

Advocacy of the Imperfect Self-defense Theory for Nondeadly aggressors in U.S. Criminal Law

Yiran Zhang *

Criminal Justice School, Zhongnan University of Economics and Law, Wuhan, China

* Corresponding Author Email: 202111180063@stu.zuel.edu.cn

Abstract. In self-defense theory, there is a special situation. The aggressor attacks the defender by nonlethal means, and the defender defends him with lethal force; then, the aggressor fails to fulfill his duty to withdraw from the conflict and, instead, proceeds directly to self-defense with lethal force, which results in the death of the initial defender. The question of how to convict the aggressor for his homicidal act in such a situation becomes controversial. There are three conclusions to the problem in U.S. criminal law, and they are murder, innocence, and voluntary manslaughter. To prove the voluntary manslaughter conclusion, there are three paths: failure to satisfy the elements of murder, defense of provocation, and imperfect self-defense. Through theoretical and practical analysis, in this situation, the aggressor should be convicted of voluntary manslaughter, and the imperfect defense theory can provide a sound theoretical basis for this conclusion.

Keywords: Self-defense; imperfect self-defense; aggressor; voluntary manslaughter.

1. Introduction

In U.S. criminal law, defense, as a major kind of justification, can be divided into self-defense, property defense, defense of others, and law enforcement defense, depending on the object of interest protected. Self-defense refers specifically to self-defense to protect one's own body. Self-defense in U.S. criminal law means that the law permits a person to use force against another person if firstly, he is not the aggressor, and secondly, he reasonably believes that the use of force is necessary to protect him from imminent unlawful attack by another person [1]. According to this definition, "not being the aggressor" is a prerequisite for self-defense, as the aggressor is the one who in some way provokes the conflict and causes the other to defend himself. In fact, under certain conditions, the initial aggressor can also defend himself against the defensive behavior of the other party after triggering the defensive behavior to protect himself. According to the general theory, the aggressor regains the right to self-defense after triggering the defensive behavior of the other party if he retreats in good faith, i.e., abandons his previous attack to take cover, so that the initial defender should know that the conflict has ended. When the aggressor fulfills his duty to retreat, his defensive behavior can be justified as self-defense. However, the question is, if the aggressor does not retreat first and instead immediately uses deadly force to defend himself, resulting in the death of the initial defender, how to recognize his homicidal act?

Aggressors can be divided into fatal and nonfatal aggressors based on whether deadly force was used to initiate the conflict. In response to the question posed above, there is little theoretical controversy that a fatal aggressor can be convicted of murder if he or she fails to meet the duty to retreat and defend directly with deadly force and causes the death of the initial defender. The theoretically controversial issue is how a nonfatal aggressor should be convicted if he does not retreat first but instead defend directly with lethal force against the act of defense and causes the death of the initial defender. Currently, three typical theoretical views exist, including the murder view, the innocence view, and the voluntary manslaughter view. To prove the voluntary manslaughter view, there are three different means, each advocating different theoretical paths to prove that aggressor constitutes the crime of voluntary manslaughter.

This paper compares these different views and argues that if a non-lethal aggressor defends himself by using lethal force without retreating first, resulting in the death of the initial defender, he should

be considered to be guilty of voluntary manslaughter based on the theory of imperfect defense, which is more advantageous in both theory and practice than other views.

2. Controversy over the Views: Murder, Innocence, or Voluntary Manslaughter?

The aggressor attacked the defender with non-lethal means, and the defender defended with lethal force. The aggressor did not fulfill the duty to retreat, but directly defended with lethal force, and caused the death of the defender. In such a situation, how should the aggressor be convicted for the homicide? There are three theoretical views: murder, innocence, and voluntary manslaughter, which are described below.

