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CONSULTATION PAPER

LEGITIMATE DEFENCE

(LRC CP 41-2006)

IRELAND

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INTRODUCTION

A Background

1. This Consultation Paper addresses the law relating to the criminal defence of legitimate defence in the context of homicide. Legitimate defence is the lawful killing of another person in response to a threat to “private” or “public” interests. “Private defence” covers the use of force for the protection of the person or of property. “Public defence” covers the use of force for the prevention of crime or to effect arrests.

2. This is the fourth in a series of papers which is intended to provide a comprehensive review of the law of homicide in this jurisdiction with the eventual aim of codification.¹ It follows the Commission’s Consultation Papers on Homicide: The Mental Element in Murder,² and Homicide: The Plea of Provocation,³ and the Commission’s Report on Corporate Killing.⁴ The law of homicide is included in the Commission’s Second Programme for Law Reform, approved by the Government in 2000.

3. One of the values underpinning codification is the principle of legality. The principle of legality is described as “the idea that conduct should not be punished as criminal unless it has been clearly and precisely prohibited by the terms of a pre-existing rule of law.”⁵ A failure to specify rules of acceptable conduct clearly exposes accused persons to “the vagaries of juries” and to “gusts of public opinion”.⁶ The principle of legality is of the utmost importance in cases of homicide.

¹ See the *Report of the Expert Group on the Codification of the Criminal Law: Codifying the Criminal Law* (Department of Justice, Equality and Law Reform 2004).

² Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001).

³ Law Reform Commission *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27 – 2003).

⁴ Law Reform Commission *Report on Corporate Killing* (LRC 77- 2005).

⁵ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 42. This principle is expressed in the judgment of Henchy J in *King v AG* [1981] IR 233 at 257. See also Ashworth “Self-Defence and the Right to Life” [1975] CLJ 282 at 307; Ashworth *Principles of Criminal Law* (2nd ed Clarendon Press 1995) 136 at 150.

⁶ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 457.

4. As noted in the Report of the Expert Group on Codification, the general principles of criminal liability need to be defined in a manner which is compatible with the principle of legality and “citizens are entitled to clear notice as to what the law expects of them and to be given a fair opportunity to act in conformity with its provisions”.⁷ In particular, the justification defences, which permit the use of force- particularly lethal force, should be comprehensively defined since they seek to set out the limits of what a citizen may and may not lawfully do.

5. The approach adopted in this paper is to carry out a comprehensive and systematic review of the law as it operates in Ireland and in other common law jurisdictions. This review will be structured in accordance with the traditional rules which have for centuries governed the law of legitimate defence.

6. The essence of the legitimate defence can be summarised as a defender’s response to a threat from an attacker.⁸ Thus, any assessment of the liability will involve a two-stage test, namely:

(a) Was the nature of the threat such as to permit a lethal defensive response?

(b) Was the response warranted?

7. Each stage of the test can be further divided into a series of sub-issues. Under the threat stage of test, three primary questions arise:

(i) Is the threatened interest of sufficient importance to warrant a lethal response? (The Threshold requirement)

(ii) Is the threat imminent? (The Imminence requirement)

(iii) Is the threat unlawful? (The Unlawfulness requirement)

8. Under the response stage of the test, two primary questions arise:

(i) Is the use of lethal force necessary to protect the threatened interest? (The Necessity Requirement)

(ii) Is the use of lethal force proportionate to the level of harm threatened? (The Proportionality requirement)

⁷ *Report of the Expert Group on the Codification of the Criminal Law: Codifying the Criminal Law* (Department of Justice, Equality and Law Reform 2004) paragraph 2.90.

⁸ The term “defender” will be used throughout the paper to denote the individual who uses defensive force in either public or private defence in response to an “attacker”.

B Outline of this Paper

9. The format of this paper follows the above analysis.
10. Chapter 1 contains a brief overview of the defence of legitimate defence and considers the definition of “lethal defensive force” and discusses whether this area of law can be said to be governed by the *Non-Fatal Offences against the Person Act 1997*.
11. Chapter 2 considers the threshold requirement in the 4 categories of legitimate defence- defence of the person; defence of property; the use of force to effect arrests and the use of force to prevent crime. It discusses the type of threats necessary to allow a defender to resort to lethal defensive force and whether lethal force may ever be used to defend property or to prevent crime.
12. Chapter 3 deals with the imminence rule, and considers the difficult cases which may form a challenge to this rule.
13. Chapter 4 reviews the unlawfulness rule, which provides that legitimate defence may only be used in response to an unlawful attack. It considers the scope of the rule and resistance to unlawful arrest, and then goes on to discuss the lack of capacity cases.
14. Chapter 5 discusses the requirement of necessity in legitimate defence. It discusses the duty to retreat as well as the Castle doctrine, which asserts that defenders do not have a duty to retreat when attacked in their own home. It also considers the rule as it applies when the defender is wholly or partly to blame for the attack.
15. Chapter 6 contains a discussion of the proportionality rule, which provides that a defender’s response to an attack must be proportionate to the harm sought to be avoided.
16. Chapter 7 considers the problem of when a defender is mistaken in the use of lethal force, whether it is a mistake as to fact or a mistake as to the law governing the issue, and considers the possibility of a partial defence for mistaken defenders.
17. Chapter 8 contains a summary of the Commission’s provisional recommendations.
18. This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations made are provisional in nature. Following further consideration of the issues and consultation with interested parties, the Commission will make its final recommendations. Submissions on the provisional recommendations contained in this Consultation Paper are welcome. In order that the Commission’s final Report may be made available as soon as possible, those who wish to do so are requested to send

their submissions in writing by post to the Commission or by email to info@lawreform.ie by **30 April 2007**.

CHAPTER 1 OVERVIEW OF LEGITIMATE DEFENCE

A Introduction

1.01 As noted above, this Consultation Paper seeks to examine and set out the law on Legitimate Defence in Ireland and in other common law jurisdictions. It will look particularly at the various requirements that exist in relation to the defence.

1.02 However, before embarking on this examination, it is necessary to consider further the principle of legality and how the generalised test of reasonableness which now appears to govern the defence of legitimate defence affects this principle. It is also necessary to define the meaning of “lethal defensive force” and to consider the relevance of the legitimate defence provisions contained in the *Non-Fatal Offences Against the Person Act 1997*.

B Reasonableness and The Principle of Legality

1.03 The starting point in identifying the rules which govern the defence of legitimate defence is the oft-quoted passage of the 1879 Criminal Law Commissioners:

“We take one great principle of the common law to be, that though it sanctions the defence of a man’s person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent.”¹

1.04 Though this passage only touches upon some of the key issues which arise in legitimate defence, it stands in stark contrast to the

¹ (1879) C2345 at 11. The Commissioners were Lord Blackburn and Stephen, Lush and Barry JJ.

reasonableness test which has developed in the common law and now governs the defence.

1.05 Despite the fact that legitimate defence is one of the key criminal defences, it is questionable whether the defence as currently constituted could be said to meet the ideals of the principle of legality. Abandoning the framework of detailed rules and principles that evolved at common law over a number of centuries, a generalised test of reasonableness has enveloped the law of legitimate defence. Lawyers are familiar with the concept of “reasonableness” in different areas of the law; yet, it is notoriously difficult to define.

1.06 Whilst some would argue the earlier approach was unnecessarily complex and rigid, others submit that the modern approach lacks the precision to offer any real guidance to the courts or to society at large as to the limits of acceptable conduct. It is true that the modern approach permits flexibility and discretion, but at what cost? It may be argued that many of the fundamental questions as to the proper limits of criminal liability are concealed behind the reasonableness test.

1.07 One of the principal motivations for the adoption of the reasonableness approach seems to have been the noble pursuit of greater simplicity within the criminal law. Central to this aim has been the anxiety as to whether juries are readily able to comprehend the law as it is directed to them by trial judges. However, it is arguable that this drive for simplicity fails to recognise that criminal offending can often not be understood in a simple theoretical context; rather the law must reflect the complex reality of the world of human interaction and therefore must be sufficiently elaborate to reflect the many variables that make up criminal liability. If the simplification of the law results in a test that offers juries little guidance, then it may be questioned whether their job has been made any easier or whether difficult questions of law and policy have merely been transferred behind the closed door of the jury-room. Such a result would be unfair not only to juries, but also to accused persons and the public at large. Whilst it is crucial that juries play a central role in the criminal justice system, precedence should be granted in the area in which they are most competent, namely in relation to assessing credibility of testimony and other evidence and weighing up and deciding on matters of fact.

C “Lethal Defensive Force”

1.08 How should “lethal defensive force” be defined? Should it include the application of any defensive force that results in death or, alternatively, is it necessary to take account of the defender’s intent or purpose?

1.09 It is submitted that a simply *result*-based definition – that is, “force that kills” – would be inadequate insofar as it would be inconsistent with the *intention*-based general approach to criminal liability. Arguably a higher standard of conduct should be expected of those who intentionally apply lethal force in contrast to those who intentionally apply force but do not intend to kill.

1.10 This view is reflected in the statutory provisions governing legitimate defence in Australia and Canada. Hence, the Australian *Commonwealth Criminal Code Act 1995*² and the *Australian Capital Territory Criminal Code 2002*³ distinguish defensive force where there is *intent* to inflict death or serious injury from ordinary cases of legitimate defence. Other statutory provisions in Queensland and the Northern Territory impose stricter rules on the use of defensive force that is intended or is *likely* to cause death or grievous bodily harm.⁴

1.11 A similar approach was adopted by the Court of Criminal Appeal in *People (AG) v Keatley*.⁵ The Court held that the high threshold requirement for the use of lethal defensive force did not apply to cases in which the defender did not intend to cause death nor could any oblique intention be implied. The death in this case had been caused after a relatively minor physical dispute involving the deceased and the appellant’s brother. The appellant had stepped into the fray on his brother’s behalf and had struck the deceased from behind with a blow that was described as not very powerful. The deceased died not as a result of the blow but as a result of his head striking an object as he fell to the ground. In these circumstances, the stricter rules governing lethal defensive force did not apply.⁶

² Section 10.4(3) of the Australian Commonwealth Criminal Code Act 1995.

³ Section 42(3) of the Australian Capital Territory Criminal Code 2002.

⁴ The requirements set out in section 271(1) of the Queensland *Criminal Code*, which apply to force that “is not intended, and is not such as is likely, to cause death or grievous bodily harm” are more lenient than those applying under the catchall provision in subsection (2); the latter applies “even though [the defensive force] may cause death or grievous bodily harm”. Similar wording appears in section 248 of the Western Australian *Criminal Code*. Sections 28 and 27 of the Australian Northern Territory *Criminal Code* distinguish between, on one hand, “force that will or is likely to kill or cause grievous bodily harm” and that which is not likely to do so. Stricter rules apply to the former.

⁵ [1954] IR 12.

⁶ [1954] IR 12 at 16. It seems likely that the Supreme Court adopted a similar view in *People (AG) v Quinn*. In that case, the appellant had punched the deceased during a dispute, causing the deceased to fall to the ground and fatally strike his head. Again, the issue was whether the blow amounted to manslaughter as the Court accepted that death could not even have been reasonably expected to result.

1.12 It is submitted that the lethal defensive force should be defined so as to be consistent with the intent requirements as identified in the Commission's *Consultation Paper on Homicide: The Mental Element in Murder*.⁷ To the extent that the defender does not satisfy these intent requirements, the law should be governed by the same rules as apply to non-fatal legitimate defence.

1.13 This could be achieved in two ways. First, the *Non-Fatal Offences against the Person Act 1997* could be amended to allow for this hybrid approach.⁸ However, it is submitted that it is likely to cause unnecessary confusion if an Act relating to "non-fatal" offences were extended to cases in which death is caused. In order to achieve greatest clarity a better approach would be to set out explicitly in a specific "homicide" provision the rules relating to the use of defensive force which results in unintended death. Nevertheless, these rules should correspond with those which govern non-fatal offences. Whilst a review of the 1997 Act is beyond the scope of this Paper, many of the comments made in this paper may have relevance to that Act.

1.14 It must be conceded that the creation of separate rules governing intentional and unintentional lethal force could create practical difficulties in trials in which the question of lethal intent is disputed: in these circumstances, the trial judge would have to direct juries on both sets of rules. Nevertheless, if the law is to reflect properly the lower culpability of a defender who does not intend the death of his attacker, then this would appear to be an unavoidable complication.

D The Non-Fatal Offences against the Person Act 1997

1.15 Sections 18-20 of the *Non-Fatal Offences against the Person Act 1997* ("1997 Act") govern the use of legitimate defensive force in non-fatal cases. However, an argument may be made that the somewhat ambiguous language contained in the Act is sufficiently broad also to govern the legitimate defence in cases of *homicide*. To understand how this potential anomaly has arisen, it is necessary to consider carefully the wording of the Act.

⁷ Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17 – 2001).

⁸ The 1997 Act does not currently permit this hybrid approach; either it codifies the law relating to lethal defensive force (and abolishes the common law) or it has no application to fatal cases whatsoever: section 22(2) of the *Non-Fatal Offences against the Person Act 1997*. For discussion, see paragraphs 1.15-1.19.

1.16 On the one hand, both the Short and Long Titles of the 1997 Act suggest that it is confined to “non-fatal offences”.⁹ Furthermore, the Commission’s 1994 *Report on Non-Fatal Offences Against the Person*,¹⁰ upon which the 1997 Act was based, expressly restricted its ambit to non-fatal offences.¹¹

1.17 On the other hand, the provisions of the 1997 Act do not expressly draw any distinction between fatal and non-fatal uses of defensive force.¹² Furthermore, the draft clause contained in the Commission’s 1994 Report drew heavily on a draft *Criminal Law Bill* proposed by the Law Commission of England and Wales; the general part and defences contained in that Bill were intended to apply to both fatal and non-fatal offences alike.¹³

1.18 If the 1997 Act does apply to cases of homicide, then the Act states that the common law rules, as articulated in cases such as *People (AG) v Keatley*¹⁴ and *People (AG) v Dwyer*,¹⁵ have been abolished.¹⁶

⁹ The Long Title states: “An act to revise the law relating to the main non-fatal offences against the person and to provide for connected matters.” However, it might be said that the “non-fatal” reference in the Long Title refers only to the type of offences contained in the Act and not to the type of defences, which presumably fall under the description of “connected matters”. Likewise, the Explanatory Memorandum to the *Non-Fatal Offences against the Person Bill 1997* states that it refers to “the law dealing with the main non-fatal offences against the person” but later indicates ambiguously that the legitimate defence provisions “[govern] the use of force in public and private defence” without clarifying whether or not this is limited to non-fatal force.

¹⁰ LRC 45-1994.

¹¹ The Commission explained in the introduction to its Report: “We decided to divide our study of offences against the person into two reports, one on non-fatal offences, the other on criminal homicide, and to deal first with non-fatal offences”: LRC 45-1994 at 1.

¹² See Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 1044.

¹³ Report of the Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (No 218, 1993). The Report emphasises, at 46, that Part II of the proposed Criminal Law Bill, which deals with defences and general principles, “goes further than merely applying that part of the general law in the case of offences against the person. Rather, it legislates for the defences and principles to apply throughout the criminal law, in respect of all offences.” See, for discussion, McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 764. However, it should be noted that, unlike the Criminal Law Bill, the 1997 Act contains no express provision stating that the defence and general principles apply to all offences.

¹⁴ [1954] IR 12.

¹⁵ [1972] IR 416.

¹⁶ Section 22(2) *Non-Fatal Offences against the Person Act 1997* states that the Act codified the law of legitimate defence and abolished “any defence available under

1.19 Interestingly, this issue does not appear to have arisen directly for determination by the appellate courts. Nevertheless, to date the Court of Criminal Appeal appears to have assumed that the common law Plea recognised in *Dwyer* continues to apply notwithstanding the enactment of the 1997 Act.¹⁷ One might assume, therefore, that the Courts have taken the view that the common law is undisturbed. However, it is difficult to draw any firm conclusions on this point; consequently, this paper will analyse the Irish law of legitimate defence in homicide from the perspective of both the common law and the 1997 Act.

common law in respect of the use of force within the meaning of [the legitimate defence provisions]”.

¹⁷ *People (DPP) v Dunne* Court of Criminal Appeal Geoghegan, O’Higgins and Peart JJ 25 November 2002.. See also *People (DPP) v Kelly* [2000] 2 IR 1 at 10, in which the Court of Criminal Appeal contrasted the partial defence of provocation, with which the case was directly concerned, with the plea of excessive defence, referring with apparent approval to *Dwyer*.

CHAPTER 2 THE THRESHOLD REQUIREMENT

A Introduction

2.01 In this chapter, the Commission discusses the threshold requirement in the 4 categories of legitimate defence- defence of the person; defence of property; the use of force to effect arrests and the use of force to prevent crime. It considers the type of threats necessary to allow a defender to resort to lethal defensive force. It also discusses whether lethal force may ever be used to defend property and what types of situation (if any) would warrant the use of lethal force for the prevention of crimes or for the apprehension of those who commit them.

B The Threshold Requirement

2.02 This Chapter considers whether it is possible to develop a “threshold requirement”¹ which would identify in advance an exhaustive list of interests which are of such importance that their protection could warrant the use of lethal defensive force, that is, it would prescribe a clear minimum legal standard which, if not reached, would prohibit the use of lethal force. Not only would the threshold test have the practical benefit of filtering out unmeritorious claims to legitimate defence, but it could also play an instructive role insofar as it would provide individuals with concrete standards to gauge their conduct.

2.03 Some difficult issues arise in this chapter, and the Commission notes that on the one hand, the sanctity of human life is at stake and therefore the law must keep a tight rein on the use of lethal force; while on the other, it is important that the threshold should not be set so high that legitimate acts of defence are criminalised.

2.04 Many common law jurisdictions have responded to this dilemma by refraining from setting any threshold tests whatsoever. A common

¹ Robinson expresses the same idea with different terminology; he refers to the “triggering conditions” which he describes as the “circumstances that must exist before the actor will be eligible to act under a justification.” Robinson “Criminal Law Defenses: A Systematic Analysis” (1982) 82 Columbia Law Review 199 at 216. See also Clarkson & Keating *Criminal Law: Text and Materials* (2nd ed Sweet & Maxwell 1990) at 293.

argument is that it is impossible to do so with any degree of certainty given the many factual permutations that may arise in cases of legitimate defence. Advocates of this approach favour a generalised defence typically based on the test of “reasonableness”.

2.05 However, others argue that, particularly where liability for serious offences is concerned, it is of the utmost importance that the rules of conduct are clearly stated. This view is based on the “principle of legality”; namely, “the idea that conduct should not be punished as criminal unless it has been clearly and precisely prohibited by the terms of a pre-existing rule of law.”² Whilst the principle is usually associated with *offences*, it seems equally applicable to the definition of those *defences* which seek to set limits to what the citizen may or may not lawfully do. On this reasoning, a defender “is entitled to fair warning as to the limits of any possible criminal sanction”.³ The aim of a “threshold test”, therefore, is to define the ambit of legitimate defence with maximum certainty. Whether this aim is valid, and indeed whether it is achievable, is the subject of this chapter.

C The Categories of Legitimate Defence

2.06 Legitimate defence can be broken down into four categories of defence, namely:

- Defence of the person (self-defence and defence of others);
- Defence of property;
- The use of force to effect an arrest;
- The use of force to prevent crime.

2.07 The first two categories – defence of the person and defence of property – respond largely to threats to *individual* interests and therefore are grouped together under the heading of “private defence”.⁴ The latter two categories – the use of force to effect arrests and prevent crime – respond largely to threats to *societal* interests and therefore are labelled the “public defences”.⁵

² McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 42. For discussion of the origins and development of the principle of legality, see 42-56.

³ *Ibid* at 773.

⁴ The terms ‘public defence’ and ‘private defence’ are adopted in Smith & Hogan *Criminal Law* (9th ed Butterworths 1999), at 252; see also, Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 449.

⁵ For a discussion of the different interests addressed by public and private defence, see *State v Sundberg* (1980) 611 P2d 44 at 47 (Supreme Court of Alaska).

2.08 The public and private defences are conceptually distinct. Nevertheless, in some cases it may appear that both are applicable on the facts. For example, consider a scenario in which a defender uses lethal force against a knife-wielding attacker. Whilst the defensive force might be categorised as an example of public defence – say, to prevent a crime of attempted murder or even effect an arrest – it is submitted that it is better understood *primarily* as a case of self-defence. In legitimate defence, the protection of the lives of innocent victims is viewed as the paramount consideration. Individual interests in the protection of property and societal interests in upholding the law are secondary considerations.

D Defence of the Person

2.09 Threats to the person represent the most common ground upon which legitimate defence is claimed. This section explores whether it is possible to identify a minimum level of threat to the person which would justify lethal defensive force: for example, would threats of serious harm be completely ruled out of contention for the defence? What about threats of rape, or confinement, where no risk of death or even long term physical harm arises?

2.10 The most straightforward approach would be to permit lethal defensive force only in response to deadly threats. This formula would present not only the simplest proposition to be applied by juries, but it would also provide the utmost respect for the sanctity of life of the *attacker*, which could be forfeited only to save the life of another human being.

2.11 However, it will be seen that, to a greater or lesser extent, common law jurisdictions make allowance for lethal responses to non-deadly threats. If this is appropriate, the difficult problem arises as to where to draw the line.

(1) Threats of Physical Harm (Excluding Rape)

2.12 This section considers the types of physical threats that might satisfy the threshold requirement.⁶

(a) The Irish Approach

2.13 Traditionally the Irish courts have maintained a minimum threshold requirement for the use of lethal defensive force, albeit that the nature of this requirement has varied from time to time. For example, in *People (AG) v Keatley*⁷ the Supreme Court indicated that resort might be had

⁶ Excluded from this section, however, is a discussion of threats of rape and other sexual offences; this category is often treated separately by the courts and therefore the same approach will be adopted here.

⁷ [1954] IR 12.

to lethal defensive force to repel “some felony involving violence or from some forcible and atrocious crime”; an attack amounting to a misdemeanour such as assault would be insufficient.⁸ In contrast, Walsh J indicated in the Supreme Court decision of *Attorney-General v Dwyer* that there must be a threat endangering life.⁹

2.14 Whether either of these threshold tests continue to apply is a matter of speculation given the Court of Criminal Appeal’s conflicting approval of both the *Palmer* “reasonableness” approach and the *Dwyer* threshold requirement in the more recent case of *People (DPP) v Clarke*.¹⁰ Furthermore, if the *Non-Fatal Offences against the Person Act 1997* has codified the law in relation to the use of lethal defensive force then the threshold requirement has been replaced with the test of “reasonableness”.

(b) Comparative Law

2.15 Broadly speaking, two approaches to the issue of physical threats and the threshold requirement may be discerned. Some jurisdictions have attempted to define a threshold test, typically requiring a threat of death or serious injury. Conversely, in other jurisdictions, the threshold requirement has been abandoned in favour of a proportionality requirement or, more commonly, a generalised test of “reasonableness”. A classic pronouncement of the latter is found in the Privy Council judgment in *Palmer v R*.¹¹ Adopting a “common sense” approach relying on no strict legal formula, the Committee preferred to state the legitimate defence as simply a test of “what is reasonably necessary”.¹²

“Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation.... Of all these matters the good sense of the jury will be the arbiter.”¹³

⁸ *People (Attorney-General) v Keatley* [1954] IR 12 at 16. The Court held that a lesser threshold test applied where the defender killed unintentionally.

⁹ *People (AG) v Dwyer* [1972] IR 416 at 420: “[T]he homicide is not unlawful if the accused believed on reasonable grounds that his life was in danger and that the force used by him was reasonably necessary for his protection.” (Emphasis added).

¹⁰ [1994] 3 IR 289 at 298-300.

¹¹ [1971] AC 814.

¹² *Ibid* at 831.

¹³ *Ibid* at 831-832.

2.16 The broad nature of the proportionality test stated in this passage is discussed further below¹⁴. It suffices to note here that any remnants of the traditional threshold rules were swept away by this decision.¹⁵

2.17 In *Zecevic v DPP*¹⁶ this approach was adopted by the High Court of Australia in relation to the Australian common law jurisdictions, prompting one commentator to observe that there is no “specified... lower threshold of violence or threatened violence” for lethal defensive force.¹⁷ However, it should be noted that the majority of the High Court did observe that a threat would not “ordinarily” warrant a lethal defensive response unless the threat causes a reasonable apprehension of death or serious bodily harm.¹⁸

2.18 The reasonableness approach has also been adopted in a number of jurisdictions, including Tasmania¹⁹ and New Zealand *Crimes Act 1961*.²⁰ The New Zealand Court of Appeal has held that this test has abolished any threshold requirement:

“The defence is available in a wide variety of situations and is not limited to situations where there is a danger of death or serious bodily harm. The seriousness of the threat or attack is relevant at the point of determining the reasonableness of the response.”²¹

2.19 In contrast, many courts and legislatures have tackled the problem of identifying a threshold level of threat. A classic example is the approach adopted in Scotland. The Scottish courts have taken the view that the sanctity of an attacker’s life demands that lethal defensive force may be resorted to only in the event that the defender’s life is endangered.²² However, this limitation has been interpreted as permitting lethal responses to threats of serious injury given that the latter entail a risk that may prove fatal.²³ This approach has been largely replicated in the recently

¹⁴ See Chapter 6 below.

¹⁵ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 456.

¹⁶ (1987) 71 ALR 641.

¹⁷ Gilles *Criminal Law* (4th ed LBC Information Services 1997) at 318.

¹⁸ (1987) 71 ALR 641 per Wilson, Dawson and Toohey JJ at paragraph 17 (Mason CJ concurring).

¹⁹ Section 46 Tasmanian *Criminal Code*.

²⁰ Section 48 New Zealand *Crimes Act 1961*.

²¹ *R v Kneale* [1998] 2 NZLR 169 at 178.

²² See *McCluskey v HM Advocate* (1959) JC 39 and *Elliot v HM Advocate* (1987) SCCR 278, both discussed in Gordon *Criminal Law* (3rd ed W Green 2001) Volume 2 at 326.

²³ Gordon *Criminal Law* (3rd ed W Green 2001) Volume 2 at 325.

promulgated Draft Criminal Code for Scotland which states that lethal defensive force should be permissible only “for the purpose of saving the life, or protecting from serious injury” the person attacked.²⁴

2.20 Threshold tests play a more prominent role in many criminal code jurisdictions. For example, the statutory legitimate defence provisions in force in Canada, Queensland and Western Australia permit lethal defensive force only in response to a threat of death or grievous bodily harm.²⁵ A similar test applies under the Northern Territory *Criminal Code*²⁶ and the US *Model Penal Code*.²⁷

2.21 However, the statutory threshold requirements set out above have not escaped criticism. Various Canadian law reform bodies have recommended that a specific threshold test for lethal defensive force should be abandoned in favour of a general provision that applies to fatal and non-fatal defensive force.²⁸

2.22 Recent legislation in Australia has taken a middle course by specifying the general types of conduct that might warrant the use of lethal defensive force (that is, excluding the defence of property or the prevention of trespass) but otherwise leaves the response to be judged against a reasonableness requirement.²⁹

(2) Threats of Rape and other Sexual Offences

2.23 Although threats of rape and other sexual offences *may* present a risk of death or serious injury (and therefore, would fall to be considered in the above section), this section is concerned with threats of this type that *do not* threaten serious long-term physical harm. The question is, therefore, whether lethal defensive force may be used to repel threats of this kind

²⁴ See clause 23 of the Code, published under the auspices of the Scottish Law Commission *A Draft Criminal Code for Scotland with Commentary* (2003) at 64-65. The commentary notes that a stricter approach is adopted than currently applied under Scots law, but offers no explanation for the proposed change.

²⁵ Queensland *Criminal Code*, section 271(2); Western Australian *Criminal Code*, section 248; Canadian *Criminal Code*, section 34(2).

²⁶ Northern Territory *Criminal Code*, section 28.

²⁷ Sections 3.04(2)(b) of the US *Model Penal Code* permits the use of lethal force in defence of the person only where necessary to repel threats of “death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat”.

²⁸ See, for example, the Law Commission of Canada *Working Paper on Criminal Law: the general part – liability and defences* (No 29 1982); Law Commission of Canada *Report on Recodifying Criminal Law* (No 31 1987).

²⁹ Section 10.4(3) of the Commonwealth *Criminal Code Act 1995* and section 42(3) of the Australian Capital Territory *Criminal Code 2002*.

notwithstanding the typical threshold requirement of a threat of death or serious injury.

2.24 This issue does not appear to have arisen for determination before the Irish courts. Accordingly, if the minimum threshold requirement is a threat endangering life – as indicated by Walsh J in *Attorney-General v Dwyer*³⁰ – this would suggest that the use of lethal defence to prevent rape would fall outside the ambit of legitimate defence. On the other hand, a threat of rape would appear to satisfy the less strict threshold requirement articulated in *People (AG) v Keatley*.³¹ If, however, the “reasonableness” test has replaced the threshold requirement then it may be argued that it would always be for the jury to decide whether a lethal response is warranted regardless of the type of threat involved.

2.25 In a number of jurisdictions there is support for the use of lethal defensive force in these circumstances.³² The US *Model Penal Code*, for example, permits lethal defensive force to repel “sexual intercourse compelled by force or threat”.³³

2.26 The Scottish courts have been more circumspect. Although they have recognised that the threat of rape is an exception to the normal requirement of a deadly threat,³⁴ this exception does not extend as far as defence against “homosexual assaults”.³⁵ Interestingly, the Draft Criminal Code for Scotland has deliberately taken an even stricter line and excludes from the ambit of the defence any acts likely to kill which are committed to prevent rape.³⁶

2.27 Although the Australian courts have now adopted the “reasonableness” approach, it is relevant to note that previously lethal

³⁰ *People (AG) v Dwyer* [1972] IR 416 at 420.

³¹ [1954] IR 12.

³² For example, it has been pointed out that in the United States, 36 States “explicitly affirm a person’s right to use deadly force in self-defense when threatened with forcible rape, even when that rape is not aggravated by physical injuries outside of the rape itself”: McDonagh cited in Diamond “To Have But Not to Hold: Can ‘Resistance Against Kidnapping’ Justify Lethal Self-Defense Against Incapacitated Batterers?” (2002) 102 *Columbia Law Review* 729 at 746

³³ Section 3.04 (2)(b) of the US *Model Penal Code*.

³⁴ *McCluskey v HM Advocate* [1959] JC 39 (High Court of Justiciary). For discussion see Gordon *Criminal Law* (3rd ed W Green 2001) at 326-327.

³⁵ See *Elliot v HM Advocate* [1987] SCCR 278 (High Court of Justiciary), following *McCluskey*.

³⁶ See clause 23 of the Code, published under the auspices of the Scottish Law Commission *A Draft Criminal Code for Scotland with Commentary* (2003) at 64-65.

defensive force had been permitted to repel threats of rape.³⁷ Adopting the *Palmer* “reasonableness” approach in *Zecevic v DPP*,³⁸ the majority of the High Court of Australia made no express reference to this issue. However, the two minority judgments, whilst maintaining the traditional threshold requirement of at least a threat of serious injury, expressed the view that latitude should be afforded to defenders who responded to threats of a sexual nature. Gaudron J held that a lethal defensive force might be permissible in response to “a threat of sexual violation, in circumstances in which reasonable apprehension stops short of death or serious bodily harm”.³⁹ Similarly, Deane J held that “the concept of serious bodily harm should, in an appropriate case, be expanded to include serious bodily abuse by way of, for example, sexual abuse or prolonged incarceration”.⁴⁰

(3) *Protection of Liberty*

2.28 Can a defender ever use lethal defensive force to overcome forceful unlawful confinement? This question rarely arises in isolation given that “kidnapping”⁴¹ or “false imprisonment” cases typically entail threats of a more serious nature, such as serious harm or rape. However, this need not always be the case. The question arises, therefore, whether the confinement must be coupled with a threat to the physical safety of the defender in order to ground a successful plea or whether the protection of liberty *per se* is sufficient.

2.29 There are two arguments typically advanced in support of the proposition that defence of one’s freedom simply is enough. First, it may be argued that deprivation of liberty places the victim at constant risk of *future* physical harm.⁴² Alternatively, it may be argued that the deprivation of

³⁷ See for example *R v Lane* [1983] 2 VR 449 (Supreme Court of Victoria).

³⁸ (1987) 71 ALR 641.

³⁹ *Ibid* per Gaudron J at paragraph 5.

⁴⁰ *Ibid* per Deane J at paragraph 16.

⁴¹ In this jurisdiction the common law offences of kidnapping and false imprisonment have been abolished and replaced with a broader statutory offence of false imprisonment: sections 15 and 28 of the *Non Fatal Offences Against the Person Act 1997*. Under the new provisions, the presence of any aggravating factors, which previously had distinguished the offence of kidnapping, is only relevant for the purposes of sentencing and not the definition elements of the offence. The new scheme is based on recommendations of the Law Reform Commission *Report on Non-Fatal Offences Against the Person* (LRC 45 – 1994) at 314-320.

⁴² Diamond “To Have But Not to Hold: Can ‘Resistance Against Kidnapping’ Justify Lethal Self-Defense Against Incapacitated Batterers?” (2002) 102 *Columbia Law Review* 729 at 746-747. The commentator argues that this view accords most closely with the US *Model Penal Code* which lists kidnapping alongside other violent crimes that may authorise the use of lethal defensive force.

liberty, privacy, dignity and honour is such a fundamental violation of an individual's autonomy and self-determination that, even in the absence of a risk of serious harm, it warrants the use of lethal defensive force.⁴³ As Schopp argues, individuals are entitled to protect not only their "concrete interests" – that is, their physical safety – but also their "personal sovereignty" – their right to self-determination and equal standing with others in society.⁴⁴

2.30 Again, this issue does not appear to have arisen for determination by the Irish courts. On its own, deprivation of liberty does not appear to satisfy the strict threshold requirement suggested by Walsh J in *Attorney-General v Dwyer*;⁴⁵ indeed, it is unclear whether it would even qualify under the more lenient standard identified in *People (AG) v Keatley*.⁴⁶ Again, if the "reasonableness" test has replaced the threshold requirement then it may be argued that it would always be for the jury to decide whether a lethal response is warranted regardless of the type of threat involved.

2.31 Interestingly, the *Non-Fatal Offences Against the Person Act 1997* makes express reference to the use of defensive force to "protect [any person] from injury, assault or detention caused by a criminal act" or its continuance.⁴⁷

2.32 Historically, the protection of liberty has always been intertwined with legitimate defence.⁴⁸ Indeed, the *Indian Penal Code 1860* made express provision for the use of lethal defensive force to prevent "[a]n assault with the intention of kidnapping or abducting" and to prevent

⁴³ This argument is favoured by LaFare and Scott *Criminal Law* (2nd ed 1996) at 456, discussed in Diamond "To Have But Not to Hold: Can 'Resistance Against Kidnapping' Justify Lethal Self-Defense Against Incapacitated Batterers?" (2002) 102 *Columbia Law Review* 729 at 746. See also Kadish "Respect for Life and Regard for Rights in the Criminal Law" (1976) 64 *Cal L Rev* 871 at 888, discussed in Green, "Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles" (1999) *University of Illinois Law Review* 1 at 35-36.

⁴⁴ Schopp *Justification Defenses and Just Convictions* (Cambridge University Press 1998) at 63-64.

⁴⁵ *People (AG) v Dwyer* [1972] IR 416 at 420.

⁴⁶ [1954] IR 12.

⁴⁷ Section 18, subsections (1)(a) and (4), of the *Non-Fatal Offences Against the Person Act 1997*. Referring to these provisions, the point has been made that "[i]n the old law the doctrine of 'continuing attack' went primarily to the use of force in pursuit of fleeing robbers and thieves. In its modern statutory incarnation [the doctrine] plainly also applies to unlawful arrest and false imprisonment": McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 753.

⁴⁸ It is to be recalled that the Criminal Code Commissioners of 1879 expressly referred to the defence of "a man's person, liberty, and property".

“wrongful confinement” preventing the defender from having “recourse to the public authorities for his release”.⁴⁹

2.33 A similar view was expressed in late nineteenth century Australian case-law. One of the issues before the Court for Crown Cases Reserved in *R v Ryan*⁵⁰ was whether a defender could use lethal force to escape from unlawful confinement.⁵¹ All three judges answered this question in the affirmative; however, unlike Foster J,⁵² Windeyer and Innes JJ’s affirmations were qualified.

2.34 Windeyer J held that a killing would be unlawful⁵³ where the defender was merely “subjected to some temporary confinement for which an action of false imprisonment might afford ample redress”.⁵⁴ In contrast, he thought, a killing might be lawful where the defender was “imprisoned under circumstances that might naturally lead him to suppose that he was to be deprived of his liberty of action in the largest sense of the word – the liberty of the freeman, as contrasted with the bondage of the slave”.⁵⁵ Innes J, adopted a similar stance to Windeyer J.

2.35 This protection of liberty approach is still adhered to by most of the statutory legitimate defence provisions in force in the United States.⁵⁶ At the same time, false imprisonment falling short of the aggravating features of kidnapping would not generally be sufficient to meet the threshold, reflecting the traditional requirement that the trespass to the liberty of the person must be serious.⁵⁷ For example, the US *Model Penal Code* includes

⁴⁹ Section 100 of the *Indian Penal Code 1860*.

⁵⁰ (1890) 11 NSW 171 (Court for Crown Cases Reserved).

⁵¹ The case was primarily concerned with the use of lethal force to resist unlawful arrests by law enforcement officers, discussed below in the Chapter 3.

⁵² (1890) 11 NSW 171 at 212.

⁵³ Albeit that the defender would be guilty of no more than manslaughter.

⁵⁴ (1890) 11 NSW 171 at 187.

⁵⁵ *Ibid* at 187. In support of this position, Windeyer J cited *Ex parte Woo Tin* (1888) 9 NSWLR 493. In that case the accused had been “a foreigner who was deprived of his liberty by an arbitrary and high-handed exercise of power by the Executive Government without any legal sanction.”

⁵⁶ McDonagh, cited in Diamond “To Have But Not to Hold: Can ‘Resistance Against Kidnapping’ Justify Lethal Self-Defense Against Incapacitated Batterers?” (2002) 102 *Columbia Law Review* 729 at 746: “Thirty-five states legislatively recognize people’s right to use deadly force in self-defense against kidnapping. Only one... stipulates that the kidnapping must occur with the use of the threat of force; kidnapping alone is sufficient in the other states”.

⁵⁷ See, for example, *Commonwealth v Higgs* (2001) 59 SW 3d 886 (Supreme Court of Kentucky). However, the Court stressed at 890 that the issue was whether the defender perceived he had been kidnapped.

kidnapping (together with threats of death, serious bodily injury and forced sexual intercourse) in an exclusive list of offences that may justify the use of lethal defensive force.⁵⁸

2.36 There is little case-law in the US considering this issue,⁵⁹ and the few cases that there are generally deal with kidnapping in combination with other threats such as death, rape, or other injury.⁶⁰

(4) Defence of Others

2.37 It is generally considered an uncontroversial proposition that the defence of others is an extension of the right to defend oneself. It is consistent with the argument that legitimate defence, as a justification, is a “universal” defence that is available to everyone because it is the “right” thing to do.⁶¹ However, surprisingly this view is of relatively recent origin and, in some jurisdictions, has yet to be formally adopted.

2.38 Historically, the use of force in defence of the person was restricted to the protection of those “in a special relationship to the defender such as a wife, child or master.”⁶² It has been suggested that defence of others was restricted in this fashion because it was treated as a variation of the defence of *property*; that is, a man was entitled to protect what was “his”, namely his wife, his children and his servants.⁶³ Gradually reciprocal rights were recognised such that any member of a family could protect another, and a servant could protect his master.⁶⁴

2.39 In *People (AG) v Keatley*,⁶⁵ the Court of Criminal Appeal took the view that the historical limitations on the defence of the person were “obsolete” and “irrelevant” given that the defence of others is in any event

⁵⁸ Section 3.04(2)(b) of the *Model Penal Code*.

⁵⁹ Diamond “To Have But Not to Hold: Can ‘Resistance Against Kidnapping’ Justify Lethal Self-Defense Against Incapacitated Batterers?” (2002) 102 *Columbia Law Review* 729 at 746-750.

⁶⁰ See for example the case of *State v French* 2001 Wash App LEXIS 1651 (Court of Appeals of Washington 27 July 2001) where it was held that self-defence should have been put to the jury in circumstances where the appellant feared that her son was being kidnapped and where she feared for the safety of her son and of herself.

⁶¹ Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 760-761. For further discussion, see Chapter 7 below.

⁶² *People (AG) v Keatley* [1954] IR 12 at 17.

⁶³ Boyce & Perkins *Criminal Law and Procedure* (7th ed Foundation Press 1989) at 819.

⁶⁴ *Ibid.*

⁶⁵ [1954] IR 12.

justifiable for the sake of prevention of crime.⁶⁶ However, given the Court's reliance on the public defence of crime prevention, it felt that it did not have to determine whether the defence of the person extended to cover the protection of others.⁶⁷

2.40 The fact that the matter was left unresolved goes some way toward explaining the puzzling language found in the *Non-Fatal Offences Against the Person Act 1997*. The Act permits the use of defensive force for the protection of "himself or herself or a member of the family of that person or another from injury."⁶⁸ The reference to defender's family seems redundant given that defensive force is permitted for the defence of another.⁶⁹

2.41 In some jurisdictions, restrictions continue to be recognised. For example, the Canadian *Criminal Code* restricts the use of defensive force to those "under [the defender's] protection", albeit that it seems to be of little practical consequence given the broader provisions relating to the prevention of crime.⁷⁰ Nevertheless, this restriction on use of force to defend those under one's protection has drawn criticism from a number of law reform bodies.⁷¹

⁶⁶ [1954] IR 15 at 17.

⁶⁷ "In the older text-books, the right of defence is suggested to be limited to persons in a special relationship to the person charged, such as a wife, child or master; but, even if this were still the case, there seems to be no good reason why the relationship of brothers should not be included": *Ibid*.

⁶⁸ Section 18(1)(a) of the *Non-Fatal Offences against the Person Act 1997*. Another interesting aspect of the provision is that the use of force to prevent a trespass or infringement to the person or property of a third party requires the third party's authority: subsections (1)(a) and (1)(b).

⁶⁹ The reference to the defender's family is not found in the Law Reform Commission *Report on Non-Fatal Offences Against the Person* (LCR 45 – 1994), nor in the Law Commission of English and Wales *Report on Offences Against the Person and General Principles* (No 218 – 1993) upon which the Law Reform Commission relied.

⁷⁰ Section 37 of the *Canadian Criminal Code*. However, as Stuart notes, the defence of strangers may fall within the provisions for the prevention of crime: Stuart *Canadian Criminal Law* (3rd ed Carswell 1995) at 446.

⁷¹ Whilst the Law Commission of Canada initially recommended the retention of this restriction, it subsequently recommended the extension of the defence to the protection of "himself or another person": Law Commission of Canada *Report on Recodifying Criminal Law* (No 31, 1987) at 36-37. The Canadian Bar Association Task Force have also considered the current provisions unduly restrictive: Report of the Canadian Bar Association Criminal Codification Task Force *Principles of Criminal Liability - Proposals for a New General Part of the Criminal Code of Canada* (1992), discussed in Canadian Department of Justice Consultation Paper *Reforming Criminal Code Defences: Provocation, Self-Defence, Defence of Property* (1998).

2.42 The English Courts have held as recently as 1971 that “some special nexus or relationship between the party relying on the doctrine [of self-defence] to justify what he did in aid of another, and that other, would still appear to be necessary”.⁷² However, as in Canada, other judgments have “evaded the issue by saying that, whether or not one can defend a stranger, one can prevent the commission of a crime against a stranger – which comes to much the same thing.”⁷³ For example, in *R v Duffy*,⁷⁴ the Court held that the defence of a sibling was outside the recognised relations, but nevertheless held that “there is a general liberty even as between strangers to prevent a felony”.

2.43 Smith and Hogan are critical of this approach. The authors submit that the legal principles should not differ regardless of whether the defensive force is grounded in defence of the person or prevention of crime.⁷⁵

2.44 In general, the defence of others is not limited by a “special relationship” requirement under the statutory provisions in force in New Zealand⁷⁶ and Australia,⁷⁷ nor under the US *Model Penal Code*.⁷⁸

2.45 Nevertheless, difficulties may arise where defenders use defensive force to assist third parties in circumstances where the third parties would *not* be entitled to defend themselves. Consider a case in which a third party intervenes on behalf of a victim of a deadly attack. Suppose that the law imposes a duty to retreat that the victim fails to satisfy (hence, rendering unlawful the use of lethal defensive force by the victim) and that the third party is aware of this. Should liability attach to the third party if he or she nevertheless comes to the victim’s aid and kills the attacker?

2.46 Dressler sets out two opposing arguments. On one hand, it may be argued that third party defenders, faced with this type of dilemma, “should be given freer rein than we give primary actors, to induce assistance and to deter aggressors.” On the other, it may be argued that “third parties... often

⁷² *Devlin v Armstrong* [1971] NI 13 at 35-36.

⁷³ *Williams Textbook of Criminal Law* (Stevens & Sons 1978) at 448.

⁷⁴ *R v Duffy* [1967] QB 63.

⁷⁵ Smith & Hogan *Criminal Law* (9th ed Butterworths 1999) at 257.

⁷⁶ Section 48 of the New Zealand *Crimes Act 1961*.

⁷⁷ Queensland *Criminal Code*, section 273; Western Australian *Criminal Code*, section 250; Tasmanian *Criminal Code*, section 46; Northern Territory *Criminal Code*, sections 27(g) and 28(f); South Australian *Criminal Law Consolidation Act 1935* *Criminal Law Consolidation Act 1935*, section 15(3)(a); *Commonwealth Criminal Code*, section 10.4(2)(a) and (b); Australian Capital Territory *Criminal Code 2002*, section 42(2)(a)(i).

⁷⁸ Section 3.05 of the US *Model Penal Code*.

misunderstand the nature of affrays, or too often shoot wildly”; hence, it may be argued that *stricter* rules should apply to third party interveners.⁷⁹

2.47 This latter approach has been adopted under the Queensland and Western Australian *Criminal Codes* which allow defensive force on behalf of another only where the force could be lawfully deployed by the other. In contrast, whilst the US *Model Penal Code* requires in general that the third party intervener believes that similar defensive force could lawfully be used by the victim; defensive force is expressly endorsed notwithstanding that the victim has failed to retreat. Thus, the Code recognises a concern expressed in *Alexander v State*⁸⁰ that citizens may be reluctant to lend assistance to victims of violence out of fear of incurring legal liability.

(5) Summary and Conclusions

2.48 At present in Ireland, the position is, as observed above, unclear. Traditionally, the Irish courts have imposed a minimum threshold requirement for the use of lethal defensive force.⁸¹ There are indications however that the Irish courts are moving in favour of a reasonableness approach and abandoning any attempt to place a threshold on the circumstances in which lethal force can be used in legitimate defence.⁸²

2.49 This movement towards a reasonableness test, mirrored in the various common law jurisdictions, is motivated by the perceived complexity and rigidity of a threshold test.

2.50 However, the Commission is of the opinion that it is both possible and desirable to construct an appropriate threshold test for the use of lethal force in private defence and that the concerns of the opponents of this approach can be met.

2.51 Advocates of the reasonableness approach argue that the fear and panic generated by an attack or deprivation of the liberty of an individual tends to deprive individuals of their rational emotions and accordingly, that a threshold rule is inappropriate. However, this argument demonstrates that individuals need clear criteria by which they can judge their conduct when making “spur of the moment” decisions.

2.52 Secondly, it is important that the sanctity of human life is protected to the highest degree practicable. Providing a minimum threshold requirement in this regard sends out a clear message that lethal defensive

⁷⁹ Dressler “New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking” (1984) 32 UCLA L Rev 61 at 96-97.

⁸⁰ (1982) 52 Md App 171 (Court of Special Appeals of Maryland).

⁸¹ See *People (AG) v Keatley* [1972] IR 416 at 420.

⁸² See paragraph 2.14.

force should not be resorted to so as to repel minor threats and correspondingly, protects the right to life of the attacker. Given that it is generally accepted that certain threats do not justify the use of lethal defensive force, it seems practical and coherent to state this in the legislation.

2.53 *The Commission provisionally recommends that a minimum threshold requirement should be imposed on the use of private lethal defensive force.*

2.54 As the discussion of the comparative law has illustrated, some jurisdictions which have adopted a threshold requirement have required a threat of death or serious injury to be imminent before there can be resort to lethal reactive force.

2.55 It is accepted that the use of lethal force should be permissible when an individual is subject to the threat of death or serious bodily injury. The justifications for giving the defender's right to life some priority over that of the attacker are discussed in the final chapter of this Paper.⁸³ Where an individual is confronted with the real threat of death or serious injury, it is accepted that the defender may have in essence no choice but to kill the attacker.⁸⁴ In addition to this, enabling a defender to use lethal force in this dire instance is a vindication of the individual's autonomy.⁸⁵ Where an individual faces a threat of such seriousness, the use of lethal defensive force is justified as the lesser of two evils. In this respect the life of the attacker is in essence "discounted" given that the aggressor created the circumstances making the defence necessary.⁸⁶ Accordingly, it is accepted that the use of lethal defensive force to repel a threat of death or serious injury may be justifiable if the other stages of the test for legitimate defence are satisfied.

2.56 However, should a threat of death or serious injury be the threshold requirement for lethal defensive force or should less serious threats be accommodated within this threshold? For example, should it be permissible to use lethal defensive force when confronted with the threat of rape or aggravated sexual assault? The Commission is aware that only a handful of cases will arise where a person will be subject to the threat of rape but not serious injury. However, should these cases, albeit limited, be provided for, and if so, how? As discussed above, in a number of

⁸³ See paragraphs 7.31-7.51.

⁸⁴ See Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 856.

⁸⁵ See the arguments of Schopp in *Justification Defenses and Just Convictions* (Cambridge University Press 1998) at 59.

⁸⁶ See Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 857-858.

jurisdictions there is support for the use of lethal defensive force in these circumstances.

2.57 The Commission is of the opinion that to impose a very high threshold on the use of lethal defensive force in the area of private defence would be arbitrary. The need to act in self defence generally arises in unexpected situations and often in circumstances of acute terror and fear. Individuals faced with the threat of rape and aggravated sexual assault are deprived of calm deliberation and are overwhelmed by the need to react to and escape from the danger. The difficulty could then arise that any unnecessary or disproportionate use of lethal defensive force would be precluded by virtue of the necessity and proportionality stages of the test for legitimate defence. Consequently, it is suggested that lethal defensive force should be permissible where an individual is confronted with the real and imminent threat of rape⁸⁷ or aggravated sexual assault.⁸⁸

2.58 A more difficult question is whether a person should be entitled to use lethal force to escape from unlawful imprisonment. As observed earlier,⁸⁹ this question will rarely arise in isolation but if it does, should the false imprisonment be sufficient to justify the use of lethal force? It is important to observe that in defining a threshold in this context, the Commission is merely specifying the threats which *could* enable lethal force to be used. The use of lethal defensive force would still have to fulfil the other criteria necessary to ground legitimate defence before the plea would be available. In particular, if the false imprisonment is of a non-violent and temporary nature, it could prove difficult to satisfy the requirements of necessity and proportionality.

2.59 The final issue to be addressed in this section is the circumstances in which lethal force may be used to defend another person. It is suggested that there should be no restriction on the persons whom an individual may defend given the public interest need for prevention of crime. This is in accordance with the views expressed by the Court of Criminal Appeal in *People (AG) v Keatley*.⁹⁰ It is also commonly accepted that individuals

⁸⁷ The offence of rape is provided for under section 2 of the *Criminal Law (Rape) Act 1981* and section 4 of the *Criminal Law (Rape)(Amendment) Act 1990*.

⁸⁸ “Aggravated sexual assault” is defined as a sexual assault that involves serious violence or the threat of serious violence or is such as to cause injury, humiliation or degradation of a grave nature to the person assaulted”. See section 3 of the *Criminal Law (Rape) (Amendment) Act 1990*.

⁸⁹ See paragraph 2.28.

⁹⁰ [1954] IR 12 at 17. See paragraph 2.39.

should intervene on behalf of others who are in danger and therefore that that is response which should be encouraged on policy grounds.⁹¹

2.60 However, the issue is whether a third party should only be allowed to use lethal defensive force where the person being defended was entitled to use such force. Two competing arguments are usually made here. On the one hand, it is argued that assistance in these circumstances should be encouraged and therefore the threshold should be more flexible in the context of persons defending third parties. On the other hand, it is argued that third parties have a tendency to overreact when defending others and should accordingly be deterred from this.⁹²

2.61 It is suggested that it should only be lawful for a third party to use lethal defensive force where the person who is being defended could also have used such force. Any hardship caused in this regard would be alleviated by allowing for mistakes in this respect.⁹³ This strikes an appropriate balance between the two competing arguments.

2.62 It is provisionally recommended by the Commission that private lethal defensive force should only be permitted to repel threats of death or serious injury, rape or aggravated sexual assault and false imprisonment by force and then only if all the requirements of legitimate defence are made out. Such force is permitted whether it is applied in defence of one self or of a third party.

E Defence of Property

2.63 Should lethal defensive force ever be allowed in defence of property when the other threshold requirements are not satisfied, that is, the defender is not otherwise threatened with death or serious injury (or sexual offending or deprivation of liberty)? Intuitively, many people would not consider the preservation of property as sufficiently important to warrant the taking of human life. Yet, historically the common law allowed the use of lethal defensive force to protect property in certain circumstances.

⁹¹ See Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 760-761.

⁹² See paragraph 2.46.

⁹³ Whether the test should be normative or narrative is discussed in detail in the chapter on mistake. As the Commission noted in its *Consultation Paper on Provocation*,

“It would be better if the expressions “objective” and “subjective” were avoided in this context. The first element is better seen as involving nothing more than a factual enquiry, namely, whether the accused was provoked. The second element invites an evaluation of the quality of the accused’s fatal response, as judged by the application of generally accepted norms of appropriate conduct. Accordingly, the first element may be described as the narrative issue; and the second as the normative issue.”

2.64 This section is divided into two parts. First, brief consideration will be given to the relatively straightforward issue of the defence of personal property. The more problematic issue of defence of the home is the subject of the second part.

(1) *The Defence of Personal Property*

2.65 It is almost universally accepted that lethal defensive force may not be deployed in defence of personal property.

2.66 Although there appears to have been little judicial comment on this issue in Ireland, Walsh J's observation in *Attorney-General v Dwyer*⁹⁴ might be construed as leaving open the possibility of a lethal response to protect property:

“A homicide is not unlawful if it is committed in the execution or advancement of justice, or in reasonable self-defence of person *or property*, or in order to prevent the commission of an atrocious crime, or by misadventure.”⁹⁵

2.67 At the same time, such an interpretation might be seen as incompatible with Walsh J's suggestion later in the judgment that lethal self-defence is permissible only where life is endangered.⁹⁶ To the extent that Walsh J *was* countenancing the possibility of allowing the lethal defence of property, it is likely that he was referring to the defence of dwelling-houses, which is the subject of the next section.

2.68 The position of disallowing lethal defensive force in defence of personal property has been expressly adopted in the statutory provisions governing legitimate defence in the various States of Australia⁹⁷ and in New Zealand.⁹⁸ Whilst the use of lethal force is permitted under the US *Model Penal Code* for the purposes of preventing crimes such as robbery or felonious theft, there must also be a risk of at least serious bodily injury.⁹⁹

⁹⁴ [1972] IR 416

⁹⁵ Ibid at 420.

⁹⁶ See paragraph 2.13 above.

⁹⁷ Sections 274-279 of the Queensland *Criminal Code*; sections 251-256 of the Western Australian *Criminal Code*; section 15A(b) of the South Australian *Criminal Law Consolidation Act 1935*; sections 41-45 of the Tasmanian *Criminal Code*; section 10.4(3)(a) of the Commonwealth *Criminal Code*; section 42(3)(a) of the Australian Capital Territory *Criminal Code 2002*. No provision is made for the defence of personal property under section 28 of the Northern Territory *Criminal Code* (which deals with lethal defensive force).

⁹⁸ Sections 52 and 53 of the New Zealand *Crimes Act 1961*.

⁹⁹ Section 3.06(3)(d)(ii) of the United States' *Model Penal Code*.

The Canadian *Criminal Code*¹⁰⁰ does not expressly prohibit the use of lethal force in defence of property, but it has been argued that the use of lethal force would not be justifiable unless there is a direct risk to human life or safety.¹⁰¹

2.69 However, some commentators have questioned whether the use of lethal force in the defence of personal property can be excluded altogether. For example, Smith and Hogan pose the question whether it would be reasonable to kill a man about to destroy a priceless old master, or whether it would have been reasonable to kill one of the Great Train Robbers to prevent them from getting away with their millions of pounds of loot. The authors do not seem to rule out the possibility, noting that “[i]t can *rarely*, if ever, be reasonable to use deadly force merely for the protection of property”.¹⁰²

2.70 There is some case law in support of the proposition that lethal defensive force may be used in defence of property. For example, in the Supreme Court of Victoria decision in *R v McKay*¹⁰³ – a case concerning a farmer who fatally shot an intruder on his farm in order to prevent the theft of his chickens – at least one of the judges left open the possibility of lethal defence of property.¹⁰⁴

(2) The Defence of Dwelling-Houses

2.71 As mentioned above, *dicta* from Walsh J’s judgment in *People (AG) v Dwyer*¹⁰⁵ might be construed as leaving open the possibility of a lethal response to protect the home.

2.72 Additional support may be found in the civil case of *Ross v Curtis*¹⁰⁶ in which Barr J held that the defence of property was a good ground for the defensive use of a firearm. In the early hours of the morning the plaintiff and two others had forcibly broken into a shop owned by the

¹⁰⁰ The provisions relating to the legitimate defence of property are set out in sections 38 to 42 of the Canadian *Criminal Code*.

¹⁰¹ See for discussion, Canadian Department of Justice Consultation Paper on *Reforming Criminal Code Defences: Provocation, Self-Defence, Defence of Property* (1998).

¹⁰² Smith & Hogan *Criminal Law* (9th ed Butterworths 1999) at 260 (emphasis added).

¹⁰³ [1967] VR 560. For a discussion of the case, see Lantham, “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 20-23.

¹⁰⁴ Lowe J seemed to indicate that lethal force could be used in reasonable defence of a person’s property: “Homicide is lawful if it is committed in reasonable self-defence of the person committing it, or of his wife or children, or of his property....” In contrast, Smith J considered that the defence of property was not available, but did not rule out the public defence of crime prevention in relation to which more lenient rules applied.

¹⁰⁵ [1972] IR 416

¹⁰⁶ High Court Barr J 3 February 1989.

defendant and adjacent to his home. The defendant was awoken and went to the shop armed with a rifle. Fearing that he was about to be attacked by the burglars, the defendant attempted to fire a warning shot but unintentionally hit the plaintiff. It was held that the defendant was entitled to fire a warning shot both in self-defence *and in defence of his property*. However, whilst this decision provides some support for a defence of property, given the facts of the case it does not establish that *lethal* force may be used for this purpose.

2.73 In the recent high profile Irish case of *(People) DPP v Padraig Nally*,¹⁰⁷ a farmer was found guilty of the manslaughter of another man on his farm. The deceased man and his son, both travellers, had come unsolicited to the defendant's farm. When questioned as to the reason for his presence on the property by the defendant the son replied that they were interested in whether a car that was on the defendant's property was for sale. The defendant then questioned the deceased's son as to the whereabouts of "his mate" only to learn that Mr. Ward had gone uninvited to the back of the house to 'take a look'. After passing a remark to the effect that if he had indeed done so, Mr Ward "would not be coming out" the defendant went around the back of the house where he witnessed the deceased pushing open the back kitchen door of the house. Upon seeing this, the defendant got his loaded shotgun and shot the deceased in the hip and hand. According to the defendant the intruder, who at trial was found to be a man of violent disposition with experience in fighting, then threw himself at him and in the violent struggle which followed, the deceased was hit 20 times about the head and upper body with a stick, and despite suffering a fractured arm in his efforts at defending himself he managed to flee. The deceased called out to his son for assistance however at this point he had driven away from the scene. The defendant believing that the son of the deceased had gone for reinforcements in terms of personnel or weaponry, returned to his hay barn, reloaded the shotgun and followed the deceased. He shot at him again, and the deceased died at the scene. The defendant then pulled the body across the road and put it in a field, because he feared the consequences of reinforcements arriving to find the body. The Court found that the defendant had developed major anxieties that his house would be burgled and that he himself would be harmed or killed by intruders. These fears were engendered by a recent spate of thefts and burglaries that had occurred in the area, property having been removed from the defendant's house and those of his immediate neighbours. The judge, in sentencing the defendant to 6 years, said that initially he had been protecting the inviolability of his home, but having got the upper hand in the altercation this changed. However, as in

¹⁰⁷ Central Criminal Court Carney J 11 November 2005.

Ross v Curtis, there is no support in this case for the use of lethal force in defending property.¹⁰⁸

Before the jury had returned the verdict, the judge directed that he would accept either a verdict of murder or manslaughter, and would not acquit the accused. This was done on the basis that the force used by the defendant was so excessive as to destroy the notion that it was reasonable and in those circumstances a jury could only convict of manslaughter or murder. Accordingly the trial judge removed the option of a full self-defence verdict from the jury leaving them the option of the partial defence or a murder conviction. At this point the judge also acceded to a request by Counsel for the defence that provocation should also be put to the jury. The defendant's conviction for manslaughter was appealed to the Court of Criminal Appeal, which gave judgment in the matter on Oct 12th 2006, quashing the conviction and granting a retrial on the grounds that the trial judge had misdirected the jury by allowing them to consider only the partial defence..

2.74 The question of whether lethal defensive force may be used in defence of one's dwelling has recently attracted considerable public and academic attention¹⁰⁹ in the United Kingdom as a result of the well-publicised trial and appeal in the case of *R v Martin*.¹¹⁰ The appellant in that case was a farmer who lived in an isolated country home. Confronted with burglars at night, he shot and killed one and injured another. The appellant's plea of self-defence was unsuccessful at trial on the grounds, it seems, that the jury either rejected his claim that he was acting in self-defence (as opposed to revenge) or held that his use of lethal force was unreasonable (that is, excessive). Whilst the appeal did not deal directly with the issue of defence of the home,¹¹¹ it has been argued that the law in this area remains unclear.¹¹²

¹⁰⁸ Before the jury had returned the verdict, the judge directed that he would accept either a verdict of murder or manslaughter, and would not acquit the accused. An appeal is currently before the courts as to whether the judge should have allowed the jury to consider a defence of self-defence.

¹⁰⁹ For example, see Yeo "Killing in defence of property" [2000] New Law Journal 730; Murdie "The ins and outs of defending your home" (2002) 99 The Law Society Gazette 39; Wedd "Jumping the Gun" (2000) 97 Law Society Gazette 19; Comment "Injustice observed" (2000) 150 New Law Journal 601.

¹¹⁰ [2002] 1 Cr App Rep 27 at 326

¹¹¹ The appeal turned largely on the question of incompetent counsel (which the Court of Appeal rejected) and new evidence relating to the partial defence of diminished responsibility, which was accepted and the appellant's conviction was reduced from murder to manslaughter.

¹¹² Murdie "The ins and outs of defending your home" (2002) 99 The Law Society Gazette 39. The author expressed regret that the issue was neither addressed by the

2.75 It is often argued that the defence of property should be dealt with under the rubric of crime prevention.¹¹³ However, this argument fails to recognise the special status which the common law historically granted to the protection of the home. This status reflected the fact that “for most people the home represented the most important source of personal protection from felonious attack; hence the oft-quoted remark that “the house of every one is to him as his castle and fortress.”¹¹⁴ The common law developed two related doctrines on this subject. The first, the “castle doctrine”, exempted those attacked in their home from the duty to retreat.¹¹⁵ The present section is concerned with the second doctrine, which permitted the use of lethal defensive force to protect the home.

2.76 Whether the doctrine continues to apply is a matter of some controversy. Authority in support of the doctrine may be found in the 1920s case of *R v Hussey*.¹¹⁶ In that case, a tenant shot at his landlady who was trying to evict him. The landlady had given her tenant an invalid notice to quit in the mistaken belief that she was entitled to do so. In holding that the shooting action was justified, the Court stated that it would be lawful for a man to kill one who would unlawfully dispossess him of his home, even though there was no suggestion that the defendant had been threatened with death or serious injury. Furthermore, this rule was applied even though the “aggressor” was known to be acting under a claim of right.

2.77 However, the current authority of *Hussey* has been disputed.¹¹⁷ For example, Smith and Hogan submit that “[e]ven if this were the law at the time, it would seem difficult now to contend that such conduct would be reasonable; for legal redress would be available if the householder were wrongly evicted.”¹¹⁸ Similarly, McAuley and McCutcheon have submitted

Court of Appeal nor referred to the House of Lords for consideration (leave to appeal was refused).

¹¹³ For example, Boyce & Perkins argue that the defence of the dwelling is founded upon the defence of crime prevention rather than the protection of property: *Criminal Law and Procedure* (7th ed Foundation Press 1989) at 835-836.

¹¹⁴ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 761, citing Semayne’s case (1604) 5 Co Rep 91a at 91b.

¹¹⁵ This doctrine is discussed in depth in Chapter 5: The Necessity Requirement

¹¹⁶ (1924) 18 Cr App Rep 160. For a discussion of the case, see Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 476.

¹¹⁷ See the unreported case of *Iddenden* English Court of Appeal 10 June 1988, noted by O’Connor & Fairall *Criminal Defences* (3rd ed Butterworths 1996) at 181: “it was assumed that the use of a firearm could not be justified in defence of property so as to provide a defence to a charge of wounding.” The authors tentatively conclude that “the present common law contains no specific sub-category dealing with the use of force in defence of property.”

¹¹⁸ Smith & Hogan *Criminal Law* (9th ed Butterworths 1999) at 260.

that the decision is not in keeping with the modern authorities that require a minimum threshold threat of deadly harm.¹¹⁹

2.78 The Canadian courts appear to have taken a dim view of the *Hussey* decision. In *R v Baxter*¹²⁰ the appellant had shot and wounded a number of people who had come in a threatening manner onto land occupied by the appellant and others. Rejecting the appellant's claim that he was entitled to use extreme force to protect his property, the Ontario Court of Appeal questioned the authority of the English case of *R v Hussey*.¹²¹ In *R v Clark*¹²² the appellant's claim that he had been entitled to stab to death two intruders in his flat was rejected on the grounds that, "although a man has a right to defend his property, he is not entitled to kill a trespasser in the absence of some threat to his person."¹²³

2.79 The prohibition on the use of force for the protection of property has attracted the support of a number of Canadian law reform bodies.¹²⁴ However, others have argued that it imposes an arbitrary threshold for the use of lethal force which unnecessarily precludes the inquiry into reasonableness and consequently could result in injustice.¹²⁵

2.80 In contrast to the approach favoured in Canada, a number of other common law jurisdictions operate statutory defences which permit the use of lethal defensive force in protection of the dwelling-house. Under the New Zealand *Crimes Act 1961*, for example, there is no upper limit on the amount of force that may be employed to "prevent the [unlawful] forcible breaking

¹¹⁹ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 761-762. See also, Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 473.

¹²⁰ (1975) 27 CCC (2d) 96 (Ontario Court of Appeal).

¹²¹ The Court referred to the comment in Lanham, "Defence of Property in the Criminal Law" [1966] Crim LR 368 at 372, that "*Hussey's* case makes strange reading".

¹²² (1983) 5 CCC (3d) 264 (Alberta Court of Appeal).

¹²³ *Ibid* at 271.

¹²⁴ See Law Commission of Canada *Report on Recodifying Criminal Law* (No 31 – 1987) at 37-38. In its earlier *Working Paper on Criminal Law: the general part – liability and defences* (No 29 – 1982) at 108, the Commission took the view that it should reflect the principle that property has a lower value than bodily safety. See also Report of the Canadian Bar Association Criminal Codification Task Force *Principles of Criminal Liability - Proposals for a New General Part of the Criminal Code of Canada* (1992).

¹²⁵ Stuart *Canadian Criminal Law* (3rd ed Carswell 1995) at 455. A similar argument is discussed in the Canadian Department of Justice *Consultation Paper on Reforming Criminal Code Defences: Provocation, Self-Defence, Defence of Property* (1998); for example, it might be said that a person should have the right to use deadly force to prevent someone from stealing a deadly weapon, such as a bomb or contagious materials.

and entering of a dwellinghouse”.¹²⁶ Similar provisions apply in some States of Australia.¹²⁷

2.81 This defence was raised in the New Zealand case of *R v Frew*.¹²⁸ The Court held that it might be open to a defender to shoot for the sole purpose of stopping a burglary of the defender’s house.¹²⁹ The facts were that the accused’s house had been burgled the previous night and he had reason to believe that the burglars would return. The accused’s stated intention was to disable one of the burglars so that he could detain him and thus improve his chances of getting his property back from the earlier burglary, as well as making the house safe for his children.¹³⁰ The accused hid in the house with two loaded guns, and upon the entry of the burglars he intentionally shot, without warning, one of them in the knee. All parties accepted that self-defence was not available to the accused as he was not under any form of attack from the burglar. Nevertheless, the Court directed the jury that they could acquit the accused if they found that he acted to prevent the continuation of the burglary.

2.82 The US courts have likewise permitted the use of lethal force in protection of dwelling-houses from felonious attacks or intrusions¹³¹ even where the defender faces a risk of no more than assault.¹³² There is support for the proposition that the defence applies even if the defender is attacked in a temporary place of residence such as a hotel or even as a guest at another’s home.¹³³ However, it has been argued that the defence should not apply

¹²⁶ New Zealand *Crimes Act 1961*, section 55.

¹²⁷ For example, section 267 of the Queensland *Criminal Code* places no limit on the level of force permitted to prevent or repel an intruder believed to be acting with an intent to commit an indictable offence in the dwelling. See also section 40 of the Tasmania *Criminal Code*, which requires “forcible breaking and entering”, and the “home invasion” defence under section 244 of the Western Australian *Criminal Code*.

¹²⁸ [1993] 2 NZLR 731 (High Court per Tipping J).

¹²⁹ Section 55 of the New Zealand *Crimes Act 1961* applies to force used “to prevent the forcible breaking and entering of the dwellinghouse”.

¹³⁰ They were not present in the house at the time of the shooting.

¹³¹ For discussion, see Boyce & Perkins *Criminal Law and Procedure* (7th ed Foundation Press 1989) at 835-836. However, the authors argue that these decisions are founded in the defence of crime prevention rather than the protection of property.

¹³² *Ibid* at 831 citing, inter alia, *Leverette v State*, 104 GaApp 743; 122 SE2d 745 (1961 Court of Appeals of Georgia), in which the Court stated: “One may permissibly, acting under the fears of a reasonable man, kill to prevent the commission of a felony in defense of habitation, property, or person; he may also kill one riotously attempting to enter his habitation for the purpose of assaulting him although the assault be less than a felony.”

¹³³ *State v Mitcheson*, 560 P2d 1120 (1977 Supreme Court of Utah).

where there is no suggestion that a trespasser intends to commit a felony or inflict physical harm on an occupant.¹³⁴

2.83 A narrower defence is recommended under the US *Model Penal Code* where special allowance is made only for the use of lethal defensive force to prevent the attacker dispossessing the defender of his or her dwelling.¹³⁵

(3) Summary and Conclusions

2.84 As this discussion has illustrated, for the most part it has been accepted that lethal defensive force may not be used to defend personal property with only a few judges dissenting on this point.¹³⁶ In addition, the matter remains uncertain in Irish law. In *People (AG) v Dwyer*,¹³⁷ Walsh J suggested that lethal defensive force could be used in defence of personal property. However this remark was made without any consideration of the matter and is contradicted by other aspects of Walsh J's judgment in that case. Accordingly, the matter needs to be clarified in Irish law.

2.85 The Commission is of the belief that, whatever the circumstances, it is not permissible to use lethal defensive force in defence of personal property. Critics of this approach could argue that it is inflexible and unduly harsh on innocent defenders. Such criticisms however do not take account of the attacker's right to life or the need for certainty in the law.

2.86 The reasonableness approach adopted at present leaves individuals in doubt as to whether they may or may not use lethal defensive force in these circumstances. It is consequently better that the law reflect the reality of the situation and preclude the use of lethal defensive force in these circumstances. This would also lead to greater certainty in the law and, accordingly, justice in all circumstances. A more vexed question is whether lethal defensive force should be permitted to defend the dwelling house. As our discussion has illustrated, there is considerable disagreement on this issue.

2.87 On what grounds might one justify lethal defence of the home? The answer to this question turns largely on one's view as to why legitimate defence is a justification. If, as Fletcher and others submit, the essence of

¹³⁴ Boyce & Perkins, *Criminal Law and Procedure* (7th ed Foundation Press 1989), at 836. For a discussion of the approach adopted by various US States, see Green "Castles and Carjackers: Proportionality and the Use of Deadly Force in Defence of Dwellings and Vehicles" [1999] U Ill L Rev 1.

¹³⁵ Section 3.06(3)(d) of the *Model Penal Code*.

¹³⁶ See for example Lowe J in *R v McKay* [1967] VR 560.

¹³⁷ [1972] IR 416.

legitimate defence is the vindication of individual autonomy then the validity of protecting the sanctity of the home assumes considerable weight.¹³⁸

2.88 For example, it may be argued that the historical doctrine, under which the protection of the home in itself was of sufficient importance to warrant use of lethal force is valid and is based on the notion that this approach can be justified as a vindication of a person's autonomy. From the perspective of lesser evils, one would question whether the sanctity of a home is so essential to life or so valuable that it could outweigh the value of the life of the intruding attacker.¹³⁹

2.89 Nevertheless, one might argue that the defence of the home might satisfy a lesser-evils standard if one *assumed* that all intrusions are likely to threaten death or serious injury. If defenders were entitled to act on such an assumption, they would be relieved of the burden of making split second decisions as to the risk posed by intruders. However, it has been argued that a legal presumption of this kind would not be empirically sound given that most home intrusions do *not* threaten death or serious injury to the occupants.¹⁴⁰

2.90 The argument that a lower threshold requirement is justified on the ground that defenders are more vulnerable when attacked in the home rather than outside it may also be questioned. Whilst one might be more likely to be off one's guard or even asleep in the home, at the same time those in the home are more likely to have notice of an attack and would probably be better positioned to repel it than victims attacked on the street.¹⁴¹

2.91 The Commission finds the arguments in favour of allowing the use of lethal force to defend the dwelling house persuasive. This approach safeguards the individual's autonomy. It also has regard to the individual's inability to make split second decisions when confronted with an attacker in the home. While it is sometimes argued that this approach is not justified on the lesser-evils standard, this is open to dispute given that most individuals subject to intrusion in their homes are likely to fear death or serious injury, whether this belief is reasonable or not. It should also be borne in mind that the defender would still have to satisfy the necessity and proportionality tests before he or she could use lethal defensive force. If these tests are satisfied, it is likely that the individual would be facing a threat of death or serious

¹³⁸ For an analysis of the reasons why legitimate defence is considered to be a justification, see paragraphs 7.35-7.51 below.

¹³⁹ Green "Castles and Carjacks: Proportionality and the Use of Deadly Force in Defence of Dwellings and Vehicles" [1999] U Ill L Rev 1 at 32-35.

¹⁴⁰ *Ibid* at 25-30.

¹⁴¹ *Ibid* at 30-32.

injury and consequently, that lethal defensive force is justified on the lesser evils standard.

2.92 In any event, even if the defence cannot be justified on the traditional ground of protecting physical safety, it may nevertheless be justifiable on another ground: namely, in recognition of the home's importance to the defender's dignity, privacy and honour. In this respect, an analogy may be drawn with the use of defensive force to protect one's liberty or to prevent a sexual attack.¹⁴² Arguably, the use of lethal defensive force should not be precluded in respect of the home, when it is not available in these situations.

2.93 The question of what constitutes a "dwelling house" also falls to be considered. For example, does a dwelling house extend to the property surrounding the home? Should this protection apply to sanctuaries other than the home? It is important that a precise definition be adopted for the phrase "dwelling house" in order to avoid uncertainty in this regard. This issue is considered in more detail when examining how far the "castle doctrine" should be extended.¹⁴³ The Commission proposes that for clarity the definition of "dwelling house" should be the same as the definition of "castle" for the purposes of the "castle doctrine".

2.94 *The Commission provisionally recommends that lethal defensive force may not be used in defence of personal property. However, it does not recommend that any upper limit be placed on the force that may be used to defend one's dwelling house.*

F The Use of Force to Effect Arrests

(1) Introduction

2.95 Public defence is that branch of legitimate defence which regulates the use of force to effect arrests and prevent crime. As observed above, in many cases public defence will overlap with private defence.¹⁴⁴ For the purposes of this Paper, these cases are treated as being cases of private defence. As a result, this section will avoid these overlapping cases as they do little to illuminate the factors relevant to the use of lethal force exclusively in public defence. Instead, the focus will be on cases where private defences are inapplicable. In relation to arrest, the relevant cases typically are those in which an arrestor uses lethal force to prevent the flight

¹⁴² Green "Castles and Carjacks: Proportionality and the Use of Deadly Force in Defence of Dwellings and Vehicles" [1999] U Ill L Rev 1 at 37

¹⁴³ See paragraphs 5.75- 5.133.

¹⁴⁴ See paragraph 2.08.

of a suspect (rather than to overcome resistance, which will normally be authorised in self-defence).

2.96 Whilst public defence is not the exclusive remit of law enforcement officials, they occupy a special position in that, unlike members of the general public, law enforcement officials are routinely placed in confrontation situations where the risk of an escalation of violence is ever present. Whilst this country operates with a largely unarmed police force, situations have and will continue to arise where members of the Gardaí, in particular, are required to make split-second decisions as to whether to employ lethal force to carry out their duties.

2.97 The law provides certain powers of arrest to both law enforcement officers and private citizens for the purposes of securing such public interests as upholding and enforcing the law, deterring crime, and bringing criminals to justice.¹⁴⁵ As an adjunct to this power, authority is also granted to use force, including in some cases lethal force, to effect these arrests. Given the intrusive nature of these powers, it is of the utmost importance that the law is clear as to the degree of force which may be used by arrestors and, in particular, when lethal force may be used. Unfortunately, the law in this jurisdiction appears to lack the necessary clarity in this regard.

2.98 As far back as 1937 Hanna J, in *Lynch v Fitzgerald*,¹⁴⁶ recognised that it was “important that the principles governing the use of firearms against an assembly of civilians should be clearly laid down.”¹⁴⁷ It is of the utmost importance that the law regarding the use of lethal force in all cases of public defence is clear and provides sufficient guidance as to the circumstances in which lethal force will be permissible:¹⁴⁸

“In this important area of criminal law and justice, the discretionary power placed in the hands of a law enforcement officer is inordinate. Many times, officers are faced with decisions, without the aid of trial, judge and jury, whether or not to kill suspected fleeing felons. Only after a person is seriously

¹⁴⁵ A review of the laws of arrest is beyond the scope of this paper. For a discussion of this area of law see Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 141-158 and Walsh *The Irish Police* (Sweet & Maxwell 1998) at Chapter 6.

¹⁴⁶ [1938] IR 382.

¹⁴⁷ *Ibid* at 386.

¹⁴⁸ This has been highlighted by a number of commentators. For a summary of recommendations made by various commentators, see Simeone, “Duty, Power, and Limits of Police Use of Deadly Force in Missouri” (2002) 21 St Louis U Pub L Rev 123 at 189-190. For example: “Written policies must be clear and easily understood”: Community Relations Service, United States Department of Justice Principles of Good Policing: Avoiding Violence Between Police and Citizens (1993) at 21.

injured or killed is a judgment made by the society as to the appropriateness of the officer's action.”¹⁴⁹

2.99 Unfortunately, currently would-be public defenders are offered no more than the vague yardstick of “reasonableness” with respect to the use of force in situations of this kind. This section attempts to identify a more useful threshold test for the use of lethal force in public defence.

2.100 Force is used to effect arrest in broadly two circumstances: first, to overcome resistance to arrest; and secondly, to prevent the flight of an arrestee (“fleeing suspect cases”).

(2) Resisting Arrest

2.101 An arrestor is obliged to stand his or her ground against any resistance offered by an arrestee because, in contrast to the typical private defender who might be expected to take any opportunity to retreat,¹⁵⁰ an arrestor is under a duty to carry out the arrest.¹⁵¹

2.102 However, it should be noted that an arrestor’s use of defensive force to overcome resistance would typically be governed by the rules on *self-defence* given that the arrestor would be repelling a threat to his or her person. Consequently, the problematic cases are those involving fleeing suspects where there is no physical threat posed to the arrestor, and consequently where the issue of self-defence does not arise.

(3) Fleeing Suspect Cases

2.103 This section will begin with a brief overview of the historical evolution of the law relating to the use of force to effect arrests from the twelfth to the twentieth centuries. It will be seen that whilst initially the common law provided very broad powers to use lethal force, changes in nineteenth and twentieth century law led to greater restrictions being imposed. Broadly speaking, four separate models (including the model adopted in this jurisdiction) evolved from these changes and each will be critically considered. Finally, this section will consider whether additional restrictions should be placed on the use of lethal force to effect arrests, such as limiting its use to law enforcement officers and requiring the use of warnings.

¹⁴⁹ Harper, “Accountability of Law Enforcement Officers in the Use of Deadly Force” (1983) 26 How L.J. 119 at 128.

¹⁵⁰ For a full discussion of the retreat rule, see paragraphs 5.15- 5.74.

¹⁵¹ Albeit a moral rather than a legal duty in the case of the private citizen acting in public defence. Elliot “The Use of Deadly Force in Arrest: Proposals for Reform” [1979] 3 Crim LJ 50 at 59.

(a) History

2.104 Historically, the common law placed little value on the lives of fleeing felons. Under the “fleeing felon rule”, lethal force was authorised to effect the arrest of all felons.¹⁵²

2.105 The rule has its origins in the feudal system. Those who breached their feudal obligations were outlaws who could be taken by force. Feudal disloyalty was seen as a threat to the entire social structure of 12th century society and consequently, the use of lethal force to ensure the capture of the individual was perceived as entirely justifiable.¹⁵³

2.106 The common law drew a distinction between felonies and misdemeanours and lethal force could only be used to effect the arrests of felons.¹⁵⁴ Misdemeanours were less serious offences and were not punishable by death. On the other hand, felonies were few in number in medieval times and all involved the use of violence.¹⁵⁵ Furthermore, all felonies were punishable by death, and therefore the use of lethal force “was seen as merely an acceleration of the penal process”.¹⁵⁶

2.107 This seemingly harsh approach was deemed necessary given the likelihood that a felon would ultimately escape arrest if he or she escaped immediate apprehension. Given that such felonies were capital offences, felons had a strong incentive to use whatever force was necessary to effect an escape. In addition, the lack of an organised police force meant that escape was relatively easy.¹⁵⁷

2.108 Whilst the fleeing felon rule was endorsed by institutional writers such as Hale,¹⁵⁸ suggestions were emerging by the end of the nineteenth

¹⁵² See Smith J’s extensive review of the history of the law relating to public defence in the Supreme Court of Victoria decision of *R v McKay* [1967] VR 560.

¹⁵³ Harper, “Accountability of Law Enforcement Officers in the Use of Deadly Force” (1983) 26 How LJ 119 at 121.

¹⁵⁴ *Ibid* at 124.

¹⁵⁵ Rabinowitz CJ, writing the judgment of the Supreme Court of Alaska in *State v Sundberg* (1980) 611 P.2d 44 at 47, noted that in 1500 the only felonies recognised in England were murder, rape, manslaughter, robbery, sodomy, mayhem, burglary, arson, and prison break. From 1500-1800 the number of statutory felonies increased by over 200.

¹⁵⁶ Harper, “Accountability of Law Enforcement Officers in the Use of Deadly Force” (1983) 26 How LJ 119 at 123.

¹⁵⁷ McAuley & McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 735-736. See also *R v McKay* [1967] VR 560, per Smith J (Supreme Court of Victoria), where this concern was noted.

¹⁵⁸ See for discussion, Lantham, “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 18.

century that the broad powers to use lethal defensive force should be curbed.¹⁵⁹ Indeed, in 1879 the Criminal Law Commissioners eloquently articulated the dual necessity and proportionality test.¹⁶⁰ Under this test, lethal force could not be used to effect an arrest where such force was out of proportion to the seriousness of the alleged offending.

2.109 However, at least one commentator has doubted the authority of the Commissioners' statement, notwithstanding the standing of its authors.¹⁶¹ Despite the debate surrounding the pedigree of the dual necessity and proportionality test, the 1879 Commission's approach was a sign that the law was beginning to evolve and was attempting to shed the harshness associated with the rule allowing for the shooting of the fleeing felon.

(b) *The Demise of the Fleeing Felon Rule*

2.110 During the course of the twentieth century the fleeing felon rule was increasingly undermined for five principal reasons:

- The abolition of capital punishment in most jurisdictions;
- The erosion of the distinction between felonies and misdemeanours;
- The effect of the development of policing on arrests;
- The development of weapons technology;
- The increasing emphasis on individual rights and freedoms.

(4) *The Emergence of Alternative Approaches to the Fleeing Felon Rule*

2.111 The fleeing felon rule came under sustained attack during the course of the twentieth century leading to its abandonment in most jurisdictions. The various models that have supplanted the fleeing felon rule have been grouped under four general headings, namely:

- The "reasonableness" rule (which, strictly speaking, does not embody a threshold requirement);

¹⁵⁹ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 770.

¹⁶⁰ See paragraph 7 of the Introduction for the relevant passage.

¹⁶¹ See Lantham "Killing the Fleeing Offender" [1977] 1 Crim LJ 16 at 19. He observed that whilst the statement purports to apply to both public and private defence, the named cases upon which it relies relate to self-defence only. He also noted that the Commissioner's draft code allowed for the shooting of a fleeing thief. Finally, he observed that one of the Commissioners subsequently stated that lethal force is permissible when done to effect the arrest of a felon even if there was no threat of violence to any person.

- The “specified-crimes” rule (which focuses on specific qualifying offences);
- The “violent-crimes” rule (which focuses on the violent nature of the offending); and
- The “dangerous-suspect” rule (which focuses on the future risk of offending posed by the arrestee).

2.112 The tests are not mutually exclusive and combinations of them are employed in some jurisdictions.¹⁶² However, for the sake of clarity each will be considered separately below.

2.113 However, before proceeding to an analysis of these various approaches, this section begins with a review of the legal position in this jurisdiction. It will be seen that, as in the United Kingdom, the reasonableness rule is the preferred standard. However, unlike the United Kingdom, there is little judicial guidance as to how this standard should be interpreted.

(5) The Reasonableness Rule

2.114 Under the reasonableness rule, lethal force may be used to effect arrests whenever such force is considered “reasonable”. Effectively, the reasonableness rule abandons the concept of the threshold test in that it does not attempt to specify the types of threats that warrant the use of lethal force.

2.115 A number of commentators have suggested that the reasonableness rule should be interpreted as incorporating the dual elements of necessity and proportionality as argued by the Criminal Law Commissioners of 1879. Hence, reference will be made to a selection of cases from the European Commission and the Supreme Court of Victoria where the dual necessity and proportionality test is applied. First, however, an examination will be conducted of a number of cases from England and Wales and Northern Ireland, where the reasonableness rule was also applied.

(a) Ireland

2.116 There is little case-law outlining the ambit of the power to use defensive force to effect arrests. However, in the Supreme Court case of *People (AG) v Dwyer*,¹⁶³ Walsh J indicated that lethal defensive force could be used “in the execution or advancement of justice”¹⁶⁴ In *Dowman v*

¹⁶² For example, the Model Penal Code employs the violent-crimes rule and the dangerous-suspect rule as alternative tests for the use of lethal force to effect arrest.

¹⁶³ [1972] IR 416.

¹⁶⁴ *Ibid* at 420.

*Ireland*¹⁶⁵ Barron J preferred to state the test in terms of the reasonableness standard:

“An arresting officer is entitled to use such force as is reasonably necessary to effect an arrest. Once the arrest has been effected, then he is also entitled to use such force as is necessary to ensure that the arrest is maintained.”¹⁶⁶

2.117 Commentators, however, have suggested that the reasonableness standard should be interpreted as importing the dual requirements of necessity and proportionality as identified by the Criminal Law Commissioners of 1879.¹⁶⁷

2.118 However, it may be argued that authority to use lethal force to effect arrests has inadvertently been abolished by section 3 of the *Criminal Law Act 1997*. This provision abolishes all distinctions between felony and misdemeanour; where relevant, the law is now deemed to be that as previously applied to misdemeanours. Given that lethal force was only permissible under the common law to effect arrests of suspected *felons* and not *misdemeanants*, it would seem that there is no longer a power to use lethal force to effect an arrest.¹⁶⁸

2.119 Again, under the *Non Fatal Offences Against the Person Act 1997* the test is one of “reasonableness”.¹⁶⁹ This standard has been criticised as lacking precision:

“[I]t is by no means clear how far a police officer can go in using force to effect an arrest. Should there, for example, be some

¹⁶⁵ [1986] ILRM 111 (High Court).

¹⁶⁶ *Ibid* at 115. However, it should be noted that: first, the case did not involve the use of lethal force; secondly, the case was decided on the basis that the Garda had not been entitled to use any force (given that he was not attempting to effect an arrest) and therefore the degree of permissible force was not in issue.

¹⁶⁷ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 772, suggest that if the common law continues to apply to lethal force cases despite the enactment of the Non Fatal Offences Against the Person Act 1997 then the appropriate test is one involving necessity and proportionality.

