REVIEW ARTICLE

Redrawing the Boundaries of Self-Defence

Jeremy Horder*

Suzanne Uniacke, **Permissible Killing: The Self-Defence Justification for Homicide,** Cambridge: Cambridge University Press, 1994, ix + 244 pp, hb £35.00.

It would be no exaggeration to suggest that this original and rigorously argued book will prove to be the most significant contribution yet to jurisprudential thinking about the theoretical foundations of, and limits to, valid pleas of self-defence. Uniacke's specific focus is the self-defence justification for homicide, but much of her argument is of general theoretical importance and applicability. Her book is, moreover, of considerable topical importance. As the Law Commission published its final proposals for codification of the law relating to self-defence,[1] debate continued over whether, and if so in what circumstances, self-defence was an appropriate plea for women who had killed their violent abusers by taking the opportunity to strike whilst the latter were off-guard.[2] Uniacke frequently uses legal doctrine as a source of reference and examples, and subjects the proposals for law reform in the Law Commission's Draft Criminal Code to detailed critique.[3] So, what has a philosophical analysis of self-defence to offer to lawyers and legislators who are determined to enact a clear, comprehensive and (above all) just law of self-defence? To answer this question we must turn to an examination of Uniacke's thesis.

1 Distinguishing justification from excuse

For Uniacke, the permissibility of self-defence 'is *grounded* in the fact that the act is one of resisting, repelling or warding off an unjust immediate threat' (p 177).[4] Her strategy is not, however, to start with this definition and then consider in turn each of its features. Instead, she builds up an understanding of the nature and limits of permissible self-defence by examining questions most commonly thought to bear on such an understanding. Amongst the questions central to her analysis are the following: Is permissible self-defensive action justified or merely excused? What is the relationship between self-defence and necessity? What is the relevance

*Worcester College, Oxford.

1 Law Com No 218, *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993).

2 See, in this regard, McColgan, 'In Defence of Battered Women Who Kill' (1993) 13 OJLS 508.

3 Law Com No 177 (1989), Clause 44. For Uniacke's discussion of this Report, see the references to it in the index under 'English Law Commission.' The book was published prior to the Law Commission's final proposals for reform of self-defence (see Law Com 218, discussed at n 22 *infra*), although it is those final proposals that I will scrutinise in the light of her analysis. Hereinafter, references to her book will be by page number in parentheses.

4 Her emphasis. The point of the emphasis is to make it clear that whether self-defence is in fact permissible depends, *inter alia*, on whether the force used was necessary and proportionate (p 157). See further Waldron, 'A Right to do Wrong?' (1981) 92 *Ethics* 21–39.

of so-called 'double effect' reasoning to the limits of what may be done in self-defence? Do people who pose unjust immediate threats of death lose their rights to life as against those faced by the threat? In the course of answering some of these questions, Uniacke turns her gaze on many issues of great interest to the criminal lawyer, such as how to describe actions and how to distinguish between intended effects, side-effects and concomitants. There is much of value in her book beyond the contribution that it makes towards a jurisprudence of self-defence.

Uniacke starts her analysis with an attempt to shed light on a key building block: the nature of, and distinction between, justification and excuse. Justified conduct can be permissible (weak justification) or right (strong justification). The difference is important, in that one could have a permissive legal justification for doing something that it would be morally wrong, in some circumstances, to exercise (pp 26–29). Suppose you launch a potentially lethal attack on me. Other things being equal, I am entitled — permitted — to defend myself with the use of lethal force, if that would be a necessary and proportionate response. Suppose, though, that I know (a) that you are a child who does not realise that the gun you are about to fire at me is real, and (b) that I am, virtually simultaneously, certain to be blown to pieces by an unrelated explosion. These additional facts cannot negate my legal permission to use necessary and proportionate force against you; but they are facts that may place a strong moral obligation on me not to make use of that permission (p 182). By way of contrast, if a third party sees the situation and knows that he can easily both ward you off and prevent the explosion, without himself or any other person coming to harm, it would almost certainly be morally right — not merely legally permissible — for him to do so. So although defensive action is mostly permissible, it may sometimes be right. Furthermore, right or permissible defensive action is to be distinguished from a justified infringement of another's rights (p 30). Suppose that you fire at me, leaving me with no choice but to deflect the shot towards an innocent bystander who is harmed. Even if my conduct permissibly uses necessary and proportionate force to ward off your unjust attack, that does not *ipso facto* make my harming of the bystander permissible as well. Whereas I act *in* self-defence against you, I merely act *in the course of* self-defence against the bystander. The bystander is unoffending and is not posing an unjust threat. Hence, I infringe her or his rights in acting as I do. The bystander is wronged by my conduct, whereas you are not. But that leaves open the question of whether I infringe the bystander's rights justifiably in these circumstances (p 30).