2.1. Murder

The traditional American criminal law theory has an "all or nothing rule" for self-defense, which means that unless the defender meets all the elements of self-defense, he cannot plead self-defense at all. The murder view is a concrete application of this rule. This view argues that the defender should be FREE from fault for the initial conflict and that even if the aggressor's minor fault triggers the conflict with the initial defender, the aggressor will therefore have no right to self-defense. Therefore, his use of deadly force in defense, which causes the death of the initial defender, is not justified and is no different from ordinary murder. The rationale for this view lies in the absolute adherence to the elements of self-defense. There are three elements of self-defense, including the necessity component, The proportionality component, and the reasonable belief in the imminence of danger and the necessity of defense [1]. Suppose the aggressor, out of his own free will, chooses to cause a violent confrontation with the initial defender. In that case, the resulting use of lethal force is avoidable and not truly necessary. Therefore, the aggressor cannot plead self-defense because of the loss of necessity component¹. There are cases in judicial practice that follow this view. For example, some courts held that although the initial aggressor did not carry out the attack with lethal intent but only with non-lethal blows or mere verbal provocation unless he retreated in good faith, his killing could not be justified as self-defense².

This article argues that the murder theory is flawed both from theoretical proof and a practical perspective.

Firstly, under the self-defense theory, an aggressor should have the right to defend himself when confronted with unlawful violence. The traditional view that "the aggressor has no right of defense" is based on the fact that self-defense can only be carried out against unlawful violence. When the aggressor does not carry out a physical attack for lethal purposes or with deadly forces but triggers the initial defender to defend with clearly excessive deadly force, at this point, the defender's violence is unlawful due to the loss of proportionality component, and the aggressor can defend.

Secondly, the argument is also problematic under the murder theory. Murder in U.S. criminal law can consist of four kinds of acts. Firstly, the defendant kills with the intent to kill. Secondly, the defendant kills with the intent to cause grievous bodily injury. Thirdly, the defendant kills with extreme recklessness of another's life. Fourthly, felony-murder, that is, the defendant kills with the intent to commit a felony and causes the death of another in the course of committing the felony [1]. The aggressor, who provokes a conflict with the initial defender for non-lethal purposes and later causes the death of another person for defensive purposes, does not have the intent to kill and cause grievous injury, nor does it constitute extreme recklessness of another person's life. Therefore, he does not constitute the first three kinds of murder mentioned above. So, does he constitute the fourth type, felony-murder? This article argues that it also does not.

Felony-murder means that if the defendant intentionally, recklessly, negligently, accidentally, or unforeseeably causes the result of death in the commission or attempted commission of a felony, then

1 Andrews v. United States, 125 A.3d 321-322 (2015) .

2 State v. Murdy, 81 Ia.1. c. 614, 47 N. W. 867 (1891); Leonard v. State, 66 Ala. 461 (1880).

he will be convicted of murder. Because of the potential danger of undue expansion of the defendant's liability in the application of felony-murder, a restriction on applying this rule has been widely supported, one of which is the independent felony limitation. The principle of independent felony limitation refers to the requirement that the commission of a felony should be independent of the act of killing or that the defendant should have an independent felony purpose concerning the killing [1]. Specifically, under this limitation, the felony murder rule cannot be applied to all assaultive-type felonies because the defendant's felonious act of causing serious bodily injury to the other person is not independent of the homicide but rather can be construed as subordinate to the homicide. Under this principle, felony-murder can be applied to some felonies against property because of the independence of the act and purpose of unlawfully acquiring property as opposed to the act of killing. The independent felony limitation is reasonable. Firstly, without this limitation, all acts of assault that result in death would be convicted as murder. This would result in voluntary manslaughter being characterized as murder for causing death, and then there would be no room for voluntary manslaughter [1]. Secondly, the purpose of the felony-murder rule is to deter the perpetrator, to remind him of how he acts, and to try to choose a way to commit the felony that does not cause significant bodily harm to the victim. Nevertheless, for assaultive felonies, the rule cannot have this effect. The nature of the act in an assaultive felony is such that it poses a significant risk to the victim's life, and there is no other safer, restrained way for the perpetrator to achieve his criminal objective. Thus, it is inappropriate to convict a nonfatal aggressor of murder even when he attacks the initial defender, even if he attempts to commit a felony. Because his assault and subsequent acts of defense are not independent, objectively or subjectively, of the act that causes the death of the defender. A murder conviction would, in fact, expand his criminal liability.

Third, in practice, what usually happens is that after someone starts a conflict, two people fight each other, and one of them escalates the struggle into a fatal one and causes the death of one of them. The basis for judging the existence of the right to self-defense is more based on who escalated the conflict into a deadly struggle rather than who started the conflict in the first place. It would be unjust to deny someone the right to self-defense simply because he provoked a non-lethal conflict.

