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THE EXCESSIVE USE OF FORCE

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## Use of Force in Protecting Property

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# Use of Force in Protecting Property

*In memoriam J. W. H.*

*Joshua Getzler\**

*A long-standing common-law policy holds that anyone may lawfully use force to repel or arrest a criminal threatening property, and a fortiori that force may be used to defend one's own property. But there are limits to these powers. In cases where some amount of violence is justified but excessive force is used, some common-law jurisdictions will deny any defence to murder. Killing through excessive force is neither justified nor excused. Other jurisdictions will allow a partial defence, excusing from the fullest penalty and reducing the offence to manslaughter or unlawful homicide, on the ground that the actor should be punished for a grievous miscalculation. By analyzing the relationships between persons and property and investigating the historical development of self-help doctrines, the principles defining excessive force here may be reduced to four. First, property cannot easily be conceived as a value worth protecting by force where there is no accompanying threat to the person. Second, the law may nonetheless see a presumptive identity between an owner's person and his property which is external to his person, so that violent defence of property becomes justified even without a threat to bodily or personal safety. Third, intentionality and purpose play an important role in attributing legal blame for excessive force in protecting property, and the test of allowable quantum of force is not objective. Finally, the legal and ethical issues are transformed when we move from individual to collective property. Judgments concerning state and international*

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*legality regarding excessive force may derive only limited guidance from the contours of criminal law and private law. Yet, much of international conflict today is carried out by private actors who do not wear uniforms or wrap themselves in the shield of state immunity, and the domestic legal dimension thus begins to have purchase on issues of excessive force in war and communal conflict.*

## I. PROPERTY, PERSONALITY, AND VIOLENCE

According to the Roman jurist Ulpian, a free man could not sue for property damage under the *lex Aquilia* for a culpable but non-intentional harm inflicted on his own person, "because no one is deemed to be the owner of his own limbs."<sup>1</sup> Only if the attacker intended to harm the person could one sue, and then, not for economic harm nor even for physical pain and suffering, but only for the *injuria*, the attack on the dignitary interest of the human personality. This important ruling suggests how persons and property have formed a polarity in legal analysis since the early days of the Western legal tradition. The late property theorist Jim Harris may have drawn from the clear positions of classical Roman law in constructing his own strong rejection of self-ownership. "Who Owns My Body?" is the rhetorical title of one of Harris's classic essays. "Nobody owns my body, not even me" is the laconic conclusion.<sup>2</sup>

Building on the rejection of self-ownership, Harris insisted that property rights involved relations with external assets that are strictly and analytically separate from the right-holding subject. He thereby demolished the Lockean theory stating that one mixed one's labour into the world and, by this active possession, made parts of the world one's property. More generally, property

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1 Dig. 9.2.13.pr (Ulpian, *Ad Edictum* 18) (Alan Watson ed., 1998). We can see such ideas operating in the recent House of Lords case of *R. v. Benthall*, 2005 U.K.H.L. 18, para. 8, where Lord Bingham refused to find that a hand concealed under a jacket could be "possession [of an] imitation firearm" under the Firearms Act, 1968, c. 27, § 17(2) (Eng.):

One cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. Therefore, one cannot possess it. Resort to metaphor is impermissible because metaphor is a literary device which draftsmen of criminal statutes do not employ. What is possessed must under the definition be a thing. A person's hand or fingers are not a thing.

2 James W. Harris, *Who Owns My Body?*, 16 *Oxford J. Legal Stud.* 55, 84 (1996); James W. Harris, *Property and Justice* 8-13, 182-212, 230-46 (1996) [hereinafter Harris, *Property and Justice*].

metaphors could not rightly be used to articulate the justice claims of persons based on projections of their bodies, or their labour power, or their rational purposive will into the world. Harris's analysis left room for intangibles, for "ideational entities" such as intellectual rights; one could own assets created by the legal mind.<sup>3</sup> Again this was in a tradition; the Romans since Gaius were well used to the reification of legal concepts, of incorporeities, of mental objects.<sup>4</sup> But the analytical line between persons proper and the things external to the person that could be owned, tangible and intangible, was for Harris essential to clear thinking about the nature of both property and justice in property institutions.

I would like to harness some doctrines of the criminal law to approach this central plank of Harris's property theory from a new, slightly tangential angle. The rootedness of the distinction between persons and property may become evident by measuring the permissible levels of reaction to violent attacks on persons and property. The particular doctrine I want to discuss — the right to use force, even deadly force, to repel those who attack one's property, in particular the invader of one's home — has now become a matter of public and party-political controversy. I hope that the distractions of today's politics will not blunt the readers' appreciation of the serious jurisprudential issues regarding property and persons lying within this pocket of law. My initial hypothesis in this paper is that the legal permission of violence in defence of property does derive from the analytical and normative relationships between property and personhood in ostensibly liberal societies, and is formulated as a two-stepped argument. The law licences self-help to repress all forms of crime, with forceful defence of property or of persons being just two (partially entwined) categories in a larger class. But at steeper levels of violent self-help, defence of the person is the key justifying factor, and the pursuit of other goals — such as defence

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<sup>3</sup> Harris, Property and Justice, *supra* note 2, at 8-13, 42-47.

<sup>4</sup> See Peter Birks, *The Roman Law Concept of Dominium and the Idea of Absolute Ownership*, 1985 Acta Juridica 1; György Diószdi, Ownership in Ancient and Preclassical Roman Law 121-36 (1970); Joshua Getzler, *Roman Ideas of Landownership*, in Land Law: Themes and Perspectives 81 (Susan Bright & John Dewar eds., 1998). Modern German legal science complicated the matter with the doctrine that the subjective right to property or *Eigentum* had to comprise a tangible thing or part of the material world and could not comprise immaterial obligations. See Wolfgang Mincke, *Property: Assets or Power? Objects or Relations as Substrata of Property Rights*, in Property Problems: From Genes to Pension Funds 78 (James W. Harris ed., 1998).

of property or resistance to generic criminal acts — will destroy the legal validity of the self-help.

In *Property and Justice*, Jim Harris postulated "imaginary" or ideal-typical societies in order to illustrate different property regimes, giving us Forest Land, Status Land, Red Land, Contract Land, Wood Land, and Pink Land.<sup>5</sup> We might borrow his expository technique in order to help us frame our inquiry and suggest what is at stake when persons use violence to defend their property.

We can see the evolution of a natural property and crime regime in its simplest form by observing children at play. Let us pay a visit, then, to a (not so) imaginary place we shall call Toy Land. Children in this innocent land will sometimes argue over who has the better right to possession of a toy, interrupting the happy flow of play. If one child asserts exclusive possession by snatching, the other may use force against the rival to attempt recovery, and the upset caused by the ensuing cycle of violent reprisals against persons will soon dwarf the disruption caused by the original property offence. To escape from this unhappy state of nature, parents in Toy Land try to teach children that any form of self-help as a means to sanction and reverse recent dispossession of a doll or a ball, and particularly personal violence, is not allowed. Rather, return of the valued object must be sought through the agency of a neutral third-party judicial authority, namely, a parent or other responsible adult. The instinct to forceful self-help, however, is difficult to eradicate. Moreover, parental coercion may only add to the violence by teaching that superior force prevails, and children will constantly ask for parental force to be applied in their favour. Toy Land, like all societies, is not easily pacified, given that its members can barely distinguish between self-help, assault, and punishment.

## II. THE PROBLEM OF EXCESSIVE DEFENCE OF PROPERTY

When such quarrels end up in court, the question is juridified and narrowed: Can people lawfully use force to protect their property, and if so, how much? The common sense answer would be yes, to a reasonable degree, and the legal answer is similar. I can thrust away a purse-snatcher, I can shove a door shut in the face of a house-breaker, I can forcefully restrain a vandal from damaging my goods, and surely, in these cases, the police will not arrest me and the prosecutor will not arraign me for assault? I need not

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<sup>5</sup> Harris, *Property and Justice*, *supra* note 2, at 15-22.

fling up my hands and submit to the criminal, and then go home to brief the police and the lawyers to find me redress.

A longstanding common-law policy holds that anyone may lawfully use force to repel or arrest a criminal threatening property; *a fortiori*, then, force may be used to defend one's own property. But there are limits to these powers. If I loose off a shotgun against a night-time burglar and kill him in the absence of a belief in personal danger, I may find myself guilty of murder or, at least, of a lesser offence of culpable homicide. When some amount of violence is justified but excessive force is used, some common law jurisdictions will deny any defence to murder. The killing through excessive force is neither justified nor excused. Other jurisdictions will allow a partial defence, excusing from the fullest penalty and reducing the offence to manslaughter or unlawful homicide, on the basis that the actor should be punished for a grievous miscalculation. But this divergence, important as it is, does not impact directly on our primary question: how does the law justify and calibrate the use of private force in defence of one's property?

The common law, like the civilian systems, has fumbled for answers in defining excessive force in defence of property. Typically, it takes refuge in the unstructured fact discretion of the jury.<sup>6</sup> This may suggest that the doctrinal issue of excessive property defence contains within it contested ethical considerations that cannot be juridified. Perhaps three general ideas may be isolated from the legal sources. First, property cannot easily be conceived as a value worth protecting by force when no accompanying threat to the person is involved. Second, the law may nonetheless see a presumptive identity between an owner's person and his property that is external to his person so that violent defence of property becomes justified, even where there is no threat to bodily or personal safety. Finally, intentionality and purpose, i.e. *mens rea*, play an important role in attributing legal blame for excessive force in protecting property; the test of allowable quantum of force is not objective. Lying beneath these relatively simple rules, however, we find many difficulties.

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6 The policies of the common law in using jury discretion are examined in Joshua Getzler, *The Fate of the Civil Jury in Late Victorian England*, in "The Dearest Birth Right of the People of England": The Jury in the History of the Common Law 217 (John W. Cairns & Grant McLeod eds., 2002).

