L.B. 925: Nebraska's New Self-Defense Statute and Its Implications

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L. B. 925: NEBRASKA'S NEW SELF-DEFENSE STATUTE AND ITS IMPLICATIONS

I. INTRODUCTION

L.B. 925 is a bill relating to self-defense which grants to an individual the right to use "any means necessary" when defending "himself, his family, or his real or personal property, or when coming to the aid of another..."1

On April 2, 1969, the Nebraska legislature first considered L.B. 925.2 According to Senator Clifton Batchelder of Omaha, who introduced the bill, the purpose of the bill was "to strengthen resolve of citizens of this state to go to the aid of those who might need defense against assault or any other kind of criminal attempts on them or their property or their families."3

Prior to the passage of L.B. 925 on June 5, 1969, there had been no statutory enactment defining the limits of justifiable self-defense.4 In passing L.B. 925 into law, the legislature enacted legislation which is practically unique among state statutes.5 Although the bill has not yet been judicially interpreted, a number of issues are clearly enough defined to present a basis for drawing some conclusions about the legislation.

1 The text of the bill is as follows:

Section 1. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting, by any means necessary, himself, his family, or his real or personal property, or when coming to the aid of another who is in imminent danger of or the victim of aggravated assault, armed robbery, holdup, rape, murder, or any other heinous crime.

When substantial question of self defense in such a case shall exist, which needs legal investigation or court action for the full determination of the facts, and the defendant's actions are subsequently found justified under the intent of this section, the State of Nebraska shall indemnify or reimburse such defendant for all loss of time, legal fees, court costs, or other expense involved in his defense.

2 Minutes of the Nebraska Legislature, General Debate, 80th Neb. Leg. Sess. 1307 (1969) [hereinafter cited as Minutes of the Legislature].

3 Id.

4 Nebraska had no self-defense statute prior to L.B. 925, but a body of case law has developed around justification for homicide. See Neb. Rev. Stat. § 28-401 (Reissue 1964) and annotations thereto.

5 The only state statute found that was similar to L.B. 925 was a South Dakota statute relating generally to permissible causes of action, reading as follows: "Any necessary force may be used to protect from wrongful injury the person or property of one's self, or of a
This article will examine four aspects of the bill: first, the legislative process leading to its enactment to determine the legislative intent in passing L.B. 925; second, the prior Nebraska law relating to self-defense and the probable changes brought about by L.B. 925; third, the policy issues surrounding the enactment of L.B. 925; and fourth, the possible areas of attack on the constitutionality of L.B. 925.

II. THE LEGISLATIVE PROCESS

A. THE HISTORY OF L.B. 925

The path of L.B. 925 through the legislature generated strong feelings, not only in the legislature but among the citizenry of Nebraska. A review of the legislative history of the bill gives some insight into why the bill evoked such feelings and what the legislature apparently intended to accomplish by its passage.

The bill in its earliest form was given to Senator Batchelder by Mr. Al Truetler, a citizen of Omaha. The bill was given to the bill drafting office to be rewritten, then to the judiciary committee. L.B. 925 was unanimously advanced from the judiciary committee on March 31, 1969. Only one person, Mr. Prohaska, one of Senator Batchelder's constituents, appeared in favor of the bill besides Senator Batchelder. No one appeared in opposition. On April 2, the full legislature advanced the bill to Enrollment and Review on a 24-1 vote. At the time of the introduction of the bill, a first attempt was made to amend the bill by insertion of the word "rea-

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wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest.” S.D. Code § 47.0303 (1939).

However, § 47.0303 is conditioned by the section following: “Every person is responsible for injury to the person, property, or rights of another caused by his willful acts or caused by his want of ordinary care or skill, subject in the latter cases to the defense of contributory negligence.” S.D. Code § 47.0304 (1939).

The effect of § 47.0303 is different in that it does not seek to absolve the defendant of all legal liability as does L.B. 925. There are no annotations to § 47.0303, so it is impossible to determine just what effect would be given this section by the South Dakota courts.

6 See Lincoln Star, April 5, 1969, at 7, col. 3.
7 Minutes of the Legislature 1305.
8 One of the changes made by the bill drafting office was to substitute the word “imminent” for the word “eminent” before “. . . danger of or the victim of . . . .”
9 Hearings on L.B. 925 Before the Committee on Judiciary, 80th Neb. Leg. Sess. 7 (1969)
10 Id. at 5, 7.
11 Minutes of the Legislature 1308.
sonable” between “any” and “means.” The amendment, offered by Senator Pederson of Omaha, failed after no discussion on a 9-20 vote.\textsuperscript{12}

It was at this time that the bill began to attract public attention, and opinions pro and con began to circulate in the press.

The bill was next before the legislature on May 26, 1969. At this time Senator Proud of Omaha asked that the bill be amended by the addition of “reasonable” between “any” and “means.”\textsuperscript{13} At this point the legislature considered the effect of the addition of the word “reasonable” to the bill. After debate, the amendment was rejected by a 16-24 vote.\textsuperscript{14} The bill was then passed on final reading, 33-8, eight senators not voting.

The bill was sent to Governor Tiemann, who returned the bill to the legislature without his signature on May 28, 1969. In his veto message, the Governor listed seven specific reasons for his opposition to the bill: the bill did not define the limits within which a person may act; it made no provision for legitimate disputes between two parties to the same piece of property and would apparently authorize both to use deadly force against the other; it made no provision for the case where an individual who was an initial aggressor meets an intended victim who responds with deadly force; “necessary force” was not defined; the statute was ambiguous and vague; there was no financial limit on the expenses which the state might be required to reimburse; and the bill “would encourage the use of private force” at an inappropriate time.\textsuperscript{15}

\textsuperscript{12} Id.
\textsuperscript{13} Id. at 1724.
\textsuperscript{14} Id. at 1728.
\textsuperscript{15} Message from the Governor, LEGISLATIVE JOURNAL, 80th Neb. Leg. Sess. 2272 (May 28, 1969). The full text of the Governor's veto message follows:

“I am returning to you herewith LB 925 without my signature for the following reasons:

1. The bill does not define the limits within which one may act to protect himself, his family, or his real or personal property. Apparently, therefore, there are no limits. The bill says that a person is immune from any legal action, regardless of the means he uses, founded on anything he might do in protecting himself, his family, or his property. In other words, conduct by authorized persons which is justified may still allow the victim to respond with 'necessary force.' For example, the language of LB 925 would allow a person to kill a police officer attempting to make a valid arrest since he would be 'protecting himself.' Likewise, the unreasonable use of force to repel minimal non-deadly force being used by an aggressor is condoned.
2. In protecting property, LB 925 makes no provision for controversies involving legitimate claims by two individuals to the same property. If two individuals claim the same property, both would be entitled to use deadly force, if necessary, against the other.

