Self-Defence and the Classification of Defences

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I: INTRODUCTION

Over the last twenty years, criminal theorists have been occupied by attempts to classify defences. Particular attention has been paid to the distinction between "justifications" and "excuses". Theorists have found self-defence hard to classify, especially where it is based on a mistaken view of the facts. One theorist, Robinson, suggests that:[1]

> [T]he fact that [certain] defences do not fit cleanly into one or another category only reinforces the usefulness of the scheme. If ambiguity in classification coincides with independently generated disputes over proper formulation, it would seem to confirm that the distinctions made by the scheme are central to the ongoing criminal law theory debates, although not perhaps recognised as such.

At its boundaries the practical application of the law of self-defence is far from straightforward. Must a battered woman wait until she is actually being attacked before fighting back? What happens where a person goes to the aid of an apparent victim, only to find that the "victim" was being lawfully restrained or was the attacker? Can self-defence be pleaded even though the defendant did not know at the time of the incident that she might need to defend herself?

It is possible that the theory of justification and excuse can help to resolve the practical problems associated with self-defence. This article examines the classifi-

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1 "Criminal Law Defenses: A Systematic Analysis" (1982) 82 Col L Rev 199, 233.

cation of self-defence in this scheme and the defence as defined by legislatures and applied by courts. It will be argued that despite apparent agreement about the nature of self-defence, there is disagreement at a fundamental level about the basis and scope of the defence, and that this severely limits the usefulness of the theoreticians' work.

II: JUSTIFICATIONS AND EXCUSES

The concept of justification and excuse was revived by Fletcher in his article "The Individualization of Excusing Conditions"[2] and his book *Rethinking Criminal Law*,[3] and was used by Robinson as the foundation of an attempt to classify criminal defences.[4] Enthusiasts claim that criminal law cannot be rationalised without the aid of this distinction. Fletcher, for example, describes the distinction as having "fundamental theoretical and practical value"[5] and expresses regret that "the distinction has gone unmentioned in most of the English language textbooks of the last hundred years"[6] since any analysis which ignores it is "superficial".[7]

1. Justification

The basis of a justification is the notion that some behaviour, although the results may be the same as criminal behaviour, is not criminal at all:[8]

> A 'justification' challenges the wrongfulness of an action which technically constitutes a crime. The police officer who shoots the hostage taker ... [is an actor] whose actions we consider *rightful*, not wrongful. For such actions are often praised, as motivated by some great or noble object.

These are the cases where the actor says: "I am responsible, but I had a legal right to do this in the circumstances."[9] In the circumstances, the actor did the "right" thing, or at least something that is legally tolerated.[10]

Fletcher analyses this in a utilitarian way:[11]

> The determination that the conduct is justified presupposes a judgment about the superior social interest in the [transaction].

Thus the harm done is outweighed by the harm avoided or the social interest furthered. A paradigm example would be the force used while arresting a thief or the excessive but careful speed of a fire engine travelling towards a major fire.

There are two incompatible approaches to justifications. They may be seen as

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2 (1974) 47 S Cal L Rev 1269.
3 *Rethinking Criminal Law* (1978).
4 Supra at note 1.
5 "The Right and the Reasonable" (1985) 98 Harv L Rev 949, 955.
6 Ibid.
7 Ibid, 957.
8 *Perka v The Queen* [1984] 2 SCR 232, 246 per Dickson J.
9 Alldridge, "The Coherence of Defenses" [1983] Crim LR 665.
10 Ibid, 665. See also Husak, *Philosophy of Criminal Law* (1987) 189.
11 Supra at note 3, at 761.

exceptions to offences (the "implicit elements" approach) or as privileges to commit certain offences in given circumstances (the "licence" approach).[12]

Implicit elements

According to the implicit elements approach, a defendant who has a valid justification has committed no offence at all:[13]

> His conduct may have satisfied each of the explicit elements of a given offense, but complete offenses are comprised of *all* their elements: unless the conduct of the defendant satisfies the implicit as well as the explicit elements, he has *not* committed the offense.

This is the approach of Glanville Williams, who sees the distinction between offences and defences[14] as resting principally on "the accidents of language, the convenience of legal drafting or the unreasoning force of tradition".[15] He acknowledges that it may not be possible to include all defence elements as part of the definition of an offence but regards this as an inadequate basis for drawing a distinction in substantive law.[16]

The difficulty with this argument is that it does not address the "intuitive difference between denials and justifications".[17] The actor who says she has not committed a crime since there was no causal connection between her actions and the harm done, or because she did not have the requisite mental state, is saying something quite different from the one who says that she was justified in what she did. Justified actions are intentional, although done with a motive that negatives criminal liability. One possible difference between the two claims is that denials are concerned with the actor's responsibility for the act or omission,[18] while justifications are concerned with the criminality of the act or omission. The former denies wrongfulness through attribution; the latter, by redefining "wrong".

Husak's second objection to this analysis is of less consequence. He suggests that if defences are merely implicit elements of offences, then "actual descriptions of most ... offenses are incomplete".[19] There is no logical reason why criminal codes cannot state these implicit elements in a general provision, applying to all offences.

Licence approach

Most theorists who favour the justification and excuse theory subscribe to the

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12 See Husak, supra at note 10, at 189.

13 Ibid, 190.

14 By which he means principally justifications.

15 "Offences and Defences" (1982) 2 Legal Studies 233, 256.

16 Ibid, 252-253.

17 Husak, supra at note 10, at 191.

18 Thus an excuse is conceptually closer to a denial than is a justification. Both may include an admission of physical responsibility coupled with a denial of mental responsibility.

