

**PARTIAL EXCUSES
AND CRITICAL ASSUMPTIONS:
THE JUDGMENT OF HINDSIGHT AJ IN
REX v DPP**

*Brent Fisse*¹

Summary

The previous essays in this collection contain many insights relevant to the nature and scope of qualified defences and defences generally. Those insights suggest the need for a framework of critical assumptions for law makers to consider and apply when formulating defences. A framework of critical assumptions is set out in the judgment of Hindsight AJ² in Rex v DPP, a recent hypothetical case in which the issues raised by Zecevic v DPP are re-run.

Hindsight AJ

The appellant, Horatio Rex, was convicted in the Supreme Court of New South Wales of having murdered Cassius Lex on 16 July 1989 at Blacktown in Sydney. This appeal is against the judgment of the Court of Criminal Appeal dismissing an appeal against that conviction. The facts verge on being identical to those in *Zecevic v DPP*.³ The course of proceedings also parallels that in *Zecevic v DPP*. Special leave to appeal has been granted in order to allow this Court to reconsider the rejection of the defence of excessive self-defence by a majority of this Court in *Zecevic v DPP*, and to re-examine the elements of the defence of self-defence there reformulated.

The impetus for granting special leave has been partly the decision of the Privy Council in *Beckford v The Queen*⁴ that a belief as to the necessity for

acting in self-defence need not be based on reasonable grounds. The Privy Council has departed significantly from its previous decision in *Palmer v The Queen*⁵ and has reformulated the law in a way that casts doubt on the decision in *Zecevic v DPP*. Doubt is cast not only on the definition of the defence of self-defence leading to a complete acquittal, but also on the rejection of the qualified defence of excessive force.

Apart from the vacillations of precedent, it is also apparent today that little guidance is to be found in the Australian criminal Codes. The Codes have been interpreted as leaving no room for a qualified defence of self-defence.⁶ However, this interpretation has been questioned.⁷ In any event, the treatment of self-defence and excessive defence in the Codes is hardly conclusive of the position at common law and may reflect past rather than current concerns. The danger of ossification in the context of self-defence is apparent from the need felt to amend the Tasmanian *Criminal Code* so as to reflect the decision in *Beckford v The Queen*.⁸ Moreover, the Codes may have been unduly insular in this respect, a possibility suggested by the failure to emulate the defence of excessive force provided under Lord Macaulay's Indian *Penal Code* and its Asian counterparts.⁹ It may also be noted that the defence of excessive self-defence is provided under the *Criminal Code* for England and Wales that has recently been proposed by the Law Commission.¹⁰

It is therefore necessary for this court to re-examine the issue whether the defence of excessive self-defence is to be recognised at common law. If such a defence is to be recognised, it is also necessary to re-examine how its elements are defined.

In my opinion, there is no qualified defence of excessive force reducing murder to manslaughter but it is a defence to murder that the accused acted genuinely in self-defence. I am unable, with respect, to agree with the reasons given by the majority in *Zecevic v DPP* for denying that genuine albeit excessive self-defence is a defence to murder. Nor do I subscribe to the definition of the defence of self-defence advanced by the majority. My views also differ substantially from those expressed in *Zecevic v DPP* by Deane J and Gaudron J when dissenting.

The conclusions to which I have come depend on certain critical assumptions¹¹ about defences in the criminal law. The critical assumptions that I have extracted from the case law and the literature are these:

- (1) history is a useful lens through which to review the present law but should not be used in so selective a way as to be misleading;
- (2) justification and excuse are concepts that initially help to unravel the nature and scope of defences but the idea of "excuse" says little about how excuse-based defences should be defined;
- (3) degrees and types of blameworthiness govern the recognition of excusing conditions, and defences should cohere in these respects;
- (4) offences and defences are best defined cohesively rather than discretely, and in a manner which reflects the type of guilty mind required by an offence;
- (5) defences should focus on the position of the accused and, as far as

- practicable, avoid stereotypes and alienating influences; and
 (6) practicality demands that defences in the law of homicide be readily applicable by juries and sensible in their predictable results.

These critical assumptions may be primitive, incomplete, elliptical, or wrong.¹² If so, others will be able quickly to see where I have erred. Thus equipped, doubtless they will advance a more commendable position.

History

A distinction was once drawn between justifiable and excusable homicide. Justifiable homicide related to killing done in the execution of justice. It entitled the accused to total acquittal, entailed no forfeiture and required no pardon. Excusable homicide, in contrast, excused rather than acquitted, at first required a pardon, and attracted forfeiture. The distinction between justifiable and excusable homicide disappeared with the abolition of forfeiture by statute.¹³ Nonetheless, the distinction remains an undercurrent in the stream of influences that have shaped, and which continue to shape, the law of homicide.

In *Zecevic v DPP*, Wilson, Dawson and Toohey JJ supported their decision partly by reference to the historical distinction between justifiable and excusable homicide.¹⁴ Excusable homicide was taken to be concerned with “a necessary and reasonable response to a threat to life and limb”, a proposition invoked to reinforce their opinion that the modern-day defence of self-defence requires a reasonably-based belief as to necessity.¹⁵ The plea of self-defence today, it was thought, has a greater connection with excusable homicide than with justifiable homicide because “most cases” relate to the preservation of life and limb rather than to the execution of justice.¹⁶ Wilson, Dawson and Toohey JJ concluded that the mental element of the defence of self-defence ought not to be regarded as a definitional element of the offence in question but as going to exculpation.¹⁷

With respect, the history of justifiable and excusable homicide is more complex and has other ostensible implications.¹⁸

Justifiable and excusable homicide are portrayed by Wilson, Dawson and Toohey JJ as if in all cases a defence of self-defence required an objectively reasonable belief as to necessity. There are several difficulties with this view. No mention is made of the distinction drawn by East between reasonably necessary defence leading to acquittal and mistaken defence leading to a conviction of manslaughter.¹⁹ East’s account of the law influenced a number of decisions that ultimately led to the decision in *R v Howe*.²⁰ East’s memoir is part of the historical background and, in my opinion, cannot be treated as if it were some erasable entry on a computerised spreadsheet.²¹ It is also questionable whether an objectively reasonable belief was a requirement for excusable homicide prior to the nineteenth century. The need for a reasonable belief was advanced in East’s *Pleas of the Crown* in 1803, on dubious authority.²² However, East’s view later prevailed and did so until the decision in *Beckford*.²³

Another problematic feature of the treatment of history in *Zecevic v DPP* by Wilson, Dawson and Toohey JJ is the implication drawn from the traditional

distinction between justifiable and excusable homicide. The concept of justifiable homicide is eclipsed, on the basis that a plea of self-defence now has "a greater connection with excusable homicide than with justifiable homicide".²⁴ With respect, it does not follow that the concept of justifiable killing is dispensable today. Cases of justifiable homicide may still arise, as where lethal force is reasonably used to prevent the commission of felonious attacks that would otherwise be likely to occasion death or grievous bodily harm.²⁵ Such attacks plainly involve a "threat to life and limb", but it hardly follows that they are not also instances of justifiable homicide.²⁶ It is difficult to understand why the choice today should be restricted by assuming that the basis of self-defence is exclusively a matter of excuse rather than a matter of either excuse or justification, depending on the circumstances.

Nor does the history of justifiable and excusable homicide warrant the implication that the mental element of the defence of self-defence relates to exculpation as a matter distinct from the definition of the offence. It is incorrect to suppose that the defence of self-defence came into existence independently of the mental element of murder. The defences of excusable self-defence and provocation evolved from the requirement of malice aforethought. A killing under provocation or on sudden quarrel was taken to lack the requisite element of malice aforethought.²⁷ The defence of excusable self-defence did not stem from some discrete construct of excuse or exculpation but flowed from the core concept of malice aforethought. There is no denying that, for two centuries or more, self-defence has been treated independently of the mental element of murder.²⁸ However, that development is only part of the history. It may well be that the earlier development of the law is more consistent with principle than the later emergence of discretely defined defences. If so, then the path shown by the earlier history should be followed. There is no justification for giving primacy to recent historical developments merely because they are recent. It is also apparent from studies of the law of homicide by professional historians that the approach of the "self-informing" jury during the middle ages was not without merit.²⁹ Indeed, to the extent that the requirement of an "evil intent" was determined by an holistic assessment of the blameworthiness of an accused, the approach adopted in homicide trials during the era of self-informing juries could be seen as superior to the atomistic delineation of defences that has become prevalent in modern criminal law.

The historical grounds advanced for the decision of the majority in *Zecevic v DPP* are thus questionable. An alternative and more plausible reading of history, in my opinion, is that excessive defence was recognised as a defence to murder by East and the courts which followed his views, that a requirement of reasonable belief as to necessity in self-defence does not appear to have been introduced until the eighteenth century, that the distinction between justifiable and excusable homicide is both traditional and adaptable to modern context, and that the defences of self-defence and provocation originated from the core requirement of malice aforethought and later came to be defined separately from the mental element of murder. This perspective hardly dictates any particular conclusion as to the nature and scope of the defence of self-defence today.

