How to Talk about Self-Defense

George P. Fletcher
Jens David Ohlin

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Abstract and Keywords

This chapter examines the landscape of current theories of self-defense by tracing its roots in criminal law. It looks first into the three doctrinal foundations of self-defense: self-defense as an exception, self-defense as a right, and self-defense as a duty. Also, it considers the four models of self-defense that shape the way of interpreting substantive law: self-defense as punishment, self-defense as an excuse, self-defense as the justified defense of autonomy, and self-defense of society.

Keywords: self-defense, criminal law, self-defense

1. The Grammar of Self-Defense

Diversity reigns in the domain of self-defense; we have variations suitable for all theoretical tastes. Our only disagreement derives from the genuine difficulty of understanding what goes on when we justify killing in response to aggressive force. As we work through these variations in the realm of domestic law, we shall discover new byways of thought to explore in international law.
A. Self-Defense as an Exception

Criminal law theorists are often tempted to think of claims of justification as exceptions to the norm that establishes a basic wrong or prohibition.¹ The reasoning goes something like this: Norms establish the wrongs—homicide, theft, and so on—that apply in standard, everyday life; however, in exceptional cases you might be justified in committing one of these wrongs on grounds of self-defense or necessity. The proper way to think of claims of justification, therefore, is that they are exceptions that should be stated as negative elements of the norm. As the legal scholar Michael Moore suggests, think of Moses descending the mountain carrying two tablets. The left-hand tablet contains the prohibitions of the criminal law; the right-hand inscriptions indicate the exceptions that permit the violation of the left-hand norms under certain circumstances. To understand the norm as it actually functions in society, you have to look at both hands at the same time.

A good example is larceny, defined in the common law as containing the following elements in the left-hand tablet:

1. An act of taking
2. an object
3. that belongs to another
4. taken from the possession of another (not necessarily the owner)
5. with the intent to deprive the owner permanently of possession.

Recently, legislative drafters have started listing the elements of defined offenses in this manner. You find it in the Elements of Offenses defined by the Assembly of State Parties to clarify the definitions of genocide, crimes against humanity, and war crimes in the Rome Statute; you also find it in the sophisticated document called Military Commission Instruction Number 2, published by the U.S. Department of Defense.² Note that these elements say nothing about possible claims of justification or excuse; they refer only to the paradigmatic or standard cases of wrongful larceny. Claims of justification and excuse are stated in the right-hand tablet, and they arise, as we have noted, only in exceptional cases. Though self-defense would be rare in larceny cases, imagine the following scenario. One street gang is attacking another by using shoulder-fired missiles, and the least costly way for the defending gang to protect itself is to seize the weapons from their enemies. They
need not kill them or even detain them. Once deprived of their
weapons, the aggressive gang can do little to harm their
adversaries. This would be a case of self-defense justifying an
act of larceny, namely, depriving the aggressive gang of their
missiles permanently.

Self-defense, then, would be an exception, stated on the right-
hand tablet. Moore’s point is that the overall norms that define
larceny require paying attention to both tablets. You cannot
read the left tablet without the right. The complete set of
elements would read:

1. An act of taking
2. an object
3. that belongs to another
4. taken from the possession of another (not necessarily
   the owner)
5. with the intent to deprive the owner permanently of
   possession.
6. The elements of self-defense are not satisfied.³ (In
   short, “No SD.”)

(p.32) But this is not the only possible exception to the norm
defining larceny. Here are a few more:

7. Necessity (i.e., stealing to save the life of a starving
   person)
8. Kleptomania or other forms of insanity
9. An order of eminent domain by the state to seize the
   property

It is hard to know when we have exhausted the potential list of
justificatory claims, so courts have the capacity to recognize
new claims of justification in the course of litigation. This is
the lesson of a famous German case decided in 1927, in which
the Supreme Court for the Weimar government recognized a
new justification based on the balancing of the competing
interests of fetus and mother in cases of abortion.⁴ Today, the
Rome Statute explicitly recognizes the possibility of
supplementing the defenses recognized by statute. Article
31(3) specifically authorizes the court to consider additional
grounds for excluding criminal liability by looking to additional
sources of law. Article 21(1)(c), which governs the court’s use
of national law, states that the court can look to “general
principles of law derived by the Court from national laws of legal systems of the world."^5

Also, Article 21(1)(b) authorizes the court to consider general principles of international law when making its decisions. This latter point raises a tricky issue of interpretation. Some scholars, including the distinguished Antonio Cassese, are inclined to view this provision as allowing the court to use "customary international law," or general principles of international law based on state practice that are not necessarily codified in any treaty or statute.^6 There are dangers lurking in this analysis. The Rome Statute does not make an explicit distinction between the definition of a criminal offense (which imposes criminal liability) and the recognition of a defense (which excludes criminal liability). While it is fine to invoke customary law when recognizing a defense, it is quite another thing to invoke it when interpreting the definition of the offense itself. The bedrock principle of criminal law, *nulla poena sine lege* (no punishment without prior legislation), stands for the idea that the portions of the law that generate criminal liability for individuals must be written down in advance.

In other words, the International Criminal Court may recognize new claims of justification, even though this principle of legality—*nulla poena sine lege*—would prohibit it from developing new common law offenses.^7 This is a fundamental difference between prohibitions and claims of justification. The elements of the prohibited act are "closed," as required by the principle of prior legislative definition of offenses. The list of justifications, however, is not closed. The court is free to add new ones as justice requires.

This crucial difference between the affirmative elements of the prohibition and the so-called negative elements led the philosopher H. L. A. Hart to suggest, at one stage of his writing, that one could state the basic norms of criminal law as necessary and sufficient conditions for liability.^8 Although the necessary conditions are laid out in the statute defining the crime (e.g., killing civilians as a war crime), there is no closed list of sufficient conditions for defeating liability. The left tablet contains a complete list of prohibitions, but the exceptions offered by the right tablet are incomplete. It is always possible that a new claim of justification, previously unforeseen on the
horizon, could destabilize the appearance of a well-stated set of affirmative and negative conditions of liability.

An alternative to viewing self-defense as a negative exception is to consider claims of justification as a separate set of norms that, as they were once called in common law pleading, “confess and avoid” the prohibition of the offense. At common law, a defendant could plead “confession and avoidance” by admitting the basic facts alleged but present new evidence to avoid liability, as would be the case if a defendant admitted to a killing but argued self-defense. He would, in a sense, be confessing to the basic facts of the killing but avoiding liability for some additional reason. To confess and avoid is to perform, in a sense, an end run around the prosecution’s argument: the defendant faces the facts squarely and admits to them but argues a path that the prosecution has not covered in its allegations. In our example of taking the missiles from the street gang, these elements are obviously satisfied. The street gang threatens an imminent attack with their missiles; the response of taking them is necessary and proportional, and the defenders act with the intention of defending themselves.

The language of confession and avoidance has largely disappeared from the criminal law, relegated to the dustbin as archaic terminology from common law. This is unfortunate, because the language is useful for a proper understanding of legal justifications. To extend the metaphor of the two tablets, a claim of justification is not simply the other side of the norm, the right hand offsetting the left hand. Rather, justificatory claims of self-defense, necessity, and the like arise on a different plane of analysis. They do not negate the norms of prohibition but provide arguments of confession and avoidance.

(p.34) Many important legal consequences follow from this view that claims of justification are grounded in a separate norm and fully independent of the rule that defines the offense. The most important of these implications is that claims of justification are still compatible with a perception of the rule as having been breached. That is, in our hypothetical street gang case, the defenders do indeed commit larceny—they have infringed upon the norm prohibiting permanent taking from another—but they do not act wrongfully, because they are justified in taking and keeping the missiles.9 It is a critical feature of the relationship between prohibitory norms
and the countervailing norms of justification. The infringement or transgression against the rule that defines the offense remains intact even if, over all, the conduct is justified.

John Gardner searches for the proper way of expressing the nature of justification in light of his commitment to the plausible view that legal prohibitions provide reasons against engaging in the conduct. Norms of justification counteract these reasons, but not by providing stronger reasons for engaging in conduct. If they did, those who kill in self-defense would not only be permitted to act, they would be obligated to follow the stronger reasons in favor of killing. Instead, the reasons for not killing remain intact, but the defender is nonetheless permitted to act. We are not sure an adequate account of this legal permissibility is available if we adhere to the idea that the act prohibited (killing) is the same as the act permitted (killing). The better way, suggested by Aquinas’s theory of double effect, is to recognize that a proper analysis requires two different descriptions of the act in question. When an act is justified, we use a different description of the act to talk about its justification than we do when we define the prohibited act in the first instance. The prohibited act is killing a human being; the justified act is thwarting the attack. One is permitted to stop the attack even though the indirect consequences to the aggressor might be fatal.