2.2. Innocence

The innocence view holds that where a nonfatal aggressor is defended by a defender with deadly force, his right of self-defense is immediately restored even if he does not retreat. In this case, the aggressor's killing of the defender can be fully justified as self-defense, and the aggressor is not guilty³.

The innocence view divides this situation into two separate stages. In the first stage, the aggressor provoked the conflict with a misdemeanor act or purpose for which he is liable for mayhem. In the second stage, the initial defender in the previous stage escalates the nonfatal conflict into a fatal one and is responsible for creating a new round of conflict. At this point, the initial aggressor automatically acquires the right to self-defense, and the fault of the first stage does not derogate his right to defense. He can defend himself perfectly if the other elements of self-defense, such as necessity and proportionality, are met. The preceding non-lethal conflict is not a matter of the same nature as the later lethal conflict, and the aggressor's fault in the former stage does not deprive him of the right to self-defense in the latter lethal conflict. Rather, it is the initial defender who takes the lead in using deadly force and escalates the conflict into a lethal one, which makes him lose the right to self-defense in the latter phase [2].

The argument is debatable. The initial aggressor's right to self-defense is limited because his defense lacks the element of necessity. That is, the aggressor's fault in initially causing the conflict makes his defense unnecessary because the violence he faced from the defender could have been avoided. However, according to innocence view, the argument that the initial aggressor automatically becomes a completely innocent defender despite his failure to fulfill his duty to retreat does not reflect the defect in his right to defense caused by his prior fault of causing the conflict.

³ Roberson v. State, 203 S. W. 349 (1918).

2.3. Voluntary Manslaughter

The voluntary manslaughter theory is a relatively eclectic view. It neither holds that the aggressor is directly guilty of murder nor does it fully affirm the aggressor's right of self-defense and find him innocent. However, it somewhat mitigates his guilt by finding him guilty of voluntary manslaughter. There are three different paths to prove the conclusion: failure to satisfy the elements of murder, defense of provocation, and imperfect self-defense.

2.3.1 Failure to satisfy the elements of murder

This opinion holds that the aggressor does not have the right to self-defense in this situation and that the reason why he does not constitute the crime of murder is that he does not possess the malice element of murder.

As mentioned above, there are four types of murder: killing with intent to kill, killing with intent to cause grievous bodily injury, killing with extreme recklessness of another's life, and felony murder. The opinion argues that a nonfatal aggressor who kills for defensive purposes against a defender's sudden escalation of lethal force does fail to satisfy the subjective elements of murder, and it does have some validity. However, this opinion still lacks its rationale. For one thing, it is based on the complete denial of the right of self-defense of nonfatal aggressor, which is then questionable. This paper argues that although the aggressor does not have the right to self-defense because of his former assault, his aggressor status is not fixed but variable. The initial defender suddenly escalates the conflict to a fatal one, at which point the identity of the aggressor has been transferred from the initial nonfatal aggressor to the initial defender. And at this point, the initial aggressor's right to self-defense should be restored. If the initial aggressor retreats before using force to defend, he has the perfect right to defend. However, if the initial aggressor fails to fulfill the duty to retreat first, he will regain a defective right of self-defense rather than being completely deprived of the right of self-defense. Secondly, while the theory argues that the elements of murder cannot be satisfied in such cases, it does not positively explain why the aggressor should be convicted of voluntary manslaughter, so the theory is also incomplete.

2.3.2 Defense of provocation

In U.S. criminal law, an intentional homicide committed under great heat of passion due to "adequate provocation" mitigates the offense to voluntary manslaughter. As some researchers argue, provocation is a partial excuse for murder: an excuse that recognizes that although the accused's conduct fell below a standard with which it is reasonable to expect people to comply and was wrongful and culpable, this was due to a loss of self-control on the part of the accused which in the circumstances was sufficiently humanly understandable to make it appropriate to convict him or her of a lesser offense than murder [3]. This opinion holds that the aggressor still has no right to self-defense in this case. However, killing the initial defender for defensive purposes can be reduced from murder to voluntary manslaughter due to the defense of provocation. In other words, the initial defender can be seen as a provocateur, and the deadly force by the initial defender can be regarded as an adequate provocation to the aggressor, which makes him kill the defender under great heat of passion.

