SELF-DEFENCE AND THE RIGHT TO LIFE

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It is almost a matter of definition that law restricts the freedom of each individual to satisfy his wants and desires in any manner he wishes. The restrictive elements in law may be regarded as justifiable because and in so far as they are necessary to ensure the maximum freedom for each and every individual. Freedom from interference can only be preserved by restricting everyone's freedom to exercise power over others. Perhaps the most fundamental and universal restriction is that placed on the use of force by one individual against another. Widely as social and legal systems may vary in the extent to which they allow some forms of power (e.g., economic power, industrial power, the powers of persuasion) to be exercised, they unite in prohibiting the exercise of physical power by one citizen against another. Many natural inequalities may be allowed to run free, but all legal systems attempt to "equalise" human beings to the extent of preventing resort to force by those who are minded and able to use this method of satisfying their desires. A prohibition on the use of force may thus be regarded as one of the minimum conditions of social life. This, in turn, is bound up with recognition of the right to life and physical security as the most basic claim of every human being. The idea of physical security as one of the "natural rights" of mankind has a long history, and Blackstone followed this tradition when he held that the right to life and limb is an "absolute right" which "every man is entitled to enjoy whether out of society or in it." 1 This "right" may be described as "natural" and "absolute" in the sense that reason demands its recognition if men are to live together in society, 2 and in the sense that the instinct towards self-preservation is so strong and basic to human nature that "no law can oblige a man to abandon" it. 3

Occasionally cases arise in which the maintenance of an individual's right to life conflicts with his duty to abstain from violence. Legal systems generally resolve this conflict by permitting the individual's right to life to override the social duty not to use force. Where the attack or threat is sudden, the protection of society and its laws is no longer effective, and the individual alone may be left to

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1 I Bl.Comm. 119.


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protect his right to life and physical security. Indeed, on practical grounds a liberty to use force in self-defence is essential if members of society are not to be put at the mercy of the strong and unscrupulous. Take away this liberty, Bentham wrote, “and you become, in so doing, the accomplice of all bad men.” If a legal system is to uphold the right to life, there must be a liberty to use force for the purpose of self-defence. The corollary of this is that an attacker may, by threatening the life of another, forfeit his own right to life.

**Legal Guarantees of the Right to Life**

English law, unlike many other legal systems, contains no constitutional declaration of fundamental rights. The English approach to such basic issues has always been thoroughly pragmatic: civil liberties and fundamental rights exist to the extent to which certain forms of conduct give rise to criminal or tortious liability, and statements about rights are therefore inferences from statutes and judicial decisions which penalise certain forms of behaviour. The correct statement of such a right is founded upon the existence of a legal remedy for its infringement or of legal means for its enforcement, and the English lawyer may look with disdain upon those legal systems where basic rights are proudly declared in a constitutional document but where their actual legal protection falls well short of the proclaimed ideals. As Dicey observed in a well-known passage: “The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.”

The point of Dicey's remark is lost if the protection actually afforded by the law is uncertain and unprincipled. Lack of enthusiasm for a constitutional declaration of rights is often combined with the belief that the terms of such declarations are invariably so vague and general that when in practice a fundamental question does arise—for instance, as to the extent of a right or as to priority between two rights which conflict—the declaration can offer little guidance. This charge can equally be levelled against rules of criminal law and the law of tort which hold that the criterion of the lawfulness or unlawfulness of the use of force is whether it was “reasonable in the circum-

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4 *Cf. Paley, Principles of Moral and Political Philosophy*, bk. IV, ch. 1, who holds that there is a natural right of self-defence which “is suspended by the establishment of civil society,” except in those cases where the law cannot interpose to protect the individual. Even then, “this liberty is restrained to cases in which no other probable means of preserving our life remain, as flight, calling for assistance, disarming the adversary, etc.”


6 The United Kingdom is a signatory to the European Convention on Human Rights, article 2 of which purports to protect the right to life: see below, p. 288.

stances" for self-defence. Such a rule, without more, leaves all the important issues unresolved. No firm statements about rights can be deduced from it, and decisions which ought to be informed by considerations of principle may be reached on wholly particularistic grounds. The proper balance between certainty and flexibility in law is an enduring problem, but its present relevance lies in the resurgence of the view that, in relation to self-defence and the right to life, legal certainty is both undesirable in principle and unattainable in practice. The English criminal law on self-defence is passing through a difficult phase: on the one hand the appellate courts, although moving away from the rigid categories of the old common law, continue to lay down the law in terms of "duties," and on the other hand leading academic writers argue against any reference to duties and in favour of a general standard of reasonableness. In this article it will be submitted that some certainty of principle is both desirable and attainable in the law of self-defence, and that recent decisions of the English courts provide the foundations for a fruitful approach. Satisfactory principles can only be constructed if attention is paid to the values protected by different legal provisions and to the resolution of the more important conflicts of interests which might arise. The value of such a "value-study" of legal rules hardly stands in need of re-emphasis; when such a fundamental issue as the right to life is at stake, its value is surely beyond question.

CONTEMPORARY PROBLEMS

Does the English criminal law on self-defence consist of a number of rules and exceptions laid down at common law, or is it governed by a general standard of "reasonableness" laid down by statute? At first blush it seems extraordinary that such an elementary point should remain in doubt, not least because the statute in question (the Criminal Law Act 1967) has been in force for several years. Professors Smith and Hogan state, in their influential work, that the common law rules no longer represent English law; the practice of the courts suggests otherwise. What are, or were, these rules? The two principal requirements are that the force should have been necessary for self-defence and reasonable in the circumstances. The requirement of necessity supports two separate limitations. The first is that it should have been necessary to use force rather than employing non-violent means of self-protection. From this limitation derives the so-called "duty to retreat": when an individual's purpose in a threatening situation is to save himself from injury or death, it cannot be neces-

sary for him to inflict harm on his assailant if there is a safe avenue of withdrawal open to him. To this duty there have always been certain exceptions.10 A second limitation is that the amount of force should have been no more than necessary for the purpose of self-defence. Courts have occasionally merged this with the requirement of reasonableness, which demands a sense of proportion between the harm inflicted and the harm thereby prevented, but the two requirements are theoretically distinct.11

What are the grounds for arguing that the common law has been overruled by section 3 of the Criminal Law Act 1967? The section enacts that “a person may use such force as is reasonable in the circumstances in the prevention of crime,” and that this provision “shall replace the rules of the common law” on the justifiability of force used in the prevention of crime. Smith and Hogan argue that “self-defence and defence of others invariably arise out of an attempt to commit a crime by the assailant and thus consist in the use of force to prevent the commission of the crime.” 12 It therefore follows that cases of self-defence should be decided according to the general test of reasonableness laid down by section 3, and that all the old common law authorities should be regarded as repealed.13 Now, even on the assumption that the conflation of the two grounds of justification would be logical and desirable, there are good reasons why it is unacceptable as an analysis of English law. In the first place, section 3 was not intended to alter the law on self-defence.14 Furthermore, the courts continue to deal with cases by reference to the common law. Indeed in not one of the appellate decisions reported since 1967 has there been even a passing reference to section 3 as relevant to self-defence.15