This view is critical to our understanding of self-defense. And if we hold to it, we cannot accept Moore’s metaphor of the two tablets of norms, some positive and others negative. We must recognize the wrong of killing at the same time that legitimate defense is treated as permissible. This might seem like a purely metaphysical issue, but in fact it is of critical importance in shaping our perceptions of aggression and justification, both in the domestic and in the international spheres. Here is another way of putting the point: Justifications such as self-defense negate the invasion of the legal interest (such as life) protected by the rule or norm defining the offense (such as homicide). But the erasure is not total, for it leaves a shadow of this invasion. The justification, as it were, shines a light of rectitude on the harm done, thus casting the conduct in relief as lawful and free from stigma, even as the shadow of the invasion remains.
The shadow of the violation serves to define the relevant legal interest. In cases of larceny, the legal interest is the possession of property; in rape, it is sexual autonomy; in homicide, the relevant legal interest is life itself. These interests are violated even if the conduct is justified. If, for example, Dan the defender kills Alice the aggressor in self-defense, Alice’s right to life is infringed, but the infringement is, all things considered, justified. While the shadow of the invasion is still perceptible—in this case, the killing of a human being—the principles of justification are superimposed on the invasion. If the claim of justification were integrated into the norm as a negative element, then it would function in the same way as a denial that any violation had occurred at all.

Let us see how that would work for a particular offense such as larceny. The definition of the offense would look like this:

1. An act of taking
2. an object
3. belonging to another
4. from the possession of another
5. with the intent to deprive the owner permanently of possession.
6. No SD (without the justification of self-defense).\(^{11}\)

If the justification completely negates the invasion caused by the offense, then all elements from this list are erased. So there is no act of taking, for example; there is no violation of the norm, and not even the shadow of a violation. The same would be true, according to this model, in all cases of self-defense, regardless of the offense in question. If the elements of self-defense are satisfied, there is no violation—no shadow of a wrong. Thus, if self-defense is merely an exception, a negative element of the definition, then no rule is violated when the defender acts to save his own life.

If we were to accept this model, we would have to figure out what interest is being protected by this legal norm. This is not so easy to do, and the only possible legal interest would appear to be the rights of non-offending persons. Specifically, if self-defense in larceny or homicide were a negative element of the rule prohibiting the crime, then the interest in question would not be the right to possession of property or life in general, but rather the right to life or property possession under *certain conditions*, namely, when the defender does not
have a valid claim of self-defense. (p.36) In effect, only non-aggressors would be protected. Aggressors would have no rights at stake; their legal interests would not be violated or infringed upon by legitimate and justified actions in self-defense. This is conceptually unsound.

The view that only non-aggressors are protected against the use of force leads to the implausible conclusion that aggression itself effects a forfeiture of the right to life—or, in the case of states, to the loss of their political independence. This would mean that aggressors become, in effect, outlaws, totally unprotected against violence. If this were true it would be extremely difficult to explain the six elements of self-defense that we outline in chapter 4. In particular, the required elements of self-defense—an overt attack, imminence, necessity, proportionality, and intentionality—would lose their grip if no protected interest remains in cases of self-defense. These elements of self-defense do not stem from the outlaw status of the aggressor, but from the particular nature of acts of aggression and how they might be legitimately be opposed.

These reflections have a direct bearing on the structure of international law. The norms prohibiting larceny or homicide are analogous to the prohibition against war in the United Nations Charter Article 2(4):

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The only exception to this—apart from military action authorized by the Security Council—is Article 51, which recognizes the inherent right of self-defense (or *le droit natural de légitime défense*). What, then, is the relationship between the prohibition in Article 2(4) and the inherent right recognized in Article 51? In considering this question, we can profitably draw on debates in the domestic theory of self-defense.

Is there a protected legal interest underlying Article 2(4)? We would like to think that it is either the “territorial integrity” or “political independence” of the states constituting the United Nations. This neat and coherent interest of states would be analogous to the individual’s right to life and property. The
values of integrity and independence are as compelling when applied to states as they are in expressing the dignity of individuals. In another age, one would have referred to this autonomy as the “sovereignty” of states, but the UN Charter expresses the spirit of modernity by avoiding the concept of sovereignty, except in two references to the “sovereign equality” of all states. Though political theorists still talk at great length about sovereignty, the concept has lost its utility to lawyers and constitutional drafters.\(^{12}\)

The idea that all states are of equal value underlies the prohibition of both force and the threat of force in Article 2(4). No state can assume the authority to dictate policy to another. If some states—those, say, with liberal democracies—were morally superior to others, they would naturally claim a right to interfere in the politics of oppressive regimes; they would regard themselves as authorized to decide when there should be a “regime change” for the sake of human rights or democratic politics. Once the principle of moral superiority is admitted, however, oppressive fundamentalist regimes could plausibly invoke the same principle of intervention to advance their “true religion.”

Would that the references in the Charter to “equal sovereignty” could support as strong an analogy between the autonomy of individuals and the autonomy of states, but one clause in Article 2(4) stands in the way. The protection of states and their autonomy is modified by the catchall phrase “inconsistent with the Purposes of the United Nations.” Force that is consistent with these vaguely defined purposes would presumably be exempted from the prohibition imposed by Article 2(4). Some writers have invoked this clause to defend various forms of urgent and temporary intervention in the internal affairs of other states. For example, Israel used this argument to justify its intervention in Uganda to rescue its nationals being held by hijackers at the Entebbe airport in 1976.\(^{13}\) If the Security Council could not intervene, then arguably Israel had the right to rescue its nationals on its own.

The 1949 condemnation by the International Court of Justice (ICJ) of the United Kingdom’s intervention in Albania’s Corfu Channel to recover evidence tends to support a stricter view of territorial inviolability of all states.\(^{14}\) Yet domestic legal systems have had to struggle with the same problem; in cases of emergency, such as the Entebbe incident, it is unacceptable
for the owners of the land to refuse access to their property when it is necessary to save life and property.\footnote{For example, if it is necessary to moor a ship to avoid the dangers of a storm, the littoral landowners (the owners of the dock in question) must yield and accommodate those in distress. If the sanctity of land gives way to the sanctity of life in these cases, why should Uganda not be required to tolerate and accept Israeli intervention to free the hostages of a hijacking? Exploring the analogy between international law and domestic law raises such unanswered questions.}

\textit{(p.38)} The typical case for humanitarian intervention is also based on a reading of Article 2(4) that acknowledges the necessity of temporary violations of territorial sovereignty to prevent the loss of life. A controversial example is NATO’s 1999 bombing of Serbia in an effort to prevent ethnic cleansing in Kosovo. Apparently, Belgium has made the most articulate case for intervention, based, intriguingly, on a duty to avoid the mass killings of innocents.\footnote{If all states have a duty to avoid mass casualties, then they also have a right to intervene to perform that duty. Later in this chapter we consider the generalized case of duty as the foundation of the right to use defensive force. Admittedly, the bombing of population centers in Yugoslavia was a rather brutal form of humanitarian intervention, which went far beyond a temporary incursion comparable to the Israeli commando-run intervention in Entebbe. Yugoslavia complained before the International Court of Justice that the NATO bombing was a disproportionate response to Yugoslavia’s actions against the Albanians in Kosovo.}

Unfortunately, it is difficult to define the basic legal interest being protected by the international legal prohibition against aggression. There might even be a good argument for the view that aggressors forfeit their interest and their territorial inviolability when they engage in armed attacks. This would be the result of incorporating Article 51 into Article 2(4) as an exception to a single norm, which would read, in essence: “The territorial integrity and political independence of all member states shall be secure against intervention by force unless that intervention is exercised in self-defense (legitimate defense) by a member state to protect its own territorial integrity and political independence.”
Occupation also raises puzzling issues. Take Israel’s occupation of Egyptian, Jordanian, and Syrian lands after the 1967 War, or the Allied occupation of Germany and Japan after World War II. What should an occupying country do after successfully repelling an aggressor? Should it simply withdraw its forces? If we follow the teachings of domestic self-defense, we would have to say yes. If the defender Dan disables the aggressor Alice, takes her weapons, and sits on her long enough to make sure that the attack is neutralized, he still must eventually get up and let Alice go. He cannot hold her prisoner permanently to ensure that she never attacks him again. If the same principle held in international armed conflict, the United States and Israel would have to withdraw as soon as they disarmed their enemy; they would not be allowed to occupy conquered lands until they were satisfied that the defeated nation was willing to sign a peace agreement or make a proper commitment to mutual recognition and to living as neighbors without threats of invasion.

There is, of course, a radical difference between the situation just described and an occupation resulting from an aggressive war, as in the case of Iraq’s occupation of Kuwait in 1990. In such cases, the international community must insist—even to the point of using force—that the aggressor terminate the occupation immediately. In the case of a defensive war, the conventional international response is to tolerate and even support occupation until a peace treaty is negotiated and signed. Even the Fourth Geneva Convention implicitly recognizes the legality of occupation by prescribing the conditions for its exercise.¹⁸

How do we explain this dichotomy in international practice between aggressive and defensive occupation? Aggressive occupation—by Germany in, say, Poland—is arguably a continuation of the initial invasion and conquest. The defensive occupation is an extension of the right of self-defense. This, as we noted earlier, is the modern view. The traditional approach to occupation stresses the rigorous distinction between jus ad bellum and jus in bello and suggests that the postwar question of occupation should be insulated against the criteria that determined the justification of the war in the first place. Occupation is, arguably, the same regardless of how the war began. Just as the status of being the aggressor in an international conflict does not make killing enemy soldiers a war crime, so, too, it should not change the
legal standards for how an occupation should be evaluated after the cessation of hostilities. If jus in bello depended on who was the aggressor, nations could never agree on the rules of warfare because they would be engaged in a constant argument about who really attacked first. Similarly, if the justification of an occupation depended on who was the aggressor, you would have a manipulation of charges against both sides.