### III. STATE AND NON-STATE COERCION

Weber defined the state as an authority with the monopoly of legitimate violence.<sup>7</sup> As a pungent example of Weberian ideal typing, this definition has been extraordinarily influential in modern social thought; yet it has only ever partially been true. James Whitman has argued that it is not the case that the modern state rises to replace more primitive self-help or vengeance with orderly, legalised punishments and compensations. Both forms of social discipline have always coincided and cross-bred, with public agencies sometimes helping or encouraging individuals to pursue their vengeance. Thus, in ancient societies, mutilations inflicted by individuals upon each other in retaliation, or compositions in lieu, were tolerated or permitted as useful signals issued by individuals to the rest of society, signals that promoted deterrence and affirmed shared values, often of a ritual or religious quality. The state thus did not supersede self-help but coincided with it and buttressed it.<sup>8</sup>

In the blood feud societies of the early to high middle ages, there was no omniscient state but rather interlocking jurisdictions, generating fierce loyalties and rivalries. Organized private violence was the norm, with the state only slowly emerging to dominance.<sup>9</sup> The omniscient state that many assumed to be the endpoint of political modernization in the twentieth century has itself turned out to have been only a temporary stage. Contemporary societies in capitalist Western states are increasingly delegating or franchising coercive as well as economic powers to non-state actors. Examples are corporate providers of security services in the United States and Europe, which substitute for national police or even for military forces overseas.<sup>10</sup> Indeed, private security providers now exceed police forces many

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7 See Max Weber, *Politics as a Vocation*, in *From Max Weber: Essays In Sociology* 77, 78 (Hans H. Gerth & C. Wright Mills trans. and eds., 1948) (1919):

[A] state is a human community ["authority association," *Herrschaftsverband*] that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory ... the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it. The state is considered the sole source of the "right" to use violence.

8 James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 Chi.-Kent L. Rev. 41 (1995).

9 William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland* (1990) (medieval Iceland), and Paul R. Hyams, *Rancor and Reconciliation in Medieval England* (2003) (blood feud in Angevin times), are here highly suggestive.

10 Non-state security agents have outnumbered state police in Great Britain since 1961. See Trevor Jones & Tim Newburn, *The Transformation of Policing? Understanding Current Trends in Policing Systems*, 42 Brit. J. Criminology 129 (2002); Trevor Jones

times over in Western countries.<sup>11</sup> An alternative model found in less-well-developed capitalist or transitional regimes involves the state tolerating the informal wielding of coercive powers, not just to repress extraordinary assaults but for the regular maintenance of contract rights and property claims. Modern Russia is a notable case in point. At a further extreme are weakened or collapsed states, with *only* private enforcement, without state oversight or restraint. For one example, skyrocketing crime rates in South Africa have led to a large amount of violent self-defence, and this has become a matter of sharp controversy, especially when whites readily kill violent blacks — or mistakenly kill members of their own families in response to a perceived attack.<sup>12</sup> Is a mistaken killing more easily excused in a social context where defensive violence is widely perceived as justified? Or is this a recipe for warfare — every man against every man? Since Hobbes, theorists have acknowledged that even in the *Rechtsstaat* or legally-ordered society, persons retain a natural power of self-defence, and Hobbes himself struggled to explain why this natural right did not call into question the authority of the state to claim total allegiance and surrender of force.<sup>13</sup>

Examples of troubled, violent, splintering societies and weakened states in today's "global" world could be multiplied. They present a spectrum extending from state-of nature anarchy, through more organized private enforcement regimes — mafia capitalism or armed crony capitalism — up to regularized state-controlled and rule-bound coercion, with many cross-bred examples of regulated and corporatist security along the way.<sup>14</sup> The spectrum

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& Tim Newborn, *Private Security and Public Policing* (1998). The Iraq crisis and the deaths of civilian security contractors in Fallujah have highlighted this trend affecting military personnel. *See* Letter from Senator Jack Reed et al. to Secretary Donald Rumsfeld (Apr. 8, 2004), *available at* <http://reed.senate.gov/iraq.htm> (a letter by thirteen liberal Democrat senators protesting the use of private security forces in Iraq outside military control). The world press is full of stories of the numbers (over 15,000 and growing), the dangers, the high pay and the control problems surrounding the private security forces in Iraq; *see, e.g., Private contractors in Iraq*, *The Economist*, Apr. 7, 2004.

<sup>11</sup> Lucia Zedner, *Too much security?*, 31 *Int'l. J. Soc. L.* 155 (2003).

<sup>12</sup> *See* Rory Carroll, *Self-defence Killings Divide S Africa*, *The Guardian*, Jan. 7, 2003, at 12; Rory Carroll, *Former Springbok Kills Daughter in Mistake for Thief*, *The Guardian*, May 25, 2004, at 12.

<sup>13</sup> *See* Thomas Hobbes, *Leviathan* 189, 268 *passim* (Crawford B. Macpherson ed., 1968), on the residual natural right of violence within a state-governed society.

<sup>14</sup> Federico Varese, *The Russian Mafia: Private Protection in a New Market Economy* (2001); Federico Varese, *Mafia Transplantation*, in *Creating Social Trust: Problems of Post-Socialist Transition* 148 (János Kornai et al. eds., 2004); Diego Gambetta, *The Sicilian Mafia: The Business of Private Protection* (1993); Benoît Dupont et



drawn here proceeds along a conventional private-public dimension, but we have noted how the structure of ancient and feudal societies challenges any axiomatic split between public and private coercion. We might approach the same problem abstracting from history and, instead, finding tools in political and social theory. To take a Marxisante view, if interests or hegemonic groups govern state power, then legal protection of property through legalistic coercion is really organized class violence. The legalism by which such power is mediated and governed may be significant, but no sharp line can be drawn between the powers wielded by state agents and the legal or extra-legal powers accorded by the state to certain privileged individuals.<sup>15</sup> From yet another vantage, thinkers of a more individualistic strain, from Thomas Hobbes and John Locke through Albert Venn Dicey and Friedrich von Hayek, might characterize state law and coercion as merely the delegated power of sovereign persons. The private defence of rights is not analytically separate from the police action of the state. All that a police force offers is a professionalized wielding of private policing powers and, conversely, police officers or any public functionary ought not to be regarded as enjoying any special state privileges or immunities. Both state and non-state security forces work within the same framework, wielding the normal or inherent policing powers of the citizen, but with a professionalism and regularity that enhances security to the consumer of such services and maximises deterrence against delinquents. In this view, state officials merely belong to a larger protection firm.

There is, of course, a median position. Public and private powers and rights may blur into each other in practice, but this does not mean that they cannot be conceived as distinct, if mutually supporting spheres. The postulates of an independent private sphere, albeit one supported and protected by communal action, and of a public sphere rising above private interests and passions, are touchstones of modern liberalism.<sup>16</sup> In particular, there are good reasons why, in a liberal society, we should want to reserve powers of punishment,

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al., *The Governance of Security in Weak and Failing States*, 3 Criminal Justice 331 (2003).

15 Two key texts are Albion's Fatal Tree: Crime and Society in Eighteenth-Century England (Douglas Hay et al. eds., 1975) and Edward P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975). Thompson, in the famous epilogue to *Whigs and Hunters*, *id.* at 258-69, made the claim that the cross-class protections afforded by the rule of law can transcend class hegemonic interests and become a universal benefit. Some say he ceased to be a Marxist at that point, see Daniel H. Cole, "An Unqualified Human Good": E.P. Thompson and the Rule of Law, at <http://ssrn.com/abstract=169264> (June 1, 1999).

16 The stream of social democratic or "new" liberalism stretches back at least over the past century. To pluck out two texts from a rich tradition, see Leonard T.

coercion, and indeed policing, to the authority and machinery of the state, such as preserving impartiality in the distribution of security and risk, and preventing abuse of state power by private and corporate persons seeking a noxious advantage or domination over others.<sup>17</sup>

If we accept the assumptions of state impartiality and competence, some licensing of and resort to self-help may yet be an efficient way of setting incentives for good behaviour. If, as governments increasingly assert, persons are expected to take some care for themselves, their dependents and their possessions, and are afforded limited coercive powers to do so, then arguably foreknowledge of these decentralised coercive powers might help potential criminals decide not to commit crimes. The revised assumptions are that state agencies and the law can be a blunt and inefficient instrument for maintaining order, and private ordering can usefully supplement state action. Other strategies for protecting persons' interests without hands-on state control include insurance pools and self-policing community institutions enforcing social norms. Such extra-legal devices can be praised as outgrowths of a rich civil society impregnated with cooperative norms and profuse market and social capital, and simultaneously criticised as inequalitarian, alienating, and demoralizing forms of power and governance.<sup>18</sup>

The question of the political justification for policing powers will be revisited in a later section. The next concern is to determine whether in legalistic countries, in particular the common law countries, individuals can be said to wield a right or privilege to use violence in defence of their property, either as a facet of self-defence of the person or as a stand-alone right to police one's possessions outside state protections.

#### IV. TONY MARTIN

At common law there are three main forms of attack on property warranting forceful defence: theft, criminal damage, and criminal trespass such as

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Hobhouse, *Liberalism* (1911) and Jurgen Habermas, *The Structural Transformation of the Public Sphere* (1989).

<sup>17</sup> Cf. Nicola Lacey, *State Punishment: Political Principles and Community Values* (1994); Ian Loader and Neil Walker, *Policing as a Public Good*, 5 *Theoretical Criminology* 9 (2001).

<sup>18</sup> Compare Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991), with David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001), and Richard V. Ericson et al., *Insurance as Governance* (2003).

burglary or housebreaking. I will concentrate on the latter and will have little to say about theft and criminal damage, which raise similar issues but to a lesser degree.<sup>19</sup> One recent case dominates attention and has indeed become one of the most notorious criminal cases in England in the past decade — *Martin v. R.*<sup>20</sup> Tony Martin, a solitary Norfolk farmer, shot dead a burglar and was then prosecuted for murder. He was convicted and given the mandatory life sentence. Martin had suffered numerous burglaries at his secluded farm, and believed that the police had decided not to make such break-ins a high priority either for prevention or investigation since more serious crime demanded their attention. He argued that, in his unprotected circumstances, it was reasonable to use deadly force in self defence against home-invaders. On August 20, 1999, when Martin suffered yet another burglary, he claimed he had acted in fear of three burglars who might have attacked him, and had therefore fired at two of the intruders from the top of his stairs. However, the prosecution argued that he had lain in wait on the ground floor and shot the burglars from behind as they exited the premises. One of the two, a sixteen-year-old traveller, bled to death; another was injured in the legs but escaped. The exact story is important because, if Martin shot egressing burglars, he could not have been acting in fear of his personal safety at that very moment and he could not have held a belief, even an unreasonable one, that he was acting in defence of his person. Rather, he would have been acting, and indeed purposing to act, as judge and executioner, levying a harsh personal punishment or revenge, or else trying to arrest burglars with unreasonable deadly force. Martin's story was disbelieved at trial although, on appeal, further "expert" evidence was readily admitted of his paranoid mental state, allowing the court to bring in a conviction of manslaughter on the grounds of diminished responsibility. Significantly, the appeal court agreed that an unreasonable but honest belief as to the facts of a dangerous situation could give rise to a claim of self-defence, but seemed to require an "objective" assessment of the danger posed by such unreasonably believed facts. This contorted doctrine placed self-defence out of Martin's reach,<sup>21</sup> hence the turn to diminished responsibility. Martin was set free after serving the full five-year sentence

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19 See generally A.P. Simester & G.R. Sullivan, *Criminal Law: Theory and Doctrine* 622-31 (2d ed. 2003); J. C. Smith, *Justification and Excuse in the Criminal Law* (The Hamlyn Lectures) 99-126 (1989). As will be seen, the pure common law position is now overlaid by statute.