The leading case is now Julien (1969).16 The accused was charged

11 Cf. below, pp. 302–303.
15 Smith & Hogan (op. cit., p. 261) cite McInnes [1971] 1 All E.R. at 302; but Edmund Davies L.J., merely stated that s. 3 holds that a person may use such force as is reasonable in the circumstances in the prevention of crime, and “the degree of force permissible in self-defence is similarly limited.” This fails to carry the point: reasonableness has always been a limitation at common law, and the question now is whether it is the sole limitation.
with assault occasioning actual bodily harm, and the jury were
directed that there is an obligation to retreat before using force in
self-defence. One of the points argued on appeal was that the duty
to retreat applies only in homicide cases, but this argument found no
favour with Widgery L.J.:

... for very many years it has been common form for judges
directing juries where the issue of self-defence is raised in any case
(be it a homicide case or not) that the duty to retreat arises. It is
not, as we understand it, the law that a person threatened must
take to his heels and run in the dramatic way suggested by
counsel for the appellant; but what is necessary is that he should
demonstrate by his actions that he does not want to fight. He
must demonstrate that he is prepared to temporise and disengage
and perhaps to make some physical withdrawal. 17

Thus the common law “duty to retreat” was re-defined as a duty to
demonstrate a desire to disengage and a willingness, if necessary, to
withdraw. Although this duty is phrased only in terms of demonstration, the court’s meaning was evidently that the defendant, if
necessary, should actually disengage and withdraw. Thus the court
upheld the trial judge’s direction that before the defendant could
lawfully use force he was required to retreat. 18 Doubts crept into the
law as a result of the subsequent decision in McLennan (1971). 19 The
trial judge had directed the jury that the accused “must have
retreated as far as he could, or as far as the fierceness of the assault
would permit him.” The Court of Appeal criticised this direction as
“too inflexible,” and referred to the modern law as “accurately set
out” in Julien. But then Edmund Davies L.J., expressed the court’s
preference for the view that failure to retreat is simply a factor to be
taken into account in deciding whether the force was necessary and
reasonable. This view is plainly at odds with the decision in Julien,
where the “duty” was described in terms of what is “necessary”
and what an individual under attack “must” do. 20 The court
appears to have reverted to the Julien approach in Field (1972). 21 The
main issue in that case was whether a person who has been fore-

17 Ibid., at p. 858H.
18 The court expressly rejected counsel’s “sturdy submission” that “an English-
man is not bound to run away when threatened, but can stand his ground and
defend himself where he is”: [1969] 2 All E.R. at 858F. Equally, however, the
court did not accept counsel’s “dramatic” formulation of the duty to retreat:
hence Lord Widgery’s re-formulation (quoted in the text).
20 This duty-terminology is criticised by Smith & Hogan (op. cit., 261) on the
ground that it fails to allow for the liberty to make a pre-emptive strike (“the
rule that force may be used to ward off an imminent attack”). But the court
did not address itself to the question of exceptions to the general duty, and there
is ample authority for exceptions to the duty to retreat which the court neither
expressly nor impliedly overruled: cf. below, p. 294.
warned of an attack ought to leave the place where he is, and the court is reported to have stated that "no duty to retreat could arise until the parties were at any rate within sight of each other and the threat to the person relying on self-defence so imminent that he was able to demonstrate that he did not mean to fight."

Evidently section 3 has little relevance in practice to self-defence cases. Those who contend that section 3 is the law are in reality using the section to argue that the law on self-defence ought to consist merely of a general standard of reasonableness. This type of case, they argue, cannot properly be dealt with by means of rules and exceptions, since it is essential to preserve a discretion for the judge and jury in each case to take account of factors which might be considered important. Oliver Wendell Holmes was an advocate of this approach, writing that the duty to retreat is "rationally . . . only one of the circumstances to be considered with the rest in deciding whether the defendant exceeds the reasonable limits." 22 The difficulty with this approach is that it says absolutely nothing about either the rights and duties of the individual or the principles upon which actual cases should be decided. The possibility of retreat may well be one factor to be considered, but how strong a consideration should it be? What type of consideration, if any, is capable of outweighing it? All cases which raise the question of justifiable force involve a conflict between certain interests and values; in most cases, some general arguments will form part of the reasoning by which the court reaches its decision. If the protection afforded by English law to life and physical security is to be at all consistent, it is important to examine the values and interests involved in self-defence cases, with a view to articulating certain general principles which may then be used for the guidance of both individuals and the courts.

**INTERESTS AND VALUES**

An individual is subjected to a violent attack; an individual finds himself threatened with serious and immediate violence. The right to life, or at least the right to physical security, is under challenge. Should the law favour the defender's interests at all times? Should an attacker forfeit his basic rights by making such an assault? Does the attacker's right to life and physical security warrant any legal protection? How highly should the state value this basic right, by comparison with other important social policies? In any legal system, the law of self-defence explicitly or implicitly adopts a particular

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22 *Holmes-Laski Letters*, I, 335, a discussion prompted by the Supreme Court case of *Brown v. U.S.* (1921) 256 U.S. 335, in which Holmes J., delivered a well-known judgment: cf. below, p. 299.
stance on these issues and embodies a more or less clear order of priority of values. A re-appraisal of the law must therefore be preceded by a discussion of the interests of each party involved (the defender, the attacker and the state) and of the values which ought to be protected.

What are the interests of an individual who falls victim to an unlawful attack? His principal interest, which some would regard as incapable of being overridden, lies in his own survival and physical integrity. If this interest is absolute when there is a realistic threat to his life, it becomes weaker as the seriousness of the harm threatened or inflicted diminishes. An individual who is attacked might also claim that he has an interest in ensuring that his attacker is punished, but there is an important distinction between assisting in the enforcement of the law and inflicting punishment. There should indeed be a liberty to use force in arresting a suspected offender or in suppressing a breach of the peace, but it is the mark of a civilised society that punishment may only be carried out by official agencies according to the law. The individual's interest is merged into the state's interest in the punishment of all persons duly proved to have broken the criminal law. For an individual to "take the law into his own hands" by inflicting summary punishment on his attacker is rightly regarded as a crime in itself.