3. LB 925 makes no provision for the case where the individual is the initial aggressor using minimal force and then discovers the intended victim is responding with deadly force. Thus, if someone committed an armed robbery on a victim, and the victim turned out to have a gun and started to use it to stop the robbery, the robber would be entitled to use any 'necessary force' to protect himself.

4. What constitutes 'necessary force' is not defined. Since it apparently is an attempt to change the existing law in Nebraska, law which requires a standard of 'reasonable force,' it must mean something different than 'reasonable.' Under existing law, the decision as to whether the actor acted reasonably is made in light of the emergency that he faced at the time. A reasonable mistake of fact does not nullify the defense of self-defense. Under LB 925, however, a person who attempts to use the argument of self-defense may in act [sic] be held to a standard of absolute knowledge of facts. This would give him less protection than the current law of self-defense in Nebraska gives him.

5. The statute is so ambiguous as to be extremely difficult to enforce and perhaps be unconstitutional as vague. I have already mentioned some of those areas. There are others. 'Holdup,' 'heinous crime,' 'legal investigation,' 'court action,' and 'other expense' are all terms for which there should be clear definitions. Likewise, who makes the determination of whether substantial questions of self-defense exist, when it is made, and how it is made is left unanswered by the statute.

6. There is no limit on the amount of 'loss of time, legal fees, court costs, or other expense' which must be reimbursed or indemnified by the state to the defendant should the action be found justified. With unscrupulous defendants, this amount could be limitless. Not only could a defendant pay an attorney any amount for legal fees, but he also could incur unreasonable expenses and the state would be obligated to pay for them.

7. Enactment of LB 925 or the passage of any law which would encourage the use of private force is most inappropriate at this time when Nebraskans are most concerned with the rising level of violence. I feel that LB 925 might increase rather than diminish the level of violence in Nebraska and would escalate the breakdown of law and order. I am insistent upon preserving law and order in Nebraska. Rather than authorize the unreasonable use of private force, as LB 925 does, we must solve the problems of increased violence and unreasonable private force if we are not to perpetuate the very evil we seek to eliminate. This bill permits private individuals to take the law into their own hands in order to deter other individuals from taking the law into their own hands. It implements a system of vigilante law enforcement, a system long ago proved to be destructive of civilized society.

The answer to better law enforcement is not vigilante law enforcement. It is better training, standards, qualifications, etc. for law enforcement officials, and an increased public awareness of the reasonableness and fairness of our laws and the ability and fairness of those officials who enforce the law.
On June 5, 1969, Senator Batchelder asked that the Governor's veto be overridden. After debate, a vote was called. A three-fifths vote of the entire legislature is required to override a governor's veto. The attempt failed on a 29-15 vote, and the president of the legislature declared the motion lost.

Some time later during that day's session, Senator Loren Schmit of David City asked that the legislature "reconsider their action on L.B. 925." Senator Schmit's motion was seconded and a vote was called. At this time a question arose over the procedure for reconsideration. Under the Rules of the Nebraska Legislature when there is a motion "to reconsider the vote on a bill which lacked the constitutional majority on a Final Reading, then a three-fifths vote shall be required for adoption." The motion to reconsider gained 29 votes; however, the chair ruled that only 25 votes were required to reconsider. A motion to sustain the chair passed on a 30-14 vote. After further debate, the self-defense bill became law on a 30-16 vote.

B. THE LEGISLATIVE INTENT OF L.B. 925

Because of the generalized language of the bill, a careful examination of legislative intent will be necessary for judicial interpretation.

In examining legislative debates leading to final passage of L.B. 925, it is difficult to find any clear statement of just what result the bill was intended to achieve. However, several statements by senators who supported the bill provide strong support for the belief that the bill was passed in reaction to the current "law and

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10 Neb. Const. art. IV, § 15. In the present 49 member legislature, 30 votes are required to override the Governor's veto.
17 Minutes of the Legislature 1912.
18 Id. at 1920.
20 Senator Warner, chairman of the legislature's rules committee, felt that the rules had been violated and requested an Attorney General's opinion on the question. In an informal opinion issued June 18, 1969, the Attorney General's office stated that they felt the rules had been followed.
21 Minutes of the Legislature 1924.
22 In construing a statute, the Nebraska Supreme Court generally follows the rule that the paramount consideration is to give effect to the legislative intent. State ex rel. School Dist. No. 6 of Thurston County v. Moore, 45 Neb. 12, 63 N.W. 130 (1895). See also State ex rel. Missouri Pac. Ry. Co. v. Clarke, 98 Neb. 566, 153 N.W. 623 (1915); Wilson v. Marsh, 162 Neb. 237, 75 N.W.2d 723 (1956). A statute may not be construed so as to defeat legislative intent. State ex rel. Retchless v. Cook, 181 Neb. 868, 152 N.W.2d 23 (1967).
order" controversy which has received so much attention in recent years. Senator Batchelder spoke on why he thought the bill was necessary:

"I think it is sound to have a statute saying that you can defend yourself, particularly in these times. Times when there are so many aggravated assaults going on that they are uncountable. . . . No nation can have a law abiding society until every citizen stands up for law and order. . . . This, to me, is enough reason right there so that we should have such a bill as this. There are not policemen enough to go around."

This would indicate that the bill is intended to provide citizens of Nebraska with a form of self-help, that is, a means of protecting themselves, their property and others from threatened criminal behavior.

