DO EFFECTIVE NON-LETHAL WEAPONS MAKE THE USE OF FIREARMS UNLAWFUL AND THE SECOND AMENDMENT IRRELEVANT?

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Abstract

Under existing American law, advances in non-lethal weapons increasingly make the use of firearms for defense unlawful and the Second Amendment of little practical significance. As the effectiveness and availability of less lethal weapons increase, the choice of a lethal firearm for protection is a choice to use more force than is necessary, in violation of existing self-defense law. At the same time, a shift to non-lethal weapons increases the frequency of situations in which a person’s use of force is authorized because defenders with non-lethal weapons are freed from the special proportionality requirements that limit the use of deadly force.

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Much has been made of the Supreme Court's recent, narrowly decided opinion in Heller, which holds the Second Amendment to give citizens a right to keep a firearm at home for their personal use. Much of its discussion revolves around one's ability to defend oneself in case of "confrontation." But while some are heralding the decision as a significant victory for citizen’s right to use firearms in self-defense, the development of non-lethal weapons (NLWs) may

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relegate the *Heller* opinion to one of minor import -- giving special constitutional protection to collectors of gunpowder technology, but having little effect on the right to use a firearm in defense. The fact is that nothing in the opinion changes the existing law of self-defense, and that law will increasingly limit the lawful use of firearms as the availability and effectiveness of less lethal weapons increases.

I. Current Rules on Self-Defense

The current self-defense rules set two kinds of limits on the force that may be used: a necessity limitation and a proportionality limitation. The necessity limitation provides that one may use no more force than is necessary to protect oneself (nor use it before the time when it is necessary). For example, Model Penal Code Section 3.04(1) requires that the force be “immediately necessary.”

The proportionality limitation works differently; it bars the use of force in defense that is disproportionate to the harm threatened. For example, Model Penal Code Section 3.04(2)(b) sets restrictions on the use of “deadly force,” which includes any use of a firearm, to situations in which death or serious bodily injury are threatened.

Note that these two limitations have independent effect. That is, the use of force could meet the necessity but not the proportionality requirement – consider a paraplegic who can only defend himself against someone kicking him in the shins in an elevator by shooting the person. Such shooting would be necessary but not proportionate (thus unauthorized). Or, force might meet the proportionality but not the necessity requirement – consider a 10th degree karate black belt who shoots a knife attacker when he could have safely disarmed him at no risk to himself with an expert kick. The shooting is proportional but not necessary (thus unauthorized).

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1 Model Penal Code § 3.04(1) (1962).
2 Model Penal Code § 3.04(2)(b) (1962).
II. Existing and Coming Non-Lethal Weapons

Consider a brief glimpse of the NLWs either on the market or in working prototype. Chemical sprays, such as mace or pepper spray, and stun guns are common today. They are effective in disabling attackers but, on balance, their use creates such greater risks to victims,
because they can only be used at very close range or are too bulky to carry, that they cannot be considered a serious alternative to firearms. Entanglers are also available, but similarly are not serious alternatives because they are too bulky.

Low-kinetic impact projectiles might present a closer balance when compared to lethal firearms. Many can be used in current firearms but typically have not the stand-off distance of

5 Neal Miller, Less Than Lethal Force Weaponry, 28 Creighton L. Rev. 733, 783 (1995) (“Other LTLs [less-than-lethal weapons] such as batons or stun guns are too bulky to carry at all times”). See Nat’l Security Research, Inc., Doc. No. 200516, Department of Defense Non-Lethal Weapons and Equipment Review C-9 (2003) (report to U.S. Dep’t of Justice), available at http://www.ncjrs.gov/pdffiles1/nij/grants/200516.pdf (hereinafter NSR); (showing that weapons for individual use, including the Individual Live Pepper Spray, has a range of up to only fifteen feet in a target-specific stream).