¹⁶⁸ It may be argued that a power to use force, including lethal force where appropriate, is implied as an adjunct to the new powers contained in the *Criminal Law Act 1997* which authorise arrests without warrant for “arrestable offences” (sections 2 and 4) and on foot of warrants or orders of committal (section 6). If this was the intention of the legislature, then it is unfortunate that the law has been left in the current state of ambiguity.

¹⁶⁹ Section 19(1) of the *Non Fatal Offences Against the Person Act 1997* states: “The use of force by a person in effecting or assisting in a lawful arrest, if only such as is reasonable in the circumstances as he or she believes them to be, does not constitute an offence.”

proportion between the degree of force used and the gravity of the suspected offence? Should there be some proportion between the degree of force used and the strength of the grounds for suspecting the victim?”¹⁷⁰

2.120 It has also been observed that there are no Irish authorities that provide an unequivocal answer to these questions.¹⁷¹ However, it has been argued that, by analogy with the case law dealing with the prevention of crime or breaches of the peace, “there must be some proportion between the degree of force used and the importance of making the arrest.”¹⁷²

2.121 The Garda Síochána Code contains its own policy guidelines as to the situations in which firearms, and hence deadly force, may be used.¹⁷³ Whilst the general thrust of the Code is that lethal force may be used where

¹⁷⁰ Walsh *The Irish Police* (Sweet & Maxwell 1998) at 150.

¹⁷¹ *Ibid* at 150-151.

¹⁷² *Ibid.* McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000), at 772, also argue that, in the event that the *Non Fatal Offences Against the Person Act 1997* governs the use of lethal force, the necessity and proportionality standards will be relevant

¹⁷³ The following extract from the Code entitled, “Use of Firearms by Members on Duty”, was published in the Report of Garda Síochána Commissioner Byrne to the Minister for Justice, Equality and Law Reform, “Investigation into the circumstances surrounding the events at Toneymore, Abbeylara, Co. Longford on Wednesday/Thursday, 19/20 April, 2000 which resulted in the death of John Carthy, 27 years” 30 June 2000, paragraph 49.25:

“Use of Firearms by Members on Duty.

Firearms are issued to members primarily as weapons of defence to repel serious criminal attacks on:

- (a) to whom issued or members in their company;
- (b) of the public and;
- (c) property of individuals or of the public generally.

In order that the discharge of firearms may be justified in any particular case, it must be shown that the intention of the member firing was to achieve a legal purpose and that all other means of achieving this purpose had been exhausted before firing.

In self-defence, or in defence of members of the public under special protection, the discharge of firearms will be justified if an assailant is seen by a member pointing or discharging a gun at the member or at a member of the public. Or, if by reason of injuries received by serious criminal assault, and reasonable grounds are adduced for believing the member or other members of the public to be in peril of life. If no other weapon is at hand to make use of, or if the member is rendered incapable of making use of any such weapon by the previous violence received. The discharge of firearms would not be justified merely on the suspicion that a person was in possession of firearms.”

there is a potential risk to life,¹⁷⁴ the Code authorises the *issuing* of firearms “as weapons of defence” to repel “serious criminal attacks” not only on people, but also on property. It is unclear whether the Code envisages that firearms could be *discharged* in these circumstances; ambiguously, it merely indicates that firearms should not be discharged except as a last resort to achieve “a legal purpose”. The Code does, however, provide more detailed guidelines as to the circumstances in which firearms may be discharged in self-defence or in defence of “members of the public under special protection”. It appears that legitimate defence may be used against an attacker who points or discharges a gun at any person or where there is reason to believe a person is “in peril of life”. However, the use of firearms is not authorised “merely on the suspicion that a person was in possession of firearms.”

2.122 Despite the detail contained within the Code, it is unclear whether the use of lethal force would be sanctioned to effect an arrest. On one hand, as the Code suggests that firearms should only be issued in the event of a “serious criminal attack” on persons and property; arguably this would not include fleeing suspect cases. On the other hand, the Code authorises the discharging of firearms for “a legal purpose” but sheds little light on whether the use of lethal force to stop a fleeing suspect would qualify as “a legal purpose” in this sense.

2.123 Interestingly, the Garda Síochána Guide suggests that the fleeing felon rule applies:

“Homicide is justifiable... where [a peace] officer... arrests or attempts to arrest one for felony who, having notice thereof, flies and is killed by such officer or assistant in pursuit.”¹⁷⁵

2.124 In summary, there is little guidance as to the proper interpretation of the reasonableness rule at common law or in the *Non Fatal Offences Against the Person Act 1997*.

(b) United Kingdom Case-Law

2.125 In England and Wales and Northern Ireland the use of force to effect arrests is governed by the *Criminal Law Act 1967*:

¹⁷⁴ Transcript of evidence of Commissioner Byrne in response to a question by Deputy McGennis, Joint Committee on Justice, Equality, Defence and Women’s Rights, Sub-Committee Inquiry on the Abbeylara Incident, Thursday, 26 April 2001: “The individual officers make decisions to use weapons in circumstances where there is a potential risk to life as laid down in the Garda Regulations.”

¹⁷⁵ The Garda Síochána Guide (6th ed The Incorporated Law Society of Ireland 1991) at 776. See also Ó Siocháin *The Criminal Law of Ireland* (6th ed Foilsiúcháin Dlí 1997) at 104 where the author submits that lethal force may be deployed “in the advancement of public justice, as in... arresting a felon.”

“A person may use such force as is reasonable in the circumstances... in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.”¹⁷⁶

2.126 Reference will be made to four cases that have considered this provision in the context of shootings carried out by members of the security forces in Northern Ireland.

2.127 The first case is *Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975)*.¹⁷⁷ The accused, a soldier on foot patrol in an area where the IRA was believed to be active, shot and killed a person whom he mistakenly (but reasonably) believed to be a member of the IRA. The deceased was unarmed and had been attempting to run away after the soldier had demanded that he halt. The soldier was unable to chase the deceased and therefore his options were to shoot him or let him escape.

2.128 The trial judge’s finding that the shooting was justified was upheld by the Northern Irish Court of Appeal.¹⁷⁸ Whilst the majority of the Court of Appeal judges declined to commit themselves as to whether the shooting was justified for the purposes of effecting an arrest or for preventing a crime, the dissenting judgment of McGonigal LJ concluded that the use of lethal force by a soldier or policeman would be manifestly disproportionate to prevent the escape of “an unarmed man whose only offence is that he is a card-carrying member of the Provisional IRA who runs away to avoid answering questions”. In doing so, McGonigal LJ rejected the suggestion that lethal force was justified to eliminate the speculative risk that the accused might provide information about the patrol to active terrorists. He observed that to cater for speculative risks would in effect enable lethal force to be used in any instance.

2.129 On further appeal, the House of Lords also upheld the trial verdict, albeit on the basis that the Court felt that there were insufficient facts contained in the reference to justify any interference with the judge’s view. Nevertheless, Diplock LJ appeared to endorse McGonigal LJ’s view that the shooting could not have been justified on the basis of being to effect

¹⁷⁶ Section 3 of the Criminal Law Act 1967 and section 3 of the Criminal Law Act (Northern Ireland) 1967.

¹⁷⁷ [1976] NI 169 (Northern Ireland Court of Appeal); [1976] 2 All ER 937 (House of Lords).

¹⁷⁸ [1976] NI 169.

an arrest who was not believed on reasonable grounds to be likely to commit actual crimes of violence if he succeeded in avoiding arrest.¹⁷⁹

2.130 Nevertheless, Diplock LJ proceeded to find that the verdict could be supported on the basis that the shooting was justified for the prevention of crime (this aspect of the judgment is discussed further below).¹⁸⁰

2.131 The second case is *R v Montgomery*.¹⁸¹ Gibson LJ held that the shooting was justified not only on the grounds of self-defence (the accused mistakenly believed that they were about to be fired upon), but also on the ground that it was necessary to prevent the suspect's escape:

“[If the officers believed the suspects to be getting out of the car] that would only be interpreted as an attempt *to get down the hill to escape into the country beyond* or being an attempt to take up a position behind the car with the intention of opening fire... As seen and understood by the accused the car contained three men, at least two murderous gunmen who had not merely given no indication of submission but seemed prepared to shoot it out *or at least escape in the dark*. In those circumstances to open fire was to my mind the most obvious and only means of self-defence and the only step consistent with their duty... It was in my view the use by them of such force as was reasonable in the circumstances as appreciated by them, including their understanding of the mortal danger in which they were to effect arrests even though it may be by killing and to prevent the commission of the contemplated murder.”¹⁸²

2.132 The precise meaning of this passage is difficult to discern. On one hand, Gibson LJ may have been endorsing the use of lethal force to prevent the flight of those suspected of having committed serious violent offences. On the other hand, he may have been more concerned that the deceased were apparently intent on committing another murder in the future; in other words, the shooting was warranted to prevent a future crime rather than merely to effect their arrest.¹⁸³

¹⁷⁹ [1976] 2 All ER 937 at 947. *Williams Textbook of Criminal Law* (Stevens & Sons 1978) at 445 has taken issue with this observation: “It can hardly be the law that an escaping murderer can be shot at for the purpose of arrest only if it is reasonably believed that he will commit another crime of violence.” (Original emphasis).

¹⁸⁰ See paragraphs 2.265- 2.270.

¹⁸¹ Gibson LJ Belfast Crown Court 5 June 1984.

¹⁸² *Ibid*. An extract from this ruling is reported in *McKerr v The United Kingdom* (2002) 34 EHRR 20 at para.19.

¹⁸³ More recently this case has been before the European Court of Human Rights *McKerr v The United Kingdom* (2002) 34 EHRR 20. However, whilst the Court held that

2.133 In the third case of *R v Thain*¹⁸⁴ the defence of using force to effect an arrest was raised belatedly on appeal. The appellant, a soldier in Northern Ireland, had chased a youth who, after being involved in a minor fracas with an army patrol, was attempting to run away. After repeated warnings to stop, the soldier shot at and killed the youth. The trial judge rejected the soldier's claim that he mistakenly believed the youth was turning to fire at him with a pistol and the soldier was convicted of murder. On appeal, the Northern Ireland Court of Appeal rejected a submission that the trial judge should have considered whether the force was justified to effect the arrest of the youth (in evidence, the soldier had disavowed that he had any such intention). The Court was not, therefore, required to address whether such a defence would have been sustainable. However, the Court did indicate that, had this ground of appeal succeeded, a new trial would have been necessary to determine whether the shooting was reasonable in the circumstances. By implication, it may be argued that the Court considered that lethal force might have been permissible in such circumstances.

2.134 In the fourth case of *R v Clegg*¹⁸⁵ the defence of using force to effect an arrest was again canvassed. In that case soldiers had shot dead two joyriders in a stolen car which had been driven through an army vehicle checkpoint. One soldier was convicted of the murder of one of the passengers in the car. The soldier's claim of self-defence was rejected on the basis that he had fired the fatal shot when the car was 50 feet beyond the soldiers.¹⁸⁶

2.135 On appeal against conviction to the Court of Appeal it was held that the trial judge should have considered whether the accused had used reasonable force to arrest the occupants of the car. However, the Court of Appeal itself reviewed the evidence and concluded that such a defence could not have been established on the facts:

there were investigation and procedural failures on behalf of the prosecuting authorities, it declined to address the substantive issues in the case. The Court held that the domestic courts were better equipped to deal with factual matters (a civil case was still pending). See, for discussion, Mullan, "State Obligations in Respect of the Use of Lethal Force" (2001) 7 *The Bar Review* 76.

¹⁸⁴ [1985] NI 457 (Northern Ireland Court of Appeal).

¹⁸⁵ *R v Clegg* Northern Ireland Court of Appeal (Hutton LCJ) 30 March 1994 [1995] 1 AC 482 (House of Lords).

¹⁸⁶ The fatal shot was the accused's fourth round. The trial judge accepted that the accused's first three shots may have been justified on the basis that they were fired in defence of a member of his patrol. It was accepted as a possibility that the accused may have mistakenly believed his colleague had been struck and knocked off balance by the car.

“The use of lethal force to kill or seriously wound the driver of the car in order to arrest him was so grossly disproportionate to the mischief to be averted, which was that the driver of a car who had failed to stop for an army check point and had struck a soldier and knocked him off balance might escape, that the force was clearly unreasonable beyond a reasonable doubt.”

2.136 This conclusion was upheld on further appeal to the House of Lords.¹⁸⁷ It would seem, therefore, that the dual necessity and proportionality test is applicable under the law of England and Wales and Northern Ireland, as it is under the European Convention on Human Rights and Fundamental Freedoms.

(c) European Law

2.137 The European Convention on Human Rights and Fundamental Freedoms permits the use of lethal force to effect arrests where such force is “absolutely necessary”.¹⁸⁸

2.138 It has been observed that this test is more precisely defined than the reasonableness rule.¹⁸⁹ One possible explanation for the difference in approach is that the drafters of the European Convention were “looking at the matter from the point of view of the person whose life was threatened”, whereas the architects of the reasonableness rule “were looking at the matter from the point of view of the person who has taken life and was charged with crime.”¹⁹⁰ On this interpretation, the European provision acts as a civil standard but does not interfere with the more relaxed criminal standard applied in the domestic courts. However, others have argued that the European Convention standard should be applied in the domestic criminal courts.¹⁹¹

2.139 In any event, despite the absence of any express reference to a requirement of proportionality, the European Court of Human Rights has

¹⁸⁷ *R v Clegg* [1995] 1 AC 482.

¹⁸⁸ Article 2.

¹⁸⁹ Smith “The right to life and the right to kill in law enforcement” [1994] NLJ 354 at 355.

¹⁹⁰ *Ibid.*

¹⁹¹ For example, Leverick, “Is English Self-Defence Law Incompatible with Article 2 of the ECHR?” [2002] Crim LR 347 at 349-350 states: “The EHCR does not specify whether [the protection contained in Article 2] should be criminal or civil, but the principle of proportionality suggests that where someone deprives another human being of her life intentionally, the legal sanction should be criminal.” See the reply of Smith “The Use of Force in Public or Private Defence and Article 2” [2002] Crim LR 958 and Leverick’s counter-arguments in “The Use of Force in Public or Private Defence and Article 2: A Reply to Professor Sir John Smith” [2002] Crim LR 963.

interpreted the test of “absolute necessity” as incorporating both “necessity” and “proportionality” components.¹⁹²

2.140 Most of the cases before the European Court of Human Rights have dealt with the use of lethal force in response to threats, or perceived threats, of imminent harm. There are very few examples where this test has been applied to the fleeing suspect.

2.141 However, one such case is *Kelly v United Kingdom*,¹⁹³ which again involved a shooting by the security forces in Northern Ireland. Occupants of a stolen car had attempted to break through a security checkpoint and in doing so had hit a civilian vehicle and knocked down two members of the security patrol. Soldiers at the scene had mistakenly formed the view that the joyriders were terrorists and shot and killed the driver of the car. After the car crashed, one of the passengers attempted to run away but was shot by the soldiers, although the shot was not fatal.

2.142 A civil action for damages was brought against the soldiers. The Northern Ireland Court of Appeal found for the defendant on the grounds that the shootings were reasonable in order to prevent the occupants of the car from escaping and carrying out further terrorist missions.¹⁹⁴ Interestingly, the Court of Appeal did not accept that the shooting would have been warranted either in self-defence (given that at the time of firing the threat posed by the occupant was not sufficiently great) or for the purposes of effecting an arrest (given that the fleeing occupant had not committed any offence that would justify the use of such force).

2.143 When the case came before the European Human Rights Commission, it was dealt with not on the basis that the force was warranted to prevent future crime (as the Court of Appeal had held), but on the basis that it could be used to effect the arrests of the suspects. The apparent reason for the shift in the defence was that, as the Commission noted, the prevention of crime is not a justification for the use of lethal force under the Convention. The Commission concluded that the use of lethal force was justified as it was necessary and proportionate given the soldiers’ reasonable belief that the occupants were terrorists:

¹⁹² *Kelly v United Kingdom* (1993) 16 EHRR CD20 CD21.

¹⁹³ *Ibid.* See also the Northern Ireland Court of Appeal judgment regarding a civil action for damages, *Kelly v Ministry of Defence* [1989] NI 341. See for discussion Smith “The Right to Life and the Right to Kill in Law Enforcement” (1994) 144 NLJ 354.

¹⁹⁴ *Kelly v Ministry of Defence* [1989] NI 341. Whilst this was a civil case for damages, the principles are the same given that the defence raised was that the force used was justified pursuant to the section 3 of the *Criminal Law Act (Northern Ireland) 1967*, the Northern Irish equivalent to s.3 of the *Criminal Law Act, 1967*. The Court of Appeal considered it sufficient that the occupant appeared to be “a terrorist making a determined effort to escape.”

“In this context the Commission recalls the judge’s comments that, although the risk of harm to the occupants of the car was high, the kind of harm to be averted (as the soldiers reasonably thought) by preventing their escape was even greater, namely the freedom of terrorists to resume their dealing in death and destruction.”¹⁹⁵

2.144 A further case which deals with a fleeing suspect is *Nachova v Bulgaria*¹⁹⁶ which concerned the killing of two men by a military policeman who was attempting to arrest them. The two men were conscripts and were at the time serving terms for being repeatedly absent without leave. They had fled the construction site outside the prison where they had been working and were hiding at one of the men’s grandmother’s house. Acting on an anonymous tip, four members of the military police, under the command of Major G, were sent to arrest them. Armed with handguns and automatic rifles, the police arrived at the house in which they were hiding, whereupon the two men fled, and were pursued by Major G who shot and killed them when they failed to obey his order to surrender.

2.145 The subsequent report into the deaths found that Major G’s actions had been in accordance with the Military Police Regulations and no offence had been committed. The applicants, relatives of the two dead men, complained that Majors G’s actions were in violation of Art 2 and that the investigation into the killings had breached Art 2 and Art 13.

2.146 In discussing the alleged breach of Art 2, the European Court of Human Rights referred to proportionality in relation to the requirement that the action be “absolutely necessary”: “...any use of force must be no more than “absolutely necessary”, that is to say be strictly proportionate in the circumstances... in principle there can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost.”

2.147 The Court held that there had been a breach of Article 2 and that Bulgaria had failed in its duty to protect the right to life by not having in place the appropriate legal and administrative framework defining the limited circumstances in which law-enforcement officials may use force and fire-arms. It was found that the force used by the arresting officer had been “grossly excessive” in that he fired an automatic weapon at the men, neither of whom was armed or dangerous; one of them had been shot in the chest, implying that he had attempted to surrender; and the arresting officers had a jeep and could have pursued the men, rather than shoot them.

¹⁹⁵ *Kelly v United Kingdom* (1993) 16 EHRR CD20, CD22.

¹⁹⁶ [2005] ECHR 465.

(d) Australia

2.148 In Australia the accepted view at common law¹⁹⁷ is now that the dual necessity and proportionality test governs the use of lethal force in effecting arrests.¹⁹⁸

2.149 An important modern case dealing with this topic is the Supreme Court of Victoria decision in *R v McKay*¹⁹⁹. The case involved a farmer who had fatally shot an intruder to prevent the theft of his chickens.²⁰⁰

2.150 At his trial for murder, the trial judge left the defences of self-defence, arrest, and crime prevention to the jury, but directed them that lethal force could only be used where it was both necessary and proportionate²⁰¹ and could not be used in defence of property “when the thief has not shown violence or an intention to use violence.”²⁰²

2.151 The farmer was convicted of manslaughter and this verdict was upheld on appeal in the Supreme Court by a majority of two to one. The two majority judges, Lowe J and Dean J, did not dwell upon the differences between the use of force to effect arrest and the other two defences put forward at trial, namely self-defence and crime prevention, and do not enlarge on the appropriate standard to be applied in arrest cases.

2.152 It is difficult to glean any conclusions from Lowe J’s judgment as he was apparently undecided as to whether lethal force could be used to

¹⁹⁷ The common law has been varied by legislation in a number of criminal states.

¹⁹⁸ The Australian Law Reform Commission, in its 1975 Report, “Criminal Investigation Report No.2” (Parliamentary Paper No.280, 1975) at 21, suggested that legitimate defence was governed only by the requirement of necessity (effectively retaining the fleeing felon rule). However, it would appear that the accepted view is that the common law requires both necessity and proportionality requirements to be met: see *R v McKay* [1967] VR 560, per Smith J; Lantham “Killing the Fleeing Offender” [1977] 1 Crim LJ 16; and Gilles *Criminal Law* (4th ed LBC Information Services 1997) at 328.

¹⁹⁹ [1967] VR 560. An application to the High Court of Australia for special leave to appeal was rejected, bolstering the authority of the Victorian Supreme Court’s decision. For a discussion of the case, see Lantham, “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 20-23. See also paragraphs 2.261-2.264 below.

²⁰⁰ As Smith J noted: “This situation had been continuing for three and a half years and throughout that period the farm was subjected to an unbroken series of thefts of fowls, the total number of birds lost being at least 1000, which was about half the total number of birds carried upon the farm. The thefts occurred at short intervals, birds being stolen about every second Saturday night, which would mean an average of ten or twelve birds per visit over the period.”

²⁰¹ See for discussion Lantham, “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 20.

²⁰² [1967] VR 560, per Lowe J.

prevent a non-violent theft.²⁰³ However, it may be argued by implication that Lowe J's rejection of the appeal must be read as an endorsement of the trial judge's restriction that lethal force can only be used where necessary and proportionate and where *violent* crime is involved.²⁰⁴

2.153 Dean J approved a test of "reasonable necessity" which he believed had formed the basis of the trial judge instruction to the jury. However, his use of the term "reasonable necessity" suggests that Dean J meant the dual necessity and proportionality test given that this was actually the criteria adopted by the trial judge.²⁰⁵ Dean J also appeared to endorse the trial judge's view that lethal force could only be used where violent crime is involved; Dean J concluded that the shooting could not have been necessary²⁰⁶ in the absence of any threat of harm from the thief or an accomplice.

2.154 While also endorsing the dual necessity and proportionality test, Smith J's dissenting opinion²⁰⁷ arguably adopted a more lenient standard than that favoured by the majority. Smith J indicated that the prohibition on the use of lethal force to defend property against non-violent attacks (as suggested by the trial judge) did not apply to public defences involving the prevention of felonies or apprehension of felons.

2.155 In relation to the necessity element of the test, Smith J appeared to concur with the majority view that the shooting could only have been necessary if there was some threat of physical harm. However, Smith J differed from the majority in that he considered that the farmer might reasonably have believed that the thief was part of an organised and armed gang, and therefore, that calling on the thief to surrender before attacking

²⁰³ In response to the submission that the trial judge was wrong to direct the jury that lethal force could not be used against non-violent thieves, Lowe J stated: "Whatever may ultimately turn out to be the law where the felony in question does not involve violence, the judge in this case did leave to the jury that the applicant had [the right to prevent crime]." Interestingly, however, Lowe J also indicated that lethal force could be used in reasonable defence of a person's property.

²⁰⁴ See for discussion, Lantham, "Killing the Fleeing Offender" [1977] 1 Crim LJ 16 at 21.

²⁰⁵ *Ibid.*

²⁰⁶ Lantham, *ibid.*, argues that Dean J confused the necessity test with the proportionality test insofar it was clear that the shooting was necessary to stop the thief. However, the factors that Dean J lists are relevant to the question of proportionality.

²⁰⁷ Smith J would have allowed the appeal on the basis that the trial judge had misdirected the jury on issues unrelated to this Paper. However, it was in the context of deciding whether a retrial would have been appropriate that he expressed the view that the shooting might have been reasonable in the circumstances.

him would have been unduly dangerous.²⁰⁸ There was, accordingly, room to believe that the shooting was necessary.

2.156 More significantly, Smith J appeared to accept that the farmer might reasonably have believed that the shooting was *proportionate* to the threatened harm. First, it was reasonable to believe that the likelihood of fatally wounding the thief was remote.²⁰⁹ Secondly, this was not a “casual petty offence” but “one of a series of offences carried out systematically and with great boldness and determination, and involving, in total, property of a very substantial value.”²¹⁰

2.157 In summary, the standard articulated in *R v McKay*²¹¹ is, at best, unclear. The dual necessity and proportionality test received at least implicit support from all three judges. However, it is arguable that the majority also imposed a threshold test requiring the threat of at least some physical violence.

2.158 The degree of permissible force when effecting an arrest was again in issue in the Supreme Court of Victoria decision in *R v Turner*.²¹² The appellant had suffered a series of thefts from his car. On the night in question he had armed himself and was keeping watch over his car when he witnessed a thief attempting to break into the vehicle. The thief fled when called upon to stop and the appellant fired towards the thief intending to scare him into halting. However, the thief was shot and killed. At trial the appellant was acquitted of murder but convicted of manslaughter. On appeal, the Supreme Court quashed his conviction.

2.159 On this occasion the entire Supreme Court of Victoria gave a clear endorsement of the dual necessity and proportionality test.²¹³ Applying this

²⁰⁸ [1967] VR 560, per Smith J.

²⁰⁹ This belief was possible given that the farmer aimed at the thief’s legs and given that he fired from a distance.

²¹⁰ [1967] VR 560 per Smith J.

²¹¹ Ibid.

²¹² [1962] VR 30. The case was not directly concerned with the common law right to use force to arrest but with a statutory right to arrest those found committing an indictable offence by night (in this case the indictable misdemeanour of attempted theft). Nevertheless, the Court considered the statutory power as analogous to the common law power: see, for discussion: Lantham “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 23.

²¹³ The express adoption of the dual necessity and proportionality test was commended by Lantham, “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 24: “The Victorian Full Court, drawing on respectable English authority, have restored the balance between effective law enforcement and protection of life and limb of fleeing offenders by adding to necessity the requirement of proportionality. It is a lead which deserves to be followed in all common law jurisdictions.”

test to the facts, the Court asked whether lethal force could ever be used to arrest a fleeing suspect. The Court stated that, “it is wrong... to say categorically that the use of a lethal weapon to effect an arrest for a misdemeanour can in no circumstances be justified” and concluded:

“In our opinion, it was open to the jury to hold that in the particular circumstances of this case the applicant was justified in firing towards (not at) the person whom he was trying to arrest.”

2.160 However, this broad power to use firearms to effect arrests was subject to an important caveat: namely, that firearms could not be used intentionally to cause death or serious injury.

2.161 In summary, it would seem that, of all the jurisdictions applying the reasonableness rule, the courts of Australia have come closest to defining the rule to include a threshold test prohibiting the use of lethal force against a fleeing felon.

(e) Summary of the Reasonableness Rule

2.162 The reasonableness rule has been criticised for lacking precision by a number of commentators. For example, Williams describes the reasonableness rule contained in section 3 of the English *Criminal Law Act, 1967* as “so vague that it is hardly a rule at all”.²¹⁴ Similarly, Smith and Hogan consider the question of when lethal force will be “reasonable” in public defence as “somewhat speculative”.²¹⁵

2.163 However, despite the lack of clarity associated with the reasonableness rule, it is possible to identify some of the factors that the courts have taken into account in the cases discussed above:

- Whether the arrestee was known to be a dangerous criminal;²¹⁶
- The seriousness of the offence which the arrestee was believed to have committed;²¹⁷
- Whether the arrestee posed any future (imminent or otherwise) threat of violent crime.²¹⁸

²¹⁴ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 440-441.

²¹⁵ Smith & Hogan *Criminal Law* (9th ed Butterworths 1999) at 256.

²¹⁶ For example in *R v Montgomery* Gibson LJ Belfast Crown Court 5 June 1984, the court appeared to place weight on the fact that the fleeing suspects were known murderers.

²¹⁷ For example, in *R v Clegg* Northern Ireland Court of Appeal (Hutton LCJ), 30 March 1994; [1995] 1 AC 482 (House of Lords), the Courts took into account that the use of lethal force was disproportionate to the objective of apprehending the fleeing suspects for committing the crimes of assault (by driving the car into one of the soldiers) and breaking a roadblock.

2.164 Unfortunately, there was no consistency in the decided cases as to when each of these factors would be taken into account and the weight that would be attached to them. Whilst some might favour the retention of such flexibility and discretion, as McAuley and McCutcheon have pointed out, the general criterion of reasonableness “is not easy to reconcile with the normal requirement of precision and certainty in criminal statutes.”²¹⁹ Accordingly, the Commission does not recommend the adoption of this approach.

(6) Options for Reform

2.165 Next, three alternatives, which attempt to create a more structured test for the use of force to effect arrests, will be considered.

(a) The Specified-Crimes Rule

2.166 Under the specified-crimes rule lethal force is permissible to effect the arrest of a fleeing arrestee suspected of having committed one of a specified category of serious offences. Essentially, the specified-crimes rule performs the role originally played by the fleeing felon rule when the felony / misdemeanour distinction served to identify only the most serious violent offences. With the demise of this distinction, the specified-crimes rule is used in a similar fashion to categorise individual or classes of offences which are deemed to be sufficiently serious to warrant the use of lethal force to effect arrests.

2.167 An example of this approach can be seen in the New York *Penal Code*, which specifies certain felonies, which, if believed to have been committed, justify the use of deadly force to effect the arrest of the alleged felon.²²⁰ Included in the New York list of qualifying felonies are the offences of: kidnapping; arson; escape in the first degree; and, burglary in the first degree.

2.168 Further examples are to be found in the criminal codes of a number of Australian states. Under the Queensland and Western Australian Criminal Codes, lethal force is only permissible where “reasonably necessary” to prevent the flight of arrestees who are reasonably suspected of

²¹⁸ For example, in *Kelly v United Kingdom* (1993) EHRR CD20, CD22 the European Commission on Human Rights took into account that the arrestee posed a future threat of violent crime.

²¹⁹ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell, 2000) at 773. The authors are commenting on the reasonableness rule as incorporated in the *Non Fatal Offences Against the Person Act 1997*.

²²⁰ New York *Penal Law* 35.30(1)(a)(ii) (Consol 1996), cited in Smith, “Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied *Tennessee v Garner*” (1998) 7 Kan J L & Pub Pol’y 100 at 102.

having committed an offence punishable with life imprisonment.²²¹ Further provision is made for the use of “reasonably necessary” lethal force to prevent the escape or rescue of a person who is already in custody for an offence punishable by at least 14 years imprisonment (Western Australia)²²² or where the offence rendered the person arrestable without warrant (Queensland).²²³ This latter class is very broad given that suspects are generally arrestable without warrant for any crime.²²⁴ Under the Tasmanian *Criminal Code* lethal force is authorised only where the crime of which the arrestee is suspected appears on a specified list of serious offences.²²⁵

2.169 The Canadian *Criminal Code* incorporates a specified-crimes rule in combination with a dangerous-suspect rule. The specified-crimes component provides that lethal force may only be used to prevent the flight of an arrestee where he or she is arrestable without a warrant.²²⁶ Again, this is a broad class of qualifying offences given that suspects are generally arrestable without a warrant for any indictable offence or for any ordinary criminal offence committed in the presence of the arrestor.

2.170 There is tentative support amongst commentators for this approach in combination with a violent-crimes rule or the dangerous-suspect rule.²²⁷ In contrast, its merits were considered and rejected by the American Law Institute in the course of their deliberations on the *Model Penal Code*. The Institute favoured a combination of the violent-crimes rule and the dangerous-suspect rule, which are discussed below.

²²¹ Section 256 of the Queensland *Criminal Code* and section 233 of the Western Australian *Criminal Code*.

²²² Section 235 of the Western Australian *Criminal Code*.

²²³ Section 258 of the Queensland *Criminal Code*.

²²⁴ Section 5(2) of the Queensland *Criminal Code* provides that an offender may be arrested without warrant when an offence is defined as a crime (except when otherwise stated).

²²⁵ Section 30 and Appendix B of the Tasmanian *Criminal Code*.

²²⁶ Section 25(4) of the Canadian *Criminal Code*. The Canadian Law Reform Commission recommended the reform of this provision. Initially, in their Working Paper, the Commission suggested that the test should be in the form of a violent-crimes rule, but subsequently, in their Report, recommended that the reasonableness rule should be adopted: Law Commission of Canada *Report on Recodifying Criminal Law* (No 31 1987) at 39-40.

²²⁷ See for example Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1104 and Simon, “Tennessee v Garner: The Fleeing Felon Rule” (1986) 30 St Louis U L J 1259 at 1276-1277.

(b) The Violent-Crimes Rule

2.171 As in the case of the specified-crimes rule, the violent-crimes rule focuses on the nature of the alleged offending for which the arrestee is sought. However, whilst the specified-crimes rule is satisfied by the alleged commission of one of the list of qualifying offences, lethal force is permissible under the violent-crimes rule only when the alleged offending involves an element of violence.

2.172 The degree of violence required may vary. For example, US states such as Alaska²²⁸ and Oregon,²²⁹ adopt a low threshold whereby lethal force may be adopted to apprehend those suspected of committing felonies involving the use of *any* force.²³⁰ However, these provisions have been criticised on the grounds that they grant arrestors undue discretion to resort to lethal force. Under a literal reading of these statutes any degree of physical violence, however minor, warrants the use of lethal force.²³¹

2.173 In contrast, under the US *Model Penal Code*²³² and in states such as Connecticut²³³ and Hawaii²³⁴ lethal force is permissible to effect the arrest of a fleeing felon when the alleged offending “involved conduct including the use or threatened use of *deadly force*.”²³⁵

2.174 The drafters of the *Model Penal Code*, the American Law Institute, justified their adoption of the violent-crimes rule on two grounds. First, the test provides law enforcement officers “a specific criterion by which to govern their conduct.”²³⁶ Secondly, an offender’s past conduct is likely to be indicative of their future behaviour. The fact that an offender has committed a violent act illustrates that he may perpetrate another one.²³⁷

²²⁸ Alaska Stat 11.81.370(a)(1) (Michie 1996).

²²⁹ Or Rev Stat 161.239(1)(a) (1996).

²³⁰ See Smith “Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied Tennessee v Garner” (1998) 7 Kan J L & Pub Pol’y 100 at 101-102.

²³¹ *Ibid* at 102.

²³² Section 3.07(2)(b)(iv)(A) of *the Model Penal Code*.

²³³ Conn Gen Stat 53a-22(c)(2)(1997).

²³⁴ Haw Rev Stat 703-307(3)(d) (1996).

²³⁵ Emphasis added. These provisions also justify the use of lethal force under the dangerous-suspect rule. See Smith, “Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied Tennessee v Garner” (1998) 7 Kan J L & Pub Pol’y 100 at 101-102.

²³⁶ American Law Institute *Model Penal Code and Commentaries* (1985) Part I Vol 2 at 120-121.

²³⁷ *Ibid*.

2.175 This approach was adopted by the Canadian Law Reform Commission.²³⁸ The Commission recommended that the current test employed by the Canadian *Criminal Code* (a dual specified-crimes and dangerous-suspect rule) should be replaced by a violent-crimes rule; namely, lethal force should be permitted when the arrestee's alleged offence was one "endangering life, bodily integrity or state security."²³⁹ The Commission argued that "the notion that criminals are better dead than at large should only apply to those known to be a source of serious danger."²⁴⁰

2.176 The US Supreme Court, in *Tennessee v Garner*,²⁴¹ has also provided at least *obiter* support for the violent-crimes rule:

"[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."²⁴²

2.177 This passage was applied in *Daniels v Terrell*²⁴³ which involved a high-speed vehicle pursuit of a suspect by a police officer who had failed to pull over for a traffic infringement. During the course of the pursuit occupants of the suspect's car shot at the police officer's vehicle. When the suspect's car eventually stopped, the driver (then unarmed) ran from the scene and was shot by the police officer, although not killed. A civil action brought by the driver against the police officer was dismissed on the grounds that the shooting was justified under *Tennessee v Garner* as the driver was fleeing from the commission of a violent crime.

2.178 The violent-crimes rule has been subjected to a number of criticisms. First, the rule can be over-inclusive; the violent nature of the

²³⁸ Law Commission of Canada *Working Paper on Criminal Law: the general part – liability and defences* (No 29 1982) at 118. However, this recommendation was later abandoned without explanation in the Commission's subsequent Report in which the Commission preferred the reasonableness rule: Law Commission of Canada, *Report on Recodifying Criminal Law* (No 31 1987) at 39-40.

²³⁹ Law Commission of Canada, *Working Paper on Criminal Law: the general part – liability and defences* (No 29 1982) at 118.

²⁴⁰ *Ibid.*

²⁴¹ (1985) 471 US 1.

²⁴² *Ibid* at at 11-12 (emphasis added). However, the dissenting judges argued at 32 that this statement provided police officers with little guidance.

²⁴³ (1992) 783 FSupp 1211 (ED Mo), cited in Smith, "Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied *Tennessee v Garner*" (1998) 7 Kan J L & Pub Pol'y 100 at 106. Like *Tennessee v Garner*, this was a civil case claiming breaches of the suspect's constitutional right under the Fourth Amendment.

crime for which the arrestee is sought may not necessarily indicate that the arrestee is dangerous to the public at large:

“[T]he fact that the suspected fleeing felon used force in committing his alleged crime does not necessarily indicate that he is dangerous. For example, the man who kills his wife in a heated argument, or upon finding her in bed with another man, is not likely to go out and kill again.”²⁴⁴

2.179 Secondly, the violent-crimes rule may also be underinclusive in that some serious crimes, such as robbery and rape, may not always involve the use or threatened use of deadly force, yet offenders may nevertheless pose a serious threat to society.²⁴⁵

2.180 Finally, unlike the specified-crimes rule which provides an arrestor with a concrete list of qualifying offences, the violent-crimes rule arguably places the arrestor in the difficult position of having to assess whether the arrestee’s alleged offending involved “serious” or “deadly” force.²⁴⁶

2.181 Accordingly, the Commission believes that the threshold for the use of lethal force in effecting arrests should not be set on the basis of the offender’s perpetration of violent crimes.

(c) *The Dangerous-Arrestee Rule*

2.182 Under the dangerous-arrestee rule, lethal force is permissible to apprehend a fleeing suspect where it is believed that the suspect poses a future threat of harm.

2.183 In contrast to the “backward-looking criterion” of the specified-crimes rule and the violent-crimes rule, the dangerous-arrestee rule focuses on the potential future conduct of the arrestee.²⁴⁷ Hence, “[t]he question is not whether the use of deadly force is proportionate to the evil done, but to the evil to be prevented.”²⁴⁸ This focus on future harm concentrates the minds of arrestors on their task of law enforcement and minimises the risk

²⁴⁴ Harper “Accountability of Law Enforcement Officers in the Use of Deadly Force” (1983) 26 How L.J 119 at 132-133.

²⁴⁵ *Ibid* at 133.

²⁴⁶ *Ibid*.

²⁴⁷ Elliot, “The Use of Deadly Force in Arrest: Proposals for Reform” [1979] 3 Crim LJ 50 at 87.

²⁴⁸ *Ibid*.

that they will be improperly motivated to use lethal force by the desire to punish arrestees for their alleged past crimes.²⁴⁹

2.184 The dangerous-arrestee rule has been adopted in a number of jurisdictions. For example, US states such as Idaho²⁵⁰ and New Mexico²⁵¹ authorise the use of lethal force to apprehend felons who threaten to cause future death or serious injury.

2.185 The United States *Model Penal Code* also incorporates this rule (in addition to the violent-crimes rule) and sanctions the use of lethal force where the law enforcement officer believes “there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed”.²⁵²

2.186 According to the drafters of the *Model Penal Code*, the American Law Institute, arrestors would be entitled to draw on a range of factors when assessing the risk posed by the arrestee:

“The offender’s use or threatened use of deadly force during an attempt to resist the arrest may provide the evidential basis upon which this conclusion can be drawn, as may factors that are known about his prior record, his disposition to use force, whether he is armed, the likelihood of apprehending him with less danger on another occasion, and so on.”²⁵³

2.187 This approach has also found favour in other common law jurisdictions. For example, the Australian Northern Territory *Criminal Code* authorises police officers and prison officers to use “not unnecessary” lethal force where there is a reasonable belief that the arrestee, “unless arrested, may commit an offence punishable with imprisonment for life.”²⁵⁴

2.188 The Canadian *Criminal Code* authorises peace officers to use lethal force to prevent the flight of an arrestee who has committed a specified offence (specified-crimes rule) and where “the officer believes that the force is necessary to protect any person from imminent or future death or grievous bodily harm”.²⁵⁵

²⁴⁹ Harper, “Accountability of Law Enforcement Officers in the Use of Deadly Force” (1983) 26 How LJ 119 at 141.

²⁵⁰ Idaho Code 18-4011(2) (1997).

²⁵¹ NM Stat Ann 30-2-6(B) (Michie 1997).

²⁵² *Model Penal Code*, s.3.07(2)(b)(iv)(B).

²⁵³ American Law Institute, *Model Penal Code and Commentaries* (1985) Part I Vol.2 at 122.

²⁵⁴ Section 28(a) and (b) of the Northern Territory *Criminal Code*.

²⁵⁵ The Canadian *Criminal Code*, section 25(4) and (5).

2.189 In the 1985 decision of *Tennessee v Garner*²⁵⁶ the majority of the US Supreme Court adopted the dangerous-arrestee rule as the correct test for assessing the constitutionality of state laws which purported to authorise the use of lethal force by law enforcement officers.²⁵⁷ This was the first occasion that the Supreme Court had been called upon to address the topic of the use of lethal force against the fleeing felon. Prior to this case, as many as twenty-four states had retained the fleeing felon rule.²⁵⁸

2.190 The majority held that the use of deadly force to apprehend an unarmed fleeing suspected felon was unconstitutional pursuant to the Fourth Amendment²⁵⁹ “unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others”.²⁶⁰

2.191 The case was a civil action in relation to a police killing of a fleeing burglary suspect. The police officer concerned had attended a call-out for a suspected home-burglary at night and had seen an apparently unarmed suspect fleeing the scene through the backyard of the property.²⁶¹ As the police officer identified himself and told the suspect to halt, the suspect began to climb over a fence. Convinced that the suspect would evade capture if he made it over the fence, the police officer shot him. The officer was not faced with any physical threat from the suspect and did not attempt to justify the shooting other than on the basis that it was necessary to prevent the suspect’s flight.

²⁵⁶ (1985) 471 US 1 (US Supreme Court).

²⁵⁷ As discussed earlier at paragraph 2.176, the majority of Supreme Court also made obiter comments apparently endorsing a violent-crimes rule: (1985) 471 US 1 at 11-12.

²⁵⁸ The Supreme Court in *Tennessee v Garner* listed 24 states in which the ‘Any-Felony Rule’ was in force. Other commentators have suggested that a more accurate figure was 22: Tennenbaum, “The Influence of the Garner Decision on Police Use of Deadly Force” (1994) 85 J Crim L & Criminology 241, 244. However, in many cases the internal police guidelines in these states adopted a more restrictive approach than the state laws required. See *Tennessee v Garner* (1985) 471 US 1 at 10-11.

²⁵⁹ Which provides: “The right of People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

²⁶⁰ *Tennessee v Garner* (1985) 471 US 1, 3, per White J, Brennan, Marshall, Blackmun, Powell and Stevens JJ concurring. O’Connor J, Burger CJ and Rehnquist J dissented.

²⁶¹ As the majority noted, under the Memphis City Code the suspect was subject to a maximum \$50 fine for fleeing arrest.

2.192 The majority concluded that deadly force could not be justified to prevent the escape of an arrestee suspected of burglary. That crime was not sufficiently dangerous to justify the automatic use of deadly force.²⁶²

2.193 Notwithstanding the reluctance of many US state legislatures expressly to adopt the rule as set down in *Tennessee v Garner*,²⁶³ that decision has nevertheless had a significant impact on police guidelines and practice.²⁶⁴ Indeed, many police departments have promulgated guidelines which are even more restrictive than those required by the Supreme Court.²⁶⁵

2.194 However, the *Tennessee v Garner*²⁶⁶ and other dangerous-arrestee rule formulations²⁶⁷ do not specify with sufficient particularity how *immediate* a threat must be in order to warrant lethal force. In other words, must arrestors believe that the threatened harm is *imminent* or does it suffice that they believe that the harm will occur at *some* point in the future?

2.195 If lethal force may be used to effect the arrest of a fleeing suspect on the grounds that he or she may commit a dangerous offence in the remote future, then arguably it goes well beyond the authority to effect the arrest in the first place.²⁶⁸ Furthermore, unconstrained by any imminence requirement, the defence of effecting arrests would grant greater powers to use lethal force than the specific defence of crime prevention.

(7) *Distinction between Flight and Escape*

2.196 Although the use of lethal force in public defence arises primarily in the context of arrests, the defence also covers the use of force to prevent the escape or rescue of prisoners held in custody.

2.197 Prison escapes are typically viewed as more serious than flight from arrest, given that prison inmates, having already been convicted of a

²⁶² (1985) 471 US 1 at 21.

²⁶³ (1985) 471 US 1.

²⁶⁴ In one study, it was shown that shootings by police in America had reduced by 16 percent: Tennenbaum, "The Influence of the Garner Decision on Police Use of Deadly Force" (1994) 85 J Crim L & Criminology 241 at 257.

²⁶⁵ *Ibid* at 258.

²⁶⁶ (1985) 471 US 1 (US Supreme Court).

²⁶⁷ Smith, "Police Use of Deadly Force: How Courts and Policy-Makers Have Misapplied *Tennessee v Garner*" (1998) 7 Kan J L & Pub Pol'y 100 at 101, notes that dangerous-suspect rules incorporated in the statutory codes of Idaho and New Mexico contain no express requirement that the threat be imminent.

²⁶⁸ A similar criticism was made by Smith "The Right to Life and the Right to Kill in Law Enforcement" (1994) 144 NLJ 354 at 356, in relation to the apparent broad powers granted to use lethal force to effect an arrest under the European Convention on Human Rights.

serious offence, are typically perceived as being more dangerous than a fleeing suspect who may only have committed a minor offence, or none at all.²⁶⁹ A prisoner desperate enough to attempt to escape from prison may use any means possible in order to remain free.²⁷⁰

2.198 Given the different status of prisoners compared to suspects, the question arises as to whether a less stringent test should apply to the use of force to prevent their escape or whether the conventional tests for preventing the flight of suspects are equally applicable to prison escapees.

2.199 Consider the examples provided by the specified-crimes rule. If this test was applied to prison escapes, then authorisation of the use of lethal force would depend on the crime for which the prisoner was incarcerated.²⁷¹ Arguably a criterion of this kind would provide an accurate indication of the danger that a prisoner poses to society.²⁷²

2.200 However, this rule may be too inflexible in that the offence for which the prisoner was detained may have occurred in the distant past and may not be indicative of the danger the prisoner now poses.²⁷³

2.201 There are also difficulties involved in applying the dangerous-arrestee rule to prison escape cases. Whilst an arrestor will generally be aware of the danger posed by a fleeing suspect, it will often be impossible for a prison guard to assess the dangerousness of a particular prisoner in a facility holding a variety of inmates.²⁷⁴

2.202 One way of addressing this problem would be to assume that “any given escapee may be armed or pose a danger to others in the community” and that “[a]n escapee, by virtue of his escape, is a desperate individual and

²⁶⁹ Wiener, “Running Rampant: The Imposition of Sanctions and the Use of Force Against Fleeing Criminal Suspects” (1992) 80 Geo L J 2175 at fn.59.

²⁷⁰ Lydon, “Escape: A Deadly Proposition? Prisoners and Pretrial Detainees” (1995) 21 NE J on Crim & Civ Con 203 text at fn 191.

²⁷¹ In *R v Foster* (1825) 1 Lew 187, Holroyd J said that “[a]n officer must not kill for an escape where the party is in custody for a misdemeanour”; he should rather withdraw from the conflict and allow the escape.

²⁷² *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics* (1971) 403 US 388 at 419, per Burger CJ dissenting. See also, Law Commission of Canada, Working Paper on Criminal Law: the general part – liability and defences (No 29 1982) at 118.

²⁷³ Law Commission of Canada Working Paper on Criminal Law: the general part – liability and defences (No 29 1982) at 119.

²⁷⁴ Lydon, “Escape: A Deadly Proposition? Prisoners and Pretrial Detainees” (1995) 21 NE J on Crim & Civ Con 203, text at footnotes 198-199, citing *Newby v Serviss* (1984) 590 F Supp 591 at 596.

is in the process of committing a felony.”²⁷⁵ This approach has been adopted in Canada: whilst arrestors must individually assess whether fleeing suspects pose a serious threat, lethal force may be used against an escaping prison inmate if there is reason to believe that any of the inmates pose such a threat.²⁷⁶

2.203 A number of other jurisdictions have also drawn a distinction between the standards applicable to fleeing suspects and escaping prisoners.²⁷⁷ For example, in the Australian States of Queensland and Western Australia, a police officer may use lethal force to apprehend a fleeing escapee where he has reason to believe that the latter has committed an offence punishable with life imprisonment.²⁷⁸ However, lethal force may be used to prevent the escape or rescue of a prisoner where the latter had committed any offence justifying arrest without warrant (Queensland)²⁷⁹ or punishable with imprisonment for at least 14 years (Western Australia).²⁸⁰

2.204 Under the US *Model Penal Code* there is significantly greater scope for the use of lethal force to prevent the escape of a prisoner after, as compared to during, arrest. The authority to use lethal force to prevent the escape of prisoners is subject only to a requirement that the prison guard or peace officer believes it to be “immediately necessary” in order to prevent the escape of the prisoner.²⁸¹ The American Law Institute, which drafted the provisions, argued:

“The public interest in prevention of escape by persons lawfully in the custody of penal institutions is regarded by the provision as sufficient to warrant the use of deadly force when the custodian or guard believes that only such force can prevent the escape. Persons in institutions are in a meaningful sense in the custody of the law and not of individuals; the social and psychological

²⁷⁵ *Newby v Serviss* (1984) 590 F Supp 591 at 596, cited in Lydon, “Escape: A Deadly Proposition? Prisoners and Pretrial Detainees” (1995) 21 NE J on Crim & Civ Con 203, text at fns 198-199.

²⁷⁶ Section 25(4) of the Canadian *Criminal Code*.

²⁷⁷ However, not all jurisdictions draw such a distinction. For example, in the Australian State of Tasmania and in New Zealand the same criteria apply for the use of force to prevent the escape of suspects and prisoners: section 30 of the Tasmanian *Criminal Code*; section 40 of the New Zealand *Crimes Act 1961*.

²⁷⁸ Section 256(2) of the Queensland *Criminal Code*; section 233(2) of the Western Australian *Criminal Code*.

²⁷⁹ Section 258(2) of the Queensland *Criminal Code*.

²⁸⁰ Section 235(2) of the Western Australian *Criminal Code*.

²⁸¹ The *Model Penal Code*, s.3.07(3).

significance of an escape is very different in degree from flight from an arrest.”²⁸²

2.205 It is suggested therefore that there are factors peculiar to prison breaks which render it necessary to fashion different standards for the use of force than those adopted in relation to the arrest of fleeing suspects. The Commission suggests that in this instance, where it is necessary to resort to lethal force in order to prevent the escape of an inmate, it should be assumed that the escaping prisoner is in fact dangerous. The dangerous-crimes rule should apply but in this regard, the prison guard should be entitled to assume that the escapee is in fact dangerous. Consequently, the dangerous-suspect rule should be deemed to apply in every case in which a prisoner is endeavouring to escape unless the prison guard is aware that the prisoner is not dangerous.

2.206 In the absence of a special rule for escaping prisoners, it is likely that the dangerous-suspect rule would be held to apply anyway given that escaping prisoners in general pose an immediate threat to the community. It makes practical sense therefore to recognise this in the legislation.

2.207 *The Commission provisionally recommends that a prison guard should be entitled to assume that every escaping prisoner is dangerous and consequently resort to lethal force, where all the other requirements for legitimate defence are met, unless he or she is aware that the escapee is not in fact dangerous.*

(8) Restriction on Lethal Force to Law Enforcement Officers

2.208 At common law, lethal force may be used in public defence by both private citizens and public officers.²⁸³ However, under modern conditions some argue that the power to use lethal force to effect arrests and prevent escapes should be restricted to law enforcement officers.²⁸⁴

2.209 This approach was adopted by the US *Model Penal Code*²⁸⁵ on the ground that it achieves “an appropriate balance between the needs of effective law enforcement and the desirability of discouraging private resort

²⁸² American Law Institute, *Model Penal Code and Commentaries* (1985) Part I Vol 2 at 126. The Commentaries note, at 127, that many American states also require that the escapee is a felon or that the escape is from a maximum security institution.

²⁸³ Historically, the authority for private citizens to use lethal force was void if the suspect had in fact been innocent of the alleged crime: Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1099.

²⁸⁴ This would include members of the Gardaí, prison officers, and those private citizens called upon to assist.

²⁸⁵ Section 3.07(2)(b)(ii) and (3) of the *Model Penal Code*.

to violence”.²⁸⁶ The drafters of the Code, the American Law Institute, argued that in modern conditions “the arrest of suspected criminals is peculiarly the concern of the police.”²⁸⁷ Limiting the use of lethal force to trained personnel arguably minimises the risks associated with its use. The Institute was also anxious to discourage “private vigilante activity in a day of organized law enforcement machinery.”²⁸⁸

2.210 A number of other jurisdictions, including New Zealand,²⁸⁹ Canada,²⁹⁰ and the Australian States of Queensland,²⁹¹ Western Australia,²⁹² the Northern Territory²⁹³ and Tasmania,²⁹⁴ authorise only law enforcement officers to use lethal force to effect arrests.

2.211 However, in Ireland neither the common law nor the *Non Fatal Offences Against the Person Act 1997* draws any express distinction between the use of lethal force by law enforcement officers and private citizens.²⁹⁵

2.212 For the reasons discussed above by the American Law Institute, it is suggested that there should be a prohibition on the use of lethal defensive force by private citizens in effecting arrests. This approach has been widely adopted internationally. Private individuals lack appropriate training in the use of this force and, under pressure, are apt to inadvertently injure bystanders or use lethal force unnecessarily. These risks have increased in modern society given the prevalence of guns.

2.213 *The Commission provisionally recommends that the power to use lethal defensive force in effecting arrests should be restricted to law enforcement officers.*

²⁸⁶ American Law Institute, *Model Penal Code and Commentaries* (1985) Part I Vol 2 at 116.

²⁸⁷ *Ibid* at 132.

²⁸⁸ *Ibid* at 129.

²⁸⁹ Sections 39 and 40 of the New Zealand *Crimes Act, 1961*.

²⁹⁰ Section 25(4) and (5) of the Canadian *Criminal Code*.

²⁹¹ Sections 256 and 257 of the Queensland *Criminal Code*.

²⁹² Section 233 of the Western Australian *Criminal Code*.

²⁹³ Section 28(a), (b) and (c) of the Northern Territory *Criminal Code*.

²⁹⁴ Sections 30, 31 and 32 of the Tasmanian *Criminal Code*.

²⁹⁵ Similarly, no such distinction is made under the United Kingdom’s section 3 of the *Criminal Law Act 1967* and section 3 of the *Criminal Law Act (Northern Ireland) 1967*.

(9) Requirement of Warnings or Less-Than-Lethal-Force

2.214 In order to reinforce the principle that lethal force should only be used where necessary, it may be argued that arrestors should be required to issue warnings to arrestees to surrender or to exhaust less-than-lethal options (including warning shots) prior to resorting to lethal force (including the use of firearms to injure but not kill).

2.215 A number of foreign statutory schemes expressly require that an arrestor call upon the arrestee to surrender before resorting to lethal force.²⁹⁶ Examples include the criminal codes of the Australian States of Queensland,²⁹⁷ Western Australia²⁹⁸ and Tasmania.²⁹⁹ The Northern Territory *Criminal Code* permits police and prison officers to use lethal force only where the arrestee has been called upon to surrender “and has been allowed a reasonable opportunity to do so.”³⁰⁰ Furthermore, where the officer intends to use a firearm, he or she must first fire a warning shot “if practicable”.³⁰¹

2.216 However, the requirement that warning shots be fired is a controversial one given that such action may not only be dangerous to bystanders but could also provoke a violent response from the arrestee.³⁰² The offender may not realise that he was in fact receiving a warning and not being shot at.

2.217 Similarly, the use of firearms to wound also causes difficulties. As Ashworth observes:

“Should [arrestors] shoot to kill, or try to wound and disable? The policy of minimal force would suggest the latter, but in practice there are difficulties: (i) if the other person is armed, any failure to incapacitate totally may leave the opportunity for a gun to be fired or explosive to be detonated, resulting in the loss of innocent life; and (ii) it is far more difficult to shoot at and hit legs and arms than to shoot at and hit the torso, again making failure and the loss

²⁹⁶ However, many criminal codes do not incorporate such a requirement; see, for example, the *New Zealand Crimes Act, 1961* and the *US Model Penal Code*.

²⁹⁷ Section 256(2) of the *Queensland Criminal Code*.

²⁹⁸ Section 233(2) of the *Western Australian Criminal Code*.

²⁹⁹ Section 30(3) of the *Tasmanian Criminal Code*.

³⁰⁰ Section 28(a), (b) and (c) of the *Northern Territory Criminal Code*.

³⁰¹ Section 28(a), (b) and (c) of the *Northern Territory Criminal Code*.

³⁰² In the New Zealand case of *Wallace v Abbott* Elias CJ New Plymouth High Court 14 June 2002 at 15-16, these underlying reasons for discouraging warning shots was discussed.

of innocent life more probable. This argument, if sustained, might lead to the paradox that, in order to achieve minimal injury and loss of life, it would be best to shoot to kill as soon as the danger to life becomes apparent³⁰³

2.218 Other forms of non-lethal force are currently under consideration in this jurisdiction and abroad. In the report of Garda Síochána Commissioner Byrne on the Abbeylara shooting, the Garda Commissioner undertook to carry out a review of “less than lethal” weapons.³⁰⁴ A Working Group was subsequently established to consider international research into the use of less-than-lethal force including rubber projectiles, shotguns that fire nets, sticky foam, water guns, bean bags, and pepper spray/balls.

2.219 The Report of the Working Group was completed in 2002 and the effect of these was a recommendation to the Minister for Justice, Equality and Law Reform that three devices be introduced for use by the Garda Emergency Response Unit. This was approved by the Government in November 2002. The devices introduced were a “bean bag” shot, fired from a shotgun and used to temporarily incapacitate an individual; a Ferret 12 CS/OS Shotgun, which can penetrate windows and doors in order to deliver a chemical agent inside; and an OC/CS Multi-purpose Grenade, which can be launched to deliver a chemical agent to a distance of 25-30 feet.³⁰⁵

(10) Summary and Conclusions

2.220 From the outset, it should be observed that the Commission is of the opinion that it is essential for a threshold on the use of lethal force to be adopted in the case of public defence. Law enforcement officers are confronted on a frequent basis with the need to use force in effecting arrests and the prevention of crime. They need to be presented with a legal protocol outlining the precise circumstances in which they may resort to force and in particular, lethal force. Accordingly, the Commission submits that it is

³⁰³ Ashworth *Principles of Criminal Law* (2nd ed Clarendon Press 1995) at 141-142.

³⁰⁴ This intention was indicated in the Report of Garda Síochána Commissioner Byrne to the Minister for Justice, Equality and Law Reform, “Investigation into the circumstances surrounding the events at Toneymore, Abbeylara, Co. Longford on Wednesday / Thursday 19/ 20April 2000 which resulted in the death of John Carthy, 27 years” (30 June 2000) at paragraph 74.

³⁰⁵ It is also worth noting that in the *Report of the Tribunal of Inquiry into the Facts and Circumstances surrounding the Fatal Shooting of John Carthy at Abbeylara, Co. Longford on 20th April, 2000* (Government of Ireland, 2006), Justice Barr recommended that the Garda Síochána conduct research into the use of a fourth less than lethal option, the Taser gun, with a view to establishing whether it should become part of the armoury of the Garda ERU, as it was his opinion that it would seem to have had a greater prospect of success than the other options, if used in the particular circumstances of the John Carthy shooting.

particularly important that law enforcement officers are presented with rules which are as clear as practicable by which they can regulate their conduct.

2.221 There are essentially four models which can be adopted for the purpose of imposing a threshold on the lethal force which may be used to effect an arrest. Firstly, the reasonableness rule could be adopted. This rule provides that lethal force may be used to effect an arrest where it is reasonable to do so. The major drawback to this alternative is its inherent imprecision. It offers little guidance to juries on how the matter should be resolved. Accordingly, the Commission suggests that this rule should not be adopted. There are three plausible alternatives to this option.

2.222 The first of these is the specified-crimes rule. Under this rule, lethal force is permissible to effect the arrest of a fleeing arrestee suspected of having committed one of a specified category of offences. The second option is the violent-crimes rule. Lethal force is only permissible under the violent-crimes rule where the alleged offence has involved a degree of violence. The final option is the dangerous-crimes rule. Under this rule, lethal force may be used to apprehend a fleeing suspect where it is believed that the suspect poses a future threat of harm.

2.223 It has already been argued above that the violent-crimes rule should not be adopted. This is because it is both over-inclusive *and* under-inclusive and is also lacking in certainty. What exactly is meant by “violent” is a difficult question to determine and the violent-crimes rule is as difficult to apply as the reasonableness rule.

2.224 As an alternative to the violent-crimes rule, the specified crimes rule could be adopted. Allowing lethal force to effect the arrest of a fleeing suspect only where they are suspected of committing certain crimes has benefits. In particular, such an approach would bring clarity and certainty to the law. It would provide Gardaí with a clear standard by which they could regulate their conduct. As a result, some commentators, including Williams, have advocated the adoption of this approach.³⁰⁶

2.225 However, this approach also has disadvantages. In particular, it is difficult to prescribe a list of offences in this regard, which is neither over inclusive nor under inclusive. The American Law Institute adverted to this difficulty. In addition, the seriousness of an offence frequently depends on the surrounding circumstances.

2.226 The Commission suggests that the specified-crimes rule be adopted. The difficulties adverted to by the American Law Institute above can be reduced by setting the threshold at “arrestable offences”. An “arrestable offence” is defined by the *Criminal Law Act 1997* as “an offence

³⁰⁶ See Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 444-445.

for which a person of full capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any offence”. It is significant that the concept of an arrestable offence is one with which the Gardaí are familiar. For example, a Garda may question an arrestee where they are suspected of committing an “arrestable offence”.³⁰⁷ A similar category of offences has also been set as the threshold in some common law jurisdictions.³⁰⁸

2.227 However, prescribing a list of offences for this purpose may lead to dangerous suspects escaping. Whilst a fleeing arrestee may be suspected of committing a relatively minor offence, there may be reason to believe that he or she is dangerous and intends to commit serious offences. Allowing a fleeing suspect to go free in cases of this kind would not sufficiently protect the public interest. Accordingly, the Commission suggests that in addition to the specified-crimes rule, the dangerous-suspects rule should also be adopted. This would allow lethal force to be used where a fleeing suspect is believed to pose a future threat of harm, regardless of the offence which they have already committed.

2.228 The dangerous-arrestee rule has found considerable support amongst commentators, not least because it brings clarity to the law.³⁰⁹ However, others have argued that the rule places an intolerable burden on the arrestor to make an accurate assessment of the likely consequences of the suspect’s future actions.³¹⁰

2.229 In addition, there is uncertainty over the scope of the rule. This is apparent from the decision of *Tennessee v Garner*,³¹¹ which adopts the dangerous-suspect test but fails to specify how imminent the threat must be in order to warrant the use of lethal force. This is an important question to determine. Must the arrestor believe that the threat is imminent or is it sufficient that the harm is expected to occur at some time in the future? If

³⁰⁷ See section 4 of the *Criminal Justice Act 1984* Criminal Justice Act 1984.

³⁰⁸ See for example section 25(4) of the Canadian *Criminal Code*, which provides that lethal force may only be used to prevent the flight of an arrestee where he or she is arrestable without warrant.

³⁰⁹ For example, McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 773-774 state that such a provision would create certainty in the law and ensure that the value of human life is recognised in the law. See also Simeone, “Duty, Power, and Limits of Police Use of Deadly Force in Missouri” (2002) 21 St Louis U Pub L Rev 123 at 193-194 and his summary of recommendations made by other commentators.

³¹⁰ Harper, “Accountability of Law Enforcement Officers in the Use of Deadly Force” (1983) 26 How LJ 119 at 132-133.

³¹¹ (1985) 471 US 1 (US Supreme Court).

the latter approach is adopted, the use of lethal force would be justified in respect of a known terrorist who had merely committed a minor offence. This would be so even if the Gardaí were aware that the terrorist was unlikely to be involved in illegal activity for a considerable period.

2.230 The Commission is of the opinion that this latter position should not be adopted. Lethal force should be permissible only where the threat is imminent. Otherwise, the Gardaí would be placed in the unenviable position of making very subjective appraisals about whether a particular suspect is likely to present a danger in the future. The arguments made by Harper, as set out above, in respect of the uncertainty of this doctrine would be very persuasive if lethal force could be justified whenever a suspect posed a future, albeit, remote risk. Indeed, it is likely that most fleeing arrestees would be deemed to present a danger in the future if such a test were adopted; lethal force would be justifiable in effecting the arrest of all fleeing arrestees and both the specified-crimes rule and dangerous-crimes rule would be rendered nugatory.

2.231 In contrast, requiring an imminent threat before lethal force may be used, gives the Gardaí much more guidance on when lethal force is in fact permitted. Sanctioning the use of lethal force to effect an arrest where the arrestee poses an imminent danger is a satisfactory method of creating certainty in the law and protecting the right to life and fair trial of the arrestee.

2.232 *The Commission provisionally recommends that the use of lethal force in effecting the arrest of a fleeing suspect should be prohibited except where the arrestee is suspected of an “arrestable offence” or it is necessary to protect a person from an imminent threat of death or serious injury.*

G The Prevention of Crime

(1) Introduction

2.233 The public defence of crime prevention authorises the use of force to eliminate a threat of future harm. As its name suggests, the defence differs from the reactive nature of arrest in that it authorises proactive defensive action prior to the commission of the threatened offence. Perhaps for this reason, historically the common law kept a tighter reign on the use of lethal force under this defence than for arrests. As discussed below, however, in more recent times this jurisdiction and others have adopted the general criterion of reasonableness to govern both public defences.

2.234 As discussed earlier,³¹² there is often an overlap between public and private defence and this is also true of crime prevention. However, there

³¹² See paragraph 2.08 above.

is little point in applying public defence to cases in which the defensive force is otherwise permissible in defence of the person. After all, given the greater status accorded to the protection of human life, one would expect self-defence to be the primary defence. Cases in which private defences are inapplicable are of greater interest when attempting to determine the outer limits of the authority to use lethal force in order to prevent crime. Typically, these cases will arise where lethal force is used to prevent remote future crimes or non-violent crimes that would normally fall beyond the ambit of self-defence.

2.235 It may be argued that an even narrower definition of the defence of crime prevention should be adopted. The tendency of some courts to subsume defence of others and the defence of property under a broadly framed prevention of crime defence has already been observed above.³¹³ However this approach runs the risk of blurring the traditional boundaries separating the various rubrics of legitimate defence and the conflicting policies which underlie them.

2.236 In contrast, a narrower interpretation of the defence of crime prevention would focus on cases in which defensive force is genuinely used in *public* defence; in other words, where the threat is primarily to the interests of society as a whole. This view is reflected in many (although not all) of the cases discussed below; typically, they involve the use of defensive force by public authorities. The Commission finds this approach preferable.

2.237 This section will begin with a brief overview of the historical evolution of the law relating to the use of lethal force in crime prevention. Next, an examination will be conducted of the applicable law in this country and of alternative models adopted in a number of foreign jurisdictions. Finally, consideration will be given to two ancillary questions: first, whether authority to use lethal force should be confined to law enforcement officers or also granted to civilian defenders; and secondly, whether defenders should be required to provide warnings and exhaust less-than-lethal options before resorting to lethal force.

(2) *Historical Evolution*

2.238 The origins of the authority to use lethal force to prevent crime are intertwined with those of effecting arrests:

“As the felon had forfeited his life by the perpetration of his crime, it was quite logical to authorize the use of deadly force if this reasonably seemed necessary to bring him to justice. And as he would forfeit his life if the felony was accomplished it was

³¹³ See paragraphs 2.42, 2.43 and 2.66.

equally logical to authorize the use of deadly force if this reasonably seemed necessary to prevent its consummation.”³¹⁴

2.239 Hence, in medieval times, lethal force was permitted to prevent any of the small number of felonies then in existence. However, “[w]ith progressive creation of a great number of statutory felonies, few of which were punishable by death or even life imprisonment, this supporting rationale disappeared.”³¹⁵

2.240 With the gradual dilution of the felony/misdemeanour distinction, attempts were made to modify the common law so as to ensure that lethal force could only be used to prevent the most serious crimes. However, there was a divergence of opinion amongst the institutional writers as to how this goal could best be achieved and, as a result, it is difficult to identify a single and coherent rule from their surveys. This is demonstrated by Smith J’s historical review in the Supreme Court of Victoria case of *R v McKay*³¹⁶ where the different approaches of the various commentators including Hale,³¹⁷ Foster,³¹⁸ Blackstone,³¹⁹ Hawkins³²⁰ and East,³²¹ were observed.³²² All these approaches placed some restrictions on the use of lethal force to prevent a crime.

2.241 The attempt to place restrictions on the use of force to prevent crime may be contrasted with the apparent absence of restrictions on the use of force to effect arrests (as discussed earlier³²³).³²⁴ An example cited by a number of the institutional writers highlights this contrast; namely, lethal

³¹⁴ Perkins & Boyce Criminal Law (3rd ed Foundation Press 1982) at 1103-1104.

³¹⁵ *State v Sundberg* (1980) 611 P2d 44 at 47, per Rabinowitz CJ (Supreme Court of Alaska). See also the American Law Institute Model Penal Code and Commentaries (1985) Part I Vol 2 at 132

³¹⁶ [1967] VR 560.

³¹⁷ Hale Pleas of the Crown (3rd ed) Vol 1 at 488.

³¹⁸ Foster Discourse on Homicide at 273.

³¹⁹ Blackstone Commentaries Vol 4 at 180.

³²⁰ Hawkins Vol 1 at 84.

³²¹ East Pleas of the Crown Vol 1 at 271-2.

³²² See also McAuley & McCutcheon Criminal Liability (Round Hall Sweet & Maxwell 2000) at 769: “The scope of the power to use force in the prevention of crime or in effecting an arrest was however uncertain.”

³²³ See paragraphs 2.104-2.109.

³²⁴ Institutional writers, such as Hale (1 Hale 481), Foster (Fost. 271) and East (1 East PC 298) drew a distinction between the use of force to prevent crime and to effect arrests: cited and discussed in Lantham, “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 17.

force was permissible to arrest a pickpocket but not to prevent the commission the felony of pickpocketing.³²⁵

2.242 In 1879 the Criminal Code Commissioners, in an attempt to distil a single and general rule for the use of force in legitimate defence, advocated the dual necessity and proportionality test.³²⁶ The Commissioners' statement was to foreshadow a shift toward a more generalised test by a number of jurisdictions in the twentieth century.

(3) The Modern Law of Crime Prevention

2.243 It is against this historical background that the modern law regarding the use of lethal force to prevent crime is examined. In particular, this section will assess three tests currently in force in various common law jurisdictions, namely:

- The “reasonableness” rule;
- The “specified-crimes” rule;
- The “dangerous-suspect” rule.

2.244 It will be noted that the first two tests replicate those discussed in the Arrests Section. However, in the case of crime prevention, the tests are prospective rather than retrospective; that is, they are concerned with crimes that may be committed in the future rather than with offences which have been committed in the past.

(a) The Reasonableness Rule

2.245 Under the reasonableness rule, the use of force to prevent crime is regulated by the vague but flexible standard of “reasonableness”.

2.246 The reasonableness rule has been adopted in this jurisdiction, both under at common law and in the *Non Fatal Offences Against the Person Act 1997*³²⁷; in England and Wales by the *Criminal Law Act 1967*,³²⁸ and by a number of Australian state courts.³²⁹ It will be seen from a discussion of

³²⁵ Hale and East both use this pickpocket example: see, for discussion, Lantham, “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 17-18.

³²⁶ See paragraph 7 of the Introduction.

³²⁷ See paragraph 2.119.

³²⁸ See paragraph 2.125.

³²⁹ The reasonableness rule is adopted by those Australian states that are not governed by criminal codes. In addition, the Western Australian Criminal Code permits the use of “reasonably necessary force” to prevent the commission of an offence (section 243) and the use of “reasonably necessary” and “reasonably proportioned” force to prevent breaches of the peace (section 237) or to suppress a riot (section 238-242).

some of the leading cases in these jurisdictions that it is difficult to establish a precise definition of the reasonableness rule.

(i) Ireland

2.247 As seen earlier in the Arrests Section, there is uncertainty as to whether the common law or the *Non Fatal Offences Against the Person Act 1997* governs the use of lethal force in order to prevent crime.³³⁰ Moreover, the precise nature of the test is difficult to establish.

2.248 Were the *Non Fatal Offences Against the Person Act 1997* to apply, the use of force to prevent crime (or breaches of the peace) is authorised only when the force is “such as is reasonable in the circumstances as the [user] believes them to be”.³³¹ The same criticisms made in the Arrests Section as to the ambiguity of the reasonableness rule are equally applicable here.³³² Similarly, the Garda Síochána Code sheds little additional light on the topic.³³³

2.249 At common law, Walsh J suggested in *People (AG) v Dwyer*³³⁴ that the use of lethal defensive force might be warranted “to prevent the commission of an atrocious crime”. More in depth discussion can be found in the High Court and Supreme Court decision in the leading reported Irish authority on this topic, *Lynch v Fitzgerald*.³³⁵ Although *Lynch v Fitzgerald* was a civil case dealing with the issue of riot prevention and suppression, the High Court judgment of Hanna J and those of the Supreme Court, particularly that of Meredith J, remain relevant today to the broad topic of crime prevention.³³⁶

2.250 The plaintiff had brought a civil action against the Gardaí in relation to the shooting of his son during a demonstration that took place in 1934. Several hundred Gardaí, including a number of armed detectives, had been assigned to maintain order at the demonstration was held to protest against the sale of seized cattle at a sale yard. Over 1500 people had gathered outside the yard when a lorry filled with men carrying sticks drove

³³⁰ See paragraphs 2.116-2.124 above.

³³¹ Section 18(1)(e) of the Non Fatal Offences Against the Person Act 1997.

³³² See paragraphs 2.162-2.164 above.

³³³ As in the case of arrests, the Code authorises the use of lethal force for “a legal purpose” but fails to clarify whether this would include the use of lethal force to prevent crime. For a discussion of the Garda Síochána Code, see paragraphs 2.121-2.122 above.

³³⁴ [1972] IR 416.

³³⁵ [1938] IR 382.

³³⁶ For example, *Lynch v Fitzgerald* [1938] IR 382 is cited in the recent textbook, Walsh *The Irish Police* (Sweet & Maxwell 1998) at 158.

into a cordon of Gardaí and crashed through a gate into the yard. However, the occupants of the lorry became trapped by the gates and were quickly surrounded by a further group of Gardaí inside the yard. The Gardaí outside quickly reformed their cordon so that the crowd, with the exception of a small number (including the plaintiff's son) who followed the lorry, was kept out of the yard and under control. Nevertheless, three detectives inside the yard claimed that they feared for the lives of one or more of the prospective buyers to whom they were assigned to protect and opened fire on the occupants of the truck, injuring several and eventually killing the plaintiff's son.

2.251 Both Hanna J at first instance and the Supreme Court on appeal found for the plaintiff and held that the shooting was a “reckless disregard of necessity” and that a moment's reflection would have made the Gardaí realise that it was unnecessary.³³⁷ Indeed, Hanna J was of the view that the case disclosed a *prima facie* case of manslaughter and urged the Attorney-General to bring criminal charges against the Gardaí concerned.³³⁸

2.252 In his examination of the relevant law, Hanna J indicated that the use of lethal force in public defence was subject to the dual necessity and proportionality test. This was in line with the English cases and extra-judicial authorities upon which he purported to rely.³³⁹ However, he went beyond these authorities and appears to have imposed an additional threshold requirement, namely that human life must be imperilled:

“[T]he armed forces can fire upon an unlawful or riotous assembly only where such a course is necessary as a last resort *to preserve life*. Force is threatened and it can be repelled by force. It goes back to the common law principle that it is lawful to use only a reasonable degree of force for the protection of oneself or any other person against the unlawful use of force, and that such repelling force is not reasonable if it is either greater than is requisite for the purpose or disproportionate to the evil to be prevented.”³⁴⁰

³³⁷ [1938] IR 382 at 405.

³³⁸ [1938] IR 382 at 407.

³³⁹ For example, at [1938] IR 382 at 401, Hanna J referred to a charge of Tindal CJ to a Bristol Grand Jury in 1832 where “[Tindal CJ] takes the test to be whether the danger is so sufficiently immediate that it could not be prevented without recourse to arms.” At 401-402 Hanna J referred to a Report of the Proceedings of the Select Committee on the Employment of Military in the case of Disturbances Parliamentary Papers 1908 HC 236, where it was said that “neither [soldiers], nor for that matter the civil authority, are entitled to use more force than is necessary in order to assert the cause of law and order.”

³⁴⁰ Emphasis added. [1938] IR 382 at 405.

2.253 None of the authorities cited by Hanna J expressly contain any threshold requirement that life be threatened before lethal force may be used to prevent crime. Indeed, a passage of Bowden LJ from the *Report of the Select Committee on the Featherstone Riot, 1893*,³⁴¹ upon which Hanna J appears to have placed considerable reliance,³⁴² suggests a less restrictive test – that lethal force can be used to protect property.³⁴³

2.254 Even instructions issued to the Gardaí at the time, of which Hanna J expressly approved,³⁴⁴ failed specifically to limit lethal force to the protection of life; they did, however, state that firearms “are to be used as a last resort and then only in the gravest of circumstances.”³⁴⁵

2.255 Notwithstanding these discrepancies, the majority of the Supreme Court considered that the law was well settled and were content to cite with apparent approval both Hanna J’s legal conclusions and the authorities upon which he purported to rely.³⁴⁶

2.256 Meredith J, however, writing a separate but concurring judgment, proposed a different legal approach, namely a two-stage test.³⁴⁷ Under this approach, the first question was whether a situation had arisen “which gave a *contingent* right to have recourse to firearms as a last resort”.³⁴⁸ The second question was whether “recourse to firearms had become actually necessary”.³⁴⁹

“Until the situation which contingently justifies a recourse to firearms has arisen as an objective fact there is the danger that, if firearms are used, serious, and even fatal, injuries may be inflicted on members of a crowd that is not engaged in doing anything the

³⁴¹ Parliamentary Papers, 1893-94, C.7234.

³⁴² Cited in [1938] IR 382 at 402-403.

³⁴³ Emphasis added. [1938] IR 382 at 402.

³⁴⁴ [1938] IR 382 at 405.

³⁴⁵ Instructions issued to the Civic Guards on the use of firearms dated 24 November 1932, cited at [1938] IR 382 at 404-405.

³⁴⁶ [1938] IR 382, 411 and 414, per Sullivan CJ, Fitzgibbon and Murnaghan JJ concurring.

³⁴⁷ However, Meredith J conceded that there may be instances where the two-stage test was inapplicable: “Of course in certain cases a situation may arise and develop with such suddenness as to usher in the necessity for extreme action as its immediate concomitant” [1938] IR 382 at 423.

³⁴⁸ [1938] IR 382 at 422. Meredith J considered that this was a question of objective fact.

³⁴⁹ [1938] IR 382 at 422. At 422-423, Meredith J considered that this question was “more subjective and matter of opinion” and that allowances should be made for those who act in the spur of the moment and are confused by the turmoil of the situation.

doing of which may be prevented at all costs. But once that situation is definitely staged possible innocence on the part of the participators in the disturbance is out of the question, and the matter becomes merely one of forbearance and restraint and the preservation of a due proportion between the means adopted and the end to be attained and the danger of its not being secured.”³⁵⁰

2.257 In other words, Meredith J was proposing a threshold test for the use of lethal force to prevent or suppress a riot, albeit that the precise requirements of this test were left unclear. Nevertheless, in the circumstances of this case Meredith J took the view that the threshold test was met when the lorry crashed through the gate of the yard. However, once the lorry became trapped and the Gardaí outside the yard had regained control of the crowd there was no supervening development that rendered lethal force necessary. Accordingly, Meredith J concurred in upholding the plaintiff’s claim.³⁵¹

2.258 Meredith J did, however, consider a more difficult hypothetical scenario in which he assumed a large number of the crowd had entered the yard and were undeterred by warning shots.³⁵² In these circumstances, Meredith J was of the view that the use of lethal force would have been warranted.

2.259 In this regard, Meredith J differed from the majority. The latter had indicated that, even had a large number of the crowd succeeded in getting through the gate, the defendant Gardaí would not necessarily have been justified in opening fire without evidence that the crowd intended to attack the prospective buyers.³⁵³ In contrast, Meredith J stated in this instance that such an intention could be assumed.³⁵⁴ It is unclear whether this was intended as an expression of support for the less stringent threshold standard suggested by a number of authorities cited by Hanna J: namely, that lethal force could be employed where there is a threat falling short of one to human life.

2.260 In any event, it is undesirable that ambiguous passages from the various judgments in this case govern this important area of law and it is surprising that there has been no opportunity since 1937 for the Supreme

³⁵⁰ [1938] IR 382 at 422.

³⁵¹ [1938] IR 382 at 425.

³⁵² [1938] IR 382 at 424-425.

³⁵³ [1938] IR 382 at 419.

³⁵⁴ [1938] IR 382 at 424-425.

Court to clarify its position.³⁵⁵ It is, therefore, necessary to turn to cases decided in Australia and the United Kingdom for further judicial consideration of this topic.

(ii) Australia

2.261 An important case dealing with the topic of lethal force for the prevention of crime is the Supreme Court of Victorian decision in *R v McKay*³⁵⁶ (also discussed earlier under the heading of Arrests).³⁵⁷ The facts of this case are detailed earlier. The case concerned a farmer who had fatally shot an intruder to prevent a theft of his chickens.³⁵⁸ As discussed in greater detail in the Arrests Section, it is unclear whether the judges viewed this case as primarily one of crime prevention or arrest, although it would seem that they drew no real distinction on this point.³⁵⁹ All three judges appeared to adopt, at least implicitly, the dual necessity and proportionality test. Did the dual test exclude the use of lethal force to prevent non-violent crimes?

2.262 Lowe J, in his majority judgment, indicated that lethal force could be used to prevent “forcible and atrocious crime” but purported to leave open the question as to whether lethal force could be used to prevent a non-violent theft. However, one could argue that the rejection of the appeal by the majority judges, Lowe and Dean JJ, should be read as an endorsement of the trial judge’s apparent prohibition on the use of lethal force to prevent non-violent crime.³⁶⁰

2.263 In contrast, Smith J indicated that the prohibition on the use of lethal force to defend property against non-violent attacks (as suggested by the trial judge) did not apply to public defences involving the prevention of felonies or apprehension of felons. Indeed, Smith J accepted that the

³⁵⁵ Indeed, Hanna J recognised that it was “important that the principles governing the use of firearms against an assembly of civilians should be clearly laid down”: [1938] IR 382 at 386.

³⁵⁶ [1967] VR 560. An application to the High Court of Australia for special leave to appeal was rejected, bolstering the authority of the Victorian Supreme Court’s decision. For a discussion of the case, see Lantham, “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 20-23.

³⁵⁷ See paragraphs 2.149-2.157 above.

³⁵⁸ Interestingly, the crime had been committed by the time the first shot had been fired and therefore it may be argued that the question of crime prevention does not arise. However, this defence was raised before and discussed by the court.

³⁵⁹ Indeed, Dean J expressly held that it was unnecessary to determine “the exact nature of the rights which the appellant is said to have been exercising.”

³⁶⁰ See for discussion, Lantham, “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 21.

shooting *might* have satisfied the proportionality component of the dual test on the facts.

2.264 In summary, the standard articulated in *R v McKay*³⁶¹ is, at best, unclear. The dual necessity and proportionality test received at least implicit support from all three judges. However, arguably the majority also imposed a threshold test requiring the threat of at least some physical violence.

(iii) England and Wales and Northern Ireland

2.265 One of the leading cases dealing with the use of lethal force to prevent crime is *Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No.1 of 1975)*³⁶² (discussed above in relation to Arrests).³⁶³ The accused, a soldier on foot patrol in an area where the IRA were believed to be active, shot and killed a person whom he mistakenly (but reasonably) believed to be a member of the IRA. The deceased was unarmed and had been attempting to run away after the soldier had asked him to halt. The soldier was unable to give chase to the deceased and therefore the only options were to shoot him or to let him escape.

2.266 The soldier was acquitted of murder by the trial judge. On appeal, the House of Lords concluded that they could only indirectly answer the question of whether this verdict was warranted; their Lordships held that the facts (as set out in the reference) were sufficient for the trial judge to entertain a reasonable doubt.

2.267 Whilst the House of Lords appeared to be reluctant to endorse positively the shooting of the fleeing suspect and disclaimed any intention of deciding a point of law, one commentator has suggested that “more than one passage in the report suggests that a soldier was entitled to shoot a man whom he believed to be a terrorist if it was the only way he could prevent him from escaping and that, if he escaped, he would commit terrorist offences.”³⁶⁴

2.268 This observation applies particularly to the judgment of Diplock LJ who was the only judge to attempt any detailed analysis of the relevant law. Unlike the majority, who were reluctant even to identify which defence they considered had authorised the shooting, Diplock LJ ruled out the

³⁶¹ [1967] VR 560.

³⁶² [1976] NI 169 (Northern Ireland Court of Appeal); [1976] 2 All ER 937 (House of Lords).

³⁶³ See paragraphs 2.127-2.130.

³⁶⁴ Smith “The right to life and the right to kill in law enforcement” 1994 NLJ 354 at 356.

alternative defences of self-defence³⁶⁵ and arrest.³⁶⁶ He held that the only defence in issue was crime prevention, which was governed by the reasonableness rule. This rule envisaged a balancing process which required the weighing of “the risk of harm to which others might be exposed if the suspect were allowed to escape” against “the risk of harm to [the suspect] that might result from the kind of force that the accused contemplated using.”³⁶⁷ Applying this balancing test to the circumstances of the case, Diplock LJ concluded:

“So in one scale of the balance the harm to which the deceased would be exposed if the accused aimed to hit him was predictable and grave and the risk of its occurrence high. In the other side of the balance it would be open to the jury to take the view that it would not be unreasonable to assess the kind of harm to be averted by preventing the deceased escape was even graver – the killing and wounding of members of the patrol by terrorists in ambush, and the effect of this success by members of the Provisional IRA in encouraging the continuance of the armed insurrection and all the misery and destruction of life and property that terrorist activity in Northern Ireland has entailed. The jury would have to consider too what was the highest degree at which a reasonable man could have assessed the likelihood that such consequences might follow the escape of the deceased if the facts had been as the accused knew or believed them reasonably to be.”³⁶⁸

2.269 Despite the detail in his discussion, Diplock LJ reached a conclusion similar to that of his fellow judges; he considered that he was unable to interfere with the trial judge’s conclusion on the basis of the “scanty” and “general” nature of the facts contained in the reference. However, one may argue by implication that Diplock LJ (and, indeed, the other judges) was saying that lethal force *might* have been permissible *in the circumstances* of the case. However, as one commentator has observed, identification of these circumstances is difficult because of Diplock LJ’s “regrettably ambiguous dicta”.³⁶⁹

³⁶⁵ Diplock LJ ruled out this defence given that the deceased was unarmed and was shot while running away: [1976] 2 All ER 937 at 946.

³⁶⁶ [1976] 2 All ER 937 at 946. The Court of Appeal’s and the House of Lord’s treatment of this defence is discussed in greater depth at paragraphs 2.127-2.130 above.

³⁶⁷ [1976] 2 All ER 937 at 947.

³⁶⁸ [1976] 2 All ER 937 at 948.

³⁶⁹ Smith “The right to life and the right to kill in law enforcement” [1994] NLJ 354 at 356.

“[T]he question for the House, as it was put by the Attorney-General, concerned ‘the likely result of the man getting away *in terms of his committing an immediate act of terrorism*’. Lord Diplock said, on the one hand, that he would deal with the case on the basis that the accused reasonably believed the deceased to be ‘a member of the IRA who, if he got away, was likely *sooner or later* to participate in acts of violence;’ and, on the other hand, that the facts to be assumed for the purposes of the reference were that the accused ‘had reasonable grounds for the *apprehension of imminent danger to himself and other members of the patrol* if the deceased were allowed to get away’.”³⁷⁰

2.270 Hence, it is unclear whether Diplock LJ should be understood as deciding that lethal force may be used to prevent remote future violent crimes or whether he intended to restrict the defence to the prevention of imminent threats of danger.³⁷¹

2.271 Another Northern Irish case, *Kelly v Ministry of Defence*,³⁷² is also ambiguous as to whether lethal force may be used to prevent remote future crimes. In this case soldiers had shot at the occupants of a stolen car after it had been driven through an army checkpoint. While breaking through the checkpoint the car had hit a civilian vehicle and had knocked down two members of the security patrol. The soldiers had formed the view that the joyriders were terrorists and shot the driver dead. After the car had crashed, an unarmed passenger of the car attempted to run away but was shot by the soldiers, although not killed.

2.272 A civil action, brought by the injured occupants and the family of the deceased, was unsuccessful both at trial and on appeal. As discussed in the Arrests Section,³⁷³ a claim that the shooting was authorised to effect an arrest was rejected on the basis that none of the soldiers were aware that the occupants had committed any specific crime other than reckless driving. However, it was held that the soldiers’ use of lethal force was warranted to prevent the occupants of the car escaping and carrying out further terrorist missions, even in the case of the fleeing unarmed passenger. The Northern

³⁷⁰ “The right to life and the right to kill in law enforcement” [1994] NLJ 354 at 356, citing [1976] 2 All ER 937 at 945 and 947 (emphasis added by Smith).