Should the interests of the criminal attacker also be considered? There is little to commend the view that a criminal loses all his civil rights when he commits any offence. On the other hand, someone who makes a murderous attack on another must forfeit his right to life if this appears to be the only way in which the victim's life can be preserved. The European Convention on Human Rights approaches self-defence from this point of view: Article 2 provides that "everyone's right to life shall be protected by law," but it goes on to declare that "deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary (a) in defence of any person from unlawful violence. . . ." In these circumstances of necessity, then, the right to life is lost. When his assault is less serious, the criminal's right to life remains protected and he merely loses his right to physical security: the defender's liberty to use force in self-

\[23\] Cf. *Timothy v. Simpson* (1835) 1 C.M. & R. 757. There are other decisions of the same era which suggest that there is not merely a liberty but a duty to assist a constable to suppress a breach of the peace when called upon to do so (*Brown* (1841) Car. & M. 314), and a duty to assist in suppressing a riot (*Charge to the Bristol Grand Jury* (1832) 5 C. & P. 262n.). It is uncertain whether these authorities still represent English law.

\[24\] The term "punishment" in this context is used to refer to any non-compensatory order made by a criminal court on the conviction of an offender; thus it includes, e.g., probation orders, which some might not regard as punishment.
defence overrides the criminal's normal right to physical integrity. In all cases, however, the criminal should retain the right not to be subjected to force which is neither necessary for his victim's defence nor necessary for any other lawful purpose which the defender starts to pursue. A criminal ought to be protected against excessive force and against any arbitrary treatment after his attack has been repelled, such as force used by the victim in revenge or for punitive purposes.

It is for the law to achieve a just and proper balance between the interests of defender and attacker, victim and criminal. This balance will reflect the state's own priority of values. The preservation of human life must rank high among state interests, and the interests in the minimisation of physical violence, in the promotion of law enforcement and in what Dicey termed "the suppression of private warfare" all have a bearing upon the justifiability of force. When there is an attack or threat of attack with deadly force, there arises the problem of the extent to which the respective lives of attacker and defender should be protected by law. It is thought that where a situation does present a stark choice between the lives of attacker and defender, the law should not hesitate to protect the life of the innocent rather than the life of the criminal attacker. But how far should this protection be carried in a state which regards the right to life as fundamental? Surely the "choice of lives" situation only arises when the defender cannot (without physical danger to himself) avoid the use of serious violence. Thus a legal system which supports the maximum protection for every human life should provide that a person attacked ought if possible to avoid the use of violence, especially deadly force, against his attacker. This might be termed the "human rights" approach to self-defence, since it accords with the provision in the European Convention that no life shall be deprived of protection unless absolutely necessary for a lawful purpose. This approach, supported by the state interest in the minimisation of violence, would result in a general duty to avoid the use of force where non-violent means of self-protection are reasonably open to the person attacked.

A different set of legal provisions would result from what might be termed a "stand fast" approach. Whilst on a "human rights" approach a person attacked might be obliged to withdraw if this would protect him from further attack, the "stand fast" approach favours the liberty of a law-abiding citizen to stand his ground when confronted with an unlawful assault. Three reasons for this approach might be advanced: a show of strength may often discourage a pending attack (si vis pacem para bellum), it is wrong that a criminal should be able to oblige a law-abiding citizen to make a timid and
dishonourable withdrawal, and moreover a law which purports to curb the basic instinct towards self-preservation will prove unenforceable. A person attacked should therefore be entitled to stand fast and to repel force by force until that is no longer necessary for self-protection. From the "human rights" point of view, the drawback of this approach lies in its use of the concept of necessity. It is arguable that the use of force cannot be necessary if withdrawal is reasonably possible, and that therefore the "stand fast" approach neglects to offer the maximum protection for the life and limb of the attacker. Indeed, the "stand fast" approach appears to favour the law-abiding citizen's feelings of honour and self-respect at the expense of the criminal's right to life or physical security. Stephen adopted this view in relation to the use of non-serious force but it surely blurs the distinction between purely defensive force and the kind of punitive force which often goes with the phrase "teaching him a lesson." Dicey, in an astute and sensitive discussion of the law of self-defence, described the dangers in this way:

The rule which fixes the limit of the right of self-help must, from the nature of things, be a compromise between the necessity, on the one hand, of allowing every citizen to maintain his rights against wrongdoers, and the necessity, on the other hand, of suppressing private warfare. Discourage self-help, and loyal subjects become the slaves of ruffians. Over-stimulate self-assertion, and for the arbitrament of the courts you substitute the decision of the sword or the revolver.

Could it be contended that the "human rights" approach, with its emphasis on the avoidance of violence, would put loyal subjects at the mercy of ruffians? Might not the "stand fast" approach encourage individuals to take the law into their own hands? Opinions may differ as to the realism of these fears at the present day. In principle, however, the "human rights" approach may be defended on the grounds that it aims at maximum protection for every life, the minimisation of violence and the suppression of private warfare, whereas the "stand fast" approach aims at maximum protection for the rights and liberties of the law-abiding citizen.

It must be emphasised that self-defence remains only one of the legal justifications for the use of force. If a person attacked is merely concerned to defend himself, then of course he is bound by the law

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25 Although Stephen accepted the duty to withdraw in cases where the alternative was to inflict death or serious harm on the assailant, he adopted the "stand fast" approach in relation to the use of "force short of the intentional infliction of death or grievous bodily harm." (This is the distinction subsequently rejected in *Julien*: cf. above, p. 286 and note 18.) Stephen argued that "if this were not the law, it would follow that any ruffian who chose to assault a quiet person in the street might impose upon him the legal duty of running away, even if he were the stronger of the two": *Digest of the Criminal Law*, 6th ed. (1904), p. 125.

of self-defence. But if he intervenes in order to prevent crime, to suppress a breach of the peace or to defend his property, then the test will be whether his conduct was necessary and reasonable for that purpose. 27 Unfortunately in English law the scope of these justifications is also shrouded in uncertainty, 28 but it is not conducive to clarity if they are jumbled together. The state's interest in ensuring the full enforcement of the law generally militates in favour of civilian assistance in this type of case, but once again there are difficult questions about the protection of human life. Some years ago a senior police officer, in answer to a question about the citizen's proper reaction to a bank raid, said: "It depends entirely on how you are placed in the situation, but if you can have a go, then have a go." 29 This remark is not as controversial as it may have appeared. The cautious preface to the exhortation shows an awareness of the dangers of intervention, and the thrust of the whole statement was that citizens should try to frustrate criminal enterprises, and not necessarily that they should use serious violence against offenders. In this sphere there is the special danger that a citizen's intervention may put his own life at peril, in addition to the question of policy whether a bank robber or other criminal should lose his normal legal protection and may be killed or seriously injured by any public-spirited citizen. How should the law approach this type of situation?