6 Brian Rappert, Non-Lethal Weapons as Legitimizing Forces: Technology, Politics, and the Management of Conflict 44 (2003); Robert J. Bunker, Nonlethal Weapons: Terms and References 13 (U.S. Air Force Inst. for Nat’l Sec. Studies, INSS Occasional Paper 15), available at http://www.aquafoam.com/papers/Bunker.pdf (establishing that the most common entanglers are nets that constrain an individual); Alexander, supra note 9 at 83 (1999) (describing that dispensers for the nets come in a variety of munitions, including 2.75-inch rockets, MK65 bombs, and a forty-millimeter munition for ballistic deployment, which is compatible with standard M203 grenade launchers; the net size in this small round is limited to an eight-foot diameter and, if effective, up to ninety feet). Various net systems include guns that shoot nets designed for ensnaring single individuals (Alexander, supra note 9 at 82; Neil Davison & Nick Lewer, Bradford Non-Lethal Weapons Research Project, Research Report #4 (Dec. 2003), http://www.brad.ac.uk/acad/nlw/research_reports/docs/BNLWRPResearchReportNo4_Dec03.pdf (Last visited May 25, 2006), large, long-range nets designed to capture 3-4 individuals (Alexander, supra note 9 at 83), “sticky” nets that make it more difficult to free themselves (Alexander, supra note 9 at 83), electrified nets that deliver shocks (Alexander, supra note 9 at 83, Bunker, supra at 11), nets that use certain types of spider fibers (Rappert, supra at 44), and nets that are detonated from mines (Bunker, supra at 13, Alexander, supra at 85). Other entanglers include animal “come-alongs” or choke collars (Bunker, supra at 12), bola devices designed to entangle the legs of an individual to stop or retard movement (Bunker, supra at 12), and net-poles (Bunker, supra at 13).

7 NRC, supra note 9 (explaining that most non-lethal rounds and projectiles are designed to be fired from existing weapons, such as a 12-gauge shotgun); ring air foil projectiles fit onto a standard M16 rifle (Alexander, supra note 9 at 91); rubber projectiles have a range of up to thirty meters, NRC, supra note 9 at 25; The foam rubber baton cartridge (forty millimeters), is best used from twenty to forty feet, and can be fatal under twenty feet (U.S. Army, NLW, Tactical Employment of Nonlethal Weapons b-4 (2003) (hereinafter NLW); The rubber Fun Stabilized Cartridge (twelve-gauge), has a range of ten to twenty meters, NLW, supra at B-14; the working...
normal firearm ammunition. And because low-kinetic impact projectiles work by temporarily immobilizing or confusing single individuals, they may be seen as lacking a clear and reliable disabling effect. Thus, the cost of reducing the risk of death of an attacker, by NLW use, may come at too much of an increase in risk to the victim.

Tasers and other such electrical shock weapons, however, might provide an effective alternative. Their disabling effect upon contact typically is better than that of firearms: immediate muscle spasm operating at an autonomic level without regard to how determined an attacker may be. Further, the effective disabling zone on an attacker’s body is larger than that for firearms. Any good contact by a taser will instantly disable, while only a few locations with a firearm – such as a shot to the head – will instantly disable, and even these kinds of shots provide no guarantee. On the other hand, Tasers typically do not have the second shot capability needed

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7 (...continued) range of current hollow rubber projectiles is from five to seventy-five feet, Bunker, supra note 10 at 17; sponge grenades can knock down an individual from up to fifty meters. NLW, supra at B-13; NIJ, supra at 29; plastic bullets have an effect range of thirty to sixty-five yards (Bunker, supra note 10 at 16).

8 NRC, supra note 9 at 25; Sponge grenades minimize injury while delivering sting. NRC, supra note 9 at 138; plastic bullets cause a bruising impact blow but can be fatal at point blank range, Bunker, supra note 10 at 16; when the ring airfoil projectile is launched, it spins, the ring expands, and when the ring hits the target, the impact is spread over a larger area, minimizing the potential for undesired serious injury (Alexander, supra note 9 at 91); bean bag rounds spread the impact over a broad area, limiting physical damage (Alexander, supra note 9 at 91); Traction modifiers can either increase (stick’ems) or decrease (lubricants) the friction of a surface, making it more difficult for an individual to move or more difficult for an individual to control their movements; stick’ems and lubricants are in early stages of development and lubricants can be difficult, time-consuming, and expensive to remove. Richard L. Garwin, Council on Foreign Relations, Nonlethal Technologies: Progress and Prospects 24 (1999).