As will be discussed more fully below, Nebraska has allowed as a defense a plea of self-defense in criminal and civil actions for assault and homicide. This defense has been based on the standard of "reasonableness." Because the legislature twice rejected proposed amendments to add the word "reasonable" to L.B. 925, it is presumed that the legislature intends some standard to be applied other than "reasonable" when a question of self-defense is at issue. In the course of debate during the consideration of Senator Peder-


24 This is the first mention of 'aggravated assaults,' although that is the term used in the self-defense bill. It is interesting to note that there is no such crime as aggravated assault in the State of Nebraska. The comparable crime is "assault with intent to do great bodily harm." NEBREV. STAT. § 28-413 (Reissue 1964). The bill also mentions "holdup" as a crime. This crime does not exist in Nebraska, and a search of the statute books of other states has failed to reveal such a crime. One can only imagine what is included under the heading of "any other heinous crime."

25 Minutes of the Legislature 1904-05. L.B. 925 was passed shortly after a major civil disorder in Omaha, Nebraska. If it was the desire of the legislature that L.B. 925 would encourage citizen intervention in a civil disorder, it would seem a most unwise course of action. Past civil disorder may be loosely characterized as an encounter between an ethnic, racial, or societal minority and established agencies, generally the police. See generally T. Gurr, VIOLENCE IN AMERICA 544-65 (1967). It would take armed intervention by only a few private citizens in a riot situation to cause a black-police encounter to degenerate into a racial war. Stated briefly, the reasonably anticipable effect of L.B. 925 on a ghetto disturbance would be a dramatic increase in the level of violence between two or more groups of private citizens. Needless to say, this would be a terribly counter-productive result.
son's amendment, Senator Pederson explained the meaning of "reasonable" when a question of self-defense is raised:

Reasonableness is determined in light of the factual situations that give justification for applying a certain type of force. What was reasonable at one time may not be reasonable at another. If you can actually prevent someone from doing something then your act could be an unreasonable act if you go beyond that which is necessary to prevent something that you seek to abort.

The legislature then considered several hypothetical situations in which certain force may be reasonable or unreasonable. During this debate Senator Carpenter expressed his feelings about the amendment by saying:

[W]e ought to leave this bill like is [sic] and try it... [T]ake it back and put the word "reasonable" in there and everytime you have one of these things you have 9,000 law suits between 9,000 lawyers trying to determine what is reasonable. I think we should leave the bill alone and see if it won't work and if a few of these crooks get shot that won't be too bad either.

Senator Carpenter's statement was indicative of future debate on the bill, and lends further support to the idea that the standard of "reasonable" as defined by prior case law was not meant to be retained.

Inquiry must then focus on the meaning of the word "necessary." Because the bill seeks to prevent an individual from being "placed in legal jeopardy of any kind whatsoever" when acting in defense of himself, his property, or others, it must be presumed that "necessary" is to be interpreted in a literal sense, that is, the issue is whether the individual acted in a manner that was "necessary" to prevent the completion of the act which was sought to be stopped.

A logical interpretation of the phrase "any means necessary" would probably result in a determination that "any means" is intended to be inclusive of all means available, without restriction; the restriction is to be supplied by "necessary." This word has generally been interpreted to be not absolute, but inclusive of several alternatives.

One possible interpretation, then, is that "any means necessary" includes a number of alternatives, all equally available to one who acts under L.B. 925, and what is necessary will be based on a subjective evaluation by the actor. There are other possible interpretations. By using the vague terminology employed in L.B. 925, as well

26 Minutes of the Legislature 1725.
27 Id. at 1726.
as the rejection of the word "reasonable," the legislature has rendered invalid present Nebraska jury instructions on self-defense. No instructions for use with L.B. 925 have been developed, and there are at present no meaningful guidelines to use in developing the necessary instructions if the issue of self-defense is to go to the jury.

One of the stated purposes of the bill was "to strengthen resolve of citizens of this state" to intervene when a third party was in apparent danger of criminal behavior. This intent may be presumed to include the encouragement of the citizen to act on his own subjective evaluation of a situation apparently calling for intervention. In this situation the citizen could take whatever action was necessary to protect the threatened property or individual.

C. REACTION TO L.B. 925 BY THE CITIZENS OF THE STATE AND THOSE WHO WOULD BE CHARGED WITH ITS ENFORCEMENT

The bill gained a great deal of popular support throughout the state; indeed, after nationwide exposure on CBS news broadcasts many letters in support were received from around the nation. Several letters asked for copies of the bill so that they could have it presented in their state legislatures. However, some police officers and county attorneys were outspoken in their disapproval of the bill. The debate became a confrontation between those who felt that citizens should have the right to self-defense, and those who felt that that right already existed under the common law, there was no need to enact a law as broad in scope as L.B. 925.

30 Minutes of the Legislature 1307.
31 Id. at 1904, 1909.
32 Lincoln Star, April 5, 1969, at 7, col. 3. See also Lincoln Journal, June 7, 1969, at 1, col. 1. Lancaster County Attorney, Paul Douglas, described in the 80th Legislature as "probably Nebraska's most able and dedicated County Attorney," was highly critical of the bill. Douglas stated that after discussing the bill with Douglas County Attorney Donald Knowles and "several different county attorneys throughout the state . . . no one has indicated an interest that the bill be passed. Some of them had no opinions; but those that did, were opposed to the bill." Douglas, as did the Governor, listed seven reasons why he felt the bill would be a "detriment to law enforcement officials and more especially prosecuting attorneys . . . ." The reasons listed by Douglas were substantially the same as those of the Governor. Douglas said that "at a time when we are most concerned with the rising crime rate, LB 925 would only encourage the unreasonable use of private force. It would not diminish violence or assist law and order." Id.
33 See generally Minutes of the Legislature 1717-24, 1904-12, 1920-24. It is interesting to note that of the 5 senators in the Nebraska legislature with any legal training, 1 voted in favor of the self-defense bill, 3 against, 1 not voting. LEGISLATIVE JOURNAL, 80th Neb. Leg. Sess. 2350 (June 5, 1969).
The debate leading to and immediately following the adoption of the self-defense bill became quite vehement, and there was speculation that the passage of the bill over the Governor's veto was based more on political motivation than anything else. Some evidence that the bill finally became a political issue can be found in the legislative debates.