More controversially, Uniacke stoutly defends (pp 15–25, 37–47) a sharp distinction between 'objective' justification and what she aptly calls 'agent-perspectival' justification, in order to categorise defensive conduct as justified or merely excused. 'Objective' justification is all-things-considered or 'fully informed' justification. If I defend myself against what appears to be an assault by you raising your fist, my conduct will only be objectively justified if the force I use is in fact necessary and proportionate in warding off what is in fact a genuine assault by you. Whether or not I believe your assault to be genuine, and whether or not I believe my use of force to be necessary and proportionate, will not be relevant to this objective judgment. My conduct is legally justified if it is a necessary and proportionate response to your assault, whatever the lack of moral justification for my acting without the relevant beliefs (p 19). By way of contrast, suppose that I use what would be necessary and proportionate force, were your attack genuine, but I — quite reasonably — mistake your conduct for an attack when in fact you were raising your fist in triumph, or something of this kind. Here, says Uniacke, I am agent-perspectivally justified but not objectively justified in

acting as I do (pp 21–22). The justification from my perspective (the agent's perspective) depends on the reasonableness of my beliefs and not on whether you are in fact attacking me. My conduct can be, and is, morally justified, even in the absence of any legal (objective) justification.

The sharpness of the distinction enables Uniacke to avoid some confusions evident in the works of others. She can say clearly, for example, that where V points a realistic imitation gun at the lawfully armed D, leading D to shoot V, the question of whether D was 'justified' in so acting must be answered by firmly insisting on the distinction between moral and legal justification. D is certainly morally (agent-perspectivally) justified in so acting, given the reasonableness of her beliefs, but is equally clearly not legally (objectively) justified.[5] V's rights are hence infringed by D, even if the infringement is (agent-perspectivally) justified. So V would be objectively justified (even if *not* agent-perspectivally justified, given that V precipitated D's conduct) in seeking to ward off D's 'defensive' conduct. I will come back to this point when I turn to the Law Commission's proposals for reform of self-defence. The controversial part of Uniacke's analysis here is the suggestion that purely agent-perspectival (moral) justification is merely an excuse, whereas objective justification is the only true kind of (legal) justification (pp 15–16). It may be true that excuses presuppose wrongdoing of some sort. Perhaps this suggests that purely agent-perspectival justification is merely an excuse, because in such circumstances one is objectively wrong in acting as one does. Nonetheless, the fact that purely agent-perspectival justification involves objective wrongdoing cannot *ipso facto* establish that it is an excuse.

Uniacke follows the orthodox view that 'an excusing condition . . . primarily affects the agent; a justifying circumstance primarily affects the act.'[6] This view obviously underpins the notion that agent-perspectival justification is an excuse, since the focus of such justification is the agent's practical reasoning rather than the objective rightness or wrongness of her conduct. But the orthodox view can be misleading. The true picture is much more complex. The importance of some important kinds of justifications, including agent-perspectival justifications such as the reasonable belief that one must act in self-defence, is that they negate the (particular kind of) wrongdoing complained of, even if they nonetheless involve wrongdoing of another (lesser) kind.[7] A defendant's agent-perspectival justification can negate a wrong, because the well-grounded beliefs he holds, intrinsic to that justification, are inconsistent with some *mens rea* element that is itself a defining characteristic of the wrong in question. By way of contrast, excuses (along with some other kinds of justification, like necessity) leave the kind of wrongdoing complained of intact, whilst focusing on the reasons why that wrongdoing occurred.[8]

Suppose X had intercourse with the unconsenting Y, but had reasonable grounds for thinking (and did think for those reasons) that Y was consenting at the time. X

5 See further Smith, *Justification and Excuse in the Criminal Law* (London: Stevens, 1989) pp 19–27.

6 The passage just quoted appears in D'Arcy's *Human Acts* (Oxford: Clarendon Press, 1963) p 85, cited by Uniacke (p 23).

7 This suggestion is an adaption of a line of argument first made to me by John Gardner of Brasenose College, Oxford. He is not, of course, responsible for the use I have made of this line of argument. The argument develops and supports the long-held views of Professor Fletcher: see eg 'The Right Deed for the Wrong Reason' (1975) 23 UCLA L Rev 293–321.

