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In Defense of "Self-Defence in Criminal Law"; and
on "Killing in Self-Defence" - A Reply to Fiona
Leverick

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In Defense of Self-Defence in Criminal Law; and on Killing in Self-Defence – A Reply to Fiona Leverick

*Boaz Sangero**

A B S T R A C T

Recently, Fiona Leverick published a review of my book, Self-Defence in Criminal Law. In the same year that my book was released, Leverick published her own monograph on this subject, Killing in Self-Defence. We basically take two different approaches to the subject of self-defense. One approach seeks only “permission” for killing and views the right to life as a sufficient rationale. The other approach seeks a justification for self-defense and proposes a more complex rationale suited to all cases of self-defense and not just the extreme situation of a life versus a life. This rationale is based on three main factors operating to justify the act of the defender: the autonomy of the attacked person, the guilt of the aggressor, and the social-legal order. The first approach is so harsh with the defender that it requires him to accept even serious physical injury. In contrast, the second approach gives proper weight to the three aforesaid factors, and is therefore more liberal with the defender and allows the defender to use greater defensive force than (although, not force that is out of all proportion to) the force used by the aggressor.

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1. Introduction

Recently, Fiona Leverick published a review¹ of my book, *Self-Defence in Criminal Law*.² As she herself notes,³ in the same year that my book was released, Leverick published her own monograph on this subject – *Killing in Self-Defence*.⁴ Naturally, neither of us saw the other’s book prior to their almost simultaneous publications.

In the end, we both believe that the subject of self-defense is a fascinating and complex subject – otherwise we would not have spent years of our lives researching it. However, we basically take two different approaches to this subject. The first part of this article is designed to present readers with my original theory, which is incorrectly presented in Leverick’s review, and to answer her criticism. This part deals, inter alia, with the rationale of private defense, the duty to retreat, the innocent aggressor, and other elements of private defense. The second part of this article relates to Leverick’s own book – *Killing in Self-Defence*. Irrespective of the disagreements between us, her book undoubtedly merits attention. This part deals, inter alia, with the subjects of killing to prevent rape and putative self-defense (due to a mistake of fact).

2. First Reply – In Defense of Self-Defence in Criminal Law

A. The Rationale of Private Defense⁵

¹ Fiona Leverick, *Defending Self-Defence*, 27 OXFORD J. LEGAL STUD. 563 (2007).

² BOAZ SANGERO, *SELF-DEFENCE IN CRIMINAL LAW* (2006).

³ Leverick, *supra* note 1, at 578.

⁴ FIONA LEVERICK, *KILLING IN SELF-DEFENCE* (2006).

⁵ The traditionally accepted term is “self-defense,” which is commonly used in current criminal codes. However, this term does not necessarily encompass defense of other persons or of property – hence the preferability of the term “private defense.” For the sake of consistency, I will use the term “self-defense” in this Article except when directly quoting other sources or citing chapter headings and when emphasizing self-defense in its aforesaid broader sense.

In her review, Leverick claims that the theory presented in my book “might best be described ... as consequentialist,” while she herself admits that I do not describe my approach as such.⁶ She makes this claim according to her understanding that my theory “is based on the notion that the consequences of killing or injuring an aggressor in self-defence are preferable to the consequences of allowing the attacked person to be killed or injured.”⁷

Having thus characterized my approach as consequentialist, Leverick uses this criticism to attack the theory that I have proposed. Apart from this, my theory is also criticized for its focus on the guilt of the aggressor⁸ and the social-legal order,⁹ as well as for its supposed failure to deal with the right to life, in particular, and rights in general.¹⁰

In order to demonstrate the extent to which Leverick’s portrayal diverges from the actual theory that I have presented, I shall refer to selected portions in my book, as well as to another article in which I have discussed my approach.¹¹ It should be noted that the proposed rationale for private defense¹² is based, in large part, on the negation of alternative theories that are solely based on a single factor, such as the aggressor’s culpability or the autonomy of the attacked person.¹³

⁶ Leverick, *supra* note 1, at 565.