19 Supra at note 10, at 191. This objection would be taken more seriously where there is a codified criminal law, which is probably why it does not trouble Glanville Williams.

licence approach to justification. Robinson says:[20]

> Where conduct is covered by an offense modification, it is not in fact a legally recognised harm. Such conduct is always tolerated by the criminal law. Justified conduct, on the other hand, causes a legally recognised harm or evil. The conduct remains generally condemned and prohibited. It is tolerated only when, by the infliction of the intermediate harm or evil, a greater societal harm is avoided or benefit gained.

According to this approach, an actor has a "privilege" to respond in some specified way if certain triggering conditions exist.[21] The actor's response is, however, prima facie wrong; if it is to be labelled non-criminal it must be shown to have been the correct response to those conditions. Approval is suspended until rightfulness is confirmed. In easy cases, there is no prosecution. In others there may be a trial followed by acquittal.

There may be resistance to the idea that a person with a valid justification has nevertheless committed a criminal offence.[22] However, in determining whether there is a valid justification, it is implicit in the licence approach that the decision maker looks not at an abstract situation as would be done for a mere exception, but at the situation in which the actor actually found himself or herself. This does not confuse justification and excuse – the emphasis is still on the act – but the act must be positively justified. Non-liability cannot be predicted with certainty. This is logical, given the balance of harms basis of justification, since balancing can only be done *ex post facto*. There is considerable resistance to dealing with deadly use of self-defence by way of the discretion not to prosecute. People like to be sure that the force was really necessary before removing the criminal tag. This need to assert a justification positively accords better with the licence approach than with the implicit elements approach.

The first of these analyses is generally associated with a broader understanding of justifications, and tolerance of reasonableness standards being incorporated in them. The latter is associated with "orthodox" theories of justification and excuse. For the purpose of the following discussion, it will therefore be assumed that there is a valid distinction between offences and defences.

2. Excuses

Fletcher describes excusing conditions as "variations on the theme 'I couldn't help myself' or 'I didn't mean to do it' ".[23] An excuse centres on the actor, not on

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[20] Supra at note 1, at 220.

[21] Glanville Williams criticises this use of the term "privilege", saying Fletcher has misunderstood Hohfeld. A Hohfeldian liberty is "not a limited exception from duty; it is the ordinary liberty to do things that are not criminal". This would support Glanville Williams' own thesis: supra at note 15, at 247-249. The objection is not fatal to the licence approach, since the ordinary language meaning of "privilege" will do instead; it simply casts doubt upon one suggested source of support.

[22] Husak, supra at note 10, at 192.

[23] Supra at note 2, at 1269.

the act:[24]

> It is always actors who are excused, not acts. The act may be harmful, wrong and even illegal, but it might not tell us what kind of person the actor is. And precisely in those cases in which there is no reliable inference from censuring the act to censuring the actor, we speak of excusing the actor for his misdeed.

Examples of "excusing conditions" include some instances of necessity, duress, insanity and mistake. Each connotes some degree of involuntariness. The act seems to be due to the circumstances in which the actor found himself. It is not the result of any blameworthiness on the part of the actor. The scope of excusing conditions is limited by the requirement that there be a causal link between the actor's disability and the particular result.[25]

It is unclear whether the success of a claim that an actor is excused must rest on the concession that there is a wrong to be excused.[26] Fletcher insists that "the concept of wrongful conduct logically precedes the concept of personal culpability. The analysis of justification must precede the analysis of excuse."[27] However, the proponents of a serial view of defences do not agree about the order of the series.[28] There may be good reasons to eliminate an excuse such as insanity before determining culpability. Sometimes, there may be tactical or personal reasons for the selection of a particular defence. A defendant might, for example, choose to rely on automatism (an excuse) because he or she finds self-defence (a justification) morally repugnant.[29] A serial analysis does not account adequately for the variety of situations and actors encountered in the real world.

According to Fletcher, we excuse actors because their acts provide no information about their characters. This has been criticised by Chapman, who points out that it makes motive relevant to liability.[30] A better basis for excusing, and one also mentioned by Fletcher, is "compassion for [the actor's] understandably human weakness in the face of unexpected and overwhelming circumstances".[31]

These two rationalisations are not mutually exclusive. The difficulty with the "no information about character" rationale is that Fletcher does not explain what he means by character: surely the fact that someone was provoked does tell us something about that person's character, and that may be something for which we might censure him or her. But because the person has shown a very human weakness, we limit liability.[32] The rationale of excuses may vary, depending on the particular excuse pleaded.

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24 Ibid, 1271.
25 Robinson, supra at note 1, at 222.
26 Fletcher, supra at note 3, at 798.
27 Supra at note 5, at 958.
28 Husak, supra at note 10, at 194.
29 Ibid, 195.
30 "A Theory of Criminal Law Excuses" (1988) 1 Can J Law & Juris 75, 79.
31 Ibid.
32 Perhaps this is why provocation is only a partial excuse?

3. Self-Defence

Fitting the modern law of self-defence cleanly into one or other category has proved difficult. Partly this is because it involves questions of morality. In allowing self-defence the law balances the prohibition on private use of force and the protection of the right to life and physical security.[33] In some circumstances, the latter overrides the former. Of necessity, this requires us to set priorities.[34] This is very difficult if society has not expressed its wishes in the form of legislation or judicial decision.[35] Indeed, there may be powerful reasons for leaving the scope of self-defence undefined: vagueness provides at least an appearance of compromise between competing opinions.[36]

Another difficulty with self-defence is that people often mistake the urgency of a situation or the degree of force necessary.[37] Fletcher comments that:[38]

> The most difficult problems in criminal theory are generated by dissonance between reality and belief, between the objective facts and the actor's subjective impression of the facts.

