

LIFE AND LIBERTY: SEVEN FACTORS THAT WILL BETTER EVALUATE SELF- DEFENSE IN NEVADA'S COMMON LAW ON RETREAT

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Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or disable his assailant rather than to kill him.¹

-Justice Oliver Wendell Holmes, United States Supreme Court

I. INTRODUCTION

Although self-defense in Nevada originally developed under the common law, the Nevada Legislature has adopted a statute of self-defense to protect victims from imminent death or great bodily harm.² Nevada judges have interpreted the self-defense statute to mean that victims, or non-aggressors, need not retreat from danger presented by an assailant, but instead have a right to kill their assailant.³ This view has become known as the no-retreat doctrine.⁴ The doctrine has many advantages, such as simple application; however, it does not clearly evaluate the necessity of killing a person because it does not require the non-aggressor to pursue other options to preserve his own life before killing his aggressor.⁵

This Note will discuss seven factors Nevada should adopt to evaluate better the necessity of using lethal force in self-defense. First, this Note will briefly explain the history of the self-defense doctrine, focusing specifically on the doctrine of retreat. Next, the Note will briefly discuss the three different

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¹ *Brown v. United States*, 256 U.S. 335, 343 (1921).

² NEV. REV. STAT. § 200.200 (2007).

³ *State v. Grimmett*, 112 P. 273 (Nev. 1910) (holding that a non-aggressor “need not flee for safety, but has the right to stand his ground and slay his adversary”).

⁴ *Wilmeth v. State*, 610 P.2d 735, 738 (Nev. 1980).

⁵ *Grimmett*, 112 P. at 273. The Nevada Supreme Court stated that this was a “clear case of self-defense. . . . [I]t was necessary for the defendant to kill him in order to preserve his own [life].” The fact finder only must determine whether it was necessary for defendant to kill his assailant to preserve his own life. There is no requirement to determine whether defendant could have pursued other means before killing his aggressor.

doctrines of retreat along with the reasons and benefits of applying each doctrine. Then, the Note will review the history of self-defense in Nevada followed by an introduction and discussion of seven factors that will better aid Nevada in evaluating the necessity of self-defense. Finally, the Note will address both the impacts of implementing such factors and some concerns these proposed factors might present.

II. HISTORICAL BACKGROUND OF SELF-DEFENSE

Our Founding Fathers declared that people shall not “be deprived of life, liberty, or property.”⁶ Since 1791, when the states ratified the Bill of Rights, and even well before that for the colonies, each state comprising the United States has had the difficult task of defining under which circumstances a person may use lethal force to protect his life, liberty, and property.⁷ “There is generally no dispute that deadly force may be used in self-defense to protect oneself from death or serious bodily injury”⁸ However, states disagree as to the circumstances for determining when a person is truly in danger of death or serious bodily injury thereby permitting that person to protect himself, and if necessary, to kill his assailant in self-defense.⁹

A. *History of Self-Defense from England to the United States of America*

Beginning no later than the reign of Edward I, homicide was only justified when “‘committed in execution of the law.’ In all other cases . . . the defendant was not justified.”¹⁰ As punishment, the king would take all the killer’s chattels and imprison him.¹¹ The sole means to avoid this punishment was to obtain the king’s pardon.¹² Eventually the king permitted his chancellors to issue pardons.¹³ Later, in 1532, Henry VIII eliminated the requirement for English citizens to obtain a pardon from the chancellor by enacting a statute that enabled a defendant to claim self-defense during his trial.¹⁴

In England, two ideas of self-defense evolved: justifiable self-defense and excusable self-defense.¹⁵ However, the distinction between the two types of self-defense has become more intermingled and “blurred” because several dif-

⁶ U.S. CONST. amend. V.

⁷ Because the Constitution does not specifically delegate the power to govern the doctrine of self-defense to the federal government, via the Tenth Amendment, each state has this power. *Id.* amend. X.

⁸ Michelle Jaffe, Note, *Up in Arms over Florida’s New “Stand Your Ground” Law*, 30 NOVA L. REV. 155, 158 (2005).

⁹ See Steven P. Aggergaard, Note, *Criminal Law—Retreat from Reason: How Minnesota’s New No-Retreat Rule Confuses the Law and Cries for Alteration—State v. Glowacki*, 29 WM. MITCHELL L. REV. 657 (2002).

¹⁰ Jaffe, *supra* note 8, at 158 (quoting Joseph H. Beale, Jr., *Retreat from Murderous Assault*, 16 HARV. L. REV. 567, 567-68 (1902)).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 158-59.

¹⁴ *Id.* at 159; see also Stuart R. Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation*, 2 WM. & MARY L. REV. 381, 387 (1960) (citing 24 Henry VIII, c. 5).

¹⁵ See Jaffe, *supra* note 8, at 159. Although there is a slight distinction between justifiable and excusable self-defense, the distinction is not important in determining whether Nevada

ferent courts, including state courts in the United States, began to interpret self-defense differently and hence the terms began to mean the same thing.¹⁶

The one point of law that remained clear and consistent was that the defendant, to claim self-defense, must have acted with “a reasonable and honest belief in the imminent danger of death or grave bodily harm.”¹⁷ The vast majority of jurisdictions require the defendant to prove the following: (1) the defendant only used force against an aggressor, (2) the defendant’s use of force was necessary, (3) the defendant’s use of force was proportional to the aggressor’s use of force, and (4) the aggressor’s attack was imminent.¹⁸

Today, legal scholars tend to focus their debates of self-defense upon the necessity and reasonableness of the defendant’s actions.¹⁹ One hotly debated issue related to necessity and reasonableness is whether a defendant has a duty to retreat to the wall before defending himself with deadly force.²⁰

B. Three Theories to Determine Self-Defense

1. Duty to Retreat

The duty to retreat requires the defendant to prove that he retreated “to the wall” and that his killing was necessary to save a life or prevent serious bodily injury.²¹ This theory is rooted in English common law and adopted by the Model Penal Code.²² Twenty-four states have adopted the “duty to retreat” doctrine requiring the defendant to prove that he could not have left the scene safely before killing his aggressor.²³

should adopt the seven factors suggested in this Note. The important point is that self-defense was beginning to take slightly different forms.

¹⁶ *Id.*

¹⁷ Monique M. Gousie, Comment, *From Self-Defense to Coercion: McMaugh v. State Use of Battered Woman’s Syndrome to Defend Wife’s Involvement in Third-Party Murder*, 28 NEW ENG. L. REV. 453, 455 (1993), quoted in Jaffe, *supra* note 8, at 159.

¹⁸ Jaffe, *supra* note 8, at 158.

¹⁹ *Id.* at 159; see also Aggergaard, *supra* note 9, at 663.

²⁰ See generally Aggergaard, *supra* note 9, at 659-93 (discussing whether a co-resident has a duty to retreat); Jaffe, *supra* note 8, at 160-81 (discussing the reaction to Florida’s recently enacted law eliminating a defendant’s duty to retreat).

²¹ Jaffe, *supra* note 8, at 160 (quoting RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 3-4 (1991)).

²² State v. Grimmer, 112 P. 273, 273 (Nev. 1910).

The use of deadly force is not justifiable . . . if . . . the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take

MODEL PENAL CODE § 3.04(2)(b)(ii) (2001).

²³ Aggergaard, *supra* note 9, at 662. In his article, Aggergaard reports that twenty-nine states follow the majority view. Those numbers were accurate in 2002; however, since Aggergaard’s note was published only twenty-four states now follow the duty to retreat doctrine. These states include the following: Arkansas, Ricketts v. State, 729 S.W.2d 400 (Ark. 1987); Colorado, People v. Toler, 9 P.3d 341 (Colo. 2000); Connecticut, CONN. GEN. STAT. § 53a-19 (2007); Delaware, DEL. CODE ANN. tit. 11, § 464 (2007); Iowa, State v. Sedig, 16 N.W.2d 247 (Iowa 1944); Maine, ME. REV. STAT. ANN. tit. 17-A, § 108 (2007); Maryland, Dawson v. State, 395 A.2d 160 (Md. Ct. Spec. App. 1978); Massachusetts, Commonwealth v. Toon, 773 N.E.2d 993 (Mass. App. Ct. 2002); Michigan, People v. Couch, 211 N.W.2d 250 (Mich. Ct. App. 1973); Minnesota, State v. Edwards, 717 N.W.2d 405 (Minn.