There are four elements of this kind of provoked manslaughter. Firstly, the actor is in the heat of passion. The heat of passion includes anger, fear, mania, extreme despair, hatred, and other emotions that can give rise to impulses. Secondly, the actor's impulse is the result of sufficient provocation. In response to "sufficient provocation", the early common law provided for specific acts that did or did not constitute sufficient provocation. Acts that constituted "sufficient provocation" included, for example, aggravated assault or battery or a husband seeing his wife committing adultery with another person in flagrante delicto. In contrast, acts that did not constitute sufficient provocation included highly insulting and provocative verbal attacks. The modern common law tends to leave it to the jury to decide whether sufficient provocation exists in an individual case. Usually, the judge will instruct the jury that sufficient provocation should cause a rational person to lose control and lose his reason, and act impulsively. However, a traditional rule from the common law of the past has been preserved

that no verbal attack, no matter how insultingly provocative, constitutes a sufficient provocation, which is recognized in the Model Penal Code. What, then, is the standard of a rational person in modern law? It will usually be assumed that a rational person here is an ordinary person of moderate temperament, and a more objective standard will be applied [1]. While in some cases, the judge may direct the jury to decide on a more subjective standard. Thirdly, there is no time for the actor to calm down. If the actor has sufficient time to calm down after being provoked, this rule cannot be used to mitigate the crime. Under the limitation of this element, if the actor kills with foreknowledge of the provocation before committing the act from the scope of application, or if the actor kills after a series of non-consecutive minor provocations, he cannot plead the defense of provocation and thus may constitute murder. This is because, in both of these cases, the actor had enough time to calm down. Fourthly, there should be a usual connection between the provocation, the heat of passion, and the act of killing. If the actor's motive to kill is not related to provocation, he cannot be found to have been provoked to kill.

In this case, the aggressor clearly satisfies the first, third, and fourth elements. Does he then satisfy the second element, i.e., was the aggressor sufficiently provoked by the initial defender? The initial defender's conduct can be recognized as "aggravated assault" required by early common law to constitute sufficient provocation. The lethal injury inflicted on the aggressor by the initial defender could indeed cause a rational person to lose control and act under great heat of passion under the rational person standard adopted by most contemporary law. Thus, it appears that the aggressor could assert a defense of provocation.

The provoked manslaughter claim seems reasonable. However, the theoretical analysis of the argument needs to be more logical. In U.S. criminal law, the status of the provocation defense is controversial, ranging from a partial justification to a partial excuse. Regardless of the viewpoint that provocation is a justification or an excuse, the provocation view is hard to solve the aggressor issue.

Firstly, the opinion that provocation is a partial justification is based on the "excessive retaliation theory". The doctrine of excessive retaliation means that the provocateur is also at fault for the provocation act, so the provoked person's retaliation is partially justified. However, because the provocateur's act does not constitute so serious a crime that makes him sentenced to death, the direct deprivation of the provoker's life for his provocation is an excessive retaliation. Therefore, the killing is not fully but partly justified, so the crime cannot be exonerated but can be mitigated to voluntary manslaughter [1].

However, problems arise when the provocation theory is used to interpret the circumstances of the initial aggressor. Provoked manslaughter is partially justified because the provoked person's retaliatory behavior was somewhat excessive and thus cannot be fully justified. In this case, however, the aggressor is faced with a serious provocation against his supreme right to life. It is difficult to consider his retaliation excessive when he responds with the same level of fatal force. Then the aggressor should be exonerated rather than sentenced to voluntary manslaughter, which would contradict the logic of the provocation theory. However, if the aggressor is exonerated, the difference between an aggressor with some fault and a genuine innocent defender evaporates. In other words, the provocation theory can only focus on the stage of being provoked and attacking the provocateur; it cannot take into account the former fault of the aggressor to trigger the conflict. Therefore, it cannot infer the conclusion that the aggressor's fault in causing the conflict should, to some extent, derogate his subsequent retaliation right.