20 The trial was held on 19 April 2000 in the Crown Court at Norwich before Owen J; the 2001 appeal is reported at 2003 Q.B. 1 (C.C.A.).

21 Simester & Sullivan, *supra* note 19, at 552; see also A.P. Simester & G.R. Sullivan, *Update on Self-defence, Other Defences, and Subjectivity*, at

for the unlawful killing; early release on parole was unavailable because he staunchly refused to concede that he had done anything wrong.

*Martin v. R.* provoked a storm of debate, with a wave of public sympathy going to the defendant. Martin's cause was taken up by conservative newspapers, Tory politicians, and the rural community, who all thought justice had gone awry. *The Sun* newspaper polled one quarter of a million people, and only four per cent agreed with Martin's conviction.<sup>22</sup> The turn of the New Labour government to repressive crime policies might be pinned to its sensitivity to the depth of the popular outrage at Martin's conviction for shooting a burglar.<sup>23</sup> The Tories raised home invasion as an electioneering banner in 2004-2005, campaigning against the "chaos and confusion" of the existing law permitting an unspecified "reasonable force" and no more. Instead, the Criminal Law (Householder Protection) Bill, a private member's bill enjoying massive support from the Tory benches, stipulated that the law should ensure that householders need not fear prosecution, let alone conviction, unless they use "grossly disproportionate force" against burglars.<sup>24</sup> By the 2005 general election, the Tory campaign to ensure legal immunity to householders using disproportionate force seemed to have stalled. Opposition forces, especially rural interests, were by now more exercised by the expressive right to use lethal violence against foxes.<sup>25</sup> The Crown Prosecution Service and the Association of Chief Police Officers have somewhat cooled the debate by issuing guidelines showing how householders can use extensive force against intruders within the bounds of a reasonableness standard.<sup>26</sup>

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[http://www.hartpub.co.uk/Updates/upcrimlaw\\_selfdefence.htm](http://www.hartpub.co.uk/Updates/upcrimlaw_selfdefence.htm) (n.d.), pointing out that the approach of the Court of Criminal Appeal is at odds with *Shaw v. R.*, [2001] 1 W.L.R. 1519 (P.C. 2001) (appeal taken from Belize) and with *Beckford v. R.*, 1988 A.C. 130 (P.C. 1987) (appeal taken from Jam.).

<sup>22</sup> *The Sun*, April 22, 2000 and *The Sun*, April 27, 2000.

<sup>23</sup> Cautious use may be made of Tony Martin's own account recently ghosted by journalists. See Tony Martin, *A Right to Kill?* (J. McVicar & D. Wallace eds., 2004).

<sup>24</sup> BBC News television broadcast, Feb. 4, 2005.

<sup>25</sup> The nature of hunting in English law and society is considered in Joshua Getzler, *Judges and Hunters: Law and Economic Conflict in the English Countryside, 1800-1860*, in *Communities and Courts in Britain 1150-1900*, at 119 (Christopher Brooks & Michael Lobban eds., 1997).

<sup>26</sup> See The Crown Prosecution Service, at <http://www.cps.gov.uk/publications/prosecution/householders.html> (Feb. 1, 2005).

## V. HOUSEBREAKING AS THREAT TO PERSONS AND THREAT TO PEACE: OLD AND NEW HISTORICAL PERSPECTIVES

The Tony Martin case that kicked off this debate seemed to turn on whether an attack on a particular type of property — the dwelling or home — could reasonably be interpreted as a presumptive threat to personal safety. The perception of threat might be actuarial or predictive. A regular proportion of housebreaking and burglary in Britain is committed by non-professional criminals, often juvenile drug-addicts of little self-control, so fears for safety at their hands might contain a grain of good sense. Normal levels of risk aversion might induce a victim of housebreaking to shoot and then ask questions.<sup>27</sup> This presumption has long historical antecedents. Roman law allowed the slaying of a thief at night but not by day,<sup>28</sup> and Jewish law took

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27 Home Office statistics suggest that England and Wales have one of the highest burglary rates in the world, hitting some 3.5% of homes per year, and both fear of burglary and harm suffered from this crime are commonly reported in crime surveys. See Jonathan Herring, *Criminal Law: Text, Cases and Materials* 579-81 (2004); Nicola Lacey et al., *Reconstructing Criminal Law: Text and Materials* 345-50 (3d ed. 2003). Interestingly, the crime of burglary has fallen every year over the past decade and is continuing to drop, perhaps a reflection of full employment. UK figures provided by the Home Office record some 5.2 million offences in 2000/1, of which 82% were property offences, with 16% of all crime being burglaries (836,000), and 14% violent crime (601,000). Only 12% of burglaries were detected. In 1990 there were 250,000 violent offences, 1 million reported burglaries, 3.3 million other property offences and 4.54 million offences overall. The classifications are of course contentious and real crime rates may be very much larger. See Home office, *Criminal Statistics, England and Wales 2000*, at <http://www.archive.official-documents.co.uk/document/cm53/5312/crimestats.pdf> (Dec. 2001), for 2000/1; Home Office, *Research Development Statistics*, at <http://www.homeoffice.gov.uk/rds/patterns1.html> (2005) for historical trends. United States statistics tell a rather different story: in 2001 burglary amounted to 2.11 million incidents out of a total of property crimes of 10.41 million, down from 3.07 million and 12.65 million respectively in 1990. These figures are overshadowed by some 11.85 million violent crimes in 2001, down from 14.48 million in 1990. See Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States*, at <http://www.census.gov/prod/2004pubs/03statab/law.pdf> (2003).

28 Starting with the *Twelve Tables*, VIII.3, *reprinted in* 3 *The Library of Original Sources: The Roman World*, 9-11 (Oliver J. Thatcher ed., 1901) ("If one is slain while committing theft by night, he is rightly slain"). Justinian's Digest, Dig. 9.2.4.1 (Gaius), gives the rule as follows:

The law of the *Twelve Tables* permits one to kill a thief caught in the night, provided one gives evidence of the fact by shouting aloud, but someone may

a similar position.<sup>29</sup> How can we account for this rule? On one view, it may be because detection and apprehension are more difficult at night, hence the power of forceful self-help against the night-time miscreant is ratcheted up to level the playing field.<sup>30</sup> But another interpretation, favoured in ancient legal sources, holds that the night-time intruder creates a higher risk to personal safety for household members, making robust or even lethal force reasonable. Daytime intruders usually plan to break in when no one is home. Night-time intruders can more likely expect to confront the inhabitants, and a prepared and watchful intruder might easily prevail against sleepy and surprised dwellers. Again, licensing high levels of defensive violence serves as deterrent and remedy.

English law has long been especially concerned with theft or other felonies allied to trespass and housebreaking, especially housebreaking at night. In the old Anglo-Saxon law, housebreaking was a well-established category of disturbance. Maitland suggests that any thief might be killed to prevent escape, whether or not the house was broken into, but housebreaking made the crime more atrocious. In this context:

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only kill a person caught in such circumstances at any other time if he defends himself with a weapon, though only if he provides evidence by shouting.

This ancient rule was mitigated in later law but left its traces: *see also* G. Inst. 3.184-.185, 3.189-.190 (Francis de Zulueta trans., 1946); J. Inst. 4.1.3, 4.1.5 (Peter Birks & Grant McLeod eds., 1987); Dig. 3.2.13.7, 47.2.1-47.2.3, 47.18.2; *Cf.* Dig. 9.2.5.pr (Ulpian):

if for fear of death someone kill a thief, there is no doubt that he will not be liable under the *lex Aquilia*. But if, although he could have arrested him, he preferred to kill him, the better opinion is that he should be deemed to have acted unlawfully (*injuria*).

<sup>29</sup> *Exodus* 22:1-2: "If the thief is seized while tunnelling [i.e. housebreaking] and he is beaten to death, there is no blood guilt in his case. If the sun has risen on him, there is bloodguilt in that case." One explanation for the rule is that the thief would be more ready to kill at night when unobserved by witnesses: *see* Mishnah, *Sanhedrin* 8:6, reprinted in Mishnah 395 (Herbert Danby ed., 1933); The Jewish Study Bible 155 (Adele Berlin et al. eds., 2004). Another explanation, found in Rashi's Commentary on *Exodus* 22:1, reprinted in Chumash with Rashi's Commentary 116-17 (A. M. Silbermann trans., 1934), and in the Babylonian Talmud, *Sanhedrin* 72a-b, reprinted in [xix] The Talmud, Tractate Sanhedrin 47-57 (Adin Steinsaltz trans. & ed., 1999), is that people carefully guard their possessions in the security of the home and an intruder knowing this is likely to kill to steal them, if not on this occasion then maybe on another. Both explanations justify the rule for deadly force as preemptive and presumptive self-defence. *See also* J. David Jacobs, *Privileges for the Use of Deadly Force Against a Residence-Intruder: A Comparison of the Jewish Law and the United States Common Law*, 63 Temp. L. Rev. 31 (1990).

<sup>30</sup> *Cf.* Richard A. Posner, *Economic Analysis of Law* 219-27, 234-35 (6th ed. 2003).

An outlaw might...be slain with impunity; and it was not only lawful but meritorious to kill a thief flying from justice. A man who slew a thief...was expected to declare the fact without delay, otherwise the dead man's kindred might clear his fame by their oath and require the slayer to pay wergild as for a true man.<sup>31</sup>

Hyams has recently shown how in the vendetta culture that continued after the Conquest into Angevin England, attacks on households were a particularly common form of feuding behaviour. To assault or kill a man in his house or *domus* and humiliate his household was the ultimate form of public retribution, of destruction of *dominium*.<sup>32</sup> This power-mongering was the obverse of Sir Edward Coke's familiar claim, "a man's house is his castle, *et domus sua cuique est tutissimum refugium* [and each man's home his safest refuge]."<sup>33</sup>

In an ambitious new work of historical political science, Markus Dubber argues it is not the case that the state or Crown simply licensed violence by the householder in defence of his home. He suggests that the private coercive power of the householder in Western law rather provided the

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31 1 Frederick Pollock & Frederic W. Maitland, *The History of English Law Before the Time of Edward I* 53 (2d ed. 1968).