⁷ Leverick, *supra* note 1, at 565.

⁸ Leverick, *supra* note 1, at 566.

⁹ Leverick, *supra* note 1, at 568.

¹⁰ Leverick, *supra* note 1, at 567, 571-73.

¹¹ Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475 (2006).

¹² Detailed treatment of the rationale for private defense stretches from the beginning of the book until page 106. Readers interested in a shorter treatment of this subject are referred to pages 90-106, under the heading “The Proposed Rationale.”

¹³ SANGERO, *supra* note 2, at 30-90.

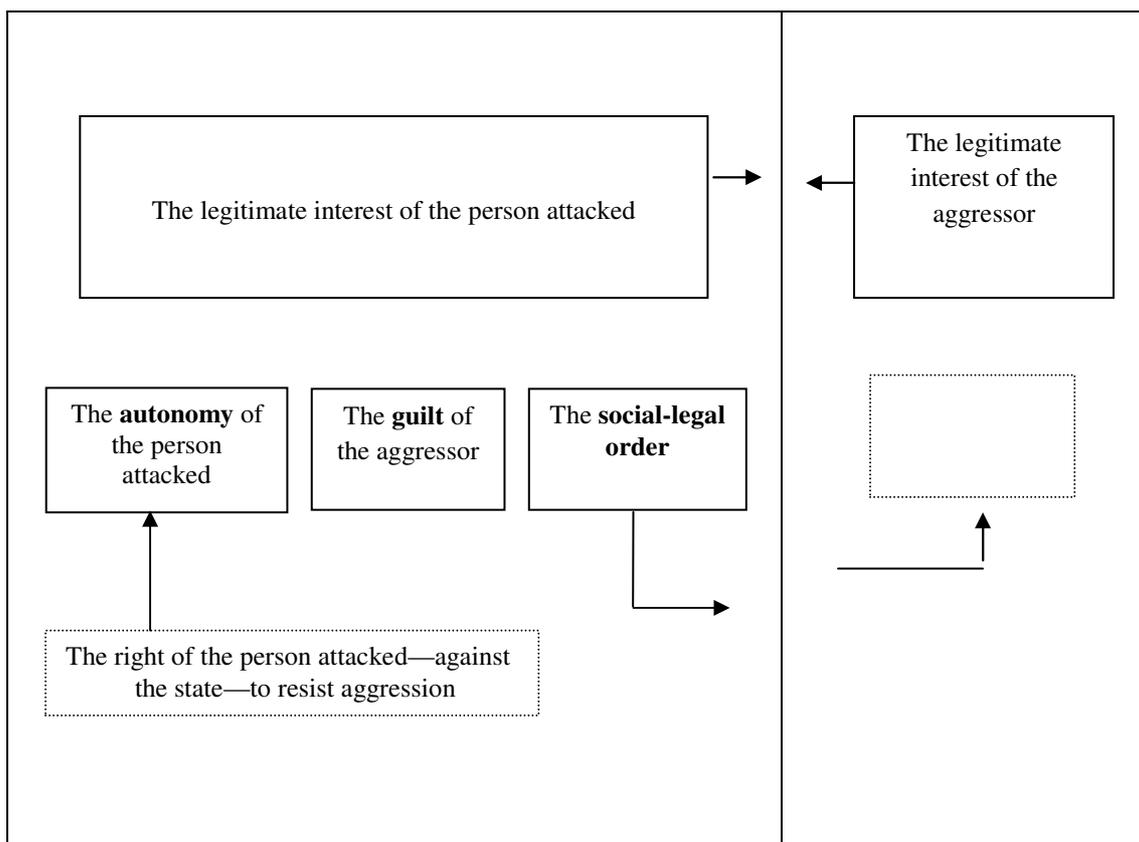
Furthermore, in establishing the rationale of private defense it is important to understand the distinction between a “justification” and an “excuse.”¹⁴ Once this distinction is understood, the nature of self-defense as a justification¹⁵ becomes clear. It is not just that we are excusing the actress from criminal responsibility because we understand the grave nature of the situation in which she has found herself, but rather we are saying that her action was completely justified and free from any moral reproach. It seems that Leverick’s failure to consider self-defense as a *justification* explains why she is so willing to discount the weight of the aggressor’s guilt (as well as that of the social-legal order) in the equation, as will be demonstrated below.