That the legislature did not adequately examine the substantial questions raised by L.B. 925 is evident from a reading of the debates leading to its adoption. This is pointed out most strongly by the somewhat heated debate leading to the overriding of Governor Tiemann's veto. None of the seven issues raised by the Governor were mentioned by opponents of the bill, nor were they refuted by its proponents during debate. At the very least, Governor Tiemann's veto message raised serious doubt as to the propriety of passing a bill of this nature. The inattention that the Governor's objections received indicates that the bill may have been passed on considerations other than its merits.

The legislature, in passing the self-defense bill, apparently intended that it serve as a broad policy statement regarding their feelings about the right of a citizen to defend himself and his property. The propriety of turning a broad policy statement into legislation is a question deserving detailed examination.

III. THE EFFECT OF L.B. 925 ON PRIOR NEBRASKA LAW

Nebraska's law of self-defense has evolved through the courts. For purposes of this article, L.B. 925 may be examined as to its effect on three specific areas of the law: first, when one acts in defense of himself, his family or his habitation; second, when acting in defense of property; third, when acting in defense of another. Because L.B. 925 includes defense of life and defense of property in the same language, it apparently intends to grant the same right of defense to each. Further, it appears that it is intended that this same right of defense be extended to the defense of another.

L.B. 925 states that "No person in this state shall be placed in legal jeopardy of any kind whatsoever" when he has acted under

34 The history and character of the feud between Governor Tiemann and the 80th Legislature is too lengthy to set forth here. At one point, prior to the final vote, the President of the legislature said, "[W]e're just going to override the Governor's veto." Minutes of the Legislature 1921.

35 Minutes of the Legislature 1922. That at least a few of the senators thought that the major considerations related to the bill were political can be seen by reference to the Minutes of the Legislature at 1908.

36 Minutes of the Legislature 1308, 1726, 1904.

the terms of L.B. 925. By this language, and by expression of the legislative intent, this would include civil liability as well as criminal liability.

A. SELF-DEFENSE IN DEFENSE OF LIFE AND HABITATION

Self-defense as a justification for assault or homicide under Nebraska common law has been in conformity with the majority viewpoint. To establish a defense of self-defense, it is necessary that the defendant act reasonably and use only such force as is necessary to render the attacker harmless. He may act under a reasonable mistake of fact if a reasonable man would have acted in the same way. The rule is stated by the Nebraska Supreme Court in *Coil v. State*.

The rule, as we understand it, is that the threatened danger, real or apparent, must be such as to induce a reasonable and well-grounded belief that one's life is in peril, or great bodily harm impending, before the act of taking life can be justified on the ground of self-defense.

Defense of habitation is included with the right to protect life because in cases holding that deadly force is justifiable in defense of domicile, the assault on the habitation carries an implied threat of danger to the person occupying the domicile.

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41 Barr v. State, 45 Neb. 458, 63 N.W. 856 (1895). "It was not necessary that it be shown that great bodily injury was in fact about to be inflicted upon the defendant in order to justify him to repel force by force, but all the law required of him was that he honestly and in good faith believed he was about to receive great bodily harm, and that he used no more force to repel the attack than to him appeared to be reasonably necessary." *Id.* at 464-65, 63 N.W. at 858 (emphasis added).
42 62 Neb. 15, 86 N.W. 925 (1901).
43 *Id.* at 25, 86 N.W. at 928.
44 In Young v. State, 74 Neb. 346, 352, 104 N.W. 867, 869 (1905), the Nebraska Supreme Court said: "Where one is assailed in his home, or the home is attacked, he may use such means as are necessary to repel the assailant from the house, or prevent his forcible entry or material injury to his home, even to the taking of life; but a homicide in such a case would not be justifiable, unless the slayer, in the careful and proper use of his faculties, bona fide believes, and has reasonable ground to believe, that the killing is necessary to repel the assailant or prevent his forcible entry."
In every case wherein an issue of self-defense is raised, the touchstone is reasonableness and appropriateness of the force used to repel the attack. The effect of L.B. 925, as discussed earlier, will be to interpose a different standard, that is, "necessary." Clearly, the availability of a defense of justification will be broadened. To what extent it will be broadened is not so obvious, but it seems certain that courts will be forced to extend the defense to areas which had previously been classified as unreasonable uses of force.

B. THE EFFECT OF L.B. 925 ON THE LIMITS OF PERMISSIBLE FORCE IN PROTECTION OF PROPERTY

L.B. 925 places the right to defend property on a co-equal status with the right to defend one's life. This is a substantial change in prior Nebraska law.45

It was clear that excessive force could not be used in Nebraska to repel a mere trespass.46 As regards personal property, Nebraska apparently adhered to the rule that "a shooting is unreasonable and unjustifiable and will give rise to civil liability where it is done solely in defense of property and without any threat to the personal safety of the actor or those whom he is entitled to protect."47

This is stated by the Nebraska Supreme Court in the case of Reed v. State:48 "Self defense is extended to the defense of the person and of the domicile. Intentional homicide may not be justified completely beyond this scope."49 The court expressly rejected the idea that the accused could kill in defense of only his property.

The clear trend of the law is away from the era when property rights were valued above human rights.50 By placing in the hands of the private citizen the choice between damage to a human life and damage to property, it is questionable whether the Nebraska legislature enacted a statute which will promote law and order or provoke violent settlement of private disputes.

45 Although there is no Nebraska case law directly setting forth a rule as to defense of property, the thrust of the cases seems to be that deadly force is justifiable only when there is a threat of harm to the person.
47 Annot., 100 A.L.R.2d 1021 (1965).
48 75 Neb. 509, 106 N.W. 649 (1906).
49 Id. at 516, 106 N.W. at 652. In Atkinson v. State, 58 Neb. 356, 78 N.W. 621 (1899), the supreme court held that a jury might find some force in defense of property to be justifiable and should not have the question taken from them.
50 Annot., 100 A.L.R.2d 1021 (1965).
C. THE EFFECT OF L.B. 925 ON THE LIMITS OF JUSTIFIABLE FORCE IN AIDING ANOTHER IN DANGER OF A CRIMINAL ACTION

No rule has been developed by Nebraska case law regarding justification for force used in aiding one not in a family relationship to the actor. Some statements seem to indicate that the right of intervention is limited to those in family relationship, 51 but this has never been set forth in a judicial holding.

