

## NORVAL MORRIS AND THE ‘NEW MANSLAUGHTER’ IN THE *ADELAIDE LAW REVIEW*

The first issue of the *Adelaide Law Review* in 1960 opens without preamble or dedication. In that respect, it resembles the initial issues of other university law reviews of the same era. The Adelaide Law Review Association had been established by Norval Morris<sup>1</sup> (1923–2004) in the preceding year, early in his tenure as Dean of the Faculty of Law.<sup>2</sup> The first issue of the *Review* includes his discussion of ‘A New Qualified Defence to Murder’, a partial defence which resulted in what he was later to call ‘the new manslaughter’.<sup>3</sup> It is a significant essay for it brings within its compass a pantheon of tutelary deities of Australian criminal law in the late 20<sup>th</sup> century and it addresses issues of continuing concern in criminal responsibility for unlawful homicide. The pantheon to which I refer includes Sir Owen Dixon (1886–1972), Sir John Barry (1903–69), Glanville Williams (1911–97) and Colin Howard (1928–2011), who was recruited by Norval Morris to the Adelaide Law School in 1960. A prelude to Howard’s significant monograph on *Strict Responsibility*,<sup>4</sup> entitled ‘Not Proven’, appears in a subsequent issue of vol 1 of the *Review*.<sup>5</sup>

The ‘new qualified defence’ of Norval Morris’ essay celebrated Victorian and South Australian courts’ extension of the common law of justifiable and excusable homicide to allow a partial defence to murder, reducing that offence to manslaughter, when death resulted from excessive force to resist an assault, prevent a crime or apprehend an offender. The qualified defence came to be known as ‘excessive defence’. In retrospect, this well-intentioned exercise in creative law-making now appears to be an example of what Ngaire Naffine has called ‘the man problem’ in criminal law.<sup>6</sup> The authors of the new qualified defence, all of whom were men,

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<sup>1</sup> See Mark Finnane, ‘Norval Morris (1923–2004)’ (2004) 15(3) *Current Issues in Criminal Justice* 267.

<sup>2</sup> Victor Allen Edgeloe, ‘The Adelaide Law School 1883–1983’ (1983) 9(1) *Adelaide Law Review* 1, 36–7. Edgeloe records that Norval Morris was Dean of Law from August 1958 to June 1962.

<sup>3</sup> Norval Morris, ‘A New Qualified Defence to Murder’ (1960) 1(1) *Adelaide Law Review* 23.

<sup>4</sup> Colin Howard, *Strict Responsibility* (Sweet & Maxwell, 1963). The monograph is based on the text of Howard’s PhD thesis, which was awarded a Bonython Prize in 1962: Victor A Edgeloe, ‘The Adelaide Law School 1883–1983’ (1983) 9(1) *Adelaide Law Review* 1, 28.

<sup>5</sup> Colin Howard, ‘Not Proven’ (1962) 1(3) *Adelaide Law Review* 269.

<sup>6</sup> Ngaire Naffine, *Criminal Law and the Man Problem* (Hart Publishing, 2019).

perceived its 'only real subjects' to be men.<sup>7</sup> Men who kill in self defence, whether excessive or not, were conflated with the entire population of 'persons' who kill in response to a threatened harm, a population which includes a small though significant minority of women. None of those who developed the new partial defence considered the question whether a doctrine formulated for men who kill men in response to threatened harm might fail to reflect the exculpatory circumstances when women kill men in self defence.

Morris presented this realignment of the border between murder and manslaughter as a significant Australian departure from English common law, though he took care to compile a miscellaneous collection of fragments from English and American cases to provide support for the Australian development. JC Smith was later to quibble over Morris' inconsistency in proclaiming a new Australian development while 'seeking to show that it is well grounded in English common law'.<sup>8</sup>

## I EXCESSIVE DEFENCE OF PERSON OR PROPERTY

The new qualified defence made its first appearance in the trial for murder in 1957 of Gordon McKay, a young Victorian poultry farmer who shot and killed a thief called Walter Wicks when he was running away with three stolen fowls.<sup>9</sup> Though self defence was argued, the primary ground for exculpation was prevention of the escape of a thief. Justice John Barry,<sup>10</sup> who presided at the trial in the Supreme Court, advised the jury that he considered McKay's use of a firearm against a poultry thief to be well in excess of reasonable force.<sup>11</sup> His Honour directed them, however, that they might acquit McKay of murder and convict him of manslaughter if they concluded that he might have acted in the belief that he was justified in shooting at the thief to apprehend him. The prosecution had effectively conceded that possibility by arguing that a conviction or manslaughter was available as an alternative. Justice Barry went on to add that a complete acquittal would be, in his view, inappropriate on the facts of the case, but did not withdraw that possibility from the jury.<sup>12</sup>

McKay was convicted of manslaughter and sought leave to appeal to the Full Court against his conviction for manslaughter on the ground that the case was one of murder or nothing. The prosecution found itself in the strange position of arguing in favour of the qualified defence to support McKay's conviction for manslaughter. A majority

<sup>7</sup> Ibid 187. On the male subject and male violence: at 37–40.