³⁷¹ Smith “The right to life and the right to kill in law enforcement” [1994] NLJ 354 at 356, submits that the adoption of the former interpretation would be “a very dangerous doctrine”.

³⁷² [1989] NI 341 (Northern Ireland Court of Appeal). Whilst this is a civil case, section 3 of the Criminal Law Act (Northern Ireland), 1967 is equally applicable as a criminal case. See, for discussion, Smith, “The right to life and the right to kill in law enforcement” [1994] NLJ 354 at 356.

³⁷³ See paragraph 2.142.

Ireland Court of Appeal cited, with apparent approval, the trial judge's conclusion:

“It seems to me reasonable to regard a man who makes such a strong bid for freedom in the circumstances of this case as one who is an active and dangerous terrorist intent on evading capture, who is highly likely to commit terrorist crimes if not apprehended.”

2.273 Given that no specific terrorist threat was identified, it would seem that lethal force might be permissible to prevent even remote future offences.

(iv) Summary of Reasonableness Rule

2.274 The various judgments in *Lynch v Fitzgerald*³⁷⁴ and the Australian and United Kingdom case law contain useful discussions of the law in this area and provide some guidance to law reformers. For example, Diplock LJ helpfully indicated that the reasonableness rule involves not only a balancing of potential harms, but also requires an assessment of the *likelihood* that the threat of harm posed by suspect and by the use of lethal defensive force will materialise.³⁷⁵

2.275 However, more questions are raised than answered by this approach. For example, the type of crime that lethal force may be used to prevent remains unclear: the possibilities include deadly³⁷⁶ or “terrorist” crimes;³⁷⁷ “forcible and atrocious” crimes;³⁷⁸ or even non-violent crimes.³⁷⁹ Furthermore, it is unclear whether the imminence requirement has been diluted or eliminated altogether; some courts have suggested that lethal force may be used to prevent only imminent crimes,³⁸⁰ whilst others suggest that it

³⁷⁴ [1938] IR 382.

³⁷⁵ *Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No.1 of 1975)* [1976] 2 All ER 937 (House of Lords).

³⁷⁶ *Lynch v Fitzgerald* [1938] IR 382, per Hanna J.

³⁷⁷ For example, *Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No.1 of 1975)* [1976] 2 All ER 937 (House of Lords) and *Kelly v Ministry of Defence* [1989] NI 341 (Northern Ireland Court of Appeal).

³⁷⁸ *R v McKay* [1967] VR 560, per Lowe J. The Supreme Court judgment of Meredith J and some of the authorities relied upon by Hanna J in *Lynch v Fitzgerald* [1938] IR 382 suggest a less stringent test encompassing violent crimes against property.

³⁷⁹ *R v McKay* [1967] VR 560, per Smith J.

³⁸⁰ For example, see the internal conflict within Diplock LJ's judgment in *Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No.1 of 1975)* [1976] 2 All ER 937 (House of Lords).

may be used to prevent unspecified remote future crimes.³⁸¹ It is, therefore, unsurprising that the reasonableness rule has been subject to strong criticism from a number of commentators.³⁸²

2.276 Accordingly, the Commission does not recommend the adoption of this approach; and in the result, this section will now consider two alternatives which attempt to create a more structured test for the use of force to prevent crime.

(b) The Specified Crimes Rule

2.277 Under the specified-crimes rule, lethal force is permissible to prevent any offence contained in a specified list. As discussed above,³⁸³ historically the specified-crimes rule was one of the approaches adopted by the common law to regulate crime prevention. Today, however, few (if any) jurisdictions attempt to define comprehensive lists of qualifying offences.

2.278 Nevertheless, the rule has survived to a degree in some jurisdictions, although primarily in the form of provisions relating to the prevention or suppression of riots, breaches of the peace and mutinies.³⁸⁴

2.279 One example is contained in the US *Model Penal Code* which specifically authorises the use of lethal force for the suppression of riot and mutiny³⁸⁵ (in addition to the general power to use lethal force to prevent crimes which cause death or serious injury, discussed below under the heading of the dangerous-suspect rule). Special provision is also made for the suppression of riots and mutinies in the criminal codes of Western Australia,³⁸⁶ Queensland,³⁸⁷ Northern Territory,³⁸⁸ Tasmania,³⁸⁹ New Zealand³⁹⁰ and Canada.³⁹¹ The special status of riots has been noted by Gordon.³⁹²

³⁸¹ *Kelly v Ministry of Defence* [1989] NI 341 (Northern Ireland Court of Appeal).

³⁸² See paragraphs 2.162-2.164 for a criticism of this rule.

³⁸³ See paragraph 2.166 above.

³⁸⁴ It may be that special provision is made for the prevention of these crimes because they threaten not only life and limb but also the authority of the state.

³⁸⁵ Section 3.07(5)(ii)(B) of the Model Penal Code.

³⁸⁶ Sections 237-242 of the Western Australian Criminal Code.

³⁸⁷ Sections 260-265 of the Queensland Criminal Code.

³⁸⁸ Section 28(d) of the Northern Territory Criminal Code.

³⁸⁹ Sections 34-38 of the Tasmanian Criminal Code.

³⁹⁰ Sections 42-47 of the *New Zealand Crimes Act* 1961.

³⁹¹ Sections 30-33 of the Canadian Criminal Code.

³⁹² Gordon *Criminal Law* (3rd ed W Green 2001) at 331.

2.280 In a few instances the specified-crimes rule has been adopted in general crime prevention provisions. One example is the Queensland Criminal Code which authorises “reasonably necessary” force to prevent the commission of any offence falling within the broad category of those which render suspects “arrestable without warrant”.³⁹³ A similar test has been incorporated in the Canadian Criminal Code (in combination with a violent-crimes / dangerous-suspect rule).³⁹⁴

2.281 The specified-crimes rule has some support amongst commentators. For example, Williams argues:

“The objection to the [reasonableness rule contained in section 3 of the United Kingdom *Criminal Law Act, 1967*] is that it gives no clear guidance on what we are allowed to do. Complete precision is not possible, but at least the law could specify the offences that are so serious that extreme force may lawfully be used to prevent them, leaving the prevention of other offences to be governed by the general test of reasonableness.”³⁹⁵

2.282 If a specified-crimes rule is to perform a worthwhile function, it must identify offences which are of such seriousness that their prevention might warrant the use of lethal force. In contrast, the specification of a broad category of qualifying offences, such as offences “arrestable without warrant”, arguably fails to serve as a useful guideline to public defenders.

2.283 However, it would be a difficult task to identify a comprehensive list of qualifying offences which is neither overinclusive nor underinclusive.³⁹⁶ Hence, the principal drawback associated with the specified-crimes rule is its inflexibility.

³⁹³ Section 226 of the Queensland Criminal Code. Section 5(2) of the Code provides that an offender may be arrested without warrant when an offence is defined as a crime (except when otherwise stated). Broader powers are granted to the police to arrest without warrant, for example, under section 198 of the Police Powers and Responsibilities Act 2000, for any offence when certain criteria are met.

³⁹⁴ Section 27 of the Canadian Criminal Code. The Canadian Law Reform Commission, in their Working Paper on Criminal Law: the general part – liability and defences (No 29 1982) at 117, recommended that the requirement that the would-be offender be arrestable without warrant be deleted “on the ground that the qualification is inappropriately technical, unnecessary since offences dangerous to the person are or should be so arrestable, and liable therefore to blur the message of the law.”

³⁹⁵ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 444-445.

³⁹⁶ For a discussion of the drawbacks of the specified-crimes rule in the context of Arrests, see paragraph 2.170 above.

(c) ***The Dangerous-Suspect Rule***

2.284 Under the dangerous-suspect rule, lethal force is permissible to prevent crimes which threaten to cause harm to persons or property. Accordingly, like the “forcible and atrocious” rule articulated by a number of the institutional writers,³⁹⁷ authorisation for the use of lethal force hinges on not only the nature of the crime but also on the manner of its perpetration. In the result, the dangerous-suspect rule sacrifices some of the simplicity and certainty of the specified-crimes rule in an attempt to achieve a more comprehensive test that focuses on the actual danger posed by a suspect.

2.285 Variations of this rule can be found in the United States of America, Australia, New Zealand and Canada. For example, the US Model Penal Code prohibits the use of lethal force to prevent crimes other than those that “will cause death or serious bodily injury to another.” The drafters of the Model Penal Code, the American Law Institute, sought to employ a concrete standard for the use of lethal force to prevent crime, namely “the criterion of peril to life or serious injury, including, of course, sexual outrage, rather than the abstract concept of prevention of a felony.”³⁹⁸

2.286 The Australian Northern Territory also adopts a dangerous-suspect rule. Under the Northern Territory Criminal Code, police officers may use “not unnecessary” lethal force to prevent any offence that they reasonably believe will result in “death or grievous harm to another”.³⁹⁹

2.287 In Canada, New Zealand and the Australian State of Tasmania, a less stringent standard is adopted which permits any person to use force reasonably believed to be necessary to prevent the commission of a crime “likely to cause immediate and serious injury to any person or property”.⁴⁰⁰ The Canadian Law Reform Commission has argued that the reference to using force to prevent crimes threatening property should be removed “in accordance with the general legal principle that property takes second place to life.”⁴⁰¹

³⁹⁷ The “forcible and atrocious” rule was favoured by Lowe J in *R v McKay* [1967] VR 560.

³⁹⁸ American Law Institute, Model Penal Code and Commentaries (1985) Part I Vol 2 at 133.

³⁹⁹ Section 28(e) of the Northern Territory Criminal Code.

⁴⁰⁰ Section 39 of the Tasmanian Criminal Code. Similar wording is adopted in section 41 of the New Zealand *Crimes Act* 1961. Section 27 of the Canadian Criminal Code adopts almost identical language, but combines the dangerous-suspect rule with specified-crimes rule in that the offence must be one which would render the would-be offender liable to be arrested without warrant.

⁴⁰¹ Law Commission of Canada, Working Paper on Criminal Law: the general part – liability and defences (No 29, 1982) at 117. This recommendation was not followed

2.288 It can be seen from these examples that there is a wide variety of standards; at one extreme, there must be a threat to life and, at the other, the threat need only be to property. Moreover, some tests state that the threat must be immediate whilst others do not appear to impose any imminence requirement. As discussed in the Arrests Section,⁴⁰² such ambiguity is unhelpful. If this rule is adopted, it should be made more certain.

(4) Summary and Conclusions

2.289 There are three tests which could be adopted to place some limit on the use of lethal force in preventing crime. The first of these is the reasonableness test. As has already been detailed, the Commission does not recommend the adoption of this test.⁴⁰³ This test essentially places no limit on the force that can be used to prevent a crime. It merely provides that a person can use lethal force where it is reasonable to do so. In practice, this test is so nebulous it is not a test at all.

2.290 The second option is the specified-crimes rule. The adoption of this in combination with the dangerous-crimes rule has already been recommended in respect of the use of lethal force in effecting arrests. Should the specified-crimes rule likewise be applied to the use of lethal force in the prevention of crime? At present, few jurisdictions adopt this rule in respect of the prevention of crime. One of the jurisdictions which has adopted this rule is Queensland.⁴⁰⁴ The advantages and disadvantages of this rule have already been detailed.⁴⁰⁵ In summary, while this rule offers certainty, it is also inflexible.

2.291 While the Commission found that this rule was appropriate in the context of effecting arrests, it is not a useful rule for defining a threshold in respect of preventing crime. In order for the specified-crimes rule to be applied, the Garda would have to know the precise nature of the crime he or she was preventing. It would be excessively difficult for a Garda to determine exactly what crime he or she was endeavouring to prevent before it was committed. With regard to arrests, it is evident that the Garda knows what crime he or she is arresting the suspect for. This is not the case in respect of preventing crime. This distinction renders the specified-crimes rule undesirable in the context of crime prevention.

up in the subsequent report of the Commission: Law Commission of Canada Report on Recodifying Criminal Law (No 31 1987) at 39-40.

⁴⁰² See paragraphs above.

⁴⁰³ See paragraphs 2.274-2.276.

⁴⁰⁴ Section 226 of the Queensland Criminal Code.

⁴⁰⁵ See paragraphs 2.281-2.283.

2.292 It is also arguable that the upper limit for the use of lethal force in preventing a crime should be lower than that in respect of effecting an arrest. In the case of arrests, a person is already suspected of having committed a crime, whereas in the case of the use of force in the prevention of crime, it is merely expected that the person *will* commit a crime. Consequently, allowing lethal force to be used in respect of a defined category of offences could operate harshly in respect of individuals who are suspected of being on the verge of committing crimes.

2.293 The Commission submits that the dangerous-crimes rule is more appropriate and just in this regard. The benefits and costs of this rule have already been set out in the context of arrests.⁴⁰⁶ Although the dangerous-crimes rule does not achieve the level of certainty associated with the specified-crimes rule, it allows public defenders the latitude to take into account not only the type of offence the suspect is likely to commit, but also the manner in which it is likely to be committed, as well as the danger likely to be created. Accordingly, this rule avoids the inflexibility of the specified-crimes rule.

2.294 It is also necessary to adopt the dangerous crimes rule in this regard to avoid creating a disparity between the law in respect of the use of force to effect arrests and the law in respect of the use of force to prevent crimes. It would be anomalous if it was only when an arrest was being effected that lethal force could be used to prevent a person committing a dangerous crime. The fact that the person is an arrestee should be irrelevant if they are about to commit another dangerous crime. At this point, the only relevant consideration for the law enforcement officer is the need to prevent the crime.

2.295 Accordingly, there is an overlap between the law in respect of effecting arrests and the law with regard to preventing crimes. In the former instance, the law enforcement officer is, in practice, preventing a crime rather than effecting an arrest as clearly a dead person cannot be arrested. It could be argued that consequently there is no need for a specific dangerous-crimes rule to be adopted in the context of effecting an arrest. It could be argued that such a rule is superfluous as in this situation the Garda would be entitled to use lethal force anyway for the purpose of preventing the crime.

2.296 However, the Commission is of the view that it is appropriate for the dangerous-crimes rule to be specifically set down in the legislation in respect of both effecting arrests and preventing crimes. This approach ensures that when the law enforcement officer is carrying out an arrest, his or her attention is focussed on the precise circumstances in which lethal

⁴⁰⁶ See paragraphs 2.228-2.229.

force may be resorted to. While this approach leads to some repetition in the law, it also guarantees certainty.

2.297 As observed in respect of arrests,⁴⁰⁷ it is suggested here that this rule should only apply where the crime which the lethal force seeks to prevent is imminent. It is only where the crime is imminent that lethal force could be deemed appropriate. If the crime did not have to be imminent, the law enforcement officer would be forced to make subjective, difficult appraisals as to whether a future crime would be committed or not.⁴⁰⁸

2.298 It is also important that the crimes which lethal force may be used to prevent are precisely set out in the legislation. It is submitted by the Commission that the Model Penal Code provides useful guidance in this respect. This prohibits the use of lethal force to prevent crimes other than those that “will cause death or serious bodily injury to another”.⁴⁰⁹ Such an approach would mirror the position in respect of arrests.

2.299 *The Commission provisionally recommends that lethal force should be prohibited to prevent crimes other than those which are imminent and cause death or serious injury.*

(5) Prohibition on the Use of Lethal Force by Civilians

2.300 Should authority to use lethal force to prevent crimes be restricted to law enforcement officers? This issue has already been discussed in the arrests section.⁴¹⁰ Some would argue that authority to use extreme force is best placed in the hand of trained professionals, thereby limiting the risk of accidental or unnecessary harm being caused.

2.301 This argument was rejected by the American Law Institute when drafting the Model Penal Code:

“In modern conditions, the arrest of suspected criminals is peculiarly the concern of the police. The prevention of crime, on the other hand, is properly the concern of everyone.”⁴¹¹

2.302 A similar approach has been taken in Canada, New Zealand and the Australian States of Queensland, Western Australia and Tasmania. In those jurisdictions, only law enforcement officers may resort to lethal force

⁴⁰⁷ See paragraphs 2.229-2.231.

⁴⁰⁸ See Harper “Accountability of Law Enforcement Officers in the Use of Deadly Force” (1983) How LJ 119 at 132-133.

⁴⁰⁹ Section 3.07 of the Model Penal Code (Check section).

⁴¹⁰ See paragraphs 2.208-2.211 above.

⁴¹¹ American Law Institute Model Penal Code and Commentaries (1985) Part I Vol 2 at 132.

to effect arrests or to prevent escapes,⁴¹² whereas any citizen may use lethal force to prevent crimes⁴¹³ or to suppress riots.⁴¹⁴

2.303 In contrast, jurisdictions such as the Australian Northern Territory authorise only police officers to use lethal force to prevent crimes and to suppress riots.⁴¹⁵

2.304 The *Non Fatal Offences Against the Person Act 1997* draws no express distinction between the use of force by members of the Gardaí and private citizens. However, in *Lynch v Fitzgerald*⁴¹⁶ Hanna J cited with apparent approval a passage which hinted that private citizens have (or should have) less authority to resort to lethal force than those in law enforcement.⁴¹⁷

2.305 However, it is unclear whether it was intended to stipulate, as a matter of law, that private citizens were prohibited from resorting to lethal force to suppress riots except those which “savour of rebellion”. In any event, a prohibition on citizens using lethal force in riot situations would not necessarily apply to all cases of crime prevention. Indeed, the Garda Síochána Guide suggests that the authority to use lethal force should be restricted to “peace officers or persons acting in their aid” in both riot and arrest situations, but should be available to all citizens for the prevention of crime.⁴¹⁸

2.306 It is suggested that a valid distinction can be drawn between the use of lethal force by citizens in effecting an arrest and the use of this force

⁴¹² Section 25 of the Canadian Criminal Code; sections 39 and 40 of the New Zealand *Crimes Act*, 1961; sections 256-257 of the Queensland Criminal Code; section 233 of the Western Australian Criminal Code; sections 30-32 of the Tasmanian Criminal Code.

⁴¹³ Section 27 of the Canadian Criminal Code; section 41 of the New Zealand *Crimes Act*, 1961; section 266 of the Queensland Criminal Code; section 243 of the Western Australian Criminal Code; sections 39 of the Tasmanian Criminal Code.

⁴¹⁴ Section 32 of the Canadian Criminal Code (albeit that non-peace officers may only use force to suppress riots where the timely attendance of a peace officer is not possible); sections 42-43 of the New Zealand *Crimes Act*, 1961; sections 260-261 of the Queensland Criminal Code; sections 237-238 of the Western Australian Criminal Code; section 34 of the Tasmanian Criminal Code. However, typically law enforcement officers are granted greater legal protection than other crime-preventers in the event that they act on the basis of a mistaken belief.

⁴¹⁵ Section 28(d) and (e) of the Northern Territory Criminal Code.

⁴¹⁶ [1938] IR 382.

⁴¹⁷ [1938] IR 382 at 401 citing Curwood, Hawkins *Pleas of the Crown* book I chapter 28 section 11 page 517.

⁴¹⁸ The Garda Síochána Guide (6th ed The Incorporated Law Society of Ireland 1991) at 776.

in preventing a crime. In the latter instance, the force may be justified. As is evident from the discussion above, this distinction has been recognised in many jurisdictions. For example, if an individual witnessed a murder taking place, should they be compelled to stand back and allow it to go ahead? Clearly, they should be allowed to resort to lethal force in such a case.

2.307 However, the Commission feels that cases similar to that in the aforementioned paragraph are better dealt with under the law on private defence. There is no need for the individual in this example to raise the defence of crime prevention as they would be covered by the provisions on the defence of others.⁴¹⁹ To allow individuals to invoke the defence of crime prevention would blur the distinction between private defence and public defence. It would lead to the blurring of the traditional boundaries separating the various rubrics of legitimate defence and accordingly, confuse the policies underlying each of them. For clarity and for practicality therefore, it is suggested that the defence of crime prevention should be restricted to law enforcement officers.

2.308 *The Commission provisionally recommends that the power to use lethal force in preventing crimes should be restricted to law enforcement officers. Instead, it is more appropriate for individuals who use lethal force to protect others to be dealt with under the law on private defence.*

(6) Warnings and Less-Than-Lethal-Force

2.309 The Arrests Section has already discussed the arguments for and against the imposition of a requirement that defenders give warnings or use less-than-lethal options before resorting to lethal force.⁴²⁰ These arguments are equally applicable here.

2.310 One could argue, however, that realistically these requirements could be imposed only if the authority to use lethal force was limited to law enforcement officers. Without specific training, it is unlikely that civilian defenders would be aware of such technical prerequisites. Indeed, it is unlikely that civilian defenders would have the equipment or expertise to use less-than-lethal-force effectively.

2.311 The Report of the Working Group has been discussed above, in particular the recommendation, and subsequent introduction for the use of the Garda Emergency Response Unit, of 3 “less than lethal” devices.⁴²¹

⁴¹⁹ See paragraphs 2.37-2.47 and 2.59- 2.60 for a discussion on the law and the recommendations in respect of the defence of others.

⁴²⁰ See paragraphs 2.214-2.218.

⁴²¹ See paragraphs 2.218- 2.219.

CHAPTER 3 THE IMMINENCE REQUIREMENT

A Introduction

3.01 In this chapter the Commission discusses the imminence rule, and considers the difficult cases which form a challenge to the rule. One of the types of cases which can pose problems is when battered women kill their abusive partners. The Commission considers various comparative approaches to this issue, and sets out options for reform.

B The Imminence Rule

3.02 The imminence rule has two elements. It is permissive, in that it permits a defender to use defensive force to pre-empt a threatened attack, but it is restrictive in that pre-emptive force may only be used where the attack is 'imminent'.

3.03 The first element causes little difficulty given that all defensive acts are, in reality, pre-emptive. For example, even the defender who uses force against the attacker immediately before being struck is pre-empting the threat of future harm. However, a defender need not wait until the threatened harm is so near at hand. Hence, it is said that a defender "need not wait until the assailant's attack is on the point of success; until the assailant approaching with a knife comes within striking distance, or until the assailant who is drawing a pistol points it with his finger on the trigger."¹

3.04 The second element, namely that the attack must be imminent, creates greater difficulties, and is dealt with in this chapter. The imminence rule stipulates that there should be a proximate temporal relationship between the use of defensive force and the likely occurrence of the threatened harm. Hence, in the paradigm example of the threat of attack with an "uplifted knife", a defender might anticipate that the threatened harm, being stabbed, is near in time and therefore it is permissible to use defensive force.

3.05 Whilst it is clear that the imminence rule contemplates that the threatened harm be proximate, it is difficult to define this timeframe with

¹ "Homicide in Self-Defence" (1903) 3 Col LR 526 at 529, cited in McAuley & McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 751.

any precision. Although the term “imminence” is often used interchangeably with that of “immediacy”, their meanings are not necessarily congruent. One court has distinguished the terms by noting that “imminent” meant “ready to take place: near at hand: ... hanging threateningly over one's head: menacingly near”, whereas the term “immediate” meant “occurring, acting, or accomplished without loss of time: made or done at once”.² Therefore, it would seem that the concept of imminence permits a defender to act notwithstanding that there will be a short delay before the onset of the threatened harm.

3.06 The extent of the permitted delay, however, remains elusive and is perhaps impossible to define given the variety of situations in which legitimate defence may arise. Hence, the imminence rule has implicitly malleable quality.³ This flexibility may be regarded as a strength given that the rule may be moulded to achieve justice in difficult cases. However, it may also be argued that this flexibility creates the potential for inconsistent results. The various applications of the imminence rule in the cases discussed below lend weight to this argument. If the imminence rule is too flexible then little guidance is offered to juries in assessing claims of legitimate defence, exposing the system to the risk of arbitrary decisions based on sympathy and prejudice. There is also the risk that ‘bending’ the imminence rule will undermine its purpose, namely conflict avoidance.

3.07 The purpose of the imminence rule is to restrain would-be defenders from using force unless there is a degree of certainty that the apprehended danger will occur and there are no alternatives to the use of defensive force, such as retreating from the conflict or summoning the authorities for help. Of course, absolute certainty is not required. After all, it is impossible to know for sure whether an attacker armed with an “uplifted knife” will carry through his attack, and to require certainty would compel the defender to wait until he is struck with the knife, completely defeating the purpose of the defence.

3.08 Nevertheless, the imminence rule is intertwined with the requirement of necessity. As one commentator explains:

“[I]mminence is required because, and only because, of the fear that without imminence there is no assurance that the defensive action is necessary to avoid the harm. If the harm is not imminent

² *State v Janes* 121 Wn2d 220 at 241-2 (1993 Supreme Court of Washington).

³ O'Connor & Fairall have described the concept as “elastic”: O'Connor & Fairall *Criminal Defences* (3rd ed Butterworths 1996) at 187. McAuley and McCutcheon have also noted the difficulty in “pinning down” the meaning of the term: McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000 at 749-50).

then surely the actor can take steps that will alleviate the necessity for responding with fatal force.”⁴

3.09 Despite the relationship between imminence and necessity, the requirement of imminence is generally considered as a ‘stand-alone’ rule in the plea of legitimate defence. Similarly, imminence is also a prerequisite for the related defences of necessity⁵ and duress.⁶

3.10 However, there is a body of opinion which suggests that the need for defensive force may, on occasion, arise notwithstanding that there is no threat of imminent harm. If such cases existed, then a requirement of imminence would act as an “inhibitor” rather than a “facilitator” of necessity.⁷

3.11 This point is illustrated by way of a number of hypothetical examples.⁸ Take the example of a defender who is kidnapped and imprisoned in a secure cell. The kidnapper announces that the defender will be executed at some point in the future, although he is perfectly safe in the interim. The defender discovers an opportunity to escape days before the execution, but must kill the kidnapper to do so safely. However, a strict imminence rule would require the defender to wait until the threat to his life is about to come to fruition, but this could significantly reduce his chances of success when he finally attempts to escape. However, if one focused on the immediacy of the action necessary to avert the threat, rather than the immediacy of the threat, then the defender would be permitted to act “as early as required to defend himself effectively.”⁹

3.12 However, as one commentator has put it, it would be ill-advised to abandon the imminence rule which generally reflects the underlying

⁴ Rosen R “On Self-Defence, Imminence and Women Who Kill Their Batters” (1993) 71 NCL Rev 371 at 380.

⁵ For example, in Canadian Supreme Court decision of *Perka v R* (1984) 13 DLR 1 at 16, Dickson J stated: “The requirement that the situation be urgent and the peril be imminent, tests whether it was indeed unavoidable for the actor to act at all.

⁶ See for example, *R v Hudson & Taylor* [1971] 2 QB 202.

⁷ Rosen R “On Self-Defense, Imminence, and Women Who Kill Their Batters” (1993) 71 NCL Rev 371 at 380-1.

⁸ The following example is discussed in Murdoch, “Is Imminence Really Necessity? Reconciling Traditional Self-defense Doctrine with Battered Woman Syndrome” (2000) 20 N Ill U L Rev 191 at 210-212 citing the work of Kadish *Criminal Law and Its Processes* (1995) (6th ed Little Brown 1995) at 131(c)(1) and Robinson *Criminal Law Defences* (1984) at 832.

⁹ Kadish *Criminal Law and Its Processes* (1995) (6th ed Little Brown 1995) at 131(c)(1).

necessity principle “merely because law professors can dream up hypotheticals that defy the rule”.¹⁰

3.13 The Commission submits instead that the law must seek to maintain a balance between upholding the core values of the substantive criminal law and ensuring justice in individual cases that challenge the conventional rules.

3.14 This chapter will explore the role that the imminence rule does and should play in a legitimate defence scheme. We will begin by briefly exploring the origins of the imminence requirement. We will review the limited relevant case-law in Ireland and England, and examine the more abundant jurisprudence in other common law jurisdictions which have tackled ‘difficult cases’ which challenge the traditional application of the imminence rule. Finally, we will examine various options for reform.

(1) History

3.15 Whilst the imminence rule is commonly associated with legitimate defence, it has been suggested that it “does not have an unquestioned historical lineage as a fundamental requirement for a finding of self-defence.”¹¹

3.16 The modern conception of self-defence is essentially a melding together of the justification of felony prevention and the excuse of self defence.¹² On their face, neither restricted the use of force to repelling imminent threats. However, an imminence requirement was implicit for self defence which involved the use of defensive force in cases of ‘chance-medley’ where the need to use immediate defensive force arose from sudden quarrels and was also implicit in the requirement to retreat in such instances. On the other hand, imminence was explicitly not required for felony prevention where lethal force was justifiable whenever it was necessary to capture a felon. When the two defences combined, the modern form of self-defence adopted the broad applicability of the former defence of felony prevention beyond the chance medley situation, but like *se defendendo* it was constrained by the imminence requirement.

3.17 This thesis, if accepted, does not dispute that there are compelling rationales for the existence of the imminence rule which remain relevant to modern legitimate defence. Nevertheless, the suggestion that the early architects of what is now legitimate defence did not concern themselves with imminence, at least insofar as public defence was concerned, adds weight to

¹⁰ Rosen R “On Self-Defense, Imminence, and Women Who Kill Their Batterers” (1993) 71 NCL Rev 371 at 390-1.

¹¹ *Ibid* at 387.

¹² *Ibid* at 382-390.

the call for a re-examination of the foundations of the imminence rule in the modern context.

(2) *The Imminence Rule in Ireland and England*

3.18 Remarkably, there is scant reference to the requirement of imminence in the reported authorities in this jurisdiction. Indeed, neither *Dwyer* nor *Keatley*, two of the leading authorities on legitimate defence, refer to the imminence requirement at all. This void is perhaps explicable on the basis that cases which fall to be decided on the imminence rule are relatively few and far between. Nevertheless, the experience of other common law jurisdictions indicates the imminence rule is likely to assume considerable importance in a small but significant proportion of legitimate defence cases.

3.19 There are two reported cases in this jurisdiction where the imminence rule has played more than an insignificant role. The first of these cases is *DPP v Kelso*,¹³ where the Special Criminal Court appeared to indicate that imminence was an absolute requirement for legitimate defence. It should be noted that this is a ‘preparatory’ case which, as discussed below, may be of little assistance to ascertaining the scope of the imminence rule in legitimate defence to homicide.

3.20 In *Kelso*, the Court considered whether armed RUC Officers, who ventured across the border into this State for recreational purposes, had possession of their firearms for an unlawful purpose. The Officers claimed that they carried their guns intending to use them to protect their lives should the necessity arise. The Court cited a passage from the decision of the Court of Appeal of Northern Ireland, *R v Fegan*,¹⁴ which had stated:

“Possession of a firearm for the purposes of protecting the possessor or his wife or family from acts of violence may be possession for a lawful object but the lawfulness of such a purpose cannot be founded on a mere fancy or on some aggressive motive. The threatened danger must be reasonably and genuinely anticipated, *must appear reasonably imminent* and must be of a nature which could not reasonably be met by more pacific means.”¹⁵

3.21 The Special Criminal Court acquitted the RUC Officers on the basis that they reasonably believed that they would be in danger by interception by subversives and that it was necessary to carry a firearm for their protection.

¹³ [1984] ILRM 329.

¹⁴ [1980] NI 80.

¹⁵ Emphasis added.

3.22 In contrast, the Court of Criminal Appeal, in *People (DPP) v Clarke*,¹⁶ appeared to indicate that there was no imminence requirement in this jurisdiction, but rather imminence was merely a factor to be taken into account. The factual background was as follows. The deceased had violently assaulted the appellant and threatened to kill the appellant, his family and his girlfriend. The appellant left the scene, armed himself, and confronted the deceased whom he believed was headed to his girlfriend's house. During the confrontation the appellant claimed that the deceased again attacked him, and the appellant fatally shot the deceased. The Court disapproved of the following direction given to the jury by the trial judge:

“...there was ample time to avoid the confrontation. There was ample time to notify the guards. You are not entitled to go and get a lethal weapon and go in search of somebody to protect even yourself and your family if there are other means available to you which you should make use of. And we have been given no suggested explanation why it was not possible to invoke the power of the law on that occasion.”

3.23 The Court ordered a retrial on the grounds that the trial judge's erroneous comments effectively withdrew the defence of self-defence from the jury. The Court appeared to be endorsing the view of the English Court of Appeal in *Palmer v R* that imminence, like the retreat rule, was merely a factor to be taken into account by the jury in determining the reasonableness of the defender's actions. The *Clarke* Court cited the following passage from *Palmer*:

“But everything will depend upon the particular facts and circumstances. Of these a jury can decide... If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger he may have to avert the danger by some instant reaction... Of all these matters the good sense of the jury will be the arbiter.”¹⁷

3.24 Hence, to the extent that *Kelso* and *Clarke* articulate a view as to imminence rule, they appear contradictory.

3.25 The English authorities have also espoused apparently contradictory dicta, at times suggesting the existence of an absolute

¹⁶ [1994] 3 IR 289.

¹⁷ [1971] AC 814 at 831.

imminence requirement, and at other times suggesting that imminence is but one factor in the broader inquiry as to reasonableness.¹⁸

3.26 In contrast to the more flexible approach espoused in *Palmer v R*, as referred to above, the Northern Ireland Court of Appeal, in *Devlin v Armstrong*,¹⁹ stated:

“The plea of self-defence may afford a defence where the party raising it uses force, not merely to counter an actual attack, but to ward off or prevent an attack which he has honestly and reasonably anticipated. In that case, however, the anticipated attack *must be imminent...*” (emphasis added).

3.27 The appellant in that case claimed, in defence to charges of riotous behaviour and incitement of riotous behaviour, that she was acting in legitimate defence against a threat posed by the police that they would unlawfully assault, and damage the property of, those in her community. Evidence advanced to substantiate the appellant’s belief in this threat included a communication from a police officer rejecting superior orders and indicating that the police had sufficient force “to eat the place” and “to polish them off once and for all”. The Court rejected the appeal on the grounds, *inter alia*, that the danger the appellant anticipated was not “sufficiently specific or imminent”.

3.28 Unfortunately, this finding sheds little light what would have amounted to an ‘imminent’ timeframe in the context of those facts. Nevertheless, the Court’s reliance on the absence of a sufficiently specific threat suggests that timeframe was not the only element taken into account when assessing the reasonableness of the appellant’s actions. It would appear that the degree to which a specific threat had been identifiable, and presumably the likelihood of the threatened harm occurring, were also relevant.

3.29 This aspect was discussed in more detail by the House of Lords in *Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No.1 of 1975)*.²⁰ The facts have already been detailed.²¹

¹⁸ Professor Williams suggests that “the requirement of immediacy for private defence is not an independent one but merely an application of the requirement of reasonableness”: Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 451.

¹⁹ [1971] NI 13.

²⁰ [1976] 2 All ER 937.

²¹ See paragraphs 2.127-2.129. This case is also discussed in chapter 1 in examining whether there is a threshold rule for the use of lethal force in effecting arrests and in preventing crime. See paragraphs 2.127-2.130.

3.30 Lord Diplock indicated that any tribunal of fact would have to undergo a balancing process involving not only the seriousness of the threatened harms to the defender and attacker, but also the likelihood of their occurrence.²²

3.31 The Court concluded that, based on the assumed facts, it was open to the tribunal of fact to find that the shooting was justified. In other words, it may be lawful to resort to defensive force if there were reasonable grounds for believing that the intention of the deceased was to secure help to continue the attack.²³

3.32 Hence, the Irish and English Courts are unclear as to whether imminence is a requirement or merely a factor to be taken into account and offer little guidance as to the precise meaning of imminence.

(3) Preparatory Cases

3.33 In addition to the cases mentioned above, the Irish and English Courts have referred to an imminence requirement in what may be termed ‘preparatory cases’. These are cases where the accused has sought the shield of legitimate defence in relation to *prima facie* illegal *preparations* for the use of force (should the necessity arise), such as the possession of a weapon, rather than in relation to the use of force itself.

3.34 An example of a preparatory case is that of *Evans v Hughes*,²⁴ where the English Court of Appeal upheld an acquittal of an accused found in possession of a metal bar in a public place. The accused had been attacked a week before and was carrying the bar for the purposes of defending himself if he were attacked again. It was accepted by the court that while it was permissible for someone to carry an offensive weapon in anticipation of an imminent attack, the carrying of such a weapon on a *permanent* basis is not justifiable just because a person is subject to a continuing threat. If someone is facing such a threat, they should inform the police and seek protection from them.

3.35 The Court acknowledged that it was “a nice point” as to whether seven days took the case beyond one of “imminent danger”, but accepted the conclusion was one open to the court of first instance.

3.36 At first glance, it is unclear why the imminence requirement imposed any ceiling on the time that the appellant was permitted to carry the weapon. After all, surely the appellant should have been permitted to arm

²² [1976] 2 All ER 937 at 948, per Lord Diplock.

²³ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 751.

²⁴ [1972] 3 All ER 412, [1972] 1 WLR 1452, 56 Cr App Rep 813.

himself on day eight provided he still perceived that the danger was imminent. As far as the appellant was concerned, the danger could have arisen at any moment and there may have been no opportunity to seek the assistance of the authorities or to escape. However, the Court was not imposing a temporal requirement between the *threatened harm* and the response, but rather between the *threat* and the response. In other words, the Court required that the response (the carrying of a weapon) occurred within seven days of the threat (the initial attack) regardless of when the threatened harm (a second attack) was likely to take place. The restriction was necessary to prevent the undesirable “constant carriage of an offensive weapon”.

3.37 Hence it is doubtful that any guidance offered by the preparatory cases as to the meaning of the concept of imminence is applicable to ‘true’ legitimate defence cases. The ‘seven day rule’, for example, does not authorise a lethal response to threatened harm that is not anticipated for a further week. Any proponent of a strict imminence requirement would argue that there would be sufficient time to take alternative non-violent steps to avoid the threatened harm.

3.38 The High Court of Australia, in *Taikato v R*,²⁵ was careful to draw this distinction and held that legitimate defence was inapplicable to preparatory cases until such time that a reasonable apprehension of attack arose. In this case, no such specific threat had arisen, so the case did not turn on whether any threat was imminent.

(4) Overview of Comparative Analysis

3.39 The Commonwealth jurisdictions do not establish a unified approach to the role of the imminence rule. With the exception of the United States of America,²⁶ the Criminal Code jurisdictions contain no express imminence requirement. On the other hand, the common law courts have universally attempted some definition of the imminence requirement.

3.40 Increasingly, however, the strictness of the imminence rule has come under pressure, both as a result of the growing reliance on the flexible concept of “reasonableness” in some jurisdictions as well as the challenge presented by the ‘difficult cases’ discussed below. Consequently, the case

²⁵ High Court of Australia, 16 October 1996 FC 033/1996; 1996 AUST HIGHCT LEXIS 60.

²⁶ The United States Model Penal Code restricts the use of defensive force to occasions when it is “immediately necessary”: sections 3.04 (self-defence); 3.06 (defence of property); 3.07 (law enforcement). Whilst a small number of States have adopted the *Model Penal Code* provision, (such as Delaware, Hawaii, New Jersey, Nebraska, and Pennsylvania) most retain the requirement of an imminent or immediate threat: see, for discussion, Samaha *Criminal Law* (6th ed Wadsworth 1999) at 235.

law has become increasingly murky in the various Australian State jurisdictions.²⁷ At present, it would appear that imminence is now but one of the factors to be taken into account in assessing the reasonableness of an accused's actions, albeit that it may be a crucial factor.²⁸ In Canada, the strictness of the imminence rule has been waived in cases such as those involving battered women (discussed below), but would otherwise appear to remain intact.²⁹ In New Zealand, imminence would appear to be treated as a requirement, although there is a call for statutory reform.³⁰ Finally, state legislation in the United States of America almost universally embodies some form of imminence requirement,³¹ which in general have been strictly enforced by the courts notwithstanding the criticism that this can result in unduly harsh results.

C 'Difficult' Cases

3.41 In approximately the last twenty years, new categories of cases have arisen which have challenged traditional thinking as to the boundaries of legitimate defence and, in particular, the imminence rule. These difficult cases are those where it is argued that lethal force is necessary, notwithstanding that the threatened harm is not imminent.

3.42 The most prominent, but by no means the only, of these categories is that of battered women who kill their abusive spouses. Other cases which have challenged traditional thinking include those in the related category of battered children who kill abusive parents; prisoners who kill fellow inmates in the belief that this is the only viable means of defending themselves;

²⁷ At least one commentator has observed that there must be "an imminent or immediate threat of attack for [self-defence] to have any prospect of success": Gilles, *Criminal Law* (4th ed LBC Information Services 1997) at 319. Indeed, in *Viro v R* the High Court of Australia referred to an attack that "being or about to be made": (1978) 141 CLR 88 at 146, per Mason J. Nevertheless, more recently the High Court made no reference to 'imminence' at all during its substantial review of the law of self-defence in *Zecevic v DPP* (1987) 162 CLR 645. Indeed, in the Supreme Court of Victoria decision of *R v Lane* [1983] 2 VR 449 at 456, Murphy J indicated that it was not necessary that lethal self-defence be "performed whilst an actual physical onslaught on the accused was ensuring or immediately threatened."

²⁸ See *R v Secretary* (1996) 107 NTR 1 (Supreme Court of the Northern Territory, Court of Criminal Appeal) and *R v PRFN* [2000] NSWCCA 230 (Supreme Court of New South Wales, Court of Criminal Appeal), discussed below.

²⁹ See *Lavallee v R* (1990) 55 CCC (3d) 97 discussed below at paragraphs 3.53-3.57.

³⁰ The self-defence provision of the *Act* does not specify an imminence requirement: of the *Crimes Act 1961*. Nevertheless, an imminence requirement has been 'read' into the statute by the Courts: see, for example, *R v Wang*, discussed below.

³¹ An example of an application of the imminence rule is contained in *McDaniel v State* 257 Ga 345; 359 SE 2d 642 (1987 Supreme Court of Georgia).

others who kill in the belief that cultural or environmental factors prevent them from effectively resorting to non-violent courses of action such as seeking help from the authorities. Indeed, the issue is likely to arise in any case in which there is a significant power differential between the attacker and defender, that is, where the defender would be in a position of weakness in a confrontation against his or her attacker.

3.43 It has been suggested that if the traditional rules of self-defence are incapable of dealing with these difficult cases, and in particular those involving battered women, then a re-examination of the defence is warranted:

“When a theory yields results that seem counter-intuitive, the theory itself must be examined in order to determine if it is the theory or our intuition that is flawed... The inability of traditional self-defence laws to handle situations where a victim kills a batterer in a non-confrontational situation in a manner that is morally and intuitively acceptable suggests that a look at its theoretical underpinnings is appropriate.”³²

3.44 However, the simple fact that an accused is, for example, a battered woman, is insufficient to override the application of the imminence rule. Rather, the common factor that unites these ‘difficult’ cases is the argument that there are no non-violent alternatives available to the would-be defender.

3.45 Whilst categories such as those involving ‘battered women’ provide convenient labels, care must be taken to treat each case on its merits and not to treat the category as an indivisible whole. This can be illustrated using the example of battered women. In many cases the traditional rules of self-defence provide a defence for battered women who kill. Some battered women who kill *will* be responding to an imminent threat, in which case the traditional rules will be adequate.

3.46 In other cases the threat may, in fact, be non-imminent, but the battered woman may mistakenly *believe* that she is responding to an imminent threat. These cases will be accommodated in jurisdictions which adopt a subjective standard³³ for the imminence rule. Indeed, there is a considerable volume of case-law relating to the admissibility of expert evidence, such as that of Battered Woman’s Syndrome (also labelled ‘Battered Wife’s Syndrome’ or Battered Person’s Syndrome), the purpose

³² “Is Imminence Really Necessity? Reconciling Traditional Self-defense Doctrine with Battered Woman Syndrome” (2000) 20 N Ill U L Rev 191 at 191-193.

³³ For example, an unreasonable mistaken belief that there is an imminent threat will satisfy a purely subjective standard. A reasonable mistaken belief will satisfy all but the purest of objective standards.

of which is to explain and to provide support for the defender's erroneous perception that a threat was imminent.³⁴ However, it is important to note that these cases do not challenge the traditional imminence rule. Rather, the purpose of expert evidence in these cases is to assist juries in assessing claims in terms of traditional self-defence law.³⁵

3.47 For the purpose of examining the imminence rule, the critical cases are those where the battered woman kills in situations where it would be impossible to say that the threatened harm was imminent.³⁶ For illustrative purposes, the best examples are those where those where the accused kills a sleeping person. These cases intuitively seem to be inconsistent with the concept of self-defence given that there appears to be time to avail of non-violent alternatives.

3.48 Consider an example where a battered woman faces a threat of serious future (but non-imminent) harm, such as where her violent partner threatens to kill her when he awakes from a sleep. At first glance, there appears to be a number of non-violent alternatives to lethal defensive force. Firstly, to be certain that defensive force is necessary, the woman could wait until such time that her batterer is about to strike. However, given the disparity in physical strength, this may reduce or eliminate the woman's chance of successfully defending herself. The woman could arm herself pending an attack, but unless she is well versed in the use of weapons this may entail a considerable degree of risk. Alternatively, the woman could enlist the help of the authorities or friends and relatives, yet the woman may have previously experienced the powerless or unwillingness of the authorities and others to provide effective assistance, let alone prevent violent reprisals.³⁷ An attempt to escape may also entail a real risk of violent

³⁴ For example, a large number of States in the United States of America have admitted expert evidence relating to Battered Woman Syndrome and Battered Child Syndrome to support a claim that the battered defender believed he (or she) was in imminent peril. However, self-defence has generally not been admitted in non-confrontational situations. For a discussion of the law in the State of Ohio as well as a number of other States, see *State v Thomas* 77 Ohio St 3d 323 at 331 (1997 Supreme Court of Ohio).

³⁵ Murdoch "Is Imminence Really Necessity? Reconciling Traditional Self-defense Doctrine with Battered Woman Syndrome" (2000) 20 N Ill U L Rev 191 at 206.

³⁶ In other words, on a subjective test the battered woman knows that the threat is non-imminent, or on an objective test a reasonable person would believe that the threat was non-imminent.

³⁷ The New Zealand Law Commission has cited research in the United States, Canada, Australia, and New Zealand which suggests that that peaceful and effective avenues for self-protection may not always be available to victims of domestic violence: New Zealand Law Commission, *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper* (PP41 2000) at paragraph 43. See below for further discussion.

repercussions.³⁸ Assuming that the woman has the financial and logistical support to successfully escape far beyond the reach of her batterer, the question arises whether the woman is under an obligation not only to retreat temporarily, but to abandon whatever community support she has and in effect permanently renounce her personal and family identity. It has been suggested that the law does not require “completely innocent people to behave in this fashion.”³⁹

3.49 If it is accepted that the only effective option available to the battered woman to defend herself is to kill her aggressor, it may be argued that self-defence should be available notwithstanding that the threatened harm is not imminent. Whilst it may be argued that eliminating the imminence requirement may encourage self-help, and hence undermine the principle of conflict avoidance, it is unlikely that many battered women would be motivated to kill on the assumption that the law will provide a defence. Rather, in genuine cases battered women are likely to kill out of fear and the belief that there is no other way to end the abuse.⁴⁰ However, it has been pointed out that some less scrupulous individuals, such as prison inmates, could well take advantage of any relaxation of the imminence rule to kill under the guise of legitimate defence.⁴¹

3.50 Furthermore, some would argue that the failing of society to provide adequate protection for certain groups does not warrant granting those groups a ‘licence to kill’. It is suggested that the solution in these cases is to redress this failing of society rather than allow for the taking of life in unjustifiable circumstances.⁴² Others argue in the absence of adequate societal protection for those groups, the law must fill the void.⁴³

3.51 Notwithstanding these important moral and legal choices, it will be seen that the approach of the common law courts to ‘difficult cases’ remains somewhat ambiguous, which in turn has led to somewhat

³⁸ A lack of financial resources, family support, child care concerns, and psychological pressures such as the concept of “learned helplessness” amplify the lack of alternatives open to a battered woman: Veinsreideris, “Comment: The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women” (2000) 149 U Pa L Rev 613 at 622.

³⁹ Rosen R “On Self-Defense, Imminence, and Women Who Kill Their Batterers” (1993) 71 N C L Rev 371 at 396.

⁴⁰ “Comment: The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women” (2000) 149 U Pa L Rev 613 at 626.

⁴¹ *Ibid.*

⁴² *People v Aris* 264 Cal Rptr 167 (Californian Court of Appeals 1989).

⁴³ Murdoch, “Is Imminence Really Necessity? Reconciling Traditional Self-defense Doctrine with Battered Woman Syndrome” (2000) 20 N Ill U L Rev 191 at 218.

inconsistent results. This has prompted greater scrutiny of the imminence rule by a number of law reform bodies and commentators.

3.52 Given the absence of case-law in Ireland and England dealing with ‘difficult cases’ we will examine the approaches taken in Canada, Australia, New Zealand and the United States.

(1) Canada

3.53 In the seminal case of *Lavallee v R*⁴⁴ the Supreme Court held, in the context of a case in which a ‘battered woman’ had used lethal force against her batterer, that there was no strict requirement of imminence.⁴⁵ The factual background may be summarised as follows. The defender had lived with the deceased for several years during which the deceased often subjected the defender to violent beatings. During one of the assaults the deceased threatened that he would kill her when visitors at the house left. The defender then shot the deceased in the back of the head as he was walking away. At trial an expert testified that the defender was suffering from ‘Battered Wife Syndrome’.

3.54 The Court noted that in the normal paradigm of legitimate defence, a threat must be imminent before a defender may resort to self-defence, and that this approach had traditionally be taken by the Canadian Courts. It stated that the fact that the threat is not imminent generally suggests that the force has been motivated by revenge rather than self defence as during the intervening period the alleged defender could have notified the police or escaped.

3.55 However, the Court held that these “tacit assumptions” may not apply in cases involving battered women. It is unrealistic to expect such a woman to wait until the knife is uplifted or the gun pointed before using force as it is unlikely that the woman’s strength would match the man’s in this instance:

“The requirement... that a battered woman wait until the physical assault is "underway" before her apprehensions can be validated in law would, in the words of an American court, be tantamount to sentencing her to ‘murder by instalments’.”⁴⁶

⁴⁴ *Lavallee v R* (1990) 55 CCC (3d) 97.

⁴⁵ This reversed the previous approach of the Canadian Courts. For example, in *R v Whynot* (1983) 9 CCC 449 (NSCA) the Court applied the imminence test strictly to a battered woman’s case. See, for discussion, Stuart *Canadian Criminal Law* (3rd ed Carswell 1995) at 449-50.

⁴⁶ Citing *State v Gallegos* 719 P2d 1268 at 1271 (1986 Supreme Court of New Mexico). It should be noted that the Court in *Gallegos* accepted that the appellant was faced with an imminent threat.

3.56 The Court did not accept that non-violent alternatives would always be available to a defender threatened with non-imminent harm. In cases such as this, it was accepted that there are not always realistic non-violent alternatives available.

3.57 The Court accepted that expert testimony may be admissible in order to dispel the myths and stereotypes relating to battered women⁴⁷ and to explain that women's experiences and perspectives in relation to self-defence may be different from the experiences and perspectives of men. In particular, expert testimony may be relevant to explain the concept of 'learned helplessness', that is, why a woman remained in the battering relationship and why she did not flee when she perceived her life to be in danger. This could assist a jury in assessing the woman's belief that the killing was the only way to save her own life.

3.58 In *R v Petel*,⁴⁸ the Supreme Court of Canada confirmed that imminence was not required for a successful plea of self-defence and extended the *Lavallee* dicta beyond the Battered Woman's Syndrome scenario. The accused in this case was a mother whose daughter and boyfriend had temporarily moved into her home. The deceased was a companion of the boyfriend. The deceased and the boyfriend were involved in drug trafficking and often conducted these illegal activities at the accused's house. The boyfriend often threatened to kill the accused. On the occasion in question, the boyfriend forced the accused to hide the weapon and threatened to kill her. Shortly afterwards, the deceased arrived. The accused then fired the weapon at the boyfriend and then the deceased as he lunged for her.

3.59 The Court affirmed that the accused's conviction for second degree murder should be quashed and a retrial ordered. More importantly, the Court reaffirmed the dicta in *R v Lavallee* that there was no rule requiring that the apprehended danger be imminent:⁴⁹

"Imminence is only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself otherwise than by killing the attacker."

⁴⁷ Court noted the common misconception that battered women are not really beaten as badly as they claim; otherwise they would have left the relationship. Alternatively, others mistakenly believe that women enjoy being beaten, that they have a masochistic strain in them.

⁴⁸ (1994) 87 CCC (3d) 97.

⁴⁹ Whilst four of the nine judges dissented from the majority, the dissenting judgment concurred with the statement of legal principles applicable to self-defence.

3.60 Whilst the Court indicated that the ‘presumption of imminence’ would normally be rebutted by expert evidence, for example that the accused was suffering from Battered Woman’s Syndrome, such evidence was not obligatory, and indeed there was none led in this case.

3.61 In *R v McConnell*,⁵⁰ the Supreme Court affirmed, this time in the context of a prison killing, that imminence was merely a factor to be taken into account in determining reasonableness. Whilst the Court appeared to endorse a prosecution submission that there was a “sliding scale” of importance associated with imminence, namely “as strength between the parties equalizes, imminence becomes a greater factor”, this was said to be a matter for the jury. In this case, there was evidence upon which the jury could conclude that the respective strengths of the appellants and the threatening group were unequal. Drawing an analogy with the case of battered women, the phrase “prison environment syndrome” was adopted to describe the culture of hopelessness or the ‘kill or be killed’ attitude that could prevail amongst prisoners.

3.62 Whilst *Lavallee, Pete* and *McConnell* tend to indicate that the ‘presumption of imminence’ may be rebutted in any case where there is an inequality between the strengths of the parties, the most recent Supreme Court decision on the issue, *R v Charlebois*,⁵¹ may be resiling from that position.

3.63 In *R v Charlebois* the Court appeared to restrict the applicability of the *Lavallee* dicta to cases of a similar ilk. The appellant in this case had been convicted of murder. On the night of the murder the deceased had come to the defender’s home and had threatened the defender with a knife. The deceased then relaxed on the couch and told the appellant to go to sleep. There was evidence in the case that the defender had developed an overwhelming fear of the deceased over the course of their long and difficult relationship. The appellant testified that once in his bedroom, his panic became overwhelming. He got up, took the rifle, approached the deceased and shot him in the back of the head while he was sleeping. There was no argument, skirmish or threat. At trial a psychiatrist who was called by the defence testified that the accused was suffering from acute anxiety at the time of the shooting.

3.64 The Court distinguished this case from *R v Lavallee*, indicating that the ambit of that case was restricted to the killings by battered women of their abusive partners. It was accepted that there was no expert evidence

⁵⁰ [1996] 1 SCR 1075, (1996) 48 C.R. (4th) 199 (S.C.C.), reversing (1995) 32 Alta. L.R. (3d) 1 (C.A.). The Supreme Court adopted the reasons given by the dissenting Court of Appeal of Alberta judgment of Conrad J.A.

⁵¹ [2000] 2 SCR 674.

which justified extending the scope of *Lavallee* to cases of this kind. The court held that such an extension would not be justified on the facts or in policy.

3.65 Prior to *R v Charlebois* a substantial report in relation to self-defence had recommended that the Criminal Code should be updated to reflect the law as determined by the Supreme Court in *R v Lavallee* and subsequent cases.⁵² In particular, the report recommends that the Code should stipulate that the imminence of an assault upon a defender is but one of the factors relevant in determining the reasonableness of the defender's defensive response. However, it is now questionable whether this recommendation would accurately reflect the current position in Canada given that Canadian law in this area would appear to be again in flux.

(2) *Australia*

3.66 Earlier Australian case-law as to the role of the imminence rule presented a confusing picture. However, at least in the context of killings in defence to domestic violence, it would now appear that imminence is no more than a factor to be taken into account in determining reasonableness, albeit that it may be a critical factor. This tendency towards a minimised imminence rule may have its origins in a 1992 case which held that the fact that the victim is asleep could not justify the withdrawal of self-defence from the jury.⁵³ Subsequently, a 1994 Australia Law Reform Commission Report recommended that self-defence, including the requirement of imminence, should be re-examined taking into account women's perspectives.⁵⁴

3.67 The imminence issue arose squarely in the case of *R v Secretary*,⁵⁵ where the Supreme Court of the Northern Territory was required to determine whether self-defence was open where the defender deliberately killed a sleeping person. The appellant in that case had been subjected to repeated serious violence from her partner for the previous eight years. Notwithstanding the police involvement at a number of the assaults and the fact that the appellant had obtained a restraining order against the deceased,

⁵² Judge Ratushny "Self Defence Review (Submitted to the Minister of Justice of Canada and Solicitor General of Canada)" 11 July 1997. This review was commissioned to examine aspects of the law relating to self-defence in response to *R v Lavallee*.

⁵³ O'Connor & Fairall *Criminal Defences* (3rd ed Butterworths 1996) at 188 citing *R v Kontinnen* 27 March 1992.

⁵⁴ Australian Law Reform Commission, *Equality Before the Law: Justice for Women* (ALRC 69 1994) at Chapter 12. No specific proposals were tendered other than in the development of the Australian uniform criminal code, that women's perspective should be actively sought.

⁵⁵ (1996) 107 NTR 1 (Supreme Court of the Northern Territory, Court of Criminal Appeal).

the violence continued. During the course of the day of the killing the deceased repeatedly assaulted and threatened the appellant. Then, as the deceased was going to sleep the appellant understood the deceased to threaten to kill her when he awoke. The appellant then fatally shot the deceased as he slept.

3.68 The relevant provisions of the State Criminal Code provided that a defender could act in self-defence against an assault, which included a threat provided the person threatening “has an actual or apparent present ability to affect his purpose.” The trial judge considered that the provision “carried distinct overtones of the need for imminent danger and held that self-defence was not open to the appellant on the grounds that the deceased had no “present ability” to carry out the threat while he slept.⁵⁶

3.69 However, on appeal the Supreme Court of the Northern Territory rejected this statutory interpretation and overturned the ruling. Drawing support from the Canadian decision, *R v Lavallee*,⁵⁷ the Court held that it would have been open to the jury to find that the appellant’s pre-emptive strike was in self-defence:

“Both the threat and the ability (actual or apparent) to effect the threat may endure for some time after the utterance of the threat. The assault endures for so long as the threat and ability to effect it coexist...

In the present case there was a threat to apply force at a future stated time. The threat was never withdrawn. At the time the threat was uttered there was an ability (actual or apparent) to carry out the threat when the stipulated time came. On the facts, short of being disabled from effecting the threat, whether by pre-emptive strike or the accused’s flight or otherwise, the deceased’s ability to carry out the threat continued.”⁵⁸

3.70 The Court recognised the difficulties that may arise “in discriminating between a defensive response” and “a response that simply involves a deliberate desire to exact revenge for past and potential - but unthreatened - future conduct.” However, the Court adopted a pragmatic approach and considered that this was a matter for the jury.

⁵⁶ The trial judge’s view was upheld by the minority appellate judgment of Martin CJ.

⁵⁷ Per Mildren J. Mildren J also agreed with the reasoning in *Lavallee* that whilst the availability of less violent alternatives were relevant, self-defence does not require a person to retreat from his or her home in these circumstances.

⁵⁸ Per Angel J.

3.71 In the High Court of Australia decision, *Osland v R*,⁵⁹ the imminence issue was addressed by only a single dissenting judge. This case had similar facts to those in *R v Secretary*. Kirby J, the only judge who commented on the issue of imminence, adopted the approach of the Court in *Lavallee v R*:

“The significance of the perception of danger is not its imminence. It is that it renders the defensive force used really necessary and justifies the defender's belief that ‘he or she had no alternative but to take the attacker's life.’”

3.72 In contrast in *R v PRFN*,⁶⁰ the Supreme Court of New South Wales held that self-defence was properly withheld from a jury on the grounds that there was no imminent threat to the appellant. The facts in that case were as follows. When 14 years of age the appellant was raped by his next door neighbour, the deceased. Thereafter, the deceased continued to make overtures to the appellant, but there was no further sexual contact. During the course of the following year the appellant suffered from psychological trauma. The appellant also feared that the deceased would molest his newly born nephew or others. Approximately a year and a half after being raped, the appellant lured the deceased to his home and fatally shot him. At that time, the appellant had not had any contact with the deceased for a month.

3.73 The Court held that it was proper for the trial judge to treat “the imminence of any threat to the appellant as an important factual consideration relevant to whether, as a realistic hypothesis, the appellant could have believed on reasonable grounds that it was necessary in self-defence to do what he did.” The appellant had nothing beyond a generalised apprehension of future harm to himself or others. It was not open to conclude that the appellant had a reasonable belief that he was acting in defence given that “the critical element of imminence of a threat was lacking.”

(3) New Zealand

3.74 The leading New Zealand case on the question of imminence and self-defence is the pre-*Lavallee* case of *R v Wang*.⁶¹ In this case, the defendant, an immigrant from China, was subject to frequent abuse from her husband. On the night of the murder, the husband threatened to kill her and her sister. He then went to sleep in an intoxicated state. The defendant then

⁵⁹ [1998] HCA 75 (High Court of Australia).

⁶⁰ [2000] NSWCCA 230 (Supreme Court of New South Wales, Court of Criminal Appeal).

⁶¹ [1990] 2 NZLR 529, affirmed *R v Kneale* [1998] 2 NZLR 169.

killed him. The trial judge refused to allow self defence to go to the jury as she was in no immediate danger and she could have went to the police for assistance.

3.75 Upholding the appellant’s conviction for manslaughter (on the basis of provocation), the Court of Appeal noted that, “attack may be the best form of defence, but not necessarily in law”.⁶²

“In our view what is reasonable... and having regard to society’s concern for the sanctity of human life requires, where there has not been an assault but a threatened assault, that there must be immediacy of life-threatening violence to justify killing in self-defence or the defence of another.”⁶³

3.76 The Court also endorsed the trial judge’s view that to allow self-defence where there was no immediate threat and alternative courses of action were available to the appellant would be “close to a return to the law of the jungle.”⁶⁴ However, whilst these statements appear to be unequivocal that imminence is an absolute prerequisite for self-defence, elsewhere in the judgment the Court indicated that pre-emptive strikes may be permissible and the key question is whether there were alternate non-violent options open to the accused.⁶⁵ Indeed, the case appears to turn on the fact that the deceased was in a drunken sleep and, as the appellant was not held hostage, she was free to seek protection in other ways.⁶⁶

3.77 However, a recent report of the New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, has suggested that peaceful and effective avenues for self-protection may not always be available to victims of domestic violence.⁶⁷ The Law Commission recommends legislative change to permit force to be used in self-defence

⁶² *Ibid* at 539, citing Ormrod LJ in *R v Shannon* (1980) 71 Cr App R 192 at 196.

⁶³ [1990] 2 NZLR 529 at 539.

⁶⁴ *Ibid* at 535.

⁶⁵ *Ibid* at 535-6 (emphasis added). See also *R v Oakes* [1995] 2 NZLR 673 where the Court of Appeal held that Battered Woman’s Syndrome was relevant to explain that battered woman may perceive a threat as imminent where others would not, in which case a pre-emptive strike might be appropriate.

⁶⁶ [1990] 2 NZLR 529 at 539.

⁶⁷ Citing research in the United States, Canada, Australia, and New Zealand, the Commission concluded that some such women feel that they will be exposed to further violence if they attend the police station. They may also fear that the abuser will find them if they attempt to run away and previous attempts may show this to be a real possibility. New Zealand Law Commission, *Battered Defendants: Victims of Domestic Violence Who Offend: A Discussion Paper* (PP41 2000) at paragraph 43.

when the threatened harm is “inevitable” notwithstanding that the threat of harm may not be imminent.⁶⁸

(4) *United States of America*

3.78 The law relating to imminence in the United States of America is dominated by the fact that criminal statutes invariably require that legitimate defence may be resorted to only when “immediately necessary” or in response to an “imminent” or “immediate” threat.⁶⁹ Consequently, the question has not been whether there *is* an imminence requirement, but to what extent the imminence requirement provides an impediment to a plea of self-defence in cases involving non-confrontational killings, such as where the deceased was sleeping. Some courts have sought to relax the imminence requirement and have adopted subjective standards for the imminence rule, consequently allowing the accused to determine whether the threat was imminent. However, the general response of the courts has been that self-defence is not available in cases where objectively there was no imminent threat.

3.79 A leading case is *State v Stewart*, where the Kansas Supreme Court stated that “a battered woman cannot reasonably fear imminent life-threatening danger from her sleeping spouse.”⁷⁰ The facts demonstrated that the appellant had been subjected to horrific treatment by her husband and that when she had run away he had found her and brought her back. The Court held:

“Because of [a] prior history of abuse, and [because of] the difference in strength and size between the abused and the abuser, the accused in such cases may choose to defend during a momentary lull in the abuse, rather than during [an active] conflict. However, in order to warrant the giving of a self-defence instruction, the facts of the case must still show that the spouse was in imminent danger close to the time of the killing.”⁷¹

3.80 The Court was not prepared to allow self-defence in the non-confrontational circumstances of the case, and distinguished it from cases

⁶⁸ New Zealand Law Commission Some Criminal Defences with Particular Reference to Battered Defendant (R73 2001) at paragraphs 23-24.

⁶⁹ See paragraph 3.39 for discussion. Whether the differing terminology results in different outcomes in cases involving battered woman has been questioned, and it has been suggested that there is little practical difference between the standards: Veinsreideris, “Comment: The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women” (2000) 149 U Pa L Rev 613 at 623-4.

⁷⁰ 763 P2d 572 at 578 (1988 Kansas Supreme Court).

⁷¹ *Ibid* at 577.

involving confrontational killings or cases where the deceased gave the defender good cause to believe that she was about to be attacked.⁷²

3.81 Similarly, in *State v Norman*,⁷³ the North Carolina Supreme Court agreed that self-defence should not be put to the jury where the appellant had killed her sleeping abusive partner. This was because the defender faced no imminent threat. The Court held any other approach would not protect the right to life of the attacker.

3.82 The role of the imminence rule has not been restricted to cases involving battered women. The same conclusion was reached by the Supreme Court of Wyoming in *Jahnke v State*⁷⁴ in the context of a battered child case and in *State v Wiggins*⁷⁵ in respect of a prisoner case. In this latter case despite expert evidence being presented as to the “culture of fear” in prison, the accused’s conviction was upheld.

3.83 A minority of States do not have an imminence requirement *per se*, but rather impose the *Model Penal Code* standard requiring ‘immediate necessity’ before defensive force may be used. However, in reality this test is interpreted no differently than the imminence requirement. For example in *Commonwealth v Grove*,⁷⁶ the Court held that the “immediately necessary” test was no broader than the imminence requirement.

3.84 Some Courts have accepted that killing in self-defence may be permissible in non-confrontation cases.⁷⁷ For the most part however, the defence has not been available where there is no objective imminent threat.

D Options for Reform

3.85 In response to difficult cases such as those discussed above, law reform bodies and scholars have made varying suggestions as to how to accommodate deserving claims of legitimate defence by those who kill in

⁷² 763 P2d 572 at 577-9 (1988 Kansas Supreme Court).

⁷³ 378 SE 2d 8 (1989 North Carolina Supreme Court).

⁷⁴ 682 P2d 991 (1984 Wyoming Supreme Court).

⁷⁵ 808 P2d 1383 (1991 Kansas Supreme Court).

⁷⁶ 363 Pa Super 328 at 337 A 2d 369 (1987 Superior Court of Pennsylvania).

⁷⁷ See for example *State v Leidholm* 334 NW2d 811 (1983 Supreme Court of North Dakota) where the court held that the appellant, who killed her sleeping husband, could hold an honest and reasonable belief that she was in imminent harm. Similarly in *State v Janes* 121 Wn2d 220 (1993 Supreme Court of Washington) at 241-2 the Supreme Court of Washington interpreted the imminence requirement broadly to leave open the possibility that self-defence could apply where a battered child killed his abusive parent in a non-confrontational situation.

response to threats of non-imminent harm and yet maintain the integrity of the defence.

(1) Presidential Pardon

3.86 The first option would be to maintain the status quo, and to remedy any individual injustices by way of the President's constitutional power to grant a pardon where there has been a miscarriage of justice.⁷⁸ It is arguable that in this jurisdiction the President would not be bound by strict rules of law, such as the imminence requirement. This option would preserve the integrity of the imminence rule, but would provide a "safety valve" where an "aberrational case arises in which the application of the rule works an injustice".⁷⁹

3.87 One commentator who favours this approach accepts that there are drawbacks to relying on executive clemency.⁸⁰ For example, the reliance on the executive would "obviate the judiciary's traditional role in shaping the law of the land", and that clemency could become more of a political than legal tool, particularly in the context of emotionally charged cases such as those involving battered women.⁸¹ Nevertheless, the commentator concludes that "any negative effects will be limited to the context that the system is created to address, whereas a change in self-defence law would apply to all cases, not just those involving battered women."⁸²

3.88 Whilst this approach is at least superficially convenient, it may be argued that a more comprehensive approach is required if the imminence rule poses difficulties that are more widespread than the occasional "aberration". The principle of legality also requires that the scope of the criminal law offences be clearly established.

⁷⁸ Article 13.6 of the Constitution. Hogan & Whyte Kelly: *The Irish Constitution* (3rd ed 1994 Butterworths) at 92 report three pardons which were granted in 1940, 1943 and 1992.

⁷⁹ R "On Self-Defense, Imminence, and Women Who Kill Their Batterers" (1993) 71 NCL Rev 371 at 391. Rosen does not accept, however, that cases such as those involving battered women who kill are mere aberrations, and so does not favour this approach.

⁸⁰ Veinsreideris, "The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women" (2000) 149 U Pa L Rev 613. Veinsreideri, at 641 notes that in the United States of America the use of clemency power in cases involving battered women is not "particularly widespread" but is "not necessarily novel."

⁸¹ *Ibid* at 643.

⁸² *Ibid*.

(2) Broader Definition of ‘Imminence’

3.89 One method of accommodating difficult cases within the traditional framework of the imminence rule would be to use a broad and flexible definition of the imminence rule. This method takes advantage of the fact, discussed above, that the meaning of imminence is inherently difficult to define with precision.

3.90 Taking the example of the battered woman who kills her sleeping batterer, it could be argued that harm that is anticipated when the batterer awakes, say within hours, is sufficiently proximate to be described as imminent. However, this would ignore the relationship between imminence and necessity. The purpose of the imminence rule is to restrict defensive force to cases where the threatened harm is so temporally proximate that there are no non-violent alternatives available. In the case of the sleeping batterer, it is not the constraints of time that prevent the battered woman from escaping, but rather there may be a multitude of physical, social, financial, and psychological factors. A broad interpretation of the imminence requirement under the German defensive necessity principle is generally favoured, namely that “an imminent danger can endure prolonged intervals, thereby accommodating a threat of danger which may linger, rather than only the instantaneous threat that is characteristic of confrontational attacks”.⁸³

3.91 This approach, adopted by a minority of American Courts,⁸⁴ ignores the reality of the situation, and effectively amounts to ignoring the imminence requirement on an ad hoc and arbitrary basis.

(3) An ‘Inevitability’ Test

3.92 The New Zealand Law Commission has recommended that the requirement of imminence should be abandoned, but recommends that it should be replaced with one of “inevitability”:

“In many, perhaps most, situations, the use of force will be reasonable only if the danger is imminent because the defendant will have an opportunity to avoid the danger or seek *effective* help. However, this is not invariably the case. In particular, it may not be the case where the defendant has been subject to ongoing physical abuse within a coercive intimate relationship and knows

⁸³ Dubin “A Woman’s Cry for Help: Why the United States Should Apply Germany’s Model of Self-Defence for the Battered Woman” (1995) ISLA Journal of International and Comparative Law 235 at 261. (However, it should be observed that the authors in this article cite no actual case in which the German courts have applied this interpretation to a case before them.)

⁸⁴ See for example *State v Janes* 121 Wn2d 220 at 241-2 (1993 Supreme Court of Washington).

that further assaults are inevitable, even if help is sought and the immediate danger avoided.’⁸⁵

3.93 Hence, a defender could launch a lethal pre-emptive strike against an aggressor, notwithstanding the absence of a threat of imminent harm, provided that the previous pattern of violence established that the aggressor would ‘inevitably’ use violence again.

3.94 However, it may be argued that this would set too high a threshold for any deserving non-imminent case to succeed. It is unlikely that the New Zealand Law Commission intended that the defender need establish as a *certainty* that future violence would occur given that in nearly all cases such certitude would not be known until moments before the attack, that is, when the threatened harm was imminent. If the Commission intended that something short of actual certainty was required, it does not identify the intended standard.

It may also be argued that the ‘inevitability’ standard would set too low a threshold, allowing undeserving non-imminent cases to succeed. Threats of ‘inevitable’ harm could arise in gangland situations or in the prison context where social, financial, cultural and (in the case of prisons) physical barriers may prevent would-be defenders from adopting non-violent alternatives.⁸⁶

3.95 Whilst it may also be argued that killings carried out for defensive purposes in such circumstances are deserving of the cloak of legitimate defence, it may be difficult to separate and identify the genuine cases absent a specific screening mechanism such as imminence. The Commission, therefore, does not favour this approach.

(4) *Abandoning the Imminence Requirement*

3.96 Another option would be to abandon the imminence requirement, and regard imminence as merely one of the factors to be considered in determining whether defensive force was necessary. There would appear to be the approach adopted by the Australian Courts.⁸⁷

⁸⁵ The New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendant* (R73 2001) at 30.

⁸⁶ See in particular for a discussion of the prison context Veinsreideris, “Comment: The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women” (2000) 149 U Pa L Rev 613.

⁸⁷ See for example *R v PRFN* [2000] NSWCCA 230 (Supreme Court of New South Wales, Court of Criminal Appeal). However, the Australian Courts would appear to have taken this approach because of the growing reliance on the general concept of ‘reasonableness’.

3.97 However, this approach may be subject to the same criticisms as the ‘inevitability’ test, namely that there is no mechanism to screen out the undeserving from the genuine claims, potentially leading to arbitrary results:

“One reasonable concern is that a jury would be encouraged to make ad hoc decisions based upon its estimation of the relative worth of the individuals involved. The danger also exists that increasing the discretion given to jurors will simultaneously increase the opportunity for bias, arbitrariness, or discrimination to influence the jurors’ decision making.”⁸⁸

3.98 Any assessment of this risk will depend on the degree of trust one has in jurors to reach objective decisions.⁸⁹

However, it is suggested that the imminence rule, which for the most part operates sensibly, should not be abandoned merely to accommodate a few non-paradigm cases. Indeed, the relaxation or elimination of the imminence rule may well lead to undesirable consequences for society.

3.99 However, at least two proposals have been put forward in an attempt to remedy this weakness.

(5) *The ‘Immediately Necessary’ Approach*

3.100 Another possible modification of the imminence rule would be to permit defensive force only when there was an immediate necessity to act, regardless whether the threatened harm was imminent or not. In other words, this approach focuses on the proximity of the *need to act*, whereas the conventional imminence requirement focuses on the proximity of the *threatened harm*.

3.101 Take the example of the battered woman who kills her batterer in a non-confrontational situation, such as where he is sleeping. Under this approach the battered woman could argue that it was necessary to use defensive force immediately, namely when the batterer is sleeping, as she would be incapable of effectively defending herself against the physically stronger batterer if she waited until an attack was imminent.⁹⁰

⁸⁸ See for example *R v PRFN* [2000] NSWCCA 230 (Supreme Court of New South Wales, Court of Criminal Appeal). However, the Australian Courts would appear to have taken this approach because of the growing reliance on the general concept of ‘reasonableness’.

⁸⁹ *Ibid* at 405.

⁹⁰ However, one commentator has suggested that the “immediately necessary” test would not exonerate battered women who kill in non-confrontational situations since although the use of force may be eventually necessary under the circumstances, it may not be necessary to kill now: Finkelstein, “Self-Defense and Relations of Domination:

3.102 The United States of America *Model Penal Code* adopts this ‘immediately necessary’ test.⁹¹ The Commentaries to the Code explain:

“The actor must believe that his defensive action is immediately necessary and the unlawful force against which he defends must be force that he apprehends will be used on the present occasion, but he need not apprehend that it will be used immediately. There would, for example, be a privilege to use defensive force to prevent an assailant from going to summon reinforcements, given a belief that it is necessary to disable him to prevent an attack by overwhelming numbers – so long as the attack is apprehended on the ‘present occasion.’ The latter words are used in preference to ‘imminent’ or ‘immediate’ to introduce the necessary latitude for the attainment of a just result in cases of this kind.”⁹²

3.103 A number of commentators have cited this approach as an effective model for dealing with ‘difficult cases’.⁹³ However, the vast majority of American States have declined to modify their conventional imminence requirements to adopt this test.⁹⁴ In a State where the *Model Penal Code* formula was incorporated, the Court refused to recognise that it altered the traditional imminence requirement.⁹⁵ A body of commentators

Moral and Legal Perspectives on Battered Women Who Kill: Self-Defense as a Rational Excuse” (1996) 57 U Pitt L Rev 621 at 628-9.

⁹¹ Sections 3.04 (self-defence); 3.06 (defence of property); 3.07 (law enforcement).

⁹² American Law Institute, *Model Penal Code and Commentaries* (1985) Part I Vol.2 at 39-40.

⁹³ See also, Alexander, “Propter Honoris Respectum: A Unified Excuse of Preemptive Self-Protection” (1999) 74 Notre Dame L Rev 1475. Alexander offers an example to support the Model Penal Code formulation: “Consider the situation where A has announced his intention to kill B, who is in a wheelchair in an otherwise abandoned building, as soon as A goes into his office and gets his gun. B has a gun and can shoot A now, before A goes into his office. But once A has a gun, B will not be able to win a duel with A. A's attack may not be ‘imminent’, but B's shooting A may be ‘immediately necessary’ to save B's life.” For further examples see Lee, “The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification” (1998) 2 Buff Criminal L R 191 and Schopp et al, “Battered Woman Syndrome, Expert Testimony and the Distinction Between Justification and Excuse”, 1994 U Ill L Rev 45 at 66-67.

⁹⁴ For example, Delaware, Hawaii, New Jersey, Nebraska, and Pennsylvania; see Samaha Criminal Law (6th ed Wadsworth 1999) at 235.

⁹⁵ See *Commonwealth v Grove* 363 Pa Super 328 at 337 A 2d 369 (1987 Superior Court of Pennsylvania).

have also expressed doubts as to whether the *Model Penal Code* test is any broader than the imminence requirement.⁹⁶

3.104 Another problem with this approach is that it interferes with the core values of legitimate defence merely to accommodate a few cases. As observed by one commentator “One cannot deny that, in most situations, the imminence requirement accurately translates the underlying necessity principle and therefore plays a useful role in self-defence.”⁹⁷ However, under this approach, the imminence requirement is substantially altered to provide for a few difficult cases.

3.105 This approach leads to the replacement of the relatively precise imminence rule with a far less certain requirement.⁹⁸ While this approach could achieve justice in the difficult cases, ultimately its uncertainty and imprecision could lead to injustice in the paradigm cases. This is fundamentally illogical.

3.106 The next option for reform addresses these difficulties in that it preserves the imminence requirement for the paradigm cases but abolishes it in respect of the difficult cases.

(6) *Removing the Imminence Requirement in Specific Cases*

3.107 One reform proposal suggests that the imminence requirement should be retained for the vast majority of cases where it provides a useful guidance to the jury. However, the proposal recommends that the imminence requirement should be waived where the accused can meet an initial evidential burden establishing that the killing was necessary notwithstanding that the threatened harm was non-imminent.⁹⁹

⁹⁶ Veinsreideris notes that “not all commentators see the distinction between the two formulations as significant: “The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women” (2000) 149 U Pa L Rev 613. Indeed, one commentator, on the basis of an empirical study, argues that the ‘imminence’ standard expands the temporal circumstances that a jury can consider, while an ‘immediate’ standard restricts those circumstances: Maguigan, “Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals” (1991) 140 U Pa L Rev 379 at 415.

⁹⁷ Rosen R “On Self-Defense, Imminence and Women Who Kill Their Batterers” (1993) 71 NCL Rev 371 at 391.

⁹⁸ The uncertainty of the “immediately necessary” approach is evident from the disagreement of the various commentators on the precise meaning of this phrase. This disagreement is described by Veinsreidreis in “The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women” (2000) 149 U Pa L Rev 613.

⁹⁹ Rosen R “On Self-Defense, Imminence, and Women Who Kill Their Batterers” (1993) 71 NCL Rev 371 at 405-6.

3.108 Essentially, this is the approach that has been adopted by the Canadian Supreme Court. The presumption that imminence is required may be rebutted by the accused by adducing evidence, typically expert evidence, that the killing was necessary notwithstanding the absence of a threat of imminent harm.¹⁰⁰

3.109 Another possible method of upholding the imminence requirement in all but the deserving non-imminent cases may be to accept the concept of ‘perpetual imminence’ for those who are in a state of cumulative terror resulting from repeated acts of violence perpetrated against them.¹⁰¹ The imminence rule would remain, but it would be satisfied by evidence that defenders such as battered woman were under a constant threat of harm, rather than requiring evidence of a particular threat. In difficult cases, such as where the battered person subjectively does not believe that he or she is facing a threat of imminent harm, the perpetual imminence approach enables the imminence requirement to be waived.¹⁰² Effectively, this would amount to abolishing the imminence rule for battered defenders, without doing so directly.

3.110 An opponent of both approaches argues that they remain open to abuse, albeit less so than abandoning the imminence requirement altogether.¹⁰³ No doubt this commentator would be concerned about the decision of the Supreme Court of Canada, in *R v McConnell*,¹⁰⁴ which accepted that self-defence should be put to the jury in the case of a prison killing notwithstanding the non-imminent nature of threatened harm.

3.111 The Commission agrees with this opinion, and notes that to remove the imminence requirement in specific cases would dilute the

¹⁰⁰ See *R v Charlebois* [2000] 2 SCR 674. In Ireland, the Courts have upheld the constitutionality of reverse burdens of proof which require the accused to establish a defence on the balance of probabilities. See McAuley & McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 40 and Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 73.

¹⁰¹ Martin J, dissenting in the North Carolina Supreme Court decision of *State v Norman* (1989) 378 SE 2d 8 at 18-19, argued that because battered women never experience any momentary sense of safety, future attacks are imminent at all times.

¹⁰² To the extent that this ‘perpetual imminence’ approach accommodates a defender who genuinely believes that he or she is under constant threat of harm, then it advocates no more than a subjective standard for the imminence rule, but does not challenge the imminence rule itself. Indeed, it may well be that that is the current standard in this jurisdiction.

¹⁰³ Veinsreidreis “Comment: The Prospective Effects of Modifying Existing Law to Accommodate Preemptive Self-Defense by Battered Women” (2000) 149 U Pa L Rev 613 at 626-7 and 633.

¹⁰⁴ [1996] 1 SCR 1075, (1996) 48 CR (4th) 199 (SCC), reversing (1995) 32 Alta LR (3d) 1 (CA).

integrity of the rule and open it to abuse. The Commission thus provisionally recommends that the imminence requirement should not be waived.

3.112 *The Commission provisionally recommends that the imminence requirement should be retained.*

(7) A New Defence?

3.113 In our Consultation Paper on Provocation,¹⁰⁵ the Commission addressed the question of battered women and other difficult cases within the context of that defence. The Commission addressed whether the new defence of “Extreme Emotional or Mental Disturbance” should be adopted so as to provide a complete and tailored defence to these defendants.

3.114 In our earlier Paper, it is noted that the defence takes the following form under section 210.3(1)(b) of the United States’ Model Penal Code:

“(1) Criminal homicide constitutes manslaughter when: ...
(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”

3.115 Versions of the defence of extreme emotional disturbance have been enacted in a number of American states.¹⁰⁶ A number of states have created an affirmative defence, *ie* one in which the burden of proof rests with the accused. Some states also exclude the defence where the accused was at fault in bringing about the events that triggered his or her condition.

3.116 In our Consultation Paper, the Commission stated the following regarding the introduction of the defence within the scope of our discussion of provocation:

“The Commission emphatically rejects th[e] course of reasoning [that states that the removal of the need to introduce evidence of provocation as a triggering condition would facilitate manslaughter verdicts in cases which are morally

¹⁰⁵ Law Reform Commission *Consultation Paper on Provocation* (LRC CP 27 2003).

¹⁰⁶ *Eg*, sections 53a-54 of the *Conn Gen Stat Ann*; title 11, section 641 of the *Del Code Ann*; sections 707-702(2) of the *Hawaii Penal Code*; section 507.020(1)(a) of the *Ky Rev Stat*; section 94-5-103 of the *Rev Codes of Mont*; section 125.25 of the *NY Penal Law*; sections 12.1-16-02 of the *ND Century Code*; section 163.115 of the *Ore Rev Stat*; section 76-5-205 of the *Utah Code Ann*.

indistinguishable from those covered by the traditional defence]. In a recent Seminar Paper¹⁰⁷ the Commission has accepted the proposition that the law of murder as currently configured is over-inclusive in respect of several categories of intentional killings; and that this state of affairs might usefully be addressed by introducing, among other measures, new defences (and partial defences) not excluding the plea of extreme emotional disturbance. However, the Commission has also cautioned against the adoption of reforms in this area which would have the effect of compromising the principle of accurate labelling in the definition of offences and defences.¹⁰⁸ In the Commission's opinion, provoked killings are *sui generis* and should continue to be treated as such. By parity of reasoning, the Commission is committed to examining, as part of its general review of the law of homicide, the larger question of over-inclusion insofar as it affects *unprovoked* killings; and will return to the arguments for and against the plea of extreme emotional disturbance in that context.”

3.117 The Commission seeks views on the most appropriate approach to the question of battered women and other difficult cases within the context of legitimate defence.

¹⁰⁷ Law Reform Commission Seminar Paper on Homicide: The Mental Element in Murder (LRC SP1 – 2001) at 5-8.

¹⁰⁸ *Ibid.*

CHAPTER 4 THE UNLAWFULLNESS RULE

A Introduction

4.01 In this Chapter, the Commission discusses the Unlawfulness Rule, which provides that legitimate defence may be used only in response to an unlawful attack. It first considers the issue of resistance to unlawful arrest, considering the law in Ireland and other jurisdictions and then goes on to discuss options for reform. The Commission then considers the exceptional (non-paradigm) examples of lack of capacity and mistaken attackers.

B Resistance to Unlawful Arrest

(1) Introduction

4.02 The ‘unlawfulness’ rule provides that legitimate defence may be used only in response to an *unlawful* attack. The simplicity of this statement, however, belies a number of (at least theoretical) complexities and ambiguities within the rule, which we discuss further below. Perhaps because of the difficulties with the rule, the status of the rule is far from clear in many jurisdictions, including Ireland. Nevertheless, given that few cases turn on its application, it has generated little practical difficulty for the courts and it is rare that the rule is the subject of any critical analysis at judicial level.

4.03 However, a full discussion of the rule is important not only to address how best to deal with the handful of ‘difficult cases’, but is also useful to map out the ill-defined boundaries between legitimate defence and other defences, in particular, necessity.

4.04 The primary issue which this section seeks to address is whether there are any circumstances in which a person (an “arrestee”) may use lethal force to resist an arrest that is, or appears to be, unlawful.¹

4.05 This question arises under the heading of the ‘unlawfulness rule’ because the rule has two elements. First, it is restrictive in that generally defensive force may *not* be used to repel a *lawful* attack. This aspect of the

¹ Throughout this chapter, where the term “arrestees” is referred to in the context of resisting arrest, it is also intended to refer to third parties who use defensive force on the arrestees’ behalf.

rule has already been examined. Secondly, the rule is permissive, in that it generally *permits* the use of defensive force to repel an *unlawful* attack. It is this aspect which will be examined below.

4.06 A strict application of the unlawfulness rule would permit an arrestee, who is being subjected to an unlawful arrest, to use defensive force to resist arrest in the same way that other defenders would be entitled to repel any other type of unlawful attack.

4.07 However, it is often argued that in a civilised society individuals should be required to submit to arrests, particularly those carried out by law enforcement officers, regardless of whether the arrests are lawful or otherwise. A number of policy reasons support this argument; chief among them are society's interest in conflict avoidance and the desire to cloak those who carry out the often dangerous task of enforcing the law² with a degree of legal protection from attack by arrestees. In contrast, however, others argue that the liberty of the individual should not be undermined by a requirement that arrestees submit to what amounts to unlawful attacks by (in most cases) agents of the state.

4.08 As will be demonstrated in the review of the evolution of the common law conducted below, many jurisdictions have struggled to find a balance between these competing considerations. Interestingly, however, in contrast to other jurisdictions, Ireland's approach arguably has remained rooted in a seventeenth century common law rule that has more in common with the partial defence of provocation than legitimate defence. That the Irish law arguably remains a relic of bygone centuries is perhaps more to do with the fact that the issue does not appear to have been litigated in over fifty years when much of the development elsewhere has occurred. However, this fact merely underlines the necessity for a review of the law. Nevertheless, it should be noted that despite the volume of jurisprudence and law reform proposals elsewhere, few countries could be said to have achieved resolution of the matter and the law remains very much in a state of flux.

4.09 Before proceeding with this review, it is useful to consider the types of situation in which an arrest will be unlawful or, at least, will appear unlawful to an arrestee. This discussion will demonstrate how difficult a task it can be to determine the lawfulness of an arrest and will highlight the complications caused by the common involvement of mistakes of fact and mistakes of law. Furthermore, the discussion will illustrate the results that might be expected were one to strictly apply the unlawfulness rule and the other conventional rules of legitimate defence to the problem of unlawful

² Throughout this chapter, the terms "Gardaí", "law enforcement officers" and "police officers" are used interchangeably depending on the context. It should also be noted that in addition to the Gardaí, other officers have responsibility in enforcing the law including certain officers of the courts and prison officers.

arrests. This illustration will serve as a yardstick against which it will be possible to compare the approach taken to this problem in Ireland and in other jurisdictions.

