THE ENGLISHMAN'S CASTLE: THE USE OF LETHAL FORCE IN DEFENCE OF THE HOME

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> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter — the rain may enter — but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement!

So spoke William Pitt, the Earl of Chatham, in March 1763.[1] It is perhaps the most famous exposition of the idea that 'the Englishman's home is his castle'.[2] That said, most Englishmen, or women, would perhaps not be too concerned at the possibility of an entry by the reigning monarch, or even by the forces of the Crown in general. A far more pressing fear is that of an entry by an intruder. This fear is reflected in the most recent official survey in England and Wales, where some ten percent of those surveyed indicated that they were worried about the possibility of being burgled.[3] The statistics suggest that the rate of domestic burglary has declined considerably in recent years,[4] but there would seem to be strong emotions at work here.

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[1] Quoted by Denning MR in *Southam v Smout* [1964] 1 QB 308 at 320. The original quotation was in the context of Pitt's speech on the Excise Bill of 1763, which would have allowed for searches to take place without a warrant.

[2] This metaphor goes back to *Semayne's Case* (1604) 5 CoRep 91a, as cited by Denning MR in the passage noted above.

[3] Office for National Statistics, *Public Perceptions of Crime in England and Wales: Year Ending March 2016*<https://www.ons.gov.uk> (accessed 13th June 2018). For discussion of what has been described as a current ongoing moral panic regarding home security see further Atkinson, Rowland and Blandy, Sarah, *Domestic Fortress: Fear and the New Home Front* (Manchester University Press, Manchester, 2016), to which further reference will be made throughout this paper.

[4] Office for National Statistics, "Overview of Burglary and other Household Theft: England and Wales" (2017) <https://www.ons.gov.uk> (accessed 2nd July 2018); Bureau of Justice Statistics, *Household Burglary 1994-2011* (2013) <https://www.bjs.gov> (accessed 2nd July 2018).

These emotions are illustrated in particular by cases of home invasion involving a physical confrontation between the intruder and the householder. In such a situation householders sometimes resort to desperate measures. One such person was Richard Osborn-Brooks, an elderly pensioner, who was confronted by Henry Vincent and another man in his home at Hither Green in the south eastern suburbs of London in 2018. At the time Vincent, who had a substantial criminal record for burglary and other related offences, was carrying a screwdriver. A tussle took place between the two men, in the course of which Vincent was stabbed to death. The subsequent arrest of Osborn-Brooks for murder caused substantial disquiet among his friends and neighbours, as well as on social media, where the hashtag #FreeRichardOsbornBrooks soon attracted considerable comment.[5] According to one commentator: 'A person should have the right to defend themselves, their belongings and their home.[6] Had the burglars harmed him physically, all they would have been given would be a slap on the wrist. When will the Criminalisation of Victims of crime who defend themselves stop?'[7] A commentator on Twitter said: 'Intruders should lose all rights or privileges once they set foot on or inside someone else's property.'[8] Another added: 'Suspected of murder but only guilty of being a hero'.[9] In another comment Malcolm Starr, who had led the campaign to release the Norfolk farmer Tony Martin in a similar case some years previously, proclaimed: 'It's just not right. What happened to the premise an Englishman's home is his castle?'[10]

Richard Osborn-Brooks was subsequently released without charge, but others were less fortunate. One such was Tony Martin, mentioned in the previous paragraph, who in August 1999 surprised two burglars in his farmhouse and let loose at them with his shotgun; one escaped, but the other died at the scene. He was subsequently convicted of murder, though the crime was later reduced to manslaughter on the grounds of diminished responsibility.[11]

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[5] *The Sun*, 5 April 2018

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] *Daily Mirror*, 5 April 2018.

[11] *Martin* [2001] EWCA Crim 2245, [2003] QB 1.

In September 2009 Munir Hussain, a prominent businessman in the town of High Wycombe, was confronted in his home by three masked intruders who tied up both him and his family. Having managed to free himself, he chased one of the intruders out of the house and battered him with a cricket bat, causing severe injuries. Despite his plea of self-defence, he was found guilty of causing grievous bodily harm with intent, and was jailed for 39 months, though once again this was reduced on appeal.[12] An even more striking case is that of Steven Ray, whose conviction for murder in similar circumstances was upheld by the Court of Appeal in September 2017, despite his claim that he had believed his life to be in danger at the relevant time.[13]

The purpose of the present article is to examine and analyse the emotional pressures involved in home invasion cases of this sort, and to consider to what extent the criminal law should make allowance for them,[14] as it does already in relation to such matters as duress and provocation.[15] The issue of self-defence in the home has given rise to a fair amount of academic commentary,[16] as have the emotional dynamics associated with the home and the

[12] *R v Hussain* [2010] EWCA Crim 94, [2010] 2 Cr App R (S) 60.

[13] *R v Ray* [2017] EWCA Crim 1391, [2018] 2 WLR 1148.

[14] Recent years have seen a considerable amount of academic commentary on the interface between law and emotion: see in particular Bandes, Susan, *The Passions of Law* (NYU Press, New York, 2000); Maroney, Terry, 'Law and Emotion: a Proposed Taxonomy of an Emerging Field (2006) 2 *Law and Human Behavior* 119; Patrick, Carlton J, 'A New Synthesis for Law and Emotions: Insights from the Behavioral Sciences' (2015) 47 *Arizona State Law Journal* 1239; Bandes, Susan et al (eds), *Edward Elgar Research Handbook on Law and Emotion* (Forthcoming). The present author and others have argued that there are three broad strands to the study of law and emotion, namely: (1) the reaction of the law to emotion; (2) the role of the law in creating emotion, and (3) emotion in the practice of the law: Conway, Heather and John Stannard, 'Contextualising Law and Emotion: Past Narratives and Future Dimensions' in Conway and Stannard (eds), *The Emotional Dynamics of Law and Legal Discourse* (Hart Publishing, Oxford, 2016), 1 at 6. The present paper seeks to contribute to the first of these strands.

[15] See Spain, Eimear. *The Role of Emotions in Criminal Law Defences* (Cambridge University Press, 2011)

[16] See for instance Lanham, David, 'Defence of Property in the Criminal Law' [1966] *Crim LR* 368; Jacobs, J David, 'Privileges for the Use of Force against at Residence-Intruder' (1990) 63 *Temple LR* 31; Green, Stuart P, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] *University of Illinois LR* 1; Carpenter, Catherine L 'Of the Enemy Within, the Castle Doctrine and Self-Defense' (2003) 4 *Marquette LR* 654; Jefferson, Michael, 'Householders and the Use of Force against Intruders' (2005) 69 *Journal of Criminal Law* 405; Lerner, Renee L, 'The Worldwide Popular Revolt against Proportionality in Self-Defense Law' (2006) 2 *Journal of Law, Economics and Policy* 331; Drake, Denise M, 'The Castle Doctrine: an Expanding Right to Stand your Ground' (2008) 39 *St Mary's Law Journal* 574; Skiba, Rebekah, 'Returning to the Roots of the Castle Doctrine' (2016) *10 Southern Journal of Policy and Justice* 71.

law's response to them,[17] but less has been done to bridge the gap by exploring in particular the emotions at work in cases of this sort. Obviously there are a lot of possible variables here. For instance, some of these cases involve the use of fatal force (as in relation to Richard Osborn-Brooks, Tony Martin and Steven Ray), and others do not (as in relation to Munir Hussain). Again, some of the cases may also involve a threat of force to the householder and her or his family, whilst others do not. However, for the sake of brevity, the focus of this paper will be on cases where fatal force is used in defence of property as such, as it is here that the tension between the emotional dynamics and the traditional approach of the criminal law is seen at its greatest.

The key legal issues here relate to the use of reasonable force in the context of private and public defence, where the general rule is clear, namely that the force used by the accused should not be out of proportion to the harm averted by using it.[18] Where death has been inflicted in defence of property, it would seem to be obvious that the force must of necessity be disproportionate, but as we have seen, it is not obvious to all by any means. Why should this be? The answer would seem to that in some cases there are emotional dynamics in the situation which militate against the strictly proportional approach. In the pages which follow we shall begin by drawing on psychological literature in order to analyse these emotional dynamics. We shall then consider the extent to which the criminal law should respond to them by allowing a defence in appropriate cases. Our main focus will be on the law of England and Wales, but we shall also consider approaches taken in other common law jurisdictions. Our conclusion will be that, whilst there is certainly a range of possible approaches that might be adopted, the existing law of England and Wales strikes an appropriate balance in this respect for the most part. However, more allowance might be made by allowing a mitigating defence in cases involving the use of fatal force.

