Judge Lowe wrote:

In the decade that commenced with the assassination of President Kennedy, climaxed with the creation of this Court, and concluded with the marriage of Tiny Tim, violence proliferated, partly because police were constitutionally hobbled in controlling a rebellious reaction and partly because citizens were reluctant—or afraid—to become “involved” in deterring that violence. This reticence seemed to emanate less from fear of physical harm than from the potential consequences of a legal aftermath. Representative was the 1964 New York homicide of Catherine “Kitty” Genovese, who was viciously ravaged and repeatedly stabbed while onlookers turned their backs to avoid witnessing the butchery, and neighbors closed their doors and windows to shut out her screams of anguish until her suffering was finally ended by the murderer. Witnesses who were interviewed excused their indifference by noting that the law did not protect a protector from criminal assault charges if the one he aids was initially in the wrong, however misleading the appearances may have been (citation omitted). The onlookers hesitated to become involved in the fracas [for fear of] legal peril. Even if their hearts had been stout enough to enter the fray in defense of a stranger being violently assaulted, the fear of legal consequences chilled their better instincts.³⁸

Today, primarily due to the impact of the American Law Institute’s Model Penal Code and opinions like *Alexander*, all American jurisdictions, with but one apparent exception, have finally abandoned the alter ego rule.³⁹ The rule has been replaced by stan-

35. *Alexander*, 447 A.2d at 883 (citing R. PERKINS, CRIMINAL LAW 1018-19 (2d ed. 1969)).

36. *E.g., Id.*

37. *Id.* at 880.

38. *Id.* at 881.

39. The apparent exception among the states is Ohio, which is one of the nine states with no statute on defense of others. See *supra* note 11. As recently as 1994, an

dards which now allow exculpation based upon the intervenor's reasonable belief that his defensive action was required.

C. *Impact of the Model Penal Code*

The focus of this survey is to report the current state of the law of justifiable homicide in the defense of others. This law has been shaped in large part by the principles advocated in the Model Penal Code. Therefore, to understand the aim of today's statutes and the relevance of the new changes, basic knowledge of the Model Penal Code is essential.

The court in *State v. Chiarello* characterized the "[t]he American Law Institute [as] reject[ing] the 'alter ego' rule as repugnant to the fundamental principle of Anglo-American criminal jurisprudence [which should always espouse] that the defendant must be shown to have a mens rea, or guilty intent."⁴⁰ The Model Penal Code charges that without mens rea (or criminal intent), "a person should not be convicted of a crime of intention where he has labored under a mistake that, had the facts been as he supposed, would have left him free from guilt."⁴¹ This crucial distinction differentiates the Code from prior laws that would hold a mistaken intervenor criminally liable. The Model Penal Code drafters insist summarily that they would not "impos[e] liability without fault in cases where the [intervenor acts] in good faith and uses due care."⁴²

An examination of the pertinent parts of three sections illustrates how the Model Penal Code endeavors to exculpate a defender who believes his intervention is necessary to protect another.

SECTION 3.05. *Use of Force for the Protection of Other Persons*

Ohio court held that "one who intervenes to help a stranger stands in the shoes of the person whom he is aiding, and if the person aided is the one at fault, then the intervenor is not justified in his use of force . . ." *State v. Musing*, No. 63838, 1994 WL 24289 (Ohio Ct. App. Jan. 27, 1994) (citing *State v. Wenger*, 390 N.E.2d 801, 803 (Ohio 1979)). *Musing* is pending on appeal.

40. 174 A.2d 506, 510 (N.J. Super Ct. App. Div. 1961). *Mens rea* is defined "as an element of criminal responsibility; a guilty mind; a guilty of wrongful purpose; a criminal intent . . ." BLACK'S LAW DICTIONARY 985 (6th ed. 1990).

41. MODEL PENAL CODE § 3.09 cmt. 2 (1962 Proposed Official Draft with 1985 Revised Commentary).

42. MODEL PENAL CODE § 3.05, cmt. 1 (1962 Proposed Official Draft with 1985 Revised Commentary); see also *State v. Chiarello*, 174 A.2d 506, 511 (N.J. Super. Ct. App. Div. 1961) (holding that "one defending another in good faith and in ignorance of [whether he is defending one who is at] fault is justified when acting upon reasonable appearances").

- (1) Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable to protect a third person when:
- (a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and
 - (b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and
 - (c) the actor believes that his intervention is necessary for the protection of such other person.⁴³

In § 3.05, the Code lays out three basic requirements for the justification of use of force in the defense of others. First, force is justified if the intervenor would be justified under § 3.04 (the self-defense statute) when employing the same measures to protect himself.⁴⁴ Second, under the circumstances as the actor believes them to be, the other person would be justified in taking the same protective measures.⁴⁵ Third, the actor believes that his intervention is necessary for the third person's protection.⁴⁶

Section 3.05 assimilates the Code's self-defense provision which reads in part:

SECTION 3.04. *Use of Force in Self-Protection*

- (1) *Use of Force Justifiable for Protection of the Person.*

Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.⁴⁷

It is critical to understand that the Code emphasizes what the actor believes about the circumstances, as opposed to what the circumstances actually are. Under § 3.04(1),

the actor's actual belief is sufficient to support the defense; if his belief is mistaken and is recklessly or negligently

43. MODEL PENAL CODE § 3.05 (1962 Proposed Official Draft with 1985 Revised Commentary).

44. See MODEL PENAL CODE § 3.05 explanatory notes (1962 Proposed Official Draft with 1985 Revised Commentary).

45. *Id.*

46. *Id.*

47. MODEL PENAL CODE § 3.04 (1962 Proposed Official Draft with 1985 Revised Commentary).

formed, he may then [only] be prosecuted for an offense of recklessness or negligence under Section 3.09. In other words, if an actor makes [merely] a negligent mistake in assessing the need for [the "defense of others"] . . . he cannot be prosecuted for an offense that requires [intent] to establish culpability.⁴⁸

Section 3.09, in pertinent part, reads as follows:

SECTION 3.09. *Mistake of Law as to Unlawfulness of Force or Legality of Arrest; Reckless or Negligent Use of Otherwise Justifiable Force; Reckless or Negligent Injury or Risk of Injury to Innocent Persons . . .*

- (2) When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under Sections 3.03 to 3.08 but the actor is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief that is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.
- (3) When the actor is justified under Sections 3.03 to 3.08 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those Sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.⁴⁹

Even in pre-Code statutes, there were jurisdictions that adopted a more lenient, intermediate approach. Under these statutes, if there was a reasonable ground, "a mistaken belief in the necessity of force or the degree of force employed might suffice to exculpate; but [even in these jurisdiction] the actor's

48. MODEL PENAL CODE § 3.04 explanatory note (1962 Proposed Official Draft with 1985 Revised Commentary). The Model Penal Code, in § 2.02, sets forth the general requirements of culpability. Subsection (1) states that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently . . ." Subsection (2) then goes on to define the four levels of culpability. The most serious offenses, requiring "intent," can only be realized by acting either purposely or knowingly when committing the offense. Commentators have noted that "[t]he most important distinction between [acting purposely or knowingly versus recklessly or negligently] . . . is that we condemn purposeful and knowing conduct for being 'willful,' while we merely scold reckless [and negligent] conduct for being at most 'careless'." KAPLAN & WEISBERG, CRIMINAL LAW 136-37 (2d ed. 1991).

49. MODEL PENAL CODE § 3.09 (1962 Proposed Official Draft with 1985 Revised Commentary).

negligence in making the mistake might strip him of any defensive claim, thus permitting his conviction of an [intentional] offense, even of murder.”⁵⁰

In comparison, Model Penal Code section 3.09 goes even further to protect an intervenor by statutorily negating a murder prosecution when a negligent mistake is involved. Section 3.09 limits the possible prosecution to either reckless or negligent homicide where the actor is reckless or negligent in forming his belief.⁵¹ Through this mitigation, section 3.09 limits the level of culpability that can be charged to a defendant. Comment 2, following § 3.04, explains what the Code is attempting to accomplish:

Compare, for example, an actor who purposely kills in order to reap financial reward [with] the actor who purposely kills while believing in the existence of circumstances that would, if they actually existed, exonerate [him for defending another]. If the second actor was mistaken—if the circumstances were not in fact as he believed them to be—it is unjust to view him as having the same level of culpability as the first actor.⁵²

Consequently, the Code stresses that “the justification is retained in a prosecution for an [intentional] offense that can only be committed irrespective of recklessness or negligence in assessing the grounds for justification.”⁵³ The combined preset parameters of sections 3.05, 3.04 and 3.09 serve to preempt a murder prosecution for an intervenor, while still allowing for possible prosecution for a lesser offense.⁵⁴ Although it is true

50. MODEL PENAL CODE § 3.04 cmt. 2, n.3 (1962 Proposed Official Draft with 1985 Commentary) (citing *People v. Manzo*, 72 P.2d 119 (1937); *State v. Haynes*, 329 S.W.2d 640 (Mo. 1959); *State v. Bongard*, 51 S.W.2d 84 (1932); *State v. Perno*, 23 S.W.2d 87 (Mo. 1929)). Such homicides were reduced to manslaughter by previous statutes in some states, e.g., WIS. STAT. ANN. § 940.05(2) (West 1992 & Supp. 1993). The same result has also been achieved by judicial decision. See, e.g., *State v. Thomas*, 114 S.E. 834 (1922); *Commonwealth v. Colandro*, 80 A. 571 (1911).

51. See MODEL PENAL CODE § 3.09 cmt. 2 (1962 Proposed Official Draft with 1985 Revised Commentary).

52. *Id.* The Code continues its support for this proposition by stating: “Where the crime otherwise requires greater culpability for a conviction, it is neither fair nor logical to convict when there is only negligence as to the circumstances that would establish justification.” *Id.*

53. MODEL PENAL CODE § 3.09 cmt. 2 (1962 Proposed Official Draft with 1985 Revised Commentary) (emphasis added).

54. *Id.* One criticism of the Code is that the uniform application of § 3.09 will, in some cases, exculpate crimes of “intention.” See *Baker v. Commonwealth*, 677 S.W.2d 876 (Ky. 1984). However, *Baker* (which rejected the Code) was subsequently overturned by *Shannon v. Commonwealth*. In *Shannon*, Justice Vance dissented (joined by two other

that the same result could be achieved by a prosecutor's decision to seek lesser charges, to remove any possible indiscretions these standards should be reflected in criminal codes.⁵⁵

The Code supplies provisions that hold a defender liable if he recklessly or negligently forms his belief as to the necessity of his intervention. However, an intervenor can be *fully* exculpated when he is mistaken in his belief without being reckless or negligent. This revolutionary departure from prior law spelled death to the alter ego rule.

Although most jurisdictions have not adopted the entire Code,⁵⁶ all states with a defense of others statute at least adopt the *spirit* of the Code.⁵⁷ It is this spirit of the Code which has influenced the state legislatures and judiciaries to now focus on what the intervenor himself believed at the time of the intervention, rather than on what the defended person would have been able to do to defend himself. Although the standard of belief is the central requirement of the justification defense, there remain other threshold requirements which must be considered as well.

III. REQUIREMENTS OF THE DEFENSE

A. *Introduction: The Civil Government Shares the Sword*⁵⁸

That the principles of the Model Penal Code were so well received by the states was indicative of a significant shift in

justices), writing that "[t]he basic fault with the majority opinion [in overturning *Baker* and adopting the principles of the Code] lies in its conclusion that an intentional homicide (one committed with an intent to cause death) can become a wanton or reckless homicide if the act was precipitated by an unreasonable belief in the necessity for self-defense." *Shannon v. Commonwealth*, 767 S.W.2d 548, 553 (Ky. 1988) (Vance, J., dissenting).

55. See MODEL PENAL CODE § 3.04 cmt. 2 (1962 Proposed Official Draft with Revised Commentary 1985).

56. The following five states have adopted statutes very closely resembling the MODEL PENAL CODE prototype, enacting three separate but integrated statutes for self-defense, defense of others, and reckless/negligent use of otherwise justifiable force: DEL. CODE ANN. tit. 11, §§ 464, 465, 470 (1987 & Supp. 1992); HAW. REV. STAT. §§ 703-304, 703-305, 703-310 (1985); KY. REV. STAT. ANN. §§ 503.050, 503.070, 503.120 (Michie/Bobbs-Merrill 1990 & Supp. 1992); NEB. REV. STAT. §§ 28-1409, 28-1410, 28-1414 (1989); PA. STAT. ANN. tit. 18, §§ 505, 506, 503 (1983 & Supp. 1994). The remaining thirty-six states, while adopting their own individual statutory form and language, have nonetheless adhered to the spirit of the Code by allowing a mistaken intervenor the opportunity to be exculpated. See *supra* note 11.

57. The spirit of the Code has been adopted by the majority of the states having defense of others statutes, which only require a "reasonable belief" on the part of the intervenor for exculpation. See *infra* note 109 and accompanying text.

58. From antiquity, the sword has remained a symbol of the civil government's authority. "[I]f you do what is evil, be afraid; for [the civil government] does not bear *the sword* for nothing; it is . . . an avenger who brings wrath upon the one who practices evil." *Romans* 13:1-4 (New American Standard) (emphasis added).

public policy. In *State v. Chiarello*,⁵⁹ the court held that “[t]he sense of justice of the community will not tolerate the infliction of punishment which is substantial upon those innocent of intentional or negligent wrongdoing; and law in the last analysis must reflect the general community sense of justice.”⁶⁰

In Maryland, passage of a bill allowing witnesses of an assault to intervene was welcomed by the court as an “act [that] was clearly intended to encourage and to afford protection to ‘good samaritans’ by removing [any] legal doubts [about prosecution]. . . . [The] need [for allowing intervention of this type] has increased apace with the contemporary increase in violent crime.”⁶¹ The court explained that it is not a new concept for the civil government to delegate authority to prevent crime: “[e]ven in the days of Blackstone, such need was recognized to supplant the slowly grinding wheels of justice.”⁶²

Early in Anglo-American jurisprudence, the states statutorily empowered citizens to use deadly force.⁶³ These statutes, however, arbitrarily varied from jurisdiction to jurisdiction. Some would justify a homicide if committed in “the protection of a stranger from a felonious attack, [others] only from an attack in a habitation; or [in still others] the killing of an attacker might [not] be justified [unless he was faced with fatal force].”⁶⁴ The Model Penal Code says that, “[s]uch distinctions are indefensible.”⁶⁵

Today’s statutes which justify the use of deadly force vary greatly in describing when deadly force may be used to defend another. The Missouri Criminal Code is representative of those

59. 174 A.2d 506 (N.J. Super. Ct. App. Div. 1961).

60. *Id.* at 514 (quoting Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933)).

61. *Alexander v. State*, 447 A.2d 880, 884 (Md. Ct. Spec. App. 1982).

62. *Id.* at 884. The court, quoting Blackstone, wrote:

[T]he law, in this case, respects the passions of the human mind; and (when external violence is offered . . .), makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say what wanton lengths or rapine or cruelty outrages of this sort might be carried unless it were permitted a man immediately to oppose one violence with another.

Id. (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *3, 4).

63. MODEL PENAL CODE § 3.03 cmt.1 (1962 Proposed Official Draft with 1985 Revised Commentary).

64. *Id.*

65. *Id.* (contending that the Code’s prototype resolves any possible discrepancies by providing a formula that would result in uniformity).

which provide a comprehensive list of requirements which, if met, will trigger the defense. This statute will be used as a model throughout this section describing requirements of the defense. Omitting the statutory limitations which are discussed later in this article,⁶⁶ the Missouri statute, "Use of Force in Defense of Persons," reads, in pertinent part:

1. A person may, subject to the provisions of sub-section 2 of this section, use *physical force* upon another person when and to the extent he reasonably believes such force to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful force by such other person

2. A person may not use *deadly force* upon another person under the circumstances specified in subsection 1 of this section unless he reasonably believes that such deadly force is necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping or serious physical injury through robbery, burglary or arson.⁶⁷

B. The Core Requirements

1. Necessity

"Necessity" is a key prerequisite for the justification of homicide in the defense of others.⁶⁸ Of the forty-one states with a defense of others statute,⁶⁹ all but six use the words "necessity" or "necessary".⁷⁰

Because necessity is always required to use the defense of others under the larger umbrella of justification,⁷¹ it merits noting

66. See *infra* notes 196-256 and accompanying text.

67. MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994) (emphasis added).

68. *E.g.*, State v. Badgett, 167 N.W.2d 680, 683 (Iowa 1969) (stating that "defense of others" is a "doctrine of necessity which seeks to . . . justify a homicide") (citing State v. Haffa, 71 N.W.2d 35, 43 (Iowa 1955)).

69. See *supra* note 11.

70. CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); IDAHO CODE § 18-4009 (1987 & Supp. 1994); MISS. CODE ANN. § 97-3-15 (1972 & Supp. 1993); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); OKLA. STAT. ANN. tit. 21, § 733, tit. 22 § 33 (West 1983 & Supp. 1994); WASH. REV. CODE ANN. §§ 9A.16.020, 9A.16.050, 9A.16.110.

