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The Worldwide Popular Revolt Against Proportionality in Self-Defense Law

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The Worldwide Popular Revolt Against Proportionality in Self-Defense Law
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I. Introduction

Many legal scholars love to draw fine analytic distinctions and invent complicated balancing tests, carefully weighing various interests in different circumstances in an effort to achieve theoretical perfection. They contemplate issues in the safety of their offices, at leisure. True, they try on occasion to take account of the gritty world of quick action, limited information and resources, violent emotion, and basic intuition. But that world is largely foreign to their lives and temperaments. There are times when scholarly theories, embodied in law, come into conflict with popular views of morality. This is happening around the world with respect to the law of self-defense.

While proportionality in some form has long been a feature of the English law on self-defense,² scholarly opinion has particularly championed the idea since at least the middle of the eighteenth century.³ Blackstone,⁴ Beccaria, Bentham and the utilitarians all played their role in encouraging the idea: the prevention of harm cannot be achieved by causing harm that is disproportionate. Proportionality asks a defender to balance his own interests against those of an aggressor, discounted to some extent by the aggressor's

² Thomas A. Green, *The Jury and the English law of Homicide, 1200-1600*, 74 MICH. L. REV. 414, 420, 428-30 (1976) (by the early thirteenth century, self-defense "had come to be defined as slaying out of literally vital necessity," but noting that juries manipulated verdicts to fit other situations within that category). Blackstone stated that English law, "like that of every other well-regulated community," would not "suffer with impunity any crime to be prevented by death unless the same, if committed, would also be punishable by death." WILLIAM BLACKSTONE, 4 COMMENTARIES *182. See also MICHAEL FOSTER, DISCOURSES OF HOMICIDE (1762) 289; Bernard Brown, *Self-Defence in Homicide from Strict Liability to Complete Exculpation*, 1958 CRIM. L. REV. 583, 598-90.

³ I do not mean to imply that elite legal opinion is currently monolithic, or that it is incapable of changing.

⁴ It should be noted that Blackstone, unlike the others mentioned, rested his ideas of proportionality on traditional legal norms (the English common law). BLACKSTONE, *supra* note 2, at *181-82.

blameworthiness,⁵ and also to take into account the means to be used and the necessity of defensive action. This is not an easy task. Ordinary people may find it hard to do in the heat of the moment. The idea, however, has spread widely: virtually every industrialized country has adopted some form of proportionality.⁶

A popular revolt against certain notions of proportionality has been underway for the past several decades in the United States, and for at least the past five years abroad. I do not mean necessarily that a majority of the population of various countries believe that proportionality standards should be changed, though that may be true in some, but that there is a widespread and increasingly vocal movement to do so. This worldwide revolt has several common themes. People in many countries are angered by particular instances of what they see as injustice in the treatment of those who defend themselves with force. The cause célèbre is so powerful in this area because many people can easily identify with the defender and imagine themselves in his shoes; even if the incidents are rare, they have a great hold on the imagination. People blame police forces and especially prosecutors for being more concerned to punish victims of crime than criminals; there is a deep distrust of governmental authority.⁷ This distrust of criminal justice insiders is linked with distrust of legal and other elites generally. (By “elites,” I

⁵ Or, in Paul Robinson’s view, instead of discounting the interests of the aggressor, one may consider, in addition to physical harm to the innocent, various intangible harms arising from the aggression. PAUL H. ROBINSON, 2 CRIMINAL LAW DEFENSES 70 (1984).

⁶ As George Fletcher pointed out, Germany and the Soviet Union largely rejected the idea of proportionality, Germany in favor of a Kantian idea of autonomy and the Soviet Union in favor of maximum deterrence of crime. See GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 855-56, 861 (1978); George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 951-52 (1985). Since Fletcher wrote on the topic, however, Germany has adopted a proportionality rule in its penal code.

⁷ Popular distrust of the criminal justice system is the theme of a recent essay by Stephanos Bibas, who argues that the gulf between insiders (judges, police, and prosecutors) and outsiders (crime victims, bystanders, and most of the general public) undercuts the effectiveness of criminal law and procedure. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911 (1006).

mean primarily prosecutors, judges, and legal scholars, though popular distrust extends to other social and economic elites as well.) People are outraged by defenders having to pay court costs and civil damages to would-be burglars. This movement is thus part of a global distrust of litigation. They complain that criminals have easy access to guns while they are legally prohibited from owning or carrying any. They are concerned that the law pays insufficient attention to retribution.

Underlying all of this discontent is the idea that the state is unable to defend law-abiding citizens against crime, and that therefore citizens must be allowed to defend themselves. The English tend to state the situation explicitly in terms of social contract theory (and to declare that the contract has been broken), whereas continental Europeans tend to characterize private self-defense as a delegation from the state's monopoly of the use of force. In both cases, there is an undercurrent of thought that too much restraint cannot be asked of people subject to constant predations.

It is possible that certain popular views of self-defense discussed here stem from deep-rooted moral intuitions, and are not mere passing reactions to current conditions or perceptions. Recent empirical studies have shown striking agreement in intuitions about moral blameworthiness among people throughout the world and from every demographic group.⁸ These shared intuitions are highly nuanced.⁹ They are so arrestingly similar that several scholars have suggested the most likely explanation is that they have some

⁸ Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice* 15-27 (July 13, 2006) (reviewing studies) (work in progress, on file with author).

⁹ *Id.* at 15-27, 30-37 (providing results for new study).

biological component, similar to language.¹⁰ It would be helpful to see empirical work done on moral intuitions about self-defense, in particular. If similar agreement is found on intuitions about certain aspects of self-defense, such as use of force against an intruder in the home, for example, it may be very hard for governments to persuade citizens to accept a different view. (Not only might it be difficult to persuade citizens otherwise, it may be unwise to try to do so for other reasons. Such shared norms, whether biological or social or some combination of the two, may have developed because they further the smooth working and flourishing of individuals and societies, though the way they do so may not be immediately apparent.¹¹) Scholarly theories about self-defense that run counter to such deep-seated intuitions will tend to generate intense resentment toward government.¹²

In keeping with the idea of moral intuition, the popular revolt against proportionality makes appeals to common sense rather than philosophical theory. Although rejection of proportionality certainly could be justified on philosophical grounds, relying on philosophical theory alone would produce results that many would view as morally unacceptable, just as untempered philosophical theories of

¹⁰ Paul H. Robinson et al., *The Origins of Shared Intuitions of Justice* (July 7, 2006) (work in progress, on file with author).

¹¹ See, e.g., 1 FRIEDRICH H. HAYEK, *LAW, LEGISLATION, AND LIBERTY*, chap. 1 & 4 (1973).

¹² Not surprisingly, ideas about the use force in self-defense seem to align with certain ideas about the role of individuals in society. In a series of papers, Dan Kahan and Donald Braman offer empirical evidence that people tend to have a more favorable view of private gun ownership if they are individualistic and what the authors call “hierarchical,” meaning that they believe, for example, that men and women tend to have different strengths and to play different roles. The authors posit that people are skeptical of risk if activities are challenged as harmful that are integral to their status. Kahan and Braman call this “status anxiety.” Dan M. Kahan, et al, *Gender, Race, and Risk Perception: The Influence of Cultural Status Anxiety*, work in progress, Apr. 7, 2005 draft, available on SSRN; Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. Penn. L. Rev. 1291 (2003); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, work in progress, available on SSRN.

proportionality may be unacceptable. The idea of autonomy as a basis for self-defense, as found in the thought of liberals Locke and Kant, provides a theory for the rejection of proportionality. Several decades ago, George Fletcher emphasized the idea of autonomy in his work on self-defense: if an intruder violates one's personal autonomy, one has the right (and possibly even the duty) to use any force necessary to prevent it.¹³ According to the purest version of this theory, for example, the owner of an orchard would be justified in shooting a boy who was running away after stealing fruit.

There is some evidence for a revival of autonomy notions, particularly in the United States. But one should not exaggerate the strength of this; the popular revolt against proportionality usually does not entail a complete rejection of the concept in all areas.¹⁴ Reformers often talk of an effort to “rebalance” the interests of the defender and the aggressor; according to this way of thinking, the concept of proportionality is acceptable, but the way the balance has been struck (often under the influence of legal elites) is wrong. It is sometimes hard to tell if reformers are criticizing the idea of proportionality because it is wrong in theory or simply unworkable in practice (because of issues of proof, allowing too much discretion to prosecutors, etc.). The area in which ideas of autonomy seem most pronounced around the world is in defense of the home.¹⁵

¹³ See FLETCHER, *RETHINKING*, *supra* note 6, at 860. Fletcher notes the embrace of this idea by the liberal theorists Locke and Kant. *Id.* at 855-65. Blackstone explicitly rejected Locke's theory of autonomy, and accompanying lack of proportionality, in the area of self-defense. BLACKSTONE, *supra* note 2, at *182.

¹⁴ Some notion of proportionality does seem to fit with most people's ideas of morality. Mordecai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor's Culpability in Self-Defense*, 39 TULANE L. REV. 875, 896 (2004).

¹⁵ But see Stuart Green's article arguing that defense of home statutes in the U.S. might in fact be consistent with a proportionality rationale because of an aggregation of different interests. Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 7.

The popular revolt against elite notions of proportionality has led to several different types of proposed legislation. Characteristic of many of them is the blunting of finer legal distinctions, which may cause confusion, in favor of clear rules that ordinary people can understand and apply. The efforts frequently concern protection of the home, and seek to introduce a presumption that a forcible intrusion into a home may be met with force, including deadly force. Other proposed legislation seeks to limit proportionality rules by excusing excessive defensive force in cases of fear or panic.

This paper examines three particular efforts to limit proportionality rules in self-defense law: enacted legislation in Florida, and proposed legislation in England and Belgium. These examples by no means exhaust the scope of the revolt: Italy has recently enacted reform, and serious efforts are underway in New Zealand, among other countries, as well as several other states in the U.S. The paper will first look at the sources of popular discontent with the proportionality standard in each of the three jurisdictions and then compare the specific proposals made. The comparison of proposals focuses on excuse and provocation and then takes up presumptions about the use of force.

II. The Seeds of Discontent

A. Florida

While the Florida law that went into effect October 1, 2005 has attracted considerable media attention, including a skit on The Daily Show, it is by no means unique. It should rather be seen as one of the latest in a series of state statutes around the country allowing defense of dwelling or vehicle.

The revolt against proportionality (or, at least, a major overhaul of proportionality) has been underway in the United States for the past several decades. Many states have adopted defense of premises statutes. It should be kept in mind that the castle doctrine is distinct from defense of premises. The castle doctrine simply does away with the duty to retreat inside one's home; it still permits use of force only to counter a threat to one's person. Defense of premises statutes allow use of force in response to an entry.¹⁶ Defense of premises statutes use different standards for allowing deadly force against intruders. Certain statutes allow lethal force if necessary to prevent or terminate an unlawful entry (trespasser)¹⁷; some that use this standard require that the

¹⁶ *See id.* at 8-9.

The trend in the United States to do away with the duty to retreat is more a revolt against the necessity requirement than against the proportionality requirement. In the nineteenth and early twentieth centuries, many states rejected the common law duty to retreat in favor of allowing a person to "stand his ground" in a place where he had a right to be. RICHARD M. BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 5-37 (1991). The Model Penal Code, adopted in 1962, provided for a general duty to retreat, and several states followed its recommendations and changed their laws. Lately there has been something of a trend to do away with the duty of retreat once again. The duty to retreat, while related to autonomy theory and the balancing of interests under proportionality theory, does not do away with the proportionality requirement. In theory, even if one has no duty to retreat, one could still be required to respond to an attack with proportionate force.