<sup>8</sup> JC Smith, Book Review: 'Studies in Criminal Law' by Norval Morris and Colin Howard (1965) 16(1) *University of Toronto Law Journal* 217, 219. The comment by Smith is directed to a subsequent but virtually identical version of the *Adelaide Law Review* essay on the 'new qualified defence'.

<sup>9</sup> See, on appeal, *R v McKay* [1957] VR 560 ('McKay').

<sup>10</sup> *Australian Dictionary of Biography* (online at 14 April 2019) 'Barry, Sir John Vincent (1903–1969)' <<http://adb.anu.edu.au/biography/barry-sir-john-vincent-9442>>.

<sup>11</sup> *McKay* (n 9) 563 (Lowe J).

<sup>12</sup> Ibid 564 (Lowe J).

of the Court upheld the verdict, agreeing with Barry J that a manslaughter verdict was open to the jury when death resulted from excessive force to prevent a theft or apprehend the thief.<sup>13</sup> Norval Morris, who was then a senior lecturer at Melbourne Law School and a lifelong friend and associate of Sir John Barry,<sup>14</sup> attended the trial and published an extended analysis of the decision in the *Sydney Law Review*.<sup>15</sup> This was the precursor to his article in the *Adelaide Law Review*, which was prompted by a South Australian case arising from another fatal shooting in 1957, once again in response to a comparatively minor criminal offence.<sup>16</sup>

Malcolm Horace Howe shared a bottle of wine with an acquaintance, Kenneth Frederick Millard, as they sat in Howe's motor car on the outskirts of the township of Port Pirie in South Australia. Howe was 23 years old, living at home with his parents; Millard a hotel barman in his late thirties. They planned an evening at the drive-in theatre after which they were to join a social gathering at the local football club. At his trial for murder in March 1958, Howe testified that Millard suddenly leaned over, pulled his fly open and grabbed or touched his penis.<sup>17</sup> Howe said he protested and told Millard to get out of the car. Howe followed him in what he said was an 'instinctive rather than rational' reaction to the assault. He testified at his trial that they were standing on open ground near the car when Millard ran at him from behind and grabbed him by the shoulders. Howe pulled himself free and returned to the car where he picked up a rifle he used for shooting rabbits, took aim and shot Millard in the back. He meant to kill him. He said he was afraid that Millard would rape him. Howe was a small and slender man; Millard was larger and stronger.<sup>18</sup>

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<sup>13</sup> Ibid 566 (Lowe J), 567 (Dean J). The Full Court appears to have accepted Barry J's reservation that the qualified defence would not be open if the defendant intended to kill rather than inflict grievous bodily harm in defence of property or to apprehend a thief. That limitation has been preserved in the South Australian statutory provisions on defence of property: *Criminal Law Consolidation Act 1935* (SA) ss 15A(1)(b), (2)(b). Cf the even more restrictive provisions when excessive force is used in defence of property in the *Crimes Act 1900* (NSW) ss 418(2)(c)–(d), 420(a)–(b).

<sup>14</sup> Barry was Chairman and Morris was Secretary of the University of Melbourne Department of Criminology: see Norval Morris, 'The Department of Criminology University of Melbourne' (1952) 26(1) *Australian Law Journal* 12, 12–13. Morris, together with Mark Perlman, edited the memorial tribute to Barry: Norval Morris and Mark Perlman (eds), *Law and Crime: Essays in Honor of Sir John Barry* (Gordon and Breach, 1972).

<sup>15</sup> Norval Morris, 'The Slain Chicken Thief: Some Aspects of Justifiable and Excusable Homicide' (1958) 2(3) *Sydney Law Review* 414. Whether by chance or editorial arrangement, it is of interest that the 'Slain Chicken Thief' was immediately preceded by: John V Barry, 'Hanged by the Neck Until...' (1958) 2(3) *Sydney Law Review* 401.

<sup>16</sup> *R v Howe* [1958] SASR 95; *R v Howe* (1958) 100 CLR 448 ('Howe').

<sup>17</sup> In his written statement to police, given in evidence at the trial, Howe said that Millard 'grabbed my penis' after pulling his fly open. The Supreme Court's summary of Howe's testimony states that Millard pulled his fly open and 'touched the flesh of his penis': *R v Howe* [1958] SASR 95, 100–1.

<sup>18</sup> Malcolm Howe, 163 cm — 51 kg, BMI 19.2; Kenneth Millard, 175 cm — 64 kg, BMI 20.9.

The prosecution disputed Howe's testimony that he acted in self defence and argued that it was a simple case of murder and robbery. Millard was known to be carrying a substantial sum of money. After shooting him, Howe emptied his wallet, threw it away and went on to the picture show and the football social.