8 I gesture towards this point, albeit rather obscurely, in my 'Autonomy, Provocation and Duress' [1992] CLR 706, 708.

(objectively) unjustifiably infringes Y's rights, and wrongs her in this sense. Yet the agent-perspectival justification that X gives for his conduct negates one particular — more heinous — kind of wrong, namely the rape of Y. Similarly, consider a self-defence case where you shoot me dead because you reasonably but wrongly believe that I am attacking you with potentially lethal force. Even if you reasonably believe your conduct to be defensively necessary and proportionate, you wrong me, infringing my rights. But your agent-perspectival justification negates at least one kind of wrong which you might otherwise have been committing; namely, murdering me. No doubt I am (objectively) unjustifiably killed both in the case where I am murdered and in the case where I am killed in putative self-defence. But the wrong done to me in each case is different. Duff makes a similar point about the impact of action and intention on the nature of harm:

> We cannot first identify . . . harm as a harm, and *then* discover that it is in fact caused by a human action: for essential to the character of this harm as a harm is the human action which perpetrates it . . . Central to the idea of rape as an evil is thus not the consequentialist idea of an *occurrence* whose cause could be either human or natural, but that of a human *action* which *attacks* the victim; and that action is defined as an attack by the intentions with which its agent acts.[9]

Although Duff is speaking here of the distinction between harmful actions and tragic events, and analogously of the distinction between intended and unintended conduct, what he says is sometimes equally true of the distinction between justified and unjustified conduct. The very fact that, in shooting me dead, you act on (an *ex hypothesi*) reasonable belief that I am attacking you, changes the nature of the wrong that you do me, even if the outcome — an objectively unjustified killing — is the same as when you murder me. In both cases I am 'attacked' with lethal force; but a murderous attack is not the same kind of wrong as an unjustified killing reasonably believed to be in self-defence.

Genuine excuses, on the other hand, leave the *particular kind* of wrong done intact. If I am provoked — even gravely — to lose my self-control and deliberately stab you to death, the wrong done to you is just the same as if I stabbed you to death for no reason at all. Some justifications operate in a similar manner. If I kill you under conditions of necessity, the wrong done to you is just the same whether I act justifiably or not. Now, of course, the excused or justified wrong done to you in such cases may not be *called* the same thing as its completely inexcusable or unjustified counterpart. I am not convicted of murder but of manslaughter if I plead provocation successfully; but, as in the case of diminished responsibility, that involves a use of the notion of 'manslaughter' as a (less damning) label, rather than as a description of a different wrong done. The point is even clearer in the case of necessity, where what matters is whether the undoubted wrong of murder can justifiably be committed under conditions of necessity. It is the justification itself for committing the wrong of murder that will warrant the acquittal (if any) and not a finding that no such wrong was committed, even though — and somewhat misleadingly — an acquitted defendant would in such a case be said to have been acquitted of murder, rather than — more properly — acquitted by reason of justification. In short, whereas a wrong is done to a victim, a label is for an offender. A conviction — as for 'murder' — may seek to express both the wrong and the label together, yet that does not make them inseparable: unity implies a

9 Duff, *Intention, Agency and Criminal Liability* (Oxford: Blackwell, 1990) p 112.

difference. So, one may be able to affirm the wrong done whilst deeming the label inappropriate and acquitting or modifying the label (and hence the crime) for that reason. In this regard, the notion of 'confession and avoidance' is what excuses and justifications of this kind are all about.[10]

2 The heart of the matter

Whether Uniacke draws the line between justification and excuse in the right place is an important, but not necessarily decisive, element in her thesis. Her main task is to show that the limits of genuinely and objectively justified self-defensive conduct are much wider than lawyers (and some philosophers) are apt to suppose. Let us now return to Uniacke's central proposition that permissible self-defence is necessary and proportionate force used to resist, repel or ward off an unjust immediate threat. I take it that no one would disagree with the need for permissible force to be proportionate.[11] So the focus is on the other aspects of the proposition; and unpacking the notion of an 'unjust threat' is at the heart of the matter. In this regard, one could easily be forgiven for thinking one or both of the following related things about self-defence: that truly self-defensive force is exercised only against (objectively) wrongful aggressors and that the morally innocent cannot be killed in self-defence. As Uniacke shows, both of these suppositions are wrong.