At this time, only six states affirmatively permit defense of others by statute irrespective of family relationship. Other states appear to grant this right by construction, while twelve states limit the right to defend only to those in a personal relationship to the defender. 52 Some writers have mentioned a need to incorporate the right to defend others into statutory law. 53

The legislative declaration that one should come to the aid of another in "imminent danger of or the victim of" 54 a felony is probably desirable. The common law rule on this is somewhat vague and rules to the contrary "should yield to the rule that one may kill in the defense of a third person when he has a reasonable belief that the person defended is in imminent peril of death or great bodily harm without fault on his own part." 55

However, L.B. 925 defines no limits to intervention and raises more questions than it resolves. The propriety of encouraging private use of force upon encountering a situation where a person is in danger of an apparent criminal attempt which does not seriously threaten his physical safety is questionable at best. The result could be to accelerate violence rather than to diminish it, since the person engaging in the criminal attempt would likely meet violent intervention with violence. A further possibility was pointed out by Governor Tiemann in his veto message:

51 E.g., Cowperthwait v. Brown, 82 Neb. 327, 117 N.W. 709 (1908).
52 Note, A Statutory Study of Self-Defense of Others As an Excuse For Homicide, 5 U. Fla. L. Rev. 58 (1952). Although this study would appear to be dated, a check of statute books and case law of states used as sources for the study revealed no substantial changes.
53 "[T]he law should encourage intervention by giving a justification for a force used with a reasonable belief in its necessity." Note, Self-Defense In South Carolina, 19 S.C.L. Rev. 823, 837 (1967). "[I]t is suggested that the proper view should place no [family] limitation on the right of one to defend a third person." Note, A Statutory Study of Self-Defense and Defense of Others As an Excuse For Homicide, 5 U. Fla. L. Rev. 58, 61 (1952).
LB 925 makes no provision for the case where the individual is the initial aggressor using minimal force and then discovers the intended victim is responding with deadly force. Thus, if someone committed an armed robbery on a victim, and the victim turned out to have a gun and started to use it to stop the robbery, the robber would be entitled to use any "necessary force" to protect himself.56

Under prior Nebraska law, the initial aggressor could not raise self-defense as a justification.57 It is submitted that L.B. 925 compels the opposite result because of the failure to differentiate between the intervenor and the initial aggressor.

D. JUSTIFICATION AS A DEFENSE TO CIVIL LIABILITY

Under prior Nebraska law, self-defense has been a legitimate defense to civil liability for assault and battery.58 However, in repelling an assault, one is restricted to the force that "an ordinarily prudent man would be justified in believing was necessary to repel the assault ...."59 The reasonableness of the force used is a jury question.60 One may use such means as are reasonably necessary to require a trespasser to depart,61 but unreasonable force used in a situation when there is no threat of physical harm will result in liability.62 The effect of L.B. 925 on substantive law relating to civil liability will probably be about the same as the changes in prior law relating to criminal liability, that is, a general broadening of the areas of justification.63

63 It should be noted that an examination of case law relating to self-defense does not take into account cases where prosecutorial discretion has dictated that no charges be filed when there has been an issue of self-defense, but examines only those close cases where the issue has had to be resolved on appeal. An idea of possible future actions under L.B. 925 may be gained from a recent incident arising from a labor dispute in Dakota County, Nebraska. A striking employee was shot twice in the abdomen while picketing, and the Dakota County Attorney declined to press charges, stating that he felt it would be impossible
E. Possible Effects of L.B. 925 on Other Nebraska Law Relating to Self-Defense

Under Nebraska law it is clear that the issue of justification based on self-defense has been a question of fact for jury determination.

Because of the language of L.B. 925, it appears that the issue of self-defense will be a matter of law for the judge to determine, and whenever a *prima facie* case of self-defense is developed the prosecution or plaintiff's case must be dismissed.\(^6\) This appears to be so for two reasons. First, the words "legal jeopardy of *any kind whatsoever*"\(^6\) can easily be construed to mean that the defendant shall be spared the difficulty of *trial upon the issue*, not just the possibility of sentence upon conviction. In other words, the issue shall be withdrawn from the trier of fact and ruled upon as a matter of law by the judge. Second, the state may not wish to sustain the considerable expense of staging a full trial when faced with the strong possibility that it will be called upon to bear *all costs of the defendant* if he is acquitted on grounds of self-defense.

In examining case law relating to self-defense, it is noteworthy that in most cases where self-defense is raised as a justification, it is based on what appeared reasonable to the actor under the circumstances. A reasonable mistake of fact still justifies self-defense.\(^6\) However, because L.B. 925 rejects the "reasonable" standard and adopts a standard based on what is "necessary," L.B. 925 serves to invalidate a defense based on a reasonable mistake of fact. Interposing a defense of reasonable mistake of fact could be conclusive that what appeared reasonable was not, in fact, necessary. A significant number of self-defense cases are based on a mistake of fact, that is, the situation is other than the actor thought it to be and his act in self-defense was not necessary by an objective standard. However, under prior law, if the mistake was reasonable, the defendant could still avail himself of the defense of self-defense. If, under L.B. 925, an objective standard is to be used to determine what is necessary, the reasonable mistake of fact will not justify self-defense. Because this would impose liability in a number of instances on the innocent actor, it is more likely that a subjective standard of "necessary" will be used, that is, what the actor thought to gain a conviction under the new law. Omaha World-Herald, Nov. 25, 1969, at 14, col. 3. The issues surrounding civil liability under L.B. 925 may soon be resolved, as the wounded picket has filed a $500,000 personal injury suit against his alleged attacker. Omaha World-Herald, Dec. 2, 1969, at 4, col. 3.

\(^6\) This issue raises constitutional questions which are discussed more fully in Section V of this article.