At Howe's trial for murder, the jury were instructed that they must convict him of that offence if they were persuaded that he had either failed in his duty to retreat or used excessive force in self defence. The jury were not directed that a manslaughter conviction might be returned when death resulted from excessive force in self defence. He was convicted of murder and sentenced to death. Execution of the sentence was not an entirely remote possibility. Three men had been hanged for murder in South Australia over the preceding decade<sup>19</sup> and another South Australian, Raymond John Bailey, was hanged for murder during the period when Howe's High Court appeal was pending.<sup>20</sup>

The Full Court of the Supreme Court of South Australia quashed the murder conviction and ordered a new trial for that offence, holding that the trial judge had been in error both in his direction that retreat was a prerequisite for acquittal and in his rejection of the possibility of a qualified defence that might reduce murder to manslaughter. The ensuing prosecution appeal to the High Court provided an opportunity for a definitive statement of the new common law doctrine of self defence in its complete and qualified forms. A majority endorsed the Supreme Court's conclusion that a plea of self defence to murder that fails only because an attack was repelled with excessive force should result in a conviction for manslaughter.<sup>21</sup> Moreover, failure to retreat was not an independent criterion for guilt when liability for an unlawful homicide was in issue, but one among the set of relevant circumstances to be considered when deciding whether deadly force was excusable resulting in acquittal, or partially excusable, resulting in conviction for manslaughter.<sup>22</sup> This was the 'new qualified defence' of the *Adelaide Law Review* essay.

At Howe's second trial for murder in September 1958, he was convicted of manslaughter and sentenced to 11 years and six months imprisonment, an unusually severe sentence for the offence in the mid-20<sup>th</sup> century.<sup>23</sup>

During the remaining time of his brief tenure as Dean of the Adelaide Law School, Norval Morris and Colin Howard collaborated in the preparation of their *Studies in*

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<sup>19</sup> ARG Griffiths, 'Capital Punishment in South Australia, 1836–1964' (1970) 3(4) *Australian & New Zealand Journal of Criminology* 214, 218.

<sup>20</sup> 'Bailey Hanged for Murder of Mrs Bowman', *The Canberra Times* (Canberra, 25 June 1958) 12.

<sup>21</sup> *Howe* (n 16) 462 (Dixon CJ with McTiernan and Fullagar JJ agreeing), 474 (Menzies J).

<sup>22</sup> *Ibid* 462 (Dixon CJ, with McTiernan and Fullagar JJ agreeing), 469 (Taylor J), 470–1 (Menzies J).

<sup>23</sup> Transcript, Malcolm Horace Howe, 3391/8/P, 32/Feb/58, Box 98. Higher Courts Criminal Registry, Supreme and District Court, Adelaide.

*Criminal Law* ('*Studies*').<sup>24</sup> The preface to the collection of essays declared their objective to acquaint the legal community, and English lawyers in particular, with 'a number of original and valuable contributions to the criminal law by the courts of Australia'.<sup>25</sup> These were lean and troubled years in English criminal jurisprudence and the Australian invitation was welcomed by JC Smith in his review of the *Studies*.<sup>26</sup> They were introduced by a substantial essay by Sir John Barry, in which he deplored the House of Lords' acceptance in *Director of Public Prosecutions v Smith* of an 'objective test' of criminal fault and its fictional imputation as an 'unfortunate aberration'.<sup>27</sup> The essays that follow this introduction are all presented, as Glanville Williams remarked in his review, as works for which Morris and Howard 'now take joint and unapportioned responsibility'.<sup>28</sup> Some, though not all, were revised versions of their earlier solo publications. Norval Morris' 'New Qualified Defence' from the *Adelaide Law Review* became 'A New Manslaughter', the fourth of the *Studies*. Howard's essay, 'Not Proven', now bearing the more descriptive title 'Strict Responsibility,' was the sixth. The opening essay on 'The Definition of Murder', which takes up the 'subjectivist' cause announced by Sir John Barry, incorporates passages from an address by JL Travers QC of the South Australian Bar and Norval Morris to the Law Council Convention in 1961,<sup>29</sup> roundly rejecting the House of Lords decision in *Smith*.<sup>30</sup> The Law Lords were guilty, declared Travers QC and Morris, of blurring the 'distinction between wickedness and stupidity, which is one of the hallmarks of a mature and humane system of criminal law...'<sup>31</sup>

Completion of the manuscript of the *Studies* coincided with the declaration by Dixon CJ in *Parker v The Queen*<sup>32</sup> that the High Court would no longer consider itself bound to follow decisions of the House of Lords. Sir John Barry's introductory essay concludes with a 'postscript' of the High Court judges' joint declaration and injunction that '*Smith's Case* should not be used as authority in Australia at all'.<sup>33</sup>

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<sup>24</sup> Norval Morris and Colin Howard, *Studies in Criminal Law* (Clarendon Press, 1964).

<sup>25</sup> *Ibid* iii.

<sup>26</sup> Smith (n 8) 217–18. Smith characterised English case law as 'undistinguished' and agreed with Morris and Howard that introducing the English legal profession to 'the example set by their Australian brethren must be a step in the right direction'.

<sup>27</sup> Morris and Howard (n 24) xxi, xxix–xxx, citing *DPP v Smith* [1961] AC 290 ('*Smith*').

<sup>28</sup> Glanville Williams, Book Review: 'Studies in Criminal Law' by Norval Morris and Colin Howard (1965) 23(1) *Cambridge Law Journal* 137, 137.

<sup>29</sup> JL Travers and Norval Morris, 'Imputed Intent in Murder or *Smith v Smyth*' (1961) 35(4) *Australian Law Journal* 154; Morris and Howard (n 24) 5–6.