¹⁷ *See* IND. CODE § 35-41-3-2(b) (West 2004), *amended by* 2006 Ind. Legis. Serv. P.L. 189-2006 (West) (deadly force is permissible if occupant believes it is necessary to "prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage . . ."); LA. REV. STAT. ANN. § 14:20(A)(4)(a) (1997 & Supp. 2005), *amended by* 2006 La. Sess. Law Serv. Act No. 141 (West) (deadly force is justifiable when committed by a person inside a dwelling against a person attempting to make unlawful entry into the dwelling, and occupant reasonably believes deadly force is necessary to prevent entry or to compel intruder to leave the premises).

defender first warn the trespasser if reasonable.¹⁸ Other statutes allow use of deadly force against an intrusion where the entry is forcible or violent.¹⁹ Some statutes allow for deadly force when entry is violent and an occupant believes force may be used against any occupant.²⁰ More commonly, statutes will permit deadly force whenever the occupant reasonably believes the intruder intends to commit a felony²¹ or a specific type

¹⁸ See DEL. CODE ANN. tit. 11, § 469 (2001) (deadly force is permissible where intruder is in occupant's dwelling, occupant demands intruder to surrender if reasonable, and intruder refuses to do so); 18 PA. CONS. STAT. ANN. § 507(c)(1), (c)(4)(i) (West 1998) (deadly force justified if occupant first warns trespasser to desist if reasonable, trespasser remains unlawfully in dwelling, and actor believes no less than deadly force would be sufficient to terminate entry).

¹⁹ See CONN. GEN. STAT. ANN. § 53a-20 (West 2001) (deadly force permissible to the extent that defender "reasonably believes such to be necessary to prevent or terminate an unlawful entry by force into his dwelling"); GA. CODE ANN. § 16-3-23(2) (2003) (deadly force is permissible against a person who "unlawfully and forcibly enters or has unlawfully and forcibly entered the residence" and the defender knew or had reason to know that such an entry occurred).

²⁰ See COLO. REV. STAT. ANN. § 18-1-704.5(2) (2004) (deadly force permissible when there is unlawful entry into dwelling, there is reasonable belief that the intruder has committed a crime against person or property or intends to, and there is a reasonable belief that the trespasser may use "any physical force, no matter how slight, against any occupant"); GA. CODE ANN. § 16-3-23(1) (2003) (a person is justified in using deadly force when "entry is made or attempted in a violent and tumultuous manner and he or she reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person dwelling therein and that such force is necessary to prevent the assault or offer of personal violence"); IDAHO CODE ANN. § 18-4009(2) (2004) (deadly force justified in defense of habitation against "one who manifestly intends or endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein"); 720 ILL. COMP. STAT. ANN. 5/7-2(a)(1) (West Supp. 2006) (one is justified in using deadly force if entry is "made or attempted in a violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to, him or another then in the dwelling"); MO. ANN. STAT. § 563.036(2)(3) (West 1999) (deadly force permissible when entry into premises is made or attempted in a violent or surreptitious manner, person in possession or control of premises reasonably believes that the "entry is attempted or made for the purpose of assaulting or offering physical violence to any person or being in the premises" and defender also reasonably believes that the "force is necessary to prevent the commission of a felony"); MONT. CODE ANN. § 45-3-103(1) (2005) (deadly force justified if "entry is made or attempted in a violent, riotous, or tumultuous manner" and an occupant "reasonably believes that such force is necessary to prevent an assault upon or offer of personal violence to him or another then in the occupied structure"); UTAH CODE ANN. § 76-2-405(1)(a) (2003) (one is justified in using deadly force when "entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation and he reasonably believes that the force is necessary to prevent the assault or offer of personal violence").

²¹ See FLA. STAT. ANN. § 782.02 (West 2005) (deadly force justifiable by a person resisting any felony "upon or in any dwelling house in which such person shall be"); GA. CODE ANN. § 16-3-23(3) (2003) (deadly force is permissible when defender "reasonably believes that the entry is made or attempted for the purpose of committing a felony therein and such force is necessary to prevent the commission of the felony"); IDAHO CODE ANN. § 18-4009(2) (2004) (deadly force justifiable in defense of habitation against

of felony or crime²² and that lethal force is necessary to prevent it. Sometimes threat of physical harm to an occupant is an additional requirement imposed when using deadly

“one who manifestly intends or endeavors, by violence or surprise, to commit a felony”); 720 ILL. COMP. STAT. ANN. 5/7-2(a)(2) (West Supp. 2006) (deadly force is justified if defender “reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling”); 18 PA. CONS. STAT. ANN. § 507(c)(1), (c)(4)(ii) (West 1998) (deadly force justified if occupant first warns trespasser to desist if reasonable, trespasser remains unlawfully in dwelling, and “such force is necessary to prevent the commission of a felony in the dwelling”); Minn. Stat. Ann. § 609.065 (2003) (deadly force justifiable when necessary in preventing “the commission of a felony in the actor’s place of abode”); MISS. CODE ANN. § 97-3-15(1)(e) (West 2005), *amended by* 2006 Miss. Legis. Serv. Ch. 492 (West) (effective July 1, 2006) (deadly force justifiable when occupant resists an attempt to commit a felony “upon or in any dwelling . . . in which such person shall be”); OKLA. STAT. ANN. tit. 21, § 733(1) (West 2002) (homicide is justified when resisting an attempt “to commit a felony upon him, or upon or in any dwelling house in which such person is”); S.D. CODIFIED LAWS § 22-16-34 (1998), *amended by* 2005 S.D. Adv. Code Serv. ch. 120 § 165 (LexisNexis) (effective July 1, 2006) (“deadly force justifiable when committed by any person while resisting any attempt to commit a felony “upon or in any dwelling house in which such person is”); UTAH CODE ANN. § 76-2-405(1)(b) (2003) (deadly force is justified when occupant “reasonably believes that the entry is made or attempted for the purpose of committing a felony in the habitation and that force is necessary to prevent the commission of a felony”); *cf.* ME. REV. STAT. ANN. tit. 17-A, § 104(3)-(4) (2006) (deadly force permissible to prevent a criminal trespass when the occupant reasonably believes the trespasser is attempting to enter the dwelling place or has surreptitiously remained therein, is likely to commit some other crime within the dwelling place, and the occupant has warned the trespasser to terminate the trespass);

²² See ALASKA STAT. § 11.81.350 (2004) (deadly force is justifiable by any person in possession or control of any premises in order to terminate what the person reasonably believes to be “a burglary in *any* degree occurring in an occupied dwelling or building”, and by any person in order to terminate the “commission or attempted commission of arson upon a dwelling or occupied building”) (emphasis added); ARK. CODE ANN. § 5-2-608(b)(2) (2006) (deadly force permissible by a person in lawful possession or control of premises if he “reasonably believes the use of such force is necessary to prevent the commission of arson or burglary by a trespasser”); COLO. REV. STAT. ANN. § 18-1-705 (West 2004) (deadly force permissible by a person in possession or control of any building when he “reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit first degree arson”); CONN. GEN. STAT. ANN. § 53a-20 (West 2001) (deadly force permissible to the extent that defender “reasonably believes such to be necessary to prevent an attempt by the trespasser to commit arson or any crime of violence”); KY. REV. STAT. ANN. § 503.080(2) (West 2005), *amended by* 2006 Ky. Rev. Stat. & R. Serv. ch. 192 (West) (deadly force permissible when the defendant believes the person on whom the force is used is “committing or attempting to commit a burglary, robbery, or other felony involving the use of force” of such dwelling in his possession”); MO. ANN. STAT. § 563.036(2)(2) (West 1999) (deadly force permissible when person in possession or control of premises “reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit arson or burglary upon his dwelling”); MONT. CODE ANN. § 45-3-103(2) (2005) (deadly force justified if occupant “reasonably believes that such force is necessary to prevent the commission of a forcible felony in the occupied structure”); N.H. REV. STAT. ANN. § 627:7 (1996) (deadly force permissible when a person in possession or control of premises “reasonably believes it necessary to prevent an attempt by the trespasser to commit arson”); N.Y. PENAL LAW § 35.20(1)-(2) (McKinney 2004) (deadly force is justifiable by any person in possession or control of any premises in order to prevent or terminate the commission or attempted commission of burglary, and by *any* person in order to prevent or terminate the commission or attempted commission of arson) (emphasis added); OR. REV. STAT. §§ 161.219(2), .225(2)(b) (2005) (deadly force is permissible when a person “reasonably believes that the other person is committing or attempting to commit a burglary in a dwelling” or a person in lawful possession or control of a premises “reasonably believes it necessary to prevent the commission of arson or a felony by force and violence by the

force to prevent the felonious act.²³ Several states have also adopted defense of vehicle statutes, most famously Louisiana with its so-called “Shoot the Carjacker” law.²⁴

Some of the most prominent of these statutes explicitly embody a presumption that those using deadly force against intruders had a “reasonable fear of imminent peril of death or great bodily injury,” as in California’s 1984 statute (known as the Homeowner’s

trespasser”); TEX. PENAL CODE ANN. § 9.42 (Vernon 2003) (deadly force justified to “prevent the other’s imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime” and use of force other than deadly force would expose the actor to “a substantial risk of death or serious bodily injury”).

²³ See DEL. CODE ANN. tit. 11, § 469 (2001) (deadly force justifiable if the actor reasonably believes that the person against whom force is used is attempting to commit “arson, burglary, robbery or felonious theft or property destruction,” and has either “employed or threatened deadly force” or any less force would expose the actor to “reasonable likelihood of serious physical injury”); HAW. REV. STAT. ANN. § 703-306(3) (LexisNexis 2003) (deadly force permissible if the actor reasonably believes that the person against whom force is used is attempting to commit “felonious property damage, burglary, robbery, or felonious theft,” and has “employed or threatened deadly force” or any less force would expose the actor to “substantial danger of serious bodily injury”); NEB. REV. STAT. ANN. § 28-1411(6) (LexisNexis 2003) (deadly force permissible if the actor believes that the person against whom force is used is attempting to commit “arson, burglary, robbery or other felonious theft or property destruction,” and has “employed or threatened deadly force” or any less force would expose the actor to “substantial danger of serious bodily harm”); N.J. STAT. ANN. § 2C:3-6(b)(3) (2005) (deadly force permissible if the actor reasonably believes that the person against whom force is used is attempting to commit “arson, burglary, robbery or other criminal theft or property destruction,” and has “employed or threatened deadly force” or any less force would expose the actor to “substantial danger of bodily harm”).

²⁴ See ARK. CODE ANN. § 5-2-608 (2006) (deadly force justifiable by a person in lawful possession or control of a vehicle if he “reasonably believes the use of such force is necessary to prevent the commission of arson or burglary by a trespasser”); GA. CODE ANN. §§ 16-3-23, -24.1 (2003) (deadly force is permissible when defender “reasonably believes that the entry is made or attempted for the purpose of committing a felony therein and such force is necessary to prevent the commission of the felony,” where a habitation encompasses dwellings, motor vehicles, and places of business); IND. CODE § 35-41-3-2(b) (West 2004), *amended by* 2006 Ind. Legis. Serv. P.L. 189-2006 (West) (effective July 1, 2006) (deadly force is permissible if occupant believes it is necessary to “prevent or terminate the other person’s unlawful entry of or attack on the person’s . . . occupied motor vehicle”); LA. REV. STAT. ANN. § 14:20(A)(4)(a) (1997 & Supp. 2005), *amended by* 2006 La. Sess. Law Serv. Act No. 141 (West) (deadly force is justifiable when committed by a person inside a motor vehicle against a person attempting to make unlawful entry into the motor vehicle, and occupant reasonably believes deadly force is necessary to prevent entry or to compel intruder to leave the motor vehicle); MISS. CODE ANN. § 97-3-15(1)(e) (West 2005), *amended by* 2006 Miss. Legis. Serv. Ch. 492 (West) (effective July 1, 2006) (deadly force justifiable when occupant resists an attempt to commit a felony “in any vehicle . . . in which such person shall be”).