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[17] See for instance Radin, Margaret J, 'Property and Personhood' [1982] *Stanford LR* 957; Fox, Lorna, 'The Meaning of Home: a Chimerical Concept or a Legal Challenge?' (2002) 29 *Journal of Law and Society* 580; Barros, D Benjamin, 'Home as a Legal Concept' (2005) 46 *Santa Clara LR* 255; O'Mahony, Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, 2007); Stern, Stephanie M, 'Residential Protectionism and the Legal Mythology of Home' (2009) 107 *Michigan LR* 1093; Austin, Lisa M, 'Person, Place or Thing: Property and the Structure of Social Relations' (2010) 60 *Univ Toronto LJ* 445; O'Mahony, Lorna Fox, 'The Meaning of Home: from Theory to Practice' (2013) 5 International Journal of Law and the Built Environment 156; Turnipseed, Terry L, *Community, Home and Identity* (Routledge, 2016); Carr, Helen, Brendan Edgeworth and Caroline Hunter (eds), *Law and the Precarious Home* (Bloomsbury Publishing, 2018).

[18] Criminal Justice and Immigration Act 2008, s 76(6).

1. THE EMOTIONAL DYNAMICS

So, what are the emotional dynamics at work in cases of home invasion? In this connection a good starting point is a study written by Fox in 2002 regarding the legal status of the home.[19] There she argued that though the term 'home' was instantly familiar, and though the physical reality of home was an omnipresent feature of our everyday lives, the legal conception of home had to date received surprisingly little attention.[20] She therefore sought to explore the significance of home in the light of interdisciplinary research, arguing that it could provide a useful starting point for the development of a more clearly articulated socio-legal understanding of the meaning and value of home to occupiers.[21] Though her main focus in this context was on property law, most notably as applied in decisions involving conflicts between occupiers and secured creditors,[22] the relevant insights are clearly of equal significant importance to the issues presently under discussion. The main argument made by Fox is that whereas the law has tended to treat a home as no more than a capital asset, there was much more to it than that.[23] Rather, interdisciplinary studies on the home served to demonstrate its key significance in four separate but related senses: as a physical structure, as territory, as a social cultural unit, and indeed as an aspect of one's very identity;[24] in the words of Carole Despres, after the body itself, home was to

[19] Fox, above n 17.

[20] Ibid at 580. Though this is certainly true in relation to the home in particular, the emotional dynamics of property law had been explored at a more general level by Margaret Radin twenty years previously: see Radin, above n 17.

[21] Ibid.

[22] Ibid. This issue was subsequently developed at greater length by Fox in *Conceptualising Home* (Hart Publishing, Oxford, 2007).

[23] Fox, above n 17 at 586.

[24] Ibid at 581. This insight is by no means a novel one; as long ago as 1890 William James, the great pioneer of emotion scholarship, declared in an oft-quoted passage that a man's self included the sum total of all he could call his, including not only his body and his psychic powers but 'his clothes and his house, his wife and children, his reputation and works, his lands, his yacht and his bank account': James, William, *The Principles of Psychology* (Henry Holt, New York, 1890) vol. 1, 291-292. This point was developed further by Meir Dan-Cohen: see Dan-Cohen, Meir, 'The Value of Ownership' (2001) 1 *Global Jurist*.

be seen as the most powerful extension of the psyche[25]. Thus Fox goes on to say that the physical structure of the home provides not only shelter from the elements but the locus for family life, a place of safety, a place of privacy, continuity and a sense of permanence.[26] Even more significant here is the notion of territoriality, a characteristic which human beings share alike with animals,[27] and which has been described in terms of a spatial strategy to affect, influence or control resources or people by controlling a particular area.[28] Such a strategy has been mapped in contexts ranging from a nation[29] or a city[30] or part of a city[31] to a particular seat in a classroom[32] or even a cubicle in a public lavatory.[33] Large or small, in this context the aspect of *control* is of key significance; indeed, it has been said that such common expressions as 'a man's home is his castle' are supported by research findings which suggest that this feeling of control within the home is salient for most people, and is

[25]Despres, Carole, 'The Meaning of Home: Literature Review and Directions for Future Research and Theoretical Development' (1991) 8 *Journal of Architecture and Planning Research* 96 at 100, cited by Fox, above n 17 at 598. To be fair, not everyone accepts this approach; see especially Stern, above n 17, who argues that the emotional dynamics at work here relate not to the home as such but to the social relations associated with home. Whilst the latter are clearly important – see Austin, above n 16 – it is surely going too far to make them the *sole* determinant of home attachment, as it would seem to exclude the possibility of such attachments in the case of people living on their own – for instance Tony Martin (above n 11). Nor does such an argument fit well with the examples cited below at notes 27-33.

[26] Fox, above n 17 at 592, and see Sixsmith, Judith, 'The Meaning of Home: an Exploratory Study of Environmental Experience' (1986) 6 *Journal of Environmental Psychology* 281 at 292. Feminist scholars have not been slow to highlight the contradictions posed by this notion in the light of the sufferings of victims of abusive relationships, to whom home is anything but a place of safety: see in particular Stanko, Elizabeth A, 'Fear of Crime and the Myth of the Safe Home: a Feminist Critique of Criminology' in Yllö, Kersti and Bograd, Michelle (eds), *Feminist Perspectives on Wife Abuse* (Sage Publications, Thousand Oaks, US, 1988) 75, cited by Fox, above n 17 at 594.

[27]Buttimer, Anne, 'Home, Reach and the Sense of Place' in Buttimer, Anne and Seamon, David (eds), *The Human Experience of Space and Place* (St Martin's Press, New York, 1980) 167.

[28] Sack, Robert D, *Human Territoriality: its Theory and History* (Cambridge University Press, Cambridge, 1986), 1-2.

[29] Herb, Guntram H and Kaplan, David (eds), *Scaling Identities: Nationalism and Territoriality* (Rowman and Littlefield, London, 2018).

[30] Hubbard, Phil, *City* (Routledge, 2017)

[31] Boal, Frederick, 'Territoriality on the Shankill-Falls Divide, Belfast) (1969) 6 *Irish Geography* 30.

[32]Guyot, Gary W, Byrd, Gary R and Caudle, Richard, 'Classroom Seating: an Expression of Situational Territoriality in Humans (1980) 11 *Small Group Behavior* 120.

[33] Cormier, Brittany et al, 'Is this Stall Taken? Territoriality in Women's Bathroom Behaviour' (2017) 8 *EVOS: the Journal of Evolutionary Studies Consortium* 16.

linked to the satisfaction of basic psychological needs.[34] Perhaps the most important of these in the present context is the sense of safety; in the words of Dovey, home is 'a place of security within an insecure world, a place of certainty within doubt, a familiar place in it strange world, a sacred place in a profane world'.[35]

All of this goes a long way towards explaining what has been described as the modern culture of fear[36] surrounding home security in some societies. In this connection it has been asked by Bauman how it is that, contrary to the objective evidence, it is the people who live in the greatest comfort on record, more cosseted and pampered than any other people in history, who feel more threatened, insecure and frightened, more inclined to panic, and more passionate about matters relating to security and safety than people in most other societies both past and present.[37] In this connection the modern home has been recently described by Atkinson and Blandy as a kind of fortress that tells us as much about our need for privacy as it does about ensuring our security. In their words, fortress homes, gated communities and elaborate defensive systems have become everyday features of urban life, highlighting the depth of fear as well as the desire for prestige and social display and the ideological strength of home ownership.[38]

It is against this background, most notably the idea of the home as a place of safety and privacy, that we can best understand the emotional dynamics at work in home invasion cases. One of the key aspects of the so-called 'bundle of rights' that are said to characterise property is the right to exclude outsiders,[39] and where this right is openly infringed one can

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[34] Smith, Sandy G, 'The Essential Qualities of a Home' (1994) 14 *Journal of Environmental Psychology* 31, and see Sebba, Rachel and Churchman, Arza, 'The Uniqueness of the Home' (1986) 3 Architecture and Behaviour 7 at 21.

[35]Dovey, Kimberley, 'Home: an Ordering Principle in Space' (1978) 22 *Landscape* 27

[36]Glassner, Barry, *The Culture of Fear: why Americans are Afraid of the Wrong Things*(Basic Books, New York, 2010)

[37] Bauman, Zygmunt, *Liquid Fear*(John Wylie and Sons, Hoboken, NJ, 2013) 160.

[38] Above n 3.

