Dismantling the Purported Right to Kill in Defence of Property

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Two of the most fundamental western legal principles are the right to life and the right to own property. But what happens when life and property collide? Such a possibility exists within the realm of criminal law where a person may arguably be acquitted for killing in defence of property. Unlike life, property has never been a fundamental right,[1] but a mere privilege[2] based upon the power to exclude others. Killing in defence of property, without something more,[3] can therefore never be justified. The right to life is now recognised internationally[4] as a fundamental human right, that is, a basic right available to *all* human beings.[5] Property is not, nor has it ever been, such a universal right. The common law has developed "without explicit reference to the primacy of the right to life".[6] However, the sanctity of human life, from which the right to life may be said to flow, predates the common law itself.

This article examines two main sources to show that, wherever there is conflict between the right to life and the right to property, the right to life must prevail. The first such source is the historical, legal and social

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1 The word 'fundamental' is defined in the Macquarie Dictionary to mean 'essential; primary; original'. A 'right' is defined as 'a just claim or title, whether legal, prescriptive or moral': Delbridge, A et al (eds), *The Macquarie Dictionary* (3rd Ed), Macquarie Library, NSW, 1998, pp 859, 1830.

2 A 'privilege' is defined as 'a prerogative, advantage, or opportunity enjoyed by anyone in a favoured position (as distinct from a right)': Delbridge et al, note 1, p 1701.

3 'without something more' — meaning without self-defence, crime prevention or offender apprehension.

4 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life': *International Covenant on Civil and Political Rights* (New York, 19 December 1966; Aust TS 1980 No 23; 999 TINTS 171), Article 6(1).

5 "Civil rights and human rights", *Halsburys Laws of Australia,* CD-ROM Butterworths Para [80-10] June 2000.

6 Ashworth, A, *Principles of Criminal Law* (3rd Ed), Oxford University Press, UK, 1999, p 145. According to Michael Kirby J, the incorporation of human rights considerations within judicial decision making is a 'completely novel notion' – one 'that would have been unimaginable in [his] law school days': Kirby J, M, "Judicial Stress" (1995) 13(2) *Australian Bar Review.*

evolution of what are now called 'fundamental rights'. This will be traced from the time of the ancient Israelites, through to Medieval Europe, feudalism, liberalism, industrialisation and the European invasion of Australia. It will be shown that throughout Western history, contrary to the claims of liberalism, 'property' ownership has been merely a privilege – a claim forged by might, not owed by right. The second source favouring the prevalence of the right to life over the right to property is to be found in the current common law. In particular, an analysis of the 1957 decision of the Victorian Supreme Court in *R v McKay*[7], which reveals that, while the law *may* permit killing to prevent a serious offence, apprehend an offender or defend a person, it does not permit killing for the sole purpose of defending property. Evidence will be presented to show that this ruling in *McKay* is consistent with current public, political and judicial opinion placing greater value on life than property. The same is instanced in parliamentary debates justifying the abolition of the death penalty and several recent judicial pronouncements upholding the sanctity of life.

The final part of this article will consider the apparent confusion in New South Wales concerning the level of force that may be used in reasonable defence of property, drawing comparisons with other jurisdictions. It will be proposed that the solution is for the plea of excessive defence to be reintroduced for situations where an accused kills in honest but unreasonable defence of property.

Early Evolution of the Purported Right to Kill in Defence of Property

Early rights in ancient religions

While Christianity is no longer a part of the law,[8] "the common law had its roots in Christianity"[9] and "[t]he links between law and religion are both strong and ancient".[10] At common law, Judeo-Christianity still underpins the sanctity of human life:

> "Those who adhere to religious faiths which believe in the sanctity of all God's creation and in particular that human life

[7] [1957] VR 560.

[8] Lord Radcliffe, cited by Wootton, in Bates, A et al (Eds), *The System of Criminal Law: Cases and Materials: New South Wales, Victoria, South Australia,* Butterworths, Sydney, 1979, p 19.

[9] Lord Hodson, cited in Bates, note 8, p 19.

[10] Wootton, in Bates, note 8.

> was created in the image of God himself will have no difficulty with the concept of the intrinsic value of human life."[11]

Yet, from the earliest days of the Old Testament, sanctity of life did not extend to all human beings. Israelites believed themselves alone to be God's chosen people,[12] and the lives of women,[13] slaves[14] and non-Israelites[15] were considered inferior. However, unlawful killing among Israelites themselves was considered so serious a crime that only punishment of death would suffice.[16]

Arguably, the earliest reference to a possible right to kill in defence of property has been attributed to Moses:

> "If a thief is caught breaking in and is struck so that he dies, the defender is not guilty of bloodshed, but if it happens after sunrise, he is guilty of bloodshed."[17]

This appears to be the only occasion within the book of *Exodus* where the use of deadly force is justified in response to the commission of a property crime.[18] It may have been the nature of the perceived threat that distinguished the crime of breaking in at night[19] from other

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[11] *Airedale NHS Trust v Bland* [1993] AC 789 at 826 per Hoffman LJ. In *Wake v NT of Australia* (1996) *5* NTLR 170, Angel J, after citing Hoffman LJ's judgment with approval, rejected the existence of a 'right to life', holding it to be essentially meaningless in law.

[12] *Exodus* 6:7.

[13] *Exodus* 21:7 (Israelite men could sell their daughters as servants – unlike males, female servants could never go free).

[14] *Exodus* 21:20 (no punishment for beating a slave).

[15] *Exodus* 23:23 (God promises to "wipe out" the Amorites, Hitites and several other inferior races so that the Israelites can take possession of their lands).

[16] *Exodus* 21:12-14, 23.

[17] *Exodus* 22:2-3. It should be noted from the outset that there are obvious problems with translating such ancient documents. According to one possible interpretation of the above passage, for example, the text refers to a person burrowing under a sheep fold, rather than breaking into a house: Jacobs, J, "Privileges for the use of deadly force against a residence-intruder: A comparison of the Jewish law and the United States common law" (1990) 63 *Temple Law Review* 31, pp 34-35, fns 25 & 28.

[18] In all other cases the prescribed remedy is restitution: *Exodus 22: 1, 3-14*. Although, if the thief was unable to pay restitution, he/she would be sold into slavery to repay the debt: *Exodus 22:3.*

[19] Ancient Roman law made a similar distinction between day and night thieves: Stuart, D, "Killing in Defence of Property" (1967) 84 *South African Law Journal* 123.

property offences.[20] While the actual threat (that intended by the deceased) may have been merely to property, the perceived threat (in the mind of the startled occupant) was predominantly a threat to life.

Maimonides[21] explained that an occupant could not kill an intruder if the occupant knew that the intruder intended only to commit a property crime. If the occupant did not know the intruder's intention, the intruder was deemed to be a 'rodef' (a 'life-threatening pursuer') and could, therefore, be killed.[22] However, once a thief had left the premises, he or she could not be killed.[23] In other words, once the actual threat had passed or the threat was merely to property, killing ceased to be justifiable under Jewish law.

Having adopted the Jewish law,[24] the Christians were constrained by the Sixth Commandment, which over time, was incorrectly translated to mean 'Thou shalt not kill'. A more accurate translation — 'You shall not murder'[25] – illuminates the likely understanding of the early Christians and helps to explain how Christians, for hundreds of years, found no Biblical impediment to killing, provided it was not murder.[26]

The right to use force in defence of property certainly existed at the time of Jesus of Nazareth, for he is attributed as having said:

> "When a strong man, fully armed, guards his own house, his possessions are safe. But when someone stronger attacks and

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[20] This interpretation is disputed by other ancient Jewish authorities. The *Talmud,* for example, interprets the text to mean 'if the sun be risen upon him' rather than 'if it happened after sunrise'. The *Talmud* further explains that this has been interpreted by Rabbis to mean either 'if it is as clear to you as is the sun that the thief has no peaceful intentions toward you, kill him', or, conversely, 'if it is as clear to you as is the sun that the thief has only peaceful intentions towards you, don't kill him': *Babylonian Talmud,* in Jacobs, note 17, p 35. However interpreted, an occupant in daylight hours was likely to be fully awake, in a position to more accurately perceive the nature and gravity of the threat, and able to use the element of surprise to their own advantage in planning and carrying out appropriate defensive action.

[21] 1135-1204 CE. Note: Throughout this essay, the use of the letters 'CE' indicates 'Common Era' – a more appropriate secular term correlating with the Christian 'AD' ('*Anno Domini*' – 'year of our Lord'). Likewise, I will be using the term BCE ('Before Common Era') rather than the Christian 'BC' ('Before Christ'): Delbridge et al, note 1, pp 21, 180, 354.

[22] Killed, not only by the occupant, but by any other person.

[23] Due to the fact that once they had gone they ceased to resemble *rodefs:* Maimomdes, in Jacobs, note 17, p 37.

[24] *Galatians* 3:15-18; 5:3; *John* 4:22.

[25] *Exodus* 20:13.

[26] For example, the mass murder of witches ('wise women'): Walker, B, *The Women's Encyclopedia of Myths and Secrets,* Castle Books, NJ, USA, 1996, pp 1076-1090.

> overpowers him, he takes away the armour in which the man trusted and divides up the spoils."[27]

Apparently, the occupant of a house could legitimately resort to the use of deadly weapons to defend his property. It appears also that, at the time of Jesus, an intruder obtained the *right* to the property of another if he simply had the *might* to take possession of it.

Feudalism and Medieval Rights

From the 4th Century CE, persistent attacks upon a thinly spread Roman Empire led to the people of England being without adequate state protection.[28] It therefore became the responsibility of individual landowners to protect themselves as best as they could against "waves of invaders who swept over the ruins of the old Empire".[29] Some landowners were better able to defend themselves than others and arrangements came to be made between neighbours whereby, in return for protection, a weaker neighbour would surrender ownership of his land to the stronger.[30] The weaker neighbour remained in occupation of the land merely as a 'vassal' and 'tenant', while the stronger neighbour became the 'lord' and 'owner' of all the land.[31]

By the 8th Century CE, European trade had ground to a halt and the traditional means of payment for military service - gold, silver and coins —were non-existent. European monarchs began dividing up vast tracts of church land in lieu of payment for vassals who were willing to unite against invading forces.[32] This practice of granting land in return for battle came to be known as 'knight's service'.[33] The knights

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[27] *Luke* 11:21-22.

[28] Butt, P, *Land Law* (2nd ` Ed), Law Book Company, Sydney, 1988, p 36.

[29] Butt, note 28, p 36.

[30] This was done by way of a ceremony known as 'homage', in which the weaker man would kneel and pledge allegiance to the stronger as 'his man' for life: Butt, note 28, pp 36-37; Millard, A et al, *The Law of Real Property in New South Wales* (5th Ed), Law Book Company, Sydney, 1939, p 19.

[31] Butt, note 28, pp 36-37.

[32] For example, Martel, grandfather of Charlemagne and ruler of the Frankish kingdom: Butt, note 28, p 37.