In my book, I emphasize the importance, when balancing interests, of taking into consideration not only the physical harms caused to both parties to the confrontation, but also three abstract factors, none of which is sufficient on its own to justify self-defense: the **autonomy of the person attacked**, the **guilt of the aggressor** and the **social-legal order**.¹⁶ The following diagram illustrates the place of these factors in the proposed rationale:

¹⁴ SANGERO, *supra* note 2, at 11-9 (section 1.1). *See also id.* at 19-30 (section 1.2 – “The Distinction between an Offence and a Defence”). *See also, e.g.*, GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 759-75 (1978); PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* (1984); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 13-14 (1968); Albin Eser, *Justification and Excuse*, 24 *AM. J. COMP. L.* 621, 627ff (1976); J.C. SMITH, *JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW* (1989).

¹⁵ SANGERO, *supra* note 2, at 14-19.

¹⁶ SANGERO, *supra* note 2, at 93.



“Private defence is, simultaneously, a defence both of the autonomy of the person attacked and of the social-legal order, by means of essential and reasonable defensive force against the aggressor who is criminally responsible for his attack.”¹⁷

Naturally, the book contains a much more detailed explanation of the proposed theory, covering both the nature and relative strength of each of the three aforesaid factors in justifying self-defense. However, it seems to me that even the brief description above suffices to refute the presentation of the theory as consequentialist. In fact, such a characterization is rejected in the book itself:

I shall begin with a clarification regarding the framework of balancing interests and choice of the “lesser evil.” Despite the use of this common expression (the “lesser evil”), private defence should not be viewed as evil, and not even as the lesser evil, but as the “best possible good.” It concerns a desirable action, just and free from all moral fault and not merely a permissible action, the fruit of a narrow utilitarian calculation alone. Thus, private defence should be perceived as a

¹⁷ SANGERO, *supra* note 2, at 99.

“strong” criminal law defence, having significant moral justification, and this is – inter alia – in comparison with the defence of “necessity.”¹⁸

In order to label the result “consequentialist,” Leverick sometimes ignores, in whole and in part, the abstract factors in the equation while presenting a simplistic portrayal of the theory as if it only deals with the physical injuries caused to the parties.¹⁹ She also criticizes the theory in that “the aggressor’s guilt is used as the basis for a certain devaluation of his interest.”²⁰ In Leverick’s opinion, this is problematic given the value of the right to life.²¹

First of all, this kind of devaluation is well accepted, and there are scholars who even view the guilt of the aggressor as the crucial factor in justifying self-defense.²² In fact, this view of “the guilt of the aggressor as the basis for justification of private defense is the classic and most common theory in Anglo-American law.”²³ Second, my proposed theory indeed views the guilt of the aggressor as an important factor, but not as the *sole* factor for justifying self-defense. Third, the theory of forfeiture adopted by Leverick²⁴ – whereby the aggressor forfeits her right to live at the moment of the attack because of the danger she poses to the victim – reflects a much more extreme and harsher treatment of the aggressor. It entails more than just a devaluation of her rights and it relies on her conduct, not her guilt, going so far as the loss of her right to live.

¹⁸ SANGERO, *supra* note 2, at 94. This paragraph is also important regarding the case of the “innocent aggressor,” which will be discussed below.

¹⁹ Leverick, *supra* note 1, at 565.

²⁰ Leverick, *supra* note 1, at 566; SANGERO, *supra* note 2, at 103.

²¹ Leverick, *supra* note 1.

²² SANGERO, *supra* note 2, at 44-49 (section 1.5.2 – “The Aggressor’s Culpability as the Crucial Factor”); Phillip Montague, *Self-Defense and Choosing between Lives*, 40 PHIL. STUD. 207 (1981).

²³ George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367, 377 (1973).