71. *E.g.*, MODEL PENAL CODE § 3.05 cmt. 1 (1962 Proposed Official Draft with 1985 Revised Commentary) (stating that the "necessity requirement . . . underlies all defensive use of force in the Code . . ."); see also LAFAYETTE & SCOTT, CRIMINAL LAW § 50 (1972). Here, the authors state that the defense of necessity requires three essential elements: the act committed must have been done to prevent greater evil; there must be no other adequate alternative; and the harm caused must not be disproportional to the harm avoided. A reasonable belief that the first two elements were present will suffice, but reasonable belief is not adequate for the third. *Id.* at 385-88. .

how the model Missouri statute⁷² interweaves the necessity requirement into both of its subsections. Subsection 1 provides justification for the use of physical force only when the actor reasonably believes it is necessary. Because mere physical force may only be prompted by necessity, a logical construction of the statutory language carries over the need for necessity to subsection 2, to allow for the use of the greater level of force.

The necessity confronted by the actor is measured by, and must pass, a two-prong test.⁷³ The use of deadly force is restricted to those times "when" the actor believes it is necessary, and "to the extent" the actor believes it is necessary. Each of these phrases has a separate and distinct meaning.

The term "when," in the context of the statute, appears self-explanatory. In this context, one may use deadly force whenever it is necessary. However, eight state legislatures couple the word "immediate"⁷⁴ with "necessary," creating a requirement that the actor must not respond with defensive deadly force unless there is an immediate necessity.⁷⁵

Necessity is not evaluated solely in terms of "when" force is necessary, but also "to the extent" the force is necessary. This phrase, "to the extent," represents the degree of force that may be used and still be justified. Only the degree of force which is necessary will be justified.⁷⁶

In *People v. Jordan*,⁷⁷ the defendant, his friend, and the victim left the Dating Game Lounge after arguing over a cocaine

72. See *supra* note 67.

73. MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994) (justifying deadly force "when and to the extent" necessary).

74. "Immediate" is defined as: "Present; at once; without delay; not deferred by any interval of time. In this sense, the word without any very precise signification, denotes that action is or must be taken either instantly or without any considerable loss of time. A reasonable time in view of particular facts and circumstances of case under consideration." BLACK'S LAW DICTIONARY 749 (6th ed. 1990).

75. ARIZ. REV. STAT. ANN. § 13-406 (1989) (stating that a "reasonable person would believe that such person's intervention is *immediately* necessary . . .") (emphasis added); DEL. CODE ANN. tit. 11, § 464 (1987 & Supp. 1992); HAW. REV. STAT. § 703-304 (1985); NEB. REV. STAT. § 28-1409 (1989); N.J. STAT. ANN. § 2C:3-4 (West 1982 & Supp. 1994); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994); TENN. CODE ANN. § 39-11-611 (1991); TEXAS PENAL CODE ANN. § 9.31 (West 1994). The statutes listed above are either the statutes on defense of others or self-defense, since many of the states incorporate their self-defense requirements into their statutes on defense of others.

76. See *People v. Clark*, 181 Cal. Rptr. 682 (Cal. 1982). In *Clark*, the court stated that "a person may use only that force which is necessary in view of the nature of the attack; any use of excessive force is not justified and a homicide which results therefrom is unlawful." *Id.* at 686 (quoting *People v. Young*, 29 Cal. Rptr. 595 (1963)).

77. 474 N.E.2d 1283 (Ill. App. Ct. 1985).

deal. A fight broke out between the victim and the defendant's friend, and the victim ended up sitting on top of and choking the defendant's friend. The defendant then came up behind the victim, striking him with a walking cane. The coroner testified that the victim had suffered a skull fracture so severe that it extended almost completely from one side to the other and through several bones at the base of the skull. After considering the expert medical testimony and conflicting testimony as to where and when the defendant struck the victim, the court found that justifiable homicide in the defense of another was negated because the force was "grossly excessive."⁷⁸ This illustrates that the courts, in examining both prongs of the doctrine of necessity as it relates to the defense of others, will negate the defense if both conditions are not satisfied.

2. Imminence

Another typical prerequisite found in the Missouri statute is that the intervenor must reasonably believe that the defended person is being confronted with the *imminent* use of force.⁷⁹ The defender cannot act until the defended person is being imminently threatened. In the majority of the states that codify the defense of others, legislatures use the word "imminent" to describe the proximate threat of force that must be facing the defended person.⁸⁰

Judicial decisions have done much in refining the meaning of the word "imminent." In *Scholl v. State*, speaking of the

78. *Id.* at 1285.

79. *See supra* note 67.

80. The following statutes require that a threat be "imminent" to justify homicide: ALA. CODE § 13A-3-23 (1994); CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994); FLA. STAT. ANN. § 776.012 (West 1992); GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); IDAHO CODE § 18-4009 (1987 & Supp. 1994); ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-Hurd 1993 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); IOWA CODE ANN. § 704.3 (West 1993); KAN. STAT. ANN. § 21-3211 (1988 & Supp. 1993); KY. REV. STAT. ANN. § 503.070 (Michie/Bobbs-Merrill 1990 & Supp. 1992); LA. REV. STAT. ANN. § 14:20 (West 1986 & Supp. 1994); MISS. CODE ANN. § 97-3-15 (1972 & Supp. 1993); MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994); MONT. CODE ANN. § 45-3-102 (1993); NEV. REV. STAT. § 200.160 (1991); N.M. STAT. ANN. § 30-2-7 (Michie 1994); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); N.D. CENT. CODE § 12.1-05-03 (1985 & Supp. 1993); OKLA. STAT. ANN. tit. 21, § 733 (West 1983 & Supp. 1994); OR. REV. STAT. § 161.209 (1993); S.D. CODIFIED LAWS ANN. § 22-16-35 (1988 & Supp. 1994); TENN. CODE ANN. § 39-11-611 (1991); TEX. PENAL CODE ANN. § 9.32 (West 1994); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994); WASH. REV. CODE ANN. § 9A.16.050 (West 1988 & Supp. 1994); WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994).

justifiable homicide requirements, the court stated that when a threat has an imminent danger of success; "'imminent,' [as applied to danger] means near at hand, mediate rather than immediate, close rather than touching."⁸¹ There are twenty-seven state statutes which impose this requirement.⁸²

Three state statutes imply that the actor must be facing an imminent threat without actually using the word "imminent."⁸³ These statutes assert that the intervenor cannot act unless an aggressor is "about to use" deadly force.⁸⁴

3. Specific Threats of Danger

Under Missouri Criminal Code Section 563.031,⁸⁵ the requirements of "necessity" and "imminence" must be prompted by an impending threat of danger. The statute cautions that a defender may not use deadly force unless he is protecting "against death, serious physical injury, rape, sodomy, or kidnapping or serious physical injury through robbery, burglary or arson."⁸⁶

Statutes codifying the defense of others typically begin by setting forth broad or general-type threats that can be defended against (i.e., death, deadly physical force or serious bodily harm), and then continue by cataloging specific-type threats (i.e., rape, sodomy, kidnapping) that may also be defended against.⁸⁷ Most statutes mirror the Missouri statute which contains both general-type and specific-type threats which can be defended against.⁸⁸

81. 115 S. 43 (Fla. 1927).

82. *See supra* note 80.

83. CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993).

84. *E.g.*, N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993) (stating, in part, that "[a] person is justified in using deadly force upon another person when he reasonably believes that such other person: (a) is *about to use* unlawful, deadly force against the . . . third person") (emphasis added).

85. MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994).

86. *Id.*

87. *See, e.g., id.* (stating that a person may use deadly force when "such deadly force is necessary to protect himself or another against death, serious physical injury, rape, sodomy or kidnapping or serious physical injury through robbery, burglary or arson").

88. ALA. CODE § 13A-3-23 (1994); ALASKA STAT. §§ 11.81.335, 11.81.340 (1992 & Supp. 1993); ARK. CODE ANN. § 5-2-607 (Michie 1993); CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994); DEL. CODE ANN. tit. 11, § 464 (1987 & Supp. 1992); FLA. STAT. ANN. §§ 776.012, 776.031 (West 1992); GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); HAW. REV. STAT. § 703-304 (1985 and Supp. 1992); IDAHO CODE § 18-4009 (1987 & Supp. 1994); ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-

Even though both types of threats are included in nearly all defense of others statutes, this survey treats them separately.

The statutes use a myriad of phrases to describe general-type threats.⁸⁹ The most common language, used by eight state statutes,⁹⁰ is that the defender is justified in killing if "such other person is using or about to use unlawful *deadly physical force* . . ."⁹¹ Other states allow for deadly force when merely threatened with "*bodily injury*,"⁹² while others call for a threat of

Hurd 1993 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); KY. REV. STAT. ANN. § 503.070 (Michie/Bobbs-Merrill 1990 & Supp. 1992); LA. REV. STAT. ANN. §§ 14:20, 14:22 (West 1986 & Supp. 1994); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); MINN. STAT. ANN. § 609.065 (West 1987 & Supp. 1994); MISS. CODE ANN. § 97-3-15 (1972 & Supp. 1993); MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994); MONT. CODE ANN. § 45-3-102 (1993); NEB. REV. STAT. § 28-1410 (1989); NEV. REV. STAT. § 200.160 (1991); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); N.M. STAT. ANN. § 30-2-7 (Michie 1994); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); N.D. CENT. CODE §§ 12.1-05-03, 12.1-05-04, 12.1-05-07 (1985 & Supp. 1993); OKLA. STAT. ANN. tit. 21, § 733, tit. 22, § 33 (West 1983 & Supp. 1994); OR. REV. STAT. § 161.209 (1993); PA. STAT. ANN. tit. 18, § 506 (1983 & Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 22-16-34, 22-16-35, 22-18-4 (1988 & Supp. 1994); TENN. CODE ANN. §§ 39-11-611, 39-11-612 (1991); TEXAS PENAL CODE ANN. §§ 9.31, 9.32, 9.33 (West 1994); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994); VT. STAT. ANN. tit. 13, § 2305 (1974 & Supp. 1994); WASH. REV. CODE ANN. §§ 9A.16.020, 9A.16.050, 9A.16.110 (West 1988 & Supp. 1994); WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994).

89. *E.g.*, LA. REV. STAT. ANN. §§ 14:22, 14:20 (West 1986 & Supp. 1994) (justifying a homicide when there is a "danger of losing . . . life or great bodily harm"); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994) (stating that "a person may not use deadly physical force . . . unless . . . the other person is using or about to use deadly physical force").

90. ALA. CODE § 13A-3-23 (1994); ARIZ. REV. STAT. ANN. § 13-406 (1989); ARK. CODE ANN. § 5-2-607 (Michie 1993); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); OR. REV. STAT. § 161.219 (1993); TEXAS PENAL CODE ANN. § 9.32 (West 1994).

91. ALA. CODE § 13A-3-23 (1994) (emphasis added). The annotations define "deadly physical force" as "readily capable of causing death or serious physical injury," and continue by stating that "[t]his section recognizes the opinion justifying one, to whom it reasonably appears, he [or the one he is protecting] is imminently threatened with violence, or actually attacked, to ward off his attacker with counter-force which reasonably appears to be necessary under the circumstances." *Id.* at Notes, References, and Annotations (citing MICH. REVISED CRIMINAL CODE § 615 (not yet enacted); N. Y. PENAL LAW § 35.15, PROPOSED REVISION TEXAS PENAL CODE §§ 9.31, 9.32, 9.33; MODEL PENAL CODE §§ 3.04, 3.05). *See also*, MODEL PENAL CODE § 3.11(2) (1962 Official Proposed Draft with 1985 Revised Commentary).

92. Five state statutes will justify a homicide if defending against "death or serious bodily injury." HAW. REV. STAT. § 703-304 (1985 & Supp. 1992); MONT. CODE ANN. § 45-3-102 (1993); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994); TENN. CODE ANN. § 39-11-611 (1991); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994). "Serious bodily injury" is defined as "any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body." N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993). For two states using the language "great bodily injury,"

"bodily harm"⁹³ to trigger the defense. The significance of these variations may appear merely academic in nature, but the semantics of these statutes are at times crucial.

In *People v. Reed*,⁹⁴ the appellant sought a reversal of her conviction for shooting her husband to death with a handgun she had purchased only three weeks before. During a violent argument between Mr. and Mrs. Reed, their thirteen-year-old daughter became so upset that she ran from the house. Mr. Reed followed her to get her back into the house and Mrs. Reed followed him. When Mr. Reed caught the child, he grabbed her by the neck. As the daughter struggled to get free, screaming, "Help me, mamma, help me,"⁹⁵ Mrs. Reed fatally shot her husband.

The jury was instructed that Mrs. Reed could use a deadly weapon if she believed either she or her daughter was in imminent danger of being killed or receiving great bodily injury. Mrs. Reed appealed her case because the trial court instructed the jury that great bodily injury had the same meaning as serious bodily injury. The appeals court stated that although great bodily injury is not statutorily defined, serious bodily injury is defined as "[b]odily injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body."⁹⁶ Although the appellate court agreed that "[b]odily injury" differs in degree from 'serious bodily injury,'⁹⁷ it held that there is "no rational basis for distinguishing between 'great' and 'serious' as applied to bodily injury."⁹⁸

see CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); IDAHO CODE § 18-4009 (1987 & Supp. 1994). See also IND. CODE ANN. § 35-41-3-2 (West 1994) (using only the words "serious bodily injury"); TEX. PENAL CODE ANN. § 9.32 (West 1994) (where only the threat of "death" will justify homicide).

93. Three states justify a homicide when the impending danger includes a threat of "death or great bodily harm. FLA. STAT. ANN. § 776.012 (West 1992); MINN. STAT. ANN. § 609.065 (West 1987 & Supp. 1994). Two states use the language "death or serious bodily harm". WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994). NEB. REV. STAT. § 28-1410 (1989); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994). See also N.D. CENT. CODE § 12.1-05-03 (1985 & Supp. 1993) (which justifies a homicide when defending against "unlawful bodily harm"); LA. REV. STAT. ANN. §§ 14:20, 14:22 (West 1986 & Supp. 1994) (justifying homicide if the killing occurs while being faced with a threat of "losing . . . life or great bodily harm"); ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-Hurd 1993 & Supp. 1994) (exonerating a killing committed when faced with "death or great bodily harm").

94. 695 P.2d 806 (Colo. Ct. App. 1985).

95. *Id.* at 810.

96. *Id.* at 808.

97. *Id.* (quoting *People v. Benjamin* 591 P.2d 89 (1979)).

98. *Id.* (stating that "great bodily injury" is defined as "serious and violent injury which could reasonably result in loss of health, life or limb") (citing *Barbee v. State* 369 N.E.2d 1072 (Ind. 1977)).

Once a legislature designates general-type harms that may be defended against, the statute routinely will follow with specific-type harms that will also justify a homicide. To list specific-type harms, legislatures choose between cataloging individual harms (i.e., sexual offenses, kidnapping, robbery),⁹⁹ or referring to them as any "felony,"¹⁰⁰ or "forcible felony."¹⁰¹ Six states list these harms both ways.¹⁰²

In *State v. Havican*,¹⁰³ a hitch-hiker threatened with forcible sodomy shot and killed his attacker. The Connecticut statute for self-defense and defense of others stated that one may use deadly physical force to repel a threat of "deadly physical force" or "great bodily harm."¹⁰⁴ The Connecticut Supreme Court reversed the conviction because the trial court's "definition of serious

99. There are fifteen states which use this cataloging approach, itemizing certain offenses which may prompt a justifiable killing. ALA. CODE § 13A-3-23 (1994); ALASKA STAT. §§ 11.81.335, 11.81.340 (1992 & Supp. 1993); COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994); DEL. CODE ANN. tit. 11, § 464 (1987 & Supp. 1992); HAW. REV. STAT. § 703-304 (1985 & Supp. 1992); KY. REV. STAT. ANN. § 503.070 (Michie/Bobbs-Merrill 1990 & Supp. 1992); MD. ANN. CODE art. 27, § 12A (1992) (listing "violent assault" as its sole specific-type harm); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994); NEB. REV. STAT. § 28-1409 (1989); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994); TEX. PENAL CODE ANN. § 9.32 (West 1994); VT. STAT. ANN. tit. 13, § 2305 (1974 & Supp. 1994).

100. The following states justify homicide when the intervenor was faced with a felony: CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); IDAHO CODE § 18-4009 (1987 & Supp. 1994); MINN. STAT. ANN. § 609.065 (West 1987 & Supp. 1994); MISS. CODE ANN. § 97-3-15 (1972 & Supp. 1993); NEV. REV. STAT. § 200.160 (1991); N.M. STAT. ANN. § 30-2-7 (Michie 1994); OKLA. STAT. ANN. tit. 21, § 733, tit. 22, § 33 (West 1983 & Supp. 1994); S.D. CODIFIED LAWS ANN. § 22-16-34 (1988 & Supp. 1994). A felony is defined as "any offense punishable by death or imprisonment for a term exceeding one year." BLACK'S LAW DICTIONARY 617 (6th ed. 1990).

101. The following states allow justification when faced with a "forcible felony." ARK. CODE ANN. § 5-2-607 (Michie 1993); FLA. STAT. ANN. § 776.031 (West 1992); GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-Hurd 1993 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); IOWA CODE ANN. § 704.6 (West 1993); LA. REV. STAT. ANN. § 14:20 (West 1986 & Supp. 1994); MONT. CODE ANN. § 45-3-102 (1993); OR. REV. STAT. § 161.219 (1993); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994). A forcible felony "includes any treason, murder, voluntary manslaughter, rape, robbery, arson, kidnapping, aggravated battery, aggravated sodomy and any other felony which involves the use or threat of physical force or violence against any person." KAN. STAT. ANN. § 21-3110 (1988 & Supp. 1993).