Suppose a police marksman exchanges fire with a sniper, each having simultaneously come to the conclusion that the other was about to open fire. Other things being equal, clearly only the police marksman acts lawfully in opening fire. On what implicit proposition, though, does such a judgment depend? In one sense, of course, what matters on these particular facts is that the marksman was acting reasonably in prevention of crime (pp 39–41). But whether true or not, this does not capture the richer underlying sense that the marksman's use of force is permissible, in part, precisely *because* it is self-defensive. Yet the sniper's conduct is also self-defensive, albeit criminal, so the self-defensiveness of conduct can only be part of the underlying justificatory story. One thing that singles out the marksman's self-defensive conduct from that of the sniper is that the marksman's conduct is not unjust. The sniper is posing an unjust immediate threat that can only be averted by the use of self-defensive force, whereas the threat of this kind posed by the marksman is just. There is no *objectively* good reason for the sniper's self-defensive conduct, whereas there is just such a reason for similar conduct on the part of the marksman. Crucially, this will remain true of each agent even if the sniper is insane or sleepwalking, and so commits no legal wrong.[12] In the latter set of circumstances, it will still be true that the sniper's 'conduct' occurs for no objectively good reason, whereas the justifiability of the marksman's conduct rests

10 See generally Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978) pp 554, 567, 575, 863. Some so-called 'excuses,' like automatism or insanity, may negate the particular kind of wrong; but that is because these pleas are not really excuses at all. They are denials of responsibility *tout court*. See further Horder, 'Pleading Involuntary Lack of Capacity' (1993) 52 CLJ 298, 299–304. The wrong done in cases of murder justified under conditions of necessity is not — as some suppose — 'intentional killing,' for this equally describes permissible killing in self-defence, where no wrong is done, and thus begs the question.

11 For Uniacke's discussion, see eg pp 32–34. The need for defensive force to be necessary as well as proportionate is addressed in my conclusion, *infra*.

12 See the discussion by Williams, 'The Theory of Excuses' [1992] CLR 732, 733–734.

on the objective goodness of the reasons for engaging in it, whether the marksman engaged in it for those reasons or not.[13]

It follows that the morally innocent may indeed be killed in self-defence. Young children, the insane or sleepwalkers are morally innocent, but that does not stop them being capable of posing unjust immediate threats that may be resisted, repelled or warded off by necessary and proportionate force. No objectively justified reasons underpin what they 'do' in posing a threat. The use of reasonable defensive force against the threat they pose is hence rightly described as permissible self-defence, not as force justified under conditions of necessity (where what is justified is an infringement of the rights of another). For force used to repel an unjust threat in permissible self-defence may not objectively justifiably itself be resisted by the person posing the threat. This is part of what distinguishes force justifiably used in self-defence from force objectively justified under conditions of necessity. For the latter may sometimes objectively justifiably be resisted by the person subjected to the force. To give an illustrative variation on a famous example, suppose you and I are equidistant from a plank in the sea and suppose we both know that we will drown if we do not reach the plank. We also know that the plank will support the weight of only one of us and that there is no time to seek a fair means of deciding between us who should be allowed unresisted access to the plank. In any ensuing struggle for access to the plank, reasonable acts aimed by each of us at warding the other off may be objectively justified under conditions of necessity, but that does not mean that either of us is bound passively to give in to the other (pp 147–155[14]). If, by way of contrast, I am already on the plank and you seek to displace me, I will be objectively justified in using necessary and proportionate force in repelling your attempt, whereas your efforts to displace me will not be so justified (although they may be agent-perspectivally justified).

A question obviously related to the status of the morally innocent is the question of whether one may legitimately defend oneself only against wrongdoers or aggressors.[15] By construing the defences of infancy and insanity as excuses,[16] it is possible to presuppose some notion of 'wrongdoing' or 'aggression' on the part of young children or the insane who attack others; but this way of interpreting their conduct misses the point. They are in the same position as someone who is involuntarily turned into an unjust threat and who can in no sense be said to be guilty of wrongdoing or aggression (pp 72–73). To borrow Robert Nozick's famous example,[17] suppose you are picked up against your will by a third party and hurled down a deep well at me as I am trapped at the bottom. Am I expected to allow you to hit me with (let us presume) almost certainly lethal consequences — rather than (say) vapourising you with my raygun — simply because you are not responsible for posing the threat? It seems implausible to suppose that the answer could be 'yes.' In taking necessary and proportionate steps to ward you off, I am acting in self-defence here, because (a) like it or not, responsible for it or not, *you* are now a threat to me, and (b) the threat you pose is unjust in the sense that there is no good (objectively justified) reason for its occurrence. The third party is certainly the origin of the threat and you are his helpless instrument; but it seems to be a matter of inescapable moral logic that if I were consequently to choose to

