

1997

Doing Another's Bidding Under a Theory of Defense of Others: Shall We Protect the Unborn with Murder?

Shelby A. D. Moore
South Texas College of Law

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Criminal Law Commons](#), and the [Law and Society Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Moore, Shelby A. D. (1997) "Doing Another's Bidding Under a Theory of Defense of Others: Shall We Protect the Unborn with Murder?," *Kentucky Law Journal*: Vol. 86 : Iss. 2 , Article 2.

Available at: <https://uknowledge.uky.edu/klj/vol86/iss2/2>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

KENTUCKY LAW JOURNAL

VOLUME 86

1997-98

NUMBER 2

ARTICLES

Doing Another's Bidding Under a Theory of Defense of Others: Shall We Protect the Unborn with Murder?*

BY SHELBY A.D. MOORE**

* This Article is not intended to be a manifesto for or against abortion. Rather, it is intended to make a statement about the value of life. Even if one finds the acts of another morally reprehensible, it does not give one the authority to act outside of the confines of the positive law to take another's life.

** Associate Professor of Law, South Texas College of Law. LL.M. 1992, Harvard Law School; J.D. 1984, University of Baltimore; B.A. 1981, Towson State University.

I am grateful for the critical readings of and suggestions from Professors Michael Wheeler, Helen Jenkins, Teresa Collett, James Musselman, and Elizabeth Dennis, my colleagues at South Texas College of Law. I extend a special thanks to Professor Neil McCabe for his guidance throughout this project. I also thank student assistants Angela Nolan, Wendell Champion, Judith Mitchell, and Markay Stroud. I am eternally grateful for the assistance of Helene Dameris and Monty Sullivan, whose hard work and long hours were instrumental in my completion of the project.

TABLE OF CONTENTS

I.	INTRODUCTION	258
II	VIOLENT ACTIVITIES OF THE ANTI-ABORTION ACTIVISTS .	261
	<i>A. Increased Violence to End Abortion</i>	261
	<i>B. The Reason for Change</i>	267
III.	THE LAW OF DEFENSE OF OTHERS	271
	<i>A. Common Law Origins</i>	271
	<i>B. Defense of Others Under the Model Penal Code</i>	277
	<i>C. Justification for Using Deadly Force in Defense of</i> <i>Another: Basic Requirements</i>	281
	1. <i>Necessity</i>	284
	2. <i>Proportionality</i>	285
	3. <i>Reasonable Belief</i>	286
	4. <i>Unlawful Act</i>	288
IV.	APPLICATION OF DEFENSE-OF-OTHERS THEORY TO THOSE WHO KILL ABORTION PROVIDERS	292
	CONCLUSION	301

I. INTRODUCTION

One of the most volatile and bitterly divisive issues to confront this country is abortion. While there have always been heated debates about abortion, the debate has given way to increased violence toward – and even the killing of – those who perform abortions.¹

¹ See, e.g., S. REP. NO. 103-117, at 5 (1993); William Booth, *Jury Urges Death Sentence in Abortion Clinic Murders; Hill Speaks Starkly of 'Responsibility,'* WASH. POST, Nov. 4, 1994, at A1; William Claiborne & Hamil R. Harris, *Explaining Pensacola's Violent Reputation; Residents Have Many Theories About Why Their City Has Become Abortion's Battleground,* WASH. POST, Aug. 1, 1994, at A4; Seth Faison, *Abortion Doctor Wounded Outside Kansas Clinic,* N.Y. TIMES, Aug. 20, 1993, at A12; Stephen J. Hedges et al., *Abortion: Who's Behind the Violence?*, U.S. NEWS & WORLD REP., Nov. 14, 1994, at 50; Dirk Johnson, *Abortions, Bibles and Bullets, and the Making of a Militant,* N.Y. TIMES, Aug. 28, 1993, at 1; Ian Katz & Madeleine Bunting, *God's Shock Troops,* THE GUARDIAN, Nov. 8, 1993, at 2; Dianne Klein, *The End Does Not Justify the Fanatical Means of Terrorism,* L.A. TIMES, Mar. 16, 1993, at A3; Larry Rohter, *Doctor is Slain During Protest Over Abortions,* N.Y. TIMES, Mar. 11, 1993, at A1; Rorie Sherman, *Abortion Activists Aiding Federal Probe,* NAT'L L.J., Aug. 15, 1994, at A9; *Suspect in Doctor's Shooting Praised Killing,* N.Y. TIMES, Aug. 22, 1993, at 29 [hereinafter, *Suspect in Shooting*]; Eric L. Wee, *Clinic Slaying Suspect Caught;*

Much of the activism in opposition to abortion emanates from religious leaders and their followers. While most religious leaders believe abortion is morally wrong, most also acknowledge that the use of force to prevent abortion is unacceptable and denounce the killing of abortion providers.² However, other religious leaders and their followers cross the line separating sympathy for and advocacy of the rights of the unborn. These individuals openly support violence toward and the killing of those who perform abortions,³ reasoning that it is justifiable homicide.⁴ A scenario

Shooting at Norfolk Abortion Center Tied to Massachusetts Attacks, WASH. POST, Jan. 1, 1995, at A1.

² Cardinal John O'Connor and Pat Robinson state that they deplore the recent killing of abortion providers. See Faye Wattleton, *Anti-Choice Terrorism: From Blockades to Bombs to Murder*, MS., Nov./Dec. 1994, at 90; *2 Killed, 5 Hurt in Clinic Attacks*, RICHMOND TIMES-DISPATCH (Richmond, Va.), Dec. 31, 1994, at A1. Flip Benham, preacher and director of Operation Rescue National, condemns the attacks on abortion providers. "Vigilantism invariably brings with it lawlessness. One never has the right to take upon himself [sic] the roles of judge, jury and executioner." *Id.* See also David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 119-20 (1995) (noting that John T. Noonan, the most respected pro-life scholar "writing in the natural law tradition, found the 'root' of *Roe [v. Wade]* to be the positivist belief that the sovereign has an absolute right to define who counts as a person with rights. Noonan and an overwhelming majority of those who share his views, morally condemn" the killing of abortion doctors); John W. Kennedy, *Killing Distorts Pro-life Message; Assassination of Pensacola Doctor John Bayard Britton and James Barrett*, CHRISTIANITY TODAY, Sept. 12, 1994, at 56.

³ See Georgia M. Sullivan, Note, *Protection of Constitutional Guarantees Under 42 U.S.C. Section 1985(3): Operation Rescue's "Summer of Mercy,"* 49 WASH. & LEE L. REV. 237, 237 (1992); Melinda Beck et al., *Propaganda Made Me Do It*, NEWSWEEK, Feb. 28, 1994, at 34; Booth, *supra* note 1, at A1; Hedges et al., *supra* note 1, at 50; Jim Naughton, *The Faces of Two Anti Abortionists; A 'Pretty Normal' Life Contrasts with Confrontational Stand*, WASH. POST, Dec. 3, 1991, at D1; Rohter, *supra* note 1, at A2; Rene Sanchez, *From Year of Promise to Year of Violence; Abortion Rights Advocates Decry Trend Toward Militant Opposition*, WASH. POST, Dec. 31, 1994, at A14; Ronald Smothers, *Death of a Doctor: The Overview—Abortion Doctor and Bodyguard Slain in Florida; Protestor is Arrested in Pensacola's Second Clinic Killing*, N.Y. TIMES, July 30, 1994, at 1, Wattleton, *supra* note 2, at 90-91.

⁴ See Mark Curriden, *An Unusual Theory Tested and Rejected*, Law Review Article, *Withdrawn by Author, Argues Killing of Abortionist Justified*, A.B.A. J., Dec. 1994, at 26; *The Murder of "Baby Killers" Slaying Splits Protesters*, NEWSDAY, Aug. 1, 1994, at A03 [hereinafter *The Murder of "Baby Killers"*];

often cited by anti-abortionists to justify the killing of abortion providers is as follows: A gunman walks onto a crowded playground (or into a classroom), gun in hand, and announces that he will kill all the children on the playground. Before he is able to accomplish his goal, however, a bystander intervenes and kills the gunman. Because the gunman's actions are unlawful and because the intervenor's actions are both lawful and beneficial to society, the intervenor's actions are justified based on a theory of defense of others.⁵ The scenario grabs the emotions of the hearer and cries out for someone to protect the innocent children. However, it is a weak bridge in the gap between the anti-abortionist's killing of an abortion provider and his assertion that his act is justified under a theory of defense of others.

This Article presents a dispassionate response to Paul Hill and other commentators and scholars who argue that defense of others is a legitimate defense for those who kill doctors and other health care providers who perform abortions. In addition, the Article seeks to dismantle and ultimately invalidate the anti-abortionist's reliance on criminal law principles to justify the killing of abortion providers. Part II of this Article briefly discusses the violent activities of anti-abortionists, which culminate in the deaths of doctors and other health care providers who assist in the performance of abortions. It also advances reasons for the shift from discussion and debate to violence, including the anti-abortionist's belief that the killing is justified both morally and legally under a theory of defense of another. Part III discusses the defense of others under both common law and the Model Penal Code ("MPC"), as well as the elements necessary to assert the defense. This Part concludes that the element inextricably tied to a third-party defense is that one must respond to an unlawful act. Virtually every court having the opportunity to decide this issue as it pertains to abortion has held that response to unjustified *illegal*

Suspect in Shooting, *supra* note 1, at 29; Sam Howe Verhovek, *At Center of Abortion Shooting: An Avid Protester and an Uncertain Martyr*, N.Y. TIMES, July 31, 1994, at 26.

⁵ See William Raspberry, *A Case of Abortion by Gunshot*, WASH. POST, Sept. 14, 1994, at A21 (Raspberry sets forth a scenario similar to that which appears above to demonstrate the ambivalence most people feel towards abortion. Many pro-life activists recognize a difference between abortion and infanticide and many pro-choice activists are repulsed by late-term abortions. However, in my conversations with those who support the use of violence against abortion providers, they use the scenario to demonstrate the appropriateness of asserting defense of others when defending the unborn.).

aggression is essential to a successful assertion of defense of others. Part IV addresses the illegitimacy of the anti-abortionist's reliance on the atrocities of Nazi Germany and slavery to justify the use of the third-party defense, on both moral and legal grounds. This Article concludes that even if abortion were illegal, it could not serve as the basis to use deadly force to end abortion.

II. VIOLENT ACTIVITIES OF THE ANTI-ABORTION ACTIVISTS

A. *Increased Violence to End Abortion*

On March 19, 1996, John C. Salvi III was convicted of murder for the deaths of two receptionists, Shannon Elizabeth Lowney and Leanne Nichols, that resulted from a methodical attack on two Boston abortion clinics, which also resulted in the wounding of five other people.⁶ "While many people were stunned by the shootings others seemed to expect such violence," predicting an increase in similar acts in the future.⁷ In fact, an anti-abortion protestor stated, "We're seeing the violence that's been going on inside [the clinics] for the last 22 years. It has been spilling out into the streets and parking lots. There's been a war waged against the unborn and now there's a response with equal force."⁸

Six months before these killings, in July 1994, Dr. John B. Britton and his unarmed escort, James Barrett, were shot to death as they sat in their truck outside a Florida abortion clinic. Barrett's function was to protect Dr. Britton. Barrett's wife, June, also was wounded in the shooting.⁹

⁶ See Wee, *supra* note 1, at A1. One day after the Boston murders, and moments after a man pulled out a rifle and fired seven times into a Norfolk abortion clinic foyer, John C. Salvi III was arrested. Salvi was charged with the murders of the two Boston receptionists. Investigators focused on Salvi after recovering a bag containing a handgun, hundreds of rounds of ammunition, and a receipt that led police to a gun shop in Massachusetts. Just before his arrest, Salvi discarded a .22 caliber semiautomatic Ruger rifle. See *id.*, see also David Weber, *Guilty; Salvi Convicted in Clinic Slayings*, BOSTON HERALD, Mar. 19, 1996, at 1.

⁷ Wee, *supra* note 1, at A1.

⁸ *Id.*

⁹ See Claiborne & Harris, *supra* note 1, at A4. Dr. Britton was one of a rapidly decreasing number of physicians willing to perform abortions in Pensacola, Florida, after the execution-style killing of Dr. David Gunn, Dr. Britton's predecessor at the Pensacola Women's Clinic. See Sherman, *supra* note 1, at A9.

Paul Hill was immediately arrested for the killings of Dr. Britton and James Barrett. At trial, State Assistant Attorney Jim Murray showed how Hill purchased

On March 10, 1993, as he got out of his car outside of the same abortion clinic that later claimed the lives of Dr. Britton and his escort, Dr. David Gunn was shot to death by a pro-life activist.¹⁰ Dr. Gunn's killing, the first of its kind in the nation,¹¹ made it clear that the nature of the

the shotguns two days before the murders and arrived at the Pensacola Ladies Center Clinic with thirty rounds of ammunition. *See Booth, supra* note 1, at A1. Murray described to the jury how Hill first fired three shots into the pickup truck carrying Dr. Britton and his two escorts. During the first round, James Barrett was killed. Hill then took thirty seconds to reload while Dr. Britton lay wounded in the front passenger seat. Hill discharged four additional shotgun blasts, killing Britton. *See id.* Murray explained, "'You're literally watching your own execution take place before your own eyes.'" *Id.* (quoting Jim Murray). Murray said the killings were like a mirror into Hill's soul. The jury convicted Hill of first-degree murder and unanimously recommended that he be sentenced to death by execution. *See id.*

¹⁰ *See* S. REP. NO. 103-117, at 3 (1993). "Dr. Gunn's death was a tragic end to years of threats, blockades, and personal attacks he had endured." *Id.* at 3, 4. *See also* Katz & Bunting, *supra* note 1, at 2; Klein, *supra* note 1, at A3; Rohter, *supra* note 1, at A2. Police officers arrested and later charged Michael Griffin with Dr. Gunn's murder. *See Suspect in Shooting, supra* note 1, at 29.

Two days after Dr. Gunn's death, Paul Hill began strongly urging the public to support Michael Griffin, arguing that the killing was justifiable homicide. *See Verhovek, supra* note 4, at 26.

