Chapter 18
SELF-DEFENSE

§ 18.01 GENERAL PRINCIPLES

[A] Overview

Every state in the United States recognizes a defense for the use of force, including deadly force, in self-protection. Indeed, one court has observed:

It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether, thereby leaving one a Hobson's choice of almost certain death through violent attack now or statutorily mandated death [or life imprisonment] through trial and conviction of murder later. 1

If a state legislature were to abolish the defense of self-defense, it might very well violate the United States Constitution. 2

Most issues regarding the application of defensive force arise in the context of homicide and attempted murder prosecutions. Therefore, this chapter primarily focuses on the question of when deadly force may be used in self-defense.

[B] Elements of the Defense

At common law, a non-aggressor is justified in using force upon another if he reasonably believes such force is necessary to protect himself from imminent use of unlawful force by the other person. 3 Specifically, however, deadly force is only justified in self-protection if the actor reasonably believes that its use is necessary to prevent imminent and unlawful use of deadly force by the aggressor. 4

1 Griffin v. Martin, 785 F.2d 1172, 1186 n.37 (4th Cir. 1986), aff'd en banc and op. withdrawn, 796 F.2d 22 (4th Cir. 1986).
2 See District of Columbia v. Heller, 554 U.S. __, 128 S.Ct. 2783 (2008) (holding that the Second Amendment to the United States Constitution provides an individual the right to possess a firearm, and to use that weapon for traditional lawful purposes, including self-defense within the home); see also Eugene Volokh, State Constitutional Rights of Self-Defense and Defense of Property, 11 Tex. Rev. Law & Pol’y 899, 900 n.2 (2007) (reporting that 44 of the 50 state constitutions "secure either a right to defend life or a right to bear arms in defense of self" and, therefore, concluding that "a constitutional right to self-defense is firmly established in American legal traditions").
These principles are subject to substantial clarification, as discussed in the next chapter section. However, it should be noted at the outset that the defense of self-defense, as is the case with other justification defenses, contains: (1) a “necessity” component; (2) a “proportionality” requirement; and (3) a reasonable-belief rule that overlays the defense.

[C] The Necessity Component

The necessity rule provides that force should not be used against another person unless, and only to the extent that, it is necessary. One aspect of this requirement—one which is increasingly controversial—is that self-defense is limited at common law to imminent threats. Moreover, a person may not use deadly force to combat an imminent deadly assault if some nondeadly response will apparently suffice. For example, if V, an elderly or infirm aggressor, attempts to stab D, D may not kill V if D knows or should know that he could avoid death by disarming V, or by using nondeadly force.* And, in some jurisdictions, a person may not use deadly force against an aggressor if he knows that he has a completely safe avenue of retreat.7

[D] The Proportionality Component

The proportionality rule provides that a person is not justified in using force that is excessive in relation to the harm threatened.* Assuming all of the other elements of the defense apply, a person may use nondeadly force to repel a nondeadly threat; he may also use nondeadly force against a deadly threat (and, in some circumstances may be required to do so, as noted above). However, a person is never permitted to use deadly force to repel what he knows is a nondeadly attack, even if deadly force is the only way to prevent the battery. For example, if V threatens to strike D on a public road, and the only way D can avoid the battery is to push V into the street in front of a fast-moving car, D must abstain and seek compensation for the battery after the fact.9

5 See § 18.02[D](1), infra.
6 People v. Riddle, 649 N.W.2d 90, 34 (Mich. 2002); see State v. Garrison, 525 A.2d 498 (Conn. 1987) (V, intoxicated, moved menacingly toward G with a gun in his waistband; G disarmed V; V then pulled out a knife; G shot V to death; G’s conviction was upheld, in part on the ground that G knew, or should have known, that he could have disarmed V again).
7 See § 18.02(C), infra.
8 State v. Warren, 794 A.2d 766, 783 (N.H. 2002). But see Renée Lettow Lerner, The Worldwide Popular Revolt Against Proportionality in Self-Defense Law, 2 J. Law, Econ. & Pol’y 331, 333 (2006) (“A popular revolt against certain notions of proportionality has been underway for the past several decades in the United States, and for at least the past five years abroad.”).
9 For the definition of “deadly force,” see § 18.02[A], infra.