[33] Butt, note 28, p 37; Lawson, F & Rudden, B, *The Law of Property* (2nd Ed), Clarendon Press, Oxford, 1982, p 80.

would sub-let their newly acquired 'freehold'[34] land to their vassals,[35] who, in turn, would sub-let to their own vassals.[36] This process, later known as 'feudalism', spread throughout England following the Norman Conquest.[37] Saxon kings who resisted William's rule lost their land, while those who agreed to offer knight's service to the new King remained as William's tenants. Thus, in both England and Europe, the right to land was a right forged in battle.[38]

Land ownership[39] was not a fundamental' right, for most Feudal folk were simple 'villeins' whose lot in life was to till the soil for their lord. In return for military or other service, some villeins were allocated small strips of land within communal farms in which to grow crops. Most villeins, however, owned nothing at all, and were themselves the property of their lord, along with their chattels and everything else in the village.[40] Therefore, any action taken by a villein in defence of property may more accurately be described as having been in 'defence of the lord's property'.[41] This may have shifted the defensive action of a feudal peasant into the realm of 'public', rather than 'private' defence.[42]

Over time, most of the labour services demanded of villeins were replaced with fixed monetary fees regulated by customary rules and enforceable in the 'customary court' of the manorial lord.[43] Villeins who held free strips of land in the common field could also rely on the manorial court to protect their interests.[44] By contrast, the 'royal

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[34] 'Freehold' — derived from 'free holding' *(liberum tenementum):* Millard, note 30, p 17.

[35] Often the knight would grant land to his vassals in return for their military service. By the 15th Century, every knight was expected to provide the monarch with a fixed number of armed horsemen for 40 days service each year: Butt, note 28, p 45.

[36] Lawson & Rudden, note 33, p 80.

[37] Following William's victory in the Battle of Hastings, 1066 CE: Butt, note 28, pp 37-39; Millard, note 30, pp 12-13.

[38] Millard, note 30, pp 13, 18.

[39] Strictly speaking, only the king 'owned' land - the knights merely 'held land of the king'. However, the actual level of control over land enjoyed by the knights / lords was often at least that of a landowner: Millard, note 30, p 17.

[40] Butt, note 28, pp 40-41.

[41] Lawson & Rudden, note 33, p 80.

[42] Something more akin to crime prevention than property defence *per se.*

[43] 'Customary law' evolved to regulate the internal workings of the manor. At the same time the King was developing his own royal courts to administer feudal law across the entire country: Butt, note 28, p 42.

[44] Butt, note 28, p 41.

court' of the King refused to recognise the land interests of anyone but lords. Thus, the common law[45] from its earliest days, existed solely to protect the property of the rich and powerful few.[46]

Originally, a claim for the recovery of land was instituted by way of a writ of *praecipe in capite* and settled by way of 'trial by battle'. Thus, a man's 'right' to possession was measured in law by his capacity not only to repel, but to violently attack and even kill an intruder.[47] 'Trial by battle' certainly suggests that, in the earliest days of the common law, killing in defence of property may have been justified.[48] Eventually 'trial by battle' made way for 'possessory assizes', identifying a right of possession independent of the right of ownership. Wrongdoers were ordered to pay restitution and surrender possession to the dispossessed party. Thus, as Peter Butt states, "the dispossessed tenant was provided with a remedy which, because of its speed, *took away the sole legitimate excuse for the violence of self-help*".[49]

In England, property was a privilege reserved only for 'good' Christian people. The Medieval common law created certain category of offences known as 'felonies', for which the penalty was not only death,[50] but forfeiture of property.[51] At the same time, the Church

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[45] The common law evolved from the law created by the royal feudal courts: Butt, note 28, p 42.

[46] For example, the earliest and most important action at common law – 'trespass' – was not available to those who did not possess freehold land: Gray, K & Symes, P, *Real Property and Real People. Principles of Land Law,* Butterworths, London, 198l, p 6; Lawson & Rudden, note 33, p 149; Butt, note 28, p 42.

[47] Like all other 'royal remedies', trial by battle was only available to lords: Butt, note 28, pp 56-57.

[48] It should be noted, however, that such killing was not in the nature of 'self-help', where an occupant takes the law into his or her own hands, but was a recognised remedy provided by the law itself.

[49] Butt, note 28, p 59 (my emphasis). Yet, as recently as 1924, the common law has held that 'in defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it…' : *R v Hussey* (1924) 17 Cr App R 160. Although this case is widely regarded as being out of line, not only with current trends, but with 'older and more humane authorities': Lanham, D, "Defence of Property in the Criminal Law" (1966) *CrimLR* 368, p 372. *Hussey* is discussed further below.

[50] 'The punishment for felony was always death till the reign of George IV': *R v Morris* [1951] 1 KB 394 at 395-396; S *v The Queen* (1989) 45 ACrimR 221at 234 per Gaudron & McHugh JJ.

[51] *Escheat propter delictum tenentis:* whereby the freehold property of the convicted felon reverted immediately to his superior lord or to the Crown: Butt, note 28, p 48.

sought to justify its own massive land holdings[52] by declaring it 'heresy' for a person to claim that Jesus and his apostles had owned no property.[53] Such 'heretics'[54] were irrevocably destined to burn in hell[55]and their continued existence placed Christian souls at risk. The imprisonment, torture and execution of heretics was justified even to the extent that their own families were expected to pay for such 'services'. A heretic's property could be confiscated and sold even before his trial concluded.[56] Furthermore, even within the ranks of Christianity itself, each human life was not afforded the same measure of sanctity.[57] For example, only those Christians possessing a "*pre-eminent* sanctity of life"[58] were considered worthy of being buried in cathedral vaults upon their death. In addition, women were expected to keep silent and to be subservient to men at all times[59] and slavery was even encouraged by the apostle Paul.[60]

Through the course of the Middle Ages, the traditional obligations owed to the lords were gradually substituted for regular monetary payments.[61] Subinfeudation was extinguished[62] so that freehold land

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52 There was an unprecedented cathedral building frenzy in the 13th Century: Walker, note 26, pp 437-439. The Church was also able to obtain large areas of land from the King and knights for literally no more than a prayer. Religious blessings offered in return for land were called 'Frankalmoin': Butt, note 28, p 46.

53 Through a Papal bill issued in 1325 CE known as *'Cum inter nonnullos':* Walker, note 26, pp 439- 440.

54 The word 'heretic' is likely to have been derived from the name of the Mother of the Greek gods – *Hera.* The cult of Hera was strongly entrenched across pagan Europe by the time of the arrival of Christianity, providing tough competition for the new faith. Indeed, the legend of Hera's son – *Heracles* – was remarkably similar to that of Jesus: both were sons of a god, born of virgins at the time of the winter solstice (Christmas), killed at the time of the spring equinox (Easter), rising from the dead to return to their spiritual fathers as saviours of humankind: Walker, note 26, pp 392-393.

55 '[A]nyone who blasphemes against the Holy Spirit will not be forgiven': *Luke* 12:10.

56 Walker, note 26, pp 439-440.

57 The qualities of 'sanctity' are "holiness, saintliness, or godliness": Delbridge, note 1, p 1882.

58 *Centennial Park Cemetery Trust Inc v SA Planning Commission and the Government of SA* [1991] SASC 202 at 7 (my emphasis).

59 *Ephesians* 5: 22-24; *1 Corinthians* 14:34-35.

60 *Ephesians* 6:5-9.

61 Knight's service was replaced with monetary tax as early as the 12th Century, however, it was not officially abandoned until the passing of the *Tenures Abolition Act* of 1660: Butt, note 28, p 51.

62 By the statute *Quia Emptores* in 1290 CE. This statute was repealed in NSW and re-enacted in a simpler form by the *Imperial Acts Application Act 1969* (NSW), s 36.

was alienable without the requirement of services to former owners. Some agriculturalists were, thereby, able to obtain free tenure,[63] enclosing the common fields as their own and replacing villeins with hired labourers. At the same time, chattels became personal 'property' — no longer the property of the lord.[64]

Liberalism and the rise of property

By the 16th Century, the fees payable to the lord had dwindled away to nothing and agricultural tenures were eventually held directly of the monarch.[65] Possessory assizes gave way to 'writs of entry', allowing for the settling of land disputes, not simply by reference to immediate possession ('seisin'), but by allowing the court to determine, on the evidence, which of the parties had the best title to the land. The party in possession was held to have a valid title 'against all the world' unless it could be shown that another party had a stronger prior claim.[66] Thus, the ownership of property began to resemble a legally enforceable right, making the possibility of unlawful eviction less likely.

Tenants moved beyond the manorial farms and away from the direct control of the lord.[67] Yet, as the land they tilled no longer belonged to the lord, the new owners could no longer rely on the lord to act in defence of their property. It became necessary for the common law to provide protection where the manorial law was no longer able. In the 17th Century, the common law ceased to focus exclusively on the great manor-houses of the lords, widening its conception of the 'castle' to supposedly include the humblest of homes:[68] "[T]he house of every one is to him a castle and fortress, as well as for his defence against injury and violence, as for his repose".[69] By the end of the 17th Century, new trade links had been established and new fortunes were

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[63] Known as 'socage tenure': Butt, note 28, p 46.

[64] Lawson & Rudden, note 33, p 95. 'Property' means 'the condition of being "proper" to (or belonging to) a particular person'. The earliest use of the word dates to c 1400: 'With his own propre Swerd he was slayn': Oxford Dictionary, cited in Gray & Symes, note 46, p 7.

[65] Butt, note 28, pp 50-51.

[66] Butt, note 28, pp 60-61.

[67] Butt, note 28, pp 50-51.

[68] *Semayne's Case* (1604)5 Co Rep 91; 77 ER 194; *Bowle's Case* (1616) 11 Co Rep 82; Lanham, D, "Self-Defence, Prevention of Crime, Arrest and the Duty to Retreat" (1979) 3 *Crim LJ* 188, p 190.

[69] *Semayne's Case* , note 68, 77 ER 194 at 195.

being made. A new middle-class had emerged seeking to challenge feudal privilege, in particular, hereditary monopoly of the land. John Locke invented an entirely new concept: property ownership as a 'natural right'.[70]

Yet, if private property had become a 'right', it would hardly be described today as having been a 'natural' right, for the right did not extend to women, children or slaves. Indeed, slaves were among the 'private property' to which all men were entitled — Locke himself having made a comfortable living from the African slave trade.[71] Nevertheless, Locke's "life, liberty and property" formed a new holy trinity of natural rights — a worthy slogan for bourgeois uprisings that culminated in the French and American Revolutions.[72] Centuries of hereditary property domination were thus brought to an end in both countries.[73]

A century earlier, England's Revolution of 1688 had not provided freedom for all, but freedom only for men of property. An emerging middle-class gained a powerful voice in parliament, while the property interests of the hereditary lords survived relatively unscathed.[74] Locke[75] subsequently declared that "[g]overnment has no other end but the preservation of private property",[76] and, by the 18th Century,[77]

[70] 'Before 1690 no one understood that a man had a natural right to property created by his labour; after 1690 the idea came to be an axiom of social science... [It was] the year when the middle class rose to power: the year in which their experience, dressed up in philosophical language by John Locke, was presented to the world as the eternal truth of things': Schlatter, in Neave, M, Rossiter, C & Stone, M, *Sackville & Neave: Property Law: Cases and Materials* (6th Ed), Butterworths, Sydney, 1999, p 13.

[71] Besant, C, "From Forest to Field: A Brief History of Environmental Law" (1991) 16 *Legal Service Bulletin* 160, p 163.