In response to the killing of Dr. Gunn, Rachel Rance Shannon was quoted as stating, "Is it really so bad? People cheered when Hitler was killed. And this abortionist was a mass murderer." *See Johnson, supra* note 1, at A1. Shannon wrote to Michael Griffin, praising him for his courageous decision. *See Suspect in Shooting, supra* note 1, at 29. Mrs. Shannon wrote, "I know you did the right thing. It was not murder. You shot a murderer. It was more like anti-murder. I believe in you and what you did, and really want to help if possible. I wish I could trade places with you." *Id.* Shannon also referred to Griffin as both a "brave soldier" and a "hero." *Id.*

Shortly after the death of Dr. Gunn, Dr. George R. Tiller was shot in both arms by Shannon, who was passing out anti-abortion literature as Tiller sat in his car preparing to leave an abortion clinic in Wichita, Kansas. *See Faison, supra* note 1, at A12. Shannon escaped by car and was arrested at an Oklahoma airport shortly after the shooting. She was charged with attempted murder. *See Suspect in Shooting, supra* note 1, at A29. It appears that Shannon targeted the Women's Health Care Services Clinic in Wichita, Kansas because it is one of the few clinics in the country where women can obtain an abortion in the third trimester. *See Faison, supra* note 1, at A12. Shannon was convicted of attempted first-degree murder. *See 11-Year Term in Abortion Clinic Shooting*, N.Y. TIMES, Apr. 27, 1994, at A4.

¹¹ *See* Rohter, *supra* note 1, at A1.

abortion issue had moved beyond debate and that the cost of performing abortions in this country could be death.¹²

Undoubtedly, there has been an increase in the killing of doctors who perform abortions and health care providers who work in abortion facilities.¹³ Yet these deaths are only part of the story. Many other acts of violence are perpetrated against physicians who provide abortions as part of their medical practice. Since 1977 there have been more than 200 attempted or completed arsons, bombings, and fire bombings of abortion clinics.¹⁴ Many of the most costly arsons and bombings are still unresolved.¹⁵ The consequences of these attacks for health care providers have been devastating. For example, in March of 1993, arson completely destroyed the Blue Mountain Clinic in Missoula, Montana.¹⁶ While one of the Clinic's purposes was to provide first-trimester abortions, the Clinic was a non-profit facility that "offered a wide range of health care services including prenatal care and delivery, childhood immunizations, diagnosis and treatment of sexually transmitted infection, and contraceptive services."¹⁷ According to Willa Craig, Executive Director of the Blue Mountain Clinic, seventy percent of the Clinic's prenatal patients received Medicaid and had difficulty obtaining obstetric care.¹⁸ Many patients traveled long distances to reach the Clinic because no services were

¹² See Dana S. Gershon, Note, *Stalking Statutes: A New Vehicle to Curb the New Violence of the Radical Anti-Abortion Movement*, 26 COLUM. HUM. RTS. L. REV. 215, 215-16 (1994); J. Paige Lambden, Note, 24 SETON HALL L. REV. 2096, 2096-98 (1994). Police have not resolved the killing of Dr. George Patterson, who served as a physician at the Pensacola, Florida abortion clinic. See Johnson, *supra* note 1, at 1.

¹³ See Clarence Page, *Birmingham Abortion Bombing Revives Ugly Memories*, THE CINCINNATI POST, Feb. 5, 1998, at 19A (stating that according to the Federal Bureau of Alcohol, Tobacco and Firearms, there have been "47 bombings and 151 arsons at clinics since 1982" and that 13 of these instances occurred in 1997, "twice the number of the previous year"); see also *Suspect Is Named in Clinic Blast: FBI Changes Fugitive from Witness Status*, CHI. TRIB., Feb. 15, 1998, at 11 (discussing the Jan. 29, 1998 abortion clinic bombing in Birmingham, Ala., which killed an off-duty police officer and seriously wounded a nurse).

¹⁴ See S. REP. NO. 103-117, at 5 (1993).

¹⁵ See Hedges et al., *supra* note 1, at 50. The Bureau of Alcohol, Tobacco and Firearms reports that of the ten costliest arsons and bombings, eight remain unsolved. See *id.*

¹⁶ See S. REP. NO. 103-117, at 5 (1993).

¹⁷ *Id.*

¹⁸ See *id.*

available near their homes.¹⁹ After the fire, however, the Clinic was forced to reduce the number of patients in its care by sixty percent, preventing it from meeting the needs of the uninsured, the working poor, and citizens dependent on Medicaid and Medicare.²⁰

Those clinics that have avoided acts of physical violence have experienced an increase in death threats and hate mail.²¹ Beyond these more traditional acts of harassment, however, those seeking to end abortion have adopted a new tactic commonly called "stalking," which is generally defined as "repeated following or harassing of another person."²² "Stalking scenarios involve a series of individual acts, such as harassing phone calls and slashed tires, that build on one another. Too often, the conduct does not end until serious physical injury, or even death, results."²³ While stalking is a "new" tactic for anti-abortionists, it has existed for some time in connection with domestic violence.²⁴ In order to combat stalking as it initially developed, many state legislatures passed anti-stalking laws.²⁵ Congress responded to stalking and state legislation aimed

¹⁹ See *id.*

²⁰ See *id.* at 6.

²¹ See Beck et al., *supra* note 3, at 34. The National Abortion Federation, which represents abortion providers, reported that death threats at clinics climbed from eight in 1992 to 78 in 1993. The incidence of hate mail and harassing phone calls increased from 469 to 628 during that same time period. See *id.*

²² Dawn A. Morville, *Recent Development, Stalking Laws: Are They Solutions for More Problems?*, 71 WASH. U. L.Q. 921, 921 n.2 (1993).

²³ Kathleen G. McAnaney et al., Note, *From Impudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 889 (1993).

²⁴ See Morville, *supra* note 22, at 925 (stating that "approximately ninety percent of women killed by their husbands or boyfriends were stalked prior to their deaths"); McAnaney et al., *supra* note 23, at 823-24; Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 996 (1993) (indicating that an alarming number of women murdered each year were stalked by attackers prior to being killed); Tamar Lewin, *New Laws Address Old Problem: The Terror of a Stalker's Threats*, N.Y. TIMES, Feb. 8, 1993, at A1.

²⁵ See Gershon, *supra* note 12, at 223 n.2; Morville, *supra* note 22, at 921 n.3, 927-31, see generally McAnaney et al., *supra* note 23; Keirsten L. Walsh, Comment, *Safe and Sound at Last? Federalized Anti-Stalking Legislation in the United States and Canada*, 14 DICK. J. INT'L L. 373 (1996). But see Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996) (overturning the existing stalking law, holding that it was void for vagueness). Recently, however, Texas enacted a new stalking law that arguably contains the same vague language that caused the older statute to be overturned. See S. 97, 75th Leg., Reg. Sess. (Tex. 1997). In 1996, the Minnesota Supreme Court overturned a 1993 anti-stalking statute on grounds

at combating stalking by creating a model state anti-stalking law. It was designed to evaluate state stalking statutes and to draft a model statute that would pass constitutional muster.²⁶

As in cases of domestic violence, anti-abortionists follow, threaten, injure, or sometimes even kill their victims. For example, neither Dr. Gunn's nor Dr. Britton's murder was spontaneous – both doctors were previously targeted by radical anti-abortion protesters.²⁷ In other cases, when physicians who perform abortions refuse to cease their activities, protesters follow them to their homes and tell their neighbors they are “baby killers.”²⁸ Protesters also follow the children of doctors who provide abortions, taunting them about their parents' activities.²⁹ While there is little case law applying stalking statutes to anti-abortionists' activities, these laws probably will be deemed a legitimate means of thwarting, and perhaps ending, the intimidations, threats, and murders of physicians who perform abortions.³⁰

similar to those used in Texas. See Conrad de Fiebre, *Anti-stalking Bill Sent to House Floor Takes the Middle Ground*, STAR TRIBUNE (Minneapolis, Minn.), Jan. 15, 1997. See generally Brant E. Poling, Comment, *Stalking: Is the Law Hiding in the Shadows of Constitutionality?*, 23 CAP U. L. REV. 279 (1994).

²⁶ See 18 U.S.C. § 2261A (1996) (The Interstate Stalking Punishment and Presentation Act establishes a federal crime for stalking across state lines.); Morville, *supra* note 22, at 932-34.

²⁷ See Gershon, *supra* note 12, at 224 and accompanying notes (Just before his murder, Dr. Gunn's picture appeared on a “wanted” poster; before Dr. Britton's murder, Paul Hill began appearing outside the Pensacola, Florida women's clinic yelling “Mommy, please don't kill me!”); Klein, *supra* note 1, at A3; Pierre Thomas, *Abortion Rights Activists Ask Why Law Failed; Pensacola Slayings Underscore Federal Agents' Difficulties in Preventing Clinic Violence*, WASH. POST, Aug. 5, 1994, at A3.

²⁸ See Richard Lacayo, *Abortion; The Future Is Already Here; No Matter What Happens to Roe v. Wade, the Doctors Who Perform Abortions and Their Patients Face Formidable Obstacles*, TIME, May 4, 1992, at 26, 28-29.

²⁹ See Gershon, *supra* note 12, at 220; *The Shouting of the Lambs*, TIME, May 4, 1992, at 30.

³⁰ See Gershon, *supra* note 12, at 242-46 (suggesting that applying anti-stalking laws to radical anti-abortion tactics will pass constitutional muster because such statutes regulate conduct mixed with expression, which is not speech in and of itself). Pro-abortion politicians also are stalked, not just to keep the issue of abortion in the public eye, but also to embarrass pro-abortion politicians. See JOSEPH M. SCHEIDLER, *CLOSED – 99 WAYS TO STOP ABORTION* 287-89 (rev. ed. 1993).

One of the most successful means of ending abortion practices has been the use of blockades, that are designed to prevent access to facilities that provide abortions. Since 1977, over 6000 of these clinic blockades have been reported. Many anti-abortionists engage in what they call "rescues," a form of blockade wherein men and women are held hostage in either a health care facility or in their cars while in the parking lot of the facility³¹ While captive, the hostages are taunted and vilified.³² Many of these blockades and rescues culminate in intentional acts of physical harm to health care providers.³³ Rescue demonstrations create a substantial risk to a clinic's patients, who may suffer both physical and mental harm.³⁴ However, with the recent enactment of the Freedom of Access to Clinic

³¹ See S. REP NO. 103-117, at 7 (1993).

Clinic blockades disrupt a wide range of health services, terrorize patients and staff, and impose upon clinics, individuals and responding jurisdictions millions of dollars in costs for law enforcement, prosecutions, staff overtime, medical expenses and property damage. Typically dozens of persons – and in some cases hundreds or even thousands – trespass onto clinic property and physically barricade entrances and exits, by sitting or lying down or by standing and interlocking their arms. These human barricades often involve pushing, shoving, destruction of equipment and other violent acts as blockaders try to keep patients and staff from entering the clinic.

Id. See also David Cole, *Commentary: Sliding Down the Slippery Slope*, TEX. LAW., Aug. 1, 1994, at 26.

³² See S. REP NO. 103-117, at 8-9; NOW v. Operation Rescue, 726 F Supp. 1483 (E.D. Va.), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub. nom. Bray v. Alexandria Women's Health Clinic*, 498 U.S. 1119 (1991), *and rev'd in part*, 506 U.S. 263 (1993). Operation Rescue is the organization most frequently associated with the "rescue" tactic. The purpose of the "rescue" is to disrupt operations at a chosen clinic and ultimately to cause it to permanently cease operations. See *id.* at 1488. As stated by Randall Terry, the founder of Operation Rescue, "[W]hile the child-killing facility is blockaded, no one is permitted to enter past the rescuers – all are prevented from entering the abortuary while the rescue is in progress." *Id.* In its literature, Operation Rescue defines "rescues" as "physically blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims." *Id.* (quoting *Operation Rescue, National Day of Rescue – Oct. 29, 1988* (1988)). The underlying purposes of the "rescue" are threefold: "(i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services and (iii) to impress upon members of society the moral righteousness and intensity of [Operation Rescue's] anti-abortion views." *Id.* See also Sullivan, *supra* note 3.

³³ See S. REP NO. 103-117, at 8-9 (1993).

³⁴ See *id.*

Entrances Act ("FACE"), the acts of anti-abortion protesters who attempt to prevent abortions through blockades and rescues are questionable.³⁵

B. *The Reason for Change*

While the decision in *Roe v. Wade*³⁶ engendered fierce debate, it was not necessarily a signal that the controversy over abortion would escalate to such a degree that it would give way to the killing of abortion providers. Marcy Wilder, Legal Director for the National Abortion and Reproductive Rights Action League ("NARRAL"), states that the increased violence is primarily attributable to two occurrences: the election of pro-choice President Bill Clinton and the United States Supreme Court's affirmation of abortion rights³⁷ in *Planned Parenthood v. Casey*³⁸ Wilder argues that these two events marked a setback in the anti-abortion movement's quest to eradicate abortion. More importantly, however, it marked a split in the movement. Those dissatisfied with the slow progress in ending abortion turned to a rhetoric of violence and, ultimately, to the killing of abortion providers.³⁹

³⁵ See 18 U.S.C. § 248 (1994); *Operation Rescue*, 726 F. Supp. at 1489. *But see* Schenk v. Pro-Choice Network, 117 S. Ct. 855 (1997).

³⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

³⁷ Interview with Marcy Wilder, Legal Director for NARRAL (Mar. 25, 1997); see JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR 20* (1994) (stating that with the election of President Clinton many concluded that "the abortion controversy was for all practical purposes over"). Hunter noted, however, that this and other events only "ensure that the controversy will rage on" for some time "through different political strategies." *Id.*, see also Alissa Rubin, *The Abortion Wars Aren't Over; Beyond the Court, Battles Over Access and Restrictions Have Just Begun*, WASH. POST, Dec. 13, 1992, at C2; RANDALL A. TERRY, *WHY DOES A NICE GUY LIKE ME KEEP GETTING THROWN IN JAIL?* 133-42 (1993) (opining that President Clinton is an enemy of Christians and the pro-life movement). *But see* LIFE RESEARCH INSTITUTE, *ABORTION-RELATED VIOLENCE AND ALLEGED VIOLENCE* (1995) (copy on file with author). This report details the violence that has ensued in the abortion "war" and concludes that there is very little violence committed by those who are pro-life; however there is a great deal of violence committed by abortion rights advocates and police against pro-life advocates.