Some relevant factors are the structure of society, the disposition of its members and its problems of law and order. Thus the Commissioners on the Indian Penal Code recommended an extension of the limits of self-defence and justifiable force on the ground that the Indian people were "too little disposed to help themselves," although they acknowledged that a different approach would have been appropriate for "a bold and high-spirited people, accustomed to taking the law into their own hands." 30 Similarly deserving of consideration are the crime rate, the style of offences and police efficiency. Some might argue that in a society in which all crimes (especially offences of violence) are apparently increasing, in which the seriousness of offences (especially the numbers involving firearms) appears to grow continually and in which the percentage of offences cleared up shows little improvement, there are powerful social reasons in favour of 27 As with self-defence, if the person is charged with an offence against the person, the prosecution must prove beyond reasonable doubt that his conduct was not justifiable. 28 Cf. de Smith, Constitutional and Administrative Law, 2nd ed. (1973), chap. 20, for a discussion of the citizen's liberties to assist in the enforcement of the law. Cf. also below, p. 303. 29 Mr. Ranulph Bacon, Assistant Commissioner in the Metropolitan Police, at a press conference on 31 December 1964, reported in The Times, 1 January 1965, p. 4; correspondence on the subject followed in The Times on 4, 5 and 9 January 1965. 30 Lord Macaulay, Works, ed. Trevelyon, Vol. vii, p. 450.
greater involvement by members of the public in law enforcement. Yet this fails to establish the point that citizens should play a more physical role, as opposed to making fuller use of their powers of observation and informing the police of suspicious circumstances. These, then, are some of the arguments. Their resolution awaits a thorough investigation of the roles of police and citizens in law enforcement, and this lies outside the scope of the present article.

SOME LEGAL PRINCIPLES

For the law to attempt a detailed formulation of rights and duties in cases of self-defence would be both futile and unjust—futile because no one can foresee all the possible circumstances in which self-defence might be raised, and unjust in so far as the result of failure to legislate for a particular type of situation might be the absence of rights on a most worthy occasion. Thus the rules and exceptions of the old common law have attracted considerable criticism.31 However, it is wrong to suppose that the only practical alternative to a “rule-and-exception” approach is complete open texture—a general standard of reasonableness, unaccompanied by any more detailed legal prescriptions. Although Dicey criticised the “minute provisos” of the common law as outmoded, he asserted that “the principle on which they rest is . . . clear and most important.”32 What is required is a form of legal guidance which attempts to maximise both consistency of policy and flexibility in individual cases; and it is suggested below that the beginnings of such an approach are discernible in recent English decisions. The approach could be termed “the method of legal principles.” It would involve the use of general propositions which have prima facie application to a certain type of case, but which may be overridden for stated reasons where appropriate. Such principles are not hard-and-fast in their application, the number of principles is not fixed but unlimited, and their main function is to guide decision-making rather than to dictate a particular result. The method would preserve an element of discretion for the court, in so far as the court must determine whether a particular case falls within the ambit of a given principle and might hold that the general principle should be overridden in that particular type of case. The method would also encourage consistency of policy, since there could be an appeal on a point of law if the principles were wrongly used. It is therefore preferable to the “rule-and-exception” approach in that it is more flexible and in that the issues of policy are more closely and

31 Stephen, loc. cit.; Dicey, loc. cit.; Smith & Hogan, op. cit., pp. 260–262, referring to the 1st ed. of their work (1965), pp. 230–238, where the common law and their criticisms are set out at length.

explicitly linked with the result of each case; and it is preferable to
the "open texture" approach, which is unsatisfactory in that it fails
to give any guidance to those who have to make decisions and in that
references to "considerations" disclose neither any order of priority
nor any consistent policy.\textsuperscript{33} Courts have to reach decisions, and citi-
izens may need to know something about their duties and liberties.
The law is surely neglecting its primary function if it cannot offer at
least some guidance.

Five principles which have received judicial support are now
examined in the light of the wider issues of policy discussed above. In
view of the provisional nature of legal principles, they cannot pro-
perly be said to give rise to duties and rights as such. The terminology
of prima facie liberties and duties is therefore adopted.

(i) \textit{The Principles that a Person Threatened with Attack Ought to
Avoid Conflict if Reasonably Possible, and that a Person Under
Attack Ought to Withdraw if Reasonably Possible.}

These two principles, which impose the same prima facie duty, derive
from the requirement that force may only be used in self-defence if it
is \textit{necessary} for the protection of the individual's right to life and
physical security. If attempts to avoid conflict by non-violent means
fail, and if it is reasonably open to the individual to avoid using
(further) force by withdrawing, then he ought to withdraw rather than
stand his ground. It is submitted that this is the result of Lord
Widgery's ruling in \textit{Julien},\textsuperscript{34} and that it is now the correct legal mean-
ing of the so-called "duty to retreat." In this respect English law
adopts the "human rights" approach, preferring to give maximum
protection to the basic right to life of both defender and attacker,
rather than allowing a person attacked to stand his ground and use
such force against the attacker as is needed to make \textit{him} desist or
withdraw. Stephen's "quiet person"\textsuperscript{35} would be obliged to withdraw,
if non-violent methods of persuading the attacker to desist either
failed or were impracticable.

The general principle sustains no more than a prima facie duty to
avoid conflict. The words "if reasonably possible" indicate that in
some types of case the duty cannot apply. Thus, when an individual
apprehends an attack, and withdrawal or other avoidance-methods
are not reasonably practicable, he ought to be permitted to strike
first in an endeavour to prevent imminent and serious harm to himself.

\textsuperscript{33} Cf. above, p. 287.
\textsuperscript{34} Quoted above, p. 286; cf. the subsequent decisions in \textit{McInnes} and \textit{Field}, discussed
thereat.
\textsuperscript{35} Cf. above, note 25, for Stephen's distinction between the use of serious and
non-serious force.
There is ample authority for the principle that an individual placed in such a situation has the liberty to make a pre-emptive strike.36 This principle operates as an exception to the general principle, and is practically essential if basic rights are to be preserved. Similarly, where the very fierceness of the attack precludes withdrawal or other methods of avoiding conflict the general principle is also inapplicable. Of course, in a criminal trial it is for the jury to classify a case upon its facts—was there an immediate threat to safety or life? Was it reasonably practicable to avoid conflict? Was it open to the defendant to withdraw? Was he aware of all this?—but once the questions of fact are decided, legal principles should guide the determinations.

One longstanding exception to the prima facie duty to avoid conflict by, if necessary, withdrawing is where an individual is attacked in his own home. In the old common law there was no duty to retreat in such cases37 and many people would still support this exception. One does not have to share the proverbial Englishman’s regard for his “castle” to see a significant difference between a withdrawal which means leaving a public place or taking a different route and a withdrawal which means leaving one’s home. Perhaps on a purely logical basis it could be argued that the normal principle of avoiding conflict should apply where the householder’s person is attacked or threatened, and that the principles applicable to defence or property should apply if the threat is to evict him or to steal or damage his property.38 However, English law apparently upholds the liberty of a person attacked in his home to stand his ground and repel force by force. The criminal who attacks an individual in his home thereby forfeits maximum protection for his rights to life and physical integrity. The threatened householder has, presumably, the duty to avoid conflict by temporising but he need not withdraw. His right to remain in his home is to this extent valued more highly than the criminal’s basic rights, which would receive greater protection if the full duty to avoid conflict applied.


37 Cf. Beale, “Retreat from a Murderous Assault” (1903) 16 Harv.L.R. 567; the term “home” was strictly construed, even in the nineteenth century, so that in Dakin's Case (1828) 1 Lew. 166, where the accused was merely a lodger in the house, Bayley J., directed that “If [he] had known of the back way, it would have been his duty to have gone out backwards, in order to avoid the conflict.”