(2) *Lawful and unlawful arrests*

4.10 This Part considers the types of situation in which an arrest might be unlawful or, at least, might appear unlawful to an arrestee. The determination of the lawfulness of an arrest is a notoriously difficult task in the calm and considered atmosphere of the courts; so much more difficult is this task in the emotionally laden circumstances of a confrontational arrest. Aside from the technicalities of arrest procedure and the interplay of the common law and statutory rights of arrest, the task is often further complicated by either the arrestor or the arrestee (or both) acting on the basis of a mistake of fact or mistake of law (or both). This distinction is addressed elsewhere in this Paper in greater depth but, as will be seen below, its application in this area can cause additional difficulties.

4.11 For the purposes of this chapter, two assumptions will be made. First, it is assumed that defenders are entitled to act on the basis of their subjective understanding of the factual circumstances.³ Thus, the defence of mistake of fact is available to those who use force in the mistaken belief that factual circumstances exist that would permit the use of defensive force (although it may or may not be necessary that that belief be reasonable). Secondly, it is assumed that the maxim *ignorantia juris neminem excusat* (ignorance of the law is no excuse) is a valid principle in relation to mistakes made as to the laws of arrest. Thus, the defence of mistake of law is not available to those who use force in the mistaken belief that they are legally entitled to use such force.⁴

4.12 Powers of arrest are extremely varied and can be broad in their scope.⁵ While no attempt will be made to detail all these powers here, it is sufficient to note that the powers can be broad and consequently it will be uncommon for an arrest to lack any authorisation, at least insofar as the arrest is carried out by a Garda or a person assisting a Garda.

4.13 Nevertheless, even where an arrest is lawful the unlawfulness rule will be relevant where the arrestee mistakenly believes otherwise. In many

³ It is unnecessary to discuss here whether such a belief must also be objectively reasonable, but rather it is suffice at this stage to proceed on the basis that there is at least a subjective component to the test.

⁴ For a discussion of this topic see McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 464-465.

⁵ See Ryan and Magee *The Irish Criminal Process* (Mercier Press 1983) at 95-100, and Woods *District Court Practice and Procedure in Criminal Cases* (Limerick 1994) at 100-123.

cases this belief would amount to a mistake of law, such as the belief that the Gardaí have no power to arrest an innocent person (when all is required is a reasonable belief that the person has committed, is committing, or will commit an offence). Such a mistake of law would afford an arrestee no defence.

4.14 However, in other cases the arrestee's belief may amount to a mistake of fact. An example would be where the arrestee is unaware that the person attempting to arrest him or her is a Garda and believes that, say, the Garda is a private citizen trying to assault the arrestee.⁶ Another example would be where a paranoid arrestee mistakenly believes that a Garda is acting maliciously (that is, that the Garda does not suspect the arrestee of wrongdoing but is acting with improper motives). Under a strict application of the unlawfulness rule, one would expect that these arrestees would be entitled to use defensive force to resist arrest.

4.15 The determination as to whether resistance is permissible can be more complicated where the arrest is actually unlawful. Take the typical example of a member of the Gardaí exercising a power of arrest without a warrant.⁷ Such arrests are generally authorised where the Garda has a reasonable belief that an offence has been, is being, or is about to be committed. The circumstances in which an arrest by a Garda would be unlawful can be summarised as follows:

- (i) The Garda does not believe an offence has been, is being, or is about to be committed. In other words, the Garda is acting with improper motives or maliciously.
- (ii) The Garda does genuinely have the requisite belief, but this belief cannot be substantiated on objective grounds.
- (iii) The Garda does meet the criteria of reasonable belief, but carries out the arrest in such a manner as to render the arrest unlawful. A typical example of this would be the use of excessive force to carry out the arrest.

⁶ This was the factual scenario in *Kenlin v Gardiner* [1967] 2 QB 510.

⁷ Citizens also have powers of arrest in certain circumstances. For example, “[w]hereas a] member of the Gardaí may arrest a person if he suspects with reasonable cause that a felony has been committed and that the person has committed it... a private person will be able to arrest only if the felony has in fact been committed by somebody and the arrester suspects with reasonable cause that the person to be arrested has committed it.” (Emphasis added): Woods *District Court Practice and Procedure in Criminal Cases* (Limerick 1994) at 100. See also Ryan and Magee *The Irish Criminal Process* (Mercier Press 1983) at 95-100.

(iv) The Garda does not meet the technical requirements of the power of arrest. A typical example would be failing to advise the arrestee of the reasons for his or her arrest.⁸

4.16 The Garda in scenario (i) is operating under a mistake of law as to prerequisites of a lawful arrest (or, if acting maliciously, is not operating under a mistake at all).

4.17 The Garda in scenario (ii) may be operating under either a mistake of fact or a mistake of law. An example of a mistake of fact would be where a Garda wrongly identifies the arrestee as the alleged criminal when in fact the wrongdoer is clearly someone else. An example of a mistake of law would be where the Garda is unaware as to the level of suspicion required to reach the objective criteria for arrest and acts on a lesser standard.

4.18 Again, the Garda in scenario (iii) may be operating under either a mistake of fact or a mistake of law. An example of a mistake of fact situation would be a Garda who uses excessive force because he or she mistakenly believes the threat posed by the arrestee to be greater than in fact it is, such as where a Garda believes the arrestee to be armed and dangerous when in fact he or she is not. An example of a mistake of law situation would be a Garda who uses excessive force because he or she mistakenly believes that such force is authorised by law.

4.19 Finally, the Garda in scenario (iv) is likely to be acting under a mistake of law as to the technical requirements for carrying out an arrest.

4.20 Gardaí who carry out unlawful arrests because of mistakes of law are acting unlawfully. Therefore, under a strict application of the unlawfulness rule one would expect that an arrestee would be entitled to use defensive force to resist any force used to carry out the unlawful arrest.

4.21 Similarly, one would normally expect that an arrestee would be entitled to resist an arrest which is unlawful due to a Garda's mistake of fact. However, this scenario is complicated by the fact that, although the arrest would be *unlawful*, the Garda would be acting *lawfully* as he or she is entitled to act on the basis of the facts as he or she believes them to be.⁹ Hence, the Garda would have a defence to a charge of assault if he or she

⁸ See for discussion on this Woods *District Court Practice and Procedure in Criminal Cases* (Limerick 1994) at 102-3.

⁹ This principle is enshrined in section 19(3) of the *Non Fatal Offences Against the Person Act 1997* which states: "... the question as to whether the arrest is lawful shall be determined according to the circumstances as the person using the force believed them to be." Whilst it may be debated whether "the circumstances" referred to in this section contemplate not only the factual circumstances but also the legal circumstances, it is submitted that the provision should be interpreted to include only the former. This point is argued elsewhere in this Paper.

used force to carry out an arrest in such circumstances. It is necessary, therefore, to draw a distinction between the culpability of the Garda and the lawfulness of the arrest itself in the same way that one might draw a distinction between the culpability of an insane attacker and the lawfulness of their attack. Hence, although the Garda would be acting lawfully, he or she would be a *mistaken attacker* and one would normally expect under a strict application of the unlawfulness rule that an arrestee would be entitled to use defensive force to resist such an arrest.¹⁰

4.22 However, as a general principle a defender is entitled to use defensive force against an unlawful attacker only if the defender is aware that the attacker is acting unlawfully. This is known as the *Dadson* principle.¹¹ It follows that an arrestee who resists an unlawful arrest would not be entitled to the benefit of a defence unless the arrestee knew that the arrest was unlawful and was resisting for that reason (rather than because, say, the arrestee detested the Gardaí or simply wanted to cause a violent confrontation). However, in the ordinary course of events an arrestee will not know that an arrest is unlawful or, at least, will not know the reason why an arrest is unlawful. Consequently the *Dadson* principle is a significant restriction on the defender's entitlement to use defensive force.

4.23 In summary, there are only limited circumstances in which an arrest will lack authorisation given the broad powers bestowed on the Gardaí. Hence, in the majority of cases, one would expect that resistance to such lawful arrests would be permitted only where an arrestee acted on the basis of a mistake of fact. Even where an arrest is unlawful, one could argue that resistance would be permitted only if the arrestee were aware of the reasons as to why the arrest was unlawful. Hence, one would expect that there would only be a small number of cases where an arrestee would be entitled to resist arrest.

(3) *The Current Law in Ireland*

4.24 The law as to the use of lethal defensive force to resist unlawful arrests differs considerably depending on whether the common law or the *Non Fatal Offences Against the Person Act 1997* applies.

¹⁰ Hence, in *Kerr v DPP* [1995] Crim LR 394 it was held that a constable was acting unlawfully when he physically detained the accused under the mistaken factual belief that his colleague had already arrested the accused. The constable was therefore held not to be acting in the execution of his duty when the accused punched him.

¹¹ *R v Dadson* (1850) 4 Cox CC 358. See paragraphs 7.92-7.106 for a greater discussion of this principle.

(a) *The Non Fatal Offences Against the Person Act 1997*

4.25 At first glance, the 1997 Act appears to minimise the legal protection available to arrestees who use defensive force to resist apparently unlawful arrests. Section 18(6) of the 1997 Act provides:

“... a person who believes circumstances to exist that would justify or excuse the use of force... has no defence if he or she knows that the force is used against a member of the Garda Síochána acting in the course of the member’s duty or a person so assisting such member, unless he or she believes the force to be immediately necessary to prevent harm to himself or herself or another.”

The origins of this provision lie in a series of reports by various English law reform bodies, the most recent of which is a 1993 Report of the Law Commission of England and Wales.¹² In that Report, the Law Commission justified a restriction on resistance to arrest as follows:

“This special exception, in the case of force used against a person known to be a constable, who is in fact acting in the execution of his duty, accords with existing authority.¹³ It is usually thought to be justified or required by the need to encourage obedience to constables who are in fact... acting in the execution of their duty.”¹⁴

4.26 However, if it were the intention of this provision to limit the circumstances in which legitimate defence could be used against law enforcement officers then it is doubtful that it has reached its objective given that there are at least three situations in which an arrestee may resist arrest:

- (i) The arrestee does not know that the person carrying out the arrest is a member of the Gardaí.
- (ii) The arrestee does not know (or believe) that the member of the Gardaí is acting in the course of his or her duty.
- (iii) The arrestee believes that force is immediately necessary to prevent harm to himself / herself or another.

¹² The Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (LC-218, 1993).

¹³ It should be noted that whilst this statement accorded with then existing authority, the English courts have subsequently modified their approach and are less inclined to prohibit defensive force to resist unlawful arrests by the police: see below at paragraphs 4.47-4.55 for a discussion of the English Court of Appeal cases, *Blackburn v Bowering* [1994] 3 All ER 380 and *R v Lee* [2001] 1 Cr App Rep 293.

¹⁴ The Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (LC-218 1993) at paragraph 39.4.

4.27 The 1997 Act, although at first glance may appear to restrict the right to resist arrest, in reality places no practical restrictions on the right of arrestees to use defensive force. As observed by McAuley and McCutcheon:

“[I]f the policy that inspired section 18(6) was to discourage people from second-guessing the police on the lawfulness of arrest and detention, it has scarcely been served by the sub-rule in section 18(1) which effectively removes the common law requirement to show reasonable cause for the belief that it was necessary to flee police custody in order to repel a threat of personal violence by the police... [S]ubjectivising the criterion of belief in this context seems unduly indulgent of defendants as it arguably neutralises 18(6) as a standard of conduct.”¹⁵

(b) The Common Law

4.28 If the common law, rather than the *Non Fatal Offences Against the Person Act 1997*, applies in cases of lethal resistance, then it would appear that an obscure seventeenth century common law rule remains in force in this jurisdiction. This rule reduces the culpability of an arrestee who kills his or her arrestor from murder to manslaughter when the arrest is unlawful. This reduction in culpability is based on a presumption that the arrestee is provoked by the unlawful arrest. Hence, the rule has more in common with the partial defence of provocation than the conventional rule of legitimate defence and, therefore, will be referred to as the “presumed-provocation rule”.¹⁶

4.29 To understand how such an antiquated rule remains part of the Irish common law, it is necessary to examine the most recent decision which dealt with the problem of lethal resistance to arrest, namely, the 1947 decision of the Court of Criminal Appeal in *People (Attorney-General) v White*.¹⁷ Furthermore, we will also review the evolution of the presumed-provocation rule from its seventeenth century origins through to the current approach taken by the various common law jurisdictions. It will be seen that in contrast to the situation in Ireland, the presumed-provocation law has largely fallen into disuse in other jurisdictions.

¹⁵ See also, McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 748.

¹⁶ This term was used by White ACJ in the South Australian Supreme Court decision of *R v Fry* (1992) 58 SASR 424.

¹⁷ [1947] IR 247.

(c) *Attorney-General v White*

4.30 In *People (AG) v White*¹⁸ the appellant successfully appealed against his conviction in the Special Criminal Court for murdering a member of the Gardaí. The circumstances of the case were that the Gardaí had surrounded the appellant and his companion for the purposes of arresting the companion. The Gardaí did not know the identity of the appellant and were not aware of any cause for his arrest. Hence, the attempt to arrest the appellant was unlawful. A violent exchange of gunfire erupted between the appellant, his companion and the Gardaí, the first shot of which was probably fired by the Gardaí. Whilst attempting to escape, the appellant shot dead one of the Gardaí. The appellant subsequently claimed that he did not know that those confronting him were Gardaí, although this was irrelevant to the outcome of the appeal.¹⁹

4.31 The Court of Criminal Appeal quashed the appellant's conviction for murder and substituted one of manslaughter. The Court's reasoning is interesting in that it appeared to reject a submission that the appellant had been entitled to act in self-defence: "Now, on the one hand, no plea of justification seems open on the evidence, which shows no necessity, and [the appellant] alleged no necessity, for the firing of the fatal shot."²⁰

4.32 The basis of the manslaughter verdict is not entirely clear, but appears to be the presumed-provocation rule which provided that a person who used lethal force to resist an unlawful arrest was guilty only of manslaughter on the grounds that the unlawful arrest amounted to provocation. The Court of Criminal Appeal, by relying on the 1825 decision of *R v Thompson*,²¹ held that this common law rule remained part of the Irish criminal law as at 1947. Indeed, this statement of the law does not appear to have been disturbed to date.²²

¹⁸ [1947] IR 247.

¹⁹ The Gardaí were not in uniform and there was no evidence that the Gardaí identified themselves to the appellant. Ultimately, the Court held that it was unnecessary to resolve this question of fact.

²⁰ *People (AG) v White* [1947] IR 247 at 256.

²¹ (1825) 1 Mood 80

²² Whilst the presumed-provocation rule does not appear to have been the subject of any judicial discussion since, *People (AG) v White* [1947] IR 247 has been referred to with approval on a number of occasions including in the Court of Criminal Appeal case of *People (DPP) v O'Donnell* [1995] 3 IR 551 and the High Court judgment of O'Hanlon J in *People (DPP) v Rooney* [1992] 2 IR 7.

(4) Other Jurisdictions

(a) Evolution of the Common Law Approach- Seventeenth to the Nineteenth Centuries

4.33 The decision in *R v Thompson*²³ was one of a line of authority establishing that an unlawful arrest grounded a partial defence of provocation to a charge of murder and a full defence to a charge of assault. In *R v Thompson*²⁴ a constable had unlawfully attempted to take the accused, a journeyman shoe-maker, into custody on the grounds that his master “suspected he had tools of his, and was leaving his work undone”.²⁵ The accused had been forewarned by his master that a constable was being called and the accused had armed himself with a knife and indicated that he was prepared to use it to resist arrest. When confronted, the accused stabbed the constable, although by chance the blows were not fatal. The majority of the Court overturned the accused’s conviction for assault with intent to murder on the following ground:

“... as the actual arrest would have been illegal, the attempt to make it when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation, as if death had ensued would have made the case manslaughter only, and that therefore the conviction was wrong.”²⁶

4.34 The presumed-provocation rule appears to have been first established in the 1666 decision of *Hopkin Huggett’s Case*.²⁷ In that case the accused (along with several others) had intervened to rescue a third party whom a constable was unlawfully attempting to impress into the army. Although the constable was killed, it was held that the appropriate verdict was one of manslaughter, not murder as a result of the provocation generated by the unlawful arrest.²⁸

4.35 The law gradually developed distinctions between the types of unlawful arrest that could qualify for the partial defence and by the mid-nineteenth century the state of the law could be summarised as follows:

²³ (1825) 1 Mood 80.

²⁴ *Ibid*.

²⁵ *Ibid* at 80.

²⁶ *Ibid* at 81-82.

²⁷ (1666) 84 Eng Rep 1082 (King’s Bench), cited in Chevigny, “The Right to Resist an Unlawful Arrest” (1969) 78 Yale LJ 1128 at 1129.

²⁸ (1666) 84 Eng Rep 1082.

“The English courts thus arrived at certain basic distinctions essential to an understanding of the law of resistance to unlawful official action. A legal process which is valid ‘on its face’ must be obeyed, but one that is patently unlawful is such a provocation to the citizen that the criminal element in his resistance is reduced [as in the case of a killing where the charge would be reduced from murder to manslaughter], if not removed entirely [in the case of an assault]. The distinction is sometimes a difficult one to apply, but it is a useful guide.”²⁹

4.36 Whilst the common law rule was based on the concept of “provocation”, it is important to note that the term should not be interpreted strictly in accordance with the contemporary understanding of the partial defence. As the Supreme Court of South Australia recently observed in *R v Fry*:³⁰

“... the verdict of murder would automatically be reduced to manslaughter if the apprehension or arrest was unlawful by virtue of any defect in the warrant, lack of jurisdiction or error in identity... Provocation, or something like it, was presumed.”³¹

4.37 However, it was decided in 1867 that lethal resistance to an unlawful arrest was no longer sufficient to warrant a reduced verdict of manslaughter unless it was also “attended by circumstances affording reasonable provocation.”³² In other words, the presumed-provocation rule appears to have merged with the ordinary test for provocation and thereafter the rule descended into obscurity in most jurisdictions.³³

(b) The Twentieth Century Demise of the Rule in the United States

4.38 Unlike most other common law jurisdictions, the presumed-provocation rule has been the source of considerable debate in the courts,

²⁹ Chevigny “The Right to Resist an Unlawful Arrest” (1969) 78 Yale LJ 1128 at 1131.

³⁰ (1992) 58 SASR 424.

³¹ *R v Fry* (1992) 58 SASR 424 at 436. In addition, the presumed-provocation rule differs the conventional defence of provocation in that it provides not only a partial defence to murder, but also a full defence to lesser charges of assault.

³² *R v Allen* (1867) 17 LTR (NS) 222 at 225, cited in *R v Fry* (1992) 58 SASR 424 at 437.

³³ A review of case-law carried out in *R v Fry* (1992) 58 SASR 424 was unable to point to any cases decided in the twentieth century on the basis of the rule (presumably the Court was unaware of *People (AG) v White* [1947] IR 247). The most recent case referred to was *R v Tommy Ryan* (1890) 11 LR (NSW) 171.

legislatures and academic literature of the United States from the beginning of the twentieth century through to the present.³⁴

4.39 Nevertheless, it would appear that the only case in which the United States Supreme Court has expressly addressed the presumed-provocation rule has been the 1900 decision in *Bad Elk v United States*.³⁵ In this case the Court appeared to affirm the presumed-provocation rule.³⁶

4.40 A number of commentators have expressed the view that this decision “changed the primary justification [of the presumed-provocation rule] from provocation to self-defense” in the United States of America.³⁷ Robbed of its original foundation in the defence of provocation, the presumed-provocation rule was to wither under scrutiny of twentieth century reformers who saw no modern justification for upholding the right to resist unlawful arrest.³⁸

4.41 Academic criticism of the presumed-provocation rule commenced in the 1920s.³⁹ It was based largely on the view that conditions in society had changed since the period in which the rule was formulated so that many of the circumstances that may have earlier motivated an arrestee to resist an unlawful arrest were no longer applicable.⁴⁰ Academic criticism culminated

³⁴ As an indication of the current interest in the unlawful-arrest problem, there have been at least four articles published in the last five years dealing with the topic: Wright, “Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?” (1997) 46 Drake L Rev 383; Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1; Owens, “Note: Maryland’s Common Law Right to Resist Unlawful Arrest: Does it Really Exist?” (2000) 30 U Balt L Rev 213.

³⁵ (1900) 177 US 529 at 535 (US Supreme Court). See for discussion Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1.

³⁶ *Bad Elk v United States* (1900) 177 US 529 at 534.

³⁷ Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1, 6, who also cite the opinion of Engel, “The Right to Resist an Unlawful Arrest in Modern Society: *Commonwealth v. Moreira*” (1984) 18 Suffolk U L Rev 107 at 109.

³⁸ See, for discussion, Chevigny, “The Right to Resist an Unlawful Arrest” (1969) 78 Yale LJ 1128.

³⁹ R M R “Note: Resistance to Illegal Arrest” (1924) 23 Mich L Rev 62, cited in Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1 at 18.

⁴⁰ For an in depth account of the debate regarding the presumed-provocation rule in the United States of America during the twentieth century, see Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1.

in the proposal in 1962 by the drafters of the *Model Penal Code* to eliminate the presumed-provocation rule. The provision stated:

“The use of force is not justified [in self-defence] to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful”.⁴¹

4.42 Although not expressly stated, it was not intended that the provision would prohibit resistance where the arrestee apprehended bodily injury, such as where the officer uses excessive force in carrying out the arrest.⁴²

4.43 Following the publication of the *Model Penal Code* the presumed-provocation rule suffered a “devastating deluge of criticism”.⁴³ Whilst in 1966 forty-five of the fifty States allowed the use of defensive force against unlawful arrests,⁴⁴ by 2001 thirty-nine states had abolished the right,⁴⁵ “consigning the common law rule to the dustbin of history”.⁴⁶

4.44 However, the Washington Court, like the *Model Penal Code*, maintained that an arrestee was still entitled to use defensive force “to resist an attempt to inflict injury on him or her during the course of an arrest”.⁴⁷

(c) England

4.45 The presumed-provocation rule appears to be a doctrine long forgotten by the English courts. Nevertheless, the last 35 years have seen a wealth of appellate law jurisprudence accumulated in relation to the unlawful arrest problem. From the 1960s to the 1980s the courts created various restrictions on the right to use defensive force against police officers. However, in the 1990s the courts appeared to resile from this approach and indicated that the use of defensive force against police officers should be treated no differently to any other case of legitimate defence against unlawful attack.

⁴¹ American Law Institute, *Model Penal Code* (1962) section 3.04(2)(a)(i).

⁴² American Law Institute, *Model Penal Code and Commentaries* (1985) at Vol 2 at 43.

⁴³ *State v Thomas* (1978) 262 NW2d 607 at 610, cited in *State v Valentine* (1997) 132 Wn2d 1 at 17; 935 P2d 1294 at 1302.

⁴⁴ For example see *State v Poinsett* (1967) 157 SE2d 570 at 571 (Supreme Court of South Carolina).

⁴⁵ Twenty-three had done so by statute and sixteen by judicial decision: Owens “Note: Maryland’s Common Law Right to Resist Unlawful Arrest: Does it Really Exist?” (2000) 30 U Balt L Rev 213 at 220.

⁴⁶ *State v Valentine* (1997) 132 Wn2d 1 at 18; 935 P2d 1294 at 1302 (Washington Supreme Court).

⁴⁷ (1997) 132 Wn2d 1 at 21; 935 P2d 1294 at 1304.

4.46 The first case of major importance during this period was the 1967 decision of *Kenlin v Gardiner*.⁴⁸ The two accused boys in that case had struck two police officers after they had unlawfully detained the boys (based on an erroneous suspicion that the boys had committed an offence). The Court held that the boys had been entitled to resist because the officers' actions amounted to technical assaults. The more interesting aspect of the judgment, however, was an *obiter* passage in relation to an alternative defence of mistake of fact. The boys had mistakenly believed that the officers, who had been dressed in plain-clothes, were thugs. However, the Court apparently took the view that, had the arrest in fact been lawful, the boys would not have been entitled to the benefit of their mistaken belief.

4.47 However, the subsequent decisions of *Blackburn v Bowering*⁴⁹ and *R v Lee*⁵⁰ points to a change in approach by the English courts to the unlawful-arrest problem.

4.48 The facts in *Blackburn v Bowering*⁵¹ involved the use of defensive force by the accused against bailiffs who were attempting to enforce warrants for the arrest of the accused. The accused claimed (and it was assumed for the purposes of the appeal) that they were unaware of the bailiff's official capacity.

4.49 Aside from the case-law considered above, the initial difficulty for the accused was the long-established rule⁵² that, in relation to offences of assaulting a police officer or court officer acting in the execution of their duty and like offences, the prosecution need not establish that the accused knew that he or she was assaulting a police officer or court officer. Although the pedigree of this rule has been strongly criticised, it has been repeatedly relied upon since 1865 and remains the law in England and Australia.⁵³ Indeed, Bingham MR remarked that it "makes good sense" not to require the prosecution to establish as part of its case that the accused believed that the victim of the assault was a police officer or court officer "given the public policy of giving such officers special protection when carrying out their difficult and sometimes dangerous duties."⁵⁴ Hence, the Court affirmed this rule.

⁴⁸ [1967] 2 QB 510.

⁴⁹ [1994] 3 All ER 380 (English Court of Appeal).

⁵⁰ [2001] 1 Cr App Rep 293.

⁵¹ [1994] 3 All ER 380 (English Court of Appeal).

⁵² See *R v Maxwell and Clanchy* (1909) 2 Cr App R 26 and *McBride v Turnock* [1964] Crim LR 456.

⁵³ See for discussion *Blackburn v Bowering* [1994] 3 All ER 380.

⁵⁴ *Blackburn v Bowering* [1994] 3 All ER 380, per Bingham MR.

4.50 Nevertheless, as Roch LJ stated, “the law relating to assault has developed since [this] narrow principle... was established. For the defendant to be guilty of an assault it must be proved that he knew that his use of force was unlawful, or, put another way, that he did not believe his use of force to be lawful.”⁵⁵ In other words, the prosecution must exclude the possibility that the arrestee acted in self-defence. Defenders, including arrestees, are entitled to act on the basis of the circumstances as they believe them to be, including on the basis of any, even unreasonable, mistake of fact. Hence, Bingham MR held:

“If a defendant applies force to a police or court officer which would be reasonable if that person were not a police or court officer, and the defendant believes that he is not, then even if his belief is unreasonable he has a good plea of self-defence... subject to the important qualification that the mistake must be one of fact (*particularly as to the victim’s capacity*) and not a mistake of law as to the authority of a person acting in that capacity.” (Emphasis added).

4.51 Whilst the Court was chiefly concerned with mistakes as to identity of the arrestor, the highlighted phrase in the quote above indicates that other mistakes of fact could ground a defence.

4.52 Bingham MR did not believe that this would weaken the protection which the law gives to police and court officers as such officers would generally identify themselves or be identifiable from the outset and the more unreasonable the belief the defendant claimed to have the less likely that he would be held to have it.⁵⁶

4.53 Hence, given that the accused may have mistakenly believed that the bailiffs were ordinary citizens who had no right to use force on them, the orders against them were quashed. In permitting an arrestee to act on a mistake of fact, the Court implicitly rejected the approach adopted in the earlier decisions.

4.54 However, in *R v Lee*,⁵⁷ the Court emphasised that arrestees who resist arrest were entitled to the benefit of mistakes of fact only and not mistakes of law. The accused in this case had assaulted two police officers who were arresting him for drink driving. The accused had acted on a mistake of law that he had not failed the roadside breath alcohol test. Whilst an accused was entitled to the benefit of a mistake of fact in such

⁵⁵ *Blackburn v Bowering* [1994] 3 All ER 380, per Bingham MR, per Roch LJ.

⁵⁶ *Blackburn v Bowering* [1994] 3 All ER 380, per Bingham MR. Leggatt LJ shared this view.

⁵⁷ [2001] 1 Cr App Rep 293 (English Court of Appeal).

circumstances (citing with approval *Blackburn v Bowering*⁵⁸), he was not entitled to the benefit of a mistake of law. As the mistake here was a mistake of law, it provided no defence for the accused.⁵⁹

4.55 In summary, it would appear that under the English common law an arrestee now has the same rights to use legitimate defence as any other defender confronted with an unlawful, or what appears to be an unlawful, attack. No longer are police officers cloaked with additional legal protection prohibiting resistance even to arrests carried out in an “unwarranted” or “unjustifiable” manner.⁶⁰ This accords with the jurisprudence in other common law countries, including New Zealand.

(d) New Zealand

4.56 In New Zealand, legitimate defence is governed by statute.⁶¹ Resistance to arrest is treated no differently to other forms of legitimate defence and the presumed-provocation rule has been abolished by statute.⁶²

4.57 As in England, it was established in *Waaka v Police*⁶³ that an arrestee was not entitled to the benefit of a mistake of law as to whether an arrest was lawful:

“... it can be no defence that the defendant, while aware that the person was a police constable, entertained an incorrect understanding of the law regarding the extent of the constable’s powers.”

4.58 However, an accused is entitled to the benefit of a mistake of fact. Hence, in *R v Thomas*⁶⁴ the Court of Appeal held that the accused was entitled to use defensive force against policemen whom the accused mistakenly believed were beating up a third party. The accused was not operating under a mistake of law given that she knew that those carrying out the arrest were police officers and that they were legally entitled to use necessary force. The accused’s mistake was one of fact as to how much

⁵⁸ [1994] 3 All ER 380.

⁵⁹ [2001] 1 Cr App Rep 293 at paragraph 13.

⁶⁰ *R v Browne* [1973] NI 96.

⁶¹ For example, self-defence is covered by s.48 of the New Zealand *Crimes Act 1961*.

⁶² Section 170 of the *Crimes Act 1961* states: “An illegal arrest shall not necessarily reduce the offence from murder to manslaughter but if the illegality was known to the offender it may be evidence of provocation.”

⁶³ [1987] 1 NZLR 754 at 759 (New Zealand Court of Appeal).

⁶⁴ [1991] 3 NZLR 141 (New Zealand Court of Appeal).

force was being used. The Court rejected the submission that the police should be granted special protection in such circumstances.⁶⁵

(e) Australia

4.59 In *R v Fry*,⁶⁶ the Supreme Court of South Australia considered whether the presumed-provocation rule remained part of the Australian common law. The accused in that case had killed a police officer who was pursuing him for brandishing a knife. The accused argued that the arrest was unlawful on the grounds that the police had used excessive force while attempting to carry out his arrest. However, the Court held that the force used by the police was reasonable in the circumstances and hence it was unnecessary to decide whether the presumed-provocation rule was still in force.⁶⁷ However, the Court made the following observation:

“The fine balance between personal liberty, on the one hand, and law enforcement, on the other, was, in earlier centuries when police forces as such did not exist, maintained by the use of crude techniques such as presumed provocation. In modern times, the police force has become a much more disciplined body and subject, in South Australia, to ministerial and regulatory control and to defined rules of conduct as well as judicial powers to exclude evidence and the availability of the right to claim damages for excessive violence. Furthermore, a disciplinary board exists to investigate and discourage excessive violence.”⁶⁸

4.60 It is therefore doubtful that the presumed-provocation rule continues to apply at common law in Australia.

4.61 In the States governed by criminal codes, resistance to arrest is treated no differently to other forms of legitimate defence⁶⁹ and the presumed-provocation rule has been abolished.⁷⁰

⁶⁵ *Ibid* at 143-144.

⁶⁶ (1992) 58 SASR 424.

⁶⁷ The Court ambiguously concluded that “the ancient defence of presumed provocation did not apply”: *R v Fry* (1992) 58 SASR 424 at 439.

⁶⁸ *R v Fry* (1992) 58 SASR 424 at 437-438.

⁶⁹ See the Criminal Codes of Queensland, Western Australia, the Northern Territory and the South Australian *Criminal Law Consolidation Act 1935*. See also the discussion of the use of force in resisting arrest in Gilles *Criminal Law* (4th ed LBC Information Services 1997) at 328-331.

⁷⁰ Queensland *Criminal Code*, section 268; Western Australian *Criminal Code*, section 245; Tasmanian Criminal Code, section 160(4). Each provision has the same effect as section 170 of the New Zealand *Crimes Act 1961*.

(f) Canada

4.62 In Canada defensive force may be used to repel unlawful conduct by police officers in the same manner as other forms of legitimate defence⁷¹ and the presumed-provocation rule has been abolished by statute.⁷² However, the Canadian Law Reform Commission has recommended that a special exception should be created to exclude the use of defensive force against those in law enforcement. The suggested provision states:

“[The right to use defensive force] does not apply to anyone who uses force against a person reasonably identifiable as a peace officer executing a warrant of arrest or anyone present acting under his authority.”⁷³

4.63 The Commission stated:

“[The clause] excludes force altogether against arrest made in good faith but in fact under a defective warrant by a person who is clearly a peace officer. The policy is to restrict violence, to render it as far as possible a State monopoly and to make the arrestee submit at the time and have the matter sorted out later by authority.”⁷⁴

4.64 This suggested provision has been the subject of criticism by one Canadian commentator:

“This will not reduce violence directed at police officers but will result in unjust convictions for those who have exercised their civil right to resist unlawful force from any source. There cannot be a right of self-defence against lawful force such as a lawful arrest even if the arrestee is innocent. On the other hand there should be a right of self-defence against any illegal force.”

4.65 Interestingly, the Law Commission had earlier proposed in its Working Paper a similar test to the one suggested above.⁷⁵ The Commission also recommended that, in cases where the arrest was unlawful due to a *bona*

⁷¹ Stuart *Canadian Criminal Law* at 440. Stuart cites Larlham [1971] 4 WWR 304 (BCCA) in support of the proposition that the right to self-defence under section 34(1) of the Canadian *Criminal Code* applies to resisting illegal searches, and argues that the same principle should apply to unlawful arrests.

⁷² Canadian *Criminal Code* section 232(4), which has the same effect as section 170 of the New Zealand *Crimes Act 1961*.

⁷³ Canadian Law Reform Commission *Recodifying Criminal Law* (Report 31 – 1987) at 36.

⁷⁴ *Ibid* at 37.

⁷⁵ Canadian Law Reform Commission, *The General Part - Liability and Defences* (Working Paper 29 – 1982) at 100-104.

vide mistake of law on behalf of the arresting officer, the arrestee could not knowingly use force which was likely to cause death or serious bodily harm. However, ultimately this approach was discarded by the Commission in its later Report.

(g) *Summary and Conclusions from Review of Various Jurisdictions*

4.66 The review of the evolution of the presumed-provocation rule through to the modern jurisprudence regarding the right to resist unlawful arrest illustrates the diversity of approaches taken in the various common law jurisdictions. Ireland's apparent retention of the presumed-provocation rule (assuming that the 1997 Act does not apply to lethal resistance) may be contrasted with, on the one hand, the special restrictions imposed on resistance to arrest in the United States and, on the other, the absence of special restrictions in other common law jurisdictions. In order to assess which approach is to be preferred, it is now necessary to consider in greater detail the policy arguments concerning the right to resist unlawful arrest.

(5) *Policy Considerations*

(a) *Arguments in Favour of Restricting the Right to Resist Unlawful Arrest*

4.67 One of the primary reasons urged by advocates of the prohibition on defensive force against police officers is that such a clear prohibition would reduce violent confrontations in arrest situations. As one American court observed, "force begets force and escalation into bloodshed is a frequent probability".⁷⁶ This consequence was also discussed by the American Law Institute in considering the *Model Penal Code*.⁷⁷ Permitting resistance to arrests, even those which are unlawful, can lead to at least four harmful consequences, namely:

- (a) The arrestee may be harmed;
- (b) Bystanders may be harmed;
- (c) The arrestor may be harmed;
- (d) Anarchy is encouraged.

(i) *Risk of Harm to the Arrestee*

4.68 A decision to resist arrest will almost inevitably lead to escalation in the amount of force used by arrestors to carry out the arrest.⁷⁸

⁷⁶ *State v Koonce* (1965) 214 A2d 428 at 436 (New Jersey Superior Court, Appellate Division).

⁷⁷ American Law Institute *Model Penal Code and Commentaries* (1985) Vol 2 at 43.

⁷⁸ Arrestors are not legally obliged "to retreat" when faced with resistance to arrest, and nor are law enforcement officers likely to do so.

Notwithstanding the rights or wrongs of the arrestee's position, it is likely that the arrestee will come off second best from the confrontation.⁷⁹ It is therefore argued that the risk of harm associated with resisting arrest is potentially more detrimental to the arrestee than the disadvantages associated with submitting to an apparent unlawful arrest. The drafters of the Model Penal Code justified their prohibition on the use of defensive force against law enforcement officials on this ground.⁸⁰

4.69 In response, however, it is argued that the potential for harm to an arrestee is not, of itself, a good reason for prohibiting resistance to arrest. As one American judge has argued:

“It may be true, as the majority posits, those who resist an unlawful arrest... will often be the worse for it physically; however, that is not to say that their resistance is unlawful. The police power of the state is not measured by how hard the officer can wield his baton but rather by the rule of law.”⁸¹

(ii) Risk of Harm to Bystanders

4.70 Regardless as to whether the arrestee or arrestor is in the right, wherever an arrest is resisted by force, and in particular by lethal force, there is a risk that innocent bystanders may be harmed.

(iii) Risk of Harm to the Police

4.71 When attempting to strike the correct balance between arrestee's rights to liberty and arrestor's rights to safety, it is argued that due weight should be given to the fact that law enforcement officers are constantly 'on the front line' dealing with difficult and confrontational situations. Therefore, as one Court concluded, “[police officers] attempting in good faith, although mistakenly, to perform their duties... should be relieved of the threat of physical harm at the hands of the arrestee.”⁸²

⁷⁹ Smith, “Comment, Criminal Law – Arrest – The Right to Resist Unlawful Arrest” (1967) 7 Nat Resources J 119 at 125, cited in Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1 at 27. Wright, “Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?” (1997) 46 Drake L Rev 383 at 391-392, argues that typically arrestees are “vastly outgunned and “resistance is futile at best”.

⁸⁰ American Law Institute *Model Penal Code and Commentaries* (1985) at Vol 2 at 42-43.

⁸¹ *State v Valentine* (1997) 132 Wn2d 1 at 37; 935 P2d 1294 at 1312, per Sanders J dissenting.

⁸² *State v Koonce* (1965) 214 A2d 428 at 436 (New Jersey Superior Court, Appellate Division).

4.72 Furthermore, it may be argued that the rights of the arrestor should be favoured given that the vast majority of arrests are lawful. Hence, a blanket prohibition on the right to resist police arrest would rarely lead to unfair results for arrestees.⁸³ Indeed, it has been suggested that only criminals would resist arrest and, therefore, the revocation of the right to resist arrest would not be prejudicial to law-abiding citizens.⁸⁴

4.73 In response, it is said that this argument overlooks the fact that some innocent arrestees resist out of “principle or passion” at the unlawful police action.⁸⁵ Such a reaction is envisaged by the presumed-provocation rule which views unlawful arrests as ‘provocation’.

(iv) Encouraging Anarchy

4.74 In *State v Valentine*⁸⁶ the majority of the Washington Supreme Court decided to abandon the common law right to resist unlawful arrest except where the arrestee was faced with a risk of injury. The majority reasoned that, “[w]hilst society has an interest in securing for its members the right to be free of unreasonable searches and seizures, society also has an interest in the orderly resolution of disputes between its citizens and government.”⁸⁷ Imposing a prohibition on the use of force to resist arrest would arguably foster an attitude of obedience to the authorities; to permit otherwise would be “inviting anarchy”:⁸⁸

“Briefly stated, a far more reasonable course is to resolve an often difficult arrest legality issue in the courts rather than on often hectic and emotion laden streets. Modern urbanized society has a strong interest in encouraging orderly dispute resolution. Confronting this is the outmoded common law rule which fosters

⁸³ Wright “Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?” (1997) 46 Drake L Rev 383 at 392.

⁸⁴ Warner “The Uniform Arrest Act” (1942) 28 Va L Rev 315 at 330, cited in Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1 at 20.

⁸⁵ Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1 at 21.

⁸⁶ (1997) 132 Wn2d 1; 935 P2d 1294 (Washington Supreme Court).

⁸⁷ (1997) 132 Wn2d 1 at 18; 935 P2d 1294 at 1302, citing *United States v Ferrone* (1971) 438 F2d 381 at 390.

⁸⁸ *State v Valentine* (1997) 132 Wn2d 1 at 21; 935 P.2d 1294, 1304. A similar argument was put forward by Wright, “Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?” (1997) 46 Drake L Rev 383 at 390-391.

unnecessary violence in the name of an obsolete self-help concept which should be promptly discarded.”⁸⁹

4.75 As observed by the American Law Institute “[t]o the extent that the law can encourage conduct on this point, it is believed to be entirely sound that the encouragement be in favor of judicial resolution of the legality of the arrest, rather than self-help”.⁹⁰

4.76 Determining the legality of an arrest is a notoriously difficult task. As one commentator has argued, “[even] a law-abiding citizen who might seek to resist in good faith has no sound method by which to gauge the legality of his conduct.”⁹¹ This task is considerably more difficult today, given the plethora of laws regarding criminal processes, than was the case when the presumed-provocation rule was developed.⁹²

4.77 However, it has been argued that the ‘anarchy’ argument “focuses on preventing violence and injury, [but] it fundamentally confuses the use of police force in affecting arrests with creating civilized order. Although lawful arrests are necessary to restore order, unlawful arrests are themselves a threat to law and justice.”⁹³

4.78 Certainly, the risk of encouraging violent confrontations did not discourage the seventeenth century architects of the presumed-provocation rule from reducing the liability of those who killed whilst resisting unlawful arrests.⁹⁴

4.79 However, it may be argued that society has changed considerably since the period when the presumed-provocation rule evolved such that

⁸⁹ *State v Valentine* (1997) 132 Wn2d 1 at 19-20; 935 P2d 1294 at 1303 citing *State v Thomas* (1978) 262 NW2d 607 at 611.

⁹⁰ American Law Institute Model Penal Code and Commentaries (1985) at Vol 2 at 42-42.

⁹¹ Smith, “Comment, Criminal Law – Arrest – The Right to Resist Unlawful Arrest” (1967) 7 Nat Resources J 119 at 124-125, cited in Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1 at 26.

⁹² Wright, “Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?” (1997) 46 Drake L Rev 383 at 392.

⁹³ Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1 at 31.

⁹⁴ Both *Hopkin Huggett’s Case* (1666) 84 Eng Rep 1082 and *R v Tooley* (1710) 92 Eng Rep 349 involved the use of lethal defensive force. This point is made by Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1 at 19.

physical resistance can no longer be justified.⁹⁵ A person wrongfully arrested in eighteenth-century England did not enjoy any of the pretrial procedural rights a person enjoys today. Consequently, a person arrested unlawfully could be detained indefinitely and individuals had a strong incentive to resist arrest. In contrast, modern criminal procedural safeguards are intended to ensure that accused persons are bailed where appropriate and that, where accused persons are incarcerated prior to trial, prison conditions are satisfactory and that trials are brought without undue delay.⁹⁶

4.80 Furthermore, it is argued that the legal remedies available subsequent to an unlawful arrest are now adequate to vindicate the violation of an arrestee's personal liberty. For example, an unlawful arrest may result in the dismissal of criminal proceedings that prompted the unlawful arrest.⁹⁷ Other remedies include the right to bring civil proceedings and to instigate complaint procedures.⁹⁸

4.81 Nevertheless, some would regard these '*post facto*' remedies as inadequate in that they "can be expensive and time consuming, require proof which is sometimes unavailable, and do nothing to remove the stigma of the arrest."⁹⁹ The dissenting drafters of the Model Penal Code also observed that the alternative remedies for police misconduct have proved ineffective.¹⁰⁰

4.82 Furthermore, regardless as to whether it is accepted that these remedies are effective,¹⁰¹ it has been argued that the availability of

⁹⁵ Wright "Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?" (1997) 46 Drake L Rev 383 at 388.

⁹⁶ *Ibid* at 389.

⁹⁷ See, for example, *DPP v McCreesh* [1992] 2 IR 239, and other cases discussed in Fennell *The Law of Evidence in Ireland* (Butterworth 1992) at 51-72.

⁹⁸ The various remedies are discussed in Wright, "Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?" (1997) 46 Drake L Rev 383 at 393-401.

⁹⁹ Tauson, "Recent Decision: Criminal Law – Resisting Arrest – Unlawful Arrest – The Pennsylvania Supreme Court held that resistance to an arrest found to be unlawful cannot result in a conviction for resisting arrest but can result in a conviction for aggravated assault: Commonwealth v. Biagini, 655 A2d 492 (Pa 1995)" (1996) 34 Duq L Rev 755 at 773.

¹⁰⁰ American Law Institute *Model Penal Code and Commentaries* (1985) Vol 2 at 43.

¹⁰¹ Chevigny "The Right to Resist an Unlawful Arrest" (1969) 78 Yale LJ 1128 at 1135-36, disputes that either remedy is effective. He argued that the expense and delay involved in civil proceedings can deter many potential claimants. He also suggested that administrative inquiries into alleged police wrong-doing will often be futile where there is a lack of corroborative evidence in support of the complaint. The dissenting drafters of the Model Penal Code also used this line of reasoning to support their argument that there should be no prohibition on the use of lethal defensive force against law enforcement officials.

alternative remedies is unlikely to discourage an arrestee from resisting an unlawful arrest in the heat of the moment.¹⁰²

4.83 Thus, some commentators suggest that the right to resist should be reassessed in light of its origins as a form of provocation.¹⁰³

(b) Arguments Supporting a Right to Resist Arrest

4.84 Three related arguments may be made in support of a right to resist arrest, namely:

- (a) To uphold the liberty of citizens;
- (b) To ensure that government agents are treated no differently;
- (c) To discourage abuse of police powers.

4.85 One of the fundamental planks of the argument in support of the right to resist unlawful arrest is the value that society attaches to individual freedoms. Arguably, to grant law enforcement officers the privilege to use unlawful force and deny citizens the right to defend themselves would undermine the freedoms that legitimate defence aims to secure.¹⁰⁴

“Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”¹⁰⁵

4.86 At best, a prohibition on the right to resist unlawful arrest creates a separate rule for law enforcement officers and for citizens. At worse, it creates the opportunity for the abuse of powers of arrest.

4.87 When resisting an unlawful arrest is criminalized, the initial unlawful arrest becomes lawful and the resisting individual may be charged

¹⁰² Chevigny “The Right to Resist an Unlawful Arrest” (1969) 78 Yale LJ 1128 at 1133-34.

¹⁰³ *Ibid* at 1147. A similar argument was put forward by Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1 at 45.

¹⁰⁴ *State v Valentine* (1997) 132 Wn2d 1 at 27-28; 935 P2d 1294 at 1307, per Sanders J dissenting.

¹⁰⁵ *Ibid* at 1311, per Sanders J dissenting, citing a passage from the dissenting judgment of Brandeis J in *Olmstead v United States* (1928) 277 US 438 at 485 (United States Supreme Court).

with a crime, even though the individual committed no crime prior to being provoked by the police. In such situations, the police, who already have the advantage in such encounters, have further incentive to abuse their authority.”¹⁰⁶

(6) Options for Reform

4.88 Reform of the law in this jurisdiction regarding the unlawful-arrest problem is necessary if only for the purposes of clarification given the current uncertain state of the law. Law reform options range across a spectrum depending largely on policy choices as to whether greater weight is placed on the protection of arrestors or the upholding of individual freedoms:

- (i) An absolute prohibition on the use of defensive force to resist arrest;
- (ii) An absolute prohibition on the right to resist arrest by members of the Gardaí;
- (iii) Defensive force is permitted only when the arrest *is* unlawful;
- (iv) Defensive force is permitted only to the extent that it is (or appears to be) necessary to prevent harm to the arrestee;
- (v) Culpability for killing in resisting an unlawful arrest will be reduced from murder to manslaughter;
- (vi) Defensive force is permitted to resist an unlawful arrest or a lawful arrest that the arrestee believes, due to a mistake of fact, is unlawful.

4.89 Options (i) and (ii) draw a distinction between arrests carried out by law enforcement officers and private citizens. On the one hand, if the carrying out of arrests is considered to be such value to society that arrestors should be given special protection then arguably this protection should apply to both public and private arrestors. On the other hand, if the purpose of the prohibition on resistance is to discourage self-help by arrestees leading to ‘street violence’, then arguably the law should likewise discourage private citizens from attempting to arrest others unless the lawfulness of the arrest is absolutely clear-cut. Law enforcement is best carried out by professionals trained to carry out the task.

4.90 The advantage of an absolute prohibition is that it would send a clear message to arrestees that regardless of whether the arrest is subsequently determined to be unlawful, any resistance would not be tolerated by the courts.¹⁰⁷ This would go a long way toward eliminating

¹⁰⁶ Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1 at 41 and 43.

¹⁰⁷ See Wright, “Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?” (1997) 46 Drake L Rev 383 at 392.

cases where an arrestee wrongfully resists a lawful arrest because of a mistaken belief that it is unlawful. It would ensure that the risk of harm to the arrestor, arrestee and innocent bystanders is minimised.

4.91 However, arguably the difficulty with options (i) and (ii) is that they effectively legalise what would otherwise be unlawful actions by arrestors and criminalize what would otherwise be lawful legitimate defence by arrestees. Both these options also enable law enforcement officers to abuse their powers and offer little protection for the liberty of the individual. Accordingly, the Commission does not recommend the adoption of either of these options.

4.92 Option (iii) addresses some of these concerns in that arrestees would be permitted to repel unlawful arrests, but would do so at their peril given that they would not be entitled to the benefit of a mistaken belief should the arrest turn out to be lawful. This was effectively the law as pronounced by the English Court of Appeal in *R v Fennell*,¹⁰⁸ *R v Browne*,¹⁰⁹ and *R v Ball*,¹¹⁰ although it was subsequently modified in *Blackburn v Bowering*.¹¹¹ This type of approach retains support in some quarters:

“The police are content in the knowledge that an individual that resists a lawful arrest will face additional sanctions. Given the loose standard provided by the probable cause requirement, logic would dictate that few individuals justified in using force to resist an arrest will feel secure enough in their convictions to do so. But should they do so, an ability to show the illegality of the arrest will not only ward off a criminal conviction but also will presumably humble any police misconduct involved.”¹¹²

4.93 However, the removal of the defence of mistake of fact singles out resistance to unlawful police action as warranting different treatment from other forms of legitimate defence. Whether defenders should be entitled to the benefit of mistakes is debated elsewhere, but if so then it is difficult to justify a different rule simply on the basis that the unlawful attacker is a law enforcement officer. In addition to this, the failure to cater for mistakes in this regard in reality prevents individuals from resisting unlawful arrests at

¹⁰⁸ [1971] 1 QB 428.

¹⁰⁹ [1973] NI 96.

¹¹⁰ (1989) 90 Cr App Rep 378.

¹¹¹ [1994] 3 All ER 380.

¹¹² Wright, “Resisting Unlawful Arrests: Inviting Anarchy or Protecting Individual Freedom?” (1997) 46 Drake Rev 383 at 406. See also Hemmens and Levin, “‘Not a Law At All’: A Call for a Return to the Common Law Right to Resist Unlawful Arrest” (1999) 29 Sw U L Rev 1at 27.

all. This is because there are very few arrests which are clearly unlawful and consequently, individuals would be deterred from exercising their rights in this regard in case the arrest turns out to be lawful. Accordingly, the Commission does not favour this approach.

4.94 Option (iv) makes reference to the compromise suggested in *R v Fennell*¹¹³ and which the *Non Fatal Offences Against the Person Act 1997* attempts to replicate, namely that an arrestee is only permitted to use defensive force if he or she is threatened with a risk of harm. Similarly the United States *Model Penal Code* and decisions such as *State v Valentine*,¹¹⁴ whilst generally prohibit resistance to unlawful arrests, would still permit the use of defensive force to prevent the infliction of injury by the arrestor.¹¹⁵

4.95 However, a number of objections may be made to this approach. First, if the accused is to be judged on the basis of his or her subjective view as to the facts, then arguably the test would be “unduly indulgent of defendants”.¹¹⁶ Given that many arrests involve the use of some physical force by the arrestor, it would be difficult for a prosecutor to prove that an accused did not fear some harm. Even if an objective test is adopted in this regard, a reasonable person is very likely to fear harm in such a situation. Accordingly, this approach would permit the use of lethal force in a wide variety of circumstances.

4.96 Secondly, this special restriction for unlawful-arrests is arguably unnecessary given that the conventional rules of legitimate defence impose a requirement that any defensive force must be proportionate to the unlawful attack. Hence, even in the absence of such a special rule, it would be unlikely that the use of lethal force to resist arrest would be allowed except in extreme circumstances. Consequently, the Commission does not recommend the adoption of this approach.

4.97 Option (v) essentially proposes the reintroduction of the presumed-provocation rule.¹¹⁷ One of the advantages of this rule is that it offers a compromise between, on one hand, the severity of a conviction of murder, and on the other, an unduly lenient exoneration of an arrestee who kills whilst being subjected to an unlawful arrest. Such compromises are not unknown to this jurisdiction; the excessive defence doctrine is an example.

¹¹³ [1971] 1 QB 428.

¹¹⁴ (1997) 132 Wn2d 1; 935 P2d 1294.

¹¹⁵ *Ibid* at 1304.

¹¹⁶ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 748, referring to the test under the s.18 of the *Non Fatal Offences Against the Person Act, 1997*.

¹¹⁷ Such a rule would presumably stand outside the conventional law regarding provocation.

4.98 However, arguably a strict presumed-provocation rule would fail to take into account that some unlawful arrests would be more deserving of a lethal response than others. A solution proposed by one of the main proponents of the reintroduction of this rule was that there should be a distinction drawn between arrests which are patently unlawful and those that are unlawful as a result of a mere technicality.¹¹⁸ However, such a distinction would be difficult to make.¹¹⁹

4.99 This approach has the potential to operate too leniently or too harshly in respect of arrestees. Arguably, arrestees who resist an unlawful arrest in bad faith and do not realise it was unlawful should be guilty of murder rather than manslaughter. However, if the presumed-provocation rule is applied, they would be guilty of manslaughter only. However, arguably those who resist an unlawful arrest while being aware of its unlawfulness should not be guilty at all. Under this approach, they would be guilty of manslaughter. Consequently, the Commission does not recommend this approach.

4.100 Finally, option (vi) proposes that the problem of unlawful arrests should be dealt with under the general rubric of legitimate defence and should not be given special treatment. Such an approach would ensure that a consistent approach was followed in relation to the use of defensive force and that one rule was applied for both private citizens and those in positions of authority.

4.101 However, permitting arrestees to act on the basis of their subjective view of the facts poses particular risks that may not be present in other forms of legitimate defence. In particular, the legality of an arrestor's actions is notoriously difficult to determine given the complexity of the laws of arrest and the often emotionally laden atmosphere. Mistakes on behalf of both the arrestor and arrestee are liable to occur. It is inevitable that if disputed arrests are adjudicated by way of a show of force then harm will result.

4.102 Accordingly, it is suggested that while option (vi) is desirable if an objective test towards the question of mistake is adopted, it is not appropriate if a subjective test is applied in this regard. This is because a subjective test fails to offer sufficient protection to law enforcement officers in carrying out their functions. In addition to this, a subjective test could

¹¹⁸ Chevigny "The Right to Resist an Unlawful Arrest" (1969) 78 Yale LJ 1128.

¹¹⁹ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 464, states that "the difficulty is that one can hardly distinguish as a matter of rule between an outrageously wrong arrest and one that is wrong only for breach of some technical rule or limitation". Chevigny, "The Right to Resist an Unlawful Arrest" (1969) 78 Yale LJ 1128 at 1150, concedes that it would be a "difficult" although "not impossible" task.

lead to anarchy¹²⁰ and in effect encourages arrestees to resist arrest in every instance where they believe the arrest is unlawful. The policy considerations are accordingly against a subjective approach in this regard.

4.103 We recommend in chapter 7 that an objective test be adopted in respect of the question of mistake with a partial defence being available for those who act on the basis of honest but unreasonable mistakes. Accordingly, there is no justification for treating unlawful arrests any differently from other unlawful conduct. While adopting this approach means that there is still a risk of some harm occurring to the arrestor, arrestee or innocent bystanders, it is suggested that this harm could occur anyway. Prohibiting the use of lethal defensive force against law enforcement officers is unlikely to deter arrestees from resisting arrests as discussed earlier and just leads to unjust convictions.¹²¹

4.104 This approach strikes an adequate balance between on the one hand the need to protect law enforcement officials who are performing their duties and to discourage conflict avoidance and on the other hand, the need to protect the liberty of an individual and to discourage abuse of police powers.

4.105 Whether this is applicable only to mistakes of fact or also encompasses mistakes of law will be considered after the discussion on this issue in Chapter 7.

4.106 Accordingly, the Commission provisionally recommends that unlawful arrests should be dealt with under the general rubric of self defence and should not be given special treatment. Therefore, a person should be entitled to resist an unlawful arrest which the person realises is unlawful or a lawful arrest which the arrestee believes and a reasonable person would believe due to a mistake is unlawful.

C Lack of Capacity and Mistaken Attacker Cases

(1) Introduction

4.107 Two non-paradigm cases do not appear to chime well with the retention of the unlawfulness requirement. These are cases those in which the attack is deemed lawful by reason of the fact that either the attacker does not have the requisite capacity to perform an unlawful attack, or the ‘mistaken attacker’ cases discussed below. Should it matter, under the law of self defence, whether or not the attacker has the requisite capacity when we

¹²⁰ For a discussion of this problem see *State v Valentine* (1997) 132 Wn2d 1 at 21; 935 P2d 1294 at 1304 and paragraphs 4.74-4.83.

¹²¹ See for example the comments of the American Law Institute Model Penal Code and Commentaries Vol 2 at 43.

are assessing the lawfulness of the defender's response? The lack of capacity cases might be accommodated within the unlawfulness rule by reasoning that although the insane attacker would be excused on grounds of lack of *mens rea*, for the purposes of self-defence, the attack itself remains unlawful by reason of the fact that it cannot be justified at law. Determining the lawfulness of the act from the perspective of the defender in this way may obviate the need to treat these non-paradigm cases as specific exceptions to the unlawfulness rule.

4.108 The Commission acknowledges that further exploration into this area is merited, in an effort to conceptually reconcile these cases with the unlawfulness requirement and invites submissions as to how this may best be achieved.

4.109 The unlawfulness rule places an important restriction on the use of defensive force:

“Self-defence is not a charter to kill or assault those who are under a duty or who have a right to apply force to the accused. In the days of capital punishment, a condemned man could not have killed the hangman in self-defence. A person who is being lawfully arrested is not entitled to defend himself by using force to resist the arrest, even if he be innocent of the offence for which he is being arrested. A prisoner escaping from gaol cannot justify or excuse shooting a warder though he believes on reasonable grounds that the warder was trying to shoot him and that it was necessary to shoot back to avoid being killed. A man who threatens deadly force to a person who is attempting to rape his wife or child cannot be killed with impunity by the would-be rapist, even if he believes on reasonable grounds that he will otherwise be killed. The lawful application of force, even deadly force, does not confer on the person to whom it is applied any legal authority, justification or excuse to resist it.”¹²²

4.110 These examples may be contrasted with a paradigm case of legitimate defence involving a (sane) attacker wielding an “uplifted knife”. Whilst few would dispute that a defender would normally be entitled to use lethal defensive force, if necessary, to repel such an unlawful attack, it is useful to examine why the defender is considered to be morally justified in taking the life of the attacker.

¹²² *Zecevic v DPP* (1987) 71 ALR 641 (High Court of Australia) per Brennan J (dissenting). As discussed below, the majority of the Court took the view that there may be some unusual situations where defensive force may be used against a lawful attacker.

4.111 A defender who takes the life of his or her attacker is depriving the attacker of what might be considered a fundamental human right, namely the right to life. The defender's decision to take the attacker's life rather than to submit to being killed by the attacker is a form of self-preferential killing. Likewise, a defender who intervenes to defend a third party from a homicidal attacker, and in doing so kills the attacker, has also exercised a preference for one human life over another.

4.112 In general, some form of forfeiture theory is called upon to justify self-defensive killing, whereby the attacker, by dint of their conduct, is said to have forfeited his or her right to life.¹²³ Hence, where the law must choose between the competing rights of the innocent defender and the wrongful attacker, the rule elevates the defender's rights (such as the right to life) above that of the attacker.

4.113 In contrast, the common law has demonstrated an unwillingness to permit the taking of an innocent life, even in extreme circumstances where this is necessary to save the life of another innocent person (or even numbers of innocent people). The common law's concern with the protection of innocent life was famously illustrated in the case of *R v Dudley and Stephens*.¹²⁴ In that case, an English court found guilty of murder shipwrecked sailors who killed and ate a cabin-boy to sustain themselves until they were rescued. The sailors and cabin-boy were castaway in a lifeboat and had been without food or water for days. The guilty verdict was returned notwithstanding the jury's finding that if the sailors had not eaten the cabin-boy they probably would not have survived until they were rescued four days later, and that the boy, who was in a weaker condition, would probably have died before them.¹²⁵

4.114 This concern for the protection of innocent life appears to underpin the basis of the unlawfulness rule; that is, only an attacker who is acting unlawfully may be said to have forfeited their right to life. In contrast, it might seem peculiar to suggest that a person who is acting

¹²³ See for discussion Uniacke *Permissible Killing* (Cambridge University Press 1994) at 194-209.

¹²⁴ (1884) 14 QBD 273. For discussion, see McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell) at 797.

¹²⁵ Whether *R v Dudley and Stephens* is authority for the proposition that innocent life will be protected absolutely in all circumstances is open to conjecture. However, that this decision has stood for well over 100 years demonstrates the common law's resolve to protect innocent life. See *R v Dudley and Stephens* (1884) 14 QBD 273. The decision was approved by the House of Lords in *R v Howe* [1987] AC 417. For discussion see McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell) at 797.

lawfully, even if he or she is endangering the life of another, could thereby forfeit such a fundamental right as their right to life.

4.115 Such is the apparent logic of these propositions that the unlawfulness rule operates without difficulty in the vast majority of cases and judicial comment is rare. However, although rarely encountered, the rule can generate significant legal dilemmas in the ‘non-paradigm’ cases where the distinction between the innocent defender and the wrongful attacker becomes blurred. For convenience, these non-paradigm cases will be considered below under 2 headings *lack of capacity* cases and *mistaken attacker* cases. The operation of the rule in Irish law and other common law jurisdictions will then be discussed, and in particular examine how these non-paradigm cases are accommodated, if at all. Finally, we will address a number of alternative approaches to the conventional unlawfulness rule and consider whether any of these options present a preferable method for dealing with the non-paradigm cases.

(2) *The Unlawfulness Rule and Criminal Liability*

4.116 The non-paradigm cases set out below are difficult to accommodate within the conventional boundaries of the unlawfulness rule. A number of issues arise as a result.

4.117 First, the fundamental question arises as to whether any defence should be available to defenders who use lethal defensive force in these non-paradigm cases. If not, then the conventional operation of the unlawfulness rule should remain undisturbed. However, this chapter proceeds on the assumption that in at least some such situations there should be a defence available to defenders.

4.118 The second question that arises is whether legitimate defence is the appropriate vehicle for exculpating such defenders. It may be argued that it is better not to tamper with the well-established rules of legitimate defence which have been developed with paradigm cases in mind. Non-paradigm cases, under this argument, would be better dealt with under either an alternative pre-existing defence, such as necessity,¹²⁶ or under a new specifically devised defence. This is an important issue which will be returned to later in this chapter. First, however, we identify a number of distinct groups of non-paradigm cases.

(a) *Lack of Capacity Cases*

4.119 *Lack of capacity* cases are those where the attacker’s actions do not attract criminal liability only because the attacker does not have the capacity to form a criminal intent. An example would be an insane attacker.

¹²⁶ For a discussion of the defence of necessity to murder, see McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell) at 829-835.

The insane attacker is not criminally responsible for his or her actions, and hence in one sense is acting lawfully. A strict requirement of unlawfulness would deny a defender, who knew their attacker to be insane,¹²⁷ the right to use self-defensive force. Similar difficulties could also arise, for example, in cases where the attacker was under the age of capacity.

(b) *Mistaken Attacker Cases*

4.120 *Mistaken attacker* cases are those where the attacker's actions are lawful only because the attacker has acted on a mistaken belief of the circumstances. A hypothetical example was provided by McGarvie J in the Australian Supreme Court of Victoria decision of *Lawson and Forsythe*:¹²⁸

“Take the example of an identical twin whose brother, a notorious killer, had threatened to kill A before the end of the day. Both A and the twin know of the threat. The twin knows of and recognises A but A is unaware that the killer has a twin brother. The twin innocently walking in the country with a gun to shoot rabbits, unexpectedly meets A. A believing he has met the killer who is there to shoot him, draws a pistol he is carrying for protection and commences to fire shots at the twin. The twin realizes A's mistake and knows that A reasonably believes it necessary to shoot him to save his own life. In other words the twin knows that A is doing what is lawful in firing the shots at him.”¹²⁹

(c) *Summary of the Non-Paradigm Cases*

4.121 In the examples considered above the attacker is judged to be innocent ‘in the eyes of the law’. Yet, many would argue that defenders in such situations should be permitted to repel the attack by resorting to legitimate defence. After all, why should the innocent defender be required to submit to the attack? On the other hand, to allow the use of legitimate defence would appear to undermine the requirements of the unlawfulness rule. After all, how can the taking of an attacker's life be morally justified if the attacker has not forfeited it by some unlawful conduct?

4.122 Unfortunately there has been little judicial discussion of these apparent flaws in the unlawfulness rule. As a result, there is a lack of clarity throughout the common law world as to whether an unlawful attack is an essential condition for the resort to legitimate defence.

¹²⁷ This qualification is based on the assumption that the test for legitimate defence is a subjective one.

¹²⁸ *R v Lawson and Forsythe* 1985 VIC LEXIS 452; [1986] VR 515.

¹²⁹ LEXIS at 39-40.

(3) *The Law in Ireland*

4.123 How would the Irish courts deal with the examples discussed above? The answer to this question is far from clear. The initial problem is determining whether legitimate defence as a defence to murder remains under the ambit of the common law, or whether it is now governed by the *Non Fatal Offences Against the Person Act 1997*. Given this uncertainty, both eventualities are considered below.

4.124 If the defence remains under the rubric of the common law, it would appear that the position of the Irish courts is that unlawfulness is an essential condition for legitimate defence.¹³⁰ However, this conclusion cannot be stated with certainty given that there appears to have been no reported case that has turned on the application of the rule and consequently the unlawfulness rule has not been subjected to any critical analysis.

4.125 The situation is even less clear if lethal legitimate defence falls within the ambit of the *Non Fatal Offences Against the Person Act 1997*. First, the Act is ambiguous as to whether the threat must be unlawful. Section 18(1) permits force protecting persons “from injury, assault or detention caused by a criminal act...”¹³¹ It is unclear whether the phrase, “caused by a criminal act” refers only to “detention”, or whether it also refers to “injury” and “assault”.¹³² If the former is correct, then defensive force may be used to prevent “injury” regardless as to whether the threat of injury is from a lawful or unlawful source.¹³³

4.126 It is more likely, however, that the drafters of the provision intended that defensive force be permissible to prevent “injury... caused by a criminal act.” That this is the intended meaning is evident not only from the context of the entire section,¹³⁴ but also from the report of the original drafters of the provision, the Law Commission of England and Wales. The

¹³⁰ For example, Butler J in *People (DPP) v Dywer* [1972] IR 416 at 429 stated: “A person is entitled to protect himself from unlawful attack.”

¹³¹ Sections 18(c) and 18(d) are constructed in a similar manner. Defence of property is permitted against “appropriation, destruction or damage caused by a criminal act”.

¹³² Unlike an “injury”, which may be inflicted either lawfully or unlawfully, an “assault” is by definition a criminal act, namely an intentional (or reckless) application of force to another. Therefore, the phrase, “caused by a criminal act” adds nothing to the meaning of “assault”.

¹³³ This would, however, produce the strange result that a defender could resist a lawful threat of injury, but if the threat fell short of injury then it would need to be unlawful, namely an “assault” (which contemplates the unlawful application of force) or “detention caused by criminal act.”

¹³⁴ Section 18(5) indicates that the matters referred to in subs.(1) are “acts”. Given that an “injury” is not an “act”, subs.(1)(a) must be read as referring to an “injury... caused by a criminal act”.

Law Commission's recommendations in relation to legitimate defence were adopted by the Law Reform Commission in its 1994 Report, which in turn formed the basis of the legitimate defence provision in the 1997 Act. The Law Commission's Report, therefore, is instructional in this regard.

4.127 The Law Commission of England and Wales was well aware of the problems posed by the unlawfulness rule, and in particular the *lack of capacity* cases and the *mistaken attacker* cases. Its approach to the problem was two-pronged. First, the Commission "abandoned the use of the generalised concept of protection against 'unlawful' force or injury, in favour of separately identifying protection against criminal and against tortious acts."¹³⁵ Hence, defensive force would be permitted to prevent criminal attacks ("to protect himself or another from injury, assault or detention caused by a criminal act"¹³⁶) and to prevent tortious attacks ("to protect himself or (with the authority of that other) another from trespass to the person"¹³⁷). The Commission noted that many "non-culpable" attacks "will or may be tortious, even if not criminal".¹³⁸

4.128 However, the Commission also recognised the weakness of this first approach. It observed that the determination of criminal liability should not depend on "complicated enquiries into the law of tort".¹³⁹ Given the Commission's recognition of the weakness of this approach, it is somewhat surprising that the distinction between tortious and criminal acts was retained in its draft provision, and furthermore that it was eventually transplanted into the *Non Fatal Offences Against the Person Act 1997*. Its retention is particularly surprising given that the Law Commission went on to propose a way of avoiding this weakness, namely, to specifically identify a number of cases "where the *fact* of what would otherwise be a criminal act occurs, but for particular reasons the actor would not be subject to criminal liability".¹⁴⁰ The two cases that the Law Commission was concerned with were the *lack of capacity* cases and the *mistaken attacker* cases.

4.129 In relation to the former, the Law Commission observed that there was need for a person to have reasonable protection against the acts of this

¹³⁵ Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (Report 218-1993) at paragraph 38.5.

¹³⁶ *Ibid* at paragraph 38.6 and Clause 27(1)(a) of the Criminal Law Bill.

¹³⁷ Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (Report 218-1993) at paragraph 38.6 and clause 27(1)(b) of the Criminal Law Bill.

¹³⁸ Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (Report 218-1993) at paragraph 38.20.

¹³⁹ *Ibid*.

¹⁴⁰ *Ibid* at paragraph 38.21.

person even though these acts are not in fact ‘criminal’. It recognised that the fact that this person lacks the capacity to commit a crime does not in any way reduce the threat to the defender.¹⁴¹

4.130 The Law Commission therefore made specific provision for *lack of capacity* cases, which in turn were largely reproduced in the 1997 Act as follows:¹⁴²

“For the purposes of this section an act involves a ‘crime’ or is ‘criminal’ although the person committing it, if charged with an offence in respect of it, would be acquitted on the ground that –

- (a) he or she was under 7 years of age; or
- (b) he or she acted under duress, whether by threats or of circumstances; or
- (c) his or her act was involuntary; or
- (d) he or she was in a state of intoxication; or
- (e) he or she was insane, so as not to be responsible, according to law, for the act.”¹⁴³

4.131 The inclusion of these provisions demonstrate that, other than in these specifically exempted circumstances, legitimate defence is to be permitted only against unlawful attacks.¹⁴⁴

4.132 The Law Commission also considered the *mistaken attacker* cases, and gave the following example, which was extrapolated from the facts of the well-known case of *R v Gladstone Williams*.¹⁴⁵

“[The attacker] comes upon a fight in the street between [the defender] and [a third party]. [The defender] is in fact lawfully attempting to make a ‘citizen’s arrest’. [The attacker], not realising that, and thinking that [the defender] is gratuitously

¹⁴¹ Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (Report 218-1993) at paragraph 38.19. The Commission notes, at paragraph 38.23, that in most cases of this type the defender will not have directed his mind to those special facts which make the act non-criminal. In these circumstances, the defender will be judged on the basis of the facts as the defender believes them to be. Special provision need only be made where the defender is aware of the special facts that render the attacker’s conduct non-criminal.

¹⁴² Section 18(3) of the 1997 Act.

¹⁴³ McAuley & McCutcheon note that it is peculiar that the *Non Fatal Offences Against the Person Act 1997* makes reference to the defences of intoxication and duress of circumstances given that neither appear to be recognised in this jurisdiction: McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 748.

¹⁴⁴ Otherwise, the inclusion of this provision would have been superfluous.

¹⁴⁵ (1984) 78 Cr App Rep 276 (English Court of Appeal).

attacking [the third party], intervenes to restrain [the defender]. [The defender] in turn uses force to resist [the attacker].”¹⁴⁶

4.133 The Law Commission proposed that defenders were entitled, with one exception,¹⁴⁷ to use legitimate defence in *mistaken attacker* cases:

“Where an act is lawful by reason only of a belief or suspicion which is mistaken, the defence provided by this section applies as in the case of an unlawful act, except...[exception omitted]”¹⁴⁸

4.134 The Law Reform Commission, in its 1994 Report,¹⁴⁹ recommended that the Law Commission’s provisions in relation to both *lack of capacity* cases and *mistaken attacker* cases be incorporated into Irish legislation. However, whilst the former was included in the 1997 Act, the *mistaken attacker* exception was effectively left out. The reason for this omission is unclear, and no explanation is tendered in the Explanatory Memorandum that accompanied the Bill.¹⁵⁰

4.135 As a result of this omission, the 1997 Act prohibits a defender from defending against an attacker whose actions are lawful on account of their mistaken belief in the circumstances. Hence in Ireland a defender in the *Gladstone Williams*-type scenario discussed above would not be entitled to resist the attacker.¹⁵¹ In this respect, the 1997 Act strictly upholds the unlawfulness rule, albeit perhaps unintentionally.

¹⁴⁶ Commission of England and Wales (Report 218-1993) at paragraph 38.24.

¹⁴⁷ The exception provides that a defender may not use force against a police officer acting in the execution of his or her duty (even if the police officer’s actions are lawful only on account of a mistaken belief) unless the defender believes force is immediately necessary to prevent injury. This exception will be dealt with in greater depth below

¹⁴⁸ Law Commission of England and Wales (Report 218-1993) paragraph 38.27 and Clause 27(6) of the Criminal Law Bill.

¹⁴⁹ Law Reform Commission Report on *Non-Fatal Offences Against the Person* (LRC 45-1994).

¹⁵⁰ *Explanatory Memorandum to the Non-Fatal Offences Against the Person Bill 1997* (February 1997). The Memorandum simply notes that the Bill “takes account of [the Law Reform Commission’s] recommendations.” However, it may well be that the omission was unintentional given that the 1997 Act includes the prohibition on the use of force against police officers, which is unnecessary given the omission of the mistaken belief exception.

¹⁵¹ Provided, of course, that the defender knew that the attacker was acting on a mistaken belief.

(4) The Law in Other Common Law Jurisdictions

4.136 A brief survey of a number of foreign common law jurisdictions suggests that there is no general consensus as to whether an unlawful attack is a requirement of legitimate defence, and perhaps more importantly, what constitutes an unlawful attack.

4.137 In relation to self-defence, the New Zealand *Crimes Act 1961*, for example, makes no explicit reference to any requirement of unlawfulness.¹⁵² In contrast, under the *Canadian Criminal Code* it is a prerequisite for any resort to legitimate defence that the defender “is unlawfully assaulted”.¹⁵³ Similarly, under the United States *Model Penal Code* defensive force may only be used “for the purpose of protecting himself against the use of unlawful force”.¹⁵⁴

4.138 There is no consistent approach amongst those Australian States operating criminal codes. The Queensland and Western Australian provisions allow a defender to act only when “a person is unlawfully assaulted”.¹⁵⁵ The Northern Territory statutory provision is not as clear, making no express mention of an unlawfulness requirement.¹⁵⁶ However, an unlawfulness requirement is implied, at least in the case of a potentially lethal attack, given that there is a requirement that there be a life threatening “assault”. In South Australia, there is no explicit unlawfulness requirement where a defender is acting in self-defence or in defence of another, although the provision does state that any imprisonment which the defender seeks to prevent or terminate must be unlawful.¹⁵⁷ The Tasmanian Code makes no reference to any requirement of unlawfulness.¹⁵⁸ In relation to those Australian states not governed by criminal codes, the High Court of Australia has held that there is no absolute requirement for an unlawful attack.¹⁵⁹ The approach taken by the Australian Courts is discussed in greater detail below.¹⁶⁰

¹⁵² The provision merely specifies that defensive force may be used when it is reasonable: New Zealand Crimes Act 1961, section 48.

¹⁵³ *Canadian Criminal Code*, sections 34, 35 and 37.

¹⁵⁴ *Model Penal Code*, section 3.04.

¹⁵⁵ Western Australian *Criminal Code Act* section 248. Queensland *Criminal Code* section .272.

¹⁵⁶ Northern Territory *Criminal Code*, section.27(g).

¹⁵⁷ South Australia *Criminal Code*, section 15.

¹⁵⁸ Tasmanian *Criminal Code*, section 46.

¹⁵⁹ *Zecevic v DPP* (1987) 71 ALR 641.

¹⁶⁰ See paragraphs 4.141-4.158.

(5) Options for Reform

4.139 Given that there a number of non-paradigm cases which cannot be accommodated within a strict application of the unlawfulness rule, the question arises whether the rule should be relaxed, modified or even abandoned. Below we consider a number of options for reforming the unlawfulness rule.

(a) Abandonment of the Strict Unlawfulness Rule

4.140 The first approach for dealing with non-paradigm cases is to abandon any strict requirement that an attack be unlawful. This would involve either abolishing the unlawfulness rule altogether, or classifying the unlawfulness of an attack as merely a factor to be taken into account in addressing the reasonableness of the accused's actions, much in the same way as the retreat rule is now dealt with in many jurisdictions.¹⁶¹

4.141 This issue was addressed by the Australian courts in *Zecevic v DPP*¹⁶² and *R v Lawson and Forsythe*,¹⁶³ which are particularly important cases given that they are two of the few cases where the unlawfulness rule has been subjected to any critical analysis at judicial level.

4.142 *Lawson and Forsythe*¹⁶⁴ is a decision of the Australian Supreme Court of Victoria. The facts were somewhat unusual. The accused, Lawson, and the deceased's wife, Forsythe, had been having an affair. During the course of this affair Lawson and Forsythe decided to kill Forsythe's husband ("the deceased. After one unsuccessful attempt Lawson lured the deceased to a deserted house, again with the intention of killing him. However, (according to Lawson's case on appeal) when the deceased arrived, Lawson abandoned his intention to kill him, walked into the deceased's view carrying a shotgun in the crook of his arm pointing towards the ground at 45 degree angle, and announced his presence. The deceased, having reason to believe (based on the earlier incident) that Lawson was about to shoot him, fired his gun at Lawson lawfully in self-defence (based on the deceased's mistaken belief that Lawson was about to attack). Lawson was aware that the deceased was shooting at him lawfully in self-defence, but nevertheless shot and killed the deceased. One of the issues on appeal was whether Lawson was entitled to act in self-defence notwithstanding that he was aware the force used by the deceased was lawful.

¹⁶¹ For discussion of the retreat rule, see Chapter 5 below.

¹⁶² (1987) 71 ALR 641, per Wilson, Dawson and Toohey JJ, Mason CJ concurring.

¹⁶³ 1985 VIC LEXIS 452; [1986] VR 515.

¹⁶⁴ *R v Lawson and Forsythe* 1985 VIC LEXIS 452; [1986] VR 515.

4.143 Ultimately, a majority of two of the three-member court upheld the murder conviction. The first member of the majority, Young CJ, was of the view that the unlawfulness issue was irrelevant to the outcome of the appeal given that this was a case of self-generated necessity. As Lawson, by his aggression, had created the situation in which it was necessary for him to use defensive force and had not overtly abandoned this aggression, self-defence was not available to him. However, he did accept that the argument that “in some circumstances” a person may defend himself against a lawful attack “may well not have been an unreasonable assumption”.¹⁶⁵

4.144 McGarvie J dealt with the appeal on similar grounds to Young CJ, but reached a different view on the facts. McGarvie J held that after the initial confrontation there was evidence that the roles had changed such that the deceased had become the aggressor and Lawson the victim of that aggression. However, importantly for the present purposes, McGarvie J also carried out an extensive, albeit *obiter*, analysis of the argument that a person could use defensive force against a lawful attack.

4.145 McGarvie J was of the view that, in some circumstances, a person could use defensive force against a lawful attacker. He supported this view by reference to examples of *lack of capacity*¹⁶⁶ and *mistaken attacker* cases. In relation to the latter, McGarvie J gave the mistaken-belief example of the twins, as set out above.¹⁶⁷ In this scenario an innocent twin is mistaken for his brother, a notorious killer, and is lawfully attacked. Is the innocent twin entitled to defend himself with lethal force, if need be? McGarvie J opined that the law must allow the twin to shoot in self-defence:

“Morally and socially it may be commendable for the twin to sacrifice his life. The criminal law, however, is built on an understanding of human nature as it exists in a civilised society. It is a law designed for ordinary people not for saints... The criminal law would not in my opinion be based on an expectation that it could influence the twin to submit to execution and thus become a martyr to A’s mistake. It is not so unrealistic as to require that the twin must sacrifice his life or commit a crime...”¹⁶⁸

¹⁶⁵ 1985 VIC LEXIS 452 at 23. Young CJ also commented: “It is not difficult to invent hypothetical situations in which it can be said that the requirement that self-defence can only be used to repel an unlawful attack might lead to injustice”: *Ibid* at.25.

¹⁶⁶ McGarvie J stated: “I consider that a man subjected to an attack on his life by one he knew to be legally insane and activated by an insane delusion would have a right to respond in self-defence”: *Ibid* at 38.

¹⁶⁷ See paragraph 4.120.

¹⁶⁸ 1985 VIC LEXIS 452 at.39-40

4.146 Although this would have “the regrettable result that A and the twin would be firing at each other without either acting in breach of the criminal law”, “[t]here is no way of the law choosing between them and disapproving of what one rather than the other is doing. They are both acting as civilised citizens would be expected to act in their respective exigencies.”¹⁶⁹

4.147 Based on this example, McGarvie J concluded that a strict requirement of an unlawful attack was flawed, and proposed an alternative test:

“I consider that a man who has not by any aggressive conduct produced the situation which results in the attack, is not required by law to submit to an attack or threatened attack endangering his life or bodily safety.”¹⁷⁰

4.148 Applying this test to the facts, McGarvie J concluded that, if the deceased’s attack had been lawful, Lawson would not have been entitled to use defensive force. This is because Lawson’s aggressive conduct led to the confrontation. However, as stated above, McGarvie J went on to find that there was evidence that the deceased’s attack was unlawful (that is, Lawson’s and the deceased’s roles changed during the confrontation), and on that basis would have ordered a retrial.

4.149 The judgment of Ormiston J is perhaps the most important given that he was the only judge who decided the appeal on the basis of the unlawfulness rule. Unlike McGarvie J, Ormiston J concluded that the deceased was clearly acting in self-defence and therefore not only were the deceased’s actions lawful but inevitably Lawson would have known that the deceased’s actions were lawful. Unlike Young CJ, Ormiston J declined to decide the case solely on the basis of the ‘self-generated necessity rule’.¹⁷¹ Rather, Ormiston J held that an unlawful attack was an essential requirement in the test for self-defence. Given that the deceased’s actions were lawful, Lawson had not been entitled to use defensive force and was therefore guilty of murder. However, in the course of his judgment he expressed serious misgivings as to the historical legitimacy of the unlawfulness rule, and whether it should be part of the test for self-defence

4.150 First, Ormiston J noted that the (then) two leading decisions of the High Court of Australia in relation to self-defence, *R v Howe*¹⁷² and *R v*

¹⁶⁹ 1985 VIC LEXIS 452 at 40-41.

¹⁷⁰ 1985 VIC LEXIS 452 at 38.

¹⁷¹ Ormiston J also adopted Young CJ’s reasons, apparently as a second ground for rejecting the appeal: 1985 VIC LEXIS 452 at 204.

¹⁷² (1958) 100 CLR 449.

Viro,¹⁷³ both stated that an unlawful attack was a prerequisite for self-defensive force. However, in both decisions the unlawfulness rule was neither essential to the Courts' reasoning nor supported by additional authorities. In order to determine whether the unlawfulness rule had any historical support, Ormiston J delved back in history and examined the requirements of the medieval forerunners of the modern law of self-defence. From this survey, Ormiston J proffered the view that, as opposed to the justification form of the defence, the excuse form, self defence, never embodied a requirement of an unlawful attack.¹⁷⁴

4.151 Ormiston J argued that historically the unlawfulness requirement had been a means by which the courts could restrict the availability of the full defence to those cases which were most deserving. However, the distinction between justifiable and excusable self-defence had been gradually eroded until such time that any practical significance between the defences, namely the requirement of forfeiture,¹⁷⁵ had vanished by the nineteenth century. Nevertheless, the unlawfulness rule found its way into the modern form of legitimate defence. In this regard, Ormiston J warned: "...one must be careful not to bring into the modern rules of self-defence restrictions or rules which were designed to perpetuate the distinction between justifiable and excusable self-defence."¹⁷⁶

4.152 In relation to modern case law, a general requirement of unlawfulness appears to have first been imposed in the High Court of Australia decision in *R v Howe*.¹⁷⁷ There, the Court implied that it was a requirement of self-defence that there be "an attack of a violent and felonious nature, or at least of an unlawful nature". Ormiston J suggests that this requirement may have been incorporated inadvertently and was intended as no more than a reflection of the facts hypothetically assumed for the purposes of the argument on appeal.¹⁷⁸ If, however, it was the considered view of the Court, then it was no more than an *obiter dictum* in support of which no authority was cited. Nevertheless, the statement in *R v Howe* was consolidated in subsequent Australian cases, including *R v Viro*.¹⁷⁹

¹⁷³ (1978) 141 CLR 88.

¹⁷⁴ 1985 VIC LEXIS 452 at 159-161.

¹⁷⁵ Those who were justified in their use of defensive force were acquitted, whereas those who were merely excused were routinely pardoned, but still forfeited their property.

¹⁷⁶ 1985 VIC LEXIS 452 at 123.

¹⁷⁷ (1958) 100 CLR 448.

¹⁷⁸ 1985 VIC LEXIS 452 at 175.

¹⁷⁹ (1978) 141 CLR 88.

4.153 Notwithstanding Ormiston J's misgiving as to the legitimacy of the unlawfulness rule, he felt constrained by the precedents of superior courts and therefore did not depart from the status quo requirement of unlawfulness.¹⁸⁰ In any event, whilst he considered that the requirement of unlawfulness was too strict a test, he was reluctant to accept alternative formulations of the law, such as the simple removal of the word 'unlawful' from the test¹⁸¹ or the adoption of test formulated by McGarvie J.¹⁸²

4.154 Whilst Ormiston J felt constrained by precedent, the majority of the High Court of Australia in *Zecevic v DPP*¹⁸³ did not. Adopting Ormiston J's analysis of the unlawfulness rule (and not his ultimate conclusion), the majority stated:

“Whilst in most cases in which self-defence is raised the attack said to give rise to the need for the accused to defend himself will have been unlawful, as a matter of law there is no requirement that it should have been so... Thus, for example, self-defence is available against an attack by a person who, by reason of insanity, is incapable of forming the necessary intent to commit a crime. It is, however, only in an unusual situation that an attack which is not unlawful will provide reasonable grounds for resort to violence in self-defence.”¹⁸⁴

4.155 The majority did not elaborate to any great extent as to when defensive force could be used legitimately against a lawful attack. However, they did indicate that “the whole of the surrounding circumstances are to be taken into account”, including whether the accused generated the need for defensive force him- or herself by their aggression.¹⁸⁵

4.156 This approach has a number of practical advantages. First, the test is flexible and leaves a generous amount of discretion in the hands of the judge and jury to achieve justice in individual cases and, in most cases, will be simpler for juries to understand. Furthermore, the transformation of the status of the unlawfulness rule from a strict requirement to one of a mere

¹⁸⁰ 1985 VIC LEXIS 452 at 197.

¹⁸¹ Ormiston J was concerned that this would lead to too wide a test allowing, for example, Lawson to legitimately kill the deceased.

¹⁸² Ormiston J was not comfortable with McGarvie J's formulation because it was derived from the American authorities which Ormiston J considered were too far diverged from the Australian law to be relied upon: 1985 VIC LEXIS 452 at 202-204.

¹⁸³ (1987) 71 ALR 641, per Wilson, Dawson and Toohey JJ, Mason CJ concurring.

¹⁸⁴ *Zecevic v DPP* (1987) 71 ALR 641, per Wilson, Dawson & Toohey JJ, Mason CJ concurring.

¹⁸⁵ The majority did indicate, however, that cases of self-generated necessity would not be covered by legitimate defence.

factor to be taken into account accords with the trend in recent decades to remove specific requirements from the test for legitimate defence and introduce a more generalised formulation.

4.157 However, coupled with the increased flexibility, there would also be a corresponding decrease in guidance being provided to judges and juries as to the proper boundaries of legitimate defence. For example, Brennan J, in a dissenting judgment in *Zecevic v DPP*, argued that the dilution of the strict requirement of unlawfulness could result in legitimate defence being extended beyond its proper parameters.

“The test would not exclude cases where the accused does nothing to court the lawful application of force to him (as in the case of the lawful arrest of an innocent man) or where he does something unlawful but not necessarily violent which causes the lawful application of force to him (as in the case of a prisoner who tries to escape from lawful custody) or where lawful force is threatened or applied to him by the victim in protection of a third party (as in the case of an attack by the accused on the third party). In any of these cases, the person who threatens to apply or applies force to the accused initiates the violence against which the accused defends himself and the accused might have reasonable grounds to believe that, if he does not do what is necessary to defend himself, that force will be applied or will continue to be applied to him. Unless a criterion of defence against unlawful force is adopted, the defence of self-defence may be extended to cases of these kinds.”