³⁸ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). For a detailed discussion of the impact of *Casey*, see Kelly Sue Henry, Note, *Planned Parenthood of Southeastern Pennsylvania v. Casey: The Reaffirmation of Roe or the Beginning of the End?*, 32 U. LOUISVILLE J. FAM. L. 93 (1993/94).

³⁹ See HUNTER, *supra* note 37, at 50-60 (noting that both the pro-life and pro-choice movements have been guilty of rhetoric that engenders violence); Smolin,

Although abortion has been at the center of American political debate for more than twenty years, not until 1986 did zealous abortion opponents openly begin to organize and discuss ways to end abortion.⁴⁰ It was at that time that Randall Terry revealed his plan for what became known as Operation Rescue.⁴¹ Terry, now a prominent figure in the anti-abortion movement, and Joseph Scheidler, founder of the Pro-Life Action Network ("PLAN") and considered the godfather of radical abortion opponents, both denounced the violent tactics of the anti-abortion movement.⁴² However, many claim that the rise in violence in the anti-abortion movement is directly linked with the ascension of groups like Operation Rescue and PLAN.⁴³ To support the suspicion that the core of the radical anti-abortion movement is violence, one can point to Terry's statement, "If you believe abortion is murder, you must act like it's murder."⁴⁴ This statement implicitly indicates that Terry was instructing his followers to use any means necessary to end abortion. And by likening the fight to end abortion to a "war,"⁴⁵ Terry indirectly instructed his followers to take up arms against the enemy – those who "murder" unborn children by performing abortions.

supra note 2, at 120 (suggesting that the absolutism of the anti-abortion movement has led to the recent murders of physicians and others involved in the provision of abortion services).

⁴⁰ See Hedges et al., *supra* note 1, at 54 (indicating that one of the first meetings took place in 1986 at a steak house in Pensacola, Florida. About 40 anti-abortion activists were in attendance).

⁴¹ See RANDALL A. TERRY, ACCESSORY TO MURDER: THE ENEMIES, ALLIES, AND ACCOMPLICES: TO THE DEATH OF OUR CULTURE 221-29 (1990) [hereinafter TERRY, ACCESSORY TO MURDER]; RANDALL A. TERRY, OPERATION RESCUE (1988).

⁴² See Hedges et al., *supra* note 1, at 55; *U.S. Marshals Guard Clinics: Anti-abortion Violence Sparks Move*, NEWSDAY, Aug. 2, 1994, at A5.

⁴³ See David Van Biema, *Your Activist, My Mobster (Supreme Court Allows Racketeer Influenced and Corrupt Practices Act to Be Used Against Attacks on Abortion Clinics)*, TIME, Feb. 7, 1994, at 32.

⁴⁴ Sullivan, *supra* note 3, at 237 (During an appearance on *Donahue*, Randall Terry ended the interview on a highly emotional note, stating, "Abortion is murder! If we don't bring an end to it, our country is going to be destroyed!"). *Id.* Operation Rescue's slogan has also been stated as "If you think abortion is murder, act like it!" Hedges et al., *supra* note 1, at 55.

⁴⁵ TERRY, ACCESSORY TO MURDER, *supra* note 41, at 246. Similarly, David C. Trosch, a Roman Catholic priest, stated, "Anyone in the war zone has to expect to be part of the war that's going on." *2 Killed, 5 Hurt in Clinic Attacks*, *supra* note 2, at A1.

Although in 1990 Randall Terry resigned as director of Operation Rescue and officially closed the doors of the organization,⁴⁶ his efforts to end abortion became more vocal. In a recent speech, Terry promised his new “‘leadership institute’ would raise up ‘a cadre of people who are militant, who are fierce, who are unmerciful.’”⁴⁷

Joseph Scheidler, an authoritative spokesperson for the anti-abortion movement, states he does not condone violence and that he has clearly written and spoken out against the use of violence in the fight against abortion.⁴⁸ He views violence as an admission of defeat and an acknowledgment that abortion cannot be ended through proper channels.⁴⁹ However, while Scheidler appeared to denounce the 1982 kidnapping of Hector Zevallos and his wife as an act of a zealous anti-abortionist,⁵⁰ he wrote a letter to the attorney representing the kidnapper, Don Benny Anderson, suggesting a “nationwide movement to seek his release.”⁵¹

Many of the voices that resonate loudly in the fight to end abortion are the voices of religious leaders, religious organizations, and those who identify with the radical anti-abortion movement.⁵² They believe that ending abortion is a moral imperative. For example, Michael Bray, a former minister and the Washington, D.C. Operation Rescue coordinator, has expressed his belief that the use of deadly force to end abortion is morally justified. When rhetorically asked during an interview if it is legitimate to use force on behalf of the unborn,⁵³ Bray answered, “Yes, it is justified to terminate an abortionist.”⁵⁴ He repeated his belief when called before a House subcommittee.⁵⁵

⁴⁶ See Hedges et al., *supra* note 1, at 51. While Randall Terry is no longer the national director of Operation Rescue, he continues to maintain some connection with a very similar organization, known as Operation Rescue National. See *id.*

⁴⁷ Kio Stark, *Call it Pro-death*, THE NATION, Aug. 22, 1994, at 183 (quoting Randall Terry).

⁴⁸ See Hedges et al., *supra* note 1, at 54; SCHEIDLER, *supra* note 30, at 299-301 (1993) (discussing why violence will not work to end abortion).

⁴⁹ See Hedges et al., *supra* note 1, at 54.

⁵⁰ See SCHEIDLER, *supra* note 30, at 299-300.

⁵¹ Hedges et al., *supra* note 1, at 55.

⁵² I define “religious leaders” broadly and do not limit the definition solely to clergy or the recognized ministers or heads of particular denominations.

⁵³ See Naughton, *supra* note 3, at D1.

⁵⁴ *Id.*

⁵⁵ See S. REP. NO. 103-117, at 4 (1993); see also MICHAEL BRAY, A TIME TO KILL 129-44 (1986) (among other violent anti-abortionists, Bray portrays as heroes John Brockhoeft, Curtis Beseda, and Don Benny Anderson. Anderson and others

Michael Bray is not alone in his beliefs. Paul J. Hill is a former pastor of both the Orthodox Presbyterian Church and the Presbyterian Church of America ("PCA"), and director of an anti-abortion group, Defensive Action, which was established to promote the use of violence to end abortion. He regularly espoused his belief that killing doctors who perform abortions is justifiable homicide.⁵⁶ Hill gained a broad audience for his views, appearing on nationally televised programs including *Nightline*, *Donahue* and *Sonya Live*.⁵⁷ In one interview he stated, "The Christian principle is to do unto others as you would have them do unto you. If an abortionist is about to violently take an innocent person's life, you are entirely morally justified in trying to prevent him from taking that life."⁵⁸ After a physician who provided abortions was shot and wounded in 1993, Hill said the Sixth Commandment requires "that we try and prevent [sic] killing, and requires that we use force if necessary to do that."⁵⁹ More than twenty-four religious leaders and leaders of city abortion rescue organizations signed a statement written by Hill stating that the use of deadly force is justified.⁶⁰ Shortly after publicly revealing his belief in the theory of justifiable homicide to defend those who kill abortion providers, Paul Hill killed an abortion provider and his escort and stated, "I know one thing. No innocent babies are going to be killed in that clinic today."⁶¹

Implicitly, Hill and those who adopt his beliefs present themselves as martyrs. Based on what they believe is a Christian directive, they will lay down their own lives for the unborn, if necessary. Those religious leaders who support the use of deadly force to end abortion willingly elevate to the status of martyr those who are bold enough to take such radical steps to end abortion. David C. Trosch, a Catholic priest who was suspended from his clerical duties for supporting violence in the fight against abortion, defended Paul Hill, stating, "He's becoming more of a martyr. If he is actually put to death, he will encourage even more violent protest against abortionists and their clinics."⁶²

kidnaped an abortion provider and his wife and held them captive in order to convince them to stop performing abortions); Hedges et al., *supra* note 1, at 52.

⁵⁶ See Smothers, *supra* note 3, at 1, *The Murder of "Baby Killers," supra* note 4, at A03; Curriden, *supra* note 4, at 26.

⁵⁷ See Kennedy, *supra* note 2, at 57

⁵⁸ Smothers, *supra* note 3, at 1, see Wattleton, *supra* note 2, at 90-91.

⁵⁹ Smothers, *supra* note 3, at 1. Hill stated, "[A]ll godly action is necessary for the taking of innocent life, including force." Kennedy, *supra* note 2, at 56.

⁶⁰ See Kennedy, *supra* note 2, at 56-57

⁶¹ Smothers, *supra* note 3, at 26.

⁶² Booth, *supra* note 1, at A3; see Rohter, *supra* note 1, at A1. There are those, however, who are unwilling martyrs. Rohter notes that rather than accept the status

III. THE LAW OF DEFENSE OF OTHERS

Part III presents the development of the law of defense of others and its common law and statutory origins. Also presented are the elements necessary for a successful assertion of the defense. It concludes that a crucial element of the defense is an illegal act, which does not exist in the context of anti-abortionists who kill abortion providers.

A. Common Law Origins

The basic premise underlying the theory of defense of others is that one is justified in using force to protect a third party from unlawful force by an aggressor.⁶³ The theory closely parallels the law of self-defense,⁶⁴ which allows for the use of force to the extent necessary to save one's own life⁶⁵ or to protect oneself from bodily harm.⁶⁶

At English common law the rule of defense of others extended only to the intervenor's family, which was defined to include one's wife, child, parent, or servant.⁶⁷ Although the law of defense of others parallels the laws of self-defense, it has its origins in the right of a man to protect his property⁶⁸ William Blackstone, who believed the right to protect one's self and one's property to be deeply entrenched in natural law, stated:

In these cases, if the party himself or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray.⁶⁹

of martyr, Michael Griffin claims that minister John Burt brainwashed him and drove him to kill Dr. Gunn. *See id.*, Larry Rohter, *Towering Over the Abortion Foe's Trial: His Leader*, N.Y. TIMES, Mar. 5, 1994, at 6C.

⁶³ *See* Commonwealth v. Martin, 341 N.E.2d 885, 889-90 (Mass. 1976).

⁶⁴ *See* Adkins v. Commonwealth, 168 S.W.2d 1008, 1008 (Ky. 1943); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 231-33 (2d ed. 1995).

⁶⁵ *See, e.g.*, Hughes v. State, 719 S.W.2d 560, 564 (Tex. Crim. App. 1986).

⁶⁶ *See, e.g.*, Adkins, 168 S.W.2d at 1008.

⁶⁷ *See* Martin, 341 N.E.2d at 891-92.

⁶⁸ *See* Alexander v. State, 447 A.2d 880 (Md. Ct. Spec. App.), *aff'd*, 451 A.2d 664 (Md. 1982); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND ch. 1, § 8(2) (1916) (noting that at common law one's acquired rights of property encompassed his wife, child, parent, or servant); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 1018-19 (3d ed. 1982); RESTATEMENT (SECOND) OF TORTS § 76 cmt. e (1965).

⁶⁹ BLACKSTONE, *supra* note 68, at ch. 1, § 7(1). Blackstone states the right to self-defense "is justly called the primary law of nature, so it is not, neither can it be

In the course of time, however, the analogy of a man's right to protect what was his – his property – eroded and was replaced by a “mutual and reciprocal defense.”⁷⁰ The household came to be regarded as a unit, and any member had a privilege to defend any other member.⁷¹ This rule was supplanted by a rule that recognized the right of one to protect anyone “whom he is under a legal or socially recognized duty to protect.”⁷²

The English common law rule became deeply entrenched in American jurisprudence.⁷³ However, it eventually developed to permit a rule that included crime prevention as a justification for homicide.⁷⁴ Since the essence of the common law privilege of using force for crime prevention was that anyone who was free from fault was authorized to use whatever force was reasonably necessary to save an innocent victim⁷⁵ from assault, one needed no special privilege. One could take the life of a felonious assailant if one reasonably believed it was necessary to save either an innocent family member⁷⁶ or a stranger.⁷⁷ The early limit to the rule, however, was that the privilege of using force for crime prevention did not allow for intervention to protect third persons from invasions that did not involve danger of death or serious bodily injury.⁷⁸ Over time, the law of defense of others developed to provide authority to act even where there was no felonious assault.⁷⁹ The privilege to use force for crime prevention presently extends to circumstances that include non-felonious personal

in fact, taken away by the law of society.” *Id.*

⁷⁰ *Pond v. People*, 8 Mich. 150, 176 (1860) (holding that “[a] man may defend his family, his servants or his master, whenever he may defend himself”).

⁷¹ *See id.*, RESTATEMENT OF THE LAW OF TORTS § 76(b)(1) (1934) and accompanying illustrations 4 and 5.

⁷² *Pond*, 8 Mich. at 176.

⁷³ *See* Marco F. Bendinelli & James T. Edsall, *Defense of Others: Origins, Requirements, Limitations and Ramifications*, 5 REGENT U. L. REV. 153, 155-56 (1995); MODEL PENAL CODE § 3.05 cmt. 1 (Proposed Official Draft 1962; Revised Commentary 1985).

⁷⁴ *See* MODEL PENAL CODE § 3.05 (1962).

⁷⁵ *See id.*

⁷⁶ *See* *Lacy v. State*, 297 P. 872 (Ariz. 1931) (any other family member); *Warnack v. State*, 60 S.E. 288 (Ga. Ct. App. 1908) (brother); *Crowder v. State*, 76 Tenn. 669 (1881) (parent, child).