Rather, it confirms the need to look for guidance by considering other critical assumptions, as discussed below.

Justification and Excuse

The theory of defences in the criminal law has been the subject of increasing scrutiny in the literature. It is instructive to consider what appear to be the more adhesive strands of thought. The first is the distinction between justification and excuse, a distinction partly derived from the history of justifiable and excusable homicide.

The justification-excuse distinction has been pin-pointed in these terms:

A person claiming a justification acknowledges his or her responsibility for the harmful conduct but contends that it was done in circumstances which made the conduct rightful in the eyes of society. Since society approves or at least tolerates the conduct, the actor deserves praise rather than blame. The focus is then on the person's act or conduct rather than the person as an individual. A person claiming an excuse likewise acknowledges the harm done by her or his conduct. Unlike justifications, however, the person concedes that her or his conduct is disapproved of by society. What is being pleaded is that while the conduct was wrong, there were particular circumstances which made it just that society should render the actor blameless for the harm committed. The focus then is on the person of the actor rather than the conduct performed.³⁰

This is a fundamental distinction. However, the line is not always clear-cut and other considerations may ultimately be more important in shaping particular defences in the criminal law.³¹ Nonetheless, the concepts of justification and excuse are part of the underlying foundation of defences.³²

One implication to be drawn from the distinction between justification and excuse is that a killing would not amount to murder or manslaughter if the conduct of the accused was justified from an objective standpoint.³³ Lethal conduct in self-defence is justified from an objective standpoint if performed in a situation where the accused was in fact under an unlawful attack by another,³⁴ where the attack exposed the accused to an actual and substantial risk of suffering death or grievous bodily harm, and where the force used by the accused in self-defence was no more than reasonably necessary to avert that risk. It is immaterial that the accused was mistaken as to the threat confronting him or her, or incorrectly believed that the force used was reasonably necessary. If the killing is justified in the sense described, it is also irrelevant that the accused may have been unaware of the circumstances which in fact created a right to use force in self-defence. On this analysis, a person in the position of the accused in *R v Dadson*³⁵ would not be liable for murder because, from an objective standpoint, the killing was justified. In such a case however, the accused would be liable for attempted murder assuming that impossibility is no bar to conviction for attempt where, on the facts as the accused took them to be, he or she was trying to commit the offence of murder.³⁶

Another implication of the concept of justification is that, for a killing to be

justified, the accused must have been acting in response to an unlawful attack by the deceased. Many accounts have been given of the need or otherwise for an unlawful attack as an element of the defence of self-defence. One perennial source of difficulty has been the case where an accused is attacked by a psychotic aggressor. With the benefit of hindsight, this issue appears to have been much ado about little. It is apparent that the conduct of a psychotic aggressor in attacking an accused is unlawful even if it be excused by reason of insanity.³⁷ Given that the attack is unlawful, the accused is entitled to use lethal force if necessary in self-defence, and this is so whether or not he or she happens to be aware of the psychotic condition of the aggressor. A different issue arises where in fact the victim was acting lawfully in using force against the accused and the accused used counter-force in the mistaken belief that it was reasonably necessary to do so. In such a case the question is whether the conduct of the accused should be excused by reason of the mistaken belief as to necessity. As explained below, the answer to that question depends on considerations other than merely the general concept of excuse.

The implications of the concept of excuse are far from obvious. "Excuse" is an umbrella term that serves mainly as a useful reminder that criminal liability is subject not only to defences of justification but also to a range of excusing conditions. The concept seems inscrutable, however, if relied upon for guidance in delimiting excuse-based defences. Some excusing conditions, such as automatism, duress, or the *Proudman v Dayman*³⁸ defence of reasonable mistaken belief, result in a complete acquittal. Others, such as provocation or diminished responsibility, reduce murder to voluntary manslaughter. The concept of excuse does not in itself provide a criterion for distinguishing between complete and qualified defences. Nor is it clear from the concept whether or not a defence that leads to a complete acquittal should be subject to some requirement of reasonableness, such as care to avoid lapsing into automatism, or reasonable grounds to believe in the necessity to act in self-defence, or under duress. The implications are also obscure in the context of qualified defences to murder. In particular, it is unclear whether a requirement of reasonableness is an appropriate element. Take the rule in provocation that the provocative conduct must be such that loss of self-control might have been experienced by an ordinary person in the same circumstances as the accused. The concept of excuse is too opaque to reveal whether the ordinary person rule is a paradigm feature of an excuse-based qualified defence or, to put the opposite possibility, a misconception.

The concepts of excuse and justification have been debated at length in the literature, a debate largely inspired by J L Austin's seminal essay "A Plea for Excuses".³⁹ Some writers have tried to accommodate qualified defences of excessive force and provocation by introducing the concepts of "partial excuse" and "partial justification".⁴⁰ Others have sought refinement through detailed conceptual analysis.⁴¹ These enterprises are intriguing but, for the purpose of resolving the issues with which we are confronted, their yield seems low. It may be that there has been too much theorising for the sake of theorising, or that insufficient attention has been paid to J.L. Austin's caution that the language of

excuses provides the first but not the last word on excusing conditions.⁴² It may also be observed that philosophical technicality does not necessarily produce useful ideas, just as scientific jargon is no substitute for worthwhile sociological explanations. Recollect Hugh Stretton's critique of Talcott Parsons' attempt to explain the "social system" in terms derived from the laws of physics:⁴³

To encourage blind endeavour without yield, ... it is necessary to abandon the inconvenient precisions of English for a language specially capable of blur, obscurity and ambiguity. With enough difficulties of reference, theory is hard to *disprove*. Meanwhile the jargon is defended as scientific terminology on the curious ground that the terminology of physics is *more* precise, distinctive and unambiguous than English. Whatever may be true of Parsons, acquaintance with some of his followers makes it very clear that their love for the jargon *is* love, and their reasons for it sometimes unlovely: it camouflages the failures of failing methods, and attracts scientific status without scientific performance.

The terminology of excuse has limited explanatory power.⁴⁴ As indicated earlier, the concept of justification does suggest the nature and basic elements of defences that rest on that foundation. However, the concept of excuse is many things to all persons. It therefore seems what Stretton described as a "failing method" to discuss the defences of self-defence and excessive defence as if the concept of excuse is the main key to understanding. The nature and definition of excuse-based defences depend more fundamentally on other critical assumptions, including the conception that excuses should cohere in terms of degrees or types of blameworthiness.

Coherence and Blameworthiness

A basic precept of the theory of defences in the criminal law is that degrees or types of blameworthiness should be treated coherently.⁴⁵ This precept reflects the law's quest for like treatment of like cases. Unfortunately, that quest has not been satisfied by the decision in *Zecevic v DPP*.⁴⁶ On the contrary, several possible inconsistencies emerge. One is that mental impairment short of insanity comes within a defence of diminished responsibility, whereas impairment of judgment by reason of terror or nervous reaction is not within the scope of diminished responsibility or any other qualified defence to murder. Another is that lethal force will attract an acquittal if the accused acted with a reasonable belief as to its necessity but the result is manslaughter if the accused reasonably lost self-control in response to provocation. These inconsistencies may be more apparent than real but, if so, some explanation is required. In my opinion, there are significant differences between diminished responsibility, excessive self-defence, and provocation.⁴⁷ However, as indicated below, these differences do not support the decision in *Zecevic v DPP*. Rather, they suggest that the law should be placed on a different foundation, and reformulated.

An initial reason for believing that diminished responsibility, provocation and excessive force are treated incoherently is that in all of these contexts the accused is subjected to extraordinary pressure (internal or external)⁴⁸ and yet

excessive force alone is not a qualified defence. This may be the way that non-lawyers or non-philosophers would look at the matter and hence there is much attraction in the view that it is both unnecessary and undesirable to go any further. There is, however, another school of thought.⁴⁹ It is that excusing conditions differ in kind and that it is misleading to assume that there is some barometer for measuring degrees of criminal responsibility. From this standpoint, it is essential to focus on the special features of particular excusing conditions and, by dint of considered reflection, to see what exactly those distinctive features imply. A number of differences emerge if one pursues such an inquiry.

First, diminished responsibility and provocation require an attenuated mental capacity whereas self-defence does not.⁵⁰ The attenuated mental capacity required for diminished responsibility or provocation may be conceived as a reduced capacity for choice by reason of mental impairment or loss of self-control.⁵¹ Alternatively, persons acting under diminished responsibility or provocation may be viewed as entities who are exempt from criminal liability because they are not moral agents. Thus, a psychopath may be thought of as a child;⁵² a person acting in a rage might be treated likewise, or as half-beast. The position in the context of self-defence is different.⁵³ Although there may be many cases where persons acting in self-defence may be suffering from a "dethronement of reason" comparable to loss of self-control in provocation, there is no requirement that the accused be reduced to such a state. The basis of the defence is that the accused was either justified in killing or mistakenly believed⁵⁴ that the killing was justified. It is not that the accused was suffering from some impairment of reason or control, or was acting like a child.