[E] The “Reasonable Belief” Component

A self-defense claim contains a subjective and an objective component.10 First, the jury must determine that the defendant subjectively believed that he needed to use deadly force to repel an imminent unlawful attack. Second, the defendant’s belief in this regard must be one that a reasonable person in the same situation would have possessed. Notice, however, the implication of the latter component: A defendant is justified in killing a supposed aggressor if the defendant’s belief in this regard is objectively reasonable, even if appearances prove to be false, i.e., even if the decedent did not represent an imminent threat to the defendant.11

On the other hand, the defense is unavailable to one whose self-defense belief, although genuine, was unreasonable. In such circumstances, the traditional rule is that the unreasonably mistaken actor loses his self-defense claim and, therefore, is guilty of murder. An increasing number of jurisdictions, however, now permit an unreasonably mistaken actor to assert an “imperfect” or “incomplete” claim of self-defense, which mitigates the offense to manslaughter.12

§ 18.02 DEADLY FORCE: CLARIFICATION OF THE GENERAL PRINCIPLES

As stated in § 18.01, a person who is not an aggressor is justified in using deadly force upon another if he reasonably believes that such force is necessary to protect himself from imminent use of unlawful deadly force by the other party. This rule is examined here in detail.

[A] “Deadly Force”: Definition

Statutes vary in their definition of the term “deadly force.” However defined, it applies whether one is considering the force used by the aggressor (decedent) or the innocent person threatened (defendant).

As summarized by one court,13 some states define the term on the basis of the likelihood of the force causing death or serious bodily injury.14 Thus, “deadly force” is, for example, force “likely” or “reasonably expected” to cause death or serious bodily injury; the actor’s state of mind in regard to the likely outcome is irrelevant.15

12 See § 18.08, infra.
14 Notice: The definition of “deadly force” usually is broadly defined to include serious bodily injury (or, alternatively, “grievous bodily injury” or “life-threatening injury”), and not just death.
15 E.g., if D stabs V, this constitutes deadly force, even if D only intended to wound V slightly.
Other jurisdictions include a mental-state element in the definition. Thus, "deadly force" is, for example, force "intended" to cause death or serious bodily injury, regardless of the likelihood of such a result occurring. Other definitions, while including a mental-state element, tie it to the likelihood of a result (e.g., the actor "knew" or "reasonably should have known" that the force used was likely to cause death or serious injury).

[B] The "Non-Aggressor" Limitation

[1] Definition of "Aggressor"

An aggressor "has no right to a claim of self-defense." 16 Although there is no universally accepted definition of the term, an "aggressor" has been defined as one whose "affirmative unlawful act [is] reasonably calculated to produce an affray foreboding injurious or fatal consequences." 17 Or, he is one who threatens unlawfully to commit a battery upon another or who provokes a physical conflict by words or actions calculated to bring about an assault. 18 For example, if A unlawfully brandishes a knife and threatens to kill B, A is not justified in defending himself if B responds to A's threats by use of self-protective force.

Courts frequently state that a person is not privileged to use force to resist an attack unless he is "free from fault in the difficulty," 19 but that is an overstatement. 20 For example, if D calls V, an acquaintance, "a jerk," to which V take such umbrage that he pulls out a gun and menaces D with it, D is justified in killing V (assuming that the other requirements of the defense are met), although D was not entirely free from fault in the conflict. D was not the aggressor: his mild insult was not an "affirmative unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences."

Three features of the concept of "aggression" merit brief attention here. First, a person is an aggressor even if he merely starts a nondeadly conflict. Second, it is incorrect to state that the first person who uses force is always the aggressor. 21 One who unlawfully brandishes a weapon in a threatening manner, but who does not use it, is an aggressor; the person threatened, although he is the first to use actual force, can still potentially claim self-defense. Third, the issue of whether a defendant lost the right of self-defense in a conflict ordinarily is a matter for the jury to decide, based on a proper instruction on the meaning of the term "aggressor." 22

[2] Removing the Status of "Aggressor"

The initial aggressor in a conflict may purge himself of that status and regain the right of self-defense. The issue always is: Who was the aggressor at the time the defensive—in this context, deadly—force was used? In this regard, it is important to distinguish between "deadly" (or "felonious") and "nondeadly" aggressors.

[a] Deadly Aggressor

A "deadly" (or "felonious") aggressor is a person whose acts are reasonably calculated to produce fatal consequences. The only way such a person may regain the right of self-defense is by withdrawing in good faith from the conflict and fairly communicating this fact, expressly or impliedly, to his intended victim. 23

This rule is strictly applied. For example, suppose that D initiates a deadly attack on V in the street, whereupon V responds with sufficient force that D is now fearful for his own life. If D runs behind a parked car, and V pursues him, D is still not entitled to act in self-defense, unless by actions or words D puts V on actual or reasonable notice that he no longer is a threat to V, i.e., that D's retreat is not simply a temporal strategic act of avoiding V's resistance. In the absence of fair notice to V of the termination of the conflict, D is guilty of murder if he kills V in "self-defense."