⁷⁷ *See* *State v. Hennessy*, 90 P. 221 (Nev. 1907); MODEL PENAL CODE § 3.05 cmt. 1 (1962); Bendinelli & Edsall, *supra* note 73, at 156 n.20 and accompanying text.

⁷⁸ *See* PERKINS & BOYCE, *supra* note 68, at 1145; RESTATEMENT (SECOND) OF TORTS § 76, cmt. e (1965).

⁷⁹ *See* PERKINS & BOYCE, *supra* note 68, at 1145.

attacks.⁸⁰ The law of defense of others and the privilege to use force for crime prevention probably exist independently, and both privileges may be asserted where appropriate.⁸¹

As the law of defense of others developed, it became intertwined with the law of self-defense.⁸² If someone is using privileged force in order to defend himself against an unlawful attack, a third party is authorized to defend him and may use force in an effort to save him.⁸³ In other words, "the right of one to defend another is coextensive with the right of the other to defend himself."⁸⁴

Two distinct standards developed regarding the potential liability encountered when one individual came to the aid of another. One line of reasoning, based on the theory of self-defense, held that he who comes to the defense of another "stands in the shoes" of the one defended and possesses no greater privilege than the one on whose behalf he intervenes.⁸⁵ This principle, sometimes referred to as the "alter ego" rule,⁸⁶ was based upon the theory that one is not justified in using deadly force in self-defense if one is at fault.⁸⁷ The other theory, which takes a more subjective

⁸⁰ See *Spicer v. People*, 11 Ill. App. 294, 297 (1882) (holding use of force justified to prevent misdemeanors such as fighting or other breach of the peace); MODEL PENAL CODE § 3.07(5) (1962) (allowing force in crime prevention for "a crime involving or threatening bodily injury, damage to or loss of property or a breach of the peace"); PERKINS & BOYCE, *supra* note 68, at 1145.

⁸¹ See *Hennessy*, 90 P. at 227; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.9, at 465 (2d ed. 1986).

⁸² See *Lovejoy v. State*, 15 So. 2d 300, 301 (Ala. Ct. App. 1943); Bendinelli & Edsall, *supra* note 73, at 156 n.21.

⁸³ See *Steele v. State*, 389 So. 2d 591 (Ala. Crim. App. 1980); *People v. Travis*, 56 Cal. 251 (1880), *overruled in part by People v. Conkling*, 44 P. 314 (Cal. 1896); *State v. Turner*, 152 S.W. 313 (Mo. 1912).

⁸⁴ Bendinelli & Edsall, *supra* note 73, at 156; *see also Lovejoy*, 15 So. 2d at 301.

⁸⁵ See *Wood v. State*, 29 So. 557, 558 (Ala. 1900); *see also People v. Young*, 183 N.E.2d 319, 319-30 (N.Y. 1962) (upholding a conviction for third degree assault despite the defendant's good faith intervention in a fight between a third person and a policeman).

⁸⁶ See *Young*, 183 N.E.2d at 319; *State v. Chiarello*, 174 A.2d 506, 511 (N.J. Super. Ct. App. Div. 1961); Bendinelli & Edsall, *supra* note 73, at 157-58. The "stands-in-the-shoes," "alter-ego," and "acts-at-his-own-peril" rules are used interchangeably to describe the liability of an intervenor who is mistaken as to the rights of the one on whose behalf he intervenes. *See id.*

⁸⁷ See *Chiarello*, 174 A.2d at 511 (holding that a homicide is not justified in such a case if the defender is at fault in occasioning the difficulty); *Wood*, 29

approach to defense of others, is the "reasonable appearance" or "reasonable belief" rule, which holds that an intervenor who acts in defense of another is not liable if his actions were reasonable under the circumstances.⁸⁸

Under the stands-in-the-shoes theory, if the defended person was at fault in any way, he lost the right to self-defense. Thus, anyone acting on his behalf lost the right to be relieved of liability because his actions were justified.⁸⁹ For example, in *Wood v. State*,⁹⁰ the Alabama Supreme Court considered whether a defendant who came to the aid of his brother, who was the initial aggressor, was justified in shooting the victim, with whom his brother was engaged in an altercation.⁹¹ The court later reaffirmed its ruling in *Lovejoy v. State*,⁹² holding: "[H]e who invokes self-defense in protection of a third person is placed in the shoes of him whom he seeks to protect."⁹³ He is on no greater plane than the one he seeks to aid.⁹⁴

There are two chief public policy considerations underlying the theory that an intervenor "acts at his own peril." One is that it would be dangerous for police officers to allow an individual to intervene in a rightful arrest, even if the intervenor does not have the specific intent necessary to be

So. at 558.

⁸⁸ See *infra* note 99 and accompanying text.

⁸⁹ See *Wood*, 29 So. at 558 (affirming conviction although defendant came to his brother's aid, without knowledge that his brother confronted the victim about a prior incident); MODEL PENAL CODE § 3.05 (Proposed Official Draft 1962; Revised Commentary 1985); Bendinelli & Edsall, *supra* note 73, at 157 and accompanying notes.

⁹⁰ *Wood v. State*, 29 So. 557 (Ala. 1900).

⁹¹ See *id.* at 558.

One who intervenes in a pending difficulty in behalf of a brother, and takes the life of the other original combatant, stands in the shoes of the brother in respect of fault [of the brother] in bringing on the difficulty, and cannot defend upon the ground that [the] brother was in imminent and deadly peril and could not retreat, unless the latter could have defended on that ground had he killed his assailant. Hence it is a material inquiry whether defendant's brother was at fault in bringing on the difficulty.

Id.

⁹² *Lovejoy v. State*, 15 So. 2d 300, 301 (Ala. Ct. App. 1943); see also Bendinelli & Edsall, *supra* note 73, at 156.

⁹³ *Lovejoy*, 15 So. 2d at 301 (quoting *Humphries v. State*, 181 So. 309, 310 (Ala. Ct. App. 1938)).

⁹⁴ See *id.*

convicted of a crime.⁹⁵ A second argument against extending protection to someone who intervened to defend another is that to justify the acts of a defendant who, at the time of the affray, had a reasonable belief that the one he was defending was without fault might result in allowing the killing of an innocent person without any criminal liability on the part of the killer.⁹⁶ While both policies appear sound when viewed in the context of preventing the hampering of law enforcement, both policies are untenable when balanced against principles of fairness and justice. The law has always recognized circumstances where one who caused a homicide was free of criminal intent and, therefore, free of guilt.⁹⁷

The harshness of the “alter ego” rule led courts to follow the American Law Institute in rejecting the rule as repugnant to the fundamental principle of Anglo-American criminal jurisprudence – that the defendant must have a guilty mind or guilty intent in order to incur criminal liability.⁹⁸ As a result, many jurisdictions replaced the rule with a more lenient standard known as the “reasonable belief” rule, which holds that so long as the defendant reasonably believes another is unlawfully attacked, he is justified in using reasonable deadly or non-deadly force to defend him.⁹⁹

⁹⁵ See *People v. Young*, 183 N.E.2d 319 (N.Y. 1962).

It would be a dangerous precedent for courts to announce that plain-clothes police officers attempting lawful arrests over wrongful resistance are subject to violent interference by strangers ignorant of the facts, who may attack the officers with impunity so long as their ignorance forms a reasonable basis for a snap judgment of the situation unfavorable to the officers.

People v. Young, 210 N.Y.S.2d 358, 367 (1961) (Valente, J., dissenting).

⁹⁶ See *State v. Chiarello*, 174 A.2d 506, 510 (N.J. Super. Ct. App. Div. 1961).

⁹⁷ “The 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.” *Id.* at 514 (quoting Francis Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 70 (1933)).

⁹⁸ See *id.* at 510.

⁹⁹ See *Alexander v. State*, 447 A.2d 880, 885-87 (Md. Ct. Spec. App.), *aff'd*, 451 A.2d 664 (Md. 1982) (holding that defendant, a prisoner who assaulted a correctional officer, had a viable defense if it reasonably appeared to him that the other prisoner was being unlawfully beaten); *Mayhew v. State*, 144 S.W. 229 (Tex. Crim. App. 1912) (holding it was error to instruct the jury that one may act in defense of another only if the one being defended would be justified in defending himself; rather, it is the defendant’s own intent that governs if he reasonably believes that another needs aid and he is therefore entitled to act on that belief, even if the belief is erroneous); DRESSLER, *supra* note 64, at 232; Bendinelli & Edsall,

In *Alexander v. State*,¹⁰⁰ the court, drawing upon the circumstances surrounding the brutal killing of Catherine "Kitty" Genovese,¹⁰¹ presented one of the most compelling reasons for rejecting the "alter ego" rule. Genovese was repeatedly stabbed while onlookers turned their backs to avoid witnessing the attack or closed their windows to drown out her screams of anguish.¹⁰² The court noted that while witnesses may have been motivated by fear, they excused their inaction by reasoning that the law did not protect an intervenor from criminal liability if the one being protected was the initial aggressor, notwithstanding how misleading the circumstances may have been.¹⁰³ In abandoning the alter ego rule, Judge Lowe embraced the reasonable-appearance rule on utilitarian grounds, noting that a consequence of the act-at-peril doctrine was that citizens hesitate to intervene.¹⁰⁴ The reasonable-appearance rule seeks "to afford protection to a defendant who acts while injury may still be prevented."¹⁰⁵ Other courts reject the alter ego rule on retributive grounds, meaning that "one should not be convicted of a crime if [one] selflessly attempts to protect the victim of an apparently unjustified assault, [but h]ow else can we encourage bystanders to go to the aid of another who is being subjected to an assault?"¹⁰⁶ Imposing liability under these circumstances violates concepts of "just desserts" because the rule imposes liability without fault.¹⁰⁷ The reasonable-appearance rule ensures that people who act reasonably, even if mistakenly, are not punished for their good motives.¹⁰⁸ With the

supra note 73, at 158-59; Valerie Couch, Note, 35 OKLA. L. REV. 141 (1982); Recent Case, 8 MINN. L. REV. 340 (1923-1924); Danny R. Veilleux, Annotation, *Construction and Application of Statutes Justifying the Use of Force to Prevent the Use of Force Against Another*, 71 A.L.R.4TH 940, 947 (1989).

¹⁰⁰ *Alexander v. State*, 447 A.2d 880 (Md. Ct. Spec. App.), *aff'd*, 451 A.2d 664 (Md. 1982).

¹⁰¹ *See id.*

¹⁰² *See id.* at 881.

¹⁰³ *See id.*

¹⁰⁴ *See id.* at 881-83. Judge Lowe reasoned, "[T]he onlookers hesitated to become involved in the fracas at their 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." *Id.* at 881. *See also* DRESSLER, *supra* note 64, at 232.

¹⁰⁵ *Alexander*, 447 A.2d at 887; *see also* DRESSLER, *supra* note 64, at 232.

¹⁰⁶ *State v. Fair*, 211 A.2d 359, 368 (N.J. 1965).

¹⁰⁷ *See* MODEL PENAL CODE § 3.05 cmt. 1 (1962); DRESSLER, *supra* note 64, at 232.

¹⁰⁸ *See Alexander*, 447 A.2d at 883 (pointing out that the alter ego rule "forces a Good Samaritan to gamble not only his health but his freedom and reputation,

exception of Ohio, all American jurisdictions have abandoned the alter ego rule.¹⁰⁹

B. Defense of Others Under the Model Penal Code

The MPC appears to have shaped the development of the law of defense of others primarily by renouncing the harshness of the alter ego rule and supporting an approach which requires the showing of *mens rea* or guilty intent in order to burden an intervenor with criminal liability.¹¹⁰ The drafters of the MPC argued that, at common law, criminal negligence encompassed more than civil negligence in that it implied a wide departure from the reasonableness standard.¹¹¹ In other words, for a mistake to disallow the successful assertion of justification, it must be more than unreasonable – it must be grossly unreasonable.¹¹² The drafters reasoned that without 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.”¹¹³ The Code refused to impose liability without fault where one acts in good faith and uses due care.¹¹⁴

Since the drafters of the Code incorporated the law of self-defense in the law of defense of others, it is important to review provisional sections 3.04, 3.05, and 3.09 in order to understand the drafters’ refusal to impose liability upon an intervenor without fault.

and overlooks the likelihood that the intervenor might have acted entirely without *mens rea*, and perhaps even with the highest sense of duty[, not as a] willing participant in a brawl”) (*citing* ROLLIN M. PERKINS, CRIMINAL LAW 1018-19 (2d ed. 1969)); DRESSLER, *supra* note 64, at 232.

¹⁰⁹ See *State v. Hussing*, No. 63838, 1994 WL 24289 (Ohio Ct. App. Jan. 27, 1994), *appeal dismissed*, 640 N.E.2d 846 (Ohio 1994); Bendinelli & Edsall, *supra* note 73, at 159.

¹¹⁰ See Bendinelli & Edsall, *supra* note 73, at 160; *State v. Chiarello*, 174 A.2d 506, 510 (N.J. Super. Ct. App. Div. 1961); MODEL PENAL CODE § 3.05(1) (Tentative Draft No. 8, 1958).

¹¹¹ See MODEL PENAL CODE § 3.09 cmt. 2 (Proposed Official Draft 1962; Revised Commentary 1985).

¹¹² See *id.*

¹¹³ *Id.*

¹¹⁴ See Bendinelli & Edsall, *supra* note 73, at 160. The prevailing view held a mistaken intervenor criminally liable. See *Chiarello*, 174 A.2d at 511, MODEL PENAL CODE § 3.05 cmt. 1 (Proposed Official Draft 1962; Revised Commentary 1985).

Under section 3.04, *Use of Force in Self-Protection*,¹¹⁵ it is the actor's subjective belief, not the facts as they actually exist, that controls.¹¹⁶ If one asserting self-defense does so based on a mistaken belief and is reckless or negligent in forming that belief, one may then be prosecuted only for an offense of recklessness or negligence under section 3.09.¹¹⁷ "[I]f an actor makes a negligent mistake in assessing the need for self-defensive action, he cannot be prosecuted for an offense that requires purpose to establish culpability."¹¹⁸

The basic premise underlying section 3.04 is that one is justified in using force for self-preservation when one believes that it is immediately necessary to protect oneself against the *unlawful* force of another.¹¹⁹ Both common law and statutory law require that the actor believes defensive action is necessary, and that he use no more force than is necessary to prevent the peril.¹²⁰

¹¹⁵ MODEL PENAL CODE § 3.04 (1962).