These jurisdictions believe that “[a]ll human life, even that of an aggressor should be preserved if at all possible.”²⁴ This “triumph of civility”²⁵ theory allows lethal self-defense only as the non-aggressor’s last resort. They conclude that lethal force is only reasonable and necessary when the defendant reasonably believes that “he had ‘no choice’ but to kill.”²⁶

2. *Stand Your Ground*

Twenty-five states, including Nevada,²⁷ accept the “true-man” or “stand-your-ground”²⁸ doctrine, which rejects the duty to retreat rule.²⁹ This theory says that a person need not retreat when his life is threatened by an aggressor, but instead may use deadly force to prevent his death or great bodily harm.³⁰ This theory of self-defense believes that “victims need not yield their rights, surrender their dignity, or reveal their weak side to aggressive wrongdoers.”³¹

This theory of self-defense began to gain prominence in 1876 when the Ohio Supreme Court held that the law

will not permit the taking of [life] to repel a mere trespass, or even to save life, where the assault is provoked; but a true man, who is without fault, is not obliged to fly

2006); Nebraska, NEB. REV. STAT. § 28-1409 (2007); New Hampshire, N.H. REV. STAT. ANN. § 627:4 (2007); New Jersey, *State v. Rodriguez*, 920 A.2d 101 (N.J. Super. Ct. App. Div. 2007); New York, *People v. Chung*, 835 N.Y.S.2d 223 (App. Div. 2007); North Carolina, N.C. GEN. STAT. § 14-18 (2007); North Dakota, N.D. CENT. CODE § 12.1-05-07 (2007); Ohio, *State v. Walker*, 598 N.E.2d 89 (Ohio Ct. App. 1991); Oklahoma, *Walston v. State*, 597 P.2d 768 (Okla. Crim. App. 1979); Pennsylvania, *Commonwealth v. McClendon*, 874 A.2d 1223 (Pa. Super. Ct. 2005); Rhode Island, *State v. Silvia*, 836 A.2d 197 (R.I. 2003); South Carolina, *Gilchrist v. State*, 612 S.E.2d 702 (S.C. 2005); South Dakota, *State v. Stumbaugh*, 132 N.W. 666 (S.D. 1911); Vermont, *State v. Albano*, 102 A. 333 (Vt. 1917); and Wyoming, *Small v. State*, 689 P.2d 420 (Wyo. 1984).

²⁴ Aggergaard, *supra* note 9, at 662 (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 227 (3d ed. 2001)).

²⁵ *Id.*

²⁶ *Id.* at 663 (quoting GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 856-65 (1978)).

²⁷ These twenty-five states include the following: Alabama, ALA. CODE § 13A-3-23 (1975); Alaska, ALASKA. STAT. § 11.81.335 (2007); Arizona, *State v. Palomarez*, 657 P.2d 899 (Ariz. Ct. App. 1982); California, *People v. McFearson*, 70 Cal. Rptr. 3d 296 (Ct. App. 2008); Florida, FLA. STAT. § 776.013 (2005); Georgia, *McClendon v. State*, 651 S.E.2d 165 (Ga. Ct. App. 2007); Hawaii, HAW. REV. STAT. § 703-304 (2007); Idaho, *State v. McGreevey*, 105 P. 1047 (Idaho 1909); Illinois, *People v. White*, 819 N.E.2d 1239 (Ill. App. Ct. 2004); Indiana, IND. CODE § 35-41-3-2(a) (2006); Kansas, KAN. STAT. ANN. § 21-3211 (2006); Kentucky, KY. REV. STAT. ANN. § 503.050 (2007); Louisiana, LA. REV. STAT. ANN. § 14:20 (2007); Mississippi, MISS. CODE ANN. § 97-3-15 (2007); Missouri, MO. REV. STAT. § 563.031 (2007); Montana, *State v. Merk*, 164 P. 655 (Mont. 1917); Nevada, *Runion v. State*, 13 P.3d 52 (Nev. 2000); New Mexico, *State v. Horton*, 258 P.2d 371 (N.M. 1953); Oregon, *State v. Gray*, 79 P. 53 (Or. 1905); Tennessee, TENN. CODE ANN. § 39-11-611 (2007); Texas, TEX. PENAL CODE ANN. § 9.31 (Vernon 2007); Utah, UTAH CODE ANN. § 76-2-402 (2007); Virginia, *Graham v. Commonwealth*, 525 S.E.2d 567 (Va. Ct. App. 2000); Washington, *State v. Hiatt*, 60 P.2d 71 (Wash. 1936); and West Virginia, *State v. Donahue*, 90 S.E. 834 (W. Va. 1916).

²⁸ Aggergaard, *supra* note 9, at 662.

²⁹ *Id.* at 661.

³⁰ *Id.* Between 1949 and 1990 it was not clear what standard was used, but the true-man doctrine was never abandoned. *See Culverson v. State*, 797 P.2d 238, 241 n.2 (Nev. 1990).

³¹ Aggergaard, *supra* note 9, at 661.

from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm.³²

These “stand-your-ground” jurisdictions believe that “[r]equiring retreat . . . put[s] innocent people at risk as they escape an aggressor bolstered by apparently successful dominance.”³³ The “true-man doctrine” justifies self-defense when “killing [was] necessary because personal liberties [had] been threatened.”³⁴

3. Middle Ground

The middle ground theory attempts to find a balance between the necessity of the non-aggressor to protect his life and liberty, and the value of the aggressor’s life.³⁵ Two jurisdictions, the District of Columbia³⁶ and Wisconsin,³⁷ have attempted to appease both theories of retreat.³⁸ Within these jurisdictions, juries or courts analyze “the possibility of escape” and “opportunity to retreat” to determine whether deadly force was necessary and reasonable.³⁹ The Supreme Court upheld this standard in *Brown v. United States*,⁴⁰ holding that “failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt.”⁴¹ This retreat doctrine takes a middle ground approach, neither accepting nor rejecting the two differing views previously mentioned.⁴² Instead, the “middle ground theory” assesses the opportunity to retreat as a factor to determine the necessity and reasonableness of the killing in self-defense.⁴³

C. Castle Doctrine

Although this Note will not analyze the castle doctrine in depth, it should be mentioned in more than a mere footnote that all courts, including the Supreme Court,⁴⁴ follow the “castle doctrine.”⁴⁵ This common law doctrine permits the non-aggressor to use lethal force in his home when his life is endangered, even when retreating in complete safety is possible.⁴⁶ Courts have upheld the use of lethal force while in your home to protect yourself because it

³² *Erwin v. State*, 29 Ohio St. 186, 199-200 (1876), *quoted in Jaffe supra* note 8, at 161.

³³ *Aggergaard, supra* note 9, at 661-62.

³⁴ *Id.* at 663.

³⁵ *Id.*

³⁶ *Gillis v. United States*, 400 A.2d 311, 313 (D.C. 1979).

³⁷ *State v. Watkins*, 647 N.W.2d 244 (Wis. 2002); *see also State v. Wenger*, 593 N.W.2d 467, 471 (Wis. Ct. App. 1999).

³⁸ *Aggergaard, supra* note 9, at 662-63.

³⁹ *Id.* at 663.

⁴⁰ *Brown v. United States*, 256 U.S. 335 (1921).

⁴¹ *Id.* at 343.

⁴² *Aggergaard, supra* note 9, at 662-63.

⁴³ *See Jaffe, supra* note 8, at 166-67.

⁴⁴ *Beard v. United States*, 158 U.S. 550, 560 (1895).

⁴⁵ *See Aggergaard, supra* note 9, at 664.