²⁴ Leverick, *supra* note 1, at 571-73.

In reference to the well-known philosophical debate between Montague,²⁵ who emphasizes the guilt of the aggressor in justifying self-defense, and Wasserman,²⁶ who emphasizes the significance of the attack itself, I have stated that:

There is crucial value and moral significance regarding both the attack of the aggressor and his guilt. In fact, this is the primary uniqueness of private defence – it is comprised of both the attack itself and the aggressor’s culpability. Great moral significance should be attributed both to the fact that the defensive force is directed towards the aggressor himself (a matter that gives significant expression to the important factor of the aggressor’s guilt) and also to the fact that the aggressor can cease his attack and render the defence unnecessary (a matter that gives significant expression to the important factor of the attack itself).²⁷

Therefore, neither of these two important factors can be ignored in justifying self-defense. This is also my response to Leverick’s attempt to negate the importance of the aggressor’s guilt.

In arguing that this last factor should not be given significant weight, she says that “if the aggressor’s life is discounted on the basis of culpability, the attacked person’s life might be discounted in the same way if she has contributed in some way to the conflict or has engaged in acts of violence in the past or is likely to do so in the future.”²⁸

First of all, as made evidently clear in my book, the devaluation of the aggressor’s rights is based on her guilt in the present conflict (or proximate to it), and not her entire past.²⁹ Second, a full section of the book deals with a “Situation of Private Defence Caused by the Actor Bearing Guilt,”³⁰ and proposes a detailed

²⁵ See *supra* note 22; Phillip Montague, *The Morality of Self-Defense: A Reply to Wasserman*, 18 PHIL. & PUB. AFF. 81 (1989).

²⁶ See David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFF. 356 (1987).

²⁷ SANGERO, *supra* note 2, at 46.

²⁸ Leverick, *supra* note 1, at 566.

²⁹ SANGERO, *supra* note 2, at 44-49.

³⁰ SANGERO, *supra* note 2, at 310-39 (section 5.4).

arrangement for this type of case. Third, this same argument could be raised – even more forcefully – against the theory of forfeiture, which Leverick supports.

At this point, Leverick moves on to criticize my focus on the social-legal order as a factor in the proposed rationale. One of her arguments is that this factor is vague and that it is not clear how it operates to justify self-defense. She also claims that my choice of the relevant abstract factors is unclear (Leverick refers to the aggressor’s guilt and the social-legal order, while she ignores the attacked person’s autonomy in the proposed equation).³¹ This criticism fails to consider several things: 1) that the entire first chapter of the book³² is designed to explain and argue this choice; 2) that an entire section deals with the social-legal order and describes its nature and influence;³³ 3) that the section discussing the proposed rationale³⁴ offers balancing formulas that reflect the relative strengths of the three factors serving to justify self-defense; 4) and, most importantly, that the relevance and influence of the social-legal order is discussed and analyzed separately in regard to the specific topics covered in each of the sections comprising the second part of the book, examining the elements of private defense,³⁵ its internal distinctions,³⁶ and additional issues on this subject.³⁷

The importance in protecting the social-legal order, which Leverick questions, may be discerned from the very fact that in some legal systems³⁸ this interest is an

³¹ Leverick, *supra* note 1, at 568.

³² SANGERO, *supra* note 2, at 11-106.

³³ SANGERO, *supra* note 2, at 67-73 (section 1.5.5).

³⁴ SANGERO, *supra* note 2, at 90-106 (section 1.6).

³⁵ SANGERO, *supra* note 2, at 117-238 (necessity, immediacy, proportionality, the duty to retreat, the mental element, etc.).

³⁶ SANGERO, *supra* note 2, at 239-278 (self-defense, defense of another person, defense of property, defense of another person’s property, defense of the dwelling).

³⁷ SANGERO, *supra* note 2, at 279-354 (putative self-defense, deviation from the conditions of private defense, situation of private defense caused by the actor bearing guilt, the defensive action of battered women).