Bill of Rights).²⁵ Colorado borrowed this presumption for its 1985 statute, dubbed the “Make My Day” statute. The origins of the Colorado law show the depth of popular feeling on the subject and contain echoes of what would later happen in England.

The Colorado statute was born of a grass-roots, popular concern about uncertainty in the law. Rep. Vicki Armstrong, a Republican from Grand Junction, held a series of town meetings with her constituents to see what problems her constituents had that might be addressed by legislation.²⁶ One of the problems they mentioned most often was the fear of being prosecuted or sued for defending their homes against intruders. Many said they were unsure of the law and how it might be applied by police and prosecutors. Some said that they would consider putting a gun in the hand of an unarmed intruder they had shot or that they would drag the dead body inside the house if an intruder were shot outside. Along with these specific concerns went the more general belief that “criminals (including home intruders) have more rights than law-abiding citizens” and that “the courts are more concerned with protecting the rights of defendants than victims and that victims are at a disadvantage in the criminal justice system.”²⁷ Rep. Armstrong said that she did not contact any lobbyists (such as the National Rifle Association) when drafting the bill; she simply borrowed the language of the California statute.²⁸

Although Florida’s law was drafted with extensive involvement of the NRA, many of the concerns that prompted it were the same as the ones expressed in Colorado.

²⁵ CAL. PENAL CODE § 198.5 (West 2006).

²⁶ WILLIAM WILBANKS, THE MAKE MY DAY LAW: COLORADO’S EXPERIMENT IN HOME PROTECTION 29 (1990).

²⁷ *Id.* at 30.

²⁸ *Id.* at 31-32.

According to Marion Hammer, the executive director of The Unified Sportsmen of Florida and a representative of the National Rifle Association²⁹ who worked closely with Florida legislators in drafting the bill, prosecutors (as well as police, judges, and juries) could not always be trusted to arrive at a fair result under a “reasonableness” standard. They too often tended to “favor the criminal over the victim,”³⁰ and their discretion needed to be limited by clear presumptions and procedural mechanisms. This distrust of prosecutors is part of a distrust of elites (or “insiders,” as Stephanos Bibas puts it) generally in the criminal justice system. One might wonder what the incentive is for prosecutors in the United States, many of whom are elected, to bring cases against those who defend themselves against intruders. One answer might be that some prosecutors are willing to risk bringing, or at least consider bringing, an occasional politically unpopular case to enforce the law as they see it.³¹ Even though such prosecutions may be rare, reform supporters want no risk of them at all. They do not want citizens to live in fear of a prosecutor’s decision, and all the expense and disruption that a criminal case entails, and a civil suit which may to some extent piggyback on the prosecution’s case. They therefore want a clear rule to cabin prosecutorial discretion. Similarly, even though juries in this country may rarely convict those with a legitimate claim to self-defense, reform supporters want to limit even that risk.

²⁹ She was the president of the NRA from 1995-1998.

³⁰ Telephone interview with Marion P. Hammer, Former President of the Nat’l Rifle Ass’n, (October 26, 2005).

³¹ There is anecdotal evidence to suggest this is true. In the Workman case, discussed below, the prosecutor allegedly hesitated about whether to bring the case, though ultimately did not. I am told that an assistant county attorney discussed with the county attorney in Tucson, Arizona why he continued to bring cases against homeowners who shot burglars in the back, even though in three consecutive such cases the jury acquitted. The county attorney is said to have responded, “Well, it’s illegal.”

Both Hammer and the co-sponsors of the Florida bill pointed to certain instances of what they viewed as the failure of the criminal justice system before the reform legislation, particularly problems with prosecutors. One example involved James Workman, 77, and his wife, who had been living in a FEMA trailer beside their Escambia County house, which had been damaged by Hurricane Ivan. Workman is said to have fired a warning shot, then shot an intruder.³² Prosecutors considered filing charges against Workman for three months but ultimately did not. According to Hammer, this may have been because State Senator Peaden told the prosecutor “enough is enough.” In another instance, a man in Perry, Florida named Jared L. Fowler said that Don Bain came to his mobile home shortly after midnight, shouting and spoiling for a fight. According to the Tallahassee Democrat, when Fowler refused to go outside, Bain forced his way in, started beating Fowler, and threatened to kill him before Bain was shot as they struggled over a shotgun. The prosecutor charged Fowler with manslaughter, but a Taylor County grand jury refused to return the indictment.³³

According to Hammer, she and state Senator Peaden were talking about another matter when Peaden brought up the Workman case and said, “We’ve got to do something about this.”³⁴ Hammer says she had been concerned about the role of prosecutors for some time. She is quoted as saying, “Prosecutors are always looking for somebody to prosecute and too often it’s the victim. They are part of the problem.”³⁵ She told Peaden her office had draft legislation ready to go, Peaden introduced it, and the two

³² James L. Rosica, “No Retreat” Gives Right to Defend Self, TALLAHASSEE DEMOCRAT, May 12, 2005.

³³ Dan Christensen, *NRA Uses New Florida Gun Law as National Model*, DAILY BUSINESS REVIEW, May 17, 2005.

³⁴ Hammer, *supra* note 28.

³⁵ Christensen, *supra* note 30.

worked closely together through various changes in the bill after that, along with Representative Dennis Baxley in the Florida House.

The bill as originally introduced would have provided for damages against prosecutors and police for wrongful prosecution. After consultation with prosecutors, that provision was dropped, but Hammer says that if prosecutors do not get the message, “we’ll be back to the legislature asking for it.”

The Florida law makes two major substantive changes, one designed to clarify defense of dwelling and the other to strengthen the right of self-defense outside the home. Neither of these changes is revolutionary; they are part of well-established trends in U.S. law. As in the California and Colorado statutes, the Florida act creates a presumption that a person using defensive force had a “reasonable fear of imminent peril of death or great bodily harm” if someone unlawfully and forcibly entered a dwelling or occupied vehicle.³⁶ As many other states have done, the Florida act also does away with the duty to retreat, thus clarifying the law of self-defense outside the home.³⁷

³⁶ Fla. Stat. § 776.013(1) (2005). Florida law previously was that someone inside a home facing an intruder could “meet force with force.” The new law may restrict the actual area that may be protected somewhat because it does not use the term “curtilage,” but suggests that the area protected must be roofed. One interesting feature of the Florida law is that it does not do away with the duty to retreat in cases of attack by co-tenants. In 1999, the Florida Supreme Court held that there is no duty to retreat from one’s residence before resorting to deadly force in self-defense against a co-occupant. *Weiand v. State*, 732 So.2d 1044, 1051, 1057 (Fla. 1999). An interesting question for the Florida courts will be if the new law overturns that decision.

³⁷ The act declares that a person who is not engaged in an unlawful activity and is “attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force,” including deadly force if necessary to prevent “death, great bodily harm, or the commission of a forcible felony.” Fla. Stat. § 776.013(3) (2005). Hammer says that the concern here again is for clarity; retreat will often not be possible with safety, especially for women, and in cases of doubt, she says, the presumption should be with the defender rather than against her.

The Florida law contains certain procedural mechanisms designed to protect against civil suits as well as changes in the substantive criminal law. There is a provision that people who appear to be validly relying on the law are “immune” from arrest and criminal prosecution unless probable cause exists to believe that the use of force was not legal. This would appear to be simply another way of stating the substantive presumption. Also, as will be seen respecting England, there was concern in Florida about civil suits against a person acting in self-defense. The act awards attorney’s fees, lost income, and all expenses of defending any civil action to any person sued because of their use of defensive force who is found to be “immune” in the civil case. This is a largely symbolic gesture, since it is likely that any such plaintiffs would have no money to pay the expenses. Still, it does indicate frustration with the machinery of justice being used on behalf of would-be criminals against ordinarily law-abiding citizens.³⁸

As might be expected, prosecutors have generally not been enthusiastic about the act. Several have suggested the bill was unnecessary, and others say they are concerned about giving bad actors a defense. A few have supported the legislation. Opponents of the bill have said that the law “encourages vigilante ‘justice’ and empowers street gangs,”³⁹ and repeatedly invoked the Wild West in various forms. The Brady Campaign threatened to attack the tourism industry in Florida if the bill were passed, and indeed has been passing out leaflets in Florida airports, issuing press releases, and posting ads

³⁸ The effect is made worse in the U.S. adversarial system because of expensive and protracted litigation and lack of a general fee-shifting rule leading to possibilities for strike suits.

³⁹ See Martin Dyckman, *Bringing the Wild West to Florida*, ST. PETERSBURG TIMES, Mar. 27, 2005, at 3P.

warning that tourists now “face a greater risk of bodily harm in Florida” because of the “Shoot First Law.”⁴⁰ Nevertheless, the bill overwhelmingly passed the legislature. There were no votes against it in the Florida Senate and the vote was 94-20 in the House. According to the Christian Science Monitor, “[m]any Democrats admitted they did not want to appear soft on crime by voting against it.”⁴¹

Despite the hot rhetoric against the act, the Florida law is part of an established trend in the U.S., and the NRA is working to keep the trend rolling.⁴² The Florida language has become a model for the NRA as it seeks passage of legislation in other states. Following a presentation by Hammer in August 2005, the American Legislative Exchange Council, a group of conservative state legislators, has adopted the Florida law as a model for other states.⁴³ Thus far in 2006, the following states (in order of enactment) have passed legislation similar to the Florida law: South Dakota, Indiana,

⁴⁰ See generally <http://www.bradycampaign.org> (featuring an ad against Florida’s “Shoot First Law”) (last visited Apr. 20, 2006).

⁴¹ See Jacqui Goddard, *Florida Boosts Gun Rights, Igniting a Debate*, CHRISTIAN SCI. MONITOR, May 10, 2005, at 2.

⁴² Adam Liptak, 15 States Expand Right to Shoot in Self-Defense, N.Y. Times, Aug. 7, 2006. The article’s tone is generally unfavorable toward the trend. The article cites several examples where the article suggests a shooter acted in questionable fashion and was not charged because of the new law. However, in nearly all the examples given, the new law would likely have made no difference. For example, the article describes a 23-year-old prostitute who says she was confronted with a 72-year-old longtime client with a gun who threatened to kill her and then himself. A suicide note and other evidence supported her contention. She allegedly wrested the gun away from the man and then shot him, rather than retreating. Even if the retreat rule had been in effect, she would only have needed to retreat if she could have done so in complete safety, without risk that a desperate man could have jumped her and taken the gun.

⁴³ The next issue that Ms. Hammer is tackling is the question of employees being prohibited from keeping guns in their vehicles in employer parking lots. Interest in the issue was triggered by Weyerhaeuser’s decision to search employee vehicles for guns on the first day of hunting season at an Oklahoma plant. A dozen employees were fired as a result. The Oklahoma legislature moved quickly to permit employees to keep guns in their vehicles. Members of the Florida legislature introduced similar legislation, but the bills died in committee in May 2006. See Florida Senate Bill 206, House Bill 129. The issue raises interesting questions of dueling property rights.