[39] Merrill, Thomas W and Smith, Henry E, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730. Indeed, the authors go so far as to argue that the right to exclude is not just one key element in that bundle, but *the* key element, though this has been recently said to be an over-simplification of a more complex picture: Blomley, Nicholas, 'The Boundaries of Property: Complexity, Relationality and Spatiality' (2016) 50 *Law and Society Review* 224.

expect an emotional response. As Coletta argues, humans are conditioned to ground themselves in their physical environment and to claim nearby space with a characteristic absoluteness, any attack on its inviolability producing immediate outrage and defensive strategies.[40] At one level the emotions involved may involve no more than a general antipathy towards intruders,[41] but in cases of home invasion they can be much more focussed, involving anger directed against the particular intruder in question, coupled with a fear of what he or she might do.[42] However, these basic emotions[43] must be seen in the context of a more complex emotional dynamic which has received much attention in recent years, namely that of attachment. As most students of emotion will know, this had its origins in the seminal work of John Bowlby with regard to the bond between a child and his

[40]Coletta, Raymond R, 'The Measuring Stick of Regulatory Takings: a Biological and Cultural Analysis (1998) I *University of Pennsylvania Journal of Constitutional Law* 20, 72. Of course, in many cases of this sort the occupier may act not only in defence of the home as such, but also in defence of those inside it. Such cases would fall within the mainstream law of self-defence, but as argued above –Stern (n 17) – this does not rule out similar dynamics in the sort of cases we are considering.

[41] Thus for instance antipathy towards squatters is well documented: see Conway, Heather and John Stannard, 'The Emotional Paradoxes of Adverse Possession' (2013) 64 *Northern Ireland Legal Quarterly* 75; O.Mahony, Lorna Fox, David O'Mahony and Robin Hickey, *Moral Rhetoric and the Criminalisation of Squatting: Vulnerable Demons* (Routledge, 2016). However, the issues raised by squatting are not quite the same. In particular, the fact that squatters tend to target unoccupied property in order to take up residence there may reverse the standard emotional dynamic, with the sense of attachment being felt by the squatter in occupation rather than the absentee owner: see Finchett-Maddock, Lucy, *Protest, Property and the Commons: Performances of Law and Resistance* (Routledge, 2016) and the review by Cobb, Neil at (2019) 27 *Feminist Legal Studies* 235.

[42] There is an extensive academic literature devoted to the physiological changes associated with anger and fear, going back to Walter B Cannon and his analysis of the so-called 'fight or flight' response: see Cannon, Walter B, *Bodily Changes in Pain, Hunger, Fear and Rage* (New York, Appleton-century-Crofts, 1915); Funkenstein, Daniel H, 'The Physiology of Fear and Anger' (1955) 192 *Scientific American* 74; Jansen, Arthur SP et al, 'Central Command Neurons of the Sympathetic Nervous System: Basis of the Fight-or-Flight Response' (1995) 270(5236) *Science* 644; Kennedy, Margaret E and Avgusta Shestyuk, 'Emotions, the Neuroendocrine and Immune Systems, and Health' in Lewis, Michael, Jeannette M Haviland-Jones and Lisa Feldman Barrett, *Handbook of Emotions* (3rd edn, Guilford Press, New York, 2008),661, 662-666. The fight or flight response has been described as 'one of nature's fundamental defense mechanisms': Dhabar, Firdaus S, 'A Hassle a Day may keep the Pathogens Away: the Fight-or-Flight Stress Response and the Augmentation of Immune Function' (2009) 59 *Integrative and Comparative Biology* 215. This must however be read subject to two qualifications. The first is that the concept may need some revision – in particular, it has been argued that the instinct to flee may kick in before the instinct to fight: Bracha, Stefan, Andrew E Williams and Adam S Bracha, 'Does "Fight or Flight" need Updating?' (2004) 45 *Psychosomatics* 448. The other is that these basic emotional factors are not to be seen as depriving the person concerned of all control, but rather as predisposing her or him towards certain types of behaviour: Levenson, Robert W. 'Autonomic Nervous System Differences among Emotions' (1992) 3 *Psychological Science* 23; Ekman, Paul. 'Moods, Emotions and Traits' in Ekman, Paul and Richard J Davidson (eds), *The Nature of Emotion: Fundamental Questions* (OUP, New York, 1994), 56-58.

[43] This concept goes back to the work of Paul Ekman, who identified six such emotions which he described as 'universal', namely happiness, surprise, fear, sadness, anger and disgust combined with contempt: Ekman, Paul, Wallace V. Friesen, and Ellsworth, Phoebe, *Emotion in the Human Face: Guide-lines for Research and an Integration of Findings* (Pergamon Press, Oxford, 1972); see further Ekman, Paul, 'Basic Emotions' in Dalgliesh, Tim and Power, Mick J (eds), *Handbook of Cognition and Emotion* (Wiley Online Library), Chapter 3.

or her primary caregiver,[44] but has since then been applied to adult relationships,[45] and beyond that to possessions and other attachments of a similar sort.[46] Two such theories are of particular relevance in the present context, one being material possession attachment and the other being place attachment.

(1) Material Possession Attachment

Material possession attachment is what distinguishes ordinary, 'run-of-the-mill' possessions – a toothbrush, say, or the banknotes in a wallet – from those which as we say have 'sentimental value', such as a family heirloom, a child's comfort blanket, or an old letter from a friend who is long dead. Material possession attachment has been defined in terms of a multi-faceted property of the relationship between an individual or group of individuals and a specific material object that has been psychologically appropriated, de-commodified and singularised through person-object interaction.[47] Nine characteristics are said to portray material possession attachment: (1) a physical object; (2) psychological appropriation; (3) an extension of the self; (4) de-commodification and singularisation; (5) a personal shared history between the person and the possession concerned; (6) it can vary in degree and strength; (7) it is multi-faceted; (8) it is emotionally complex; and (9) it can evolve over time as the meaning of the self changes.[48] Such possessions, as we have noted, can form part of the self; and in so far as this is the case, a threat to such possessions

[44] These ideas were first summarised by Bowlby in his famous *Attachment and Loss* trilogy, brought out between 1969 and 1980, but can now be found in Bowlby, John, *Attachment* (Basic Books, New York, 2008).

[45] This aspect of attachment theory is associated with the work of Hazan and Shaver, who began with romantic love (Hazan, Cindy and Shaver, Phillip, 'Romantic Love Conceptualised as an Attachment Process' (1987) 52 *Journal of Personality and Social Psychology* 511) and then moved on to other close relationships (Hazan, Cindy and Shaver, Phillip, 'Attachment as an Organizational Framework for Research on Close Relationships' (1994) 5 *Psychological Inquiry* 1; see further Fraley, R Chris, *Adult Attachment Theory and Research: a Brief Overview*<http://labs.psychology.illinois.edu/~rcfraley/attachment.htm> (accessed 3rd July 2018).

[46] As Schulz and Baker point out, individuals can psychologically appropriate and extend themselves into a number of things and in a variety of ways, including material possessions, places, brands, experiences and ideas: below at n 47, fn 1. The extent to which such processes can be said to resemble human attachment is a matter of some debate, but the similarities are obvious: see Giuliani, below n 54, 155-161.

[47]Kleine, Susan Schulz and Baker, Stacey Menzel, 'An Integrative Review of Material Possession Attachment' (2004) *Academy of Marketing Science Review*, <http://www.amsreview.org> (accessed 3rd July 2018).

[48] Ibid.

constitutes a threat to one's very person.[49] Indeed, one of the standard ways of measuring possession attachment is to ask to what extent the person concerned would be affected by the loss of the possession in question.[50] In the same way, the courts tend to regard domestic burglary as more than just a property offence,[51] and it has been suggested by empirical surveys that whereas financial losses can often be recouped through insurance, the psychological impact of a domestic burglary can be considerable and can last for a long time.[52] It has also been argued that one's home contributes to the sense of self only to the degree that the person concerned feels control over it, so that burglary victims may report less sense of community, less feeling of privacy, and less pride in their house's appearance than do their non-burglarised neighbours.[53] All of this can be summed up by saying that whereas we own our ordinary possessions, our attachment possessions to a certain extent own us.

(2) Place Attachment

As Giuliani observes, we have all experienced some form of affective bond, either positive or negative, pleasant or unpleasant, with some place or other.[54] Such a place can be related to our past or current experience, or even to the future; in the same way, it can be more or less restricted in scale: the house in which we live or have lived, a certain room in the home, the area around the home, the neighbourhood, the city, the country.[55] This is the focus of place attachment, which has been defined as 'an emotional link formed by an individual to a

[49] Belk, Russell W, Possessions and the Extended Self (1988) 15 *Journal of Consumer Research* 139 at 142; Dan-Cohen, Meir, above n 24.

[50] Ball, A Dwayne and Tasaki, Lori H, 'The Role and Measurement of Attachment in Consumer Behavior' (1992) 1 *Journal of Consumer Psychology* 155, Tables 1 and 2.

[51] As has been said, something precious is violated by the burglary of a home: *R v Saw* [2009] EWCA Crim 1 at [6].

[52] Beaton, Alan et al, 'The Psychological Impact of Burglary' (2000) 6 *Psychology, Crime and Law* 33

[53] Belk, above n 24 at 143.

[54] Giuliani, Maria V, 'Theory of Attachment and Place Attachment' in Bownes, Mirilia, Lee, Terence and Bonaiuto, Mario (eds), *Psychological Theories and Environmental Issues* (Ashgate, Aldershot, 2003), Chapter 5.