Secondly, there is also the view that provocation is a partial excuse. This is based on the theory of "partial loss of self-control". According to this theory, the law understands human beings' inherent weaknesses and deficiencies, and it is reasonable to lose some self-control under sufficient provocation. Therefore, homicidal behavior is partially excusable. However, understanding the reasonableness of the loss of self-control does not mean affirming the reasonableness of the killing behavior. Therefore, the aggressor is only less punishable rather than fully excused [1].

Explaining the aggressor issue with the excuse theory remains flawed. Under this view, the law recognizes a person's loss of partial control over his emotions under sufficient provocation and partly

condones the killing committed under such circumstances. In this situation, the aggressor who suffered a fatal attack undoubtedly also lost some self-control, so a defense of provocation seems reasonable to apply. However, provocation is partially not wholly excused, and provocative acts generally refer to less damaging acts, such as adultery or minor physical altercations. These acts often do not cause physical damage but more often cause dignity and emotional damage. Although a more serious lethal attack can logically be seen as a provocation, its nature significantly differs from the usual provocation described above. The degree of loss of self-control caused is also qualitatively different. Thus, the provocation view does not explain why a homicide with a lesser loss of self-control from a minor provocation would be condoned to the same degree as a homicide with a greater loss of self-control from an actual lethal assault, and both would be convicted of the same crime.

In summary, the aggressor shall not be condemned to murder, nor should he be regarded as innocent. And the third conclusion, voluntary manslaughter is reasonable. While the argument, whether based on the failure to meet the elements of murder or through the defense of provocation, is quite deficient. It can be argued that the common thing between the two paths is that both completely deny the aggressor's right to self-defense, while finding mitigating reasons for his crime from other perspectives. This paper argues that denying the aggressor's right to self-defense in this situation is inappropriate and too extreme. The aggressor's right to self-defense should be affirmed, but the right is somewhat flawed due to his fault in provoking the conflict. The aggressor's killing does not constitute murder but is mitigated to voluntary manslaughter because of his partial right of self-defense. Thus, the theory of imperfect self-defense is a relatively more scientific path to prove that aggressor constitutes voluntary manslaughter.

3. The Practical Origin and Theoretical Basis of The Theory of Imperfect Self-Defense

Imperfect self-defense refers to a kind of self-defense in which there is a specific degree of defect in one of the elements of self-defense, which does not constitute a perfect defense but does not completely lose the opportunity to plead self-defense. There are three types of imperfect self-defense in U.S. criminal law. The first is when there is a defect in the reasonable belief element, and the actor mistakenly believes that an unlawful attack exists. The second is when the element of proportionality is flawed, and the defender is overly defensive. The third is when the non-aggressor element is flawed, and the nonfatal aggressor encounters the defensive force at a lethal level and defends without retreat. This article discusses the third type.

3.1. The Origin of Imperfect Self-Defense in Practice

The practical origin of imperfect self-defense lies in Texas. The 1882 Reed case in Texas was the first case to propose the doctrine of imperfect self-defense. The judge, in that case, stated that when an actor, through the fault of his own, creates a situation in which he must use deadly force in defense, then the law should limit his right to self-defense based on the extent of his fault, and this limited self-defense becomes an imperfect right of self-defense⁴. The rule was later refined in the Texas case of Franklin. In that judgment, homicide cases in which the defendant pleaded self-defense were divided into three categories, holding that the defendant's right to self-defense was specifically decided by the degree of his fault in provoking the conflict. In the first category, where the defendant provoked the conflict with deadly intent and later claimed self-defense to kill the other person, the defendant should be convicted of murder. In the second category, a defendant who provokes a conflict with only a misdemeanor purpose, or a conflict that would normally only lead to an ordinary brawl as planned, and then claims self-defense to kill the other person constitutes imperfect self-defense. In the third category, where the defendant did not initiate the conflict, the defendant's defense constitutes

4 Reed v. State, 17 11 Tex. App. 509 (1882).

perfect self-defense⁵. This “fault impact theory” set forth by Franklin was accepted and cited by some states, and the rule of imperfect self-defense kept evolving⁶.

3.2. Rationale for the Imperfect Self-Defense Theory

The rationale for the doctrine of imperfect self-defense is that the initial defender who defends himself with excessive force against violence from the aggressor is at fault and thereby gives the aggressor the legal right to fight against him with deadly force [4]. Some scholars have also looked to the antisocial nature of this defensive act, arguing that the law provides for different levels of crimes and penalties according to the different levels of antisociality of the actor, and therefore an aggressor who meets this condition should be more logically charged with voluntary manslaughter rather than murder because he does not have the same antisocial attributes as someone who commits murder with malice [5].