<sup>30</sup> Morris and Howard (n 24) 1.

<sup>31</sup> Travers and Morris (n 29) 157.

<sup>32</sup> (1963) 111 CLR 610, 632–3.

<sup>33</sup> Morris and Howard (n 24) xxxiv.

The *Studies* were soon followed by Howard's *Australian Criminal Law*,<sup>34</sup> a work distinguished by its prefatory homage to Glanville Williams<sup>35</sup> and Howard's ambition to present a unified jurisprudence of Australian criminal law.<sup>36</sup> It is, however, the 'new manslaughter' that is the subject of the remaining pages of this essay. Howard's discussion of the qualified defence in the first edition of his text is curiously perfunctory.<sup>37</sup> Ten years after *Howe*, in 1968, he published a critical review titled 'Two Problems in Excessive Defence',<sup>38</sup> which reflects his doubts as to its viability.

The qualified defence was fashioned by men for a characteristic pattern of masculine aggression that began with an unlawful attack by the eventual victim of homicide on the person or property of another. Deadly force in response to the attack was not excusable if the defendant failed to take advantage of a reasonable opportunity to disengage, withdraw or retreat from conflict. The initial wrong did not licence an aggressive response or vengeance: an unlawful attack was not an invitation to a fight which could be accepted without consequences. The qualified defence did permit courts to avoid a murder verdict in an age when courts were required to sentence murderers to death, a sentence occasionally executed by governments, though the usual outcome was commutation of the death sentence and imprisonment for an indefinite period of years. Of the early proponents of the new manslaughter, Morris and Sir John Barry were actively engaged in the campaign to eliminate the death penalty.<sup>39</sup> The qualified defence averted the unlikely risks of execution or lifelong imprisonment and permitted the trial judge to determine the punishment when sentencing for manslaughter. It should be noted, however, that the period of 'life imprisonment' in the usual case where the sentence was commuted, though wildly variable across jurisdictions, was relatively short by comparison with the current severity of sentences for murder.<sup>40</sup>

<sup>34</sup> Colin Howard, *Australian Criminal Law* (Lawbook, 1965).

<sup>35</sup> 'Since the publication in 1953 of the first edition of his book, *Criminal Law: The General Part*, every writer on the criminal law has owed an intellectual debt to Dr Glanville Williams. The extent of my own is evident on every page': *ibid* v.

<sup>36</sup> The 'Australian' appellation was subsequently dropped in Colin Howard, *Criminal Law* (Lawbook, 3<sup>rd</sup> ed, 1977) and the attempt to provide comprehensive coverage of Australian criminal law abandoned in the last edition: Brent Fisse, *Howard's Criminal Law* (Lawbook, 5<sup>th</sup> ed, 1990).

<sup>37</sup> Howard, *Australian Criminal Law* (n 34) 80–3.

<sup>38</sup> Colin Howard, 'Two Problems in Excessive Defence' (1968) 84(3) *Law Quarterly Review* 343. Subsequent editions of his textbook incorporate a summary exposition of the critique.

<sup>39</sup> See Mark Finnane and John Myrtle, *JV Barry: A Life* (University of New South Wales Press, 2007) 157–62, 257–63.

<sup>40</sup> Arie Freiberg and David Biles, *The Meaning of 'Life': A Study of Life Sentences in Australia* (Australian Institute of Criminology, 1975) 144. The authors conclude their survey, which covers the years 1918–74: 'There is a considerable disparity in Australia regarding the length of time served by life sentence prisoners, the maximum ... average being 17 years 6 months in New South Wales [1932–74] and the minimum being 9 years 8 months in South Australia [1918–74]. However, lengths of detention in the various jurisdictions have tended to fluctuate over the years.'

The qualified defence had a further consequence, welcomed by Morris. Juries that were unwilling to acquit of murder in dubious cases of self defence now had the opportunity to convict for manslaughter rather than return a simple verdict of not guilty.<sup>41</sup> The resulting increase in the overall ambit of liability for unlawful homicide could be expected to result in relatively short deterrent sentences, rather than outright acquittal, for men who responded with unnecessary aggression to threats of unlawful violence. In his 1968 critique, Howard suggested that perhaps the true object of excessive defence was not to mitigate the severity of the law, but ‘on the contrary to restrict ... an admitted right of self-defence.’<sup>42</sup>

## II THE PROBLEMS OF PROPORTIONALITY

Concentration on the potential applications of a partial or qualified plea of self defence in murder obscured what appears, in retrospect, to have been a more significant element in the High Court’s decision in *Howe*. This was the first time the High Court had been required to state the common law requirements for a complete acquittal on the ground of self defence. The decision that *Howe* was to be tried again for murder meant that the possibility of an outright acquittal, however unlikely, required consideration. The High Court endorsed the Supreme Court’s decision that failure to retreat was a circumstance to be considered among others in deciding whether the defendant was ‘acting reasonably in standing his ground and fighting back ...’<sup>43</sup> The more interesting issue, however, has to do with the nature of threatened harm that could excuse a resort to force intended to kill or cause grievous bodily harm. The Supreme Court concluded that self defence required proof of a ‘violent and felonious attack’;<sup>44</sup> one that threatened death, ‘grave bodily injury’ or the ‘commission of a forcible and atrocious crime’<sup>45</sup> — in this instance an assault that would now be recognised as an attempted rape.<sup>46</sup> This was a requirement of *equivalence* between the threat and an

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<sup>41</sup> Morris, ‘A New Qualified Defence to Murder’ (n 3) 51–2.