102. The following state statutes list specific-type harms in both ways, first listing the term "felony" or "forcible felony," and then cataloging individual harms: IND. CODE ANN. § 35-41-3-2 (West 1994); LA. REV. STAT. ANN. §§ 14:20, 14:22 (West 1986 & Supp. 1994); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.D. CENT. CODE §§ 12.1-05-03, 12.1-05-04, 12.1-05-07 (1985 & Supp. 1993); OR. REV. STAT. § 161.209 (1993); WASH. REV. CODE ANN. §§ 9A.16.020, 9A.16.050, 9A.16.110 (West 1988 & Supp. 1994).

103. 569 A.2d 1089 (Conn. 1990).

104. CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994).

physical injury included in the jury charge was too restrictive and did not fully encompass the threat of sexual assault [because the instruction did not include the threat of great bodily harm]."¹⁰⁵

Havican clearly indicates that fine semantic distinctions are meaningful. The same case also reveals that statutes which rest solely on sweeping general threats are insufficient when they fail to further identify specific threats that will also justify the use of deadly force, leaving the judiciary to compensate. The court stated:

Rather than delineate the specific felonies which may be defended against by the use of deadly physical force, as was done in the New York penal code and the Model Penal Code, the Connecticut legislature chose to utilize the term "great bodily harm." In doing so, however, the legislators recognized that they were not setting forth an all-inclusive list of offenses that would justify the use of deadly physical force.¹⁰⁶

The Court further pointed out that "New York has recognized that the imminent threat of deadly physical force and the threat of forcible sodomy are two distinct grounds for the justified use of deadly physical force."¹⁰⁷

This illustrates that statutes setting forth general-type threats function best when coupled with specific-type threats that will justify homicide. In fact, only four state statutes do not include specific-type offenses with their general-type offenses which may be defended against.¹⁰⁸

C. *The Requisite Standard of Belief*

The requisite standard of belief is arguably the pivotal component of the defense of justification. In a majority of states with a defense of others statute, necessity, imminence, and threat

105. *Havican*, 569 A.2d at 1093 (citing *State v. Hunter*, 286 S.E.2d 535 (N.C. 1982)) (holding that a man who is in fear of homosexual assault has fear of great bodily harm).

106. *Id.* at 1093 (citing Commission to Revise the Criminal Statutes, CONN. PENAL CODE (1972)).

107. *Id.*

108. These four states only mention general-type harms from which one may be defended: ARIZ. REV. STAT. ANN. § 13-406 (1989); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); KAN. STAT. ANN. § 21-3211 (1988 & Supp. 1993); MD. ANN. CODE art. 27, § 12A (1992).

of danger all hinge upon the reasonable belief of the intervenor.¹⁰⁹ If an intervenor kills based upon a mistaken but reasonable belief, he may nevertheless be justified.

The remaining jurisdictions are divided into five subcategories, presenting divergent statutory standards of belief required to justify homicide committed in the defense of others. Significantly, the judicial interpretations in these jurisdictions frequently limit, expand, or even contradict the language of their statutes, and actually adopt another standard — often the reasonable belief standard espoused by the majority.¹¹⁰

1. The Majority Standard: Reasonable Belief

The majority of the states have abandoned the alter ego rule by statute, adopting a standard which examines the reasonableness of an intervenor's belief that his action was necessary and prompted by an imminent threat of danger.¹¹¹ Under this standard, the intervenor who makes a mistake as to one of the other requirements of the defense may still be exculpated, provided that he had a reasonable belief that those conditions existed. The reasonableness of the actor's belief is the critical factor. If the intervenor is unreasonable in forming his belief, irrespective of whether the other conditions are met, he will be without a justification defense.

The Illinois statute, "Use of Force in Defense of a Person," is representative of the "reasonable belief" standard.¹¹² The stat-

109. The majority, which has adopted a standard of reasonable belief, is comprised of twenty-three states. ALA. CODE § 13A-3-23 (1994); ALASKA STAT. §§ 11.81.335, 11.81.340 (1992 & Supp. 1993); ARK. CODE. ANN. § 5-2-607 (Michie 1993); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); FLA. STAT. ANN. §§ 776.012, 776.031 (West 1992); GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-Hurd 1993 & Supp. 1994); IND. CODE. ANN. § 35-41-3-2 (West 1994); IOWA CODE ANN. § 704.3 (West 1993); KAN. STAT. ANN. § 21-3211 (1988 & Supp. 1993); LA. REV. STAT. ANN. §§ 14:20, 14:22 (West 1986 & Supp. 1994); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); MINN. STAT. ANN. § 609.065 (West 1987 & Supp. 1994); MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994); MONT. CODE ANN. § 45-3-102 (1993); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); OR. REV. STAT. § 161.209 (1993); TENN. CODE ANN. §§ 39-11-611, 39-11-612 (1991); TEX. PENAL CODE ANN. §§ 9.31, 9.32, 9.33 (West 1994); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994); WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994).

110. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-404, 13-406 (1989) (calling for the objective standard of a "reasonable person"); *contra* State v. Wright, 786 P.2d 1035, 1036 (Ariz. Ct. App. 1989) (where the court, in applying the statute, allowed a more subjective examination into what the intervenor "reasonably believed" at the time of the intervention).

111. See *supra* note 109.

112. ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-Hurd 1993 & Supp. 1994).

ute reads that “[a] person . . . is justified in the use of force which is intended or likely to cause death or great bodily harm only if he *reasonably believes* that such force is necessary to prevent imminent death or great bodily harm to . . . another”¹¹³

The reasonable belief standard “shifts the emphasis to [the] defendant’s reliance on *reasonable appearances* rather than exposing him to the peril of liability for defending another where appearances were deceiving and there was no actual imminent danger.”¹¹⁴ In *State v. Holmes*, the court stated that this reasonable belief test “is founded upon, and strengthened by [the] persuasive policy consideration [that] one should not be convicted of a crime if he selflessly attempts to protect a victim of an apparently unjustified assault”¹¹⁵

Although the standard does focus on the reasonable belief of the intervenor, it requires more than just an actual belief.¹¹⁶ The reasonableness of an intervenor’s belief is determined by a combination subjective and objective inquiry. As noted in *David v. State*, the “defense is composed of an objective element, i.e., a reasonable belief that force is necessary, and a subjective element, i.e., an actual belief that force is necessary.”¹¹⁷ In other words, the “actor must actually believe that he is in danger and that belief must be a reasonable one.”¹¹⁸

The combination objective and subjective inquiry is the essence of the reasonable belief standard. The intervenor is *not* held to a totally objective, reasonable person standard, which would preempt any inquiry into his perceptions of the circumstances in which he acted.¹¹⁹ The reasonable belief standard is more forgiving to an intervenor. An inquiry under this standard

113. *Id.* (emphasis added).

114. *Morris v. State*, 405 So. 2d 81, 83 (Ala. Crim. App. 1981) (citing ALA. CODE § 13A-3-23 commentary at 38).

115. 506 A.2d 366, 370 (N.J. Super. Ct. App. Div. 1986) (citing MODEL PENAL CODE § 3.05 tentative draft no. 8, 1958). The shift towards basing the innocence or guilt of an intervenor upon his reasonable belief can be primarily attributed to public policy concerns voiced through the Model Penal Code. See *supra* notes 40-42 and accompanying text.

116. *Howard v. State*, 420 So. 2d 828 (Ala. Crim. App. 1982). In *Howard*, the court held that “[t]he law requires that a belief of imminent peril and urgent necessity to slay in [defense of another], though it may be based on appearances, must be both well-founded and honestly entertained.” *Id.* at 832 (citing *Williams v. State*, 161 Ala. 52, 59, 50 So. 59 (1909)).

117. 698 P.2d 1233, 1235 (Alaska Ct. App. 1985).

118. *State v. Elam*, 328 N.W.2d 314, 317 (Iowa 1982).

119. See, e.g., *State v. Moore*, 429 A.2d 397 (N.J. 1981) (emphasizing the *objective* element of the reasonable belief test). See *infra* notes 158-60 and accompanying text (exploring the reasonable person standard).

permits the trier of fact to view the incident through the eyes of the intervenor at the time of the killing.

In *Morris v. State*, the Alabama Court of Criminal Appeals reversed and remanded a decision by the trial court because the lower court failed to allow the defendant to produce evidence showing that he reasonably believed that the person he defended was facing an imminent threat of unlawful force.¹²⁰ The appellant Morris had been found guilty of murder for killing Lawrence Grizzard, and had claimed that the shooting was justified in defense of his sister.

Morris had heard and seen Grizzard act belligerently toward his sister on the night of the killing, and went to Grizzard's house to be sure of her safety. When Morris arrived at the scene, through the open front door, he saw Grizzard and his sister fighting over a handgun, and "leapt" to her defense, wrestling the gun away from Grizzard. According to Morris, Grizzard then walked out the door toward his car saying, "You sorry [expletive deleted], I am going to kill you, both of you." Morris's sister then warned him that Grizzard kept a second gun in the car. Morris warned him, "Griz, I've got your gun," but Grizzard reached for the glove compartment, and Morris shot him.¹²¹

At his trial, Morris, on direct examination, was asked, "When you shot Lawrence Grizzard, did *you believe* he was about to shoot your sister?"¹²² The district attorney objected to inquiry concerning what Morris believed, and the trial court sustained the objection.¹²³ On appeal, the court found that the trial court committed reversible error, agreeing with the appellant who argued that "the above questions were crucial in order for the jury to determine whether he *reasonably believed* that he had to shoot Grizzard so as to protect his sister," stressing that the circumstances under which an intervenor may be justified "are to be ascertained by the jury."¹²⁴ *Morris* demonstrates that the reasonable belief standard requires inquiry into the intervenor's own subjective belief concerning the necessity of intervention, combined with an objective analysis of the circumstances to determine whether his belief was reasonable.

Even though the majority of jurisdictions adhere to the reasonable belief standard, the standard is applied in various

120. 405 So. 2d 81 (Ala. Crim. App. 1981).

121. *Id.* at 82.

122. *Id.* (emphasis added).

123. *Id.*

124. *Id.* (emphasis added).

ways. The courts examine both the objective and subjective elements, with some jurisdictions stressing one element more than the other.¹²⁵

In *People v. Hagi*,¹²⁶ the New York court evinced its jurisdiction's willingness to focus on the subjective element of the reasonable belief test. The *Hagi* court stated that the jury considering the justification defense "must first determine whether the defendant actually believed that [the life of the person defended] was in imminent danger, and then ascertain whether the defendant's perceptions concerning the need for use of deadly force were reasonable."¹²⁷ The court then emphasized examination of the subjective element of the test, stating:

The determination of the "reasonableness" of a defendant's belief must be based on the "circumstances" facing defendant or his "situation." These circumstances . . . involve a host of *subjective* factors, including any relevant knowledge that the defendant has concerning the [deceased], the physical attributes of the defendant and [the deceased], [the deceased's] reputation for violence or assaultive behavior and any specific prior acts of violence on [the deceased's] part, if known to the defendant.¹²⁸

One need only cross from New York into New Jersey to find a jurisdiction that leans the other way. The court in *State v. Moore*¹²⁹ expressed its intent to keep a tight reign on the scope of the defense. The per curiam opinion states:

[T]he test for determining one's criminal responsibility has a very limited subjective component. . . . [and so] it is clear . . . that the rule remains an objective test to the extent that justification for killing depends on the jury's determination of what it thinks a reasonable man would have done under the circumstances and not upon a subjective exploration of a defendant's psyche.¹³⁰

125. See, e.g., *State v. Moore*, 429 A.2d 397 (N.J. 1981) (emphasizing the *objective* element of the reasonable belief test); *People v. Hagi*, 572 N.Y.S.2d 663 (N.Y. App. Div. 1991) (emphasizing the *subjective* element of the test).

126. 572 N.Y.S.2d 663 (App. Div. 1991) (a self-defense case which applied the reasonable belief test identically to the manner in which it would be applied in a defense of others case under the applicable New York statute). See N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994).

127. *Hagi*, 572 N.Y.S.2d at 667-68.

128. *Id.* at 668 (citations omitted) (emphasis added).

129. 429 A.2d 397 (N.J. 1981).

130. *Id.* at 401. See also *Smiley v. State*, 395 So. 2d 235, 236 (Fla. 1st Dist. Ct. App.

In *Howard v. State*, a case heard by the Alabama Court of Criminal Appeals, the court in a similar vein wrote:

It is not [only] an honest, but [also] a reasonable belief, that justifies. An honest [belief] may not be a reasonable belief; it may be the offspring of fear, alarm or cowardice, or it may be the result of carelessness, and irrational. A reasonable belief, generated by the attendant circumstances — circumstances fairly creating it — honestly entertained, will justify a homicide; but not an irrational belief, however honest it may be.¹³¹

Despite the difference in emphasis displayed by jurisdictions within the majority, the objective and subjective elements are always an essential part of the reasonable belief standard. This standard, in reflecting the more subjective spirit of the Model Penal Code, responds to public policy concerns and eliminates the alter ego rule, thereby encouraging intervention in the defense of others.

2. The Minority Standards

a. Actual Necessity

The most stringent minority statutory standard, imposed by Maryland, North Dakota, and Vermont,¹³² requires that use of deadly force must actually be necessary to be justified. As stated in the North Dakota Century Code: "Deadly force is justified . . . [w]hen used in lawful self-defense, or in lawful defense of others, if such force *is necessary* to protect the actor or anyone else from death, serious bodily injury, or the commission of a felony. . . ."¹³³ The Maryland statute similarly states:

1981) (holding that before the defendant could have a reasonable belief that his action was required, there needed to be an "overt act expressing an intention to immediately execute the threats so that the [intervenor had] a reasonable belief that [the person he defended would] lose his life or suffer serious bodily harm if he [did] not immediately take the life of his adversary").

131. 420 So. 2d 828, 832 (Ala. Crim. App. 1982) (citing *Holley v. State*, 75 Ala. 14, 19 (1883)).

132. MD. ANN. CODE art. 27, § 12A (1992); N.D. CENT. CODE §§ 12.1-05-03, 12.1-05-04, 12.1-05-07 (1985 & Supp. 1993); VT. STAT. ANN. tit. 13, § 2305 (1974 & Supp. 1994).

133. N.D. CENT. CODE § 12.1-05-07 (1985 & Supp. 1993) (emphasis added). See also VT. STAT. ANN. tit. 13, § 2305 (1974 & Supp. 1994) (a similar statute which states, in part, that if a person kills another, "he shall be guiltless [if it is done] . . . [i]n the just and necessary defense of his own life or the life of [another]").

Any person witnessing a violent assault upon the person of another may lawfully aid the person *being assaulted* by assisting in that person's defense. The force exerted upon the attacker or attackers by the person witnessing the assault may be that degree of force which the assaulted person is allowed to assert in defending himself.¹³⁴

The statutory requirement of actual necessity would appear to leave no room for consideration of the intervening actor's perception of the need for use of deadly force. This, indeed, would suggest that the alter ego rule is still applicable, imposing liability if the actor was mistaken as to the degree of force necessary, or in his belief that the person had a right to be defended. However, judicial decisions in these three states demonstrate that the courts refuse to adhere to such an intractable and harsh statutory standard, and allow an examination of what the actor reasonably believed was necessary.

In *Alexander v. State*, the Maryland Court of Special Appeals held that "[the intervenor] must be judged on his own conduct, based upon his own observation of the circumstances as they reasonably appeared to him,"¹³⁵ and that "[t]he reasonableness of [the intervenor's] perceptions and the bona fides of his reactions are key elements of consideration by the factfinder, who must review the totality of the circumstances in their setting."¹³⁶ Similarly, the Supreme Court of North Dakota, in *State v. Liedholm*, stated:

[A] defendant's conduct is not to be judged by what a reasonably cautious person might or might not do or consider necessary to do under the like circumstances, but what he himself in good faith honestly believed and had reasonable ground to believe was necessary for him to do to protect [another] from apprehended death or great bodily injury.¹³⁷

Vermont's Supreme Court applied a combination objective and subjective standard in *State v. Wheelock*, where the court stated:

A defendant must have an honest belief of imminent peril, but that honest belief by itself is insufficient to invoke the

134. MD. ANN. CODE art. 27, § 12A (1992) (emphasis added).

135. 447 A.2d 880, 887 (Md. Ct. Spec. App. 1982); accord *Lambert v. State*, 519 A.2d 1340 (Md. Ct. Spec. App. 1987).

136. *Alexander*, 447 A.2d at 886.