COMMENT

was necessary. Therefore, if a determination of what is a necessary act of self-defense is to be based on an objective standard, anyone operating under a reasonable mistake of fact would be liable. If a subjective standard of necessity is to be used, the actor would have complete freedom to determine the necessity of any act taken in defense of life or property.

It is arguable that what is “necessary” must also be “reasonable.” This may be valid when the issue is defense of life, but the argument deteriorates rapidly when applied to defense of property. Actions necessary to protect property from a criminal attempt would in many instances not be “reasonable” under any existing standard of reasonableness.

IV. POLICY CONSIDERATIONS RELATING TO L.B. 925

The self-defense bill unquestionably brings about change in the Nebraska law relating to self-defense.67 But since there has as yet been no case law under the bill, the actual nature of the change can only be a matter of speculation. As noted earlier, the bill appears to be a reaction to the current demand for “law and order.”68 That the citizen has a stake in the maintenance of an orderly society is conceded, but there must be some inquiry into the extent of citizen involvement.

67 Again, reference is made to the legislature’s rejection of the attempt to insert the word “reasonable” into L.B. 925, and the expressed feeling of some of the senators toward the desirability of a “reasonable” standard for self-defense.

E. g., Senator Terry Carpenter: “And yet we have the Senator from Omaha who wants to make it ‘reasonable,’ for example, before a citizen can react.” Minutes of the Legislature 1908. Senator Clifton Batchelder: “We have gotten so reasonable in this country. So reasonable that we let crooks and vandals get away with murder because we don’t want to be unreasonable with him so we get this bill into some sort of state that I thought would strengthen the resolve and we get right back to sweet reasonableness that the lawyers have been injecting into all these situations so long that we have become impotent in our ability to defend ourselves.” Id. at 1726.

68 Some state self-defense statutes expressly grant a citizen the right to forcibly intervene in a riot situation. E.g., N.M. STAT. ANN. § 40A-2-8(C) (1953), stating that homicide is justifiable “[w]hen necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed in his presence, or in lawfully suppressing any riot, or in necessarily and lawfully keeping and preserving the peace.” However, most statutes of this type were enacted at a time when governmental law enforcement was less efficient than today. The need for, and propriety of, counter-violence in a riot situation is today questionable. Compare Note, Criminal Law: Justifiable Homicide to Prevent Commission of Felonies, 7 OKLA. L. REV. 344 (1954), with Hinshaw, Riots and the Law: “Justifiable” Homicide, 43 CAL. S.B.J. 541 (1968).
To say that the police need support is a truism . . . . [But i]f the white middle class turns its homes into armed fortresses, it is also contributing more to the climate of challenge and fear than to the dissolution of violence.\(^6\)

To the extent that L.B. 925 encourages private force in the resolution of private disputes that are best settled in a more peaceful forum, it is unwise. To the extent that it would increase rather than diminish the resort to violence by private individuals, it is undesirable.\(^7\) In reducing the likelihood of criminal liability for violent action, these are two of the possible results of L.B. 925. But the results of L.B. 925 will extend into civil disputes as well.

Section one, paragraph two of the self-defense bill provides that when one's action in self-defense is found justified under the intent of the bill, the state "shall indemnify or reimburse such defendant for all loss of time, legal fees, court costs, or other expenses involved in his defense."\(^7\)

On the day L.B. 925 was introduced, the following exchange took place:

*Senator Duis:* I'd like to ask Senator Batchelder what the fiscal impact [of this bill] is.

*Senator Batchelder:* There is none.\(^72\)

The bill received initial passage with no further discussion on fiscal impact. On June 5, 1969, the day of the vote to override Governor Tiemann's veto, the following exchange took place:

*Senator Proud:* I'd like to ask what the fiscal impact of this bill is.

*Senator Batchelder:* I'm not aware of any.

*Senator Proud:* Well, then, I will read to you this part, the last four sentences: "The State of Nebraska shall indemnify, or reimburse such defendant for all loss of time, legal fees, court costs, and [sic] other expenses involved in his defense." Wouldn't you say that that's some cost to the State of Nebraska? The extent of which we do not know.

*Senator Batchelder:* Yes, I'm in error in that regard, if that is the case. There could be a fiscal impact.\(^73\)

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\(^7\) See Editorial: *The Self-Defense Act*, Lincoln Journal, Dec. 12, 1969, at 4, col. 1. A particularly strong condemnation of L.B. 925 appeared in the Dec. 13 Lincoln Journal as a reprint from the Des Moines Register. The editorial noted that "[i]n a day when there are millions of weapons in the hands of private citizens, the Nebraska law encourages them to be trigger-happy. It legalizes anarchy—the antithesis of 'law and order' which the Nebraska lawmakers evidently thought they were upholding." Lincoln Journal, Dec. 13, 1969, at 4, col. 1.


\(^72\) Minutes of the Legislature 1308.

\(^73\) Id. at 1905, 1906.
Indeed, the extent of the fiscal impact may be difficult to ascertain. It cannot even be determined by examining the number of cases involving self-defense in Nebraska because the state will now be responsible for all the defendant's investigative costs.\textsuperscript{74}

The legislature has made no appropriation to provide funds under this part of the bill, yet the state is liable to pay these costs.\textsuperscript{75}

The state may find itself facing a large number of claims under this portion of the self-defense bill. Any attorney who is representing a client facing charges or civil action based on any form of violence, will interpose a defense of self-defense, first, because under the broad terms of L.B. 925 his client stands a better chance of acquittal and second, because he is guaranteed payment not only of legal fees, but also for investigative costs, expert witnesses, travel expenses, or any other costs involved in defending his client. Further, the client has a chance to recover court costs, lost income, and, apparently, virtually all other expenses.

The state had not appropriated funds for this provision at the time of adjournment. If no funds are appropriated in the future, it would appear that paragraph two is needless and undesirable to the extent that individuals rely upon its language. If funds are appropriated, the expense could be considerable.

\textsuperscript{74} See id. at 1910.