[72] Flew, A et al, *A Dictionary of Philosophy*, Pan Books, London, 1984, p 207.

[73] Feudalism was abolished in France by decree on August 11, 1789: "The French Revolution" Hanover College, 7/3/1999 <http://historv.hanover.edu/texts/abolfeud.html> (6/06/00); Avalon Project at Yale Law School, "Declaration of Independence: July 4, 1776" 8/5/2000 <http://www.yale.edu./lawweb/avalon/declare.htm> (6 June 2000).

[74] Columbia University, "English Civil War" <http://www.encyclopedia.com/articles/04124.html> (6 June 2000)

[75] An apologist for the English Revolution.

[76] Locke, cited in Hay, in Bates, note 8, p 645.

[77] Lockean philosophy promoting property ownership as the 'natural' right of those whose sweat mixed with the land was slow to be accepted in England. At the time Locke was writing, the powerful few preferred the system of royal dominion, whereby the property interests of the wealthy were maintained through the sweat of the poor: Schlatter, in Neave, Rossiter & Stone, note 70, pp 13-14.

propertied Englishmen[78] considered Locke's claim to be self-evident.[79]

Industrialisation

By 1800, the British parliament had effectively legislated to give ownership of most of the remaining common land to the new rich — mainly industrialists, merchants and gentlemen of leisure.[80] This carving up of common farmland led to the wholesale redirection of poor villagers' foodstuffs to newly created national and international markets. Riots erupted across England in 1766 and 1767, culminating with the rioters tearing down wholesalers' mills. In response to the crisis, parliament passed legislation, not to ensure the poor were fed, but to protect the wholesalers from suffering any further damage to property. From 1769, the so-called 'food rioters' faced the prospect of the gallows.[81]

Without food, thousands of commoners were forced to leave traditional farms and villages in the hope of finding employment in the growing industrial centres.[82] With urbanisation came unemployment and poverty. Hunger and homelessness inevitably brought crime, yet lawmakers still failed to address the blatant inequality between those with property and those without. Instead, the propertied class attributed an ever-expanding list of capital offences to "the degeneracy of human nature"[83] and "the wicked inventions, and licentious practices of modern times".[84] From approximately 50 capital crimes in 1688, there were more than 200 by 1820, with almost all of these being property offences.[85]

However, the real driving force behind Britain's death penalty frenzy was not the degeneracy of the poor, but the preservation of the "commerce, opulence and luxury" of the rich.[86] According to Hay:

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78 *A fortiori* those *without* property.

79 Hay, in Bates, note 8, p 645.

80 Hay, in Bates, note 8, p 646.

81 Hay, in Bates, note 8, p 646.

82 Schlatter, in Neave, Rossiter & Stone, note 70, p 14.

83 Lord Chancellor Hardwick, cited in Hay, in Bates, note 8, p 644.

84 Christian J, cited in Hay, in Bates, note 8, p 644.

85 Hay, in Bates, note 8, p 645.

86 *Hawkin's Pleas of the Crown* (1788) cited in Hay, in Bates, note 8, p 646; Rush, P & Yeo, S, *Criminal Law Sourcebook,* Butterworths, Sydney, 2000, p 45.

> "[T]he gentry and merchants and peers who sat in Parliament in the eighteen century set new standards of legislative industry, as they passed act after act to keep the capital sanction up to date, to protect every conceivable kind of property from theft or malicious damage".[87]

In addition, the introduction of promissory notes and negotiable paper led to new possibilities for fraud and forgery and, consequently, further capital legislation.[88] Judges sought "to expound the law of the propertied, and to execute their will",[89] and, in so doing, enforced "one of the bloodiest criminal codes in Europe".[90]

English law at the time appears to have allowed the right to property to prevail over the sanctity of life, or, at least, over the lives of the property-less poor.[91] The measure of a person's worth was equated to the property they owned. Subsequently, the lives of those without property were considered to be of little value.[92] For example, Blackstone[93] declared that "the execution of a needy decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours and his fortune".[94]

Britain's invasion of Australia — (white) might is right

At the end of the 18th Century, Britain adopted an 'out of sight, out of mind' approach to its inequality — sending its convicts as far away as possible: Australia. This not only satisfied the propertied classes by expelling those degenerate persons considered to be entirely responsible for crime,[95] it also provided a source of free convict labour

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[87] Hay, in Bates, note 8, p 647.

[88] Hay, in Bates, note 8, p 646.

[89] Hay, in Bates, note 8, p 644.

[90] Hay, in Bates, note 8, p 645.

[91] Hay, in Bates, note 8, p 645.

[92] Traditionally the law regarded a person without property as being in a state of civil 'death': Delbridge, note 1, p 556.

[93] Blackstone was a tremendous fan of private property, describing it as 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe': Blackstone, W, cited in Hay, in Bates, note 8, p645.

[94] Blackstone, cited in Hay, in Bates, note 8, p 645.

[95] Hay, in Bates, note 8, p 644.

for those wishing to exploit the new colony's resources. Yet, for Australia's indigenous peoples, this grand British scheme was to prove disastrous.

While 'possession' is meant to prove a claim enforceable against all the world,[96] the possessory rights of indigenous Australians[97] were 'extinguished' as soon as any Englishman exercised his 'right' to forcibly exclude them from their land.[98] Property may be implied, in part, from a demonstrated right to exclude,[99] yet the courts have said nothing of the right to property demonstrated by more than 26,000 Aboriginal warriors killed attempting to 'exclude' British intruders.[100] Apparently, the 'right' to exclude only existed if those attempting to exclude others had the necessary force (and colour) to do so. Once again,[101] 'might' was 'right'.[102]

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96 Butt, note 28, pp 60-61.

97 Captain Cook had been instructed *not* to take occupied land without the express permission of
the indigenous inhabitants: Elder, B, *Blood on the Wattle: Massacres and Maltreatment of Australian Aborigines since 1788,* National Book Distributors and Publishers, NSW, 1994, p 193. It would seem, then, that to the British Government, at least, the existence of prior occupants in a 'discovered' land amounted to some form of recognised interest in that land.

98 *Mabo v Queensland* (1992) 175 CLR 1 at 69 per Brennan J. The common law has failed to interpret Aboriginal land occupation as 'ownership', notwithstanding Aboriginal plaintiffs having expressed that fact in the plainest of English language. In *Milirrpum v Nabalco Pty Ltd and Commonwealth* (1971) 17 FLR 141, Blackburn J, at 268-273, interpreted terms such as 'our country', 'land of the Rirratjingu' and 'land belonging to Gumatj' as used by the plaintiffs to mean 'the land as being in a very close relationship to them'. If similar terms had been used by an Anglo-Australian plaintiff (eg. 'land belonging to Fred Jones') would a court have interpreted this as signifying anything less than ownership of the land?

99 'Property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate': *Milirrpum v Nabalco Pty Ltd and Commonwealth* (1971) 17 FLR 141, at 272 per Blackburn J. The imposition of such prerequisites implies that property is neither a natural nor a fundamental right.

100 Federal Opposition Leader, Kim Beazley, in Australian Broadcasting Corporation, *After Mabo: The Long and Difficult Road to Native Title,* ABC video, 1997.

101 As was the case at the time of Jesus and in Feudal England & Europe.

102 Lawson & Rudden, note 33, Introduction.

Aborigines were treated as intrusive pests[103] upon the land they had occupied for countless thousands of years.[104] Settlers believed that violent self-help was necessary to defend 'their' property from the threat of Aborigines[105] given the inadequacy of police in remote areas.[106] However, the lynch mob murder of indigenous men, women and children can never be justified under any guise of 'self-help'.[107] Moreover, white squatters were trespassers and any reasonable force used by Aboriginal inhabitants to remove them ought to have been lawfully justified.[108]

The above discussion demonstrates that throughout Western history property ownership has never been a fundamental right but merely a privilege reserved for the powerful. I have shown that there was, from Medieval times, a gradual evolution away from reliance upon violent self-help in settling land disputes towards court intervention and more peaceful, structured remedies - perhaps early evidence of the desire to place human life above property. Nevertheless, an emerging capitalist class in the 18th Century attempted to strategically manufacture property ownership as a 'fundamental right', despite 'property' not being available to slaves, women, children or indigenous peoples. Further, the glut of capital punishment offences for property crimes at the turn of the 19th Century suggests that, for a brief time, the right to property of the few may have gained supremacy over the right to life of the many. Yet, I have attempted to show that it is the quality of exclusivity in property ownership that sets it apart from 'life' and

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[103] 'They were nothing better than dogs, and... it was no more harm to shoot them than it would be to shoot a dog when he barked at you': Yate, Rev W (1835), cited in Elder, note 97, p 9.

[104] 'This vast country was to [the Aborigines] a common.., their ownership, their right, was nothing more than that of the Emu or the Kangaroo... The British people found a portion of the globe in a state of waste – they took possession of it; and they had a perfect right to do so, under the Divine authority, by which man was commanded to go forth and people, and till the land': Editorial, *The Herald,* 7 November 1838, cited in Harrison, B, *The Myall Creek massacre and its significance in the controversy over the Aborigines during Australia's early squatting period,* Australian Institute of Criminology, ACT, 1988, pp 46-47.

[105] For example, see H7H, "Taming the Niggers", in Reynolds, H, *Dispossession: Black Australians and White Invaders,* Allen & Unwin, St Leonards, 1989, pp 56-60.

[106] A similar argument for self help based on rural remoteness was perpetuated in the Supreme Court of Victoria as recently as 1983: *Shaw v Hackshaw* [1983] 2 VR 65 at 100-101 per McInerney J.

[107] See generally, Elder, note 97.

[108] 'At law a squatter is regarded as a trespasser and the true owner is entitled to recover possession from a trespasser without serving a notice to quit': *Nyul Nyul Aboriginal Corporation v Dann* (1996) 133 FLR 359 at 371 per Owen J.

belies any claim to property's purported status as a fundamental human right. Certainly, any right to use lethal force to repel intruders in defending one's home did not extend to indigenous Australians. Unlike 'life', the privilege of property throughout Western history appears to have always been contingent upon the physical or economic subjugation of others and in the next section I will examine the boundaries of property defence in order to demonstrate that 'life', not 'property', is the paramount human right.

More Recent Legal Developments on the Purported Right to Kill in Defence of Property

A critique of *R v McKay*

In relation to present day common law, the Victorian Supreme Court decision in *R v McKay*[109] is often cited for the supposed existence of the right to kill in defence of property.[110] Upon careful analysis, however, this was not really a case where the killing occurred in the defence of property. In *McKay*, the caretaker of a chicken farm shot dead a thief making off with three chickens. Prior to that fateful morning, the farm had been repeatedly targeted by chicken thieves and had suffered substantial financial loss as a result.[111]

The word 'defence' literally means "resistance against attack",[112] yet where was the 'attack' in McKay? The deceased was running away when the fatal shots were fired. Even if, with the farthest stretch of the bow, it is conceded that the relevant 'attack' was the stealing of three chickens, all of the elements of the offence of larceny had been made

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[109] [1957] VR 560.