Secondly, there is no defence of self-defence unless the accused had a right, or perceived right, to act in self-defence.⁵⁵ By contrast, there is no such requirement for diminished responsibility or provocation. In the case of provocation it is true that the contributory fault of the victim is part of the rationale for the defence. However, the defence of provocation has not been taken to mean that an accused has any entitlement to use force. Nor is the focus on whether the accused has any actual or perceived entitlement to use force.

Thirdly, diminished responsibility and provocation do not require the accused to act in the belief that the force used was necessary to avoid the risk of death or grievous bodily harm. There is no question of an intention to kill one person being nullified or discounted by an intention to save another. The position is different in the context of self-defence.⁵⁶ The intention to kill is offset by an intention to preserve life. This is not to say merely that the accused had a good motive.⁵⁷ Nor is it to invoke the doctrine of double effect.⁵⁸ It is simply to focus on the counter-balance between an intention to kill and an intention to save life where the only reason for the intention to kill is the intention to save life.

Fourthly, account should be taken of the pathfinding role⁵⁹ played by the defence of diminished responsibility. Diminished responsibility serves partly as a test site for discovering more about the significance of mental or emotional illness or deficiency in assessing criminal responsibility. The criminal law's traditional model of a freely choosing conscious rational actor has long been challenged by philosophers, psychiatrists and sociologists.⁶⁰ The precise legal

limits of conscious rational action are also obscure.⁶¹ The defence of diminished responsibility allows the model to be tested in practice by making psychiatric testimony freely admissible and by allowing other models of human behaviour to emerge.⁶² The experiment is conducted cautiously, however, and a successful defence does not lead to an acquittal but to a conviction for manslaughter. Similar considerations seem relevant in the context of provocation, where much uncertainty surrounds the meaning of "loss of self-control".⁶³ The ordinary person rule in provocation has meant that loss of self-control has been assessed by reference to everyday experience rather than psychiatric evidence.⁶⁴ However, the rules relating to the admission of such evidence may be relaxed,⁶⁵ in which event the defence of provocation would also play a pathfinding role comparable to that of diminished responsibility. The same pathfinding concerns do not arise in the context of the defence of self-defence. The underlying model in self-defence is conscious rational response to attack, a model that adheres to the traditional rational actor conception of criminal responsibility.⁶⁶

These dissimilarities reveal that excessive self-defence relates to a different type of blameworthiness from that covered by the defences of diminished responsibility and provocation. Moreover, the difference is such that excessive self-defence does not fit easily into the category of qualified defences to murder. In the case of diminished responsibility and provocation, murder is reduced to manslaughter because there is an impairment of mental or emotional capacity, or because the accused only half qualifies as a moral agent. The fault of the accused is attenuated by his or her mental or emotional condition. This is not so in the case of excessive defence. The postulate is that the accused was a conscious rational actor who acted under a mistake as to justification. The fact that a mistake as to justification was made is not in itself enough to show that the mistake was blameworthy. An inaccurate judgment is not necessarily a blameworthy judgment. Some test is needed for assessing the blameworthiness of the accused's mistake. What is this test and whence is it derived? The construct of voluntary manslaughter does not hold the clue.

In my opinion, a possible answer is to be found in the linkage between offences and defences in the criminal law, particularly the linkage between the mental element of involuntary manslaughter and the mental element of self-defence. This linkage is explained in the next section of my judgment. To foreshadow the result of that discussion, a mistake as to the justification for using lethal force in self-defence attracts liability for manslaughter only if the accused was criminally negligent. In contrast, a test of criminal negligence would be inappropriate in relation to diminished responsibility where the central issue is not blameworthiness of mistaken justification but impact of mental or emotional impairment. For a similar reason, a test of criminal negligence would also be irrelevant in provocation,⁶⁷ except perhaps where the accused is mistaken as to the nature or the source of the provocation. It might be argued that provocation should be assessed on the facts as the accused mistakenly believed them to be unless the mistaken belief was criminally negligent. However, this approach would complicate the ordinary person test and in any event is inconsistent with the elements of the defence now stipulated in s 23 of the *Crimes Act* (NSW).

The question has arisen whether qualified defences, such as diminished responsibility, provocation and excessive self-defence, still have a place in the criminal law.⁶⁸ It has often been contended that, with the abolition of capital punishment and the introduction of discretionary sentences for murder, there is little or no need for qualified defences. It has also been maintained that the absence of qualified defences elsewhere in the criminal law is problematic and that coherence should be achieved by abandoning the qualified defences to murder. These matters are significant but, on the analysis that I have advanced, do not have a bearing on the present case. In my opinion, as explained above, it is incorrect to characterise excessive self-defence as a qualified defence. The question whether a mistake as to justification is sufficiently blameworthy to warrant criminal liability does not depend on the constructs of qualified defence or partial excuse. Rather, the mental element of the defence of self-defence depends on the mental element of the particular offence, whether that offence be murder, involuntary manslaughter, unlawful wounding or assault.

Some further observations are pertinent given what I have already said. The defence of diminished responsibility, as explained, provides a test-bed for models of human action other than that of conscious rational action. The conscious rational actor model is open to question⁶⁹ and hence there is some value in having a defence that allows further intelligence to be gathered in a practical way. There is also a case for incorporating the defence of provocation as a branch of the defence of diminished responsibility.⁷⁰ This step would require the elimination of the ordinary person test, which has outlived whatever usefulness it may once have had.⁷¹ Provocation already provides a substitute for the defence of diminished responsibility in New Zealand.⁷² In New South Wales and other jurisdictions where both defences are available it is often artificial to differentiate between them. This is especially so in cases where, as in *R v Troja*,⁷³ psychiatric evidence is admitted in relation to diminished responsibility but excluded in relation to a concurrent defence of provocation. The *Model Penal Code* contains a defence that assimilates provocation and diminished responsibility⁷⁴ and this might well provide a starting point for legislative reconsideration of ss. 23 and 23A of the *Crimes Act (NSW)*.

I turn now to a more fundamental matter of coherence, namely the linkage between the mental element of offences and the mental element of the defence of self-defence.

Offences and Defences

The relationship between the mental element of offences and the mental element of defences is critical in determining the nature and definition of the defence of self-defence. If the defence is divorced from the mental element of murder and involuntary manslaughter it is possible to arrive at the position taken in *Zecevic v DPP*.⁷⁵ However, if the mental element of the defence is linked to that of murder or involuntary manslaughter then the implications are quite different.⁷⁶

In my opinion, the decision in *Zecevic v DPP*⁷⁷ is based on a flawed view of the relationship between the offences of murder and manslaughter and the

defence of self-defence. The majority relied on the proposition that the defence of self-defence is exculpatory and that the mental element of an excuse-based defence is independent of the mental element of the offence in issue.⁷⁸ With respect, this proposition lacks persuasion. First, it neglects the historical point that self-defence grew out of the requirement of malice aforethought in murder.⁷⁹ It does not follow from the later emergence of self defence as a particularised defence that the definition of offence and defence should be seen as entirely separate.⁸⁰ Form should not be mistaken for substance. The substance is that an intention to kill which is formed genuinely in order to defend oneself and with intent to preserve life is a materially different kind of intention to kill from one formed independently of such a need.⁸¹ Secondly, it hardly follows that, because a defence is one of excuse, the mental element of the defence is independent of the mental element of the offence. A defence of justification does not depend on the mental element of the offence but the same is not necessarily true of a defence based on excuse. This can readily be seen by looking at the operation of mistake as a means of denying the mental element of an offence.⁸² A mistake in such a context is an "excuse"⁸³ and yet the definition of the kind of mistake that will exculpate flows directly from the mental element of the offence. What needs to be explained is why the position should be different in the context of the defence of self-defence. It seems to me, again with all respect, that no adequate explanation was given in *Zecevic*.⁸⁴ Reliance was placed on the definition of self-defence advanced in a number of previous cases, including *R v Howe*⁸⁵ and *Viro v The Queen*,⁸⁶ but those definitions are themselves based on precedent rather than explanation. The decision in *Beckford v The Queen*⁸⁷ casts doubt on the foundation of precedent previously relied upon by this court. *Beckford* also provides a principled explanation.

In *Beckford v The Queen*⁸⁸ it was held by the Privy Council that the defence of self-defence is available to an accused on the facts as the accused took them to be, and that it is unnecessary for the mistake as to the factual basis for justified action in self-defence to be based on reasonable grounds. The relevant facts are those relating to both the occasion for acting in self-defence and the nature of the force used in response. The reasonableness of the force that the accused thought he or she was using is judged by an objective standard.