<sup>42</sup> Howard, ‘Two Problems in Excessive Defence’ (n 38) 354.

<sup>43</sup> *R v Howe* [1958] SASR 95, 110; *Howe* (n 16) 462 (Dixon CJ, with McTiernan and Fullagar JJ agreeing), 469 (Taylor J), 470–1 (Menziez J).

<sup>44</sup> *R v Howe* [1958] SASR 95, 121.

<sup>45</sup> The judgment of Lowe J was the immediate source for the reference to ‘atrocious crime’: *McKay* (n 9) 562.

<sup>46</sup> *R v Howe* [1958] SASR 95, 119. The Supreme Court formulation appears to reflect the argument presented by Dr JJ Bray QC, subsequently Chief Justice of the Court, for the appellant, that no distinction was to be drawn between excusable and justifiable homicide so that the possibility of retreat was irrelevant, when the defendant killed in response to a violent and felonious (‘sodomitical’) attack: at 108–10. The Court rejected Dr Bray QC’s argument on retreat, holding that the possibility of retreat was relevant when considering whether there was reasonable necessity for deadly force, but retained his formulation of the nature of the threat that might justify or excuse such a response: at 110.

excusable resort to deadly force.<sup>47</sup> The judgment of Dixon CJ in the High Court, which attracted majority support,<sup>48</sup> would permit a far more extensive area of exculpation for deadly force in self defence. Causing death with intention to kill or cause grievous bodily harm might be justified or excused,<sup>49</sup> his Honour said, in response to

an attack of a violent and felonious nature, or at least of an unlawful nature ... made or threatened so that the person under attack or threat of attack reasonably feared for his life or the safety of his person from injury, violation or indecent or insulting usage.<sup>50</sup>

Chief Justice Dixon is precise in his qualification of the Supreme Court's requirement of a 'violent and felonious attack'. Though his formulation of the test had potential application to Howe's account of the shooting, it was evidently intended to be of more general application in the Court's restatement of the common law of self defence. It is puzzling, to say the least, that Morris failed to perceive the significance of this extension of the scope of complete and partial self defence in his essays on the 'new manslaughter'.<sup>51</sup> Though the circumstances of *Howe* were very different, Dixon CJ's restatement has potential application to excuse deadly force in self defence against domestic terrorism and protracted degradation or humiliation within intimate relationships that may not involve threats to life or an 'atrocious' crime.

Australian courts are in general agreement that 'proportionality' between the threat and the defensive response is relevant to the determination of common law culpability when self defence is in issue.<sup>52</sup> Depending on the circumstances of the case, Dixon CJ's judgment allows the possibility that a resort to deadly force in self defence against threats to the safety of one's person from 'injury, violation or indecent or insulting usage' may be 'proportionate' in some sense other than equivalence

<sup>47</sup> 'Justifiable homicide' in response to a 'forcible and atrocious crime' included the case of a 'woman who kills a man who attempts to ravish her': see *Howe* (n 16) 452 (JJ Bray QC) (during argument), citing JF Archbold, *Archbold's Criminal Pleading, Evidence & Practice* (Sweet & Maxwell, 33<sup>rd</sup> ed, 1954) 934–5 [1638], 943–4 [1652].

<sup>48</sup> Justices McTiernan and Fullagar concurred. Justice Menzies adopted a less expansive statement of the circumstances that might give rise to a complete or qualified defence.

<sup>49</sup> In this essay, which is solely concerned with self defence, the old distinction between 'justifiable homicide' (in the execution of 'justice') and 'excusable homicide' (in self defence), can be disregarded: see *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 658 ('*Zecevic*'). Though a contrary view has been expressed on the issue, the discussion in the text assumes that there is no significant difference between justification and excuse when self defence is in issue: cf Stanley Yeo, 'Revisiting Excessive Self-Defence' (2000) 12(1) *Current Issues in Criminal Justice* 39, 40–1.

<sup>50</sup> *Howe* (n 16) 460. Justice Menzies, who concurred in the result, also departed from the Supreme Court formulation, referring to 'self-defence against serious violence though not necessarily felonious violence': at 471.

<sup>51</sup> Morris, 'A New Qualified Defence to Murder' (n 3) 43; Morris and Howard (n 24) 118.