Fletcher rationalises acquittal or non-punishment differently according to whether reality conformed to belief or whether the actor was mistaken. In conventional theory of justification and excuse, these two classes of case cannot be accommodated within the same category. Fletcher therefore distinguishes between "actual" and "putative" self-defence.

Actual self-defence

Where an actor is required to defend himself or herself in order to avert death or serious bodily injury, he or she has a justification:[39]

> Society's interest in the right to bodily integrity, when combined with the physical harm threatened, outweighs the harm inflicted to deter such an aggressor.

Fletcher considers the possibility that the exercise is, instead, a concession to human weakness (and hence self-defence an excuse), but concludes that this would not explain why a person may defend a third party or defend property with force.[40] He adopts instead the "lesser evils" approach, which leads to categorisation as a justification:[41]

> The source of the right is a comparison of the competing interests of the aggressor and the defender, as modified by the important fact that the aggressor is the one party responsible for the fight.

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33 Ashworth, "Self-Defence and the Right to Life" [1975] CLJ 282.
34 Ibid, 287-288.
35 Smith, *Justification and Excuse in the Criminal Law* (1989) 12.
36 Greenawalt, "The Perplexing Borders of Justification and Excuse" (1984) 84 Col L Rev 1897.
37 Brookbanks, "Self-Defence in New Zealand" [1989] NZLJ 258, 262.
38 Supra at note 3, at 683.
39 Robinson, supra at note 1, at 214.
40 Although human weakness could be said to include inordinate attachment to chattels and to other human beings.
41 Supra at note 3, at 857-858.

The self-defender has the superior interest by virtue of being the innocent party. The aggressor's interest is discounted by the act of aggression.

It follows from this reasoning that a mistaken defender cannot be justified: until there is an act of aggression, both parties' interests are equal.[42] The act of "defending" discounts, instead, the interests of the mistaken defender and gives the "victim" a privilege to use force in response. This does not mean, however, that there is no defence for the mistaken self-defender: he or she may yet have an excuse.

4. Putative Self-Defence

The term "putative self-defender" is explained by Fletcher as follows:[43]

> [It] refers to the problems that arise when someone reasonably believes that he is being attacked, but in fact is not, and uses force against a person who is not in fact an aggressor. The problem is whether in view of the actor's reasonable belief, the use of force will support a charge of battery or, if the victim dies, of homicide. The self-defence is called putative for it is not a case of real self-defence, but of force used against a putative aggressor.

This solution relies on two premises. The first is that "mistakes cannot justify homicide".[44] Certainly this is true if the basis of self-defence is objective necessity. The second is that a mistaken belief as to the existence of a justificatory claim may be an excusing condition in its own right.[45] Putative self-defenders may, therefore, have an excuse.

For putative self-defence to be pleaded, Fletcher would require the actor to believe he or she is being attacked and that belief to be reasonable, since an excused actor must be blameless.[46] It is implicit in his reasoning that an unreasonable actor is not blameless.[47]

5. Value of Theoretical Distinction Between Justification and Excuse

There are several reasons why it may be valuable to categorise a defence as a justification or excuse. For example, it is thought that classification may help determine the scope and limits of the rights of assistance and resistance.[48]

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42 Fletcher makes no allowance for on-going aggression to discount the interests of one party. See discussion of self-defence and battered women, infra at pp136-140.

43 Supra at note 5, at 972.

44 Ibid, 973.

45 Fletcher, supra at note 3, at 684.

46 Ibid, 697.

47 Supra at note 15. Glanville Williams' argument that there is no reason why the mistake should be reasonable rests on a fundamentally different thesis. Since he subscribes to the "implicit elements" approach, it seems appropriate to apply the same mental standards for offences and defences. Further, he does not distinguish between actual and putative self-defence, so he is not talking about an excuse at all.

48 Husak, supra at note 10, at 205.

One possible distinction between justifications and excuses relates to the nature of rules. A legal rule may be categorised as a decision rule or a conduct rule. A decision rule is a rule applied by a court in reaching its verdict. A conduct rule is a guide to what behaviour is or is not tolerated or encouraged.[49] A conduct rule can generally be expressed as a decision rule. However, the two sorts of rules are not interchangeable. Alldridge argues that some rules applied by courts "cannot be translated into a prescriptive statement about behaviour".[50] Excuses, as distinct from justifications, can be expressed only as decision rules. Involuntary conduct will be excused – but no-one can plan their actions in the knowledge that they are not acting criminally because their actions are involuntary. It is the essence of involuntariness that the actor is not applying a rule about acceptable or unacceptable conduct. Conduct can only be excused after the event. Alldridge suggests that this distinction is helpful in determining whether an excuse can be claimed. Since a rule about what conduct will be excused is not a prescription of a new norm, it is unnecessary to limit the availability of excuses on the ground that they may encourage unacceptable behaviour. Whether conduct is excused should depend solely on the actor, not on the effect of other people's behaviour.

In practice, it is difficult to draw a clear distinction between the two types of rules, especially where verdicts are expressed in general terms:[51]

> [A]lthough the policies underlying an actual legal rule may require that the rule be only a decision rule or only a conduct rule, such a rule is likely in the real world to have both decisional and conduct effects and hence to defeat (at least in part) its underlying purposes.

However, the distinction does have value. For example, if the excuse of self-defence is simply a decision rule, the requirement of reasonableness cannot be explained as a direction "to ascertain that there are reasonable grounds upon which the belief is held".[52] Self-defence relates solely to the culpability of the actor.