[55] Ibid at 157.

physical site that has been given meaning through interaction',[56] or more broadly as referring to 'the positive bonds people form with places, arising from affective, behavioural and cognitive ties between individual groups and their sociophysical settings'.[57] It is said to involve three elements, these being person, process and place.[58] Place attachment theory has been well described by Giuliani,[59] who traces the development of the theory from its origins in the 1960s and 1970s up until the turn of the century, and also seeks to define its relationship with the theories of personal attachment as set out by Bowlby and his successors. In this context, a number of points are of particular significance to the present study. The first is the connection between place attachment theory and the notion of territoriality, to which we have already referred;[60] here Giuliani draws our attention to the central role of emotion in Altman's model of human territoriality, in which territorial behaviour is viewed not as instinctive behaviour, but as purpose-oriented behaviour subject to social rules, the primary function of which is to regulate social interaction.[61] She then goes on to cite Brower's definition of human territoriality in terms of 'the relationship between an individual or group and a particular physical setting, that is characterised by a feeling of possessiveness, and by attempts to control the appearance of the space',[62] such control in turn being characterised by three elements, namely attachment, occupancy and defence.[63] Last but not least, she relates all of this to home attachment, which she follows Harris and others in linking to a central aspect of the territoriality model, that is to say the

[56] Milligan, Melinda J, 'Interactional Past and Potential: the Social Construction of Place Attachment' (1998) 21 Symbolic Interaction 1 at 2.

[57] Brown, Barbara B, Altman, Irwin and Werner, Carol M, 'Place Attachment' in Smith, Susan J (ed), *International Encyclopedia of Housing and Home* (Elsevier, New York, 2012) 183.

[58]Scannell, Leila and Gifford, Robert, 'Defining Place Attachment: a Tripartite Organizing Framework' (2010) 30 *Journal of Environmental Psychology* 1; see further Low, Setha and Altman, Irwin (eds), *Place Attachment: a Conceptual Inquiry* (Plenum Press, New York, 1992).

[59] Above, n 54.

[60] Above, text at nn 27-33.

[61] Altman, Irwin, *Environment and Social Behavior: Privacy, Personal Space, Territory and Crowding* (Brooks/Cole, Monterey, CA, 1975), cited by Giuliani, above n 54, 153.

[62]Brower, Sidney N, 'Territory in Urban Settings' in Altman, Irwin and Wohlwill, Joachim F (eds), *Environment and Culture (Vol 3)* (Plenum Press, New York, 1980) 179, cited by Giuliani, above n 54, 153.

[63] Ibid.

regulation of privacy.[64]Needless to say, each and every one of these factors – territoriality, possessiveness, control, attachment, occupancy, defence, the home, privacy – are of central importance in the context of the present study.

2. GENERAL PRINCIPLES

So much for the emotional dynamics; what of the law? It is one thing to say that the law should make allowances for those who use lethal force in cases of home invasion, but quite another to decide what the precise rationale for this should be or how the law should operate in these cases. In this context there are numerous possibilities available, but for the sake of clarity these can be broken down into two cases of justification and one case of excuse. This of course draws on a well-recognised distinction in the context of criminal defences,[65] the broad difference being this: Cases of justification relate to the act, and involve saying that the defendant did nothing wrong, whereas cases of excuse relate to the actor, and involve saying that the defendant was not to blame for the wrong done.[66] Within this paradigm we can distinguish three broad approaches. The first concentrates on the status of the intruder, who is said to have forfeited his or her rights by virtue of the intrusion. The second concentrates on the property interests of the occupier, by seeking to privilege them over those of the intruder. The third approach concentrates on the emotional reactions of the occupier, which are viewed as providing an excuse for the infliction of the force. Needless to say, it is the third of these that is of particular resonance in the context of the present study.

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[64] Harris, Paul B, Brown, Barbara B and Werner, Carol M, 'Privacy Regulation and Place Attachment' (1996) 16 *Journal of Environmental Psychology* 287, cited by Giuliani, above n 54, 154.

[65] The distinction was originally drawn in connection with forfeiture in cases of homicide, but regained prominence as a result of the writings of George Fletcher: see Fletcher, George, *Rethinking Criminal Law* (Little, Brown, Boston, 1978) and Smith, John C, *Justification and Excuse in the Criminal Law* (Hamlyn Lectures, 40th Series, Stevens and Sons, London, 1989). For a more recent analysis see Ferzan, Kimberley K, 'Justification and Excuse' in Deigh, John and Dolinko, David (eds), *The Oxford Handbook of Philosophy of Criminal Law* <www.oxfordhandbooks.com> (accessed 5th July 2018).

[66] Ibid at 759.

(1) Moral Forfeiture

One sometimes hears the slogan 'the burglar leaves his rights on the doorstep', and this sentiment is reflected in the theory of moral forfeiture. Though such theories are not without their defenders,[67] to say that a burglar (or any other intruder for that matter) leaves his or her rights on the doorstep invites a number of difficult questions. One is as to the conduct that triggers the forfeiture; does it just apply to burglars and other intruders, or does it apply to other crimes as well?[68] Another is as to the extent of the forfeiture: presumably the rights to life and bodily integrity are forfeited, but does this apply to other rights too; for instance, can the burglar be tortured?[69] Again, who can take advantage of the forfeiture; is it just the victim of the crime who can use serious force on the burglar, or are others entitled to do so as well?[70] A more focussed and nuanced version of the theory is given by Bedau, who argues that the violation of the rights of others brought about by a crime entails forfeiture of those same rights.[71] However, as Green points out, even if one were to accept such an application of the *lex talionis*, it would appear to rule out the use of serious personal force in cases of this sort; a burglar may forfeit the right not to have his or her house burgled, but it does not follow from that that their right to life is forfeited as well.[72]

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[67] See in particular Wellman, Christopher Heath, 'The Rights Forfeiture Theory of Punishment' (2012) 122 *Ethics* 371, who argues in terms of a family of theories rather than one single overarching theory. In this paper Heath does not commit himself to any particular version of such a theory: he merely seeks to argue that such theories should not be ruled out of court. For a fuller development of this theory see Wellman, Christopher Heath, *Rights, Forfeiture and Punishment* (Oxford University Press, Oxford, 2017)

[68] As Ashworth points out, Article 2 of the European Convention on Human Rights can be read as a kind of forfeiture: Ashworth, Andrew J, 'Self-Defence and the Right to Life' (1975) 34 *Cambridge Law Journal* 282 at 288.

[69] Though Wellman (above, n 67 at 385) would not rule out the possibility of torture altogether, he adds that 'even if a criminal has forfeited all of her rights, many believe that there are impersonal (non-rights-based) deontological side constraints against certain treatments, for instance, that would rule out any "cruel and unusual" forms of punishment'.

[70] Since Wellman's arguments are put forward in the context of punishment, they would hardly justify a free-for-all, but he would not rule out the possibility of punishment by parties other than the state (above, n 67 at 379), though he himself adds that he would oppose vigilantism on other grounds.

[71] Bedau, Hugo, 'The Right to Life' (1968) 12 *The Monist* 550 at 558.

[72] Green, Stuart P, 'Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles' [1999] *University of Illinois Law Review* 1 at 5.

(2) Privileging the Occupier's Interest

One of the main problems in this area of the law is that, in principle, the intruder's right to personal security would seem to trump the occupier's property interests, whatever the emotional dynamics involved. However, there are arguments which seek to privilege the latter over the former. One is that, just as in cases of rape and kidnapping, the threat to the occupier's dignity and honour is so great that the use of extreme force in response is lawful and justified.[73] The other is that an intruder who seeks to enter another person's dwelling does more than just invade property; rather, in common law terms, the fortress has been attacked, and a person's primary source of safe and private habitation has been jeopardized.[74] However, whilst the emotional dynamics discussed above clearly support the notion that an invasion of the home does more than just threaten property rights, they would seem to go nowhere near putting such interests as dignity, honour and privacy on the level of the right to life. After all, an invasion of privacy will normally amount to no more than the tort of trespass, and no legal liability whatsoever is incurred by an invasion of someone's dignity and honour.

(3) Emotional Reaction as an Excuse

A more promising approach in the present context is by way of excuse. In the words of Jeremy Horder,[75] 'it is a necessary condition of any claim to excuse that it is an explanation for engagement in wrongdoing (not best understood as a justification, or a simple claim to involuntariness, or an out-and-out denial of responsibility) that sheds such a favourable light on the defendant's conduct that it seems entirely wrong to convict, at least for the full

[73] Ibid at 36.

[74] Ibid; Dressler, Joshua, Strong, Frank R and Moritz, Michael E, *Understanding Criminal Law* (2nd edition, Matthew Bender, San Jose, 1995) 238-239.