Add to this mix another consideration. Occupation could be regarded as a substitute for killing the aggressor and thus eliminating the threat. Although in domestic law the defender Dan is permitted to kill the aggressor Alice when it is necessary to do so, recall that a defender nation may not eliminate the aggressor’s existence as a collective entity. The defending army may kill soldiers and even capture whole armies, but it may not target the invading state as a whole. There was no way, short of genocide, that the Allies could have eliminated the German or Japanese nations, or that the Israelis can blot out the Palestinians; therefore, there must be some remedy, short of the “homicide” of nations, to achieve security against hostile neighbors. The answer is occupation, the least forcible means available to protect the basic interests of the defender in its long-range territorial integrity and political independence.

(p.40) Let us look at this phenomenon from the point of view of an occupied state. They have aggressed against another state and thus violated our combined norm 2(4)/51 as stated above, and so their intended victims are entitled to occupy them to ensure their own territorial integrity and political independence. But what about their independence and selfdetermination? How do we explain their subordination? So far as we accept the legitimacy of defensive occupation, it must be the case that they have forfeited their independence, at least temporarily. They can regain their right to political autonomy by engaging in a process of negotiation with the occupying state, convincing them of their peaceful intentions, and entering into a peace treaty.

This way of thinking generates a theory of legitimate occupation. The occupying force must have conditions for ceasing the occupation. The conditions must be related to their interests in peace and security. Israel might properly insist that the Palestinians commit themselves to peaceful
relations with Israel and to controlling terrorist incursions against Israeli civilians. But it would be a stretch for the United States to remain in Iraq until a democracy was firmly established unless they could defend the democratic goal in the interests of peace and security in the Middle East.

That we can even pose this novel question about the legitimacy of occupation illustrates, once more, the value of systematically comparing international and domestic law. A theory of partial forfeiture of one’s rights—leading to temporary occupation—has some explanatory value in the context of international armed conflict, but it has little explanatory power in the domestic theory of self-defense. To hold this theory, as some philosophers do, you have to explain how aggressors reacquire their rights as soon as the attack has terminated, regardless of the outcome. So the legal right is forfeited, and then the forfeiture is itself revoked, thus bringing the participants back to square one. To speak of legal interests that die and are reborn so quickly strains the imagination. Even more embarrassingly, the argument of forfeiture suggests that the aggressor may be killed with impunity, whether those seeking to kill him know that he is an aggressor or not. This comes remarkably close to treating the aggressor as an outlaw.

These objections against the forfeiture theory are less compelling in an international context. The rights of occupied states are restored by negotiation, and therefore the notion of a revoked forfeiture and reinstatement of rights is not as elusive as it is in the give-and-take of fights between two individuals. Also, if a third party sought to intervene in an occupation, this action would encroach upon the interests of the occupying power and generate a new armed conflict. Whereas in domestic law third parties could conceivably each seek to kill an outlaw without interfering with each other, this is not possible internationally once the defensive use of force has matured into occupation.

Occupation is far better than homicide. Though individual killing is routine in domestic self-defense, entire nations may not seek to eliminate each other in warfare; they may not engage in genocide (killing the nation) or aggrandize themselves by incorporating the occupied land into their own territory (i.e., killing the political entity). Kant correctly rejects
the acquisition of colonies or territory by conquest because the permanent subordination of defeated peoples would imply a punitive war rather than a defensive one.\textsuperscript{20}

It is important to see that even if a country occupies another as an act of self-defense, defensive occupation is not a form of punishment for the initial aggression. As we noted earlier, Kant’s position on punishment follows from his rigorous commitment to the moral equality of all states. Punishment presupposes authority, which must be based, in turn, on a privileged position from which to judge others’ wrongdoing. States are not entitled to punish each other, but they may certainly defend themselves, even to the point of temporary occupation.

This inquiry illustrates a fundamental problem in the relationship between the interest protected by the law of self-defense and the nature of aggression. The international community has had a notoriously difficult time formulating a systematic definition of aggression,\textsuperscript{21} as well as addressing the related problems of understanding the unlawful use of force or the attack required to trigger a right of self-defense. On a case-by-case, common law basis, criminal lawyers have fared better than international lawyers in trying to define aggression. The common law decentralizes the problem by approaching defensive force as a set of distinct claims based on protecting oneself, other persons, personal property, land, or dwellings. Interfering with these basic interests is the essence of an attack, though of course there is always the problem of determining when such interference is sufficiently serious to warrant a defensive response. Is exhaling in someone’s face an attack against his person? Is repeatedly honking your car horn at a pedestrian an attack against him?

These borderline violations of the rights of others are addressed in a body of tort law called \textit{common law of trespass}. How much encroachment on the rights of others is required to constitute a trespass to a person, or to land?\textsuperscript{22} In this context, the phrase “borderline violations” suggests a relationship between tort law and international law. Indeed, (p.42) many tort theorists speak of trespass as a “boundary crossing.”\textsuperscript{23} The image of neighboring states informs our understanding of individuals as distinct spheres of autonomy. For the purpose of protecting individual liberty, it is correct to say that every person is an island unto himself.\textsuperscript{24} Yet determining when a
boundary crossing occurs is, in both domestic and international law, a matter of judgment and evaluation. A physical intrusion always constitutes a boundary crossing; an old case in the common law held that cutting a thornbush and allowing the thorns to fall on a neighbor’s land constituted a trespass. But interference by sound and light waves does not constitute a physical crossing of the line. (They do not meet the threshold of trespass; however, they might nonetheless constitute a nuisance.)

The question is always whether the level of intrusion constitutes a harm that might trigger a right to use defensive force in resistance.

This problem is even more subtle in the Continental legal tradition, because legitimate or necessary force is permissible to protect the autonomy (defined by the set of personal rights) of every person. German courts have agonized in detail over whether specific interests such as privacy and reputation are covered by the general law of necessary defense, whether the specific interest is a right worthy of protection by the use of force. In one case, a German court recognized the right of self-defense to protect the temporary occupation of a parking space (manifested by the Parker’s wife standing in the spot) against someone else who was trying to take it. No American lawyer would think of justifying the use of force in this situation. The interest being protected would fall between the cracks—not a dwelling, not personal property—not subject to classification under any conventional category for the legitimate use of force.

In the common law way of thinking, there are always two questions: Is the interest covered by the law of self-defense? Is the intrusion sufficiently serious to warrant a defensive response? In the Continental tradition, the first question is submerged in the assumption of a comprehensive interest in personal autonomy. Any interference with autonomy is an attack, but to know whether the person’s autonomy justifies defensive force against certain forms of intrusion, you have to decide whether the intrusions constitute a sufficiently serious attack to warrant resistance. The two questions are interdependent; the question of attack leads you to think about autonomy, and the latter leads you back to ponder the former. Concluding that playing loud music in the ear of another is not an attack is equivalent to a ruling that individual autonomy...
does not include the right not to have loud music played in one’s ear. The two concepts—autonomy and (p.43) attack—might diverge in some contexts, but a good starting point for thinking about them is their reciprocal dependence.

There is no better example of this complex interdependence of ideas than the dispute between the United States and Nicaragua over U.S. support for the contras, a paramilitary opposition group working against the established Sandinista government of Nicaragua. In a hearing before the International Court of Justice, the United States had two lines of argument. First, it claimed that its financial and logistical support for the contras did not amount to a prohibited use of force under Article 2(4). However, if the court found that the U.S. activities did amount to an “attack,” the United States then sought to justify its intrusion by invoking the principle of collective self-defense to protect Costa Rica, Honduras, and El Salvador against “armed attacks” by Nicaragua. In both cases — that is, Nicaragua against its neighbors and the United States against Nicaragua—the method of interference was supplying arms and financial support, and there was controversy about whether this level of interference constituted an armed attack. In addition, there was a question as to whether the actions of distinct paramilitary organizations could be attributed or imputed to the states involved. Under the conventional way of thinking about international law, there would be no violation unless these actions were deemed to be the actions of the state.

The first argument raises an unavoidable problem, because some forms of getting involved in the affairs of others are permissible. For example, there is nothing wrong with publishing articles in the New York Times condemning the Sandinista government or even with broadcasting propaganda messages to encourage the local population to rise up and overthrow the existing regime. Providing financial support to the opposition might be permissible, but there must come a point where encouraging regime change becomes an unlawful intrusion in the affairs of another state. The court drew the sensible distinction between supplying funds to the contras and “arming and training” them. Generating armed resistance amounts to armed intervention. The United States tried to advance the policy of legitimate regime change, but
apparently this argument did not generate a sufficient legal basis for deviating from a strict principle of sovereign independence, regardless of the moral quality or political respectability of the regime.

Having concluded that the United States improperly intervened in the affairs of Nicaragua by arming the contras, the court had to confront the issue of whether this action was justified as collective self-defense on behalf of Costa Rica, Honduras, and El Salvador.\(^{34}\) The case might have qualified as collective self-defense had the Sandinista government actually been using force against those nations, in violation of Article 2(4). The court concluded that the Sandinistas had not engaged in an armed attack against their neighbors, but nonetheless evaluated the U.S. claim of collective self-defense. The court reached a number of conclusions that are very much at odds with our claims about légitime défense in the name of the international community.