Finally, conceptual clarity is a valuable goal in itself. Cameron, expressing scepticism about the practical utility of the scheme, says:[53]

> [T]he overall scheme is nevertheless of considerable heuristic value. The justification/excuse distinction, in particular, provides a vehicle for teasing out the typical ingredients of and distinctions between both current and proposed defences and for assessing the consistency of the law reform process.

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49 Alldridge, "Rules for Courts and Rules for Citizens" (1990) 10 OJLS 487.

50 Ibid, 489.

51 Dan-Cohen, "Decision Rules and Conduct Rules: An Acoustic Separation in Criminal Law" (1984) 97 Harv L Rev 625, 634.

52 Alldridge, supra at note 49, at 495.

53 "Defences and the Crimes Bill" in Cameron & France (eds), *Essays on Criminal Law in New Zealand, Towards Reform?* (1990) 57, 58.

III: THE LAW OF SELF-DEFENCE

According to the theorists, self-defence is a justification. Where, however, a mistake has been made about the existence of a threat, it is only an excuse.

In this section two issues will be examined:

(1) How is self-defence explained – as a justification, an excuse or both?
(2) Are the consequences which flow from this description consistent with those described by the theorists?

1. Judicial and Statutory Classification of Self-Defence

In common law jurisdictions self-defence is generally described as a justification, regardless of whether it is actual or putative. The New Zealand provision, s 48 of the Crimes Act 1961, reads: "Everyone is justified in using, in self-defence or the defence of another, such force as, in the circumstances as that person believes them to be, it is reasonable to use." The formula used in England is similar: "a person may use such force as is reasonable in the circumstances as he honestly believes them to be in the defence of himself or another".[54]

The Canadian Criminal Code distinguishes between provoked and unprovoked attacks. If an attack was unprovoked, s 34(1) states that force in self-defence is "justified". If an assault was provoked "without justification" the provoker may subsequently invoke a right to protect himself, provided various tests are satisfied. The same applies if an assault was commenced without intent to cause death or grievous bodily harm (s 35). However, these provisions do not apply solely to actual self-defence since force used to *prevent* an assault is also justified (s 37).

In Australia the question is whether the accused reasonably believed he was under threat of death or serious bodily harm.[55] In *Zecevic v DPP* the majority noted that the modern law of self-defence had its origins in the distinction between justifiable and excusable homicide, but added that "today it is no part of the law in Australia to differentiate between the two".[56] The comment was made that a self-defence plea resembles justification but the scope and practice of the plea had a greater connection with excuses.[57]

While these provisions pay lip-service to the concept of justification, they do not distinguish between actual and putative self-defence. This is not because judges are unaware of what a justification is. In *Perka v The Queen*[58] the Supreme Court of Canada discussed the difference between justification and excuse.

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[54] *Beckford v The Queen* [1988] AC 130, 145 (PC) per Lord Griffiths.
[55] See *Zecevic v DPP* (1987) 162 CLR 645 (HCA).
[56] Ibid, 658 per Wilson, Dawson & Toohey JJ; 666 per Brennan J.
[57] Ibid, 650.
[58] Supra at note 8.

Dickson J noted that:[59]

> A 'justification' challenges the wrongfulness of an action which technically constitutes a crime.

and that:

> [A]n excuse concedes the wrongfulness ... but asserts that ... it ought not to be attributed to the actor.

The High Court of Australia also showed awareness of the distinction in *Zecevic*.[60]

The terminology of justification is frequently resorted to, often in the context of a reminder that the burden is upon the prosecution to negative self-defence and that an act done in self-defence is not wrongful.[61] Legislatures also make use of the distinction. The New Zealand Crimes Bill 1989, for example, put defences into two categories: those affecting "criminal responsibility" and those of "justification and protection from criminal responsibility". The former included excuses such as involuntariness and mistake; the latter included self-defence. Nor is the statutory/common law defence restricted to actual self-defence. Section 48 and corresponding provisions of the Crimes Act 1961 clearly capture mistaken self-defence. One example is *Beckford v The Queen*[62] where the appellant police officer shot and killed a man he wrongly believed to have been armed.

Therefore, despite the use of the word "justified", it is unclear whether in these provisions self-defence will be a justification within Fletcher's meaning of the word. It may combine elements of both justification and excuse or it may be a different sort of justification from that described by Fletcher.

2. Consequences of Judicial and Statutory Classification

If the defence of self-defence as applied by the courts is a justification, even when putative, does it operate in other respects as a "true" justification or does it contain elements of an "excuse"?

Pre-emptive strike by a battered woman

The typical accused is a woman[63] who has been subjected to severe mental and physical abuse by her husband over several years. On the occasion in question, she has suffered abuse for a number of hours, culminating in a threat from her husband to kill her. He eventually goes to sleep. While he is asleep she kills him. The fact situation raises the question of pre-emptive strikes and the role played by the "reasonableness" of the woman's reactions.

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59 Ibid, 246.

60 Supra at note 55.

61 See for example, *R v Robinson* (1987) 2 CRNZ 632 (CA); *R v Fennell* [1971] 1 QB 428, 431 (CA).

62 Supra at note 54.

63 Although there is no reason why a man might not be battered by a woman, disparity in physical strength is central to the "choice" to make a pre-emptive strike rather than to wait and fight back.

(a) Justification and excuse theory

It is not clear from Fletcher's writings whether a pre-emptive strike would be a form of actual self-defence or whether it would be putative self-defence. Fletcher insists that violence must not be used unless there is no "alternative reasonable means for avoiding the threatened harm".[64] He also says that any force must be "undertaken to avoid an imminent and impending danger of harm".[65] He does not explain, however, how imminent the danger must be. Given that it is the actual aggression of the other party that raises the justification, it probably does not arise unless violence is inevitable. This would have to be judged "objectively" by an impartial observer, focusing on the single transaction leading to the death.[66] It is unlikely, given the combined effect of an objective duty to retreat and the need for "imminence", that the battered woman's pre-emptive strike could be justified self-defence.