[75] Horder, Jeremy, *Excusing Crime* (Oxford University Press, Oxford, 2003).

offence'.[76] Such explanations can include emotional reactions; even in cases of intentional killing, there are cases where 'the phenomenological strength of the desire at the heart of the emotion … spontaneously eclipses or bypasses the moderating power of reason'.[77] However, this will not of itself give rise to a legally recognised defence, even by way of excuse; as Horder goes on to say, these are only *necessary* conditions. For the law to recognise an excuse in any given case, the case must still seem compelling in the light of broader strategic or 'common good' concerns.[78] In particular, though emotional reactions are sometimes described in terms of a loss of control, this need not necessarily be the case in the sense that the person concerned is truly at the mercy of his or her emotions.[79] Moreover, saying that the defendant's *emotional reaction* can be excused does not necessarily mean that *the use of the force* can be excused.[80] This is a point to which we shall return in due course.

3. THE LAW

Bearing all of this in mind, we can now turn to the specific doctrines of the law. We shall begin by looking at the law of England and Wales, before turning to other approaches seen in common law jurisdictions.

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[76] Ibid at 8-9.

[77] Ibid at 11. Of course, psychological studies have shown that the line between 'emotion' and 'reason' is by no means as simple and stark as Horder implies: see Blanchette, Isabelle (ed), *Emotion and Reasoning* (Psychology Press, Hove, 2014). In particular, recent research in the cognitive and neurobiological sciences has shown that the relationship between cognition and emotion is more interdependent than separate: Liu, Ye, Fu, Qiufang and Fu, Xiaolan, 'The Interaction between Cognition and Emotion' (2009) 54(22) *Chinese Science Bulletin* 4102; Robinson, Michael D, Watkins, Edward R, and Harmon-Jones, Eddie (eds) *Handbook of Cognition and Emotion* (Guilford Press, 2013).

[78] Ibid at 15-20.

[79] Rather, as Raz says, in cases of this sort 'we … allow the emotion to express itself, the will acting as a non-interfering gate-keeper': Raz, Joseph, *Engaging Reason* (Oxford University Press, Oxford, 1999) 44, as quoted by Horder, above n 68, 87. In a similar way, emotions have been defined in terms of their association with behavioural predispositions: Levenson, Robert W. 'Autonomic Nervous System Differences among Emotions' (1992) 3 *Psychological Science* 23; Ekman, Paul. 'Moods, Emotions and Traits' in Ekman, Paul and Richard J Davidson (eds), *The Nature of Emotion: Fundamental Questions* (OUP, New York, 1994), 56-58.

[80] Horder, above n 75, 74-76.

(1) England and Wales

There are two possible defences that can be raised in England and Wales for cases of this type, one being private defence and the other loss of control. We shall now analyse each of these in the light of the foregoing discussion.

(a) Private Defence

Section 76(2)(aa) of the Criminal Justice and Immigration Act 2008 refers to 'the common law defence of property'. Though this has its own peculiar roots in legal history,[81] it is now generally treated as part of the greater topic of 'private defence', a term that is taken to encompass the use of force in defence of oneself, or in defence of others, or in defence of property. As is well known, the law allows the use of reasonable force in this context, which immediately gives rise to a problem in cases of the sort we are considering; after all, one key aspect of reasonableness is proportionality,[82] and how can the use of fatal force be in proportion to a threat to property, be the emotional dynamics never so strong? However, as we shall now see, there are no less than four different ways the law might circumvent this problem, these being the rule in *Beckford*, the jeweller's scales principle, the rule in *Hussey*, and the 'householder' qualification in section 76(5A) of the Criminal Justice and Immigration Act .

(i) The Rule in *Beckford*

Section 76(3) of the 2008 Act tells us that the question whether the degree of force used by the defendant was reasonable in the circumstances is to be decided by reference to the circumstances as he or she perceived them to be. This of course reflects the common law as

[81] Green, above n 72 at 4.

[82] Criminal Justice and Immigration Act 2008, s 76(6).

laid down by the Privy Council in *Beckford*[83] and by the Court of Appeal in *Williams*;[84] where the defendant is acting under a misapprehension, there is no need for him or her to show that it was based on reasonable grounds,[85] though the reasonableness of otherwise of the belief may be relevant to the question as to whether it was genuinely held in the first place.[86] All of this leaves it open to the defendant to argue in cases of the type under discussion that he or she genuinely believed that the intruder posed a serious threat to life or limb; if so, the defence will be made out[87] and the defendant entitled to an acquittal.[88] In so far as this line of defence relies on a perceived threat to life and limb rather than a threat to the security of the home as such, the emotional dynamics discussed above are of no relevance at all, except in so far as they may lend colour to the defendant's fear for his or her personal security.[89] In any event, it is not in every case that an intruder can be plausibly seen to pose such a threat;[90] in other cases the rule in *Beckford* can be of no help to the defendant in this sort of situation.

(ii) Jeweller's Scales Principle

According to Lord Morris, it will be recognised that 'a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action' and if a jury thought that 'in a moment of unexpected anguish' someone had only done what he or she 'honestly and instinctively' thought was necessary, 'that would be most potent evidence that only

[83] *Beckford v R* [1988] AC 130.

[84] *R v Williams (Gladstone)* (1984) 78 Cr App R 276.

[85] Compare *DPP v Morgan* [1976] AC 182.

[86] Criminal Justice and Immigration Act 2008, s 76(4)(a),

[87] The only exception to this is where the belief is attributable to voluntary intoxication: see s 76(5) and *R v O'Grady* [1987] QB 995.

[88] Some would classify this as a case of excuse, whereas others would term it a case of justification: compare Simester, Andrew et al, *Simester and Sullivan's Criminal Law* (5th edition, Hart Publishing, Oxford, 2013) 668 (justification); Robinson, Paul, 'Competing Theories of Justification: Deeds versus Reasons' (1996) <https//papers.ssrn.com> (accessed 5th July 2018) (excuse).

[89] However, as we shall see, some US jurisdictions apply a presumption in cases of this sort: see below at n 121.

[90] Green, above n 72 at 28-29.

reasonable defensive action was taken'.[91] This principle was well summed up in the words of Geoffrey Lane J., who said that the criminal law would not use 'jeweller's scales' to determine whether force was reasonable,[92] and is now codified in section 76(7) of the 2008 Act. On the face of it, this would appear to map well onto the sort of situation we are currently considering, in that allowance is made for the occupier's emotional reaction to the intrusion, but the extent and scope of the principle is not entirely clear. As will be seen, the principle predates the rule in *Beckford* by some years, and in so far as it makes allowances for the fact that a defendant under pressure may misjudge the extent of the threat posed, it would appear to have been largely superseded by that rule. However, it has been said that the principle also allows for a certain latitude even where the force used is excessive on the basis of the perceived situation, and to the extent that that is the case, then we have a genuine example of an excuse-based defence based on the emotional pressures arising in cases of this type. However, the principle cannot be carried too far, and will have no application to cases where it is clear that any reasonable jury would have found the force used against the intruder to be excessive in the circumstances.[93] This makes it of limited use in the present context.

(iii) The Rule in *Hussey*

A distinct principle was set out by the Court of Criminal Appeal in the 1924 case of *Hussey*.[94] Here the court approved a passage from Archbold[95] which stated that in defence of a man's house the owner or his family might lawfully use deadly force against a trespasser who would forcibly dispossess him of it, there being no duty to retreat in this situation. As it stands, this is a clear example of a justificatory defence of the second type discussed above, whereby the occupier's rights are privileged over the intruder's right to life. However, it has its limits; in particular, it only applies where the intruder's aim (or perhaps perceived aim) is

[91] *Palmer v R* [1971] AC 814 at 832.

[92] *Reed v Wastie* [1972] Crim LR

[93] *R v Yaman* [2012] EWCA Crim 1075, [2012] Crim LR 896.

[94] Case name? (1924) 18 Cr App R 160.

[95] *Archbold's Criminal Pleading, Evidence and Practice* (26th edition, Sweet and Maxwell, London, 1920), 887.

to dispossess the occupier but he or she has not yet succeeded in doing so. Moreover, though this doctrine has a respectable pedigree, being if anything even older than self-defence itself,[96] it is doubtful to say the least whether it still applies in the modern law,[97] at least in England and Wales.[98]

(iv) The 'Householder' Qualification

So far we have seen that the law of private defence gives only limited protection to an occupier who uses fatal force against an intruder. Given the emotional dynamics described above, together with the atmosphere of moral panic surrounding the security of the home,[99] it is not surprising that this caused considerable disquiet in certain quarters. Following on from a number of high profile cases (not least the case of Tony Martin described above)[100] various attempts were made to reform the law in this area,[101] but in the end action was taken by the Government which in the Crime and Courts Act 2013 made amendments to section 76 of the 2008 to apply in what are now called 'householder' cases. According to the then Home Secretary, the aim of these amendments was to allow in cases of this sort the use of any degree of force that was not grossly disproportionate.[102] Had this been done, we would have had another example of the occupier's rights being allowed, at least to a certain degree, to trump the intruder's right to life. However, this is not what the

[96] See Green, above n 72 at 4 and the sources cited there.