¹¹⁶ *See id.* § 3.04 explanatory note.

¹¹⁷ *See id.*

¹¹⁸ *Id.* The drafters of section 3.04 intended to reflect three general principles in creating statutory justifications for the use of force.

[First was the] desirability of eliminating anomalous distinctions among similar justifications. [Second was to create] standards of culpability governing the absence of facts to justify the use of force [so that they] parallel[ed] the standards governing other material elements of an offense. The third principle is that the circumstances in which acts of force and of deadly force will be justified should be specified in some detail.

Id.

The drafters believed that ultimately, the law on this subject could influence behavior and moral perspectives, encouraging members of the community not to employ force when immediate emotional reaction might support its use but enlightened morality would reject it. The alternative of a general standard of reasonableness would largely forfeit these advantages and would leave judgment to the uninstructed responses to particular juries.

Id.

¹¹⁹ *See id.* § 3.04 cmt. 2(d). As pointed out in the Code, it is sufficient that one believes force is unlawful. The parameters of his actions, however, are governed by section 3.09. *See id.*

¹²⁰ *See id.* § 3.04 cmt. 2(a). The drafters note that jurisdictions generally require a reasonable ground for one's belief in the necessity for using force. The consequences are that in some jurisdictions a mistaken belief about the necessity of force or the degree of force used might exculpate a defendant. *See id.* In other

Under the MPC, the principles that govern self-defense parallel those that govern section 3.05, *Defense of Others*.¹²¹ One must meet three requirements in order to successfully assert justification for the use of force in the defense of others. First, as with self-defense under section 3.04, the actor is justified in using force to protect a third party if he could use the same force to protect himself.¹²² In other words, he is privileged to use the amount of force he could use to protect himself.¹²³ Second, under the circumstances as the actor believes them to be, the third party would be justified in using protective force.¹²⁴ If, for example, a third party were resisting arrest by a known officer, he would have no defense; and if someone seeking to intervene knew the circumstances, he likewise would have no defense.¹²⁵ Third, the actor believes that the intervention is necessary to protect another.¹²⁶ This requirement underlies all use of defensive force under the Code.¹²⁷ As with section 3.04, section 3.05 sought to avoid liability without fault.¹²⁸ The drafters realized that an actor would refrain from acting if he knew his inaccurate assessment of the circumstances would be punishable even without fault.¹²⁹ As a result, they deemed it far preferable to predicate the justification on the actor's beliefs.¹³⁰ Where the actor was reckless or negligent in forming his beliefs about the circumstances, section 3.09 imposes liability proportional to the degree of fault.¹³¹

jurisdictions, however, the actor's negligence might remove the right to assert any defense and might permit a conviction for an intentional action, even murder. *See id.* The driving theme in the MPC, particularly sections 3.04, 3.05, and 3.09, is that the second result is wrong. The drafters note that it is wrong to place one who acts negligently or recklessly on equal footing with one who kills intentionally for financial gain, for example. *See id.* One with a lesser culpability should be protected in a criminal code rather than have his fate left to the whims of a prosecutor. *See id.*

¹²¹ *See id.* § 3.05; Bendinelli & Edsall, *supra* note 73, at 161.

¹²² *See* MODEL PENAL CODE § 3.05 explanatory note (1962); Bendinelli & Edsall, *supra* note 73, at 161.

¹²³ *See* MODEL PENAL CODE § 3.05 explanatory note (1962).

¹²⁴ *See id.*

¹²⁵ *See id.* § 3.05 cmt. 1.

¹²⁶ *See id.* § 3.05 explanatory note.

¹²⁷ *See id.* § 3.05 cmt. 1.

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ *See id.* For a discussion of the importance of section 3.09, see *infra* note 132.

While section 3.04 parallels section 3.05 in its requirements for propriety of defensive action, the analysis of these sections is incomplete without a discussion of section 3.09, *Mistake of Law*, which takes into account the actor's culpability when evaluating claims of self-defense and defense of others. In essence, 3.09 serves as the gatekeeper for defendants who have acted without intent but whose actions cannot completely exculpate them under the circumstances.¹³²

The Code affords broad protection to an intervenor, thus preventing a prosecution for murder when an accused acts by negligent mistake. Section 3.09 limits the prosecution to either reckless or negligent homicide when an actor has been reckless or negligent in forming his belief.¹³³ This treatment is in stark contrast to many of the pre-Code formulations, which required both a *belief* in the justifying circumstances as well as the

¹³² See MODEL PENAL CODE § 3.09. This section was presented to the American Law Institute in Tentative Draft No. 8 and considered at the May 1958 meeting. It was again presented to the Institute in the Proposed Official Draft and approved at the May 1962 meeting. The section reads as follows:

Section 309. 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.

(1) The justification afforded by Sections 3.04 to 3.07, inclusive, is unavailable when:

(a) the actor's belief in the unlawfulness of the force or conduct against which he employs protective force or his belief in the lawfulness of an arrest that he endeavors to effect by force is erroneous; and

(b) his error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the legality of an arrest or search.

(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 Section 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.

¹³³ See *id.* § 3.09 cmt. 2; Bendinelli & Edsall, *supra* note 73, at 163.

reasonableness of that belief.¹³⁴ The MPC, however, focuses on the inequity of a person being convicted of a crime of intention where he has labored under a mistake and where, had the facts been as he believed, he would have been free from guilt.¹³⁵ “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 a justification.”¹³⁶ The solution is simply to remove such situations from the category of purposeful crimes and deal with them as cases of recklessness or negligence.¹³⁷ Ultimately, “recklessness and negligence as to the factors that establish justification [are treated similarly to] recklessness or negligence as to the other material elements of the offense involved.”¹³⁸ The drafters of the Code, however, did not embrace the position that “*any* honest belief as to justification” served to exculpate “an actor from conviction for crimes of *negligence* and *recklessness* as well as crimes of purpose.”¹³⁹

The purpose of the Code was not to relieve an actor from all liability when the circumstances indicate he was reckless or negligent in his actions. Rather, the Code sought to protect him from a higher degree of liability when it was not warranted. In combination, sections 3.04, 3.05, and 3.09 limit such liability, refusing to attribute a higher degree of culpability without the requisite mental state, and thereby preventing unjust results.

C. *Justification for Using Deadly Force in Defense of Another: Basic Requirements*

While only five states have adopted statutes that closely parallel the MPC,¹⁴⁰ all states with defense-of-other statutes have adopted the Code’s philosophy,¹⁴¹ which encourages “Good Samaritans.” Such an individual may intervene on behalf of another without fear of reprisal if his assessment of the circumstances, although inaccurate, was nonetheless well-

¹³⁴ See MODEL PENAL CODE § 3.09 cmt. 2 (1962).

¹³⁵ See *id.*

¹³⁶ *Id.*

¹³⁷ See *id.*

¹³⁸ *Id.*, see LAFAVE & SCOTT, *supra* note 81, § 5.8, at 463-64.

¹³⁹ MODEL PENAL CODE § 3.09 cmt. 2 (1962) (emphasis added). Glanville Williams urged the complete exculpation of one who had an honest belief as to justification, indicating that negligence was not a useful legal concept under these circumstances. See *id.*

¹⁴⁰ See Bendinelli & Edsall, *supra* note 73, at 164 n.56.

¹⁴¹ *Id.* at 164, 175 and accompanying notes.

reasoned.¹⁴² Most states that have not taken legislative action on this issue have adopted some form of defense-of-others justification by judicial decision.¹⁴³

When a defendant has gone to the aid of another and acted reasonably, his expectation is not just that his actions will be excused,¹⁴⁴ meaning that although his conduct caused a social harm,¹⁴⁵ the law “pardons his unlawful conduct as the product of a non-culpable state of mind.”¹⁴⁶ The defendant,

¹⁴² See *Alexander v. State*, 447 A.2d 880, 887 (Md. Ct. Spec. App.), *aff'd*, 451 A.2d 664 (Md. 1982); *State v. Chiarello*, 174 A.2d 506, 514-15 (N.J. Super. Ct. App. Div. 1961).

¹⁴³ See 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* § 133, at 101 (1984) (giving complete listing of the states that have adopted the defense-of-others justification by statute or case law).

¹⁴⁴ See DRESSLER, *supra* note 64, at 189-94; Peter Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POL'Y 59, 62 (Spring 1990); Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992); Michael Corrado, *Notes on the Structure of a Theory of Excuses*, 82 J. CRIM. L. & CRIMINOLOGY 465 (1991); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671 (1988); George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984); Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 LAW & PHIL. 193-94 (1993); Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257 (1987); Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985); Michael S. Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL'Y, 29 (Spring 1990); Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587 (1994); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719 (1992); Glanville Williams, *The Theory of Excuses*, 1982 CRIM. L. REV. 732; Deborah W. Denno, Comment, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 615 (1988); Peter D.W. Heberling, Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914 (1975); George Vuoso, Note, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661 (1987).

¹⁴⁵ See Joshua Dressler, *Justification and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1162-63 (1987).

¹⁴⁶ Heberling, *supra* note 144, at 916-17; Dressler, *supra* note 145, at 1163 (noting that what the defendant states when asserting an excuse defense is that “I admit, or you have proven beyond a reasonable doubt, that I did something that I should not have done, but I [still] should not be held criminally accountable for my

instead, seeks to have his actions justified. By this he seeks recognition that his actions were not wrong but rather were, in fact, morally right and socially appropriate.¹⁴⁷ In essence, the defendant is seeking society's collective seal of approval for his conduct.

Yet, due to the value of human life and one's right not to be killed,¹⁴⁸ and because an intervenor's actions may result in death or serious bodily injury, the defendant must meet a high standard before society finds his actions justified and wipes his slate clean. Before society extends such broad protection to a defendant, society must be certain that the defendant's conduct is warranted.

actions").

¹⁴⁷ See J.L. AUSTIN, FREEDOM AND RESPONSIBILITY 6 (Herbert Morris ed., 1961) (stating that justified conduct is viewed as "a good thing, or the right or sensible thing, or a permissible thing to do. "); Heberling, *supra* note 144, at 916 (noting that a justification defense defines "that conduct, otherwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure"); see also DRESSLER, *supra* note 64, at 182.

Dressler suggests four main theories of justification under which the law does not condemn an act and may even welcome it. *See id.* at 186.

First, the "public benefit" theory indicates that conduct was not justified unless it was performed for the public's benefit. *See id.* at 187 Generally, this theory was limited to the actions of public officers. *See id.*

A second theory of justification is "moral forfeiture," which is based upon the view that people possess certain moral rights and interests that society recognizes, such as the right to life. These rights, however, may be forfeited. Dressler points out that this theory is morally troubling to some people because it ignores the simple moral principle that human life is sacred. *See id.* at 188.

The "moral rights" theory asserts that the actor is justified because he has an affirmative right to protect a particular moral interest. The law treats the defendant's conduct as affirmatively proper. *See id.*

A final theory, the "superior interest" or "less harm" theory, authorizes the conduct when the interests of the defendant outweigh the interest of the person he harms. Society permits the balancing of a non-inferior interest of the defendant against the victim's right or interest. *See id.* at 188-89. What is most important about this theory of justification is that it is "consistent with the utilitarian goal of promoting individual conduct that reduces overall harm." *Id.*

¹⁴⁸ See Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV 1063 (1993). Rakowski states that people should always be treated as ends in themselves and never just as a means to enhance the welfare of others. By this he means that, at a minimum, people may not be killed simply to satisfy another's desire. Further, they should not be killed against their will so that another person may live unless they would have been killed in any event and, if possible, were fairly selected. *See id.* at 1104-08, 1129-41.

Generally, the standards that apply to self-defense also apply to defense of others.¹⁴⁹ Only a small number of critics propose that more stringent standards should be applied to one who goes to the aid of another, on the ground that the action involves an inherent risk of injury to innocent parties and the intervening actor's conduct is wholly voluntary.¹⁵⁰ In balancing the equities, however, most courts and legislatures have concluded that "the value protected – the preservation of life or health – outweighs the risks involved, and the need to encourage such action is paramount."¹⁵¹

While there is no precise language common to all judicial decisions and legislative enactments addressing justification based on defense of others, the following basic, objective criteria must be taken into account when assessing the appropriateness of the defendant's actions.

1. *Necessity*

An important element in successfully asserting a defense-of-others justification is necessity. The rule provides that force should not be used to defend another unless, and only to the extent that, it is necessary.¹⁵² The rule, then, provides that an actor must satisfy two requirements. Part one¹⁵³ encompasses the "when" requirement, which asserts that an actor cannot use force if it would be equally effective if asserted at a later time and the actor would suffer no harm by waiting.¹⁵⁴

In defining when defensive force is necessary, many states require that the threat of harm from the aggressor be "imminent," which simply means that an intervenor cannot act until the party whom the intervenor is defending is immediately threatened.¹⁵⁵ Where the use of deadly force results in homicide, courts have defined "imminent" to mean "near at hand, mediate rather than immediate, close rather than touching."¹⁵⁶ And as noted

¹⁴⁹ See Heberling, *supra* note 144, at 932.

¹⁵⁰ See *id.* at 932-33.

¹⁵¹ *Id.* at 933.

¹⁵² See DRESSLER, *supra* note 64, at 199-200 (stating that one may not use deadly force to prevent an imminent deadly attack if a nondeadly response is sufficient); see also ROBINSON, *supra* note 143, § 131(c), at 77

¹⁵³ For a discussion of the second part, proportionality, see *infra* notes 162-66 and accompanying text.

¹⁵⁴ See ROBINSON, *supra* note 143, § 131(c), at 77

¹⁵⁵ For a detailed list of states requiring that a threat be "imminent" in order to justify homicide, see Bendinelli & Edsall, *supra* note 73, at 168 n.80; ROBINSON, *supra* note 143, § 131(b), at 76.