<sup>52</sup> See, eg, *Viro v The Queen* (1978) 141 CLR 88 ('*Viro*'); *Zecevic* (n 49).

between threat and response. As the law stood, after the decision in *Howe*, it seemed that absence of proportionality, like failure to retreat, was a circumstantial factor to be considered when determining whether the use of deadly force was reasonably necessary in the circumstances: equivalence between threat and response was not an independent or imperative requirement for exculpation.<sup>53</sup>

There was, however, a missing item in the set of factors or considerations that had to be considered when reasonable necessity for deadly force was in question. Disengagement from conflict, retreat and other modes of avoidance of threatened harm may involve the sacrifice of significant personal interests or values. When, for example, property is threatened, one must sometimes simply accept its loss or destruction rather than use force against a predator. McKay should not have shot the chicken thief but let him go, with or without his booty.<sup>54</sup> Missing from the usual list of modes of avoidance of threats of unlawful harm is *submission*. Glanville Williams was unusual in his blunt conclusion that the criminal law will sometimes require submission to unlawful threats in circumstances where there is no reasonable way of avoidance: ‘there are some insults and hurts that one must suffer rather than use extreme force ...’<sup>55</sup> The requirement of submission to unlawful conduct is implicit in case law but rarely articulated. Courts are content with the injunction that a trivial or minor assault does not licence deadly force in response. Exercises of judicial imagination about the circumstances that might require submission, rather than a resort to deadly force, are remarkable for their artificiality. A newspaper editor faced by an enraged reader intent on ‘throwing a bottle of ink over him’ must not shoot him.<sup>56</sup> Nor it is excusable for a ‘weak lad whose hair was about to be pulled by a stronger one’ to shoot the bully even if that is the only way he can avoid the assault.<sup>57</sup>

Howard, alone among those who discussed the question of proportionality in the years following *Howe* managed to ask the right question:<sup>58</sup> in what circumstances does the law require a person to submit to ‘indecent or insulting usage’ when there is no reasonable avenue of escape or avoidance? His question was accompanied, however, by an arch illustration — a girl armed with a hatpin threatened by a man intent on stealing an unwanted kiss — which seems to have been intended to amuse

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<sup>53</sup> See *Howe* (n 16) 461, where Dixon CJ formulates the test in term of the defendant’s perception of ‘circumstances [that] could cause him reasonably to believe that [deadly force] was necessary for his protection’. Proportionality is subordinate to reasonable necessity.

<sup>54</sup> Even so, the emerging law of home invasion is a reminder that threats to property interests do sometimes excuse a resort to deadly force. See, eg, *Criminal Law Consolidation Act 1935* (SA) s 15C (Requirement of Reasonable Proportionality Not to Apply in Case of an Innocent Defence against Home Invasion). See also *Criminal Code Act Compilation Act 1913* (WA) app B sch 1 s 244 (Home Invasion).

<sup>55</sup> Glanville Williams, *Textbook of Criminal Law* (Stevens, 2<sup>nd</sup> ed, 1983) 506.

<sup>56</sup> *Viro* (n 52) 126 (Gibbs J), citing *R v Tikos (No 1)* [1963] VR 285, 291 (Sholl J).

<sup>57</sup> *Zecevic* (n 49) 666 (Brennan J), quoting *Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (Report, 1879) 44.

<sup>58</sup> Howard, ‘Two Problems in Excessive Defence’ (n 38) 352.

his readers rather than to encourage serious consideration of the mundane realities of dominance and submission where they are most commonly manifest, in the theatre of intimate partner violence.<sup>59</sup> Howard did not attempt an answer to his question about circumstances that might require submission to a threatened assault and ventured no opinion on the criminal responsibility of the girl with the lethal hatpin. He did, however, suggest a reading of the law of self defence that has potential application in the very different circumstances of domestic abuse involving threats of injury, violation or indecent or insulting usage. Perhaps, in these circumstances, the victim:

is entitled to take measures, not proportionate to the seriousness of the harm she anticipates if she does not escape, but proportionate to the difficulty of escaping from a situation in which the unlawful interference with her person is to be expected.<sup>60</sup>

### EPILOGUE

In the years that followed, courts expressed increasing concern that the qualified defence was incoherent in principle and difficult, if not impossible, to explain to juries. Almost three decades passed however, before the High Court was asked, in *Viro*,<sup>61</sup> to reconsider the scope of self defence and its pendant doctrine of excessive defence in a challenge prompted by the Privy Council decision in *Palmer v The Queen*.<sup>62</sup> The Privy Council had concluded that the qualified defence was no part of English common law or, the decision being on appeal from Jamaica, the common law of that jurisdiction.<sup>63</sup> The High Court was unanimous in holding that Privy Council decisions did not determine the content of Australian common law.<sup>64</sup> The Court divided, however, on the question whether *Howe* should be followed. Justice Mason provided a summary six point formulation of the law of self defence, in its complete and qualified versions,<sup>65</sup> that secured the reluctant agreement of a majority of the Court.<sup>66</sup> Though the 'new manslaughter' was saved for another day, all members of

<sup>59</sup> See, eg, the case studies in Danielle Tyson et al, 'The Effects of the 2005 Reforms on Legal Responses to Women Who Kill Intimate Partners' in Kate Fitz-Gibbon and Arie Freiberg (eds), *Homicide Law Reform in Victoria: Retrospect and Prospects* (Federation Press, 2015) 76; Stella Tarrant and Julia Tolmie, 'Transforming Legal Understandings of Intimate Partner Violence' (Research Report, Australia's National Research Organisation for Women's Safety, 2019) (forthcoming).