4.158 Brennan J suggested an alternative approach, which is discussed below under heading (iii) *An Alternative Requirement of an “Unjust Threat”*.

(b) Individually Specify Exceptions

4.159 The second approach for dealing with the difficult cases would be to create specific exemptions to the unlawfulness rule to allow for the use of defensive force against lawful attacks in the difficult cases. As discussed above, this is the approach that was adopted in the *Non Fatal Offences Against the Person Act 1997* in relation to the *lack of capacity* cases. The 1997 Act largely follows recommendations made by the Law Commission of England and Wales,¹⁸⁶ although it omits the exemption proposed by the Law Commission in relation to *mistaken attacker* cases.

¹⁸⁶ Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (Report 218-1993) at paragraph 38.19 and 38.27.

4.160 This approach does not undermine the conventional understanding of the unlawfulness rule except to the extent that exceptions are clearly identified. However, whilst *lack of capacity* and *mistaken attacker* cases are easily accommodated, the same is not necessarily true for *necessity-type* cases. It would be difficult to devise a sufficiently clear yet narrow exception for such cases.

(c) *An Alternative Requirement of an “Unjust Threat”*

4.161 The third approach neither diminishes the mandatory nature of the unlawfulness rule nor introduces exceptions to the rule. Instead, this approach focuses on what is meant by the term “unlawful”. Rather than asking whether an attack is lawful or otherwise from the attacker’s perspective, the key question is whether the attack is “justified” from an objective perspective. Hence, in the case of an insane attacker, the issue is not whether the attacker is legally culpable for his or her actions, but whether the attack can be justified from an objective perspective.

4.162 This approach was favoured by two of the dissenting judges in *Zecevic v DPP*, Brennan and Deane JJ.¹⁸⁷ Brennan J suggested that the test should be formulated as follows:

“Was the force or threatened force against which the accused reasonably believed it was necessary to defend himself *such that a person in the victim’s position was not lawfully entitled to apply it?*” (Emphasis added).

4.163 Brennan J further explains that the term “unlawful” is not used to connote the criminal responsibility of the victim for an offence, but to connote violence which is not authorised, justified or excused by law whatever be the state of mind of the person who inflicts it.”¹⁸⁸

4.164 Deane J went further and suggested that the term “unlawful” should be removed from the test altogether and replaced with the term “unjustified”. He asserted that using the word ‘unlawful’ as opposed to ‘unjustified’ was contrary to common sense and caused difficulties for juries.

¹⁸⁷ (1987) 71 ALR 641.

¹⁸⁸ McAuley & McCutcheon, although using different terms, draw a similar distinction between an unlawful attack and one that amounts to a criminal offence: “The unlawfulness requirement does not imply that the initial attack must amount to a criminal offence. Since criminal liability presupposes criminal capacity, a rule to that effect would lead to the counter-intuitive result that the right of self-defence would be denied to a defendant who made a pre-emptive strike against an aggressor who lacked such capacity: vis., a child below the age of criminal responsibility or an insane person. Moreover, it would preclude the use of defensive force against an attacker who lacked the mens rea by reason of intoxication or whose actions were constrained by threats or circumstances”: McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 748.

In addition to that, it was observed that the requirement of unlawfulness led to absurd conclusions as it prevented an innocent victim from defending himself in the lack of capacity and mistaken attacker cases. He observed that “[t]hese problems seem to me to be largely, if not completely, eliminated if the relevant requirement is framed not in terms of legal technicality but in terms of factual justification.”

4.165 A similar approach is suggested by Uniacke who argues that self-defence should be available to ward off “unjust threats”, as opposed to “unlawful threats”.¹⁸⁹ An “unjust threat” is “a threat posed to someone for no objective justificatory moral reason.”¹⁹⁰ Under this approach, a person is entitled to ward off an unjust threat notwithstanding the attacker is morally innocent, acting lawfully, or indeed not acting at all (that is, he or she is a passive threat).¹⁹¹

4.166 This approach accommodates not only the *lack of capacity* cases and the *mistaken attacker* cases but also the *necessity-type* cases. Take the example of the mountaineer who is at risk of being dragged over a cliff by his falling companion. The mountaineer would be permitted to cut the rope attaching him to his falling companion on the grounds that his companion, though innocent, poses an unjust threat.¹⁹²

4.167 How is the taking of innocent life morally justified under this approach? After all, the unlawfulness rule is seemingly founded on the proposition that an innocent person cannot forfeit their right to life by lawful actions. One response to this argument is the suggestion that one’s right to life is conditional on not being an unjust threat to others.¹⁹³ Uniacke argues that “someone who is an unjust immediate threat to the life or proportionate interest of another does not possess an unqualified right not to be killed.”¹⁹⁴

¹⁸⁹ Uniacke “Permissible Killing: The Self-Defence Justification of Homicide” (Cambridge University Press 1994).

¹⁹⁰ Horder, “Self-defence, Necessity and Duress: Understanding the Relationship” (1998) 11 Can J L & Jurisdiction 143 at 146, drawing on Uniacke’s concept of self-defence, namely the warding off of “unjust threats.”

¹⁹¹ *Ibid* at 145-146.

¹⁹² This example is often cited in the context of the defence of necessity: for example Smith & Hogan *Criminal Law* (9th ed Butterworths 1999) at 251. However, it has been suggested that it may be more properly considered under the rubric of self-defence: Horder, “Self-defence, Necessity and Duress: Understanding the Relationship” (1998) 11 Can J L & Jurisdiction. 143 at 147-8, drawing on Uniacke’s concept of self-defence, namely the warding off of “unjust threats”.

¹⁹³ Uniacke “Permissible Killing: The Self-Defence Justification of Homicide” (Cambridge University Press 1994) at 197.

¹⁹⁴ *Ibid* at 217. At 209, Uniacke describes this as an “appropriate specification of the scope of the right to life” rather than adopting the term “forfeiture”.

She notes that there are many other circumstances in which entirely blameless people forfeit rights. For example, insane persons may forfeit their parental rights on the grounds that they may be a danger to their children.¹⁹⁵

4.168 However, one objection to the “unjust threat” approach is that it would be difficult to identify a clear boundary for the use of defensive force against innocent attackers, or at least, without relying on unduly complicated tests. One commentator, for example, has acknowledged that there is an “uncertain borderline between necessity and self-defence” and that “[t]here is perhaps no definitive test that will mark out a bright line between the two.”¹⁹⁶

4.169 In summary, it must be conceded that the “unjust threat” approach attempts to comprehensively and logically deal with all the non-paradigm cases which would otherwise create difficulties for a conventional application of the unlawfulness rule. However, as a result, the tests are complex and indeed fail to provide definitive answers in all cases.

4.170 A more fundamental objection to the “unjust threats” approach is that it may overextend legitimate defence to the point that the defence would become very close to, if not within, the traditional boundaries of the defence of necessity. The boundaries would be blurred by effectively removing one of the key distinctions, namely the innocence or otherwise of the attacker.

4.171 The Commission also suggests that rather than altering the whole structure of the defence and the unlawfulness requirement, which for the most part works well, to accommodate a few non-paradigm cases, specific exemptions from the unlawfulness rule might be the only option. This accords with both the Law Commission of England and Wales¹⁹⁷ and the Law Reform Commission’s¹⁹⁸ previous recommendations in respect of the *Non-Fatal Offences Against the Person Act 1997*. Regardless of whether this Act applies to lethal offences or not, it seems confusing and anomalous to have different rules in these cases.

¹⁹⁵ Uniacke “Permissible Killing: The Self-Defence Justification of Homicide” (Cambridge University Press 1994) at 206.

¹⁹⁶ Horder “Self-defence, Necessity and Duress: Understanding the Relationship” (1998) 11 Can J L & Jurisdiction 143 at 154. Horder suggests a test in this regard: namely that a distinction can be drawn between exacerbating a threat and exposing someone to an independent threat but it is evident from his subsequent discussion that this test is excessively complex.

¹⁹⁷ Law Commission of England and Wales Legislating the Criminal Code: Offences Against the Person and General Principles (Report 218-1993).

¹⁹⁸ Law Reform Commission Report on Non-Fatal Offences Against the Person (LRC 45-1994).

4.172 As has been discussed, the alternative unjust threat approach is excessively complex and would be very difficult for a jury to comprehend. It is undesirable to import a very complex requirement into the law on legitimate defence merely to provide for a few anomalous cases which are unlikely to even arise in this jurisdiction and if they do can be catered for by individual exceptions from the unlawfulness requirement. The fact that this approach has been adopted without any problems in the UK makes it more persuasive.

4.173 If the Commission were to go the route of providing for specific exceptions, the lack of capacity cases could be provided for in a provision similar to that adopted in section 18(3) of the *Non-Fatal Offences Against the Person Act 1997*. It is also possible for the mistaken attacker cases to be individually specified as exceptions to the unlawfulness requirement. A formulation similar to that adopted by the Law Commission of England and Wales in its Report could be used in this regard. The drafting of these individual exceptions from the unlawfulness requirement is therefore unproblematic.

4.174 The Commission provisionally recommends that the lack of capacity cases and the mistaken attacker cases be subject to the unlawfulness rule and is committed to conceptually reconciling these cases with the unlawfulness requirement rather than providing for them in specific exceptions. The Commission invites submissions on how this may best be achieved.

CHAPTER 5 THE NECESSITY REQUIREMENT

A Introduction

5.01 In this Chapter, the Commission considers the requirement of necessity in legitimate defence. It discusses the requirement that a defender must retreat, as well as discussing the Castle doctrine which asserts that defenders are not required to retreat if attacked in their own home. It goes on to consider self-generated necessity and discusses the rule as it applies when the defender is wholly or partly to blame for the conflict.

B The Principle of Necessity

5.02 The principle of necessity is an integral component of the test for legitimate defence; so much so that the term is often used to encapsulate the essence of the defence:

“It is almost an axiom of our law that a man who kills another in the necessary defense of himself from death or even serious bodily harm is excused, and must be acquitted when indicted.”¹

5.03 Similarly, the Court of Criminal Appeal used the principle of necessity to sum up the law of self-defence in *People (AG) v Keatley*² where Maguire CJ cited with approval the following passage from *Russell on Crime*:

“The use of force is lawful for the necessary defence of self or others or of property; but the justification is limited by the necessity of the occasion and the use of unnecessary force is an assault.”³

5.04 However, passages such as the two above can be misleading where “necessity” is used as shorthand for the entire test, namely both the threat stage (threshold, imminence and unlawfulness) and response stage

¹ Beale, “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 567.

² [1954] IR 12 (Court of Criminal Appeal).

³ *Russell on Crime* (10th ed 1950) at 763 cited in *People (AG) v Keatley* [1954] IR 12 at 17.

(necessity and proportionality) requirements. The use of the term in this broad sense is not the focus of this chapter.

5.05 Rather, this chapter examines the principle of necessity as a single component in the overall test of legitimate defence. The principle states that a defender must adopt the least harmful means of achieving his or her defensive purpose; in other words, lethal defensive force must be used only as a last resort.⁴

5.06 The simplicity of this proposition, however, beguiles a longstanding debate as to the nature of the obligations placed upon defenders by the rule; in particular, the extent to which a defender must take steps to avoid potential conflict. A variety of interpretations have been adopted.

5.07 First, under a strict interpretation of the rule, defenders would always be obliged to exhaust any non-lethal means of avoiding a threat before resorting to the use of lethal defensive force (“absolute retreat” approach). In practical terms, this approach would require defenders to retreat from attack in all cases where this was physically possible, notwithstanding any risks posed to the retreating defenders. Even if all avenues of escape are blocked, defenders would still need to exhaust other non-lethal methods of defence such as negotiation, compliance with their attackers’ demands (at least insofar as the demands would not lead to immediate death of the defenders or others), warnings and non-lethal defensive force.

5.08 Whilst the absolute retreat approach accords most closely with the common understanding of the meaning of “necessity” - that defensive force must be “essential” or “unavoidable”⁵ - it arguably sets an unrealistic standard for defenders to achieve in that it obliges them to assume a high degree of risk in dealing with threats not of their own making. Consequently, this approach has not found favour at common law.

5.09 An alternative approach tempers the strictness of the absolute retreat approach with the qualification that defenders are obliged to exhaust non-lethal options only to the extent that they may do so in safety (“safe-retreat” approach):

⁴ The necessity rule was recognised as a fundamental component of the test for legitimate defence by the Criminal Code Commissioners (Lord Blackburn and Stephen, *Lush and Barry JJ*) (1879) C.2345 at 11, cited in Lantham, “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 18-19.

⁵ The New Oxford Dictionary of English defines “necessity” as, “the fact of being required or indispensable”, “unavoidability” or “a state of things or circumstances enforcing a certain course”. “Necessary” is defined as, “required to be done, achieved or present; needed; essential” or “determined, existing, or happening by natural laws or predestination; inevitable”.

“[A] defender was not expected to retreat unless he could do so without danger to himself. But supposing that he were long-legged and his assailant had no firearm, or that he could back out of a door and lock it before his assailant could get at him, then he was under a duty to retreat before using extreme force.”⁶

5.10 If unable to retreat in safety, defenders would still be obliged to adopt the least violent means of defence, again provided they can do so in safety.⁷

5.11 However, a contrary approach asserts that defenders should have the right to stand their ground against a threat and fight⁸ (“stand-fast” approach⁹). Although this approach would also demand that defenders use the least violent means of defence, they would be entitled to use this defensive force where they stand and would not be obliged to run in the face of an attack. For sound reasons, this position has consistently been adopted in relation to the public defences of crime prevention and effecting arrests; after all:

“A person who is acting merely in self-defence can give back; whether he should be obliged to do so is a question of evaluation of his self-esteem and dignity in comparison with the safety of the attacker. But a person who is arresting a criminal or preventing a crime cannot retreat without abandoning his purpose. To argue that, because the latter cannot and need not retreat, the former need not, is a fallacy.”¹⁰

5.12 In contrast, the common law in relation to the private defences has oscillated between the safe-retreat and stand-fast approaches over the centuries. However, the twentieth century “solution” to this age-old problem has been to adopt a “compromise” whereby the necessity rule is subsumed under the broad umbrella of the test of “reasonableness”; retreat is not compulsory but merely one of the factors to be taken into account (“compromise” approach).¹¹

⁶ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 459-460.

⁷ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell, 2000) at 746. See also Ashworth, “Self-Defence and the Right to Life” [1975] *The Cambridge Law Journal* 282 at 284-285.

⁸ Except in cases where the defender had initiated, or otherwise contributed to, the conflict (see the discussion of self-generated necessity below).

⁹ This approach is also described in the United States of America as the “true man” rule.

¹⁰ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 462.

¹¹ See for example *Brown v United States* (1921) 256 US 335 (US Supreme Court).

5.13 If the ambit of the necessity rule were not already confusing enough, the matter is complicated further by two ancillary issues: namely, the “castle” doctrine and the principle of “self-generated necessity”. In essence, the castle doctrine states that defenders in the sanctuary of their homes are under no obligation to retreat from attacks by intruders. The principle of self-generated necessity states that those who create, or contribute to the creation of, a conflict should not be entitled to take advantage of the necessity of the situation and, therefore, should not have an unqualified right of self-defence.

5.14 In Ireland, as in many other common law jurisdictions, the exact parameters of the necessity rule, the obligation to retreat, the castle doctrine and the principle of self-generated necessity are unclear. This chapter examines each of these components, with particular emphasis on their historical origins, and considers how best to fit each together in other overall framework of legitimate defence.

C The Retreat Rule

5.15 In order to come to terms with the complexities of the necessity rule it is essential to delve back into tumultuous history surrounding the obligation to retreat. The necessity rule and the retreat rule are inextricably linked; a strict interpretation of the necessity rule goes hand-in-hand with a strict application of the retreat rule and *vice versa*. Hence, only by examining the issues surrounding the duty to retreat is it possible to chart the borders of the necessity rule.

5.16 The starting point for this inquiry are the seventeenth century words of Sir Edward Coke:

“If a thief offer to rob or murder B either abroad or in his own house, and thereupon assault him, and B defend himself without any giving back, and in his defence killeth the thief, this is no felony; for a man shall never give way to a thief, &c., neither shall he forfeit anything... So if any officer or minister of justice that hath lawful warrant &c”.¹²

5.17 This passage is important not because it was the first pronouncement on the duty to retreat; indeed, to the contrary, its focus is on those cases in which defensive force would have been considered justified and, therefore, retreat would not have been required. Rather, the importance of the passage is that several influential writers were later to seize upon these words to support diametrically opposed positions on the duty to retreat.

¹² 3 Co. Inst. 55, cited in McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 738.

These writers included Sir Michael Foster, who first articulated the stand-fast approach, and Professor Joseph Beale, who was one of the strongest advocates of the safe-retreat approach.

5.18 This clash of approaches has defined the borders of discussion of the retreat rule for centuries, yet remains contentious and opinions are sharply divided.¹³ Whilst the respective positions will be probed in considerable detail, the ultimate purpose of this chapter is not to attempt to decide which was the correct approach. After all, this is an area in which reasonable lawyers would beg to differ. Indeed, such a task is likely to be overly ambitious given that it would involve ascribing consistency and coherency to a developing common law world in which such values were impossible to attain. However, a thorough examination is both warranted and essential given the impact that these two approaches have had, and continue to have, on the development of the necessity principle.

(1) The Foster Analysis

5.19 Writing in 1762, Foster identified three scenarios in which a killing might occur in defence to a violent and felonious assault.¹⁴ First, justifiable homicides described killings carried out by entirely blameless defenders (“innocent defenders”); such defenders would have been under no obligation to retreat.¹⁵ Secondly, excusable homicides described killings carried out by defenders who were not entirely blameless such as those who entered “chance-medleys”; such defenders would have been required to “retreat to the wall”, unless in their own homes (the “castle doctrine”, discussed further below). Finally, culpable homicides described those who had themselves initiated the conflict with a murderous assault; they forfeited all rights of self-defence until such time as they were able to completely withdraw from the conflict.

5.20 The focus of this section, however, is Foster’s first category of justifiable homicides.¹⁶

5.21 Foster’s analysis was based on the view that “[t]he right of self-defence... is founded in the law of nature. In cases of necessity the law of

¹³ For example, as discussed above, Perkins & Boyce have strongly criticised Beale’s analysis and have endorsed Foster’s approach: *Criminal Law* (3rd ed Foundation Press 1982). The opposite view is taken by McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000).

¹⁴ For a summary of Foster’s position, see Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1121.

¹⁵ Fost 273 & 274 cited in McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 737-738.

¹⁶ Foster’s categories of excusable and culpable homicides are discussed further under the heading of self-generated necessity below.

society fails; and the victim in remitted to his natural rights.”¹⁷ Foster’s views are said to have encapsulated the changing philosophical mood of the times and reflected “the new importance of the individual in the legal and political thought of the seventeenth and eighteenth centuries”. This mood resulted in a large emphasis on the individual’s right to bodily integrity and autonomy as opposed to just the need to uphold the law for public policy reasons.¹⁸

5.22 Whilst Foster’s analysis was adopted by most of the institutional writers and academics through until the twentieth century,¹⁹ the retreat issue received little analytical attention from common law courts²⁰ with the notable exception of those in nineteenth century United States of America.²¹

5.23 It would appear that the US favoured the stand-fast approach as advocated by Foster.²² However, it is debatable whether the US Supreme Court ever went as far as expressly adopting the stand-fast approach.²³ One case that is often cited as having done so is the 1895 judgment in *Beard v United States*.²⁴ The appellant in that case had been in a dispute with three brothers who claimed that they were entitled to a cow in one of the appellant’s fields. When the three attempted to take the cow by force, the appellant struck one of them with his gun, resulting in his death. As an innocent defender, the Court held that the appellant was under no greater obligation to retreat than if he had been in his house.

5.24 Nevertheless, the degree to which the case is supportive of the stand-fast approach is questionable. It may be argued that, rather than

¹⁷ Foster’s position is summarised here by Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 573. Beale submitted that the fallacy of such an argument was as a result of the philosophy of Foster’s time.

¹⁸ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 738-739.

¹⁹ *Ibid* at 739 where they state: “Foster’s analysis was followed by Blackstone and East and, notwithstanding Stephen’s doubts, was repeated almost verbatim by both Russell and Kenny.”

²⁰ For a discussion of English and Irish law, see McAuley & McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 740. However, as discussed below, the safe-retreat approach was eventually abandoned in favour of the compromise approach.

²¹ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 460.

²² American Law Institute *Model Penal Code and Commentaries* (1985) Part I Vol 2 at 53. See also Mischke “Recent Development: Criminal Law – Self Defense- Duty to Retreat: State v Kennamore” (1981) 48 Tenn L Rev 1000.

²³ Beale makes this claim in “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 567.

²⁴ (1895) 158 US 550.

adopting the stand-fast approach as a general principle, the Court was merely extending the ambit of the castle doctrine (the right to stand-fast when attacked in one's home).²⁵ Indeed, the Supreme Court interpreted *Beard* in this manner in its subsequent decision in *Allen v United States*.²⁶

5.25 Nevertheless, even if this was the Supreme Court's intention, the cases and textbooks cited with apparent approval by the Court were in no doubt that the stand-fast approach was generally applicable to all cases of self-defence by innocent defenders.

5.26 As seen below (under the heading of "The Compromise Approach) the US Supreme Court ultimately clarified its position in 1921 with the adoption of the compromise approach in *Brown v United States*.²⁷ Nevertheless, a number of US state legislatures and courts have continued to endorse the stand-fast approach.²⁸

5.27 Beale however disagreed with this approach and his alternative analysis is discussed below.

(2) *The Beale Analysis*

5.28 In a celebrated 1903 article, published at a time in which the debate in the US courts on this issue was at its fiercest, Beale examined the historical treatment of the retreat rule at common law. He submitted that the institutional writers, beginning with Foster, had underestimated the ambit of the retreat obligations imposed at common law.²⁹ The proper approach,

²⁵ A similar explanation might be given for the apparent adoption of the stand-fast rule in *Alberty v United States* (1896) 162 US 499 (US Supreme Court). The incident arose when the appellant challenged the deceased who was in the process of climbing in the bedroom window of the appellant's wife. Whilst the appellant was separated from his wife and lived elsewhere, he was nearby working on the property for the owner. Whilst the judgment is not clear whether it was the intention of the deceased to attack the appellant's wife, one explanation as to why the appellant was under no obligation to retreat was that he was acting in defence of another who was being attacked in her home.

²⁶ (1896) 164 US 492 at 498. The Court stated that the "general duty to retreat instead of killing when attacked was not touched upon in [*Beard v United States* (1895) 158 US 550 and *Alberty v United States* (1896) 162 US 499]."

²⁷ (1921) 256 US 335 (US Supreme Court).

²⁸ According to one commentator, these jurisdictions are in the minority, with the majority adopting the stand-fast approach: Samaha, *Criminal Law* (6th ed, Wadsworth, 1999) at 245. However, Perkins & Boyce, make the opposite claim. According to these authors, examples of states which adopt the stand-fast approach include Oklahoma, North Carolina, California and Montana: Perkins & Boyce *Criminal Law* (3rd ed Foundation Press, 1982) at 1128 & 1133.

²⁹ Beale "Retreat from a Murderous Assault" (1903) 16 Harv L Rev 567.

according to Beale, required innocent defenders faced with a deadly threat to exhaust all safe opportunities to retreat before resorting to lethal defensive force. This duty was grounded in the principle that “before one could kill justifiably absolute necessity must be shown.”³⁰ However, Beale’s guiding principle of absolute necessity did not dictate that defenders retreat in all cases of legitimate defence. Notably, public defence and defence against robbers were excluded.³¹

5.29 However, safe-retreat was required in almost all other cases³² before an innocent defender could resort to lethal force³³ in self-defence. Even more stringent retreat requirements were imposed on those who had contributed to the conflict³⁴ Hence, Beale was proposing a duty that was broader in scope than that which had been suggested by Foster, which was applicable only in cases of self-generated necessity.

5.30 Beale’s primary attack on Foster’s analysis focused on the latter’s apparent misunderstanding of the writings earlier institutional writers; in particular, the passage of Coke which indicated that a defender was *justified* in using lethal force in circumstances where “a thief offer to rob or murder [the defender] either abroad or in his own house”. Foster interpreted this passage as saying that a defender would be justified in repelling any violent and felonious attack and, therefore, would be under no obligation to retreat. However, Beale submitted that that this passage “contemplates the use of lethal force against a robber whose threat was in the form ‘your money or your life’, one of the paradigm cases of justified force at common law... Yet Foster chose to interpret it as justifying lethal force against threats of robbery or threats of murder”.³⁵

5.31 Whilst the contrast between Beale’s and Foster’s interpretation of the earlier law was marked, the difference in philosophical approach may have been even more significant. Beale’s regard for the paramount interests

³⁰ *Ibid* at 574.

³¹ *Ibid* at 574. Defence against robbers was excluded as otherwise the robber would be permitted to escape with the property.

³² Beale also made an exception for those cases covered by the castle doctrine. See paragraph 5.75 below.

³³ There was no duty to retreat in non-lethal cases. As observed by American Law Institute, *Model Penal Code and Commentaries* (1985) Part I Vol 2 at 53: “The actor who knows he can retreat with safety also knows that the necessity can be avoided in that way. The logic of this position never has been accepted when moderate force is used in self-defense; here all agree that the actor may stand his ground and estimate necessity on that basis.”

³⁴ See paragraphs 5.134-5.172 below.

³⁵ This summary of Beale’s argument is taken from McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 738 (original emphasis).

of the state was the antithesis of Foster's emphasis on the rights of individuals and the laws of nature, which Beale considered to be flawed.³⁶

“The interests of the state alone are to be regarded in justifying crime; and those interests require that one man should live rather than that another should stand his ground in a private conflict.”³⁷

5.32 Beale also rejected the argument that no-one should be subjected to the dishonour and humiliation of retreat and asserted that a really honourable person would prefer to retreat in this instance.³⁸

5.33 The Beale analysis has not been without controversy. The strongest voices of dissension have been fellow American authors, Perkins and Boyce. They dispute Beale's analysis of the views of the institutional writers and argue in favour of Foster's position. Firstly, they argue that Beale misinterpreted the passage of Coke set out at paragraph 5.16 above.³⁹ They favour the Foster interpretation of this passage.⁴⁰

5.34 Beale acknowledges the apparent *non sequitur* of his necessity argument in relation to non-deadly attacks and the castle doctrine. However, his response is that these examples are mere exceptions to the general rule that the necessity principle compels safe-retreat. For example, in relation to non-deadly attacks he asserts that retreat is not required because lives are not at stake: “Ordinary defence and the killing of another evidently stand upon different footing.”⁴¹ However, despite the claim that the logic is evident, it is unclear why the use of non-lethal defensive force can be labelled as “necessary” in the absence of retreat, when the use of lethal defensive force in the same circumstances would be “unnecessary”.

5.35 In relation to the castle doctrine, Beale argues that retreat is not required because to do so would apparently expose householders to increased danger, a situation which the safe-retreat approach is at pains to avoid.⁴² However, if this safety prerequisite always provided satisfactory protection for householders then arguably there would have been no need to

³⁶ Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 573.

³⁷ Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 582.

³⁸ *Ibid* at 581.

³⁹ Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1122.

⁴⁰ The authors also assert that Beale's analysis lacks common sense and is internally inconsistent in that it requires innocent defenders to retreat from a deadly attack but not in the face of an attempted robbery: see Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1123.

⁴¹ Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 578, citing *Commonwealth v Drum* 58 Pa St 9 at 22.

⁴² Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 579.

develop a separate castle doctrine. In reality there can be situations in which a householder may retreat in safety, yet for policy reasons the common law developed a rule which permitted them to stand-fast. At the same time, however, householders are still subject to the necessity principle. In other words, the necessity principle does not inevitably compel safe-retreat.

5.36 Despite these criticisms, the safe-retreat approach has been adopted in a number of jurisdictions. For example, Gordon notes that the safe-retreat rule is applied under Scots law.⁴³

5.37 The safe-retreat approach has also been endorsed by a number of US state legislatures and courts⁴⁴ and has been incorporated into the US *Model Penal Code*. Under that Code, lethal defensive force may not be used if the defender “knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take”.⁴⁵ There are two exceptions to the requirement of safe-retreat: first, it does not apply to public defence scenarios;⁴⁶ and secondly, it can be overridden by the castle doctrine.⁴⁷ The drafters of the Code, the American Law Institute, justified this approach on the basis that the

“the protection of life has such a high place in a proper scheme of social values that the law should not permit conduct that places life in jeopardy, when the necessity for doing so can be avoided by the sacrifice of the much smaller value that inheres in standing up to an aggression.”

5.38 It was also asserted here in accordance with Beale’s analysis that a truly honourable man would retreat when faced with unjustifiable force. The remedy in this instance is a complaint to the police as opposed to the use of force.⁴⁸

⁴³ Gordon *Criminal Law* (3rd ed W Green 2001) at 323.

⁴⁴ According to one commentator, the safe-retreat approach is the majority position amongst US jurisdictions: Samaha, *Criminal Law* (6th ed Wadsworth 1999) at 245. However, Perkins & Boyce assert that it is only adopted by a substantial minority of jurisdictions.

⁴⁵ Section 3.04(2)(b)(ii) of the *Model Penal Code*.

⁴⁶ Section 3.04(2)(b)(ii)(B) of the *Model Penal Code*.

⁴⁷ Section 3.04(2)(b)(ii)(A) of the *Model Penal Code* provides that a defender “is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work [the defender] knows it to be”.

⁴⁸ American Law Institute *Model Penal Code and Commentaries* (1985) Part I Vol 2 at 54.

5.39 Despite the widespread adoption of either the safe-retreat approach or stand-fast approach in the US, the remainder of the common law world has tended towards the less structured “compromise” approach.

(3) *The Compromise Approach*

5.40 Given the entrenched views of those supporting the safe-retreat and stand-fast approaches, it was perhaps unsurprising that the twentieth century response of many common law jurisdictions was to side-step the conflict altogether by adopting the compromise approach. Whilst not resolving the debate, the courts adopted what has been described as “median position”⁴⁹ or “supposed compromise”⁵⁰ whereby retreat is merely one of the factors to be taken into account when assessing the reasonableness of an accused’s actions.

5.41 The debate came to a head in the 1921 US Supreme Court case, *Brown v United States*.⁵¹ In a celebrated judgment, Holmes J held that the failure to retreat was not fatal to a claim to self-defence:

“Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt... Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense... Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore in this Court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.”⁵²

5.42 Holmes J was conscious that his compromise approach had little historical support at common law and, indeed, that it was inconsistent with

⁴⁹ *Ibid* at 53.

⁵⁰ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 460.

⁵¹ (1921) 256 US 335. The deceased had on the previous day threatened the accused with a knife at their workplace. On the day of the killing the accused came to work armed with a gun. When the deceased came at the accused with a knife the accused had retreated to where he had stored his gun and shot the deceased four times. At the accused’s trial, the trial judge directed the jury that the accused had been obliged to retreat if a reasonable person would have believed that retreat could be achieved without risk of death or serious bodily harm.

⁵² *Brown v United States* (1921) 256 US 335 at 343.

Beale's analysis.⁵³ However, he took the robust view that little assistance could be gleaned from "[c]oncrete cases or illustrations stated in the early law in conditions very different from the present [which] have had a tendency to ossify into specific rules without much regard for reason."⁵⁴

5.43 During the course of the twentieth century the Holmes J "compromise" was embraced by the courts of most common law jurisdictions.

5.44 The first jurisdiction to do so was Australia in the 1958 High Court decision, *R v Howe*.⁵⁵ The issue of retreat arose from the following facts. The appellant claimed that he had been sexually attacked by his male drinking companion. The appellant escaped from the deceased's grasp and retreated to his car where he seized a rifle. Whilst it appears to have been suggested that the appellant could have driven away in safety, instead he shot the deceased when he was still eight or nine paces away. The High Court held that it was an error to direct the jury in terms of the safe-retreat approach.⁵⁶ Citing Holmes J's judgment, Dixon CJ stated that "whether a retreat could and should have been made is an element for the jury to consider as entering into the reasonableness of the defendant's conduct."⁵⁷

5.45 Whilst *R v Howe* purported to settle the law only in relation to non-criminal code states, the various Australian criminal codes have been interpreted consistently with the decision, at least insofar as it applies to cases involving innocent defenders.⁵⁸ The Canadian courts have likewise embraced the compromise approach in their interpretation of their *Criminal Code*.⁵⁹ However, as will be seen below, different rules apply under the codes in relation to self-generated necessity cases.

⁵³ *Brown v United States* (1921) 256 US 335 at 343.

⁵⁴ *Ibid* at 343.

⁵⁵ [1958] 100 CLR 448 (High Court of Australia).

⁵⁶ *R v Howe* [1958] 100 CLR 448, 463-464 (per Dixon CJ, McTiernan and Fullagar JJ concurring), 469 (Taylor J) & 471 (per Menzies J).

⁵⁷ *R v Howe* [1958] 100 CLR 448, 463 (per Dixon CJ, McTiernan and Fullagar JJ concurring). Menzies J stated that the possibility of retreat was "to be taken into account in considering what [the accused] did was necessary": [1958] 100 CLR 448 at 471. Notwithstanding that *R v Howe* was subsequently reversed on other grounds by the High Court in *Zecevic v R*, the Court upheld its earlier views as to the retreat rule: (1987) 71 ALR 641, para.19, per Wilson, Dawson and Toohey JJ, Mason CJ concurring.

⁵⁸ O'Connor & Fairall *Criminal Defences* (3rd ed Butterworths 1996) at 187.

⁵⁹ See for example *R v Deegan* (1979) 49 CCC 2d 417 (Alberta Court of Appeal). Whilst the defender in *R v Deegan* was attacked in his home (and hence, pursuant to the castle doctrine, retreat would not have been required at common law in any event), the Court also stated obiter that the retreat requirement was no longer applicable to

5.46 The Tasmanian *Criminal Code* goes further than any other Australian legislation insofar as the self-defence provision has been amended to expressly reflect the compromise approach.⁶⁰ The New Zealand *Crimes Act 1961* adopts the same language and its Court of Appeal has accepted that the question as to whether a defender “should have retreated depends on the jury’s view of what was reasonable in the circumstances.”⁶¹

5.47 The adoption of the compromise approach by the English courts was a more gradual affair than that which occurred in Australia. Until the “turning-point”⁶² came with the 1969 Court of Appeal case, *R v Julien*,⁶³ the safe-retreat approach seems to have prevailed under English law.⁶⁴ However, in *R v Julien*,⁶⁵ the Court held that a defender need not “take to his heels and run”; rather, the defender must only “demonstrate that he is prepared to temporise and disengage and perhaps make some physical withdrawal”.⁶⁶ Whilst this test arguably is less stringent than the safe-retreat approach, it is not as relaxed as the compromise approach insofar as there is, albeit a limited, positive obligation placed upon the defender.⁶⁷

cases where the defender was attacked outside the home. In doing so, the Court relied on both *Brown v United States* (1921) 256 US 335 and *R v Howe* [1958] 100 CLR 448. Stuart *Canadian Criminal Law* (3rd ed Carswell 1995) at 443 states that *R v Deegan* represents the approach adopted by the Canadian courts.

⁶⁰ Section 46 of the Tasmanian *Criminal Code* states: “A person is justified in using, in defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use.” Section 48 of the New Zealand *Crimes Act 1961* is substantively the same.

⁶¹ *R v Savage* [1991] 3 NZLR 155 at 160, interpreting section 48 of the New Zealand *Crimes Act 1961*.

⁶² McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 740.

⁶³ [1969] 2 All ER 856.

⁶⁴ See, for discussion McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 740. The authors dispute the claim made by Beale, “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 576 that the retreat issue had not come before the courts since Foster’s time and point out a small number of nineteenth and twentieth centuries cases applying the safe-retreat approach.

⁶⁵ [1969] 2 All ER 856.

⁶⁶ *Ibid* at 858.

⁶⁷ As to the argument that *R v Julien* did not disturb the safe-retreat approach, McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 741, argue: “Given that the Court of Appeal upheld the trial judge’s direction that there was an obligation to retreat before defensive force could lawfully be used, it is arguable that these words were not intended to qualify the traditional rule [citing Ashworth, ‘Self-defence and the Right to Life’ (1975) Camb L J 282 at 286]... Ashworth does, however, concede that the words effectively re-define the common law duty to retreat as a duty to demonstrate a willingness to do so; and since showing

5.48 There were two other notable features of this decision. First, the Court expressly held that its retreat rule applied to cases of both lethal and non-lethal defensive force.⁶⁸ In contrast, previously the common law had imposed no retreat obligations on defenders who resorted to moderate force. Secondly, the Court did not appear to distinguish between cases involving innocent defenders and cases of chance-medley.⁶⁹ These two features were another indication of the trend toward a generalisation of the retreat rule.

5.49 In the Court of Appeal decision in *R v McInnes*⁷⁰ a trial judge's direction to the jury that the defender was obliged to retreat "as far as he could"⁷¹ was said to have been "expressed in too rigid terms" when "[v]iewed in isolation".⁷² Interestingly, whilst the Court purported to follow *R v Julien*,⁷³ it also endorsed the compromise approach as adopted by the Australian High Court in *R v Howe*.⁷⁴

5.50 Ultimately, any confusion was removed by the Court of Appeal's abandonment of the *R v Julien* approach in its 1985 judgment, *R v Bird*.⁷⁵ There, the Court clearly endorsed the compromise approach, indicating that a tribunal of fact merely needs to *take into account* any failure to retreat when determining the question of necessity:

"Evidence that the defendant tried to retreat or tried to call off the fight may be a cast-iron method of casting doubt on the suggestion that he was the attacker or retaliator or the person trying to revenge himself. But it is not by any means the only method of doing that."⁷⁶

5.51 This was in accordance with the reasoning of Smith and Hogan who argued that any retreat requirement was "scarcely consistent with the rule that it is permissible to use force, not merely to counter an actual attack,

a willingness to retreat ex hypothesi falls short of actually doing so, the better view would seem to be that Julien to that extent dilutes the traditional rule."

⁶⁸ *R v Julien* [1969] 2 All ER 856 at 858.

⁶⁹ On the evidence of the appellant, he could be described as a mutual aggressor: *R v Julien* [1969] 2 All ER 856 at 857.

⁷⁰ [1971] 3 All ER 295 (English Court of Appeal).

⁷¹ *R v McInnes* [1971] 3 All ER 295 at 300.

⁷² *Ibid* at 301.

⁷³ [1969] 2 All ER 856.

⁷⁴ [1958] 100 CLR 448 (High Court of Australia).

⁷⁵ [1985] 2 All ER 513.

⁷⁶ *R v Bird* [1985] 2 All ER 513 at 516.

but to ward off an attack honestly and reasonably believed to be imminent.”⁷⁷ However, McAuley and McCutcheon criticise this assertion:

“The difficulty with this reasoning is that Smith and Hogan’s analysis was based on the mistaken assumption that the common law rule imposed an absolute duty to retreat such that it precluded a pre-emptive strike in the face of an imminent, life-threatening attack... [T]he common-law rule did nothing of the kind; it merely required a defendant ‘to flee as far as he could with safety of life’ and therefore provided for precisely the sort of case Smith and Hogan and [the Court in *R v Bird*] thought it excluded.”⁷⁸

(4) *Current Law in Ireland*

5.52 The two most important decisions in this jurisdiction regarding the issue of retreat are the Supreme Court’s 1972 decision, *People (AG) v Dwyer*,⁷⁹ and the Court of Criminal Appeal’s 1994 decision, *People (DPP) v Clarke*.⁸⁰

5.53 In *Dwyer* the Court firmly endorsed the principle of necessity. Yet, at the same time, Walsh J (who delivered one of the Court’s two judgments⁸¹) *appeared* to embrace the compromise approach, albeit that his comments were *obiter*.⁸² Walsh J cited both the Australian High Court in *R v Howe* and the English Court of Appeal in *R v McInnes*, although he did not *expressly* endorse them.

⁷⁷ Smith & Hogan *Criminal Law* (5th ed Butterworths 1983) at 327.

⁷⁸ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 742 citing *Chaplain of Gray’s Inn’s case* (1369) Lib. Ass ann 43 f 274, pl 31.

⁷⁹ [1972] IR 416.

⁸⁰ [1994] 3 IR 289. The Commission’s attention was also drawn to a case before the Court of Criminal Appeal at the time of publication, see The Irish Times 10 November 2006, namely, *The People (D.P.P.) v Barnes* in which Counsel for the defendant asserted the castle doctrine in denying that there was any duty on his client to retreat while in his own home where

⁸¹ Ó Dálaigh CJ concurred with the judgment of Walsh J. Budd J concurred with the judgment of Butler J. Curiously, Fitzgerald J concurred with both judgments.

⁸² McAuley notes the apparent contradiction of these approach in “Excessive Defence in Irish Law” in Yeo (editor) *Partial Excuses to Murder*, (Federation Press 1990) at 196-197 but concludes that Walsh J’s remarks regarding the compromise approach “were plainly *obiter* since His Lordship went on to answer the certified question by holding that the defendant must believe that the force he or she uses is necessary to defend himself or herself.”

5.54 Butler J's judgment is even more ambiguous. He makes no direct reference to any retreat rule. However, from his factual observations it is clear that he considered retreat to be at least a relevant consideration.⁸³

5.55 Although Butler J concurred that a retrial should be ordered (on the grounds that the partial defence of excessive defence may have been open to the appellant), he indicated that if a jury accepted that "the appellant came out of the cafe unnecessarily and acted aggressively with full knowledge of what he was doing" then a murder verdict would be appropriate.⁸⁴ He added that it was "clearly open to the jury to find that the appellant used more force than was reasonably necessary for his own protection" given that "there was no evidence... that he was prevented from making his escape."⁸⁵ Whilst these remarks suggest that Butler J considered that retreat was important, they do not clarify whether he preferred the safe-retreat approach, the compromise approach, or whether their relevance was confined to cases involving self-generated necessity.

5.56 However, the Court of Criminal Appeal, in its 1994 decision in *People (DPP) v Clarke*,⁸⁶ did not entertain any doubt regarding the correct interpretation of *People (AG) v Dwyer*.⁸⁷ The Court took the view that Walsh J's judgment in *Dwyer* had modified the retreat rule in accordance with the compromise approach.⁸⁸

5.57 The issue of retreat was important in the context of the facts in *People (DPP) v Clarke*.⁸⁹ The appellant had been violently assaulted by the deceased in a bar, and the deceased had threatened to come back with a weapon to kill the appellant, his family and girlfriend. The appellant went home but later learnt that the deceased had returned to the bar with a weapon and had made further threats. The appellant did not call the Gardaí, but

⁸³ The facts leading to the appellant's conviction for murder were as follows. Three young men, including the deceased, had sought out the appellant to exact revenge after the appellant had insulted the mother of one of their group earlier that evening. They located the appellant at a café and called him out onto the street. When the appellant and his companion emerged a fight ensued in the street. The appellant was engaged with two of the opposing group and claimed that he was caught from behind and hit on the head with some instrument. Fearing that he would be killed, the appellant brandished a knife he was carrying and stabbed the deceased.

⁸⁴ *People (AG) v Dwyer* [1972] IR 416 at 428.

⁸⁵ *Ibid.*

⁸⁶ [1994] 3 IR 289.

⁸⁷ [1972] IR 416.

⁸⁸ [1994] 3 IR 289, 301, where O'Flaherty J stated that "[the 'obligation to retreat'] has now, of course, been modified in the manner described in... *People (AG) v Dwyer*."

⁸⁹ [1994] 3 IR 289.

instead armed himself with a gun and his brother with a machete. Together with their father, they set out to, according to the appellant, confront and frighten the deceased. Believing the deceased to be heading towards his girlfriend's house and to be armed with a hatchet (although the appellant never saw one), the appellant confronted the deceased. The appellant claimed that the deceased again threatened to kill him. Despite warnings from the appellant, the deceased ran at the appellant. The appellant fatally shot the deceased.⁹⁰

5.58 The Court quashed the appellant's manslaughter conviction on the grounds that the trial judge effectively removed self-defence from the jury as a matter of law by directing that the facts "hardly admit of the possibility of an acquittal because there was ample time to avoid the confrontation".⁹¹

5.59 Whilst the matter is far from clear, it would seem that the Court of Criminal Appeal was not offended by the trial judge's references to the "obligation to retreat" and the like, so much as his description of it as an absolute legal requirement.

5.60 The incorporation of the compromise approach into Irish law appears to have been completed with the enactment of the *Non-Fatal Offences Against the Person Act 1997*, which states:

"The fact that a person had an opportunity to retreat before using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was reasonable."⁹²

5.61 As discussed elsewhere, it is debatable whether the 1997 Act governs legitimate defence in cases of homicide. Nevertheless, on this topic it appears to be consonant with the approach taken at common law in Ireland and in some jurisdictions abroad, with one major exception. Interestingly, under the 1997 Act the issue of retreat must be considered not only in relation to the private defences but also the public defences. This is contrary to the common law where the question of retreat was irrelevant in public defence situations such as arrest or crime prevention; an obligation to retreat in these circumstances would render the public defender's task impossible.

⁹⁰ The appellant claimed that he did not intend to kill the deceased but had intended to shoot over his head.

⁹¹ [1994] 3 IR 289, 301. The trial judge had also erroneously directed the jury as follows: "There was ample time to notify the guards. You are not entitled to go and get a lethal weapon and go in search of somebody to protect even yourself and your family if there are other means available to you which you should make use of. And we have been given no suggested explanation why it was not possible to invoke the power of the law on that occasion." See [1994] 3 IR 289, 301.

⁹² Section 20(4) of the *Non-Fatal Offences Against the Person Act 1997*.

(5) Summary and Conclusions

5.62 It is evident from this discussion that the principle of necessity is an essential component of legitimate defence. This Part of the chapter has examined how far the duty to retreat should extend. It is apparent that there should be no duty to retreat in respect of public defence. It would be impossible for a law enforcement officer effecting an arrest or preventing a crime to retreat without abandoning his or her purpose.

5.63 Ashworth also stresses the importance of “articulating certain general principles which may then be used for the guidance of both individuals and the courts” rather than relying on such vague concepts as reasonableness.⁹³ The Commission agrees with these comments and is of the opinion that the compromise approach offers so little guidance that it is not a rule at all. Accordingly, the Commission does not recommend the adoption of this approach.

5.64 The stand fast approach is founded on the individual’s right to bodily integrity and autonomy. It has some academic support. For example, although not necessarily accepting the historical accuracy of Foster’s analysis, Williams submits that the stand-fast approach achieves the best substantive results. The “basic question”, according to Williams, is whether “the life of the aggressor [is] the paramount consideration, so that the defender must retreat ‘to the wall,’ perhaps leaving a thug to strut in triumph, or do we say that the defender should not be liable for acting courageously in standing his ground?”⁹⁴ Williams answers this question by favouring the abolishment of any retreat obligations for innocent defenders.⁹⁵

5.65 Arguably, this position recognises the reality that defenders are often required to act instinctively in dangerous circumstances and that their natural impulses may lead them to ignore safe avenues of retreat;⁹⁶ “a law which purports to curb the basic instinct towards self-preservation will prove unenforceable.” Furthermore, rather than placing lives at risk, the stand-fast approach encourages “a show of strength [which] may often discourage a pending attack (*si vis pacem para bellum*)”.⁹⁷

⁹³ Ashworth “Self-Defence and the Right to Life” [1975] *The Cambridge Law Journal* 282 at 287.

⁹⁴ Williams *Textbook of Criminal Law* (Stevens & Sons, 1978) at 461.

⁹⁵ *Ibid* at 462.

⁹⁶ This argument is discussed in Mischke, “Recent Development: Criminal Law – Self-Defense – Duty to Retreat: *State v Kennamore*” (1981) 48 *Tenn L Rev* 1000 at 1020-1021.

⁹⁷ Ashworth acknowledges this argument but ultimately rejects the stand-fast approach: “Self-Defence and the Right to Life” [1975] *The Cambridge Law Journal* 282 at 289-290.

5.66 However, this view is not supported by all. For example, one US judge commented that the stand-fast approach “places barbaric emphasis on manliness unleavened by a proper sensitivity to the value of human life.”⁹⁸ The conflict avoidance argument has been advanced by a number of commentators. Ashworth argues that “the ‘stand fast’ approach appears to favour the law-abiding citizen’s feelings of honour and self-respect at the expense of the criminal’s right to life or physical security”.⁹⁹

“If the real thrust of the argument is that retreat and the avoidance of conflict is dishonourable, then it is not self-defence but the defence of self-respect which is in issue. And English law, adopting a ‘human rights’ approach, presently makes no concession to that argument.”¹⁰⁰

5.67 Instead, the Commission is of the opinion that the safe retreat approach is preferable. This approach places the primary emphasis on the attacker’s right to life rather than the defender’s right to dignity and honour. As observed by Ashworth:

“It is thought that where a situation does present a stark choice between the lives of attacker and defender, the law should not hesitate to protect the life of the innocent rather than the life of the criminal attacker. But how far should this protection be carried in a state which regards the right to life as fundamental? Surely the ‘choice of lives’ situation only arises when the defender cannot (without physical danger to himself) avoid the use of serious violence. Thus a legal system which supports the maximum protection for *every* human life should provide that a person attacked ought if possible to avoid the use of violence, especially deadly force, against his attacker.”¹⁰¹

5.68 The Commission accepts that the defender also has a right to dignity and honour and not to be compelled to retreat from an attack they did not initiate but believes that this right should yield to the more important right of the attacker’s life.

⁹⁸ *Kennamore v State (No.1)* Tennessee Court of Criminal Appeals, 15 February 1979 (slip opinion) at 8, cited in Mischke, “Recent Development: Criminal Law – Self-Defense – Duty to Retreat: State v Kennamore” (1981) 48 Tenn L Rev 1000 at 1021 (referring to the “true man doctrine”).

⁹⁹ Ashworth “Self-Defence and the Right to Life” [1975] The Cambridge Law Journal 282 at 290.

¹⁰⁰ *Ibid* at 303.

¹⁰¹ Ashworth “Self-Defence and the Right to Life” [1975] The Cambridge Law Journal at 289. Ashworth labels this as the ‘human rights’ approach to self-defence, since it accords with the provision in the European Convention that no life shall be deprived of protection unless absolutely necessary for a lawful purpose.

5.69 Ironically, Perkins and Boyce, two of the most ardent opponents of Beale's analysis, agree that the safe-retreat approach strikes a better balance between the defence of honour and that of life. They assert that while Beale's position cannot be accepted as an accurate statement of the common law in England, it is a preferable approach.¹⁰²

5.70 This approach is also justified on the basis of the policy consideration of encouraging conflict avoidance. The law should encourage individuals to retreat from attacks where it is safe to. If individuals retreat from unjustified attacks, no one will be injured. However, if an individual confronts an attacker, both the attacker and the defender may be injured as well as any innocent parties for example law enforcement officials who intervene to quell the violence. It is therefore apparent that the law should not sanction confrontation in this instance.

5.71 The requirement that a person be capable of retreating with complete safety should not be interpreted in an unduly strict manner. In moments of immense stress and pressure, individuals have a tendency to act on the "spur of the moment" and are unlikely to subject themselves to additional risks. Accordingly, it is only where the individual could retreat with complete safety that they should be required to do so. Any risk to their safety, however minute and unlikely, should entitle them to confront their attacker. In addition to this, any mistakes made by a defender in believing that they could not depart with safety would be accounted for in accordance with the standard articulated in Chapter 6.

5.72 It could be argued that such a lenient test renders the safe retreat approach inapplicable to a wide variety of situations and therefore, it should not be adopted. However, as noted by Beale the fact that safe-retreat will be impossible in many situations does not undermine the general rule that a person should retreat where it is safe to do so.¹⁰³

5.73 The *Model Penal Code* provision on this is a useful model. This provision requires a defender to retreat where he can do so with complete safety. It is suggested that a similar provision should be incorporated into Irish law.

5.74 *The Commission provisionally recommends that innocent defenders may only resort to lethal defensive force in response to a threat where they are unable to retreat with complete safety from the threat. Public defenders should not be required to retreat from a threat in any instance.*

¹⁰² Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1143. However, the authors conclude that this is a matter that should be settled by legislatures rather than the courts.

¹⁰³ Beale "Retreat from a Murderous Assault" (1903) 16 Harv L Rev 567 at 580.

D The Castle Doctrine

5.75 The castle doctrine asserts that defenders are entitled to stand their own ground when attacked in their home and, as such, represents a significant exception to any normal obligation to retreat. Even Beale, who advocated the safe-retreat approach, recognised the doctrine:

“In one case a person attacked might properly defend himself against attack without retreating, that is, where he was attacked in his dwelling-house. He might defend his castle against felonious attack without retreating from it, since that would be to give up the protection of his ‘castle’, which the law allows him.”¹⁰⁴

5.76 The special status granted to the protection of the home is related to “[mankind’s] fundamental physical and psychological need for some sort of shelter and sanctuary.”¹⁰⁵

“[T]he original rationale for that rule was that for most people the home represented the most important source of personal protection from felonious attack; hence the oft-quoted remark that ‘the house of every one is to him as his castle and fortress’.¹⁰⁶ Thus the occupier was entitled to stand fast because to require him to retreat would be to expose him to the dangers against which his home or ‘fortress’ provided a shield.”¹⁰⁷

5.77 The origins of the doctrine can be traced back at least as far as the fourteenth century.¹⁰⁸ It had been established by that time that a killing performed in defence of one’s home or to repel a burglar was a justification. This is illustrated in the following fourteenth century case:

“[I]t was found that [the defendant] was in his house; and the man whom he killed and others came to his house in order to burn him, &c... and surrounded the house but did not succeed; and he leapt

¹⁰⁴ Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 574-575.

¹⁰⁵ Katheder, “Lovers and Other Strangers: Of, When is a House a Castle? Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants – State v Bobbitt” (1983) 11 Fla St U L Rev 465 at 484.

¹⁰⁶ Semayne’s case (1604) 5 Co Rep 91a at 91b. McAuley and McCutcheon note that this formulation goes back at least to Bracton: Bract f 144b.

¹⁰⁷ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 761.

¹⁰⁸ Katheder, “Lovers and Other Strangers: Of, When is a House a Castle? Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants – State v Bobbitt” (1983) 11 Fla St U L Rev 465 at 467 at fn 16.

forth &c... and killed the other &c... And it was judged that this was no felony.”¹⁰⁹

5.78 However, it is unclear whether the thrust of the defence was to protect the integrity of the home or the safety of its occupants. One commentator has suggested that, at least initially, that it was more concerned with the former.¹¹⁰

5.79 This distinction may explain the otherwise perplexing conclusion in the 1924 English case of *R v Hussey*:¹¹¹

“In the twentieth century case of *R v Hussey*, the [castle doctrine] was applied to a lessee who fired a shot at his landlady who was trying to evict him in the mistaken belief that she was entitled to do so. Although there was no suggestion that the defendant had been threatened with death or serious injury the Court of Criminal Appeal held that his action was justified as the attempted eviction was unlawful.”¹¹²

5.80 Whilst *R v Hussey*¹¹³ has never been overruled, most commentators agree that it no longer represents the modern state of the law.¹¹⁴ In contrast to the historical emphasis on the preservation of the sanctity of the home itself, the current view is that lethal defensive force is

¹⁰⁹ Anonymous (1352) Lib ann 26, f 123, pl 23, cited in McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 734-735. Beale cites a number of supporting authorities: “Where a man... comes to his house to commit burglary and the like... let him go quit without the king’s pardon”: F Coron 261 (T 22 Ed III); “[A] man may kill another without impeachment, as if thieves come to rob a man, or to commit burglary in his house, he may safely kill them, if he cannot take them”: Compton’s Case 22 Lib Ass 97, pl 55 (translated, Beale, Court of Cas Cr L 316), cited in Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 569.

¹¹⁰ Katheder, “Lovers and Other Strangers: Of, When is a House a Castle? Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants – State v Bobbitt” (1983) 11 Fla St U L Rev 465 at 467.

¹¹¹ (1924) 18 Cr Appeal R 160.

¹¹² This summary is taken from McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 762.

¹¹³ (1924) 18 Cr Appeal R 160.

¹¹⁴ See for example McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 762. See also Ashworth, “Self-Defence and the Right to Life” [1975] The Cambridge Law Journal 282 at 294.

permissible to repel only those intruders who pose a serious threat to the occupants.¹¹⁵

5.81 One explanation as to why the ruling in the case has never been revisited is that the castle doctrine arguably has been rendered redundant, or at least occupies an ambiguous position, in most common law jurisdictions as a result of the widespread adoption of the compromise approach to the retreat rule.¹¹⁶ If a defender is not ordinarily obliged to retreat from an attack, then the advantage which the castle doctrine offers those attacked in their home is questionable.

5.82 However, it will be seen from the following discussion that the castle doctrine still generates a healthy level of debate in the United States of America, particularly in jurisdictions that have rejected the compromise approach.¹¹⁷ Drawing on this jurisprudence, as well as largely historical material from the English common law, it is possible to examine a number of potentially problematic facets of the doctrine and to assess whether the doctrine should play a greater role in the Irish law of legitimate defence

5.83 In the case of *The People D.P.P. v Nally*¹¹⁸ the trial judge did not appear to be of the view that there was any duty on the applicant to retreat while the defendant had initially been protecting the inviolability of his home, however, Carney J noted that once the defendant had got the upper hand in the altercation the position changed. The trial judge placed emphasis on the fact that the defendant had reloaded his shotgun as the intruder was retreating in purporting to deny the defendant the full defence of self defence. This denial of the full defence was later impugned by the Court of Criminal Appeal.

5.84 As a direct consequence of the interest generated by this case a Private Members Bill, the *Criminal Law (Home Defence) Bill 2006* was introduced to the Dáil by Fine Gael in June 2006. This Bill proposed to amend the law in relation to the protection of home occupiers who confront

¹¹⁵ Katheder “Lovers and Other Strangers: Of, When is a House a Castle? Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants – State v Bobbitt” (1983) 11 Fla St U L Rev 465 at 470.

¹¹⁶ The castle doctrine does not even rate a mention in Smith & Hogan *Criminal Law* (9th ed Butterworths 1999).

¹¹⁷ For example, the castle doctrine is incorporated in the self-defence provisions under the US Model Penal Code (which adopts the safe-retreat approach). Section 3.04(2)(b)(ii)(A) of the *Model Penal Code* provides that “the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be”. See, for discussion, American Law Institute, *Model Penal Code and Commentaries* (1985) Part I Vol 2 at 56.

¹¹⁸ Unreported, Court of Criminal Appeal, 12th October 2006.

intruders to their homes. Section 5 of the Bill specifically precluded a defence to murder or unlawful killing. A second private members Bill introduced by Senator Tom Morrissey, the Defence of Life and Property Bill 2006 published in early June 2006 proposes to extend such a defence to murder and manslaughter

5.85 Section 3 of the *Criminal Law (Home Defence) Bill 2006* proposed to create a rebuttable presumption that any force used by an occupier to protect his or her home or family is reasonable. This would shift the balance in favour of the defender. Section 6(c) proposed to remove the requirement to retreat (by amending section 20(4) of the Non-Fatal Offences Against the Person Act 1997. Section 7 of the Bill then set out the factors that must be considered by a jury in order to rebut the resumption of reasonableness and these include: whether there were family members in the house at the time, whether it was a split second decision on the part of the defender, as well as a considerations of the other options that were available to a defender and the presence or absence of an honest belief in the availability of such alternatives.

5.86 The second of these Bills, *the Defence of Life and Property Bill 2006* would also remove the duty to retreat proposing that where a householder uses force to repel or prevent trespass on the house or surrounding areas by persons who appear to be intent on committing a serious criminal offence, the entitlement of the householder to use justified force shall not be judged by reference to the opportunity to retreat. It allows for this defence to be used in criminal and civil proceedings and it applied to murder, manslaughter and non-fatal offences against the person

5.87 The former of these Bills was not voted down by the Government and the Minister for Justice Equality and Law Reform has stated that the issues raised in both Bills present a need for further consideration and that government proposals on this area may be included in the proposed *Criminal Justice (Miscellaneous Provisions) Bill*. The need for clarification of this area was echoed by Mr Justice Hardiman in the *People (DPP) v Barnes*.¹¹⁹

(1) *Scope of the Castle Doctrine*

5.88 This section considers a number of critical issues which influence the ambit of the castle doctrine, namely:

- (a) Who is entitled to the benefit of the doctrine?
- (b) Does the doctrine apply when the attacker is a non-intruder?

¹¹⁹ The Irish Times Friday 10 November 2006.

- (c) Does the doctrine apply to the property surrounding the home?
- (d) Does the doctrine apply to “sanctuaries” other than the home?

(a) Who is Entitled to the Benefit of the Castle Doctrine?

5.89 In the paradigm case involving the castle doctrine it is the owner or legal possessor of the home who claims the right to defend his or her castle from an attacker.¹²⁰ Hence, the term “householder” is often used to describe those who may benefit from the doctrine.

5.90 Less clear, however, is whether others who are lawfully present in the home, such as guests, licensees and servants, are encompassed by the doctrine. In the seventeenth century case of *R v Cooper*¹²¹ it was not suggested that a mere lodger or sojourner was required to retreat before using lethal defensive force against an attacker who broke into a house with intent to burgle or kill.¹²² The nineteenth century case of *R v Dawkin*,¹²³ however, expressly stated that the retreat duty did apply to mere lodgers in a house.

5.91 In contrast, the US courts have generally been content to afford occupants of a dwelling the privileges of the castle doctrine even if they are not the “householders”. Hence, Perkins and Boyce observe that “[a lodger’s] room is his dwelling place and hence he is under no obligation to retreat if attacked in his room”.¹²⁴ Indeed, the *Model Penal Code* defines a person’s dwelling broadly as “any building or structure, though movable or temporary, or a portion thereof, that is for the time being the actor’s home or place of lodging.”¹²⁵ Such a definition would, no doubt, include temporary accommodation in hotels and motels.

¹²⁰ Beale describes the doctrine as applicable when a person is “attacked in his dwelling-house”: Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 574 (emphasis added). For case examples to the same effect, see *ibid* at 569.

¹²¹ (1641) Cro Car 544, cited in McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 736 at fn14.

¹²² However, McAuley & McCutcheon state: “Insofar as it makes no mention of a retreat requirement, this case also evinces a liberal attitude to the substantive law of *se defendendo*”: *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 736, at fn14.

¹²³ (1828) 1 Lew 166, cited in Ashworth, “Self-Defence and the Right to Life” [1975] *The Cambridge Law Journal* 282 at 294 and McAuley & McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) 736 at 740.

¹²⁴ Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1134.

¹²⁵ Section 3.11(3) of the *Model Penal Code*.

5.92 Some US courts have gone further and held that the castle doctrine removes any obligation upon guests to retreat when attacked by intruders to their host's homes. Hence, in *State v Mitcheson*¹²⁶ it was held that a guest attending his sister's party was under no obligation to retreat before adopting lethal defensive force to repel an intruder.¹²⁷

(b) Does the doctrine apply when the attacker is a non-intruder?

5.93 Whilst the paradigm case in which the castle doctrine is applicable involves the defence of the home against an intruder, there may be instances in which householders are faced with threats from non-intruders such as invitees, licensees or co-habitees. In such cases, the question would arise whether householders would be entitled to stand their ground or whether they would be bound by the ordinary rules of retreat.

5.94 By the beginning of the twentieth century it had been established, at least in the United States of America, that the castle doctrine was applicable to intruders and non-intruders alike. As Beale stated, "one may stand his ground and repel a murderous assault by one who is already within the house, even one rightfully there."¹²⁸

5.95 This approach was not universally adopted. For example, in *Baker v Commonwealth*¹²⁹ the appellant's husband and two friends were drinking together in the adjoined house / shop of the appellant. When a fight erupted and the two turned upon the appellant's husband, the appellant shot and killed one of them in his defence. The Court held that the castle doctrine was inapplicable given that the assailants were invitees.

5.96 However, on the ground that the invitees are transformed into trespassers by their aggression, in the majority of those US States that impose a duty of retreat it would appear that the castle doctrine operates in favour of defenders who repel aggressive invitees.¹³⁰

¹²⁶ (1977) 560 P2d 1120 (Supreme Court of Utah), cited in Samaha *Criminal Law* (6th ed Wadsworth 1999) at 251-252.

¹²⁷ The Court was persuaded to adopt this approach notwithstanding that the relevant statutory provision, on its face, granted the "defence of habitation" rights only to the owner or occupier of the property.

¹²⁸ Beale "Homicide in Self-Defense" (1903) 3 Columbia Law Review 525 at 541.

¹²⁹ (1947) 305 Ky 88 (Court of Appeals of Kentucky).

¹³⁰ The Supreme Court of Florida noted in *Weiland v State* (1999) 732 So 2d 1044 at 1051 that, of the US States that impose a duty of retreat, only eight require defenders to retreat when attacked in their home by non-intruders (invitees and co-habitees) (including three states in which the duty has been imposed controversially by statute), whereas nine state courts have held that the castle doctrine applies in these circumstances.

5.97 A more problematic case is arguably that of co-habitees.¹³¹ In Beale's time it was apparently accepted that the castle doctrine was applicable. Hence, in *State v Jones*,¹³² it was held that a co-owner of a public bar (the workplace was held to fall within the castle doctrine in this case) was entitled to the benefit of the castle-doctrine against his co-owner.¹³³ The court saw no reason to draw a distinction between intruders and co-habitees in this regard.

5.98 However, the opposite stance has since been adopted in a number of US jurisdictions which have held that a householder should be required to retreat in the face of an attack by a co-habitee on the ground that co-habitees have "equal rights to be in the 'castle' and neither [have] the legal right to eject the other."¹³⁴ As the Supreme Court of Florida argued in *State v. Page*,¹³⁵ any other approach could have unwelcome consequences. The appellant in this case claimed to have been attacked by his neighbour on a common walkway running along the front of their apartments. It was held that the castle doctrine did not apply in these circumstances until the appellant had retreated inside the door of his apartment. The court held that this approach was necessary to ensure proper enforcement of the criminal law. As observed by the court "[t]o rule otherwise would, in effect, allow shoot-outs between persons with equal rights to be in a common area."¹³⁶

5.99 A similar conclusion was reached in *Cooper v United States*,¹³⁷ albeit for different reasons. The appellant in that case had shot his brother in response to a supposed attack in the living room of their home. Holding that the castle doctrine was inapplicable to co-occupants, the Court stated:

¹³¹ One commentator has argued that needless complication is introduced by excluding co-habitee cases from the castle doctrine but at the same applying the doctrine to invitee / licensee cases is unrealistic and places an undue burden on defenders: Katheder, "Lovers and Other Strangers: Of, When is a House a Castle? Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants – *State v Bobbitt*" (1983) 11 Fla St U L Rev 465 at 479.

¹³² (1884) 76 Ala 8 (Supreme Court of Alabama).

¹³³ *Ibid* at 16. According to the prosecution case, the appellant and the deceased had a dispute over money and the deceased was shot while taking money from the cash-register on the premises.

¹³⁴ *State v Bobbitt* (1982) 415 So 2d 254 at 726.

¹³⁵ (1984) 449 So. 2d 813.

¹³⁶ *Ibid* at 255. It is questionable whether this decision still accurately reflects Florida law given that the Court was following its earlier decision, *State v Bobbitt* (1982) 415 So 2d 724 which was subsequently overruled by *Weiland v State* (1999) 732 So 2d 1044.

¹³⁷ (1986) 512 A 2d 1002 (District of Columbia Court of Appeals), cited in Boyce & Perkins *Criminal Law and Procedure* (7th ed Foundation Press 1989) at 807.

“[A]ll co-occupants, even those unrelated by blood or marriage, have a heightened obligation to treat each other with a degree of tolerance and respect. That obligation does not evaporate when one co-occupant disregards it and attacks another.”¹³⁸

5.100 Whilst the minority of courts maintain this position, the majority view is now that the castle doctrine does apply in co-habitee cases.¹³⁹ Rejecting the argument that those who attack co-habitees have a proprietary right not to be evicted, the Supreme Court of Florida stated in *Weiland v State*:¹⁴⁰

“[T]he privilege of nonretreat from the home stems not from the sanctity of property rights, but from the time-honored principle that the home is the ultimate sanctuary”.¹⁴¹

5.101 Interestingly, in this case the Court adopted a half-way approach rather than adopting the castle doctrine in its entirety.¹⁴² The accused, fearing for her life, had killed her abusive husband during a violent argument. The Supreme Court overturned the accused’s second degree murder conviction on the ground that the jury had erroneously been instructed that the general duty to retreat was applicable. However, rather than simply holding that the castle doctrine applied, the Court held that co-habitees were obliged to retreat as far as possible *within* the home but were not required to retreat *outside* the home.¹⁴³

5.102 Whilst the Court held that this half-way approach applied to all cases of defence against non-intruders, the Court was particularly motivated by concern for the plight of those suffering domestic violence at the hands of co-habitees.¹⁴⁴ The Court considered it incongruous to permit householders the benefits of the castle doctrine when attacked by strangers yet at the same time to require a householder to retreat from an abusive spouse when statistically the risk of serious harm was greater.¹⁴⁵

¹³⁸ (1986) 512 A 2d 1002 at 1006. The Court noted that this conclusion was consistent with the compromise approach.

¹³⁹ See *Weiland v State* (1999) 732 So 2d 1044 at 1051.

¹⁴⁰ *Ibid* at 1052.

¹⁴¹ *Ibid*.

¹⁴² *Ibid*. discussed in Etheredge, “The Castle Doctrine: Extension of the Rule to Co-Inhabitants” (2000) 3 Fla Rev 695.

¹⁴³ *Weiland v State* (1999) 732 So 2d 1044 at 1056-1057.

¹⁴⁴ *Weiland v State* (1999) 732 So 2d 1044 at 1054.

¹⁴⁵ *Ibid* at 1053 citing Kampmann, “The Legal Victimization Of Battered Women” (1993) 15 Women’s Rts L Rep. 101 at 112-13.

(c) ***Does the doctrine apply to the property surrounding the home?***

5.103 Historically, the castle doctrine appears to have been limited in its application to defence within the four walls of the home and the “curtilage”, namely the area immediately surrounding the home.¹⁴⁶ At the turn of the twentieth century Beale described the rule as follows:¹⁴⁷

“[O]ne is not required to retreat from his dwelling-house, or even from his land in the immediate vicinity of his dwelling-house, to which he can retire in case of need; though if he can withdraw from his yard to his house, and thus avoid the necessity for killing, he must do so”.¹⁴⁸

5.104 Beale’s qualification of the curtilage extension – that the defender must withdraw into the house if possible – contradicted a US Supreme Court decision delivered only a few years earlier. In *Beard v United States*,¹⁴⁹ the Court had held that a defender was not obliged to retreat from an attack carried out in one of his fields which was some 50 to 60 yards from his house. Beale disagreed with the Court’s finding to the extent that it implied that mere land could have the status of a “castle” and could be defended in the same manner as a dwelling-house.¹⁵⁰

5.105 Whilst a distance of 50 to 60 yards was apparently close enough to the defender’s house to fall within the definition of “curtilage”, it would appear that 200 to 300 yards was too far. Faced with a similar set of facts as occurred in *Beard v United States*, the Florida Supreme Court held in *Danford v State*¹⁵¹ that the appellant was obliged to retreat notwithstanding that he was working in his field which was adjacent to, but about 200 to 300 yards from, his house.¹⁵²

5.106 Whilst these cases grappled with the concept of “curtilage” as it applied to rural properties, in more recent times the courts have been concerned with difficulties that can arise in suburban contexts. A typical

¹⁴⁶ Perkins & Boyce, *Criminal Law* (3rd ed Foundation Press 1982) at 1135; Katheder, “Lovers and Other Strangers: Of, When is a House a Castle? Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants – State v Bobbitt” (1983) 11 Fla St U L Rev 465 at 471-472.

¹⁴⁷ Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 579.

¹⁴⁸ Beale “Homicide in Self-Defense” (1903) 3 Columbia Law Review 525 at 540-541.

¹⁴⁹ (1895) 158 US 550 (US Supreme Court).

¹⁵⁰ Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 580.

¹⁵¹ (1907) 53 Fla 4 (Supreme Court of Florida).

¹⁵² *Ibid* at 19.

scenario is illustrated by the case of *State v Browning*¹⁵³ where it was held that the castle doctrine was applicable when the appellant was attacked between the backdoor of his home and a shed in the yard.

5.107 In contrast, however, it was held in *People v Godsey*¹⁵⁴ that the castle doctrine was inapplicable where the appellant had battered to death with a baseball bat his neighbour who had been throwing concrete and rocks at the appellant's home and car. The fatal confrontation had taken place on the edge of the appellant's property bordering on that of his neighbour. Finding that the doctrine extended "only to inhabited outbuildings located within the curtilage of the home",¹⁵⁵ the Court observed:

"Indeed, in this day of small city and suburban residential lots, the contrary rule – that a man may utilize deadly force without retreat whenever attacked in the curtilage of his home – would effectively limit the applicability of the prevailing retreat requirement to situations in which the defendant was on another's property."¹⁵⁶

5.108 A willingness to place concrete limits on the concept of "curtilage" was also expressed in *State v Bonano*.¹⁵⁷ In this case, the Court questioned whether it was sound to rely on the archaic and ill-defined concept of "curtilage" and suggested that the concept of the "castle" should not be extended beyond "[a] porch or other similar physical appurtenance".

(d) Does the doctrine apply to "sanctuaries" other than the home?

5.109 Whilst the castle doctrine was developed in recognition of the special status of the home, developments in the United States have resulted in the extension of the doctrine to encompass other places in which a defender might seek refuge or sanctuary. It has already been seen above,¹⁵⁸ that the castle doctrine has been held to apply in favour of defenders in temporary accommodation such as hotels. This section, however, deals with the more controversial topic of whether it should be extended to encompass places of work and recreation.

¹⁵³ (1976) 28 NC App 376 (Court of Appeals of North Carolina). The doctrine was held to be applicable notwithstanding that the attacker was the appellant's brother-in-law and a co-occupant of the house.

¹⁵⁴ (1974) 54 Mich App 316 (Court of Appeals of Michigan).

¹⁵⁵ *Ibid* at 321.

¹⁵⁶ *Ibid*.

¹⁵⁷ (1971) 59 NJ 515 (Supreme Court of New Jersey).

¹⁵⁸ At paragraph 5.91

5.110 Interestingly, this is not a novel concept. It appears to have been established in some quarters as far back as the late nineteenth century that a defender's "place of business will be treated like his dwelling-house."¹⁵⁹ More recently, Perkins and Boyce have observed "a definite trend" in US jurisdictions towards this position.¹⁶⁰ For example, the *Model Penal Code* expressly extends the castle doctrine to include defenders' places of work.¹⁶¹ Whilst the drafters of the Code acknowledged that the "the sentimental factors relevant to dwellings may not apply to one's place of work", they "concluded that the practical considerations concerning the two locations were far too similar to sustain a distinction."¹⁶²

5.111 It should be noted, however, that one distinction is drawn by the *Model Penal Code* between the right of defenders to stand their ground in their homes and in their workplaces. In the former scenario, a defender is not obliged to retreat even if attacked by a co-habitee whereas, in the latter, the castle doctrine is inapplicable if a defender is attacked by a co-worker in a common place of work.¹⁶³ The opposite view was reached by the Supreme Court of Carolina in *State v Gordon*¹⁶⁴ where it was held that a foreman was not obliged to retreat in the face of an attack by one of his workers.

5.112 It should also be noted that the presence of defenders at their place of work must be related to their employment. Hence, in *State v Davis*¹⁶⁵ it was held that the appellant, who shot an alleged attacker in a cornfield where the appellant happened to have worked earlier in the season, was not entitled to rely on the doctrine given that "his presence there on the night in question was wholly unrelated to his employment."¹⁶⁶

5.113 Other cases have extended the doctrine to other private places such as a defender's club. For example, in *State v Marlowe*¹⁶⁷ it was held

¹⁵⁹ Beale "Homicide in Self-Defense" (1903) 3 Columbia Law Review 525 at 541.

¹⁶⁰ Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1135.

¹⁶¹ Section 3.04(2)(b)(ii)(A) of the *Model Penal Code*.

¹⁶² American Law Institute *Model Penal Code and Commentaries* (1985) Part I Vol 2 at 56.

¹⁶³ See the decision of the Supreme Court of Georgia in *Wilson v State* (1882) 69 Ga 224 and Katheder, "Lovers and Other Strangers: Of, When is a House a Castle? Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants – *State v Bobbitt*" (1983) 11 Fla St U L Rev 465 at 477 fn.66.

¹⁶⁴ (1924) 128 SC 422 (Supreme Court of South Carolina).

¹⁶⁵ (1948) 214 SC 34 (Supreme Court of South Carolina), cited in Boyce & Perkins *Criminal Law and Procedure* (7th ed Foundation Press 1989) at 804.

¹⁶⁶ (1948) 214 SC 34 at 38.

¹⁶⁷ (1921) 120 SC 205 (Supreme Court of South Carolina).

that the appellant, who shot the deceased during a game of cards at the appellant's club, was under no obligation to retreat from an attack; "[a] man is no more bound to allow himself to be run out of his rest room than his workshop."¹⁶⁸

(2) *Current Law in Ireland*

5.114 Whether the castle doctrine remains in force in this jurisdiction is speculative. The *Non-Fatal Offences Against the Person Act 1997*, if it applies to fatal offences, would appear to abolish the doctrine. The 1997 Act stipulates that the failure to retreat is one of the factors that must be taken into account in assessing the reasonableness of an accused's actions, regardless whether the attacks took place in the home or otherwise.¹⁶⁹

5.115 Assuming that the 1997 Act does not apply to fatal offences, the status of the doctrine at common law is less clear. On one hand, the castle doctrine "has never been repudiated by an Irish court".¹⁷⁰ However, on the other, the leading Irish cases on legitimate defence, including *People (Attorney-General) v Dwyer*,¹⁷¹ appear to have insisted that the criterion of necessity be satisfied whilst none have explicitly acknowledged the doctrine as an exception to this principle.¹⁷² To confuse matters even further, decisions such as *People (Attorney-General) v Dwyer*¹⁷³ appear to have adopted the compromise approach to the retreat rule (in apparent contradiction to the necessity principle), perhaps rendering the castle doctrine redundant.

(3) *Summary and Conclusions*

5.116 Accordingly, the "castle doctrine" enables a defender to stand their ground when attacked in their home. If accepted by the Commission, this doctrine would constitute an important exception to the rule proposed by the Commission, that one should retreat where it is completely safe to do so.

¹⁶⁸ *Ibid* at 207. The deceased was not a member of the club and the Court was unaware as to how he had attained admittance.

¹⁶⁹ Section 20(4) of the *Non-Fatal Offences Against the Person Act 1997*.

¹⁷⁰ McAuley "Excessive Defence in Irish Law" in Yeo (editor) *Partial Excuses to Murder* (Federation Press 1990) at 197.

¹⁷¹ The Supreme Court, in *People (AG) v Dwyer* [1972] IR 416 at 420, stated "[T]he homicide is not unlawful if the accused believed on reasonable grounds that his life was in danger and that the force used by him was reasonably necessary for his protection."

¹⁷² This dilemma is explored by McAuley in the context of the apparent exclusion of the castle doctrine from the partial defence of excessive defence: McAuley, "Excessive Defence in Irish Law" in Yeo (editor) *Partial Excuses to Murder* (Federation Press 1990) at 197-198.

¹⁷³ The Supreme Court, in *People (AG) v Dwyer* [1972] IR 416 at 420.

This doctrine is strongly linked to the issue of whether a person should be entitled to use lethal defensive force in defence of their dwelling house. This latter issue has already been discussed in chapter 2.¹⁷⁴ The Commission recommended in this chapter that lethal defensive force could be used in defence of the dwelling house.¹⁷⁵

5.117 The three options for reform in this area have been described above. In summary, the castle doctrine could be disregarded altogether, it could be incorporated into legislation or it could be merely a factor to be taken into account when assessing the reasonableness of a failure to retreat.

5.118 The Commission is of the opinion that third approach is not appropriate as a result of the Commission's acceptance of the safe retreat rule as opposed to the compromise approach. The third approach is clearly premised on the compromise approach being adopted as the retreat rule. For the reasons that the Commission has deemed the compromise approach undesirable, it also finds that the third approach above should not be adopted. It is imprecise and fails to offer sufficient guidance to juries.

5.119 Consequently, the question arises as to whether the castle doctrine should be adopted or not. A number of arguments can be advanced in favour of disregarding the castle doctrine. It is asserted that the "spread of civilisation" has rendered the castle doctrine obsolete: "In a civilized country a person's leaving his dwelling does not automatically ordain that he is forsaking a place of safety for one wrought with danger. The ancient reason no longer sustains the rule."¹⁷⁶ In particular, the development of policing and communications has reduced the need for householders to resort to self-help.¹⁷⁷ Another commentator has argued that "the 'lack of permanence, solidity and rootedness' in the American experience of the home and of home life [is] so inconsistent with the fanciful metaphor of a castle, that [it is doubtful] whether the doctrine ever had any real significance in America outside its incessant rhetoric in American case law."¹⁷⁸

¹⁷⁴ See paragraphs 2.71-2.72 and paragraphs 2.86-2.94.

¹⁷⁵ See paragraph 2.94.

¹⁷⁶ "Note, A Further Erosion of the Retreat Rule in North Carolina" (1976) 12 Wake Forest L Rev 1093 at 1100, cited in Katheder, "Lovers and Other Strangers: Of, When is a House a Castle? Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants – State v Bobbitt" (1983) 11 Fla St U L Rev 465 at 482 at footnote 80.

¹⁷⁷ "Note, Self Defense – Retreat – Instruction on Self Defense of Home Need Not Be Given Where Victim and Accused are Members of Same Household" (1979) 7 Fla St U L Rev 729 at 732, cited in Katheder, "Lovers and Other Strangers: Of, When is a House a Castle? Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants – State v Bobbitt" (1983) 11 Fla St U L Rev 465 at 482 at fn.81.

¹⁷⁸ This is a summary of an argument made in "Comment, Is a House a Castle?" (1976) 9 Conn L Rev 110 at 131, summarised in Katheder, "Lovers and Other Strangers: Of,

5.120 In contrast it has been argued that the increasing incidence of violent crime renders the castle doctrine no less relevant than in earlier times.¹⁷⁹ Notwithstanding the developments in policing and communication, there remains the risk that law enforcement officers may be unable to react with sufficient speed to assist those attacked in the home, even assuming that those under attack may be in a position to call for help. Furthermore, the concept of the “castle” as a place of sanctuary remains firmly embedded in the modern psyche.¹⁸⁰

5.121 Assuming that this claim is equally valid in this jurisdiction, then it is a strong argument in support of the recognition of the doctrine by the Irish courts.

5.122 This approach also recognises the importance of the home to the defender’s dignity, respect and honour.¹⁸¹ This argument has also been detailed in discussing whether lethal force can be used in defence of the dwelling house.¹⁸² It is equally valid in this context.

5.123 The Commission finds the arguments in favour of incorporating the “castle doctrine” into Irish law persuasive. This doctrine should constitute an important exception to the general rule that one should retreat where it is safe to do so. In order to avoid uncertainty in this regard, the precise parameters of this doctrine should be specified in the legislation.

5.124 The first issue is who should be entitled to the benefit of this doctrine? Should it be confined to the owners of the house or should all occupants be entitled to avail of it. As has been observed earlier, the US courts in general have been content to afford all occupants the benefit of this doctrine. Even occupants in temporary accommodation have been entitled to the benefit of this doctrine.¹⁸³

5.125 The Commission accepts that this approach is advantageous. There is no logical basis for distinguishing between householders and occupants in this regard. It seems that the true rationale for the doctrine is

When is a House a Castle? Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants – State v Bobbitt” (1983) 11 Fla St U L Rev 465 at 482.

¹⁷⁹ Katheder, “Lovers and Other Strangers: Of, When is a House a Castle? Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants – State v Bobbitt” (1983) 11 Fla St U L Rev 465 at 482.

¹⁸⁰ *Ibid.*

¹⁸¹ See Green’s discussion on this in the context of the defence of the dwelling house in “Castles and Carjackers: Proportionality and the Use of Deadly Force in Defence of Dwellings and Vehicles” [1999] U Ill L Rev 1 at 35-37.

¹⁸² See paragraph 2.92.

¹⁸³ See *State v Mitcheson* (1977) 560 P2d 1120 at 1122.

that the home constitutes a place of sanctuary. It is consequently irrelevant if the dwelling is a temporary or permanent one once it constitutes that person's sanctuary for the time being. As a result, the definition advanced of dwelling by the *Model Penal Code* as "any building or structure, though movable or temporary, or a portion thereof, that is for the time being the actor's home or place of lodging"¹⁸⁴ would be appropriate in the Irish context.

5.126 Secondly, does the doctrine apply when the attacker is a non-intruder such as an invitee, licensee or co-habitee? The majority view in the US is that this doctrine applies where the attacker is a non-intruder.¹⁸⁵

5.127 The Commission agrees with this view. There is no logical reason why the doctrine should only apply where the attacker is an intruder. The basis for the doctrine is the home's position as a sanctuary and also the importance of the home to the dignity, integrity and honour of the defender. These reasons for the recognition of the doctrine are valid irrespective of whether the attacker is an intruder or non-intruder. This approach also has the additional advantage of protecting individuals who are suffering domestic violence at the hands of co-habitees. Compelling them to leave their homes in such an instance would be unjust.

5.128 Thirdly, does the doctrine apply to the property surrounding the home? In the past, the doctrine was confined to defence within the four walls of the home and its curtilage¹⁸⁶

5.129 The Commission is of the opinion that the word "curtilage" is appropriate in this regard in that it ensures that the word dwelling is not defined too narrowly yet also places some definite limits on what actually constitutes the "dwelling". It is a phrase which can be interpreted with regard to the area within which the dwelling is located – for example, different considerations apply to houses located in rural areas as opposed to in urban areas, as is evident from the US case law on this topic.¹⁸⁷

5.130 Fourthly, does the doctrine apply to 'sanctuaries' other than the home? In the US, there is support for the extension of this doctrine to places of work. For example, the *Model Penal Code* extends the castle doctrine to defender's places of work.¹⁸⁸

¹⁸⁴ Section 3.11(3) of the *Model Penal Code*.

¹⁸⁵ *Weiland v State* (1999) 732 So 2d 1044 at 1052.

¹⁸⁶ See Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1135.

¹⁸⁷ See paragraphs 5.105-5.108.

¹⁸⁸ See section 3.04(a)(b)(ii)(A) of the *Model Penal Code*.

5.131 However, the Commission submits that this doctrine should not be extended to defender's places of work. If the doctrine is extended to an individual's place of work, there is no rationale for not extending it to a defender's club or organisation. Thus, if the doctrine is extended in this manner, it would be difficult for its precise parameters to be identified and it would be extended to such an extent that it would no longer constitute a coherent doctrine.

5.132 The primary basis for the doctrine – namely to protect the position of the home as a place of sanctuary – would be obscured if it was extended to defender's places of work. Few individuals would perceive a place of work as a place of sanctuary. It is evident also that a defender's place of work is less important to the defender's dignity, integrity and honour than their home.

5.133 The Commission provisionally recommends that a defender should not be required to retreat from an attack in their dwelling home even if they could do so with complete safety. In this regard, all occupants of dwelling houses should be entitled to the benefit of this doctrine, it is irrelevant if the defender is attacked by an intruder or non-intruder and the "dwelling house" should be defined as including the curtilage or the area immediately surrounding the home.

E The Principle of Self-Generated Necessity

5.134 Cases involving self-generated necessity are those in which the defender is wholly or partly to blame for the conflict. In these circumstances, the common law has always been reluctant to bestow the full rights of legitimate defence and has imposed stringent retreat requirements over and above those normally required under the stand-fast or safe-retreat approaches.

5.135 Interestingly, advocates of both the stand-fast and safe-retreat approaches were in broad agreement as to the ambit of the principle of self-generated necessity; both approaches imposed a duty to retreat in such circumstances.¹⁸⁹ However, under the stand-fast approach, self-generated necessity was the sole circumstance in which retreat was required; and even that duty could be overridden by the castle doctrine.¹⁹⁰ In contrast, advocates of the safe-retreat approach argued that self-generated necessity created additional and more stringent retreat requirements over and above the ordinary obligation imposed on an innocent defender to retreat when safe to do so.

¹⁸⁹ See the summary of Foster's approach to self-generated necessity cases at paragraph 5.19 above.

¹⁹⁰ Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1121.

5.136 In order to examine the historical development of the principle of self-generated necessity it is useful to consider three broad categories of cases, following a similar tripartite distinction adopted by Beale.¹⁹¹ First, there are cases in which the accused have deliberately initiated or provoked the conflict in order that they might kill their victims under the pretext of self-defence. Such accused will be referred to as “deadly original aggressors”.¹⁹² Secondly, there are cases in which the accused have deliberately initiated or provoked the conflict, but with the intention of using only less-than-lethal force. Such accused will be referred to a “non-deadly original aggressors”.¹⁹³ Thirdly, there are cases in which the accused have not initiated or provoked the conflict, but have willingly joined it, again with the intention of using only less-than-lethal force. Such accused will be referred to as “mutual aggressors”.¹⁹⁴

5.137 It should be noted that many cases in which an accused initiates or contributes to a conflict can be resolved under the unlawfulness rule (see Chapter 4) and without reference to the principle of self-generated necessity. The unlawfulness rule provides that no-one may repel a lawful “attack”. Hence, original aggressors would have no entitlement to repel the defensive measures of their victims provided their victims do not go beyond the lawful limits imposed by legitimate defence.¹⁹⁵

5.138 However, the unlawfulness rule is of little assistance in resolving cases in which both parties to a conflict have acted unlawfully; for example, in cases in which the response of the original victim goes beyond that permitted in legitimate defence or where both parties willingly participate in a minor skirmish which escalates out of control. The common law principle of self-generated necessity fills this lacuna in the law.