We should note that in the French domestic law of legitimate defensive force (légitime défense), the law of self-defense extends to third parties under attack. There is no need for the consent of the third party. This is the case under most Continental European legal systems, which equate the right to defend oneself with the right to defend others, and treat them under a single statutory provision. In the United States and other common law systems, though, the law distinguishes between self-defense and defense of others and treats them with different provisions. For example, the Model Penal Code has a separate provision for “defense of other persons” that says nothing about the consent of the other.\(^{35}\) This issue is the sole focus of chapter 3. The same principle holds in all modern legal systems: the victim need not consent to be rescued. There is not much discussion of this point in the contemporary literature. It is taken for granted that because the interveners seek to defend the legal order—to defend the law itself—they need not have the particular consent of the victim.

Nonetheless, the International Court of Justice came to two conclusions about the conditions for collective self-defense that fly in the face of domestic law. They required the neighboring countries that the United States was seeking to protect to express two separate states of consciousness: first, that they were being attacked, and second, that they desired intervention by the United States.\(^{36}\) It is unclear if these...
requirements are appropriate. One can imagine cases where
the victim is unaware of the attack (at least in domestic law)
and nonetheless needs protection; in the international arena, it
might be more difficult to imagine a case of actual attack that
the leaders of the victim state would fail to recognize. But
suppose the leaders of a nation were all kidnapped and a
puppet regime installed. Would the international community
still insist on an articulated consciousness of being attacked?

The second conclusion of the International Court of Justice
was that the victim state must consent to collective self-
defense. There are two possible reasons for this. The court’s
sense of the international legal order might have been too
weak to uphold the argument that, by defending the interests
of a third party, the defender was upholding an international
(p.45) legal order comparable to domestic legal orders. The
second reason is more pragmatic: a fear of states mixing in the
business of other states and exploiting claims of defensive
necessity to invade them and control their internal affairs.
Interestingly, this pragmatic argument has no parallel in the
defense of other persons under domestic law. The defended
person has nothing to fear from temporary assistance
rendered to fend off aggressors, but defensive force in the
international context entails more than fending off an attack.
It implies ongoing military action, the stationing of troops and
armaments on the territory of the defended state, and the
inevitable impact on civilian lives. Understandably, states do
not want to be defended by allies who might ultimately
interfere in their lives even more than the aggressor threatens
to.
B. Self-Defense as a Right

We conventionally refer to self-defense as a right. As we discuss in greater detail in the next chapter, the UN Charter uses the term “inherent right” in English to describe self-defense, but the phrase “natural right” in French. We agree on the word, but what does it mean in this context? “Rights” bears the connotation of being in line with the law. Indeed, virtually all European languages use the same word for both personal rights and the law itself. Thus, Germans must distinguish objective Right (objektive Recht) and subjective or personal rights (subjektive Rechte). In French, le droit refers both to law as in “rule of law” (la règle de droit), as well as a “right” to do something. Acting with a right, in this dual sense, brings one into conformity with the legal order. Justification has the same connotation. Jus, after all, refers to law in the same elevated sense as we find in the European words for Right (e.g., Recht, droit, derecho, prava, jog).

Justification means to render right (jus-facere). The action rendered “right” is the exercise of force in self-defense—force that would otherwise constitute a crime in its own right. It is right because it stands in a certain relationship with the aggression that it seeks to repel.

As we have already noted, the right of self-defense bears no similarity to rights in private law. It is not a right against the aggressor, but rather an expression of the Law (the Right) seeking to reestablish itself against external aggression. To put it another way, the defender’s lawful autonomy is compromised by the attack, and using defensive force is a way of vindicating his autonomy and reestablishing the supremacy of the law. This is the sense in which the defender has a right to use force—the sense that the Right is on his side.

(p.46) The claim that the defender has a “right” to kill in self-defense is a misleading statement of the legal relationship between aggressor and defender. The defender does not have the right to kill in the same sense that he has the right to demand the performance of a contract. When you have a right to do something, you are entitled to enjoy exercising that right, to do it as an end in itself, but if the defender “enjoys” the use of force too much, his legal position is undermined. For example, when Bernard Goetz shot the four black youths on the subway, many charged him with a motivation of racial animus rather than accept his claim of defensive necessity. Insofar as his motives were racist, his position was much less
believable. He could not get up in court and say, “I had a right to kill, and I enjoyed it.” Nonetheless, many gun advocates celebrate the expression “Make my day” as a motif of self-defense. In other words, if you attack me, then you make my day by giving me the right to use deadly force in response.

The idea that an aggressor vests a right to kill in response overstates the nature of the right to respond to aggression. The purpose of the response must always be to repel the attack. As we pointed out earlier, the response is described in terms different from those that apply to an act that infringes on the norm defining the crime. Whereas the aggressor may intend to kill, the defensive reaction is described not as an attempt to kill, but only to ward off the aggressive attack. This restatement, conceptually linking defensive force with avoiding the attack, is made explicit in the terminology of the leading criminal codes in the world. The Model Penal Code requires that the use of force be “for the purpose of protecting [oneself] against the use of unlawful force.” The German Penal Code stipulates that the purpose be “to avert the attack.” The Rome Statute defines self-defense for killings that would otherwise be war crimes as force directed “against an imminent and unlawful use of force.” It is safe to generalize and conclude that no criminal law in the world deviates from this pattern. It would be a great surprise if somewhere a criminal code read, “And if someone attacks you, you have the right to kill him.”

The right of self-defense, in the strong sense, implies both the defender’s right to avert the attack and the aggressor’s lack of a corresponding right to use force to “defend” himself from the defense. The latter point is expressed by the thesis of incompatible rights. If a mother has the right to abort a fetus in the first trimester, for example, no one has the right to defend the interests of the fetus. That is, one party’s right to act implies a corresponding denial of the right of those who are affected to resist the rightful use of force. Rights in general, and justificatory claims in particular, have a subordinating effect; for the purposes of exercising his right, at least, the right holder dominates those who may have inconsistent interests.

The same principle seems to apply in international law: if the United Nations authorizes military intervention under Chapter VII of the Charter, this right of intervention presumably...
excludes the right of self-defense for the state that is subject to the UN’s military measures. But other forms of international intervention are more dubious and controversial. For example, if Serbia could have mounted an effective resistance to the invading NATO forces, it would arguably have had the right to do so. The NATO force was acting outside of Chapter VII’s system of authorized force. NATO might have made an argument based on collective self-defense of the Albanian national interest in Kosovo, but this argument is controverted for several reasons. For example, there is some doubt about whether self-defense could operate on behalf of the Albanian nation rather than an independent state. Article 51 does, after all, refer to the member states of the United Nations. Yet it is also true that nonstate national entities have received recognition in the period since the adoption of the Charter, notably in the Genocide Convention of 1948 and the International Covenant of Civil and Political Rights adopted by the General Assembly in 1976.

“Strong” rights, then, exclude the possibility of resistance, but rights are not always applied in their strong sense. “Rights” may also refer to permissions that are indeed compatible with permissions to resist. Kent Greenawalt seems to subscribe to this version of rights when he argues that both sides in a conflict might be warranted in using defensive force. In referring to these rights as permissions, we have something much less august in mind than acting in such a way as to render the action lawful.

Sometimes having a right to an activity simply means that no governmental agency has the authority to prohibit the activity. This is what people mean when they refer to a “right to free speech.” In the United States, no state or federal authority can censor or prohibit speech on the basis of the message conveyed. In this limited sense we have a “right” to write this book. Rights as “permissions” or “warrants” tell us only that the rights bearer will not be prosecuted for exercising the right. But we learn virtually nothing about the implications of rights for legal relationships with others.

It is difficult to decide whether the strong or weak sense of a right to self-defense should prevail. Current usage seems to support the strong version of rights; the inherent right of self-defense implies that the aggressor is not permitted to respond to defensive force with the use of force. The doctrine
of self-defense speaks to the relationship between states caught in an armed conflict, and its purpose is to distinguish neatly between the lawful and the unlawful, between aggressor and rightful defenders. But if the notion of rights is reduced to a set of permissions, these sharp profiles lose their definition. In the international arena, with its deficit of courts and other enforcement mechanisms, the prospect of prosecution pales in importance. In the diplomatic and legal interaction of states, it is important to be able to make well-defined charges of aggression and to respond with well-grounded claims of justification. The proper concept for our purposes, then, is the strong sense of rights.
C. Self-Defense as a Duty

Referring to the right of self-defense as “inherent” or “natural” is a good way to sidestep arguments about its foundations. After all, where do rights come from? How do we argue for their existence? One view, explored in the strong theory of rights, is that they derive from the law. They represent the ability of each citizen to vindicate his or her autonomy under the law. In the Kantian system of law, all of these issues hang together. The notion of law, or Right, is based on the maximum possible external freedom for all. Aggression compromises this freedom, and therefore the defender is entitled to vindicate his freedom by repelling the aggressor.

An entirely different methodology for deriving rights is grounded in the recognition of preliminary duties. For example, the Belgian defense of humanitarian intervention is based on a simple syllogism: Every state has a duty to intervene to prevent human disasters, and therefore every state must have a right to do so. This is an unusual way to derive a right of military intervention, one that is generally foreign to Western legal culture. Yet there is one ancient legal system that does derive its principles of defensive force from a duty of rescue, and therefore we should take a closer look at that system. There is much to learn from the ancient sources, in this case Jewish law, based on the Bible and the Talmud.