\textsuperscript{75} In a letter to Governor Tiemann, Attorney General Clarence A. H. Meyer outlined the procedure for recovery of claims under L.B. 925. The proper procedure for a claim is to file with the Sundry Claims Board, which is authorized to hear all claims for monies which the legislature has not yet appropriated. \textit{Neb. Rev. Stat.} § 81-858 (Supp. 1967). It should be noted that L.B. 154, passed by the 1969 Legislature and which went into effect on Jan. 1, 1970, has changed the name of the Sundry Claims Board to the "State Claims Board" and amended § 81-858 to authorize the board to hear "all other claims against the State of Nebraska for the payment of which no money has been appropriated . . . ."

Because L.B. 925 does not place any limitation on fees and expenses, the only finding the board need make is that the defendant was justified under the bill and that he did have expenses. The bill allows no latitude as to determining reasonableness, etc., of the expenses claimed.

This will present some difficulties in a criminal case. If a jury returns a general verdict of acquittal, there is no way of determining if the acquittal was based on L.B. 925, as Nebraska makes no provision for a special verdict in a criminal case. In a civil suit, attorneys representing a defendant who claims self-defense under L.B. 925 would be best advised to ask for a special verdict to insure that a finding for the defendant based on L.B. 925 will show as such in the record.

To date only one claim has been filed under L.B. 925. A man who was acquitted of manslaughter in July of 1969 has sought to file a claim for $2,825 in attorney's fees. Lincoln Star, Aug. 14, 1969, at 7, col. 1.
Assuming the legislature will provide funds under L.B. 925, the provision for indemnification raises serious questions in civil suits arising from assault and battery or wrongful death. When a plaintiff brings suit believing he has a legitimate claim for recovery for one of these causes of action, the obvious course for a defendant would be to prolong the dispute as long as possible if he can raise any evidence whatsoever of justification under L.B. 925. The plaintiff will be forced to bear the costs and inconvenience on his own, while the defendant is aware of the strong possibility that all his costs will be reimbursed by the state. This places a defendant in a very favorable position in a civil action. There is no sound reason whatsoever why the odds in a legitimate civil dispute should be so overwhelmingly stacked in the defendant's favor.

A defendant in a criminal action is likewise placed in an advantageous position, at least in relation to defendants in a criminal action where there can be no defense of self-defense. When self-defense is an issue, the defendant will be aware that the more money spent on his defense of self-defense, the less likely he is to have to bear these costs. This places the defendant in an assault or homicide case in a preferred position if self-defense is at issue, particularly since most prosecuting attorney's offices operate on limited resources.

One noteworthy result of paragraph two of L.B. 925 is that it serves to remove the current limitations placed on reimbursement to court-appointed counsel representing indigent defendants whenever an acquittal is based on L.B. 925.76

Another result sought by L.B. 925 is to encourage intervention of people who witness criminal attempts on others. It is conceded that the inaction of bystanders who witness a criminal action can be a serious problem. It is proper for legislative action to be brought to bear on this problem.77 The "crisis" in law and order is considered to be of such large proportions that some authorities have suggested what has been termed a "hard line" approach to crime and crim-

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76 The current limitation on compensation for court-appointed counsel is "reasonable attorney's fees" in a non-capital case. Neb. Rev. Stat. § 29-1803.03 (Supp. 1967). Prior to its amendment in 1967, § 29-1803.03 had limited compensation to $300. L.B. 925 places no limit whatsoever on attorney's fees and further provides a subsidy for investigative costs, travel expenses, expert witnesses, etc., which places the indigent defendant who can raise some issue of self-defense in a favorable position as opposed to other indigent defendants.

77 See Note, Torts: Privilege to Defend Third Parties, 6 Okla. L. Rev. 231 (1953).
On the other hand, it is questionable whether permitting even the police to use deadly force will bring about a more orderly society. A legislative codification of the right to self-defense is probably appropriate, as the common law can sometimes reach strange results. But to legislatively encourage the use of force by private individuals may bring a further deterioration of law in society:

The passage of any law which would encourage the use of private force is most inappropriate at this time when Nebraskans are most concerned with the rising level of violence. I feel that LB 925 might increase rather than diminish the level of violence in Nebraska and would escalate the breakdown of law and order. I am insistent upon preserving law and order in Nebraska. . . . We must solve the problems of increased violence and unreasonable private force if we are not to perpetuate the very evil we seek to eliminate. . . . [This bill] implements a system of vigilante law enforcement, a system long ago proved to be destructive of civilized society.

Conceding that the citizen has a right to reasonable self-defense, it is not conceded that there should be legislative action which affirmatively encourages forceful retaliation.

V. POSSIBLE CONSTITUTIONAL DEFECTS IN L.B. 925

A detailed examination of the constitutional implications of L.B. 925 is beyond the scope of this article. However, because the bill will no doubt be subject to some form of court test in the near future, several areas of possible constitutional attack will be briefly outlined.

A. L.B. 925 IS SO VAGUE AS TO BE INVALID

As expressed in the legislative debates, the intent of L.B. 925 is to encourage citizens to forcibly defend the lives and property of themselves and others.

The bill operates in a very sensitive area, that is, the constitutional right of the citizen to life. With L.B. 925 the legislature has

78 See Momboisse, Riot Prevention and Survival, 45 Chi.-Kent L. Rev. 143 (1968), and note in particular the suggestions of Dean Joseph O’Meara of the Notre Dame Law School in O’Meara, Riots, 43 Notre Dame Lawyer 908, 910 (1968).
80 Comment, Manslaughter: Adequacy of Provocation in Missouri, 30 Mo. L. Rev. 112 (1965).
conferred the power to make determinations regarding a constitutional right under a bill which contains no limitations on the exercise of that power. It offers no guidance as to when force is permissible, nor does it offer guidance as to limits on the force used.

As the Supreme Court of the United States has said: "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." L.B. 925 does not offer that precision.