13 On this latter point, see Uniacke's discussion of the *Dadson* principle (pp 20–21).
14 Although in Uniacke's discussion of this example, it seems that I am already on the plank before you get there (p 149), which seems to me to change the position: see the next example.
15 On this, see Williams, n 12 above.
16 For the view that these defences are not excuses, see n 10 above.
17 *Anarchy, State and Utopia* (Oxford: Blackwell, 1974) pp 34–35, cited by Uniacke, at p 73, n 17.

vapourise the third party rather than you (if this was possible), this would mean I had preferred retaliation to self-defence and had myself become an aggressor, assuming the third party was posing no further threat himself.

Contrast this example with a duress case in which I have been threatened with death unless I kill you. In one sense, of course, your continued existence is here a 'threat' to my continued existence; but there is a crucial difference. In the duress case, it is the third party and not you yourself posing the threat. If, thus, I kill you to avert my death at the hands of the third party, I will be killing you as a means of averting the threat, but I will not be directly blocking the threat in so acting. Whilst legitimate self-defence entails permission to use necessary and proportionate — and hence sometimes lethal — force to block threats as such, force used against someone not themselves posing the threat, as a means or incidental effect of averting a threat,[18] is outside the limits of that permission (p 73). For the use of the latter kind of force is not *defensive vis-à-vis* the person against whom it is used (pp 184–190), although it may be justified or excused through a plea of necessity or duress; but this raises a different set of considerations, analysed below. Naturally, many will be uncomfortable with the notion that someone who is thrown down a well or otherwise finds themselves willy-nilly posing a threat can permissibly be killed, if that is a necessary and proportionate response to the threat they pose. Would it not be more natural to say that one infringes their rights, albeit justifiably or excusably, by using force against them in such instances? It is at this point that Uniacke's discussion of self-defence and the right to life becomes crucial.

The right to self-defence is correlated with the right not to be killed (p 178). I can clearly 'waive' my right to self-defence by choosing to allow an aggressor to kill me (a point made earlier), but this will leave undisturbed my right not to be killed. So, depending on the circumstances, third parties may still be permitted to assist me in spite of my waiver, because their permission is based on my right not to be killed and not on my right to defend myself (p 178). If, though, I seek to protect my right to life by using necessary and proportionate force in self-defence, what implications does this have for the position and rights of the person posing the threat? After all, it must be remembered that properly exercising one's right to self-defence may involve the purely self-preferential use of (perhaps lethal) force against and at the expense of someone who is entirely morally innocent, such as a young child, insane person or unfortunate victim hurled in one's direction. Uniacke argues that when a person is posing an unjust threat, that person forfeits their right not to have force — even self-preferential force — used against them, in so far as such force is both necessary and proportionate in warding off the threat. But although Uniacke employs the notion of 'forfeiture' as an analytical device, she is rightly not entirely at ease with it because of its implication that, once one has forfeited something — one's right not to be harmed, say — the forfeiture is irrevocable. Obviously this is not true in the context of self-defence. Self-defence is not permitted *because* an aggressor forfeits his rights. An aggressor might, for example, become unconscious during the course of his attack and fall to the ground, in which case (other things being equal) the right to use further force to repel him ceases to exist or to be exercisable. Yet it seems odd to say that having initially forfeited his rights, the aggressor regained them on falling to the ground.

18 On the relationship between strong and weak means of averting threats, and on incidental effects of action in self-defence, see pp 112–121.

It is better to avoid the language of forfeiture by saying that a right not to be harmed — including, in appropriate circumstances, a right not to be killed — depends on one's conduct, including more broadly one's involuntary conduct and what is happening to one (pp 206–209). Whilst one is posing an unjust threat, a gap opens up in one's right not to be harmed, that instantly closes the moment one ceases to pose such a threat. The existence of that gap is what makes it possible to say that the self-preferential use of force to ward off a threat does not violate rights, so long as the force is directed only at negating the threat itself, and takes the form only of necessary and proportionate steps towards that end. Where, by way of contrast, third parties are harmed or killed in the course of or as a by-product of the self-defensive use of force, their rights are violated, although such violations may be justified or excused. This commonly means that third parties may do what is reasonable to resist such violations, whereas the person posing the unjust threat may not (objectively) justifiably resist necessary and proportionate self-defensive force aimed solely at negating the threat, whatever that person's moral innocence. For there is (*ex hypothesi*) a gap in the very right not to be harmed on which the latter's resistance would depend for its legitimacy.