[110] Yeo, S, *Unrestrained Killings and the Law: A Comparative Analysis of the Laws of Provocation and Excessive Self-Defence in India, England and Australia*, Oxford University Press, Oxford, 1998, p 142; "Defence of property", Halsbury's Laws of Australia, note 5, Para [130-3550]; Yeo, S, "Killing in Defence of Property Downunder" (2000) 150 New Law Journal 730, p 743.

[111] [1957] VR 560, at 569-570 per Smith J.

[112] Delbridge, note 1, p 566. *The Macquarie Dictionary* also defines 'defence' as 'protection', which, in turn, means 'preservation from injury or harm': Delbridge, note 1, pp 566, 1715. It is unlikely McKay fired his gun out of concern for the physical safety and well being of the three chickens themselves. Rather, he was attempting to 'protect' the farmer's proprietary interest in the chickens from the 'injury or harm' of larceny – an injury that had already been sustained by the farmer prior to the firing of the fatal shots (see below). Likewise, 'defence of property' is defined in the Butterworths Concise Legal Dictionary as '[t]he use of reasonable force to protect one's *possession* of land or goods…': Nygh, P et al (eds), *Butterworths Concise Australian Legal Dictionary*, Butterworths, Sydney, 1997, p 110. Yet, in *McKay*, the three chickens were no longer in the 'possession' of the accused at the time of the shooting.

out prior to the shooting.[113] The moment the thief laid his hands upon the chickens with the requisite intent[114] and began to move them away,[115] the larceny was complete.[116] Perhaps, if McKay had been waiting in the hen house and fired the fatal shot as the thief broke in, this would have constituted a 'resistance to attack' and, thus, 'defence' of property. However, on the established facts of this case, it seems unlikely that *McKay* could be construed as any sort of authority for establishing a right to kill in defence of property. Moreover, as the common law disallows the shooting of chicken thieving dogs,[117] it would be a strange thing, indeed, if it justified the shooting of a chicken thieving human!

To the contrary, the trial judge in *McKay* provided the following direction to the jury:

> "A man is entitled to use such force as is reasonable in the circumstances to prevent the theft of his property, but *he is not permitted under the law to take the life of a thief* – to do so when the thief has not shown *violence* or an intention to use violence. The owner of a property, or the occupier of a property, is entitled to require a trespasser to leave the property, but he is not entitled to kill the trespasser upon his property".[118]

The trial judge continued: "[H]e is not justified, *merely for the protection of his property*, in killing or inflicting grievous bodily harm or substantial physical injury upon the person who interferes or seeks to interfere with his property".[119]

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[113] cf *Territory v Drennan* (1868) 1 Mont 41, where it was held that an assault cannot be justified in defence of property where the injury to property has already taken place and cannot be prevented.

[114] *R v Matthews* (1950) 34 Cr App R 55.

[115] *Wallis v Lane* [1964] VR 293.

[116] *Ilich v R* (1986) 162 CLR 110. This is not to suggest that the accused has no recourse once the offence against property is complete - for example, the accused may do whatever is reasonably necessary in order to apprehend an offender – but such action is *not* 'defence' of property.

[117] *Barnard v Evans* [1925] 2 KB 794; [1925] All ER 231.

[118] [1957] VR 560, at 563 (my emphasis).

[119] [1957] VR 560, at 563 (my emphasis).

On appeal to the Victorian Supreme Court, all grounds of objection raised against the trial judge's direction subsequently failed,[120] Lowe J declaring:

> "It is in the highest public interest that *the view of the trial judge as to the sacredness of human life should be upheld,* and that the public must realise that deliberate action without justification which causes death must be severely punished".[121]

It is strange that, earlier in his judgment, Lowe J declared that "[h]omicide is lawful if it is committed in *reasonable self-defence of... property*".[122] Stranger still, his Honour then limited the occasions where such fatal force could be used to instances where "life… is endangered or grave injury to [the] person is threatened" or "where there is a reasonable apprehension of such danger or grave injury",[123] thus excluding situations where all that one is seeking to defend is property. A mere threat to property does not involve a threat to life or limb, and even if such a threat was mistakenly considered to be a threat to life or limb by an accused, the resultant killing would then be in defence of the person, not of property. With respect, then, Lowe J's reference to a right to kill in reasonable self-defence of property is self-defeating and ultimately meaningless.

Felonies, felons and public defence

In *McKay*, Smith J had not considered the facts before him in terms of being a protection of property case, but rather as a felony prevention and felon apprehension matter:

> "In the present case… if the appellant was acting to protect his property he was doing so by taking action to prevent the completion of a felony. Hence, as it appears to me, it was only the [prevention of felony and apprehension of felon].., that were really relevant here; and there was no occasion to refer to

[120] [1957] VR 560, at 567, per Lowe J. In addition, Smith J did not expressly overrule the trial judge's directions: [1957] VR 560, at 577; and, on further appeal to the High Court, it was held that the trial judge's directions had not led to any miscarriage of justice: [1957] VR 560, at 579-580, per Dixon CJ, Webb, Fullagar, Kitto & Taylor JJ.

[121] [1957] VR 560, at 567, per Lowe J (my emphasis).

[122] Note that here Lowe J includes defence of property as a species of 'self-defence': [1957] VR 560, at 562 (my emphasis).

[123] [1957] VR 560, at 562.

> any *more restricted rights* to use force which the appellant might have had for the purpose of defence of property *if no felony had been involved*".[124]

Yet, the 'felony' to which Smith J referred could only have been larceny[125] - a felony that, as I have already shown, was completed prior to the fatal shot.[126] Therefore, it would seem that the only ground upon which McKay could have sought to justify his actions was 'felon apprehension'.[127]

Felony prevention and felon apprehension[128] are often merged together with defence of property,[129] yet this is a confusing and inaccurate practice.[130] The defence of property is a species of *private* defence, whereas crime prevention and apprehension of criminals are more akin to *public* defence.[131] In private defence, one acts only for the benefit of one's own interest or that of some other private person, whereas, in public defence, one acts in the interests of the state. It is worth noting that Smith J indicated that the right to act in defence of property is a more "restricted" right where there is no accompanying public utility involved.[132] Yet, even in the context of public defence his Honour found McKay's use of force excessive. How much more

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124 [1957] VR 560, at 577 (my emphasis).

125 Yeo (1998), note 110, p 142.

126 It is noted that Professor Yeo has described *McKay* as a 'defence of property' and 'prevention of crime' matter: Yeo (1998), note 110, p 142. With respect, it is submitted, for the reasons given above, that neither ground was applicable in this case.

127 As implied by Lanham, D, "Killing the Fleeing Offender" (1977) 1 *Crim LJ* 16, pp 20-23.

128 From 1 January, 2000, the use of the word 'felony' is no longer used within the *Crimes Act 1900* (NSW). It has been replaced with the term 'serious indictable offence' at s 580E(4) of the *Crimes Act1900* (NSW). 'Serious indictable offence' is defined at s 4(1) to mean 'an indictable offence punishable by life imprisonment or imprisonment for a term of 5 years or more'.

129 Indeed, the principles applied in a case where a person has killed to apprehend a criminal or to prevent a crime are the same as those applied in self-defence: *R v Earley* (1990) 55 SASR 140.

130 English legislation does not provide specifically for 'defence of property', other than within the ambit of crime prevention: *Criminal Law Act 1967* (UK); Yeo (1998), note 110, pp 138-139. While it is true that there is a great deal of crossing-over between crime prevention and defence of property, crime prevention is a less restricted right (being of a public nature): *R v McKay* [1957] VR 560 at 577 per Smith J.

131 An English Law Commission appears to have recognised this distinction in its 1989 draft C*riminal Code for England and Wales,* cited in Yeo (1998), note 110, p 140.

132 [1957] VR 560, at 577.

excessive would the court have considered the force if used only in defence of property?

While the focus of this work is on the private defence of property, it is worth noting briefly the use of lethal force in the prevention of felonies or the apprehension of felons. Such use of force was justified in centuries past because, unlike today, felonies were capital offences. If caught, the felon faced the hangman's noose; if the felon escaped, complete freedom.[133] The felon had nothing to lose by resorting to deadly force to avoid apprehension,[134] and so, a person attempting to arrest a felon *a fortiori* had very good reason to fear serious violence or even death. The killing of felons was, therefore, justified whether or not there was any necessity to do so.[135] Hale and East expressly stated that killing a person attempting to pick a pocket was not justified. However, both held that such killing would be justified once the offence was completed, because the penalty for a completed felony, as opposed to an attempt, was certain death.[136] A century later, Blackstone "would not allow the killing of a runaway pickpocket",[137] yet some still claim the existence of a right to kill property offenders in order to effect their arrest.[138] It is impossible to reconcile such logic with the fact that, if arrested, property offenders may now receive little more than a bond.[139] In any event, it is not possible to arrest a dead person.[140]

The personal threat in 'property' crimes

If there were any ancient cases that suggested a right to kill in defence of property could exist in the absence of violent threats,[141]such cases

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[133] 'The punishment for felony was always death till the reign of George IV': *R v Morris* [1951] 1 KB 394 at 395-396 per Lord Goddard.

[134] [1957] VR 560, at 571, per Smith J.

[135] [1957] VR 560, at 571-572 per Smith J.

[136] Lanham, note 127, pp 17-18.

[137] Lanham, note 127, pp 17-18.

[138] *European Convention on Human Rights* 1950, Art 2(b); Australian Law Reform Commission (1975), cited by Lanham, note 127, p 17.

[139] It is also difficult to reconcile with the fact that 'an arrest can be effected without any force at all being used': Murphy, P, et al, *Blackstone* 's *Criminal Practice,* Blackstone Press Ltd, Great Britain, 1991, p 55.

[140] Smith, Sir J, cited in Ashworth, note 6, p 141.

[141] Conceivably these could only be spring gun or man trap cases. (Discussed further below).

would probably be overruled in the present age,[142] when the sanctity of life no longer competes with property for fundamental supremacy.[143]

Certain crimes traditionally described as 'property crimes' are actually part-property, part-personal offences. One example is robbery. Robbery involves both a threat to property and a threat to the person. The threat that causes a victim to submit is the threat of personal violence.[144] Imagine, for example, an unarmed man who waves down a stagecoach and, instead of calling out 'your money or your life', says 'your money or your watch'. There is no threat of violence — the demand becomes a request and the robber becomes a beggar. I have yet to discover any rule of law that would justify the killing of a beggar.

Killing in response to an attempted robbery is more accurately a matter of self-defence than defence of property.[145] As long ago as 1250, Bracton declared "one who kills a robber is not liable if he can escape danger in no other way".[146] Clearly the word 'danger' implies that it was in response to a threat of personal violence that the victim was able to lawfully resort to deadly force.[147]

In 1616, the court in *Bowle's Case*[148] held that "he who kills... a thief who would *rob* him in the highway, by the common law shall forfeit his goods; but he who kills one that would *rob and spoil* him in his house, shall forfeit nothing".[149] Lanham claims that the above extract "clearly implies that a person who kills a *thief* in his home is not liable".[150] With respect, *Bowle's Case* does not 'imply' that the

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[142] 'The use of lethal force would rarely, if ever, be justified in the defence of property, but may be proportionate if the accused is threatened with death or serious injury': Clough, J & Mulhem, C, C*riminal Law,* Butterworths Tutorial Series, Butterworths, Sydney, 1999, p 267.