9 The advanced taser fires two probes up to twenty-one feet. These probes are connected to the weapon by high-voltage insulated wire. The M-26 uses a new electromuscular disruption technology that completely overrides the central nervous system and directly controls skeletal muscles. John B. Alexander, Winning the War: Advanced Weapons, Strategies, and concepts for the Post 9/11 World 18, 22 (2003).

10 John B. Alexander, Future War 67 (St. Martin’s Press 1999) (“[Taser] . . . shock causes a loss of neuromuscular control. The affected person normally falls to the ground due to the inability to operate his or her legs . . . [t]o ensure the subject remains compliant, shocks may be readministered as necessary, but a single shock is usually enough!”); Urey W. Patrick, Handgun Wounding Factors and Effectiveness, U.S. Dpt. of Justice, FBI (1989) available at http://www.firearmstactical.com/pdf/fbi-hwfe.pdf (“Physiologically, no bullet or caliber is (continued...)
certain to incapacitate any individual unless the brain is hit. Psychologically, some individuals can be incapacitated by minor or small caliber wounds. Those who are stimulated by fear, adrenaline, drugs, alcohol, and/or sheer will and survival determination may not be incapacitated even if mortally wounded.”).

10 (...continued)

11 See generally Eva D. Blaylock, New Technology ‘Dazzles’ Agressors, November, 11, 2005 available at http://www.af.mil/news/story.asp?storyID=123012699. Many laser technologies are completely or nearly developed. Bunker, supra note 10 (showing that specific weapons include: flares; the Cobra, a thirty pound hand-held laser weapon used to “damage enemy sensors and human eyes”; the Dazer, a “[b]attery operated 20,000 candlepower ‘flashlight,’” which weighs about twenty pounds and is submachine gun size; the Dazzle Rifle, which emits an eye-safe argon-ion laser beam designed to disorient the target; high intensity hydrogen-chloride lights; MK 1 illuminating grenade, which produces 55,000 candlepower for twenty-five seconds (used in Vietnam); isotropic radiators, which illuminate with laser-bright intensity; the low-energy laser-eye safe, which is mounted on a M-16/M-203 rifle that produces a glare strong enough to temporarily delay and disorient an adversary in a range of several hundred meters, powered by six rechargeable AA batteries; stroboscopic device, which causes flashing like a strobe light); Nick Lewer & Steven Schofield, Non-Lethal Weapons: A Fatal Attraction? 11 (1997) (describing that the specific weapon is a directed radiator, which pumps light through the front of a shell in a single direction; it is not dependent on line-of-sight firing); NIJ, supra note 9 at 35 (listing the specific weapon as the Dissuader Laser Illuminator, which is essentially a handheld flashlight that gives off an extremely bright, variable-width beam of red light; it produces an overpowering glare/flash that temporarily blinds the individual and is certified eye-safe at all ranges); NRC, supra note 9 at 28 (listing weapons: the Saber 203, which fits onto the grenade launcher attached to a rifle and creates glare- and flash-blinding that cause adversaries to protect their eyes and slow their advance; the “hinder adversaries with less-than-lethal technology” (HALT) system, which uses a red diode source mounted on an infantry rifle so either the dazzler or the rifle can be used; the veiling glare system which produces violet light that appears to the subject as omni-directional (still being developed); flash grenades produce a single intense burst of incandescent light); Alexander, supra note 9 at 64, 67; Bunker, supra note 10.