The main point of using the language of forfeiture, in this context, is to press home one simple point about the luckless person who becomes an unjust threat willy-nilly, like the man thrown down the well. One may forfeit rights through no fault of one's own (pp 199–201). My right to engage in some activity, or to apply for a job, may be forfeited if I do not by the critical date renew the necessary licence, or put in my application, even if it was only grave illness that prevented me from so doing. The point is that to say that the luckless person who becomes an unjust threat willy-nilly has lost his right not to be harmed, in so far as harm is a necessary and proportionate means of negating the threat, is not an argument weakened by that person's lack of fault or voluntary conduct. Simply becoming an unjust threat may open up a gap in certain of one's rights, just as simply having failed to apply for something in time may lead to the complete extinction of other rights.

3 Self-defence, duress of circumstances and the Law Commission

For lawyers, one of the most important consequences of accepting Uniacke's thesis is the light that it sheds on the troublesome and uncertain border between self-defence and duress of circumstances.[19] Uniacke is both too meticulous and too cautious a scholar to claim that her theory of self-defence eliminates any uncertainty over precisely where the boundary runs (pp 176–177). In some cases, it may be necessary to draw very fine distinctions. Suppose D and V are locked in a room with a diminishing supply of oxygen. D realises that only if he kills V will the oxygen supply be likely to last long enough for rescuers to save him. So he kills V. On Uniacke's view, this will not be a killing in self-defence because V is not herself posing the threat; the threat stems from the lack of oxygen. V is merely a contingent threat, namely someone exposing D to a threat whose source is not V herself (p 168). It might be different, however, if, instead of breathing normally, V began to hyperventilate, hence (*ex hypothesi*) ensuring that the oxygen will not

19 She calls the latter 'necessity,' but she is in fact speaking of what English lawyers would call duress of circumstances.

last until the rescuers arrive. Now, we may want to say that V has become part of the threat. V is, albeit involuntarily, assisting or enhancing the threat itself (pp 168–172).[20] So, whereas in the former case we may say that D will be guilty of murder, duress of circumstances being no defence in law, in the latter case D will permissibly kill V in self-defence if D's conduct is regarded as necessary and proportionate (and, as Uniacke hints, these may be harder conditions to satisfy when directing force against involuntary contingent threats (pp 171–172)).

Whatever the thinness of such distinctions, at the very least Uniacke's theory makes it possible to give a coherent account of why we should be clear about some cases and undecided about others.[21] Most importantly, her theory gives us a critical perspective within which to analyse some of the Law Commission's recent proposals concerning reform of self-defence and duress of circumstances.[22] In this regard, the relevant part of Clause 27, dealing with self-defence, runs as follows:

> (1) The use of force by a person . . . if only such as is reasonable in the circumstances as he believes them to be, does not constitute an offence —
>
> (a) to protect himself or another from injury, assault or detention caused by a criminal act.
>
> (3) For the purposes of this section an act involves a 'crime' or is 'criminal,' although the person committing it, if charged with an offence in respect of it, would be acquitted on the ground that —
>
> (a) he was under ten years of age, or
>
> (b) he acted under duress . . . or
>
> (c) his act was involuntary, or
>
> (d) he was in a state of intoxication, or
>
> (e) he was insane, so as not to be responsible, according to law, for the act.

The drafting of this Clause is meant to capture the sense in which force used in self-defence is defined by the fact that it 'avoid[s] the consequences of a direct attack by another.'[23] Uniacke discusses this very issue in some depth (pp 160–164).

For her, whilst the link between self-defence and an attack of some kind is very common, it is unjust threats — not attacks — that are at the heart of the matter, and unjust threats posed by others cover a wider set of circumstances than attacks, even under the extended definition of criminal attack given in Clause 27(3). The Law Commission recognised that dangers might well arise other than through 'direct or deliberate interference,' as where 'P's entirely lawful driving of his motor car may threaten a child that has carelessly run into the road.'[24] Nonetheless, the Commission thought that self-defence could not be defined in such a way as to cover such cases 'without producing a defence expressed in unduly wide terms, which would be in danger of taking the concept and defence of necessity further than the courts have seen fit to do.'[25] This is a rather weak objection. In the example the Commission gives, the driver of the motor car poses an unjust threat to the child. If, as Clause 27(3) implies, the Commission's understanding of those who may permissibly be the object of defensive action expressly includes those

20 It may be that Uniacke could have made the distinctions she is drawing clearer by use of a theory of causation: see eg Hart and Honore, *Causation in the Law* (Oxford: Clarendon Press, 2nd ed, 1985) pp 351, 377–388.