32 Hyams, *supra* note 9.

33 Sir Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* 162 (E. Brooke & R. Brooke eds., 4th ed. 1797) (1644). The famous Cokean slogan is expanded in an important passage in *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1603):

[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills one *per infortuna*, without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing...[a]nd the reason of all this is, because *domus sua cuique est tutissimum refugium*.

We find modern echoes and inversions of the medieval sense of the house-as-castle in the perverse behaviour of some burglars who seem to delight in trashing homes and intruding into personal spaces — one burglar who came to visit on Christmas Eve is reported to have opened all of the family's presents (but to have stolen none). See David Aaronovitch, *The Tony Martin in all of us*, *The Guardian*, July 29, 2003, at 7. Wilful destruction by intruders is, however, quite rare. See Mike Maguire & Trevor Bennett, *Burglary in a Dwelling: the Offence, the Offender, and the Victim* (1982).

ur-text of state power, and that this form of power is inherently vague and limitless.<sup>34</sup> Dubber suggests that the state can be seen as wielding two ideal types of coercion: a defined power of law, which provides rules for autonomous individuals to coexist harmoniously, and a discretionary power of police, which derives from the functions of the patriarch in defending his family and advancing its sectional interests. Dubber cites the *patria potestas* of the classical world, which gave unconstrained powers of coercion to male heads of houses over women, children, and slaves, and locates a similar coercive power in the head of the medieval household, dwelling on the stringencies of petty treason. The law of petty treason in medieval England exacerbated the punishment for a servant killing a master, or a wife a husband, or a child a parent, on the ground that the insubordination rendered the homicide particularly atrocious and destabilizing to the natural order of the realm.<sup>35</sup> Church, Crown, and lords wielded such punishments on a grander scale as "macro-households" or heads of families writ large. Early modern political theorists such as Jean Bodin and Robert Filmer emphasized the non-contractual, centralizing powers of the patriarchal sovereign, with Filmer in particular claiming biblical authority for his positions.<sup>36</sup> John Locke in his two *Treatises of Government* attacked the illiberalism of the patriarchal theorists and argued for a bounded legislator governing by consent, but even he accepted the unlimited executive police power of the state in repressing disorder.<sup>37</sup> William Blackstone and Adam Smith also emphasized the police power, and they in turn were a powerful influence in colonial and revolutionary

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34 Markus Dirk Dubber, *The Police Power: Patriarchy And The Foundations Of American Government* (2005).

35 *Id.* at xi-xvi, 3-62. It is tolerably clear that the common law quickly regulated and reduced the incidence of petty treason, mildly undermining one of the planks of Dubber's argument. Petty treason was certainly taken seriously, being the first offence to be excluded from benefit of clergy by declaration of Parliament in 1496; but by 1551 Robert Brooke had demonstrated that the distinction between murder and petty treason had shrunk in significance and turned on technicalities of marriage law. In 1554, a case decided that a parricide who did not earn his board in the household through service to his slain parent was not within the ambit of petty treason, and the ambit of the crime was steadily narrowed. See 6 John H. Baker, *The Oxford History of The Laws of England, 1483-1558*, at 520-21, 556-58 (2003).

36 Sir Robert Filmer, *Patriarcha or The Natural Power of Kings* (Johann P. Sommerville ed., 1991) (1680).

37 See John Locke, *Two Treatises of Government* (c. 1680-90; Peter Laslett ed., 1960); Jeremy Waldron, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought* (2002); Daniel Engster, *Jean Bodin, Scepticism and Absolute Sovereignty*, 17 *Hist. Pol. Thought* 469 (1996); Daniel Engster, *Divine Sovereignty: The Origins of Modern State Power* (2001).



America.<sup>38</sup> According to Dubber, the licence to use violence against burglars traces its lineage to the very same conception of a householder's intrinsic police power to defend the family interest, however that family is defined. Dubber's "householder" theory of policing and the state is highly suggestive, and is raising interest amongst theorists of crime and policing in Britain.<sup>39</sup>

James Whitman has argued in another major new historical study that the foundations of common-law punitive attitudes to criminals, which include the licensing of personal violence against intruders, lie in an egalitarian and libertarian cultural legacy that values negative freedom as a sphere of sovereignty excluding state power. English, and especially American, law sees the integrity of the home, and the right to defend it, as a hallmark of individual freedom and independence. Whitman contrasts this libertarian independence with continental European (i.e., French and German) notions of individual dignity and autonomy, and the concomitant immunity of the human personality from degradation. He argues that the dignitary concept of individuality makes for a milder approach to punishment, as miscreants who trench on the freedoms of the community yet retain personal rights. He links these notions to an "aristocratic," honour-based cultural praxis, which leads modern European social democracies to raise up the malfunctioning bottom-end of society rather than simply repressing it as a threat to the majority.<sup>40</sup> We shall see that European law has in fact tilted at times towards allowing disproportionate force against criminals, such as home intruders who threaten their victims' autonomy and personality, but this may be an exception probing rather than overthrowing Whitman's overall thesis.

## VI. THE OLD COMMON LAW DEFINITION OF BURGLARY AND BLACKSTONE'S RESTATEMENT

Let us now return to the positive law. Burglary was defined by ancient common law and by statute as a felonious housebreaking in time of peace. It came to include intruding into a house without force but with intent to commit another, different felony. Felonious intent as an element of

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<sup>38</sup> Dubber, *supra* note 34, at 47-77.

<sup>39</sup> See, e.g., Lindsay Farmer, *Tony Martin and the Nightbreakers: Criminal Law, Victims and the Power to Punish*, in *Perspectives on Punishment: The Contours of Control* (Sarah Armstrong & Lesley McAra eds., forthcoming 2005).

<sup>40</sup> James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (2003); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale L.J. 1151 (2004).

the offence took time to crystallize. Mountford, in 1527, tended to define the mental element negatively, by listing the instances of housebreaking that were not felonious (putting out fires, legally taking one's own goods, arresting other felons, or separating fighters). Earlier cases had seemed to require either intent to murder or a completed lesser felony, as required, in order to convert non-felonious housebreaking into the greater offence of burglary. Fitzherbert, writing in 1538, held that burglarious intent had broadened to encompass other intended felonies, such as rape and theft. Non-felonious but wrongful intentions were insufficient. A mere intentional trespasser, or even one who intruded intending to harass or beat another, did not necessarily become a burglar. Where the felony was incomplete, but intention proved, the *mens rea* could be added to the act of unlawful entry or invasion in order to construct the separate felony of burglary, and so was a useful surrogate for a law of attempts. Many sixteenth-century writers argued that the *actus reus* of burglary involved breaking into a dwelling or church (but not an alehouse or inn) by night, the nocturnal requirement possibly being an echo of Roman doctrine. A 1503 writer states categorically that housebreaking by day was not a felony, but leading writers such as Fitzherbert and Mountford omitted the nocturnal requirement. The situation was further confused by a 1547 statute that removed benefit of clergy from housebreaking by day or night. This reform tilted housebreaking towards becoming a twenty-four hour offence of serious gravity, but still not necessarily a felony if committed by day.<sup>41</sup>

Sir William Blackstone's extensive reflections on burglary summarize much of the earlier legal history from the medievals to Coke, and further suggest a philosophy determining how much force could be used in defence of property:

BURGLARY, or nocturnal housebreaking, *burgi latrocinium*, which by our antient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature; an invasion, which in such a state, would be sure to be punished with death, unless the assailant were the stronger. But in civil society, the laws also come in to the assistance of the weaker party: and, besides that they leave him this natural right of killing the aggressor, if he

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<sup>41</sup> The above paragraph is derived from 6 Baker, *supra* note 35, at 572-73.

can, ... they also protect and avenge him, in case the might of the assailant is too powerful. And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of antient Rome ... For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private. Hence also in part arises the animadversion of the law upon eaves-droppers, nusancers, and incendiaries: and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case.<sup>42</sup>

Blackstone repeated Coke's definition of a burglar as: "he that by night breaketh and entreth into a mansionhouse, with intent to commit a felony." The legal definition divided into four components: time, place, manner, and intent. First, a burglary had to be nocturnal, tracking the policy that saw any night-time attack as particularly atrocious and so making homicide in self-defence more justifiable. The test was not whether there was any light to see the assailant, for

then many midnight burglaries [by moonlight] would go unpunished: and besides, the malignity of the offence does not so properly arise from it's being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.<sup>43</sup>

Second, the place had to be a "mansion house," which could include a church being "*domus mansionalis Dei* ... it may also be committed by breaking the gates or walls of a town in the night; though that perhaps Sir Edward Coke would have called the mansion-house of the garrison or corporation." A deserted house or an uninhabited structure such as a barn could not be burgled since no one dwelt (or, more particularly, slept) there, thus precluding "the same circumstances of midnight terror." A complex

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42 4 William Blackstone, *Commentaries on the Laws of England* 223-28 (1765-69). Important earlier treatments include Coke, *supra* note 33, at 63-65, and 1 William Hawkins, *A Treatise of the Pleas of the Crown* 129-37 (1716-21). An especially detailed treatment of the historical law is given in 2 Edward Hyde East, *Pleas of the Crown* 481-523 (1803).

43 4 Blackstone, *supra* note 42, at 224.

body of law dealt with the question of how permanent a structure or dwelling had to be so as to attract the law's protection from burglary, and also with the matter of whether subdivided rooms, gardens, barns, and so forth fell within the rule.<sup>44</sup> Blackstone then described the third element of *actus reus* as involving breaking and entry. Merely crossing a boundary might not be enough, but knocking on a door, lifting a latch, or entering on a pretext, could all amount to housebreaking. Jurists of Blackstone's time and after differed over whether a peaceable entry with felonious intent could involve an implied or fictitious breaking. "As to the intent," concluded Blackstone,

it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute.<sup>45</sup>

Blackstone also noted how Tudor statutes had removed benefit of clergy from burglary to underline its seriousness.<sup>46</sup> But outside the severity of state punishment, the main importance of the definition of the offence of burglary was that it licensed the householder to kill the criminal without more. Neither theft nor malicious property damage warranted such defence. If the eighteenth-century legal system upheld a "Bloody Code" of capital offences to protect property, it did not commonly licence private actors to execute such punishments, but applied them by strict legal process.<sup>47</sup> Burglary was the striking exception.