**B. L.B. 925 is a Deprivation of Due Process of Law**

The legislature has no power to deprive a person of a legal right to seek redress without due process of law.\(^2\)

The Nebraska Supreme Court has stated that "[t]he primary purpose of [the constitutional guarantee of due process] is security of the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice."\(^4\)

The state has no authority to deprive an individual of life or property without due process of law, nor may they delegate that authority to a private individual.\(^5\)

\(^3\) The Nebraska Constitution's "due process" provision, art. I, § 3, is identical in wording to that of the 14th amendment to the United States Constitution. For this portion of the examination of the constitutional issues raised by L.B. 925, attention will be restricted to the interpretation of due process developed by the Nebraska Supreme Court. However, it should be noted that L.B. 925 raises substantial issues under the 14th amendment in that it seeks to delegate to private citizens the right to make determinations traditionally reserved to the judicial process, and then only when accompanied by all due process safeguards. Whenever a person acts pursuant to L.B. 925 to deprive an individual of life, he is acting under legislative authority to make a determination affecting a constitutional right. Although a detailed examination of the question is beyond the scope of this article, it does raise the argument that an injured party who is unable to recover in a civil action because of L.B. 925 may be able to seek relief in federal court under 42 U.S.C. § 1983 (1964).

This question was presented in the case of Sauls v. Hutto, 304 F. Supp. 124 (E.D. La. 1969). The court found that the plaintiff was entitled to recover for the wrongful death of her son, who was shot by a policeman while fleeing the scene of an attempted theft.

The court decided that under Louisiana law police may not kill to protect property, thus avoiding a decision on the constitutional question.

\(^4\) Rein v. Johnson, 149 Neb. 67, 82, 30 N.W.2d 548, 557 (1947).
C. L.B. 925 is Contrary to Article I, Section 13 of the Nebraska Constitution

Perhaps the strongest argument against the constitutionality of L.B. 925 is provided by article one, section thirteen of the Nebraska Constitution, which provides that:

All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due process of law, and justice administered without denial or delay.

L.B. 925 seeks to remove a certain class of defendants from civil liability, that is, those defendants who have acted in defense of life or property shall face "no legal jeopardy whatsoever." In a civil action, the corollary to this must be true; when a defendant is statutorily declared without liability, a plaintiff who has suffered damage is left without the right to seek legal redress.

Statutes enacted by the legislature must not violate rights guaranteed to the people by the constitution. In Nebraska, "litigants are [constitutionally] entitled to access to the courts of the land when they have probable cause and reasonable basis for believing an injury has been done to their lands, goods, person or reputation."

In reversing a dismissal of a complaint, the Nebraska Supreme Court said in Temple v. Cotton Transfer Co.: Here we have a justiciable controversy for personal injuries sustained, wherein the plaintiff is constitutionally guaranteed an open court for any injury done him or his person, and a remedy by due course of law in which the right of trial by jury is inviolate.

Decisions of the Nebraska Supreme Court indicate that the individual may neither contract away his right to seek redress in a court, nor may the legislature impair it. Because L.B. 925 deprives a class of plaintiffs access to the courts to seek relief in a civil suit, it raises a constitutional question under article one, section thirteen of the Nebraska Constitution.

D. L.B. 925 Is in Contravention of Both the Equal Protection Clause of the United States Constitution and Article III, Section 18 of the Nebraska Constitution

Article three, section eighteen of the Nebraska Constitution provides that the Nebraska Legislature shall not pass local or special

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80 Fender v. Waller, 139 Neb. 612, 298 N.W. 349 (1941).
87 Id. at 618, 298 N.W. at 352.
88 126 Neb. 287, 253 N.W. 349 (1943).
89 Id. at 290, 253 N.W. at 350 ( cita tions omitted).
laws "[g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever."

If the legislature passes an act designed to act on a class, the class must not be arbitrarily drawn, and the law must operate equally upon all within the class.

Because L.B. 925 provides reimbursement for legal fees, etc., for only a designated class of people, that is, those who are found justified in acting in self-defense within the terms of L.B. 925, it must be shown that the classification is not arbitrary in order for L.B. 925 to be constitutional.

This determination can be made only by analogy. In Thompson v. Commercial Credit Equipment Corp., the Nebraska Supreme Court held that classifying installment lenders into four groups for penalty purposes was violative of article three, section eighteen because "[t]here would seem to be no reasonable basis for the making of such classifications . . . ." Nor would there seem to be any reasonable basis for reimbursing only defendants acquitted under L.B. 925 as opposed to all other defendants.

This portion of the article is not intended to outline all possible areas of constitutional attack. The implications of L.B. 925 are so extensive that it will be some time before the true extent of the changes brought about can be known. Certainly other questions are raised by the bill which have not been examined.

In 1959, the legislature asked the Nebraska Attorney General's office for an advisory opinion on the constitutionality of L.B. 379, a bill similar to L.B. 925 in that it sought to limit the liability of the pilot of the state aircraft to the limits of insurance coverage. The Attorney General's office concluded that the statute was unconstitutional. The determination of unconstitutionality was based on the Nebraska Constitution article one, section three (due process); article one, section thirteen (access to courts) and article three, section eighteen (special legislation). This opinion adds some force to any argument that L.B. 925 is unconstitutional.

VI. CONCLUSION

In considering the multitude of issues arising from L.B. 925, there is one additional factor which emerges dominant. For the

92 United Community Services v. Omaha Nat. Bank, 162 Neb. 786, 77 N.W.2d 576 (1956); Althaus v. State, 94 Neb. 780, 144 N.W. 799 (1913).
94 Id. at 390, 99 N.W.2d at 769.
95 1959-1960 NEB. ATT'Y GEN. REP. 120.
immediate future, the question is not what L.B. 925 was intended by the legislature to say, nor what the courts will interpret it to say. The question is what the average citizen of Nebraska thinks it says. It is submitted that the average person reading the bill will assume that the legislature has granted an almost unlimited right to use force in protecting one's self, others, and property. It appears that the legislature has not only condoned the resort to private violence as a means of settling disputes, but has sought to encourage it by subsidizing the legal and other expenses of those who do use violent means and are subsequently found justified within the meaning of L.B. 925.

The conclusion is inescapable that the legislature not only intended L.B. 925 to serve as a law relating to self-defense, but also as an attempt to state a political philosophy.

Ironically, that philosophy may be retarded rather than promoted by the legislation. There is a place in a society ruled by law for a right to act in self-defense. That right, reasonably asserted, has always existed in Nebraska. But legislation which encourages resort to private violence as a means to seek redress of grievances can only be destructive of order in a civilized society.

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