³⁸ For example, in American law – see, e.g., 1 AM. JUR. 649 (2d ed. 1999); and the additional references cited in SANGERO, *supra* note 2, at 67 n.324.

independent factor that permits an individual to exert force in order to prevent the commission of a crime.

Leverick doubts that a potential aggressor would be influenced by a rule that grants a liberal right to self-defense and cites important scholars who have questioned the deterrent effect of the criminal law.³⁹ However, this is not relevant to the present discussion, because I am not talking about the general deterrence of the criminal law (and penal sanction), but rather the deterrent effect of a reality in which law-abiding citizens will resist aggressors – a reality encouraged by a liberal right to self-defense. Therefore, Leverick’s references to the writings of Von Hirsch⁴⁰ and Robinson,⁴¹ who deal with the deterrence of criminal punishment, are not at all relevant to the subject in question.

Leverick repeatedly presents a partial description of the proposed theory that distorts its nature, while ignoring the attacked person’s autonomy as a factor in the equation.⁴² This is apparently necessary in order to allow her to argue that the proposed theory does not grant weight to the right to life.⁴³ However, what she fails to understand is that the right to life is a key element of the autonomy of the individual. Therefore, we shall move on to a discussion of this central argument. This is essentially the main “accusation” that Leverick levels at my book. The right to life is the magic formula proposed by Leverick in both her review and her own book, within the context of a theory of “rights and forfeiture.”⁴⁴ Leverick adopts Thomson’s approach,⁴⁵ whereby the aggressor – who, with her attack, threatens the life of the victim – forfeits her own right to live. Leverick views Uniacke’s approach⁴⁶ as

³⁹ Leverick, *supra* note 1, at 568 & n.32.

⁴⁰ A. VON HIRSCH ET AL., *CRIMINAL DETERRENCE AND SENTENCE SEVERITY* (1999).

⁴¹ Paul H. Robinson & John H. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004).

⁴² Leverick, *supra* note 1, at 567.

⁴³ Leverick, *supra* note 1, at 567.

⁴⁴ Leverick, *supra* note 1, at 572-73.

⁴⁵ Judith J. Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283 (1991).

⁴⁶ SUZANNE UNIACKE, *PERMISSIBLE KILLING: THE SELF-DEFENCE JUSTIFICATION OF HOMICIDE* (1994).

another variation of this same theory.⁴⁷ She argues that both of these approaches are preferable to the one taken in my book because they are not based on guilt but rather on conduct, providing a better explanation for the right to kill an innocent aggressor, and because they grant more weight to the right to life.⁴⁸ I shall respond to the first claim in the next section, but will note here that the repeated emphasis on the right to life, as if this factor is unique to any particular theory, is like preaching to the converted. Nearly all theories of self-defense are based on the right to life. A more interesting question is whether this right suffices as the sole factor in providing a solution for all questions arising in this field. In my opinion, this is only possible when one limits the discussion to the very narrow case of *killing* in self-defense, as Leverick does. To do so is to ignore all cases where moderate, non-lethal defensive force is sufficient to repel an attack. Given the accepted requirement of proportionality between the defensive force and the danger, this also ignores the many cases where the attack itself is non-lethal. This is because, apart from several exceptions (such as when fending off a rape), the use of lethal defensive force is considered unjustified. Therefore, if the discussion is limited to *killing* in self-defense then, when the attack is non-lethal, the negative answer is simple. In reality, the cases where a person is *killed* in self-defense only represent a minority of those cases that demand a suitable rationale and legal rules to justify the use of defensive force.

I reject the claim that my theory does not emphasize rights, in general, and the right to life, in particular. Already in the first chapter of the book, there is a separate section discussing the right to life.⁴⁹ And this important right is given a prominent

⁴⁷ Leverick, *supra* note 1, at 572-73. It should be noted that Leverick is incorrect in stating that these approaches are only considered in a single paragraph of my book under the heading “additional approaches” (*id.* at 578). A detailed treatment of these approaches can be found not only under the headings “The Attack as a Sufficient Factor” (SANGERO, *supra* note 2, at 85-87 (section 1.5.8.5)) and “Moral Specification and Factual Specification” (*id.* at 89 (section 1.5.8.8)), but also in the section entitled “The Aggressor’s Culpability as the Crucial Factor” (*id.* at 44-49 (section 1.5.2)), where the theory of forfeiture is extensively discussed, as well as in many other sections of the book.