Mississippi, Alabama, Idaho, Kentucky, Arizona, Georgia, and Oklahoma.⁴⁴ As of this writing, seven states have legislation pending.⁴⁵

B. England

England finds itself in the position of having one of the highest crime rates in the industrialized world—with especially astronomical burglary rates⁴⁶—combined with the strictest gun control regime.⁴⁷ One influential commentator, in chronicling deep failings

⁴⁴ Act of Feb. 17, 2006, ch. 116, sec. 2, § 22-18-4, 2006 S.D. Sess. Laws (abolishing the duty to retreat) (to be codified at S.D. CODIFIED LAWS § 22-18-4); Act of Mar. 21, 2006, P.L. 189-2006, 2006 Ind. Legis. Serv. (West) (abating the duty to retreat and immunizing third parties using reasonable force from legal jeopardy) (to be codified at IND. CODE § 35-41-3-2); Act of Mar. 27, 2006, ch. 492, 2006 Miss. Laws (abolishing the duty to retreat, presuming a reasonable fear of sufficient harm after forcible entry into certain premises or removal of someone from those premises, immunizing the actor from civil action after being found “not guilty” in a criminal proceeding arising from the same conduct, and awarding attorney’s fees and other costs in any civil action if use of force is found reasonable) (to be codified at MISS. CODE ANN. § 97-3-15); Act of Apr. 4, 2006, Act 2006-303, sec. 1, § 13A-3-23, 2006 Ala. Legis. Serv. (West) (abating the duty to retreat, presuming the justified use of deadly force in limited circumstances, and immunizing the actor from criminal prosecution and civil action) (to be codified at ALA. CODE § 13A-3-23); Act of Apr. 14, 2006, ch. 453, 2006 Idaho Sess. Laws (immunizing the actor from civil liability and awarding attorney’s fees and costs in any civil action if immunity is found) (to be codified at IDAHO CODE ANN. § 6-808); Act of Apr. 21, 2006, ch. 192, 2006 Ky. Acts (abolishing the duty to retreat, presuming a reasonable fear of sufficient harm after forcible entry into the home or removal of someone from the home, immunizing the actor from criminal prosecution and civil action, and awarding attorney’s fees and other costs in any civil action if use of force is found reasonable) (to be codified in scattered sections of KY. REV. STAT. ANN. § 503); Act of Apr. 24, 2006, ch. 199, 2006 Ariz. Sess. Laws (abolishing the duty to retreat, presuming a person acts reasonably after forcible entry into his or her residential structure or vehicle in certain circumstances, and awarding attorney’s fees in any civil action if use of force is found reasonable) (to be codified in scattered sections of ARIZ. REV. STAT. ANN. § 13); Act of Apr. 27, 2006, Act 599, 2006 Ga. Laws (abolishing the duty to retreat and immunizing the actor using proper defensive force from criminal prosecution) (to be codified at GA. CODE ANN. §§ 16-3-23.1, -24.2, 51-11-9); Stand Your Ground Law, ch. 145, 2006 Okla. Sess. Laws (abolishing the duty to retreat, presuming a reasonable fear of sufficient harm after forcible entry into the home or removal of someone from the home, immunizing the actor from criminal prosecution and civil action, and awarding attorney’s fees and other costs in any civil action if use of force is found reasonable) (to be codified at OKLA. STAT. tit. 21, § 1289.25).

⁴⁵ The states are: Alaska, Michigan, Minnesota, Missouri, New Hampshire, Ohio, and South Carolina. Updates can be found at www.nraila.org.

⁴⁶ Global Report on Crime and Justice 286 (Graeme Newman ed., published for the United Nations, Office of Drug Control and Crime Prevention, 1999); Gordon Barclay et al., International Comparisons of Criminal Justice Statistics 2001, 12/03 Home Office Statistical Bulletins, Oct. 24, 2003, at 14, 17, available at <http://www.homeoffice.gov.uk/rds/pdfs2/hosb1203.pdf>.

⁴⁷ See generally JOYCE L. MALCOLM, *Guns and Violence: The English Experience* 164-216 (2002).

in the English criminal justice system, opened a recent article by declaring, “For the last 40 years, government policy in Britain, de facto if not always de jure, has been to render the British population virtually defenseless against criminals and criminality.”⁴⁸ Under these circumstances, England was ripe for a *cause célèbre*, and it surely has one in the case of Tony Martin. Martin was a Norfolk farmer who fired his unlicensed shotgun at two would-be burglars during a nighttime break-in in the dark, killing one and wounding the other. He was originally sentenced to life imprisonment for murder, 10 years for attempted murder, and a year for having an unregistered shotgun. On appeal, after much public outrage, the sentence was reduced to five years for manslaughter. The surviving burglar has announced he is suing Martin for civil damages based on the incident.⁴⁹ Current English law allows a person to use “reasonable force” in defense of the home, according to a 1967 act.

The story of reform efforts in England is the most unusual anywhere. The English have turned to media outlets to make their voices heard. The story includes a strange approximation to direct democracy in a country famed for its representative government. In late 2003, BBC Radio 4’s Today program ran an experiment in direct

⁴⁸ Theodore Dalrymple, *Real Crime, Fake Justice*, City Journal, summer 2006. Dalrymple, in a review of a book by David Fraser called *A Land Fit for Criminals*, notes that British police routinely fail to record crimes that come to their attention, and frequently refuse to investigate serious crime because prosecutors will either decline to prosecute, or sentences will be so light that their efforts would not be justified. Police are encouraged not to bring too many offenders to court, but to let them off with a “caution”—including those accused of robbery, burglary, and violence against the person. Those convicted of murder are sometimes confined in “open” prisons, from one of which prisoners abscond at the rate of two per week for three years. Offenders regularly serve less than half their sentences under an early release program Dalrymple and Fraser are especially damning of the probation service, which they say routinely undercounts the number of crimes committed by those in their charge. For every 1,000 people on probation, about 600 are reconvicted at least once within the two years the Home Office tracks them for statistical purposes.

⁴⁹ See BBC News, *Timeline: The Tony Martin Case*, July 28, 2003, <http://news.bbc.co.uk/1/hi/england/norfolk/3087003.stm> (last visited Apr. 20, 2006).

democracy: listeners were asked to suggest a piece of legislation to improve life in Britain, with the promise that an MP would then attempt to get it enacted. Out of over 10,000 suggestions, five were chosen as finalists, and listeners were encouraged to vote by email and phone for the one they favored. The results were tallied New Year's Day, 2004. Labour MP Stephen Pound was drafted to introduce the legislation and push it through Parliament. Pound got a shock when the results were announced. With 37% of the vote, the winner was a law (now called "Tony Martin's Law") allowing people to use "any means to defend their home from intruders." Pound appeared to have been expecting something more like the runner-up, which provided for automatic organ donation unless the deceased had opted out. A shaken Pound said on the January 1 program, "Well, I have to say that my enthusiasm for direct democracy is slightly tempered. . . . I can't remember who it was who said, 'The people have spoken—the bastards.'"⁵⁰ He later called the proposal a "ludicrous, brutal, unworkable blood-stained piece of legislation" and said he would go through the motions of presenting the bill but hoped it would fail. He said it was "the sort of idea somebody comes up with in a bar on a Saturday night between 'string 'em all up' and 'send 'em all home.'"⁵¹

Saturday night bars or not, the campaign seems to have struck a chord with the English. The Mail on Sunday got responses from 21,500 people in support of a Tony Martin law, and also got a large response to its Police Watch campaign, which invited people to send in stories about police who made legal trouble for victims of crime. Two

⁵⁰ See Radio Broadcast: The People Have Spoken—the Bastards (Jan. 1, 2004) (available on BBC Radio 4 at http://www.bbc.co.uk/radio4/today/listenagain/zthursday_20040101.shtml) (last visited Apr. 21, 2006).

⁵¹ Vincent Graff, *MP Calls Radio 4 Listeners "Bastards" Over Vigilante Vote*, THE INDEPENDENT, Jan. 2, 2004.

cases described by the Mail on Sunday: Police confiscated the gun of Baker White (71) after he fired a shot to scare off burglars. Criminals then bashed the unarmed White over the head when they returned to his home. Metropolitan Police warned Brian Conn for breaching data protection laws after he used shop records to identify the person who beat him unconscious at work.⁵² The Sunday Telegraph also launched a “Right to Fight Back” campaign in 2004. That campaign is supported by Sir John Stevens, the immediate former Metropolitan Police Commissioner. Stevens has suggested a presumption that the force used by someone in their home against a violent intruder was lawful.⁵³ Even the establishment Law Commission has acknowledged that “[t]here is undoubtedly a very strongly held view among many members of the public that the law is wrongly balanced as between householders and burglars.”⁵⁴

The legal establishment in England has reacted cautiously to this popular movement. The Law Commission, an independent body established to review laws and recommend reform, responded in early January 2004. In an interview with Radio 4, Chairman Roger Toulson said that the Commission was looking at a particular aspect of self-defense: whether someone who kills using excessive force in self-defense should have a partial defense, reducing the charge from murder to manslaughter. (Some jurisdictions in the United States allow a similar defense, called imperfect self-defense. It

⁵² Bernard Ginns, *21,500 Reasons Why We Need a Tony Martin Law*, THE MAIL ON SUNDAY, Jan. 11, 2004, at 38.

⁵³ John Steele, *Time to Let People Kill Burglars in Their Homes, Says Met Chief*, THE TELEGRAPH, Apr. 12, 2004.

⁵⁴ Law Commission, *Partial Defences to Murder: Final Report* at 49, Aug. 6, 2004, available at [http://www.lawcom.gov.uk/docs/lc290\(1\).pdf](http://www.lawcom.gov.uk/docs/lc290(1).pdf).

operates as a partial defense.⁵⁵) He also said the Commission was looking at the law of self-defense more generally.

In its final report, the Law Commission rejected a partial defense of excessive defensive force.⁵⁶ However, the Commission recommended a change to the law clarifying the partial defense of provocation, so that charges would be reduced to manslaughter from murder if a defendant acted in response to gross provocation, defined as words or conduct that cause a defendant to have a justifiable sense of being seriously wronged or to be in fear of serious violence.⁵⁷ The Law Commission noted that some burglars do “the most vile acts of desecration of a person’s home and of belongings,” and householders may therefore be provoked to use deadly force.⁵⁸

The British Government has so far responded tepidly. The Government did successfully support a change in civil liability standards in 2003, so that householders would not be sued for damages by intruders unless they reacted with “grossly disproportionate” force.⁵⁹ After the Radio 4 referendum, Tony Blair said that he would ask the Attorney General to look into the question of changing the criminal law to give

⁵⁵ Imperfect self-defense is distinguished from ordinary provocation doctrine because with the former, violence is provoked by fear, while with the latter, violence is provoked by anger. The English Law Commission rejected such a distinction because it claimed it was difficult to distinguish between fear and anger psychiatrically, and also in everyday experience. *Id.* at 80.

⁵⁶ *Id.* at 6.

⁵⁷ *Id.* at 4-5. The inclusion of “words” as legally adequate provocation contrasts with the “mere words rule” recognized by most jurisdictions in the United States.

⁵⁸ *Id.* at 49, *quoted in* John Cooper, *Courts Already Respect the Right to Self-Defence*, THE TIMES, Nov. 30, 2004. The Law Commissioners decided not to recommend any changes implementing a battered woman defense. “It would be wrong to introduce special rules relating to domestic killings unless there is medical or other evidence that demonstrates a need and a proper basis on which to do so,” adding that “the criminal law should be gender-neutral unless it is absolutely necessary to depart from that principle.”

⁵⁹ Criminal Law (Amendment) (Householder Protection) Act 2005, *available at* <http://www.publications.parliament.uk/pa/cm200405/cmbills/020/05020.1-i.html>.

people in their homes and shops more rights to protect themselves.⁶⁰ The Lord Chancellor, Lord Falconer, and the Attorney General, Lord Goldsmith, expressed doubts about changing the law. Labour MPs were ordered to vote against any change. But, in the run-up to elections in fall 2004, the Home Secretary, David Blunkett, joined Conservative shadow Home Secretary David Davis in supporting householders against intruders, and suggested that government action to change the criminal law was likely. So far the Government has introduced no bill on the subject. Also in October 2004, Police Chief Superintendent Ian Johnson of the Chief Superintendents Association of England and Wales formally advised householders, if they discovered a burglary in progress, to barricade themselves in a room and “not to approach the intruder.”⁶¹

Conservatives stepped in to try to push legislation. Conservative MP Roger Gale introduced a bill that was viewed as extreme and blocked by the Government in April 2004. Conservative MP Patrick Mercer then introduced a private member’s bill called the Householder Protection Act of 2005:

- (1A) Where a person uses force in the prevention of crime or in the defence of persons or property on another who is in any building or part of a building having entered as a trespasser or is attempting so to enter, that person shall not be guilty of any offence in respect of the use of that force unless—
 - (a) the degree of force used was grossly disproportionate, and
 - (b) this was or ought to have been apparent to the person using such force.
- (1B) No prosecution shall be brought against a person subject to subsection (1A) without the leave of the Attorney General.