¹⁵⁶ Scholl v. State, 115 So. 43, 44 (Fla. 1927); see Bendinelli & Edsall, *supra* note 73, at 168-69.

in *State v. Daniels*,¹⁵⁷ the focus of inquiry as to whether harm is “imminent” is the aggressor’s threatened conduct and not the defendant’s response to it.¹⁵⁸ This requirement reflects an underlying policy that only imminent harm necessitates an immediate response.¹⁵⁹ Criminal law scholar Professor Robinson, however, argues that under some circumstances the focus should not be on the immediacy of the threat, but rather the immediacy of the response necessary in defense.¹⁶⁰ He notes that, “[i]f a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defense must permit him to act earlier – as early as is required to defend himself [or another] effectively.”¹⁶¹

2. Proportionality

The second prong of necessity dictates that force can be used only “to the extent” that it is necessary. This is known as the “proportionality” rule, which provides that one is not justified in using force that is excessive in relation to the harm threatened.¹⁶² The underlying public policy consider

¹⁵⁷ *State v. Daniels*, 682 P.2d 173 (Mont. 1984).

¹⁵⁸ *See id.* at 181-82; LAFAVE & SCOTT, *supra* note 81, § 5.7(d), at 458 n.35.

¹⁵⁹ *See* ROBINSON, *supra* note 143, § 131(c)(1), at 78.

¹⁶⁰ *See id.* Robinson notes that there may be a reason to act where harm is not imminent. For example, *A* kidnaps and confines *B* and indicates that he will kill him one week later. Each morning when *A* brings him food, *B* has the opportunity to kill *A* and escape. Under the literal meaning of “imminent,” *B* would have to wait until *A* is “standing over him with a knife.” *Id.* Robinson argues that this outcome is inappropriate. If the purpose “is to exclude threats of harm that are too remote to require a response,” the issue is resolved by requiring that the response be necessary. *See id.* Some courts use the term “immediate” rather than “imminent.” However, some scholars argue that the two words are not precisely interchangeable, particularly in the battered woman context. *See* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 414-16 (1991); ROBINSON, *supra* note 143, § 131(c)(1), at 78-79. Professor Robinson indicates that the term “immediate” is less problematic than using the term “imminent.” But use of “immediate” is also imprecise because it fails to highlight the “to-the-extent-necessary” requirement and focuses on “when” defensive conduct is proper. *See id.* at 78. He further notes that the term may be repetitive since the issue really is whether the defendant’s conduct is or is not necessary. *See id.* at 78-79.

¹⁶¹ ROBINSON, *supra* note 143, at 78.

¹⁶² *See* LAFAVE & SCOTT, *supra* note 81, at 455-56; ROBINSON, *supra* note 143, § 131(d), at 81-84; *see also* *State v. Metcalfe*, 212 N.W. 382, 386 (Iowa 1927) (holding that degree of force used must be reasonably necessary under the

ations appear to include both a desire to avoid harm that may be justified and yet still be avoidable, and a desire to minimize mistakes as to the existence of justifying circumstances.¹⁶³ Accordingly, a person going to the aid of another cannot use deadly force to prevent a nondeadly attack, even if the deadly force is necessary to prevent a battery.¹⁶⁴ As with the “when” requirement, there is no universal statutory term used to describe the appropriate degree of force to be used in a given situation.¹⁶⁵ However, most jurisdictions have enacted legislation that enumerates specified situations in which deadly force is or is not permitted or when it is or is not reasonable in relationship to the harm threatened.¹⁶⁶

3. *Reasonable Belief*

The thread that ties together the elements necessary to establish justification under the defense of others is *reasonable* belief. This standard dictates that one is not justified in using force to defend a third party unless one actually and reasonably believes that such force is necessary to prevent an imminent and unlawful attack on another. In order to assess whether an intervenor’s actions were warranted, the majority of jurisdictions have adopted an objective standard that examines the reasonableness of a defendant’s belief – whether his actions were necessary due to an imminent threat of danger to another.¹⁶⁷ The principle extends to defendants who make a mistaken, but reasonable, assessment about the need to intervene with force.¹⁶⁸

In determining the reasonableness of an intervenor’s actions, the majority approach requires more than an assessment of subjective belief. Therefore, the inquiry does not end simply because the defendant actually believed that force was necessary.¹⁶⁹ A fact-finder must also determine if the defendant meets objective criteria – whether the defendant’s belief was

circumstances; one cannot take the life of a wrongdoer for ordinary trespass.).

¹⁶³ See ROBINSON, *supra* note 143, § 131(e), at 88.

¹⁶⁴ See DRESSLER, *supra* note 64, at 200. Dressler uses the following example to illustrate the point: “[I]f *V* threatens to strike *D* on a public road, and the only way that *D* can avoid the battery is to push *V* into the way of a fast-moving car, *D* must abstain, and seek compensation for the battery after the fact.” *Id.*

¹⁶⁵ See ROBINSON, *supra* note 143, § 131(d)(1), at 82.

¹⁶⁶ See *id.* § 131(d)(1), (2), at 82-84.

¹⁶⁷ See Bendinelli & Edsall, *supra* note 73, at 173-74.

¹⁶⁸ See DRESSLER, *supra* note 64, at 199-200.

¹⁶⁹ See Bendinelli & Edsall, *supra* note 73, at 175.

reasonable based on the circumstances.¹⁷⁰ If it is determined that an intervenor honestly and yet *unreasonably* believed force was necessary to defend another, he cannot avail himself of the defense-of-others justification.¹⁷¹ Some states, however, permit a mistaken but unreasonable belief to lessen the charge of a killing by an intervenor from murder to manslaughter.¹⁷²

Jurisdictions that do not adopt the majority approach employ a number of different standards that focus on the intervenor's use of deadly force in defending third parties. For example, two states require that a defendant's use of deadly force be *actually necessary* before it is deemed justified.¹⁷³ While this standard seems inflexible, courts having the opportunity to strictly enforce the actual necessity requirement have not done so. These courts opt, instead, for an interpretation that permits an assessment of a defendant's reasonable belief.¹⁷⁴

The remaining jurisdictions rely upon one of the following standards to establish reasonableness: *reasonable* ground and imminent danger, *reasonable* persons, *actual* belief plus reasonable ground, and the *actor's* belief, which is the MPC standard.¹⁷⁵ While the foregoing represent

¹⁷⁰ See *id.*, David v. State, 698 P.2d 1233, 1235 (Alaska Ct. App. 1985).

¹⁷¹ See DRESSLER, *supra* note 64, at 200.

¹⁷² See *id.*, see ROBINSON, *supra* note 143, § 131(c), at 77

¹⁷³ See N.D. CENT. CODE §§ 12.1-05-03, -04, -07 (1985); VT. STAT. ANN. tit. 13, § 2305 (1974 and Supp. 1996); Bendinelli & Edsall, *supra* note 73, at 178.

¹⁷⁴ See Alexander v State, 447 A.2d 880, 887 (Md. Ct. Spec. App.), *aff'd*, 451 A.2d 664 (Md. 1982); Lambert v. State, 519 A.2d 1340 (Md. Ct. Spec. App. 1987) (indicating that the defendant must be judged on the circumstances as they reasonably appeared to him and on the reasonableness of his perceptions); State v Leidholm, 334 N.W.2d 811, 820 (N.D. 1983) (indicating that the defendant should be judged based on her good faith honest belief and the reasonableness of that belief); State v Wheelock, 609 A.2d 972, 975 (Vt. 1992) (reasoning that the defendant must have an honest belief that is grounded in reason); see also Bendinelli & Edsall, *supra* note 73, at 179-80.

¹⁷⁵ For a comprehensive analysis of the various statutory constructions, see Bendinelli & Edsall, *supra* note 73, at 180-88.

The *actor's* belief standard is worthy of brief discussion because it presents the most subjective standard of reasonableness and is adopted directly from the Model Penal Code ("MPC"). As with the MPC, jurisdictions that use a subjective standard temper the standard's effects by indicating that a person may still be criminally liable if his conduct is reckless or negligent. Even those jurisdictions that appear to completely reject the reasonable person standard, replacing it with "actually believes" language, continue to use the reasonable person test as a factor to be

differing standards of belief required to justify homicide committed in defense of others, courts in the various jurisdictions limit, expand, or contradict the chosen statutory language, often adopting the *reasonable* belief standard employed by the majority¹⁷⁶

4. *Unlawful Act*

“In order to trigger a defensive force defense the aggressor must unjustifiably threaten harm to” a third party¹⁷⁷ To this end, when one acts

considered in determining reasonableness. *See* Heberling, *supra* note 144, at 919-20.

Critics of the MPC’s subjective standard of belief argue that “[a]lthough the MPC advocates the proper standard of liability for acts based on culpable beliefs [by] insisting that [one’s] liability should never exceed [one’s] degree of culpability,” the MPC does not logically reach this conclusion. *Id.* at 919. For example, under the MPC, where a defendant acts with a mistaken but reasonable belief, the MPC justifies rather than excuses the conduct. This approach leads to the inconsistent assertion that mere belief is sufficient to establish a defense of justification “and that a culpable belief does not forfeit the defense but simply requires a lesser defensive claim. [I]t implies the anomalous concept of a defense that does not negate liability.” *Id.* (footnote omitted). The implications of the Code’s position, that a defense continues to exist even though the belief upon which it is based is culpable, may have served as the impetus for most codes to reject the “actual belief” standard in favor of the “reasonable belief” rule. The Code requires that an intervenor with an unreasonable belief forfeit the defenses of justification and excuse and become liable as if he had committed a purposeful offense. *See id.*

Heberling also argues that once the absence of reasonable belief is proven, liability is determined according to the intent of the act without further reference to the quality of the belief. The result is unsatisfactory both in terms of theory and justice. Theoretically, this approach equates a defense of excuse based on wrongful belief with other defenses of excuse by failing to recognize that belief is not an absolute condition, like insanity, which either qualifies an act completely or not at all. It is also unjust to subject a person who honestly but negligently believes that justifying circumstances exist and, for example, kills in reliance on that belief, to the same liability as one who did not believe that the situation existed at all, such as a robber who murders his victim solely to prevent identification by the victim.

Id. at 920.

¹⁷⁶ *See* Heberling, *supra* note 144, at 920.

¹⁷⁷ ROBINSON, *supra* note 143, § 131(b)(2), at 74-75. While Robinson is actually discussing self-defense, the same rule would apply to defense of another.

to defend another, one has the right to assert reasonable force to prevent unlawful aggression.¹⁷⁸ One should note, however, that an individual may not lawfully defend another against justified aggression.¹⁷⁹ This line of reasoning finds significant support in cases where defendants are charged with criminal trespass in connection with demonstrations at abortion clinics and those defendants assert they acted in defense of fetuses. Courts have consistently held that the successful assertion of a third-party defense requires that defendants respond to unlawful activity. To illustrate, the court held in *Allison v. Birmingham*¹⁸⁰ that unless unlawful physical force is being used by persons in the abortion clinic, a defendant could not support a defense-of-third-party claim.¹⁸¹ The court noted that abortions performed by licensed facilities are not unlawful.¹⁸² Every court having the opportunity to decide the issue has required an unlawful act.¹⁸³

Even those courts that have addressed the issue under a general necessity theory have required that a defendant prove the homicide was in response to illegal activity.¹⁸⁴ In *Bird v. Municipality of Anchor-*

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *Allison v. Birmingham*, 580 So. 2d 1377 (Ala. Crim. App. 1991).

¹⁸¹ *See id.* at 1383.

¹⁸² *See id.* at 1382.

¹⁸³ *See Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981); *State v. Clarke*, 590 A.2d 468 (Conn. App. Ct. 1991); *State v. Aguilard*, 567 So. 2d 674 (La. Ct. App. 1990); *City of Missoula v. Asbury*, 873 P.2d 936 (Mont. 1994); *Brumley v. State*, 804 S.W.2d 659 (Tex. App. 1991, *no pet.*); *Boushey v. State*, 804 S.W.2d 148 (Tex. App. 1991, *pet. ref'd*); *Reed v. State*, 794 S.W.2d 806 (Tex. App. 1990, *pet. ref'd*); *Erlandson v. State*, 763 S.W.2d 845 (Tex. App. 1988, *pet. ref'd*); *Bobo v. State*, 757 S.W.2d 58 (Tex. App. 1988, *pet. ref'd*); *Crabb v. State*, 754 S.W.2d 742 (Tex. App. 1988, *pet. ref'd*); *State v. Migliorino*, 442 N.W.2d 36 (Wis. 1989).

¹⁸⁴ There appear to be two distinct views of the requirement for an unlawful act in the general necessity context. For the prevailing view, see Debbe A. Levin, Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. CIN. L. REV. 501, 502-07, 513 (1979). This view posits that the requirement did not exist at early common law because initially the cases dealt only with harm emanating from natural forces, which are not subject to criminal law. *See id.* at 506-07. However, when faced with circumstances involving harm from human sources, courts modified the law to require that anyone asserting necessity act in response to illegally threatened harm to another. *See id.* at 507. *But see* Patrick G. Senftle, Comment, *The Necessity Defense in Abortion Clinic Trespass Cases*, 32 ST. LOUIS U. L.J. 523 (1987). Senftle rejects the unlawful act requirement and asserts that the harm an actor seeks to avoid need not flow from illegal human

age,¹⁸⁵ for example, defendants argued that the trial court erred in refusing to instruct the jury on the defense of necessity,¹⁸⁶ particularly since the defendants believed they had to act to save the unborn.¹⁸⁷ Relying on *Cleveland v. Municipality of Anchorage*,¹⁸⁸ the court held “the defense of necessity was not available to defendants charged with trespassing at an abortion clinic when the alleged necessity was the need to prevent abortions,”¹⁸⁹ even if the defendants believed they acted reasonably to prevent imminent threat to human life.¹⁹⁰ The court rejected the defendants’ argument on three grounds: First, the defense of necessity applies only where the harm to be avoided arises from forces of nature or unlawful human acts. Since abortion is lawful, defendants could not break the law to prevent abortion.¹⁹¹ Second, the court found protestors had lawful alternatives available,¹⁹² and, in any event, their actions could not prevent the threatened harm and would at best postpone the harm for a short interval.¹⁹³ Third, the *Cleveland* court held there was no showing that the harm defendants sought to prevent was greater than the reasonably

activity. *See id.* at 532. He argues that early common law courts recognized that the necessity defense did not fit any specific formula, particularly since citizens might justifiably break the law under a number of different circumstances. *See id.* He further argues that limiting the use of the defense to illegal human-created harm unnecessarily constricts the intended scope of the defense. *See id.* at 528-29, 533-39. This view finds limited support in statutes that employ generic language such as “harm” or “evil,” allowing courts to define the terms as they deem appropriate. *See id.* at 529.