Is it excused?[67] This situation can be fitted into the putative self-defence scenario only with difficulty. The accused is under no mistake as to the imminence of danger.[68] The threat is quite real: but it is a *future* threat. The question of a mistake about the *degree* of force needed does not even arise.[69]

(b) Relevant case law

Case law dealing with battered women who kill is concerned not so much with whether a pre-emptive strike may be justified – this is fairly settled – but with whether the woman concerned reasonably apprehended sufficient danger to justify the use of deadly force. I shall look at two cases, *R v Wang*[70] and *Lavallee v R.*[71] In *Wang* the accused failed to establish self-defence but a provocation defence was successful; in *Lavallee* she was acquitted.

Wang Xiao Jing and her husband had had a small party. He had drunk a lot and been ill. According to Wang, he twice forced her to ring her sister in Hong Kong and ask for money. He threatened to kill the accused and her sister. When he eventually fell asleep, Wang tied him up, stabbed him several times and then put a pillow over his face. When telling her sister what she had done, in the morning, she was disinclined to take him to the hospital because "if he didn't die, our whole

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64 Supra at note 3, at 775.

65 Ibid.

66 An argument that cumulative violence could replace a single act of aggression would founder on the duty to retreat.

67 The focus here is on whether an excused self-defence argument might succeed: it should be noted, however, that other excuses such as provocation might also be available.

68 "If an actor believes that he *is* being attacked and responds with force, his injuring the putative aggressor is a wrongful but excused battery." Fletcher, supra at note 3, at 696.

69 The concept of reasonableness is alien to Fletcher's scheme. He considers that it blurs the lines, making it impossible to "[order] the dimensions of liability"; supra at note 5, at 962.

70 [1990] 2 NZLR 529 (CA).

71 [1990] 1 SCR 852.

family would be finished".[72] At the trial, the judge ruled there was insufficient evidence for self-defence to go to the jury. Wang appealed.

It was not in dispute that the jury could have inferred the deceased believed she and/or members of her family were under the threat of being harmed. There was expert evidence that the applicant would have believed the threats would be carried out and that "in the state she was in, the only course she could think of was to kill her husband".[73] The issue was whether the force used was reasonable in the circumstances. The conclusion was that it was not. Wang had several objective alternatives available:[74]

> [N]o ordinary reasonable person who knew the kind of man that the husband was and of his threats to his wife and sister and blackmail of her family, would, while he was unarmed and in a drunken sleep, have believed it necessary to kill him.

The force here was not reasonable force, as the threat was insufficiently imminent. The Court treated self-defence as having its basis in necessity: "having regard to society's concern for the sanctity of human life requires, where there has not been an assault but a threatened assault, that there must be immediacy of life-threatening violence to justify killing in self-defence".[75]

This decision has been criticised for its failure to address the role of the subjective element of the defence (the circumstances as the actor believes them to be) in determining the reasonableness of force.[76] That is not in issue here. The question is whether the reasoning was consistent with the theory of justification and excuse. The answer has to be that it was. The force used was measured on a "balance of harms" basis and found to be excessive, even on the appellant's view of the facts. That was the end of the story: the possibility of a separate mistake-based defence was not explored.

Wang and similar cases could be seen as discriminating against female self-defenders. Relative physical weakness and lack of experience in fighting mean they are more likely to have to use more force than their attacker or to resort to pre-emptive strikes.[77] Some of these criticisms were met by the Canadian Supreme Court in *Lavallee*.[78]

The facts were not dissimilar from those in *Wang*, although the threat was more concrete and more immediate. Lavallee shot her de facto husband in the back of the head when he was leaving the bedroom. He had threatened to kill her that night. He

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72 Supra at note 70, at 531.

73 Ibid, 534.

74 Ibid, 535.

75 Ibid, 539.

76 Noted by Finn (1990) 14 Crim LJ 200.

77 See for example, Chipparone, "The Defense of Battered Women Who Kill" (1987) 135 U Pa L Rev 427; Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defense" (1985) 8 HWLJ 121; and Schneider, "Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense" (1980) 15 Harvard Civil Rights - Civil Liberties Law Review 623.

78 Supra at note 71.

had already loaded the gun that she used to kill him. The issue was whether Lavallee's fears, and thus her resort to deadly force, were reasonable.

Wilson J accepted that objective standards of reasonableness failed to take into account differences of gender and the history of a relationship. She noted research on the battered woman syndrome and the typical cyclical nature of violence. This was essential to any assessment of a woman's actions. In particular, it was relevant to whether a perception of imminent danger was real, since "it may ... be possible for a battered spouse to accurately predict the onset of violence before the first blow is struck, even if an outsider ... cannot".[79] Since "women are typically no match for men in hand-to-hand combat"[80] the use of a weapon against an unarmed man was not necessarily unreasonable force. Wilson J added that "the law does not require ... fear to be correct, only reasonable".[81]

Is this approach more akin to an excuse or a justification? There is a suggestion that the danger is real, just imperceptible to the outsider: this could be used to reconcile the case with Fletcherian actual self-defence, although it would not counter the objective element of the duty to retreat. But the emphasis is not on the correctness of the fear, making it difficult to tell what the Court would have decided.

Certainly the reason why writers have urged self-defence as the preferable defence is that it is thought to be a justification, and a concession that the killing was wrong is undesirable.[82] Discussion has tended to rely, however, on the common-law definitions of self-defence. These, as has been demonstrated, have little to do with Fletcher's theory of justification.