⁴⁸ Leverick, *supra* note 1, at 567, 573.

⁴⁹ SANGERO, *supra* note 2, at 40-43 (section 1.5.1).

place in all other discussions in the book. It finds particular emphasis, *inter alia*, in discussions of the case of the innocent aggressor⁵⁰ (and, in my opinion, Leverick somewhat neglects the right to life of the innocent aggressor); the justification for self-defense based on the autonomy of the attacked person (which naturally includes, first and foremost, the right to life);⁵¹ and the aggressor's guilt (as well as the theory of forfeiture, which Leverick adopts).⁵² The proposed rationale includes: the legitimate interest of the aggressor – including, of course, his right to life; the legitimate interest of the attacked person – including, obviously, his right to life; the aggressor's guilt (in this context expression is given to the right to life of both the attacked person and the aggressor); the attacked person's autonomy (in this context expression is given to the attacked person's right to life); and the social-legal order (in this context expression is given to the right to life of all parties to the confrontation).⁵³ In each and every discussion in the book the right to life is given a prominent place, and even influences the legal arrangements that are proposed. Thus, for example, it is very supportive of the requirements of necessity, immediacy, and proportionality, and creates a need for separate rules regarding the use of lethal defensive force, such as its complete rejection for the defense of property.⁵⁴ It also supports the duty to retreat before the use of lethal defensive force (in the broader sense, which also includes the danger of serious bodily injury to the aggressor).⁵⁵ In effect, Leverick's claim that my approach does not take into account the right to life reflects a lack of understanding of my theory. The autonomy of the attacked person is a very important factor in the proposed theory, reflecting not only his right to life, but also his rights to bodily integrity, freedom, property, etc. Therefore, it is her disregard of this central factor⁵⁶

⁵⁰ SANGERO, *supra* note 2, at 49-60 (section 1.5.3).

⁵¹ SANGERO, *supra* note 2, at 60-67 (section 1.5.4).

⁵² SANGERO, *supra* note 2, at 44-49 (section 1.5.2).

⁵³ SANGERO, *supra* note 2, at 90-106.

⁵⁴ SANGERO, *supra* note 2, at 178-86, 252-65.

⁵⁵ SANGERO, *supra* note 2, at 192-217.

⁵⁶ She does this repeatedly and it would seem that this omission is not accidental – *see* Leverick, *supra* note 1, at 566, 567. Even in the concluding section of her review (*id.* at 578), Leverick presents my theory as if it is based solely on the factors of the aggressor's guilt and the social-legal order, and allows herself to eliminate, with the

that apparently allows Leverick to claim that the theory ignores rights and deals only with consequences.

B. The Duty to Retreat

On this subject, Leverick's incorrect presentation of my analysis reaches its high point. First of all, she ignores my broad definition of "deadly force" as "an injury to the life or *bodily integrity* of the aggressor."⁵⁷ This leads her to mistakenly claim that my proposed duty to retreat does not apply when an attack may be repelled with less than lethal force, including force causing bodily injury to the aggressor short of death.⁵⁸ Leverick then argues, quixotically, that:

If a way can be found to preserve the bodily integrity of both the attacked person and the aggressor, then this should be encouraged.... Indeed it seems odd that any concern with avoiding the aggressor's death (something that obviously does occupy Sangero's attention) is not carried over into a concern with avoiding her bodily injury.⁵⁹

However, in my book, I never suggest that there is no duty to retreat when non-lethal force is sufficient to fend off an attack. What I do say is that, in a situation where lethal defensive force is required, if the attack does not create an existential danger to the person attacked (an injury to his life *or bodily integrity*), then a duty to retreat must certainly be imposed, while in all other cases this matter should be resolved based on the requirement of proportionality.