There are several laser projects in the works: Alexander, supra note 12 at 31-32 (describing the Laser Dazzler, which uses a random flashing green laser to temporarily blind subjects and the Veiling Glare Laser, which uses violet light and causes the human eye to see only a glare; the effects of the green light/violet light lasers are to incapacitate short term); NRC, supra note 9 (showing that handheld and rifle-mounted models are available; grenade launched (continued...)
temporarily disable a person by blinding them temporarily or produce the sensation of burning pain. E.g., National Research Council, An Assessment of Nonlethal Weapons Science and Technology 28 (National Academies Press 2003) (describing technologies that use light in the visible spectrum to temporarily blind a person and technologies in development that induce fluorescence in the human eye, likely producing a blinding effect); National Research Council, An Assessment of Nonlethal Weapons Science and Technology 30 (National Academies Press 2003) (“High-energy lasers” produce a kinetic shock through a laser-induced plasma, stimulating the nerves in the skin to produce pain and temporary paralysis.”).


Nick Lewer & Steven Schofield, Non-Lethal Weapons: A Fatal Attraction? 11 (Zed Books 1997) (“[The directed radiator laser weapon] has the advantage over low-energy lasers of utility in operations that are not dependent on line-of-sight firing.”). See Alexander Future War 61 (describing laser weapons that can allow a single soldier to use the laser weapon to prevent a fighter aircraft pilot from attacking) (explaining that one weapon, the ZM-87, can “dazzle and blind up to ranges of 3,000 meters.”).

III. NLW and the Necessity Requirement: Making Firearm Use in Self-Defense Unlawful?

Given the existing law, the obvious difficulty with the use of a firearm is that if one can defend oneself as effectively with a NLW, then use of a lethal firearm is not "necessary" and therefore is unjustified and unlawful. Two sorts of counter-arguments might be made to support the continued use of firearms for defense: most defenders don't have a NLW handy at the time of the attack, and using a NLW may be effective but also might expose the defender to a risk that he would not have if he were defending with a firearm.
A. Creating the Conditions that Cause the Need for Excessive Force: The T1-T2 Analysis

Most defenders will be able to argue that they did not have a NLW handy when attacked. The firearm that the defender does have was the least harmful force available to him at the time he needed to defend himself. But will the law ignore the fact that at some earlier time the person made a choice -- to buy last year, or to take with him that morning -- a lethal rather than a non-lethal weapon? I think not.

Consider the case of the person who sets a fire, which threatens a town, and then burns a firebreak in his enemy's cornfield to save the town. Will the law give him a defense to the property destruction because at T2 his burning was necessary, even though it was by his own earlier decision -- at T1, when he set the fire -- that he was forced later at T2 into the need to burn the field. Current law will give him no defense.\(^\text{15}\)

To put it in the self-defense context, assume you know another person is boiling mad at you and expect that he will attack you if you enter his local bar. You head for the bar and as you leave the house, you choose to take your .357 Magnum instead of your equally effective NLW. When you kill him in necessary self-defense, should you get the defense even though you could have avoided the death by picking the NLW? Presumably the law should and would say "no defense." The killing might have been necessary under the conditions at T2, but at T1 you could have made a choice that would have avoided that need to kill.

Of course, people today don't have the lethal and the non-lethal weapon sitting at home from which to choose. But as effective NLWs become more available, it will be harder for people to claim that they did not have that choice, especially if they are at the store buying a weapon for self-protection. The purchase of a hunting rifle by someone who does hunt cannot be faulted, but the purchase of a firearm for self-defense, if an equally or more effective NLW is available, reflects a choice to use greater force than is necessary.

B. Claims of that Firearms Are More Effective that NLWs

To the extent that NLWs provide as effective a defense as firearms, the argument above in support of firearm use is the only one available, and it is a loser. The choice to carry a lethal

\(^{15}\) See, e.g., Model Penal Code § 3.02(2) (1962) (stating that when an actor negligently or recklessly brings about the situation necessitating a decision, justification is unavailable in any offense where the culpability requires only recklessness or negligence).

I have argued elsewhere that current law is wrong in its treatment of these kind of situations, in which a person causes the conditions of his own defense. Current law focuses on the person's culpability as to causing the justifying conditions. I would have it focus instead on the person's culpability at T1 of causing the prohibited result at T2. Paul H. Robinson, Causing the Conditions of One's Own Defense, 71 Va. L. Rev. 1 (1985).
firearm instead of an equally effective NLW is a choice to create the conditions for a killing that need not have occurred.