## VII. MODERN ENGLISH LAW

The modern definition of burglary is found in section 9 of the Theft Act 1968, and involves two elements: entry into a building by a person as a trespasser, with the added component of intending to steal, inflict grievous

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<sup>44</sup> *Id.* at 224-26.

<sup>45</sup> *Id.* at 227-28.

<sup>46</sup> *Id.* at 228, 366-67.

<sup>47</sup> Thompson, *supra* note 15; Peter King, *Crime, Justice, and Discretion in England 1740-1820* (2000).

bodily harm, or cause unlawful property damage, whether the offender commits any of these offences or merely intends to do so.<sup>48</sup> Entry as a trespasser with intent to rape was historically part of the definition, but was removed in 2003.<sup>49</sup> The current definition also includes the case of an offender not necessarily intending to commit a serious crime at the very time of entry, but engaging in such a criminal attempt after trespassory entry into a building. Burglary is punished more severely when the building is also a dwelling, and the definition of the offence is extended to include trespassory entry into an inhabited vehicle or vessel, even if the inhabitant is not present at the time of trespass.<sup>50</sup>

The gist of the offence seems to be that the burglar's invasion of a person's physical space makes for a serious crime, which is separate from the ulterior crime or attempt that accompanied the trespass. Stealing from or attacking a person, or intentionally destroying a person's property, is a crime; to invade a person's dwelling in order to do so is a further crime that causes a distinct, superadded type of harm, an *injuria* or attack on personality, security, and dignitary interests. The extension of the crime to protect people's space in any building, including non-dwellings (such as places of business and vehicles), can be seen as a fencing device protecting the core interest of protection of home or dwelling place.<sup>51</sup>

The modern definition of the offence throws no light on what type of force may be used to repel the intrusion. Modern authorities provide that, in general, reasonable force may be used to prevent a crime, including a property crime such as burglary, and it may be that more force is allowed

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48 Theft Act, 1968, c. 60, § 9 (Eng.).

49 Sexual Offences Act, 2003, c. 42, § 1 (Eng.).

50 See Herring, *supra* note 27, at 566-74; A.T.H. Smith, Property Offences 889-922 (1994); P. Pace, *Burglary Trespass*, 1985 Crim. L. Rev. 716.

51 Compare Theft Act § 9(4) with other statutory codifications, such as the Western Australian Criminal Code, 1913, § 244, which protects an occupant in peaceable possession of a dwelling or "associated building" against "home invasion" but does not extend like protection to other forms of property. The New Zealand Crimes Act, 1961, §§ 52-56, differentiates between persons in possession of moveable property or land without claim of right, who may use reasonable force to repel a trespasser or defend possession but who may not strike or inflict harm upon the body of the attacker; and a person in a dwelling house who may use reasonable force to repel a forcible entry, with no added restrictions. For the varied U.S. position, which on a state by state count tends to be harsher to assailants and more tolerant of violent reprisal, see Stuart P. Green, *Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, [1999] 1 U. Ill. L. Rev. 1. The innovative Canadian legislation is analyzed below.

in crime prevention generally than in self-defence.<sup>52</sup> Case law offers little authoritative guidance as to the permissible quantum of force. The question is a mixed one of fact and law, and is ultimately decided through the black-box discretion of the jury. Lord Hewart, in the case of *R. v. Hussey*<sup>53</sup> in 1924, stated that a householder could kill a trespasser forcibly trying to dispossess him or evict him, and, crucially, that the householder had no duty to retreat as in normal self-defence. In other words, a householder could not be expected to flee his home to avoid confrontation with a burglar. Lord Hewart was purportedly following the 1922 edition of *Archbold's Criminal Pleading, Evidence and Practice* stating:

[I]n defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self-defence a man who attacks him personally, with this distinction, however, that in defending his home he need not retreat...for that would be giving up his house to his adversary.<sup>54</sup>

In this formulation, home defence was even less restricted than personal self-defence, which was based on the necessity of using lethal force. In *Hussey* itself a lessee was acquitted of using excessive force when he let off a gun to repel his landlords who were trying to force their way in to evict him; and Lord Hewart seemed to agree with Hussey's counsel that violence could be used in the absence of a direct personal threat. Other indications also suggest that judges at the turn of the last century acted as if a burglar and other home trespassers had forfeited all legal protection.<sup>55</sup> The judgment in *Hussey*, however, appeared as something of an archaic throwback even at the time. Hewart was a notoriously tough judge, and later editions of *Archbold* did not follow his lead.

A similarly harsh result was reached in a German case in 1920, when a farmer shot some thieves stealing fruit from his farm after warning them that he would do so if they tried to flee. The German Supreme Court held that the use of force in this case, whilst harsh, was not excessive, since the farmer could not be expected to weigh his own interests in protecting his

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52 Simester & Sullivan, *supra* note 19, at 626-68; cf. Andrew J. Ashworth, *Self-Defence and the Right to Life*, 34 Cambridge L.J. 282, 290-92 (1975).

53 *R. v. Hussey*, 18 Crim. App. R. 160, 161 (C.C.A., 1924).

54 *Archbold's Criminal Pleading, Evidence and Practice* 887 (26th ed. 1922), *cited in Hussey*, 18 Crim. App. R. at 161.

55 See Smith, *supra* note 19, at 109-12, for some telling examples, such as an elderly Irishman who was knighted for slaying four burglars with his carving knife in 1911.

property against the right of the thieves to bodily safety.<sup>56</sup> Neither of these pro-owner authorities would be followed today but these decisions, even if controversial, were read as legitimate in the interwar period.

If some doubt has attached to the right to kill a burglar, the common law early made clear that one could not kill or harm a mere trespasser in the absence of personal danger. Garrow B. stated this in *R. v. Scully*<sup>57</sup> as early as 1824, holding that shooting an intruder merely to apprehend him was unjustified. In the case before the court,

the life of the prisoner was threatened, and if he considered his life in actual danger, he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter.<sup>58</sup>

In 1823, in *R. v. Mead and Belt*,<sup>59</sup> Holroyd J. instructed a jury that violence could not be used against a civil trespasser, adding: "[b]ut, the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle and therefore, in the eye of the law, it is equivalent to an assault."<sup>60</sup> Later cases repeat that lethal force may not be used to arrest or apprehend a trespasser committing a felony (such as a chicken thief on a farm),<sup>61</sup> excepting cases of burglary where personal danger was commonly presumed.<sup>62</sup> The saga of spring guns and man-traps in the eighteenth and early nineteenth centuries is instructive here. The courts were clearly troubled by this problem. In *Ilott v. Wilkes*,<sup>63</sup> Abbott C.J. squeamishly legitimized these cruel devices in the following terms:

We are not called upon in this case to decide the general question, whether a trespasser sustaining an injury from a latent engine of mischief, placed in a wood or in grounds where he had no reason to apprehend personal danger, may or may not maintain an action. That question has been the subject of much discussion in the Court

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<sup>56</sup> RGSt 55, 82, cited in T. M. Funk, *Justifying Justifications*, 19 Oxford J. Legal Stud. 630 (1999).

<sup>57</sup> *R. v. Scully*, 171 Eng. Rep. 1213 (Gloucester Assizes 1824).

<sup>58</sup> *Id.* at 1213.

<sup>59</sup> *R. v. Mead and Belt*, 168 Eng. Rep. 1006 (York Assizes 1823).

<sup>60</sup> *Id.* at 1006.

<sup>61</sup> *R. v. McKay* 1957 V.L.R. 560, with similar facts to *Scully*, 171 Eng. Rep. 1213.

<sup>62</sup> *R. v. Price*, 173 Eng. Rep. 78 (Worcester Assizes 1835); *R. v. Symondson*, 60 J.P. 645 (1896); See David Lanham, *Defence of Property in the Criminal Law*, 1966 Crim L. Rev. 368, 426.

<sup>63</sup> *Ilott v. Wilkes*, 106 Eng. Rep. 674, 676 (K.B. 1820).

of Common Pleas, and great difference of opinion has prevailed in the minds of the learned Judges, whose attention was there called to it. Nor are we called upon to pronounce any opinion as to the inhumanity of the practice, which in this case has been the cause of the injury sustained by the plaintiff. That practice has prevailed extensively and for a long period of time, and although undoubtedly I have formed an opinion as to its inhumanity, yet at the same time I cannot but admit that repeated and increasing acts of aggression to property may perhaps reasonably call for increased means of defence and protection. I believe that many persons who cause engines of this description to be placed in their grounds do not do so with the intention of injuring any one, but really believe that the notices they give of such engines being there will prevent any injury from occurring, and that no person who sees the notice will be weak and foolish enough to the perilous consequences likely to ensue from his trespass.<sup>64</sup>

Automatic devices to shoot intruders were banned in an 1828 statute, but an exception was made allowing lethal devices to be set to protect dwellings against felons. In particular, devices could be placed in a house between sunset and sunrise as a protection against burglars.<sup>65</sup>

Presumably, a legally set gun that shot a non-felonious entrant would bring criminal liability to the householder. Further issues of line-drawing arose from man-traps that did not threaten grievous bodily harm, and from fierce guard dogs that did. Notice of the danger set by the owner was often sufficient to dispel liability, on the ground that the intruder had caused his own misfortune. In the famous case of *Bird v. Holbrook*<sup>66</sup> in 1828, the Court of Common Pleas led by Best C.J. (who as a puisne justice had agreed with Abbott C.J.'s reluctant decision to allow spring guns in *Ilott v. Wilkes*) held that a man who set a spring gun without notice or warning was liable for injuries caused to an underage trespasser, even though the gun had been set at night in his dwelling, as envisaged by the 1828 statute. The plaintiff was a nineteen-year-old lad innocently retrieving a pea-fowl that had strayed; the defendant had put the gun in place after having suffered theft of some £20 worth of plants. Best C.J. based his decision largely on the moral revulsion he felt at the practice of setting a spring gun, especially without notice:

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<sup>64</sup> *Id.* at 676.

<sup>65</sup> Spring Guns and Man Traps Act, 1828, § 12 (Eng.).

<sup>66</sup> *Bird v. Holbrook*, 130 Eng. Rep. 911 (C.P. 1828).