[97] Section 76 of the 2008 Act makes no reference to the *Hussey* rule, but section 76(9) clearly states that the provision is merely intended to 'clarify' the operation of the existing defences (other than in relation to the 'householder' rule discussed below) rather than to replace them; see further *R v Keane* [2010] EWCA Crim 2314, [2011] Crim LR 393. See however *Revill v Newberry* [1996] QB 567 (self-defence rejected in civil case on facts similar to *Hussey*). In Ireland the doctrine has been rejected as inconsistent with the right to life as guaranteed by the Constitution: *DPP v Barnes* [2006] IECCA 165, [2007] 3 IR 130 at [48].

[98] The position is very different in the USA: see below at nn 119-139.

[99] Atkinson and Blandy, above n 3, pp 136-139.

[100] Above at n 11.

[101] For instance the Criminal Justice (Justifiable Conduct) Bill introduced by Roger Gale in 2004, the Criminal Law (Householder Protection) Bill introduced by Patrick Mercer the same year, and the Criminal Law (Amendment) (Protection of Property) Bill introduced by Anne McIntosh in 2005.

[102] Chris Grayling, quoted in *The Independent*, 5th April 2018 <https://www.independent.co.uk/news/uk> (accessed 10th July 2018)

new section 76(5A) says; rather than saying that the use of force in such cases *will* be regarded as reasonable if it is *not* grossly disproportionate, it says that it will *not* be regarded as reasonable if it *is* grossly disproportionate. What this means, according to Sir Brian Leveson in the Divisional Court,[103] is that in any case where a householder genuinely believed that it was necessary to use force in self-defence, a jury must now approach the matter by asking two questions. First of all, they must ask whether the degree of force the defendant used was grossly disproportionate in the circumstances as he or she believed them to be. If the answer is 'yes', the defence fails. If 'no', then they must ask whether the degree of force the defendant used nevertheless reasonable in the circumstances as he or she believed them to be. If it was reasonable, the defence succeeds; if not, not.[104] All in all, these provisions would seem to be more show than substance; as with the 'jeweller's scales' principle discussed above, all they do is to allow for a degree of latitude in cases of this type, without making any substantial change to the law. As Laird says, given the court's conclusion that it is for the jury to assess whether the degree of force used was reasonable and that something less than grossly disproportionate force may be considered unreasonable, householders may be just as likely to be prosecuted now as they were before the enactment of the new provisions.[105]

(b) Loss of Control

Another possibility in cases of this type, at least where the charge is murder, is for the occupier to raise the defence of loss of control, as set out in section 54 of the Coroners and Justice Act 2009. As is well known, this consists of three elements, the first being the loss of control, the second the 'qualifying trigger', and the third that a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have reacted in the same or in a similar way. All of these requirements would seem to map well onto the kind of case we are considering, given the

[103] *R (Collins) v Secretary of State for Justice* [2016] EWHC 33 (Admin), [2016] QB 862; *Ray* {2017] EWCA Crim 1391, [2018] 2 WLR 1148.

[104] [2016] EWHC 33 (Admin) at [20].

[105] [2018] 4 Crim LR 342.

emotional dynamics involved. First of all, it is not at all uncommon for an occupier to experience intense anger in response to an intrusion; as one account put it, 'the fury when you feel that your private space is invaded and despoiled is extraordinary'.[106] Next, whilst as we have seen not all cases of this sort necessarily or even commonly involve a fear of serious violence,[107] the second qualifying trigger – the loss of self-control being attributable to a thing or things done or said (or both) which constituted circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged[108] – fits in very well with the notions of territoriality and attachment discussed above.[109] Last but not least, showing that the ordinary person might very well have acted in the same way would not be too difficult, given the numerous cases in which such a reaction has in fact taken place.[110] Indeed, this defence maps well not only on to the emotional dynamics of the situation, but also on to Horder's excuse framework discussed earlier.[111] Its one key drawback as compared with private defence is, of course, that it only operates as a mitigating defence, so as to reduce murder to manslaughter, but perhaps, given the constraints of the proportionality rule and of human rights standards, it may be unreasonable for the occupier to expect more; other cases can be taken care of by way of mitigation.

(2) Other Approaches

Other common law jurisdictions adopt different approaches to the issue, three of which deserve particular attention; these are the United States castle doctrine, the Canadian 'Lucky Moose' law, the Model Penal Code defence of extreme emotional disturbance, and the Irish doctrine of excessive defence.

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[106] Craig, Amanda, 'The Thief who Stole our Peace' (*The Independent*, 18th September 2007), cited by Atkinson and Blandy, above n 3, 136.

[107] Coroners and Justice Act 2009, section 55(3).

[108] Ibid, section 55(4).

[109] Above, text at nn 19-64.

[110] See the cases discussed above at nn 5-13 and by Atkinson and Blandy, above n 3 at 133-134.

[111] Above at nn 75-80.

(a) Castle Doctrine

The so-called castle doctrine has its historical roots in the common law rule allowing an occupier to use whatever force is necessary to repel an invasion of the home.[112] In its narrow sense it constitutes an exception to the duty to retreat, in so far as it permits the occupier to use such force to prevent death, grievous bodily harm or the commission of a crime of violence in the home rather than give ground to the aggressor.[113] However, in its wider sense it also allows the use of force, including deadly force, against intruders that impose no such threat, and it is with this wider aspect of the doctrine that we are particularly concerned.

Though versions of the doctrine can be seen in a number of jurisdictions,[114] our focus will be on the United States, as this is the context with which it is most closely associated.[115] As we shall see, nearly all of the fifty states of the Union apply the doctrine to some extent, but before we go on to analyse the matter in more detail it should be noted that the approach differs from that in England and Wales in three key respects. The first is that the United States' jurisdictions give far more prominence in this connection to the concept of justification; indeed, only nine states do not frame the issue in these terms.[116] Secondly, whereas in England and Wales the use of serious physical force is dealt with in terms of

[112] Above at nn 94-98.

[113] Carpenter, Catherine L, 'Of the Enemy within, the Castle Doctrine and Self-Defence' (2003) 86 *Marquette Law Review* 654

[114] See for instance Criminal Law Consolidation Act 1935, s 15A (South Australia); Criminal Code Act 1913, s 244 (Western Australia); Criminal Law (Defence of the Dwelling) Act 2011, s 3 (Ireland);

[115] The United States provides a very fruitful source for comparison in the present context, for three reasons, namely: (1) the number of different approaches as between states (discussed below); (2) the wealth of academic commentary generated thereby (for examples see above, n 15), and (3) the broader context of the ongoing debates about guns in US law and politics: see Kleck, Gary, *Point Blank: Guns and Violence in America* (New York, Aldine/de Gruyter, 1991); Mauser, Gary A, 'Gun Control in the United States' (1991) 3 *Criminal Law Forum* 147.

[116] These being Maryland, Massachusetts, Michigan, Ohio, Rhode Island, South Carolina, Virginia, West Virginia and Wisconsin.

general principle, all bar three states make special legislative provision for the matter.[117] The third key difference is that, with a small number of exceptions, none of the states adopt the *Beckford* principle; in cases where the defendant relies on a mistaken belief as to the facts, that belief has to be a reasonable one. [118]

To what extent, then, do the various state codes allow for the use of fatal force in defence of the home? Needless to say, there are many variations, but broadly speaking there are three approaches here.

The first is to allow the use of such force against unlawful intruders generally. Perhaps the most extreme example of this is the code of Indiana, which provides that even deadly force is justified, without there being any duty to retreat, if necessary (or reasonably believed to be necessary) to 'prevent or terminate' an unlawful entry or attack.[119] Delaware has a similar provision, though here a warning is necessary.[120] Other states, such as Kansas and Ohio reach the same result by providing for a presumption; in Kansas, for instance, an occupier is presumed to have had a reasonable belief that deadly force is necessary to prevent imminent death or great bodily harm to such person or another person if the person against whom the force is used, at the time the force is used was unlawfully or forcefully entering, or had unlawfully or forcefully entered, and was still present within the dwelling, place of work or occupied vehicle of the person using force.[121] All of these provisions have been described as 'Shoot the Trespassing Intruder' laws.[122]

A more common approach is to allow the use of deadly force in relation to some intruders but not others. Once again, there are many variations, and space prevents them being set out in full, but a number of broad themes are evident. One common approach relates to the

[117] Maryland, Ohio and Virginia (all of which apply the common law to this situation).

[118] Only the Nebraska code specifically adopts the *Beckford* principle: see NE Code § 28-1409(5) (2012). Delaware, Hawaii and Pennsylvania are silent on the matter. All the other states specifically provide for a reasonableness standard.

[119] Ind Code § 35-41-3-2(b) (2017).