¹⁸⁵ *Bird v. Municipality of Anchorage*, 787 P.2d 119 (Alaska Ct. App. 1990).

¹⁸⁶ *See id.* at 120.

¹⁸⁷ *See id.* at 121.

¹⁸⁸ *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073, 1078 (Alaska 1981) (noting that in order to successfully assert the defense of necessity, the defendant must show that the act was done to prevent a significant evil, that there were no adequate alternatives, and that the harm done was not disproportionate to the harm avoided); *see also* LAFAYE & SCOTT, *supra* note 81, § 5.4, at 441, 448; PERKINS, *supra* note 106, at 1019; Levin, *supra* note 181, at 513 (discussing the level of force which may be used by the actor). *But see* Senftle, *supra* note 184, at 528-29 (arguing that the *Cleveland* court relied on the illegal act requirement without legal authority for doing so).

¹⁸⁹ *Bird*, 787 P.2d at 121 (citing *Cleveland*, 631 P.2d at 1078-79).

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

¹⁹² *See id.*

¹⁹³ *See id.*

foreseeable harm caused by the defendants' own actions.¹⁹⁴ The court balanced the emotional distress suffered by the clinic's patients due to the defendants' invasion of their right of privacy against the defendants' failure to intervene to prevent abortions. In accordance with *Roe v. Wade*,¹⁹⁵ the court concluded that since the Alaska legislature regulated but did not prohibit abortion, the patients' right of privacy outweighed the harm of taking a potential life, and the greater harm would be the foreseeable results of the defendants' actions, not the taking of a potential life.¹⁹⁶

Cases decided before and after *Cleveland* have consistently held that the defense of necessity does not extend to those charged with trespass when seeking to obstruct access to or the operation of abortion clinics.¹⁹⁷ The only reported opinion to recognize the necessity defense when applied to trespass at abortion clinics is *People v. Archer*.¹⁹⁸ Unlike other abortion facility trespass cases, *Archer* involved a distinction between first-trimester and late-term abortions. The court recognized that "*Roe* prohibits the State statutory necessity defense whenever there are intentional interruptions which interfere with the performance of first trimester abortions."¹⁹⁹

¹⁹⁴ *See id.*

¹⁹⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹⁶ *Bird*, 787 P.2d at 121. The court acknowledged the U.S. Supreme Court's recent decision in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and addressed the appellant's argument that *Roe* was no longer determinative since *Webster* "recognized that abortion is the purposeful killing of life." *Id.* The court held:

[E]ven assuming that appellants are correct in arguing that *Roe v. Wade* does not control as to the weight to be accorded "potential life" in this context, the United States Supreme Court is not the only authority to which we must defer in this area. The Alaska legislature is better suited to strike the balance than is this court.

Id. at 123 (quoting *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073, 1080-81 (Alaska 1981)).

¹⁹⁷ *See City of Wichita v. Tilson*, 855 P.2d 911, 915-17 (Kan. 1993). For a detailed discussion of the general necessity defense as it relates to abortion trespass cases, see James O. Pearson, Jr., Annotation, "Choice of Evils," *Necessity, Duress, or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protest*, 3 A.L.R.5TH 521 (1992 & 1996 Supp.). *See also United States v. Turner*, 44 F.3d 900 (10th Cir. 1995) (holding that the defense of necessity does not apply to abortion trespass cases); *Zal v. Steppe*, 968 F.2d 924, 929 (9th Cir. 1992) (noting the necessity defense is unavailable to abortion protestors because legal alternatives exist to achieve the goal of persuading women not to have abortions).

¹⁹⁸ *People v. Archer*, 537 N.Y.S.2d 726 (City Ct. of Rochester 1988).

¹⁹⁹ *See id.* at 734.

However, defendants were entitled to assert the necessity defense so long as the jury concluded that physicians were about to perform abortions beyond the first trimester.²⁰⁰ Although *Archer* is inconsistent with holdings in other jurisdictions, it is distinguishable most significantly because New York, in codifying the justification defense, did not adopt the MPC's narrow definition of "injury to be avoided," which includes an inquiry only into the legality or illegality of the act a defendant seeks to prevent.²⁰¹ Under the MPC, an actor may assert necessity only when he seeks to prevent an illegal act. The New York legislature adopted a much broader test, which permits a jury to make a moral judgment about abortion despite its legality²⁰² "[A] jury of private citizens is free to decide that many of those abortions are immoral 'injuries to be avoided' and that 'the urgency of avoiding such injuries [to the developing fetus] clearly outweighs the desirability of avoiding injuries such as Trespassing and Resisting Arrest'."²⁰³ *Archer* makes clear, however, that the balancing of injuries and morals can take place only after the first trimester, the point at which the State has a compelling interest in pregnancy and so may regulate abortion.²⁰⁴

IV APPLICATION OF DEFENSE-OF-OTHERS THEORY TO THOSE WHO KILL ABORTION PROVIDERS

Using the circumstances surrounding Paul Hill's killing of John Britton and his escort as a starting point, this Part addresses the legitimacy of those who kill abortion providers asserting that homicide is justified in order to save the fetus based on the defense-of-others justification. This Part

²⁰⁰ *See id.*

²⁰¹ *See id.* at 730-31, MODEL PENAL CODE § 3.02 (1985). Acts that the legislature had determined were legal could not be evil. This reasoning also encompassed abortion since the court enumerated which pregnancy terminations were legal and which were not. *See Archer*, 537 N.Y.S.2d at 730. New York rejects the MPC's narrow definition of choice of evils. *See id.*

²⁰² *See Archer*, 537 N.Y.S.2d at 730-31. The New York penal law and the legislature rejected the MPC language and adopted a broader standard of inquiry. Under New York law, "conduct which would otherwise constitute an offense is justifiable and not criminal when [the injury to be avoided] is of such gravity that, according to ordinary standards of intelligence and morality avoiding such injury clearly outweigh[s] the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue." *Id.*

²⁰³ *Id.* at 732 (paraphrasing N.Y. PENAL LAW § 35.05 (McKinney 1987)).

²⁰⁴ *See id.* at 733-34.

analyzes the defense under both the generally accepted criteria as well as the MPC and concludes that under either standard the defense is inappropriate.

Under the generally accepted criteria, a person who kills an abortion provider must show that the action was necessary. This means that he must have acted timely and used no greater force than was necessary to defend another. As for the timeliness requirement, the threat to another must be imminent or near at hand. In killing Dr. Britton, for example, Paul Hill might argue that the "killing" of the unborn was close at hand because, when Dr. Britton arrived at the clinic that day, he was going to perform abortions. As a result, Hill arguably acted to avert imminent peril.

However, this argument does not pass muster under either an MPC or objective standard. Under an objective approach, one could argue that since Dr. Britton had just arrived at the clinic and had not begun his day's work, which may or may not have included performing abortions, and since no patients had presented themselves to the clinic, there was no "immediate" threat to any fetus.

The MPC, on the other hand, does not require imminence. Rather, the defensive force must be "immediately necessary,"²⁰⁵ which shifts the focus of inquiry from the imminence of the threatened harm to the intervenor's actual need to use force at the time he uses it.²⁰⁶ Even under this construction, the imminence of the harm remains a significant factor in determining whether force was necessary.²⁰⁷ Relying on the MPC, Paul Hill could argue his need to use force to prevent future harm to the unborn. If he waited for Dr. Britton to enter the clinic, it might have been too late to prevent the harm. An equally strong argument, however, is that Hill's use of deadly force was premature because Dr. Britton had not yet entered the clinic and women had not yet arrived for their abortions. By acting before Dr. Britton had at least prepared to perform the abortion, Hill deprived the doctor of the ability to change his mind about performing abortions.²⁰⁸

²⁰⁵ MODEL PENAL CODE § 3.04(1) (1985); see Charles E. Rice & John P. Tuskey, *The Legality and Morality of Using Deadly Force to Protect Unborn Children from Abortionists*, 5 REGENT U. L. REV. 83, 97 (1995).

²⁰⁶ See ROBINSON, *supra* note 143, § 124(f).

²⁰⁷ See Rice & Tuskey, *supra* note 205, at 96-97.

²⁰⁸ See *id.* at 97 n.58. "The value of a less restrictive temporal limitation is that it allows early intervention, but . . . the virtue of a more restrictive standard is that it 'allows time for the apparent threat to abate itself before justifying conduct to prevent it.'" *Id.* (citing ROBINSON, *supra* note 143, § 124(f), at 58). See also ROBINSON, *supra* note 143, § 131(c), at 79 and § 121(a), at 4-5 n.5.

The other integral component of necessity is proportionality. One can use no more force than is necessary to prevent the threatened harm. Even if one accepts the argument that Hill meets the timeliness requirement for using force, it is a difficult argument to accept that he could not have used any force other than deadly force to prevent the threatened harm. There is no showing that, on the day of the shooting, Hill made a demand for Britton to stop performing abortions nor that threats were made in an attempt to persuade Dr. Britton not to perform abortions. Moreover, there is nothing indicating that Hill applied a degree of deadly force²⁰⁹ short of force resulting in death.²¹⁰ In fact, while the law recognizes one's right to use deadly force to defend another, one must use a lesser degree of force if it can prevent the threatened injury to another.²¹¹ Unless Hill could show that no lesser force would have averted the threatened harm, he does not meet the proportionality element of necessity.

Under a majority standard, one who acts in defense of another must *subjectively* and *objectively* believe that he must intervene with force. In applying the subjective standard, the actor's belief that force is necessary is critical. Part of the inquiry, then, is determining what the actor believed at the time of the killing. If we again rely on the circumstances surrounding the killing of Dr. Britton, it is clear that Hill actually believed that the unborn are persons beginning at conception, that aborting them is morally wrong and constitutes murder, and that Dr. Britton was about to use unlawful force against the unborn.²¹² As a result, Hill actually believed that he had to intervene with deadly force to prevent their murders. If the inquiry were to end here, under the MPC, Hill could argue that his actual belief about the necessity to act absolved him of liability for murder, and at most he was liable for reckless or negligent homicide.²¹³

²⁰⁹ In this context deadly force means not just force resulting in death, but any force that is likely to result in death or serious bodily injury and "also includes force *intended* to cause death or grievous bodily injury even if such a result is unlikely." JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 192 (1st ed. 1987).

²¹⁰ See Rice & Tuskey, *supra* note 205, at 104 n.80. In reality, short of a change in the law, no amount of force, including a forceful demand, from an anti-abortionist would stop a health provider from performing abortions.

²¹¹ See DRESSLER, *supra* note 64, at 200. It is important to note that Hill has no legitimate argument for the killing of James Barrett, Dr. Britton's escort. Barrett in no way participated in the performance of abortions, and he was unarmed. The facts indicate that Hill intended to kill Barrett, since he shot him in the head with a rifle, reloaded, and shot him again. There is absolutely no defense for this killing.

²¹² See Paul J. Hill, *In Defense of Another: The Paul Hill Brief*, 5 REGENT U. L. REV. 31, 37-48 (1995).

²¹³ See generally *id.*

However, the inquiry must extend further. The court must determine that, based on the circumstances, the belief was reasonable. Relying on the above factors, Hill could not meet the reasonableness component. Although he argued that his actions were morally defensible, they could not be justified legally.²¹⁴ Crucial to this analysis is that under the current status of the law, abortion is legal. The law of defense of others requires that the person against whom force is being exerted be engaged in an unlawful act against another. Based on *Roe*, a fetus is not a person within the meaning of the law,²¹⁵ which prevents one from successfully asserting defense of others. Even if Hill actually believed that he needed to act, his belief was unreasonable under the circumstances because he could not meet a basic objective element of the defense – that the act be unlawful. The law generally does not permit one to defend against justified aggression. Abortion is aggression against the fetus, but it is lawful aggression against which there is no legally recognized defense for the fetus or its self-appointed defenders.²¹⁶

²¹⁴ *See id.*

²¹⁵ *See Roe v. Wade*, 410 U.S. 113, 157-58 (1973) (holding that a fetus is not a person under the 14th Amendment).