⁴⁶ *Id.* at 664-65.

is assumed that there is no safer place for the non-aggressor to flee to than his own home.⁴⁷

There is some debate among different jurisdictions as to how far the castle doctrine should be extended, for example, whether a mobile home, an automobile, or one's own yard is considered a person's "castle."⁴⁸ The importance of the castle doctrine, with respect to this Note, is that every jurisdiction allows a person to kill an intruder if that person is in his own home and reasonably believes his life is in danger.⁴⁹

D. History of Self-Defense and Retreat in Nevada

Nevada follows the true-man doctrine.⁵⁰ This permits a person to kill his aggressor if it is more reasonable for the non-aggressor to take the aggressor's life, even though retreat is possible.⁵¹ Even though this has been the standard since 1910,⁵² it has developed. The Nevada Supreme Court first addressed self-defense in 1910 while deciding *State v. Grimm*.⁵³ In this case, Grimm approached Baker and asked him for \$7.50, which Baker owed him.⁵⁴ Baker became violent, grabbed a pool cue, and charged Grimm.⁵⁵ Baker was initially restrained but ran to the bar, where he grabbed a revolver and shot at Grimm.⁵⁶ Grimm returned fire, killing Baker.⁵⁷ The Court held:

[W]here a person, without voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty of his own free will, is attacked by an assailant, and it is necessary for him to take the life of his assailant to protect his own, then he need not flee for safety, but has the right to stand his ground and slay his adversary.⁵⁸

In a one-page decision, the Nevada Supreme Court rejected the duty to retreat doctrine and accepted the true-man doctrine.⁵⁹

⁴⁷ *Id.* "The rationale is that a person in her own home has already retreated 'to the wall,' as there is no place to which she can further flee in safety." *State v. Thomas*, 673 N.E.2d 1339, 1343 (Ohio 1997).

⁴⁸ Aggergaard, *supra* note 9, at 665; *see also* *State v. Borwick*, 187 N.W. 460, 463 (Iowa 1922) ("When [a person] takes his family or friends or guests into his car and drives out upon the public street, we think it no undue stretch of the principle to hold that the car is (in a restricted sense, perhaps) for the time being his castle . . ."); *State v. Baird*, 640 N.W.2d 363, 369-70 (Minn. Ct. App.) (ordering new trial when jurors were instructed that co-residents had a duty to retreat from a motor home), *aff'd*, 654 N.W.2d 105 (Minn. 2002); *State v. Frizzelle*, 89 S.E.2d 725, 726 (N.C. 1955) ("[T]he curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings."); *State v. Marsh*, 593 N.E.2d 35, 38 (Ohio Ct. App. 1990) ("[F]or purposes of a duty to retreat, a tent and a home are the logical equivalent of each other.").

⁴⁹ Aggergaard, *supra* note 9, at 664-65.

⁵⁰ *Culverson v. State*, 797 P.2d 238 (Nev. 1990).

⁵¹ *Quillen v. State*, 929 P.2d 893, 900 n.7 (Nev. 1996).

⁵² *State v. Grimm*, 112 P. 273, 273 (Nev. 1910).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See id.*

In 1931, the Nevada Supreme Court clarified and distinguished its holding in *Grimmett* by requiring people who begin quarrels to attempt to retreat before killing another person.⁶⁰ In *State v. Robison*,⁶¹ Mr. Robison was living with his friend, Mr. Rowland, for a while because his wife, Mrs. Robison, was troubled by Mr. Robison's drinking.⁶² After a Legion meeting on September 11, 1931, Mr. Robison returned to Mr. Rowland's home, where the two men commenced drinking a considerable amount of "moonshine whiskey."⁶³ After several drinks, Mr. Rowland told Mr. Robison that he picked up Mrs. Robison and took her home earlier that day.⁶⁴ An argument ensued that eventually turned into a grapple.⁶⁵ Mr. Rowland "pointed his left finger at [the] defendant and reached back quickly with his right hand to his right hip pocket."⁶⁶ Mr. Robison "immediately drew his gun," but shots were not immediately exchanged.⁶⁷ After more wrestling, Mr. Robison shot and killed Mr. Rowland.⁶⁸

The Nevada Supreme Court upheld Mr. Robison's homicide conviction, stating that Mr. Robison's actions were "to provoke a continuance of the assault."⁶⁹ "If he is at fault in bringing on the encounter, before he can justify the killing it must appear that he had in good faith endeavored to decline any further struggle before the mortal blow was given."⁷⁰

Following the *Robison* decision, district courts began to give jury instructions requiring the jury to determine whether the defendant made a "reasonable effort" to avoid killing his assailant before administering the mortal blow.⁷¹ By 1950, Nevada courts were beginning to adhere more closely to the principles of a duty to retreat jurisdiction.⁷²

One example is in *State v. Helm*.⁷³ Helm's employer directed Helm, a special police officer, to purchase a ticket to New York for another employee, Ferroni.⁷⁴ Helm visited Ferroni to discuss travel plans and purchase a ticket to New York.⁷⁵ Ferroni disagreed with Helm's suggested travel plans to go through Salt Lake City en route to New York.⁷⁶ The argument escalated to a

⁶⁰ See *State v. Robison*, 6 P.2d 433 (Nev. 1931).

⁶¹ *Id.*

⁶² *Id.* at 434.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 435.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 438.

⁷⁰ *Id.* at 439.

⁷¹ See *id.* at 438.

⁷² For example, in 1949 the Nevada Supreme Court upheld a district court decision, which issued jury instructions requiring the defendant, who was not the aggressor, to make a "reasonable effort" to retreat before killing his aggressor. *State v. Helm*, 209 P.2d 187, 198 (Nev. 1949).

⁷³ *Id.*

⁷⁴ *Id.* at 192.

⁷⁵ *Id.*

⁷⁶ *Id.*

point where Ferroni swung a knife at Helm.⁷⁷ During the struggle, Helm struck Ferroni on the head with a gun and shot him at least once.⁷⁸ Ferroni attempted to escape but was stopped by other police officers.⁷⁹ After informing the police officers that Helm was trying to kill him, Ferroni was able to head towards an exit.⁸⁰ The police officers attempted to persuade Helm not to shoot Ferroni, but Helm shot two or three more times, killing Ferroni, who was only a few feet from the exit.⁸¹

The Nevada Supreme Court affirmed Helm's conviction for first-degree murder for failing to make reasonable effort to retreat.⁸² This decision slightly obscured the law because, after this case, courts could issue jury instructions that required a non-aggressor defendant to make reasonable efforts to retreat, which was contrary to the precedent established in *Grimmett*.⁸³

The Nevada Supreme Court did not clarify the law on self-defense until 1990, in *Culverson v. State*.⁸⁴ Because of conflicting testimony by three witnesses, the only *Culverson* facts that are clear are that Culverson, Smith, Thomas, and Broadus were seeking drugs and that Culverson shot Smith.⁸⁵ Two people testified that Culverson acted in self-defense because Smith pulled out a gun first, and one testified that Culverson pulled his gun first.⁸⁶

The Nevada Supreme Court held that "a person, who is not the original aggressor, has no duty to retreat before using deadly force, if a reasonable person in the position of the non-aggressor would believe that his assailant is about to kill him or cause him serious bodily harm."⁸⁷ The paramount fact the court must determine is whether the defendant was the original aggressor.⁸⁸ If the defendant was the original aggressor, only *then* must he make reasonable efforts to retreat before he can use deadly force to defend himself.⁸⁹ If the defendant was attacked without deadly provocation or encouragement of his own, then there is no requirement to retreat.⁹⁰ "Nevada does not require a person to retreat when he reasonably believes that he is about to be attacked with deadly force."⁹¹ The court believed that a rule requiring a non-aggressor

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 192-93.

⁸² *Id.* at 200.

⁸³ Compare *State v. Grimmett*, 112 P. 273 (Nev. 1910), with *State v. Robison*, 6 P.2d 433 (Nev. 1931), and *Helm*, 209 P.2d 187. It seems clear that Helm would have been convicted of murder in almost every jurisdiction, but rather than focusing on the fact that he used disproportionate force (using a gun when the original aggressor only had a knife), the Nevada Supreme Court decided to focus on Helm's reasonable efforts to retreat and avoid the conflict all together.

⁸⁴ *Culverson v. State*, 797 P.2d 238 (Nev. 1990).

⁸⁵ *Id.* at 239.

⁸⁶ *Id.*

⁸⁷ *Id.* at 240-41. It is also worth mentioning that note 2 in the *Culverson* opinion reads, "To the extent that *Helm* is inconsistent with our holding in this case, it is overruled." *Id.* at 241 n.2.