5.139 This section begins with a review of the three categories outlined above, drawing heavily on Beale given that he has been one of the few commentators to explore this tripartite distinction in depth. Whilst much of this material is taken from cases and commentaries that have adopted the safe-retreat approach, the principles could also apply with modification to the stand-fast approach. Next, the treatment of the principle of self-

¹⁹¹ Beale “Homicide in Self-Defense” (1903) 3 Columbia Law Review 525.

¹⁹² *Ibid* at 531-533 labels this category as cases of “necessity maliciously caused by the defendant”.

¹⁹³ *Ibid* at 533-536 labels this category as cases of “necessity caused by the defendant, but not maliciously”.

¹⁹⁴ *Ibid* at 533-536 labels this category as cases of “necessity caused by mutual acts of the parties”.

¹⁹⁵ See for example *Viro v R* (1978) 141 CLR 88 at 117 (High Court of Australia, per Gibbs J).

generated necessity under the compromise approach is analysed. Finally, options for reform are assessed.

(1) *The Categories of Aggressors*

(a) *The Deadly Original Aggressor*

5.140 The category of deadly original aggressors was the most serious in Beale's hierarchy of self-generated necessity cases. Consequently, in Beale's view it was difficult, although not impossible, for such aggressors to recover their right of self-defence:

“The party who brings on a difficulty for the purpose of killing his adversary in the conflict can under no circumstances excuse a killing *during the conflict*... even in the greatest extremity... But if he is able to escape from the difficulty entirely, the conflict which he has brought on having ceased, the defendant may defend himself from a subsequent attack by his adversary, even though it be an immediate renewal of the conflict.”¹⁹⁶

5.141 Hence, in the nineteenth century case of *Stoffer v State*¹⁹⁷ it was held that the appellant was entitled to have resorted to lethal defensive force notwithstanding that he initiated the conflict by attacking the deceased on a street with the intention of killing him with a knife. At some point during the attack the appellant had “desisted from the conflict, declined further combat, and retreated rapidly a distance of one hundred and fifty feet, and took refuge in the house of a stranger, where he shut and held the door”¹⁹⁸. The deceased and two associates had pursued the appellant and killed him.¹⁹⁹

5.142 Whilst the Court held that the appellant was entitled to defend himself, the case illustrates the strict and absolute nature of the requirement to withdraw (“absolute withdrawal requirement”). Without satisfying this requirement, a deadly original aggressor may not use lethal defensive force, even “where the conflict is so hot that neither party can withdraw”²⁰⁰. Hence, the Court indicated that it was insufficient that a deadly original aggressor merely retreats to the wall:

¹⁹⁶ Beale “Homicide in Self-Defense” (1903) 3 Columbia Law Review 525, 531-532. Interestingly, the US Supreme Court case upon which Beale relies, *Wallace v United States* (1896) 162 US 466, (he also refers to a multitude of state court cases) makes no reference to the possibility of deadly original aggressors regaining a right of self-defence. However, this might be explained on the grounds that the issue did not arise on the facts.

¹⁹⁷ (1864) 15 Ohio St 47 (Supreme Court of Ohio).

¹⁹⁸ (1864) 15 Ohio St 47 (Supreme Court of Ohio) at 48.

¹⁹⁹ *Ibid.*

²⁰⁰ Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 575.

“[T]he conduct of the accused, relied upon to sustain such a defense, must have been so marked, in the matter of time, place, and circumstance, as not only clearly to evince the withdrawal of the accused, in good faith, from the combat, but also such as fairly to advise his adversary that his danger had passed, and to make his conduct thereafter, the pursuit of vengeance, rather than measures taken to repel the original assault.”²⁰¹

5.143 The withdrawal in this case was sufficient because the appellant “had not only retreated to the wall, but behind the wall; and had not only gone from the view of his adversary, but to a place of supposed security from his attacks.”²⁰²

5.144 It should also be noted that the absolute withdrawal requirement applies not only to original aggressors who attack their victims with deadly force, but also those who merely provoke an attack by, say, insulting words,²⁰³ provided the aggressor does so with a deadly intention.²⁰⁴

5.145 In the US, at least, the law as espoused by Beale in relation to deadly aggressors appears to remain intact today.²⁰⁵

(b) Non-Deadly Original Aggressors

5.146 According to Beale, non-deadly original aggressors are required to retreat to the wall (“retreat-to-the-wall requirement”). In essence, this requirement is satisfied by “withdrawing from the combat in such a way that anything that happens subsequently is chargeable not to him, but entirely to the other party, who wrongly continues or renews the attack.”²⁰⁶ However, as will be seen below, the definition of the retreat-to-the-wall requirement is a matter of some confusion.

5.147 Beale distinguishes the retreat-to-the-wall requirement, which was imposed on non-deadly original aggressors, from the apparently more stringent absolute withdrawal requirement, which was applicable to deadly original aggressors. Whilst the underlying purpose of the former is “to avoid the necessity of killing”, the onus is greater for deadly original aggressors as they must retreat “to avoid the responsibility for the combat.”²⁰⁷

²⁰¹ (1864) 15 Ohio St 47 at 51.

²⁰² *Ibid* at 53.

²⁰³ Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1132.

²⁰⁴ Beale “Homicide in Self-Defense” (1903) 3 Columbia Law Review 525 at 531-532, citing *State v Scott* (1889) 41 Minn 365 at 367 (Supreme Court of Minnesota).

²⁰⁵ See Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1129-1130.

²⁰⁶ Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 575.

²⁰⁷ *Ibid*.

5.148 Given the care with which Beale takes to distinguish between these two categories of original aggressors, it is surprising that he goes on to blur the distinction with his ambiguous definition of the retreat-to-the-wall requirement.

5.149 At first, he indicates that the test requires that non-deadly original aggressors *withdraw* from conflict.²⁰⁸ Such a requirement seems to come close to that applicable to deadly original aggressors. However, within paragraphs of stating that the requirement is one of “withdrawal”, Beale suggests that a lesser standard is applicable: “The *only* method of putting an end to the force he has set in motion by his original attack is to *let his adversary know that he desires to withdraw*; or at least to do acts which ought to convey that knowledge to the adversary.”²⁰⁹

5.150 However, in contrast to this statement, it later emerged that Beale believed that a mere indication of one’s desire to withdraw would not suffice without at least a physical attempt at retreat.²¹⁰

5.151 Finally, Beale comes full circle and suggests that only a full withdrawal will suffice, citing *Stoffer v State*.²¹¹ However, as set out above, this case was concerned not with *non-deadly* original aggressors but with *deadly* original aggressors. Given that the Court expressly held that retreat to the wall would not suffice in the circumstances of that case, it could hardly be used as a definition of the retreat-to-the-wall requirement. Hence, Beale’s suggestion that complete withdrawal was required in cases involving non-deadly original aggressors is best explained as an oversight.

5.152 Undoubtedly, one of the reasons for these conflicting statements was the fact that the various state courts were producing volumes of jurisprudence in this area with subtle (and not so subtle) differences in approach.²¹² Nevertheless, the general approach, and one with which Beale apparently agreed,²¹³ was that the absolute withdrawal requirement was

²⁰⁸ Beale “Homicide in Self-Defense” (1903) 3 Columbia Law Review 525 at 537.

²⁰⁹ *Ibid.* (Emphasis added).

²¹⁰ *Ibid* at 538. However, at least some of the cases which Beale cites in support of this proposition would appear to involve deadly original aggressors rather than non-deadly original aggressors: see *State v Edwards* (1893) 112 NC 901 (Supreme Court of North Carolina) and *State v Smith* (1975) 10 Nev 106 (Supreme Court of Nevada).

²¹¹ (1864) 15 Ohio St 47 (Supreme Court of Ohio).

²¹² Perkins and Boyce observe similar confusions in later cases between the retreat-to-the-wall requirement and the requirement to withdraw: Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1139-1141.

²¹³ Earlier, Beale had stated: “In a few cases it appears to be held that if the assailant does all that he can to decline further difficulty, and manifests that intention to his adversary, but is unable to escape, he may kill in self defence. Whatever may be said

restricted to cases of deadly original aggressors and a less stringent approach was applicable to non-deadly original aggressors.²¹⁴ Indeed, this appears to remain the current position adopted at common law in the US.²¹⁵

5.153 It should be noted that the distinction that Beale attempted to draw between the tests applicable to deadly and non-deadly original aggressors was not limited to the strictness of the relevant retreat rules. A further difference related to the types of conduct that could amount to original aggression. Whilst deadly original aggressors would lose their rights of self-defence by the use of mere provocative words,²¹⁶ non-deadly original aggressors were granted greater latitude.²¹⁷

5.154 For example, in *Butler v State*,²¹⁸ a restaurant customer who insulted his waiter was held not to be a non-deadly original aggressor and, therefore, was entitled to use lethal defensive force when attacked by the waiter with a wooden banister and gun.²¹⁹ In contrast, if the appellant had intended to provoke an attack as a pretext for killing the waiter then he would have been denied the right to use defensive force.²²⁰

5.155 This position appears to have remained largely unaltered in the US:

“The use of words so vile that they are calculated to result in combat, and do so result, makes one an aggressor and deprives him of the privilege of self-defense, at least if they were spoken with this intent. And there are indications that the mere use of such words will produce this result if they cause an encounter. On the other hand, the use of words neither intended nor likely to

in favour of this opinion when the defendant brought on the difficulty without the intention to kill, it seems to be quite inadmissible in [the case of deadly original aggressors]”: Beale “Homicide in Self-Defense” (1903) 3 Columbia Law Review 525 at 532-533.

²¹⁴ For example, in *State v Partlow* (1886) 90 Mo 608 the Supreme Court of Missouri held that non-deadly original aggressors could recover their rights of self-defence by attempting to withdraw from the conflict.

²¹⁵ See Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1128-1129.

²¹⁶ Beale “Homicide in Self-Defense” (1903) 3 Columbia Law Review 525 at 531.

²¹⁷ Beale “Homicide in Self-Defense” (1903) 3 Columbia Law Review 525 at 534.

²¹⁸ (1893) 92 Ga 601 at 606 (Supreme Court of Georgia).

²¹⁹ However, to the contrary, there is some case-law that suggests that mere words may be sufficient to render a defender a non-deadly original aggressor. For an example, see *State v Partlow* (1886) 90 Mo 608 (Supreme Court of Missouri).

²²⁰ (1893) 92 Ga 601 at 605.

result in physical violence does not impair the privilege of self-defense, even if they unexpectedly have this consequence.”²²¹

5.156 It should also be noted that not every unlawful act would amount to aggressive conduct. For example, a mere trespass would not necessarily transform an innocent defender into a non-deadly original aggressor provided it was “not intended or expected to bring on a quarrel”.²²² In the case of *State v Perigo*,²²³ the appellant had wrongfully and unlawfully trespassed onto the deceased’s property and had taken a dog which both parties claimed to own. Even so, it was held that the appellant would have been entitled to use lethal defensive force to repel the deceased’s pitchfork attack when he had become entangled in a barbed wire fence as he attempted to leave the property.

5.157 By the same token, lawful acts that were not intended to provoke a response did not normally amount to original aggression. Hence, defenders were entitled to go about their lawful business even if this knowingly brought them into conflict with an aggressor.²²⁴ Hence, in *People v Gonzales*²²⁵ it was held that the appellant was not prohibited from resorting to lethal defensive force to repel a threat “provoked” by the defender’s *lawful* actions, even when the defender knew and anticipated the likely effects of his or her actions.²²⁶

5.158 This principle was applied in more recent times in the English Court of Appeal case of *R v Field*.²²⁷ As Ashworth summarises:

“The defendant had been warned that certain men with whom he had previously quarrelled were coming to attack him. He stayed where he was, allowing the men to find him. The men made their attack, and in the course of the struggle the defendant stabbed one of them fatally. The court rejected the contention that the defendant had a duty to avoid confrontation by leaving the place and going elsewhere: the duty to avoid conflict... only arises

²²¹ Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 1132.

²²² Beale “Homicide in Self-Defense” (1903) 3 Columbia Law Review 525 at 534-535.

²²³ (1887) 70 Iowa 657 (Supreme Court of Iowa).

²²⁴ Beale “Homicide in Self-Defense” (1903) 3 Columbia Law Review 525 at 530.

²²⁵ (1887) 71 Cal 569 (Supreme Court of California), cited in McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 760.

²²⁶ See, for discussion, McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 759-761.

²²⁷ [1972] Crim LR 435, cited in Ashworth, “Self-Defence and the Right to Life” [1975] The Cambridge Law Journal 282 at 295.

when an individual has sight of his adversary and attack is imminent.”²²⁸

5.159 Ashworth complains that “the *Field* principle favours the greater liberty of law-abiding citizens to continue acting lawfully, instead of restricting that liberty in an early attempt to forestall violence and therefore protect basic rights.”²²⁹ In contrast, he suggested that defenders in these circumstances should be under “a *prima facie* duty to inform the police about threats of imminent violence”, thereby “at least [signifying] an effort by the defendant to avoid an expected conflict”.²³⁰ Whilst such a requirement would go beyond what would normally be required of non-deadly original aggressors (in that non-deadly original aggressors would only be required to retreat when the conflict begins), the purpose is similar: to curtail the right to use defensive force of those who voluntarily engage in action likely to lead to conflict.

5.160 The Ashworth-argument may be rebutted on the ground, *inter alia*, that no such duty should be placed on defenders who are acting lawfully.²³¹ This view would certainly find support from those who advocate the stand-fast approach but sits uneasily with the safe-retreat approach. After all, it seems incongruous to assert that innocent defenders are required to retreat in the face of aggression yet at the same time claim that there is no legal sanction against those who deliberately put themselves in the face of their enemies knowing that such actions are likely to evoke an aggressive response.

(c) Mutual Aggressors

5.161 A mutual aggressor is one who does not initiate or provoke the conflict, but willingly joins it, although with the intention of using less-than-lethal force. According to Beale, “the blame for the combat need not be altogether the defendant’s in order to oust him of his right of self-defence”.²³²

²²⁸ Ashworth, “Self-Defence and the Right to Life” [1975] *The Cambridge Law Journal* 282 at 295.

²²⁹ *Ibid.*

²³⁰ *Ibid* at 296.

²³¹ McAuley & McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 761. However, it is doubtful that “lawfulness” would be a useful “litmus test” for assessing whether a defender’s conduct amounted to original aggression. After all, in many instances “provocative” conduct may nevertheless be lawful: “To taunt a man with his impotence or his wife’s adultery may be cruel and immoral, but it is not unlawful and it may, surely, amount to provocation”: Smith & Hogan *Criminal Law* (9th ed Butterworths 1999) at 368, discussing the partial defence of provocation.

²³² Beale “Homicide in Self-Defense” (1903) 3 *Columbia Law Review* 525 at 536.

“In case of mutual combat neither party may kill during the combat and be either justified or pardoned; for either by bringing on the combat or at least by consenting to it and voluntarily taking part in it he has become responsible for the necessity and is guilty of the death both at law and in equity. He can protect himself only by clearing himself from this responsibility.”²³³

5.162 The only method by which a mutual aggressor could remove this responsibility was by retreating to the wall. Hence, the retreat requirements imposed upon mutual aggressors were the same as those which were applicable to non-deadly original aggressors.

5.163 The difficulty with imposing the retreat-to-the-wall requirement upon mutual aggressors is that often one who enters into a non-deadly conflict voluntarily, but does not initiate it, will be merely exerting his or her lawful right of self-defence (bearing in mind that he or she will be under no obligation to retreat in the face of a non-deadly attack). In the event that the original aggressor escalates the conflict to the point that the mutual aggressor is faced with a deadly threat, it is difficult to see why the mutual aggressor’s right of self-defence should be any more restricted than that of an innocent defender faced with a similar threat.

5.164 Perhaps the distinction between a mutual aggressor and an innocent defender is their differing intentions: the former intends to carry on the conflict whilst the latter seeks to terminate the threat. Arguably, however, this is a fine distinction to make.

(2) *A Partial Defence of Self-Generated Necessity*

5.165 According to Beale, non-deadly original aggressors who failed to satisfy the retreat-to-the-wall requirement would be guilty of no more than manslaughter.²³⁴ Hence, in *State v Partlow*,²³⁵ the appellant, who went to the home of his enemy and “brought on a difficulty”, was still entitled to a verdict of manslaughter for killing in defence to a murderous attack by his enemy notwithstanding that the appellant had not retreated to wall.²³⁶

5.166 This approach, under which a manslaughter verdict is applicable when a non-deadly original aggressor kills and has *failed* to retreat to the

²³³ Beale “Retreat from a Murderous Assault” (1903) 16 Harv L Rev 567 at 575.

²³⁴ Beale “Homicide in Self-Defense” (1903) 3 Columbia Law Review 525 at 536.

²³⁵ (1886) 90 Mo 608 (Supreme Court of Missouri).

²³⁶ It is unclear on which grounds the manslaughter was considered appropriate. It was suggested that, one on hand, the killing lacked the necessary malice required for murder ((1886) 90 Mo 608 at 622) and, on the other, the killing was carried out in the heat of the passion of the encounter ((1886) 90 Mo 608 at 616).

wall, has found support among a number of commentators.²³⁷ However, it would appear to be the view of some other commentators that non-deadly original aggressors who fail to retreat retain full liability and the reduced verdict should only be available in the event that they *have* retreated to the wall. In consequence, the full defence is never available to non-deadly original aggressors.

5.167 For example, McAuley and McCutcheon argue that manslaughter is the appropriate verdict when non-deadly original aggressors kill in self-defence, thereby giving “effect to the culpability of the defendant and victim alike”.²³⁸ Ashworth makes a similar argument:

“It would be in accordance with principle and with the older authorities if [non-deadly original aggressors] were under a prima facie duty to avoid further violence and if, when placed in a situation where violence could not be avoided if his life were to be saved, he should retain a qualified liberty to use force for self-defence. The exercise of this liberty would not justify an acquittal, but would reduce the offence from murder to manslaughter.”²³⁹

(3) *Self-Generated Necessity in Ireland*

5.168 There is no clear judicial statement of Irish law on the issue of self-generated necessity. However, the Australian court’s adoption of the compromise approach appears to have been translated into Irish law by way of *People (AG) v Dwyer*²⁴⁰ and *People (DPP) v Clarke*.²⁴¹ Unfortunately, in neither of these two cases was the appellate court clear as to the appropriate role, if any, of the principle of self-generated necessity.

²³⁷ For example, Williams states: “It is reasonable to say that if the defendant initiated a display of aggression, he must afterwards if possible retreat, even ‘to the wall,’ if he is to claim the defence of self-defence, at any rate if he uses extreme force”: Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 462. See also Perkins & Boyce who accept as a “very sound position” that “he who brings on an encounter intending no more than an ordinary battery is guilty of manslaughter if he kills in self-defense without retreating, but excused if forced to use deadly force to save himself after he has ‘retreated to the wall’”: *Criminal Law* (3rd ed Foundation Press 1982) at 1139.

²³⁸ McAuley & McCutcheon, *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 759. The authors support this argument by reference to an analogy with the law relating to self-induced provocation: see, *Edwards v R* [1973] 1 All ER 152.

²³⁹ Ashworth, “Self-Defence and the Right to Life” [1975] Cambridge Law Journal 282 at 301. Perkins and Boyce adopt a similar stance in *Criminal Law* (3rd ed Foundation Press 1982) at 1141-1142.

²⁴⁰ [1972] IR 416 (Supreme Court).

²⁴¹ [1994] 3 IR 289 (Court of Criminal Appeal).

5.169 In *Dwyer* the appellant might be said to have initiated the conflict by insulting the mother of one of his attackers.²⁴² Furthermore, when his attackers verbally confronted him in a café, the appellant came out onto the street where a fight broke out, although it is unclear who threw the first punch.²⁴³

5.170 Butler J indicated that if a jury accepted that “the appellant came out of the café unnecessarily and acted aggressively with full knowledge of what he was doing” then a murder verdict would be appropriate.²⁴⁴ He added that it was “clearly open to the jury to find that the appellant used more force than was reasonably necessary for his own protection” given that “there was no evidence... that he was prevented from making his escape.”²⁴⁵ Unfortunately, it is uncertain whether Butler J intended these comments to imply that retreat was *ordinarily* required of a defender or whether any such obligation was only imposed on a defender who had provoked an attack.

5.171 In *People (DPP) v Clarke*,²⁴⁶ although the appellant did not initiate the conflict, he did arm himself in response to threats made by the deceased and set out to find the deceased, ultimately leading to the fatal confrontation.²⁴⁷ Again, it was unclear whether the Court of Criminal Appeal classified this situation as one of self-generated necessity and, if so, whether the appellant was under any heightened obligation to retreat. The Court did, however, criticise the trial judge’s direction to the jury that the appellant had been under an absolute legal requirement to avoid the confrontation, albeit that the appellant’s failure to avoid the conflict seemed to remain a relevant consideration.

5.172 McAuley and McCutcheon note that in cases such as *Dwyer* and the English cases of *McInnes* and *Julien* self-defence was left to the jury without qualification notwithstanding that in each case there was evidence that the accused had contributed to the situation; nor was the issue raised on appeal. The authors concluded that “the strict policy evident in the old cases has arguably been superseded by the principle that a person is entitled to

²⁴² The case is discussed above at paragraphs 5.53-5.55.

²⁴³ [1972] IR 416 at 427.

²⁴⁴ *People (AG) v Dwyer* [1972] IR 416 at 428. This was an interesting remark given the appellant’s evidence that he was held by two people at the time he brandished the knife. However, presumably Butler J was referred to the opportunity to escape prior to the physical confrontation.

²⁴⁵ *People (AG) v Dwyer* [1972] IR 416 at 428.

²⁴⁶ [1994] 3 IR 289.

²⁴⁷ The case is discussed above at paragraphs 5.56-5.59.

defend himself against an unlawful attack notwithstanding that it may have been provoked by wrongful conduct on his part.”²⁴⁸

(4) Self-Generated Necessity in other Jurisdictions

(a) Criminal Code Jurisdictions

5.173 As in other areas of legitimate defence, the twentieth century was marked by a move away from specific self-generated necessity rules to the adoption of the generalised principle of “reasonableness” (the compromise approach, as discussed above).

5.174 However, an exception to this trend is found in those criminal code jurisdictions whose provisions were influenced by late nineteenth century thinking regarding self-generated necessity. Hence, a distinction between defence against “provoked” and “unprovoked” attacks is still found in the Canadian *Criminal Code*²⁴⁹ and the *Criminal Codes* of the Australian States of Queensland²⁵⁰ and Western Australia.²⁵¹ Where a defender has “without justification provoked²⁵² an assault on himself by another” or “without justification assaulted another”, authority to use defensive force is subject to restrictions.²⁵³ Foremost amongst these is the obligation that the defender must have “declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself

²⁴⁸ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 757.

²⁴⁹ Section 35 of the Canadian *Criminal Code*. However, this distinction is undermined by the fact that in lethal defensive force cases the “unprovoked attacks” provision has been interpreted broadly enough to cover cases of “provoked attacks”: see Stuart *Canadian Criminal Law* (3rd ed Carswell 1995) at 444.

²⁵⁰ Section 272 of the Queensland *Criminal Code*.

²⁵¹ Section 249 of the Western Australian *Criminal Code*.

²⁵² “Provocation” is defined by the Canadian (section 36), Queensland (section 268) and Western Australian (section 245) *Criminal Codes*.

²⁵³ Section 35 of the Canadian *Criminal Code* states: “Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if: (a) he uses the force (i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and (ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm; (b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and (c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.” Section 272 of the Queensland *Criminal Code* and section 249 of the Western Australian *Criminal Code* are to the same effect.

from death or grievous bodily harm arose”; in other words, the defender must satisfy the requirements of the safe-retreat approach. In contrast, no express obligation is placed upon a defender who has not provoked an attack to retreat,²⁵⁴ although, as seen earlier, the courts in these jurisdictions have imposed a duty to retreat to the extent that it is “reasonable” to do so.

5.175 There has been movement amongst some criminal code jurisdictions to abandon this distinction and to adopt the compromise approach as the relevant test in all circumstances.²⁵⁵ In Canada, for example, Stuart has argued that the distinction found in the Canadian provisions is “overly complex and unduly rigid”:

“It might well be that the defence of self-defensive force should be less available to an aggressor. But assaults often occur in a very volatile situation. It is questionable whether a rule that decides in advance that the aggressor is always more culpable is desirable. In some cases it might lead to injustice.”²⁵⁶

5.176 The issue came before the Canadian Supreme Court in *R v McIntosh*.²⁵⁷ On account of a legislative ambiguity, the Court was presented with the opportunity to abandon the distinction.²⁵⁸ The dissenting judges warned of the folly of removing a distinction which had been part of the Canadian *Criminal Code* for a century and part of the common law for even longer. Otherwise a person who wished to kill would have an incentive to provoke an attack so he could respond with a death blow. They also observed that any other approach does not offer sufficient protection to life.²⁵⁹

5.177 However, the majority did not heed this warning and chose to interpret the provisions in such a manner that the safe-retreat obligations, which until that time had been imposed on original aggressors, were rendered obsolete.

²⁵⁴ Section 34 of the Canadian *Criminal Code*; section 271 of the Queensland *Criminal Code*; section 248 of the Western Australian *Criminal Code*.

²⁵⁵ The distinction was abandoned in the New Zealand *Crimes Act 1961* (section 48) and the Tasmanian *Criminal Code* (section 46) in the 1980s and was replaced by a generalised “reasonableness” rule.

²⁵⁶ Stuart Canadian *Criminal Law* (3rd ed Carswell 1995) at 447.

²⁵⁷ (1995) 95 CCC 3d 481 (Supreme Court of Canada).

²⁵⁸ Apparently as a result of a drafting error during a 1955 revision of the Criminal Code, the Court felt constrained to interpret section 34(2) of the Code, which on its face relates to the use of lethal defensive force where the attack was unprovoked by the defender, as covering cases where the defender provoked the attack.

²⁵⁹ *R v McIntosh* (1995) 95 CCC 3d 481 at 507-508, per McLachlin J (La Forest, L’Heureux-Dube and Gonthier JJ concurring) dissenting.

(b) Scots Law

5.178 Although not governed by a criminal code, Scots law has developed specific rules for dealing with self-generated necessity cases. Whilst original aggressors are not prohibited from responding to threats with lethal defensive force, they are entitled to do so only if the response of the original victim is “so out of proportion to the accused’s own actings as to give rise to the reasonable apprehension that he was in immediate danger from which he had no other means of escape, and whether the violence which he then used was no more than was necessary to preserve his own life or protect himself from serious injury.”²⁶⁰

5.179 This test imposes a duty of safe-retreat upon original aggressors. It also does away with the distinctions between deadly and non-deadly original aggressors and mutual aggressors and provides that any aggressor may use lethal defensive force in the face of a disproportionate response from the original victim.

5.180 An illustration of this approach can be found in the High Court of Justiciary’s decision in *Boyle v HM Advocate*.²⁶¹ The appellant in this case had killed during the course of a fight between two groups of armed men. The appellant had willingly followed one of the groups to the place of the fight. He claimed he did so as a spectator, although there was contradictory evidence that suggested that he was a participant in the fight. According to the appellant, during the course of the fight he came to the assistance of one of his group who had fallen to the ground. He claimed that he stabbed the deceased only in response to a deadly threat from the deceased and his companion.

5.181 On the ground that an original aggressor is entitled to act in self-defence where his or her victim “uses violence altogether disproportionate to the need, and employs savage excess”,²⁶² the Court held that even if the appellant was a participant in the fight, and not merely a spectator as he claimed, he may have been entitled to act in self-defence if the jury accepted that he had gone to the assistance of another and had responded to a deadly threat from the deceased. However, the jury would also need to consider “whether the appellant had a means of escape and whether he used cruel excess.”²⁶³ Unfortunately, it is unclear from the case whether the duty of

²⁶⁰ *Burns v HM Advocate* [1995] SLT 1090.

²⁶¹ 1993 SLT 577.

²⁶² Citing *HM Advocate v Robertson and Donoghue* High Court of Justiciary on Appeal, October 1945.

²⁶³ There was no rigid requirement, as suggested by the trial judge, that the original aggressor must only have used mild violence to which his or her victim must have responded with lethal force. “If, therefore, the accused was in danger of his life by

safe-retreat was absolute (as under the Beale approach) or whether it was merely a matter to be taken into account (as under the compromise approach).

5.182 The facts of this case also raise the thorny question as to ambit of any retreat obligations in cases involving the defence of third parties. Is a defender entitled to intervene on behalf of a third party when the third party is a victim of an attack but is unable or unwilling to retreat? This problem can be resolved in at least three ways.

5.183 First, it might be said that the ordinary retreat obligations apply to defenders regardless of whether they are defending themselves or third parties. However, to require a defender to seize any opportunity to retreat notwithstanding that the third party remains in danger would defeat the defender's objective of providing assistance.

5.184 The retreat requirement might, therefore, be modified such that defenders would be under no obligation to retreat unless they *and* the third parties they were seeking to protect were able to retreat in safety. However, this would render defenders liable in the event that the third parties fail (for whatever reason) to take a safe opportunity to retreat. Arguably this would place an unfair burden on the defender for the actions of a third party which are beyond their control.

5.185 A third approach would treat the case as one of crime prevention rather than self-defence. Hence, regardless of any failure on the third party's behalf to retreat, the defender would still be entitled to use defensive force to prevent any crime committed by the attacker. In other words, the defender would be under no obligation to retreat.

5.186 Unfortunately this issue was not addressed by the High Court of Justiciary in *Boyle v HM Advocate*.²⁶⁴

reason of an unjustified assault – however much provoked – at the time of the fatal blow and could save himself only by killing the ‘assailant’, he is entitled to succeed in his plea of self-defence”: Gordon *Criminal Law* (3rd ed W Green 2001) at 322 (emphasis added).

²⁶⁴ 1993 SLT 577. The issue also potentially arose in the Irish Court of Criminal Appeal case of *People (AG) v Keatley* [1954] IR 12 where the appellant had killed a person attacking the appellant's brother. Although Counsel for the Attorney General raised the question of retreat in argument, the issue was not mentioned in the course of the judgment. However, the reason for this omission may have been the fact that, although the appellant had killed the deceased during a fight, he had only used moderate force; in these circumstances it may be argued that any retreat obligations normally associated with the use of lethal defensive force are inapplicable. Nevertheless, it is unclear what view the Court would have taken had there been a safe opportunity for the appellant and his brother to retreat.

5.187 The case of *Burns v HM Advocate*²⁶⁵ is interesting insofar as it demonstrates that there must be a close temporal relationship between any aggressive conduct and a response by the victim in order for it to be classified as original aggression. The appellant in this case had been generally aggressive and violent in a pub and night-club during the course of the evening of the killing. Shortly before the killing, the appellant assaulted the cousin of the deceased outside a nightclub. In response, the deceased crossed the street towards the appellant (according to some witnesses, for the purposes of defusing the situation). When approached by the deceased, the appellant hit him with a metal bar, killing him. The appellant claimed that he had acted in self-defence but was convicted of murder.

5.188 The High Court upheld the appellant's murder conviction on the ground that there was no evidence that the appellant was acting in self-defence when he struck the deceased. Nevertheless, during the course of its judgment the Court indicated that the trial judge had misdirected the jury. It was wrong to direct the jury that self-defence was unavailable to those who had "started the trouble". Furthermore, "the only events which were relevant to the issue of self-defence raised by the charge of murder were those which immediately preceded the fatal blow"; namely, "the trouble between the appellant and his victim in the street." The accused's aggressive behaviour earlier in the evening, including the assault upon the deceased's cousin shortly before the fatal blow, was deemed irrelevant to the question of self-defence.

(c) The Compromise Approach

5.189 Those jurisdictions which have adopted the compromise approach to the retreat rule have generally accepted that original aggression on behalf of a defender is relevant to an assessment of the reasonableness of the defender's actions. However, these jurisdictions have struggled to define the nature and extent of this relevance. In particular, it is often unclear whether there is any greater obligation imposed upon original aggressors to retreat than that imposed on innocent defenders (bearing in mind that the test for innocent defenders is also ill-defined).

5.190 These ambiguities can be illustrated by relevance to a number of Australian cases decided at common law.

5.191 In the Australian High Court case of *Viro v R*,²⁶⁶ the appellant and others had agreed to assault and rob a passenger who was travelling with them in their car and to whom they had arranged to sell drugs. The appellant assaulted the deceased with a jack handle in order to stun him so they could

²⁶⁵ 1995 SLT 1090 (High Court of Justiciary).

²⁶⁶ (1978) 141 CLR 88.

rob him. However, the deceased pulled a flick-knife and a struggle ensued amongst the passengers in the car. The passengers were unable to subdue the deceased and the appellant stabbed him to death. The appellant claimed to have abandoned any thoughts of robbing the deceased when he saw the deceased's knife and his only concern was to act in self-defence. Despite the facts that the car was stationary at the time and the appellant was in the front and the deceased in the back, the appellant did not attempt to disengage from the struggle.²⁶⁷

5.192 Gibbs J considered that the issue of self-generated necessity should be regarded in a "similar light" to the failure to retreat; namely, "the fact that the person raising self-defence was the aggressor is an important consideration of fact, but not a legal barrier to the success of the plea."²⁶⁸ However, Gibbs J added that the failure to take an opportunity to retreat "assumes a special significance" given that "it is difficult to see how, as a matter of fact, the conduct of the aggressor, which commences as a criminal assault with an intent to commit a serious crime, can become transmuted in split seconds into lawful self-defence, unless the aggressor has clearly broken off his attack."²⁶⁹ On the facts of the case, Gibbs took the view that the appellant's plea of self-defence was far-fetched, but ultimately declined to decide whether there was sufficient evidence to raise an issue of self-defence.²⁷⁰

5.193 Murphy J held that it was "not decisive that Viro was the original aggressor". Seemingly, he considered that retreat was relevant to whether the jury accepted that the appellant had abandoned his attack and was acting in self-defence when he stabbed the deceased, but was not obligatory.²⁷¹

5.194 Although Jacobs J agreed that the issue of self-generated necessity was one for the jury to consider as part of its assessment of the reasonableness of an accused's actions, he appeared to lay down a more stringent test:

"I accept that it is the law that a felonious aggressor must *positively terminate* his aggression and thereafter be himself the

²⁶⁷ The appellant's appeal was upheld on unrelated grounds and therefore the appellate decision is useful only insofar as three of the seven judges commented on the question of self-generated necessity, notwithstanding that it clearly arose on the facts.

²⁶⁸ (1978) 141 CLR 88 at 117.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid* at 117-118.

²⁷¹ *Ibid* at 170.

subject of aggression by his victim before his subsequent act can be regarded as his self-defence against his victim's aggression."²⁷²

5.195 Despite these differing interpretations of the obligations imposed on original aggressors, the majority of the Court held that this was a case in which the self-defence should be left to the jury,²⁷³ indicating that the appellant's failure to retreat did not necessarily exclude the defence.

5.196 In contrast, under the Beale approach the appellant would have been denied the right to use defensive force in the absence of a complete withdrawal (to the extent that the deceased would have been entitled to repel a robber with lethal force).²⁷⁴

5.197 The issue of self-generated necessity arose starkly in the unusual facts of *R v Lawson and Forsythe*.²⁷⁵ In this case, rather than focusing on the issue of retreat, the Supreme Court of Victoria indicated that the test was whether the original aggressor had *overtly* abandoned his or her murderous intentions.

5.198 The majority Supreme Court of Victoria upheld the appellant's murder conviction. One member of the majority,²⁷⁶ Young CJ, did so on the grounds that the appellant, by his aggression, had created the situation in which it was necessary for him to use defensive force. Even if he had subjectively abandoned his murderous intentions, he could not claim that he acted in self-defence as he had not done so overtly.²⁷⁷

5.199 Again, had this case been dealt with under Beale's approach, then the appellant would have been treated as a deadly original aggressor and would have been denied any right of self-defence notwithstanding that he was unable to retreat in safety.

5.200 The High Court of Australia returned to the issue of self-generated necessity in *Zecevic v DPP*.²⁷⁸ The appellant in that case had been convicted

²⁷² (1978) 141 CLR 88 at 117 at 148 (emphasis added).

²⁷³ Gibbs J declined to decide.

²⁷⁴ Gibbs J accepted as much in his judgment, which may explain his hesitance to concur with the majority that the self-defence may have arisen on the facts: (1978) 141 CLR 88 at 115.

²⁷⁵ *R v Lawson and Forsythe* 1985 VIC LEXIS 452; [1986] VR 515.

²⁷⁶ The other member of the majority, Ormiston J, concurred with the judgment of Young CJ but decided the case primarily on the basis of the unlawfulness requirement (discussed earlier in Chapter 3): 1985 VIC LEXIS 452 at 204-205.

²⁷⁷ 1985 VIC LEXIS 452 at 27-28. Cryptically, Young CJ added that in some cases it might be possible that "an aggressor could escape the consequences of his aggression by a simple change of mind", but that this case was not one of them.

²⁷⁸ (1987) 71 ALR 641 (High Court of Australia).

of murdering his neighbour. Relations between the two had been acrimonious. On the night of the killing the appellant had gone to his neighbour's unit to continue an earlier argument. When knocking on the door he had broken a glass pane and in response the deceased had apparently stabbed the appellant and then threatened to shoot him. The appellant went back to his own unit and retrieved his gun. He feared that the deceased might have a gun in his car and when the deceased approached the car the appellant shot him.

5.201 The majority judgment considered that the fact that the appellant was an original aggressor did not exclude self-defence and was merely an evidential matter going to the ultimate question of whether the force was reasonably necessary.²⁷⁹ The judgment therefore makes it clear that there is no rule of law that the original aggressor must have retreated.²⁸⁰

5.202 The Court held that the trial judge was wrong to withdraw self-defence from the jury and ordered a retrial. In contrast, under the Beale approach the appellant would have been treated as a non-deadly original aggressor and, on the assumption that he did not take the opportunity to retreat to the wall when he returned to his own unit, he would have been denied any right to use self-defensive force.

F Summary and Conclusions

5.203 It is evident from this discussion that clarification is required in the area of self-generated necessity. At present in Ireland, the law on this topic is very uncertain. The cases of *People (AG) v Dwyer*²⁸¹ and *People (DPP) v Clarke*²⁸² offer little guidance in this regard.

²⁷⁹ *Zecevic v DPP* (1987) 71 ALR 641, per Wilson, Dawson and Toohey JJ (Mason CJ concurring) at paragraph 19. Brennan J expressed a similar view, adopting the approach of Gibbs J in *Viro v R* (1978) 141 CLR 88. The judgment adds that, whilst there is no rule of law that the self-defence is prohibited against lawful attacks, a tribunal of fact will be reluctant to accept that the original aggressor in an attack was acting defensively: *Zecevic v DPP* (1987) 71 ALR 641, per Wilson, Dawson and Toohey JJ (Mason CJ concurring) at para.20.

²⁸⁰ O'Connor & Fairall *Criminal Defences* (3rd ed Butterworths 1996) at 189 cite *Zecevic* for the following proposition: "The common law has no special rule with respect to self-defence against provoked assaults. Specifically, the fact that D was the original aggressor is not a bar to pleading self-defence in relation to any subsequent attack. The question is whether aggressive behaviour has transmuted to conduct which is genuinely defensive. However, [*Zecevic*] suggests that the person who initiates hostilities may have difficulty pleading self-defence."

²⁸¹ [1972] IR 416

²⁸² [1994] 3 IR 289.

5.204 The Commission accepts that there are sound reasons for drawing a distinction between provoked and unprovoked attacks when establishing the boundaries of the duty to retreat.

5.205 It is clearly desirable to impose greater retreat obligations on those who create the need to use self-defence than on those who are innocent defenders. Failing to draw a distinction in this regard would provide insufficient protection to the life of the original victim and would give a person who wished to kill an incentive to provoke an attack so he or she could respond with lethal force.²⁸³

5.206 There are a number of options for reform in this area. Firstly, a distinction could be drawn between provoked and unprovoked attacks and Beale's categories of aggressors could be adopted in this regard. This would require the courts to distinguish between "deadly original aggressors" – namely those who deliberately initiate or provoke a conflict with the intention of killing their victims, "non-deadly original aggressors" – namely those who provoke or initiate a conflict with the intention of using less-than-lethal force and "mutual aggressors" – namely those who have not initiated or provoked a conflict but who have willingly joined it with the intention of using less-than-lethal force. Deadly original aggressors would be subject to an absolute withdrawal requirement while non-deadly original aggressors and mutual aggressors would be required to retreat to the wall before they can use lethal defensive force.²⁸⁴

5.207 This approach aims to impose retreat obligations on aggressors, which are commensurate with their culpability. This is clearly a desirable objective but it is questionable whether Beale's approach could ever achieve this aim. Beale's approach raises very complex problems of definition. It is very difficult and perhaps arbitrary to draw a line between the various categories of aggressors. As a question of fact, determining which category of aggressors, the aggressor falls into will not be an easy task. It will be even more difficult for the jury to determine whether the aggressor has withdrawn absolutely or retreated to the wall.

5.208 It is apparent that even Beale himself had difficulty in defining all the concepts related to this approach. In particular, he seemed unable to proffer a precise definition for the absolute withdrawal requirement and the requirement to retreat to the wall.²⁸⁵ In summary therefore, this tripartite distinction raises more questions than answers.

²⁸³ See the dissenting comments of McLachlin J (La Forest, L'Heureux-Dube and Conthier concurring) in *R v McIntosh* (1995) 95 CCC 3d 481 at 507-508

²⁸⁴ See Beale "Homicide in Self-Defense" (1903) 3 Columbia Law Review 525 and the discussion at paragraphs 5.140-5.164.

²⁸⁵ See paragraphs 5.148-5.152.

5.209 Proponents of Beale’s approach would argue that it creates certainty in the law on self-generated necessity. However, while this approach appears certain when set down on paper, in practice, its application is far too complex to ever allow for certainty. The adoption of this approach would lead to court time being wasted on complex questions of definition. As these questions of definition could never be conclusively answered, in reality, this approach would yield no more certainty than the compromise approach, which is discussed below. Accordingly, the Commission does not recommend the adoption of this approach.

5.210 Secondly, a distinction could be simply drawn between “provoked” and “unprovoked” attacks. A duty of safe retreat could be imposed on those who provoke attacks. This is the position adopted in the Canadian *Criminal Code*²⁸⁶ and the Queensland *Criminal Code*.²⁸⁷ The Commission does not recommend such an approach given that it has already accepted that a duty of safe retreat should be imposed on “unprovoked attacks”. Accordingly, if the Queensland approach were implemented here, there would be no distinction between “provoked” and “unprovoked” attacks, which would for the reasons expressed above be undesirable.

5.211 Thirdly, the compromise approach could be adopted. This approach regards the original aggression as a factor to be considered in assessing the reasonableness of the defender’s actions. Accordingly, the fact that the defender was the original aggressor does not preclude a finding that they were entitled to act in self-defence. This approach has been adopted in a number of jurisdictions, most notably in Australia.²⁸⁸

5.212 This approach has the advantage of flexibility. Each individual case can be examined for the purpose of determining, whether in this particular instance, the aggressor’s actions were reasonable. It has the advantage of catering for unforeseeable circumstances.

5.213 However, as observed by Ashworth:

“the vice of the discretionary approach to decision-making is that the real problems of conflicting rights and value-preferences remain concealed behind the question of reasonableness. Decisions may therefore be taken according to the concealed assumptions of the particular judge, jury or magistrate who happens to be trying the case”.²⁸⁹

²⁸⁶ See section 35 of the Canadian Criminal Code.

²⁸⁷ Section 272 of the Queensland Criminal Code.

²⁸⁸ See *Zecevic v DPP* (1987) ALR 641 (High Court of Australia)

²⁸⁹ Ashworth “Self-Defence and the Right to Life” [1975] *The Cambridge Law Journal* 282

5.214 This reasonableness approach offers no real guidance to juries and is imprecise. It gives no guidance, for example, on what weight should attach to the fact that the attack was provoked. Under this approach, no real distinction is drawn between provoked and unprovoked attacks. The Commission accordingly does not recommend the adoption of this approach.

5.215 Fourthly, the Scottish approach could be adopted. This approach abandons any distinction between “deadly original aggressors”, “non-deadly original aggressors” and “mutual aggressors” and allows any aggressor to use lethal defensive force when confronted by a disproportionate response from the original victim. Accordingly, under this approach aggressors could only use lethal defensive force when they had both satisfied the safe retreat rule, which all defenders must comply with and when they were faced with a disproportionate response from the original victim.

5.216 Drawing a distinction between the various categories of aggressors offers the advantage of enabling the retreat obligations to be linked to the defender’s culpability. However, as has been observed above, drawing such a distinction is very complicated. It would lead to jury confusion and consequently, deflect the jury from its proper task. It is also likely that if such an approach were adopted, its complexity would lead to aggressors being placed in the wrong categories and this would result in miscarriages of justice.

5.217 Instead, the Commission suggests that a distinction should be drawn simply between provoked and unprovoked attacks. Where a person has provoked or initiated the attack against which they wish to use lethal defensive force, their use of this defensive force should be subject to greater restrictions than in the case of an unprovoked attack. Accordingly, the Commission agrees with the Scottish law on this point.

5.218 In any event, the Scottish approach, which the Commission agrees with, achieves the advantages of Beale’s approach and does impose retreat obligations on defenders, which are commensurate with their culpability. However, the manner in which it does this avoids the complexity of Beale’s approach. It does this in a more subtle way. This is apparent from the operation of this approach. For example, if a person initiates aggression with the intention of killing this person, any force used by the initial victim will not be disproportionate and accordingly, the aggressor will not have any defence in this case. However, if an aggressor provokes an attack, with the intention of using only minor force and the initial victim responds with an attempt to use lethal force, the aggressor can defend himself with lethal force.

5.219 Allowing the use of lethal defensive force by the aggressor where he is faced with a disproportionate response from the original victim and is unable to retreat safely strikes an adequate balance between the competing

considerations at issue. First, it ensures that the policy consideration of encouraging conflict avoidance is furthered. This is because it is only where the original victim responds with disproportionate violence that the aggressor may use lethal defensive force. It ensures that a person who wishes to kill does not have an incentive to provoke an attack so he can respond with a death blow.²⁹⁰ Secondly, it safeguards the original victim's life in that where an aggressor initiates a conflict with the intention of using lethal force, the original victim can respond with lethal force and does not face the possibility of prosecution. Thirdly, it also protects the initial aggressor's right to life. It would be an infringement of this right if he or she were required to submit to lethal force even though they had only provoked a minor response.

5.220 The factors which should be taken into account in deciding whether the force is disproportionate will be discussed in the chapter concerned with proportionality generally.²⁹¹ This chapter also examines what proportionality test should be adopted in this regard.²⁹²

5.221 *The Commission provisionally recommends that a person, who has provoked or initiated the conflict which is threatening their safety, is only entitled to use lethal defensive force in the face of a disproportionate response from the original victim and where they are unable to retreat in complete safety.*

²⁹⁰ McLachlin J in *R v McIntosh* (1995) 95 CCC 3d 481 at 507-508 observed that a failure to distinguish between provoked and unprovoked attacks would give a person an incentive to provoke an attack so he could respond with lethal force

²⁹¹ See paragraphs 6.69-6.83.

²⁹² See chapter 5.

CHAPTER 6 THE PROPORTIONALITY RULE

A Introduction

6.01 In this Chapter, the Commission considers the proportionality rule, which provides that a defender may only use lethal defensive force when the response is proportionate to the harm sought to be avoided. The Commission discusses the rule in Ireland and in other jurisdictions and considers the factors relevant to the assessment of proportionality.

B The Proportionality Rule

6.02 The proportionality rule provides that lethal defensive force may only be used when the response is proportionate to the harm sought to be avoided: “The proportionality rule is based on the view that there are some insults and hurts that one must suffer rather than use extreme force, if the choice is between suffering the hurt and using the extreme force.”¹ The point is illustrated with the simple example of the weakling who must submit to being slapped if the only possible method of avoiding the attack is to use a gun.²

6.03 The role of the proportionality rule, in combination with the threshold test,³ is to ensure that lethal defensive force is deployed only where the threat is sufficiently serious to warrant a deadly response. Proportionality, therefore, is said to require “a balancing of competing interests, the interests of the defender and those of the aggressor”.⁴

“[T]he liberty of a person attacked to use such force as is necessary is curtailed out of respect for the attacker’s right to life

¹ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 456. See also Ashworth, “Self-Defence and the Right to Life” [1975] *Cambridge Law Journal* 282 at 296: “This restriction is important because, if necessity were the sole requirement, the infliction of death or serious injury might in theory be justifiable if it were the only way of preventing a relatively trivial assault.”

² Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 456.

³ For a discussion of the relationship between the proportionality rule and the threshold test, see paragraphs 6.52-6.55 below.

⁴ Fletcher *Basic Concepts of Criminal Law* (Oxford University Press 1998) at 136.

and physical security. In some cases, therefore, these fundamental rights of the attacker are preferred to the innocent citizen's right to freedom from interference."⁵

6.04 As a balancing process, the proportionality rule resembles the "choice of the lesser of two evils" test associated with the defence of necessity. In the case of the proportionality rule, however, the defensive response does not have to be a *lesser* evil; the interests protected by the defender need not *outweigh* the life of the attacker but, at most, need only be of an equivalent value. Hence, faced with the choice of preserving the attacker's life or his or her own, a defender is entitled to prefer the latter. Such self-preferential killing is generally considered acceptable on the basis of the "moral asymmetry" between the attacker and defender.⁶

6.05 However, the common use of the term in the parlance of legitimate defence conceals the complex nature of the balancing process it entails. Despite the relatively straightforward application of the proportionality principle in examples where the interest threatened by the attacker (the life of the defender) and that threatened by the defender (the life of the attacker) are of the same kind, greater difficulties arise where they differ. For example, how is the attacker's right to life to be weighed against a defender's right not to be seriously injured; or, in the case of an attack on property, the defender's right to defend his or her possession; or, in the case of preventing a non-deadly crime, society's interest in upholding the law; or, in the case of arrest, society's interest in apprehending and punishing criminals?

6.06 A robust stance would be to prohibit the use of lethal defensive force in all cases in which the threat is not life-threatening. However, as has been seen in the preceding chapters, the common law has deemed this approach too simplistic. In consequence, a precise definition of the proportionality rule has proved elusive.

6.07 Consider the following example. A defender is confronted by an armed burglar in her home at night. The defender is also armed and decides to shoot the burglar. In assessing whether this response is proportionate, one

⁵ Ashworth, "Self-Defence and the Right to Life" [1975] Cambridge Law Journal 282 at 297.

⁶ See, for example, the argument of Uniacke who submits that a legitimate basis for the defender's self-preferential killing is that there is a "moral asymmetry" between the attacker and defender on account of the attacker posing an unjust immediate threat; consequently, the attacker does not have a right to life equal to that of the defender. The attacker's unqualified right to life is conditional on not posing such a threat, and therefore ceases until such time as he or she no longer poses the threat: Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994), and especially at 229 and 330.

might take into account that the burglar appears to pose a threat not only to the defender's life, but also to her property, privacy and sense of security. On the other hand, one might also consider the probability that each of these threats would materialize into actual harm, as compared to the almost certitude that the defender's shot will kill the burglar. Would it make any difference if the burglar would not be held criminally liable in that he lacked capacity due to age or insanity?

6.08 It is submitted that the difficult task of achieving a degree of unanimity as to whether a lethal defensive response would be proportionate to the attacks in all the scenarios that could arise can only be achieved with the assistance of detailed legal guidelines. Yet, the comparative survey carried out below demonstrates that in most jurisdictions the standard of conduct traditionally imposed by the proportionality rule has been diluted and the rule no longer enjoys the status of a stand-alone legal requirement.

C History

6.09 The concept of "proportionality" has long been intertwined with the test for legitimate defence, whether in the form of a proportionality rule or a "threshold test". Illustrations of threshold tests from the medieval and early modern period are set out in Chapter 2; for example, the medieval power to use lethal force to apprehend fleeing felons was not available for preventing the escape of mere misdemeanants.⁷ Similarly, limits were imposed on the use of lethal force both in private defence and to prevent felonies. As Holt CJ pointed out in the 1705 case of *Cockcroft v Smith*,⁸ "For every assault it is not reasonable a man should be banged with a cudgel".⁹

6.10 The nineteenth century case of *R v Ryan*¹⁰ demonstrates that the principle of proportionality was entrenched in the law of legitimate defence:

"If a man be struck with the fist he may defend himself in a similar manner, and so knock his assailant down, but he is not justified in shooting him, or maiming him with an axe or other deadly weapon."¹¹

⁷ See Harper "Accountability of Law Enforcement Officers in the Use of Deadly Force" (1983) 26 How LJ 119 at 124.

⁸ (1705) 2 Salk 642, cited in Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 456.

⁹ *Cockcroft v Smith* (1705) 2 Salk 642, cited in Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 456.

¹⁰ (1890) 11 NSW 171.

¹¹ *R v Ryan* (1890) 11 NSW 171 at 182 per Windeyer J.

“[A]n assault with an umbrella or a cane will not justify the use in self-defence of a crowbar, a knife, a hatchet, or other dangerous weapon....”¹²

6.11 At the same time, it must be recognised that allowances made by the common law, say, for the use of lethal force to prevent certain non-life-threatening crimes, may no longer reflect modern views as to proportionality. Indeed, the adaptable nature of the proportionality concept does highlight the differing values that have been (and, to some extent, still are) attached to the right to life of attackers and the counterbalancing interests of defenders and society.

6.12 Nevertheless, by 1879 the law had developed to a point where the Criminal Code Commissioners felt able to generalise the various threshold tests to a simple requirement of proportionality. Refining concepts that were arguably already well-established in law,¹³ the Commissioners stated that both the public and private defences were subject to the requirement not only of necessity but also that “the mischief done by, or which might reasonably be anticipated from, the force used is not disproportioned to the injury and mischief which it is intended to prevent.”¹⁴ The Commissioners observed that the omission of such a restriction “would justify every weak lad whose hair was about to be pulled by a stronger one, in shooting the bully if he could not otherwise prevent the assault.”¹⁵

D Modern Developments

(1) *The Law in Ireland*

6.13 Proportionality was well-established in the vocabulary of the Irish law of legitimate defence up until the 1950s. For example, in the 1937 Supreme Court decision in *Lynch v Fitzgerald*,¹⁶ Meredith J highlighted the

¹² *R v Ryan* (1890) 11 NSW 171 at 183 per Windeyer J.

¹³ But see Lantham’s argument that the Criminal Code Commission’s statement of the law was not an accurate account of the common law at the time: “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 19-20. However, the author concludes that “[d]espite these weaknesses associated with the Commissioners’ formulation, it stands as a clear statement of the proportionality rule and as a statement more fully in line with modern values than those made by the earlier institutional authorities.”

¹⁴ Report of the Royal Commission on the *Law Relating to Indictable Offences* (1879 C2345) at 11, cited in Ashworth, “Self-Defence and the Right to Life” [1975] *The Cambridge Law Journal* 282 at 297.

¹⁵ Report of the Royal Commission on the *Law Relating to Indictable Offences* (1879 C2345) at 44, note B, cited in Ashworth, “Self-Defence and the Right to Life” [1975] *The Cambridge Law Journal* 282 at 296.

¹⁶ [1938] IR 382 at 422.

need for proportionality when lethal force was being deployed to prevent or suppress a riot.¹⁷

6.14 The principle also found expression in the 1936 High Court decision of *Gregan v Sullivan*,¹⁸ a civil case dealing with a non-fatal attack. The High Court overturned a circuit court jury finding that the defendant had acted in “reasonable and necessary self-defence” when he struck the plaintiff with pitch-fork (breaking his arm and causing 13 puncture wounds) in response to the plaintiff striking him with his fist.¹⁹ Finding that the plaintiff had been assaulted, O’Byrne J observed: “I am inclined to agree that we ought not to weigh a method of self-defence on too fine a scales, but steam hammers ought not to be used to crush flies.”²⁰

6.15 The 1957 Circuit Court judgment *Dullaghan v Hillen and King*²¹ noted that necessary defensive force must also be “reasonable and proper”; namely “the force used in defence must be not more than commensurate with that which provoked it.”²²

6.16 However, the role of the proportionality rule became increasingly obscure in the course of the latter half of the twentieth century. Two of the leading criminal law cases on legitimate defence, *People (AG) v Keatley*²³ and *People (AG) v Dwyer*²⁴ made no reference to the rule whatsoever. *Keatley* defined the test for legitimate defence solely in terms of “necessity”²⁵ whilst *Dwyer* adopted a test of “reasonable necessity”.²⁶ It should be noted, however, that Walsh J’s judgment in *Dwyer* substitutes a

¹⁷ *Lynch v Fitzgerald* [1938] IR 382 at 422.

¹⁸ [1937] 1 Ir Jur Rep 64.

¹⁹ The plaintiff, 65 years old, was some 30 years the senior of the defendant.

²⁰ *Gregan v Sullivan* [1937] 1 Ir Jur Rep 64 at 65.

²¹ [1957] 1 Ir Jur Rep 10 per Judge Fawsitt.

²² *Dullaghan v Hillen and King* [1957] 1 Ir Jur Rep 10 at 13 (this was a civil case for damages against a customs officer who used excessive force in carrying out the arrest of the plaintiff). Judge Fawsitt emphasised that the reasonableness of defensive force was a question of fact.

²³ [1954] IR 12 (Court of Criminal Appeal).

²⁴ [1972] IR 416 (Supreme Court).

²⁵ Maguire CJ held that the test required “that the use of force is necessary and that no more force than is necessary is used”: *People (AG) v Keatley* [1954] IR 12 at 17.

²⁶ *People (AG) v Dwyer* [1972] IR 416 at 420 (per Walsh J) and 429 (per Butler J). It would appear that the addition of the word “reasonable” to the test was intended to denote a objective standard: see Walsh J at 424. Interestingly, Ó Siocháin’s commentary on the Irish criminal law, published shortly after *Dwyer*, maintained that “the amount of force allowed in one’s self-defence must be proportionate to the attack...”: *The Criminal Law of Ireland* (6th ed Foilsíúcháin 1977) at 104-105.

threshold test in lieu of proportionality requirement, apparently restricting the use of lethal force to cases of life-threatening attack.²⁷

6.17 More recent judgments have reintroduced the concept of proportionality, albeit that its role remains unclear. For example, in a 1994 decision, *People (DPP) v Clarke*,²⁸ the Court of Criminal Appeal appeared to endorse the approach taken in England and Wales as laid down in *Palmer v The Queen*.²⁹ As discussed above,³⁰ a jury is entitled to take account of a defender's use of *grossly* disproportionate force as part of the overall assessment of the reasonableness.

6.18 However, five years later, the same Court appeared to elevate proportionality to a more prominent role. In *People (DPP) v Cremin*,³¹ the Court stated that the issue for the jury was whether the defender's response to aggression by the complainants was a "reasonably proportionate reaction".³² If it is to be assumed that a negative finding on this point would be fatal to a successful plea, then *Cremin* represents a modification of the approach taken in *Clarke*; proportionality is no longer to be treated as a mere element in the overall test of reasonableness, but rather has the status as a stand-alone test.

6.19 Whilst this conclusion may read too much into the wording of the judgment, it is nevertheless consistent with the observation of Charleton, McDermott and Bolger that "[t]here is a tendency in modern interpretations of the judgment in *Keatley* to require reasonable force to be proportionate".³³ The authors go on to argue that a proportionality rule is "consistent with the objective of 'true social order' set out in the Preamble to the Constitution."³⁴ In similar vein, McAuley and McCutcheon submit that "it is far from clear"

²⁷ *People (AG) v Dwyer* [1972] IR 416 at 420.

²⁸ [1994] 3 IR 289.

²⁹ [1971] AC 815. The passage was cited with apparent approval by the Court of Criminal Appeal in *People (DPP) v Clarke* [1994] IR 289 at 300.

³⁰ See paragraph 6.25 above.

³¹ Court of Criminal Appeal (Keane, McCracken and Lynch JJ) 10 May 1999.

³² *People (DPP) v Cremin* Court of Criminal Appeal (Keane, McCracken and Lynch JJ) 10 May 1999. The appellant in this case had been convicted of maliciously wounding the complainant. The Court held that, if the jury had accepted that the appellant might have been responding defensively to aggression by the complainants, the issue was whether the degree of force used was "a reasonably proportionate reaction".

³³ The authors' further observe that "[t]here is, as yet, no binding authority which requires reasonable force to be interpreted as proportionate" seems to predate *People (DPP) v Cremin* Court of Criminal Appeal (Keane, McCracken and Lynch JJ) 10 May 1999.

³⁴ Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 1032.

that the “modern authorities leave the fundamental questions of whether lethal force was necessary and/or proportionate ‘at large’”.³⁵

6.20 However, the question remains as to what is meant by the *Cremin*³⁶ test of “reasonable proportionality”? On the one hand, it may be argued that the qualification of “reasonableness” is intended to indicate that proportionality is to be judged by an objective standard. On the other, it may mean that the proportionality rule is not to be applied in the strict sense; only *grossly* disproportionate defensive force would fall shy of attaining this standard.

6.21 The role of proportionality under the legitimate defence provisions of the *Non-Fatal Offences against the Person Act 1997*, which relies solely on the test of reasonableness, is even more obscure. Given that the provision is modelled on a clause drafted by the Law Commission of England and Wales, one might assume that it was intended to encapsulate the approach adopted in cases such as *Palmer*.³⁷ Such an interpretation would be consistent with the views expressed by the Court of Criminal Appeal in *Clarke*.³⁸ In any event, it is difficult to avoid the conclusion reached by McAuley and McCutcheon that proportionality does not enjoy “the status of formal legal rules” under the 1997 Act.³⁹

(2) *The Common Law Jurisdictions*

6.22 As in other areas of legitimate defence, the twentieth century saw the gradual erosion of the Criminal Code Commissioners’ concise statement of the common law. Perhaps reflecting a reluctance to impose rigid limitations on the use of lethal defensive force, the proportionality requirement was enveloped into the amorphous test of reasonableness and is now generally considered to be merely one factor to be taken into account when assessing the reasonableness of an accused’s actions. As the Privy Council stated in *Beckford v R*:⁴⁰ “[T]he test to be applied in self-defence is

³⁵ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 755-756.

³⁶ *People (DPP) v Cremin* Court of Criminal Appeal (Keane, McCracken and Lynch JJ) 10 May 1999.

³⁷ [1971] AC 815. The passage was cited with apparent approval by the Court of Criminal Appeal in *People (DPP) v Clarke* [1994] IR 289 at 300.

³⁸ [1994] 3 IR 289.

³⁹ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 755.

⁴⁰ (1987) 85 Cr App R 378.

that a person may use such force as is *reasonable* in the circumstances as he honestly believes them to be in the defence of himself or another.”⁴¹

6.23 How is this test of reasonableness to be interpreted? Ashworth offers the following guidance:

“The standard cannot be a precise one: probably the best way of defining it is in terms of what is reasonably proportionate to the amount of harm likely to be suffered by the defendant, or likely to result if the forcible intervention is not made.”⁴²

6.24 Ashworth emphasises that the concept of proportionality should not be understood in a strict sense, but rather that it merely “requires a *rough approximation* between the apparent gravity of the attack or threatened attack and the style and severity of the defensive actions.”⁴³ Smith and Hogan also agree that strict proportionality is not required. Interpreting the reasonableness test, the authors suggest that a response “cannot be reasonable to cause harm unless... the evil which would follow from failure to prevent the crime or effect the arrest⁴⁴ is so great that a reasonable man might think himself justified causing that harm to avert that evil.”⁴⁵ As the authors concede, such a question is “somewhat speculative.”⁴⁶

6.25 There are a number of judgments that support this broad interpretation of the concept of proportionality. For example, in *Palmer v The Queen*⁴⁷ the Privy Council indicated that the prosecution would need to show something more than mere disproportionality:

“If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was *wholly* out of proportion to the necessities of the situation.” (Emphasis added).⁴⁸

⁴¹ *Beckford v R* (1987) 85 Cr App R 378 at 387 (emphasis added).

⁴² Ashworth, *Principles of Criminal Law* (2nd ed Clarendon Press 1995) at 136.

⁴³ Ashworth, “Self-Defence and the Right to Life” [1975] Cambridge Law Journal 282 at 296. Hence, Ashworth’s comment at 297 that there is “ample authority that the principle of proportionality forms part of the modern English law” should be understood in this constrained sense.

⁴⁴ The authors indicate that the same principle would apply to private defence: Smith & Hogan *Criminal Law* (9th ed Butterworths 1999) at 257.

⁴⁵ *Ibid* at 255-256.

⁴⁶ *Ibid* at 256.

⁴⁷ [1971] AC 815. The passage was cited with apparent approval by the Court of Criminal Appeal in *People (DPP) v Clarke* [1994] IR 289 at 300.

⁴⁸ *Palmer v The Queen* [1971] AC 815 at 831 per Lord Morris of Borth-y-Gest.

6.26 Furthermore, the Board opined that the question of proportionality was merely one of the matters of which “the good sense of the jury will be the arbiter”.⁴⁹

6.27 Evidently, the House of Lords had in mind a similar test in its 1995 decision in *R v Clegg*.⁵⁰ The case concerned the use of lethal force by a member of the British Army stationed in Northern Ireland to arrest the occupants of a car which had driven through a vehicle checkpoint, apparently striking a soldier and knocking him off balance. The House of Lords accepted that no defence was available to the soldier on the basis that “the use of lethal force to kill or wound the driver of the car in order to arrest him was, in the circumstances, so *grossly disproportionate* to the mischief to be averted” (emphasis added).

6.28 The New Zealand courts appear to have adopted a similar approach to that taken by their counterparts in England and Wales, at least insofar as self-defence is concerned.⁵¹ For example, in *Wallace v Abbott*⁵² Elias CJ held that proportionality, whilst an integral part of the reasonableness test imposed by the New Zealand *Crimes Act 1961*,⁵³ was a matter for the jury to consider.⁵⁴ Furthermore, in *R v Bridger*,⁵⁵ the Court appeared to accept the suggestion of the House of Lords in *R v Clegg*⁵⁶ that only grossly disproportionality would infringe the rule.⁵⁷

6.29 In Australia, the tendency has also been towards minimising the role of proportionality. In *R v Viro*,⁵⁸ Mason J held that the jury was required to “consider whether the force in fact used by the accused was reasonably proportionate to the danger which he believed he faced.”⁵⁹

⁴⁹ *Palmer v The Queen* [1971] AC 815 at 831-832.

⁵⁰ [1995] 1 AC 482.

⁵¹ Under section 48 New Zealand *Crimes Act 1961*, self-defence and defence of others is governed by the test of reasonableness. However, as discussed at paragraph 6.32 below, the defence of property and the public defences are governed by more complex provisions which tend to specify either a proportionality requirement or a threshold test.

⁵² (2003) NZAR 42, paragraph 101 (High Court).

⁵³ Section 48 New Zealand *Crimes Act 1961*.

⁵⁴ See also *R v Oakes* [1995] 2 NZLR 673 at 683, where the Court of Appeal indicated that there must be “proportionality of response” for self-defence to succeed.

⁵⁵ [2003] 1 NZLR 636.

⁵⁶ [1995] 1 AC 482.

⁵⁷ *R v Bridger* [2003] 1 NZLR 636 at paragraph 24.

⁵⁸ [1978] 141 CLR 88.

⁵⁹ *R v Viro* [1978] 141 CLR 88 at 147.

However, whilst accepting this standard, the Supreme Court of New South Wales in *R v Walden*⁶⁰ stated that “the danger need not necessarily be the prospect of death or grievous bodily harm. Indeed, so to confine the danger would preclude, for example, the woman who kills in self-defence in the face of a sexual aggressor.” In *Zecevic v DPP*⁶¹ the majority of the High Court diluted the role of proportionality still further. Whilst accepting that proportionality may be relevant in many cases, the majority warned against “elevat[ing] matters of evidence to rules of law”:

“[T]he whole of the circumstances should be considered, of which the degree of force used may be only a part. There is no rule which dictates the use which the jury must make of the evidence and the ultimate question is for it alone.”⁶²

6.30 On the basis of this decision, commentators O’Connor and Fairall conclude emphatically that “[t]here is no separate requirement of proportionality in self-defence”,⁶³ other than its evidentiary significance, “[i]t has no life of its own.”⁶⁴

6.31 However, proportionality arguably plays a greater role in many criminal code jurisdictions such as those in Australia, Canada and New Zealand.

6.32 For example, the various legitimate defence provisions contained in the criminal codes of Canada, Queensland, Western Australia, Tasmania and New Zealand (excluding the New Zealand and Tasmanian provisions relating to self-defence⁶⁵) impose either a proportionality requirement or alternatively a threshold test. For instance, the use of lethal force in self-defence is typically governed by threshold tests (for example, the defender believes there to be a threat of death or grievous bodily harm).⁶⁶ Similarly, a threshold test usually applies where lethal force is used to prevent the escape of arrestees (for example, the arrestee must be suspected of having committed an offence punishable by life imprisonment),⁶⁷ to prevent crime

⁶⁰ Street CJ, Yeldham and Carruthers JJ concurring 13 March 1986.

⁶¹ (1987) 71 ALR 641, per Wilson, Dawson and Toohey JJ, Mason CJ concurring.

⁶² *Zecevic v DPP* (1987) 71 ALR 641, per Wilson, Dawson and Toohey JJ, Mason CJ concurring.

⁶³ O’Connor & Fairall *Criminal Defences* (3rd ed Butterworths 1996) at 184.

⁶⁴ *Ibid.*

⁶⁵ Section 46 Tasmanian *Criminal Code*; section 48 New Zealand *Crimes Act 1961*.

⁶⁶ See for example Queensland *Criminal Code*, section 271(2); Western Australian *Criminal Code*, section 248. See also section 35 Canadian *Criminal Code*.

⁶⁷ See for example Queensland *Criminal Code*, section 256(2); Western Australian *Criminal Code*, section 233(2).

(for example, where it would cause “serious injury to any person or property”);⁶⁸ and to defend a dwelling-house (for example to repel an intruder intent on committing a crime).⁶⁹ In contrast, provisions relating to the prevention of breaches of the peace and the suppression of riots are typically governed by a requirement that the defensive force be “reasonably proportioned to the danger”.⁷⁰ Curiously, the use of force to effect arrests is governed by neither a threshold test nor proportionality requirement; rather, the test is whether the force is “reasonably necessary”.⁷¹

6.33 The inconsistent nature of these statutory schemes has drawn criticism from academics⁷² and law reform bodies. In the 1980s the Canadian Law Reform Commission called for an overhaul of the legitimate defence provisions contained in the Canadian *Criminal Code* on account of their complexity and incoherency. The Commission initially recommended that the principle of proportionality should be enshrined in its proposed provision on the private defences (it recommended that threshold tests should govern the public defences); the use of defensive force would be judged by reference to “general social attitudes concerning the degree of force acceptable to any given situation.”⁷³ However, the Commission subsequently abandoned this approach without explanation, opting instead

⁶⁸ Defence of crime prevention is subject to various threshold tests: see for example section 39 Tasmanian *Criminal Code*, section 27 Canadian *Criminal Code* and section 41 New Zealand *Crimes Act 1961* ((reasonably) necessary force may be used to prevent crimes likely to cause “serious injury to any person or property”).

⁶⁹ See for example section 267 Queensland *Criminal Code*; section 244 Western Australian *Criminal Code* (where the intruder has or intends to commit any offence); section 40 Tasmanian *Criminal Code*.

⁷⁰ Queensland *Criminal Code*, sections 260 and 261; Western Australian *Criminal Code*, sections 237 and 238. Section 34 Tasmanian *Criminal Code* and adopts similar wording; namely, the defensive force must not be “disproportioned to the danger”. See also sections 42 and 43 New Zealand *Crimes Act 1961*. Section 30 Canadian *Criminal Code* also adopts the “reasonable proportionality” test for the prevention of breaches of the peace, whereas the suppression of riots must not be “excessive, having regard to the danger to be apprehended by the continuance of the riot.”

⁷¹ Queensland *Criminal Code*, section 254; Western Australian *Criminal Code*, section 231; section 26 Tasmanian *Criminal Code*. Section 39 New Zealand *Crimes Act 1961* and section 25(1) of the Canadian *Criminal Code*, however, are governed solely by the requirement of “necessity”.

⁷² See Stuart *Canadian Criminal Law* (3rd ed Carswell 1995) at 451.

⁷³ Law Commission of Canada *Working Paper on Criminal Law: the general part – liability and defences* (No 29, 1982) at 103.

for a requirement that defensive force be “reasonably necessary”,⁷⁴ thereby “softening” the proportionality rule.⁷⁵

6.34 The haphazard nature of these codes may be contrasted with the legislation applicable in the Northern Territory of Australia, South Australia and the US *Model Penal Code*. The Northern Territory *Criminal Code* steers clear of any proportionality rule and relies solely on threshold tests (typically that the attacker poses a threat of death or grievous harm);⁷⁶ a similar approach is adopted under the *Model Penal Code*.⁷⁷ Conversely, the South Australian legislature has foregone the use of threshold tests and adopts a “reasonably proportionate” test.⁷⁸

6.35 Recently, two reform bodies have recommended the adoption of a two-pronged approach incorporating both a threshold test and a proportionality rule. In 1992 the Australian Model Criminal Code Officers Committee recommended that lethal defensive force be permissible only for the purposes of self-defence or in response to unlawful imprisonment (the threshold test) and only if “the conduct is a *reasonable response* in the circumstances as the person perceives them”⁷⁹ (the proportionality rule). This recommendation was adopted in the *Commonwealth Criminal Code Act 1995*⁸⁰ and the Australian Capital Territory *Criminal Code 2002*.⁸¹ A similar approach was taken in the recently promulgated Draft Criminal Code for Scotland (published under the auspices of the Scottish Law Commission); lethal defensive force would be permissible only for the purposes of saving life or preventing serious injury (the threshold test) and only if the defensive

⁷⁴ Law Commission of Canada, *Report on Recodifying Criminal Law* (No 31, 1987) at 36.

⁷⁵ Judge Ratushny, “Self Defence Review (Submitted to the Minister of Justice of Canada and Solicitor General of Canada)”, 11 July 1997, Chapter 5, text above footnote 69. Such an approach was also favoured by the Canadian Bar Association Criminal Codification Task Force in its Report, “Principles of Criminal Liability - Proposals for a New General Part of the Criminal Code of Canada” (1992).

⁷⁶ Northern Territory *Criminal Code*, section 28.

⁷⁷ Sections 3.04-3.07 United States *Model Penal Code*.

⁷⁸ South Australian *Criminal Law Consolidation Act 1935*, section 15(1)(b), stipulates that “the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.”

⁷⁹ Criminal Law Officers Committee of the Standing *Committee of Attorneys-General* (now *Model Criminal Code Officers Committee*) *Model Criminal Code: Chapters 1 and 2: General Principles of Criminal Responsibility: Report* (1992) at 70-71 (emphasis added).

⁸⁰ Section 10.4.

⁸¹ Section 42.

force were both necessary and *reasonable*.⁸² It would appear that the latter is intended to operate as some kind of proportionality rule, perhaps along the lines of the current Scots case-law.

(3) The German Approach

6.36 German law offers a useful contrast to the common law's traditional dependence on the principle of proportionality. German legal theory has long been hostile to attempts to place restrictions on the use of necessary defensive force.⁸³ This position was graphically illustrated in a 1920 judgment where the Supreme Court held that a farmer had acted in legitimate defence when he shot and seriously injured an apple thief as the thief attempted to escape from the farmer's orchard.⁸⁴ In reaching this conclusion, the Court rejected the suggestion that the farmer had been constrained by the principle of proportionality.⁸⁵

6.37 According to Fletcher, the German approach invokes the maxim, "Right need never yield to wrong":

"The very idea of being in the Right against an aggressor, of having a personal right encroached upon, means that one is entitled to resist. This is what it means to be an autonomous person in a civil society."⁸⁶

6.38 This approach assumes that "all legally protected interests are entitled to the same degree of protection".⁸⁷ However, rather than promoting conflict, in theory this commitment to autonomy "reinforces the basic structure of civil society":

"Forcibly repulsing the aggressor ensures that every individual may exercise his freedom consistently with the exercise of a like freedom by others. It follows, then, that the legal system should not require that individuals surrender their rights to aggressors

⁸² See Clause 23 Draft Criminal Code and commentary in the Scottish Law Commission "A Draft Criminal Code for Scotland with Commentary" (2003) at 64-65.

⁸³ See Funk "Justifying Justifications" (1999) 19 OJLS 630, text at footnotes 28-35.

⁸⁴ Judgment of the Supreme Court, 20 September 1920 55 RGSt 82.

⁸⁵ The circumstances of the case are set out in Funk "Justifying Justifications" (1999) 19 OJLS 630, text at footnotes 3-6.

⁸⁶ Fletcher "The Right and the Reasonable" (1985) 98 Harv L Rev 949 at 968. As Fletcher emphasises that "[t]o grant a sphere of independence from state control is not to make moral judgments about what should be done, but rather to recognize the individual's competence to make the final moral choice": Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 872.

⁸⁷ Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 871.

rather than use the force necessary to vindicate both their autonomy and the legal order.”⁸⁸

6.39 However, Fletcher notes that the German “emphasis on autonomy as an absolute value has generated the most difficult single problem in the German theory of necessary defence... [which] has haunted German theory ever since.”⁸⁹ Whilst the German legislature has not expressly incorporated a proportionality requirement,⁹⁰ increasing concern for the welfare of the attacker (particularly in the past 25 years) has led to the imposition of “socio-ethical limits” (*sozialethische Einschränkungen*) on the right of self-defence;⁹¹ namely, lethal defensive force must not be grossly disproportionate to the threatened harm.⁹²

6.40 As Fletcher points out, “The humanitarian response is that sometimes the cost of defending the right is simply too high; sometimes the right must yield in order to preserve values found even in the person of a wrongful aggressor.”⁹³

E Discussion

6.41 The various approaches highlighted above may be grouped into four general categories.

6.42 First, the “strict proportionality” approach requires that the cost of the defensive act (that is, the taking of the attacker’s life) is of no greater value than the benefit (for example, saving the defender’s life). In other words, the intended good effects must equal, if not outweigh, the anticipated bad effects of the lethal defensive force.

⁸⁸ Fletcher “The Right and the Reasonable” (1985) 98 Harv L Rev 949 at 968. Eser argues that the German view is that “the aggressor is somehow outlawing himself by his illegal act and thus takes the risk of any damage inflicted by necessary defence; consequently, there was not need to pay attention to proportionality”: Eser “Justification and Excuse” (1976) 24 American Journal of Comparative Law 621 at 633.

⁸⁹ Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 871.

⁹⁰ “Even though important voices in the literature and the case law favoured [the incorporation into the 1975 German criminal code of the principle of proportionate force as a limitation on the right of self-defense], the code adopted the traditional German rule that all necessary force is privileged”: Fletcher “The Right and the Reasonable” (1985) 98 Harv L Rev 949 at 967.

⁹¹ Funk “Justifying Justifications” (1999) 19 OJLS 630, text at footnote 37.

⁹² See Eser “Justification and Excuse” (1976) 24 American Journal of Comparative Law 621 at 633.

⁹³ Fletcher “The Right and the Reasonable” (1985) 98 Harv L Rev 949 at 968-969.

6.43 The “gross disproportionality” approach provides a less rigid alternative to that of strict proportionality. Based on the view that proportionality “is a question of evaluation and social judgment”⁹⁴ and is, therefore, not capable of strict definition, this test does not require a strict correlation between the magnitude of the threat and that of the response. Defensive force is prohibited only in extreme cases such as where it would be grossly disproportionate.

6.44 The “reasonableness” approach dilutes the proportionality requirement still further by relegating the status of the rule from an independent requirement to merely one of the factors to be taken into account in assessing the reasonableness of the defender’s actions.

6.45 Finally, the concept of proportionality might be abandoned altogether; lethal defensive force would be permissible whenever necessary to protect the interests of the defender (or others), no matter how insignificant the threat of harm.

6.46 The comparative survey has demonstrated that the current approach adopted in many common law jurisdictions, including Ireland, is an amalgam of the “reasonableness” and “gross disproportionality” approaches; in other words, proportionality is relevant to the question of reasonableness but only insofar as there has been a gross departure from the standard. Interestingly, whilst German legal theory is hostile to a strict proportionality requirement, their stance is not dissimilar to that applied by the common law.

6.47 The trend in most common law jurisdictions towards the adoption of loosely defined proportionality rules appears to reflect a reluctance to place absolute limits on the use of lethal defensive force. Hence, in some jurisdictions lethal defensive force is permissible to repel, for example, threats of rape or certain types of unlawful imprisonment.

6.48 Excuse-based considerations of this kind grounded the Supreme Court’s recognition of the plea of excessive defence in *People (AG) v Dwyer*.⁹⁵ However, it must be emphasised that this plea operates as a partial defence only. Assuming that it is correct to say that the Dwyer plea renders an accused who uses disproportionate force guilty of manslaughter,⁹⁶ it follows that only defensive force which satisfies the “strict proportionality” rule should result in a full acquittal. It is therefore surprising that the Court

⁹⁴ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 441.

⁹⁵ [1972] IR 416.

⁹⁶ Neither of the Dwyer judgments mention the proportionality rule. Rather, the focus is on defensive force which is “excessive” (at 424 per Walsh J) or more than “reasonably necessary” (at 424 per Walsh J; at 432 per Butler J). For further discussion, see Chapter 7.

of Criminal Appeal in *People (DPP) v Clarke*⁹⁷ endorsed the *Dwyer* decision (arguably supporting the “strict proportionality” approach) at the same time as approving the apparently incompatible “gross disproportionality” / “reasonableness” approach set out in *Palmer v The Queen*.⁹⁸

6.49 To the extent that these broader versions of the proportionality rule implicitly accept that the use of disproportionate (albeit not grossly disproportionate) defensive force may be legitimate, they are inconsistent with a justification-based approach to the defence. In contrast, the “strict proportionality” approach is more closely aligned with the traditional (but not always observed) threshold requirement prohibiting lethal defensive force except where used in response to a life-threatening attack.

F Summary and Conclusions

6.50 The options for reform of the proportionality test have already been described. In summary, firstly, the proportionality test could be abandoned altogether, secondly, proportionality could be seen as merely one factor to be considered in assessing the reasonableness of the defendant’s actions, thirdly, a “strict proportionality” test could be adopted and fourthly, a “gross proportionality” test could be accepted.

6.51 The first option for reform suggests abandoning the proportionality requirement. Would this be an appropriate approach for Irish law to follow? This is the approach which was adopted in Germany.⁹⁹ However, concern for the welfare of the attacker has led to a move away from this approach.¹⁰⁰ Throughout this Paper, the Commission has highlighted the importance of the attacker’s right to life. For example, in chapter 1, the Commission suggested that a threshold requirement be imposed to safeguard the life of the attacker.¹⁰¹ The initial German approach had no regard for the life of the attacker and accordingly, the Commission does not approve of this option. As Fletcher points out, “The humanitarian response is that sometimes the cost of defending the Right is simply too high; sometimes the Right must yield in order to preserve values found even in the person of a wrongful aggressor.”¹⁰²

⁹⁷ [1994] 3 IR 289.

⁹⁸ [1971] AC 815. The passage was cited with apparent approval by the Court of Criminal Appeal in *People (DPP) v Clarke* [1994] IR 289 at 300.

⁹⁹ See for example Judgment of the Supreme Court 20 September 1920 RGSt 82.

¹⁰⁰ See paragraph 6.39 for a discussion of this.

¹⁰¹ See paragraphs 2.62, 2.94, 2.232 and 2.299.

¹⁰² Fletcher “The Right and the Reasonable” (1985) 98 Harv L Rev 949 at 968-969

6.52 However, in Ireland, if the Commission's recommendations were enacted into law, the right to life of the attacker would still be safeguarded to a certain extent by the threshold requirement. Accordingly, the abandonment of a proportionality rule could be more acceptable in this jurisdiction than in Germany. Indeed, one might ask whether a proportionality rule is even necessary in a jurisdiction which has a threshold requirement. Yeo has suggested that the retention of both the proportionality and threshold tests is superfluous and that a proportionality rule alone would be sufficient.¹⁰³ However, the Supreme Court in *People (AG) v Dwyer*¹⁰⁴ made no reference to a proportionality rule and instead indicated that a threshold test need only be satisfied.

6.53 However, whilst the threshold test and proportionality rule seek to achieve the same end – to ensure that lethal defensive force is deployed only where the threat is sufficiently serious to warrant a deadly response – the means by which they do so differs. A threshold specifies in advance an exhaustive list of threats in response to which lethal defensive force may be deployed. Hence, the test filters out any claim to legitimate defence which does not involve a threat falling within the pre-defined category. As such, a threshold test is a cruder and more rigid test than a proportionality rule which seeks to calculate the harm that would flow from the lethal response as balanced against that which would flow if the attack were permitted to proceed. As will be discussed in greater detail below,¹⁰⁵ the latter is a more sensitive test which takes into account not only the type of threat but also such factors as the likelihood of its occurrence and the gravity and likelihood of the harm which would flow from the defensive response.

6.54 Does, then, the greater refinement of a proportionality rule render the threshold test redundant? Arguably not. Threshold tests operate as a useful signpost to the community (including potential attackers, defenders and the tribunals which are required to judge their actions) as to the types of conduct that *might* warrant a lethal response. Hence, potential defenders are clearly put on notice as to the *minimum* requirements for a successful plea; juries are provided with a useful starting point for assessing claims of legitimate defence; and law reformers are squarely confronted with the democratic function of drawing a bright-line dividing acceptable and unacceptable defensive conduct.

6.55 In short, the adoption of both a proportionality rule and threshold test would be an important step towards achieving maximum certainty in the

¹⁰³ Yeo "Proportionality in Criminal Defences" (1988) 12 Crim LJ 211 at 224.

¹⁰⁴ [1972] IR 416.

¹⁰⁵ See paragraphs 6.69-6.83.

law of legitimate defence and, in doing so, satisfying the principle of legality.

6.56 *Accordingly, the Commission provisionally recommends the adoption of both the proportionality rule and the threshold test.*

6.57 The second approach regards proportionality as just one factor to be considered in assessing the reasonableness of the defender's actions. It does not see proportionality as a requirement in its own right. Undoubtedly, the advantage of this approach is its flexibility in that it allows courts and juries a broad discretion to tailor verdicts to what is considered to be the justice of each case.

6.58 However, the introduction of broad discretions leads to a greater risk that views will differ in borderline cases. In the absence of rules of law, an element of arbitrariness is unavoidable, offering defenders little practical guidance when making split-second defensive decisions and exposing them to "the vagaries of juries and ... gusts of public opinion".¹⁰⁶

6.59 The Commission is of the opinion that the proportionality rule should be a requirement in its own right. The comments of McAuley and McCutcheon are persuasive in this regard. They observe that:

"[A] general requirement of reasonableness is less sensitive to the overall objective of reducing conflict to a necessary minimum than the detailed refinements of the common law.... [T]here is no guarantee that a criterion of reasonableness will secure the core proportionality requirement that lethal force is never justified in the absence of a reasonable apprehension of a threat of death or serious injury."¹⁰⁷

6.60 In providing for a stand alone proportionality rule in legislation, should a "strict proportionality" or a "gross proportionality" test be adopted?

6.61 The "strict proportionality" test has many advantages. The incorporation of such a test into Irish law would ensure certainty and precision in the law on legitimate defence. Both public defenders and private defenders would be presented with clear criteria by which they could judge their conduct. This is a very simple test for the jury to apply. It entails simply assessing whether the good effects outweigh the bad effects of the lethal defensive force.

6.62 In contrast the "gross proportionality" test "can offer little detailed guidance to decision makers. A broad standard of this nature only has a clear

¹⁰⁶ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 456-7.

¹⁰⁷ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 756.

application in extreme cases, and the court will normally be left with considerable discretion”.¹⁰⁸

6.63 However, the “strict proportionality” test is also inflexible and arguably unduly onerous. Accompanied by a threshold test, the strict proportionality test imposes an inflexible restraint on the use of lethal defensive force in legitimate defence. It has no regard for human impulses or panic or fear. As observed by Nick Price QC, “Someone attacked cannot be expected to weigh to a minute degree the precise amount of force they use to protect themselves ...”.¹⁰⁹ Yet this is exactly what the strict proportionality test requires a defender to do. For example, under the strict proportionality approach, a person who fears serious injury may not be allowed to resort to lethal defensive force. This is because in this instance the cost of the defensive act (ie the taking of the attacker’s life) exceeds the benefit (ie preventing serious injury to the defender).

6.64 It is evident that the “gross proportionality” test is much less exacting. It gives the courts and juries discretion to tailor their verdicts to the circumstances of the cases in hand.

6.65 The Commission considers that the discretion afforded by the “gross proportionality” rule is not excessive. This is because the discretion allowed for by the “gross proportionality” test is fettered by the threshold requirement. The implementation of a gross proportionality test, without an accompanying threshold rule, would be vague. However, the added control of the threshold requirement brings the necessary certainty to the law on this area. In addition to this, the standard of gross proportionality is one which the jury can be provided with adequate guidance on - they should be informed that any force used must be proportionate to the threat but that this requirement need not be interpreted strictly.

6.66 It is suggested that the discretion that is afforded by the gross proportionality test is necessary to make allowance, as a concession to human frailty, for cases in which defenders are understandably over-exuberant in their response to serious attacks. Indeed, to the extent that the proportionality rule is intended to represent inherently indeterminate community standards, it seems futile to attempt a more exacting definition.

6.67 Accordingly, the Commission is of the opinion that the gross proportionality rule should be enacted into law to ensure that lethal defensive force is not used where it is wholly out of proportion to the threat faced.