Schneider commences her discussion of the issue by stating:[83]

> Justified behavior is correct and appropriate, not only tolerated by the law but encouraged.

She adds, however:[84]

> An act committed in self-defense was justified given the individual actor. The trier of fact must understand the circumstances of the act and identify with the actor. In examining the circumstances of the act, the fact finder applies substantive rules that reflect a standard of reasonableness.

Fletcher's use of justification is different: an act is justified given the *circumstances* not the *actor*. Thus the individual's personality or heightened sensitivity is irrelevant: that is only relevant to excuses, since it affects blameworthiness. Schneider compounds the confusion by suggesting that many of the problems faced by battered women (and women generally) who use force in self-defence can be alleviated through greater individualization of the defence, that is, consideration

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79 Ibid, 880-881.

80 Ibid, 883.

81 Ibid.

82 See Venesy, "Self-Defense and Battered Women – Reasonable Perception of Women or License to Kill" (1989) 23 Akron LR 89, 93; and Crocker, supra at note 77.

83 Supra at note 77, at 630-631.

84 Ibid, 631.

of the defendant's own capacity and ideas. She cites Fletcher's "The Individualization of Excusing Conditions"[85] as authority for this:[86]

> Although Fletcher does not address the applicability of individuality to self-defense, his theory can easily be applied to battered women's cases. Any thorough evaluation of a self-defense claim requires a study of both the circumstances of the act and the characteristics and perceptions of the individual defendant.

However, individualization is a process specific to excuses. It is the non-individual character of justifications that sets them apart. Individualising self-defence is inconsistent with its justificatory classification. If the goal is to avoid labelling the battered woman who kills a "criminal", this is no solution.

If this discussion appears unsatisfying it is because there is very little contact between theory and practice. The result may be similar. But it is reached by asking a different question. Fletcher asks, "was there really a threat or was the actor mistaken?" He starts with the act itself, and reasonableness only becomes an issue if a mistake has been made. The courts, on the other hand, start with the actor's view of the situation, whether mistaken or not. The question "was it a mistake?" is rarely asked. It is sidestepped by the emphasis on reasonableness.

Assistance and mistakes

Late at night, A comes around a street corner and sees a struggle going on between B and C. C has B pinned to the ground. B is trying to get away but C is much stronger. A goes to B's assistance and manages to push C off, injuring C in the process. B runs away. C then explains that she has caught B trying to break into a car. The police have been called, and she was attempting to prevent B from leaving the scene. A is charged with assaulting C.

(a) Justification and excuse theory

Fletcher sees the distinction between justification and excuse as central to the resolution of this problem:[87]

> A valid justification ... affects a matrix of legal relationships. The victim has no right to resist, and other persons acquire a right to assist .... Excuses, in contrast, do not affect legal relationships with other persons; the excuse is a claim to be raised only relative to the external authority that seeks to hold the actor accountable for the wrongful deed.

The rationale is that "[t]he determination that the conduct is justified presupposes a judgment about the superior social interest in the conflict. If the superior social interest is represented by the party seeking to moor his ship ... it is also in the social interest to suppress resistance."[88] Since a justified act is objectively good, anyone can do it, and it would be inconsistent for the law to prevent resistance or

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85 Supra at note 2.
86 Supra at note 77, at 641.
87 Supra at note 3, at 762.
88 Ibid, 761.

assistance.

The answer to the question is the same whether A was assisting B or resisting C, since only one actor in any event can be justified. This seems to follow from a "balance of harms" approach to justification and from the exclusive concern with the act and not the actor. If, therefore, C's use of force against B was justified, as the facts suggest it was, B had no right to resist and A had no right to assist. A has no justification, although he might be excused on the basis of his mistake of fact. If, however, C had used excessive force, or made a mistake herself, B did have a right to resist, and A's intervention was justified.

If the assister is to have an excuse, the mistake probably has to be reasonable since it led to a wrong act. Yeo, arguing that reasonableness is a necessary element of any mistake claim, says this requirement "permits an assessment of whether the accused could be expected to exercise circumspection and restraint taking into account all the circumstances leading to and surrounding the criminal incident".[89] The test of reasonableness can, however, be individualized.

(b) Relevant case law

I shall discuss two cases dealing with mistakes about the need to assist another. *R v Williams*[90] is concerned with the reasonableness of the assister's mistake. In *R v Thomas*[91] the Court discussed whether, as a matter of policy, assistance should be allowed if the assistee was actually resisting lawful arrest.

The facts of *Williams* are similar to those in the scenario described above. Mason was trying to immobilise a youth he had seen trying to rob a woman. Williams thought Mason was attacking the youth and intervened. Mason claimed he was a police officer, but could produce no warrant card. A struggle followed and Mason was injured.

Williams was charged with assault causing actual bodily harm. The jury had been directed that if they thought Williams had "an honest and genuine belief ... based on reasonable grounds that Mason was acting unlawfully"[92] and if they thought the amount of force used was reasonable, they should acquit. Williams was convicted but the conviction was quashed by the Court of Appeal. The recorder should have explained that it was for the prosecution to eliminate the possibility of a genuine mistake. The insistence that Williams' mistake must be reasonable was also a misdirection:[93]

> If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant .... [T]he jury should be directed ... that if the defendant may have been labouring under a mistake as to the facts he must be judged according to his mistaken view of the facts and ... that that is so whether the mistake was, on an objective view, a reasonable mistake or not.

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89 Yeo, "The Element of Belief in Self-Defence" (1990) 12 Syd LR 132, 142.

90 [1987] 3 All ER 411 (CA).