⁸⁸ *Id.* at 240.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

to retreat confers a benefit on the aggressor because it is difficult for the non-aggressor to determine whether he can safely retreat.⁹² Further, the non-aggressor should be able to avoid the appearance of cowardice.⁹³

None of the justices dissented, but not all the justices agreed with this distinction.⁹⁴ Justice Rose, in a concurring opinion, argued that every person should retreat if possible to do so in “*complete safety*.”⁹⁵ Justice Rose believed that saving one life, even the life of the aggressor, is more valuable than “avoiding the appearance of cowardice.”⁹⁶ It is the state’s responsibility to exact justice and punishment, not the non-aggressor’s responsibility.⁹⁷ Lastly, Justice Rose maintained that because self-defense is based upon necessity, it is not necessary for a person to kill another if there is a possibility of escaping in complete safety.⁹⁸ “Whether a person should reasonably know that he or she can retreat with complete safety will be determined after examination of the totality of the circumstances surrounding the attack, including but not limited to the immediate excitement which is caused by the attack.”⁹⁹ Justice Rose was arguing for a lesser standard than the true-man doctrine; however, subsequent cases and statutes in Nevada have not adopted his position on self-defense and the duty of retreat.¹⁰⁰

III. PROPOSED MIDDLE GROUND FACTORS

The questions that Nevada must answer are (1) how important or valuable is a person’s liberty in comparison to a person’s life and (2) how do Nevada courts balance these interests to sustain society’s values. Nevada tends to favor a person’s liberty more than an aggressor’s life because it follows the true-man doctrine, which permits the non-aggressor to use lethal force when his life is reasonably threatened to protect his liberty.¹⁰¹ If Nevada believes an aggressor’s life is more important than a person’s liberty, then Nevada should change its laws to enforce the duty to retreat because under the duty to retreat the non-

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.* at 241 (Rose, J., concurring, with whom Springer, J., agrees).

⁹⁵ *Id.* at 242.

⁹⁶ *Id.*

⁹⁷ *Id.*; *see also* Aggergaard, *supra* note 9, at 662.

⁹⁸ *Culverson*, 797 P.2d at 242.

⁹⁹ *Id.*

¹⁰⁰ *Id.*; *see also* NEV. REV. STAT. § 200.200 (2007). The statute requires the defendant to prove self-defense by showing that (1) “[t]he danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary;” and (2) “[t]he person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given.” *See Earl v. State*, 904 P.2d 1029 (Nev. 1995). A person who reasonably believes that he is about to be killed or seriously injured need not retreat before using deadly force. *See Runion v. State*, 13 P.3d 52 (Nev. 2000).

¹⁰¹ Aggergaard, *supra* note 9, at 663. “[W]here defenders may stand their ground, killing is necessary because personal liberty has been threatened.”

aggressor may only kill his aggressor if there are no reasonable and safe means to escape the conflict.¹⁰²

This Part of the Note will briefly discuss the advantages and disadvantages of using a factor test and then suggest some factors that Nevada should adopt to balance life and liberty better.¹⁰³ Finally, this Part will address some of the major concerns that might arise if Nevada adopted the suggested factors.

A. The Advantages of the “Middle Ground” Theory for Self-Defense

Nevada should adopt a “middle ground” theory because hard fast lines do not allow for varying discretion based on the particular circumstances.¹⁰⁴ “There are several advantages to a totality of circumstances, multi-factor test First, such a test allows for flexibility. . . . A multi-factor test accepts all relevant evidence and allows the court to give the evidence the weight the circumstances deem appropriate.”¹⁰⁵

The “middle ground” theory focuses on the entirety of circumstances leading up to a killing and therefore better balances the values of life and liberty.¹⁰⁶ The “middle ground” theory evaluates the surrounding circumstances to determine the necessity and reasonableness of the non-aggressor’s actions.¹⁰⁷ The “middle ground” theory does not require the non-aggressor to be submissive to the aggressor until the final moment where escape will be impossible, but the middle ground theory also does not permit the taking of the aggressor’s life immediately upon being threatened.¹⁰⁸

B. Factors Nevada Should Adopt to Better Determine Self-Defense

After determining that the “middle ground” theory best balances life and liberty, the question then becomes what factors should a jury consider to determine consistently and accurately whether the non-aggressor pursued necessary and reasonable means to save his life? Nevada should consider the following factors: (1) the immediate excitement presented by the assailant; (2) the type of weapon threatening a person’s life; (3) the demands of the assailant; (4) the familiarity the non-aggressor has with the surrounding area where the attack

¹⁰² See generally Adam J. Katz, Comment, *Heinzman v. Mason: A Decision Based in Equity but Not an Equitable Decision*, 13 QUINNIPIAC PROB. L.J. 441, 453 (1999); Vicki Lawrence MacDougall, *Premises Liability After the KFC Case: Potential Liability of a Commercial Establishment to a Customer Injured by Provocation of an Armed Robber*, 50 CONSUMER FIN. L.Q. REP. 397, 413 (1996). “The value of human life outweighs the value society might place on frustration of crimes and protection of property.”

¹⁰³ Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims’ Rights*, 76 TEMP. L. REV. 645, 703 n.265 (2003). “There must be a balance between the risk of harm to the defendant . . . and the value of the life of the attacker.”

¹⁰⁴ Cf. Stephanie E. Ord, Note, *Ruiz v. Santa Maria: Defining “Minority Preferred Candidate” Within Section 2 of the Voting Rights Act*, 14 BYU J. PUB. L. 295, 308-09 (2000). This article focuses mostly on how to define a minority preferred candidate; however, the advantages of multi-factor tests are the same.

¹⁰⁵ *Id.* Again, this quote comes from an article discussing minority preferred candidates, but multi-factor tests in any area of law have the same advantages.

¹⁰⁶ See generally *id.*

¹⁰⁷ *Smith v. United States*, 686 A.2d 537, 544 (D.C. 1996).

¹⁰⁸ See *id.*

occurred; (5) the familiarity the non-aggressor has with the aggressor; (6) the number of people endangered; (7) other factors the court deems necessary to determine the reasonableness and necessity of the non-aggressor's actions.¹⁰⁹ Although some factors might be more influential than other factors, none of these factors alone will be sufficient in determining whether the defendant's actions were necessary and reasonable under the circumstances.

1. *The Immediate Excitement Presented by the Aggressor*

The purpose of this factor is to help determine the mindset of the non-aggressor. When placed in dangerous situations, more often than not, humans act instinctively rather than logically.¹¹⁰ The more sudden and surprising the attack, the less likely the non-aggressor will make the most reasonable choice because he will be required to act quickly, usually on instinct, rather than on thoughtful evaluation of the circumstances.¹¹¹ Conversely, a person who anticipates that a crime will be committed against him in the future will have more time to make a reasonable decision, diffuse the situation, and seek appropriate means of protection from the state.¹¹²

2. *The Type of Weapon Threatening Life*

Attackers use a variety of weapons to coerce victims to submit to their demands.¹¹³ Some weapons are much more dangerous than others and therefore more greatly threaten a person's liberties and life.¹¹⁴ Victims are more justified in killing aggressors who wield weapons that can inflict immediate death upon single use than killing aggressors who wield weapons that can only kill with continued use on the victim.

For example, generally guns and bombs are more dangerous to a non-aggressor than brass knuckles, ropes, and knives. This is the case for two main reasons. First, one bullet can easily kill a person, whereas brass knuckles and knives will usually take a couple of blows before a person's life will be in serious danger. (However, other factors that will be discussed later will deter-

¹⁰⁹ The last factor will only be briefly discussed, but it is included because every situation will be different and using a certain set of factors for every case will defeat the purpose of coming to the most accurate and fair result depending upon the circumstances. It should also be noted that I did not gather these factors from any one source. I derived them by thinking about the various circumstances in which a person might claim self-defense. Although I was able to find some support for these factors, I first determined the factors and then searched for support. Most of the factors are based on common sense arguments.

¹¹⁰ See, e.g., *People v. Smith*, 754 P.2d 1168, 1169 (Colo. 1988); *People v. Wood*, 320 N.E.2d 32, 34 (Ill. App. Ct. 1974); *State v. Jenkins*, 473 N.E.2d 264, 301 (Ohio 1984).

¹¹¹ *Culverson v. State*, 797 P.2d 238, 242 (Nev. 1990) (Rose, J., concurring). Immediacy is one factor that Justice Rose believes should be evaluated in determining self-defense.

¹¹² James Fayette, "If You Knew Him Like I Did, You'd Have Shot Him Too . . ." *A Survey of Alaska's Law of Self-Defense*, 23 ALASKA L. REV. 171, 200 (2006). This reference is specifically dealing with abused spouses killing their sleeping partner. Self-defense is not a valid justification for the killing in such circumstances. *Paul v. State*, 655 P.2d 772, 778 n.8 (Alaska Ct. App. 1982). Another situation where the crime will be conducted in the future includes threats and crimes conducted on known specific dates.