But one might argue that the currently available NLWs, while astonishingly effective in many ways, are not yet in all respects equally effective in defense in comparison to lethal firearms. One could argue that "instant killing power" is necessarily the best defense, for only in this way can you be sure that an attacker will not get off a shot or will not get close with his knife attack, etc. Or, one may argue that the handguns have a greater effective range for incapacitating an attacker.

Yet, these arguments may overstate the case. To get instant disabling with a firearm, one must hit the person either in a business card-size area between the eyes or at the top of the spine at the back of the neck. In contrast, a Taser can hit anywhere on a person's body to disable. The studies suggest that firearms typically have only a 50%-75% “one shot stop” rate, while Tasers have a 93% rate of incapacitation.

One might argue that guns provide an advantage because they can be used at a greater distance, which is true. Currently, Tasers are available at ranges up to 15 feet for consumers, and 35 feet for law enforcement and the military. (The company that makes Tasers seeks to have police retain a superiority of weapon over citizens.) But the striking distance may have little significance. Most confrontations occur within ten feet -- well within the effective range of Tasers, and fire-arm accuracy decreases drastically with distance even in trained individuals. More important, the legal limitations on self-defense typically do not allow use of force at a

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16 “One Stop Shot” rate is defined as: (1) a single hit to anywhere on the body not counting the head, neck or extremity shot, (2) when a subject stops shooting or striking blows if that was what he was doing (3) runs no more than 10 feet before collapsing. The rate varies with the caliber of the gun and the grain of the bullet. See Evan Marshall & Edwin Sanow, Handgun Stopping Power: The Definitive Study (Paladin Press, 1992).


18 Cf. Thomas J. Aveni, The Police Policy Studies Council, Officer-Involved Shootings: What We Didn’t Know Has Hurt Us 7, reprinted in edited form in Law & Order Magazine, August, 2003 (stating 69% of shooting incidents involving NYPD Officers between 1994 and 2000 occurred in the 0-2 yard range, 19% in the 3-7 yard range, 6% in the 8-15 yard range, 2% in the 16-25 yard range, 1% in the 25+ yard range, and 2% in an unknown range). See also Tom Perroni, Handgun Stopping Power (“Most shootings involving police officers and civilian concealed carry permit holders happen at a distance of less than ten feet with average distance at three feet.”)

19 The NYPD Hit Ratios By Distance are as follows: 38% in the 0-2 yard range, 17% in the 3-7 yard range, 9% in the 8-15 yard range, 8% in the 16-25 yard range, 4% in the 25+ yard range, and 2% in an unknown range. Thomas J. Aveni, supra note 7.
distance. Defensive force is considered “immediately necessary” only when the defender can wait no longer, when the threat is “imminent.”

Even if one is not persuaded by the preceding discussion, note that one will not be able to make the less-effective claim with regard to future NLWs. Some will have clearly greater ability to instantly disable an attacker, by rendering him unconscious or blinded or in spasm, and with much less demand for the careful aiming at a instant kill zone that a firearm requires. Further developments in NLWs will extend the effective range to be equivalent or surpass the effective range of handguns.

C. Allocating Risk Between Attacker and Defender

But let us assume, for the sake of the argument, that for one reason or another the lethality of firearms provides a possible advantage for a defender. It still does not follow that the choice of a somewhat more effective lethal firearm over a somewhat less effective NLW will be justified. The law does not authorize the allocation of all risk to the attacker and away from the defender.

Consider, for example, the temporal aspect of the necessity requirement. Assume a person makes credible threats against another person that, if implemented, would justify the use of force against him in defense. The intended victim does not know when the attacker will carry out the threats. The safest course of action for the victim would be to simply use force against the threatener at the time when it would be most effective and could be done with least risk (to the intended victim). Requiring the victim to wait until the attack is imminent creates a risk to the victim that the attacker pick the time when the intended victim is most vulnerable and the attack can be made with the least risk to the attacker. Yet, the law does not allow the victim to defend himself in this most effective way. Instead, it requires the victim to suffer the continuing risk until the attack is imminent or until defensive force is necessary, and allows the use of force in self-defense only then.\(^{20}\)