[b] Nondeadly Aggressor

Suppose that D wrongfully attempts to slap V. V improperly responds to the threat by pulling out a knife and attempting to kill D. In this conflict, D was the initial aggressor. On the other hand, V's response was disproportional to D's attack, as he wrongfully converted a minor altercation into a deadly one. Thus, V is also an aggressor, indeed, a worse one than D. May D, therefore, now kill V in self-defense?

Although case law is not uniform, most courts provide that when the victim of a nondeadly assault responds with deadly force, the original aggressor immediately regains his right of self-defense. 24 Thus, in the hypothetical, although D was the initial aggressor—and is subject to prosecution, therefore, for the original assault—he may defend himself, including by use of deadly force if required.

16 Bellcourt v. State, 390 N.W.2d 269, 272 (Minn. 1986); see Loesche v. State, 620 P.2d 646, 651 (Alaska 1980) ("The law of self-defense is designed to afford protection to one who is beset by an aggressor even if he merely starts a nondeadly conflict.")(quoting Bangs v. State, 608 P.2d 9, 5 (Alaska 1980)).


18 State v. Krown, 450 S.E.2d 538, 541 (N.C. Ct. App. 1994); see also People v. Dunlap, 734 N.E.2d 973 (Ill. App. Ct. 2000) (D beat on V's apartment window and threatening V; the court noted that "[e]ven the mere utterance of words may be enough to qualify one as an initial aggressor.")


20 State v. Corchado, 438 A.2d 427, 433 (Conn. 1982) (stating that "[i]t is not difficult to visualize self-defense situations where . . . there is some fault on both sides").
The other approach, particularly followed in earlier law, is that, if a person under deadly attack should only respond with nondeadly force, if such lesser force will reasonably prevent the threatened harm. Likewise, one may ordinarily only use force when a threat has become imminent, a controversial requirement considered later in the text. At issue in this subsection is the question of whether an actor, under attack, must retreat before using deadly force. In other words, if an innocent person is attacked, and if he has only two realistic options—use deadly force or retreat to a place of safety—must he choose the latter option? As discussed immediately below, the law in this area is in flux.

25 See American Law Institute, Comment to § 3.04, at 50–51.
27 Id.
28 See § 31.07[B], infra.
29 See § 31.03, infra.
30 See generally Joseph H. Beale, Retreat from a Murderous Assault, 16 Harv. L. Rev. 567 (1903); Catherine L. Carpenter, Of the Enemy Within, the Castle Doctrine, and Self-Defense, 36 Mont. L. Rev. 609 (2000).
32 See § 18.01[C], supra.
33 See § 18.02[D][1], infra.

[C] Necessity Requirement: The Special Issue of Retreat

1. Explanation of the Issue

The general rule is that self-defense "is measured against necessity." Thus, as explained earlier, a person under deadly attack should only respond with nondeadly force, if such lesser force will reasonably prevent the threatened harm. Likewise, one may ordinarily only use force when a threat has become imminent, a controversial requirement considered later in the text. At issue in this subsection is the question of whether an actor, under attack, must retreat before using deadly force. In other words, if an innocent person is attacked, and if he has only two realistic options—use deadly force or retreat to a place of safety—must he choose the latter option? As discussed immediately below, the law in this area is in flux.

[2] Contrasting Approaches

If a person can safely retreat and, therefore, avoid killing the aggressor, deadly force is, objectively speaking, unnecessary. Nonetheless, American jurisdictions are split on the issue of whether an innocent person must retreat if this can be done in complete safety.

A majority of jurisdictions today apply a "no retreat" rule: a nonaggressor is permitted to use deadly force to repel an unlawful deadly attack, even if he is aware of a place to which he can retreat in complete safety. Nonetheless, American jurisdictions are split on the issue of whether an innocent person must retreat if this can be done in complete safety.