[120] Del Code Ann tit 11, § 469 (2016).

[121] KS Stat § 21-5224(a) (2015); compare Ohio Rev Code § 2901.05(B).

[122] Green, above n 72 at 11.

manner of the entry. Connecticut, for instance, allows deadly force to be used in cases of forcible entry,[123] as does Georgia;[124] once again, other states reach the same result by use of a presumption.[125] Another approach relates to the criminal character of the entry, several states allowing the use of deadly force against burglars,[126] or those guilty of other similar crimes such as breaking and entering[127] or home invasion.[128] Yet another approach is to look at the threat posed to the occupant; thus for instance some states, including Illinois[129] and Minnesota,[130] allow the use of deadly force to prevent the commission of a felony in the home, while others follow the English common law by providing in similar terms for the threat of dispossession.[131] Needless to say, few if any states apply just one of these approaches; in most cases, one sees a combination of two or more.[132] These cases have been described in terms of 'Shoot the Felonious Intruder', 'Shoot the Violent or Forcible Intruder' or 'Shoot the Dispossessor'.[133]

Finally, we have a number of states that, while denying any duty to retreat in cases of this sort, approximate to the English model by at least requiring some perceived threat of physical force against the person before such force is used in return. In Iowa, for instance,

[123] Conn Gen Stat §53a-20 (2015); note that this does not require force to the person, but can include the breaking of windows and doors: see <https://definitions.uslegal.com> (accessed 18th July 2018).

[124] OCGA 16-3-23(2) (2010)

[125] For instance California (CA Penal Code §198.5 (2016), Florida (FL Stat § 776.013 (2016)) and South Carolina (SC Code § 16-11-440A(1) (2013)).

[126] For instance Alaska (AK Stat §11.81.350(c)(2) (2017)), Arizona (AZ Rev Stat § 13-411A (2013)) and New York (NY UCC Law § 35.20(2)) (2010).

[127] As in Rhode Island (RI Gen L § 11-8-8 (2013)) (presumption).

[128] As in Michigan (Mich Comp Laws § 440.1101(1)) (presumption).

[129] 810 Ill Comp Stat § 5/7-2(a)(2).

[130] MN Stat § 609.065 (2014).

[131] For instance Hawaii (Haw Rev Stat §703-306(3)(a)) and Pennsylvania (18 PA Cons Stat § 507(c)(4)(ii)(A) (2014)).

[132] Thus Alabama allows deadly force in a variety of cases, including where the occupant reasonably believes that the intruder is committing burglary in any degree, or another person is in the process of unlawfully and forcefully entering, or has unlawfully and forcefully entered, a dwelling, residence, business property, or occupied vehicle (Ala Code § 13A-3-23(2) and (5)). See also Georgia (to prevent or terminate violent entry, forcible entry, or entry for the purpose of committing a felony (OCGA 16-3-23 (2010))

[133] Green, above n 72 at 14, 16 and 17.

the force must be used in self-defence or in defence of another person;[134] in Nevada, it must be used 'against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous, tumultuous or surreptitious manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein'.[135] Massachusetts is even more restrictive in requiring a perceived threat of death or serious injury.[136]

To what extent are provisions of this sort an appropriate response to the emotional dynamics referred to earlier on? In one sense, they are not a response at all, in that they do not require that the use of serious physical force be prompted by emotional factors; indeed, the occupier can be, as is sometimes said, 'as cool as a cucumber'. In so far as they are prompted by the notions such as the sanctity of the home,[137] they do so not by making allowances for the occupier's reaction in cases such as these,[138] but as has been described above,[139] by privileging his or her occupancy rights over the right to life of the intruder. Of course, there is nothing to prevent a legal system doing this in principle, but it does not sit easily with the general principle of proportionality, still less with the need to adhere to human rights norms such as those contained in Article 2 of the European Convention on Human Rights. For this reason, it would be difficult to envisage such an approach being adopted on this side of the Atlantic in any shape or form.

[134] Iowa Code §704.1 and 4.

[135] NRS 200.120.1.

[136] Mass Gen Laws ch 278, § 8A.

[137] Several of the Bills designed to strengthen the castle doctrine included a preamble taken from a template declaring that 'it is proper for law-abiding people to protect themselves their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others': see for instance House Bill 2564 (West Virginia) <http://www.wvlegislature.gov/bill_text_html/2008> (accessed 18th July 2018); Laws of Florida Chapter 2005-27 <http://laws.flrules.org/2005/27> (accessed 18th July 2018); and see Smith, Donna, 'Oklahoma's Make My Day Law' (1988) 23 *Tulsa Law Review* 533.

[138] One interesting exception is Delaware, which allows a defence where 'the encounter between the occupant and intruder was sudden and unexpected, compelling the occupant to act instantly': see 11 DE Code § 469(1) (2017).

[139] Above at nn 73-74.

(b) 'Lucky Moose' Law

The issue has also been hotly debated in Canada, most especially in relation to the legislative reforms introduced in the wake of the so-called 'Lucky Moose' case.[140] In this case David Chen, the proprietor of a Lucky Moose franchise store in Toronto, had an ongoing problem with shoplifters.[141] On the occasion in question his cameras had recorded one Anthony Bennett, a serial offender, stealing a tray of flowers and fleeing from the scene on his bicycle. When Bennett reappeared an hour later, Chen and two employees detained him and locked him in a van until the police arrived. Following this, Chen was charged with a number of crimes, including kidnapping and forcible confinement,[142] and argued that his conduct had amounted to a lawful arrest under section 494 of the Criminal Code. The difficulty was that this only applied if the suspect was apprehended either in the act or immediately thereafter,[143] and here a considerable amount of time had elapsed before the arrest took place. In the end Chen was acquitted on the basis that Bennett had returned to the store to resume stealing, and that therefore the crime was still ongoing.[144] However, all of this gave rise to considerable public concern,[145] which prompted the Government to review the existing Criminal Code provisions not only on arrest powers but also in relation to self-defence and defence of property in general.

All of this resulted in the passing of the Citizen's Arrest and Self-Defence Act 2012[146], the effect of which was to recast the relevant sections of the Criminal Code. Most important for our purposes is the new section 35, which basically allows a person in peaceable possession of property to use reasonable force against trespassers or those who threaten to steal or

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[140] Weisbord, Noah, 'Who's Afraid of the Lucky Moose? Canada's Dangerous Self-Defence Innovation' (2018) 64 *McGill LJ* 349.

[141] Weisbord, above n 140, 369.

[142] Contrary to the then s 279 of the Canadian Criminal Code.

[143] Lam, Anita and Cho, Lily, 'Under the Lucky Moose: Belatedness and Citizen's Arrest in Canada' (2015) 30 *Canadian Journal of Law and Society* 147.

[144] Weisbord, above n 140, 369.

[145] As in England and Wales following the Tony Martin case, this included the tabling of a number of Parliamentary Bills aimed at amending the legislation: Weisbord, above n 139, 370.

[146] Weisbord, above n 140, 372.

damage moveables. On the face of it this seems to be broadly in line with the law of England and Wales as stated above, but it has been argued that the effect of the rewording – in particular, the removal of the old requirement that the force used be 'necessary' – opens the door to the adoption of a broad castle doctrine in Canada.[147] However, such fears would seem to be unfounded, given the ongoing reasonableness requirement, and the insistence by courts in the past that it cannot be reasonable to kill another merely to prevent a crime which is directed only against property.[148]

So far the issue has not been directly addressed in the courts. In *Cormier*[149] it was said by the New Brunswick Court of Appeal that the defendant, who had been under siege from the victim in his father's apartment, did not forfeit his rights under section 35 merely because the fatal injuries were inflicted outside, but in the end the court concluded that here what had begun as a case of defence of property had ended up as defence of the person.[150] Likewise in *Stanley*,[151] a case with racial overtones involving the shooting of a First Nation trespasser by a white farmer, the issue of defence of property was not put to the jury, it being decided that the shooting was an accident. All in all, whilst commentators may be right to be concerned that the potential expansiveness of the Lucky Moose reforms *as a whole*,[152] there is nothing so far to substantiate any need for concern in relation to the defence of property as such.

(c) Extreme Emotional Disturbance

[147] Roach, Kent, 'A Preliminary Assessment of the New Self-Defence and Defence of Property Provisions' (2012) 16 *Canadian Criminal Law Review* 275; Weisbord, above n 140, 375.

[148] *R v Gee* [1982] 2 SCR 286 at 302; *R v Clark* [1983] 5 CCC (3d) 264 at 271; *R v Gunning* 2005 SCC 27 at para 26; *Szczerbaniwicz* 2010 SCC 15 at para 23; Weisbord, above n 140 at 375.

[149] 2017 NBCA 10 at para 62.

[150] *Cormier*, above n 149, para 63.