¹¹³ Susan B. Sorenson & Douglas J. Wiebe, *Weapons in the Lives of Battered Women*, 94 AM. J. PUB. HEALTH 1412, 1412 (2004).

¹¹⁴ See *id.*

mine the true threat of the weapon.) The size and type of the knife or brass knuckles might make them more or less dangerous. Further, one must take into account the size and strength of the aggressor. If the aggressor is a 275-pound body builder, brass knuckles and knives become more dangerous than they are in the hands of a 125-pound grandmother suffering from arthritis.

The second reason that guns tend to be more dangerous than ropes and knives is the distance necessary to injure the non-aggressor. If the weapon requires close proximity to inflict injury and threaten death, then retreat becomes a more viable option for the non-aggressor so long as the aggressor is not within range to use the weapon.

[R]etreat to the wall[] had its origin before the general introduction of firearms. If a person is threatened with death or great bodily harm by an assailant, armed with a modern rifle, in open space, away from safety, it would be ridiculous to require him to retreat. Indeed, to retreat would be to invite almost certain death.¹¹⁵

Although every weapon or object may eventually justify the non-aggressor in killing his assailant, obviously some weapons present a more compelling clear and present danger to the non-aggressor. The more dangerous the weapon, the less reasonable and necessary it is to require the non-aggressor to retreat.

3. *The Demands of the Aggressor*

This factor aids jurors in determining how much liberty the non-aggressor must surrender before using lethal force against his aggressor.¹¹⁶ The more unreasonable and dangerous the demand of the aggressor, the more reasonable self-defense becomes.¹¹⁷ If the demand greatly endangers or limits the liberty of the non-aggressor, then retreat and compliance are less necessary because a non-aggressor is not required to forfeit all of his liberties before defending with lethal force.¹¹⁸

For example, when an assailant is threatening rape, the non-aggressor need not comply, but is able to protect herself to the death because of the severe infringement on her liberty and life.¹¹⁹ Whereas, if the assailant is robbing the non-aggressor of his money, the infringement on his liberty is not so great and therefore killing the aggressor in self-defense is less justified.¹²⁰ In fact, the police suggest that victims of robbery comply with the robber's demands rather than escalate a confrontation.¹²¹ Here, the jury will need to determine the necessity of using lethal force with regard to the infringement on a person's liberty. The more harsh and severe the threat to a person's liberty, the more justified the non-aggressor is in using lethal force.

¹¹⁵ *Laney v. United States*, 294 F. 412, 414-15 (D.C. Cir. 1923).

¹¹⁶ See Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317 (2006).

¹¹⁷ See generally John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 543 (2005).

¹¹⁸ See generally *id.*

¹¹⁹ Chiu, *supra* note 116, at 1344-45.

¹²⁰ *Id.*

¹²¹ *Id.*

4. *The Non-Aggressor's Familiarity with the Place Where the Attack Occurred*

A non-aggressor has a smaller chance of retreating in safety if the non-aggressor does not know where safety is.¹²² The more familiar the non-aggressor is with the surroundings where the original attack occurs, the less necessary and reasonable it is for the non-aggressor to kill the aggressor because he has more knowledge of where safety lies.¹²³

A person confronted in his own neighborhood is more likely to receive aid if he runs or screams for help because the non-aggressor is more likely to know who can provide that assistance, and, in addition, the neighbors are more likely to recognize him and therefore be more willing to help him.¹²⁴ This has been particularly true in public housing communities.¹²⁵ For instance, "Unique Gibson, a public housing resident on Chicago's Far South Side, said that many public housing residents 'want to stay in the areas they know, that aren't far from their comfort zone. . . . They don't want to go where there is no one there to catch them [if they fall].'"¹²⁶

If the attack occurs in a different town or even in an unfamiliar neighborhood or building, the non-aggressor might not know whom he can trust for help and might not even know where the nearest hospital is if he is injured in his attempt to retreat. If the non-aggressor is completely unfamiliar with the surroundings, he might not even be able to give the police a correct description of where the attack occurred, or is occurring, so the police can aid him. For these reasons, the more unfamiliar the non-aggressor is with his immediate surroundings, the more unlikely he can safely retreat.

¹²² See *Allen v. State*, 871 P.2d 79 (Okla. Crim. App. 1994). Escape should be a factor to consider. See also 40 C.J.S. *Homicide* § 206 (2006).

¹²³ However, as discussed earlier, a person need not flee from the safety of his own home. Aggergaard, *supra* note 9, at 664-65; cf. Christian J. Rowley, Note, *Florida v. Bostick: The Fourth Amendment—Another Casualty of the War on Drugs*, 1992 UTAH L. REV. 601, 620 n.118. Distinguishing two immigration cases, the author Rowley identified one difference that "the employees were approached in familiar surroundings, reducing the threatening nature of the encounter." I realize that self-defense and immigration cases are not comparably comparable; however, both deal with one's liberties and freedom to find a safer place. In this respect, it is my opinion that the two are comparable.

¹²⁴ See generally Molly Thompson, *Relocating from the Distress of Chicago Public Housing to the Difficulties of the Private Market: How the Move Threatens to Push Families Away from Opportunity*, 1 Nw J. L. & Soc. POL'Y 267, 284-85 (2006). This particular section of the article discusses the difficulty of moving from one public housing complex to another. These moving people must cope with the fear of unknown neighbors and unknown crime in the area. There is a concern that moving will detach them from their "familiar surroundings and social networks."

¹²⁵ See generally *id.*

¹²⁶ *Id.* (omission in original) (quoting Kate N. Grossman, *More CHA Residents Are Moving Up; But 'Low Poverty' Relocations Have Pitfalls, Officials Say*, CHI. SUN TIMES, Mar. 20, 2005, at 15).

5. *The Familiarity the Non-Aggressor Has with the Aggressor*

A large portion of victims know their assailant.¹²⁷ This factor is intended to require the victim to consider his assailant's personality and intentions before killing the assailant. A victim who knows the aggressor will have a better understanding of the seriousness of the situation or will know how to defuse the situation entirely. In 2005, the Department of Justice reported that of the almost five million crime victims (4,718,330) in the United States, nearly half of the victims (47.7%) knew their assailant.¹²⁸ A comment in the *Journal of Juvenile Law* reported that over 40% of child victims of sexual abuse knew their assailant,¹²⁹ and the Department of Justice reported that 22% of all murders in 2002 were family murders.¹³⁰ The question the jury must answer under this factor is whether the previous knowledge about and relationship with the aggressor should have reasonably changed the non-aggressor's reaction.

The Nevada Supreme Court suggested that the acquaintance the non-aggressor has with his assailant is a factor the jury may consider.¹³¹ In *Robison*, the defendant knew his aggressor from childhood and "knew that it was his custom to go unarmed."¹³² Knowing such intimate and distinct facts about a person's particular aggressor will lessen or enhance the actual level of danger in which the non-aggressor finds himself.¹³³

If the two people involved in the confrontation are (or were) more than casual acquaintances, then not only will the non-aggressor know the habits and skills of his aggressor, but he also is more capable of determining the danger and seriousness of the situation.¹³⁴ The non-aggressor might even be able to reduce, minimize, or extinguish the tension and severity of the situation.

This is true for a few reasons. First, if the non-aggressor knows his aggressor, he also presumably knows what caused this confrontation. The non-aggressor is more likely to know how angry or serious his assailant is. He will be more familiar with the assailant's tone of voice, physical gestures, and other actions. On the other hand, a non-aggressor who is familiar with his assailant might know that the demands are not serious and therefore not feel so threatened.

Second, people familiar with one another presumably are more likely to talk and listen to one another than to strangers. In such situations, rational discussion might be able to conclude the threatening situation with little or no injury to either person.¹³⁵

¹²⁷ U.S. Department of Justice, Bureau of Justice Statistics, Table 27: Personal Crimes of Violence (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus/current/cv0527.pdf>.

¹²⁸ *Id.*

¹²⁹ Marisa Mortensen, Comment, *GPS Monitoring: An Ingenious Solution to the Threat Pedophiles Pose to California's Children*, 27 J. Juv. L. 17, 23-24 (2006).