The basis for the decision in *Beckford* was that a genuine belief in facts which, if true, would justify self-defence negatives the intent to act unlawfully which is required for murder. The reliance placed on the element of unlawfulness⁸⁹ perhaps masks the underlying general principle, which is that the mental element of defences matches the mental element of offences unless there is some good reason to the contrary. This principle is coherent and logical.⁹⁰ It is rooted historically in the direct inter-relationship between the elements of murder and the origin of justifiable and excusable homicide. It is consistent with the inter-connection of the mental element of defences and offences in other areas of the criminal law, including the defence of claim of right in larceny, and mistake as to consent in rape or sexual assault. The same approach is embodied in the American Law Institute's *Model Penal Code*.⁹¹ Moreover, many commentators have supported the principle that the mental element of the defence of

self-defence is governed by the mental element of the offence concerned.⁹² Indeed, Glanville Williams has expressed the view that the elements of offences and defences are functionally equivalent and that nothing should hinge on whether a particular element happens to be defined as part of a defence or as part of an offence.⁹³ That view may be too reductionist. Perhaps there is a conceptual difference between offence and defence.⁹⁴ Offences may have a prohibitory or normative quality lacking in defences. Even so, however, it does not follow that the mental element of the defence of self-defence should diverge from that of the offence in issue. If the conceptual difference mooted were to be plainly reflected in the context of murder, the focus of the offence would be upon the harm of taking life and the mental element would be relegated to a defence of lack of intent to kill. In that event, there would be a patent discontinuity between a defence of reasonable mistake as to the factual basis for self-defence and a defence of lack of subjective intention to kill.

A more fundamental consideration that supports the position taken in *Beckford v the Queen* is the value of looking at social phenomena as wholes rather than as discrete particles.⁹⁵ From this holistic perspective, the guilty mind required for an offence should be assessed by looking at the full context rather than by selective preoccupation with isolated precepts. There is artificiality in saying that an accused has the requisite guilty intention to kill for murder if the intention to kill alleged arose entirely by reason of an intent to use necessary force in order to preserve life. Moreover, experience suggests that artificiality of this kind eventually is shown up for what it is. A classic example of the danger of focussing upon precepts in isolation is the former rule that retreat is necessary for a defence of self-defence,⁹⁶ the factor of retreat is relevant when assessing the reasonableness or genuineness of an accused's response to attack but, as experience has shown, does not have any significance independently of those core elements. Another example of lack of sight of the whole picture is the distinction now drawn between loss of self-control as a basis for the defence of provocation, and loss of self-control by way of denial of the mental element in murder.⁹⁷ Reference may also be made to the failed experiment in California and other jurisdictions of using a bifurcated trial procedure for separating the issue of guilt from the issue of insanity.⁹⁸

I am therefore inclined to the view that the defence of self-defence should be put on a foundation that accords with the decision in *Beckford v The Queen*. Three central propositions flow from this approach. First, where the force used by the accused was in fact justified in self-defence, the result is an acquittal whatever the offence charged. Secondly, where the force used in self-defence was not in fact justified an accused is nonetheless entitled to be acquitted of murder if, on the facts as the accused mistakenly believed them to be, the force used was reasonable. Thirdly, in cases covered by the second proposition, the accused is entitled to be acquitted of manslaughter unless the mental element of involuntary manslaughter is present. The mental element of involuntary manslaughter would be present if the mistake made by the accused were negligent to the gross degree required for manslaughter by criminal negligence.⁹⁹ However, it would not be a case of manslaughter by an unlawful

and dangerous act: the accused's mistaken belief would negate liability for assault and hence there would be no relevant unlawful act.¹⁰⁰

These propositions are provisional. Appealing as the principle of corresponding mental elements for defences and offences may be, it is premature to come to any conclusion until other critical assumptions have been examined. The life or death of law hardly turns on symmetry. It depends much more on other critical assumptions, including the status of accused as persons rather than as stereotypes or aliens.

Accused as Persons

There are as many conceptions of what it is to be a person as there are persons. Moreover, different people have different experiences and capacities. The law should therefore tread warily lest people are judged by reference to stereotypes that have little or no relevance to their particular being.¹⁰¹ Even from a utilitarian point of view it is counter-productive to treat accused as objects or outcasts; they are likely to become alienated, to their devastation and to the detriment of the community. These considerations are supported by the tradition of subjective blameworthiness that has been a feature of the development of the criminal law under Australian common law.¹⁰² They also flow from a variety of currents in criminology, including the just deserts movement,¹⁰³ theories of re-integration,¹⁰⁴ and republican ideals of criminal justice.¹⁰⁵ It is therefore regrettable that formulations of the law of self-defence have sometimes encouraged stereotyping rather than attention to the position of particular accused.¹⁰⁶

The record of this court has not been completely impeccable in this respect. It was decided in *Zecevic v DPP*¹⁰⁷ that the defence of self-defence requires a belief on reasonable grounds that the force used was necessary. An initial difficulty is that, although "reasonableness" is assessed in light of the circumstances of the accused, the test is nonetheless objective and hence conducive to stereotyping. Attention is not confined to the person actually on trial. Instead, the mirror of law reflects not only the accused but also some "other self", namely the accused who believes on reasonable grounds.

The image of responsibility reflected may be illusory, a difficulty suggested by *People v Goetz*.¹⁰⁸ In this case a white man in a New York subway shot several black youths in response to what he took to be an attempted robbery. He had previously been robbed several times by youths in similar circumstances. One key issue was the definition of the defence of self-defence. The statutory requirement was that the accused act with a "reasonable" belief that he was in danger. The New York Court of Appeals held that the test of reasonableness took account of "any relevant knowledge the defendant had about [the victim] ... the physical attributes of all persons involved ... [and] any prior experiences [the accused] had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him."¹⁰⁹ However, the test excluded consideration of the sensitivity caused by previous exposure to repeated robberies in the subway. This approach is reminiscent of the schizoid ordinary

person test under the defence of provocation.¹¹⁰ In my view, it is unrealistic and insensitive.¹¹¹ If a person has become skittish as a result of a string of previous unprovoked assaults, that sensitivity is directly relevant to the blameworthiness of the accused in over-reacting. With the benefit of hindsight, the test laid down in *Zecevic v DPP*¹¹² seems to evade rather than to resolve difficulties of this kind.

Another weakness of the objective test endorsed in *Zecevic v DPP* is that it conduces to misleading stereotypes in the context of domestic violence. The reasonable person test is problematic in this context because of the risk that the reasonable person will be infused with male-dominated assumptions about the nature of domestic violence and the degree or kind of counter-force that is appropriate.¹¹³ This risk can hardly be overcome merely by directing a jury that the reasonableness of the belief of a woman accused is to be judged on the basis of a reasonable woman in the position of the accused.¹¹⁴ That construct may still be invested with male-dominated characteristics by the jury. Although a subjective test may also be prone to stereotyping, the danger is reduced by emphasising that it is the belief of the particular accused that matters. It may also be noticed that the approach adopted in *Beckford v The Queen*¹¹⁵ does not leave room for a compromise verdict of voluntary manslaughter. It has been argued that an unsatisfactory feature of the former qualified defence of excessive self-defence was that juries could too readily return a verdict of guilty of manslaughter if they were unsure what to make of the impact of domestic violence on the accused.¹¹⁶ The decision in *Beckford* does leave open the possibility of a verdict of guilty of involuntary manslaughter but, far from being automatic, such a verdict would require the jury to find criminal negligence on the part of the accused.¹¹⁷

A further symptom of lack of respect for accused as persons is apparent in *Zecevic v DPP*.¹¹⁸ The position was taken that accused who use excessive force in genuine self-defence are not prejudiced by the absence of a defence of excessive force because they can rely on provocation or deny the mental element required for murder. In my view, this rationalisation is procrustean. Worse, it may require accused to distort the true basis upon which they wish to deny their blameworthiness.¹¹⁹ As was made plain by Mason CJ in *Zecevic v DPP*¹²⁰ and by Mason J in *Viro v The Queen*,¹²¹ there is a significant difference between a person who kills intentionally and a person who kills intentionally but in the genuine belief that what is done is necessary to save his or her life.¹²² In the latter case there may be no question of provocation and obviously the mental element of murder is present.¹²³ It is therefore difficult to avoid the conclusion that, by excising excessive force from the range of excusing conditions, the decision of the majority in *Zecevic v DPP* prejudices rather than promotes the interests of accused.¹²⁴

The approach adopted in *Beckford v The Queen*¹²⁵, although preferable to the position under *Zecevic* in each of the fore-mentioned respects, is not free from criticism. The decision in *Beckford* requires that, on the facts as the accused believed them to be, his or her conduct satisfies an objective standard, namely that the force used be reasonable. The assumption is that the defence of

self-defence lays down a minimum standard of conduct. This assumption is problematic. One consideration is that people cannot be expected to recollect, let alone satisfy, a legally required standard if they are acting on the spur of the moment or, as may sometimes be the case, in a state of outright panic; as Holmes said, "detached reflection cannot be demanded in the face of an uplifted knife".¹²⁶ More fundamentally, the postulate that there is a legal standard is questionable because no standard is imposed by law other than a very broad test of reasonable necessity. What amounts to reasonable necessity varies from jury to jury and, even for those with access to the transcripts, typically it is impossible to discern from verdicts the particular standard applied in a given case.¹²⁷ I am therefore inclined to agree with Andrew Ashworth's view:

If the law can offer nothing more than a general standard of reasonableness, it is arguable that it is only fair that D's belief that he is acting reasonably and justifiably should constitute a defence, since the law offers no guidance for the situation which confronts him.¹²⁸

The need for accused to be respected as persons thus suggests that, in the context of excessive lethal force, liability for murder should depend on whether the accused acted genuinely in self-defence.¹²⁹ If the accused acted genuinely in self-defence, which is to say without pretence of necessity, then a complete acquittal would result unless the accused was criminally negligent in over-reacting. Is such an approach unworkable?