137. 334 N.W.2d 811, 818 (N.D. 1983) (citing *State v. Hazlett*, 113 N.W. 374 (N.D. 1907)).

defense. The belief must be grounded in reason. The jury first must assess the honesty of the belief, which is a purely subjective inquiry. It must then determine whether the particular defendant had an objective, discernable reason for such belief.¹³⁸

As written, the statutes of these states require actual necessity, without regard for the defendant's perceptions. However, as shown above, the courts' interpretations hold otherwise.

b. Reasonable Ground and Imminent Danger

The statutes of eight states codify a standard requiring both actual imminent danger of death or serious bodily injury and a "reasonable ground" to apprehend that danger.¹³⁹ The delineation of these requirements is exemplified in the New Mexico statute, "Justifiable homicide by citizen,"¹⁴⁰ which states in part:

Homicide is justifiable when committed by any person . . . in the lawful defense of himself or another and when there is a *reasonable ground* to believe a design exists to commit a felony or to do some great personal injury against such person or another and *there is imminent danger* that the design will be accomplished . . ."¹⁴¹

The statutes of two of the states in this group, rather than using the words "reasonable ground to believe," retain the words, "reasonable ground to apprehend a design on the part of the person slain."¹⁴² This language is reflective of their adherence to stricter, less subjective standards which predated the Model Penal Code. Judicial decisions in each of these states emphasize the statutory requirement that there be reasonable grounds for believing that imminent danger existed. Yet, not one of them

138. 609 A.2d 972, 975 (Vt. 1992). The court also held that "a jury . . . must assess the reasonableness of a defendant's apprehension, taking into account not only the circumstances with which he is confronted, but his individual attributes as well." *Id.* at 976.

139. CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); IDAHO CODE § 18-4009 (1987 & Supp. 1994); MISS. CODE ANN. § 97-3-15 (1972 & Supp. 1993); NEV. REV. STAT. § 200.160 (1991); N.M. STAT. ANN. § 30-2-7 (Michie 1994); OKLA. STAT. ANN. tit. 21, § 733 (West 1983 & Supp. 1994); S.D. CODIFIED LAWS ANN. § 22-16-35 (1988 & Supp. 1994); WASH. REV. CODE ANN. §§ 9A.16.020, 9A.16.050, 9A.16.110 (West 1988 & Supp. 1994).

140. N.M. STAT. ANN. § 30-2-7 (Michie 1994).

141. *Id.* (emphasis added).

142. NEV. REV. STAT. § 200.160 (1991); WASH. REV. CODE ANN. § 9A.16.050 (West 1988 & Supp. 1994).

supports the language of their statutes requiring actual imminent danger.

In *Culverson v. State*, the Supreme Court of Nevada held that the district court had erred when it instructed the jury that there could be no justification defense for homicide "unless a person is actually in danger of being seriously injured or killed by his attacker."¹⁴³ Rather, the court held that the slayer may be justified in the homicide "if [that] person 'reasonably believes' that there is danger of death or serious injury."¹⁴⁴

The Supreme Court of South Dakota, in *State v. Grimes*, stated that "as with self-defense, so also with the defense of any other, one is not justified in using force for protection unless she *reasonably* believes that there is immediate danger of unlawful bodily harm."¹⁴⁵ The court thus eschewed the requirement of actual necessity, and instead imposed a strict requirement concerning reasonable belief in the immediacy of danger.

The Oklahoma Court of Criminal Appeals has held that, although an honest and good faith belief in the necessity of killing in the defense of others is insufficient to establish a justification, actual necessity need not be present. The test that must be met is that "reasonable grounds" existed for such belief.¹⁴⁶

The court holdings in the remaining four states require that the reasonable grounds for believing that death or serious bodily injury are imminent must be found within the attendant circumstances under which the person acted.¹⁴⁷ The Supreme Court of Washington, in *State v. Theroff*, held that a person's right to use force is dependent upon what a "reasonably cautious and prudent person *in similar circumstances* would have done and whether he reasonably believed he was in danger of bodily harm," and that "*actual danger need not be present.*"¹⁴⁸

Calhoun v. State,¹⁴⁹ a decision from the Supreme Court of Mississippi, illustrates the application of this standard. In *Calhoun*, the court reviewed the conviction of Dexter Calhoun, who

143. 797 P.2d 238, 241 (Nev. 1990). While *Culverson* is a self-defense case, self-defense and the defense of others are equivalent. See NEV. REV. STAT. § 200.160 (1991).

144. *Culverson*, 797 P.2d at 241.

145. 237 N.W.2d 900, 902 (S.D. 1976).

146. *Bechtel v. State*, 840 P.2d 1, 6 (Okla. Crim. App. 1992).

147. *E.g.*, *State v. Baker*, 644 P.2d 365 (Idaho Ct. App. 1982); *Calhoun v. State*, 526 So. 2d 531 (Miss. 1988); *State v. Lara*, 784 P.2d 1037 (N.M. Ct. App. 1989); *State v. Theroff*, 622 P.2d 1240 (Wash. 1980).

148. 622 P.2d 1240, 1244 (Wash. 1980).

149. 526 So. 2d 531 (Miss. 1988).

had been found guilty of murder by the lower court. On appeal, Calhoun argued that he was justified in killing in defense of his companion, Tammy Jones.

Miss Jones had at one time been the consort of the decedent, John Lougin. On a February night in 1986, Lougin had come to the home of Calhoun to talk to Miss Jones, and shortly thereafter, in the words of the court, "the situation turned 'ugly.'"¹⁵⁰ Lougin informed Tammy that he would "stomp" her for declining to talk to him. Calhoun took his twenty-gauge shotgun from the bedroom and shot Lougin in the side. Lougin died the next day.¹⁵¹

The court found that the lower court had erred in refusing to instruct the jury that the justification of self-defense may be applicable where a defendant intervened to defend another person.¹⁵² In delineating its self-defense standard, the trial court had issued the following jury instruction:

Every human being has a right to defend himself against death or serious bodily harm. But in order to justify the use of deadly force in defense, it must appear that the person attacked was so situated and endangered that he honestly believed, and that he had *reasonable grounds for believing*, that he [or the person he defended] was in imminent danger of death or serious bodily harm. . . . The circumstances under which he acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated, the belief that the other person was then about to kill him [or the person defended], or to do him serious bodily harm.¹⁵³

The court noted that "the record was replete with evidence showing threats made by the deceased toward [Miss Jones], not only on the night in question but on prior occasions."¹⁵⁴ Based on these facts, the court found that a second instruction should have been given "fully and fairly" informing the jury that "Calhoun could act in defense of Tammy."¹⁵⁵ Thus, the court held, "self-defense may be applicable where a defendant reasonably believed [based on reasonable grounds] that another person, in addition to himself, may be in danger of imminent death or great bodily

150. *Id.* at 532.

151. *Id.*

152. *Id.* at 533.

153. *Id.*

154. *Id.*

155. *Id.*

injury.”¹⁵⁶ The verdict and sentence were reversed, and the case remanded for a new trial.¹⁵⁷

In Mississippi, as in each jurisdiction within this group, the courts do not require actual imminent harm. Case law in these jurisdictions establishes that reasonable grounds for believing that harm is imminent, found in the attendant circumstances, will suffice for justification.

c. Reasonable Person

Arizona’s statute imposes an objective “reasonable person” standard.¹⁵⁸ That statute, “Justification; defense of a third person,” states:

A person is justified in threatening or using physical force or deadly physical force against another to protect a third person if:

1. Under the circumstances as a *reasonable person* would believe them to be such person would be justified under [the self-defense statute] in threatening or using physical force, or deadly physical force to protect himself against the unlawful physical force or deadly physical force a *reasonable person* would believe is threatening the third person he seeks to protect; and
2. A *reasonable person* would believe that such person’s intervention is immediately necessary to protect the third person.¹⁵⁹

The courts of Arizona, however, contradict the standard set forth in the statute.

In *State v. Wright*, the Arizona Court of Appeals held that the state’s law of self-defense should be applied to defense of a third person.¹⁶⁰ In the opinion, the court quoted the above statute, with its objective reasonable person standard, verbatim,¹⁶¹ However, immediately thereafter, the court presented a subjective standard, citing to the state’s supreme court holding in *State v. Plew*.¹⁶²

156. *Id.*

157. *Id.*

158. ARIZ. REV. STAT. ANN. § 13-406 (1989).

159. *Id.* (emphasis added).

160. 786 P.2d 1035, 1037 (Ariz. Ct. App. 1989).

161. *Id.* at 1036 n.1.

162. 722 P.2d 243 (citing *State v. Noriega*, 690 P.2d 775 (Ariz. 1984)).

In *Plew*, the *Wright* court noted, the applicable standard had been stated as follows: “[A ‘defense of others’] instruction must be given if the accused can demonstrate that 1) *he reasonably believed* that [there] was . . . immediate physical danger; 2) he acted solely because of his belief; and 3) he used no more force than appeared reasonably necessary under the circumstances.”¹⁶³ “Moreover,” the court continued, “a defendant is entitled to [a defense of others instruction] ‘whenever there is the *slightest* evidence of justification for the defensive act.”¹⁶⁴

Thus, Arizona, the one state with a purely objective standard in its statute, does not actually enforce it. In fact, ironically, California is the only state which holds an intervenor to an actual “reasonable man” standard, and it does so by the holdings of the courts,¹⁶⁵ in contravention of the language of its statute.¹⁶⁶

d. Actual Belief plus Reasonable Ground

The Colorado statute generally allows a person to use physical force in order to defend others from what “he reasonably believes to be the imminent use of force.”¹⁶⁷ When a person intervenes using deadly force, however, the statute requires that the person must “reasonably believe that a lesser degree of force is inadequate,” and that he “has a *reasonable ground to believe and does believe* that he or another person is in imminent danger of being killed or of receiving great bodily injury . . .”¹⁶⁸ This statutory standard, containing both subjective and objective elements, was a precursor of what is now the “reasonable belief” standard.¹⁶⁹

163. 786 P.2d at 1036 (emphasis added).

164. *Id.* (quoting *State v. Bojorquez*, 675 P.2d 1314, 1316 (1984) (emphasis added)).

165. *E.g.*, *People v. Williams*, 142 Cal. Rptr. 704 (Dist. Ct. App. 1977). In *Williams*, the court held that “it must appear not only that the defendant actually believed himself in deadly peril, but that as a *reasonable man* he had sufficient grounds for his belief.” *Id.* at 709 (emphasis added).

166. CAL. PENAL CODE § 197 (West 1988 & Supp. 1994) (stating that homicide may be justified “when there is a reasonable ground to apprehend . . . imminent danger . . .”).

167. COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994).

168. *Id.* (emphasis added).

169. *E.g.*, TENN. CODE ANN. § 39-11-611 (1991) (delineating the requirements of self-defense, which are incorporated by reference into § 39-11-612, entitled “Defense of Third Person”). Tennessee is among the many states that has codified the reasonable belief standard. The Historical Notes to § 39-11-611 which include the Sentencing Commission Comments, illustrate that the current reasonable belief standard continues to embody the combination of subjective and objective elements, presenting the following test for reasonable belief: “[T]he defendant must reasonably believe he is threatened with imminent loss of life or serious bodily injury; the danger creating the belief must be real *or honestly believed* to be real at the time of the action; *and* the belief must be founded on *reasonable grounds*.” *Id.* (emphasis added).

The Colorado courts expand this statutory standard. In *Sanchez v. People*, the Colorado Supreme Court, after first quoting the statute, stated:

The statute requires the presence of both reasonable belief and actual belief. However, although a defendant invoking this defense must establish that he or she acted in a reasonable manner under the circumstances, we have also suggested that in certain circumstances *instinctive reaction* may be considered reasonable conduct. . . . The General Assembly has indirectly recognized this factor by authorizing the defense . . . when a person acts on *appearances* rather than on reality. . . . Thus it is clear that the fact finder must weigh *all relevant circumstances* to determine whether a person asserting the [defense of others] has acted as a reasonable person would act in similar circumstances.¹⁷⁰

This holding, by stressing examination of appearances and circumstances, sets forth a more lenient and subjective standard, less focused on reasonable grounds and more resembling the reasonable belief standard.¹⁷¹

e. The Actor's Belief

The five states with the most subjective statutory standard adopt language directly from the Model Penal Code.¹⁷² This is typified by the Nebraska statute, "Use of force for protection of other persons,"¹⁷³ which states, in part:

- (1) Subject to the provisions of section 28-1414,¹⁷⁴ the use of force upon or toward the person of another is justifiable to protect a third person when:
 - (a) The actor would be justified under section 28-1409¹⁷⁵ in using such force to protect himself against the injury *he*

170. 820 P.2d 1103, 1108 (Colo. 1991) (citations omitted) (emphasis added).

171. See *supra* notes 111-31 and accompanying text.

172. DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); HAW. REV. STAT. § 703-304 (1985 & Supp. 1992); KY. REV. STAT. ANN. § 503.070 (Michie/Bobbs-Merrill 1990 & Supp. 1992); NEB. REV. STAT. § 28-1410 (1989); PA. STAT. ANN. tit. 18, § 506 (1983 & Supp. 1994).

173. NEB. REV. STAT. § 28-1410 (1989) (which is patterned after Model Penal Code § 3.05); see *supra* note 42 and accompanying text.

174. NEB. REV. STAT. § 28-1414 (1989) (a Nebraska statute entitled "Mistake of Law; reckless or negligent use of force" which is modeled after Model Penal Code § 3.09); see *supra* note 49 and accompanying text.

175. NEB. REV. STAT. § 28-1409 (1989) (a Nebraska statute entitled "Use of force in self-protection," which parallels Model Penal Code § 3.04); see *supra* note 47 and accompanying text.

- believes to be threatened to the person whom he seeks to protect;*
- (b) *Under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and*
- (c) *The actor believes that his intervention is necessary for the protection of such other person.*¹⁷⁶

The language of this statute is identical to that of Model Penal Code section 3.05.¹⁷⁷

Each of the states in this group, in fact, uses language nearly identical to that of the Code, with two simply substituting the word "defendant" for the word "actor."¹⁷⁸ Each also follows the format of the Model Penal Code by incorporating a separate self-defense section into its protection-of-others section by reference.¹⁷⁹

These states also incorporate by reference a section similar to Model Penal Code section 3.09 into their protection of others statute.¹⁸⁰ As previously shown, section 3.09 provides that when the actor forms his subjective belief negligently or recklessly, the justification afforded by the sections on self-protection and protection of others will be unavailable to him. Instead he will be held criminally liable for offenses "for which recklessness or negligence . . . suffices to establish culpability."¹⁸¹ Examples of such criminal offenses would include Reckless Homicide,¹⁸² or, Negligent Homicide.¹⁸³ Negation of the justification for reckless-

176. NEB. REV. STAT. § 28-1410 (1989) (emphasis added).

177. See *supra* notes 42-43 and accompanying text.

178. DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); KY. REV. STAT. ANN. § 503.070 (Michie/Bobbs-Merrill 1990 & Supp. 1992).

179. The self-defense statutes incorporated by reference into the defense of others statutes are: DEL. CODE ANN. tit. 11, § 464 (1987 & Supp. 1992); HAW. REV. STAT. § 703-305 (1985 & Supp. 1992); KY. REV. STAT. ANN. § 503.050 (Michie/Bobbs-Merrill 1990 & Supp. 1992); NEB. REV. STAT. § 28-1409 (1989); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994).

180. DEL. CODE ANN. tit. 11, § 470 (1987 & Supp. 1992); HAW. REV. STAT. § 703-310 (1985 & Supp. 1992); KY. REV. STAT. ANN. § 503.120 (Michie/Bobbs-Merrill 1990 & 1992); NEB. REV. STAT. § 28-1414 (1989); PA. STAT. ANN. tit. 18, § 503 (1983 & Supp. 1994).

181. MODEL PENAL CODE § 3.09 (1962 Proposed Official Draft with 1985 Revised Commentary).

182. *E.g.*, KY. REV. STAT. ANN. § 507.050 (Michie/Bobbs-Merrill 1990 & Supp. 1992). Although the Model Penal Code has no counterpart for "Reckless Homicide," states which have adopted the Model Penal Code prototype have created this offense for which recklessness suffices to establish culpability. *Id.*

183. MODEL PENAL CODE § 210.4 (1962 Proposed Official Draft with 1985 Revised Commentary).

ness or negligence is equivalent to a demand that the actor not be careless or unreasonable.¹⁸⁴

The courts of each of these states temper the focus on the subjective belief of the actor accordingly. Each imposes or retains a requirement of reasonableness, predictably to different degrees. As noted in the comments to the Model Penal Code, "So strongly entrenched is the requirement of reasonable belief that it has sometimes been imposed in the interpretation of statutes that do not clearly indicate it."¹⁸⁵ The courts of Kentucky, adhering most closely to the language and policies of the Model Penal Code, directly equate the actor's honest but *unreasonable* belief to recklessness or negligence, which mitigates the degree of the offense but does not allow justification.¹⁸⁶

The courts of Delaware and Hawaii retain language predating the proliferation of the reasonable belief standard. The Supreme Court of Delaware, in *Coleman v. State*, asserted that the state's "former objective test of what a reasonable man would have believed under the circumstances . . . has been supplanted by the subjective test of what the defendant actually believed as to such necessity."¹⁸⁷ However, the court then continued, stating that "it is important to note that . . . 'the jury may consider whether a *reasonable man* in the defendant's circumstances at the time of the offense would have had or lacked the requisite belief."¹⁸⁸ "Thus," the Court held, "the 'reasonable man' test is retained as a factor to be considered with all others in the determination of the issue of justification [although] it is not necessarily the controlling factor as heretofore."¹⁸⁹

The courts of the other two states, Nebraska and Pennsylvania, specifically espouse the reasonable belief standard. The Nebraska Court of Appeals, in *State v. Palmer*,¹⁹⁰ stated, "Al-

184. See MODEL PENAL CODE § 2.02 (1962 Proposed Official Draft with 1985 Revised Commentary).

185. MODEL PENAL CODE § 3.09 cmt. 2 (1962 Proposed Official Draft with 1985 Revised Commentary).

186. See, e.g., *Shannon v. Commonwealth*, 767 S.W.2d 548 (Ky. 1989).

187. 320 A.2d 740, 743 (Del. 1974).