Not only does Leverick reject my analysis of the duty to retreat as a question of proportionality rather than necessity, but she also presents it in such a distorted manner that I fear she has failed to understand it:

mere stroke of a pen, the factor of the attacked person's autonomy, which is so strongly emphasized in the book.

⁵⁷ SANGERO, *supra* note 2, at 207 (italics added).

⁵⁸ Leverick, *supra* note 1, at 575.

⁵⁹ Leverick, *supra* note 1, at 575.

Odder still, however, is Sangero's suggestion that the duty to retreat stems not from the requirement for *necessity* of self-defensive force, but from the requirement for *proportionality*.... If one holds that there is a requirement for retreat at all, it seems absurd not to ground this in the requirement for necessity.⁶⁰

Is this really odd? Is it really absurd? This is the new fashion in which my book proposes to deal with the question of retreat:⁶¹

Traditionally it is acceptable to view the duty to retreat as a particular expression of the requirement of necessity. Several scholars have hinted that this concerns a mixed question of necessity and proportionality. In my opinion, the primary focus of the duty to retreat is actually to be found in the requirement of proportionality and not in the requirement of necessity.... I shall first examine the dominant case in legal literature in discussions concerning the duty to retreat: the aggressor endangers the life of the person attacked ... and two possible modes of action are available to the person attacked: the first – the use of deadly defensive force against the aggressor (more moderate force will not be effective in the circumstances of this case), and the second – safe retreat from the scene of the event.... My opinion is that despite the possibility of safe retreat, defensive force is necessary, and in contrast to the accepted argument, the requirement of necessity is actually fulfilled. However, although the interests necessitating defence do not include the life of the person attacked and his bodily integrity – since these can be saved by means of retreat – they do include less central interests: the defence of the social-legal order, the freedom of action of the attacked person, and his honour. Consequently, the real question is no longer a question of necessity, but rather a question of proportionality: whether the use of deadly defensive force for the defence of the social-legal order, freedom of action of the attacked person and his honour meets the conditions of the proportionality requirement.⁶²

Therefore, in the event of a lethal attack that must be repelled with deadly force, a safe retreat preserving the lives of both parties to the confrontation is certainly preferable. However, such a case – which, in effect, is the only one that Leverick considers – is the easy one to resolve and less common. Reality is much

⁶⁰ Leverick, *supra* note 1, at 576.

⁶¹ Section 3.9 of my book contains a detailed twenty-five-page analysis of the duty to retreat (SANGERO, *supra* note 2, at 192-217), of which only several paragraphs are cited here.

⁶² SANGERO, *supra* note 2, at 193-94.

more complicated, and the magic formula of “the right to life” is not enough to solve all of the problems that are raised. Thus, for example, it is possible that the attack itself is non-lethal, in which event there is no justification to use deadly force in order to repel it; but moderate defensive force meeting the requirement of proportionality can be justified. Or, perhaps the attack is lethal, but may be fended off by the use of moderate force, in which case there is clearly no reason to reject defensive force from the outset by an overly broad duty to retreat. In order to seriously cope with the wide variety of possible cases, I deal with various typical situations, classifying them according to two factors: the extent of danger created by the attack and the extent of force necessary to repel it. Following this classification, I state as follows:

As to the suitable legislative arrangement for the issue of retreat, the question is whether it is sufficient to establish explicitly that the possibility of a safe retreat should be taken into account in evaluating the existence of the requirement for proportionality, or if specific rules should also be added.... The main candidate for this issue is the rule according to which the possible (safe) retreat negates (according to the principle of proportionality) the justification of deadly defensive force (or in other words: the imposition of a duty to retreat before the use of deadly defensive force). In my view, given the great importance of the value of human life (even when this concerns an aggressor), there is a reason for this rule, although it is not desirable that it should replace the general principle.⁶³

Since the proposed analysis of the duty to retreat is designed to encompass all possible situations (and not just *killing* in self-defense), there is no way to avoid a broader analysis than that proposed by Leverick, who suffices with the right to life.⁶⁴

⁶³ SANGERO, *supra* note 2, at 213-14.