Jewish law is based, ultimately, on the narratives and laws recited in the first five books of Moses. The ancient Hebrews then developed an oral law as a companion to the Bible, which they passed down, by memory and rote, from generation to generation. In the third century of the Common Era they finally put the oral tradition to paper and produced the first code of Jewish law, called the Mishna. The rabbis then began an intensive period of debate and commentary about the Mishna and its implications, generating an extraordinarily nuanced body of legal literature called the Gemara. The Mishna and the Gemara, plus the early commentaries on the Gemara, constitute the revered, multivolume book of study known as the Talmud.

In a very thoughtful and respectful chapter on the Talmud, the Canadian legal comparativist H. Patrick Glenn quips that one might consider spending a year, perhaps even “twenty or thirty years at it, or more,” studying the multivolume work. Many scholars do in fact devote their lives to Talmudic study.
as an act of religious devotion. Our comments in this section are based on much less exposure. Fortunately, there are only a few pages of the Talmud devoted to the subject of self-defense, and they form the foundation of our comments on self-defense as a duty.

The root of this Talmudic discussion is a biblical passage, Leviticus 19:16, which commands, in Hebrew, Lo taamod al dam reacha, literally, “Do not stand on thy neighbor’s blood.” Making sense of these cryptic words has long been a challenge to translators in all languages. Luther rendered the phrase as Du sollst auch nicht auftreten gegen deines Nächsten Leben, which means basically, “You should not rise up against your neighbor’s life.” Luther’s point is obscure, but the gist of his translation seems to be shared by the new French Catholic version: Et tu ne mettras pas en cause le sang du prochain (“Do not put into question the blood of thy neighbor”). But these translations miss the idea, accepted in the Talmudic discussion, that standing on one’s neighbor’s blood means standing and doing nothing, or standing idly by while one’s neighbor suffers. The Talmud interprets Leviticus 19:16 as implying that one is under a duty to rescue those in distress. Our preferred translation would be “Do not stand idly by while your neighbor bleeds.”

The legal duty to rescue those in danger or injured by an accident is well accepted in Continental European jurisprudence. Anglo-American common law has always been more skeptical of this duty. There might be a moral duty to rescue, but this moral duty is not recognized as a legal obligation. In special cases, however, where there is a personal duty to the person in distress—as in the duty of a mother to her child—the failure to rescue might generate liability for the ensuing harm to the endangered person.

In the Talmudic view of the world, there are distinct spheres of possible defensive action. The first is the private realm (where every man’s home is his castle, his own private island); the second is the public sphere, where people mix and jostle on the street. For defensive action in the private sphere we have a specific biblical license, the passage in the Book of Exodus, not long after the Ten Commandments, that provides the basis for forcible self-defense in cases of burglary: “If a thief is found breaking in, and he is struck so that he dies, there shall no blood be shed for him” (Exodus 22:1). There
shall be no “shedding blood” (i.e., punishment) for killing a thief caught in the act of breaking in. In other words, killing the burglar is justified. The Talmud goes on to explain why deadly force is permissible even when it appears that only property interests are at stake: the homeowner is likely to resist the burglar, which will escalate the conflict and lead the burglar to threaten the life of the homeowner. So ultimately, the use of deadly force is justified as the protection of life. 51

Defending one’s home is a relatively easy case. The intruder crosses a clearly demarcated boundary by trespassing against a zone of intimacy that is fundamental in any legal system that takes individuals and their possessions seriously. When one person breaks into another’s private dwelling, there is no doubt, to borrow a phrase from a neighboring passage in Exodus (21:28), about whose ox is goring whose.

When the interaction of two people in the public sphere degenerates into a fight, however, one can never be entirely sure who started it. True, someone swings first, but behind the swing may lie prior verbal and other potentially provocative behaviors that can make it difficult to distinguish between a chance mêlée and an unequivocal attack. It makes sense to think about imposing a duty to retreat from these potentially ambiguous fights in the public arena, but no one has ever seriously suggested that a homeowner has a similar duty to retreat from his own home rather than use deadly force against an intruder. This explains why the rabbis did not try to extend the model of the private home into the more difficult sphere of fights breaking out in the public arena. And there is no specific textual base for formulating a right to use defensive force against attacks that occur in public.

Though the Bible is silent about a general right to use defensive force, the oral law as codified in the Mishna recognizes the right to kill an aggressor in certain specified cases. The Hebrew term rodef, usually translated as “pursuer” or “aggressor,” provides the linchpin for both a duty and a right to use deadly force. The text of the Mishna specifies three cases in which one should kill a rodef: to stop him from chasing another “in order to kill him,” to stop him from chasing a man, and to stop him from chasing a betrothed woman. The last two cases do not specify the purpose of the rodef in pursuing his intended victim, but the context makes it clear that the purpose is illicit sex. Unfortunately, what makes
the sex illicit in these two cases is not so obvious. Most people think the aggressor must intend (p.51) to use force against the man or the betrothed woman and thus be guilty of homosexual or heterosexual rape. (But this is not clear. The prohibited nature of the sexual liaisons might be enough to justify preventing the aggressor from contaminating himself as well as the other party.)

The Mishna provides some guidance by also delineating three cases in which deadly force is not permissible, even though the rodef may be threatening to commit a capital crime. If the pursuer is after an animal with the intent to have sex with it, one may not intervene. Although the completed crime was subject to the death penalty, it did not follow that a bystander could intervene and kill the offender before the act. This same conclusion is reached where the pursuer and probable offender threatens to desecrate the Sabbath or engage in idolatry. All three of these acts represent capital offenses in Talmudic law, but none of them directly endangers the welfare of a human being. Therefore, bystanders are not entitled to use deadly force to prevent the crimes from occurring.

Upholding God’s law, even in matters as basic as sexuality, the Sabbath, and proper worship, is still not enough to justify deadly force; another person’s life or sexual purity must be at stake. If Talmudic thinking were based exclusively on a principle of protecting the sacred order, one might expect to find a broader right to intervene; there would be no reason why individuals would not be empowered to prevent bestiality, desecration of the Sabbath, or idolatry.52

Oral law and the Mishna clearly go beyond the biblical prescriptions. The term rodef, in the sense of “aggressor,” does not even appear in the Scriptures. Yet the rabbis of the Talmud found warrant for their doctrine in Leviticus 19:16: “Do not stand idly by while your neighbor bleeds.” It does not matter whether the danger derives from human or natural sources. The attack by an aggressor is treated as analogous to a natural disaster that befalls the potential victim, and intervening to stop the aggression is like inserting oneself between a falling rock and the innocent person below it.

Grounding self-defense in a duty to rescue implies, paradoxically, that the defense of others is more easily justified than the defense of self. Western legal systems typically take the defense of self to be the basic principle, and the defense of
others is seen as an extension of the right to protect oneself. This process of generalization follows, as we have seen, from the idea of defending the legal order against the aggressor, and a generalized principle of justification treats the defense of others exactly the same as the defense of self, which is implicit in the Continental doctrines of necessary or legitimate defense.

(p.52) Treating defensive force as an act of rescue transposes this relationship between the self and the other. In the Talmudic approach, the defense of others is primary and the defense of self derivative. But making the leap from rescuing others to defending oneself is not so easy. One could claim that everyone has a duty to preserve himself that is at least as strong as his duty to rescue others; everyone is his own closest “neighbor;” and therefore no one should sit idly by if he himself, as well as his neighbor, is bleeding to death. This seems a bit strained, though, for the biblical passage appears to teach altruism more than self-love. Perhaps we simply need to be reminded of our duty to rescue others. There is apparently no corresponding need to issue an imperative to save ourselves.

In another Talmudic passage, devoted to the implications of the homeowner’s right to kill an intruder, the rabbis assert, “The Torah holds, ‘If someone comes to kill you, rise up and kill him first.’” The passage suggests that Jewish law recognizes a general right to defend oneself on the street, as well as within the confines of one’s own home, but the reference to the Torah is used here in a wonderfully ambiguous way. Narrowly defined, the Torah refers to the five Books of Moses (Genesis, Exodus, Leviticus, Numbers, and Deuteronomy), but as we have suggested, nowhere do these books explicitly recognize a general right of self-defense—only the justification to kill thieves in the act of breaking in. As used in the Talmudic recognition of self-defense, “Torah” refers not to the Bible, but to the entire body of Jewish law, including the unwritten principles of the oral tradition.

We speak here of a right of self-defense, but we should not forget that the basic Talmudic idea is that of duty, in particular a duty to God to fulfill the divine commandments. The notion of individual rights in the modern sense does not appear in either the Bible or the Talmud. This may explain why the focus is on the duty to rescue others. Rescuing oneself is an
expression of the instinct to survive and does not require legal recognition of a duty to act. Even within the framework of a religious legal system based on a single text, the lawyers (or in this case, the rabbis) engaged in interpreting the text are permitted to assume that some matters, such as the right to defend oneself, are so obvious that the lawgiver need not expressly mention the right in laying down the law.

A duty to rescue a person in danger would presumably entail a right to act to fulfill that duty. The assumption is not only that “ought” implies “can”—the principle often associated with Kant—but that “ought” implies “may.” Grounding the right of self-defense in a duty to rescue implies, however, that the notions of right and duty are coextensive. But they (p.53) are not. There are clearly instances when we have the right to act but are not obligated to act. We may use our discretion to refrain from exercising our rights. Our foundational idea is the individual’s right to protect himself and vindicate his autonomy, so the legal system should encourage a notion of individual rights that is broader than the duty to act on that right. Indeed, this is the position that has evolved in Western legal systems. Whether one acts to protect another’s body or property is left to individual judgment. Rights to use force then come into focus as permissive, or optional, rather than mandatory; extralegal considerations such as compassion or fear might lead one to refrain from the use of permissible force. In the international sphere, the restraint is often prudence. It might have been legitimate for the West to intervene in Budapest in 1956 or Prague in 1968, but legitimate concerns about war with the Soviet Union instilled a calculated sense of restraint.