It has been argued that the law does not compel every line of conduct which humanity or religion may require; but there is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England. I am, therefore, clearly of opinion that he who sets spring guns, without giving notice, is guilty of an inhuman act, and that, if injurious consequences ensue, he is liable to yield redress to the sufferer. But this case stands on grounds distinct from any that have preceded it. In general, spring guns have been set for the purpose of deterring; the Defendant placed his for the express purpose of doing injury; for, when called on to give notice, he said, "If I give notice, I shall not catch him." He intended, therefore, that the gun should be discharged, and that the contents should be lodged in the body of his victim, for he could not be caught in any other way. On these principles the action is clearly maintainable, and particularly on the latter ground.<sup>67</sup>

Later cases blurred the rule that hazards could only be laid defensively with ample notice,<sup>68</sup> but still an important line had been drawn restricting use of violence against trespassers.

Today, the matter is partially codified in England and Wales by section 3 of the Criminal Law Act 1967, stating: "A person may use such force as is reasonable in the circumstances in the prevention of crime," or in arresting offenders or suspects. The courts have glossed this defence as involving the objective standard of a reasonable man holding the subjective knowledge of the actual person involved, including his state of belief as to facts, even if mistaken.<sup>69</sup> The jury must also take into account the fact that the person using force was acting in crisis and might not have had an opportunity to judge the level of force to a nicety. Even allowing for mistaken belief and judgment formed in crisis, the amount of force must be proportionate and reasonable in light of the interests being protected and the likely harm caused by use of force. Jurists have speculated as to whether grievous bodily harm or death may reasonably be inflicted on a criminal in order to prevent theft of a large

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<sup>67</sup> *Id.* at 916. See also Getzler, *supra* note 25, at 199; Francis H. Bohlen & John J. Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices*, 35 Yale L.J. 525 (1926).

<sup>68</sup> See, e.g., *Wootton v. Dawkins*, 140 Eng. Rep. 477 (C.P. 1857).

<sup>69</sup> The development of the reasonable man standard in English law is traced in Law Commission, Consultation Paper No. 173: *Partial Defences to Murder*, paras. 1.34-1.47, 3.39-4.161 (2003) [hereinafter Consultation Paper No. 173].

sum of money or destruction of a very valuable object. A common position is that, without threat to a person, property by itself cannot reasonably provide a justification for inflicting serious physical harm. Some judgments, however, approve considerable violence to arrest criminals offending against property, as when a butcher used his knife to stop a robber escaping with his loot, leading to the criminal's death. The coroner approved of the butcher's self help.<sup>70</sup> More recently, a court approved of a builder who beat a drug-addicted burglar with a metal baseball bat, breaking his limbs and skull,<sup>71</sup> and a few months ago a court approved of the actions of a blind man stabbing to death a drunken intruder who had forced in the door to his home.<sup>72</sup> Police certainly kill fleeing suspects regularly, and cases such as *R. v. Clegg*<sup>73</sup> (where the court convicted a young soldier of murder when he shot at a car that went through a checkpoint after the potential for danger had passed) are notable, precisely because they rupture an expectation that suspected criminals may be arrested with deadly force.

### VIII. JUSTIFICATION, EXCUSE, AND PARTIAL DEFENCES

In the old common law, a distinction was drawn between defences to homicide involving justification and those involving excuse. Both varieties were defences to the felony but, in cases of excuse, forfeiture of goods was levied by the Crown.<sup>74</sup> Today, theorists use the two categories to distinguish actions that society approves of with respect to purpose or motivation,<sup>75</sup> or consequences,<sup>76</sup> from actions involving behavior that cannot

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<sup>70</sup> The Times, Sept. 16, 1967.

<sup>71</sup> Vikram Dodd, *Judge reignites self defence row*, The Guardian, May 5, 2000.

<sup>72</sup> Claire Cozens, *Blind man killed intruder in self-defence*, The Guardian, Mar. 19, 2004.

<sup>73</sup> *R. v. Clegg*, [1995] 1 A.C. 482 (H.L.). The shooting by police of Jean Charles de Menezes after his apprehension in an underground train carriage in London on 22 July 2005 raises different issues, as the police who arrested him claim to have believed mistakenly that they were dealing with an armed suicide bomber, due to poor briefing from police intelligence. An inquiry by the Independent Police Complaints Commission into the alleged shoot-to-kill policy of the London police is pending. See Tony Thompson et al., *Baptism of Fire*, The Observer, Aug. 21, 2005; Tony Thompson et al., *Police Knew Brazilian was "Not Bomb Risk,"* The Observer, Aug. 21, 2005.

<sup>74</sup> See Semayne's Case, 77 Eng. Rep. 194 (K.B. 1603).

<sup>75</sup> George P. Fletcher, *Rethinking Criminal Law* 855-75 (Oxford University Press 2000) (1978) (especially pages 870-75).

<sup>76</sup> Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 Colum. L.

be approved of, but some excuse may be found in the capacity or situation of the defendant, such as insanity or provocation.<sup>77</sup> In slogan form, justification describes the quality of the act, and excuse pertains to the intentionality of the actor. Placing the use of force to prevent crime (including property crime) within the justificatory category seems to be appropriate, given that society positively approves of the act and the results of using reasonable force against a criminal or a suspect. But the excuse/justification distinction cannot always discriminate cleanly between cases, especially when a person acts in a mistaken or objectively unreasonable state of belief. The celebrated case of *R. v. Dadson*<sup>78</sup> is key here. In that case, a policeman shot and wounded an escaping thief, not knowing that the man he shot was a felon. Had he known of the victim's status he would have had a complete defence, since force was at that time justified in order to arrest a fleeing felon.<sup>79</sup> Because the policeman did not know of this essential fact, he was convicted of intentionally causing grievous and unlawful bodily harm. Notwithstanding the beneficial consequences of his actions, his mental state in shooting the thief was not justified and so conviction was required. Simester and Sullivan in their review of the justification-excuse debate have argued that many so-called defences entail failure of proof of a complete offence rather than the addition of some extra factor to relieve of liability. For example, an insane killer could be said to lack the requisite *mens rea* and, indeed, *actus reus* of purposeful action; hence, no crime is committed, rather than a crime plus a defence. Simester and Sullivan proffer a more intricate taxonomy of defences, in which prevention of crime amounts to permissible conduct. Objectively,

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Rev. 199, 203-36 (1982); Paul H. Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in Harm and Culpability 45 (Andrew P. Simester & A.T.H. Smith eds., 1996); cf. John Gardner, *Justifications and Reasons*, in Harm and Culpability, *supra*, at 101; G.R. Sullivan, *Making Excuses*, in Harm and Culpability, *supra*, at 131; John Gardner, *The Gist of Excuses*, 1 Buff. Crim. L. Rev. 575 (1998).

<sup>77</sup> Jeremy Horder, *Provocation and Responsibility* (1992); Jeremy Horder, *Excusing Crime* (2004); Simester & Sullivan, *supra* note 19, at 342-60, 571-83.

<sup>78</sup> *R. v. Dadson*, 169 Eng. Rep. 407 (Crown Cas. Res. 1850).

<sup>79</sup> Compare to *R. v. Scully*, 171 Eng. Rep. 1213 (Gloucester Assizes 1824), which held that a guard is not justified in shooting at trespassers in order to apprehend them or to stop the commission of a crime, even if they were seen going into the owner's chicken roost in order to steal. As it happened, the trespasser who was killed by the warning shot turned out to have stolen three fowls and carried tools showing he had broken and entered the premises. Yet it was not argued that the status of the deceased as a criminal or possibly a felon was material. Indeed, Garrow B. suggested that the plaintiff had not shot in order to apprehend a felon, but, rather, had shot at another intruder in order to scare him off and so protect himself from harm. The final verdict appeared to be not guilty.

reasonable response to a situation affords additional reason to eliminate liability for what otherwise would be a completed crime.<sup>80</sup>

One important practical implication emerging from this involved defences debate is whether excessive use of force in defence of persons or property wholly eliminates any possible justificatory defence, or can yet serve as a partial defence by nature of excuse. In *R. v. McKay*,<sup>81</sup> where a farmer shot and fatally wounded a chicken thief, it was decided that some force was justified, but that excessive or unreasonable force had been applied here. The defence could not therefore be total, but could operate partially so as to excuse and reduce the charge to manslaughter.<sup>82</sup> This may have been predicated on the existence of mandatory severe punishment for murder, a context that might lead juries into refusing to find excessive force in order to allow acquittal. The Australian courts later adopted a rule where a person subject to felonious attack uses more than reasonable lethal force, but honestly believes himself to be using necessary force only, then a manslaughter conviction is appropriate.<sup>83</sup> This partial defence rule was rejected by English courts,<sup>84</sup> but long formed a pillar of Australian criminal law. It was ultimately thrown out by the High Court of Australia in 1987,<sup>85</sup> but was reinstated by legislation in some Australian states and has recently attracted support from the English Law Commission, driven in part by the sentencing rigidities set in place for punishing murder.<sup>86</sup> The partial defence debate is concerned with excessive

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<sup>80</sup> Simester & Sullivan, *supra* note 19, at 537-46, 609-55; *see also* Andrew P. Simester, *Mistakes in Defence*, 12 Oxford J. Legal Stud. 295 (1992). A piecemeal approach to excuses is also defended in Victor Tadros, *The Characters of Excuse*, 21 Oxford J. Legal Stud. 495 (2001). For a sustained effort to re-systematize *see* Horder, *Excusing Crime*, *supra* note 77.

<sup>81</sup> *R. v. McKay* 1957 V.L.R. 560.

<sup>82</sup> Norval Morris, *The Slain Chicken Thief*, 2 Sydney L. Rev. 414 (1958).

<sup>83</sup> *R. v. Howe* (1958) 100 C.L.R. 448; *R. v. Viro* (1978) 141 C.L.R. 88.

<sup>84</sup> *Palmer v. R.*, [1971] 2 A.C. 814 (P.C., appeal taken from Jam.); *R. v. McInnes*, [1971] 1 W.L.R. 1600 (C.A.); *R. v. Clegg*, [1995] 1 A.C. 482 (H.L.); *see* Consultation Paper No. 173, *supra* note 69, paras. 9.1-9.31; Law Commission, Final Report, 2004, Cm. 6301, paras. 4.8-4.11.

<sup>85</sup> *Zecevic v. Dir. Pub. Prosecution (Vic.)* (1987) 162 C.L.R. 645.

<sup>86</sup> *Cf.* Criminal Law Consolidation (Self-Defence) Amendment Act, 1991 (S. Austl.); Crimes Amendment (Self-Defence) Act, 2001 (N.S.W.). *See also* Consultation Paper No. 173, *supra* note 69, Pt. IX, paras. 9.1-9.43; Stanley M. H. Yeo, *Unrestrained Killings and The Law: A Comparative Analysis of the Laws of Provocation and Excessive Self-Defence in India, England and Australia* (2002); *See* compressed treatment in Stanley M. H. Yeo, *Killing in Defence of Property*, 150 New L.J. 730 (2000).

force used to kill in general, and excessive defence of property is only a subset of that larger subject.