188. *Id.* (citing DEL. CODE ANN. § 307(a)).

189. *Id.* (emphasis added). Similarly, Hawaii's Supreme Court declared that under that state's law, "the standard for judging the reasonableness of a defendant's belief for the need to use deadly force is determined from the point of view of a *reasonable person in the Defendant's position* under the circumstances as he believed them to be." *State v. Pemberton*, 796 P.2d 80, 85 (Haw. 1990) (citing *State v. Estrada*, 738 P.2d 812 (1987) (emphasis added)).

190. No. A-92-782, 1993 WL 191695 (Neb. App. June 8, 1993).

though the statute does not explicitly provide, it has long been held that a defendant may invoke the [protection of others] justification only where he or she reasonably believed that force was necessary."¹⁹¹ Likewise, the Supreme Court of Pennsylvania stated that "[t]he words 'believes' or 'belief' when used in this chapter [of the criminal code concerning defenses of justification] are to be interpreted as meaning 'Reasonably believes' or 'Reasonable belief.'"¹⁹² The court further held that use of deadly force in the defense of self or another, "cannot be justified unless the actor reasonably believes that such force is necessary to avoid death or serious bodily harm."¹⁹³

D. Conclusion

The Illinois statute, "Use of force in defense of person," exemplifies key requirements of justifiable homicide in the defense of others: the intervenor must have *reasonably believed* that the use of *deadly force* was *necessary* against *imminent* threat of death or serious bodily harm to another.¹⁹⁴ Of the forty-one states with a defense of others statute, the majority have adopted this reasonable belief standard.¹⁹⁵ This standard reflects a widespread change in social policy seen in the Model Penal Code which allows justification to a person who takes a life to defend another, even when his belief concerning the necessity was mistaken.

The statutory standards in the minority jurisdictions are indeed divergent. Those statutes present standards which range from a requirement of actual necessity without regard for the actor's belief to a largely subjective test of what the actor believes, as promulgated in the Model Penal Code. There is, however, a common thread which links them all: the courts in each state impose some standard of *reasonableness*, limiting, expanding, or even contradicting the language in their statutes.

Although the standards differ, the courts in each jurisdiction with a "defense of others" statute now allow consideration of an intervenor's belief concerning necessity, imminence and specific threats of danger. If his belief was sufficiently reasonable as to these elements, he will be justified.

191. *Id.* at *2 (emphasis added).

192. *Commonwealth v. McGuire*, 409 A.2d 313, 318 (Pa. 1979).

193. *Id.* (emphasis added).

194. ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-Hurd 1993 & Supp. 1994).

195. *See supra* note 109.

IV. LIMITATIONS ON THE DEFENSE;

A. *Introduction*

Limitations to the defense of justification are *implied* in the basic statutory requirements themselves. If a person uses deadly force upon another person *without* having a reasonable belief that such degree of force is necessary to defend himself or a third person from death, serious bodily injury, or specific-type harms, he *will not* be justified for such use of force. State legislatures, however, do not leave all limitations to be implied. Statutes, typically, are replete with specific, express provisions listing actions which will negate an intervenor's justification defense. These provisions are examined below.

B. *Provocation and Aggression*

The most common actions that will negate a claim of justification in the defense of others are provocation or initial aggression by the intervenor. The Colorado statute, "Use of physical force in defense of a person,"¹⁹⁶ provides a model for discussion of these limitations. That statute, after listing its basic requirements of justification, states its limitations as follows:

- a person is *not justified* in using physical force if:
- (a) With intent to cause bodily injury or death to another person, he *provokes* the use of unlawful force by that other person; or
 - (b) He is the *initial aggressor*, except that his use of physical force upon another person under the circumstances is justifiable if he withdraws from the encounter and effectively communicates to the other person his intent to do so, but the latter nevertheless continues or threatens the use of unlawful physical force"¹⁹⁷

"Provocation" is "a legal term of art, encompassing a range of situations in which a victim behaves in such a way as to cause a reasonable man to lose his normal self-control."¹⁹⁸ The general rule regarding provocation was stated by the Superior Court of New Jersey in *State v. Holmes*:

196. COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994).

197. *Id.* (emphasis added).

198. *State v. Powell*, 419 A.2d 406, 409 n.4 (N.J. 1980).

[Use of deadly force] is not justified if the third person, or the defendant, *provoked* the initial use of force against the third party that he is protecting in the incident at hand. In other words, if the defendant, himself, or the third person . . . caused the use of force against the third person, then they cannot claim . . . that [they had used force] to protect the third person.¹⁹⁹

Fifteen states have a provision nearly identical to subsection (a) of the Colorado statute, negating a claim of justification by one who claims to have defended another, but who provoked the use of force against himself or a third person with the intent to cause death or serious bodily injury to the person provoked.²⁰⁰ Six other states negate a claim of justification by one who intentionally provoked the use of force against himself, even when the intent was only to cause injury and not actual death.²⁰¹ The effect of these statutes is seen in *State v. Gorham*, where the Supreme Court of New Hampshire held: "The term 'provoke' connotes speech as well as action [A] defendant's use of words alone to bring about a fight in which he intended at the outset to kill his opponent is sufficient to destroy his legal defense" ²⁰²

As seen above in subsection (b) of the Colorado statute, acting as an "initial aggressor" will also negate justification.²⁰³ However, the person who first uses physical force is not necessarily the initial aggressor.²⁰⁴ Instead, the initial aggressor is that person "who begins a quarrel or dispute, either by threatening or striking another, that justifies like response."²⁰⁵

199. 506 A.2d 366, 368 (N.J. Super. Ct. App. Div. 1986) (emphasis added).

200. ALA. CODE § 13A-3-23 (1994); ARK. CODE ANN. § 5-2-606 (Michie 1993); COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, § 464 (1987 & Supp. 1992); HAW. REV. STAT. § 703-304 (1985 & Supp. 1992); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); NEB. REV. STAT. § 28-1409 (1989); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); N.D. CENT. CODE § 12.1-05-03 (1985 & Supp. 1993); OR. REV. STAT. § 161.209 (1993); PA. STAT. ANN. tit. 18, § 506 (1983 & Supp. 1994); WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994).

201. GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); ILL. ANN. STAT. ch. 720 para. 5/7-4 (Smith-Hurd 1993 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); IOWA CODE ANN. § 704.3 (West 1993); KAN. STAT. ANN. § 21-3211 (1988 & Supp. 1993); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994).

202. 412 A.2d 1017, 1019 (N.H. 1980).

203. COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994).

204. See *State v. Jiminez*, 636 A.2d 782, 785 (Conn. 1994).

205. BLACK'S LAW DICTIONARY 65 (6th ed. 1990).

Initial aggression is specifically mentioned as a negation of the justification in the statutes of sixteen states.²⁰⁶ The statutes of all but one of those states, however, delineate a three-part process by which an initial aggressor may be restored to a position wherein use of force in the defense of others may be justifiable.²⁰⁷ That three-part process requires: 1) the initial aggressor must withdraw from the encounter; 2) he must effectively communicate to the other person his intent to do so; and 3) the other person must nevertheless continue or threaten the use of force toward him.²⁰⁸ Nine states allow this same three-part process for one who initially provoked the use of unlawful force.²⁰⁹

The rule concerning this three-part process was the central issue in *People v. Mills*,²¹⁰ a case heard by the Appellate Court of Illinois. The defendant, Mills, had been found guilty of felony murder for stabbing a man during an armed robbery. Mills and some friends had gone to the home of the decedent, Brad Horton, armed with knives and a baseball bat in order to "obtain some marijuana."²¹¹ After being pinned to the wall with the baseball bat, Horton pulled a knife and cut the batsman, Fitzgibbon. Mills then stabbed Horton, and fled.

On appeal, Mills contended that Horton's use of his knife to defend himself constituted the first use of deadly force, terminated the armed robbery, and entitled Mills to claim justification in defense of Fitzgibbon.²¹² The court found no merit in the argument.²¹³ "To the contrary," the court stated, "in order to

206. ALA. CODE § 13A-3-23 (1994); ARK. CODE ANN. § 5-2-606 (Michie 1993); CAL. PENAL CODE § 197 (West 1988 & Supp. 1994) (using the term "assailant"); COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); IDAHO CODE § 18-4009 (1987 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); KY. REV. STAT. ANN. § 503.060 (Michie/Bobbs-Merrill 1990 & Supp. 1992); LA. REV. STAT. ANN. § 14:21 (West 1986 & Supp. 1994); MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); N.D. CENT. CODE § 12.1-05-03 (1985 & Supp. 1993); OR. REV. STAT. § 161.215 (1993); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994).

207. PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994).

208. *E.g.*, COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994).

209. ARIZ. REV. STAT. ANN. § 13-404 (1989); FLA. STAT. ANN. § 776.041 (West 1992); ILL. ANN. STAT. ch. 720 para. 5/7-4 (Smith-Hurd 1993 & Supp. 1994); IOWA CODE ANN. § 704.6 (West 1993); KAN. STAT. ANN. § 21-3214 (1988 & Supp. 1993); MONT. CODE ANN. § 45-3-105 (1993); TENN. CODE ANN. § 39-11-611 (1991); TEXAS PENAL CODE ANN. § 9.31 (West 1994); WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994).

210. 624 N.E.2d 384 (Ill. App. Ct. 1993).

211. *Id.* at 385.

212. *Id.* at 388.

213. *Id.*

restore the right of self-defense [or defense of others] . . . there must be a 'complete withdrawal such that the victim's subsequent use of force initiates a new conflict . . .'"²¹⁴ The court stated its rationale: "[I]f the situation is such that either the aggressor or the victim must suffer harm or death, the victim clearly is the one who is entitled to such protection as the law affords."²¹⁵

The withdrawal process described above is not the only way in which an initial aggressor or provocateur may be justified in the use of deadly force. Eight states additionally restore the justification when the force returned by the party assailed is grossly disproportionate or clearly excessive in the circumstances.²¹⁶ Five of these eight states, however, also require that deadly force not be used unless the initial aggressor has "exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or great bodily harm . . ."²¹⁷

Of the forty-one states with statutes concerning defense of others, eight have separate statutes specifically addressing the use of force by an aggressor.²¹⁸ Five others, while making no express mention of aggression or provocation in their statutes, espouse the three-part process for restoring the right to use force in defense of self or others in their case law.²¹⁹

C. *Committing a Felony*

The statutes of five states contain a clause stating that justification is not available to a person who is attempting to

214. *Id.* at 389 (citing ILL. ANN. STAT. ch. 720 para. 5/7-4 comm. cmts. of 1961 at 347-48 (Smith-Hurd 1993)).

215. *Id.*

216. FLA. STAT. ANN. § 776.041 (West 1992); ILL. ANN. STAT. ch. 720 para. 5/7-4 (Smith-Hurd 1993 & Supp. 1994); IOWA CODE ANN. § 704.6 (West 1993); KAN. STAT. ANN. § 21-3214 (1988 & Supp. 1993); KY. REV. STAT. ANN. § 503.060 (Michie/Bobbs-Merrill 1990 & Supp. 1992); MONT. CODE ANN. § 45-3-105 (1993); N.D. CENT. CODE § 12.1-05-03 (1985 & Supp. 1993); WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994).

217. FLA. STAT. ANN. § 776.041 (West 1992); ILL. ANN. STAT. ch. 720 para. 5/7-4 (Smith-Hurd 1993 & Supp. 1994); KAN. STAT. ANN. § 21-3214 (1988 & Supp. 1993); MONT. CODE ANN. § 45-3-105 (1993); WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994).

218. FLA. STAT. ANN. § 776.041 (West 1992); ILL. ANN. STAT. ch. 720 para. 5/7-4 (Smith-Hurd 1993 & Supp. 1994); IOWA CODE ANN. § 704.6 (West 1993); KAN. STAT. ANN. § 21-3214 (1988 & Supp. 1993); KY. REV. STAT. ANN. § 503.060 (Michie/Bobbs-Merrill 1990 & Supp. 1992); LA. REV. STAT. ANN. § 14:21 (West 1986 & Supp. 1994); MONT. CODE ANN. § 45-3-105 (1993); OR. REV. STAT. § 161.215 (1993).

219. *E.g.*, State v. Robinson, 427 N.W.2d 217, 227 (Minn. 1988); Hall v. State, 420 So. 2d 1381, 1385 (Miss. 1982); Allen v. State, 871 P.2d 79, 89 (Okla. 1994); State v. Woods, 374 N.W.2d 92, 96-97 (S.D. 1985); State v. Dennison, 801 P.2d 193, 197-98 (Wash. 1990).

commit, committing, or escaping after the commission of a *forcible* felony.²²⁰ These five statutes, each entitled, "Use of force by aggressor," are part of the eight separate aggressor statutes mentioned above.²²¹

Two other states have adopted very similar clauses, one of which negates justification for attempting, committing or fleeing after the commission of a *felony*,²²² while the other makes no mention of an attempt and substitutes the word "crime" for the word "felony."²²³

D. Resisting Arrest

Fifteen states have an express provision declaring that use of force, including deadly force, is not justifiable in resisting, or aiding another in resisting, arrest.²²⁴ Eight of those states²²⁵ adopt language very similar to that proposed in Model Penal Code section 3.04(2)(i), which states, in part, that "the use of force is not justifiable . . . to resist an arrest that the actor knows is being made by a peace officer, *although the arrest is unlawful . . .*"²²⁶

220. FLA. STAT. ANN. § 776.041 (West 1992); ILL. ANN. STAT. ch. 720 para. 5/7-4 (Smith-Hurd 1993 & Supp. 1994); IOWA CODE ANN. § 704.6 (West 1993); KAN. STAT. ANN. § 21-3214 (1988 & Supp. 1993); MONT. CODE ANN. § 45-3-105 (1993).

221. See *supra* note 218.

222. UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994).

223. IND. CODE ANN. § 35-41-3-2 (West 1994).

224. ARIZ. REV. STAT. ANN. § 13-404 (1989); ARK. CODE ANN. § 5-2-612 (Michie 1993); DEL. CODE ANN. tit. 11, § 464 (1987 & Supp. 1992); HAW. REV. STAT. § 703-304 (1985 & Supp. 1992); ILL. ANN. STAT. ch. 720 para. 5/7-7 (Smith-Hurd 1993 & Supp. 1994); KAN. STAT. ANN. § 21-3217 (1988 & Supp. 1993); KY. REV. STAT. ANN. § 503.060 (Michie/Bobbs-Merrill 1990 & Supp. 1992); NEB. REV. STAT. § 28-1409 (1989); N.H. REV. STAT. ANN. §§ 594:5, 642:2 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:3-4 (West 1982 & Supp. 1994); N.D. CENT. CODE § 12.1-05-03 (1985 & Supp. 1993); OR. REV. STAT. § 161.260 (1993); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994); TENN. CODE ANN. § 39-11-611 (1991); TEXAS PENAL CODE ANN. § 9.31 (West 1994).

225. DEL. CODE ANN. tit. 11, § 464 (1987 & Supp. 1992); HAW. REV. STAT. § 703-304 (1985 & Supp. 1992); ILL. ANN. STAT. ch. 720 para. 5/7-7 (Smith-Hurd 1993 & Supp. 1994); KAN. STAT. ANN. § 21-3217 (1988 & Supp. 1993); NEB. REV. STAT. § 28-1409 (1989); N.J. STAT. ANN. § 2C:3-4 (West 1982 & Supp. 1994); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994); TEX. PENAL CODE ANN. § 9.31 (West 1994).

226. MODEL PENAL CODE § 3.04(2)(i) (1962 Proposed Official Draft with 1985 Revised Commentary) (emphasis added). Of the eight states which adopted the language of Model Penal Code § 3.04(2)(i), four further track § 3.04(2) by adopting the Code's subsequent provision, 3.04(2)(ii). HAW. REV. STAT. § 703-304 (1985 & Supp. 1992); NEB. REV. STAT. § 28-1409 (1989); N.J. STAT. ANN. § 2C:3-4 (West 1982 & Supp. 1994); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994). Under § 3.04(2)(ii), the use of force is also not justifiable to resist force used by the occupier or possessor of property or by another

Of the remaining seven states, three prohibit use of force in resisting arrest, whether the arrest is lawful or unlawful.²²⁷ The other four provide an exception for situations in which the use of force by the peace officer was excessive.²²⁸

E. Combat by Agreement

The Colorado defense of others statute concludes by declaring that a person is not justified in using physical force if "[t]he physical force involved is the product of a *combat by agreement* not specifically authorized by law."²²⁹ Combat by agreement occurs "only when two parties willingly enter an altercation, or upon a sudden quarrel, mutually fought upon equal terms."²³⁰

A total of eight states use the term "combat by agreement,"²³¹ while two other states use the term "mutual combat."²³² One state refers simply to entering into "combat,"²³³ and another, "mortal combat."²³⁴ Two states describe the same activity as

person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:

- (A) the actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or
- (B) the actor has been unlawfully dispossessed of the property and is making a re-entry or recaption justified by [the section concerning defense of property]; or
- (C) the actor believes that such force is necessary to protect himself against death or serious bodily injury.