[143] Lanham, note 49, p 372.

[144] *R v Shendley* [1970] Crim LR 49; Woods, A, "Criminal Law – The use of force in defense of property" (1952) 41 *Kentucky Law Journal* 460, p462.

[145] 'It would make for neatness and facilitate the expeditious handling of cases were the Australian law on the general plea of self-defence to expressly single out, as falling within its operation, selected types of property offences containing an element of personal violence or threatened violence': Yeo (1998), note 110, p 143.

[146] Lanham, note 68, p 190 (my emphasis).

[147] *The Macquarie Dictionary* defines 'danger' as 'liability or exposure to harm or injury; risk; peril': Delbridge, note 1, p 548.

[148] (1616) 11 Co Rep 82.

[149] (1616) 11 Co Rep 82 (my emphasis).

[150] Lanham, note 68, p 190 (my emphasis).

killing of mere thieves is justified, even within a person's home. A 'thief commits only larceny,[151] whereas one who 'robs' commits larceny and assault.[152] In *Bowle's Case*, the court referred to "a thief who would *rob* him",[153] not merely 'a thief who would steal from him'. Likewise, the court's reference to "one who would rob and spoil him in his house"[154] implies something far more sinister than simple larceny. In short, *Bowle's Case* does not support killing in response to a mere threat to property. There must be a present, overriding threat of violence for killing to be justified. In Lanham's own words, "there is no duty to retreat when one defends *himself* in his own home".[155] Another possibility, according to Professor Perkins, is that, in the 17th Century, the word 'thief had a much wider meaning, referring not only to a person who steals, but to any 'evil man'.[156]

Coke drew support from statute[157] to assert that a person attempting to rob or murder could justifiably be killed by their intended victim.[158] It may be implied from Coke's positioning of robbery alongside murder that violence was the common denominator linking these two, otherwise unrelated offences.

One of the earliest authorities for property defence is *Cook's Case*.[159] Here, the defendant shot and killed a bailiff who was illegally trying to force his way into the defendant's house to execute a warrant. In a decision that may have been an ancient ancestor to excessive defence,[160] the King's Bench recognised that, although the defendant

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[151] Woods, note 144, p 462.

[152] *R v Dawson and James* (1976) 64 Cr App R 170; *R v Clouden* [1987] Crim LR 56.

[153] (1616) 11 Co Rep 82 (my emphasis).

[154] (1616) 11 Co Rep 82.

[155] Lanham, note 68, p 190 (my emphasis).

[156] Cited in Lanham, note 68, p 193.

[157] The statute described justifiable homicide as the killing of 'any evilly disposed person or persons [who] do attempt feloniously to rob or murder': *24 Henry 8 Cap 5.*

[158] Lanham, note 68, p 190.

[159] (1639) Cro Car 537.

[160] For more information on excessive self-defence see *R v McKay* [1957] VR 560 at 563 per Lowe J; *R v Howe* (1958) 100 CLR 448 at 456 per the Court; *Viro v The Queen* (1978) 18 ALR 257 at 303 per Mason J; Snelling, H, "Killing in Self-Defence" (1960) 34(5) *Australian Law Journal* 130, pp 136-138; Yeo, S, "Self-Defence: from Viro to Zecevic" (1988) 4 *Australian Bar Review* 25; Allsopp, J & Gregg, G, "Privy Council decisions in Australia: the law of excessive force in self-defence: Viro v The Queen" (1979) 8(3) *Sydney Law Review* 731, pp 732-3.

had a right to use force to defend his home, "he might have resisted him without killing him".[161] The resultant conviction for manslaughter established that the killing was not justified, but only partially excused, thus reducing murder to manslaughter. By definition, an excuse does not apply to 'rightful' conduct, but serves only to pardon 'wrongful' conduct.[162] Therefore, *Cook's Case* does not demonstrate a *right* to kill in defence of property.

There is authority to suggest that where a person wrongfully attempts to *forcibly* evict an occupant from the occupant's home and is subsequently killed by the occupant, the killing is justified in defence of property.[163] However, while a threat of eviction on its own could be said to be merely a threat to property, the word 'forcibly' connotes something more. In any event, the authority, *R v Hussey*,[164] is a British decision that has come into disrepute[165] for its abandonment of established precedent. As Lanham states:

> "*R v Hussey* must be regarded as out of line with the older and more humane authorities. Certainly in an era *when the sanctity of life takes precedence over the sanctity of possession, Hussey's* case makes strange reading".[166]

Criminal trespass to land or goods is certainly a property offence in response to which the person in possession can use whatever force is necessary[167] — but no more than that[168] — to expel the entrant or repossess goods.[169] Necessary force does not include beating the trespasser,[170] unless the trespasser strikes first and then the issue

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[161] (1639) Cro Car 537*;* Lanham, note 49, p 371.

[162] Only in extenuating circumstances and out of consideration for human frailty.

[163] *R v Hussey* (1924) 17 Cr App R 160.

[164] (1924) 17 Cr App R 160.

[165] The decision is also considered to be out of touch with contemporary attitudes and the availability of remedies other than violence: Murphy et al, note 139, p 130.

[166] Lanham, note 49, p 372 (my emphasis).

[167] *Barker v R* (1983) 153 CLR 338.

[168] The common law forbids the willful and serious injury of a trespassing 'animal': *Hamps v Darby* [1948] 2 KB 311; *a fortiori* must it disallow the killing of a trespassing human being.

[169] *Jones v Tresilian* (1670) 86 ER 713.

[170] *Jones v Tresilian* (1670) 86 ER 713. In the USA, a person cannot use a deadly weapon except in extreme cases – but in such cases the matter becomes one of self-defence: *State v Schloredt*, 57 Wyo 1, 111 P 2d 128 (1941).

becomes one of self-defence.[171] Again it is submitted that the emphasis must be on the nature of the threat that is present and active on the mind of the defender at the time he or she resorts to lethal force. By maintaining this focus, one avoids the easy, yet erroneous option of merging self-defence with defence of property. For example, it was held in *R v Scully*[172] that killing in defence of *property* is justified when the defender reasonably believes his or her *life* is in danger.[173] It is not disputed that the court was correct in concentrating on the defender's belief. Nor is it disputed that the relevant threat for consideration is the threat to life. However, in deciding whether or not the killing is justified, there is no mention of any requirement that the defender should have reasonably believed that his or her 'property' was threatened. Therefore, any reference to defence of property is misguided. This is clearly a case of self-defence.

Another offence commonly referred to as a property crime is burglary.[174] Dalton wrote in 1618 that:

> "To kill an offender, which shall attempt feloniously to murder or rob me in my dwelling house or in or near any highway... or that shall attempt burglary to break my dwelling house at night; this is justifiable by myself or any of my servants in my company".[175]

Burglary involves breaking and entering into a dwelling house[176] at night[177] to steal or to commit some other serious offence.[178] Unlike

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[171] *Weaver v Bush* (1798) 101 ER 1276.

[172] (1824) 1 C&P 319.

[173] Lanham, note 49, p 373.

[174] In NSW, 'burglary' has been replaced with a number of related statutory offences, the closest to common law burglary being 'Breaking and entering into any house and committing a serious indictable offence': s 112 *Crimes Act 1900* (NSW). If the serious indictable offence involved is stealing and the value of the property stolen is more than $15,000, the matter proceeds on indictment and the offender is liable to 14 years imprisonment. This is a substantial increase from the maximum two years imprisonment available in the case of a simple larceny (i.e. without breaking and entering) involving exactly the same amount of money: *Crimes Act 1900* (NSW), s 117, now dealt with summarily as a Table 1 offence: *Criminal Procedure Act 1986* (NSW), s 27: Howie, R & Johnson, P, *Criminal Practice & Procedure NSW,* Butterworths, Sydney, 1998, pp 116,382 & 116,421.

[175] Dalton, cited in Lanham, note 68, p 191.

[176] In the USA, buildings other than dwelling-houses can be the subject of burglary: Lanham, note 49, p 373. In NSW, Section 112 of the *Crimes Act 1900* (NSW) also includes various types of buildings in addition to dwelling houses.

robbery, the offence of burglary can be completed without any personal contact with the victim. However, it is submitted that, where a person uses lethal force in response to an attempted burglary, the nature of the perceived threat to which the defender is primarily and instinctively responding[179] is the threat of violence.[180] While the burglar may have no intention of committing anything more serious than a property crime, a startled occupant in the middle of the night has no way of knowing the intruder's intention, nor can he or she anticipate how a burglar might respond if confronted.[181] The threat to be considered by the jury in a situation where a burglar is killed is the threat in the mind of the reasonable person in the position of the accused[182] and not the harm intended by the deceased.[183] The instinctive fear primarily active on the mind of a home occupant in a burglary situation is most likely to be the fear of personal violence.[184] Killing in such a situation is, therefore, in the nature of self-defence, *not* defence of property.[185]

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177 A separate offence – 'housebreaking' – developed at common law for breaking and entering a dwelling house during the day with an intention to commit a misdemeanor: Gillies, P, *Criminal Law* (4th Ed), LBC Information Services, Sydney, 1997, p 497. In NSW, 60% of breaking and entering into dwelling houses occurs during the day: NRMA, *Household Burglary in NSW, Victoria, Queensland and the ACT: 1994-1995,* NRMA Insurance Ltd, Sydney, October 1995, p 13.

178 Gillies, note 177, pp 496-497; Woods, note 144, p 461.

179 It is the defender's belief that is the relevant consideration: *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.

180 '[T]he law punishes burglary primarily, not because of the injury to the dwelling house, but because of the potential danger to human life inherent in the offense (sic)': Woods, note 144, p 461.

181 Lanham, note 49, p 370. According to a survey of 60 convicted property offenders, the only desire motivating 88% of property offenders to do their crime is the desire to make quick, easy money: Tunnell, K, *Choosing Crime: The Criminal Calculus of Property Offenders,* Nelson-Hall, Chicago, 1992, p 39.

182 Watson, R et al, *Criminal Law (NSW),* LBC Information Services, Sydney, 1996, p 1-869; *Viro v The Queen* (1978) 141 CLR 88 at 146 per Mason J; R *v McManus* (1985) 2 NSWLR 448 at 461-462 per Street CJ.

183 '[J]ustification on the actual facts is as good in law as justification on the facts as they were reasonably thought to be': Williams, G, in Morawetz, I (ed), *Criminal Law,* Dartmouth, England, 1991, p 329.

184 'It is well known that a sudden threat to one's physical safety may lead to strong emotions of fear and panic, producing physiological changes which take the individual out of his or her 'normal self'': Ashworth, note 6, pp 149-150.

185 The situation may be different in the USA, however, where the law permits warehouse burglars to be shot: *State v Moore,* 31 Corm 499. The preferred view, as Lanham explains, is that 'a man (sic) is not warranted in killing 'burglars' where a dwelling-house is not involved': note 49, p 373, fn 23.

Arson, at common law, is "the malicious burning of another's dwelling-house".[186] If an occupant is not at home when an arsonist strikes, obviously no issue of defensive killing arises. However, where the occupant is at home and becomes aware of the presence or imminent threat of a house fire, the primary fear acting on the occupant will surely be for his or her own safety and possibly for the safety of other occupants. Thoughts about property are unlikely to even enter the occupant's mind until he or she knows that all human life is safe. Killing in response to an attempted arson is, therefore, also essentially an act of self-defence.