¹⁰⁸ Ashworth, “Self-Defence and the Right to Life” [1975] *The Cambridge Law Journal* 282 at 296-297.

¹⁰⁹ See the comments of Nick Price QC in “It’s your castle, but should you defend it to death” *The Times* 25 May 2004.

6.68 *The Commission provisionally recommends that lethal defensive force should be prohibited where it is grossly disproportionate to the threat for which the defence is required.*

(1) Factors Relevant to the Assessment of Proportionality

6.69 Aside from the issue of whether a strict or more flexible proportionality rule is preferable, a further question arises as to the factors that are relevant to the assessment of proportionality.

6.70 The most obvious factors to be weighed are the gravity of the harm threatened by the attacker(s) to the person or property of the defender or others against the nature and magnitude of the defensive response. Lord Diplock, in *Reference under s48A (No 1 of 1975)*,¹¹⁰ indicated that the question was whether “the prevention of the risk of harm to which others might be exposed if [the threat were carried out]¹¹¹ justified exposing the suspect to the risk of harm to him that might result from the kind of force that the accused contemplated using?”¹¹² For example, one might have to consider whether the use of a lethal weapon would be a proportionate response to the deadly threat, a threat of rape, or a threat of unlawful imprisonment.

6.71 However, a number of refinements arguably should be made to this simple cost-benefit analysis.¹¹³ First, the number of individuals threatened by the attack might be weighted against the number of attackers’ lives at stake. For example, one might be more inclined to agree that a defensive response is proportionate if *multiple innocent* lives are saved at the expense of a *single* attacker. Lord Diplock appeared to accept this to be a relevant factor in *Reference under s48A (No 1 of 1975)*¹¹⁴ where accused

¹¹⁰ *Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975)* [1976] 2 All ER 937.

¹¹¹ In this case, legitimate defence was used for the purpose of preventing crime.

¹¹² *Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975)* [1976] 2 All ER 937 at 947.

¹¹³ Uniacke highlights a number of potentially relevant factors: “Considerations such as an aggressor’s culpability and the victim’s innocence, the number of aggressors foreseeably injured in self-defence, and also the interests of third parties who are either threatened by the aggression or foreseeably directly or indirectly harmed by defensive action, might or might not be thought relevant to the permissibility of self-defence”: Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994) at 59-60.

¹¹⁴ *Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975)* [1976] 2 All ER 937.

shot the deceased on account of an “apprehension of imminent danger to himself and other members of the patrol...”.¹¹⁵

6.72 However, is the converse equally applicable? Should one be *less* inclined to accept that a defensive response is proportionate if the lives of *multiple attackers* are sacrificed in order to preserve the life of a single defender? Scenarios of this kind are likely to arise wherever a defender is attacked by a group.¹¹⁶ Consider a scenario in which a defender is confronted with two attackers threatening to kill her; escape is impossible and the only sure method of saving her life is to kill both attackers. On the ground that all lives have equal value in the eyes of the law,¹¹⁷ it might be argued that the taking of *two lives* to preserve the *single life* of a defender would not be proportionate; that is, on a purely mathematical analysis, the negative consequences of the lethal defensive response would outweigh those threatened by the attack. Would, therefore, a defender in this scenario be obliged to sacrifice her own life?

6.73 In order to avoid this counterintuitive result, one might argue that the value of the attackers’ lives should be “discounted” to reflect the moral asymmetry between the aggressors’ culpability and the innocence of the defender.¹¹⁸ However, identifying a method for calculating this discount in individual cases would be problematic. Whilst attackers are typically regarded as culpable for creating the situations in which lethal defensive force becomes necessary, this is not always the case. As seen in Chapter 3 above, a lethal defensive response may be warranted even where the attacker is “innocent” due to a mistake or lack of capacity flowing from insanity or age. Should attackers of this type avoid a discount because they are deemed morally equivalent to their victims? Conversely, in some cases it would seem perverse to label a defender as “innocent” when he or she has contributed to the creation of the hostile situation, such as seen in the “self-

¹¹⁵ Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975) [1976] 2 All ER 937 at 947 (emphasis added).

¹¹⁶ Consider, for example, the infamous New York case of *People v Goetz* (1986) 68 NY 2d 96 in which the accused was confronted with four youths on a subway train demanding that he pay them five dollars. The accused shot the four youths. He was later acquitted by a jury of all charges of attempted murder and assault. Although this issue did not arise directly, should the fact that the accused put four lives in jeopardy to protect himself have weighed against a finding of proportionality?

¹¹⁷ Presumably, it would be wrong to apportion extra value to the life of an individual who, say, has dependents or is on the verge of curing cancer, or to discount the life of, say, a known criminal or someone who is terminally ill.

¹¹⁸ Arguably this discount would be inapplicable in cases involving “innocent” attackers; ie those who lack culpability because of mistake or absence of capacity due to insanity or age.

generated necessity” cases discussed in Chapter 5. Would one have to discount the lives of this type of defender as well?

6.74 Furthermore, it would seem inevitable under this analysis that at some point the cost of human life would be so great that the benefit of preserving the defender’s life would be deemed disproportionate. Supposing that an attacker’s life was discounted to, say, one tenth of the value of a defender’s, the latter would still be obliged to sacrifice his or her life if confronted by eleven attackers. Under this analysis, in order to permit a defender the right to use lethal defensive force regardless of the number of attackers, effectively each attacker’s life would have to be treated as valueless;¹¹⁹ hence, the analysis would be rendered meaningless as a method of enforcing the principle of proportionality.

6.75 It seems, therefore, preferable that, rather than considering the “multiple attacker” cases of this type as posing a single threat, they should be treated as separate threats posed by each attacker. In this way, the question would be whether lethal defensive force would be a proportionate response to each individual deadly threat. Hence, in the example above, the defender would be responding to eleven individual deadly attacks rather than a single attack by eleven aggressors; in each case, the defender would be taking the *single* life of an attacker in order to preserve his or her own.

6.76 It is perhaps also relevant to consider under this heading the risk of harm to the lives and property of innocent bystanders who may be harmed as a consequence of the application of defensive force. This danger is particularly acute in cases where the state authorities respond to a deadly threat within a crowd, such as might occur in a riot. This occurred in *Lynch v Fitzgerald*¹²⁰ where the deceased was amongst a group of protesters who, having stormed into a sale-yard, came under fire from members of the Gardaí; the deceased was not a protester but merely a curious onlooker. Whilst the case did not turn on this point, one might imagine other scenarios where violent protesters are intermingled amongst those with peaceful intentions. It may be argued that the exposure of innocent lives to harm by the use of defensive force should weigh against a finding of proportionality. An alternative and more robust position would be that cases of this kind should not be dealt with under the auspices of legitimate defence but rather under the law of necessity or duress. The Commission however accepts that the risk to the lives of innocent bystanders should be a factor relevant to the

¹¹⁹ In other words, the collective value of the attacker’s lives would never exceed the value of singular life of the defender. Hence, if attacked by 100, each attacker’s life would be discounted to 1/100 of the value of the defender’s life; if attacked by 200, each would be discounted to 1/200 of the defender’s life.

¹²⁰ [1938] IR 382.

assessment of proportionality as it is a direct result of the use of defensive force in certain instances.

6.77 A second refinement to the simple cost-benefit analysis outlined above would be to take account of the *probability* that: (1) the threatened harm would come to pass if no defensive steps were taken; and (2) the defensive response would cause harm to the attacker(s). This type of analysis was endorsed by Lord Diplock in *Reference under s48A (No 1 of 1975)*¹²¹ where the accused, a soldier on patrol, had shot the deceased as he ran away from the patrol. He accepted that the almost certain harm that would be caused to the accused if the defensive force was used should be balanced against the consequences that were likely to follow if the deceased escaped in applying the proportionality test.¹²² The Commission accepts that this is a relevant factor.

6.78 A third refinement would be to take account of any *indirect benefit* that might flow from the application of defensive force as balanced against any *indirect harm*. In *Reference under s48A (No 1 of 1975)*,¹²³ Lord Diplock recognised an indirect benefit that would flow from preventing the deceased's escape, namely avoiding "the effect of [a successful ambush] in encouraging the continuance of the armed insurrection and all the misery and destruction of life and property that terrorist activity in Northern Ireland has entailed."¹²⁴ Eser makes a similar point; he argues that the social function of the proper application of legitimate defensive force should weigh in favour of a finding of proportionality:

"[S]elf-defense has both an individual and a social function. Since the self-defender is not only defending his own interest but also preserving the general peace, this social interest must also be put on the defender's scale. Therefore self-defense will lose its justifying function only if, after also taking the interests of social peace into account, the defended value falls short of the harm done to the aggressor."¹²⁵

6.79 The difficulty with taking into account the indirect effects of defensive force is deciding where to draw the line to exclude those which are unduly remote. For example, how should one calculate the weight to be

¹²¹ Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975) [1976] 2 All ER 937.

¹²² *Ibid* at 947-948.

¹²³ Reference under s48A of the Criminal Appeal (Northern Ireland) Act 1968 (No 1 of 1975) [1976] 2 All ER 937.

¹²⁴ *Ibid* at 948.

¹²⁵ Eser "Justification and Excuse" (1976) 24 American Journal of Comparative Law 621 at 633-634.

given to the social utility of lethal defensive force; should this weight be counterbalanced by factors such as the indirect effect of the defensive action on, say, any dependents the attacker may have. Whilst the reconciliation of such conflicting factors would prove problematic for a tribunal of fact even with the benefit of hindsight, it would pose overwhelming difficulties to defenders forced to act in the 'heat of the battle'.

6.80 Accordingly, the Commission suggests that the indirect effects of defensive force should not be considered in deciding whether the proportionality test is satisfied.

6.81 The Commission provisionally recommends that all the factors relevant to the assessment of proportionality should be clearly set down in the legislation. This would ensure that the jury are aware of the precise factors, which they should be considering in making their decision. A failure to set down these factors in the legislation could result in conflicting legitimate defence decisions. For example, one judge could hold that the risk of harm to the lives of bystanders should be considered, while another judge could hold that this factor should not be taken into account. This is all the more likely in criminal cases where the judgments are often not reported. Such an approach could lead to arbitrary and unjust decisions being reached.

6.82 Detailing these factors in the legislation would also ensure that the juries' attention is concentrated on the correct factors and that they are not making decisions based on personal prejudices and misconceived notions.

6.83 *The Commission provisionally recommends that the factors relevant to the assessment of proportionality should be clearly and concisely set down in the legislation.*

CHAPTER 7 MISTAKE

A Introduction

7.01 In this Chapter, the Commission considers the problem of when a defender is mistaken in using lethal force, whether it is a mistake as to fact or a mistake as to the law which governs the issue. The Commission discusses putative defence and excessive defence and considers options for reform including the potential availability of a partial defence for mistaken defenders.

B Mistake

7.02 In an ideal world citizens would be fully-informed before embarking on the use of force and would never conduct themselves on the basis of mistaken beliefs. Resolution of claims of legitimate defence would simply involve an assessment of whether each of the five tests discussed in the preceding chapters had been satisfied; if the tests were met, few people would dissent from the view that the defensive conduct would be justified. However, in reality many, perhaps the majority, of claims to legitimate defence are complicated by either the attacker's or defender's less than complete appreciation of the relevant circumstances.¹

7.03 Mistakes can occur in relation to any of the five tests of legitimate defence: defenders might act on a mistake of fact, such as an erroneous belief that they are facing a deadly or an unlawful or an imminent threat; alternatively, they might be mistaken as to the legal requirements of the tests. Can mistaken conduct ever be described as "justified"? In what circumstances should it be "excused"? Should a mistake deprive the defender of a full or partial defence, or not at all?

7.04 In order to address these types of questions, it is useful to separate two broad categories of mistake; namely, putative defence and excessive defence. Putative defenders are mistaken as to the *factual* circumstances of the threat. Excessive defenders are mistaken as to the *legal* limits governing the use of lethal defensive force.

¹ The separate and relatively narrow problem of "mistaken attackers" has already been addressed in Chapter 3, "The Unlawfulness Requirement". The present chapter is concerned with the problem of mistaken defenders.

7.05 Consider the following scenario.² A defender is walking through a darkened alleyway at night when he is confronted by what appears to be a mugger armed with a lethal weapon. Perceiving an imminent, unlawful and deadly threat, the defender reacts with lethal defensive force (for the purposes of this example it will be assumed that this response would be legitimate had the circumstances been as the defender perceived). However, the “attacker” is in fact an innocent late-night jogger carrying not a weapon but a flashlight. Hence, as the defender has acted on a mistake of fact, this is a case of putative defence.

7.06 Assume that the defender is confronted not by an innocent jogger but by an *actual* attacker posing a deadly threat. Again, the defender would be acting in putative defence if he failed to appreciate that lethal force was unnecessary to repel the threat; for example, the defender did not think of firing a warning shot or (assuming a legal duty to retreat) did not realise that he could have outrun his attacker.

7.07 Finally, assume that the defender is, again, confronted by an *actual* mugger but the defender is aware that he faces no more than a minor threat of physical harm and, at worst, the loss of a small amount of money. The defender uses lethal defensive force to repel the threat in the belief that such a response is permissible (however, for the purposes of this example, assume that it would be beyond the legal limits of legitimate defence). The defender is not acting under any misapprehension as to the factual circumstances and therefore this is not a case of putative defence; rather, the defender has acted in excessive defence.

7.08 Should the defenders in these examples be fully or partially justified or excused? This chapter addresses these questions by reference to the “deeds-based approach” and the “reasons-based approach”.³

7.09 Deeds theory is based on the assessment of “whether on balance the conduct in fact avoided a net societal harm.”⁴ On this view, the defender’s *reasons* for acting cannot found a justification (although they might be sufficient to establish an excuse defence).⁵ In contrast, the reasons-

² The following scenarios draw on the example set out in Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996).

³ The “deeds” and “reasons” approaches draw on terminology used by Robinson in “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996).

⁴ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 47.

⁵ Furthermore, as discussed under the heading of “unknowingly justified actors”, the deeds-based approach asserts that an actor’s malicious motives do not create liability

based approach focuses on the defender's reasons for acting. Two separate sub-categories are considered: namely, the "narrative" and the "normative" standards.⁶

7.10 On one hand, the narrative standard, championed by theorists such as Williams, excuses the mistaken use of defensive force provided the defender *believes* that justifying circumstances exist, whether or not this is actually the case.⁷

7.11 On the other hand, theorists such as Dressler, Greenawalt and McAuley have proposed what might be called a "normative" standard of conduct which falls somewhere between the deeds-based approach and the narrative standard. Whilst accepting that a defender's belief is, on its own, insufficient to establish a justification, they argue that deeds theory wrongly excludes from the category of justification defenders who use defensive force based on a *reasonable* mistaken belief as to the circumstances.

7.12 In order to make sense of these contrasting positions the Commission submits that it is helpful to draw on the theory of justification and excuse. Whilst in recent times these concepts have fallen out favour in some circles, for centuries they were used as tools for structuring the criminal law. Many of the leading criminal law theorists urge a return to this common law tradition. The Commission supports this view, not as a purely theoretical exercise, but to provide a framework by which the various approaches can be analysed and compared for coherency and consistency. Before considering these concepts further, however, it is important to say a word about the terminology used in this chapter.

(1) Nomenclature

(a) "Subjective" and "Objective" Standards

7.13 The concepts of "subjective" and "objective" standards have dominated conventional analysis of legitimate defence in recent times, particularly in relation to the interpretation of the "reasonableness" test.

when the conduct was otherwise justified (although they may be relevant to the creation of impossible attempt liability).

⁶ The concept of "narrative" and "normative" standards was introduced in the Commission's Consultation Paper on *Homicide: The Plea of Provocation* (LRC CP 27 – 2003).

⁷ At the same time, both the narrative and normative standards prohibit the use of force "if the justifying circumstances do exist but the actor is unaware of them and acts for a different purpose.... Whilst it might have been the right deed... it was for the wrong reason": Robinson "Competing Theories of Justification: Deeds v Reasons" in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 46-47.

However, this paper deliberately seeks to minimise the use of these terms given the confusion that has developed surrounding their exact meanings.⁸

7.14 The subjective / objective dichotomy suggests that there are only two discrete and opposing standards of conduct. However, in practice these terms are used to describe the array of subtly differing standards. Consider the variety of possible interpretations given to the “objective” standard: it might imply defensive conduct should be judged by reference to (a) the *actual* circumstances (as apparent only to the omniscient ideal observer, regardless of whether the defender *is*, *should be*, or even *could be* aware of them); (b) the circumstances that the defender *believed on reasonable grounds* to be in existence (*ie* from a perspective that would have been apparent to the ordinary person and *should* have been apparent to the defender); or even (c) the circumstances that the defender *believed were reasonable* to warrant defensive force (*ie* from a perspective that *was* apparent to the defender).

7.15 Similarly, the subjective standard is open to a number of interpretations. Whilst it focuses on that which the defender believed to exist, some claim that the belief must also be *reasonable* whilst others argue that it matters not if the belief is contrary to overwhelming evidence to the contrary. Moreover, some approaches have the appearance of an “objective” standard but allow certain “subjective” characteristics to be taken into account; for example, the “reasonable battered woman” standard takes account of the defender’s “subjective” belief, but only insofar as that belief was “objectively” reasonable having made allowance for the abusive circumstances that the defender has “subjectively” experienced.

7.16 The overlap between some of these standards is self-evident and it is often contentious to state unequivocally that a particular test is either subjective or objective in nature. This demonstrates not that the concepts of subjective and objective standards are invalid – indeed, this paper uses these terms where their meanings are clear – but rather that they can be misleading if not properly defined. The problem with these terms is amply demonstrated by the seemingly intractable question of whether the legitimate defence provisions contained in the *Non-Fatal Offences against the Person Act 1997* impose a subjective or objective standard.

7.17 The Commission has elsewhere pointed out the importance of achieving a shift away from the shallow thinking surrounding the subjective

⁸ Robinson likewise cautions against the use of these terms: “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 46.

/ objective debate.⁹ By creating a new conceptual platform for discussion, the Commission hopes to breathe new life into the quest to tackle the problem of mistake and related issues which, it is submitted, the current approach is poorly equipped to tackle. It will be seen below that, in contrast to the domination of appellate jurisprudence with notions of “reasonableness”, a rich vein of academic writing on the concepts such as justification and excuse has emerged over the preceding three decades.

7.18 It must be acknowledged at the outset that this body of work is notable for its sharp divisions amongst leading writers on a number of important points. However, though there is little consensus, the identification of the points of dispute illuminates many of the key legal, moral and policy decisions that reformers of the law of legitimate defence will be required to address. Hence, it is not the Commission’s intention to resolve these complex debates, but rather to draw from a sufficiently wide range of sources to make informed decisions as to the nature and structure of the proposed defence.

(2) “Justification” and “Excuse”

7.19 Fletcher, who is largely responsible for the renewed interest in justification and excuse in the criminal law, describes the distinction as follows:

“Claims of justification concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor.”¹⁰

7.20 It is said that “while ‘justification’ speaks to the act, ‘excuse’ focuses upon the actor. Justified conduct is external to the actor; excuses are internal.”¹¹ These general descriptions would draw widespread support among theorists.¹²

7.21 However, more contentiously, Fletcher submits that “justification speaks to the *rightness* of the act; an excuse, to whether the actor is

⁹ See the Commission’s Consultation Paper on *Homicide: The Plea of Provocation* (LRC CP 27-2003) at 142, where similar arguments to those outlined here were set out.

¹⁰ Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 759.

¹¹ Dressler “New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking” (1984) 32 *UCLA L Rev* 61 at 67. It should be noted that, as with many attempts to define justification and excuse, Dressler concedes that this description is “perhaps too simplistic”.

¹² Schopp *Justification Defenses and Just Convictions* (Cambridge University Press 1998) at 1.

accountable for a concededly *wrongful* act.”¹³ In other words, justified conduct is morally right, good and proper; conduct that is not objectively “right” – that is, conduct that is merely tolerable or permissible – is, at most, excused.

7.22 Beyond their theoretical tidiness, these distinctions arguably have a number of important practical consequences. First, according to Fletcher’s “universalisation” principle, a finding that a defender’s conduct is justified dictates that third parties may properly assist the defender and, indeed, that in the same circumstances others would be entitled to conduct themselves in a similar fashion.¹⁴ In contrast, those who are excused are relieved of blame but others may not assist them; nor would similar conduct by others be tolerated (unless they too were subjected to excusing circumstances).¹⁵

7.23 Secondly, according to Fletcher’s “incompatibility thesis”, only one party to a conflict can be justified:¹⁶ “It is embedded in our language... that incompatible actions cannot both be justified.”¹⁷ Hence, if a defender’s actions are justified, the attacker may not justifiably resist (although the attacker might be excused if he or she was acting, say, under a mistaken belief). In contrast, the defensive conduct of an excused defender may properly be repelled.

7.24 There are those who argue that Fletcher’s theoretical structure “posits a mode of analysis suited to a world of black and white ethical situations rarely present in the world in which we live.”¹⁸ The categorisation of the justified actor as a good, courageous person devoted to the public interest is convenient but ultimately “psychologically naïve”. The criminal law is concerned with harm (in terms of bad results or bad conduct) rather than motive.¹⁹

7.25 Furthermore, a system that depends on the rigid classification of a defender’s conduct as either good or bad would be problematic insofar as it is often impossible to identify a single motivating rationale. People often act with both good and bad motives.²⁰ Even were the criminal law concerned

¹³ Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 759.

¹⁴ *Ibid* at 761-762.

¹⁵ *Ibid*.

¹⁶ Fletcher “The Right and the Reasonable” (1985) 98 Harv L Rev 949 at 962-975.

¹⁷ *Ibid*.

¹⁸ Dressler “New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking” (1984) 32 UCLA L Rev 61 at 63-64.

¹⁹ *Ibid* at 79.

²⁰ *Ibid* at 81.

with motives, the “right thing to do” is often not self-evident in the context of legitimate defence.²¹

7.26 Hence, theorists such as Dressler argue that a justification need not imply that the conduct is “right”; rather, “a justified act indicates at least that the conduct is not wrongful”.²² In other words, justified conduct may only be *permissible* or *tolerable*.

7.27 However, theorists such as Greenawalt, are not convinced by either Fletcher’s or Dressler’s conceptualisation of justification. Greenawalt warns that the “conceptual fuzziness” at the “the perplexing borders of justification and excuse” militates against their systematic distinction.²³ This is caused by the “the uneasy quality of many of the many moral judgments that underlie decisions that behavior should not be treated as criminal.”²⁴ By way of illustration, Greenawalt cites the rule applied in many jurisdictions that retreat is not required in the face of an attack in one’s home. Some may argue that the refusal of defenders to retreat is positively right as it deters aggression and symbolizes the sacredness of dwellings; in other words, it is *justified* in the sense that Fletcher employs the term. Others may think that safe retreat is morally desirable, but that a refusal is “within the range of morally permissible responses”;²⁵ hence, refusal to retreat is *justified* according to Dressler’s definition. Still others may view a refusal to retreat as morally wrong, yet may be reluctant to impose their moral convictions on others or may be “sceptical of the capacity of jurors to determine when someone knows he can retreat safely”;²⁶ on this view a refusal to retreat might be *excused* “based on common human weakness and administrative difficulties.”²⁷ In relation to this example, and indeed many issues in legitimate defence, there is room for genuine dispute.²⁸

7.28 Furthermore, Greenawalt questions whether the time and energy required to resolve such debates would be profitable given that the labelling

²¹ Dressler “New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking” (1984) 32 UCLA L Rev 61 at 84.

²² *Ibid* at 66.

²³ Greenawalt “The Perplexing Borders of Justification and Excuse” (1984) 84 Colum L Rev 1897 at 1898.

²⁴ *Ibid*.

²⁵ *Ibid* at 1906.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ Greenawalt “The Perplexing Borders of Justification and Excuse” (1984) 84 Colum L Rev 1897 at 1906: “Whatever decision was made, a powerful minority view would be submerged by the law’s choice”.

would amount to “a legally authoritative pronouncement having no bearing on the conduct of actual criminal trials.”²⁹ The jury system is incapable of “producing authoritative determinations of whether persons escaping liability have presented justifications or only excuses” given that juries return general verdicts only.³⁰

7.29 At the same time, Greenawalt does not dismiss the role of the distinction altogether. Greenawalt concedes that a sharp division may provide an educative function that “promotes in citizens proper views about how to make difficult choices and how to regard the behavior of others.”³¹ He also observes:

“[I]nsofar as systematic clarification contributes to intelligent reform of the law, that illumination does not require embodiment of every subtle distinction in the criminal law itself. Thus, my reservations about systematic clarification within the law do not apply to scholarly endeavours to distinguish rigorously between justification and excuse.”³²

7.30 At a minimum, therefore, the justification / excuse debate serves as a useful starting point for resolving the problem of mistake.

(3) *Legitimate Defence as a Justification or Excuse?*

(a) *Excuse*

7.31 Paradigm cases of legitimate defence are often considered to be the quintessential justifications;³³ for example, the fully-informed defender who uses the correct amount of force to defend against an uplifted knife wielded by a sane but malicious attacker.

7.32 It seems strange, then, that the common law origins of self-defence – the plea of *se defendendo* – lie in excuse. As discussed in Chapter 1, a successful plea of self-defence did not result in an acquittal until the early 1800s. Prior to that, it had operated only to mitigate the offending. In contrast, the common law had always regarded the public defences as justifications which, if successfully pleaded, resulted in a full acquittal.

²⁹ Greenawalt “The Perplexing Borders of Justification and Excuse” (1984) 84 Colum L Rev 1897 at 1907.

³⁰ *Ibid* at 1900-1901.

³¹ *Ibid* at 1901.

³² *Ibid* at 1903.

³³ Yeo “Apply Excuse Theory to Excessive Self-Defence” in Yeo Partial Excuses to Murder (Federation Press 1990) at 159.

7.33 One explanation for this apparent discrepancy is that it may have been presumed that claims to self-defence – as opposed to the public defences – would have arisen from situations in which the defender had no choice but to kill the attacker.³⁴ Hence, the focus was on the constrained choice of the *actor* and the futility of trying to deter people from defending themselves rather than on the nature of the act itself: “[A] person’s desire to defend his or her life against direct attack is a very basic desire which would not be much influenced in practice by the unavailability of a complete legal defence.”³⁵

7.34 However, critics of the excuse-based model question whether the pressure of constrained choice can, on its own, provide a proper basis for acquitting a self-defender (it should be recalled that *se defendendo* did not originally purport to do so). Uniacke illustrates this point by reference to an example of a hijacker who shoots a police sharp-shooter about to open fire on him: “[Though the hijacker] may act out of fear, may have a very strong, even an irresistible, desire to defend his life, but he cannot plead Self-Defence.”³⁶ Though the hijacker lacks any moral grounds to use defensive force, the excuse-based model fails to explain why he cannot do so.

(b) Justification

7.35 The twentieth century saw a move away from constrained choice as a basis for acquittal in cases of self-defence and towards a foundation in justification.³⁷ A variety of theories have been advanced in support of this reconceptualisation. Four of these theories are discussed below: namely, arguments based on utility; the principle of double effect; the defence of lesser evils; and the vindication of autonomy.

7.36 The purpose of this discussion is not to resolve the jurisprudential question as to which model is correct; to the contrary, it is to highlight the complexity of the problem. Nevertheless, it is hoped that an outline as to why the paradigm case of legitimate defence *is* considered to be justified will provide a useful starting point for considering the central topic of this chapter; namely, the circumstances in which defensive force is *not* justified.

³⁴ Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 856.

³⁵ Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994) at 36.

³⁶ *Ibid.*

³⁷ See Heller “Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defence and Provocation Cases” (1998) 26 Am J Crim L 1 at 28.

(4) Arguments from Utility

7.37 The argument from utility is based on the assertion that the use of defensive force, even if it results in the death of the attacker, acts as a deterrent to would-be aggressors and, therefore, in the long run leads to a reduction in violence. Furthermore, “if someone must die in a deadly conflict it is better for society that the aggressor rather than the innocent person is the victim”.³⁸

7.38 The primary difficulty with the utility argument is that it lacks the sophistication to encompass all cases of apparently justified legitimate defence. For example, the use of defensive force against “innocent” attackers – such as those acting under mistake or lacking capacity due to insanity or age – do not turn on the moral culpability of the attacker and therefore are unlikely to have any future deterrent effect.

(5) The Principle of Double Effect

7.39 It is sometimes suggested that lethal defensive force can be justified under the principle of double effect.

“[The] Principle of Double Effect... says that although private persons are prohibited from engaging in intentional killing, under specified conditions they can permissibly act for some good end foreseeing that someone’s death will result, provided this effect is unintended.”³⁹

7.40 Lethal defensive force has a “good” foreseen effect, namely protecting a threatened life (or preventing crime or effecting an arrest) but also has a “bad” foreseen effect, namely the death of the attacker. As the death of the attacker is considered to be a “side-effect” of, or incidental to, the defensive act, the death is said to be unintentional.

7.41 The principle of double effect has played a significant role in the development of the Irish law of legitimate defence. Although it was not referred to explicitly, the principle appeared to guide Butler J’s recognition of the Plea of Excessive Defence in the Supreme Court case of *People (AG) v Dwyer*.⁴⁰ Butler J reasoned that a defender who knowingly uses force that

³⁸ Heller “Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defence and Provocation Cases” (1998) 26 Am J Crim L 1 at 11-12.

³⁹ Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994) at 63. Uniacke traces the development of the principle of double effect in natural law accounts.

⁴⁰ [1972] IR 416. For a more detailed discussion of the Plea of Excessive Defence, see below at paragraphs 7.107- 7.210.

will kill does not *intend* that consequence if he or she acts with a defensive purpose.⁴¹

7.42 There are, however, those that question whether the principle of double effect can adequately explain the justification for killing in all cases of legitimate defence. Uniacke, for example, concedes its applicability in some cases,⁴² but points out that in others it is impossible to realistically claim that the killing has been unintentional: “[In some cases] aspects and effects of an act are too close to what the agent believes necessary to achieve his or her aim in the circumstances not to count as part of the agent’s intention.”⁴³ For example, it would be “simply sophistical” to deny that a defender, who intentionally blows up an attacker as the only available method of defence, intended to kill.⁴⁴

(6) Variation of Lesser Evils

7.43 Legitimate defence is sometimes conceptualised as a variation of the defence of lesser evils; lethal defensive force is justified if it results in the best (or least bad) outcome, taking account of the competing interests at stake of the defender, attacker and others.

7.44 The lesser-evils model is more commonly associated with discussions of the defence of necessity. In such cases, the weighing of competing interests is relatively straightforward as the parties are normally considered to be equally “innocent” victims of circumstance. However, the application of the lesser-evils model is more complex in cases of legitimate defence on account of the moral disparity that usually exists between the attackers and defenders. Failure to heed this disparity would give rise to unexpected results; for example, lesser evils would fail to afford a defender a justification for killing a deadly attacker on the ground that the interests at stake (their respective lives) would be numerically equally balanced.

7.45 Hence, those who ascribe to the lesser-evils model accept that it must be modified; the life of the attacker is “forfeited” or “discounted” to reflect the fact that the attacker creates the necessity for the defender to use lethal force.⁴⁵

7.46 However, there are a number of difficulties with the “theory of forfeiture”. If the justification is based on the moral asymmetry between the

⁴¹ *People (AG) v Dwyer* [1972] IR 416 at 429 and 432.

⁴² Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994) at 109-110.

⁴³ *Ibid* at 109.

⁴⁴ *Ibid* at 110-112.

⁴⁵ Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 857-858.

attacker and defender, then it seems inapplicable in cases involving “innocent” attackers (those where the attacker is mistaken or lacks capacity due to, say, insanity or age): “[u]nless we assume that the life of the child or psychotic aggressor is worth less than a ‘normal’ adult life, the principle of lesser evils fails to justify the killing.”⁴⁶

7.47 Uniacke, however, rejects the suggestion that only culpable attackers can forfeit their right to life and submits that the theory of forfeiture is equally applicable to innocent and culpable attackers.⁴⁷ Fletcher’s unduly narrow interpretation of forfeiture theory follows, in Uniacke’s view, as a result of confusing forfeiture with punishment.⁴⁸ Those who pose an unjust immediate threat to others forfeit their right to life.⁴⁹

(7) *Autonomy*

7.48 A further group of theorists argue that legitimate defence is justified as a vindication of individual autonomy. The leading exponent of this approach is Fletcher:

“The [‘vindication of autonomy’] model of necessary defence takes as its premise that the significant feature is not the conflict of interests, but the unilateral violation of the defender’s autonomy.”⁵⁰

7.49 Unlike the argument from utility, this theory is equally applicable to both innocent and culpable aggressors. Indeed, in contrast to the lesser-evils model, the culpability of the attacker is largely irrelevant insofar as the focus is solely upon the vindication of the defender’s autonomy.⁵¹ He accepts that the protection offered by this model is important not only for the benefit of the individual but also for the maintenance of social order.

7.50 Schopp is in broad agreement with Fletcher’s thesis, but criticises Fletcher for blurring the vindication of individual autonomy and the maintenance of the social order.⁵² In contrast, Schopp’s model of justification focuses on the individual’s rights. These rights extend not only

⁴⁶ Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 869-870.

⁴⁷ Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994) at 207.

⁴⁸ *Ibid* at 194.

⁴⁹ *Ibid* at 218.

⁵⁰ Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 860.

⁵¹ *Ibid* at 862.

⁵² Schopp *Justification Defenses and Just Convictions* (Cambridge University Press 1998) at 59.

to the protection of their concrete interests – such as bodily integrity – but also their “personal sovereignty and equal standing”.⁵³

“When an innocent victim exercises force in self-defense against a fully responsible aggressor, the victim protects both her concrete interests and her right to self-determination, rejecting the imputation of inequality inherent in the unlawful aggression.”⁵⁴

7.51 By launching an attack, attackers step out of their own sphere of protection and expose themselves to any defensive response.⁵⁵ Hence, in contrast to the lesser-evils model, this model does not prohibit disproportionate defensive force if necessary to repel the threat; victims may choose to inflict greater harm to the aggressors’ concrete interests than would have been inflicted on the victims’ concrete interests because the victims’ sovereignty takes priority.⁵⁶

C Putative Defence

7.52 Whilst the arguments considered in the previous section support the contention that lethal defensive force is justified in *paradigm* cases, do they apply with equal force to cases involving mistaken defenders?

7.53 As discussed at the outset of this chapter, two categories of mistaken defence will be considered. The first, that of putative defence, is the subject of this section.

7.54 The problem is analysed by reference to the deed-based approach, the normative standard and the narrative standard. Whilst the deed-based approach logically falls into the category of justification, and the narrative standard into the category of excuse, it will be seen that the normative standard can be conceptualised as either a justification or excuse. The question ultimately posed by this chapter is whether a preferable approach would be to recognise two forms of the defence: one a justification and another, an excuse.

7.55 This section begins, however, with a brief overview of the historical approach to the problem of mistake at common law.

⁵³ Schopp *Justification Defenses and Just Convictions* (Cambridge University Press 1998) at 64.

⁵⁴ *Ibid* at 75.

⁵⁵ *Ibid* 75-76.

⁵⁶ *Ibid* at 77.

(I) A Brief History of the Problem of Mistake at Common Law

7.56 Historically, the common law permitted accused persons to rely on mistakes only if there were reasonable grounds for their beliefs – in other words, a normative standard was adopted. Authority for this point is found in the late nineteenth century case of *R v Tolson*.⁵⁷ The accused woman in that case had been convicted of bigamy after remarrying seven years after her first husband had disappeared, presumed lost at sea. That the accused had acted in good faith and on reasonable grounds was evidenced by the fact that, prior to her remarriage, she had been granted Probate of her first husband's will. In these circumstances, the Court for Crown Cases Reserved overturned the conviction and although the issue of *unreasonable* mistake was not squarely before the court, "*Tolson* soon came to be regarded as the *fons et origo* of the principle that mistakes must be reasonable in order to excuse."⁵⁸

7.57 In England and Wales, this position was abandoned as a general principle in the 1970s by the House of Lords in *DPP v Morgan*.⁵⁹ It was held in that case that even a grossly unreasonable mistakenly belief that a victim of rape had consented was sufficient to deny the *mens rea* for rape. However, the requirement that mistakes be based on reasonable grounds appeared to remain undisturbed in cases where the mistake went to an element of the *defence* – such as legitimate defence – rather than an element of the *offence* – for example, absence of consent for the offence of rape.

7.58 Nevertheless, it seemed only a question of time before the requirement of reasonableness was removed altogether and this was brought about with the English Court of Appeal decision in *R v Williams*⁶⁰ followed by the Privy Council decision in *Beckford v R*.⁶¹ These cases heralded the adoption of the narrative standard for putative defence.⁶²

⁵⁷ (1889) 23 QBD 168 (Court for Crown Cases Reserved).

⁵⁸ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 557.

⁵⁹ [1976] AC 182.

⁶⁰ (1984) 78 Cr App R 276.

⁶¹ (1987) 85 Cr App R 378.

⁶² Further, a person whose mistaken apprehension of an attack is caused by self-induced intoxication cannot plead self-defence, no matter what the charge might have been. See *R v Hatton* [2006] 1 Cr App Rep 16, *R v O'Grady* [1987] QB 995.

7.59 However, the abandonment of the requirement of reasonableness has by no means been universal in the common law world; it remains, for example, in Canada⁶³ and certain states of Australia.⁶⁴

7.60 The position is less clear in Ireland. In *People (AG) v Dwyer*⁶⁵ the Supreme Court held that a defender's perception of the threat must be based on "reasonable grounds".⁶⁶ In contrast, the *Non-Fatal Offences against the Person Act 1997* has abandoned the requirement of reasonable belief. McAuley and McCutcheon note that the whilst the 1997 Act was "framed against the background of the decision in *R v Williams* and *Beckford v R...*, the relevant jurisprudential background in Ireland is to the contrary effect."⁶⁷ Whilst the authors concede that the traditional rule is not immune from criticism, they submit that "a long established rule that has received the express backing of the Superior Courts should ideally be taken to represent the law unless and until its abolition has been clearly signalled by the legislature".⁶⁸

7.61 Whilst the appellate courts do not appear to have issued an authoritative ruling on point, there are indications that the Court of Criminal Appeal has acquiesced in the trial courts' adoption of the narrative standard.⁶⁹

(2) Justification-Based Defences

(a) The Deeds-Based Approach to Justification

7.62 The leading exponents of deeds-based approach are Fletcher and Robinson. They argue that the label of justification should not attach to those who inaccurately perceive the circumstances of an attack. The central

⁶³ See, for example, *R v Cinous* [2002] 2 SCR 3, 26 per McLachlin CJ and Bastarache J (Supreme Court of Canada).

⁶⁴ *Zecevic v DPP* (1987) 71 ALR 641. See, for discussion, Gilles *Criminal Law* (4th ed LBC Information Services 1997) at 316-317. See also section 46 of the Tasmanian *Criminal Code* and the recent Commonwealth *Criminal Code Act 1995* (section 10.4) and the Australian Capital Territory *Criminal Code 2002* (section 42) which require mere honest belief in relation to putative defence.

⁶⁵ [1972] IR 416.

⁶⁶ *Ibid* at 420 per Walsh J: "[T]he homicide is not unlawful if the accused believed on reasonable grounds that his life was in danger and that the force used by him was reasonably necessary for his protection."

⁶⁷ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 765.

⁶⁸ *Ibid*.

⁶⁹ For example, in *People (DPP) v McArdle* Court of Criminal Appeal, Keane CJ, O'Sullivan and O'Higgins JJ, 13 October 2003, no criticism was made to the trial judge's direction to the jury along the lines of the English common law cases.

plank of their argument is that putative defenders' faulty perception of the circumstances renders their conduct wrong and therefore they are incapable of satisfying the strict definition of justification as "right" conduct. Robinson emphasises the importance of the law's ability to communicate clearly its commands to members of society.⁷⁰

7.63 Uniacke agrees that, from a more informed perspective than is available to the defender, putative defence is the wrong thing to do.⁷¹ Although putative defenders lack maliciousness, their use of force is both unprovoked and undeserved by their victims.⁷² Furthermore, insofar as justification is said to rely on the theory of forfeiture, victims of putative defence have done nothing to forfeit their right to life.⁷³

7.64 The primary criticism of the deeds-based approach is that it is the putative defenders' *errors*, rather than their intent to commit an offence, that denies them a justification. However, as will be seen below, any harshness is arguably softened if an excused-based defence is made available.

7.65 Putting to one side the debate as to the theoretical soundness of the deeds-based approach, the approach might be criticised for failing to recognise the realities of the real world. Often (if not always), it is impossible for the tribunal of fact to identify the exact circumstances as they confronted the defender. A defender's actions can only be judged against the *actual* circumstances if it is possible to ascertain them *post facto*.

7.66 To the extent that the courts and legislative drafters tend not to identify whether putative defenders are justified or excused, it is difficult to assess the impact, if any, that the deeds-based approach has had on contemporary common law thinking. However, undoubtedly the recent shift towards a narrative standard indicates a preference for an excuse-based model of putative defence. It should be noted, however, that the narrative standard is not inconsistent with the deeds-based approach; the latter asserts

⁷⁰ Robinson "Competing Theories of Justification: Deeds v Reasons" in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 64.

⁷¹ Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994) at 16-17, 25 and 41. See also Uniacke "In Defense of Permissible Killing: A Response to Two Critics" (2000) 19 *Law and Philosophy* 627 at 630-632.

⁷² Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994) at 41, 88-89; see also Uniacke "In Defense of Permissible Killing: A Response to Two Critics" (2000) 19 *Law and Philosophy* 627 at 633.

⁷³ Uniacke asserts that only actual defence is an exception to the moral prohibition of homicide: "The right of self-defence against unjust aggression does not itself include the right to engage in what one wrongly, even if reasonably, believes to be self-defence": Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994) at 40.

that putative defenders are not *justified*, but it does not exclude the possible application of *excuse*. However, the deeds-based approach is in direct conflict with the normative standard of justification, which is the subject of the next section.

(b) The Normative-Based Approach to Justification

7.67 Advocates of the normative standard adopt the middle ground between the deeds-based approach and the narrative standard. They suggest that putative defenders should be entitled to a justification defence if their mistakes were *reasonable* – ie, those that ordinary people would make in the similar circumstances. Whilst conduct of this type may not be “right” in the strict sense employed by Fletcher, it is nevertheless *permissible* or *tolerable* given that the criminal law takes a realistic approach and is concerned primarily with *conduct* rather than *outcomes*. Whilst it is true that the outcome of putative defence is undesirable, “it scarcely makes sense to say that a defendant who acts on a reasonable view of the facts as he sees them was not justified in doing so when there is no moral difference between his conduct and that of someone who would have been entitled to do so as he did had the assumed facts been true.”⁷⁴

7.68 At the same time, advocates of the normative standard would agree with deed-based theorists that mere belief on the defender’s behalf is insufficient to found a justification. For example, McAuley and McCutcheon argue that it is proper to discount false beliefs “unless they approximate to the normal pattern of inferential reasoning”.⁷⁵ Accordingly, under this approach, individuals are “assumed to be capable of recognising the obvious features of their surroundings and of adjusting their conduct accordingly.”⁷⁶

7.69 Greenawalt accepts many of the central tenets of the normative approach. He points out that the mistaken defender who acts carefully and conscientiously should be considered to be justified:⁷⁷

“[S]ociety would expect and hope that a similar actor with a similar set of available facts would make the same choice. And society’s view of the morality of the manner in which he acted, its

⁷⁴ McAuley “The Theory of Justification and Excuse: Some Italian Lessons” (1987) 35 American Journal of Comparative Law 359 at 369 and Horder “Redrawing the Boundaries of Self-Defence” (1995) 58 MLR 431 at 433-434.

⁷⁵ McAuley & McCutcheon Criminal Liability (Round Hall Sweet & Maxwell 2000) at 549.

⁷⁶ *Ibid* at 548.

⁷⁷ Greenawalt “The Perplexing Borders of Justification and Excuse” (1984) 84 Colum L Rev 1897 at 1908.

moral judgment about him, should not be affected by the unfortunate outcome.”⁷⁸

7.70 However, Greenawalt submits that there are a variety of intermediate scenarios that are more difficult to categorise. Consider the defender who makes the best assessment of the circumstances that could be expected of him or her but makes a mistake that those with special expertise – such as law enforcement officers who have special training in threat assessment – would have avoided. Alternatively, how would one categorise the conduct of a law enforcement officer who makes an error typical of an ordinary defender but not expected from someone with professional training.⁷⁹

7.71 Such is the difficulty in resolving such problems that Greenawalt submits that it is better that jurors are not burdened with the task of distinguishing between justification and excuse, especially given that such a finding would not ultimately determine the guilt or innocence of the accused.⁸⁰

7.72 However, deeds theorists submit that the “conceptual fuzziness” that concerns Greenawalt results from the failure of the normative standard of justification to distinguish between actual and putative defence.⁸¹ This is a common feature of recent codifications of the legitimate defence. For example, both the *Non-Fatal Offences against the Person Act 1997* and the *US Model Penal Code* (both of which, in fact, adopt a narrative approach to the question of putative defence) combine putative and actual defence within a single “justification” defence that treats both as lawful conduct.⁸² This is said to lead to a number of negative consequences.

7.73 Firstly, “by packing both mistaken justification and actual justification into the same label”, a jury’s acquittal in a case of legitimate defence will be ambiguous as to whether (a) the jury disapproved of the defender’s conduct but excused the defender, or (b) approved of the conduct.⁸³ Hence, “[e]ach case of mistaken justification can be

⁷⁸ Greenawalt “The Perplexing Borders of Justification and Excuse” (1984) 84 Colum L Rev 1897 at 1909.

⁷⁹ These types of scenarios of discussed by Greenawalt, *ibid* at 1909-1910.

⁸⁰ *Ibid* at 1910.

⁸¹ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 63.

⁸² Section 18 of the 1997 Act states that conduct which falls within the ambit of the provision “does not constitute an offence”. For further discussion, see Chapter 3 on The Unlawfulness Requirement.

⁸³ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 65. Others who criticise

misinterpreted as a case of true justification, thereby approving conduct that ought to be prohibited [and *vice versa*].”⁸⁴

7.74 Secondly, it contradicts Fletcher’s incompatibility thesis. Take the example of a defender who reasonably, but mistakenly, believes he is under attack. Under the normative standard, this defender’s use of force is justified. Yet most would agree that the supposed attacker – who is, in fact, an innocent victim — would be *justified* in defending herself. The normative standard suggests, therefore, that both parties to the conflict would be justified in using force against each other,⁸⁵ yet only the victim has avoided an actual harm. This delivers an ambiguous message to the community as to the type of conduct that should be encouraged, “frustrating rather than advancing the law’s educative effect.”⁸⁶

7.75 Thirdly, the failure to distinguish putative defence from actual defence creates havoc in the statutory drafting of the defence. Given that putative defenders are said to act lawfully,⁸⁷ their victims cannot resort to defensive force without breaching the “unlawfulness rule” (as set out in Chapter 3). In order to avoid this absurd result, the legislative drafter “must engage in... gyrations to allow defensive force against mistaken justifications while prohibiting it against actual, objective justification.”⁸⁸ This is achieved by adopting an “artificial definition”⁸⁹ of what amounts to *unlawful* conduct which includes within its ambit that which is excused – *ie*, *lawful* conduct:

“Having packed both mistaken and actual justification into the same concept, ‘justification’, the codes eventually unpack them in

the compression of actual and putative defence under one heading include Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994) at 41 and Schopp *Justification Defenses and Just Convictions* (Cambridge University Press 1998) at 124.

⁸⁴ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 65.

⁸⁵ This result forces proponents of the normative standard to abandon the incompatibility thesis as a requirement of justification: see, for example, Dressler “New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking” (1984) 32 *UCLA L Rev* 61, 92-93.

⁸⁶ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 65.

⁸⁷ Section 18 of the 1997 Act states that conduct which falls within the ambit of the provision “does not constitute an offence”. For further discussion, see Chapter 3 *The Unlawfulness Requirement*.

⁸⁸ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 52-53.

⁸⁹ *Ibid* at 53.

order to define the instances in which defensive force lawfully may be used.”⁹⁰

7.76 Ironically, the final outcome of this “unpacking” process is that putative defence may be resisted – an outcome consistent with the *deeds-based approach* rather than the normative standard.

7.77 In order to avoid the negative consequences associated with “packing” actual and putative defence into the same label, it may be preferable to recognise separate limbs of legitimate defence based on justification and excuse.⁹¹ Any harshness that may result from a deeds-based justification defence would be softened by the availability of a defence based on excuse. In the next section consideration is given to three excuse-based defences: the normative standard, the particularizing standard; and the narrative standard.

(3) Excuse-Based Defences

(a) The Normative-Based Approach to Excuse

7.78 If putative defenders who act on a reasonable assessment of the factual circumstances are not *justified*, a strong argument can be made that they should nevertheless be *excused*. On this view, putative defenders would be excused if their mistakes were due to circumstances that would have overwhelmed the “reasonable” or “ordinary” person (in contrast to the narrative standard which would excuse any honestly held mistake).

7.79 By applying the normative standard to the excuse defence, arguably each member of the community is held to the same standard of conduct. At the same time, as an excuse, it makes allowances for human frailty that would be expected of the ordinary person in the face of a life-threatening attack.⁹²

7.80 However, a problematic feature of the standard is that it is often difficult to identify exactly what amounts to a “reasonable” belief. On one hand, it is said to draw a distinction between overwhelming *external* circumstances and *internal* personal characteristics of the defender; putative defence which is attributable to the former is excused whilst that which is attributable to the latter is presumed to be freely chosen and, therefore,

⁹⁰ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 52.

⁹¹ See Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 65.

⁹² Simester “Mistakes in Defence” (1992) 12 OJLS 295, 306. Simester argue that, whilst “the law does not allow emotions a free rein in conduct”, nevertheless, the reasonableness test makes allowance emotions such as fear and compassion which might displace a defender’s rational considerations.

inexcusable.⁹³ On the other hand, the “reasonableness” test might distinguish between errors attributable to *universal* personal characteristics – which would be excused – and *non-universal* idiosyncrasies of the defender – which would be inexcusable.⁹⁴ Whether it is logical to draw such distinctions, and indeed whether juries understand them, is dubious.

(b) The Particularising Standard of Excuse

7.81 The particularising standard is similar to the normative-based approach insofar as it generally expects defenders to meet normal standards of conduct. However, in contrast to the normative-based approach, it makes allowance for particular personal characteristics which might influence the way in which individuals perceive the world; individuals should be entitled to be excused if they cannot freely control their perceptions.⁹⁵

7.82 The classic example is the “reasonable battered woman” standard;⁹⁶ under this approach, the question is not whether an ordinary person would have held the mistaken belief which the defender held, but rather whether an “ordinary battered woman” would have done so. Other characteristics might include a background of physical or sexual abuse (the “reasonable abused person”), intellectual disability (the “reasonable intellectually impaired person”) or social factors (for example, the “reasonable unemployed person” or the “reasonable immigrant”).

(c) The Narrative Standard of Excuse

7.83 Critics of the normative and particularising standard of excuse advocate the narrative standard. The narrative standard asserts that putative defenders should be excused regardless of whether their mistaken beliefs would have been held by the ordinary person. As an excuse-based model, the question is not whether the defender *should* have avoided committing the erroneous defensive act, but rather whether, given the defender’s circumstances, he or she *could* have done so.⁹⁷

7.84 As discussed above, the narrative standard has been adopted under the *Non-Fatal Offences against the Person Act 1997* (and, perhaps, at Irish

⁹³ Heller “Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases” (1998) 26 Am J Crim L 1 at 28-29.

⁹⁴ *Ibid* at 40. However, Heller also finds this model unconvincing given the “extremely dubious empirical assumption” that there are universal personal characteristics.

⁹⁵ *Ibid* at 55-56.

⁹⁶ *Ibid* at 81. Theoretically, any non-universal personal characteristic could qualify for the standard.

⁹⁷ *Ibid* at 56.

common law) and by a number of common law jurisdictions, including England and Wales, some states of Australia,⁹⁸ and New Zealand.⁹⁹

7.85 The case attributed with establishing the narrative standard at English common law is *R v Williams*.¹⁰⁰ The appellant in that case had used force in the mistaken belief that his victim was unlawfully attacking a third party; in fact, the victim was attempting to make a citizen's arrest. It was held here that where an accused makes an honest but unreasonable mistake, he should be acquitted. However the unreasonableness of the defendant's belief was held to be a relevant factor in determining if the accused has honestly held that belief.¹⁰¹

7.86 The *Williams* approach to mistake is now considered settled law in England. In the recent House of Lords decision of *B v DPP*,¹⁰² Lord Nicholls cited *Williams* with approval. The *Williams* judgment also formed the basis of the Law Commission of England and Wales's approach to putative defence. Its draft legitimate defence provision, though not enacted in the United Kingdom, was largely incorporated into the *Non-Fatal Offences against the Person Act 1997*.

7.87 Curiously, the 1997 Act seems to indicate that putative defenders that satisfy the narrative standard are *justified*, not merely *excused*.¹⁰³ However, even staunch advocates of the narrative standard would accept that the narrative standard offers putative defenders no more than an excuse. As Fletcher points out, the notion that "good will" alone – as "the highest conceivable good" – could justify mistaken defensive conduct is misconceived.¹⁰⁴

⁹⁸ See, for example, section 46 of the Tasmanian *Criminal Code* which adopts the wording of the New Zealand *Crimes Act 1961*.

⁹⁹ Section 48 of the New Zealand *Crimes Act 1961* states: "Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use."

¹⁰⁰ (1984) 78 Cr App R 276.

¹⁰¹ *R v Williams* (1984) 78 Cr App R 276 at 281.

¹⁰² [2001] 1 All ER 833.

¹⁰³ Although contained only in a marginal note, sections 18 and 19 of the 1997 Act are headed, "Justifiable use of force". (The provisions themselves state only that the use of defensive force "if only such as is reasonable in the circumstances as [the defender] believes them to be, does not constitute an offence"). The same criticism could be levelled at section 48 of the New Zealand *Crimes Act 1961* and section 46 of the Tasmanian *Criminal Code*.

¹⁰⁴ Fletcher "The Right and the Reasonable" (1985) 98 Harv L Rev 949, 973.

(4) A Partial Defence?

7.88 If putative defence is properly governed by a normative or deeds-based standard (*i.e.* a defender cannot rely on honest belief alone to claim the full defence), the question arises whether a partial defence should be available for those who fall short of the belief requirements. Arguably, the use of both full and partial defences would reflect to a greater degree differences in blameworthiness amongst putative defenders. However, such a partial defence is rarely recognised.

7.89 Consider the common law of Australia: there, putative defence is governed by the normative standard. However, calls for a partial defence for defenders who act on the basis of honest but unreasonable beliefs¹⁰⁵ have been rejected by the High Court of Australia.¹⁰⁶

7.90 In this jurisdiction, it is debatable whether the normative standard continues to apply to putative defence in cases of homicide. The authority in support of this proposition is *People (AG) v Dwyer*.¹⁰⁷ Interestingly, the Plea recognised in that case – often referred to as the Plea of *Excessive Defence* – may well have been intended to reduce the liability of *putative defenders* who failed to satisfy the normative standard. If this interpretation is correct, arguably the formal introduction of a partial defence of putative defence would not represent a dramatic innovation; in fact, it would reflect the long-standing position of the Supreme Court.

7.91 This paper will return to this issue in the summary and conclusions section.

(5) The Problem of the Unknowingly Justified Actor

7.92 An unknowingly justified actor is unaware that he or she is actually under threat from an attacker but coincidentally uses force against that attacker which otherwise would be justified if the actor were aware of the circumstances. Robinson gives the example of a mugger who uses force to overpower his “victim” in a dark alleyway when in fact the apparent victim is about to launch his own attack.¹⁰⁸

7.93 Broadly speaking, there are two schools of thought as to whether the unknowingly justified actor should be liable for the use of lethal force

¹⁰⁵ See the dissenting judgment of Deane J in *Zecevic v DPP* (1987) 71 ALR 641, 666.

¹⁰⁶ *Zecevic v DPP* (1987) 71 ALR 641. For discussion, see Yeo “Applying Excuse Theory to Excessive Self-Defence” and Fairall “Excessive Self-Defence in Australia: Change for the Worse?” both in Yeo *Partial Excuses to Murder* (Federation Press 1990).

¹⁰⁷ [1972] IR 416.

¹⁰⁸ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 46.

which, unknown to the actor, was necessary for his or her defence. On one hand, theorists such as Robinson and Schopp argue that the unknowingly justified actor should be entitled to the full benefit of the justification defence on the grounds that the action is externally justified (albeit that advocates of this approach concede that an unknowingly justified actor may be guilty of an impossible attempt). This view relies on “deeds theory”. On the other hand, theorists such as Fletcher and Greenawalt argue that the unknowingly justified actor is not entitled to any defence because he or she is not internally justified.¹⁰⁹ This view is consistent with “reasons theory”; in other words, the actor has not satisfied the belief requirement associated with both the normative and narrative standards.

7.94 Both sides to the dispute accept that unknowingly justified actors are liable, but disagree as to the nature of the offending: reasons theory imposes liability for the full offence whereas deeds theory imposes mere attempt liability.¹¹⁰

7.95 The leading common law¹¹¹ case on the problem of unknowing justification is the mid-nineteenth century decision of *R v Dadson*.¹¹² The accused, a police officer, was convicted of shooting with intent to cause grievous bodily harm; the accused had witnessed the victim stealing wood and had shot him to prevent him from escaping arrest. Whilst the theft of wood was normally a misdemeanour, the victim was in fact committing a felony on account of his previous convictions. Unfortunately, this was unknown to the accused and his argument that he was entitled to use lethal force to prevent the escape of a fleeing felon was rejected on this ground.

7.96 The case established the so-called *Dadson* principle – that the unknowingly justified actor is not entitled to a defence – which, in the

¹⁰⁹ Interestingly, Fletcher finds himself in the same camp as theorists such as Greenawalt and McAuley on this issue notwithstanding that he was on the opposite side of the divide on the question of the mistaken defender. This apparent anomaly occurs because these theorists all agree that justified conduct requires internal justification (Fletcher also insists upon external justification).

¹¹⁰ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 55-56.

¹¹¹ For a discussion of a Civil Law jurisdiction, see McAuley “The Theory of Justification and Excuse: Some Italian Lessons” (1987) 35 *American Journal of Comparative Law* 359 at 371; unknowing justification is not a defence under Italian law.

¹¹² (1850) 4 Cox CC 358 (Court for Crown Cases Reserved), discussed in McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 115-116 and 766-767.

context of legitimate defence, has remained undisturbed for over a century and a half and has been adopted throughout the common law world.¹¹³

7.97 However, that is not to say that the principle not attracted criticism; to the contrary, it “has continued to vex criminal law theorists and has engendered considerable debate.”¹¹⁴ Indeed, the Law Commission of England and Wales recommended the abandonment of the principle at an earlier stage of its drafting of a codified legitimate defence provision.¹¹⁵ The Commission later reversed its position and recommended the retention of the *Dadson* principle.¹¹⁶ Although the Commission’s recommendation was never enacted in the United Kingdom, it was subsequently incorporated into the *Non-Fatal Offences against the Person Act 1997*.¹¹⁷

7.98 Advocates of the *Dadson* principle, such as Greenawalt and Fletcher, emphasise that conduct is justified only if it is “morally proper action” which requires that a defender “to have sound, good reasons for what [he or she] does”.¹¹⁸ As a consequence, those who act in ignorance of the justifying circumstances do not deserve the benefit of any defence.¹¹⁹

7.99 McAuley likewise supports the *Dadson* principle. However, alluding to the historical roots of self-defence in excuse, the thrust of his argument is that only a defender aware of the justifying circumstances can feel “constrained” to act in legitimate defence; such constrained choice is, in McAuley’s view, the essence of the plea.¹²⁰

¹¹³ For examples of early US cases applying the *Dadson* principle, see Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 930-931. The author cites *Laws v State* (1888) 26 Tex Cr R 643; *People v Burt* (1883) 51 Mich 199; *Garcia v State* (1922) 91 Tex Cr R 9.

¹¹⁴ Christopher “Unknowing Justification and the Logical Necessity of the *Dadson* Principle in Self-Defence” (1995) 15 OJLS 229 at 229.

¹¹⁵ Under the draft provision, defenders would be entitled to act on the basis of the circumstances which exist or which were believed to exist: for discussion, see Law Commission of England and Wales *A Criminal Code for England and Wales: Volume 2: Commentary on Draft Criminal Code Bill* (No 177 – 1989) at 231-232.

¹¹⁶ The Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (No 218 – 1993) at 77.

¹¹⁷ Sections 18 and 19 of the *Non-Fatal Offences against the Person Act 1997*.

¹¹⁸ Greenawalt “The Perplexing Borders of Justification and Excuse” (1984) 84 Colum L Rev 1897 at 1903.

¹¹⁹ Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 565.

¹²⁰ McAuley “The Theory of Justification and Excuse: Some Italian Lessons” (1987) 35 American Journal of Comparative Law 359, 371 (original emphasis). See also McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 766-767 where the authors also note the alternative “epistemological principle that the

7.100 Advocates of the *Dadson* principle agree that unknowingly justified conduct – *prima facie* offending that turns out to be fortuitously defensible – should not be encouraged. To do so would “subvert the central aim of the criminal law, which is to discourage *prima-facie* offences that do not turn out to be fortuitously defensible.”¹²¹

7.101 However, it is questionable that the reasons-based approach is capable of discouraging the unknowingly justified actor; after all, the actor has not been deterred by the belief that he or she is breaking the law. In any event, the most that the advocates of this approach might hope to achieve is to discourage the actor from, in fact, doing the “right” thing.

7.102 Critics of the *Dadson* principle, Robinson¹²² and Schopp¹²³ chief amongst them, argue that “the criminal law seeks to prevent harmful results rather than to punish evil intent that produces no harm”¹²⁴ Therefore, the principle is flawed because it denies a defence to those who do not cause any social harm; indeed, the conduct of the unknowingly justified actor may be beneficial to society. As Williams points out, the conduct of the unknowingly justified actor protects the victim and defeats the attacker, and thus should be encouraged.¹²⁵

7.103 Critics of the *Dadson* principle also point out that it fails to achieve the purpose ascribed to it by the reasons-based theorists; namely, to ensure that only meritorious defenders are entitled to the benefit of legitimate defence. Even a fully-informed defender might act with malicious motives.¹²⁶ Hence, it is not enough for the reasons-based theorists to insist that defenders act with *knowledge* of the justifying circumstances.

availability of [legitimate defence] to a criminal charge is normally a function of what the defendant reasonably believed.”

¹²¹ Simester “Mistakes in Defence” (1992) 12 OJLS 295 at 303 (original emphasis).

¹²² Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 54-60.

¹²³ Schopp *Justification Defenses and Just Convictions* (Cambridge University Press 1998) at 38 and 127-128. Schopp submits that the unknowingly justified actor, whilst not internally justified, is externally justified and does not violate what he labels as “the fully articulated prohibitory norms”.

¹²⁴ Robinson “A Theory of Justification: Societal Harm as Prerequisite for Criminal Liability” (1975) 23 UCLA L Rev 266 at 266-267, cited in Christopher “Unknowing Justification and the Logical Necessity of the *Dadson* Principle in Self-Defence” (1995) 15 OJLS 229 at 232.

¹²⁵ Christopher “Unknowing Justification and the Logical Necessity of the *Dadson* Principle in Self-Defence” (1995) 15 OJLS 229 at 231.

¹²⁶ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 50.

7.104 At the same time, any concern that this approach is unduly benevolent towards the actor is addressed by the argument that unknowingly justified actors would nevertheless be guilty of an impossible attempt on the ground that they *believe* they are committing an offence although, in fact, they are not.¹²⁷

7.105 The apportionment of attempt liability does not derogate from the central point that the *conduct* of the unknowingly justified actor is justified. In contrast, the reasons-based approach punishes conduct that is not harmful, arguably weakening the stigma of the criminal law¹²⁸ and causing a “detrimental effect on the law’s ability to clearly communicate its commands to those who are bound by them.... The law wishes to tell others that they can engage in similar conduct in a similar situation in the future.”¹²⁹

7.106 However, reasons-based theorists argue that the deeds-based approach cannot be applied to the problem of the unknowingly unjustified actor as it is based on the incorrect assumption that there is no reason to distinguish defences from the negative elements of the *actus reus* of an offence. This is an important issue which will be discussed in greater detail in the conclusion.

D Excessive Defence

7.107 Excessive defence¹³⁰ is the use of defensive force that goes beyond that which is permissible. Excessive defenders are not mistaken as

¹²⁷ As Christopher points out, critics of the Dadson principle are often hesitant to assert that impossible attempt liability must apply to unknowingly justified actors: Christopher “Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defence” (1995) 15 OJLS 229 at 234-237. For example, Williams initially argues that such actors should be subject to inchoate liability (*Criminal Law: The General Part* (2nd ed Stevens & Son 1961) at 26-27), but later concludes to the contrary on the basis that the actor’s “mind is irrelevant once it is established that the objective facts justifying [the act] were present” (“The Lords and Impossible Attempts, Or Quis Custodiet Ipsos Custodes” (1986) CLJ 33 at 82).

¹²⁸ Robinson “A Theory of Justification: Societal Harm as Prerequisite for Criminal Liability” (1975) 23 UCLA L Rev 266 at 266-267, cited in Christopher “Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defence” (1995) 15 OJLS 229 at 232.

¹²⁹ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 64.

¹³⁰ It should also be pointed out that this section is not concerned solely with the Plea of Excessive Defence recognised in *People (AG) v Dwyer* [1972] IR 416 which, if successful, renders an accused guilty of manslaughter rather than murder (capitals will be used where reference is made to the Plea of Excessive defence). Rather, this section considers a wide range of approaches to the problem of excessive defence including imposing full liability, allowing a full defence as well as the Plea.

to the nature of the threat or the surrounding circumstances – as in the case of putative defence – but rather misjudge their responses. Hence, it is concerned with errors of *law* not *fact*.¹³¹

7.108 Consider the case of a farmer who shoots a fleeing chicken thief in the knowledge that it is the only method of apprehending him and preventing the crime.¹³² The farmer may genuinely believe that the use of lethal force is legally permissible for this purpose, but as a matter of law the farmer has gone beyond what is permissible (assuming lethal force is not permitted in these circumstances).

7.109 However, as will be seen below, many courts and commentators have failed to appreciate the crucial difference between mistakes of fact and law with the result that the boundary between excessive defence and putative defence has been blurred.¹³³ For example, excessive defence is commonly described as the use of “unnecessary” force. Whilst errors as to the limits of the necessity requirement *may* fall within the definition of excessive defence (as a mistake of law), the mistaken use of unnecessary force is typically based on errors of *fact* – that is, putative defence.

7.110 Consider a scenario in which a defender uses lethal force without retreating: assuming that there is a duty of safe-retreat, the killing would be unnecessary. If the defender was aware of the duty but did not retreat because of a mistaken belief that all avenues of escape were blocked, he or she would be acting under a mistake of fact and, therefore, would be acting in putative defence. In contrast, if the defender failed to retreat because he or she was unaware of the legal duty – or positively believed there was no duty – this would be an error of law and the resulting conduct would properly be described as excessive defence.¹³⁴

7.111 Unfortunately, the unqualified assertion that unnecessary force is excessive ignores these important distinctions. It is submitted, therefore, that discussions of the concept of excessive defence should be treated with caution.

¹³¹ Ashworth “Self-Defence and the Right to Life” [1975] Cambridge Law Journal 282 at 304.

¹³² This is the factual basis of *R v McKay* [1967] VR 560 one of first twentieth century cases to deal with the question of excessive defence.

¹³³ Ashworth notes that the application to putative defence of the principle of *ignorantia juris non excusat* has not been acknowledged English courts: Ashworth “Self-Defence and the Right to Life” [1975] Cambridge Law Journal 282 at 304-305. See also Doran “The Doctrine of Excessive Defence: Developments Past, Present and Potential” (1992) 36 NILQ 314 at 315.

¹³⁴ Ashworth “Self-Defence and the Right to Life” [1975] Cambridge Law Journal 282 at 304.

7.112 Bearing in mind the defining feature of excessive defence as a mistake of law, this section will analyse the problem from the perspective of the deeds-based approach, the normative standard and the narrative standard. The focus will be on the issues that are specific to the problem of excessive defence; hence, to the extent that there is overlap with the discussion of putative defence, arguments for and against each approach will not be repeated in depth.

(1) Deeds-Based Justification

7.113 As in the case of putative defence, advocates of the deeds-based approach would submit that excessive defenders are not justified because their actions are based on faulty reasoning and therefore it is by definition, “wrong”.¹³⁵ Hence, under this approach excessive defence is, at best, excusable; to label it otherwise would blur the line between justification and excuse and inhibit the educative role of the criminal law. Furthermore, the justification of excessive defenders would lead to absurd results. For example, it would erroneously imply that their victims could not justifiably resist excessive defenders (pursuant to the incompatibility thesis)¹³⁶ and that third parties could justifiably assist the excessive defender knowing the force to be excessive (pursuant to the principle of universalisation).

7.114 In addition, strong support for the deeds-based approach is found in the long-established common law tradition that mistakes as to the law cannot ground a defence (with a number of narrow exceptions).¹³⁷ Arguably, the requirement that citizens be aware of the criminal law seems particularly relevant to legitimate defence insofar as the defence is intended to reflect basic rules of social order.¹³⁸

7.115 Notwithstanding these arguments, the general trend in the common law world has increasingly been to accommodate the mistakes of law of excessive defenders by adopting a normative standard and, to a lesser extent, recognising the Plea of Excessive Defence.

¹³⁵ Yeo “Applying Excuse Theory to Excessive Self-Defence” in Yeo *Partial Excuses to Murder* (Federation Press 1990) at 161.

¹³⁶ However, insofar as victims of excessive defence would have launched the original attack (and hence, would fall within the rule relating to self-generated necessity), they would have to satisfy the requirements discussed at paragraph 5.134- 5.202 before resorting to their own defensive actions.

¹³⁷ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 570-575. In contrast, civilian law jurisdictions such as Italy adopt a more flexible approach to the issue.

¹³⁸ McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 572-573.

(2) *Normative-Based Excuse*¹³⁹

7.116 Under the normative standard, excessive defenders are granted a degree of latitude for errors of law that the ordinary people might also have made under similar overwhelming circumstances.

7.117 This approach might be said to achieve a fairer balance than the absolutist deeds-based approach insofar as it recognises that defenders can only be expected to do that which is reasonable. As pointed out above, whilst traditionally the common law has not accommodated errors of law, it may be argued that it is appropriate to do so in this instance; the vague nature of the reasonableness test arguably renders it impossible for individuals to know the exact rules of legitimate defence.¹⁴⁰ If defenders fall into error as to the circumstances in which lethal defensive force may be used, arguably this will be a result – at least in part – of the failings of the courts and legislature to clearly define rules of conduct.¹⁴¹

7.118 At the same time, the normative standard excludes from its protection those who exhibit poor judgment as to the limits of legitimate defence: “Given that the use of force is *prima facie* unlawful, it seems right that the law should require defendants to take reasonable steps to ensure that defensive force is warranted in the circumstances.”¹⁴² Williams – despite being one of the strongest advocates of the narrative standard in relation to putative defence – also argues that the proportionality of a defender’s response must be measured by normative standards.¹⁴³

7.119 As seen already, a large number of common law jurisdictions have adopted the test of “reasonableness” to regulate the amount of force that may be used in response to a threat (or perceived threat).¹⁴⁴ For example, in *R v*

¹³⁹ It would seem that excessive defence which conforms to the normative standard is properly viewed as an excuse rather than a justification given that it deals with errors of law.

¹⁴⁰ Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 175. However, in his view, such errors should be dealt with by way of a Plea of Excessive Defence.

¹⁴¹ McAuley and McCutcheon acknowledge but ultimately dismiss this argument: McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 768.

¹⁴² McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 569.

¹⁴³ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 456.

¹⁴⁴ For example, in New Zealand section 48 of the *Crimes Act 1961* states: “Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.” The same wording is adopted under section 46 of the Tasmanian *Criminal Code*.

*Williams (Gladstone)*¹⁴⁵ the English Court of Appeal stated that “the exercise of any necessary and *reasonable* force to protect himself from unlawful violence is not unlawful.”¹⁴⁶ Citing this case, the Law Commission of England and Wales observed that a reasonableness test was applicable in this instance.¹⁴⁷

7.120 The reasonableness test in this context operates both as a *substantive requirement* and as a *normative standard of conduct*. Its operation as a substantive requirement has been criticised above; in lieu of a strict proportionality requirement, it requires that defenders must use no more than “reasonable” force. Its second function, that of setting a normative standard of conduct, suffers from the same problems of ambiguity insofar as there is no concrete rule against which a defender’s conduct may be measured.¹⁴⁸ It is difficult to know whether the ordinary person would have exceeded the legally permissible levels of lethal force if those limits are themselves unclear.

7.121 Given these ambiguities, it is unsurprising that the normative aspect to the test has been gradually whittled away in many jurisdictions. In particular, the Courts of England and Wales have placed a heavy emphasis on the perspective of the defender (indicating, perhaps, a tendency toward the reasons-based approach). For example, consider the following passage from the Privy Council’s judgment in *Palmer v R*:¹⁴⁹

“It is both good law and good sense that he may do, but may only do, what is reasonably necessary.... If there has been [sic] attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary

¹⁴⁵ (1984) 78 Cr App R 276.

¹⁴⁶ *R v Williams (Gladstone)* (1984) 78 Cr App R 276 at 278.

¹⁴⁷ The Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (No 218, 1993) at 66-67. Though the Commission’s Draft Criminal Law Bill was not enacted in the United Kingdom, in this jurisdiction the legitimate defence provisions were incorporated into the *Non-Fatal Offences against the Person Act 1997*.

¹⁴⁸ Yeo “Applying Excuse Theory to Excessive Self-Defence” in *Yeo Partial Excuses to Murder* (Federation Press 1990) at 168.

¹⁴⁹ [1971] AC 814. *Palmer* was cited with approval by the House of Lords in *R v Clegg* [1995] 1 All ER 334.

that would be the most potent evidence that only reasonable defensive action had been taken.”¹⁵⁰

7.122 However, as Williams points out, “it is not easy to see how ‘what the defendant thought’ could be evidence of what it was reasonable for him to do.... It looks very much as though the *dictum* is a way of escaping the test of reasonableness without acknowledging the fact.”¹⁵¹ In other words, whilst defenders are expected to satisfy a normative standard of conduct, it seems that a finding of honesty on the defender’s behalf would be tantamount to a finding of reasonableness; in practice, juries seem to be afforded the power to excuse errors of law which fall even below the standard of “reasonableness”.

7.123 The *Palmer* approach, which has been adopted in a number of common law jurisdictions including those in Australia¹⁵² and in New Zealand,¹⁵³ has been criticised for giving “conflicting signals”. Whilst it allows defenders a “generous... degree of latitude” in determining the level of their response, at the same time “[t]he difficulty with having such an open-ended and ill-defined threshold is that an offender can never be sure whether he or she has exceeded what is reasonable self-defensive force.”¹⁵⁴ Unfortunately, the open-ended nature of the *Palmer* test may be necessary in the absence of rules and principles by which juries can assess a defender’s response.¹⁵⁵

7.124 Like its common law counterparts, Irish law permits defenders to respond with no more than reasonable force. However, it is unclear whether the refinement adopted in *Palmer* is applicable to Irish law.

¹⁵⁰ *Palmer v R* [1971] AC 814 at 831-832. This was by no means a novel approach to legitimate defence. Holmes J, in the 1920s US Supreme Court decision of *Brown v US* (1921) 256 US 335 at 343 observed that “[d]etached reflection cannot be demanded in the presence of an uplifted knife”.

¹⁵¹ Williams *Textbook of Criminal Law* (2nd ed Stevens & Sons 1983) at 507.

¹⁵² *Palmer* was adopted by the High Court of Australia in *Zecevic v DPP* (1987) 71 ALR 641, overturning *Viro v R* (1978) 141 CLR 88.

¹⁵³ The approach in *Palmer* has been applied to section 48 of the New Zealand *Crimes Act 1961*: *Wallace v Abbott* New Zealand Court of Appeal 14 June 2002 at paragraph [98].

¹⁵⁴ Brookbanks “Status in New Zealand of defences of provocation, diminished responsibility and excessive self-defence with regard to domestic violence” at paragraphs 84-85, Appendix D to the Law Commission of England and Wales *Consultation Paper Partial Defences to Murder* (2003 CP 173).

¹⁵⁵ Though largely derisive of the *Palmer* approach, Ashworth acknowledges that it may be necessary in the absence of proper rules and principles governing the use of lethal force: Ashworth “Self-Defence and the Right to Life” [1975] *Cambridge Law Journal* 282, 305.

7.125 Consider the normative standard of reasonableness which governs the level of permissible force under the *Non-Fatal Offences against the Person Act* 1997. On one hand, an argument might be advanced that this standard should be interpreted along the lines suggested in *Palmer* given that the relevant provision is based on the recommendations of the Law Commission of England and Wales, which in turn is based on the common law of that jurisdiction. On the other hand, the 1997 Act does not explicitly incorporate this refinement. Unfortunately, there does not appear to have been any definitive appellate ruling on this issue.

7.126 The status of *Palmer* at Irish common law is even more confusing. On one hand, the Supreme Court in *People (AG) v Dwyer*¹⁵⁶ recognised a specific Plea of Excessive Defence and, in doing so, declined to follow *Palmer*. It was held that the full defence is available only if the defensive force is “reasonably necessary” for the defender’s protection.¹⁵⁷ Given the Court’s finding that the lesser verdict of manslaughter is available to excessive defenders whose responses are unreasonable, it seems logical to suppose that the full defence was intended to be available only to those who satisfied a strict normative standard of reasonableness. If so, it is a “little surprising” that the Court of Criminal Appeal in *People (D.P.P.) v Clarke*¹⁵⁸ appeared to endorse both the *Dwyer* and the *Palmer* approaches.¹⁵⁹ Hence, the common law position also requires clarification.

(3) *Reasons-Based Excuse*

7.127 Under the reasons-based approach, even grossly excessive defence is excusable. A full defence is available to excessive defenders who honestly believe that they are acting within the parameters of the defence, even if the ordinary person would recognise otherwise. Hence, in contrast to the deeds or normative-based approaches, the reasons-based approach does not hold excessive defenders liable for errors of negligence.

7.128 The reasons-based approach was advocated by the minority judgment of Jacobs and Murphy JJ in the decision of the High Court of Australia, *R v Viro*.¹⁶⁰ In Jacobs J’s view, a defender is entitled to a full defence if “he [used lethal force] with the purpose of defending himself and

¹⁵⁶ [1972] IR 416.

¹⁵⁷ *People (AG) v Dwyer* [1972] IR 416, 420 (per Walsh J) and 429 (per Butler J).

¹⁵⁸ [1994] 3 IR 289 at 297-301.

¹⁵⁹ See “Comment: *People (DPP) v John Clarke*” [1994] ICLJ 222 at 224, where this endorsement of both these cases in this decision was noted.

¹⁶⁰ (1978) 141 CLR 88.

in the belief that the infliction of death or the grievous bodily harm inflicted by him was necessary in order to defend himself.”¹⁶¹

7.129 Murphy J, similarly, advocated the abandonment of the any objective element in the test. Referring to Holmes J’s oft-cited statement that “[d]etached reflection cannot be demanded in the presence of an uplifted knife”, Murphy J observed: “The cases abound with statements like this neutralizing the objective test’s application by references to ‘agony of the moment’ considerations which obscure the conclusion that, if the test were dispensed with, the law would be simple and just.”¹⁶²

7.130 These judgments were considered by the High Court in its subsequent decision in *Zecevic v DPP*¹⁶³ and were unanimously rejected.¹⁶⁴ Indeed, the dissenting *Viro* judgments aside, the reasons-based approach has been almost universally rejected in the common law world. The commonly accepted reason for its rejection is summarised in the following passage of Lord Woolf CJ in *R v Martin*:¹⁶⁵

“It cannot be left to a defendant to decide what force it is reasonable to use because this would meant that even if a defendant used disproportionate force but he believed he was acting reasonably he would not be guilty of any offence. It is for this reason that it was for the jury, as the representative of the public, to decide the amount of force which it would be reasonable and the amount of force which it would be unreasonable to use in the circumstances in which they found that [the accused] believed himself to be in.”¹⁶⁶

7.131 The issue before the Court in *R v Martin*¹⁶⁷ was the extent to which defenders’ honest beliefs are relevant to assessing the reasonableness of their responses. The appellant, a farmer living in an isolated country home, had shot dead a burglar (and injured another) who had broken into his house at night. On appeal from his conviction for murder, fresh evidence was tendered to the effect that the appellant suffered a mental disorder which would have caused him to perceive a much greater danger to his physical

¹⁶¹ *R v Viro* (1978) 141 CLR 88 at 158.

¹⁶² *R v Viro* (1978) 141 CLR 88, 169.

¹⁶³ (1987) 71 ALR 641.

¹⁶⁴ *Zecevic v DPP* (1987) 71 ALR 641, 645 (per Mason CJ), 648-650 (per Wilson, Dawson and Toohey JJ), 659 (per Brennan J), 660-661 (per Deane J) and 668 (per Gaudron J).

¹⁶⁵ [2002] 1 Cr App R 27.

¹⁶⁶ *R v Martin* [2002] 1 Cr App R 27, 326.

¹⁶⁷ [2002] 1 Cr App R 27, 326 (English Court of Appeal).

safety than the average person. It was argued that not only was this evidence relevant to the question of putative defence, but also to that of excessive defence – *ie* whether the appellant acted reasonably. The Court rejected this submission in a cryptic fashion:¹⁶⁸

“We would accept that the jury are entitled to take into account in relation to self-defence the physical characteristics of the defendant. However, we would not agree that it is not appropriate, except in exceptional circumstances which would make the evidence especially probative, in deciding whether excessive force has been used to take into account whether the defendant is suffering from some psychiatric condition.”¹⁶⁹

7.132 This statement appeared to leave open the possibility that, in exceptional circumstances, evidence that a defender suffered from a mental illness might be relevant to whether his or her response was reasonable. Arguably, this is a further demonstration of a tendency in jurisdictions following the *Palmer* approach, which purport to impose a normative standard, to be influenced by the reasons-based approach.

(4) *A Partial Defence? The Plea of Excessive Defence*

7.133 A minority of jurisdictions, including Ireland, permit a specific Plea of Excessive Defence which, if successful, renders an excessive defender guilty of no more than manslaughter.

7.134 Despite the small number of jurisdictions in which the Plea is recognised, this area of law has perhaps attracted greater attention of commentators and law reform bodies than any other single issue relating to legitimate defence. Why this is so is unclear. It may be that the Plea is seen as a panacea that might alleviate potentially harsh and unjust murder convictions in cases where the full defence is unavailable because one of more of the defence conditions cannot be satisfied. In any event, despite all the attention it has received, the Plea is often poorly defined and its proper legal basis left unclear.

¹⁶⁸ The Court rightly held that this evidence could only be relevant to the issue of putative defence – *ie* to support the appellant’s own evidence as to his perceptions at the time of the shooting. However, it was inadmissible on this ground given that it was for the jury to assess the truth of the appellant’s evidence: [2002] 1 Cr App R 27 341 at 341-342.

¹⁶⁹ [2002] 1 Cr App R 27 341.

7.135 The primary argument in favour of the plea is that it is a “half-way house” which best reflects the moral culpability of the excessive defender who is neither blameless nor completely blameworthy for the killing.¹⁷⁰

“Since ordinary morality distinguishes between an intention to kill and an intention to defend one’s own or another’s life, it seems appropriate that legal systems should endeavour to reflect this judgment in the law of homicide, in the form of the plea of excessive defence.”¹⁷¹

7.136 The Plea is an acknowledgement that defenders may genuinely have difficulty discerning the fine distinction between the use of legitimate lethal force and unlawful homicide. As Yeo comments, “[t]he vagueness of the common law on this matter calls for justice to be done by giving a person who, when killing her or his assailant, has exceeded the permissible limits of self-defence, the benefit of the doctrine of excessive self-defence.”¹⁷²

7.137 The Plea, therefore, removes the “all-or-nothing” dilemma that confronts juries in the absence of a partial plea: the excessive defender is either guilty of murder or acquitted altogether.¹⁷³ By recognising a “grey area” between the culpable and the innocent, the partial plea introduces an element of flexibility for juries¹⁷⁴ and enables them to reach verdicts which are more closely in accord with their consciences.¹⁷⁵

(5) The Emergence of the Plea

7.138 Whilst the modern recognition of the Plea is often attributed to the Australian line of cases beginning with *R v McKay*¹⁷⁶ and *R v Howe* (discussed below), these judgments purported to rely on precedent stretching back centuries, such as the seventeenth century case of *R v Cook*,¹⁷⁷ and the nineteenth century cases of *R v Whalley*¹⁷⁸ and *R v Patience*¹⁷⁹ Whether

¹⁷⁰ In *R v Viro* (1978) 141 CLR 88 at 139, Mason J submitted that it would be “unjust” not to recognise the Plea.

¹⁷¹ McAuley “Excessive Defence in Irish Law” in Yeo *Partial Excuses to Murder* (Federation Press 1990) at 200-201.

¹⁷² Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 175.

¹⁷³ Doran “The Doctrine of Excessive Defence: Developments Past, Present and Potential” (1992) 36 NILQ 314 at 314.

¹⁷⁴ *Ibid* at 314 and 334.

¹⁷⁵ Yeo “Applying Excuse Theory to Excessive Self-Defence” in Yeo *Partial Excuses to Murder* (Federation Press 1990) at 164.

¹⁷⁶ [1967] VR 560.

¹⁷⁷ (1639) Cro Car 537; 79 ER 1063.

¹⁷⁸ (1835) 7 C & P 245; 173 ER 108.

these cases supported a Plea of Excessive Defence in general or whether they were concerned solely with the law relating to the use of force to resist unlawful arrests is still a matter of debate.¹⁸⁰ However, other cases, such as the 1879 judgment in *R v Weston*¹⁸¹ did appear to provide clear support for the Plea. Indeed, Stephen, writing around the same time, appeared to acknowledge its existence.¹⁸² Elsewhere in the British Empire, the Plea had been part of the *Indian Penal Code* since 1860.¹⁸³

7.139 It was against this background that the Victorian Supreme Court recognised a Plea of Excessive Defence in *R v McKay*.¹⁸⁴ The case concerned a farmer who had fatally shot an intruder to prevent the theft of his chickens. The farmer had suffered a number of thefts in recent times and, although having taken preventive measures, was unable to deter the thief or thieves. On the day in question, the farmer was woken at dawn by the thief and opened fire without warning as the thief attempted to run away with three chickens. At his trial for murder, the farmer was convicted of manslaughter and this verdict was upheld on appeal:

“If the occasion warrants action in self-defence or for the prevention of a felony or the apprehension of the felon, but the person taking action acts beyond the necessity of the occasion and kills the offender, the crime is manslaughter – not murder.”¹⁸⁵

7.140 The Plea was subsequently endorsed by the High Court of Australia in *R v Howe*.¹⁸⁶ The issue of excessive defence arose from the appellant’s claim that he had shot the deceased to repel a homosexual

¹⁷⁹ (1837) 7 C & P 775; 173 ER 338.

¹⁸⁰ For a discussion of these cases and the history of the Plea of Excessive Defence, see Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 134-144.

¹⁸¹ (1879) 14 Cox CC 346, discussed in Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 137.

¹⁸² Stephen *A History of the Criminal Law of England* (MacMillan and Co 1883) Vol III at 65.

¹⁸³ The Plea of Excessive Self-Defence is one of several Exceptions to the offence of murder under section 300 of the Indian Penal Code resulting in a conviction of a lesser offence of culpable homicide not amounting to murder. For a discussion of the Indian law relating to excessive defence, see Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 119-134.

¹⁸⁴ [1967] VR 560. An application to the High Court of Australia for special leave to appeal was rejected, bolstering the authority of the Victorian Supreme Court’s decision. For a discussion of the case, see Lantham, “Killing the Fleeing Offender” [1977] 1 Crim LJ 16 at 20-23.

¹⁸⁵ [1967] VR 560, per Lowe J.

¹⁸⁶ (1958) 100 CLR 448.

attack.¹⁸⁷ The High Court held excessive defenders should be found guilty of manslaughter and not murder in the following circumstances:¹⁸⁸

(i) There were grounds for the use of at least *some* defensive force – *ie* in circumstances where “[a real or apprehended] attack of a violent and felonious nature, or at least of an unlawful nature, was made or threatened so that the person under attack or threat of attack reasonably feared for his life or the safety of his person from injury, violation or indecent or insulting usage.”¹⁸⁹

(ii) The defender uses defensive force that he or she “honestly believes to be necessary in the circumstances” but which is more than a reasonable man would consider necessary.¹⁹⁰ It should be noted that whilst the Court misleadingly phrased the test in terms of the *necessity*,¹⁹¹ it was clearly concerned with force that went beyond the bounds of *proportionality*.¹⁹²

7.141 Whilst the Plea was endorsed by all members of the Court, the minority judgments of Taylor and Menzies JJ took the view that it would arise only in a “very unusual case”.¹⁹³

“[I]t may be thought only remotely possible that a jury, having satisfied itself beyond a reasonable doubt that an accused person had used more force in self-defence than he could reasonably have thought necessary, would, thereafter, be prepared to entertain the

¹⁸⁷ *R v Howe* (1958) 100 CLR 448 at 459-460 per Dixon CJ, McTiernan and Fullagar JJ concurring.

¹⁸⁸ *R v Howe* (1958) 100 CLR 448 at 474-475.

¹⁸⁹ *R v Howe* (1958) 100 CLR 448 at 460 per Dixon CJ, McTiernan and Fullagar JJ concurring.