Considering defensive intervention as a duty-based act of rescue seems to threaten the universality of the right to use defensive force. After all, could one be under a duty to rescue everyone? In modern legal systems, the scope of the duty to rescue is limited to family members and a set of persons with whom one has a special relationship of trust and responsibility. If we begin from this premise of a limited relational duty, the right to use defensive force would be similarly constrained by particular relationships. The biblical duty not to stand idly by while one’s neighbor bleeds appears to extend broadly to all members of the community, which in this context means all Jews. The Talmud suggests that the scope of this duty stops short of idolaters. Though modern thinking about self-
defense is pitched to multiethnic, diversified societies, the Talmud approaches the duty to rescue (and therefore defensive intervention) in the context of a closely knit, homogeneous community. So far as the duty to rescue is limited by communitarian empathy, so, too, will the right of self-defense be circumscribed and available only to protect persons with whom one stands in a close relationship.\(^{55}\)

Grounding defensive force in the duty to rescue also expresses the communitarian orientation of Talmudic jurisprudence: all Jews are responsible to each other for each other’s sins on the Day of Atonement and for each other’s welfare in daily life. Only hyperbole can capture the Jewish passion for interdependence: “If one saves the life of [a Jew], the Scriptures treat him as though he has saved an entire world.”\(^{56}\) This statement, found in the Mishna among legalistic propositions about interrogating witnesses, follows an analogous claim about the implications of killing a single Jew: it is as though one has killed an entire world. This poetic testimonial to the value of human life derives in part from the mystical Jewish view that each person carries within him not just the seed of his offspring but the seed of infinite generations yet to be born, and these unborn generations are sacrificed by every act of killing—or of failing to rescue.\(^{57}\)

As a general matter, the Talmudic conception of self-defense has considerable difficulty coping with the concept of permissive intervention. The notion of permissive action—where one has a choice whether or not to intervene—presupposes a concept of rightful (but not duty-bound) action. Permissive action inhabits the middle ground between the range of individual rights and the onset of duty, but making the notion of duty primary, in Talmudic fashion, squeezes out the central position occupied by permissive action.

Yet Rashi, a medieval commentator on the Talmud, suggests that a homeowner’s killing a burglar is permissive, rather than mandatory.\(^{58}\) Unfortunately, to make this point he must treat the killing as a trivial act, and how he achieves this requires a word of clarification. To express the notion of justifiable conduct, both the Bible and the Talmud use the suggestive expression “He has no blood.”\(^{59}\) This phrase is usually taken to mean that there is no blood guilt for killing him—no blood guilt because the killing is considered proper under the circumstances. Rashi turns this expression on its head and
claims that “He has no blood” means that as a result of breaking in, the burglar must be treated as equivalent to someone without blood—as a dead man walking.

This is a version of the familiar theory of forfeiture as a rationale for self-defense. The burglar forfeits his life by breaking in, and thus the homeowner may kill him if he wishes, for there is no legal prohibition against killing a dead person. This way of thinking about self-defense raises numerous problems, not the least of which is explaining why the forfeiture is revoked and the burglar’s life reinstated as soon as he flees from the house. Neither the Talmud nor modern secular legal systems recognize the right of the homeowner who has been the victim of a burglary to hunt down the burglar wherever he is and kill him, and yet this right would seem to follow if the burglar had indeed forfeited his life.

Recall Gardner’s “remainder” thesis, the modern conception of self-defense as justification that presupposes that killing the aggressor leaves the shadow of a wrong even when the conduct is justified. Looking at such a killing as the fulfillment of a legal duty cuts against this perception. It stops us from appreciating that thwarting aggression is an invasion (albeit a justified one) of human life that should be taken only as a last resort.

(p.55) In the end, it appears that a number of significant and intuitive features of self-defense are sacrificed when we try to derive the right of self-defense from a duty to rescue. We lose the sense that the right to rescue others is universally attached to everyone, regardless of whether or not the party deserves to be rescued. The notion of self-defense as permissive intervention—an act that may be exercised or not—falls victim to the duty to intervene, an obligation in place of an act of compassion. Further, deriving the right from the duty undermines the nuanced conclusion of the remainder thesis: that using deadly force to avert an act is justifiable, but nonetheless a breach of the victim’s right to life.

The point of this discussion has been to explore the possibilities suggested by the Belgian case for forcible intervention on the basis of a universal duty to aid others in distress. Their universal modern argument has ancient roots, not surprising in light of the general preference for duties over
rights in ancient legal cultures. On the whole, however, the evolution from a culture of duty to a law based on rights is a worthy transition. The Talmudic alternative has its attractions but, on balance, it should lead to enhanced appreciation of the rights-based model of self-defense that has come to dominate the mind of Western legal thinkers.

2. Four Models of Self-Defense
It is one thing to know the doctrinal foundations of self-defense; it is quite another to see them in practice. In this context as well as others, the elements of the law take on differing connotations depending on the underlying philosophical conception of self-defense. In fact, four distinct theories of defensive force shape the way we interpret the substantive law, whether we are discussing a shooting in a graffiti-ridden New York subway car or launching missiles on the border between India and Pakistan. By examining these conflicting models and value systems, we can begin to see the larger issues at stake in every dispute about defensive force.

A. Self-Defense as Punishment
Our commitment to justice and to the symbolic expiation of evil often leads us to consider self-defense as a form of just punishment: the individual acts in place of the state in inflicting on wrongdoers their just deserts. If Troy Canty, Barry Allen, James Ramseur, and Darrell Cabey were in fact muggers, then this rough principle of justice holds that “they got what they deserved” from Bernard Goetz. These are the exact words of a black witness, Andrea Reid. Present with her baby in the subway car at the time of the shooting, she was also afraid of the four “punks who were bothering the white man.” Goetz’s defense attorney, Barry Slotnick, referred to her words “They got what they deserved” dozens of times in the course of the trial. Sometimes he paraphrased the comment in a more respectable legal idiom: “They got what the law allowed.”

Goetz became a folk hero because, as many people saw it, he brought the arrogant predators to their knees. Yet even under the most punitive theory of giving criminals “what they deserve,” there remain questions of fact. Did these kids have records long enough to support the judgment that they were criminals and predators? Or is the public perception of Canty, Cabey, Ramseur, and Allen as criminal types largely a function of their race and youth? When our passions seek gratification
—when our lust to avenge evil gains the upper hand—we don’t always ponder the facts and weigh the gradations of evil, or their fitting punishment.

The idea that people should be rewarded and punished on the basis of their character and their lifelong behavior may express a principle of justice, but it is a principle better suited to infallible divine punishment than the imperfect human institutions of the law. In fairy tales, the witch may receive her comeuppance in the end, but surely it is not the business of human institutions—not to mention a lone rider on the subway—to determine who is a witch, or a wicked person, or an unreformable criminal. The law wisely limits itself to the question of whether a particular act constitutes a crime that merits punishment, or whether, in the context of self-defense, a particular aggressive attack properly triggers a defensive response. The general character of the suspect is important neither for human punishment nor for the assessment of whether defensive force was permissible in a particular situation. Some people who passionately sided with Goetz’s victims may have thought that when Barry Slotnick was assaulted a few weeks after the trial, he, too, got what he deserved. They are entitled to their opinion, but their passion for justice on the streets should not be heard in court. Nor should Slotnick’s repeated reiteration of Andrea Reid’s words “They got what they deserved” have been considered a persuasive argument for the proper scope of self-defense.

In the international arena, the urge to punish often overwhelms proper analysis as well. This certainly appeared to be true in the context of the U.S. invasion of Iraq in 2003 when U.S. policymakers tried to stretch self-defense to fit the facts while pointing incessantly to the great evil represented by Saddam Hussein. His crimes against the Kurds and other political opponents were recited in detail. Whether the purpose of regime change was punitive or philanthropic was never clear, and the two became readily intertwined with our government’s claim of self-defense against the prospect of weapons of mass destruction.

As we noted earlier, Kant maintained that punitive wars were a logical impossibility. Punishment, he claimed, presupposes superior authority, as parents are in a position to punish their children and God can punish human beings, but because, in Kant’s view, all states are moral equals, no state has the
authority to punish another. Although it is true that punishment might be imposed by the world community, in the same sense that the community imposes punishment at the domestic level, this is both rare and insufficiently theorized. The power of international institutions that purport to punish in the name of the world community, such as the UN Security Council, are invoked in only a small number of today’s conflicts. Reprisals (or putative reprisals, in which one state thinks it has the authority to punish another) are much more commonplace in international affairs. For good or ill, superpowers think they are in a position to discipline their wayward adversaries.