38 Cf. the authorities discussed by Lanham, “Defence of Property in the Criminal Law” [1966] Crim.L.R. 368, 426; an example of trial practice is provided by Frankum (reported in The Times, 11 May 1972), where Cusack J. directed the jury to acquit of manslaughter a householder who killed with a sword a drunken man who was breaking windows at his home and threatening to enter. Cf. the American Law Institute, Model Penal Code, which holds that the duty to retreat does not apply when a person is attacked in his dwelling: s. 3.04 (2) (b) (1).
(ii) The Principle that an Individual does not Forfeit his Liberty to use Force in Self-defence by Remaining in, or even Going to, a Place Where He Knows He May be Attacked

This principle finds support in the decision of the Court of Appeal in Field (1972).\textsuperscript{39} The defendant had been warned that certain men with whom he had previously quarrelled were coming to attack him. He stayed where he was, allowing the men to find him. The men made their attack, and in the course of the struggle the defendant stabbed one of them fatally. The court rejected the contention that the defendant had a duty to avoid confrontation by leaving the place and going elsewhere: the duty to avoid conflict, as stated in Julien,\textsuperscript{40} only arises when an individual has sight of his adversary and attack is imminent. Thus the Field principle favours the greater liberty of law-abiding citizens to continue acting lawfully, instead of restricting that liberty in an early attempt to forestall violence and thereby protect basic rights. Should the same principle apply if, for example, an individual has been threatened with violence if he goes to a certain place, and he does so? Is there a material difference between passively remaining where one is and actively seeking the company of one's adversary? In the American case of State v. Bristol (1938),\textsuperscript{41} the defendant had been threatened with attack, he armed himself and later went to a bar where he knew his potential assailant to be drinking. The Wyoming court expressly considered the conflicting interests:

The state thinks that he should have gone home instead of going to the restaurant. . . . And, ethically speaking, that perhaps is what he should have done. . . . [But] the restaurant was a public place. It was in itself not an unlawful or wrongful act for the defendant to go there. If it was wrongful, it was made so because [his adversary] had made wrongful and unlawful threats. The mind recoils from drawing such an illogical conclusion. Logic of course must give way at times to the larger interests of ethics and public policy, and if the latter clearly required the defendant to avoid the restaurant in this case because of the threats, we should disregard the logic of the situation. But the point here under consideration involves ethics and public policy as well. It involves the balancing of the interests between freedom of movement and the restraint thereof. It involves the question whether or not the law can afford to encourage bullies to stalk about the land and terrorize citizens by their mere threats. We hesitate to lay down a rule which would do that.

This course of reasoning brings the principle more clearly into the constitutional sphere. Since the celebrated case of Beatty v. Gillbanks

\textsuperscript{39} [1972] Crim.L.R. 435.
\textsuperscript{40} Above, pp. 286 and 293.
\textsuperscript{41} (1938) 53 Wyo. 304.
The Cambridge Law Journal [1975]

(1882), there has been much controversy as to whether the exercise by citizens of their liberty to use the highway may be rendered unlawful by threats from another party which make it likely that a breach of the peace will occur if the liberty is exercised. In Beatty v. Gillbanks the use of the highway was held unlawful, but it is uncertain whether the decision would be followed today and it has been persuasively argued that "the police ought to protect the meeting first in the field." This reference to police protection is crucial to the point at issue: surely a man threatened with attack ought to seek police protection, or at least to inform the police of the threats? Reference to any such obligation is absent from the decisions in Field and Bristol, yet it is fundamental to civilised society. These are not cases of sudden attack: they are cases involving a known and imminent threat of violence. It is therefore submitted that the Field principle accords excessive protection to the so-called liberties of the subject, and that good order and human rights should be promoted by a prima facie duty to inform the police about threats of imminent violence. This would at least signify an effort by the defendant to avoid an expected conflict, whereas the Field principle makes no contribution to the minimisation of violence.

(iii) The Principle that the Amount of Force used must Always be Reasonably Proportionate to the Amount of Harm Likely to be Suffered by the Defendant

The principle of proportionality plays a restrictive role in the law of self-defence. It requires a rough approximation between the apparent gravity of the attack or threatened attack and the style and severity of the defensive actions. This restriction is important because, if necessity were the sole requirement, the infliction of death or serious injury might in theory be justifiable if it were the only way of preventing a relatively trivial assault. The Royal Commission of 1879 observed that a law whose only requirement was necessity "would justify every weak lad whose hair was about to be pulled by a stronger one, in shooting the bully if he could not otherwise prevent the assault." The example might be rather far-fetched, but the

45 If the attack were sudden and there was no reasonable opportunity to inform anyone in authority, the principle should not come into play.
46 Report of the Royal Commission on the Law Relating to Indictable Offences (1879, C. 2345), note B, at p. 44; cf. also at p. 11 of the main report: "We take one great principle of the common law to be, that though it sanctions the defence
principle is nevertheless clear. It is a principle which flows from the "human rights" approach, inasmuch as the liberty of a person attacked to use such force as is necessary is curtailed out of respect for the attacker's right to life and physical security. In some cases, therefore, these fundamental rights of the attacker are preferred to the innocent citizen's right to freedom from interference. There is ample authority that the principle of proportionality forms part of the modern English law, but these authorities can offer little detailed guidance to decision-makers. A broad standard of this nature only has a clear application in extreme cases, and the court will normally be left with considerable discretion. There is at least some authority, however, for two further principles which are relevant to the question of proportionality.

(iv) The Principle that the Law of Self-defence Should be Strictly Construed Against a Person Unlawfully in Possession of a Weapon.

For many centuries the liberty of an Englishman to carry arms was commonly accepted, and it was not until the turn of this century that a change in social attitudes came to be reflected in the law. Legal controls now extend from firearms to all offensive weapons. Section 1 of the Prevention of Crimes Act 1953 provides that any person who, without lawful authority or reasonable excuse, has with him in any public place an offensive weapon shall be guilty of an offence. Is it a "reasonable excuse" for the defendant to show that he was carrying the weapon for the purpose of defending himself against attack? The question arose in Evans v. Hughes (1972), where the defendant's explanation for carrying an iron bar was that he had been attacked by three men a week earlier and that he needed the bar for self-protection. In the Divisional Court, Lord Widgery C.J. drew...
a distinction between an imminent and particular threat and a constant and enduring threat: "the threat for which this defence is required [sic] must be an imminent particular threat affecting the particular circumstances in which the weapon was carried." Non-armament is the rule, and occasions when defence against a threatened attack constitutes a reasonable excuse will be rare. The reason for this restrictive approach, as Lord Widgery explained, is that individuals who are under a constant and enduring threat should protect themselves by "enlisting the protection of the police." This strong policy has been pursued in subsequent appellate decisions, where there has been close scrutiny of defendants' contentions that they were under imminent and particular threat. Evidently the state interest in non-armament, which assists in the minimisation of violence and favours the "human rights" approach, may only be overridden in the most pressing circumstances.