Why should the law do such a thing? Because the law values all lives, even that of a potential or actual law breaker. The law judges it better to have the victim suffer the added risk, as unfortunate as that is, in the hopes that the attacker will change his mind and desist or that the police or others will intervene to avoid the attack. One may think this quite unfair: it gives “rights” of a sort to law-breakers who threaten victims. But it is this balance of interests that has come to be the mark of a civilized society. Note that the proportionality requirement of self-

\(^{20}\) The common law required that the attack be “imminent,” but the Model Penal Code shifts requirement to one that the use of defensive force be "immediately necessary." Model Penal Code § 3.04(1) (1962). For a discussion, see Paul H. Robinson, Criminal Law 437, 442 (Aspen 1997) (explaining the triggering conditions for the defense and explaining that the defensive force justification is only available when the defense is necessary in time, and further, that the victim may only use the minimum amount of force necessary to defend against the threat).
defense has the same effect. It tells the paraplegic that he must simply suffer the kicks in the elevator if his only means of preventing them is to shoot the kicker.

The same balancing of interests logically applies to the choice of weapons when NLWs are not yet perfected to the point of equal effectiveness to firearms. Killing an attacker with a lethal firearm, rather than just disabling him temporarily with a NLW, may not be judged a civilized balance if the benefit bought by killing the attacker is only a minor reduction in the risk that the defender will be injured. Keep in mind that there are a host of factors other than the "stopping power" of his weapon that will affect a defender's safety. In the larger scheme, lethality of the victim's weapon may provide a trivial improvement to safety at a dramatically greater risk of death to the attacker.

Thus, the effect of NLWs on the lawfulness of firearm self-defense requires a careful comparative study between the two. As the effectiveness of NLWs increase, the justifiability of firearms decreases.

IV. NLW and the Proportionality Requirement: Authorizing Cowboys?

Some people may be disappointed with the conclusion of above analysis, that the use of firearm in self-defense is or may soon become unlawful. There is a silver lining, however, for those persons who want to carry guns and use them against aggressors. Recall the law's

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proportionality requirement in self-defense, which bars disproportionate force in defending against a threat. It is what holds the paraplegic back from shooting the kicker in the elevator.

Especially as it is commonly formulated in the United States, it creates interesting implications for the use of NLWs: significantly increasing the frequency with which non-lethal force lawfully may be used.

A. Universal versus Two-Category Proportionality Requirement

Several countries and a few states have a proportionality requirement stated in general terms -- what might be called a "universal" proportionality requirements -- which permits the use of only that amount of defensive force that is proportionate to the harm threatened. In contrast, a majority of states follow the Model Penal Code in having a more limited requirement -- what might be called a "two-category" proportionality requirement. Instead of requiring a proportionate response across the continuum of possible threats, the Model Penal Code creates two categories, deadly force (which includes all firearms) and non-deadly force, and sets special proportionality limitations only for the use of deadly force. In other words, as long as a defender stays below the deadly force threshold, there is effectively no proportionality requirement.

Thus, when a defender shifts from carrying a firearm to carrying a NLW, he no longer need concern himself with that pesky proportionality requirement. No matter what the nature of the threat, he can do whatever is necessary to defend himself. The paraplegic in the elevator can

22 E.g., The Penal Law § 34K (Isr.) (requiring immediate necessity to prevent imminent serious injury and no alternative available act to justify use of force in defense); German Penal Code ch. 2, § 34 (F.R.G.) ("Whoever commits an act in a present and otherwise unavertable danger to life, body, liberty, honor, property or another law good to avert the danger from himself or another, acts not unlawfully if in weighing the conflicting interests, particularly the affected law goods and the degree of the danger threatening them, the protected interest substantially outweighs the impaired one."); Ind. Ann. Code, § 35-41-3-2 (2006) ("A person is justified in using reasonable force against another person to protect himself or a third person from what he reasonably believes to be the imminent use of unlawful force. However, a person is justified in using deadly force only if he reasonably believes that that force is necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible felony.") (emphasis added); Iowa Stat. Ann. § 704.3 (2006) ("A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force.") (emphasis added); La. R.S. § 14:19 (2006) ("The use of force or violence upon the person of another is justifiable, when committed for the purpose of preventing a forcible offense against the person or a forcible offense or trespass against property in a person's lawful possession; provided that the force or violence used must be reasonable and apparently necessary to prevent such offense, and that this article shall not apply where the force or violence results in a homicide.") (emphasis added).