<sup>60</sup> Howard, 'Two Problems in Excessive Defence' (n 38) 353.

<sup>61</sup> *Viro* (n 52). The significance of the issues relating to the authority of Privy Council decisions required the consideration of the Full Bench of the High Court: Barwick CJ, Gibbs, Stephen, Mason, Jacobs, Murphy and Aickin JJ.

<sup>62</sup> [1971] AC 814.

<sup>63</sup> *Palmer v The Queen* [1971] AC 814, 831–2.

<sup>64</sup> *Viro* (n 52) 93 (Barwick CJ), 119 (Gibbs J), 130 (Stephen J), 135 (Mason J), 150–1 (Jacobs J), 166–7 (Murphy J), 174 (Aickin J).

<sup>65</sup> *Ibid* 146–7 (Mason J).

<sup>66</sup> *Ibid* 128 (Gibbs J), 134–5 (Stephen J), 158 (Jacobs J), 180 (Aickin J).

the majority expressed to varying degrees their unease or incredulity that a threat of ‘injury, violation or indecent or insulting usage’ might be sufficient to excuse or partially excuse a resort to deadly force.

Eventually in 1987, in *Zecevic*, the High Court repudiated its earlier recognition of the qualified defence and declared that it was no longer a part of Australian common law. The partial defence of provocation, which shares substantial common territory with excessive defence, was called in aid to fill the lacuna left by its elimination.<sup>67</sup> The decision in *Zecevic* has been taken to affirm the view expressed in *Howe* that ‘proportionality’ does not require equivalence between the threat and response in self defence at common law.<sup>68</sup> However, the dictum that circumstances might sometimes excuse a resort to deadly force to repel ‘injury, violation or indecent and insulting usage’ has disappeared without trace.

In the years that followed the decision in *Zecevic*, legislatures in the common law states of South Australia,<sup>69</sup> New South Wales,<sup>70</sup> and Victoria<sup>71</sup> enacted statutory equivalents of the qualified defence.<sup>72</sup> Western Australia incorporated a version in its *Criminal Code*.<sup>73</sup> Of these statutory interventions, the brief Victorian experiment with a new manslaughter called ‘defensive homicide’ is the most remarkable. Defensive homicide was introduced in 2005 and repealed in 2014.<sup>74</sup> A brief account of this ‘failed law reform’<sup>75</sup> illustrates the perennial problems that beset attempts to devise a rational integration of the elements of conduct, culpability and punishment in murder and manslaughter.

In 2005, the Victorian Parliament enacted defensive homicide as a version of the qualified defence alongside other ‘family violence’ legislation abolishing the partial defence of provocation.<sup>76</sup> The qualified defence was transformed into a

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<sup>67</sup> *Zecevic* (n 49) (Wilson, Dawson and Toohey JJ), quoting *R v McInnes* (1989) 90 Cr App R 99, 562. Cf Deane J, dissenting at 678.

<sup>68</sup> *Ibid* 663–4 (Wilson, Dawson and Toohey JJ, Mason CJ agreeing at 654). See also, Fisse (n 36) 105; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4<sup>th</sup> ed, 2017) 350–1, 354, 357.

<sup>69</sup> *Criminal Law Consolidation Act 1935* (SA) s 15(2).

<sup>70</sup> *Crimes Act 1900* (NSW) s 421.

<sup>71</sup> *Crimes Act 1958* (Vic) s 9AD, as inserted by *Crimes (Homicide) Act 2005* (Vic).

<sup>72</sup> For a contemporary discussion of some of these statutory interventions and critique of *Zecevic* (n 49): see Yeo (n 49).

<sup>73</sup> *Criminal Code* (WA) s 248(3).

<sup>74</sup> See *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic).

<sup>75</sup> Kate Fitz-Gibbon, ‘The Offence of Defensive Homicide: Lessons Learned from Failed Law Reform’ in Fitz-Gibbon and Freiberg (n 59) 128.

<sup>76</sup> *Crimes (Homicide) Act 2005* (Vic). For a comprehensive, critical, account of the legislative changes: see Bronwyn Naylor and Danielle Tyson, ‘Reforming Defences to Homicide in Victoria’ (2017) 6(3) *International Journal for Crime, Justice and Social Democracy* 72.

distinct offence, with a maximum penalty of 20 years imprisonment, equivalent to manslaughter. Defensive homicide was a response with variations to a recommendation by the Victorian Law Reform Commission to reinstate, in statutory form, the common law of excessive defence.<sup>77</sup> In a post-mortem on the failed reform,<sup>78</sup> the Hon Marcia Neave AO,<sup>79</sup> the distinguished jurist who chaired the Commission, outlined the debate and conflicting views in 2004–05 about proposals to reinstate the qualified defence.<sup>80</sup> Opponents of the qualified defence had argued that a reform meant to save women from a conviction for murder when they responded with deadly force to family violence might result in a compromise verdict of unlawful homicide, rather than complete acquittal. On the other hand, aggressive men who killed unnecessarily and without reason might be convicted of the lesser offence and escape a deserved conviction for murder. A decade of experience with the 'new manslaughter' did nothing to settle the scholarly debate<sup>81</sup> but Parliament intervened and abolished defensive homicide in 2014.<sup>82</sup> It was taken to be a justification for legislative repeal that most cases of defensive homicide involved 'men who killed other men in violent confrontations, rather than women who kill in the context of family violence'.<sup>83</sup>

A peculiarity of the 2005 legislative definition of self defence survived the 2014 repeal of defensive homicide. The statutory definition of the complete defence reinstates the rule requiring equivalent proportionality when murder is charged. Nothing short of a belief that the person is threatened with death or really serious injury (which includes serious sexual assault) can excuse a resort to deadly force.<sup>84</sup>

<sup>77</sup> Victorian Law Reform Commission, *Defences to Homicide: Final Report* (Final Report No 94, 1 August 2004) 101.