When self-defence is raised by a defendant charged with an offence against the person, the courts have drawn a distinction between objects picked up in the heat of the moment for defensive purposes and objects carried as weapons. In Morse (1910), the Court of Criminal Appeal ruled unreasonable the use of a razor in response to an attack with fists, observing that the defendant carried the razor with him and "did not casually pick up a razor lying nearby." In Field the Court of Appeal held that importance should be attached to the use of a knife when considering whether the defendant's conduct was reasonable, although the report does not state whether he carried the knife as a matter of course, whether he deliberately armed himself when he knew that his adversaries were coming, or whether he seized a nearby knife as an instinctive reaction to the attack. Each of these courses ought to be accorded different weight when assessing the reasonableness of the defendant's conduct. A defendant who carries an offensive weapon or firearm cannot claim the indulgence which is rightly shown towards those who pick up a nearby object in order to repel a sudden attack, for the decision to carry a weapon negatives the suddenness and unpreparedness which form part of the paradigm of self-defence. The court should therefore look closely at the relationship between the attack made and the weapon used for allegedly defensive purposes. In this connection the oft-quoted

51 Cf. Peacock [1973] Crim.L.R. 639, and the particularly hard case of Bradley v. Moss [1974] Crim.L.R. 430, where a juvenile had been threatened by older youths. began to carry weapons, was charged by the police, and was subsequently beaten by a gang of youths.

52 An offence is committed under the 1953 Act even where a person picks up an object such as a stone and uses it to cause injury: Harrison v. Thornton [1966] Crim.L.R. 388.


54 Above, p. 295 and note 39.
American case of *Brown v. U.S.* (1921)\(^5\) needs re-appraisal. In a famous passage, Holmes J., said:

Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore, in this case at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety, or to disable his assailant rather than to kill him. The case involved two men who had been enemies for some time, and the accused had armed himself with a loaded revolver “in order to defend himself if attacked.” Now “detached reflection” puts the requirement too high; but where the defendant has decided to arm himself and has taken no steps to inform the police of the threat, the aphorism of Mr. Justice Holmes should not be the last word. In this type of case the use of a weapon for defensive purposes is not completely impulsive, and the law should require a greater restraint and sense of proportion from an individual who has forearmed himself.

(v) *The Principle that the Law of Self-defence Should be Construed Generously in Favour of an Innocent Victim of a Sudden Attack, but Construed Strictly Against an Individual Whose Own Fault has Contributed to the Show of Violence.*

One of the main criticisms of a “rule-and-exception” approach to self-defence stresses the need for flexibility when making legal judgments about “instinctive” human reactions to danger. Many defendants have no time to weigh possible courses of action, and it is known that fear, panic and surprise can bring about physiological changes which literally take a person out of his normal self.\(^5\) The strength of this natural reaction to a perceived life-threat and the need for the law to make allowances for it have long been recognised,\(^6\) and there is ample modern authority for leniency in these circumstances. Lord Morris observed in *Palmer v. R.* (1971)\(^8\) that “a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action,” and went on to hold that it is “most potent evidence” of reasonableness that the defendant only did what he “honestly and instinctively thought necessary.”

\(^5\) (1921) 256 U.S. 335, with passage quoted at p. 343; cf. above, note 22.


\(^7\) Cf. Hobbes (above, note 3), and Blackstone: “the law . . . respects the passions of the human mind; and (when external violence is offered to a man himself, or to those to whom he bears a near connection), makes it lawful for him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are strong enough to restrain.” (*Comm.*, 3, pp. 3–4)

\(^8\) [1971] A.C. 814, 832; cf. also Lane J., in *Reed v. Wastie* [1972] Crim.L.R. 221: “one does not use jeweller’s scales to measure reasonable force.”
Although this principle commands wide support, its limitations should not be overlooked. The principle enjoins a generous construction of the law in favour of the innocent victim of a sudden attack. Generous construction of the requirements of reasonableness and proportionality does not imply complete indulgence, and it cannot be the law that absolutely any reaction "in a moment of unexpected anguish" should be held reasonable and justifiable.59 Furthermore, the principle cannot apply if the attack was not sudden or unexpected: this is a necessary qualification to the aphorism that "detached reflection cannot be demanded in the presence of an uplifted knife." 60

The correspondingly strict approach to cases in which the defendant was originally at fault receives little attention in modern judgments and writings. All the institutional writers discussed the case of a person who originally fought willingly but later attempted to withdraw, and ultimately killed his adversary in order to avoid death himself. Hale took the view that a person who gave the first blow in a fight should nevertheless be at liberty to defend himself with force, if before doing so he fled as far as he could.61 But Hawkins argued that "such a person seems to be too much favoured by this opinion," because "the necessity to which he is at last reduced, was at first so much owing to his own fault."62 Foster referred to such cases as "self-defence culpable," treating them as "in some measure blameable and barely excusable" and distinguishing them from cases of justifiable self-defence in which an innocent citizen was subjected to attack.63 Where a person had been at fault either in provoking or in willingly participating in a fight, the law required

that the person . . . quitted the combat before a mortal wound given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life . . . This case bordereth very nearly upon manslaughter, and in fact and experience the boundaries are in some instances scarcely perceivable.64

East attempted to define those boundaries by holding that where the defendant struck the first blow "on the sudden" he might still plead self-defence if he subsequently "declined further combat and retreated as far as he could with safety," whereas if the first blow was pre-

60 Cf. the discussion of this aphorism above, p. 299, and also the discussion of the Field principle, above, pp. 295–296.
61 Hale, 1 P.C. 480–481.
62 Hawkins, P.C., ch. IX, s. 17.
63 Foster, C.L. 273.
64 Foster, C.L. 277.
meditated the offence could hardly be less than manslaughter even if the defendant had retreated as far as possible.\textsuperscript{65}

This was the state of the law in the nineteenth century,\textsuperscript{66} and the underlying principle surely remains valid. A reading of the judgments in \textit{Mancini v. D.P.P.},\textsuperscript{67} \textit{Chisam}\textsuperscript{68} and \textit{Julien}\textsuperscript{69} suggests that the defendant's fault in causing or provoking conflict does still influence the judicial approach to self-defence cases, and it is submitted that principle (v) should be explicitly avowed. There is no modern authority on the legal position where D attacks X, and X, having successfully repelled D's attack, passes from the defensive to the offensive. It would be in accordance with principle and with the older authorities if D were under a prima facie duty to avoid further violence and if, when placed in a situation where violence could not be avoided if his life were to be saved, he should retain a qualified liberty to use force for self-defence. The exercise of this liberty would not justify an acquittal, but would reduce the offence from murder to manslaughter.\textsuperscript{70}

**THE DEVELOPMENT OF PRINCIPLES**

Just as each principle is not necessarily conclusive in a given case, so the list of principles can never be regarded as closed. The five principles discussed above are supported by existing authorities, but new principles may be developed in response to changing social conditions or in response to particular cases which isolate general issues. A judge who gives reasons for departing from an existing principle might, especially if his reasoning is approved by an appellate court, contribute to the establishment of a new principle. Thus, it could be said that as a result of the Court of Appeal's judgment in \textit{Fennell} (1971)\textsuperscript{71} there is authority for the prima facie duty of an individual to

\textsuperscript{65} East, 1 P.C. 285, following Hawkins on the latter point by arguing that "the necessity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the first instance deliberately foreseen and resolved upon in defiance of the law."