21 See generally ch 5.

22 See generally Law Com No 218, *Legislating the Criminal Code: Offences Against the Person and General Principles* (1993) Cm 2370.

23 para 40.1.

24 para 40.1.

25 para 40.3.

who are morally innocent (madman, children, and so on), why would self-defence suddenly become 'unduly wide' if all those like the motor car driver are included as legitimate objects of defensive action? The consequences of not including them could be serious.

Self-defence is, in principle, a defence to any crime. Under the Commission's proposals,[26] duress is to be a defence to all crimes; but it seems most unlikely that this proposal will ever be accepted, in so far as it means extending the defence to murder.[27] So, consider the following scenario: D is faced with an unjust threat from V when (to vary Nozick's example) V jumps down a well in order to commit suicide, not knowing or having any reason to know that D is at the bottom. D spears V with a pole as the only available means of warding off the threat that V will crush him, killing V in the process. V's action in jumping down the well is not a crime or attack on D, even under the extended definition in Clause 27(3). So D cannot plead self-defence and must rely on duress of circumstances. But at common law this is no defence to murder and that position is very unlikely to change. Moreover, it is not the scope of the defence of duress that is the problem in such cases. In this example, as in the Commission's example of the car driver, if the defendants take necessary and proportionate steps to ward off the threat posed, they would seem to be in an identical normative position to those who take such steps to repel the threat posed by a rampaging madman or drunkard. So self-defence is the right plea and the person exercising the defensive force ought to be recognised as acting *permissibly* against the unjust threat, that is, without invading the rights of — without wronging — the person who poses the threat.

There are further problems with the Law Commission's proposals. The Commission rightly sets its face against the suggested abrogation of the *Dadson* principle in Clause 44(1) of the draft Criminal Code.[28] As the Commission puts it,[29] '[D] cannot rely on circumstances unknown to him that would in fact have justified acts on his part that were unreasonable on the facts as he perceived them.' Yet, if what should convict defendants like Dadson is that their acts are in fact unreasonable on the facts as they perceive them, then this principle should govern the converse case. It should logically follow that where D unreasonably supposes that (s)he in fact needs to act in self-defence, that should also bar him or her from successfully pleading self-defence. Failing to notice this, the Commission proposes in Clause 27(1) that one is to be regarded as acting in self-defence even if one has made a grossly unreasonable mistake in assuming that one is facing a 'criminal' attack.[30] As Uniacke points out (p 43), in so far as this suggestion is based on the authority of *R* v *Williams*,[31] it is ill-founded. For that decision confused the requirement that an intent be unlawful with the notion that one must actually intend to act unlawfully, which are different requirements.

More seriously, this proposal involves rank confusion of moral and legal justification. There may sometimes be a moral justification for jumping to a conclusion and hence inflicting wrongful harm. But the necessary and

26 See paras 28–35.
27 Or, indeed, some other criminal offences such as war crimes, treason or torture. See further Horder, 'Occupying the Moral High Ground? The Law Commission on Duress' [1994] CLR 334.
28 See *R* v *Dadson* (1850) 4 Cox CC 358 and Christopher, 'Unknowing Justification and the Logical Necessity of the *Dadson* Principle' (1995) 15 OJLS (forthcoming).
29 para 39.11.
30 Contrast the position in some other common law jurisdictions: eg *Zedevic* v *DPP* (1987) 162 CLR 645, discussed by Uniacke, at pp 42–43.
31 [1987] 3 All ER 411.