⁶⁰ More recently, in May 2006, Blair told a group of Labour supporters in London that reform of the criminal justice system was a top priority, and that that system was “the public service most distant from what reasonable people want.” George Jones and Philip Johnston, *We’ve Failed on Crime, Says Blair*, London Telegraph, May 16, 2006.

⁶¹ John Steele and Philip Johnston, *Don’t Tackle Burglars, urge Police*, DAILY TELEGRAPH, Oct. 27, 2004.

Recall that the “grossly disproportionate” language is drawn from the Government’s own change to the civil law in November 2003, which ensures that people in their homes cannot be sued by an intruder unless their retaliation is “grossly disproportionate.”⁶² The provision requiring the approval of the Attorney General for prosecutions under this section—which a commentator has called “crucial”⁶³ — suggests a distrust of the judgment of ordinary prosecutors on this issue found in many countries.⁶⁴

The Mercer bill, which had the backing of the Conservative leadership and of several Labour MPs, passed its initial Commons vote with a majority of 130 (the initial vote moves a bill to a second reading and debate), but died from lack of support by Labour MPs in March 2005. In June, Anne McIntosh, a Conservative shadow foreign office minister, said that she planned to use her high rank in a ballot for private members’ bills to resurrect householder protection legislation after a number of cases in her Vale of York constituency in which burglars had confronted homeowners. That same month, she introduced a bill identical to Mercer’s,⁶⁵ which is currently scheduled to be read for the second time October 20, 2006.

The attitudes of many of those supporting reform are reflected in an opinion piece in the Daily Telegraph by Simon Heffer, alleging a broken social contract.⁶⁶ “Most of us,

⁶² See Criminal Law Act 2005, *supra* note 54.

⁶³ Melissa Kite, *Tories Launch Bill to Give Householders the Power to Tackle Intruders*, THE TELEGRAPH, Dec. 26, 2004.

⁶⁴ See text accompanying note ____, describing the distrust of prosecutors that helped motivate the Florida law.

⁶⁵ See Criminal Law Act 2005, *supra* note 54.

⁶⁶ Simon Heffer, *If the State Fails Us, We Must Defend Ourselves*, THE DAILY TELEGRAPH, Feb. 26, 2002, at 22.

Heffer wrote, “had an implicit assumption there was a contract between law-abiding people and the state. In return for our restraint, the state would use the various means at its disposal to control crime. It would police our society properly. It would severely punish those who attacked us.” Heffer then declared that “[i]t must, though, be clear to all that the state has broken that contract.”⁶⁷ Since the contract is broken, and the government lacks the political will to protect the fundamental liberty of the people to feel safe in their own homes, the solution is to revive the right to bear arms. Gun control laws are in any case “a joke,” and there is far more gun crime now than there was before the Major government banned handguns after the Dunblane school massacre in 1996.⁶⁸ One commentator views the situation as even more drastic than Heffer, arguing that there is in Britain a “politically dangerous situation,” for the state’s failure protect the lives and property of its citizens “might bring the law itself into disrepute and give an opportunity to the brutal and the authoritarian.”⁶⁹

C. Belgium

The concept of legitimate defense (*légitime défense*) is at the heart of continental European laws of self-defense that stem from the French penal code of 1791, including

⁶⁷ Note the very similar language and arguments in C.S. Lewis’s essay on crime in the late 50’s, almost 50 years earlier. C.S. Lewis, *Delinquents in the Snow*, 38 TIME AND TIDE, Dec. 7, 1957, at 1521-22, reprinted in C.S. LEWIS, GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 306-310 (Walter Hooper ed., 2001) (1970).

⁶⁸ These laws are so strict that the British government is engaging in careful consideration of whether the British Olympic shooting team might be permitted to train with pistols in Britain prior to the 2012 Olympics in London. Top British shooters currently train in Switzerland. Britain Mulling Gun-Law Change for 2012 Olympics, <http://www.chinaview.cn> (Oct. 26, 2005).

⁶⁹ Dalrymple, *supra* (agreeing with David Fraser).

those of Belgium and Italy. At the heart of this approach is proportionality.⁷⁰ Most of the various countries adopting this concept, however, have modified it over time, and there is now some variation in areas such as what may be protected by use of force (attacks against the person only or also against property), presumptions concerning breaking into a dwelling, and so on.⁷¹ Several of those countries that have more narrow interpretations of legitimate defense, including Belgium and Italy, are now seeking to broaden them.

The debate over self-defense laws in Belgium is, as in other countries, closely tied to a debate over gun laws. Belgium in theory has strict controls on ownership and carrying of firearms, but in practice a large number of guns are not registered and a new law and regulations aim to change this.⁷² In 2005, Belgium's justice minister, Laurette Onkelinx, told the parliament that she would propose new regulations to ensure no one owns a gun without a license. She said there were 641,781 guns privately owned in Belgium and 27,492 military guns.⁷³ There are, however, a large number of guns that

⁷⁰ See, e.g., CODE PENAL FRANCIAS, art. 122-5 (Fr.) (requiring proportionality between the method of defense and the gravity of the harm sought to be avoided in cases of defense of the person and defense of property).

⁷¹ French law, for example, presumes that someone acted in legitimate self-defense if they were acting to prevent a nighttime entry by breaking, violence, or trickery into a dwelling. CODE PENAL FRANCAIS, art. 122-6 (Fr.).

⁷² A law of 1933 prohibited a private individual from owning firearms without the authorization of the chief of police of the municipality. LOI DU 3 JANVIER, art. 6 (1933). Under the same law, no one could carry a firearm without a legitimate reason and without a permit from the governor of the province with the advice of the prosecutor of the district. *Id.* at Art. 7. Licensing procedures were further governed by regulation (technically, royal decree); separate licenses are required for owning and for carrying firearms. L'Arrêté royal du 2 février 1996 modifiant l'arrêté royal du 20 septembre 1991 exécutant la loi du 3 janvier 1933 relative à la fabrication, au commerce et au port des armes et au commerce des munitions (MB 15.02.1996). These regulations contain strict requirements that a permit applicant understand the regulations concerning firearms, know how to handle a firearm, and be familiar with safe storage procedures.

⁷³ *Government Pledges Tough New Gun Law*, <http://www.expatica.com>. (Feb. 3, 2005).

have not been registered, especially hunting weapons, and the total number of guns in Belgium may be around 2 million.⁷⁴ Debate on a new law was accelerated following several murders, allegedly with racial overtones, committed by a mentally unstable man in Antwerp shortly after buying a gun on May 11, 2006.⁷⁵ In the wake of this incident, the new law passed overwhelmingly in the Belgian parliament in early June.⁷⁶ The main effect of the new law is to impose a three-month waiting period, accompanied by training and heightened police screening, before a permit may be granted. The law also subjects all hunting and sporting weapons to regulation.⁷⁷

Since at least 2001, the right-leaning Flemish parties that had opposed tightened restrictions on gun ownership⁷⁸ and others have campaigned steadily for changes to self-defense laws in Belgium. A major motivation to the campaign has been a series of incidents involving shopkeepers, especially jewelers. In a famous incident in September 1999, a jeweler in Flanders fired on thieves who were running away and killed one. He was found guilty of murder.⁷⁹ Two other causes célèbres also involved Flemish jewelers, both of whom were victims of ram-raiding, the practice of using a truck or van to ram through a shop window to steal goods.⁸⁰ The jeweler Tyberghien, from Harelbeke, was found guilty of manslaughter. Although he was given no criminal sentence, he had to

⁷⁴ *Id.*

⁷⁵ *New Weapons Law Comes into Force*, <http://www.expatica.com>. (June 8, 2006).

⁷⁶ Loi du 8 juin 2006, réglant des activités économiques et individuelles avec des armes.

⁷⁷ *Id.* See also Circulaire relative à la mise en application de la loi réglant des activités économiques et individuelles avec des armes, 8 juin 2006.

⁷⁸ These are the Flemish Christian Democrats (CD&V) and the Flemish Liberal VLD party. *Tough New Gun Law Promised*, <http://www.expatica.com>. (Feb. 3, 2005).

⁷⁹ www.stopvol.be

⁸⁰ Document parlementaire 51K0651, Proposition de loi modifiant les règles légales relatives à la légitime défense et introduisant la cause absolutoire générale de l'excès de légitime défense, 6 janvier 2004, at 3. [hereinafter 51K0651].

pay the costs of the proceedings and even civil damages and interest to the thief's next of kin. The jeweler Moortgat, from Alost, was acquitted in the court of first instance on the basis of self-defense. Public indignation in the case stemmed from the prosecutor's appeal of the judgment, causing Moortgat and his family to live in "great uncertainty" for a year until the appellate court pronounced acquittal.⁸¹

Flemish politicians have noted the "great indignation among the population" at these situations.⁸² They say that the general sentiment holds that someone in business may defend against forcible theft of his goods by firing a gun, and that such a person does not deserve criminal punishment and should not even be arrested.⁸³ (It should be noted that the Flemish seem to hold this view more strongly than French-speaking Belgians.⁸⁴) As in Florida and England, Belgian concern about self-defense law focuses on prosecutors. Members of the parliament complain that prosecutors have adopted too narrow an interpretation of legitimate defense.

As reformers see it, there are two main problems with the Belgian approach to legitimate defense. The first is that the Belgian penal code prohibits the use of defensive force to protect against anything other than personal attack; property may not be protected by force.⁸⁵ The second is that reformers want to provide exoneration for

⁸¹ *Id.* As in most non-adversarial systems, Belgium has no equivalent of the Double Jeopardy Clause rule that a judgment of acquittal in the first instance is final. The prosecution may appeal such decisions. Appeals are generally examinations of the evidence de novo, with no presumption of correctness attaching to the first judgment.

⁸² *Id.* The authors of the bill and accompanying notes were four members of the Flemish party Vlaams Blok (VB): Bart Laeremans, Gerda Van Steenberge, Koen Bultinck, and Frieda Van Themsche.

⁸³ *Id.*

⁸⁴ *See, e.g.*, <http://www.stopvol.be/> ("Cela se passait en Flandre, où la sensibilité est un peu autre.")

⁸⁵ C. PÉN., Art. 416-17 (Be.)

anyone who violates the requirement of proportionality because of a “violent emotion” (*émotion violente* or *vive émotion*).⁸⁶

The first reform falls into the category of tweaking the notion of proportionality, adjusting it to include an interest not previously able to be weighed in the balance. Reformers point out that many European countries allow use of force in defense of property, including France, the Netherlands, and Germany. They would permit use of force in defense of property, consistent with the proportionality requirement, that falls short of intentional killing.⁸⁷

The second reform strikes deeper at the notion of proportionality. Reformers advocate following Dutch (and German) law in the area of “excess of legitimate defense,” where a violent emotion causes a defender to pass the bounds of proportionality.⁸⁸ According to reformers, “every right-thinking person understands that it is not easy, for someone confronted with an immediate illegal attack, to do a rational evaluation of what is meant by ‘necessity of defending oneself.’”⁸⁹ Under Dutch law, an emotional reaction to an immediate threat may create an absolute defense to criminal

⁸⁶ Another concern is that the permissible use of force in legitimate defense situations is limited to “killing, wounds, and blows” (*l’homicide, les blessures et les coups*), whereas reformers would like to include other uses of force such as confining an attacker. Document parlementaire 51K0741, Proposition de loi 27 janvier 2004, at 7. [hereinafter 51K0741]. This bill was introduced by members of the CD&V party.