¹⁹⁰ *R v Howe* (1958) 100 CLR 448 at 456 and 462 per Dixon CJ, McTiernan and Fullagar JJ concurring.

¹⁹¹ The terms “necessity” and “proportionality” are used interchangeably throughout the judgments. For example, Dixon CJ equates the use of “an unnecessary measure of force” with the use of “a degree of force out of proportion to the danger”: *R v Howe* (1958) 100 CLR 448, 456.

¹⁹² *R v Howe* (1958) 100 CLR 448, 460 per Dixon CJ, McTiernan and Fullagar JJ concurring: “[The appeal] raises the question whether, where upon an indictment for murder the accused relies on self-defence as a plea and all the elements of that defence are made out except that which relates to the proportionality of the force used to the degree of danger threatened or reasonably apprehended, the verdict against the accused should be, or at all events may be, manslaughter and not murder.... Had he used no more force than was proportionate to the danger in which he stood, although he thereby caused the death of his assailant he would not have been guilty either of murder or manslaughter.” (Emphasis added).

¹⁹³ *R v Howe* (1958) 100 CLR 448, 469 per Menzies J.

view that the degree of force used was no greater than the accused, in fact, honestly believed to be necessary.”¹⁹⁴

(a) *The Initial English Approach – Palmer v R*

7.142 In *Palmer v R*¹⁹⁵ the Privy Council refused to follow the Australian line of cases. Declining to recognise the Plea, the Committee preferred a more “straightforward conception”¹⁹⁶ of legitimate defence: “The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected.”¹⁹⁷

7.143 The Committee’s rejection of the Plea appears to have been based primarily on its view that it lacked valid precedent.¹⁹⁸ The Committee further reasoned that the Plea was superfluous given the array of alternative remedies available to defenders undeserving of a murder conviction; in particular, they could plead a lack the intent to kill or the partial defence of provocation.¹⁹⁹

7.144 However, perhaps conscious of tempering the apparent strictness of its approach, the Committee appeared to lower the threshold of the full defence. As discussed above, although the Committee held that defensive force must be “reasonably necessary”, it emphasised that a defender’s honest belief “would be most potent evidence that only reasonable defensive action had been taken.”²⁰⁰

7.145 Interestingly, there appears to have been little factual basis upon which the Plea could have been properly raised in any event. The mistake in point appears to have been the nature of the threat confronting the appellant rather than a misunderstanding of the legal limits imposed on the use of lethal force. It appears that the Privy Council, in one of the leading pronouncements on the law of legitimate defence, failed to appreciate the

¹⁹⁴ *R v Howe* (1958) 100 CLR 448, 466 per Taylor J.

¹⁹⁵ [1971] AC 814. This case was a further appeal from the Court of Appeal of Jamaica which had upheld the appellant’s conviction for murder. The deceased had been part of a group pursuing the appellant and his companions to recover stolen drugs. The appellant had opened fire on the group, there being some evidence to suggest that the pursuers were armed with sticks and stones for the purposes of beating the appellant and his companions. The Privy Council rejected the submission that the trial judge should have left open a verdict of manslaughter on the grounds of excessive defence.

¹⁹⁶ [1971] AC 814 at 831.

¹⁹⁷ [1971] AC 814 at 832.

¹⁹⁸ [1971] AC 814 at 826.

¹⁹⁹ [1971] AC 814 at 826.

²⁰⁰ *Palmer v R* [1971] AC 814 at 832.

distinction between mistakes of law and of fact upon which the Plea of Excessive Defence is founded.

(b) *People (AG) v Dwyer*

7.146 The leading case on excessive defence in this jurisdiction is *People (Attorney-General) v Dwyer*²⁰¹ in which the Supreme Court, presented with a stark choice between the Australian and English approaches, preferred the former.

7.147 The matter came before the Supreme Court as a case stated from the Court of Criminal Appeal following the appellant's unsuccessful appeal against his conviction for murder. The conviction arose from a street fight between two groups of males. The appellant was engaged with two of the opposing group and claimed that he was caught from behind and hit on the head with some instrument. Fearing that he would be killed, the appellant brandished a knife he was carrying and stabbed the deceased.

7.148 Upholding the appeal and ordering a retrial, the Court unanimously recognised the Plea of Excessive Defence:

“Where a person, subjected to a violent and felonious attack, endeavours, by way of self-defence, to prevent the consummation of that attack by force, but, in doing so, exercises more force than is necessary but no more than he honestly believes to be necessary in the circumstances,... such person is guilty of manslaughter and not murder.”²⁰²

7.149 Interestingly, the Plea as framed by the certified question, and as it arose on the facts, appears to have been concerned with errors of *fact* rather than *law*. The only mistake the appellant appears to have made was as to the level of threat posed by his attackers – *i.e.* it was a case of putative defence.²⁰³ If it had been true, as the appellant claimed to have believed, that he faced an imminent threat of death then it is hard to understand how a lethal defensive response would have been excessively disproportionate. Indeed, the certified question appears to have assumed that the mistake in

²⁰¹ [1972] IR 416.

²⁰² This was the question of law certified by the Attorney General following the appellant's unsuccessful appeal to the Court of Criminal Appeal which both judgments answered in the affirmative: *People (AG) v Dwyer* [1972] IR 416 at 424 per Walsh J and 433 per Butler J.

²⁰³ Doran “The Doctrine of Excessive Defence: Developments Past, Present and Potential” (1992) 36 NILQ 314 at 321, where it was asserted that the mistake here was one of fact not law.

point was one of fact; reference is made to “unnecessary” rather than “disproportionate” force.²⁰⁴

7.150 Nevertheless, it may be argued that the Supreme Court intended that the Plea apply to both errors of fact *and* errors of law. This view is supported by the fact that the Court purported to follow *R v Howe*,²⁰⁵ which was concerned with errors of law. Subsequent decisions of the Court of Criminal Appeal have assumed this to be the case²⁰⁶ and, therefore, this section will proceed on this basis. Nevertheless, it is extraordinary that the appellate courts have never been presented with an opportunity to clarify this matter in the three decades since *Dwyer*.

7.151 The two judgments in *Dwyer* were delivered by Walsh J and Butler J.²⁰⁷ The judgments concurred that an accused who believes that he or she is using necessary force but who in fact uses force that is objectively unnecessary lacks the mental element required for murder²⁰⁸ and is guilty of manslaughter only.

7.152 Whilst both judgments concurred as to the result, they differed as to which mental element of murder was negated by the Plea. Butler J took the view that the honest intention of the excessive defender to act in self-defence excludes any intention to kill (or cause serious harm).²⁰⁹ In other words, Butler J relied on the principle of double effect.²¹⁰ The weaknesses of this approach have been discussed earlier. It suffices to note that an assertion that all excessive defenders lack an intent to kill is unrealistic and is inconsistent with the approach that the courts have taken in relation to the plea of provocation which is now treated as a species of voluntary homicide.²¹¹

²⁰⁴ In rebuttal to this argument, it should be noted that the certified question appears to confine the Plea to cases where there is an actual, as opposed to perceived, “violent and felonious attack”. See McAuley “Excessive Defence in Irish Law” in Yeo *Partial Excuses to Murder* (Federation Press 1990) at 199.

²⁰⁵ (1958) 100 CLR 448.

²⁰⁶ See, for example, *People (DPP) v Dunne* Court of Criminal Appeal Geoghegan, O’Higgins and Peart JJ 25 November 2002 (ex tempore).

²⁰⁷ Ó Dálaigh CJ concurred with the judgment of Walsh J. Budd J concurred with the judgment of Butler J. Fitzgerald J concurred with both judgments.

²⁰⁸ The mental element required for murder is the intention to kill or cause serious injury. This mental element is set out in section 4 of the Criminal Justice Act 1964.

²⁰⁹ [1972] IR 416 at 429; see also 432.

²¹⁰ See paragraphs 7.39- 7.42 above.

²¹¹ See the Law Reform Commission Report on Homicide: The Plea of Provocation (LRC CP 27 – 2003) at 17-19.

7.153 Walsh J's reasoning differed subtly but significantly insofar as he held that intentional killers could successfully plead Excessive Defence on the ground that they would lack the "necessary malice" for murder.²¹² Walsh J draws on

"the traditional distinction between murder and manslaughter based on the concept of malice aforethought. A person may have caused the death of another with intent to kill or inflict grievous bodily harm so as to have *technically* had the requisite mens rea for murder. Yet, if there was some justificatory, excusatory or mitigatory reason for the accused's action, the accused's mental state would not constitute the mens rea for murder."²¹³

7.154 This approach, too, has been subjected to criticism. Kaye argues that the introduction of the concept of malice aforethought adds needless technicality and obscures the proper legal basis of the Plea as a partial defence based on the reduced culpability of the defender.²¹⁴ Nevertheless, both Walsh J and Butler J preferred to conceptualise it as a denial of the *mens rea* for murder.²¹⁵

7.155 However, if the Plea denies the *mens rea* for murder, why does it not also deny the *mens rea* for manslaughter? Both judgments in *Dwyer* concurred that a successful Plea should result in a manslaughter verdict on the ground that the excessive defender would not satisfy the objective criteria of the full defence and therefore would be acting unlawfully.²¹⁶ It might be argued, therefore, that the Excessive Defence is a species of unlawful and dangerous manslaughter.²¹⁷ Yet, Walsh J expressly ruled out unlawful and dangerous manslaughter as the legal basis of the Plea on the

²¹² [1972] IR 416, 424. See, for discussion, Charleton, McDermott & Bolger *Criminal Law* (Butterworths 1999) at 1039.

²¹³ Yeo "Applying Excuse Theory to Excessive Self-Defence" in *Yeo Partial Excuses to Murder* (Federation Press 1990) at 162. The author was making this point by reference to the dissenting judgments of Deane and Gaudron JJ in *Zecevic v DPP* (1987) 71 ALR 641, but it is equally applicable to the approach adopted by Walsh J in *Dwyer*.

²¹⁴ Kaye "Excessive Force in Self-Defence After *R v Clegg*" (1997) 61 *Journal of Criminal Law* 448, 453. It should be noted that Kaye wrongly attributes to Butler J the introduction of the concept of malice aforethought.

²¹⁵ See McAuley "Excessive Defence in Irish Law" in *Yeo Partial Excuses to Murder* (Federation Press 1990) at 201; Yeo "Applying Excuse Theory to Excessive Self-Defence" in *Yeo Partial Excuses to Murder* (Federation Press 1990) at 162.

²¹⁶ [1972] IR 416 at 424 and 429.

²¹⁷ Howard "Two Problems in Excessive Defence" (1968) 84 *Law Quarterly Review* 343 at 359-360. See also Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 170.

basis that the former is a category of *involuntary* homicide whereas the latter is premised on the existence of an intent to kill.²¹⁸

7.156 An alternative basis for the manslaughter verdict would be a finding of gross negligence. In other words, defenders who used *unreasonable* defensive force would be not guilty of murder and would also be not guilty of manslaughter unless their conduct was *grossly* negligent.

7.157 Whilst the propriety of this approach may also be questioned insofar as it also applies a category of involuntary manslaughter to intentional killing, a number of commentators submit that gross-negligence manslaughter is sufficiently flexible to incorporate intentional killings in excessive defence.²¹⁹ Indeed, Walsh J appeared to acknowledge, without elaborating, the *possible* relevance of gross negligence manslaughter to cases of excessive defence.²²⁰ Nevertheless, this was not the stated legal basis of his recognition of the Plea. Indeed, such a finding would have rendered excessive defenders not guilty of any offence whatsoever unless they were grossly negligent; however, this was not the finding of the Court.

7.158 Indeed, contrary to the Court's express views that the Plea was based on the denial of the *mens rea* of murder, its finding that simple negligence is sufficient to render excessive defenders guilty of manslaughter suggests that the Plea operates in the manner of a partial defence similar to the plea of provocation.²²¹ Under this approach, it is accepted that the elements of murder (including *mens rea*) are satisfied but the excessive defence is partially excused on account of his or her reduced culpability.

7.159 McAuley submits that the Court may have "unwittingly" adopted this approach with the unfortunate result that those who successfully invoke the Plea are assumed to be guilty of manslaughter:

²¹⁸ People (AG) v Dwyer [1972] IR 416 at 422-423.

²¹⁹ See, for example, Howard "Two Problems in Excessive Defence" (1968) 84 Law Quarterly Review 343, 358-359: "In regarding the situation as being one of manslaughter by criminal negligence there is no real difficulty in the circumstance that the defendant acted intentionally. Much conduct classified by the law as negligent is necessarily in most of its aspects perfectly intentional. The negligent driving of a motor-car is in most respects the entirely intentional driving of a motor-car. It is in relation only to one aspect of an ensuing situation that the criterion of negligence is applied." See also Doran "The Doctrine of Excessive Defence: Developments Past, Present and Potential" (1992) 36 NILQ 314 at 332.

²²⁰ *People (AG) v Dwyer* [1972] IR 416, 423: "The question of negligence might possibly arise if he honestly believed what he did to be necessary but that was a belief resulting from a grossly negligent assessment of the situation."

²²¹ Kaye submits that it is proper that the Plea is treated as a partial defence: Kaye "Excessive Force in Self-Defence After R v Clegg" (1997) 61 Journal of Criminal Law 448 at 453.

“The assumption is fine if manslaughter can be committed negligently, since a person who makes an unreasonable mistake about the quantum of force necessary to defend herself or himself is, *ex hypothesi*, guilty of negligence. But it is false if manslaughter requires proof of gross negligence, as it has long been held to do in Irish law, since in that case a defendant who mistakenly believed that the force she used was necessary to defend herself would be entitled to a complete acquittal unless her mistake was a grossly negligent one.”²²²

7.160 Unfortunately, the exact basis upon which excessive defenders are relieved of liability for murder but are found guilty of manslaughter remains unclear.

7.161 A further aspect of the *Dwyer* Plea that remains uncertain is whether the threshold requirements that apply to the full defence also resist the availability of the Plea. In other words, can an excessive defender qualify for the Plea if he or she has used lethal force in response to a minor threat?

7.162 It has already been seen that the majority of the High Court of Australia in *R v Howe* accepted that the Plea was available in circumstances where the nature of the threat (or perceived threat) fell short of serious injury and, hence, did not warrant a lethal response.²²³ Under *Howe*, the threshold requirement was merely a (perceived) threat of “a violent and felonious nature, or at least of an unlawful nature [such that] the person under attack or threat of attack reasonably feared for his life or *the safety of his person from injury, violation or indecent or insulting usage*.”²²⁴

7.163 In *Dwyer*, Walsh J observed the broad nature of the threshold test proposed in *Howe*, but preferred to limit carefully his judgment to cases involving threats of “a violent and felonious nature”.²²⁵ Whilst he left open the question of an extension of his threshold test at a later date, surprisingly the issue does not appear to have arisen in the ensuing three decades.

²²² McAuley “Excessive Defence in Irish Law” in *Yeo Partial Excuses to Murder* (Federation Press 1990) at 201.

²²³ Howard “Two Problems in Excessive Defence” (1968) 84 *Law Quarterly Review* 343 at 349.

²²⁴ *R v Howe* (1958) 100 CLR 448 at 460 per Dixon CJ, McTiernan and Fullagar JJ concurring (emphasis added).

²²⁵ [1972] IR 416 at 424-425. Butler J does not address the issue directly. However, by answering the certified question in the affirmative, he limits the availability of the Plea to cases in which the “violent and felonious” threshold is met.

7.164 Interestingly, a similar approach was adopted by Mason J when the High Court of Australia reconsidered the *Howe* test in *R v Viro*. It was observed here that this question could be resolved at a later date.²²⁶

7.165 Assuming that the limitation imposed by Walsh J in *Dwyer* remains in force, what is meant by the requirement that there be a “violent and felonious” attack? Unfortunately, the scarcity of case-law prevents a definite answer.²²⁷

7.166 One interpretation of the Supreme Court’s approach is that the threshold test is similar to that which applies to the full defence. In other words, the Plea is available only where the excessive defender has responded to something approaching a deadly threat. However, as Howard has noted, if this interpretation is correct then “it follows that the actual scope of excessive defence is very slight, for if the defendant is placed in a situation of such danger it is probable that in most cases he will be acquitted of unlawful homicide altogether.”²²⁸ A narrow interpretation of this kind arguably fails to recognise that the Plea of Excessive Defence is the use of lethal force that goes beyond that which is legally permissible. The Plea, therefore, can have meaningful effect only if the threshold test is lower than that which applies to the full defence.

7.167 However, were the threshold to be set too low, the Plea would be open to those who use lethal force against the most trivial of threats, provided it was done so with a defensive purpose.²²⁹

7.168 As a suitable compromise, McAuley suggests the availability of the Plea should be limited to cases in which *some* defensive force is justified.²³⁰

²²⁶ *R v Viro* (1978) 141 CLR 88 at 143 per Mason J. The Victorian Supreme Court in *R v Tikos (No 2)* [1968] VR 306, 313, held that the attack must be such that the defender is entitled to use defensive force that will cause grievous bodily harm. Howard notes that this is equivalent to a threshold requirement of a “seriously injurious attack”: Howard “Two Problems in Excessive Defence” (1968) 84 Law Quarterly Review 343 at 347.

²²⁷ This was observed by McAuley in “Excessive Defence in Irish Law” in *Yeo Partial Excuses to Murder* (Federation Press 1990) at 198.

²²⁸ Howard “Two Problems in Excessive Defence” (1968) 84 Law Quarterly Review 343 at 347.

²²⁹ In *R v Howe* (1958) 100 CLR 448 at 468, Taylor J argued that the Plea should be available to any excessive defender who had acted “primarily for the purpose of defending himself”.

²³⁰ McAuley “Excessive Defence in Irish Law” in *Yeo Partial Excuses to Murder* (Federation Press 1990) at 199.

7.169 Whether defensive force was justified is a matter of fact which is ultimately for the jury to decide. In the case of *People (DPP) v Nally*²³¹, the Court of Criminal Appeal had to consider whether the trial judge had misdirected the jury by allowing only the Plea of Excessive Defence to go to the jury and precluding them from acquitting the defendant on grounds of full self-defence, in circumstances where he thought a finding of full self-defence would have been perverse on the facts. The Court of Criminal Appeal held that it is an unconstitutional interference with the right of juries to deliver a verdict, for a trial judge to direct them to return a guilty verdict. While the trial judge can legitimately express an opinion on the evidence, and may direct an acquittal, he cannot direct the jury to convict. The decision of the Court of Criminal Appeal is important for both its affirmation of the Plea of Excessive Defence in Irish law and for its holding that it is not permissible for a trial judge to allow a jury to consider only the Plea of Excessive Defence and not the full defence of self defence where an issue of self-defence has been raised on the facts.

(c) Subsequent Developments in Australia

7.170 As a result of the Privy Council's rejection of the Plea of Excessive Defence in *Palmer*, the issue was brought back before the High Court of Australia in *Viro v R*.²³²

7.171 Overturning the appellant's murder conviction,²³³ a majority²³⁴ of the Court reaffirmed the availability of the Plea of Excessive Defence as recognised in *Howe*. The Plea was available where "more force was used than was reasonably proportionate" but where the accused honestly believed to the contrary.²³⁵

7.172 However, in *Zecevic v DPP*,²³⁶ decided a decade later, the majority of High Court of Australia abandoned the Plea and adopted the approach set out in *Palmer*.²³⁷

²³¹ Unreported, Court of Criminal Appeal 2006, Kearns J.

²³² (1978) 141 CLR 88.

²³³ The primary ground for upholding the appeal against conviction was that the trial judge had misdirected the jury in relation to the relevance of intoxication.

²³⁴ Although only three of the seven judges expressly endorsed the Plea (Mason, Stephen and Aickin JJ), Jacobs J would also have done so if he was wrong that a honest belief that the response was not excessive was sufficient to ground the full defence. See Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 149-150.

²³⁵ *R v Viro* (1978) 141 CLR 88 at 147.

²³⁶ (1987) 71 ALR 641.

²³⁷ Although the Plea of Excessive Defence had not been raised by either prosecution or defence counsel on appeal, the High Court took it upon itself to reconsider the status

7.173 It appears that the principal motivation for abandoning the Plea was the perception that it was too complex to be easily understood by juries.²³⁸ It would seem that the main cause of the confusion was the complicated way in which Mason J had set out his six propositions in *R v Viro*; they were expressed in negative terms (in order to integrate the onus of proof) and the multiple references to “reasonableness” had different meanings.²³⁹

7.174 Given that this problem would be relatively straightforward to rectify, Yeo has questioned “whether the majority judges in *Zecevic* were being over-zealous in throwing out the doctrine in their attempt to simplify the general law of self-defence.”²⁴⁰ The authors notes that various courts and legislatures in Australia and elsewhere have devised formulations that need not create the same problems for jurors.²⁴¹

7.175 However, the majority in *Zecevic* also drew on the key arguments advanced by the English courts to reject the Plea; namely, that the problem of excessive defence is adequately accommodated under the existing defences and therefore the Plea is superfluous.²⁴² Similar views have been expressed by commentators regarding the *Dwyer* Plea.²⁴³ It is necessary to consider these alternative avenues of (partial) exculpation in greater detail.

of the Plea in this case. Indeed, Excessive Defence did not appear to arise on the facts (if anything, it posed a problem of putative defence).

²³⁸ *Zecevic v DPP* (1987) 71 ALR 641 at 651.

²³⁹ *Ibid.*

²⁴⁰ Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 151. Indeed, the two minority judges were of the view that the Plea could be reformulated in a less complicated fashion. Gaudron J suggested, at 671-672, that the Plea should be available if the defender “believed on reasonable grounds that it was necessary to resort to force in self-defence, and otherwise believed, although unreasonably, that his or her actions were necessary in self-defence.” Deane J suggested, at 667, that the Plea should be available where the defender “believed that what he was doing was reasonable and necessary in his own defence against an unjustified attack which threatened him with death or serious bodily harm” but that belief was not reasonable.

²⁴¹ For example, Yeo noted that there was no indication that the Howe doctrine had created problems for juries prior to the enunciation of the *Viro* propositions: Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 151. See also 182-185. Elsewhere, the author has noted that a statutory Plea of Excessive Defence introduced in 1997 in South Australia, sections 15(1) and 15A(1) of the Criminal Law Consolidation Act 1935, “appears to be working well in practice”: Yeo “Partial Defences to Murder in Australia and India” (2003) at paragraph 4.16.

²⁴² *Zecevic v DPP* (1987) 71 ALR 641 per Wilson, Dawson and Toohey JJ at paragraph 21.

²⁴³ See Stannard “Shooting to kill and the manslaughter option” [1992] ICLJ 19; Dwyer “Homicide and the plea of self-defence” [1992] ICLJ 73.

(d) *The Flexible Test of Reasonableness as set out in Palmer*

7.176 The majority in *Zecevic* adopted the *Palmer* “gloss” on the reasonableness test.²⁴⁴ As discussed above, *Palmer* indicated that, although defenders were required to meet a normative standard of conduct, significant emphasis would be placed on the defender’s belief that this standard was met. Given the flexible nature of the *Palmer* test, in many cases excessive defenders might find that they would receive the *full* defence in cases where the Plea would otherwise result in a manslaughter verdict; indeed, it might be expected that only grossly negligent excessive defenders would be denied a full defence. Arguably, it is fair and just that excessive defenders who display such extreme negligence should be held fully accountable for murder.²⁴⁵

7.177 However, Deane J – who delivered a dissenting judgment in *Zecevic* – argued that it is an indictment, rather than a vindication of the law that juries must rationalise “what was unreasonable... as reasonable” in order to avoid an unjust murder verdict. Moreover, Deane J considered it undesirable that the only alternative to an unduly harsh murder conviction was to find excessive defenders not guilty of any crime at all.²⁴⁶

(e) *The Partial Defence of Provocation*

7.178 Adopting the observation of the English Court of Appeal in *R v McInnes*, the majority in *Zecevic* suggested that the Plea of Excessive Defence is superfluous given that excessive defenders may well be able to rely on partial defence of provocation.²⁴⁷

7.179 Again, this argument is rejected in the dissenting judgment of Deane J:

“The defences are... quite distinct. Excessive self-defence may well be available in circumstances where there is no basis at all for a defence of provocation. Indeed, in some circumstances there may be an element of inconsistency between a genuine (albeit unreasonable) belief that what was done was done reasonably in self-defence (or defence of another) and the loss of control which ordinarily lies at the heart of a defence of provocation.”²⁴⁸

²⁴⁴ *Zecevic v DPP* (1987) 71 ALR 641 per Wilson, Dawson and Toohey JJ at paragraph 22.

²⁴⁵ Stannard “Shooting to kill and the manslaughter option” [1992] ICLJ 19 at 28.

²⁴⁶ *Zecevic v DPP* (1987) 71 ALR 641 per Deane J at paragraph 12.

²⁴⁷ *Ibid* per Wilson, Dawson and Toohey JJ at paragraph 21. See also Stannard “Shooting to kill and the manslaughter option” [1992] ICLJ 19 at 22.

²⁴⁸ (1987) 71 ALR 641 at 664-665.

7.180 Firstly, an excessive defender “may well have employed excessive force when in total control of himself, yet honestly believing that force to be necessary.” Secondly, an excessive defender might not be able to satisfy the normative requirement of proportionality traditionally associated with the plea of provocation²⁴⁹ (albeit that this is unlikely to pose difficulties to excessive defenders under the current subjectivised test of provocation adopted in this jurisdiction²⁵⁰). Thirdly, the rationale underlying the Plea of Excessive Defence is quite different to that of provocation:

“Anger is a primary feature of provocation. Self-defence is based... upon the moral imperative of self-preservation. In self-defence, [the defender] has a worthy motive, in provocation he or she has none.”²⁵¹

7.181 Hence, some commentators argue that it is untenable to accommodate those who lose self-control in anger but not those who act on the basis of an honest misjudgement.²⁵²

(f) Absence of Intent to Kill

7.182 If the plea of provocation was unavailable, the majority in *Zecevic* argued that excessive defenders may nevertheless be entitled to reduced liability in the absence of proof of an intention to kill.²⁵³ On this view, excessive defenders could escape liability for murder but would remain guilty of manslaughter on the grounds that their conduct had been either grossly negligent or unlawful and dangerous.²⁵⁴

7.183 However, this view is arguably based on a misunderstanding of the nature of excessive defence as an act of intentional killing. In *People (AG) v Dwyer*, Walsh J highlighted the point that excessive defence is a

²⁴⁹ Doran “The Doctrine of Excessive Defence: Developments Past, Present and Potential” (1992) 36 NILQ 314 at 326.

²⁵⁰ Law Reform Commission Consultation Paper on Homicide: The Plea of Provocation (LRC CP 27 – 2003). However, see *People (DPP) v Dunne* Court of Criminal Appeal Geoghegan, O’Higgins and Peart JJ 25 November 2002 (ex tempore), where the Court held that it was proper for the Plea of Excessive Defence to be put to the jury but for the plea of provocation to have been withheld.

²⁵¹ Airall “Excessive Self-Defence in Australia: Change for the Worse?” in *Yeo Partial Excuses to Murder* (Federation Press 1990) at 185.

²⁵² Doran “The Doctrine of Excessive Defence: Developments Past, Present and Potential” (1992) 36 NILQ 314 at 335.

²⁵³ *Zecevic v DPP* (1987) 71 ALR 641 per Wilson, Dawson and Toohey JJ at paragraph 22.

²⁵⁴ This argument is discussed and rejected by Doran for the reasons set out below: “The Doctrine of Excessive Defence: Developments Past, Present and Potential” (1992) 36 NILQ 314 at 328.

species of *voluntary* homicide – that is, the defender intended to kill or cause serious harm – and noted that “[i]f it was simply a question of involuntary homicide none of the present difficulties would arise in respect of the question of whether or not the offence might be manslaughter.”²⁵⁵

7.184 Interestingly, Butler J appeared to accept that excessive defence may be treated as a species of *involuntary* homicide.²⁵⁶ Hence, he submitted that, although the English courts claimed to reject the Plea, the acceptance by the *Palmer* and *McInnes* decisions that excessive defenders might lack an intention to kill was consistent with the Plea’s recognition in Ireland²⁵⁷ and Australia.²⁵⁸ However, Butler J appears to stand alone in holding this view.

7.185 Hence, commentators such as Yeo caution that, whilst involuntary manslaughter and the Plea lead to the same outcome, care should be taken not to confuse the two concepts.²⁵⁹

(g) Developments in other Common Law Jurisdictions

7.186 The Plea of Excessive Defence is not, and never has been, available under New Zealand law.²⁶⁰ Whilst the New Zealand Law Commission has recently acknowledged the strength of the arguments in favour of the Plea,²⁶¹ it declined to recommend its introduction given its view that all partial defences to murder should be accommodated at sentencing.²⁶²

7.187 In Canada, despite the absence of any express statutory basis, the Plea was embraced by the lower courts from the 1940s until it was abolished

²⁵⁵ [1972] IR 416 at 422.

²⁵⁶ [1972] IR 416, 430-432.

²⁵⁷ However, as discussed earlier, Walsh J held that the excessive defender was a species of voluntary manslaughter.

²⁵⁸ As discussed above, Menzies J in *R v Howe* (1958) 100 CLR 448 specifically rejected the argument that excessive defence was a species of involuntary manslaughter. This view was subsequently adopted by the majority in *Viro v R* (1978) 141 CLR 88.

²⁵⁹ Yeo “Applying Excuse Theory to Excessive Self-Defence” in *Yeo Partial Excuses to Murder* (Federation Press 1990) at 163.

²⁶⁰ *Wallace v Abbott* New Zealand Court of Appeal 14 June 2002 at paragraph [107], adopting the approach in *Palmer*.

²⁶¹ The New Zealand Law Commission Report on Some Criminal Defences with Particular Reference to Battered Defendants (R 73 – 2001) at 25. The Commission acknowledged that the Plea had greater merit than provocation or diminished responsibility given that excessive defenders intend to act lawfully whereas claimants to the other partial defences do not. Furthermore, the Commission was not concerned that the Plea would involve the undue complexity that plagued the Australian version.

²⁶² The New Zealand Law Commission Report on Some Criminal Defences with Particular Reference to Battered Defendants (R 73 – 2001) at 26.

by the Canadian Supreme Court in the 1983 decision, *R v Faid*.²⁶³ Speaking for the Supreme Court, Dickson J expressed concern that the “half-way house” defence “would require prolix and complicated jury charges and would encourage juries to reach compromise verdicts to the prejudice of either the accused or the Crown.”²⁶⁴

7.188 Since that decision, though there have been repeated calls for reform of the Canadian law relating to legitimate defence,²⁶⁵ there has been little support for the reinstatement of the Plea.²⁶⁶

7.189 In contrast, the attitude of law reform bodies in England and Wales toward the Plea since *Palmer* has been positive.²⁶⁷ This stance does not appear to have been affected by the High Court of Australia’s abandonment of the Plea in *Zecevic*. In its 1989 Report, the Law Commission of England and Wales noted that the Australian change was brought about not because the Plea was flawed in principle but as a result of the difficulties juries were having in comprehending the test; the Commission was confident that its reforms could be drafted in such a way as to avoid the same pitfalls.²⁶⁸ Calls for reform received the further backing of a House of Lords Select Committee in its *Report on Murder and Life*

²⁶³ (1983) 1 SCR 265.

²⁶⁴ *Ibid.*

²⁶⁵ See generally the Canadian Department of Justice “Consultation Paper on Reforming Criminal Code Defences: Provocation, Self-Defence, Defence of Property” (1998).

²⁶⁶ One of the few reform bodies to call for the reintroduction of the Plea has been the Canadian Bar Association Criminal Codification Task Force. They recommended a provision along the following lines: “A person who uses excessive force in self-defence or in the defence of another and thereby causes the death of another human being is not guilty of murder, but is guilty of manslaughter”: Report of the Canadian Bar Association Criminal Codification Task Force, “Principles of Criminal Liability – Proposals for a New General Part of the Criminal Code of Canada” (1992), at 71. However, the Plea did not find support with the Law Commission of Canada (Report on Recodifying Criminal Law (No 31, 1987) at 36-7) nor Judge Ratushny in her Self Defence Review (Submitted to the Minister of Justice of Canada and Solicitor General of Canada 11 July 1997) Chapter 5, text at footnotes 71-73. Whilst Judge Ratushny was sympathetic towards the Bar Association recommendation, she concluded that excessive defence could be adequately covered by the law of provocation or by mitigation at sentencing.

²⁶⁷ See the English Criminal Law Revision Committee’s Fourteenth Report *Offences against the Person* (Cmnd 7844 – 1980) at paragraph 288; Criminal Code Team Report to the Law Commission of England and Wales *Codification of the Criminal Law* (No 143 – 1985) at paragraphs 15.18-15.19.

²⁶⁸ The Law Commission of England recommended the introduction of a Plea of Excessive Defence in its Report on A Criminal Code for England and Wales (No 177 – 1989) at 14.19.

Imprisonment in which it argued that the current law in England and Wales is unduly harsh on excessive defenders.²⁶⁹

7.190 The matter came before the House of Lords in *R v Clegg*²⁷⁰ in which the Court held with apparent “regret” that the Plea was not available under English law.²⁷¹ Though it took account of the repeated calls for the introduction of the Plea, it considered that it was ultimately a matter for the legislature.²⁷² The Court of Appeal restated this view recently in *R v Martin*.²⁷³

7.191 The Law Commission has recently returned to the issue in its 2003 *Consultation Paper on Partial Defences to Murder*.²⁷⁴ A series of proposals was put forward but no recommendations will be made until the Commission’s Report is published later this year.

(h) Subsequent Developments in Ireland

7.192 In the ensuing three decades there has been little appellate discussion of the *Dwyer* Plea. Nevertheless, it has been reaffirmed by the Court of Criminal Appeal on a number of occasions.

7.193 The clearest endorsement of the decision has come via the Court of Criminal Appeal’s 1994 judgment, *People (DPP) v Clarke*.²⁷⁵ Whilst overturning the appellant’s murder conviction on other grounds, the Court described as “impeccable” the portion of the trial judge’s direction to the jury which “dealt fully with what might be termed *People (AG) v Dwyer* [1972] IR 416 manslaughter option.”²⁷⁶ The Court also quoted at length from Walsh J’s judgment in *Dwyer* and summarised the law of excessive defence as follows:

²⁶⁹ House of Lords Report of the Select Committee on Murder and Life Imprisonment (No 78 – 1989) at 28.

²⁷⁰ [1995] 1 All ER 334. For discussion, see Kaye “Excessive Force in Self-Defence After *R v Clegg*” (1997) 61 *Journal of Criminal Law* 448.

²⁷¹ [1995] 1 All ER 334 at 344.

²⁷² [1995] 1 All ER 334 at 345-347.

²⁷³ [2002] 1 Cr App R 27 at 326 (English Court of Appeal).

²⁷⁴ Law Commission of England and Wales Consultation Paper Partial Defences to Murder (2003 CP 173).

²⁷⁵ [1994] 3 IR 289. The Supreme Court had implicitly endorsed the *Dwyer* decision the previous year in *People (DPP) v Davis* [1993] 2 IR 1, albeit that *Dwyer* was mentioned only in passing as an example of a legal direction to be given to juries in cases of self-defence.

²⁷⁶ [1994] 3 IR 289 at 300.

“[W]here self-defence fails as a ground for acquittal because the force used by the accused went beyond that which was reasonable in the light of the circumstances but was no more than the accused honestly believed to be necessary in the circumstances, he is guilty of manslaughter and not of murder.”²⁷⁷

7.194 Inexplicably, however, the Court then cited a passage from the Privy Council’s judgment in *Palmer v The Queen*²⁷⁸ as “setting out the parameters of how a jury should approach this question of self-defence”²⁷⁹ notwithstanding that *Palmer* had rejected the approach adopted by *Dwyer*. No explanation was forthcoming from the Court of Criminal Appeal as to how the endorsements of both *Dwyer* and *Palmer* should be reconciled.

7.195 Subsequent to *Clarke*, the *Non-Fatal Offences against the Person Act 1997* was enacted, which, on one interpretation, might be said to codify the law relating to both non-fatal and fatal offences.²⁸⁰

7.196 Assuming for the purposes of argument that the 1997 Act applies to homicide offences, a strong argument could be made the Plea has thereby been abolished. No provision is made for the operation of the Plea under the Act; to the extent that the Act claims to codify the law relating to legitimate defence, one might have expected that the legislature would have expressly identified any vestiges of the previous scheme it intended to remain law. Indeed, section 22 of the Act expressly provides that “any defence available under the common law in respect of the use of force within the meaning of [the provisions concerned with legitimate defence] is hereby abolished.”²⁸¹

7.197 However, an argument could be advanced that the retention of the Plea is consistent with the 1997 Act. This argument depends on one’s acceptance that the Plea is not in the nature of a *defence*, but rather is a denial of an element of the *offence*, namely the *mens rea* of murder. The Plea would, therefore, not be expressly abolished by section 22 of the Act. Furthermore, whilst the Act indicates that excessive defenders are guilty of

²⁷⁷ [1994] 3 IR 289 at 299.

²⁷⁸ [1971] AC 814 at 831.

²⁷⁹ [1994] 3 IR 289 at 299-300.

²⁸⁰ For discussion, see paragraphs 1.15 - 1.19 above. It should be noted that the Law Commission’s 1994 *Report on Non-Fatal Offences Against the Person* (LRC 45-1994), upon which the 1997 Act was based, expressly restricted its ambit to non-fatal offences. Indeed, the Commission was aware of the *Dwyer* Plea and showed no inclination to recommend its revocation.

²⁸¹ Section 22(2) of the *Non-Fatal Offences against the Person Act 1997*.

“an offence” on the basis that they use unreasonable force,²⁸² there is nothing to suggest that that this offence should be murder and not manslaughter. Alternatively, it may be argued that the Plea remains available to excessive defenders on the ground that the 1997 Act does not apply to homicide offences.²⁸³

7.198 Whilst the appellate courts do not appear to have been asked to determine the ambit of the 1997 Act in this context, the Court of Criminal Appeal appears to accept that the Plea continues to be available in homicide cases.²⁸⁴

7.199 In 2004, the Court of Criminal Appeal addressed the issue again in *DPP v O’Carroll*. In that case, the applicant argued that the trial judge had erred in failing to direct the jury on the possible verdict of manslaughter. The Court of Criminal Appeal held that the jury should have been told to approach the case in the manner required by *People (AG) v Dwyer*. This meant that they should have been told to consider not only

“whether there was evidence that a situation of self-defence had arisen, but whether the defendant had or had not employed more force in self defence than was reasonable necessary, and whether he had used more force than was reasonable necessary, but no more than he honestly believed to be necessary. In the latter event, they should have been told that the appropriate verdict was manslaughter.”

7.200 The Court of Criminal Appeal considered that the basis on which Dwyer’s case had been left to the jury was very similar to that in the present case, and held that the trial judge had failed to place the possibility of the verdict of manslaughter before the jury, and the jury were thus left with an erroneous view of the role of self defence. The applicant’s conviction was quashed and a retrial was ordered.

7.201 The relative dearth of appellate jurisprudence, whilst surprising given the uncertainty surrounding the ambit of the *Dwyer* Plea, may be accounted for by the tendency of the prosecution to charge with

²⁸² Sections 18(1) and 19(1) of the *Non-Fatal Offences against the Person Act 1997* state that the use of defensive force that is reasonable in the perceived circumstances “does not constitute an offence”.

²⁸³ See paragraphs 1.15 - 1.19 above.

²⁸⁴ In *People (DPP) v Dunne* Court of Criminal Appeal Geoghegan, O’Higgins and Peart JJ 25 November 2002 (ex tempore), the Court overturned the appellant’s murder conviction on the ground that the trial judge failed to explain the Plea of Excessive Defence to the jury. See also *People (DPP) v Kelly* [2000] 2 IR 1 at 10, in which the Court of Criminal Appeal contrasted the partial defence of provocation, with which the case was directly concerned, with the plea of excessive defence, referring with apparent approval to Dwyer.

manslaughter rather than murder those who seem entitled to the defence, “thereby reducing to a trickle the number of cases in which the issue of excessive defence is relevant.” Alternatively, “it may simply reflect the heavy procedural bias in Irish criminal law which, since the advent of judicial activism in the 1960s, has led to a virtual eclipse of substantive criminal law appeals.”²⁸⁵

(6) Excessive Defence and the Fixed Penalty for Murder

7.202 It may be argued that excessive defender’s reduced culpability is better reflected at sentencing stage rather than as a Plea. Arguably, excessive defence, like partial defences such as provocation, merely serves to circumvent the rigidity of the mandatory sentence for murder; if the mandatory sentence was removed, so too would be the purpose of their existence.²⁸⁶

7.203 However, the Commission has repeatedly expressed the view that, whilst it favours the abolition of the fixed penalty for murder, it is strongly in favour of retaining the distinction between murder and manslaughter.²⁸⁷ The Plea of Excessive Defence draws on this distinction to reflect the moral significance of an excessive defender’s reduced culpability, permitting not only an appropriate sentence but also the proper labelling. Convictions for murder, as society’s most serious condemnation, should be reserved for the most heinous of killers, a category into which excessive defenders arguably do not fall:

“[I]t would be most inappropriate, indeed unjust, to label a person who has acted in excessive self-defence a ‘murderer’ and to then temper her or his sentence.”²⁸⁸

7.204 If there is genuine concern that the mandatory penalty is unduly harsh in certain circumstances, then the answer is to examine whether the category of murder is over inclusive. Such an examination is an important aspect of the Commission’s current series of papers on homicide. The

²⁸⁵ McAuley “Excessive Defence in Irish Law” in Yeo *Partial Excuses to Murder* (Federation Press 1990) at 194-195. See also McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 745-746.

²⁸⁶ Yeo considers but rejects this argument in *Unrestrained Killings and the Law* (Oxford University Press 1998) at 171-174.

²⁸⁷ See Law Reform Commission *Report on Sentencing* (LRC 53 – 1996) at 68, Recommendation 12; Seminar Paper on *Homicide: The Mental Element in Murder* (LRC SP1 – 2001) at 5-8; *Consultation Paper on Homicide: The Plea of Provocation* (LRC CP 27 – 2003) at 132.

²⁸⁸ Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 172. See also Doran “The Doctrine of Excessive Defence: Developments Past, Present and Potential” (1992) 36 NILQ 314 at 334.

alternative – increasing judicial discretion at sentencing – might seem inviting as a convenient short-term fix, but ultimately achieves no more than ‘sweeping under the carpet’ fundamental questions regarding the proper limits of criminal liability.

(7) *The Ambit of the Plea of Excessive Defence*

7.205 As discussed above, arguments may be marshalled both for and against the retention of the Plea. On one hand, detractors argue that it introduces unnecessary complexity given the ability of the criminal law to accommodate excessive defences under alternative defences and pleas. On the other, supporters argue that it provides a useful ‘half-way house’ that best reflects the reduced moral culpability of those whose intentions are to act within the bounds of a lawful defence but, in actuality, exceed them.

7.206 However, it has been seen that one of the principal deficiencies surrounding the operation of the Plea in this jurisdiction is its lack of precise definition. This is a matter that requires further consideration and clarification.

7.207 Firstly, there is uncertainty as to whether the Plea applies, or should apply, to putative defence. This issue turns largely on whether putative defence is governed by a normative standard; if not (*ie* in the event that a narrative standard applies), there would be no room for a partial defence to operate. However, if the normative standard *does* apply to putative defence, then it would be illogical for the Plea not to apply.

7.208 Secondly, whilst the Plea typically applies in cases in which disproportionate force is used – say, where a defender uses more force than is permissible against a non-deadly threat – one might argue that it logically extends to an error of law relating to any of the elements of the test for legitimate defence; namely, the unlawfulness, imminence, and necessity requirements. Consider the following examples:

- i) An arrestee uses lethal force against member of the Gardaí in the mistaken belief that the actions of Garda are unlawful.
- ii) A battered woman uses lethal force against her sleeping abuser in ignorance that the law requires the threat to be imminent.
- iii) A defender uses lethal force to repel an attacker; the defender is aware of a safe avenue of retreat but fails to avail of it in ignorance of the duty to retreat.

7.209 Whilst it may be proper to deny a *full* defence to the defenders in these examples, a partial defence would arguably better reflect their reduced culpability.

7.210 The potential role of this broader application of the Plea of Excessive Defence is discussed below.²⁸⁹

E Options for Reform

(1) Introduction

7.211 It is difficult to state with certainty the law as it applies to homicide in this jurisdiction.

7.212 If legitimate defence in homicide is still governed by the common law then it seems that both putative defence and excessive defence are governed by normative standards. In addition, a Plea reducing murder to manslaughter is available for those who act honestly in defence but fail to satisfy the required standard of belief. However, a number of issues remain unclear. Significantly, the courts have shown a recent inclination towards the narrative standard in relation to putative defence (consistent with the approach adopted under the *Non-Fatal Offences against the Person Act 1997*). Furthermore, it is a matter of debate whether the Plea applies to both putative defence and excessive defence. These issues require clarification.

7.213 The issue is somewhat clearer in the event that the 1997 Act applies to homicide. Under this Act, putative defence is governed by the narrative standard and excessive defence by the normative standard. It follows approaches adopted in a number of other common law jurisdictions including England and Wales.

7.214 However, many theorists criticise this model for being internally inconsistent. Whilst putative defence is framed as an excuse, excessive defence is treated in the nature of a justification. In effect, it is assumed that defenders have *no free choice* as to the way in which they *perceive* the world, but *are free to choose* the way in which they *respond* to those perceptions; this intermingling of approaches has been criticised as “philosophically incoherent”²⁹⁰ which must be difficult for juries to comprehend.²⁹¹

7.215 Is there a more coherent model which may provide the basis for reform?

²⁸⁹ See paragraphs 7.268-7.280 below.

²⁹⁰ Heller “Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases” (1998) 26 Am J Crim L 1 at 75-78.

²⁹¹ Heller “Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases” (1998) 26 Am J Crim L 1 at 72.

(2) Models for Reform

7.216 Broadly speaking, it is submitted that there are three potential models upon which reform could be based, namely, an excuse-based model; a justification-based model and a dual model comprising both separate justification and excused based defences.

(a) An Excuse-Based Model

7.217 Under an excuse based model, one would expect that putative and excessive defence would both be governed by either the narrative or normative standard of excuse.

7.218 The principal advantage of applying the normative standard to both types of cases of mistaken defence is that it holds each member of society to the same standard of conduct but, at the same time, makes allowance for human frailties. This approach is adopted in Canada²⁹² and at common law in Australia.²⁹³

7.219 Alternatively, the adoption of the narrative standard would recognise that defenders can control neither the way they perceive the world nor their responses to those perceptions. The sole requirement that defenders act honestly ensures that liability is not established by negligence alone. However, at present, there would appear to be no common law jurisdiction that adopts this model.

(b) A Justification-Based Model

7.220 Under a justification-based model, one would expect that putative and excessive defence would both be governed by either the deeds-based approach or, at least, the normative standard of justification.

7.221 The primary advantage of a deeds-based model is that it clearly delineates actual and mistaken defence. As such, it provides an educative role insofar as it clearly communicates the type of conduct expected of members of society. Furthermore, it avoids the confusion caused by placing the separate concepts within the same defence.

7.222 In contrast, the normative standard of justification makes allowance for mistakes that ordinary people would make; in doing so, it, too, fulfils an educative function insofar as it asserts that members of society will be justified in acting on the basis of reasonably grounded beliefs. To the extent that allowance is made for errors of law, it is argued that the initiator, rather than the defender, should carry the risk of the excessive force; hence, a reasonable degree of error is justifiable.

²⁹² *R v Cinous* [2002] 2 SCR 3 at 26

²⁹³ *Zecevic v DPP* (1987) 71 ALR 641. The majority took the view that the legitimate defence was primarily an excuse based defence.

(c) A Dual Model

7.223 The final model for consideration makes provision for separate defences of justification and excuse. Defenders who fall short of the requirements of justification can nevertheless qualify for a separate excuse-based defence.

7.224 The advantage of this model is that it all incorporates the advantages of the excuse and justification based models and, at the same time, clearly delineates between actual and putative defence.

7.225 *Accordingly, the Commission provisionally recommends the adoption of the dual model of reform, which would comprise both separate justification and excused based defences.*

(3) The Role of the Partial Defences

7.226 In the event that a justification-based approach (*ie* a normative standard or a deeds-based approach) was adopted in relation to putative defence and / or excessive defence, arguably fairness would dictate that a partial defence should also be available to accommodate those who act honestly but fall short of the required standard of belief.

7.227 However, whilst the Plea would soften any harshness that might result from the imposition of a justification-based full defence, it would nevertheless render negligent mistaken defenders guilty of manslaughter. In other words, *simple* negligence would be sufficient to base a verdict of manslaughter. However, this would arguably be contrary to the ordinary rules of criminal liability (the doctrine of gross-negligence manslaughter) under which *gross* negligence is required to establish a manslaughter verdict.

7.228 By the same token, if the Plea is to be consistent with the doctrine of gross-negligence manslaughter, arguably the Plea should be available to *grossly* negligent defenders.

7.229 However, it should be recalled that the gross-negligence manslaughter is a species of *involuntary* manslaughter and therefore direct comparisons may not necessarily be valid.

F Conclusions

(1) Mistakes of law and mistakes of fact

7.230 The initial question to be determined is whether the current difference in treatment between putative defence and excessive defence should be retained. There is one key distinction between putative defence and excessive defence; the former is concerned with errors of fact and the latter with errors of law. Historically, the common law has always adopted a

stricter approach to errors of law. On this basis, it may be argued that there should be a distinction between these two defences.

7.231 This traditional approach has however been subjected to criticism. For example, in *Zecevic v DPP*, Deane J submitted that there was “no real basis in principle or justice” for drawing distinctions between the moral culpability of defenders who act on the basis of mistaken perceptions or who respond excessively.²⁹⁴ The Commission agrees with this criticism.

7.232 Furthermore, one commentator has observed that it would be paradoxical if putative defenders – who are not actually under attack – are subject to a less stringent test than excessive defenders who do respond, albeit excessively, to real threats.²⁹⁵

7.233 It should be observed also that while the principle that ignorance of the law is no excuse is well-established in the law, there are exceptions to this principle.²⁹⁶ In addition to this, many jurisdictions have departed from this principle. Several civilian jurisdictions allow a defence of reasonable mistake of law. For example, the *German Criminal Code* provides a defence of unavoidable or non-negligent mistake of the law.²⁹⁷ Ignorance of the law is also a defence in certain circumstances under South African law.²⁹⁸

7.234 It is beyond the scope of this Paper to give a detailed critique of the *ignorantia juris non excusat* principle. This discussion has however illustrated that this principle is not universally accepted or applied. Accordingly, the Commission feels that it is appropriate to recommend exceptions to this principle, where they are so required.

7.235 The Commission accepts that for coherency and clarity, both these defenders should be subject to the same rules. Directing the jury on the difference between these two forms of mistake for the purpose of legitimate defence is likely to cause confusion. No true rationale can be devised for distinguishing between these two forms of mistake in this instance.

²⁹⁴ (1987) 71 ALR 641 at paragraph 15.

²⁹⁵ Fairall “Excessive Self-Defence in Australia: Change for the Worse?” in Yeo *Partial Excuses to Murder* (Federation Press 1990) at 184.

²⁹⁶ For example, the failure to publish a Statutory Instrument is a defence to a criminal charge brought under the Instrument to anyone unaware of its existence: Statutory Instruments Act 1947, section 3(3).

²⁹⁷ Article 17 of the German Criminal Code.

²⁹⁸ See *S v De Bolm* 1977 (3) SA 513, where the appellant had been convicted of taking money and jewellery out of South Africa without permission, which was contrary to the country’s Exchange Control Regulations. The conviction was quashed on the basis that “there was a reasonable possibility that she could have been under the impression that she did not need permission to take the jewellery out.” See *Ibid*, 533B-D.

7.236 Anyway, if the law was true to the principle *ignorantia juris non excusat* then one might expect that no latitude would be given to excessive defenders; yet, this is not the case.

7.237 *The Commission provisionally recommends that the test for legitimate defence should be the same for both putative and excessive defenders.*

(2) Models for Reform

7.238 The Commission has already accepted that recognising separate limbs of legitimate defence based on justification and excuse provides a coherent basis for reform of the problem of mistake.²⁹⁹ In this regard, as observed above, there are three models on which reform could be based. These are the excuse-based model, the justification-based model and the dual model.

7.239 It was accepted above that the dual model should be used as the basis for reform.³⁰⁰ Such a model would provide clear guidance to the public on what conduct was actually right and therefore justified and on what conduct was wrong but nonetheless excused. It incorporates the advantages of the excuse and justification-based models. Any harshness that would result from a justification-based defence would be alleviated by the availability of a defence based on excuse.

7.240 This model also ensures that a clear distinction is drawn between actual and putative defence. The importance of drawing a clear distinction between actual and putative defence has already been highlighted in the Paper. In summary, the failure to separate these two defences leads to ambiguity in respect of the jury's verdict, the contradiction of Fletcher's incompatibility thesis and difficulty in the statutory drafting of the defence.³⁰¹

(3) Justification-Based Defence

7.241 There are two approaches which could be adopted in respect of the justification-based defence. Either the deeds-based approach to justification could be followed or alternatively, the normative approach to justification. Both these approaches have already been discussed.³⁰² The deeds-based approach holds that the label of justification should not attach to those who inaccurately perceive the circumstances of the attack. This is because, as their conduct is mistaken, it is "wrong" as opposed to "right"

²⁹⁹ See paragraph 7.30.

³⁰⁰ See paragraph 7.224.

³⁰¹ See paragraphs 7.73-7.77.

³⁰² See paragraphs 7.62-7.77 and 7.113-7.115.

conduct.³⁰³ In contrast, the normative-based approach suggests that putative defenders should be entitled to a justification defence if their mistakes were reasonable. Advocates of this approach claim that while this conduct may not be “right” in the strict sense, it is permissible or tolerable.³⁰⁴

7.242 However, the normative standard of justification fails to distinguish between actual and mistaken defence. Under this approach, both actual and mistaken defence are perceived as justified. The failure to draw a distinction between these two forms of defence has negative consequences. These are discussed earlier in this chapter.³⁰⁵ In summary, this approach leads to uncertainty as to the basis of the jury’s verdict, contradiction with Fletcher’s incompatibility basis and difficulty in the statutory drafting. It also leads to uncertainty in the law. Accordingly, the Commission provisionally recommends that the normative standard of justification should not be adopted.

7.243 Instead, the Commission accepts that the deeds-based approach is preferable. This approach draws a clear distinction between actual and mistaken defence as under this approach, actual defence would be justified while mistaken defence would not be justified but would be excused. This approach also has the advantage of upholding the law’s educative function insofar as it clearly conveys the type of conduct to be expected of members of society. Any harshness that this approach would involve would be alleviated by the creation of an excuse-based defence.

(4) *Excuse-Based Defence*

7.244 The Commission accepts that while putative defenders who act on mistaken beliefs should not be justified, in certain circumstances they should be excused. There are three possible approaches that could be adopted here. These three approaches are discussed in respect of both putative and excessive defenders in this chapter.³⁰⁶ Firstly, the normative-based approach to excuse could be followed. This approach holds that mistaken defenders may be excused if their mistakes could also have been made by the reasonable person.³⁰⁷ Secondly, the particularising standard of excuse could be accepted. This standard also expects defenders to meet reasonable

³⁰³ See Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 64 and Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994) at 16-17.

³⁰⁴ See McAuley “The Theory of Justification and Excuse: Some Italian Lessons” (1987) 35 *American Journal of Comparative Law* 359.

³⁰⁵ See paragraphs 7.73-7.77.

³⁰⁶ See paragraphs 7.78-7.87 and 7.116-7.132.

³⁰⁷ See Simester “Mistakes in Defence” (1992) 12 *OJLS* 295 at 306 on this.

standards of conduct but it makes allowances for the personal characteristics of individuals, which may influence the way in which individuals perceive the world.³⁰⁸ Thirdly, the narrative standard of excuse could be followed. This is also known as the reasons-based theory under the heading of excessive defence. This standard states that mistaken defenders should be excused even if their beliefs would not have been held by the ordinary person.³⁰⁹

7.245 The particularising standard has many advantages. For example, it is less likely to hold defenders to unrealizable standards of conduct.³¹⁰ Furthermore, it recognises that whilst defenders are responsible for many of their own personal characteristics, some are acquired through no fault of their own.³¹¹

7.246 However, the particularising standard has drawn some criticism on account of the difficulty in identifying characteristics that should qualify for the test.³¹² For example, if a court were to take account of the fact that a defender suffered from battered woman's syndrome, would it not be arbitrary to ignore the defender's social status, race or financial circumstances to the extent that these characteristics, too, affect the way in which she perceives the world?³¹³ Indeed, it is difficult to explain legally why politically unfavourable characteristics, such as racism or excessive irascibility, should not also be considered relevant.³¹⁴ Yet, the more characteristics are taken into account, the greater the risk that the standard collapses into the narrative approach focusing purely on the defender's perspective.³¹⁵

7.247 Schopp attacks the particularising standard at a more fundamental level. He suggests that the standard is nonsensical because it is based on the oxymoronic notion of the "reasonable person with impaired reasoning".³¹⁶

³⁰⁸ See Heller "Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases" (1998) 26 Am J Crim L 1.

³⁰⁹ See Heller "Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases" (1998) 26 Am J Crim L 1

³¹⁰ *Ibid* at 85-86.

³¹¹ *Ibid* at 86.

³¹² *Ibid* at 87-88.

³¹³ *Ibid* at 94.

³¹⁴ *Ibid* at 87-88.

³¹⁵ *Ibid* at 94.

³¹⁶ Schopp *Justification Defenses and Just Convictions* (Cambridge University Press 1998) at 122-123.

For example, the “reasonable battered woman” standard appears to impose a normative standard but at the same time makes allowance for errors of perception that may stem from the defender’s background of abuse.

7.248 Furthermore, taken to its logical conclusion, consistency would demand that the standard make allowance for all psychological impairments; this would lead to absurd standards such as the “reasonable psychotic” or even the “reasonable unreasonable person”.³¹⁷

7.249 Undoubtedly, the standard would also be problematic for juries to apply insofar as it asks jurors to make the leap into the mind of, say, the ordinary battered woman whose circumstances may be well beyond the jurors’ experience or comprehension.³¹⁸ Jurors may be tempted to assess the defender’s beliefs against the unmodified normative standard or against their own subjective belief structures.³¹⁹ For these reasons, the Commission suggests that this approach should not be adopted.

7.250 Alternatively, the narrative approach could be adopted. This approach has many advantages. It would be very simple for the jury to apply as it involves no difficult determination as to what a reasonable person or a reasonable person with certain personal characteristics would believe. It would therefore bring precision and certainty to the law. It is also arguably a just approach in that it excuses all defenders who genuinely make mistakes.

7.251 However, the narrative standard suffers from a key weakness; namely, it fails to ask whether mistaken defenders are in any way culpable for holding their mistaken beliefs.³²⁰ Given that it does not subject every defender to a single, unfluctuating standard of conduct it, “is likely to excuse a wide variety of socially unacceptable self-defensive... acts” including, to take an extreme example, “an individual who, because he honestly believes that Girl Scouts are actually communist assassins, kills in ‘self-defence’ a young girl who comes to his door to sell him cookies.”³²¹ Verdicts that have the appearance of injustice are detrimental not only to the individual victims but tend to undermine the integrity of the criminal justice system as a

³¹⁷ Schopp *Justification Defenses and Just Convictions* (Cambridge University Press 1998) at 122-123.

³¹⁸ Heller “Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases” (1998) 26 *Am J Crim L* 1 at 97-98.

³¹⁹ *Ibid* at 85.

³²⁰ Uniacke *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press 1994) at 44-45.

³²¹ *Ibid* at 65.

whole.³²² In addition to this, such a flexible standard does not sufficiently protect the attacker's or supposed attacker's right to life.

7.252 It has been suggested that if the mistake was so unreasonable as to amount to gross negligence then the defender may be liable for gross-negligence manslaughter.³²³ However, it is questionable whether gross-negligence manslaughter, as a category of *involuntary* homicide, can be properly applied to mistaken defence in cases where the defender *intends to kill*.³²⁴ As a result of this crucial weakness, the Commission does not recommend the adoption of this approach.

7.253 Finally, the normative-based approach could be adopted. This approach has a number of benefits. This approach strikes an adequate balance between the defender's and the attacker's or supposed attacker's interests. This approach ensures that a defender is exonerated from liability where his actions were reasonable. It seems unduly onerous to punish a defender who acted reasonably albeit wrongfully. As Schopp argues, the attacker, as the initiator of the violence, should carry the burden of any error regarding the level of the defender's response; after all, if the defender "uses less force than necessary, she might fail to dissuade the intrusion, possibly increasing the danger to her own interests."³²⁵ The wrongful act in this instance could also be due to the legislature's failure to define the law sufficiently precisely and clearly and the individual shall not incur liability for such a mistake.

7.254 However, this approach excludes those who hold unreasonable beliefs from its protection. This ensures that the life of the attacker or supposed attacker is also protected. The narrative approach is in breach of the attacker's or supposed attacker's right to life. Allowing the defender to act on a belief, however unreasonable, offers no real protection for the life of the attacker. For example, it would permit a defender to kill someone, who merely touched them, where the defender believed, as a result of a psychiatric condition, that this person was intending to kill them. Another example can be used to illustrate this point. The narrative approach would

³²² *People v Goetz* (1986) 68 NY2d 96 at 111 (Court of Appeals of New York).

³²³ Doran "The Doctrine of Excessive Defence: Developments Past, Present and Potential" (1992) 36 NILQ 314 at 315. See also section 3.09(2) of the US Model Penal Code which states that an honest but reckless or negligently held belief that defensive force is necessary excludes the operation of the legitimate defence provisions in relation to any offence based on recklessness or negligence.

³²⁴ For a discussion of this issue in the context of excessive defence, see paragraphs 7.182-7.185.

³²⁵ Schopp *Justification Defenses and Just Convictions* (Cambridge University Press 1998) at 76-77.

allow a putative defender to kill a member of a particular ethnic group, where this defender believed on racist grounds that this member constituted a threat to his or her life. Accordingly, the normative approach to excuse is preferable.

7.255 Critics of the normative approach however point out a number of shortcomings. Firstly, Williams questions the utility of imposing a requirement of reasonable belief: if its purpose is to compel actors to verify their beliefs before acting then it will often have little application to cases of legitimate defence where defenders are required to make instantaneous decisions without the possibility of verification.³²⁶ However, the Commission does not feel that this criticism has merit. Imposing a requirement of reasonable belief on individuals is not done to compel actors to verify their beliefs but rather to provide a standard against which their conduct can be judged and to ensure non-negligent behaviour is not punished.

7.256 Secondly, Williams argues that the standard does not make sufficient allowance for the fear and other emotions that may warp the judgment of a defender in the face of an apparently life-threatening attack.³²⁷ It should be noted, however, that this criticism is disputed by commentators such as Simester who point out that reasonable belief “is not ‘judged from the rational perspective of the cold light of day.’”³²⁸ Furthermore, the genuineness of a defender’s belief is taken into account in the assessment of reasonableness.

7.257 Thirdly, Schopp argues that the normative standard is not sufficiently sophisticated to exculpate those who hold *unreasonable* beliefs for *non-culpable* reasons; for example, the defender who forms an unreasonable belief as to the necessity for defensive force due to impaired intellectual capacity is treated the same way as the racist defender who forms an unreasonable belief due to prejudices against certain sections of the community.³²⁹ As will be seen later, this criticism is met if a partial defence is enacted in respect of honest but unreasonable beliefs.

7.258 Fourthly, given that different sectors of society are likely to hold varying views as to what might be described as a reasonably held belief, the normative standard potentially discriminates against defenders from marginalized sectors of the community whose views are likely to be

³²⁶ Williams Textbook of Criminal Law (Stevens & Sons 1978) at 452.

³²⁷ *Ibid.*

³²⁸ Simester “Mistakes in Defence” (1992) 12 OJLS 295 at 305-307.

³²⁹ Schopp Justification Defenses and Just Convictions (Cambridge University Press 1998) at 124-125.

underrepresented on juries. It is argued that underrepresented defenders are likely to receive justice only in a “lottery-like fashion” depending on when they are lucky enough to draw juries that shares their belief structures.³³⁰ However, the same criticisms could be directed at the narrative approach as if the jury find that the belief is an unreasonable one, they are unlikely to believe that the defender actually held it.

7.259 Finally, given that the normative standard inculcates the defender who acts on the basis of an “unreasonable” belief, mere negligence may be sufficient to establish liability; the negligent but honest defender is treated as severely as the cold-blooded murderer.³³¹ Such a result is said to be contrary to the criminal law’s general approach to homicide under which liability based on negligence is said to lack the heinousness associated with murder.

7.260 Furthermore, not only does the standard not reflect the moral culpability of the mistaken defender, but it is also said to violate the “voluntary act requirement” which asserts that a conviction for a serious crime is warranted only if there is proof of the mental element as to *all* aspects of the offence. A putative defender who unreasonably believes that defensive force is needed is said to lack the mental element for homicide.³³²

7.261 The counter-argument is that the requirement of *mens rea* applies only to the definitional elements of the *offence* of homicide and not to the elements of *defences* such as legitimate defence.

7.262 The definition / defence distinction was applied to legitimate defence at common law until the 1980s. However, it was the subject of ardent criticism, notably from Williams who argued that it was “irrational” to attempt to distinguish between offence and defence elements.³³³ He argued that a “defence is the negative condition of the offence”.³³⁴ The negative-defence elements are said to be encapsulated in the “unlawfulness” requirement of the *actus reus*; hence, an intent to act in *lawful* defence denies the *mens rea* as to this aspect of the offence. To adopt Williams’s colourful

³³⁰ Heller “Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases” (1998) 26 Am J Crim L 1 at 53. This article draws on empirical research conducted on US juries. Whether this argument is equally applicable to Irish juries can only be a matter of speculation.

³³¹ American Law Institute *Model Penal Code* and Commentaries (1985) Part I, Vol 2 at section 1.02(2)(c), discussed in Heller “Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases” (1998) 26 Am J Crim L 1at 60.

³³² Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 452.

³³³ Williams “Offences and Defences” (1982) 2 Legal Studies 233 at 251.

³³⁴ Williams *Textbook of Criminal Law* (2nd ed Stevens & Sons 1983) at 138.

illustration, the man who shoots his wife believing her to be a burglar – treated traditionally as a mistake as to an element of the *defence* – should be treated no differently to the man who shoots his wife because he believes her to be a rabbit – a mistake which denies the *mens rea* of the *offence*.³³⁵

7.263 Commentators such as Simester argue however that there is good reason to treat differently claims to defences such as legitimate defence. He points out that putative defenders are aware that they are inflicting harm on others; as the use of force is *prima facie* wrongful, defenders should be sure of having good reasons before acting.³³⁶ Compare the case of the individual who is unaware that what he or she is doing constitutes a wrong against another person. For example, the conduct of the man who mistakes his wife for a rabbit (in Williams’s example above) is *prima facie* lawful and therefore he need not point to good reasons for so acting.

7.264 In any event, this latter criticism would lack merit if a partial defence in respect of honest but unreasonable beliefs was adopted. If there was a partial defence, individuals guilty merely of negligence would not be guilty of murder. Rather, they could be guilty of manslaughter and their sentence could reflect their culpability. Most of the other criticisms, described above, would also be met if a partial defence was adopted. For example, if there was a partial defence, individuals who hold unreasonable beliefs for non-culpable reasons could be given a lesser sentence than those who hold these beliefs for culpable reasons. The arguments in favour and against establishing a partial defence are examined in the next section.

7.265 Accordingly, the Commission accepts that the normative-based approach to excuse should be adopted in this regard. Although a normative approach has the disadvantage of incorporating the somewhat uncertain “reasonable person” test,³³⁷ the precision which the Commission provisionally recommends in respect of the five elements of the test for legitimate defence would counteract any imprecision here.

7.266 This approach ensures that every individual in the community is held to the same standard of conduct but it also makes allowances for human weaknesses.³³⁸ It also safeguards the lives of the attacker and the defender to the greatest extent possible.

7.267 The Commission provisionally recommends that mistaken defence should not be regarded as a justification. However, mistaken

³³⁵ Williams *Textbook of Criminal Law* (2nd ed Stevens & Sons 1983) at 138.

³³⁶ Simester “Mistakes in Defence” (1992) 12 OJLS 295 at 307-309.

³³⁷ See paragraph 7.80 for an examination of the difficulty of determining what exactly amounts to a reasonable belief.

³³⁸ Simester “Mistakes in Defence” (1992) 12 OJLS 295 at 306.

defenders should be entitled to an excuse-based defence if their mistakes were reasonable – those ordinary people would make in similar circumstances.

(5) A Partial Defence?

7.268 Should a partial defence be available to both putative and excessive defenders who fall short of the belief requirements? Such a defence would mean that putative and excessive defenders who could not qualify for the full defence would be guilty of manslaughter as opposed to murder. Accordingly, a sentence could be imposed on them, which would reflect their true culpability.

7.269 In respect of putative defence, such a partial defence is rarely recognised. It could be argued however that the Supreme Court decision in this jurisdiction of *People (AG) v Dwyer*³³⁹ introduced such a partial defence into Irish law. In contrast, more jurisdictions have been willing to accept a partial defence in respect of excessive defence. However, this defence is still only recognised by a minority of jurisdictions. Ireland is one of these. It recognises a specific Plea of Excessive Defence which, if successful, renders an excessive defender guilty of no more than manslaughter. This Plea was firstly accepted in this jurisdiction in *People (AG) v Dwyer*³⁴⁰ and endorsed in *People (DPP) v Clarke*.³⁴¹

7.270 A partial defence is intended to reflect the degree of culpability associated with the excessive defender's misjudgement but, at the same time, it does not treat those who defend themselves "over-zealously" on a par with cold-blooded murderers.³⁴² It is arguable that a partial defence best reflects the culpability of these mistaken defenders. While defenders who are mistaken unreasonably should not be alleviated from all liability, it is unduly onerous to convict them of murder and consequently, subject them to life imprisonment. Manslaughter is arguably the appropriate offence in this instance.

7.271 Allowing for a partial defence has at least three further positive consequences. First, it lessens "the temptation for the jury to acquit perversely in cases where a strict application of the law would lead to the morally reprehensible result of a murder conviction."³⁴³ Secondly, the availability of more precise verdicts provides the sentencing judge with

³³⁹ [1972] IR 416.

³⁴⁰ [1972] IR 416.

³⁴¹ [1994] 3 IR 289.

³⁴² See Yeo "Applying Excuse Theory to Excessive Self-Defence" on the plea of excessive defence in *Yeo Partial Excuses to Murder* (Federation Press 1990) at 163.

³⁴³ *Ibid.*

greater appreciation of the jury's view of the gravity of the offending.³⁴⁴ Thirdly, by ensuring that the mistaken defender is neither fully justified nor fully condemned, the law delivers a clear moral message and the proper distinction between justification and excuse is maintained.³⁴⁵

7.272 This approach has been criticised for its complexity. For example, in Australia, the Plea of Excessive Defence was abandoned as it was perceived as too complex to be easily understood by juries.³⁴⁶ However, the Commission does not accept that this criticism has merit. As Yeo has observed, it is easy to formulate a partial defence which lacks complexity.³⁴⁷ Indeed, the formulation as set down in respect of excessive defence in *People (DPP) v Clarke*³⁴⁸ is simple and easy to understand. A simple test could also be devised for the partial defence in respect of putative defence.

7.273 It has also been argued that the problems of putative and excessive defence are sufficiently covered by the existing defences and therefore a partial defence is superfluous.³⁴⁹ Firstly, it is suggested that the Plea of Excessive Defence is superfluous as excessive defenders, although not putative defenders, could rely on the partial defence of provocation. However, this argument has already been rejected in this chapter, where it was accepted that the defence of provocation is not sufficiently wide to cover all the circumstances where a defender may use excessive defence.³⁵⁰ For example, an excessive defender "may well have employed excessive force when in total control of himself, yet honestly believing that force to be necessary."³⁵¹

7.274 Secondly, it is also argued that a putative and excessive defender who held unreasonable but honest beliefs would be entitled to reduced liability anyway as they lacked the intention to kill. It is argued that such a defender would remain guilty of manslaughter on the grounds that they were

³⁴⁴ Yeo "Applying Excuse Theory to Excessive Self-Defence" in Yeo *Partial Excuses to Murder* (Federation Press 1990) at 164. See also Doran "The Doctrine of Excessive Defence: Developments Past, Present and Potential" (1992) 36 NILQ 314 at 334

³⁴⁵ Yeo "Applying Excuse Theory to Excessive Self-Defence" in Yeo *Partial Excuses to Murder* (Federation Press 1990) at 165.

³⁴⁶ *Zecevic v DPP* (1987) 71 ALR 641.

³⁴⁷ Yeo *Unrestrained Killing and the Law* (Oxford University Press 1998) at 151.

³⁴⁸ [1994] 3 IR 289. See paragraph 7.193 for the summary of the law on excessive defence given in this judgment.

³⁴⁹ See Stannard "Shooting to Kill and the manslaughter option" [1992] ICLJ 19.

³⁵⁰ See paragraphs 7.180-7.181.

³⁵¹ Doran "The Doctrine of Excessive Defence: Developments Past, Present and Potential" (1992) 36 NILQ 314 at 326.

grossly negligent or had engaged in unlawful and dangerous conduct. However, it is clear that both putative defence and excessive defence are forms of voluntary homicide as these defences are acts of intentional killing.³⁵² The Commission therefore suggests that gross-negligence manslaughter, as a category of involuntary homicide, cannot be applied to mistaken defence.³⁵³

7.275 Accordingly, the problem of mistaken defence is not already covered by the existing defences and if a partial defence is not introduced, those individuals killing as a result of honest but unreasonable mistakes would be guilty of murder. The Commission consequently recommends that there should be a partial defence. This defence would ensure that the mistaken defender's culpability is reflected in the jury's verdict. It is apparent that defenders who kill individuals as a result of honest but unreasonable mistakes, whether of law or of fact, are guilty merely of negligence or at the most, gross negligence and accordingly do not deserve a murder conviction. Murder convictions should be reserved for the most atrocious of crimes.³⁵⁴ As noted by the Law Commission of England and Wales in respect of excessive defenders "If murder is to be reserved for those homicides which are the most deserving of stigma, this does not seem to be one of them".³⁵⁵

(6) The Scope of this Partial Defence

(a) Putative Defence

7.276 It is simple to devise a partial defence in respect of putative defence. This defence should provide that where a putative defender kills as a result of an honest but unreasonable mistake of fact that the killing was in legitimate defence, they should be guilty of manslaughter rather than murder. It is suggested that, no matter how unreasonable the belief is, the putative defender should be entitled to qualify for the partial defence in this instance. Although, it should be observed that the more unreasonable the belief, the less likely it is that the jury will believe the defendant.

(b) Excessive Defence

7.277 The precise ambit of the Plea of Excessive Defence is more uncertain. Should it just apply to situations where the excessive defender

³⁵² See the comments of Walsh J in *People (AG) v Dwyer* [1972] IR 416 at 422 on this.

³⁵³ This point is discussed in greater detail at paragraphs 7.182-7.185.

³⁵⁴ See Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 172. See also Doran "The Doctrine of Excessive Defence: Developments Past, Present and Potential" (1992) 36 NILQ 314 at 334.

³⁵⁵ Law Commission of England and Wales *Report on A Criminal Code for England and Wales* (No 177 – 1989) at 14.19.

has used more force than was necessary against a threat or should it extend to a mistake of law in relation to any of the elements of the test for legitimate defence?³⁵⁶ The Commission submits that there is no principled basis for distinguishing between errors of law relating to excessive force and other errors of law. All persons who kill as a result of honest but unreasonable mistakes of law relating to any of the elements of the test for legitimate defence do not deserve murder convictions. A partial defence is more appropriate in these circumstances.

7.278 Should the threshold requirements that apply to the full defence also resist the availability of the Plea? This issue has already been discussed earlier in this chapter.³⁵⁷ It could be argued that the Plea should only be available where the threshold requirements recommended by the Commission in chapter 1 are satisfied.³⁵⁸ However, this approach fails to recognise the actual purpose of the plea – namely to afford a defence for those who use force in excess of that which is permissible.

7.279 Accordingly, the Commission suggests that for the purpose of the plea of excessive defence, no threshold requirement should be imposed. This approach would enable an individual to qualify for the partial defence even if they had responded to a trivial threat, once the force was used with a defensive purpose. The Commission sees no rationale for requiring a minimum threat in this instance as in the case of putative defence, the partial defence can be availed of even if the victim had used no force at all against the putative defender.

7.280 *The Commission provisionally recommends that a mistaken defender who uses lethal force as a result of an honest but unreasonable mistake, whether of law or of fact, in respect of any of the elements of the test for legitimate defence, shall be guilty of manslaughter as opposed to murder.*

(7) *The Problem of the Unknowingly Justified Actor*

7.281 An unknowingly justified actor is a person who uses force, which they believe they are not entitled to use, but which if they were aware of the circumstances would be justifiable. Essentially, this section involves examining whether one can act in legitimate defence without knowing it. There are two approaches which could be adopted to deal with this problem. On the one hand, deeds based theorists argue that the unknowingly justified actor should be entitled to a defence as their action is externally justified

³⁵⁶ See paragraph 7.208 for some examples of situations where a mistake of law could be made in respect of the other elements of the test for legitimate defence.

³⁵⁷ See paragraphs 7.160-7.168.

³⁵⁸ See paragraphs 2.62, 2.94, 2.232 and 2.299 for the Commission's recommended minimum threshold requirements.

(although the unknowingly justified actor may be guilty of an impossible attempt).³⁵⁹ On the other hand, reasons based theorists argue that the unknowingly justified actor is not entitled to any defence as their actions are not internally justified.³⁶⁰ The latter position was adopted in the main common law case on this issue.³⁶¹

7.282 As discussed earlier,³⁶² advocates of “deeds theory” suggest that the criminal law seeks to prevent damaging results rather than punish evil motive that leads to no harm.³⁶³ Punishing conduct that is not harmful weakens the stigma of the criminal law. Critics of “deeds theory” also suggest that the “reasons theory” does not achieve its purpose in that it does not ensure that only defenders who are deserving are entitled to the benefit of legitimate defence. A defender may realise that they are entitled to act in legitimate defence but still act with bad motives.³⁶⁴

7.283 However, advocates of “reasons theory”, as discussed above, suggest that only morally proper action should be justified.³⁶⁵ For example, Perkins and Boyce submit that bad motive is the key determinant that inculpates the unknowingly justified actor.³⁶⁶

7.284 Reasons-based theorists also argue that the deeds-based approach is based on a faulty assumption that the violation of an offence norm is indistinguishable from the violation of a defence norm.³⁶⁷ This technical dispute has been termed the “definition / defence debate” and turns on whether defences may be considered the negative elements of the *actus reus* of an offence.³⁶⁸

³⁵⁹ See for example Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996).

³⁶⁰ See for example Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 565.

³⁶¹ *R v Dadson* (1850) 4 Cox CC 358 (Court for Crown Cases Reserved).

³⁶² See paragraph 7.102.

³⁶³ For example see Schopp *Justification Defenses and Just Convictions* (Cambridge University Press 1998) at 38 and 127-128.

³⁶⁴ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 50.

³⁶⁵ See paragraph 7.98.

³⁶⁶ Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 930-931.

³⁶⁷ Fletcher *Rethinking Criminal Law* (Little, Brown and Company 1978) at 565.

³⁶⁸ For discussion, see McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 113-116; Christopher “Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defence” (1995) 15 OJLS 229.

7.285 The deeds-based approach is grounded in the notion that there is no principled reason to distinguish defences from the negative elements of the *actus reus* of an offence.³⁶⁹ For example, in order to prove that an unknowingly justified actor has committed the *actus reus* for murder it would be necessary to show that not only has a killing taken place, but also that the killing was *unlawful*; the killing would not be considered unlawful if the killing was, unbeknownst to the actor, actually necessary in self-defence. To take the example of the *Dadson* case, the *actus reus* would not have been established under this approach given that the shooting of the fleeing felon was, unbeknownst to the accused, lawful.³⁷⁰

7.286 However, the reasons-based theorists argue that defences are distinct from offences and, hence, the elements of any justification must be considered separately from the *actus reus* and the *mens rea* of the offence. Hence, in *Dadson* the mental element required by legitimate defence was not satisfied and therefore the accused was guilty of the offence.

7.287 The definition / defence debate, whilst a predominantly theoretical dispute, has practical implications for those who resist unknowingly justified actors. Under the deeds-based approach, the resister – whether he or she is the person *actually* posing a threat (unbeknownst to the actor) or a fully informed third party – is not entitled to repel the unknowingly justified actor because the actor’s use of force is justified. Robinson provides an example in which a loan-shark approaches the actor with the purpose of killing him. The actor is unaware of the loan-shark’s lethal intentions and draws a gun to shoot him in order to avoid repaying his debt. Can the loan-shark, or a third party who is aware of the loan-shark’s intentions, lawfully resist the actor’s use of force? Not according to Robinson who submits the central question should be whether or not the actor’s *deeds* – as opposed to reasons – are justified in the circumstances.³⁷¹ Reasons-based theorists, however, take the opposite view.

7.288 Whilst many would argue that the adoption of the *Dadson* principle is ultimately a matter of policy,³⁷² Christopher argues that the

³⁶⁹ Williams *Textbook of Criminal Law* (Stevens & Sons 1978) at 457.

³⁷⁰ For discussion, see McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 116.

³⁷¹ Robinson “Competing Theories of Justification: Deeds v Reasons” in Simester & Smith (eds) *Harm and Culpability* (Clarendon Press 1996) at 59.

³⁷² See McAuley & McCutcheon *Criminal Liability* (Round Hall Sweet & Maxwell 2000) at 116, Fletcher “The Nature of Justification” in Shute, Gardner and Horder (eds) *Action and Value in Criminal Law* (Clarendon Press 1993) at 179, who argue that the resolution of the definition / defence dispute is a matter of policy.

Dadson principle should be adopted as a matter of logical necessity as the deeds-based approach creates a legal paradox.³⁷³

7.289 In the paradigm example of unknowing justification the “defender” uses lethal force against the “attacker”, but is unaware that the “attacker” poses an imminent lethal threat. Critics of the *Dadson* principle would argue that the “defender” is justified. However, a similar analysis must follow for the “attacker”; unbeknownst to the “attacker”, the “defender” is about to strike and therefore the force that the “attacker” is about to use must be said to be justified. This gives rise to a self-contradiction prohibited by Fletcher’s incompatibility thesis (that two parties to a conflict cannot both be justified):³⁷⁴

“[I]f each actor’s force is justified, each actor would be using force against the other’s justified force. As a result, if each actor’s force is justified, then paradoxically neither actor’s force is justified.

Yet if neither [actor’s] force is justified, each actor used force against unjustified force. Force used against unjustified force is eligible to be justified. Since each actor satisfies all the other criteria in order to be unknowingly justified, then paradoxically [both are] unknowingly justified.”³⁷⁵

7.290 Christopher suggests that there are two possible methods of resolving this paradox. The first would be to eliminate the “cardinal principle”³⁷⁶ that force is justified only if used to repel unjustified force. However, this would “justify or legalize force used against *any and all* force”,³⁷⁷ an undesirable state of affairs under which both sides to a dispute could be justified and “civil war” would be liable to ensue.³⁷⁸

³⁷³ Christopher “Unknowing Justification and the Logical Necessity of the *Dadson* Principle in Self-Defence” (1995) 15 OJLS 229 at 230.

³⁷⁴ The paradox is most clearly illustrated if it is assumed that both the “attacker” and “defender” strike out at the same moment. However, Christopher demonstrates that the paradox does not depend on the simultaneity of the use of force as, regardless of who strikes first, both would be about to attack, unbeknownst to the other: Christopher “Unknowing Justification and the Logical Necessity of the *Dadson* Principle in Self-Defence” (1995) 15 OJLS 229 at 243-245.

³⁷⁵ *Ibid* at 242.

³⁷⁶ *Ibid* at 246.

³⁷⁷ Christopher “Unknowing Justification and the Logical Necessity of the *Dadson* Principle in Self-Defence” (1995) 15 OJLS 229 at 247.

³⁷⁸ Christopher “Unknowing Justification and the Logical Necessity of the *Dadson* Principle in Self-Defence” (1995) 15 OJLS 229 at 248, citing Eser “Justification and

7.291 The second method of resolving the paradox is to stipulate that an actor must have belief or knowledge of the justificatory circumstances; hence the unknowingly justified actor would be liable for the completed offence. Christopher submits that the resolution for this paradox is “rule of logic”³⁷⁹ in support of the *Dadson* principle; a principled reason to distinguish offences from defences and, hence, to sever the analogy between unknowing justification from impossible attempt.³⁸⁰

7.292 The Commission is in agreement with Christopher on this and accordingly suggests that the unknowingly justified actor should not be entitled to a defence. The Commission also feels that it would be unjust and anomalous to render a defendant liable, albeit only partially, where he has honestly but unreasonably believed that he could act in self defence but to exculpate a defendant who believed he was acting unjustifiably. This is also the position that has been adopted in most common law jurisdictions.³⁸¹

7.293 *The Commission provisionally recommends that a person may not rely on the defence of legitimate defence unless at the time they used the force, they believed that they were acting in legitimate defence.*

Excuse: A Key Issue in the Concept of Crime” in Eser & Fletcher (eds) *Justification and Excuse: Comparative Perspectives: Volume 1* (1987) at 31 (original emphasis).

³⁷⁹ Christopher “Unknowing Justification and the Logical Necessity of the Dadson Principle in Self-Defence” (1995) 15 OJLS 229 at 250.

³⁸⁰ *Ibid* at 247-251.

³⁸¹ For example Perkins & Boyce *Criminal Law* (3rd ed Foundation Press 1982) at 930-931 on the US position.

CHAPTER 8 PROVISIONAL RECOMMENDATIONS

8.01 The Commission provisionally recommends that a minimum threshold requirement should be imposed on the use of private lethal defensive force. [Paragraph 2.53]

8.02 The Commission provisionally recommends that lethal defensive force may not be used in defence of personal property. However, it does not recommend that any upper limit be placed on the force that may be used to defend one's dwelling house. [Paragraph 2.94]

8.03 The Commission provisionally recommends that a prison guard should be entitled to assume that every escaping prisoner is dangerous and consequently resort to lethal force, where all the other requirements for legitimate defence are met, unless he or she is aware that the escapee is not in fact dangerous. [Paragraph 2.207]

8.04 The Commission provisionally recommends that the power to use lethal defensive force in effecting arrests should be restricted to law enforcement officers. [Paragraph 2.213]

8.05 The Commission provisionally recommends that the use of lethal force in effecting the arrest of a fleeing suspect should be prohibited except where the arrestee is suspected of an "arrestable offence" or it is necessary to protect a person from an imminent threat of death or serious injury. [Paragraph 2.232]

8.06 The Commission provisionally recommends that lethal force should be prohibited to prevent crimes other than those which are imminent and cause death or serious injury. [Paragraph 2.299]

8.07 The Commission provisionally recommends that the power to use lethal force in preventing crimes should be restricted to law enforcement officers. Instead, it is more appropriate for individuals who use lethal force to protect others to be dealt with under the law on private defence. [Paragraph 2.308]

8.08 The Commission provisionally recommends that the imminence requirement should be retained. [Paragraph 3.112]

8.09 The Commission provisionally recommends that unlawful arrests should be dealt with under the general rubric of self defence and should not

be given special treatment. Therefore, a person should be entitled to resist an unlawful arrest which the person realises is unlawful or a lawful arrest which the arrestee believes and a reasonable person would believe due to a mistake is unlawful. [Paragraph 4.106]

8.10 The Commission provisionally recommends that the lack of capacity cases and the mistaken attacker cases be subject to the unlawfulness rule and is committed to conceptually reconciling these cases with the unlawfulness requirement rather than providing for them in specific exceptions. The Commission invites submissions on how this may best be achieved. [Paragraph 4.174]

8.11 The Commission provisionally recommends that innocent defenders may only resort to lethal defensive force in response to a threat where they are unable to retreat with complete safety from the threat. Public defenders should not be required to retreat from a threat in any instance. [Paragraph 5.74]

8.12 The Commission provisionally recommends that a defender should not be required to retreat from an attack in their dwelling home even if they could do so with complete safety. In this regard, all occupants of dwelling houses should be entitled to the benefit of this doctrine, it is irrelevant if the defender is attacked by an intruder or non-intruder and the “dwelling house” should be defined as including the curtilage or the area immediately surrounding the home. [Paragraph 5.133]

8.13 The Commission provisionally recommends that a person, who has provoked or initiated the conflict which is threatening their safety, is only entitled to use lethal defensive force in the face of a disproportionate response from the original victim and where they are unable to retreat in complete safety. [Paragraph 5.221]

8.14 The Commission provisionally recommends that lethal defensive force should be prohibited where it is grossly disproportionate to the threat for which the defence is required. [Paragraph 6.56]

8.15 Accordingly, the Commission provisionally recommends the adoption of both the proportionality rule and the threshold test. [Paragraph 6.56]

8.16 The Commission provisionally recommends that the factors relevant to the assessment of proportionality should be clearly and concisely set down in the legislation. [Paragraph 6.83]

8.17 The Commission provisionally recommends the adoption of the dual model of reform, which would comprise both separate justification and excused based defences. [Paragraph 7.225]

8.18 The Commission provisionally recommends that the test for legitimate defence should be the same for both putative and excessive defenders. [Paragraph 7.237]

8.19 The Commission provisionally recommends that a mistaken defender who uses lethal force as a result of an honest but unreasonable mistake, whether of law or of fact, in respect of any of the elements of the test for legitimate defence, shall be guilty of manslaughter as opposed to murder. [Paragraph 7.280]