The no-retreat position has gained additional recent support as the result of efforts, particularly by the National Rifle Association, to broaden self-defense law. According to one review of state legislative efforts, between 2005 and 2007, "thirty states . . . considered altering their laws on self-defense to replace the retreat element with a right to 'stand your ground.'" Although not all of these states changed their law, by 2006, fifteen states "enacted laws that expand the right of self-defense, allowing crime victims to use deadly force in situations that might formerly have subjected them to prosecution for murder." The new statutes are, to differing degrees, modeled after "Stand Your Ground" legislation enacted in Florida in 2005, which provides in part:

A person who is not engaged in an unlawful activity and who is attacked in any . . . place where he has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to prevent death or great bodily harm to himself or another or to prevent the commission of a forcible felony.

The rule that a person is not required to retreat is justified on various grounds. First, it is claimed that the law "should not denounce conduct as criminal when it accords with the behavior of reasonable men. . . . [T]he manly thing is to hold one's ground, and hence society should not demand what smacks of cowardice." Second, "Right" should never give way to "Wrong," yet this is what the retreat doctrine demands of those in the right. Third, the no-retreat rule sends a positive, utilitarian message to criminals that they threaten innocent persons at their own risk. As one legislator put it, "It's going
even though he knows he could do so in complete safety, before using deadly force in self-defense.\textsuperscript{49}

As one scholar has explained,\textsuperscript{50} the castle doctrine is justified on two grounds. Sometimes courts view the rule, although used in self-defense cases, as a form of "defense of habitation,"\textsuperscript{51} in that the home-dweller is permitted to kill to protect the sanctity of his home, which has been intruded upon. Second, the home, as castle, is viewed as a person's final sanctuary from external attack. Therefore, "[h]aving retreated as far as possible, the actor should not be compelled to leave the sanctuary."\textsuperscript{52}

May a person in his home stand his ground, even if the aggressor is a co-dweller, with an otherwise equal right to be there? This is a matter of considerable significance, in view of the fact that "[i]n the great majority of homicides the killer and the victim are relatives or close acquaintances."\textsuperscript{53} More to the point, many in-the-home self-defense cases involve a female who needs to defend herself from an abusive domestic partner. As recent courts have increasingly observed, "imposing a duty to retreat from the home may adversely impact victims of domestic violence."\textsuperscript{54} Particularly in the case of a battered woman who has attempted to leave her abusive partner—she has tried to retreat permanently from the situation—but has been dragged back home, literally or figuratively, it seems especially unjust to deny her the right of self-defense because she did not retreat again from her home, when she would have had no such legal duty if her assailant was a stranger in the dwelling.\textsuperscript{55}

Most retreat jurisdictions, especially in recent years as courts have grown more sensitive to the plight of battered women, have adopted the rule that the assailant's status as a co-dweller is irrelevant, i.e., the innocent person need not retreat from the home, even if the aggressor also lives there.\textsuperscript{56} The

\textsuperscript{40} Robert Tanner, States Signing on to Deadly Force Law, Associated Press, May 24, 2006.

\textsuperscript{41} See Beale, Note 30, supra, at 581 (in which the author states that a "really honorable man . . . would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more . . . the thought that he had the blood of a fellow-being on his hands."). Indeed, as Susan Estrich has observed, this feature of self-defense law (a retreat requirement) is not subject to criticism on the ground that it is biased in favor of the "male" view of proper conduct. Susan Estrich, Defending Women, 88 MICH. L. REV. 1430, 1431-32 (1990).

\textsuperscript{42} State v. Gardner, 104 N.W. 971, 975 (Minn. 1905) ("Self-defense has not, by statute nor by judicial opinion, been distorted, by an unreasonable requirement of the duty to retreat, into self-destruction.").

\textsuperscript{43} State v. Anderson, 631 A.2d 1149, 1155 (Conn. 1993) (holding that a judge's "retreat" instruction to the jury was erroneous because it failed to include the word "complete").


\textsuperscript{46} Should a social guest also be able to apply the "castle" no-retreat doctrine against an intruding aggressor, although the guest is not in his own dwelling? Case law is split. Compare State v. Brown, 467 S.E.2d 922, 924 (S.C. 1996) (extending the castle doctrine to an invitee) with State v. James, 867 So.2d 414, 417 (Fla. Dist. Ct. App. 2003) (holding that, given that "[h]uman life is precious," the castle doctrine should not be expanded).

\textsuperscript{47} For purposes of the castle doctrine, the "dwelling" typically includes a porch physically attached to the home, People v. Canales, 624 N.W.2d 439, 442 (Mich. Ct. App. 2000), but not the lobby or common stairway in a person's apartment building, People v. Hernandez, 774 N.E.2d 198, 201-03 (N.Y. 2002). See also State v. Marsh, 589 N.E.2d 56, 58 (Ohio Ct. App. 1990) ("[M]'s tent at a campground constituted a home, for purposes of the castle doctrine").