shoot away with his NLW if it is necessary to stop the kicking. All of the complex proportionality-based limitations -- like the retreat and surrender of property rules, and the minimum threat requirements -- just drop away.

One may wonder whether this risks creating a culture of “cowboys” who will draw and fire whenever unjustifiably threatened or restrained. NLWs might open up a new wild-West future, which is certainly not what the NLW movement is expecting, but it is what current law provides. (And perhaps it is what will stimulate more interest in NLW by the current gun enthusiasts who oppose any hint that they should give up their guns for NLWs.)

B. Cowboys and the Universal Proportionality Requirement

Note, however, that the freedom-to-defend attractiveness of NLWs would continue to a large extent even if United States law were changed from its current two-category approach to the universal proportionality requirement. That is, even if the law required that a defender's use of force always be proportionate to the harm threatened, even when non-deadly defensive force is being used, NLWs would allow defensive action more frequently than firearms. Even under a universal proportionality requirement, the defender using a NLW could use defensive force as long as the extent of the threat was serious enough that his NLW's amount of force was proportionate. It might depend on just how hard the paraplegic in the elevator was being kicked, as compared to the injury or pain his NLW would do.

Indeed, the frequency with which the law authorized defensive force would be greatest with the weapon with which the defender had the greatest flexibility in the amount use of force he could use. That is, if he could “dial up” any amount of force, he could always meet even the universal proportionality requirement. Given the nature of the technology behind many of the new and the developing NLWs -- such as laser and microwave guns -- it is quite likely that this kind of flexibility will be easy to obtain. Like Star Trek's Captain Kirk having his crew "set phasers on stun," the new NLWs can provide just the amount of force that is proportionate to the harm threatened.

Conclusion

Would the increased opportunity provided by NLWs to lawfully use defensive force produce a Wild West culture of frequent use of force? And would this be a bad thing?

Consider that there will be some natural limitations on the use of defensive force, even non-lethal proportionate force. First, there will be no more occasions for the use of force than there are today in which a victim needs to use defensive force in self-defense, but is not legally authorized to do so because the special limitations on the use of deadly force, or because other proportionality limitations are not satisfied. Giving a right to defend in these cases seems a good thing, for each case is an instance where an unlawful aggressor is today protected (by the victim's lack of access to a means of proportionate force). Second, the victim who uses force too quickly or uses more than is necessary will be subject to criminal prosecution. The availability of effective NLWs does not alter the self-defense law's necessity requirement. Third, potential
victims' greater ability to lawfully defend themselves (by having a NLW) may well deter some of the less-than-serious-bodily-injury aggression, thereby reducing overall conflicts. It is possible that a world of effective NLWs could maximize personal protection with a minimum cost in human life and health.

Does the availability of effective NLWs mean that the defensive use of firearms is unlawful? Does it mean the potential rise of NLW cowboys? Yes to both, which may be a good thing.

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24 But this argument must be tempered by the fact that such rule details as the limits of self-defense do not always translate into conduct decisions "on the street." See, e.g., Paul H. Robinson & John M. Darley, The Role of Deterrence in the Formulation of Criminal Law Rules, 91 Geo. L.J. 949, 953-56 (2003); Paul H. Robinson & John M. Darley, Does Criminal Law Deter? A Behavioural Science Investigation, 24 Oxford J. Legal Studies 173-205 (2004) (noting that the conduct controlling effective of legal rules is limited by the fact that people often do not know the rules, or if they do, they are not the rational characters that will bring this knowledge to bear on their conduct, and even if they know the rules and are rational, their calculations may lead them to believe that the perceived costs of the contemplated offense are less than its perceived benefits).