Workability

Principles must be workable if they are to be adopted as a matter of law. Two main questions of workability arise in relation to the test of liability tentatively proposed. First, is the test capable of being readily understood by juries? Secondly, is the test likely to produce acceptable results in cases of contrived, self-induced, or intoxicated necessity?

The defence of excessive self-defence was overturned in *Zecevic v DPP* mainly because of the difficulty that trial judges and juries had experienced with the six propositions articulated by Mason J in *Viro v The Queen*.¹³⁰ Dawson J, who was in the majority in *Zecevic v DPP*, has since affirmed that reason extra-curially:¹³¹

I doubt whether [academic writers] ever appreciate that the very nature of a criminal trial sometimes requires a choice to be made between a law which is explicable in simple and direct terms and one which is subject to refinements which, whilst they may be theoretically justifiable, are beyond the ordinary person's powers of comprehension.

In my view, this contention is unlikely to placate the critics, whatever their walk within the legal profession. It was not explained by the majority in *Zecevic* why exactly the relatively straight-forward solution advanced by Deane J¹³² would be beyond the ordinary juror's powers of comprehension.¹³³ If the defence of excessive self-defence were reformulated in the manner suggested by Deane J, it is not evident that the difficulty of comprehension would be any

greater than in the context of the defences of provocation and diminished responsibility.¹³⁴ The last-mentioned defences, whatever their simplicity on the surface, seem no better defined in substance. Perhaps the concern is the possible unmanageability of multiple defences in a jury trial.¹³⁵ However, that was not the basis upon which the majority in *Zecevic* proceeded, nor did it prevent the recognition of the defence of excessive self-defence in *R v Howe*¹³⁶ and *Viro v The Queen*.¹³⁷ These puzzles remain unresolved. Fortunately, they need not detain us further because the test under consideration is succinct and in plain language, and hence cannot be likened to the propositions in *Viro* which the majority in *Zecevic v DPP* felt impelled to abandon.

The second question of workability is whether the test of genuine self-defence would produce unacceptable results in the context of feigned, self-induced, or intoxicated necessity.

A feigned need to use lethal force is no defence and the jury should be instructed plainly that there is no defence of self-defence if the accused was acting under pretence of necessity. Pretence of necessity is largely a self-explanatory concept. To the extent that it is not, the trial judge should offer such clarification as is called for in the particular case.

Depending on the factual situation, it may be relevant to relate what is meant by pretence of necessity to the mental element of the relevant offence. Thus, where a bully initiates the skirmish in which he kills someone in counter-defence, he is liable for murder if, at the time of the attack, he adverted to the likelihood that death might result. There is pretence of necessity here because the accused's conduct in engineering the opportunity to use force was accompanied by a state of mind sufficient for the mental element of reckless murder.¹³⁸ This reflects the general principle that excusing conditions in the criminal law do not apply where the basis for the excuse is actuated by or stems from a state of mind sufficient to constitute the mental element of the offence charged.¹³⁹

Another clarification that may be useful is the rule that there is no pretence of necessity where the accused believed that it was reasonably necessary to resort to the force used. Again, however, the need for clarification depends on the facts. Thus, there may be cases where the accused was taken by surprise by an assailant, and reacted instantaneously without thinking about the question of reasonable necessity. In that situation it would be unrealistic to insist upon a belief as to reasonable necessity, at least at the level of conscious advertence.¹⁴⁰

Cases may arise where the accused was exposed to a threat of minor injury or lawful use of force and yet claims that he or she found it reasonably necessary to use lethal force in self-defence. Alternatively, the obvious course for the accused in the situation may have been retreat. In such cases it would be appropriate to direct the jury that pretence of necessity precludes the defence of self-defence, and that the accused was acting under pretence of necessity if he or she realised that there was a less drastic reasonable alternative to the use of lethal force. The example has been put of the person who shoots another in the belief that killing the other is the only way to prevent a bottle of ink from being thrown at him.¹⁴¹ Cases of this kind are likely to be rare. If they arise, a jury would have difficulty

in accepting that the accused believed that there was no less drastic reasonable course of action: an obvious less drastic course of action in the event of an ink-bottle attack would be to catch or deflect the bottle.¹⁴² Juries can be expected to look critically at cases of this kind.¹⁴³ Moreover, the adversarial process is such that extraordinary claims will be washed in sceptical acid. In any event, the possibility of liability for manslaughter by criminal negligence provides a safety net to catch the "over-imaginative coward"¹⁴⁴ who kills in the honest but totally misguided belief that it was reasonably necessary to kill in order to avert some minor threat.

Another category of case is self-induced necessity, where the accused is the original aggressor and uses lethal force in defence against the force justifiably used by the victim in defence against the original attack. In some instances, as in the case of the bully mentioned above, the accused would be liable for murder because he or she initiated the attack knowing that it was likely that the victim would use force in defence and, in turn, that lethal force would be needed in response to the victim's act of self-defence. Such a case comes within the general principle that excusing conditions in the criminal law do not apply where the basis for the excuse is actuated by or stems from a state of mind sufficient to constitute the mental element of the offence charged. However, the mental element of murder would not always be present at the earlier point of time. The accused may nonetheless be acting under pretence of necessity. In my view, it is pretence of necessity if the accused, in launching the initial attack, knew that there was a substantial risk of the victim responding with force in the way that he or she did.¹⁴⁵

A different problem is posed by the intoxicated or drug-crazed person who genuinely believes that it is necessary to use lethal force in response to a trivial occasion.¹⁴⁶ It is incorrect to suppose that such a person would necessarily be acquitted. The situation may be one in which the accused acted with a sufficient guilty mind at an earlier point of time. Moreover, an acquittal in relation to murder leads to the possibility of liability for manslaughter. An honest but foolish or extreme misjudgment on the part of the accused would be subject to liability for manslaughter by criminal negligence.¹⁴⁷ Intoxication does not negate the mental element of manslaughter by criminal negligence and hence the accused may be convicted on that basis where, as would typically be the case, the conduct is a gross departure from the standard of care expected of the sober citizen.¹⁴⁸ If, in the long run, intoxication proves to be too generous an escape route then it may be necessary for the legislature to provide for civil measures of control in cases where, by reason of the decision in *R v O'Connor*,¹⁴⁹ the intoxication of the accused leads to a complete acquittal.

Conclusion

In my opinion, the law of self-defence should be reformulated in accordance with the implications of the various critical assumptions that I have stated and applied. The following propositions may be advanced.

First, it is sufficient for the defence of self-defence on a charge of murder or manslaughter that the action taken by the accused was justified and hence lawful.¹⁵⁰ Lethal conduct in self-defence is justified if performed in a situation where the accused was under an unlawful attack by another, where the attack exposed the accused to an actual and substantial risk of suffering death or grievous bodily harm, and where the force used by the accused in self-defence was no more than reasonably necessary to avert that risk. It is immaterial that the accused was mistaken as to the threat confronting him or her, or incorrectly believed that the force used was reasonably necessary. If the killing is justified in the sense described, it is also irrelevant that the accused may have been unaware of the circumstances which in fact created a right to use force in self-defence. However, there may be liability for attempted murder in such a case.

Secondly, it is also sufficient for the defence of self-defence that the accused acted genuinely in self-defence. This means that there is no defence where the accused acted under pretence of necessity.¹⁵¹ The concept of pretence of necessity is largely self-explanatory, but may require some elaboration by the trial judge, depending on the facts. The following rules may be invoked by way of elaboration:

- (1) An accused acts under pretence of necessity where he or she entered into the encounter leading to the death of the victim with an intentional or reckless state of mind sufficient for the mental element of murder.
- (2) There is no pretence of necessity where the accused believed that it was reasonably necessary to resort to the force used.
- (3) There is pretence of necessity where the accused knew that there was a less drastic reasonable alternative to the use of lethal force.
- (4) There is pretence of necessity if the accused is the original aggressor and, in launching the initial attack, knew that there was a substantial risk of the victim responding with force in the way that he or she did.