\textsuperscript{48} State v. James, 867 So.2d 414, 416 (Fla. Dist. Ct. App. 2003).

\textsuperscript{49} Many in-the-home self-defense cases involve a female who has attempted to leave her abusive partner—she has tried to retreat permanently from the situation—but has been dragged back home, literally or figuratively, it seems especially unjust to deny her the right of self-defense because she did not retreat again from her home, when she would have had no such legal duty if her assailant was a stranger in the dwelling.\textsuperscript{55}

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\textsuperscript{51} State v. James, 867 So.2d 414, 416 (Fla. Dist. Ct. App. 2003).

\textsuperscript{52} Carpenter, Note 30, supra, at 697.

\textsuperscript{53} Carpenter, Note 30, supra, at 667; see also People v. Aiken, 828 N.E.2d 74, 77 (N.Y. 2005) ("Our contemporary castle doctrine grew out of a turbulent era when retreat from one's home necessarily entailed increased peril and strife. . . . [O]ne should not be deprived from the inviolate place of refuge that is the home.").

\textsuperscript{54} State v. Shaw, 441 A.2d 561, 566 (Conn. 1981).

\textsuperscript{55} Weiland v. State, 752 So.2d 1044, 1062 (Fla. 1999).

\textsuperscript{56} State v. Garland, 694 A.2d 554, 570-71 (N.J. 1997) (calling on the state legislature to reconsider its retreat rules in this context).

\textsuperscript{57} State v. Giovacco, 880 N.W.2d 392, 400 (Minn. 2001) (characterizing the no-retreat rule among co-dwellers as the majority rule).
contrary position is that, in the absence of express legislation, a court will not conclude that a "legislature intended to sanction the reenactment of the climactic scene from 'High Noon' in the familiar kitchens of this state."57

[D] Nature of the Threat: "Imminent, Unlawful Deadly Force"

1 "Imminent"58

At common law, a person who wishes to use force in self-defense must reasonably fear that the threatened harm is imminent.59 In the context of self-defense, force is said to be "imminent" if it will occur "immediately,"60 or at the moment of . . . danger.61 The danger must be "pressing and urgent."62 Force is not imminent if an aggressor threatens to harm another person at a later time; "later" and 'imminent' are opposites.63 Indeed, even if it seems clear that harm at the hands of another is inevitable, use of force is premature until the threat is immediate.64

The imminency requirement is controversial. Some scholars advocate its abolition on the ground that it is nothing more than an "imperfect proxy to ensure that the defendant's force is necessary."65 This argument has gathered greater support and attention in recent years because of society's increased awareness of the plight of battered women, who are victims of repeated, seemingly inevitable, but not always imminent, beatings.66

According to Professor Richard Rosen, because imminency "serves only to further the necessity principle, if there is a conflict between imminence and necessity, necessity must prevail."67 Therefore, he reasons, if it is truly necessary for a person, such as a battered woman, to use deadly force before a threat is imminent, she should be justified in doing so, just as the law should disallow the use of force, even if harm is imminent, if it is unnecessary. Moreover, Professor Jane Moriarty argues, in the context of international law, "anticipatory self-defense" "may be legitimately invoked if a targeted country has been victimized by prior attacks and learns more attacks are planned. When a prior aggressor threatens to commit future violence, international law treat the threat as real. So should domestic criminal law."68

There may be good reason to enlarge the defense of self-defense. The Model Penal Code provides an alternative that narrowly expands on the common law.69 Professor Stephen Morse would take the matter further, suggesting that "if death or serious bodily harm in the relatively near future is a virtual certainty and the future attack cannot be adequately defended against when it is imminent and if there really are no reasonable alternatives, traditional self-defense doctrine ought to justify the pre-emptive strike."70

Professor Morse's characterization of the use of deadly force as a "pre-emptive strike"—what Professor Moriarty describes as "anticipatory self-defense"—is a valuable one. In some sense, all self-defense cases involve pre-emptive strikes.71 Seen this way, the issue becomes how prematurely or anticipatorily the perceived aggression may be pre-empted. The difficulty is that when one moves away from an imminency requirement to something less—or to no temporal requirement of any kind—the risks of error in predicting the future and in predicting whether options less extreme than deadly force may be available are greatly enhanced. Weather forecasters predict the future, but "even funnel clouds sometimes turn around, and human beings sometimes defy predictions."72 Indeed, because humans have the capacity for free choice, humans are far less predictable than funnel clouds—there is very little "virtual certainty" about human behavior. One

57 State v. Shaw, 441 A.2d at 566. As Professor Carpenter has observed, these jurisdictions may be especially influenced by the defense-of-habitation, rather than as-home-as-self-defense, rationale of the castle doctrine. These courts "choose to emphasize the shared property interest of the deadly aggressor," rather than "the defender's right of protection in the sanctuary." Carpenter, Note 30, supra, at 671.