⁸⁷ This is the current law of France. See C. PÉN., Art. 122-25 (Fr.). Note that EU human rights law puts constraints on members’ self-defense laws, and would appear to prohibit intentional killing in defense of property. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

⁸⁸ 51K0651, *supra* note 73; 51K0741, *supra* note 79, at 11.

⁸⁹ 51K0651, *supra* note 73, at 4.

punishment.⁹⁰ Technically, such a defense should be an excuse, not a justification, though Belgian reformers seem confused about how to characterize it.⁹¹ The reformers point out the constraints on this idea: that all the elements normally permitting legitimate defense must be present, only the reaction is excessive. In Italy, the Northern League (*Lega Nord*), an important part of the former ruling coalition there, proposed a similar change in Italian law that tracks German law.⁹² (Note that there is no separate problem of civil liability in countries with non-adversarial systems, since the standards for civil and criminal liability are the same and the two issues are often combined into one case.)

The Belgian reformers are at pains to paint themselves as moderates. They make it clear that the primary responsibility for protection rests with the state: “Security remains, above all, the responsibility of the authorities.”⁹³ They do, however, make a plea for better law enforcement. They argue for structural changes to policing and the criminal justice system which would require “a political will to attack criminality without mercy.”⁹⁴ They object vigorously to attempts to shut down debate about changes to the law of self-defense by invoking “threadbare clichés” such as threats that any change “would uncork situations worthy of the Far West.”⁹⁵ (The American Wild West once

⁹⁰ Dutch Criminal Code, art. 41: “Anyone exceeding the limits of necessary defense, where such excess has been the direct result of a strong emotion brought about by the attack, is not criminally liable.” See Peter J.P. Tak, *The Dutch Criminal Justice System: Organization and Operation*, 2003 WODC, at 42, available at www.wodc.nl. This provision is unchanged from the Dutch Criminal Code which went into effect in 1886, and was based on article 53 of the German Criminal Code (Deutschen Strafgesetzbuch). See C.P.M. Cleiren & J.F. Nijboer, *Strafrecht, Tekst & Commentaar*, Deventer: Kluwer 2004, at 257.

⁹¹ Compare 51K0741, *supra* note 79, at 7 (une cause d’excuse) with *id.* at 12 (cause de justification). See PAUL H. ROBINSON, *CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES* 657-658 (2005) (exploring the differences between justification and excuse).

⁹² Stephen Skinner, *Populist Politics and Shooting Burglars: Comparative Comments on the Lega Nord’s Proposal to Reform Italian Self-Defence Law*, 2005 CRIM. L. REV. 275, 281-82.

⁹³ 51K0741, *supra* note 79, at 7; see also 51K0651, *supra* note 73, at 5.

⁹⁴ 51K0651, *supra* note 73, at 5.

⁹⁵ 51K0651, *supra* note 73, at 6.

again makes a useful bugbear.) Conservatives counter such clichés by soberly pointing out that other European countries have such laws without provoking a bloodbath. Six proposals for change in the Belgian penal code have been launched in the last three years. So far, none of the bills has passed, but it seems certain members of parliament will continue to try.

III. Analysis of the Defense of Provocation and of Presumptions in Reform Efforts

This section examines two of the main ways proposals seek to limit proportionality: justifications (or excuses) for use of excessive force, and presumptions that force was justified in certain circumstances.

A. Provocation and Excuse

In both England and Belgium, reformers have addressed the issue of defenders using excessive force out of passion. As in common law jurisdictions generally, English law does not distinguish precisely between justification (an objective measure) and excuse (which permits subjective elements). The issues are rolled together: the jury decides whether the defender's use of force was reasonable under the circumstances as he or she honestly believed them to be.⁹⁶ The proposed English reform in this area does not stem directly from popular pressure; rather, the elite Law Commission has proposed it.

⁹⁶ This resembles the subjective standard of reasonableness in the MPC's extreme emotional disturbance defense and not the modern test for provocation which looks at whether a reasonable person in the defendant's situation would have been provoked.

The Law Commission rejected the idea of a specific partial defense of excessive defensive force, but did propose a partial defense of provocation due to fear of violence.⁹⁷ (This is an interesting melding of provocation and self-defense.) Successfully raising this defense would reduce charges from murder to manslaughter, but would not exonerate the defender altogether.

In contrast, the popularly-driven reform proposals in Belgium and Italy would allow a defender using excessive force to escape criminal liability altogether. One of the Belgian proposals states, “One who exceeds the limits of legitimate defense is not punishable if the excess was the immediate consequence of a violent emotion caused by the attack.”⁹⁸ The *Lega Nord* Italian proposal closely resembles German law. “No one shall be punishable for exceeding the limits of legitimate defense because of anxiety, fear, or panic.”⁹⁹ While the defender’s emotion would exclude liability totally, there are, as the Belgian reformers point out, limits on the use of this defense. The defender has to have found himself initially in a situation allowing legitimate defense (that is, the under the necessity of defending himself against an actual unlawful attack). “At a certain moment,” the defender exceeded the limits of legitimate defense, but that excess had to be the result of a violent emotion that was the immediate consequence of the attack.¹⁰⁰

⁹⁷ *Partial Defenses to Murder*, FINAL REPORT (Law Comm’n, London, UK), Aug. 6, 2004, at 77-80 [hereinafter FINAL REPORT].

⁹⁸ Document parlementaire 51S0243, Proposition de loi, Oct. 15, 2003 [hereinafter 51S0243] (unclear whether the defense is regarded as an excuse or justification). Other proposals are similar. See 51K0741, *supra* note 79, at 7, 12 (also unclear).

⁹⁹ Skinner, *supra* note 85, at 281.

¹⁰⁰ 51S0243, *supra* note 91.

But making an absolute defense hinge on the defendant's emotion is troubling. The idea that one defendant may be exonerated totally and another found guilty for performing exactly the same act, the sole difference being their alleged emotions at the time, offends certain notions of equity. An excuse of excessive force in self-defense because of emotion is related to provocation, is indeed a subset of it, and the provocation doctrine has been under scholarly assault for the past few decades. Many of the concerns raised about provocation are relevant when considering excessive force in self-defense.¹⁰¹

In the analysis of the proper role of emotion in provocation and self-defense doctrine that follows, I will draw on the different ways of looking at emotion in criminal law developed by Dan Kahan and Martha Nussbaum.¹⁰² Despite what their title may suggest, Kahan and Nussbaum argue there are three main ways of looking at emotion in criminal law: consequentialist, voluntarist, and evaluative.¹⁰³ Under the voluntarist approach, strong emotions reduce a person's culpability because the person's will is said to be overwhelmed by the emotion, at least to some extent. In contrast, consequentialists (or utilitarians) do not regard strong emotions as reducing a person's culpability, since a person may be punished whenever the person's behavior damages the common good sufficiently. An evaluative approach looks to whether the person's emotions are objectively appropriate in the circumstances (whether the person shows by his emotions that he values the right things), and reduces culpability or not accordingly.

¹⁰¹ The concerns about provocation doctrine may be more intense in the context of excessive self-defense if the latter is considered a total defense and not just a partial.

¹⁰² Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269 (1996).

¹⁰³ The authors call the first two approaches both "mechanistic," which is how they get the "two conceptions" of their title. See *id.* at 302-304.

If one looks at the criminal law from a consequentialist (utilitarian) point of view, the case for the provocation doctrine is weak.¹⁰⁴ It is not clear, for instance, that one who kills in rage is less dangerous in the future than other types of killers. Also, even if a provoked person cannot be deterred at the moment of killing, the law (without the provocation defense) might encourage that person to learn to control his anger more effectively before the provocation occurs. There may be some gain in general deterrence if the law sent the message that people must control their rage to prevent violence or they will be treated the same as those who kill calmly.¹⁰⁵ The first consideration may be somewhat weaker in cases of excessive self-defense than in provocation cases, since one who kills in fear of being attacked might well be less dangerous than other killers. (This would depend in part on the test for the triggering event, especially whether the test was subjective or objective.) But on the second point, an excuse of excessive force in self-defense might well undermine deterrence and encourage those under attack not to think about proportionality.

Most modern scholars who support the provocation defense, therefore, do not seek to justify it on utilitarian grounds, but rather argue that it is appropriate based on

¹⁰⁴ Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 963-66 (2002).

¹⁰⁵ Some have objected that the provocation defense operates mainly to condone (or partly condone) male violence against women (the feminist critique). See, e.g., Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997); Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665 (2001). Others are concerned about partially condoning violence against men who have made non-violent sexual advances against other men. See, e.g., Robert B. Minson, Comment: *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992). The feminist critique of the provocation doctrine does not apply with the same force to excessive self-defense, since the latter is more rarely invoked to excuse violence against women. For a response to the feminist critique of the provocation doctrine, see Dressler, *supra* note 95, at 975-79.

theories of retribution and just deserts, either voluntaristic or evaluative. In this view, the partial excuse of provocation is a concession to ordinary human frailty.¹⁰⁶ The same might be said for the excuse of excessive self-defense, and indeed Belgian and Italian reformers, and Dutch scholars, make this point.¹⁰⁷ The doctrine allows for human weakness, acknowledging that it is not always possible to perform cool calculations of proportionality under stress. This idea seems to strike a chord with popular morality.

The issue is how much to concede to human weakness. By and large, elite legal opinion in England and the U.S. has been at pains to limit the defense. Many modern scholars writing about provocation put emphasis on the term “ordinary person” in order to prevent the excuse from gobbling too many instances of homicide.¹⁰⁸ There has lately been considerable scholarly attention paid to the idea of adequate provocation. As Kahan and Nussbaum point out, the idea of adequate provocation has a deep common-law history and indicates an evaluative approach to emotion.¹⁰⁹ A person must show emotion about the right thing to get mitigation. Several scholars therefore advocate an objective, not a subjective, approach to defining adequate provocation. Dressler, for example, argues: “The provocation must be so serious that we are prepared to say that an ordinary person in the actor’s circumstances, even an ordinarily law-abiding person of reasonable

¹⁰⁶ See, e.g., Cynthia Lee, MURDER AND THE REASONABLE MAN 262 (2003) (“We do not want others to emulate the behavior. We mitigate the charges only because we feel sympathy for the provoked killer.”).

¹⁰⁷ See, e.g., Peter J.P. Tak, THE DUTCH CRIMINAL JUSTICE SYSTEM: ORGANIZATION AND OPERATION 45 (2d. ed. 2003) “Due to the strong emotions, the offender’s will is impaired so that he cannot be blamed for his act.”

¹⁰⁸ Joshua Dressler, for example, has criticized the Model Penal Code’s “extreme mental or emotional disturbance” provision for improperly conflating provocation and diminished capacity. Dressler, *supra* note 95, at 984-85.