Thirdly, an accused who acts genuinely in self-defence may nonetheless be liable for involuntary manslaughter. The test of liability is whether the accused was criminally negligent in believing or assuming that the lethal force used was reasonably necessary.

These propositions might conceivably be adapted or modified for use in other contexts, including defence of another, defence of property,¹⁵² forcible arrest,¹⁵³ or duress and necessity.¹⁵⁴ However, since this question is not before us, it need not be pursued on the present occasion.

I would allow the appeal and order a new trial.

NOTES

1. I am indebted to Graeme Coss, David Fraser, Stephen Odgers and Stanley Yeo for various comments, and to Graeme Coss for research assistance.
2. Cf *Zecevic v DPP* (1987) 162 CLR 645 at 653 per Mason CJ; at 680 per Deane J; P A Fairall, "Excessive Self-Defence in Australia: Change for the Worse?" in S M H Yeo (ed), *Partial Excuses to Murder* (1991), ch 11
3. (1987) 162 CLR 645
4. [1988] AC 130. See also *R v Williams (Gladstone)* (1984) 78 Cr App R 276
5. [1971] AC 814
6. *McCullough v The Queen* (1982) 6 A Crim R 274; *Masneq v The Queen* [1962] Tas SR 354; *R v Johnson* [1964] Qd R 186; *Aleksovski v The Queen* [1979] WAR 1.
7. C Howard, *Criminal Law* (4th ed), 93-94; M Somarajah, "Excessive Defence Under the Australian Criminal Codes" (1982) 7 *University of Tasmania Law Review* 156
8. Section 46: "A person is justified in using, in the defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use." See also *Crimes Act* (NZ), s 48
9. See S M H Yeo, "Excessive Self-Defence, Macaulay's Penal Code and Universal Law" (1990) 7(3) *Australian Bar Review* (forthcoming)
10. Section 59. Cf *Report of the Criminal Code Bill Commission*, C 2345 (1879) 36 *English Parliamentary Papers* 157, 201
11. Compare the framework of literary criticism developed in K Ruthven, *Critical Assumptions* (1979)
12. Cf P Robinson, *Criminal Law Defenses* (1984), ch 2
13. *Forfeiture Act* 1870 (UK); *Forfeitures for Treason and Felony Abolition Act* 1878 (Vic); *Criminal Law Amendment Act* 1883 (NSW); *Treason and Felony Forfeiture Act* 1874 (SA); *Criminal Law Consolidation Act* 1935 (SA), s 329. See further *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583
14. (1987) 162 CLR 645 at 657-658
15. (1987) 162 CLR 645 at 658
16. *Ibid*
17. *Ibid*
18. Cf R Gordon, "Critical Legal Histories" (1984) 36 *Stanford Law Review* 57
19. *Pleas of the Crown* (1803), p 273
20. (1958) 100 CLR 448 at 461-462 per Dixon CJ. See further N Morris and C Howard, *Studies in Criminal Law* (1964), pp 124-136
21. Cf O Dixon, "The Development of the Law of Homicide" (1935) 9 (Supp) *Australian Law Journal* 64
22. See R Singer, "The Resurgence of Mens Rea: II — Honest but Unreasonable Mistake of fact in Self Defense" (1987) 28 *Boston College Law Review* 459 at 475-476
23. [1988] AC 130
24. (1987) 162 CLR 645 at 658
25. S M H Yeo, "Applying Excuse Theory to Excessive Self-Defence" in Yeo (ed), *Partial Excuses to Murder*, ch 10, p 167
26. See *Viro v The Queen* (1978) 141 CLR 88 at 114 per Gibbs J; Morris and Howard, *Studies in Criminal Law*, p 125
27. See H A Snelling, "Manslaughter upon Chance Medley" (1957) 31 *Australian Law Journal* 102; H A Snelling, "Killing in Self-Defence" (1960) 34 *Australian Law Journal* 130; J Langbein, "The Criminal Trial before the Lawyers" (1978) 45 *Uni-*

- versity of *Chicago Law Review* 263; R Singer, "The Resurgence of Mens Rea: I — Provocation, Emotional Disturbance, and the Model Penal Code" (1986) 27 *Boston College Law Review* 243 at 243-244. See also *Zecevic v DPP* (1987) 162 CLR 645 at 676 per Deane J; 685 per Gaudron J; *Howe* (1958) 100 CLR 448 at 467 per Taylor J
28. *Viro v The Queen* (1978) 141 CLR 88 at 127 per Gibbs J; 145 per Mason J; *Van den Hoek v The Queen* (1986) 161 CLR 158 at 168 per Mason J
 29. T Green, "The Jury and the English Law of Homicide, 1200-1600" (1976) 74 *Michigan Law Review* 413; T Green, "Societal Concepts of Criminal Liability for Homicide in Mediaeval England" (1972) 47 *Speculum* 669; Langbein, "The Criminal Trial before the Lawyers"
 30. Yeo, "Applying Excuse Theory", p 159. See further S M H Yeo, *Compulsion in the Criminal Law* (1990), ch 1; I Elliott, "The Use of Deadly Force in Arrest: Proposals for Reform" (1979) 3 *Criminal Law Journal* 50 at 55-58
 31. K Greenawalt, "The Perplexing Borders of Justification and Excuse" (1984) 84 *Columbia Law Review* 1897; E Colvin, "Exculpatory Defences in Criminal Law" (1990) 10 *Oxford Journal of Legal Studies* 381
 32. See I Elliott, "The Use of Deadly Force in Arrest" (1979) 3 *Criminal Law Journal* 50
 33. An implication consistent with *Beckford v The Queen* [1988] AC 130 at 144
 34. Cf *Zecevic v DPP* (1987) 162 CLR 645 at 682 per Deane J
 35. (1850) 3 C & K 148, 175 ER 499
 36. *Britten v Algotut* [1987] VR 929; Howard, *Criminal Law* (5th ed), pp 401-412; Morris and Howard, *Studies in Criminal Law*, pp 121-122
 37. *Zecevic v DPP* (1987) 162 CLR 645 at 666-668 per Brennan J
 38. (1941) 67 CLR 536
 39. (1956) 57 *Aristotelian Society Proceedings* 1, reprinted in H Morris (ed), *Freedom and Responsibility* (1961), p 6
 40. See F McAuley, "Provocation: Partial Justification and not Partial Excuse" in Yeo (ed), *Partial Excuses to Murder*, ch 2; P Alldridge, "The Coherence of Defences" [1983] *Criminal Law Review* 665 at 669; M Wasik, "Partial Excuses in the Criminal Law" (1982) 45 *Modern Law Review* 516
 41. S Uniacke, "What are Partial Excuses to Murder?" in Yeo (ed), *Partial Excuses to Murder*, ch 1
 42. "A Plea for Excuses", 10. See also W Lucy, "Controversy in the Criminal Law" (1988) 8 *Legal Studies* 317
 43. *The Political Sciences* (1969), p 299
 44. Colvin, "Exculpatory Defences in Criminal Law"
 45. I Leader-Elliott, "Intoxication Defences: The Australian Perspective" in Yeo (ed), *Partial Excuses to Murder*, ch 14; S Odgers, "Contemporary Provocation Law" in Yeo (ed), *Partial Excuses to Murder*, ch 6. Cf A Redman (ed), *The Wit and Humour of Oscar Wilde* (1959), p 207 (consistency is "the last refuge of the unimaginative")
 46. (1987) 162 CLR 645
 47. Cf *Viro v The Queen* (1978) 141 CLR 88 at 127-128 per Gibbs J, where the differences between excessive force and provocation are not explored
 48. See L Katz, *Bad Acts and Guilty Minds* (1987), pp 80-81
 49. J L Mackie, "The Grounds of Responsibility" in P M S Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (1977), ch 10; Leader-Elliott, "Intoxication Defences"; I Elliott, "Regina v Jekyll, sub nom Hyde: Metaphors of the Divided Self in Criminal Responsibility" (1984) 14 *Melbourne University Law Review* 368; M Moore, "Causation and the Excuses" (1985) 73 *California Law Review* 1091