227. ARK. CODE ANN. § 5-2-612 (Michie 1993); N.H. REV. STAT. ANN. §§ 594:5, 642:2 (1986 & Supp. 1993); OR. REV. STAT. § 161.260 (1993).

228. ARIZ. REV. STAT. ANN. § 13-404 (1989); KY. REV. STAT. ANN. § 503.060 (Michie/Bobbs-Merrill 1990 & Supp. 1992); N.D. CENT. CODE § 12.1-05-03 (1985 & Supp. 1993); TENN. CODE ANN. § 39-11-611 (1991) (specifying that use of force is not justifiable "to resist a halt at a roadblock, arrest, search stop and frisk or halt . . .").

229. COLO. REV. STAT. ANN. § 18-1-704(3)(c) (West 1986 & Supp. 1994) (emphasis added).

230. *People v. Feierabend*, 424 N.E.2d 765, 773 (Ill. App. Ct. 1981) (In the absence of this concept in the Illinois statutes, the Illinois court recognized this common law doctrine and provided this definition).

231. ALA. CODE § 13A-3-23 (1994); ARK. CODE ANN. § 5-2-606 (Michie 1993); COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); OR. REV. STAT. § 161.215 (1993); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994).

232. CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); N.D. CENT. CODE § 12.1-05-03 (1985 & Supp. 1993).

233. IND. CODE ANN. § 35-41-3-2 (West 1994).

234. IDAHO CODE § 18-4009 (1987 & Supp. 1994).

“consent[ing] to the exact force used or attempted by the other individual.”²³⁵

Application of the combat by agreement rule is illustrated in *State v. Silveira*,²³⁶ a case heard by the Supreme Court of Connecticut. The court provided this analysis of the relevant facts:

The agreement required by [the applicable statute] need not be formal or express. The defendant himself testified that he and his companions went to the Standing Room Only Bar on the evening of [the] incident to assist friends who they had heard were in trouble. There was testimony that the defendant's group, while congregated in front of the bar, became embroiled in an altercation with [the decedent] Flammia. Other testimony indicated that the defendant's group had been involved with Flammia before. In apparent response to this altercation, Flammia's crowd then proceeded to converge on the defendant's group, with the resulting acceleration of hostilities which culminated in this tragic incident [involving the death of Flammia by gunfire]. . . . [W]e find the evidence sufficient to support a reasonable inference that the physical force employed by the defendant “was the product of a combat by agreement not specifically authorized by law.”²³⁷

The court then held that the defendant's claim of justification was negated by his engaging in combat by agreement.²³⁸

As *Silveira* illustrates, engaging in combat by agreement negates the defense of justification. Six of the twelve states with an express statutory provision concerning combat by agreement, however, allow an exception to this rule.²³⁹ In these six states, one who engaged in combat by agreement may be restored to justification in the use of force through the same three-part process allowed to initial aggressors. The mutual combatant must:

235. TENN. CODE ANN. § 39-11-611 (1991) (where the Sentencing Commission Comments following the statute offers “mutual combatants or participants in contact sports” as examples of persons “consenting to the exact force offered or attempted by the other individual”); TEX. PENAL CODE ANN. § 9.31 (West 1994).

236. 503 A.2d 599 (Conn. 1986).

237. *Id.* at 608 (citing CONN. GEN. STAT. ANN. § 53A-19(c)(3) (West 1985)).

238. *Id.* The defendant contended that the trial court erred when it refused to instruct the jury that the mutual combat rule should not apply. A defense witness denied that there had been an agreement to combat. The court held that there was no merit in the defendant's claim of error.

239. CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); IDAHO CODE § 18-4009 (1987 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); N.D. CENT. CODE § 12.1-05-03 (1985 & Supp. 1993); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994).

1) withdraw from the fray; 2) effectively communicate his intent to withdraw; and 3) yet continue to face persistence by the other person in the use, or threat of use, of force.

F. Duty to Retreat

Fifteen states with statutes regarding "defense of others" have specific provisions which require an intervenor to attempt to retreat before using deadly physical force, with exceptions.²⁴⁰ If the intervenor used such force in a way not in compliance with these provisions, his claim of justification in the defense of others is negated.

1. Basic Provisions

The Alabama statute, "Use of force in defense of a person,"²⁴¹ is representative of the statutes with the most common provisions:

[A] person is not justified in using deadly physical force upon another person if it reasonably appears or he knows that he can avoid the necessity of using such force with complete safety by:

- (1) retreating, except that the actor is not required to retreat:
 - a. If he is in his dwelling or at his place of work and was not the original aggressor; or
 - b. If he is a peace officer or a private person lawfully assisting a peace officer at his direction.²⁴²

Ten states share this exact combination of requirements, which closely parallels the provisions proposed by the Model Penal Code.²⁴³

240. ALA. CODE § 13A-3-23 (1994); ALASKA STAT. § 11.81.335 (1992 & Supp. 1993); ARK. CODE ANN. § 5-2-607 (Michie 1993); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); HAW. REV. STAT. §§ 703-304, 703-305 (1985 & Supp. 1992); IOWA CODE ANN. § 704.1 (West 1993); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); NEB. REV. STAT. § 28-1409 (1989); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); N.D. CENT. CODE § 12.1-05-07 (1985 & Supp. 1993); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994).

241. ALA. CODE § 13A-3-23 (1994).

242. *Id.*

243. ALA. CODE § 13A-3-23 (1994); ALASKA STAT. § 11.81.335 (1992 & Supp. 1993); ARK. CODE ANN. § 5-2-607 (Michie 1993); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); HAW. REV. STAT. § 703-304 (1985 & Supp. 1992); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994). *See also* MODEL PENAL CODE § 3.04 (1962 Proposed Official Draft with 1985 Revised Commentary).

2. The Exceptions

a. Dwelling or Place of Work

Thirteen of the fifteen states with specific provisions regarding the duty to retreat allow an exception for one who is in his dwelling.²⁴⁴ This, in essence, is the codification of "the venerable 'castle doctrine.'"²⁴⁵ This doctrine

stands for the proposition that a person's dwelling house is a castle of defense for himself and his family, and an assault on it with intent to injure him or any lawful inmate of it may justify the use of force as protection, and even deadly force if there exists reasonable and factual grounds to believe that unless so used, a felony would be committed.²⁴⁶

Eight states provide an exception to the duty to retreat for persons either in their dwelling or at their place of work.²⁴⁷ The two states which do not specifically refer to either home or dwelling in their provisions concerning retreat instead allow their own individualized exceptions. Alaska requires no retreat from premises that the person "owns" or "leases."²⁴⁸ Utah declares that a person does not have a duty to retreat from unlawful force when he is "in a place where [he] has lawfully entered or remained," unless he was the initial aggressor.²⁴⁹

244. ALA. CODE § 13A-3-23 (1994); ARK. CODE ANN. § 5-2-607 (Michie 1993); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); HAW. REV. STAT. § 703-304 (1985 & Supp. 1992); IOWA CODE ANN. § 704.1 (West 1993); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); NEB. REV. STAT. § 28-1409 (1989); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); N.D. CENT. CODE § 12.1-05-07 (1985 & Supp. 1993); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994).

245. *Falco v. State*, 407 So. 2d 203 (Fla. 1981).

246. *Id.* at 208.

247. ALA. CODE § 13A-3-23 (1994); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); HAW. REV. STAT. §§ 703-304, 703-305 (1985 & Supp. 1992); IOWA CODE ANN. § 704.1 (West 1993); NEB. REV. STAT. § 28-1409 (1989); N.D. CENT. CODE § 12.1-05-07 (1985 & Supp. 1993); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994).

248. ALASKA STAT. § 11.81.335 (1992 & Supp. 1993).

249. UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994). Tennessee, which has no duty to retreat, statutorily justifies a killing when one "unlawfully and forcibly enters" a dwelling, stating that if a slaying results from defending another, the state *must* infer the defender's justification. The statute reads: "A person using [deadly force] in their own residence, is presumed to have held a reasonable fear of imminent peril . . ." TENN. CODE ANN. § 39-11-611 (1991) (emphasis added).

b. Assisting a Peace Officer

As previously mentioned, ten states²⁵⁰ share precisely the same provisions seen in the Alabama statute above.²⁵¹ These provisions include a second exception to the duty to retreat: a person is not obligated to retreat when lawfully assisting a peace officer at his direction. The remaining five states with provisions concerning the duty to retreat do not include this express exception.²⁵²

3. Additional Duties: Surrendering Possession and Complying with a Demand

Included in the statutes of eight states are two additional possible negations of the defense, which are akin to the duty to retreat.²⁵³ In these states, an intervenor will also not be justified in the use of deadly physical force if "he knows that he can avoid the necessity of using such force with complete safety by *surrendering possession* of property to a person asserting a claim or right thereto, or . . . by *complying with a demand* that he abstain from performing an act which he is not obliged to perform."²⁵⁴

4. Incorporation by Reference

Six of the fifteen states, following the Model Penal Code's lead, incorporate duty to retreat provisions into their defense of others statutes by reference to their self-defense statutes.²⁵⁵ Five of these states have adopted the language of Section 3.05 from the Model Penal Code:

250. See *supra* note 243.

251. ALA. CODE § 13A-3-23 (1994).

252. IOWA CODE ANN. § 704.1 (West 1993); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); NEB. REV. STAT. § 28-1409 (1989); N.D. CENT. CODE § 12.1-05-07 (1985 & Supp. 1993); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994).

253. CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); HAW. REV. STAT. §§ 703-304, 703-305 (1985 & Supp. 1992); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); NEB. REV. STAT. § 28-1409 (1989); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994).

254. CONN. GEN. STAT. ANN. § 53A-19(b)(2), (b)(3) (West 1985 & Supp. 1994) (emphasis added).

255. ALASKA STAT. § 11.81.335 (1992 & Supp. 1993); DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); HAW. REV. STAT. §§ 703-304, 703-305 (1985 & Supp. 1992); NEB. REV. STAT. §§ 28-1409, 28-1410 (1989); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994).

When the person whom the actor seeks to protect would be obliged under [the self-defense statute] to retreat, to surrender the possession of a thing or to comply with a demand if he knew that he could obtain complete safety by so doing, the actor is obliged to try to cause him to do so before using force in his protection if the actor knows that complete safety can be secured in that way.²⁵⁶

Under this provision, an intervenor cannot be justified in defending another unless he first tries to cause the defended person to avoid the conflict.

G. Conclusion

While limitations to justification in the defense of others are, indeed, *implied* in the statutory requirements themselves, each state with a defense of others statute additionally imposes its own list of *express* limitations. The violation of any of these will negate a claim of justification. Thus, all requirements concerning necessity, imminence, threat, and belief, in a defense of others statute must be satisfied, and not one of its express limitations violated. Only when these conditions are met will a person be justified in the use of deadly force in defense of others.

V. WHO MAY BE DEFENDED

A. Survey of Terms

There are nearly as many different titles for defense of others statutes as there are states which draft them. These titles range from "Use of Force for Protection of Other Persons"²⁵⁷ to "Justifiable taking of life."²⁵⁸

Within these statutes, the designation of *who* may be defended also varies greatly. Twenty-two states allow an intervenor

256. MODEL PENAL CODE § 3.05(2)(b) (1962 Proposed Official Draft with 1985 Revised Commentary). States following the Code are: DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1993); HAW. REV. STAT. § 703-305 (1985 & Supp. 1992); NEB. REV. STAT. § 28-1410 (1989); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); PA. STAT. ANN. tit. 18, § 505 (1983 & Supp. 1994).

257. DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); HAW. REV. STAT. §§ 703-304, 703-305 (1985 & Supp. 1992); NEB. REV. STAT. § 28-1409 (1989); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); PA. STAT. ANN. tit. 18, § 506 (1983 & Supp. 1994).

258. MINN. STAT. ANN. § 609.065 (West 1987 & Supp. 1994).

to act in defense of a "third person."²⁵⁹ Seven states say that a person may be justified in acting in defense of "another."²⁶⁰ Two states use the term "defense of person."²⁶¹ Two others use the term "any person,"²⁶² and three more, "any other person."²⁶³ Single states use the terms "any other human being,"²⁶⁴ "others,"²⁶⁵ "the party about to be injured,"²⁶⁶ or "anyone in his presence or company."²⁶⁷ One other state simply describes the right to prevent various offenses, implying the right to defend those who are the victims of them.²⁶⁸

B. Relationships

The traditional rule which required a special relationship between an intervenor and the person he defended has largely been abrogated.²⁶⁹ Today, of the forty-one states with statutes

259. ALA. CODE § 13A-3-23 (1994); ALASKA STAT. §§ 11.81.335, 11.81.340 (1992 & Supp. 1993); ARIZ. REV. STAT. ANN. § 13-406 (1989); ARK. CODE ANN. § 5-2-607 (Michie 1993); COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); HAW. REV. STAT. § 703-305 (1985 & Supp. 1992); IND. CODE ANN. § 35-41-3-2 (West 1994); KY. REV. STAT. ANN. § 503.070 (Michie/Bobbs-Merrill 1990 & Supp. 1992); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994); NEB. REV. STAT. § 28-1409 (1989); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); OR. REV. STAT. § 161.209 (1993); PA. STAT. ANN. tit. 18, § 506 (1983 & Supp. 1994); TENN. CODE ANN. §§ 39-11-611, 39-11-612 (1991); TEX. PENAL CODE ANN. §§ 9.31, 9.32, 9.33 (West 1994); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994); WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994).

260. FLA. STAT. ANN. § 776.012 (West 1992); ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-Hurd 1993 & Supp. 1994); IOWA CODE ANN. § 704.3 (West 1993); KAN. STAT. ANN. § 21-3211 (1988 & Supp. 1993); MINN. STAT. ANN. § 609.065 (West 1987 & Supp. 1994); MONT. CODE ANN. § 45-3-102 (1993); N.M. STAT. ANN. § 30-2-7 (Michie 1994).

261. MD. ANN. CODE art. 27, § 12A (1992); OKLA. STAT. ANN. tit. 21, § 733, tit. 22, § 33 (West 1983 & Supp. 1994).

262. CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); IDAHO CODE § 18-4009 (1987 & Supp. 1994).

263. LA. REV. STAT. ANN. §§ 14:20, 14:22 (West 1986 & Supp. 1994); NEV. REV. STAT. § 200.160 (1991); WASH. REV. CODE ANN. §§ 9A.16.020, 9A.16.050, 9A.16.110 (West 1988 & Supp. 1994).

264. MISS. CODE ANN. § 97-3-15 (1972 & Supp. 1993).

265. N.D. CENT. CODE §§ 12.1-05-03, 12.1-05-04, 12.1-05-07 (1985 & Supp. 1993).

266. S.D. CODIFIED LAWS ANN. §§ 22-16-34, 22-16-35, 22-18-4 (1988 & Supp. 1994).

267. NEV. REV. STAT. § 200.160 (1991).

268. VT. STAT. ANN. tit. 13, § 2305 (1974 & Supp. 1994).

269. *E.g.*, MINN. STAT. ANN. § 609.065, 1987 Main vol. cmt. by Maynard E. Pirsig (West 1987 & Supp. 1994). The comments that follow this Minnesota statute, "Justifiable taking of life," demonstrate this trend, stating that the statute was designed to supersede a former statute "which had made homicide justifiable when committed 'in the lawful defense of the slayer, of his or her husband, wife, parent, child, brother, sister, master, or servant.'" *Id.* The comments note that the new statute substitutes the relationships formerly listed with the words "or another" and that "[i]t is therefore, no longer necessary to establish any relationship of the slayer to the person defended." *Id.*

codifying the defense of others, thirty have statutes which make no distinction between defense of strangers and defense of those closely related to the intervenor.²⁷⁰ The remaining eleven states retain class distinctions to some degree.²⁷¹ Three of these states retain their old statutes restricting the class of persons an intervenor may defend to those closely related;²⁷² in those jurisdictions, however, the judiciaries have found room to allow justification for the defense of strangers in other statutes. Seven other states draft their statutes with two separate sections imposing distinct requirements, one for defense of strangers, and the other for defense of persons with whom the intervenor has a special relationship.²⁷³ The statute of the final state lists a specific group of persons who may be defended by an intervenor, but then continues, allowing the defense of "any other person in his presence or company."²⁷⁴

270. ALA. CODE § 13A-3-23 (1994); ALASKA STAT. §§ 11.81.335, 11.81.340 (1992 & Supp. 1993); ARIZ. REV. STAT. ANN. §§ 13-404, 13-406 (1989); ARK. CODE ANN. § 5-2-607 (Michie 1993); COLO. REV. STAT. ANN. § 18-1-704 (West 1986 & Supp. 1994); CONN. GEN. STAT. ANN. § 53A-19 (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, § 465 (1987 & Supp. 1992); FLA. STAT. ANN. §§ 776.012, 776.031 (West 1992); GA. CODE ANN. § 16-3-21 (1990 & Supp. 1993); HAW. REV. STAT. §§ 703-304, 703-305 (1985 & Supp. 1992); ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-Hurd 1993 & Supp. 1994); IOWA CODE ANN. § 704.3 (West 1993); KAN. STAT. ANN. § 21-3211 (1988 & Supp. 1993); KY. REV. STAT. ANN. § 503.070 (Michie/Bobbs-Merrill 1990 & Supp. 1992); LA. REV. STAT. ANN. §§ 14:20, 14:22 (West 1986 & Supp. 1994); ME. REV. STAT. ANN. tit. 17A, § 108 (West 1983 & Supp. 1993); MD. ANN. CODE art. 27, § 12A (1992); MINN. STAT. ANN. § 609.065 (West 1987 & Supp. 1994); MISS. CODE ANN. § 97-3-15 (1972 & Supp. 1993); MO. ANN. STAT. § 563.031 (Vernon 1979 & Supp. 1994); MONT. CODE ANN. § 45-3-102 (1993); NEB. REV. STAT. § 28-1409 (1989); N.H. REV. STAT. ANN. § 627:4 (1986 & Supp. 1993); N.J. STAT. ANN. § 2C:3-5 (West 1982 & Supp. 1994); N.Y. PENAL LAW § 35:15 (McKinney 1987 & Supp. 1994); OR. REV. STAT. § 161.209 (1993); TENN. CODE ANN. §§ 39-11-611, 39-11-612 (1991); TEX. PENAL CODE ANN. §§ 9.31, 9.32, 9.33 (West 1994); UTAH CODE ANN. § 76-2-402 (1990 & Supp. 1994); WIS. STAT. ANN. § 939.48 (West 1982 & Supp. 1994).

271. CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); IDAHO CODE § 18-4009 (1987 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); NEV. REV. STAT. § 200.160 (1991); N.M. STAT. ANN. § 30-2-7 (Michie 1994); N.D. CENT. CODE §§ 12.1-05-03, 12.1-05-04, 12.1-05-07 (1985 & Supp. 1993); OKLA. STAT. ANN. tit. 21, § 733, tit. 22, § 33 (West 1983 & Supp. 1994); PA. STAT. ANN. tit. 18, § 506 (1983 & Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 22-16-34, 22-16-35, 22-18-4 (1988 & Supp. 1994); VT. STAT. ANN. tit. 13, § 2305 (1974 & Supp. 1994); WASH. REV. CODE ANN. §§ 9A.16.020, 9A.16.050, 9A.16.110 (West 1988 & Supp. 1994).

272. OKLA. STAT. ANN. tit. 21, § 733, tit. 22, § 33 (West 1983 & Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 22-16-34, 22-16-35, 22-18-4 (1988 & Supp. 1994); WASH. REV. CODE ANN. §§ 9A.16.020, 9A.16.050, 9A.16.110 (West 1988 & Supp. 1994).

273. CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); IDAHO CODE § 18-4009 (1987 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); N.M. STAT. ANN. § 30-2-7 (Michie 1994); N.D. CENT. CODE §§ 12.1-05-03, 12.1-05-04, 12.1-05-07 (1985 & Supp. 1993); PA. STAT. ANN. tit. 18, § 506 (1983 & Supp. 1994); VT. STAT. ANN. tit. 13, § 2305 (1974 & Supp. 1994).

274. NEV. REV. STAT. § 200.160 (1991).

1. No Class Distinctions

The Alabama statute on defense of others²⁷⁵ is representative of those seen in the thirty states which allow defense of strangers without a requirement of a special relationship between the intervenor and the person defended.²⁷⁶ That statute states, in part:

A person is justified in using physical force upon another person in order to defend himself or a *third person* from what he reasonably believes to be the use or imminent use of unlawful force by that other person, and he may use a degree of force which he reasonably believes to be necessary for the purpose.²⁷⁷

The term "third person" may include family, others of close relation and also *strangers*, and therefore imposes no relational restriction.

2. A Specific Class in One Statute; Strangers in Another

As mentioned, eleven states still retain a statute specifically limiting the class of persons an intervenor may defend.²⁷⁸ However, the judiciaries of three of those states insist on allowing for the defense of strangers by finding the justification in some other statute.

The Oklahoma statute, title 21, section 733, "Justifiable homicide by any person,"²⁷⁹ limits the justification to defense of self or "husband, wife, parent, child, master, mistress, or servant."²⁸⁰ However, in *Whitechurch v. State*, the Oklahoma Court of Criminal Appeals determined that a man was justified in killing to defend a person who was not in the enumerated class (his sister) from a violent assault.²⁸¹

The court stated initially that "[i]t was clear from reading [title 21] section 733 that neither brother nor sister are included among the class of persons in defense of whom a life may be taken,"²⁸² and that it was "unwilling to judicially amend this

275. ALA. CODE § 13A-3-23 (1994).

276. *See supra* note 270.

277. ALA. CODE § 13A-3-23 (1994) (emphasis added).

278. *See supra* note 271.

279. OKLA. STAT. ANN. tit. 21, § 733 (West 1983 & Supp. 1994).

280. *Id.*

281. 657 P.2d 654, 657 (Okla. Crim. App. 1983).

282. *Id.* at 656.

statute by expanding the class of relations that a person may defend."²⁸³ However, the court then stated that, due to "society's general interest in preventing criminal acts,"²⁸⁴ a jury instruction should have been given under a separate statute, title 22, section 33, entitled "Resistance by other person."²⁸⁵ That statute provides that "[a]ny other person, in aid or defense of the person about to be injured, may make resistance sufficient to prevent the offense."²⁸⁶

The court then held that Whitechurch's conviction should be reversed and remanded, stating, "Section 33, justifying reasonable force to prevent a public offense in which personal injury is imminent, complements, and to a certain extent overlaps the principles of self-defense and defense of others."²⁸⁷

The courts of the other two states, South Dakota, in *State v. Grimes*,²⁸⁸ and Washington, in *State v. Kirvin*,²⁸⁹ have expanded the defense of others in very similar fashion.

3. A Different Standard for Strangers

The statutes of seven states are drafted with separate sections delineating requirements for defense of those closely related and defense of strangers.²⁹⁰ The statutes of six of these states

283. *Id.*

284. *Id.*

285. OKLA. STAT. ANN. tit. 22, § 33 (West 1983 & Supp. 1994).

286. *Id.* (emphasis added).

287. *Whitechurch*, 657 P.2d at 657. *Whitechurch* was decided just two years after the same court had held that because a defendant's companion did not fall within the limited group of persons listed in OKLA. STAT. ANN. tit. 21, § 733 (West 1983 & Supp. 1994), she was not entitled to an instruction on defense of others. *Cowles v. State*, 636 P.2d 342, 344 (Okla. Crim. App. 1981).

288. 237 N.W.2d 900 (S.D. 1976). The traditional defense of others statute in South Dakota (still current law) limits the class that can be defended to "husband, wife, parent, child, master, mistress, or servant." S.D. CODIFIED LAWS ANN. § 22-16-35 (1988 & Supp. 1994). In *Grimes*, however, the Supreme Court of South Dakota allowed the defense of others under S.D. CODIFIED LAWS ANN. § 22-18-4, justifying use of force in "preventing or attempting to prevent an offense against [any] person or his property." 237 N.W.2d at 902.

289. 682 P.2d 919 (Wash. Ct. App. 1984). In *Kirvin*, the Washington Court of Appeals allowed the invocation of WASH. REV. CODE ANN. § 9A.16.020 (West 1988 & Supp. 1994), which justified use of force "[w]henever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against [his person]." *Id.* at 923 n.4. The more traditional statute concerning the defense of others limits the class that can be defended to "husband, wife, parent, brother, or sister, or . . . any person in [the intervenor's] presence or company. . . ." WASH. REV. CODE ANN. § 9A.16.050 (West 1988 & Supp. 1994).

290. CAL. PENAL CODE § 197 (West 1988 & Supp. 1994); IDAHO CODE § 18-4009 (1987 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); N.M. STAT. ANN. § 30-2-7 (Michie 1994); N.D. CENT. CODE §§ 12.1-05-03, 12.1-05-04, 12.1-05.07 (1985 & Supp. 1993); PA. STAT. ANN. tit. 18, § 506 (1983 & Supp. 1994); VT. STAT. ANN. tit. 13, § 2305 (1974 & Supp. 1994).

impose a much more lenient standard for defense of those with whom the intervenor has a special relationship.²⁹¹ These statutes are typified by the New Mexico statute, "Justifiable homicide by citizen,"²⁹² which demonstrates the distinction, stating, in pertinent part:

Homicide is justifiable when committed by any person in any of the following cases:

- A. when committed in the necessary defense of his life, his family, or in necessarily defending against *any unlawful action* directed against himself, his wife or family; [or]
- B. when committed in the lawful defense of himself *or other* [with no requirement of special relationship] and when there is a reasonable ground to believe a design exists to commit a felony or to do some great personal injury against such person or *another*, and there is imminent danger that the design will be accomplished . . .²⁹³

Section A allows expansive justification, approving homicide in defending family against *any* unlawful action. Section B, by comparison, imposes a more restrictive standard for strangers, closely guarding the degree of force used, reasonableness of the belief and imminence of the danger.

The statute of the remaining state in this group, California, allows defense of "any person" in one section, and listed family members and others of close relationship in another.²⁹⁴ Interestingly, however, it appears that the standard to which an intervenor will be held is no more stringent when defending a stranger. The statute simply spells out the elements of justification in greater detail in its section concerning the defense of those with whom one is closely related.

4. Presence or Company

Nevada, the remaining state, has two statutes applicable to the defense of others.²⁹⁵ One statute lists a specific class of persons whom an intervenor may defend, yet also allows the

291. IDAHO CODE § 18-4009 (1987 & Supp. 1994); IND. CODE ANN. § 35-41-3-2 (West 1994); N.M. STAT. ANN. § 30-2-7 (Michie 1994); N.D. CENT. CODE §§ 12.1-05-03, 12.1-05-04, 12.1-05.07 (1985 & Supp. 1993); PA. STAT. ANN. tit. 18, § 506 (1983 & Supp. 1994); VT. STAT. ANN. tit. 13, § 2305 (1974 & Supp. 1994).

292. N.M. STAT. ANN. § 30-2-7 (Michie 1994).

293. *Id.* (emphasis added).

294. CAL. PENAL CODE § 197 (West 1988 & Supp. 1994).

295. NEV. REV. STAT. §§ 200.120, 200.160 (1991).

defense of "any other person in his presence or company." This statute defines "Justifiable homicide" as being

[t]he killing of a human being in necessary self-defense, or in defense of habitation, property or person, against one who manifestly intends, or endeavors, by violence or surprise, to commit a felony, or . . . in a violent, riotous, tumultuous or surreptitious manner, to enter the habitation of another for the purpose of assaulting [or] offering personal violence to any person dwelling or being therein.²⁹⁶

Nevada's other applicable statute, "Additional cases of justifiable homicide,"²⁹⁷ states that a person may be justified in committing homicide in defense of "the slayer [himself], or his or her husband, wife, brother or sister, or . . . any other person *in his presence or company* . . ."²⁹⁸

While it is unclear from case law, it is likely that the language of these two statutes is intended to allow the defense of anyone on the scene, including strangers. Additionally, the requirement that the defended person must be present indicates that the person purported to be defended must not already be away from the scene at a place of safety.²⁹⁹

C. Conclusion

The great majority of states with "defense of others" statutes no longer make any distinction between the standards for defense of those with whom one is closely related, and defense of strangers. In fact, of those states which still make mention of close or familial relationships in their statutes, each also allows strangers to be defended, typically with requirements no more stringent than when defending a friend, servant, employer, or family member. A small number of states allow use of deadly force in defending family members from any kind of unlawful force.³⁰⁰ In most states, however, a person may intervene with deadly force to defend another only if he is defending him from

296. NEV. REV. STAT. § 200.120 (1991).

297. NEV. REV. STAT. § 200.160 (1991).

298. *Id.* (emphasis added).

299. A defense of others justification is disallowed when the person the defendant claims to have intervened to protect was no longer on the scene, and already at a place of safety. *See, e.g.,* *People v. Feierabend*, 424 N.E.2d 765 (Ill. Ct. App. 1981); *People v. Baker*, 334 N.E.2d 249 (Ill. Ct. App. 1975).

300. *See supra* note 291-93 and accompanying text.

the imminent threat of death or serious bodily harm, or if he reasonably believes that such force is necessary.

VI. RAMIFICATIONS: THE KILLING OF ABORTION DOCTORS

Who a "person" is, and who "another" is, are questions of increasing legal, and social, significance. Recently, the controversial issue has arisen as to whether justifiable homicide in defense of "another" may include defense of unborn children. This issue began to receive national attention when the admitted killer of an abortion doctor claimed that the killing was justified in defending unborn children.

During 1994, Paul Hill was tried and convicted in Florida for the killing of abortion doctor John B. Britton and his escort, James H. Barrett.³⁰¹ During those proceedings, a "Memorandum of Points and Authorities in Opposition to the State's Motion in Limine,"³⁰² was submitted by Hill in which he contended that he should be entitled to present a defense of justification in "defense of another."³⁰³ The contention in Hill's memorandum was that, based on either legislative intent or ambiguous drafting, the applicable Florida statute allows "another" to include an unborn child.³⁰⁴

The statute invoked by Hill, "Use of force in defense of person,"³⁰⁵ states, in part, that a person is justified in the use of deadly force if "he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another . . ." ³⁰⁶ One possible construction of the statute is that both the title of the statute and the legal status of the defender

301. *Abortion Protestor is Guilty Under Clinic Access Law*, N.Y. TIMES, Oct. 6, 1994, at A18.

302. Memorandum of Points and Authorities in Opposition to the State's Motion in Limine, *State v. Hill* (Circuit Court in and for Escambia County, Florida 1994) (No. 94-3510) [hereinafter *Hill's Memorandum*].

303. *Id.* at 14.

Motion in limine is defined as "[a] pretrial motion requesting court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to moving party that curative instructions cannot prevent pre-dispositional effect on jury [The purpose] of such motion is to avoid injection into trial matters which are irrelevant, inadmissible and prejudicial and granting of motion is not a ruling on evidence and, where properly drawn, granting of motion cannot be error.

BLACK'S LAW DICTIONARY 1013-14 (6th ed. 1991) (citations omitted).

304. *Hill's Memorandum*, *supra* note 302, at 1.

305. FLA. STAT. ANN. § 776.012 (West 1992).

306. *Id.* (emphasis added).

imply that the defended must be another "person." *Roe v. Wade*³⁰⁷ has established that a "fetus" is not a "person" within the protections of the Fourteenth Amendment.³⁰⁸ Hill contended, however, that the word "another" may refer to one who simply shares *humanity* with a defender rather than legal personhood, and an unborn child would meet this qualification, even under *Roe*.³⁰⁹ This argument would be equally applicable under the statutes of the six other states which use the same language.³¹⁰

In his memorandum, Hill argued in the alternative that if "another" was intended to mean "another person," the court could decide that, for the purposes of its defense of others statute, an unborn child can, and should, be considered a "person."³¹¹ In fact, Hill argued that states are free to accord unborn children the status of "persons" in granting substantive rights, and often do.³¹²

Substantive rights granted by states to unborn children include the right in many jurisdictions to have a guardian appointed to represent them, particularly in the area of essential medical care.³¹³ A fetus also may have a legal representative appointed for the purpose of inheritance or other devolution of property.³¹⁴

Tort liability for "wrongful death" of unborn children is imposed by a majority of the states by statute.³¹⁵ Missouri, in

307. 410 U.S. 113 (1973).

308. *Id.* at 156-57. The Fourteenth Amendment states, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

309. 410 U.S. at 159.

310. The following statutes also use the term defense of another: ILL. ANN. STAT. ch. 720 para. 5/7-1 (Smith-Hurd 1993 & Supp. 1994); IOWA CODE ANN. § 704.3 (West 1993); KAN. STAT. ANN. § 21-3211 (1988 & Supp. 1993); MINN. STAT. ANN. § 609.065 (West 1987 & Supp. 1994); MONT. CODE ANN. § 45-3-102 (1993); N.M. STAT. ANN. § 30-2-7 (Michie 1994).

311. *Hill's Memorandum*, *supra* note 302, at 14-22.

312. *Id.*

313. *E.g.*, *In re A.C.*, 533 A.2d 611 (D.C. 1987); *In re Phillip B.*, 156 Cal. Rptr. 48 (1979); *In re Custody of a Minor*, 379 N.E.2d 1053 (Mass. 1978); *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A.2d 537 (N.J. 1964).

314. *See, e.g.*, *Wilner v. Prowda*, M.D., 601 N.Y.S.2d 518 (Sup. Ct. 1993); *People v. Davis*, 872 P.2d 591 (Cal. 1994); *Hudak v. Georgy*, 634 A.2d 600 (Pa. 1993); *In the Matter of Fathima Ashanti*, 558 N.Y.S.2d 447 (Fam. Ct. 1990). In *Ashanti*, the court stated that "[t]he legal rights of a fetus have a long history of recognition in property and inheritance law. Prior to statutory ability to inherit . . . these rights were recognized at English common law . . ." *Id.* at 449 (citations omitted).