¹⁰⁹ Kahan and Nussbaum at 306-308. For example, the infidelity of a man’s wife was typically considered adequate provocation, but the infidelity of a man’s fiancée or girlfriend was not. A man was considered to have a much greater interest in the chastity of his wife, even though the emotions provoked by the infidelity of a fiancée or girlfriend might be as strong. *Id.* at 308-309.

temperament, might become sufficiently upset by the provocation to experience substantial impairment of his capacity for self-control and, as a consequence, to act violently.”¹¹⁰ Victoria Nourse recommends that, in order for there to be adequate provocation, the provocation must be something the law proscribes and in fact punishes by imprisonment.¹¹¹

With the defense of excessive self-defense, an objective test for adequate provocation seems built-in. The person acting with emotion shows that he values the right thing: his life or safety. The defense only applies if the defendant were under unlawful attack or threatened with it, and in fact legally allowed to react with force. Thus even Professor Nourse’s standard is met. But the defense is total, not partial. Countries adopting this approach in theory reject a proportionality requirement altogether. (In practice, however, judges in these countries may still do a rough calculation of proportionality.¹¹²) Under a voluntaristic approach, one would say this assumes that the defendant has completely lost the ability to control his conduct. Therefore although the triggering event is viewed objectively, the amount of force used in the defendant’s

¹¹⁰ *Id.* at 974. See also Lee, *supra* note 97, at 264 (arguing that “act reasonableness can be satisfied if the provoking incident would have provoked an ordinary person to violence”). This standard incorporates what Cynthia Lee calls emotion-reasonableness and act-reasonableness. Emotion-reasonableness means a finding that the defendant’s passion was reasonable; act-reasonableness means that an ordinary person in the defendant’s circumstances would have acted as violently as the defendant did. *Id.* at 262-63.

¹¹¹ Nourse, *supra* note 96, at 1396-97. For a critique of Nourse’s proposal, see Dressler, *supra* note 95, at 979-84.

¹¹² In fact, some notion of proportionality may still remain, albeit in weakened form. Dutch courts have implied this in certain decisions. See, e.g., *Bijlmer Noodweer*, HR 23 oktober 1984, NJ 1986, 56 m. nt. N. Keijzer. In that case, a woman walking home late at night in a dangerous neighborhood was attacked by two men, one with a knife. She fired a warning shot with an illegal gun, but they continued toward her. She shot the man with the knife in the chest, and both men fled. Suddenly the unwounded man came back and tried to grab her purse; she shot him in the shoulder. He fled with the purse and died shortly after. The court of appeals decided that the woman breached the limits of necessary self-defense by shooting the men in vital areas, but that this was the immediate consequence of the robbery attempt which caused a strong emotion. The court appeared to consider arguments about proportionality, even though it accepted that the defendant was under a strong emotion caused by the attack.

subsequent reaction is not viewed objectively at all, but purely subjectively. Under an evaluative approach, one would say the defendant appropriately so values his own safety that the aggressor's life is forfeit if any sort of attack is made.

Under a voluntaristic approach, the provocation defense in the U.S. is partial, and a proportionality requirement observed, because, as Cynthia Lee puts it, the law “assumes that there are degrees of loss of self-control.”¹¹³ Under an evaluative approach, the defense is partial because the actor's emotion “embodies appraisals of mixed quality.”¹¹⁴ Reacting in anger or fear reflects a valuation of one's own life or safety which is in itself proper, but may be carried too far if it completely outweighs other considerations such as the aggressor's life.

The proposed English approach of elaborating a defense of provocation due to fear of violence, which is a partial defense, reflects these concerns to limit mitigation based on emotion. The elite Law Commission was particularly concerned with two types of cases: the householder who responds to an intruder and the abused child or woman.¹¹⁵ While the Law Commission expressed sympathy with both types of defendants, its report repeatedly stressed the need to keep the defense in bounds with a “robust, objective test.”¹¹⁶ The test the commission proposed takes an objective view not only of the necessary provocation, but also of the defendant's reaction:¹¹⁷ “a person of ordinary

¹¹³ Lee, *supra* note 97, at 267-68.

¹¹⁴ Kahan and Nussbaum at 313.

¹¹⁵ FINAL REPORT, *supra* note 90, at 77.

¹¹⁶ *Id.* at 80.

¹¹⁷ Lee calls this “emotion reasonableness” and “act reasonableness.” Lee, *supra* note 97, at 262-63.

tolerance and self-restraint might have acted in the same way as the defendant.”¹¹⁸ In favor of this rather strict limitation on the defense, the Commission said that without the limitation the defense might be open to a professional criminal who decided it was necessary to respond to threats of violence from a rival gang with a private execution. (Perhaps a better way to deal with this concern would be to impose an immediacy requirement, in which case the defense would still benefit the householder although not always the abused child or woman.) This limitation does seem unduly strict, considering the Law Commission has proposed only a partial defense, and the defendant would still be liable for manslaughter. It seems to go beyond the test Dressler proposes, which is simply that an ordinary person would be provoked to violence. The Commission’s insistence that the defense be “kept strictly in bounds”¹¹⁹ exemplifies elite concern with sanctioning private violence.

Countries that provide a total defense to murder based on emotion seem to have swung too far in the other direction. Even if one were willing to assume, under a voluntaristic approach, that the defendant had completely lost control, and therefore to reject a proportionality requirement in the defendant’s actions, problems would remain. How would one prove one’s emotion? Through psychiatric experts? Would simply claiming to have felt a “strong emotion” or “anxiety, fear, or panic” be enough?¹²⁰ One suspects that, in effect, the defense is mainly based on relatively objective appraisals of appropriate circumstances and therefore embodies an evaluative view of emotion in

¹¹⁸ FINAL REPORT, *supra* note 90, at 80.

¹¹⁹ *Id.*

¹²⁰ These difficulties of proof are like those under the Model Penal Code’s highly subjective approach to provocation, which is based on a voluntaristic conception. The MPC’s approach is problematic and has been criticized by Kahan and Nussbaum and others. See, e.g., Kahan and Nussbaum at 321-323.

criminal law. If so, the defense of excessive self-defense would often be treated as a presumption to use deadly force in response to attack or threats. If this defense is to be a presumption, however, the circumstances in which it applies need to be spelled out more clearly.

B. Presumptions That the Use of Force Is Justified

Several of the reform efforts discussed above involve presumptions that the use of force is justified in certain circumstances. The Florida law introduced a presumption that a person using defensive force had a “reasonable fear of imminent peril of death or great bodily harm” if someone unlawfully and forcibly entered a dwelling or occupied vehicle.¹²¹ The English Mercer/McIntosh private member’s bill in effect introduces a presumption that a person in a building using force against a trespasser to prevent a crime is justified. The notion of proportionality is preserved to some extent by prohibiting a “grossly disproportionate” response, if the gross disproportion was or ought to have been apparent to the defender, but the bill is clearly intended to greatly weaken the notion of proportionality in English law. A recently enacted Italian reform states that the requirement of proportionality is satisfied if a legally registered firearm is used against an intruder in the home or commercial premises to protect either people or property.¹²²

¹²¹ As we have seen, California and Colorado self-defense laws are also explicitly framed in terms of a presumption. Most U.S. states, however, do not explicitly invoke a presumption. In this, they more clearly resemble the proposed English law.

¹²² Legge 13 febbraio 2006, n. 59. The law provides that a firearm may only be used to protect property if the intruder does not desist and there is a danger of aggression (“quando non vi è desistenza e vi è pericolo d’aggressione”).

The function of a presumption is to begin to move from a standard to a rule. Proportionality, at least in its pure form, is very much a standard, in which multiple factors must be weighed in the balance. Applying standards is often a complex task, and as we have seen, there is considerable popular confusion about how they apply in the context of self-defense. Popular feeling, at least in some quarters, seems to be running in favor of clearer rules for self-defense. (As noted above, this desire for greater clarity in self-defense law is linked to distrust of how prosecutors and others might apply the law.¹²³) In the case of a presumption, how clear the rule is depends on whether and how the presumption is rebuttable. The text of the Florida law gives no guidance about rebutting the presumption. Courts will have to determine how it may be rebutted. In the English proposal, the phrase “grossly disproportionate,” combined with the requirement that this was or ought to have been apparent to the defender, indicates the strength of the presumption. The Italian law seems closest to a bright-line rule.

Depending on the strength of these presumptions, it might be said that they have the effect of transforming the possibility of using force into a license to use it. Some commentators are concerned that such laws provide “an open invitation” to violate the proportionality requirement.¹²⁴ But there are several possible classes of justification for these presumptions. One group of reasons focuses on necessity and the practical difficulties of applying the proportionality standard in the circumstances; another group of reasons focuses on the blameworthiness of the attacker and permits use of force for

¹²³ See *supra* text accompanying notes ____ - ____.

¹²⁴ ROBINSON, *supra* note 2, at 84.

retribution or deterrence (the latter tends more strongly to elevate the protection of property over the life of the attacker).

Legal scholars often tend to overlook or downplay the practical difficulties of a defender trying to apply the proportionality standard (assuming the proportionality standard requires that deadly force not be used when only property is in danger). These difficulties are, however, salient in the popular mind.¹²⁵ Under certain circumstances, such as an intruder in the home at night when the occupants have been asleep,¹²⁶ it is difficult for an occupant to tell if an intruder is armed, for example, or how big he might be, or whether he intends burglary or murder or rape.¹²⁷ It can be difficult to tell these things even during the day when everyone is awake. Because of these difficulties, it is hard for a defender to assess proportionality, and so a bright-line rule may be appropriate. One could argue that women are at a special disadvantage in such encounters, as being more likely to be overpowered by non-lethal force or to be raped, and so deserve an even stronger presumption in favor of the use of deadly force (though, because of currently prevailing notions of equality, it is unlikely such a sex-based presumption would be made explicit in the law).¹²⁸ Some scholars have downplayed these concerns, arguing for

¹²⁵ Note the concerns of Rep. Armstrong's Colorado constituents, and also the large volume of calls the NRA receives asking under what circumstances an intruder may be shot.

¹²⁶ One may be more vulnerable in a home than elsewhere, because of sleeping, showering, relaxing, and generally letting one's guard down. This vulnerability may help to justify a presumption about use of force to defend against an intruder in the home.

¹²⁷ Consider Marion Hammer's question, "Should I have to say, 'Excuse me, Mr. Intruder, are you here to rape and kill me or are you here to take the television set?'" Hammer, *supra* note 28. See also comments by former Italian Justice Minister Castelli and other *Leggi Nord* members. Skinner, *supra* note 85, at 280.

¹²⁸ There is a powerful argument to be made, along similar lines, that women should be permitted to carry concealed firearms. Among those noting the special need of women for firearms in scholarly literature are PAXTON QUIGLEY, *ARMED AND FEMALE* (1989); Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 *YALE L. & POL'Y REV.* 509 (1993); Inga A. Larish, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 *U. ILL. L. REV.* 467; cf. Don B. Kates &

example that burglars are statistically not likely to want an encounter with occupants,¹²⁹ and therefore a threat of death or serious bodily injury should not be presumed whenever there is a felonious entry. The point is made that the cost of error by an occupant using deadly force is high. The obvious response is that the cost of an error by an occupant not using deadly force may also be high; because of the blameworthiness of the intruder, it may not be unreasonable to make him bear the burden of mistake.

These presumptions may be viewed as privileging property over the life of the intruder. Stated that way, the presumed blameworthiness of the intruder becomes more important, and possible justifications of the rule include deterrence and retribution. Since in continental thought especially, but also in Anglo-American legal thought, these two functions are seen as solely the prerogative of the state, it might be argued that these presumptions allow citizens to usurp the state's proper functions and to become vigilantes.

A possible response is that this (limited) appropriation of the state's functions is justified in the case of intrusions into the home because such intrusions are uniquely terrifying and one's property interest in the home is different from other property

Nancy J. Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873 (1982). A gun for a woman is a powerful equalizer. (Apparently this term was first used for the Colt revolver, since it was relatively cheap and poorer people could buy it.) The concern for women's lack of ability to safely retreat is part of what led Marion Hammer, who says she is 66 years old and 4 feet 11 inches tall, to urge doing away with the duty to retreat in public in Florida. In theory, prosecutors, judges, and juries are supposed to take into account particular factors affecting the ability to retreat with safety, but Ms. Hammer preferred a clearer rule that would not leave women (and others) dependent on their discretion. Hammer, *supra* note 28.