¹³⁰ U.S. Department of Justice, Bureau of Justice Statistics, Family Violence Statistics: Including Statistics on Strangers and Acquaintances, <http://www.ojp.usdoj.gov/bjs/abstract/fvs.htm> (last visited Feb. 9, 2008).

¹³¹ *State v. Robison*, 6 P.2d 433, 438 (Nev. 1931).

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ This is simply a common sense argument based upon everyday experience and common knowledge. *See generally* *People v. Salcido*, No. A097014, 2004 WL 1192445 (Cal. Ct.

Third, the familiar non-aggressor also will better know the agility and skill of the aggressor. For example, the familiar non-aggressor will more likely know if the aggressor has ever handled a weapon before and whether this is his first lethal confrontation. The more familiar they are with one another, the more likely the non-aggressor will know whether the aggressor has a real desire to inflict harm or is even physically able to force the non-aggressor to fulfill the demand.

Obviously, the familiarity of the non-aggressor with his aggressor must be more than a one-time introduction at a company party.¹³⁶ However, if the only time the non-aggressor met the aggressor, he witnessed or learned of the aggressor's violence and anger, then the non-aggressor would be more justified in using lethal force because he would recognize the imminence of the danger. To justify a failure to retreat, the non-aggressor must know something about the aggressor that would change a reasonable person's actions in a similar situation.

6. *Number of People in Danger*

The more people endangered by the aggressor's actions, the less necessary retreat is. This might seem counterintuitive in the sense that if there are so many people in danger, then certainly the aggressor will not be able to limit everyone's liberty. However, it can be safely assumed that aggressors do not attack a group of people, unless they believe they have sufficient power to force all into submission.¹³⁷ If an aggressor does not believe this to be the case, then it must be assumed that either the aggressor is not thinking rationally or he does not want anything from the potential victims except confrontation, which will naturally result.¹³⁸

An aggressor simply seeking confrontation is acting so irrationally that rational attempts to defuse the situation are futile and people must be able to confront the aggressor with any means necessary, including lethal force.¹³⁹ Therefore, generally, it must be assumed that the rational aggressor believes, whether correctly or not, that he will be able to enforce submission by all.¹⁴⁰

In terms of numbers, when fewer aggressors are threatening more non-aggressors, then it is more reasonable for non-aggressors to kill their aggressors

App. May 28, 2004). This case permitted common knowledge and everyday experience to persuade a jury.

¹³⁶ See *Robison*, 6 P.2d at 438.

¹³⁷ See George J. Benston & Frank J. Vandall, *Legal Control over the Supply of Handguns: An Analysis of the Issues, with Particular Attention to the Law and Economics of the Hamilton v. Beretta Lawsuit Against Handgun Manufacturers*, 26 PACE L. REV. 305, 341 (2006).

¹³⁸ E.g., *Runion v. State*, 13 P.3d 52 (Nev. 2000); *Robison*, 6 P.2d 433; *State v. Grimmer*, 112 P. 273 (Nev. 1910).

¹³⁹ Christopher Slobogin, *The Integrationist Alternative to the Insanity Defense: Reflections on the Exculpatory Scope of Mental Illness in the Wake of the Andrea Yates Trial*, 30 AM. J. CRIM. L. 315, 330 (2003).

¹⁴⁰ Benston & Vandall, *supra* note 137, at 341. "[T]hey must either use violence or its threat to expand or defend their share of illegal markets." This is particularly true in rape cases. *Commonwealth v. Minor*, 591 S.E.2d 61, 66 (Va. 2004). "Simply put, the other crimes evidence here showed the defendant's intent, in each instance, to force the victim to submit to sexual contacts of various sorts, regardless of the victim's wishes."

rather than retreat.¹⁴¹ Again, this might seem counterintuitive because if there are so many potential victims, then retreat and escape are more likely simply due to the sheer numbers of potential victims involved. The concern with this reasoning is not that some individuals can retreat in complete safety, but instead it is the aggregate of all the non-aggressors' potential to flee in complete safety. It will be much more difficult for every non-aggressor to retreat in complete safety because the aggressor need subdue only one person to retain his superiority, require submission, and accomplish his objectives.¹⁴²

Further, if the aggressor becomes angry at the possible loss of control he has over the situation, he might become more inclined to act irrationally in an attempt to regain control, which might lead to him killing a non-aggressor. If anyone should lose his life, it should be the aggressor who initiated the violent situation rather than a victim the aggressor believed he could manipulate. For these reasons, the more people the aggressor is threatening, the less necessary and reasonable retreat is because of the number of lives being threatened.

7. Other Factors the Judge Believes Will Aid the Jury in Determining the Necessity and Reasonableness in the Particular Case

As the Nevada Supreme Court decided in *Runion*, each case will have its own peculiarities due to the actors and circumstances and therefore "'stock' instructions" are not appropriate.¹⁴³ If the jury needs to evaluate each case differently with more factors, such as the intoxication of the aggressor, then common sense, fairness, and justice should guide a judge when deciding how the additional factors will aid the jury in determining the reasonableness and necessity of retreat. For example, if a judge believes that the intoxication of the aggressor is important in determining whether retreat was an option, then the intoxication factor would likely make it more probable that the non-aggressor could retreat from the situation rather than kill his assailant because of the aggressor's lessened control over his faculties.¹⁴⁴

C. Summary and Final Thoughts on the Seven Factors

Two elements that Nevada requires to prove self-defense are (1) that the potential victim had a reasonable apprehension of danger¹⁴⁵ and (2) that it was necessary for the potential victim to use lethal force.¹⁴⁶ The purpose of the factors briefly examined above is to aid the jury in determining the necessity of killing another person. These seven factors are not exhaustive when determining the necessity of retreat. No one factor should be conclusive, and the jury need not weigh each factor equally.

¹⁴¹ See *Hanks v. Jackson*, 123 F. Supp. 2d 1061, 1074 (E.D. Mich. 2000); see also *State v. Powers*, 654 N.W.2d 667, 675 (Minn. 2003).

¹⁴² E.g., Jeffrey E. Zinsmeister, Comment, *In Rem Actions Under U.S. Admiralty Jurisdiction as an Effective Means of Obtaining Thirteenth Amendment Relief to Combat Modern Slavery*, 93 CAL. L. REV. 1249, 1283 n.263 (2005).

¹⁴³ *Runion*, 13 P.3d at 58-59.

¹⁴⁴ ADIC, Effects of Alcohol Intoxication, <http://www.indiana.edu/~adic/effects.html> (last visited Feb. 9, 2008).

¹⁴⁵ *Culverson v. State*, 797 P.2d 238, 239 (Nev. 1990).

¹⁴⁶ NEV. REV. STAT. § 200.200 (2007).

The major difference between the proposed middle ground theory and the duty to retreat theory is that in duty to retreat jurisdictions, you must retreat if escape in complete safety is reasonably possible.¹⁴⁷ This proposed middle ground factor theory is designed so that even though retreat is reasonably possible, if life and liberties are in sufficient danger, a person may use lethal force to defend himself or others. Most people do not know whether they can retreat in complete safety until they attempt to escape and either free themselves or receive a bullet in the back.¹⁴⁸ The purpose of the proposed factor theory is to create a standard that is more malleable to the specific circumstances in order to balance better the importance of a person's life and liberty.

This proposed factor theory of retreat balances the actual danger presented and the reasonableness and necessity of retreat to determine whether the non-aggressor truly acted in self-defense. This theory is preferable because it does not require the non-aggressor to submit to the aggressor until retreat is no longer viable, but it also does not permit the killing of another human or an escalation of events that leads to a killing simply because the non-aggressor's liberties are momentarily limited.

This proposed factor theory for Nevada also purports that the greater the loss of liberty, the greater justification the non-aggressor has in killing his aggressor. This theory requires the jury to determine whether the non-aggressor acted in self-defense. It simply guides the jury in how logically to come to a conclusion and requires them to balance the loss of life and the loss of liberty.

IV. DIFFICULTIES FACING THE NEVADA COMMON LAW OF SELF-DEFENSE IF NEVADA WERE TO ADOPT THIS MIDDLE GROUND FACTOR THEORY

The common-law change from the true-man doctrine to a more middle ground factor approach does not need to be complicated and time consuming.¹⁴⁹ The first suggestion to make a smooth and quick transition is to petition the Nevada Legislature to pass a statute enacting the above-mentioned factors rather than allowing the common law to adopt such a system.