50. See F McAuley, "Excessive Defence in Irish Law" in Yeo (ed), *Partial Excuses to Murder*, ch 12, p 201
51. See J Dressler, "Rethinking Heat of Passion: A Defence in Search of a Rationale" (1982) 73 *Journal of Criminal Law & Criminology* 421; Singer, "The Resurgence of Mens Rea: I — Provocation, Emotional Disturbance, and the Model Penal Code". There is an overlap between diminished responsibility and provocation; see *Veen v The Queen* (1979) 143 CLR 458; J Hunter and J Barga, "Diminished Responsibility: 'Abnormal' Minds, Abnormal Murderers and What the Doctor Said" in Yeo (ed), *Partial Excuses to Murder*, ch 8; R D Mackay, "Pleading Provocation and Diminished Responsibility Together" [1988] *Criminal Law Review* 411
52. Mackie, "The Grounds of Responsibility", p 184
53. Cf Yeo, "Applying Excuse Theory", p 172
54. C Howard, "Two Problems in Excessive Defence" (1968) 84 *Law Quarterly Review* 343 at 356
55. Yeo, "Applying Excuse Theory", p 159
56. Cf *Viro v The Queen* (1978) 141 CLR 88 at 169 per Murphy J; Fairall, "Excessive Self-Defence in Australia: Change for the Worse?", p 185
57. Cf G P Fletcher, *A Crime of Self Defense* (1988), p 188
58. As to this doctrine see J Glover, *Causing Death and Saving Lives* (1977), ch 6; J L Mackie, *Ethics: Inventing Right and Wrong* (1977), pp 160-168
59. See *McCray v New York* (1983) 103 S Ct 2438; P Stein, *Evolutionary Theories of Law* (1980); J D Steinbruner, *The Cybernetic Theory of Decision* (1974); Eckhoff, "Feedback in Legal Reasoning and Rule Systems" (1978) 22 *Scandinavian Studies in Law* 39
60. See M Moore, *Law and Psychiatry* (1984); B Wootton, *Social Science and Social Pathology* (1958); B Wootton, "Diminished Responsibility: A Layman's View" (1960) 76 *Law Quarterly Review* 224; G Vuoso, "Background, Responsibility and Excuse" (1987) 96 *Yale Law Journal* 1661. As regards the potential relevance of diminished responsibility as a cultural defence, see Australian Law Reform Commission, Report No 31, *The Recognition of Aboriginal Customary Laws*, para 440
61. See Leader-Elliott, "Intoxication Defences"
62. See S C Hayes, "Diminished Responsibility: The Expert Witness's Viewpoint" in Yeo (ed), *Partial Excuses to Murder*, ch 9. See also G Williams, *Textbook of Criminal Law* (2nd ed), 691. This is not to deny that psychiatric evidence may sometimes be admissible in the context of self-defence: see *Murphy v The Queen* (1989) 86 ALR 35; Fletcher, *A Crime of Self Defense*, ch 6
63. See Odgers, "Contemporary Provocation Law", pp 102-103
64. See Hunter and Barga, "Diminished Responsibility", pp 131-134
65. Hunter and Barga, "Diminished Responsibility", pp 131-132
66. This is not to deny the possible relevance of psychiatric evidence to support the claim that the accused acted genuinely in self-defence; see Fletcher, *A Crime of Self Defense*, ch 6
67. Cf Odgers, "Contemporary Provocation Law", p 109 n 17
68. See M Goode, "The Abolition of Provocation" in Yeo (ed), *Partial Excuses to Murder*, ch 3; Wasik, "Partial Excuses in the Criminal Law"; E Griew, "The Future of Diminished Responsibility" [1988] *Criminal Law Review* 75; Victoria, Law Reform Commission, Discussion Paper No 14, *Mental Malfunction and Criminal Responsibility*, pp 49-62
69. See *R v Radford* (1985) 42 SASR 266; Howard, *Criminal Law* (5th ed), pp 425-427
70. Goode, "The Abolition of Provocation", p 51
71. See Goode, "The Abolition of Provocation"; Odgers, "Contemporary Provocation

- Law", pp 103-105. Cf B Brown, "Provocation in New Zealand: A Characteristic Solution" in Yeo (ed), *Partial Excuses to Murder*, ch 5
72. *Taaka* [1982] 2 NZLR 198; Brown, "Provocation in New Zealand"
 73. *Troja*, NSW SC, Wood J, 4 June 1990, discussed in Hunter and Bargaen, "Diminished Responsibility", pp 132-134
 74. Section 210.3. See further Singer, "The Resurgence of Mens Rea: I — Provocation, Emotional Disturbance, and the Model Penal Code", 291-304
 75. (1987) 162 CLR 645. See also *Viro v The Queen* (1978) 141 CLR 88; *R v Howe* (1958) 100 CLR 448; *R v Masters* (1988) 12 *Criminal Law Journal* 199; *R v Lawson and Forsythe* [1986] VR 515 at 547; *R v Fricker* (1986) 42 SASR 436; *R v Train* (1985) 18 A Crim R 353; *R v Wills* [1983] 2 VR 201; *R v Jackson* [1982] VR 326; *R v Kostic* (1982) 8 A Crim R 57; *R v Redman* [1978] VR 178; *R v Marwey* (1977) 138 CLR 630; *R v Baxter* (1976) 27 CCC(2d) 96. Compare *R v Slater* (1987) 44 SASR 136; *R v McManus* [1985] 2 NSWLR 448; *R v Kincaid* (1983) 33 SASR 552; *Morgan v Colman* (1981) 27 SASR 334 at 337; *R v Kenney* [1983] 2 VR 470 at 472-473; *R v Loughnan* [1981] VR 443 at 460-461
 76. See Singer, "The Resurgence of Mens Rea: II — Honest but Unreasonable Mistake of fact in Self Defense", pp 471-474
 77. (1987) 162 CLR 645
 78. (1987) 162 CLR 645 at 658
 79. See references above, n 27. This is not to say that the element of malice required for murder can be denied by means of provocation or self-defence; as to the limited significance of the requirement of malice under ss 18(2) and 5 of the *Crimes Act* (NSW) see *Mraz v The Queen (No 2)* (1956) 96 CLR 62; *Coleman* (1990) 19 NSWLR 467; A Stephen and A Oliver, *Criminal Law Manual* (1883), pp 7, 9-10, 200-201
 80. See *Zecevic v DPP* (1987) 162 CLR 645 at 676 per Deane J; at 685 per Gaudron J
 81. This was how the jury saw the matter in the trial of Bernhard Goetz, according to the account in Fletcher, *A Crime of Self Defense*, pp 187-188
 82. See *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 534; *DPP v Morgan* [1976] AC 182
 83. Austin, "A Plea for Excuses"
 84. See S M H Yeo, "The Element of Belief in Self-Defence" (1988) 12 *Sydney Law Review* 131
 85. (1958) 100 CLR 448
 86. (1978) 141 CLR 88
 87. [1988] AC 130
 88. *Ibid*
 89. Compare *Loughnan* [1981] VR 443 at 450; G Williams, *Criminal Law: The General Part* (2nd ed), p 27; K Campbell, "Offence and Defence" in I Dennis (ed), *Criminal Law and Justice* (1987), pp 73 at 85
 90. This is not to say that all the implications are clear, as in felony-murder. The view has been expressed that provocation is unavailable as a defence to felony-murder: see *Scriva (No 2)* [1951] VR 298 at 305; *Burke* [1983] 2 NSWLR 93 at 104. But see *R v Thompson* (1988) 36 A Crim R 223 (diminished responsibility a defence to felony murder)
 91. Section 3.04
 92. G Williams, "Offences and Defences" (1982) 2 *Legal Studies* 233; P Allridge, "Mistake in Criminal Law — Subjectivism Reasserted in the Court of Appeal" (1984) 35 *Northern Ireland Law Quarterly* 263; Singer, "The Resurgence of Mens Rea: II — Honest but Unreasonable Mistake of fact in Self Defense"; Colvin, "Exculpatory Defences in Criminal Law" at 397. But see S M H Yeo, "The Element of Belief in Self-Defence" (1988) 12 *Sydney Law Review* 131