63 United States v. Haynes, 143 F.3d 1089, 1090 (7th Cir. 1998).

64 Ha v. State, 892 P.2d at 191.


66 The subject of self-defense in the battered-woman context is considered in detail at § 18.05[10], infra.

67 Rosen, Note 58, supra, at 380.

68 Moriarty, Note 58, supra, at 25. But see Sanford H. Kadish, Respect for Life and Respect for Rights in the Criminal Law, 64 CAL. L. REV. 871, 880 (1976) (stating the traditional view of the law that "[t]he life of the good man and the bad stand equal, because how a man has led his life may not affect his claim to continued life.").

69 See § 18.06, infra.


71 Alexander, Note 39, supra, at 1477.

benefit of the imminence requirement, therefore, is that it reduces the risk of unnecessary use of deadly force.

There are two other defenses of the imminence requirement, both of which understand imminence as more than a proxy for necessity. First, according to Professor Kim Ferzan, "[s]elf-defense is uniquely justified by the fact that the defender is responding to aggression. Imminence, far from simply establishing necessity, is conceptually tied to self-defense by staking out the type of threats that constitute aggression." In short, in the absence of imminence there is no aggression, and "we blur the distinction between offense and defense." The exception is when "danger is present and immediate, and there is no time to resort to a central authority."

[2] "Unlawful Force"

A person may not defend himself against the imposition of lawful, i.e., justified, force. For example, a robber may not assert self-defense if he shoots and kills his intended robbery victim when the latter responds with force to the robbery attempt. Likewise, reasonable force applied by a police officer in the performance of his duties is justified. Consequently, a citizen may not use deadly force to resist an officer's proper use of force against him.

Conduct that would constitute a crime or a tort is "unlawful," even if the actor could escape conviction or liability by assertion of an excuse defense. For example, if V, an insane person or an infant, uses unjustifiable force upon another, this constitutes "unlawful force," notwithstanding V's potential excuse claim.

§ 18.03 DEADLY FORCE: "IMPERFECT" SELF-DEFENSE CLAIMS

In general, the defense of self-defense is a full defense resulting in exoneration of the person acting in self-protection. Moreover, the traditional common law rule is that if any one of the elements of the defense are missing, the defense is wholly unavailable to a defendant, and the defendant may be convicted of murder. Various states, however, now recognize a so-called "imperfect" or "incomplete" defense of self-defense to mitigate which results in conviction for manslaughter.

There are two versions of imperfect self-defense. First, some courts provide that when the aggressor is the victim and his response must retreat to any place of complete safety, he using deadly force; if he fails to do this right of self-defense is considered imperfect.

Second, many states now provide by case law or statute that one who is another because he reasonably believes that his comparative degree justifying the killing, is guilty of manslaughter, rather than murder. That is, the defendant's guilt of manslaughter if he V because: (1) D unreasonably believes that V is about to use deadly force; although, in fact, V intends only nondeadly harm. (2) V intends to use deadly force, but fails to realize, as a reasonable person, that nondeadly protective force will suffice. In short, "[i]mperfect self-defense consists of the same elements [as "perfect" self-defense] except that the defendant need not have an objectively reasonable belief that he was in . . . imminent danger of death or serious bodily harm . . . , requiring the use of deadly force."

It is unfortunate to characterize cases in this realm as involving "imperfect self-defense. It is a contradiction in terms to say that a person has a "right" (or "privilege") to use deadly force in self-defense, and yet convict and punish him for enforcing this "right." Instead, the claim either should be seen as a failure-of-proof defense on the ground that the defendant's actions demonstrate he lacked a reasonable mens rea (at common law, once aforesaid), or as a partial excuse for the killing, on the ground that the actor's culpability is mitigated by his honest, albeit mistaken, belief.

77 Ross v. State, 211 N.W.2d 827, 830 (Wyo. 1973) (stating, but rejecting, the historical all-or-nothing rule).
81 State v. Peterson, 857 A.2d at 1148.
82 See § 16.02, supra.