The doctrine of imperfect self-defense is characterized by its eclectic nature. Unlike the traditional “all or nothing rule”, the doctrine of imperfect self-defense eschews the extreme idea that “either it constitutes perfect self-defense or it does not constitute self-defense at all”. And the theory adopts a specific and eclectic approach to identifying self-defense. The nonfatal aggressor provoked the conflict with non-lethal force but was defended by the initial defender with lethal force. The defender's defense has exceeded the necessary limits without the element of proportionality, so the defense constitutes unlawful violence, for which the aggressor has the right to defend himself. However, after all, the conflict is provoked by the aggressor, who should not have used force to defend himself, so the aggressor's behavior was defective in the element of necessity. Moreover, the aggressor does not fulfill his duty to withdraw first; thus, his right to defense cannot be restored to a flawless one. Therefore, at this point, his self-defense is found to be flawed, and his defense constitutes imperfect self-defense. The aggressor's guilt is somewhat mitigated from murder to voluntary manslaughter.

Theoretical challenges to the imperfect self-defense theory come from two main sources. Firstly, one of the central focuses of the theory regarding imperfect self-defense is whether it should exist as a separate justification. Some opposing views argue that imperfect self-defense is simply another expression of the defendant's lack of intent to commit murder⁷, and essentially denies him a conviction for murder from the standpoint of the elements of the crime. It is also argued that the conviction of the aggressor can be reduced from murder to voluntary manslaughter from the standpoint of provocation. However, concerning the shortcomings of the unsatisfied element theory and the provocation theory, it has been demonstrated above that they are not the more advantageous paths. The theory should be confronted with the complicated situations that arise in the judicial practice of self-defense and thus should be more specific. Establishing the status of the independent justification of imperfect self-defense is also an enrichment and optimization of the theoretical system of self-defense. Secondly, there is a view that the act of self-defense is a fully justified act recognized by the law. If a person enjoys the right to self-defense, then he must not need to bear any criminal liability. And if he needs to bear criminal liability, then his behavior is not self-defense, but totally illegal behavior⁸. This view essentially reflects the traditional “all or nothing rule”. However, a binary idea that does not fit the complexities in the real case. Instead, the imperfect self-defense doctrine can offer a more compromised, concrete solution.

4. Summary

This article has analyzed the situation when a nonfatal aggressor is defended by a defender with lethal force and fights back with lethal force without retreating first, resulting in the death of the initial

5 Franklin v. State, 30 Tex. App. 638, 18 S.W 468 (1892).

6 Wallace v. United States, 162 U.S. 466, 16 S. Ct. 859, 40 L. Ed. 1039 (1896); Kinney v. People, 108 Ill. 519 (1884); State v. Painter, 329 Mo. 314, 44 S.W 2d 79 (1931).

7 Whalen v. Trippett, 225 F.3d 660 (2000).

8 Davis v. State, 81 Tex. Cr. 450, 451, 196 S.W. 520, 522 (1917).

defender. Among the theories discussed above, the murder theory unduly expands the aggressor's liability, and the innocence theory ignores the aggressor's fault for provoking the conflict, both of which are unreasonable. It is reasonable to convict the aggressor of voluntary manslaughter, and a reasonable theoretical basis is required. This article argues that both the unsatisfied element theory and the provocation theory have certain theoretical flaws. In contrast, the imperfect self-defense theory has a sound theoretical basis and can reasonably explain why the aggressor is guilty of voluntary manslaughter in this case.

At present, there are still many theoretical controversies in the field of the aggressor's right to self-defense. However, it is undeniable that it is theoretically and practically justified to protect the aggressor's right to defend properly. Totally denial of the aggressor's right to self-defense in traditional theory should be revised. The traditional theory focuses on the construction of the self-defense right of the innocent defender and neglects the right of the aggressor who provoked the conflict. It is a major trend in the development of the self-defense system to improve the protection of the initial aggressor's right to defense, which is also the way to make promotion in theory and the practice of self-defense.

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