93. G Williams, "Offences and Defences" (1982) 2 *Legal Studies* 233
94. Campbell, "Offence and Defence"
95. See generally J O'Neill (ed), *Modes of Individualism and Collectivism* (1973); M Brodbeck (ed), *Philosophy of the Social Sciences* (1971), pp 254-303; C Geertz, *Local Knowledge* (1973). Cf M Kelman, "Interpretive Construction in the Substantive Criminal Law" (1981) 33 *Stanford Law Review* 591 (implications of broad and narrow frames of reference)
96. See *Howe* (1958) 100 CLR 448
97. See Odgers, "Contemporary Provocation Law", 102-103; T Archibald, "The Interrelationship between Provocation and Mens Rea" (1986) 28 *Criminal Law Quarterly* 454
98. See D W Louisell and G C Hazard, "Insanity as a Defense: The Bifurcated Trial" (1961) 49 *California Law Review* 805; R Gooderson, "Defences in Double Harness" in P R Glazebrook (ed), *Reshaping the Criminal Law* (1978), p 138 at pp 146-148. Diversion from the central issue of blameworthiness is also apparent in the separate penalty hearing procedure in the United States for determining whether a convicted murderer is a candidate for capital punishment; see W S White, *The Death Penalty in the Eighties* (1987), ch 3
99. Howard, "Two Problems in Excessive Defence" at 357-360; *R v O'Grady* [1987] Crim LR 706; *People v Dwyer* [1972] IR 416 at 423; ALI, *Model Penal Code*, s 3.09
100. *R v Phillips* (1971) 45 ALJR 467; *R v Zikovic* (1985) 17 A Crim R 396 at 403. Cf *Viro v The Queen* (1978) 141 CLR 88 at 101 per Barwick CJ; Howard, "Two Problems in Excessive Defence" at 359-360
101. D Fraser, "Still Crazy After all These Years: A Critique of Diminished Responsibility" in Yeo (ed), *Partial Excuses to Murder*, ch 7
102. See especially *Parker v The Queen* (1964) 111 CLR 665; *R v O'Connor* (1980) 146 CLR 64. The classic doctrinal account is G Williams, *Criminal Law: The General Part* (2nd ed). But see C Wells, "Swatting the Subjectivist Bug" [1982] *Criminal Law Review* 209
103. See eg, A von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness* (1985)
104. J Braithwaite, *Crime, Shame and Reintegration* (1989)
105. J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990)
106. For the view that depersonalisation of this nature is typical of law's empire, see A Katz, "Foucault for Lawyers" (1984) unpublished
107. (1987) 162 CLR 645
108. (1986) 497 NE2d 41
109. *Ibid* at 52
110. See *R v Voukelatos* [1990] VR 1; Odgers, "Contemporary Provocation Law", 103-105; Goode, "The Abolition of Provocation", pp 43-46. Cf Brown, "Provocation in New Zealand"
111. Goetz was ultimately acquitted of attempted murder and assault, an outcome that has been attributed to various factors, including the racial element in the case, and the lack of sympathy in the community for subway robbers: Fletcher, *A Crime of Self-Defense*, ch 11
112. (1987) 162 CLR 645 at 661. Cf *Viro v The Queen* (1978) 141 CLR 88 at 155 per Jacobs J
113. J Tolmie, "Provocation or Self-Defence for Battered Women who Kill?" in Yeo (ed), *Partial Excuses to Murder*, ch 4; Hunter and Bagen, "Diminished Responsibility"; P Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defence" (1985) 8 *Harvard Women's Law Journal* 121

114. As to the sex of the ordinary person, see Allen, "One Law for All Reasonable Persons?" (1988) 16 *International Journal of the Sociology of Law* 419
115. [1988] AC 130
116. Tolmie, "Provocation or Self-Defence for Battered Women who Kill?", p 67. The same point is made in general context in *Zecevic v DPP* (1987) 162 CLR 645 at 664, per Wilson, Dawson and Toohey JJ
117. Liability on the basis of criminal negligence is objective and hence also open to criticism: see *Tutton* (1989) 48 CCC(2d) 129, at 157-161, Wilson J. However, there must at least be a gross departure from the standard expected of an ordinary person, whereas there is no such limitation under the law as formulated in *Zecevic v DPP* (1987) 162 CLR 645 at 661; see Elliott, "The Use of Deadly Force in Arrest" at 64. Cf *Viro v The Queen* (1978) 141 CLR 88 at 154-155 per Jacobs J
118. (1987) 162 CLR 645
119. See S Doran, "The Doctrine of Excessive Defence: Developments Past, Present and Potential" (1985) 36 *Northern Ireland Law Quarterly* 314 at 325-326
120. (1987) 162 CLR 645 at 653
121. (1978) 141 CLR 88 at 139
122. See further Yeo, "Applying Excuse Theory", pp 171-172
123. *Howe* (1958) 100 CLR 448 is an example.
124. See further *Zecevic v DPP* (1987) 162 CLR 645 at 678-679 per Deane J; Lanham, "Death of a Qualified Defence" (1988) 104 *Law Quarterly Review* 239
125. [1988] AC 130
126. *Brown v US*, 256 US 335 at 343 (1921)
127. Fletcher, *A Crime of Self Defense*, ch 11; *Howard's Criminal Law* (5th ed), pp 104-105; Colvin, "Exculpatory Defences in Criminal Law" at 385-386. A related consideration is that the boundary line, if clear, is arbitrary: see Elliott, "The Use of Deadly Force in Arrest" at 66-67. Cf *Viro v The Queen* (1978) 141 CLR 88 at 146 per Mason J
128. A Ashworth, "Excusable Mistake of Law" [1974] *Criminal Law Review* 652 at 657. See further Elliott, "The Use of Deadly Force in Arrest" at 83-88
129. See the South Australian Criminal Law and Penal Methods Reform Committee, Fourth Report, *The Substantive Criminal Law* at 30; Singer, "The Resurgence of Mens Rea: II — Honest but Unreasonable Mistake of Fact in Self Defense" (1987) 28 *Boston College Law Review* 459 at 517. Cf *Howe* (1958) 100 CLR 448 at 467 per Taylor J; at 477 per Menzies J
130. (1978) 141 CLR 88
131. D Dawson, "Recent Common Law Developments in Criminal Law" (1991) 15 *Criminal Law Journal* 3 at 8-9
132. (1987) 162 CLR 645 at 681. See also *People v Dwyer* [1972] IR 416; McAuley, "Excessive Defence in Irish Law", pp 199-200
133. Cf (1987) 162 CLR 645 at 653 per Mason CJ (expressing lack of confidence that a reformulation would solve the problem)
134. It does not meet the point to say that the formulation in *Howe* (1958) 100 CLR 448 was too difficult or abstruse. Compare *Zecevic v DPP* (1987) 162 CLR 645 at 653 per Mason CJ
135. Leader-Elliott, "Intoxication Defences", p 234; Goode, "The Abolition of Provocation", p 52. Cf Gooderson, "Defences in Double Harness"
136. (1958) 100 CLR 448
137. (1978) 141 CLR 88
138. By parallel to the position where the mental element of an offence is present prior to the moment when D kills in a state of total intoxication: *O'Connor* (1981) 146 CLR 64 at 85 per Barwick CJ
139. *O'Connor* (1981) 146 CLR 64 at 85 per Barwick CJ

140. See *Howe* (1958) 100 CLR 448 at 467 per Taylor J; *Viro v The Queen* (1978) 141 CLR 88 at 170 per Murphy J
141. *Tikos (No 1)* [1963] VR 285 at 291 per Sholl J
142. Cf *Viro v The Queen* (1978) 141 CLR 88 at 126 per Gibbs J (neglecting requirement of a belief by the accused that it was *reasonably necessary* to do what he or she did)
143. See *Beckford v The Queen* [1988] AC 130 at 145
144. Cf A T H Smith, "The Defence of Duress" (1982) 45 *Modern Law Review* 464 at 465
145. Cf *Lawson and Forsythe* [1986] VR 515 at 580 per Ormiston J; *Edwards* [1973] AC 648 at 658; *Zecevic v DPP* (1987) 162 CLR 645 at 663-664; S M H Yeo, *Compulsion in the Criminal Law* (1990), ch 1; P Robinson, "Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine" (1985) 71 *Virginia Law Review* 1
146. As to the legal relevance and effect of intoxication see Leader-Elliott, "Australian Defences"; D Lanham, "Manslaughter and Intoxication" in Yeo (ed), *Partial Excuses to Murder*, ch 13; L Skene, "Medical Aspects of Intoxication" in Yeo (ed), *Partial Excuses to Murder*, ch 15
147. See *Zecevic* (1987) 162 CLR 645 at 664; *O'Grady* [1987] *Criminal Law Review* 706 at 707; *McInnes* [1971] 1 WLR 1600; SA, Criminal Law and Penal Methods Reform Committee, Fourth Report, *The Substantive Criminal Law* (1977), pp 30-31; C Howard, "Two Problems in Excessive Defence" (1968) 84 *Law Quarterly Review* 343; S Doran, "The Doctrine of Excessive Defence: Developments Past, Present and Potential" (1985) 36 *Northern Ireland Legal Quarterly* 314; Singer, "The Resurgence of Mens Rea: II — Honest but Unreasonable Mistake of fact in Self Defense" (1987) 28 *Boston College Law Review* 459 at 502
148. *Martin* (1984) 51 ALR 540; Lanham, "Manslaughter and Intoxication"
149. (1981) 146 CLR 64
150. *Beckford v The Queen* [1988] AC 130 at 144
151. See the SA, Criminal Law and Penal Methods Reform Committee, Fourth Report, *The Substantive Criminal Law* (1977), 30
152. See further B Fisse, *Howard's Criminal Law* (5th ed), 517-518; D Lanham, "Defence of Property in the Criminal Law" [1966] *Criminal Law Review* 368
153. See further Elliott, "The Use of Deadly Force in Arrest"; P A J Waddington, "'Overkill' or 'Minimum Force'?" [1990] *Criminal Law Review* 695
154. See Yeo, "Applying Excuse Theory", pp 168-171; B Fisse, *Howard's Criminal Law* (5th ed), pp 562-563