In the final analysis, we have to keep in mind that self-defense is not punishment. The purpose of a defensive act is not to inflict harm according to the desert of the aggressor; its purpose is to repel the attack. Working out this issue in the Middle Ages was an important step forward in understanding the use of force. As motives become more complex and confused, as emotions cloud the issues, individuals and states sometimes forget this simple distinction. Although we might feel that an aggressor gets his just deserts when he is killed in self-defense, it is our protection against his attack—not his punishment—that justifies killing him.
B. Self-Defense as an Excuse

An alternative approach to self-defense shifts the focus away from a passion to punish wrongdoing and directs it instead to the personal plight of the defender. In the closing portions of his summation to the jury in the Goetz case, Barry Slotnick played on this theme. He stressed Bernard’s fear: his back against the steel wall of the subway car, with no choice but to strike back. Fear invokes the primordial form of self-defense in English law; from roughly the thirteenth to the sixteenth century, the plea of self-defense, called \( \text{se defendendo} \), applied whenever a fight broke out and one party retreated as far as he could go before resorting to defensive force. His back had to be, literally, against the wall.

(p.58) If he then killed the aggressor, \( \text{se defendendo} \) had the effect of saving the defendant from execution, but it did not negate other stigmatizing effects of the criminal law. The defendant forfeited his goods as a token sanction for his having taken a human life. The murder weapon was also forfeited to the crown as a \( \text{deodand} \), or tainted object. Killing \( \text{se defendendo} \) was called \( \text{excusable homicide} \), for though the wrong of homicide had occurred, the circumstances generated a personal excuse that saved the killer from execution. The defense of \( \text{se defendendo} \) springs more from compassion for the predicament of the trapped defender than from a commitment to justice. If it is likely that we would all act the same way in the same circumstances, we can hardly condemn and execute the defendant who had no choice.

Although this theory of excuses plays a large role in domestic criminal law, it seems to hold less sway in international law, because all actions between states are assumed to be voluntary. States do not go insane; they cannot excuse aggression because their people are hungry, because their leader makes a mistake about their legal obligations, or because they feel in danger of some future attack. There is some recognition of duress in international law, not as an excuse but as a factor reducing the wrongdoing of the state in suits against the state for compensation.\(^{62}\) The knottiest problem is whether a reasonable mistake about the intentions of an aggressor should be considered in the analysis of self-defense. It would be difficult to disregard these reasonable mistakes altogether, because defending states must always act on the basis of appearances. (Suppose the Israelis were mistaken about Egyptian intentions in 1967. Would they have
lost their apparent right to defend themselves?) We shall return to this issue in due course. It is sufficient at this point to recognize that defensive action by states is treated as a justification rather than an excuse for resisting aggression. Protecting your territory and political independence is the right thing to do; it is not simply an involuntary response for which we ought to have compassion. The general moral question about excuses for the behavior of states must await further reflection. If it turns out that excuses are excluded from relations between states, this might be the most significant feature that distinguishes individual behavior in domestic law from collective action in the international sphere.
C. Self-Defense as the Justified Defense of Autonomy

English lawyers of the fifteenth and sixteenth centuries paid close attention to the jurisprudence of the Bible, and in Exodus 22 we read that there (p.59) is no blood guilt, no “taint,” in killing a thief who seeks to break into one’s home at night. This way of thinking was at odds with the early common law, which approached the subject of self-defense solely as a matter of excuse and did not recognize a justification that would totally exempt a “manslayer” from liability. The minimal penalty for those who claimed se defendendo was always the forfeiture of goods.

Eventually the British Parliament closed this gap in the common law, enacting a statute in 1532 that essentially licensed the killing of robbers and other assailants on the public highway. This statutory defense came to be called justifiable— as opposed to excusable—homicide. The defense is not based on compassion for someone with his back to the wall; rather, it expresses a right to hold one’s ground against wrongful aggressors. The defendant’s claim is not “I could not do otherwise” but “Don’t tread on me!” As the leading legal scholar of the seventeenth century, Sir Edward Coke, said of this defense, “A man shall never give way to a thief, etc. neither shall he forfeit any thing.” The result of justifiable homicide, as the 1532 statute prescribes, is total acquittal without any forfeiture of goods.

This version of justifiable self-defense is appropriately called “individualist,” for it is guided by the imperative to vindicate individual autonomy; its philosophical champions are John Locke and Immanuel Kant. Kant conceived of an unqualified right of self-defense as the foundation of a liberal legal system, in which each citizen recognizes and wills maximum freedom for himself as well as for his fellow citizens. That the legal system should be organized on the basis of maximum freedom was, for Kant, the implication of pure reason in human affairs. Relying implicitly on this tradition, Slotnick invoked the individualist theory in his opening statement on behalf of Bernard Goetz:

No one can ever take away your inalienable right to protect your property or your life or your family. No one can walk up to me and say, “Give me that watch,” “Give me your ring,”
“Give me five dollars.” And if they do, heaven help them if I’m armed, because I know what the law allows.

This vision of autonomy depends on an analogy between persons and states. The individual is an island, self-reflexively sovereign, as nations are sovereign over their territory. Indeed, the individual right of self-defense makes sense as an extension of the idea that nations can use force to maintain dominance over their own people and their own territory. Because self-defense is so strongly connected with what it means to be a person (p.60) or a nation, we speak readily of self-defense as a natural right, as in the French version of the UN Charter, or an “inherent right,” as in the English version. In this context, the principles of domestic and international law are so tightly interwoven that it is difficult to know which came first.

The individualist theory has always expressed itself most strongly in the protection of one’s home. Any intrusion against one’s “castle,” one’s refuge from the heartless world, is intolerable. The individualist theory would vindicate the use of any means necessary to defend one’s home against an attempted intrusion. Perhaps, as Kant would say, our moral concern for the welfare of others could lead us to choose not to exercise our right of defense, but liberal writings leave no doubt that freedom entails the option to resist all forms of encroachment.

D. Self-Defense as the Defense of Society

The individualist view can be contrasted with a “society-based” variation of justifiable self-defense. The difference between the two is expressed in a very loose (as opposed to very strict) approach to proportionality. The extreme version of the individualist defense rejects proportionality altogether. Any encroachment on an individual’s rights represents an intolerable violation of personal autonomy, and the affected individual can do everything in his power, deploy all necessary means to end the encroachment and vindicate his autonomy. As we have seen, this is the dominant approach toward using force to preserve the territorial integrity of states.

The society-based variation of justifiable self-defense rejects absolutes like the imperative to secure one’s rights, one’s autonomy, and one’s private physical space, whereas the individualist treats every person as an island, entitled to full
sovereignty in his own domain, as though people were states. The individualist approach ignores our interdependence, both in shaping our sense of self and in cooperating in society for mutual advantage. The alternative, society-based view regards the aggressor as another member of the same society of interdependent selves, with interests that cannot be ignored, even if he acts wrongfully in aggressing against someone else. The defender is obligated to consider the aggressor not merely as an intrusive force, but as a fellow human being. In the end, the defender’s interests may be worth more, but those of the aggressor are not totally discounted.

If one recognizes the humanity of the aggressor, it follows that in some situations the defender will be required to absorb an encroachment on his autonomy rather than inflict an excessive cost on the aggressor. If the only way to prevent intrusion and nonviolent theft in one’s home is to kill the aggressor, the defender may have to forgo defensive force and risk losing his property; he must suffer the minor invasion and hope that the police will recover his goods, since the alternative of killing the aggressor is too costly and callous a disregard of the human interests of the aggressor.

In the 1950s and 1960s, a strong defense of this society-based theory emerged from the seemingly uncontroversial general view that criminal law was meant to further the public good. After all, who could be against the public good? Criminal law reformers claimed that the purpose of punishment was primarily to encourage people to act in a socially desirable way, and the determination of what was socially desirable depended largely on the assessment of the costs and benefits of acting in particular ways.

For a time, viewing self-defense as a measure to further the public welfare led courts and legislatures to eschew all absolutist thinking about the right to defend one’s autonomy against aggressive attacks. In cases of burglary, for example, some lawmakers insisted that for a homeowner to be allowed to use deadly force against an intruder, he must fear violence to himself or the other occupants; the fear of theft would not be sufficient to justify fighting off the burglar with force endangering his life. A good illustration is the decision of the California Supreme Court in People v. Ceballos, which held that injuring a burglar with a spring gun (an automatic weapon triggered by entry) could not be justified. Because
no one was home at the time of the intrusion, the burglary did not subject an occupant to the risk of violence, and therefore the only interest at stake on the side of the homeowner was his property. The court held that defending property alone did not justify the use of deadly force against the burglar.

The social theory of self-defense says, in short, that burglars and muggers also have rights, and the rights of victims must therefore be restricted when their exercise inflicts an excessive cost on those who attack them. It’s fair to say that though the public at large may have supported this philosophy a generation ago, their feelings about crime and the rights of criminals have shifted dramatically since then.

The international law of armed conflict, however, has not reached the stage where states have no right to use force to defend property. Very few world leaders questioned the right of the United Kingdom to defend the Falkland Islands against Argentine aggression, regardless of how few British citizens actually lived there. The same principle would hold with regard to totally unoccupied territorial possessions.

Yet some of the principles underlying the social conception of self-defense have managed to penetrate the international law of war, most notably in the evolution of international humanitarian law. This body of law has evolved on the basis of the Geneva Conventions of 1949, which laid down the rules of war and generated protection for prisoners of war and civilians not engaged in combat, rules constituting the field of jus in bello, defining how wars are properly fought. The basic moral point underlying international humanitarian law is that enemy soldiers are also human beings; when they are sick or taken prisoner, they regain the protection owed to all members of the human species. If civilians never don a uniform or carry a rifle, they are entitled to the same basic rights that they have always enjoyed. The fact that their nation has gone to war does not forfeit their inherent right to be treated as human beings.