91 [1991] 3 NZLR 141 (CA).

92 Supra at note 90, at 413.

93 Ibid, 415.

The Court of Appeal concluded that this was, in view of the honest mistake, a case of defence of another.

The reasoning starts from the premise that it is an element of the offence with which the accused is charged that the accused intended to apply *unlawful* force.[94] If this cannot be proved, the accused has not been proved to have committed an offence and must be acquitted. The accused's state is exactly the same as if there had been no mistake. Any negligence in reaching this mistaken view is irrelevant since negligence is insufficient to satisfy the mental element of the crime.[95]

In *Thomas*[96] the appellant went to the aid of a man she saw struggling with police. She thought too much force was being used to restrain him. Initially, Thomas was convicted of obstructing a police officer acting in the execution of his duty. The trial judge found that Thomas' impression of what was going on was mistaken, but did not think this could found the defence. The High Court agreed:[97]

> It may be that at a later stage the officer will be held to have exceeded the needs of the occasion in his use of force and so to have gone beyond the limits of his duty, but that question is not one upon which an officious bystander at the scene is entitled to make a judgment and thereafter justify obstructive conduct on the basis that if that judgment was wrong it involved a genuinely mistaken belief in a matter of fact.

This approach would deny a defence to anyone who assisted someone being roughly arrested, whether the arresting officer was justified or excused.

The conviction was quashed by the Court of Appeal. The Court accepted that "an honest belief in a state of affairs or as to the existence of a fact, which if true would make the act innocent, will provide a defence".[98] Anything else would have undesirable consequences:[99]

> [T]o adopt any other approach would mean fettering the ability of genuinely concerned citizens to step in and prevent what they believe to be a real and unjustified risk of serious danger to a victim as a result of excessive police conduct.

In the alternative, Thomas would have a defence under s 48 of the Crimes Act (defence of another). The Court rejected the Crown's argument that the defence should be denied on public policy grounds; it would be denied only if the assister *knew* that the police were within their powers.[100]

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94 Ibid, 414.

95 Ibid, 415. Glanville Williams thinks there is no inherent illogicality in requiring mens rea for an offence and stating that it cannot be committed negligently, yet denying a defence to someone who makes a negligent mistake, but he rejects the reasoning because of its "intellectual incongruity": supra at note 15, at 242. I am less sure that it is not illogical, once it is accepted that the negativing of a defence is part of the definition of the offence. The *only* element of culpability is then negligence; a mistake is not a mental state itself, rather it is the result of a mental state. See also Yeo, supra at note 89.

96 Supra at note 91.

97 Ibid, 143.

98 Citing *Millar v Ministry of Transport* [1986] 1 NZLR 660, 673 per McMullin J.

99 Supra at note 91, at 143-144.

100 Ibid.

This decision, like that in *Williams*,[101] indicates unwillingness to follow through the consequences of labelling self-defence and defence of another a justification. It seems illogical that a person's liability could be determined by something over which he or she has no control and could not be verified quickly in a situation of emergency, so that a person acting with the best of intentions – and intentions which the community might wish to encourage – was liable for assault or even a more serious offence.

It would appear, therefore, that if the scenario described arose in real life, A would be acquitted, since A genuinely and (presumably) reasonably thought C was attacking B without justification. The force used would have been reasonable had C been doing so. A's mistake would make no difference to criminal liability.

IV: THE REASONS FOR THE DISCREPANCY BETWEEN THEORY AND PRACTICE

It should be clear from the actual and hypothetical scenarios outlined in section III of this article that there are serious discrepancies between the scope of self-defence in justification and excuse theory and the defence as it operates in common law jurisdictions. Pre-emptive strikes are generally accepted, even if there is a slight possibility that the expected attack would have materialised, provided that the amount of force used was reasonable. A mistaken self-defender is not reduced to an excuse but may claim a full justification. Assisters' liability is not determined by whether the assisted has a justification or excuse but by the assister's own view of the facts.

The basic difference between the justification and excuse theory and "practice" is one of emphasis. Fletcher looks at the circumstances both before and after the event and asks "was this result justified?" If it was not, the conduct is morally blameworthy. However, a morally blameworthy actor may not deserve punishment, since it is only bad results that derive from bad minds that deserve punishment. If, looking at the transaction objectively, the actor appears to have been disabled by circumstances or by his or her own pathology, we may decide it was not that actor's "fault".

The other approach focuses on the actor. The question is "was the actor justified?" One of the circumstances taken into account is the actor's state of mind. Regardless of the result, only a blameworthy actor deserves punishment. Indeed, the actor's blameworthiness may transform a result which appears harmless into something attracting criminal liability.[102]

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[101] Supra at note 90.

[102] For example, inchoate offences such as conspiracy and attempt.

Four factors contribute to the divergence:

(i) the practical difficulty of distinguishing between actual and putative self-defence;
(ii) the need for people to be able to apply rules about self-defence to their own behaviour with reasonable accuracy at times of stress;
(iii) the desirability of providing general guidance about acceptable and non-acceptable behaviour; and
(iv) the need for rules applied by courts to be simple enough for application by a jury.

The first of these factors is particularly important in cases of deadly force used in self-defence. Fletcher thinks it necessary to distinguish between actual and putative self-defence. However, he does not say at what point "putative" becomes "actual". Certainly, self-defence is "actual" once a struggle has started, but there must be an earlier point at which the defender is able to determine that force is close to inevitable. Fletcher's discussion of putative self-defence does not describe the boundary.