This change will be fairly monumental and significant in determining whether a person acted in self-defense. Requesting the Nevada Legislature to adopt such an important change will be the least prejudicial to defendants because in that way the change will not surprise defendants. Further, a defendant and his attorney who lacked any notice that the trial judge decided to utilize the proposed middle ground theory rather than the pre-established true-man doctrine of self-defense are prejudiced. For the judge to simply change the applicable criminal standard violates the defendant's due process rights.¹⁵⁰

¹⁴⁷ *People v. Fermin*, 828 N.Y.S.2d 546, 548 (App. Div. 2007).

¹⁴⁸ *E.g.*, *Rodgers v. State*, 948 So. 2d 655, 660 (Fla. 2006).

¹⁴⁹ *See, e.g.*, *Alabama Legislature to Consider Self-defense Bill*, GOTTLIEB-TARTARO REP., Dec. 2005, at 4, available at <http://www.saf.org/gt/gt132.pdf>. The *Gottlieb-Tartaro Report* reported that Alabama was going to contact Florida to avoid any obstacles in becoming a "no-retreat" jurisdiction. Nevada can contact a number of states to discuss how best to avoid problems involved with altering the self-defense standard.

¹⁵⁰ *United States v. Dupas*, 419 F.3d 916, 920 n.3 (9th Cir. 2005) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964)).

In addition, if Nevada waited until the courts made the changes, then this transition could take several years and probably even decades before the judges could reasonably morph the true-man doctrine into the middle ground theory.¹⁵¹ This change is not a simple or subtle evolution in the common law, and, hence, for reasons of jurisprudence and stare decisis, the Nevada Legislature should pass a bill making the transition.

Regardless of whether the Nevada Legislature adopts the proposed middle ground factors, Nevada should amend the self-defense statute to clarify the controlling self-defense theory. Currently the Nevada self-defense statute reads, “[I]t must *appear* that . . . [t]he danger was so urgent and pressing that, in order to save his own life, . . . the killing of the other was *absolutely necessary*.”¹⁵² This is not a true-man standard. *Black’s Law Dictionary* defines “absolute” as “[f]ree from restriction, qualification, or condition.”¹⁵³ “Absolutely necessary,” from its plain meaning, must mean that the necessity of the killing must be completely, without qualification, necessary. A killing can only be “absolutely necessary” if killing is the only option. From the plain meaning of the statute, how can a killing ever be “absolutely necessary” if another alternative, such as retreat, exists?

The wording of the Nevada statute currently requires the victim to retreat, even though that is not the way courts apply the statute.¹⁵⁴ In *Runion v. State*, the Nevada Supreme Court declared:

While the phrase “absolutely necessary” seems to indicate that self-defense is a justification for homicide where a person is actually in imminent danger, the use of the word “appear” implies that self-defense may be a justification for homicide in instances where a person reasonably believes that he is about to be seriously injured or killed but he is mistaken in that belief.¹⁵⁵

Why the court emphasized “appear” more than “absolutely” is unclear, but this is how the Nevada Supreme Court has interpreted the Nevada self-defense statute, even though at first glance it might seem that Nevada requires its citizens to retreat rather than engage in lethal conflict when a person’s life is in danger.¹⁵⁶ Regardless of whether the Nevada Legislature adopts the middle ground factors, it should amend the current and unclearly written self-defense statute.

The separation of powers within the Nevada Constitution gives the power of creating new laws to the Nevada Legislature.¹⁵⁷ It is not the court’s prerogative, duty, or responsibility to change or create law.¹⁵⁸ Courts are authorized to interpret the laws that the Nevada Legislature has enacted.¹⁵⁹ Further, citizens,

¹⁵¹ It was not until 1876 that a state court developed a new self-defense standard. It took over 100 years for the standard to evolve fully. See *Erwin v. State*, 29 Ohio St. 186 (1876).

¹⁵² NEV. REV. STAT. § 200.200 (2007) (emphasis added).

¹⁵³ BLACK’S LAW DICTIONARY 7 (8th ed. 2004).

¹⁵⁴ NEV. REV. STAT. § 200.200.

¹⁵⁵ *Runion v. State*, 13 P.3d 52, 56 (Nev. 2000).

¹⁵⁶ *Id.*

¹⁵⁷ NEV. CONST. art. 4, § 1.

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* art. 6.

through their representatives, should determine whether the middle ground factors are preferred over the true-man doctrine.¹⁶⁰

There are at least three concerns that Nevada might have with adopting a middle ground factor test: (1) increased confusion because the statute will not be as clear as the current Nevada standard that does not require retreat; (2) the proposed middle ground theory is too complicated for juries to efficiently utilize; and (3) there will be an increase in the number of cases being tried in the Nevada courts. Although each of these concerns has some validity, none outweighs the need to change the law in order to preserve a person's life under some circumstances. The proposed middle ground theory is a rational attempt to balance the loss of liberty and the loss of life and ensure the most just result.

A. *Increased Confusion Due to the Lack of Clarity*

Although the application of the Nevada true-man doctrine appears more clear and simple than the middle ground theory, it is not any easier to analyze. The true-man doctrine only requires the defendant to prove that a reasonable person in similar circumstances would believe that the aggressor would take his life or cause great bodily harm.¹⁶¹ However, the analysis for the jury is a little more complicated. The true-man standard requires the jury to evaluate the actual or apparent danger.¹⁶² Specifically, the jury must determine whether the danger "arouse[d] in [the defendant's] mind an honest belief and fear that he is about to be killed or suffer great bodily injury,"¹⁶³ whether "[the defendant] act[ed] solely upon these appearances and his fear and actual beliefs,"¹⁶⁴ and whether "[a] reasonable person in a similar situation would believe himself to be in like danger."¹⁶⁵ These are the guidelines given to juries before they deliberate. The true-man standard gives jurors some guidance, but the guidelines are very broad and malleable, which can be very confusing to a juror.

The factors proposed in the middle ground theory are an attempt to require jurors to analyze factor-by-factor in comprehending the dangers of the situation, in deciding whether the defendant reasonably and necessarily acted in self-defense, and in eventually coming to a conclusion. These factors give the jurors specific facts to evaluate that will aid them in their conclusion. Jurors will still be able to bring their experiences into their deliberation, but giving them some factors with which to analyze the facts should help clarify the confusion of a trial and help them come to a just conclusion. The factors might not be as clear as the general true-man rule that a non-aggressor can kill his aggressor when his life is threatened, but the rule is not nearly as important as the accuracy of the analysis.

¹⁶⁰ See *id.* art 4, § 1.

¹⁶¹ *Runion*, 13 P.3d at 55.

¹⁶² *Id.* at 56.

¹⁶³ *Id.* at 59.

¹⁶⁴ *Id.* This factor tends to coincide with the initial factor of determining whether the defendant was actually in danger rather than acting out of preconceived conceptions of the original aggressor.

¹⁶⁵ *Id.*

B. A Jury Is Incapable of Comprehending or Implementing Such a Complicated Standard of Factors

In *Culverson*, Justice Rose wrote a concurring opinion that disagreed with the majority opinion that juries are incapable of determining whether “a reasonable person should know that he or she could retreat without using deadly force.”¹⁶⁶ Justice Rose pointed out that “[a] jury is required to make many difficult decisions.”¹⁶⁷ In the course of a trial, the jury must decide a variety of difficult issues that determine the outcome of the case.¹⁶⁸

In fact, Nevada courts have realized that every self-defense case will be different and therefore the jury instructions should rarely be the same.¹⁶⁹ “[Nevada] district courts should tailor instructions to the facts and circumstances of a case, rather than simply relying on ‘stock’ instructions.”¹⁷⁰ All of these decisions and jury instructions are a little complicated, yet the jury system has survived for several centuries now.¹⁷¹

Even if the majority in *Culverson* was correct to posit that the jury is not apt to determine correctly whether the defendant could have safely retreated, one possible reason for this lack of capability is that the law has not provided a proper path to follow that will guide the jurors through the analysis. The middle ground factors provide more guidance. If jurors become confused, lawyers can utilize “[a]n experienced expert [to] explain behaviors that jurors often find baffling.”¹⁷²

In addition, because attorneys will know that the jury will be using a number of significant factors in making a conclusion, they will present the evidence supporting the factors more effectively to persuade the jury accordingly. Hence, not only will the factors guide the jury’s reasoning, they will also guide the attorneys in their manner of presenting evidence. Juries will not be making inferences and assumptions on evidence never presented. The relevant factors will aid the jury in its process of determining whether the defendant acted in self-defense.