<sup>78</sup> Marcia Neave, 'The More Things Change the More They Stay the Same: Homicide Law Reform in Victoria' in Fitz-Gibbon and Freiberg (n 59) 9.

<sup>79</sup> John Bray Professor of Law and Dean of University of Adelaide Law School 1987–89; Chair, Law Reform Commission of Victoria 2000–06; Justice of the Court of Appeal, Supreme Court of Victoria 2006–14; Royal Commissioner into Family Violence 2015–16.

<sup>80</sup> Marcia Neave, 'The More Things Change the More They Stay the Same: Homicide Law Reform in Victoria' in Fitz-Gibbon and Freiberg (n 59) 9, 18–19.

<sup>81</sup> Kate Fitz-Gibbon, 'The Offence of Defensive Homicide: Lessons Learned from Failed Law Reform' in Fitz-Gibbon and Freiberg (n 59) 128; Marcia Neave, 'The More Things Change the More They Stay the Same: Homicide Law Reform in Victoria' in Fitz-Gibbon and Freiberg (n 59) 9; Madeleine Ulbrick, Asher Flynn and Danielle Tyson, 'The Abolition of Defensive Homicide: A Step Towards Populist Punitivism at the Expense of Mentally Impaired Offenders' (2016) 40(1) *Melbourne University Law Review* 324.

<sup>82</sup> *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic).

<sup>83</sup> 'Defences to Homicide', *Victorian Law Reform Commission* (Web Page, 5 March 2019) <<https://www.lawreform.vic.gov.au/all-projects/defences-homicide>>. For an extended argument on the unintended application of defensive homicide to men killing men: see Kellie Toole, 'Defensive Homicide on Trial in Victoria' (2013) 39(2) *Monash University Law Review* 473, 503.

<sup>84</sup> *Crimes Act 1958* (Vic) ss 322H, 322K.

The requirement of equivalence is qualified, to some indeterminate extent, by the concession that the belief need not be ‘reasonable’, so long as it is honestly held. The statutory provision is remarkable for its repudiation of Australian common law on proportionality and reasonable necessity and for its divergence from statutory provisions in the other common law states.<sup>85</sup> Space does not permit discussion of its peculiarities or potential mitigation of its privative effect by recourse to the cognitive subjectivities of different kinds of reasonable people.

The qualified defence had its origin in Victoria. With its abolition in that jurisdiction, we have come full circle. In his review of Morris and Howard’s *Studies*, Louis Blom-Cooper saw little merit in the ‘new manslaughter’ in jurisdictions where sentences for murder and manslaughter were ‘equally variable’, depending on the circumstances of the case.<sup>86</sup> He argued that offenders who used excessive force and killed in self defence should plead their mitigation during a sentencing hearing.<sup>87</sup> In reality, however, judicial sentencing discretion in cases of murder and manslaughter is never ‘equally variable’ in the Australian common law jurisdictions. In South Australia, life imprisonment is mandatory for offenders convicted of murder and in all Australian jurisdictions the courts’ sentencing discretion in unlawful homicides is subject to increasingly directive legislative constraints.<sup>88</sup> The effect and unexpressed objective of eliminating the qualified defence in Victoria is to increase sentence severity for unlawful homicide. Whatever the mitigation involved in a sentencing plea of excessive defence, a conviction for murder rather than manslaughter will almost always require a retributive premium of additional years in prison.<sup>89</sup>

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<sup>85</sup> Cf *Crimes Act 1900* (NSW) s 418; *Criminal Law Consolidation Act 1935* (SA) s 15B.

<sup>86</sup> Louis J Blom-Cooper, Book Review: ‘Studies in Criminal Law’ by Norval Morris and Colin Howard (1966) 29(1) *Modern Law Review* 102, 104.

<sup>87</sup> Ibid. Cf Kate Fitz-Gibbon, ‘The Offence of Defensive Homicide: Lessons Learned from Failed Law Reform’ in Fitz-Gibbon and Freiberg (n 59) 128, 138–9.

<sup>88</sup> Note, however, the retreat from severity in the *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) repealing the ‘baseline sentence’ provisions of the *Sentencing Act 1991* (Vic).

<sup>89</sup> For a brief discussion of the punitive consequences of eliminating the qualified defences: see Ian Leader-Elliott, ‘Reform and Codification of the Law of Homicide: Reflections on the Victorian Experience’ in Fitz-Gibbon and Freiberg (n 59) 158, 167–71.