Furthermore, if the force used was fatal, only one party – the defender – remains to describe what happened. To say with certainty whether the aggressor was simply a putative aggressor, something which is essential to determine whether the accused has a justification, will be time consuming and within our present legal system pointless, since the verdict will be the same. In general we ask for no more than reasonable doubt; this is partly because we find wrongful convictions repugnant, but also stems from the sheer difficulty of determining what happened to a higher standard. The questions that the courts ask take less time to answer than do Fletcher's and may represent a necessary compromise. Reasonableness is a concept better suited to legal decision-making than certainty.

Secondly, there is considerable virtue in rules about self-defence being capable of being used as conduct rules. Fletcher recognises this:[103]

> The concept of justification is best understood as an expression of [an] ideal of self-regulation. Struggling parties should, in principle, be able to determine for themselves whose conduct conforms to the Right and whose does not.

Fletcher's rules about self-defence do not meet this objective. The extreme example is the bystander trying to decide whether to assist the victim of a vicious attack. Fletcher would have him trying to determine whether the attacker was justified or excused; usually an impossible task. The distinctions that would have to be made are just not practical when the need for self-defence arises. The thought that you might be mistaken about whether this is a deadly attack does not usually alter the response. If rules are to guide behaviour in an emergency they must make

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[103] Supra at note 5, at 976.

some allowance for the possibility of mistakes. The whole point of a mistake is that the actor does not know that she is mistaken.

The third problem with the application of orthodox theory of justification and excuse to self-defence arises because of the approval – though perhaps tacit – seen to fall upon a justified actor. If justifications are denied to genuinely and reasonably mistaken actors, the potential for signalling what conduct is acceptable and what is not is diluted.

Greenawalt illustrates this point with the example of the man who burns out part of a forest to halt a fire, which then burns in a different direction when the wind changes. He has acted as "the most competent practitioner in his field would have acted"[104] yet he has no justification because he was mistaken. On the assumption that the law transmits messages about correct moral views, and uses the tag "justification" to indicate not just that what this person did was right but that others ought to do the same if they find themselves in the same situation, the putative justification defence confuses. It may be difficult to explain why the result is justified, but this is not necessarily the same as saying that the actor was not justified. The normative value of the rule might outweigh the disadvantages of departing from "conventional understanding and existing moral consensus in defining justification and excuse".[105]

The final factor making adoption of a theory of justification and excuse upon Fletcher's lines impractical in the real world is the role of the jury in criminal trials. This means that decision rules need to be straightforward. Of the jurisdictions considered in this paper, only Canada has retained complex rules for limiting the availability of self-defence. Such rules would be necessary to implement the pure theory, but have been explicitly rejected. Richmond J said in *R v Kerr:* "We feel sure that many juries must find the varying tests and distinctions ... quite incomprehensible."[106] New Zealand's Criminal Law Reform Committee, acting upon this and similar pleas, aimed at replacing complex rules with a single, comprehensive provision and s 48 was the result. A return to the old days would be vigorously contested.

V: CONCLUSION

Given the difficulties that arise in applying Fletcher's theory of justification and excuse to substantive criminal law, can it be of any practical assistance in an analysis of self-defence? The answer has to be no, at least if the analysis is applied without distinguishing between justified and excused self-defence. It is not feasible to apply the theory to the practice unless the same definitions are being used. There are good reasons, moreover, as has been argued in this article, for treating

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[104] Supra at note 36, at 1909.
[105] Ibid, 1914.
[106] [1976] 1 NZLR 335, 344 (CA).

actual and putative self-defence in the same way when reaching decisions about criminality.

Colvin sees the underlying problem as a disagreement about the role of defences in the legal system.[107] Fletcher treats defences as a means of providing moral guidance; Colvin doubts that they are capable of doing so in the common law system. To do so would require replacement of the general verdict with a far more sophisticated vehicle for moral education. Colvin favours two alternative goals: the reflection by criminal law of societal tolerance of some violations of general prohibitions, and ensuring that the mentally impaired (temporarily or permanently) are not made liable for transgressions. If defences are analysed with these themes in mind, defences can be seen as reflecting either "contextual permission" or "mental impairment". The difference between the concepts of permission and justification is that the former covers a wider range of responses. Behaviour that is justified is "right", but this excludes much that is covered by the defence of self-defence in substantive law. Behaviour that is permitted may be applauded or it may be understood yet regretted. The concept accords better with the greys of morality: in truth, much behaviour is tolerated while not being approved. Self-defence falls easily into the permitted category without the need for drawing the complex distinction between "actual" and "putative".

This is not to say that the debate about justification and excuse has no value. One useful aspect is the focus on the role of defences in criminal law. Analysing what defences have in common leads inevitably to questions about why defences have developed and what role they play. A classification of defences is incomplete unless this issue is tackled. The theory of justification and excuse does not allow for problems of proof, or whether a jury can be given sensible instructions, or whether a person can use the theory itself for moral guidance. This limits its practical usefulness, as has been argued in this article, but the questions it throws up are still worth answering.

The other interesting feature of the justification/excuse analysis is the questions it raises about the conceptual basis of any given defence. Fletcher regards self-defence as based on necessity, the force used being balanced with the force avoided in a "lesser of two evils" approach. If this is accepted, it is difficult to justify the treatment of mistaken self-defence in substantive criminal law. It is fundamental to Fletcher's analysis that, at best, a mistaken actor can be excused. Any explanation of self-defence that does not make this distinction must be based, at least in part, on a different understanding of the reasons for allowing the defence. Either the defence has two separate rationalisations or it cannot be based on necessity. By raising the questions, the theory of justification and excuse forces those who question its explanatory value to investigate alternative answers.

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[107] Colvin, "Exculpatory Defences in Criminal Law" (1990) 10 OJLS 381.