²¹⁶ This does not mean to suggest that the fetus has not been afforded legal protection. For example, some states have taken measures to protect the fetus by criminalizing intentional acts against the fetus. *See* ARIZ. REV. STAT. ANN. § 13-1103(A)(5) (West 1989) (establishing that knowingly or recklessly causing the death of a fetus is manslaughter); CAL. PENAL CODE § 187 (West 1988 and Supp. 1997) (establishing that one who kills a human being or fetus with malice aforethought is guilty of murder); GA. CODE ANN. § 16-5-80 (1996) (stating that one who wilfully kills an unborn quick child by injury to the mother of the child is guilty of feticide and punishable by life imprisonment); 720 ILL. COMP. STAT. ANN. § 519-1.2 (Michie 1993) (stating that one who kills a fetus without privilege or excuse is guilty of murder, but the death penalty shall not be imposed); IND. CODE ANN. § 35-42-1-6 (Michie 1994) (imposing a maximum two-year sentence for taking the life of the fetus); IOWA CODE ANN. § 707.7 (West 1993 & Supp. 1997) (establishing criminal liability after the second trimester, making killing a fetus a Class C felony); LA. REV. STAT. ANN. 14:32.5 Ann. (West 1989) (imposing liability for killing a fetus other than by legal abortions); MINN. STAT. ANN. §§ 609.266 - .269 (West 1987 and Supp. 1997) (defining killing the fetus as murder when done with premeditation); N.D. CENT. CODE §§ 12.1-17.1-01 to -08 (1985 and Supp. 1995) (establishing five separate categories aimed at protecting the unborn, including the category of intentionally or knowingly causing the death of the unborn, which constitutes murder and the category of any negligent act causing the death of the unborn, which constitutes negligent homicide); TEX. REV. CIV. STAT. ANN. § 4512.5 (Vernon's 1976) (establishing the sentence for one convicted

Yet Paul Hill's successful assertion of the defense-of-others defense cannot really turn on the lawfulness or unlawfulness of the act being committed by an abortion provider. Ours is a civilized society based on an orderly system of government that includes a system of punishment. As a consequence, one must submit to the system in order to preserve the fragile state of order.²¹⁷ Still, the law ought to promote the achievement of higher values at the expense of lesser values, and there are times when the greater good of society will be accomplished by violating the literal language of the criminal law.²¹⁸ If one is unable to submit to the governing law due to the exigency of the circumstances, however, society must make value judgments about the character of one's action to be certain that one acts and, more specifically, kills only when absolutely necessary

of killing the unborn to life or not less than five years); WASH. REV. CODE ANN. § 9A.36.021 (1994) (establishing intentional actions against the unborn as second degree assault); WIS. STAT. ANN. § 940.04 (West 1995) (imposing a fine of \$5000 or imprisonment for not more than three years for killing an unborn child); *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990) (noting that the statute does not require that the living organism in the womb in its embryonic or fetal state be considered a person or human being, and does not require the state to prove that it is); Jeffrey A. Parness, *Arming the Pregnancy Police: More Outlandish Concoctions?*, 53 LA. L. REV. 427, 428-34 (1992).

And for a general review of recent statutes enacted to protect the fetus, see Julia Elizabeth Jones, Comment, *State Intervention in Pregnancy*, 52 LA. L. REV. 1159, 1164-65 (1992); and see, for example, OKLA. STAT. ANN. tit. 10, § 7001-1.3 (West 1997) (defining "deprived child" as including children born dependent on a controlled, dangerous substance); Elizabeth L. Thompson, Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357 (1988-89) (using the matter of Pamela Rae Stewart to urge restraints on the use of criminal penalties against pregnant women); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994 (1988) (reviewing coercive criminal measures taken against pregnant women); *Whitner v. State*, 492 S.E.2d 777, 778 (S.C. 1997) (holding that a viable fetus is a "child" under South Carolina's child abuse and endangerment statute, and therefore a woman who ingests illegal drugs during the third trimester of her pregnancy may be prosecuted for criminal child neglect).

²¹⁷ See PERKINS & BOYCE, *supra* note 68, at 5-6; see also *State v. Granda*, 565 F.2d 922, 926 (5th Cir. 1978); *Sauer v. United States*, 241 F.2d 640, 648 (9th Cir. 1957).

²¹⁸ See LAFAYE & SCOTT, *supra* note 81, § 5.4(a), at 442; GLANVILLE WILLIAMS, *CRIMINAL LAW* § 229, at 722 (2d. ed. 1961).

Defense of others is a unique defense in that, generally, the actor makes the decision to use justifiable force based on the circumstances as they appear at the time of his action.²¹⁹ This presupposes, then, that one usually acts out of necessity in what appears to be an emergency. The defense does not permit one to plan to kill or injure one's victim, nor does it permit one to stalk or lie in wait for one's victim knowing or anticipating that the victim will perform an illegal act against a third party. If one kills under these circumstances, one commits premeditated murder, and one's actions are neither justified nor excused.²²⁰ The following example illustrates this point:

Suppose *A*'s daughter *B* is sexually assaulted by an unknown assailant whom *A* suspects to be *C*, a neighbor. *A* does not tell police about his suspicions. *B*'s assault is the third in three months. All of the assaults occurred in various areas of the community jogging path just around sunset. Believing that the actor would probably strike again, *A* begins staking out various areas of the path, gun in hand, hoping to catch the rapist and stop him, regardless of the circumstances. As expected, within two weeks of *B*'s assault, *A* finds *C* on the jogging path in the process of sexually assaulting *D*, another neighbor. *A* shoots *C* and claims he acted to save *D*.

A cannot justify his actions by relying on the defense-of-others theory. Although *C* was engaged in an unlawful act against *D*, *A* suspected *C* to be the rapist and could have called upon law enforcement officials to catch *C*. *A* could argue that he acted in an emergency to save *D*. However, *A* did not act spontaneously based on the circumstances as he perceived them to be at that moment. Rather, *A* devised and implemented a plan to stop *C*, suspecting that *C* would likely strike again. Based on this scenario, *A* cannot rightfully assert that he acted to defend *D*.

When applying this scenario to the killing of abortion providers by those who assert they acted to protect the fetus, the defense collapses. Even if abortion, like sexual assault, were unlawful and doctors were illegally aborting fetuses, the law cannot and does not permit one who rejects the positive law to plan to kill, and ultimately kill, abortion providers. This is

²¹⁹ See ROBINSON, *supra* note 143, § 131(a), at 71. Robinson states that self-defense is unique in that it requires an actor to make a justification when he is in a difficult position. The same argument can be made of one who acts in defense of others. See *id.*

²²⁰ See generally LAFAYE & SCOTT, *supra* note 81, § 7.7, at 642-48.

not to ignore that citizens sometimes feel helpless because they believe that society is unwilling or unable to appropriately punish those who break the law, sowing the seeds of anarchy and violent self-help.²²¹ But the orderly progress of society cannot sustain vigilante justice.

Beyond this argument, however, the right to assert defense of others when defending a fetus cannot depend on the immorality of the act against which one is defending. Anti-abortionists, like Paul Hill, often draw upon the ills of slavery and the atrocities perpetrated by Nazi Germany to support their right to defend another with force.²²² Most would agree that institutionalized slavery is a source of national and historical shame. Those who saw the immorality of holding human beings as property labored to eradicate slavery, acting in violation of a positive law that allowed its existence.²²³ Even in the face of the brutality of slavery, however, one would not be justified in killing the slave-holder who acted in accordance with existing laws. In fact, the mandate to end slavery rested in the will of a collective society who engaged in civil war, in part, to dismantle the institution of slavery

A parallel argument can be made regarding Hitler's reign of terror over Germany. Hitler's regime allowed for the killing of thousands of Jews in

²²¹ See *Furman v. Georgia*, 408 U.S. 238, 308 (1971); see also Elisabeth Ayyildez, *When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante*, 4 AM. U. J. GENDER & L. 141, 151-52 (1995) (arguing that while some theorists argue that law and legal systems developed as a desirable alternative to private justice, vigilante justice is appropriate for women who are abused); Thomas D. Barton, *Violence and the Collapse of Imagination*, 81 IOWA L. REV. 1249 (1996) (reviewing WENDY KAMINER, *IT'S ALL THE RAGE: CRIME AND CULTURE* (1995)) (noting that some laws have fostered the increase in violence even though one key function is peacekeeping and constraining violent self-help); Nadine Klansky, Comment, *Bernard Goetz, a "Reasonable Man"*, A Look at New York's Justification Defense *People v. Goetz*, 53 BROOK. L. REV. 1149, 1150 (1988) (stating that while people are frustrated with our laws, there would be a breakdown of civilization if people started taking the law into their own hands). See generally HENRY M. HART, JR., *THE AIMS OF THE CRIMINAL LAW*, 23 LAW & CONTEMP. PROBS. 401 (1958).

²²² See Hill, *supra* note 212, at 58-80; Rice & Tuskey, *supra* note 205, at 124-35.

²²³ See BUTLER A. JONES, INTRODUCTION TO SARAH BRADFORD HARRIET TUBMAN, *THE MOSES OF HER PEOPLE VII* (1981) (Jones notes that Thomas Garrett, a Quaker, frequently assisted fugitive slaves even after being twice convicted for providing aid to runaway slaves. Even after losing all he owned to pay a fine levied against him for violating the fugitive slave laws, Garrett continued to provide shelter for slaves in need).

the name of imperialism.²²⁴ In the aftermath of World War II, the right and power of the collective society to punish the moral wrong of those who permitted and justified the murders as well as those who carried out the orders pursuant to illegitimate positive laws was widely recognized. Anti-abortionists, like Paul Hill, point to the Nuremberg trials as one means of legitimizing the argument that those who act immorally and commit crimes against humanity, even if pursuant to positive law, must be punished. However, when one deconstructs the argument, it becomes clear that reliance on the Nuremberg trials to support the anti-abortionists' assertion of the theory of defense of others to justify killing abortion providers is misplaced. While it is accurate that Hitler's soldiers found no refuge in the argument that they followed orders pursuant to what masqueraded as positive law to justify their terrorism of a nation of people, it is also accurate that the Nuremberg trials convened as a result of an international directive that did not sanction individual action.²²⁵

In fact, before the Nuremberg trials, a London conference of representatives from nine European countries then occupied by Germany, recognizing the need to proceed systematically to punish the German government for its brutalities toward and crimes against humanity,²²⁶ drafted the "St. James Declaration." This declaration stated: "[I]nternational solidarity is necessary in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to

²²⁴ Although many Germans acquiesced to Hitler's campaign against the Jews and other groups, some individuals heroically opposed the laws that authorized the killings. See generally *AT THE HEART OF THE WHITE ROSE* (Inge Jens ed., 1987); HANS SCHOLL & SOPHIE SCHOLL, *AT THE HEART OF THE WHITE ROSE* (1987) (The White Rose was a group of young Germans who worked to expose the brutality and lawlessness of the Nazi regime by distributing leaflets to sympathizing Germans. The group's leaders, Hans and Sophie Scholl, were arrested and charged with preparing for treason. They were convicted of their crimes and sentenced to death. See *id.* at 280.); MARIE VASSILTCHIKOV, *BERLIN DIARIES, 1940-1945, 192-220* (1985) (noting that Colonel Count Claus von Stauffenberg plotted with others to remove Hitler from power. Stauffenberg took a briefcase containing a bomb into Hitler's heavily guarded headquarters. After the bomb destroyed the building, von Stauffenberg informed his conspirators that Hitler was dead. He was tried and executed for his participation in the conspiracy. See *id.*, see also Hill, *supra* note 212, at 70-73).

²²⁵ See Hill, *supra* note 212, at 61-73.

²²⁶ See TELFORD TAYLOR, *NUREMBERG TRIALS: WAR CRIMES AND INTERNATIONAL LAW 244-45* (1949).

satisfy the sense of justice of the civilized world ²²⁷ The European countries

place[d] among their principal war aims the punishment, *through the channel of organised justice*, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them, [and] resolve to see to it in a spirit of international solidarity, that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out.²²⁸

It is clear that the Declaration's primary objectives were to call for action only through organized justice and punish only those who had been "handed over to justice" and found guilty.²²⁹ The European nations' express policies do not sustain arguments favoring vigilante justice.

Historical records clearly evidence the systematic procedures taken to vindicate those who suffered injustice at the hands of the Nazi regime. Paul Hill insists that, knowing what we know now, those who tried to hide Jews or kill Hitler and his soldiers would not be prosecuted and probably would be rewarded.²³⁰ Even if one were to allow this argument as it pertains to

²²⁷ *Id.* The London conference was the first step toward the formulation of a systematic program for handling war criminals. Not long after the St. James Declaration, the United States joined with other Allied nations in establishing a United Nations War Crimes Commission. This action was deemed the second step in establishing an international war crimes program. *See id.* at 246. The final step emerged from the Moscow Conference, which produced the "Declaration on German Atrocities in Occupied Europe." It announced that the "German officers and men and members of the Nazi party" who had in some way been responsible for the atrocities and killings would be sent back to the countries where the deeds were done and the brutalities occurred and punished according to the laws of that country. *See id.* at 246-47. Crucial to the declaration, however, is that "major [war] criminals whose offences [had] no particular geographical location [would be] punished by a joint decision of the Governments of the Allies." *Id.* at 247. This last statement provided the authority for holding the Nuremberg and other international trials.

²²⁸ *Id.* at 245 (emphasis added).

²²⁹ *Id.*, *see* THE NÜRNBERG CASE v-xii, 7-18 (as presented by Robert H. Jackson, Chief of Counsel for the United States, 1947). In his letter to President Truman, Justice Jackson set forth an orderly and systematic plan to prosecute war criminals.

²³⁰ *See* Hill, *supra* note 212, at 70-71.

insurgents in Nazi Germany, it would not lessen the illegality of Hill and others who planned the methodical killing of abortion providers. The injustices of Nazi Germany were addressed by an internationally recognized war tribunal. Vigilante justice aimed at the war criminals would have been neither tolerated nor justified. Similarly, Hill's "vigilante justice" should not either.

CONCLUSION

The anti-abortion movement's concern for preserving the life of the fetus is legitimate and cannot be ignored, nor should those concerned with ending abortion be silenced. Anti-abortionists have a constitutional right to seek change in abortion laws through protest, civil disobedience, or other means. The road to change encompasses a number of acceptable measures that can be taken to fight abortion. However, they do not include the use of violence resulting in the killing of physicians and other health care providers.

Killing abortion providers is antithetical to the very message anti-abortionists seek to convey: that life is valuable and it must be preserved. Yet there are those like Paul Hill who believe that it is a moral imperative to end abortion by any means necessary, including killing abortion providers to save the fetus. They believe they are justified under a theory of defense of others. Ironically, anti-abortionists who believe in using deadly force to end abortion have lost sight of the very value of life. In fighting to save one life, they willfully take another. However, the history of our laws is based on a notion of reasonableness, and it is unreasonable and both morally and legally indefensible to fail to recognize the value of a life, even the life of one who performs or assists in abortions. Relying on historical ills such as slavery and the death camps of Germany to justify the killings does not pass muster, particularly since the decision to avenge such injustices was based on a national or international directive. Anti-abortionists have the right to push for social change and seek the support of the collective. They have the right to be advocates for the rights of fetuses and to prevent their abortion. The question remains, however: shall we protect the unborn with murder? The moral and legal answer is "no."