\textsuperscript{66} Cf. \textit{The Digest of Offences} drawn up by the Criminal Law Commissioners (1839. B.P.P. [168 xix-235]), p. xx and Articles 34 and 37.

\textsuperscript{67} [1942] A.C. 1, 6-7 (H.L.).

\textsuperscript{68} (1963) 47 Cr.App.R. 130 (C.C.A.).


\textsuperscript{70} Cf. notes 64, 65 & 66 above; in modern cases, the English courts have manifested an unwillingness to use the offence of manslaughter in cases where a defendant has exceeded the limits of justifiable force or has abused a legal liberty to inflict force. Whereas the Australian judges accept that it is reasonable to use the manslaughter verdict in such cases (cf. Morris & Howard, \textit{Studies in Criminal Law} ch. IV), the English judges have ignored the institutional writings and have built a line of authority against the doctrine: cf. P. Smith, "Excessive Defence" [1972] Crim.L.R. 524.

\textsuperscript{71} [1971] 1 Q.B. 428; in this case it was a father who used force in an attempt to secure the release of his son from unlawful police detention.
refrain from using force against a police officer to secure his release from unlawful detention, unless the individual himself is in danger of unlawful violence. This would be a contentious principle,\textsuperscript{72} for it raises the question whether the temporary surrender of one's liberty to a police officer who is acting unlawfully should be valued more or less highly than the policy of discouraging the use of force against a police officer who himself is not using force. This is a broad question of principle about which general discussion can surely be profitable, and it would be a negation of law to regard each case as turning exclusively on its own facts.\textsuperscript{73} Whenever the application of a normative standard is involved, judgments of principle and of what ought to have been done are inevitably made and acted upon, and the law should lay down guidelines.

It is because the development of specific principles is desirable that general references to "the prevention of crime" are best avoided. Prevention of crime is a broad notion, capable of applying to any action by one person in order to prevent the consummation of an offence being committed or about to be committed by another. In this broad form it is capable of comprehending most situations which we would ordinarily describe as cases of self-defence, protection of property or the rescue of another from attack—as well as the central case of a citizen or police officer who intervenes in an incident for the specific purpose of preventing crime. Although it is possible to classify many\textsuperscript{74} self-defence and other cases under the heading "prevention of crime," it is undesirable in practice because the one broad heading fails to respect the different policies and principles which are rightly applied in the different type of case. There is clear justification for the way in which judges and ordinary people speak in terms of self-defence, defence of property and rescue from attack rather than using one general term. Part of this justification is that defendants see themselves and their actions in this way. The main justification is that the central case of prevention of crime (\textit{i.e.}, intervention by a police officer) involves aggressive acts for a positive purpose, whereas self-defence and defence of property typically involve defensive acts for a negative purpose. An individual under

\textsuperscript{72} The principle is accepted by the American Law Institute, \textit{Model Penal Code}, s. 3.04 (2) (a) (I), which provides that the use of force is not justifiable "to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful"; but \textit{cf.} earlier English authorities, such as \textit{Wilson} [1955] 1 W.L.R. 493, and \textit{Kenlin v. Gardiner} [1967] 2 Q.B. 510.

\textsuperscript{73} \textit{Cf.} note 78 below, and text thereat.

\textsuperscript{74} \textit{Cf.} the academic debate reviewed above, pp. 284–287; it would be technically incorrect to regard defence against an attack by an insane or excusably mistaken assailant as conduct in the prevention of crime, since no crime was being committed; and it would surely be inappropriate to classify the conduct of someone who provoked conflict and then later had to defend himself against excessive retaliation as conduct for the purpose of preventing crime.
attack might be able to avoid further violence by withdrawing, but a police officer who sees an offence being committed has a duty to go forward and intervene. It is therefore vital to establish the specific purpose for which the defendant was acting, and then to examine whether his actions were necessary and reasonable for that purpose. This approach avoids some of the confusion of issues which follows from treating diverse cases under the one heading of "prevention of crime." Thus it is sometimes argued that English law protects property to a greater extent than physical safety, and the law is ridiculed for imposing a prima facie duty to avoid conflict where there is a physical attack and yet allowing a prima facie liberty to stand one's ground where property is threatened. But the illogicality is more apparent than real. An individual ought if possible to withdraw in the face of a threatened attack precisely because he is able to do so and therefore the use of force is not necessary for self-protection. But where property is threatened and that property cannot easily be moved, it is ex hypothesi necessary for the individual to stand his ground if he is to protect the property at all. How much force is reasonable in defence of particular property is the question of principle which then arises, and surely far less force is justifiable to protect property than to protect life or limb. A criminal whose offence merely concerns property has a stronger claim to retain his right to life and physical security than one whose endeavour involves violence. To argue that English law protects property more earnestly than physical safety is to err in telescoping the separate requirements of necessity and reasonableness: it is indeed reasonable to use greater force to protect individuals than to defend property, but unless it is shown that the use of force was necessary for the stated purpose the issue of reasonableness does not arise. If the real thrust of the argument is that retreat and the avoidance of conflict is dishonourable, then it is not self-defence but the defence of self-respect which is in issue. And English law, adopting a "human rights" approach, presently makes no concession to that argument.

75 Cf. Greenwood, "The Evil Choice" [1975] Crim.L.R. 4, on the distinction between defensive force by citizens under attack and positive force used by police officers. Greenwood discusses some of the policy questions which must be resolved if the law relating to the justifiable use of force by police officers is to be rendered less vague and more informative. Cf. also above, note 23, as to the possibility that in some situations citizens (as well as policemen) have a duty to intervene to prevent crime.

76 The court must classify the facts of the case: the immobility of the property is just as much a condition of the application of the principle as is the possibility of withdrawal by a threatened individual.