### **IX. DEEMED ASSAULT AND PROPORTIONALITY**

The Canadian Criminal Code makes a novel juristic analysis of the circumstances where force is justified in defending property, upon early nineteenth-century common law doctrine. Where a trespasser attempts to take personal property from a person in peaceable possession, the trespasser's continuing attempts to take the property are defined by the statute as equivalent to the launching of an assault. Hence, the self-help of the victim in repelling the property attack is converted in the eyes of the law into a form of personal self-defence against assault, provided that the possessor uses no more force against the trespasser than is "necessary."<sup>87</sup> Likewise, a person in peaceable possession of a dwelling house may use force to prevent another breaking in, and any person in possession of any land may use force to prevent or repel trespass, again subject to the requirement of necessity. If the trespasser resists that resistance, he is deemed by the statute to be launching an assault on the possessor.<sup>88</sup> The provisions are complex and interlocking, and trouble has been caused by the focus on the possessor rather than the superior right-holder. The possessor is allowed to use reasonable force against a stranger to the goods, but not against a person with a superior possessory right. But a squatter can repel the true owner or any person with a superior possessory claim who tries to enter real property in order to retake possession. Thus, in the case of land, the Code cleaves to a deep legal instinct prohibiting self-help in the recovery of property but reverses that policy with respect to personal property.<sup>89</sup> The courts have held that necessary force does not include killing to defend property in the absence of personal threat, but this does not sit easily with the legislative deeming of a trespasser's resistance as a species of assault. The Department of Justice has proposed legislative reform to introduce an overt requirement of reasonable and proportionate force, but this has not been pursued to date.<sup>90</sup> The current legislative approach of deemed

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<sup>87</sup> Criminal Code, R.S.C., ch. C-46, § 38(2) (1985) (Can.).

<sup>88</sup> R.S.C., ch. C-46, §§ 40, 41(2).

<sup>89</sup> R.S.C., ch. C-46, § 39(1)(2), contrasting defence of personal property with and without claim of right; § 42(2), allowing force to prevent rightful owner entering land to take possession. Roman law and common law set their face against recovery of possession by self-help, instead according claimants possessory interdicts or assizes.

<sup>90</sup> See Department of Justice, Canada, *Reforming Criminal Code Defences* —

assault may, in practice, be little more than a drafting technique, but it might also suggest that the law regards sustained property attack as a presumptive attack on the person, and thus offers a wider array of self-defence powers.

The German position, which has evolved since the 1920 case involving the shooting of a fruit thief described above,<sup>91</sup> is that where there is a culpable aggressor who intentionally inflicts a wrong, the right-holder can respond with all necessary force to defend his or her autonomy and rights. In such a case, protection of autonomy and right has priority over utility, voiding any requirements of safe retreat or avoidance of disproportionate force. The legal risk of inflicting harm disproportionate to the offence, therefore, lies on the initial attacker. Attempts to interpret section 32 of the Criminal Code to impose proportionality through "appropriate" self-defence measures have attracted only minority juristic support, with the commitment to generous protection of autonomy prevailing.<sup>92</sup>

Theorists such as George Fletcher<sup>93</sup> and Robert Schopp<sup>94</sup> have taken this Germanic concern with autonomy and placed it at the heart of their liberal theories of justification and self-defence. Because the criminal law's concern with justification is not welfarist, disproportionality itself cannot eliminate justification for severe self-defence measures. One cannot trade off autonomy by measuring it on a balance of utilities. Extreme disproportionality, however, can still take the wielder of force out of the terrain of self-defence entirely if the initial attack becomes a pretext for violence and the right to self-defence is abused, and so voided. Hence, "abuse of rights" theory, a concept largely alien to Anglo-Commonwealth common law,<sup>95</sup> is propounded as the main control

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Provocation, Self-Defence and Defence of Property, at <http://canada.justice.gc.ca/en/cons/rccd/partie3p3.html> (June 1998) (in particular Pt. 3: Defence of Property).

91 *Supra* note 56 and accompanying text.

92 *See* Funk, *supra* note 56.

93 *See, e.g.*, Fletcher, *supra* note 75, at 855-75.

94 Robert F. Schopp, *Justification Defenses and Just Convictions* (1998).

95 Michael Taggart, *Private Property and Abuse of Rights in Victorian England* (2002); *cf.* Joshua Getzler, *Review*, 66 *Mod. L. Rev.* 819 (2003). Note however that motive may have some place in the assessment of criminal mens rea. *See* R. v. Thain, 1985 N. Ir. L.R.. 457; G. R. Sullivan, *Bad Thoughts and Bad Acts*, 1990 *Crim. L. Rev.* 559. Blackmail is a possible example, where the selfish motive of the blackmailer issuing coercive threats converts an otherwise legal act into a crime. *Cf.* Grant Lamond, *Coercion, Threats, and the Puzzle of Blackmail*, in *Harm and Culpability*, *supra* note 76, at 215.

device or backstop, rather than any direct test of necessity or reasonableness with their implications of proportionality.<sup>96</sup>

The American law on defence of property is typically fissured, with case law overlaid by state laws and the Model Penal Code. Joshua Dressler<sup>97</sup> has argued that American criminal law distinguishes (or ought to distinguish) between defence of property in the sense of self-help to guarantee rightful possession, when the use of some reasonable and proportionate, but never deadly, force is permitted, and defence of habitation, when deadly force may be used. Dressler finds different levels of licence for deadly force in the case law, and indicates dissatisfaction that the Model Penal Code tends to the severe position, allowing deadly force to be used against a home invader threatening dispossession, even without a perceived or real threat to the inhabitant's safety.<sup>98</sup> And yet, a non-disseising and non-threatening intruder may still not lawfully be killed under this provision.

In a recent sophisticated study on American defence of property law, Stuart Green notes that American law generally lacks a sturdy rule requiring proportionality of response to home invasion.<sup>99</sup> Various defences of the non-proportionality rule are on offer: a rule-utilitarian calculus that favours the householder's interests in deterrence and repulsion of attack, as against the attacker's interest in life and limb; a theory that the attacker has forfeited his right to life through aggression; a theory that the defender has an inalienable right to repel aggression; a theory that the killing of an intruder is not directly purposed or intended but is only a by-product of the rightful defence of home; a theory that the householder's autonomy interests cannot be put into a balance with the aggressor's interests but may be defended absolutely. These justifications of non-proportionality are buttressed by the typical proneness and vulnerability of a householder under attack, who has nowhere to retreat and who may therefore panic and overreact, and also by the fact that attacks on dwellings can be seen as attacks on the security, identity, dignity, and autonomy of house-dwellers, harms superadded to the physical and economic degradation caused by the trespass. Green finds all these theories ultimately lacking when attempting to explain why proportionality can be discarded

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<sup>96</sup> Cf. Jeremy Horder, *Self-Defence, Necessity and Duress: Understanding the Relationship*, 11 Can. J.L. & Jurisprudence 143 (1998).

<sup>97</sup> Joshua Dressler, *Understanding Criminal Law* (3d. ed. 2001), ch. 20.

<sup>98</sup> Model Penal Code § 3.06(3)(d)(i) (Proposed Official Draft 1962). The right to kill thus exceeds any justification of self-defence, as the American Law Institute apologetically notes in § 3.06 cmt. at 93.

<sup>99</sup> Green, *supra* note 51. The American literature is otherwise remarkably sparse; cf. Note, *A Rationale of the Law of Burglary*, 51 Colum. L. Rev. 1009 (1951).

and a life taken to defend property, and suggests that the law as it stands can only be justified by aggregating the entire set of disparate policies. His positive assessment of the non-proportionality rule is somewhat undercut by his demolition of the separate justifications commonly given for allowing householders to kill intruders not in self-defence.

Turning from the American to the European experience, it may be noted that all the justifications Green lists for allowing unlimited force have cropped up recently in Italy. Laws were proposed in 2003 and 2004 allowing householders to kill intruders with broad immunity from prosecution or punishment. These laws were propounded by Roberto Castelli, a right-wing populist leader of the Northern League without legal training, being the Justice Minister in Silvio Berlusconi's government in Italy. One clause of the bill adds a radically subjective defence: "One is not to be held punishable who exceeds the limits of self-defence, because of panic, fear or distress."<sup>100</sup> Bills proposing these changes were sent for consideration to the Camera and Senate of the Italian Parliament, but any such laws would likely collide with Article 2 of the European Convention of Human Rights.<sup>101</sup>

In Britain, the echo of this approach in conservative politics has been noted, with the favouring of a rule permitting householders to use anything up to "grossly disproportionate" violence, which, on its face, accepts the use of objectively disproportionate violence as being justified by the extreme circumstances of home invasion. But it is equally clear that the English courts have set their face against such a norm. The modern approach was stated in the 1995 appeal of *Revill v. Newbery*,<sup>102</sup> involving a claim in tort for damages by a burglar who had been shot by a householder. The latter was an elderly man who, after repeated burglaries, had hidden in his garden shed with a gun in order to apprehend the culprits. He had bored a hole in the door and shot through the hole when he heard the burglar approaching, there being no suggestion that he felt personally threatened. He was held guilty of carelessly or recklessly causing harm, though the burglar's damages were steeply reduced for contributory fault. The Court of Appeal rejected the idea

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<sup>100</sup> Proposta di legge N.4926, available at [www.camera.it/\\_dati/leg14/lavori/stampati/pdf/14PDL0059690.pdf](http://www.camera.it/_dati/leg14/lavori/stampati/pdf/14PDL0059690.pdf) (April 22 2004). I am grateful to Alessandro Spina for information on this point. See also John Hooper, *Italy plans law to allow property owners to shoot intruders*, The Guardian, Apr. 19, 2004.

<sup>101</sup> The official text is at <http://www.hri.org/docs/ECHR50.html#C.SecII>.

<sup>102</sup> *Revill v. Newbery*, 1996 Q.B. 567 (C.A. 1995), noted in Tony Weir, *Swag for the Injured Burglar*, 55 Cambridge L.J. 182, 182-84 (1996); Tony Weir, *All or Nothing?*, 78 Tul. L. Rev. 511, 531-32 (2004).



that the criminal nature of the plaintiff's trespass barred his claim regarding harm suffered in the course of his trespass. Millett L.J. stated:

For centuries the common law has permitted reasonable force to be used in defence of the person or property. Violence may be returned with necessary violence. But the force used must not exceed the limits of what is reasonable in the circumstances. Changes in society and in social perceptions have meant that what might have been considered reasonable at one time would no longer be so regarded; but the principle remains the same. The assailant or intruder may be met with reasonable force but no more; the use of excessive violence against him is an actionable wrong.