Retreat, proportion and reasonable response

In 1676, not long before the onset of the English Revolution,[187] Hale sought to provide guidance on the use of lethal force by occupants to repel various attacks in their own homes. His Lordship created a distinction between excusable and justifiable homicide, the latter being available only in response to the attempted commission of a known felony.[188] In circumstances of justifiable homicide, the occupant was not required to retreat from his house.[189]

Nearly a century later, Foster approved, not only of Hale's excuse/justification split, but also of the absence of any requirement to retreat from one's own home in the face of an attempted known felony. According to Foster, deadly force was justifiable in order to prevent any known felony, which included robbery, murder, rape, arson and burglary.[190]

After yet another century had passed, Stephen limited the right to kill to 'violent' felonies. The only occasion where the home occupant could stand his or her ground and use deadly force to repel attack, was if he or she had been "assaulted in such a manner as to put him in immediate and obvious danger of instant death or grievous bodily

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[186] Woods, note 144, p 461. Woods claims that the law regards arson as 'an offense against the security afforded by a man's (sic) dwelling house… defense of habitation [rather than property]': Woods, note 144, p 461.

[187] The Revolution occurred in 1688 CE.

[188] Three examples of known felonies provided by Hale were arson, rape and robbery: Lanham, note 68, p 191.

[189] Lanham, note 68, p 191.

[190] Lanham, note 68, p 192. In USA the offence of sodomy was also a known felony: Woods, note 144, p 461 and the cases there cited.

harm".[191] By the time of Stephen, most of the blood soaked capital punishment legislation against property offenders was gone – indicating, perhaps, that the sanctity of human life had reasserted itself. Stephen's implied prohibition on the use of deadly force in defence of property may have been guided by similar reasoning.[192] In 1879, the Criminal Code Commission, which included Stephen, upheld the right of a person to use force in defence of property, but limited the use of force with the requirements of necessity[193] and proportion.[194]

Similarly, under the common law in Australia today, a person is justified[195] in using reasonable force in defence of property,[196] but only to the extent that the force used does not exceed that which is necessary for the purpose of defending the property.[197] The requirements of proportion and retreat are no longer separate elements, but have been subsumed as ingredients of reasonableness.[198] In 1998, the *Home Invasion (Occupants Protection) Act* was introduced in NSW, providing statutory endorsement of the existing common law regarding defence of property.[199] Many current authorities exclude defence of property from their list of situations where killing may be

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[191] Lanham, note 68, pp 194-195.

[192] For more on Stephen's work at the time, see Kathol, T, "Defence of Property in the Criminal Code" (1993) 35 *Criminal Law Quarterly* 453, pp 455-456.

[193] '[T]hat the mischief sought to be prevented could not be prevented by less violent means': Criminal Code Commission, cited in Lanham, note 127, pp 18-19.

[194] '[T]hat the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent': Lanham, note 127, p 19. Despite the limitations, Lanham suggests that the Commissioner's draft code 'seems perfectly happy to allow an arrestor to shoot a fleeing thief': note 127, p 19. This may have been due to the fact that stealing was, at that time, considered a 'major offence': note 127, p 19.

[195] The rationale for 'justification' is explained in Yeo (1998), note 110, pp 167-168; cf Gammage, A & Hemphill, C, *Basic Criminal Law,* McGraw-Hill Book Company, USA, 1974, p 156, re the USA position.

[196] Weaver v Bush (1798) 8 Term Rep 78; Harrison v Duke of Rutland [1893] 1 QB 142; Robertson v Balmain New Ferry Co. Ltd [1910] AC 295.

[197] *Mitchell v Norman* [1965] Qd R 587; *Greenbury v Lyon* [1957] QSR 433; Fisse, B, *Howard's Criminal Law* (5th Ed), Law Book Company, Sydney, 1990, p 98.

[198] Fisse, note 197, p 99; Brown, D et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales,* Federation Press, Sydney, 1990, p 778; *R v Howe* (1958) 100 CLR 448, at 463 per Dixon CJ; Clough & Mulhern, note 142, p 267; Watson et al, note 182, p 1-869.

[199] *Home Invasion (Occupants Protection) Act 1998* (NSW), ss 8, 9; cf *Criminal Law Act 1967* (UK), s 3, which provides that '[a] person may use such force as is reasonable in the circumstances in the prevention of crime'.

justified.[200] Some go further, expressly stating that killing in defence of property alone may never be justified.[201]

The old common law rule that permitted a person to stand his or her ground and not retreat in the home was jettisoned by the High Court in *R v Howe*.[202] Instead, it is now for the jury to decide whether the response to a threat was reasonable in all of the circumstances, including whether or not the accused could and should have retreated as far as possible before using lethal force.[203] In coming to it's decision, the High Court was heavily influenced by *Brown v United States*,[204]where it was held, in regard to the standard of reasonableness to be applied, that "[d]etached reflection cannot be demanded in the presence of an uplifted knife...".[205] *Howe* and *Brown* were cases of self-defence and it remains unclear whether 'detached reflection' is to be demanded in the presence of an uplifted chicken, or VCR — where the threat is not to life, but to property alone. Lanham argues that theft of property, unlike personal danger, cannot be avoided by running away and, for that reason, there should be no duty to retreat in defence of property.[206] In any case, such an accused could rely on his or her 'public' powers of arrest or crime prevention in order to avoid the duty to retreat. [207]

The great rural gun debate

In the early years of the common law, rules surrounding self-defence and the defence of property were evolving "when there was no organized policing and when the carrying of deadly weapons was

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200 Clough & Mulhern, note 142, p 264; *European Convention on Human Rights,* Art 2; American Model Penal Code, s 3.04; Brett, Waller & Williams, *Criminal Law: Text and Cases* (8th Ed), Butterworths, Sydney, 1997, p 181; Gammage & Hemphill, note 195, p 156.

201 Rich, B et al (eds), *American Law Reports Annotated,* Vol XXV, Lawyers Co-operative Publishing Company, Rochester, New York, 1923, pp 542-544; Lanham, note 49, p 370; *Russell v State,* 219 Ala 567, 122 So 683 (1929); Yeo (1998), note 110, pp 142-143, 169; *R v Stephens* (1928) WLD 170 at 172; *R v Schultz* (1942) OPD 56 at 60.

202 (1958) 100 CLR 448.

203 Lanham, note 68, pp 197-198.

204 (1920) 256 US 331.

205 (1920) 256 US 331, at 343.

206 Lanham, note 68, pp 206-207.

207 Lanham, note 68, pp 206-207. The inherent dangers and necessary limitations on such powers need to be clarified, but these are beyond the scope of the present article.

common".[208] Obviously, the situation today is quite different. For the vast majority of people in NSW, the police are only a telephone call away. With the advent of mobile telephones, the person on the street may be similarly protected.[209] However, some members of the community, particularly in rural areas,[210] have protested new gun laws that expressly exclude private defence as a valid reason for owning or using a firearm.[211] It may be conceded that rural people are generally less able to rely on immediate police assistance, and, therefore, may have a greater claim to violent self-help. Indeed, in the UK there is even authority supporting the use of deadly weapons to protect property in situations where police are unable to assist.[212] However, this authority not only stems from a fact situation far removed from rural Australia, it has also been criticised for implying "that such conduct is permissible".[213]

Law depends for its smooth operation on its ability to properly reflect the "moral values and expectations" of the community.[214] In a 1999 survey, rural and urban residents in Northern New South Wales were asked to consider a fact situation similar to *R v McKay* in order to decide whether or not the use of a gun was reasonably necessary in the circumstances. Eighty-six percent did not believe firing a gun at the chicken thief was reasonably necessary, however, 21% of rural residents believed that it was.[215] Ordinary citizens depend on the

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208 Ashworth, note 6, p 138.

209 In India, the right to private defence is not available if a person has time to seek the protection of public authorities: Indian Penal Code, s 99(3).

210 Peters, R, "Shoot 'em up Shout 'em down" (1995) 20 (3) *Alternative Law Journal* 142; Wilmouth, R, "The Gun Law Con" 1997 <http://www.ozemail.com.au/~confiles/confiles.html> (26 May 1999).

211 *Firearms Act 1996* (NSW), s 12(2); Warner, K. "Firearms legislation in Australia", Australian Institute of Criminology, on Sporting Shooters Association of Australia "S SAA Web site" <http://www.ssaa.org.au/warner2.html> 26 May 1999.

212 *Attorney-General's Reference (No 2 of 1983)* [1984] QB 456. However, this case concerned a shopkeeper and police being unavailable to stop looting due to large-scale city rioting. It is quite possible that the threat of *violence* in a riot situation would be weighing more heavily on the mind of a shop keeper than the threat to property; cf *R v Stratton* (1779) 1 Doug KB 239, where Lord Mansfield held that an occasion where civil necessity might justify otherwise illegal acts could happen in India, but could not possibly happen in England!

213 Ashworth note 6, p 145.

214 Yeo (1998), note 110, p 167.

215 Compared to only 2% of urban respondents: Hughes, R & Shaw, P, "The use of firearms in defence of person or property: a rural/urban divide", Independent Legal Research Project, School of Law & Justice, Southern Cross University, Lismore, 1999, p 11.

certainty of law to guide their conduct.[216] It is therefore essential that strict enforcement of gun laws be maintained,[217] particularly in rural areas, to deter unnecessary killing[218] in situations where the only threat is to property.[219]

Dogs, death-traps and deadly devices

There are two possible exceptions to the general principle that killing is not justified in protection of property: killing by use of traps or devices and by dogs.[220] Under the *Crimes Act 1900* (NSW),[221] the setting of a deadly "trap, device or thing" or to knowingly permit the same to be set with the intention to cause grievous bodily harm or

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[216] Ashworth, note 6, p 142.

[217] In Australia, every four days a person is killed by another using a firearm, with the majority of gun-related homicides occurring in the home: Australian Institute of Criminology "Media Release: Lax firearm laws mean more deaths" <http://www.aic.gov.au/rnedia/961104.html> 26/5/99.

[218] Or serious injury – in 1984, Bernard Goetz, while traveling on a New York subway, was approached by four African-American youths asking for change. Goetz, having been assaulted and robbed on the subway three years earlier, believed he was being menaced. He pulled out a gun and shot three of the youths as they attempted to flee, causing one of the youths to become a paraplegic. The jury acquitted Goetz of all attempted murder and assault charges: Brown et al, note 198, pp 778-779. It is surely desirous to avoid such tragedy in our own country. Where juries are even remotely likely to dismiss such devastating and potentially deadly violence, the need for firm gun laws appears self-evident.

[219] Glanville Williams has written 'if the only way a weakling can avoid being slapped in the face is to use a gun, he must submit to being slapped': cited in Brown et al, note 198, p 777. If a person must submit to personal violence, how much more must a person submit to theft before resorting to the use of a gun?