CONSTITUTIONAL LIBERTIES AND CRIMINAL LIABILITY

In the foregoing discussion of the legal rules and principles, emphasis has been placed on some neglected considerations of constitutional theory and public policy. But the practical effect of these rules and principles continues to be felt in the fields of tortious and criminal liability. In view of the insistence of English criminal lawyers on subjective guilt (in the form of *mens rea*), it is important to consider whether there is, or should be, a subjective mental element which forms part of the legal distinction between justifiable and unjustifiable force. Are there grounds for holding that a person who acts unjustifiably in the (mistaken) belief that he is acting justifiably should nevertheless have a good defence to crime? For the purposes of criminal liability a distinction must be drawn between two forms of mistaken belief. A person who (mistakenly) believes that someone is about to attack him, or that there is no safe avenue of withdrawal, labours under a mistake of fact, since the existence of circumstances of necessity is a question of fact. But a person who believes that he is entitled to use serious violence against a minor assailant, or that he may stand his ground and repel force by force (when withdrawal would be possible), commits a mistake of law, for the reasonableness of defensive conduct and the existence of a prima facie duty to avoid conflict are both questions of law. 78

It is clear that there is a subjective element in self-defence as a defence to criminal liability, although the judges have invariably blunted its effect by imposing an objective requirement too. However, the authority of the line of cases holding that only a reasonable mistake of fact will suffice 79 has been rendered doubtful by the House of Lords decision in *D.P.P. v. Morgan* (1975). 80 Since both the Law Commission 81 and the House of Lords now accept that even an unreasonable mistake negatives the element of knowledge which is an essential component of criminal liability, a purely subjective test should likewise apply to a person's belief in the circumstances of necessity upon which a justificatory defence might be based.

The general effect of ignorance or mistake as to the law is fairly clear. The general principle is that *ignorantia juris non excusat*, and

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80 [1975] 2 All E.R. 347; it appears that even the dissenting judges would accept that "a mistake of a relevant fact is a defence if the mistake was honest and genuine, even if it was also unreasonable" (per Lord Edmund-Davies, at p. 379H), although they differed from the majority as to whether the court or parliament should alter the law.

there are exceptions. But the application of the principle to cases involving a mistaken belief in justification has not been acknowledged by the English courts. Indeed, the tenor of Lord Morris's judgment in Palmer v. R. is to doubt whether there ever could be a genuine case of mistake of law in self-defence. If the subjective element is present (i.e., if the defendant only did "what he honestly and instinctively thought necessary"), that is "most potent evidence" of reasonableness and so no mistake would have been committed. Now an approach resting almost entirely upon the beliefs of the person attacked would have the effect of depriving the attacker of legal protection for his basic rights. References to human rights would be unhelpful, for the degree of protection accorded to an attacker would vary according to his victim's judgment of what was right. If the circumstances of an attack were so sudden and overbearing that the victim was compelled to react immediately and without reflection, there might indeed be grounds for excusing the victim for an excessive use of violence, although even in this type of case there must come a point at which the retaliation is so disproportionate as to be unreasonable. But when we come to consider those cases in which there was some interval for reflection, the persuasiveness of Lord Morris's approach diminishes rapidly. The concept of reasonableness applicable to cases of sudden attack may derive largely from the hurried impressions of the victim; the concept applicable to other cases should surely be the objective standard of the law. Perhaps one reason for supporting Lord Morris's subjective test would be to assuage any feelings of injustice which might arise if the question of reasonableness was to be decided by each jury without reference to any rules or principles. Strict application of the ignorantia juris maxim in those circumstances would mean that a defendant is liable to conviction if the particular jury at his trial happen to take a view different from his own. If the decision were entirely a matter for the court in each case, then it would be unduly harsh to apply the ignorantia juris maxim. But the use of legal principles would largely remedy the vagueness and uncertainty which might otherwise operate unjustly against a defendant.

**Conclusions**

The law of self-defence is relevant to at least four types of human decision-making. First, a person attacked or threatened with attack

84 Cf. Lord Morris, ibid.: "If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation." For a possible alternative to the
has to decide how to protect himself. In some cases an instant reaction and immediate commitment will be called for; in others there will be time for preparation and reflection. The law should recognise this distinction, and its principles are practically more important in the latter type of situation (which includes the decision to carry a weapon for use in "self-defence") than in the former. Secondly, at a trial on indictment the judge must decide whether there is sufficient evidence on each element of self-defence for the issue to be left to the jury. Thirdly, the judge must direct the jury as to the law. And fourthly, the jury (or magistrates) must come to a decision by applying the law to the facts. These decisions need not be, and should not be, based on particularistic grounds in each case. Indeed, it is highly unlikely that the legal decisions could be taken without implicit reliance on some general notions of "ought." These general notions will embody certain value-preferences, and some of the more important values have been examined above. The writer's own preference is for the "human rights" approach, which English law adopts generally but not invariably. Exceptions in favour of the "stand fast" approach have been judicially recognised in cases of attack in one's home and in cases where an individual is led to expect an impending attack (the Field principle, criticised above). Although this article has been concerned mainly with defence against a deadly attack, it has been submitted that the same approach should apply to non-serious cases. This is English law, but some writers would prefer the view embodied in many Commonwealth codes, permitting an individual who is assaulted to stand fast and to use force rather than withdraw. But this involves a departure from the notion of necessary defensive force, and any exception to the policy of minimising violence can only be justified as promoting a value of greater social importance.

These conclusions depend on a particular assessment of the conflicting values. Some may believe that this assessment over-values the rights of an attacker (a bully's charter?), others that it over-values the individual's right to remain in his home. Of paramount importance, however, is the full and open discussion of the issues involved, yielding an order of priority of values which can support principles. The vice of the discretionary approach to decision-making is that the real problems of conflicting rights and value-preferences remain con-

\[\text{complete subjective test, cf. the hybrid test discussed by the author in [1974] Crim.L.R., 654-657.}\]

\[\text{Cf. above, p. 294.}\]

\[\text{Cf. above, p. 295.}\]

\[\text{Julien, above, pp. 285-286, and note 25.}\]

\[\text{It should be noted, however, that these codes only allow the individual assaulted to stand fast when he has not provoked the assault. If he provoked his assailant, then he is under the normal duty to withdraw. Cf. Queensland Code, ss. 271-272; Western Australia Code, ss. 248-249; Tasmanian Code, ss. 46-47.}\]
cealed behind the question of "reasonableness." Decisions may therefore be taken according to the concealed assumptions of the particular judge, jury or magistrate who happens to be trying the case. Perhaps the argument that the law needs nothing more than a general standard of "reasonableness" is partly explained by the frequent assumption that all or most cases of justifiable force involve unexpected situations and instinctive responses. It has been shown above that this is not true of a number of self-defence cases, and recent calls for more precise legal guidelines on the justifiable use of force by private citizens, the police, the armed forces and private security organisations suggest that there is a wide range of foreseeable situations for which guidance is desirable. This article has been confined to cases in which an individual defends himself against attack. A middle way between complete open texture and rigid rules and exceptions has been sought, and five general principles implicit in English law have been examined. The limited guidance which these principles provide can be claimed to indicate a desirable direction of development for the law of justifiable force.

89 Cf. above, pp. 298-300.
90 Cf. a parliamentary question on the use of force and defensive weapons by private citizens, by Mr. McNair-Wilson, M.P., in May 1973 (H.C.Deb., vol. 855, cols. 1440-1441); on the need for clearer guidance for police officers, cf. Greenwood (above, note 75); for the armed forces, security firms and others, cf. the letters printed in [1975] Crim.L.R. at pp. 186 and 302.