[151] (2018) Battleford Crim 40/17 at 22 (SKQB); Weisbord, above n 140 at 391. See also *Khill* [2020] ONCA 151 (ultimately decided on the basis of self-defence).

[152] Weisbord, above n 140 at 397.

One approach very relevant to cases of this sort is to be found in paragraph 210 of the American Model Penal Code,[153] which reduces murder to manslaughter in cases where the killing is committed under the influence of 'extreme mental or emotional disturbance for which there is reasonable explanation or excuse'.[154] It adds that the reasonableness of such explanation or excuse 'shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be'.[155] This is essentially an expanded version of the defence of provocation, and has been adopted by a number of states, including Hawaii,[156] Kentucky,[157] New York,[158] and Oregon.[159] In so far as it provides an excuse based specifically on emotional factors, it would seem to be very suitable for our purposes here. As can be seen, it is a defence of general import rather than one designed for the defence of the home. A far more serious objection however, especially in the present context, relates to the normative criterion of reasonableness and the highly subjective test based on the viewpoint of a person in the actor's situation. Many of these cases have racial overtones,[160] and a purely subjective test as to what is a reasonable reaction runs the risk of allowing the objective standard to be infected by a defendant's morally repugnant beliefs or values.[161] In so far as the law provides a defence of this sort, it must surely be on the basis of what Victoria Nourse describes as a *warranted* excuse;[162] that is to say, a situation in which the defendant's emotional reactions can be seen as justified,

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[153] Drogin, Eric Y and Marin, Ryan, 'Extreme Emotional Disturbance (EED), Heat of Passion and Provocation: a Jurisprudent Science Perspective' (2008) 36 *Journal of Psychiatry and Law* 133.

[154] Model Penal Code, §210.3(1)(b).

[155] Above, n 154.

[156] Haw Rev Stat §707.702(2); Hall, Harold, Mee, Caroline and Bresciani, Peter 'Extreme Mental or Emotional Disturbance' (2000) 23 *University of Hawaii Law Review* 431.

[157] KRS §507.030(1)(b); Drogin, Eric Y, To the Brink of Insanity: "Extreme Emotional Disturbance" in Kentucky Law' (1999) 26 *Northern Kentucky Law Review* 99.

[158] NY Penal §125.20(2); Goldstein, Robert Lloyd, 'New York's "Extreme Emotional Disturbance" Defense' in *Criminal Court Consultation* (Springer, Boston, 1989) 119.

[159] OR Rev St §163.118(1)(b).

[160] See Weisbord, above n 140.

[161] In this connection McAuley and McCutcheon give the example of the white supremacist who genuinely believes that it is a grave insult for a black person to speak to a white one without being spoken to first: McAuley, Finbarr and McCutcheon, Paul, *Criminal Liability: a Grammar* (Round Hall Press, Dublin, 2000), 877.

[162] Nourse, Victoria, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1996) 106 *Yale LJ* 1331, 1338 (emphasis supplied).

even if her or his acts are not. To allow otherwise would be, as Nourse says, to allow the defendant 'not only to serve as judge and executioner, but as legislator'.[163] In effect, the defendant would be allowed to 'stand above the victim and enforce at penalty of death a set of emotional judgements that are, at best, partial'.[164]

(d) Excessive Defence Doctrine

A rather different approach is adopted in the Irish 'excessive defence' doctrine which, while not directly concerned with cases of this sort, certainly has considerable relevance. The doctrine was set out by the Irish Supreme Court in the case of *Dwyer* in 1972,[165] and says that a person subject to a 'violent and felonious' attack who uses lethal force which is more than is necessary, but no more than he honestly believes to be necessary in the circumstances, is not entitled to an acquittal, but should be found guilty of manslaughter only.[166] This doctrine has been confirmed in subsequent cases,[167] and in its 2009 report on defences the Irish Law Reform Commission recommended that it be retained.[168]

To what extent would this approach be an advance on the present English law in cases of the sort we have been describing? Clearly there is a considerable overlap between this doctrine and the rule in *Beckford*,[169] and in so far as it provides for a manslaughter conviction in cases where the force used was proportionate on the basis of the situation as honestly perceived to exist by the defendant, it would be less generous than the present

[163] Above, n 162.

[164] Above, n 162.

[165] *People (A-G) v Dwyer* [1972] IR 416; Doran, Sean, 'The Doctrine of Excessive Defence' (1985) 36 NILQ 147; Dwyer, 'Homicide and the Plea of Self-Defence' (1992) 2 ICLJ 73.

[166] The doctrine was borrowed from the decision of the High Court of Australia in *Howe* (1958) 100 CLR 448, but was subsequently doubted by Mason CJ in *Zekevic v DPP* (1987) 162 CLR 645: Stannard, John, 'Shooting to Kill and the Manslaughter Option' (1992) 2 ICLJ 19.

[167] *O'Carroll* [2004] IECCA16, [2004] 3 IR 521; *McNally* [2006] IECCA 128, [2007 4 IR 145; *Barnes* [2006] IECCA 165, [2007] 3 IR 130.

[168] *Defences in Criminal Law* (LRC 95-2009), para 2.216.

[169] Above at nn 83-90.

rule.[170] However, it might very well be an appropriate response in cases such as that of *Ray* discussed above,[171] where the use of lethal force was found to be disproportionate to the threat posed by the intruder. After all, whereas there is a good case why occupiers in a case of this sort should be denied a complete acquittal, the argument for labelling them as murderers is much less strong. Once again, however, the disadvantage is that it only applies to cases of murder; where the intruder survives, allowance can only be made by way of mitigation.

4. CONCLUSION

With this in mind, we can return to the focus of the present article, which was to examine and analyse the emotional pressures involved in home invasion cases of this sort, and to consider to what extent the criminal law should make allowance for them, as it does already in relation to such matters as duress and provocation. In this connection we have addressed two matters, the first being the emotional factors themselves and the second the law's response.

As far as the first of these is concerned, we have seen from the literature that the sort of reaction we have been considering to cases of home invasion is as understandable from a psychological point of view as it is in cases of provocation and duress. Certainly the emotions concerned do not cause the householder to lose her or his self-control altogether, even as defined in the context of the 'loss of control' defence under the Coroners and Justice Act, but they certainly excuse his or her actions to some extent. For this reason it would seem clear that the law should make some allowance here, if only, as is sometimes said, out of concession to human frailty.

As to what this should be, the answer is not so obvious. There can be no universally acceptable approach for the law in this situation, caught as it is between the demands

[170] Stannard, John, 'Excessive Defence in Northern Ireland' (1992) 43 NILQ 147.

[171] At n 13.

generated by the sanctity of the home and the constraints of proportionality, to say nothing of basic human rights standards. However, in the light of the foregoing discussion, a number of suggestions can be made.

First of all, there is little to be said for an approach which tries to dodge the issue by discussing it in terms of a threat to life; no doubt there are some cases where such a threat can be perceived, but this is by no means true of all. Second, it is no longer satisfactory, if ever it was, to draw a bright line between an intruder who seeks to dispossess the occupier and one who does not; the emotional pressures are no less significant in the latter case, and there is no good reason why rights of occupancy should be privileged over other property rights in this regard. Thirdly, in a legal system which privileges the right to life, any defence available to the occupier in a situation of this sort would surely better be couched in terms of excuse rather than justification.

In cases where the charge is murder, one obvious approach as we have argued is to allow for a manslaughter conviction in cases not caught by the existing law of private defence; to a certain extent, as we have seen, this may already be possible under the loss of control defence, but this could very well be supplemented by something akin to the Irish doctrine of excessive defence. A defence of extreme emotional disturbance would also fit the bill, but only subject to a much stronger objective criterion based on Nourse's concept of a 'warranted excuse'.[172]

In other cases the answer is not so clear. To some extent these fall outside the focus of the present paper, but the question cannot be dodged so easily. Obviously the diminished culpability of the householder in such cases can still be taken into account at the sentencing stage, but this does not have the same advantage as the provision of a mitigating defence in terms of fair labelling. In this connection it is interesting to see that some United States' jurisdictions allow a defence of extreme emotional disturbance in cases of non-fatal force,[173]

[172] Above, n 162.

[173] As in the case of *Kentucky*: see KRS §508.040.

though of course the idea of a mitigating defence in cases other than homicide is one unknown to English law.[174]

All in all, what we need here is an approach tailored to reflect the emotional dynamics of the cases we have been describing. As Nourse says, 'we punish those who stand in emotional judgement not because of their character or their self control, but because they have replaced the state as the normative arbiter of violence, and when we partially excuse, we do so because the law sees reason in the defendant's emotion, reason that reflects the law's own sense of retribution'.[175] Or, in other words, we may excuse the emotional reaction, but we do not excuse the conduct to which it gives rise. The Englishman's home may indeed be his castle, but there must be limits to what even a king or queen of the castle can do.

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[174] *R v Cunningham* [1959] 2 QB 288.

[175] Above, n 162.