315. *See Cavazos v. Franklin*, 867 P.2d 674, 677 n.4 (Wash. App. 1994) (where the court noted that "the majority rule, adopted by 32 jurisdictions to date, [is] that a viable

fact, allows an action to be brought for wrongful death even if the fetus had not reached viability.³¹⁶ In North Dakota, "a child conceived but not born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth."³¹⁷

The Supreme Court of South Carolina has gone a step further in declaring that an unborn child is a "person," not only in a wrongful death action, but also in an action for criminal homicide.³¹⁸ Massachusetts has held that a viable fetus is a person under its vehicular homicide statute,³¹⁹ and Oklahoma has now established that a viable fetus is a person within the meaning of its assault and battery, and manslaughter statutes.³²⁰

Conversely, however, there are many other jurisdictions which refuse to extend the status of personhood to a fetus. New York considers the abortion of "an unborn child with which a female has been pregnant for more than twenty-four weeks" to be a homicide,³²¹ but expressly states that "the Legislature did

unborn child is a 'person' under state wrongful death statutes") (citing *Simmons v. Hoard Univ.*, 323 F. Supp. 529 (D.D.C. 1971)); *Eich v. Town of Gulf Shores*, 300 So. 2d 354 (Ala. 1974); *Summerfield v. Superior Court*, 698 P.2d 712 (Ariz. 1985); *Hatala v. Markiewicz*, 224 A.2d 406 (Conn. Super. Ct 1966); *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del. 1956); *Porter v. Lassiter*, 87 S.E.2d 100 (Ga. 1955); *Volk v. Baldazo*, 651 P.2d 11 (Idaho 1982); *Chrisafogeorgis v. Brandenburg*, 304 N.E.2d 88 (Ill. 1973); *Britt v. Sears*, 277 N.E.2d 20 (Ind. App. 1971); *Hale v. Manion*, 368 P.2d 1 (Kan. 1962); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Danos v. St. Pierre*, 402 So. 2d 633, 637 (La. 1981); *State ex. rel. Odham v. Sherman*, 198 A.2d 71 (Md. 1964); *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1975); *O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971); *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949); *Rainey v. Horn*, 72 So. 2d 434 (Miss. 1954); *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983); *White v. Yup*, 458 P.2d 617 (Nev. 1969); *Poliquin v. MacDonald*, 135 A.2d 249 (N.H. 1957); *Salazar v. St. Vincent Hosp.*, 619 P.2d 826 (N.M. 1980); *Hopkins v. McBane*, 359 N.W.2d 862 (N.D. 1984); *Werling v. Sandy*, 476 N.E.2d 1053 (Ohio 1985); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Libbee v. Permanente Clinic*, 518 P.2d 636, 520 P.2d 361 (Or. 1974); *Presley v. Newport Hosp.*, 365 A.2d 748, (R.I. 1976); *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964); *Nelson v. Peterson*, 542 P.2d 1075 (Utah 1975); *Vaillancourt v. Medical Ctr. Hosp. of Vt., Inc.*, 425 A.2d 92, 94 (Vt. 1980); *Moen v. Hanson*, 537 P.2d 266 (Wash. 1975); *Baldwin v. Butcher*, 184 S.E.2d 428 (W.Va. 1971); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 148 N.W.2d 107 (Wis. 1967)).

316. *Connor v. Monkem Co., Inc.*, No. 64884, 1994 WL 493561 (Mo. App. E.D. 1994).

317. *Hopkins v. McBane*, 359 N.W.2d 862, 864 (N.D. 1984) (citation omitted).

318. *See State v. Horne*, 319 S.E.2d 703 (S.C. 1984). The South Carolina Supreme Court had previously held, in *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964), that a viable child constituted a "person" even before it left its mother's womb for the purposes of a wrongful death action. In *Horne*, the Court held that "[i]t would be grossly inconsistent . . . to construe a viable fetus as a 'person' for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context." *Id.* at 704.

319. *See Commonwealth v. Cass*, 467 N.E.2d 1324, 1326 (Mass. 1984).

320. *See Hughes v. State*, 868 P.2d 730, 733 (Okla. Ct. Crim. App. 1994).

321. N.Y. PENAL LAW § 125.00 (McKinney 1987 & Supp. 1994).

not intend to make [any other] killing of an unborn child a homicide."³²² New York, in fact, defines a person as "a human being who has been born and is alive,"³²³ and has held that a nonviable fetus is not a person for whom a guardian could be appointed.³²⁴

Texas, like New York, defines person as "a human being who has been born and is alive."³²⁵ Based on this definition, a Texas court held that an unborn child does not qualify as a person who may be defended under its defense of others statute.³²⁶ New Jersey has determined that a fetus is not to be considered a person, under either its Wrongful Death Act or its Code of Criminal Justice.³²⁷ An unborn child also is not a person within the meaning of Virginia's wrongful death statute.³²⁸

Most significantly for Paul Hill, Florida has also held that an unborn child is not a person within the meaning of its wrongful death statute.³²⁹ The Supreme Court of Florida, in fact, has held that appointment of a guardian ad litem for a fetus was improper in an action which challenged the Court's earlier decision, which held the state's parental consent statute unconstitutional.³³⁰ Allowing a fetus to be considered a person within the protection of the defense of others statute would certainly constitute an aberration in Florida law.

Any court granting unborn children personhood status within the protection of its defense of others statute would assuredly invite a constitutional challenge under *Roe v. Wade*.³³¹ Under *Roe*,

322. *People v. Joseph*, 496 N.Y.S.2d 328, 330 (Orange Co. Ct. 1985).

323. N.Y. PENAL LAW § 125.05(1) (McKinney 1987 & Supp. 1994).

324. *See In the Matter of Klein*, 538 N.Y.S.2d 274 (2d App. Div. 1989).

325. *Brumley v. State*, 804 S.W.2d 659, 661 (Tex. Ct. App. 1991).

326. *Ogas v. State*, 655 S.W.2d 322, 325 (Tex. Ct. App. 1983).

327. *See State v. Loce*, 630 A.2d 843, 844 (N.J. Super. Ct. Law Div. 1991).

328. *See Modaber v. Kelley*, 348 S.E.2d 233, 237 (Va. 1986).

329. *Hilsman v. Winn Dixie Stores*, 639 So. 2d 115 (Fla. Dist. Ct. App. 1994). The

Hilsman court stated:

An unborn fetus is either a new and separate human being or "person", temporarily residing within the womb of the host mother, OR it is a part of the mother's body, OR both. The Florida Supreme Court has held that, in legal contemplation, an unborn fetus is not a person for the wrongful death of whom a tortfeasor is liable to its survivors for damages under the Wrongful Death Act (§ 768.19, Fla. Stat.); therefore, it is living tissue of the body of the mother for the negligent or intentional injury to which the mother has a legal cause of action the same as she has for a wrongful injury to any other part of her body.

Id. at 116 (citing *Singleton v. Ranz*, 534 So. 2d 847-48 (Fla. 5th Dist. Ct. App. 1988)).

330. *In re T.W., a Minor*, 551 So. 2d 1186, 1194 (Fla. 1989).

331. 410 U.S. 113 (1973). In *Roe*, use of the word "person" in the Constitution was determined to have "application only postnatally." *Id.* at 156.

the performing of a statutorily permissible abortion is a legal act.³³² A person who kills an abortionist claiming justification in defense of unborn persons, by statute, must have reasonably believed his use of deadly force was necessary against the imminent use of *unlawful* force.³³³

Paul Hill, in his memorandum, attempted to invoke the "Rule of Law"³³⁴ as a principle which would supersede *Roe*.³³⁵ The Rule of Law, as noted by Hill, was recognized by the International Military Tribunal at the Nuremberg war crimes trials as a universal standard by which international and human relations should be governed.³³⁶ According to the Tribunal, the Rule of Law was held to transcend "positive" (man-made) law which is merely created by national leaders and then imposed on citizens.³³⁷ Under this Rule of Law, Nazi leaders were found guilty of war crimes, including requiring abortions, despite their arguments that they simply were obeying the laws of Hitler's Germany.³³⁸ Hill contended that the force he intervened to prevent, the abortion procedure, was "unlawful."³³⁹ He based this contention on the idea that *Roe*, in allowing abortions, is positive law which violates the Rule of Law.³⁴⁰ The merit of this argument, however, was never decided. The state's motion in limine was granted by the Florida court,³⁴¹ and, thus, Hill was precluded from presenting his defense of justification to the jury.

If any court were to deny its state's motion in limine and allow this defense to be presented by the killer of an abortionist, the denial would itself invite constitutional challenge under

332. *Id.* at 157 (holding that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," and, that a state, "by adopting one theory of life . . . may [not] override the rights of the pregnant woman that are at stake").

333. FLA. STAT. ANN. § 776.012 (West 1992). All forty-one states with statutes codifying defense of others either expressly declare that the force defended against must be unlawful force, or provide a listing of particular unlawful acts. See *supra* note 10. "Unlawful" is defined in the Texas Penal Code as that which is "criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege." TEX. PENAL CODE ANN. § 1.07 (West 1994) (emphasis added).

334. *Hill's Memorandum*, *supra* note 302, at 3.

335. 410 U.S. 113 (1973).

336. See *Hill's Memorandum*, *supra* note 302, at 37-57.

337. *Id.*

338. *Id.*

339. *Id.* at 35.

340. *Id.* at 3-4.

341. Order Granting the State of Florida's Motion in Limine #1, *State v. Hill* (Circuit Court in and for Escambia County, Florida 1994) (No. 94-3510-J).

Planned Parenthood of Southeastern Pennsylvania v. Casey.³⁴² The issue under *Casey* would be whether allowing the defense would constitute state action creating an “undue burden” on a woman’s right to choose to abort.³⁴³ The argument in the affirmative would be that the court’s decision to allow the defense, especially if the jury were to acquit, would lead to doctors’ being fearful to perform abortions, decreasing their availability. Paul Hill, in his memorandum, argued in the negative that a woman would still have the “ability” to make the decision, as required by *Casey*,³⁴⁴ even if his defense were successful.³⁴⁵

The Supreme Court’s holding in *Harris v. McCrae*³⁴⁶ may be instructive concerning the question of whether allowing the killer of an abortionist to present a defense of justification would constitute state action. In *Harris*, the Court held that the government’s refusal to fund abortion, in accordance with the Hyde Amendment, did not constitute direct state action.³⁴⁷ It could be contended that a court’s refusal to grant a motion in limine, similarly does not constitute state action.

It is possible, then, that a jurisdiction may one day allow the killer of an abortion doctor to present his arguments of justification to the jury. Should this occur, the defense will have to demonstrate that all of the requirements of the applicable statute have been met, and that none of its limitations have been violated. In Florida, as noted above, the statute states that a person may be justified in the use of *deadly* force only if “he reasonably believes that such force is necessary against imminent use of unlawful force.”³⁴⁸

In jurisdictions with similar requirements, to acquit the defendant, the jury would have to make a number of potentially controversial findings. The jury would have to be convinced that the harm prevented truly was imminent, or that the defendant reasonably believed it to be. If, as in the case of Paul Hill, the shooting(s) occurred while the doctor was still in his car, the prosecution could contend that the doctor’s planned use of force was not yet an imminent threat to the unborn children inside

342. 112 S. Ct. 2791 (1992).

343. *Id.* at 2819 (explaining that an “undue burden” is one which places “a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”).

344. *Id.*

345. *Hill’s Memorandum*, *supra* note 302, at 30 n.113.

346. 448 U.S. 297 (1980).

347. *Id.* at 309.

348. FLA. STAT. ANN. § 776.012 (West 1992) (emphasis added).

the clinic. The defendant would be able to answer that, under holdings such as *Scholl v. State*, "imminent" means "near at hand,"³⁴⁹ and that the doctor's arrival at the clinic thus made the danger to the unborn children imminent. In the jurisdictions whose statutes require intervention to be "immediately necessary,"³⁵⁰ however, proving immediacy, which denotes that "action is or must be taken either instantly or without considerable loss of time,"³⁵¹ would be more difficult.

The jury also would have to find that the defendant reasonably believed that it was necessary to use deadly force in order to protect the unborn children inside the clinic from death or great bodily harm. The prosecution would certainly argue that it was *not* reasonable to believe that only deadly force could have prevented the doctor from performing abortions that day—threats at gunpoint, slashing of tires, or even forcible detention might have been effective, albeit less permanent.

Additionally, and most significantly, for any jury to declare the defendant justified, it would have to find that the force he intervened to prevent, the abortion procedure, was *unlawful*. To do so, it would have to agree with the contention that *Roe* itself,³⁵² by allowing abortions, is "positive law" which violates, and is superseded by, the Rule of Law.³⁵³

As of this writing, Florida is the only state in which this defense has been attempted, and, as noted, the Florida court granted the state's motion in limine, preventing the defendant from presenting these arguments to the jury.³⁵⁴ That this defense will be attempted again, in Florida or elsewhere, is almost certain in light of the continuing killing of abortion doctors. Whether a court will allow the defense to be presented to the jury remains to be seen.

VII. CONCLUSION

In the forty-three years that have passed since the last published statutory survey of justifiable homicide in the defense of others,³⁵⁵ this area of the law has changed dramatically. During

349. 115 S. 43 (Fla. 1927).

350. See *supra* note 75.

351. BLACK'S LAW DICTIONARY 749 (6th ed. 1990).

352. 410 U.S. 113 (1973).

353. See *supra* notes 334-40 and accompanying text.

354. See *supra* note 341.

355. Jack Lowery, Jr., *A Statutory Study of Self-Defense and Defense of Others as an Excuse for Homicide*, 5 U. FLA. L. REV. 58 (1952).

this time, the number of states with statutes codifying the requirements and limitations of the defense has nearly doubled, increasing from twenty-three to forty-one.³⁵⁶ The statutes of each of these forty-one states reflect a fundamental change in social policy, which the Model Penal Code helped to initiate. Good faith intervention on behalf of others is now encouraged. Today, a person may be justified in the use of deadly force to defend a friend, family member or stranger, based on a reasonable belief of necessity, even if he was mistaken, as long as he was not reckless or negligent in forming the belief. This marks the death of the alter ego rule, under which an intervenor who defended a stranger "stepped into the shoes" of that stranger, and would be held liable if he was mistaken in his belief that the person defended had the right to use deadly force in his own defense.

Though each of the states with defense of others statutes now allows the defense of strangers free from the burdens of the alter ego rule, each has drafted its statutes, and interpreted them, with its own standards, requirements and limitations. Only five states have statutes which directly parallel the language of the Model Penal Code.³⁵⁷ The Code emphasizes a subjective consideration of the actor's belief in the circumstances, tempered by a requirement that he can not be completely exonerated if he acts recklessly or negligently. The majority of the states have instead chosen language which places clearer emphasis on the requirement of objective reasonableness, while incorporating a subjective consideration of the intervenor's perception of the circumstances. This is embodied in the reasonable belief standard.

Many other jurisdictions espouse some other standard in their statutes. Some declare that actual necessity is required; others state that an intervenor will be held to the purely objective standard of the reasonable man; others maintain a stronger emphasis on an objective requirement of reasonable grounds for the intervenor's belief in the necessity of using deadly force. Yet, even in these jurisdictions, the courts interpreting the statutes allow both an objective and subjective inquiry.

Meeting the requisite standard of belief is pivotal to justification. However, there are other requirements imposed by the defense of others statutes. The statutes additionally demand careful examination of the circumstances of the intervention. It must be determined whether the degree of force used was nec-

356. *Id.* at 59 nn.6-8 and accompanying text.

357. *See supra* note 172.

essary, whether the threat of serious harm or death was imminent or immediate, and whether the intervention prevented use of unlawful force—or if it was reasonable for the actor to believe that these were the case. If any of one of these requirements is not met, there will be no finding of justification.

Defense of others statutes typically also list numerous, and varied, limitations to the defense. Under these provisions, the intervenor may have his claim of justification negated if he was the initial aggressor or provocateur, if he was committing a felony or resisting arrest, if he engaged in combat by agreement, or if he failed to retreat in specific circumstances. A person must not violate any of these limitations, and simultaneously must satisfy all requirements. If he does so, he will be justified.

Justification defenses are creatures of social policy, representing niches of exception in what would otherwise be criminal action. The modern defense of others statutes have established a detailed and expanded standard, encouraging persons with a reasonable belief in the necessity to act in the defense of others. The trend toward focusing on the intervenor's reasonable belief, however, carries its own ramifications. Today, the potential reach of the defense is being tested, as the justifiable use of force in defense of others has been claimed in the killing of abortion doctors.

To date, the use of deadly force in defense of unborn children has not been accorded justification. Will the law of justifiable homicide in the defense of others be expanded to allow such defense? Should it be, based on the language of some statutes? Will a jury be allowed to consider the merits of the argument? These questions remain both current and significant, as abortions, and the killing of abortion providers, continue to be among the most volatile issues in American society.

MARCO F. BENDINELLI*
JAMES T. EDSALL**

* Dedicated to my lovely wife Diane, and precious son Julian, without whose selfless understanding and support, this project would not have been possible.

** Dedicated with joy, affection and appreciation to my wife Robyn, and daughters Jamie and Brittany. Love is truly patient and kind.

The authors jointly wish to thank Richard S. Sperbeck for his continual technical support, Todd Longmire for his research efforts, and Professor Craig Stern for his constructive criticism.