It follows...that there is no place for the doctrine *ex turpi causa non oritur actio* in this context. If the doctrine applied, any claim by the assailant or trespasser would be barred no matter how excessive or unreasonable the force used against him.<sup>103</sup>

English law thus disallows a disproportionate response against miscreants, even in necessary defence of one's rights and autonomy. Yet, this balance of law and policy may be fragile. *Revill v. Newbery* caused public outcry, adumbrating the *Tony Martin* case four years later. Ultimately, the bill for defendant Newbery's costs and damages was paid by public subscription. In a sense, the court of public opinion reversed the Court of Appeal.

## X. THE ROLE OF PROPERTY THEORY

Rights cannot easily be described without scrutiny of the underlying interests that those rights articulate.<sup>104</sup> The trespassory rules that protect crystallized interests may be highly varied, and thereby present an ungoverned set of pragmatic choices to the lawyers designing legal institutions. At the same time, the contours of those remedial rules can fold back onto the protected

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<sup>103</sup> *Revill*, 1996 Q.B. at 580.

<sup>104</sup> The literature on the interest theory of rights is burgeoning, most notably with Joseph Raz, *Legal Rights*, 4 Oxford J. Legal Stud. 1 (1984); Joseph Raz, *The Morality of Freedom* 166 (1986); Joseph Raz, *Ethics in the Public Domain* 238-53 (1994). For recent work see Alon Harel, *Theories of Rights*, in Blackwell Guide to the Philosophy of Law and Legal Theory 191 (Martin P. Golding & William A. Edmundson eds., 2004); Alon Harel, *What Demands Are Rights? An Investigation into the Relation between Rights and Reasons*, 17 Oxford J. Legal Stud. 101 (1997); James W. Harris, *Human Rights and Mythical Beasts*, 120 Law Q. Rev. 428 (2004).

interests and help define their content. If we chose to uphold contractual performances with the death penalty, this would have some impact on our concepts of promissory obligation; the intensified remedy would mean more than just a machinery of enforcement. The right to use force to defend property therefore rests, to a degree, on our understanding of the interest in peaceable possession of property; and, likewise, the allowance of reasonable private force to defend property may teach us something about the law's regard for property interests.

The interest in peaceable possession is now enshrined in human rights legislation.<sup>105</sup> The concept of peaceable possession, as noted earlier,<sup>106</sup> served to generate rights in the Canadian Criminal Code. However, human rights discourse in both private law<sup>107</sup> and criminal law<sup>108</sup> is still emerging in common law countries outside the United States. The nature of Article 1 of the First Protocol of the European Convention on Human Rights<sup>109</sup> protecting property is still to be explored. The importance of human rights in this area may lie in the demand they place on the courts to balance self-defence, property defence, and crime prevention interests against the right to life.<sup>110</sup> This is a generic problem in the area of justification, excuse, and defences, and says little distinctive about the use of force in protecting property. We may, in fact, learn more about the precise interests at stake by drawing insights from property theory *per se* rather than looking at extant human rights institutions.

There are two major tasks pursued in property theory. The first is the analysis of conceptual distinctions between persons as right- and duty-bearers, property as external things of value, and personal rights and duties that tie together both persons and things. Inquiry into these categories is one of the oldest themes in Western legal tradition: "all the law we have is persons, things and actions," proclaims the classical Roman

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<sup>105</sup> See, e.g., Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, art. 1, 213 U.N.T.S. 262; see Francis Geoffrey Jacobs et al., *The European Convention on Human Rights* 246-59 (3d ed. 1996).

<sup>106</sup> *Supra* text accompanying notes 87-90.

<sup>107</sup> The most important case to date which is restrictive of human rights applications to contract and property is *Wilson v. First County Trust Ltd.* (No. 2), [2004] 1 A.C. 816 (H.L.); see also *Parish of Aston Cantlow v. Wallbank*, [2004] 1 A.C. 546 (H.L.).

<sup>108</sup> See Andrew J. Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Hamlyn Lectures) (2002); Ben Emmerson & Andrew J. Ashworth, *Human Rights and Criminal Justice* (2001).

<sup>109</sup> The official text is at <http://www.hri.org/docs/ECHR50.html#>.

<sup>110</sup> See Ashworth, *supra* note 52, at 282.

jurist, Gaius.<sup>111</sup> The Hohfeldian denial of property<sup>112</sup> as a meaningful juristic category is now on the defensive, as modern theorists have (re)discovered property to be an irreducible building block of the legal and social order.<sup>113</sup> The analytical exercise merges into a justificatory enquiry: does respect for the autonomy and interests of persons require respect for property rights, and, if so, in what form? Locke's theory begins with self-ownership and hence justifies claims to fruit of labours, including appropriated resources. Hegel proclaims the need for individuals to master the world through property holdings expanding the sphere of rational choice. Bentham sees property as the key social device to enable individuals to enhance their utilities through stable investment and trade. The classical theories have had new bursts of life, with modern restatements of Lockean labour and appropriation theory by Nozick and Epstein,<sup>114</sup> of Hegelian personhood theory by Waldron, Radin and Brudner,<sup>115</sup> and of Benthamite utilitarian theory by Coase, Demsetz, Barzel and others in the law and economics tradition.<sup>116</sup> Jim Harris's synthesis in *Property and Justice* took the debate in a new direction. He undermined natural right theories and argued instead that property was justified by a mix of instrumental and freedom-promoting benefits, all ultimately resting on social convention. A key part of Harris's critical work was to attack not only the self-ownership fallacy,<sup>117</sup> but also the concomitant natural-right idea that trespass upon property could be analogized as an assault on the person of the owner. Perhaps an attack on intimate articles of property — destruction

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111 G. Inst. 1.8.

112 See, e.g., Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 145-67 (1992) (especially pages 151-56). One may question whether Hohfeld was a Hohfeldian in this sense.

113 See Harris, *Property and Justice*, *supra* note 2; see also Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* 161-92, 215-26 (1987); Jeremy Waldron, *The Right To Private Property* (1988); Stephen R. Munzer, *A Theory of Property* (1990); Carol M. Rose, *Property and Persuasion* (1994); James E. Penner, *The Idea of Property in Law* (1997); D. Lametti, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 U. Toronto L.J. 325 (2003).

114 Robert Nozick, *Anarchy, State and Utopia* 150-53, 167-82 (1974); Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* 10-11, 61, 217-19, 253, 304-05, 346-49 (1985).

115 Waldron, *supra* note 113, at 343-89, 423-45; Margaret J. Radin, *Reinterpreting Property* (1993) (especially ch. 1); Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (1995).

116 Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960); Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967); Yoram Barzel, *Economic Analysis of Property Rights* (2d ed. 1997).

117 See *supra* text accompanying notes 1-4.

of a wedding ring, arson of a family home — could be seen as attacks on the person of the owner because these items are invested with emotion or personal sentiment, but attempts by theorists such as Radin to place these cases at the core of the property concept are unconvincing. They are rare anomalies, and the harm to the owner's interests caused by the trespass is better seen as a species of *injuria* or direct contempt for personality rather than interference with property as some kind of surrogate extension of personality.<sup>118</sup> Property, as James Penner puts it, is not "personality rich," and the personal qualities of even intimate objects can be stripped away by gift, bequest, sale, or other modes of transfer.<sup>119</sup> True, land-based feudal societies sometimes saw an identity between an owner and his estates, but this was more a case of the land imprinting qualities on the person than the other way around, and the existence of free transmission of estates in all developed feudalisms snapped or weakened the link between personality and property.<sup>120</sup> Thus, when older legal sources state that attacks on intimate property, such as the family home, are tantamount to personal assault, they are really identifying a presumptive danger to the body. The modern requirement of a direct threat to the person as a justification for violent attack on intruders, therefore, lies squarely within the dominant common law tradition, though modifying it by reducing the presumption of personal danger. We are left with no special licence to use force to defend property as an extension of the person but merely with the normal principles — force may be used, within bounds, for self-defence or to repress the commission of crimes when intervention by state officials might be ineffective.

The perceived legitimacy of violent self-help today may ultimately be tied to the rise or fall of the policing capacities of the state; violence becomes necessary and therefore reasonable where there is no other recourse. Be that as it may, the instinct of the law is that resort to violence cannot be justified by blurring the line between persons and property. The intuition with which we began, that persons cannot be identified with what they own and that personality is not constituted by property, remains intact.

In his own sharp critique of theories of property as constitutive of personality, Jim Harris made one important exception. A group, such as a nation, which depends for its collective existence on a certain territory, could be said to derive its identity from that property over which it claimed

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<sup>118</sup> Harris, Property and Justice, *supra* note 2, at 165 *passim*.

<sup>119</sup> Penner, *supra* note 113, at 105 *passim*.

<sup>120</sup> See also Alain Pottage, *Proprietary Strategies: The Legal Fabric of Aristocratic Settlements*, 61 Mod. L. Rev. 162 (1998).

*dominium*, the latter being a convenient word to connote both ownership and sovereignty.<sup>121</sup> Trespass on group property could of itself be seen as assault, without presumptions or surrogates, metaphors or metaphysics, because it constitutes an intrinsic attack on the group's basic interest in survival.<sup>122</sup> This line, however, diverts the enquiry away from private property and criminal law and into international law. It would be interesting to test how far international law uses concepts of necessity, subjective belief, proportionality, and autonomy in its measures of excessive self-defence of territory, and how much could be learnt from the filigree detail of domestic law.

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121 On the relation of property to ownership see James W. Harris, *Ownership of Land in English Law*, in *The Legal Mind: Essays for Tony Honoré* 143-61 (Neil MacCormick & Peter Birks eds., 1986); Harris, *Property and Justice*, *supra* note 2, at 63-84; Tony Honoré, *Property and Ownership*, in *Properties of Law: Essays in Honour of Jim Harris*, ch. 7 (T. Endicott, J. Getzler and E. Peel eds., forthcoming 2006); James E. Penner, *Ownership, Co-ownership, and the Justification of Property Rights*, in *Properties of Law: Essays in Honour of Jim Harris*, *supra*, at ch. 9.

122 Harris, *Property and Justice*, *supra* note 2, at 216-20. *See also* Alon Harel, *Whose Home Is It? Reflections on the Palestinians' Interest in Return*, 5 *Theoretical Inquiries L.* 333 (2004).