Just as recognizing the humanity of aggressors imposes restrictions on the exercise of defensive force, so this same moral insight imposes restrictions on the way wars are fought. We must never forget that war, aggression, and self-defense represent conflicts among human beings who—from a moral point of view—are created equal. As Lincoln recalled that
famous principle in the midst of the American Civil War, so we
should never forget that our enemy is essentially “like us.” In
the aftermath of September 11, 2001, we are experiencing a
new urgency in the need to work out the proper principles of
self-defense. The lessons we draw from domestic self-defense
and from international humanitarian law should aid us in this
intellectual and moral quest for the right rules in this era of
new dangers.

Notes:
(1.) See Michael S. Moore, Placing Blame: A General Theory of
the Criminal Law 66 (New York: Oxford University Press,
1997); see also Kyron Huigens, Fletcher’s Rethinking: A
Memoir, 39 Tulsa L. Rev. 803, 811 (2004). In German this
theory is called Die Lehre von negativen
Tatbestandsmerkmalen (“theory of the negative elements of
the definition”). See Claus Roxin, Strafrecht: Allgemeiner Teil,

(2.) Available online at http://www.dod.mil/news/May2003/
d20030430milcominstno2.pdf.

(3.) Kyron Huigens refers to this element as “AJC.” See
Huigens, Fletcher’s Rethinking: A Memoir, at 811.

(4.) Judgment of the Supreme Court in Criminal Cases, 61
RGSt 242 (1927).

(5.) Rome Statute § 31(1) refers back to § 21(1)(c), which
permits judicial development of the law based on comparative
analysis.

(6.) See Antonio Cassese, International Criminal Law 26 (New

(7.) Rome Statute, Art. 23.

(8.) H. L. A. Hart, The Ascription of Responsibilities and

(9.) John Gardner refers to this result as the “remainder”
thesis. John Gardner, Fletcher on Offenses and Defenses, 39
Tulsa L. Rev. 817 (2004).

(10.) Id.
(11.) There is an important logical implication of this structure: Element six itself consists of several subelements. See the six required elements of legitimate defense discussed in chapter 4. If an affirmation of SD requires a finding of all six, then a negation of SD is logically satisfied if any one of the six is missing.

(12.) The term “sovereign” does not appear in the U.S. Constitution, and it appears in only one incidental reference in the proposed Constitutional Convention for Europe, regarding “the sovereign base areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus.” See Article VI-4(6)a (“Scope”) of the final version of the draft Treaty Establishing a Constitution for Europe (CONV 850.03en), available online at http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf.


(14.) Corfu Channel Case, 1949 ICJ Rep. 4.

(15.) *Ploof v. Putnam*, 71 Atl. 188, 81 Vt. 471 (1908); German Civil Code § 904.


(17.) *Case Concerning Legality of Use of Force (Yugoslavia v. United States of America)*, 38 I.L.M. 1188 (June 2, 1999) (dismissing ICJ case for lack of jurisdiction).

(18.) Article 2 of each of the four Geneva Conventions includes the following statement: “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” In addition, the Fourth Geneva Convention contains an entire section (composed of Articles 47–78) on the treatment of civilians in occupied territories. Cf. the provisions of the Hague Convention of 1907, Articles 42–56.

(20.) Kant, *Legal Theory* at 348 [Gregor at 154].

(21.) As regards terrorism, the United Nations is currently operating under twelve different relevant conventions and protocols; see http://www.undcp.org/odccp/terrorism_definitions.html. The first official attempt at definition appears in the League of Nations Convention of 1937, which was never enacted: “All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.” Terrorism expert A. P. Schmid proposed in 1992 that the UN simply adopt the stance that acts of terrorism are the “peacetime equivalents of war crimes.” *Id.*

(22.) The common law of trespass conforms to the same categories as used in the law of necessary defense. *Trespass quare clausum fregit* covered trespass to land; *trespass vi et armis* applied to personal assaults; and *trespass de bonus asportatis* addressed the taking of chattels.


(24.) John Donne: “No man is an island, entire of itself; every man is a piece of the continent, a part of the main.” “Meditation XVII,” from *Devotions upon Emergent Occasions* (1624).

(25.) The Thorns Case, 6 Edw. 4, f.7, pl. 18 (K.B. 1466).


(27.) Admittedly, there are some cases in which the right of resistance must yield to the social interest in the intrusive activity. *See Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219 (1970).


(30.) The MPC recognizes justification for force in the execution of a public duty (§ 3.03), self-protection (§ 3.04), protection of other persons (§ 3.05), protection of property (§ 3.06), in law enforcement (§ 3.07), and by persons, “with Special Responsibility for Care, Discipline, or Safety of Others” (§ 3.08). In terms of self-protection, § 3.04(b) states, “The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat.”


(32.) An entire volume of the ICJ Reports is devoted to the numerous opinions rendered in this case. See ICJ Reports (1986).

(33.) See the interpretation by Gray, International Law and the Use of Force, at 67; G.A. Resolution 2625.

(34.) This is collective self-defense in the sense used by international lawyers, not philosophers, as we explained in chapter 1.

(35.) MPC § 3.05.


(37.) Incidentally, all of these words also refer to the right hand, and carry in addition the connotation of “making straight” or “rectifying.”

(38.) The English word “justification” comes from the Latin justificare, meaning to justify. See Oxford English Dictionary at 328–29. The Latin ficare, or facere, means “to make,” so that justification means literally “to make lawful.”

(39.) See chapter 4, section 5.

(40.) StGB § 32.
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(41.) Rome Statute § 31(1)(c).

(42.) Although the passage in Exodus 22:1 comes close to this: “If a thief is found breaking in, and he is struck so that he dies, there shall no blood be shed for him.”

(43.) There is no authority for this proposition. For most people it is intuitively obvious. But if they disagree, it is unclear how to convince them, except to say that the incompatibility thesis is built into the rule of law.

(44.) The Convention does not explicitly protect nations, but rather “national, ethnical, racial or religious” groups against the intentional effort to destroy them “in whole or in part.” This language is not incorporated in the Rome Statute Art. 6. See also ICCPR Art. 1 (“All peoples have the right of self-determination”).


(46.) The First Amendment provides that “Congress shall make no law ... abridging the freedom of speech, or of the press.” The principle of not censoring speech on the basis of content is expressed in a large body of case law. See Cohen v. California, 403 U.S. 15 (1971).

(47.) Kant, Legal Theory, Introduction, at § C.

(48.) Belgium argued this point before the ICJ. See Request for the Indication of Provisional Measures, Legality of Use of Force (Yugoslavia v. Belgium et al.), CR 99/14 (May 10, 1999). During the oral hearing, counsel for Belgium argued that “NATO, and the Kingdom of Belgium in particular, felt obliged to intervene to forestall an ongoing human catastrophe, acknowledged in Security Council resolutions. To safeguard what? To safeguard, Mr. President, essential values which also rank as jus cogens. Are the right to life, physical integrity, the prohibition of torture, are these not norms with the status of jus cogens?” See id. at CR 99/15.

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(51.) *Babylonian Talmud*, Tractate Sanhedrin 72a.

(52.) The law of rodef (aggressors) came into disrepute in 1995 when leading rabbis in Israel used the term to label Yitzhak Rabin as an aggressor against his own nation, by virtue of his plans to make peace with the Palestinians and evacuate territory seized in the Six-Day War. Yigal Amir reputedly acted on this politicized interpretation of Jewish law when he assassinated Rabin. Under Jewish law he was under a duty to kill the rodef. It is fair to say that this twisted version of the doctrine has no grounding in the Talmudic discussion. For one thing, the rabbis who declared Rabin a rodef were in effect declaring him to be an outlaw subject to assassination at any time; thus they themselves constituted aggressors relative to Rabin’s life.

(53.) *Babylonian Talmud*, Tractate Sanhedrin 72a. This passage is unfortunately often invoked in political contexts—for example, to argue for militant actions against Palestinians—since the way the maxim is formulated and applied, there is no need to establish either imminence or necessity.

(54.) *Babylonian Talmud*, Avodah Zarah 26a, 26b.


(56.) *Babylonian Talmud*, Sanhedrin (last Mishna in chap. 4).


(59.) The Hebrew expression is *Lo Damim lo* (Exodus 22:1). This is sometimes translated, “There shall be no blood shed for him.”

(61.) For approval of this practice, see Walzer, Just and Unjust Wars, at 207–11.


(63.) This classic American slogan originated on the revolutionary-era “rattlesnake” flags used by the various naval forces of the rebellious colonies, the most famous of which, known as the “Gadsden flag,” sported a coiled rattlesnake on a yellow ground. The Williamsburg, Virginia, Gazette of May 11, 1776, commented on the Gadsden flag thus: “The colours of the AMERICAN FLEET to have a snake with thirteen rattles, the fourteenth budding, described in the attitude of going to strike, with this motto, “DON’T TREAD ON ME!” See Trivia, 33 Wm. & Mary Qtrly 528 (July 1976).

(64.) Sir Edward Coke, 3 The Institutes of the Laws of England 55 (1644).

(65.) 116 Cal. Rptr. 233, 526 P.2d 241, 12 C.3d 470 (1974). Some states have now passed controversial statutes to explicitly allow the use of deadly force to stop burglaries, even in the absence of a threat to serious bodily injury. See, e.g., N.Y. Penal Law § 35.20(3).