proportionate use of force against a threat that is in fact unjust is legally justified and permissible; and, as Uniacke puts it (p 45), 'the fact that a homicide would have been [legally] justified had the circumstances been as the accused believed them to be, is not itself a [legal] justification of the act.' Implicit recognition of the moral — not legal — basis for acquitting those who mistake the need for self-defence is to be found tucked away in a footnote to the Commission's discussion,[32] where it is admitted that those who make such mistakes because they are voluntarily intoxicated cannot avail themselves of the defence. But on the Commission's logic, this exception makes no sense. My legal *right* to ward off unjust threats ought to be unaffected by whether — when the need to act defensively arises — I am voluntarily intoxicated, because we do not conventionally regard people as having waived the right to defend themselves simply by having become (for example) drunk or insane. So if, as the Commission holds, I am legally entitled to use force in self-defence where I unreasonably mistake the need for its use, how can this entitlement be affected by the fact that my mistake stemmed from voluntary intoxication? The answer is, of course, that mistakes induced by voluntary intoxication about the need for the use of force affect D's position, because D is not legally entitled to act — not objectively justified in acting — on such beliefs at all. At best, where D acts on a mistaken belief in the need for self-defence, there may be some moral — agent-perspectival — justification for his or her conduct; but it is the very lack of a moral warrant for acting on beliefs induced by intoxication that explains their unfavourable treatment in law (p 45).[33]

Conclusion

I have not touched on some of the complex and fascinating issues raised by Uniacke, such as the role of 'double effect' reasoning and natural law theories of self-defence. I hope, in general, that enough has already been said to demonstrate the significance of what she has to say. In conclusion, one further issue is worth mentioning. Uniacke insists that permissible self-defence is only exercised against unjust *immediate* threats, a requirement stated by the Law Commissioners' 19th-century predecessors (and cited by Uniacke) to be that 'the mischief sought to be prevented could not be prevented by less violent means.'[34] This issue has been raised in a number of important contexts, not least where a battered woman has made a fatal strike against her violent partner whilst he is off guard.[35] Clause 27(1) makes no reference to a need for the use of force to be immediately necessary. The requirement is simply that the use of force be reasonable in the circumstances as D believed them to be.[36] The concession here to what D believes the circumstances to be involves, of course, further confusion (of the kind discussed above) of moral and legal justification. Putting that aside, should Clause 27(1) have added that the threat must be imminent, as well as that the use of force be reasonable in the circumstances, as Uniacke's analysis implies?

---

32 para 36.6, n 372.
33 See the incisive discussion in Clarkson and Keating, *Criminal Law: Textbook and Materials* (London: Sweet & Maxwell, 3rd ed, 1994) pp 299–301.
34 From the Criminal Code Bill Commission of 1879, cited by Uniacke, at p 33.
35 See generally Clarkson and Keating, n 33 above, pp 309–313.
36 For an explanation of this, see Law Commission Consultation Paper No 122, *Legislating the Criminal Code: Offences Against the Person and General Principles* (1992) paras 20.10–20.12.

There is a complexity here, perhaps given insufficient stress by Uniacke (pp 32–34), that could be important. If 'imminent' means 'live' or 'being put into effect,' the insistence on an imminent threat or attack seems more restrictive than the insistence that the use of force be necessary in meeting the threat. After all, pre-emptive strikes can be necessary and proportionate, even though the very pre-emptiveness of the strike implies that the threat being averted was not 'live.' Suppose A (a notoriously violent criminal) is holding B hostage. A tells B that A may well kill B as a ransom demand has not been met. Knowing of A's reputation, B kills A two days later, when A falls asleep on guard duty, and escapes. If we assume that it was necessary (as well as proportionate) for B to kill A in order to escape, is anything added by the requirement that the threat posed by A be 'imminent'? I doubt it. The imminence of a threat is simply one of those factors taken into account in deciding whether the use of force was necessary.

Even if an imminence requirement would be a fifth wheel on the coach, the requirement for a threat to be *necessary*, as well as proportionate, is not. Suppose D attacks V — V being an actual or potential agressor — using physical force when D knows that she could have had V arrested without risking a simple delay and possible consequential escalation of V's attack. No doubt, under Clause 27(1) the jury is meant to take into account the fact that D could have had V arrested in deciding whether D's use of force is reasonable in the circumstances. But there is surely too great a risk that the jury will find D's action reasonable simply because they prefer to see instant 'retribution' taken on aggressors, rather than see them subjected to the often long drawn out, uncertain and almost certainly less starkly punitive process of law. I take it that no one would consider this risk — if it is a real one — worth running. On this, Uniacke deserves the last word:

> An act of defence against someone who is him or herself an unjust immediate threat is not a punitive or a retaliatory act against the person whose conduct is offending . . . The use of defensive force is an act of resisting, repelling or warding off a threat. It is not essentially a punitive act; nor is it a piece of social engineering which penalises the guilty; nor is it an attempt to achieve optimal results. When the threat to oneself is unjust, the use of force in self-defence directly blocks the infliction of unjust harm; and the permissibility of the use of force in self-defence and in defence of another person derive from this fact (pp 186–188).