C. Likelihood of More Cases Requiring More Time to Conclude

Some will argue that going through an in-depth analysis of each of the factors will greatly extend the time required for a trial.¹⁷³ Not only will each case consume more time, but more cases will be filed and tried because if there

¹⁶⁶ *Culverson v. State*, 797 P.2d 238, 242 (Rose, J., concurring).

¹⁶⁷ *Id.*

¹⁶⁸ *See generally id.*

¹⁶⁹ *Runion*, 13 P.3d at 58-59.

¹⁷⁰ *Id.* at 59.

¹⁷¹ *See* Stephen Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 288 (1999) (“The United States’s allegiance to the civil jury is the product both of its early colonial history and the constitutional debates at the conclusion of the Revolutionary War. The jury trial came to the New World with the English colonists and was, from the earliest times, the established means of resolving legal disputes.”) (footnote omitted).

¹⁷² Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, PROSECUTOR, Nov.-Dec. 2006, at 12, 14.

¹⁷³ This is a common sense argument. There is not really any empirical evidence to show what would definitively happen because Nevada has not adopted such a standard; therefore this analysis is simply weighing the advantages and possibilities on both sides.

is a question of whether the defendant could have retreated, a trial will ensue due to the consequences at stake. Both of these results will slow an already overworked judicial branch¹⁷⁴ to the point where the factors are no longer beneficial to society.

Although there might be some truth that more cases will be brought to trial, therefore requiring more judicial resources, the impact on the courts might not be as great as one would think. The assumption that trials will take more time to conclude arises from the belief that the parties are going to need more time to introduce evidence to prove each factor. It is true that each party will desire to prove each factor, but it will not require a lot more time because most of the evidence that attorneys will present would be presented regardless of which standard Nevada used. The factors are designed to use the circumstances and facts to determine whether the defendant acted in necessity.

Just because the analysis is different does not necessarily mean that the amount of evidence needed to prove self-defense would change. One of the desired outcomes from using these proposed factors is that the jury will become more efficient in reaching a verdict because the jury will be analyzing smaller aspects of the bigger picture. The jury will then be able to put the smaller pieces together to see the big picture and determine the appropriate verdict. These factors will only be tools to aid jurors in analyzing the overall situation. The current standard only requires the jurors to see the big picture. The difference is that the factors dissect the situation, requiring jurors to make determinations on smaller aspects of the overall picture. The time needed at trial to prove or disprove self-defense will unlikely be significantly greater.

The second point, that the district attorney's office will file more cases, is likely true because the key issue will not be whether the defendant was faced with a life or death situation, but instead whether killing the person was necessary and reasonable.¹⁷⁵ This issue may be more difficult to decide until discovery has occurred and more facts are revealed. However, two safeguards will prevent a large increase in cases filed. First, district attorneys and other state officials are unlikely to waste limited resources of time and money on frivolous claims. "Nevada . . . police and prosecutors . . . have generally shown the common sense to forgo prosecuting crime victims who defend themselves."¹⁷⁶ Just because one person killed another does not necessarily mean that the district attorney will prosecute the defendant to the fullest extent possible.

¹⁷⁴ In 2004, Nevada courts, including both criminal and civil, had a total of 1,004,583 cases incoming. In that same time, the Nevada courts had 807,592 cases outgoing. Nevada courts are completing about 80% of the caseload. See COURT STATISTICS PROJECT, STATE COURT CASELOAD STATISTICS, 2005, at tbl. 2 (2006), available at http://www.ncsconline.org/D_res_earch/csp/2005_files/State%20Court%20Caseload%20Statistics%202005.pdf. In 2004, 149,096 criminal cases were filed in Nevada. The Nevada courts were only able to complete 99,890 cases. *Id.* at tbl. 6. These numbers are not completely accurate because a few of the courts did not report their entire incoming and outgoing caseload. Some courts only reported either their incoming or their outgoing caseload. *Id.* at tbl. 2.

¹⁷⁵ Again, because Nevada has not enacted such a statute, I am only speculating about what might happen. This portion is only articulating some likely concerns.

¹⁷⁶ Editorial, *News from the Pro-Crime Lobby: Group Fights Against the Concept of Self-Defense*, LAS VEGAS REV.-J., Sept. 5, 2006, at 6B.

This introduces the second safeguard, which is that after the district attorney files a case, the prosecutor can drop the charges and the case at any point in the litigation.¹⁷⁷ As more facts are revealed through discovery, the district attorney may realize the innocence of the defendant and voluntarily dismiss the claims. Further, because the district attorney will know precisely what factors the jury will be evaluating, it is possible that he will benefit because he will better be able to comprehend how strong his case against the defendant really is rather than guessing on how the jury is going to interpret and analyze the evidence presented.

These questions about time are serious considerations that Nevada must ponder because there will likely be an increase in the resources devoted to prosecuting defendants.¹⁷⁸ The question to ask is, "How much of Nevada's resources should be used to determine whether a person murdered another person or whether he killed him in self-defense to preserve his life and liberties?" If utilizing the middle ground factors will require more judicial resources than Nevada is willing to invest, then maybe it is best to continue employing the no-retreat doctrine. But if Nevada believes that coming to the best decision in a homicide case is more important, then Nevada will benefit by implementing the middle ground factors.

V. CONCLUSION

Necessity is the only reason a person should kill another human.¹⁷⁹ The duty to retreat doctrine is an unreasonable standard because it is nearly impossible to evaluate whether a defendant could have retreated in complete safety "in the presence of an uplifted knife."¹⁸⁰ The no-retreat doctrine is irrational because it permits the most drastic means of determent—lethal force—without reflection about other options and the true danger confronting a defendant.¹⁸¹ Both opposing doctrines do not focus on the reasonable necessity of killing another person.¹⁸² Hence, the best standard is the proposed middle ground theory with which the jury will evaluate each case separately according to the unique objective facts to determine necessity.

Nevada should adopt the following seven factors: (1) immediacy of the excitement, (2) type of weapon threatening life, (3) the demand of the aggressor, (4) the familiarity the non-aggressor has with the place of attack, (5) the familiarity the non-aggressor has with the aggressor, (6) the number of people in danger, and (7) other factors the judge believes will aid the jury in determining self-defense. These factors will assist the jury in determining the necessity

¹⁷⁷ FED. R. CIV. P. 41(a).

¹⁷⁸ Again, this is just a common sense economical argument that the more cases a lawyer files the greater the amount of resources the lawyer will need.

¹⁷⁹ See *State v. Cox*, 23 A.2d 634, 642 (Me. 1941).

¹⁸⁰ *Brown v. United States*, 256 U.S. 335, 343 (1921).

¹⁸¹ See generally *Runion v. State*, 13 P.3d 52, 56 (Nev. 2000). The defendant acts in self-defense "where [he] reasonably believes that he is about to be seriously injured or killed but he is mistaken in that belief."

¹⁸² See generally *Brown*, 256 U.S. 335.

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and reasonableness of killing another person, which are the true measures of self-defense.¹⁸³

Even if Nevada decides not to accept this proposed middle ground factor test, Nevada will benefit from creating a list of factors for a jury to evaluate under the current no-retreat standard because factors give more guidance to jurors to ensure that they come to a more just conclusion, especially when the particular facts of the event are so important.¹⁸⁴ “In laying down a rule for the government of a jury, accuracy, clearness, and precision should be studied and sought after . . . to render it a safe and certain guide.”¹⁸⁵ The proposed factor test is an attempt to make the verdicts more accurate, clear, and precise.

¹⁸³ See generally *Culverson v. State*, 797 P.2d 238 (Nev. 1990).

¹⁸⁴ See Response, *Professor Laurence Tribe's Response*, 28 PEPP. L. REV. 537, 542 (2001). Professor Chemerinsky thinks “balancing factors are inherent to any reasonableness and totality of the circumstances test that doesn’t lend itself to bright-line rules, but it has to be fact specific.”

¹⁸⁵ *Farrish v. State*, 63 Ala. 164 (1879).