[220] In Brown et al, note 198, p 778, the authors incorrectly state that the common law and legislation do not approve of the use of deadly devices or dogs. Such measures in fact may be taken for the protection of dwelling-houses (or even vehicles): Lanham, note 49, p 370; *Offences against the Person Act 1861* (UK), s 31; *Crimes Act 1900* (NSW), s 49(l); *Companion Animals Act 1998* (NSW), s 16. There have been cases where the use of deadly devices has been approved in defence of property other than dwelling-houses or vehicles: *Ex parte Minister van Justisie: In re S v Van Wyk,* 1967 (1) SA 488 (AD); *Gray v Combs,* 7 JJ Marshall 478. It should be noted that both of these cases have been criticised for their implied racism – the former involved a black South African killed by a white shop owner's spring gun at the height of the Apartheid regime, the latter, an African American youth killed by a spring gun in a warehouse many years prior to the arrival of the civil rights era. It is unlikely that these killings would have been justified had the victims been white: Stuart, note 19; DGS, "Crimes — Defense of Property" (1926) 25 *Michigan Law Review* 57, p 61.

[221] Section 49(1).

death, is an offence punishable with five years imprisonment.[222] However, a person is not liable[223] if the trap, device or thing is set for the purpose of destroying vermin or to protect a dwelling-house.[224] The legislation expressly states that it is the 'dwelling-house' itself that is the subject of protection, not necessarily its occupants. In other words, even if the common law abolishes the right to kill in defence of property, NSW legislation would still, potentially, permit the killing of a mere trespasser or thief by the intentional use of a deadly weapon. Such legislation goes against the grain of the common law principle that a person should not be permitted to do indirectly what he or she could not do directly.[225] It is also disturbing that, in this day and age, property offenders and vermin may be disposed of in the same manner and within the same legislation.

Likewise, the owner of a dog is not guilty of an offence if the dog tears apart a trespasser or savages someone in 'reasonable' defence of property.[226] The legislation potentially provides for complete acquittal, even if the dog is a dangerous or restricted dog and even, it would seem, if the mauling results in the death of a human being.[227] Furthermore, if a dog kills a mere trespasser[228] the killing is not considered to be a wrongful act, and the owner of the dog is not liable to pay compensation to the relatives of the deceased.[229]

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[222] This legislation is almost identical to the *Offences against the Person Act 1861* (UK), s 31.

[223] cf *Bird v Holbrook* (1828) 4 Bing 628 – where it was held that a person will be civilly liable if they fail to provide adequate notice of the presence of such a device (in that case, a spring gun) and a trespasser is subsequently injured. Where notice is provided, however, the person may not be civilly liable: *Ilott v Wilkes* (1820) 3 B & Ald 304. In South Africa, failure to provide a clear warning sign may result in a conviction for unlawful homicide: Stuart, note 19, p 126.

[224] *Crimes Act 1900* (NSW), s 49(2).

[225] *Dean v Clayton* (1820) 7 Taunt 487 at 489 per Burrough J; at 511 per Park J; Lanham, note 49, p 375; Chambliss, W & Courtless, T, *Criminal Law, Criminology, and Criminal Justice,* Brooks/Cole Publishing, Cal, USA, 1992, p 154; *People v Ceballos* 526 P2d 241 (1974).

[226] *Companion Animals Act 1998* (NSW), s 16; see also *Hensler v Hauxwell* (1970) 2 DCR(NSW) 256.

[227] cf *Crimes Act 1900* (NSW), s 35A, where the owner of a dog who maliciously causes the dog to attack is liable for up to 7 years imprisonment if grievous bodily harm results.

[228] Even if the trespass is only to a vehicle.

[229] *Companion Animals Act 1998* (NSW), ss 25, 26.

Capital punishment and the right to life

In the 18th Century, a person may have swung from the gallows for the crime of stealing a piece of linen.[230] Today, by comparison, even a person convicted of breaking into the Governor General's house and stealing the Crown Jewels is liable to no more than 14 years imprisonment.[231] Even in the USA, where capital punishment still exists under various State laws, death sentences are not available for mere property crimes.[232]

Capital punishment has not been available in Britain since 1965[233] nor in Australia since 1973,[234] although NSW did not officially strike off the death penalty until 1985.[235] The policy behind the Australian Government's abolition of the death penalty was "to heighten public regard for the sanctity of human life".[236] In 1991, Senator Gareth Evans stated the attitude of Australian Government in even plainer terms: "[T]he death penalty is an inhumane form of punishment which violates *the most fundamental of all human rights — the right to life*".[237] It was, according to Senator Evans, this very conviction that "led Australia to promote actively the second optional protocol against the death penalty to the International Covenant on Civil and Political Rights, to which [Australia] became a party in October of [1990]".[238]

My purpose is not to discuss the merits or otherwise of utilising the death penalty in cases of heinous personal crimes, but to show that it is

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230 British Parliamentary decree of 1764, cited in Hay, in Bates, note 8, p 646.

231 *Crimes Act 1900* (NSW), s 112(1).

232 Death Penalty Information Center, 8 March 2000, <http://www.essential.org/dpic/feddp.html≥ (7 June 2000).

233 *Murder (Abolition of Death Penalty) Act 1965* (UK); Slattery, M, "Hanging in the balance"(1998)
106 *Police Review* 25; Hicks, J, "The Ultimate Deterrent" (1996) June *Police Review* 20, p 21.

234 *Death Penalty Abolition Act 1973* (Cth). The last man hanged in Australia was Ronald Ryan, convicted of shooting dead a prison guard during an escape. Ryan was executed in 1967 amid a huge public outcry – some people, including Ryan himself, claiming that he had been wrongfully convicted: Roberts, M, "Signs of Ryan" (1996) 7(3) *Polemic* 144.

235 *Crimes (Death Penalty Abolition) Act 1985* (NSW); *Crimes Act 1900* (NSW), s 431.

236 *Hansard (Sen)* 17 Feb 1988, p 135.

237 *Hansard (Sen)* 16 Oct 1991, p 2146 (my emphasis).

238 *Hansard (Sen)* 16 Oct 1991, p 2146.

now 'life', not property, that is considered the most fundamental of rights. Even among those who argue for the reintroduction of the death penalty, there is generally no desire to execute mere property offenders.[239] Indeed, the arguments relied on by those in favour of capital punishment typically centre around brutal murder cases and the need to provide penalties that adequately reflect the sanctity of the *victim's* life.[240] As the courts and legislators now consider that judicial killing is an outmoded and inappropriate means of preventing property crime, killing in defence of property must also be expressly condemned.[241]

The re-emergence of human life over property

Property can no longer lay claim to the title of 'fundamental right'. Each year in Australia 450,000 people are homeless,[242] 575,000 rental households live in poverty and 250,000 households are waiting on public housing waiting lists.[243] The current waiting time for public housing through the Department of Housing in NSW is between five and six years.[244]

In contrast to property, Australian courts regularly assert the supremacy of human life:

> "One principle *which stands higher than all others* in the criminal law is the sanctity of human life".[245]

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[239] Ryan, P, "Death and Justice" (1998) 42(6) *Quadrant* 87; Roberts, note 234; Hicks, note 233; Slattery, note 233.

[240] Ryan, note 234; Hicks, note 233; Slattery, note 233.

[241] Although, it is acknowledged that the rationale for capital punishment is deterrence, not defence.

[242] Thirty-one percent of these are children while 12% are indigenous Australians: Council for Homeless Persons Australia, "Homeless Persons Profiles", 12 Nov 1999,

<http://www.chpa.org.au/general.html> (21/07/00).

[243] Bissett, cited in Council for Homeless Persons Australia, note 242.

[244] Personal Communication, Dept of Housing Officer, Dept of Housing, Lismore, May 2000.

[245] *Wilson v The Queen* (1992) 174 CLR 313 at 341 per Brennan, Deane and Gaudron JJ (my emphasis). Although more recently the supremacy of the sanctity of life in law has been challenged by other concepts such as 'the right to self-determination': *Wake v Northern Territory of Australia* (1996) 109 NTR 1; *Airedale NHS Trust v Bland* [1993] AC 789; and 'quality of life': Meadows, H, "Death and the State: A Pubic Issues Conference on Euthanasia" (1995) 69 *LIJ* 974. In yet another case, the sanctity of life was described as a thing of the past, more recently overshadowed by other considerations: *The Queen v Ashley Mervyn Coulston* [1997] 2 VR 446; Vic Court of

> "[T]he protection of the community may be advanced by a sentence which emphasises that the Court, as the spokesman for the community, has a very high regard for the sanctity of life".[246]

> "It is the *paramount purpose* of the rule of law in any truly civilised society to protect unflinchingly the sanctity of human life. In such a society it is the paramount duty of the Courts to give, unflinchingly, full and public effect to that purpose".[247]

In a marked departure from the time-honoured dictates of Blackstone,[248] the common law now appears to administer an equal dose of sanctity to each and *every* human life, be they propertied or not:

> "[N]o matter what the subjective considerations are, the sanctity of human life must be paramount and a sentence for murder must reflect that consideration".[249]

> "Courts uphold the sanctity of human life. They should not put greater value on one life rather than on another or do anything which may be so understood".[250]

It can make no difference whether the homicide victim was an abusive, violent and predatory paedophile,[251] or a long-suffering terminally ill

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Appeal, No 223 of 1995, 2 April 1996, Winneke P, Brooking JA & Southwell AJA, unreported, BC9601147 at 33.

246 *R v David Weng Onn Low*, NSW Supreme Court, No 70025 of 1990, 19 March 1991, Badgery Parker J, unreported, BC9102208 at 17.

247 *Regina v David Bradley Leonard* [1999] NSWSC 510 at [15] per Sully J (my emphasis); See also *Regina v RAF* [1999] NSWSC 615 at [19] per Sully J; *R v Benjamin Bruce Andrew; R v Peter Clive Basil Kane* [1999] NSWSC 647 at [29] per Sully J.

248 See above, note 94.

249 *R v Foley* [1999] VSC 278 at [10] per Hampel J. See also *R v Osland* (1998) 159 ALR 170 at 216 per Kirby J.

250 *R v Trevor James Birmingham (No 2)*, SA Supreme Court, No 305 of 1996, 2 October 1997, Perry J, unreported, BC9705091 at 5. See also *Inkson v R* (1996) 6 Tas SR 1 at 30-31 per Zeeman J; *R v Penn*, Vic Court of Criminal Appeal, 9 May 1994, unreported, at 6; *In the matter of Smith*, Tas Supreme Court, No 66 of 1997, 17 June 1997, Slicer J, unreported, BC9702637 at 3.

251 *In the matter of Smith*, Tas Supreme Court, No 66 of 1997, 17 June 1997, Slicer J, unreported, BC9702637.

spouse,[252] the sanctity of the life taken must prevail over all other considerations.[253] Yet, if the law will not allow killing even in such terrible circumstances as these, how can it ever justify killing for the mere purpose of defending property? The life of a trespasser or thief should not be regarded as having less value than that of any other person.[254]

It is clear from the preceding discussion that the law no longer recognises – and perhaps never did recognise – any right to kill in defence of property. I have shown that *R v McKay* is not authority for the existence of such a right, and, on closer analysis, actually entrenches the common law principles of proportionality and reasonableness that prevent the taking of human life for the protection of property alone. I have revealed the unfortunate, yet popular tendency to confuse acts of public defence, such as felon apprehension and crime prevention, with the essentially private act of defending property. Likewise, I have shown that wherever there is an act of killing arising from a fear of personal danger, that act is not to be regarded as protection of property, even in a burglary or robbery situation, but as defence of the person. The focus must remain, not upon the intention of the deceased (eg stealing a VCR), but on the primary fear playing on the mind of the accused at the time of killing (eg personal danger). I have further demonstrated from the results of a recent New South Wales survey that the vast majority of the population do not consider the use of fatal force in defence of property to be reasonably necessary. Of concern, however, is the large percentage of rural dwellers that apparently see no moral impediment to the shooting of a person merely stealing chickens. Disturbing also is the survival of archaic legislation permitting the use of deadly dogs, traps and devices in protection of property. Despite these anomalies, I have concluded that we now live in an era that places the value of life far above the value of property, as demonstrated, for example, by the demise of capital punishment in this country.