¹²⁹ Green, *supra* note 13, at 28-29.

interests.¹³⁰ The home has long been regarded as the embodiment of one's dignity and privacy, a special sphere under one's own control, free from interference by the government or other citizens who do not also live there. If anything, this feeling may have intensified recently; there is a growing sense of being under siege. The home is increasingly referred to in popular culture as a "sanctuary," a "retreat," an "oasis." The line between the home (or vehicle) and the outside world is becoming sharper, the area within one's control versus the area that is not.¹³¹ This change is evident in everything from the language used in popular home decorating magazine articles and car advertisements to parents' reluctance to allow children to freely play in the neighborhood.

But it is clear that popular sentiment in favor of self-defense goes beyond simply protecting the home. It has come to seem to many Europeans intolerable, for example, to require a shopkeeper to simply stand by (or run away and hide) while a thief takes goods. Perhaps the surest sign of more willingness to allow citizens to take retribution and deterrence into their own hands is the sympathy many have shown for householders and shopkeepers who shoot a fleeing felon in the back.¹³² Such seems to have been the case with Tony Martin, and with jewelers in Belgium and Italy. It is in these cases that the gulf between popular opinion and elite opinion seems greatest. In such cases, there can

¹³⁰ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 238-39 (2d ed. 1995); Green, *supra* note 13, at 32, 36.

¹³¹ While this may be true in popular culture, it is not necessarily true in law. Cases on search and seizure do emphasize the sanctity of the home, at least rhetorically and sometimes in fact, *see e.g.*, *Kyllo v. United States*, 533 U.S. 27 (2001), but courts provide little protection for those in automobiles.

¹³² In the United States, since the U.S. Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), not even a policeman may shoot a fleeing felon unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. This is one example of elite imposition of a proportionality standard that may not accord with popular morality.

be no fig leaf, no pretending that there was an immediate continuing danger. The only possible justifications are retribution and deterrence.¹³³

There is a powerful reason why citizens may be more inclined to take deterrence and retribution into their own hands: the sense that the state is failing to do it.

Throughout the United States and Europe, as we have seen, many believe that the justice system is not capable of punishing and deterring criminals, but focuses on harassing law-abiding people instead.¹³⁴ It is certainly easier (and personally safer) for police to deal

¹³³ There is, of course, the possibility of excuse because of passion, but that is not a justification.

¹³⁴ This belief may be more justified in Europe than in the United States, where criminal sentences are longer and crime rates have been falling for several decades.

According to the National Crime Victimization Survey, an ongoing survey of households that interviews about 75,000 persons in 42,000 households twice annually, between the genesis of the survey in 1973 until 1980 there was an average 49.3 victimizations per 1,000 population age 12 and over. Bureau of Justice Statistics, U.S. Department of Justice, National Crime Victimization Survey Violent Crime Trends, 1973-2004, <http://www.ojp.usdoj.gov/bjs/glance/viort.htm> (last visited Aug. 12, 2006). Crime rates peaked in 1981, with an average of 52.3 victimizations occurring. *Id.* Violent crime rates dropped throughout the mid 80's, reaching their lowest point in 1986 with an average of 42.2 victimizations before climbing again. *Id.* Rates climbed to an average of 52.1 victimizations in 1994, but since then have steadily declined. *Id.* In 2004, an average of 21.1 victimizations occurred. *Id.* Between 1995 and 2004 violent crime rates declined about 54% in the United States. *See id.* The violent crimes included in the Survey are rape, robbery, aggravated and simple assault. *Id.* The homicide data are collected from the FBI's Uniform Crime Reports which are comprised of reports from law enforcement agencies. *Id.* The Survey was redesigned in 1993 and data before that year have been adjusted to make it comparable to data collected since the redesign. *Id.* For a discussion of the effects of the redesign, see Charles Kindermann et. al, *Effects of the Redesign of Victimization Statistics*, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/erve.pdf> (visited Aug. 11, 2006).

Similar to the trend in the National Crime Victimization Survey, household perception of crime as a problem rose during the late 1980s and early 1990s and then leveled off. Carol J. DeFrances & Steven K. Smith, *Perceptions of Neighborhood Crime* (<http://www.ojp.usdoj.gov/bjs/pub/pdf/pnc95.pdf>) (visited Aug. 12, 2006) (in 1985, 4.7% of households identified crime as a problem; 1987, 4.8%; 1989, 6.4%; 1991, 7.4%; 1993, 7.4%; 1995, 7.3%). As crime dropped sharply from 1994 to 1995 though, perceptions of crime remained relatively stable. *Id.*; *see also* Mark Warr, *The Polls-- Poll Trends: Public Opinion on Crime and Punishment*, 59 PUB. OPINION Q. 296, 298-99 (Summer 1995) (stating that public perceptions about crime have not changed substantially while noting that the public is usually pessimistic about crime); Beres & Thomas, *supra*, at 106 n.20 (discussing the widespread perception that crime is a pressing national issue but not a significant local concern).

In contrast to the falling rates of crime in the United States, English crime rates (including Wales) as measured in both victim surveys and police statistics have risen since 1981. Bureau of Justice Statistics, U.S. Department of Justice, *Crime and Justice in the United States and in England and Wales, 1981-96*

<http://www.ojp.usdoj.gov/bjs/pub/pdf/cjusew96.pdf> (last visited Aug. 16, 2006). The following crime rates are per 1,000 population. From 1981 to 1996, the rate of robbery in England rose from an average of 4.2 to 7.6 (81% increase), but in the United States, fell from 7.4 to 5.3 (28% decrease). *Id.* at 3. In that time period burglary doubled in England, from an average of 40.9 to 82.9, but was cut in half in the United States (105.9 to 47.5). *Id.* In addition, the murder rate in the United States was measured as 8.7 times as great as England's in 1981, but only 5.7 times as great in 1996. *Id.* at iii. Another significant change was the rape rate in the United States shrinking from 17 times that of England's in 1981 to 3 times as large in 1996. *Id.* A person committing a serious crime in the United States (rape, robbery, assault, burglary, and motor vehicle theft, but not murder) is generally more likely than one in England to be caught and convicted. *Id.* at iv. For all offenses (murder, rape, robbery, assault, burglary, motor vehicle theft), courts in the United States sentenced convicted offenders to longer periods of incarceration than courts in England. *Id.* According to figures for the United States in 1994 and for England in 1995, sentences in the United States were 3 years longer for murder, nearly 4 years longer for rape, nearly 3 years longer for assault, more than 2 years longer for burglary, and over one year longer for motor vehicle theft. *Id.* at 31.

In the United States, an examination of the rise of imprisonment from 1992 to 2001 concluded that the 50% increase in the incarceration rate was entirely a result of changes in sentencing policy and practice. See The Sentencing Project, *New Incarceration Figures: Growth in Population Continues*, at 1, <http://www.sentencingproject.org/pdfs/1044.pdf> (last visited Aug. 16, 2006) (emphasis in original) (citing Jennifer C. Karberg and Allen J. Beck, "Trends in U.S. Correctional Populations: Findings from the Bureau of Justice Statistics," presented at the National Committee on Community Corrections, Washington, D.C., Apr. 16, 2004). Changes included the "three strikes" rules, mandatory sentencing, and "truth in sentencing." See *id.*; See also Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 107-08 (1998) (arguing that the rise in the prison population since 1980 is a result of, *inter alia*, legislatures reclassifying misdemeanors as felonies, increased mandatory minimum sentences, sentence enhancements for the use of guns in the commission of a crime, "truth-in-sentencing" laws diminishing the ability of inmates to reduce their time served through work or good behavior, and sharply enhanced sentences for repeat offenders, most noticeably through three strikes statutes). California's crime rate, for example, remained reasonably flat from 1972-95 while the incarceration rate increased over 300%. Beres & Thomas, *supra*, at 108 n.33 (citing Legislative Analyst's Office, Handbook for the Joint Hearing of the Senate Comm. on Criminal Procedure and the Assembly Comm. on Public Safety, The State of Public Safety in California, at 13 (June 6, 1997)). Some researches have argued that increased sentencing prevented a large spike in California's crime rate. *Id.* at 109 n.35.

It is not easy to explain and compare trends in national crime rates because of differing measurement methods, recording practices, and lack of comparability over time between countries. See Michael Tonry & David P. Farrington, *Punishment and Crime across Space and Time*, 33 CRIME & JUST. 1, 6 (2005). For a discussion on the comparability and sources of international crime data, see *id.* at 11-14. The national crime rates that follow were chosen because the countries had conducted representative national crime-victimization surveys from 1981-89 that could be compared to the reported crime rates. See Phillip J. Cook & Nataliya Khmivlevska, *Cross-National Patterns in Crime Rates*, 33 CRIME & JUST. 331, 331 (2005). The following crime rates are per 1,000 population. According to recorded crime rates, in 1999, the United States rate of homicide was .057, a decrease of 42% from 1981. *Id.* at 332. In 1999, the rate of homicide in Scotland was .023, which was an increase of 31% from 1981. *Id.* In 1999, the rate of homicide in the Netherlands was .015, an increase of 12% from 1980. *Id.* In 1998, the rate of homicide in Sweden was .019, an increase of 36% since 1980. *Id.* In 1999, the rate of homicide in Switzerland was .011, a decrease of 21% from 1985. *Id.*

The victimization survey results are several times higher than the reported estimates, save Switzerland, and sometimes exhibit different trends, possibly because certain crimes were never reported, the authorities failed to record them, or survey participants were unable to remember when they were victimized and may have reported the same incident during separate time periods. *Id.* at 334-35. Homicide is not included in victimization surveys because one does not comment on one's own murder, but crimes like assault are. *Id.* at 335. The following statistics discuss the reported crime rates for assault and their change over time,

with basically law-abiding people than to attempt seriously to go after violent criminals. There is growing concern about the threat posed by the failed socialization of many boys and young men—especially those from the welfare underclasses but others as well. In the face of such a threat, and given the incentives of police, strict limits on use of force in self-defense and on the private ownership of guns are coming to seem to many untenable.

IV. Conclusion

Unless governments are willing and able to seriously reduce criminality, they can expect continued popular pressure to expand the permitted use of force in self-defense. It may be that even with falling crime rates, citizens' intuitions about the proper scope of self-defense lead them to want to reform current law in some countries. It may be better to encourage certain legal changes now than to wait for popular frustrations to grow more bitter, and to poison attitudes toward the law and government generally. In particular, changes that clarify the law, making a standard more of a rule, such as presumptions about the use of force against home intruders may help to satisfy reasonable popular demand. The costs of such laws may not be as high as some predict. The U.S. states have greatly varying laws about self-defense and gun ownership, but in none of them so far has there been an epidemic of people using deadly force in questionable

while the change from the survey data over the corresponding period is in parenthesis. In 1999, the rate of assault in the United States was 3.4, an increase of 16% from 1981 (-44%). *Id.* at 332, 335. Over the same time period, the rate of assault in Scotland increased 93% to 11.9 (21%). *Id.* In 1999, the rate of assault in the Netherlands was 2.7, an increase of 176% from 1980 (-15%). *Id.* In 1998, the rate of assault in Sweden was 5.5, an increase of 100% from 1980 (36%). *Id.* In 1999, the rate of assault in Switzerland was 1.9, an increase of 73% from 1985 (144%). Comparing the overall data, it seems that the United States enjoyed the most favorable trends, placing first or second in every crime category (homicide, assault, rape, burglary, motor vehicle theft, and robbery) when the countries are ranked from the lowest (or most negative) to the highest growth rate (the survey included eight countries: England and Wales, Scotland, Australia, Canada, Netherlands, Sweden, Switzerland and the United States). *Id.* at 333-35.

circumstances and escaping punishment by claiming self-defense. This gives reason to trust that citizens generally may exercise discretion more responsibly than some members of the elite fear.