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252 *DPP v Raymond Ernest Riordan*, Vic Supreme Court, 20 November 1998, Cummins J, unreported, BC9806644. Paradoxically, a person may be breaking the law by *failing* to kill an animal in order to end its suffering: *Baxter v Dolsen* (1911) 28 WN(NSW) 129.

253 cf Brookbanks' discussion of *R v Janine Louise Albury-Thompson* (NZCA 254/98, 19 October 1998), where the victim was a difficult, autistic child killed by her mother: "Self-help and Criminal Law" [1999] *New Zealand Law Review* 109, pp 112-113.

254 Although Yeo suggests that it is still possible that 'society regards the aggressor's wrongful conduct as rendering her or his life less valuable than the defender's': Yeo (1998), note 110, p 168; see also Kadish, S, in Morawetz, note 183, p 420; Ashworth, A, "Self-defence and the right to life" (1975) 34 (2) *Cambridge Law Journal* 282, p 303.

In Favour of a Partial Defence of Excessive Force in Protection of Property

Thus far, I have maintained that the right to life prevails over the right to property. However, this does not mean that the criminal law should never recognise a lesser moral culpability in certain circumstances where a defendant has killed in defence of property. This will be considered in the light of the current law on the doctrine of excessive force – a partial plea that, in some jurisdictions, may reduce a charge of murder to manslaughter in situations where an accused kills in honest but unreasonable defence of property.

In New South Wales, public uncertainty over how much force may be used in reasonable defence of property arises from perceived inconsistencies in trial outcomes.[255] However, the direction of the law cannot be dictated by the media-inspired, knee-jerk reactions of the populace, particularly where lives are at stake.[256] Concepts of reasonableness and proportion may tend to confuse and frustrate the average person.[257] Therefore, if it is the law's intention to prohibit killing in defence of property it ought to do so plainly and explicitly.

Such express intention, absent from the New South Wales statutes, appears in the *Criminal Code Act* 1995 (Cth),[258] and clearly prohibits intentional killing or the causing of grievous bodily harm for the purpose of protecting property.[259] New South Wales also appears to be out of sync with some of its peers. In defence of property, Queensland, Tasmania and Western Australia do not permit grievous bodily harm, far less killing.[260] Likewise, South Australia does not permit intentional or reckless killing in defence of property.[261]

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[255] Mulholland, R, & Cooper, R, "The 'Intruder' Debate" (1995) June *Queensland Police Union* Journal 63.

[256] This occurred following the decision in *McKay* [1957] VR 560 and more recently in England following the case of Tony Martin, discussed in Yeo (2000), note 110.

[257] Mulholland & Cooper, note 255.

[258] See also the Model Criminal Code, s 313.2, in Criminal Law Officers Committee of the Standing Committee of Attorneys-General, "Chapter 2: General Principles of Criminal Responsibility", *Final Report December 1992: Model Criminal Code,* The Committee, Canberra, 1992, pp 68-69; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Discussion Paper 5, *Fatal Offences against the Person* (1998), cited in Yeo, S, "Revisiting Excessive Self-Defence" (2000) 12 *Current Issues in Criminal Justice* 39, p 50.

[259] *Criminal Code Act 1995* (Cth), s 10.4; Brett, Waller & Williams, note 200, p 201.

[260] Queensland Criminal Code, ss 274-279; Tasmanian Criminal Code, ss 40-45; West Australian Criminal Code, ss 251-255 (Western Australia does not permit force *likely*

India provides a different approach. Section 3 of the Indian Penal Code confines justifiable killing in 'defence of property' to a list of particular offences,[262] all of which contain an element of personal violence or a threat thereof.[263] Such a system would provide some degree of certainty, yet as long as the misnomer of 'defence of property' is maintained in situations where the only justification for the use of lethal force is derived from a threat of personal violence, confusion will remain.[264]

The Indian Code also provides for a lesser conviction than murder where killing is due to excessive defence.[265] Interestingly, given the choice of murder, manslaughter or complete acquittal, the majority of respondents in the 1999 New South Wales survey would have convicted McKay of manslaughter.[266] Presently in New South Wales, the only conviction available for a person like McKay is 'murder'.[267] With no alternative, a jury maybe tempted to acquit, not because they think the killing was right, but because the extent of the wrong committed falls short of the culpability for murder. However, complete acquittal fails to reflect the value of the life taken — *a fortiori* a life wrongly taken.[268] Recognition of the doctrine of excessive property

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to cause grievous bodily harm or killing, however, the legislation applies only in relation to moveable property).

261 *Criminal Law Consolidation Act 1935* (SA), s 15A(l). South Australia is a further step ahead of NSW in that it offers a plea of excessive defence where an accused honestly but unreasonably kills in defence of property: *Criminal Law Consolidation Act 1935* (SA), s 15A(2).

262 I submit that, as each of these offences contains either violence or the threat of violence, killing is in response to such violence and not in response to a threat to property. Such killing is not, therefore, 'defence of property', but 'self-defence'.

263 Yeo (1998), note 110, p 139.

264 'Defence of property' should exclude occasions where a perceived threat to the person exists. However, offences such as robbery, burglary and arson are commonly referred to as 'property crimes'. This fact, combined with notions of crime prevention, leads to the situation where one could conceivably kill to prevent a property offence while *not* killing in defence of property.

265 Indian Penal Code, Exception 2 to Section 300; South Africa also provides a conviction for 'culpable homicide' where a person exceeds 'the bounds of reasonable defence of person or property... Only if the excess was immoderate will a verdict of murder be returned': Stuart, note 19, p 131.

266 Forty-nine percent favoured manslaughter, 37% murder & 14% acquittal. Even with the availability of the manslaughter option, it is of concern that 25% of rural respondents would have completely acquitted a man who shot dead a chicken thief: Hughes & Shaw, note 215, p 13.

267 Since *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.

268 'People who make grossly unreasonable decisions and kill deserve punishment. It is unjust if juries acquit such people because they are unwilling to convict them of

defence[269] would provide a more appropriate conviction of 'manslaughter' for the person who honestly but unreasonably kills in defence of property.[270]

Conclusion

In order for an action to be justified, the harm resulting from the defensive action ('death') must be a lesser harm than that which might have resulted from the threatened attack ('loss or damage to property').[271] Whether or not the deceased's actions were 'wrong' is not part of the equation, and the court should not "give special weight to the rights of the property owner simply because the other party is in the wrong".[272] Both historically and in legal terms, the law does not, in fact, justify killing in defence of property. Indeed, it may be the case that such reliance on lethal force has never been justified where the threatened harm was to property alone.

That said, the reinstatement of the partial plea[273] of excessive defence[274] is required to account for instances where the defender

murder – or if they are not prosecuted at all because of the judgment that murder charges are inappropriate': Law Reform Commission of Victoria, cited in Yeo (2000), note 110, p 743.

[269] As originally discovered in *McKay* [1957] VR 560 — although this was not a case where the killing was done in defence of property, but in order to apprehend a felon.

[270] Yeo (2000), note 110, pp 743-744.

[271] Yeo (1998), note 110, p 169.

[272] Ashworth, note 6, p 143; cf Cooper, R, in Mulholland & Cooper, note 255.

[273] An 'excuse' rather than a 'justification': See Yeo (1998), note 110, pp 168-170. However, Yeo has suggested elsewhere that a necessary feature of an 'excuse' is that the person 'concedes that her or his conduct is disapproved of by society': Yeo, note 258, p 4. Yet, surely a person who is, on the one hand, pleading that he or she honestly believed that what he or she did was justified (i.e. approved of by society), is not likely, on the other hand, to concede that his or her conduct is disapproved of by society.

[274] Or more precisely, 'excessive defence of property'. This already exists in statutory form in South Australia: *Criminal Law Consolidation Act 1936* (SA), as amended by the *Criminal Law Consolidation (Self-Defence) Amendment Act 1997* (SA), s 15A(2). Unfortunately, Section 15A(1) of the legislation indicates that there still may be some occasion where conduct causing death (albeit unintentionally) could be a reasonably proportionate response to a mere threat to property. Such killing would be justified, rather than partially excused, and would, therefore, result in complete acquittal: ss 15A(l)(b) & (c). This does not accord with the fundamental right to life now recognised by the common law (see above). Note that the focus is on the threat as perceived by the accused and that, if the accused perceived a threat beyond a simple threat to property, the matter should move from defence of property to self-defence, taking it out of the reach of this section of the Act. Yeo points out that recklessness or the presence of an intention to kill will specifically preclude any claim of fatal defence of property under

uses lethal force believing honestly, though unreasonably, that such force is necessary in defence of property.[275] This would accord with the primacy of life[276] by discouraging juries from acquitting those who kill in defence of property.[277] A manslaughter conviction would

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the legislation, whereas neither factor will preclude a defence of self-defence. Yeo states: 'the underlying rationale for these restrictions must be that the legislature took the view that no interest in property is so valuable as to warrant protection by conduct performed with the intention of causing death or, in the case of the general plea of [property defence], of recklessly causing death': Yeo (1998), note 110, pp 163-164. The doctrine of excessive self-defence, incorporating property defence, exists also in the codified common law of India: Indian Penal Code, Exception 2 to Section 300.

[275] Yeo (1998), note 110, p 143.

[276] Another suggestion is that proposed by the Law Reform Commission of Victoria, where an honest but unreasonable belief would result in acquittal for murder and conviction for a new offence of 'culpable homicide', carrying a maximum sentence of seven years imprisonment: cited in Yeo (1998), note 110, pp l64.-165.

[277] It has been suggested that juries may be hesitant to convict for murder because '[i]n our culture, to describe someone as a 'murderer' is to employ the most bitterly and effectively stigmatising epithets available in the language': Walker, F, cited in Yeo (1998), note 110, p 172. Yet, to describe someone as 'DEAD' is surely a far more bitterly and effectively stigmatising epithet!

provide at least some recognition of the value of the life of the deceased.[278]

[278] Yeo argues for the reintroduction of the partial excuse as a 'benefit' that should be available to the accused: Yeo (1998), note 110, p 139. It is submitted, however, that the focus should be on upholding the sanctity of the life that has been unnecessarily taken — that of a non-threatening thief, trespasser or vandal. Killing such a person can only be described as a chicken-hearted act and the law should not encourage cowardice by bestowing 'benefits' on the killer. If, however, the killer honestly believed that there was a present threat to life, the matter becomes one of self-defence, not defence of property.