⁶⁴ Interestingly, although Leverick finds my treatment of the duty to retreat as a question of proportionality “odd,” and even absurd, I have found several places in her book where it seems that she too – apparently unconsciously – treats the duty to retreat in terms of proportionality. Thus, for example, in her own discussion of the duty to retreat, she writes: “As was the case for the values of honour and dignity, however, it is difficult to see how the value of freedom of movement could possibly outweigh that of human life.” LEVERICK, *supra* note 4, at 78. *See also id.* at 3, 127.

Finally, it should be noted that, in discussing the duty to retreat when the attacked person is in his own dwelling, Leverick ascribes to the book things that have never been said. It is true that I propose for weight to be given to this fact, while maintaining the importance of the security and peace that the home grants the individual as an integral part of his autonomy. This is clearly more than just the mere “right to enjoy property.”⁶⁵ But here too, reality is much more complicated. Therefore, in the conclusions of the section where defense of the dwelling is discussed,⁶⁶ I propose “a certain easing of the requirement of proportionality – although not to the extent of justifying deadly force in the absence of danger to a person’s body.”⁶⁷ However, Leverick is unwilling to accept the duty to retreat as a question of proportionality. Let the reader be the judge.⁶⁸

C. The Innocent Aggressor

The question as to whether the justification for self-defense must also include the use of defensive force against an innocent aggressor touches on both legal and philosophical issues that have occupied many scholars. The discussion of these issues has gained impetus since the publication of Prof. Fletcher’s important article “Proportionality and the Psychotic Aggressor.”⁶⁹ The approach proposed in my book is that in order to reach a real and strong justification – an act devoid of any moral guilt – self-defence should be “cleansed” of several unsuitable cases, including that of an innocent aggressor. The characterization of self-defense as a justification, and not

⁶⁵ Leverick, *supra* note 1, at 577-78.

⁶⁶ SANGERO, *supra* note 2, at 266-78 (section 4.5).

⁶⁷ SANGERO, *supra* note 2, at 278.

⁶⁸ Parenthetically, it should be noted that it is unclear why Leverick cites the English judgment in the *Julien* case as support for an “absolute retreat rule,” since the English court was satisfied with the demonstration of a desire to retreat: “It is not, as we understand it, the law that a person threatened must take to his heels and run ... but what is necessary is that he should demonstrate by his actions that he does not want to fight.” LEVERICK, *supra* note 4, at 70, 76. See also *R v. Julien*, [1969] 1 WLR 839, 2 All ER 856 at 858; SANGERO, *supra* note 2, at 199.

⁶⁹ *Supra* note 23.

as an excuse, is very important because it helps us to understand its nature and allows us to establish suitable requirements for it (also in statute).

An entire section of my book is devoted to the case of the innocent aggressor.⁷⁰ Here it is explained why the use of defensive force against an innocent aggressor – someone who is legally blameless, e.g., due to insanity, age, or mistake – should not be included in the justification for self-defense, even though it is very likely that such an act will not bear criminal responsibility based on a different criminal law defense, such as mistake of fact (putative self-defense) or necessity. Fletcher adopted the approach of German law, which, while searching for a justification for the repulsion of the innocent aggressor, came to the conclusion that the sole rationale for the use of defensive force is the autonomy of the attacked person.⁷¹ This is because such an act cannot be considered self-defense if the guilt of the aggressor is one of the required elements. However, the rationale of autonomy, on its own, has serious drawbacks, primarily in that it gives no expression whatsoever to the principle of proportionality. Autonomy is viewed as an absolute right. This approach has led to a judgment by the German Supreme Court, in which it was held that a person was justified in shooting juveniles who were stealing fruit from his garden.⁷² According to my proposal, a theory that fails to reflect the requirement of proportionality should be rejected *ab initio*.

Not only is an innocent aggressor not guilty (by definition), but he does not even harm (at least not significantly) the social-legal order; and, although the attacked person's autonomy is violated, the harm caused is less than in a case of intentional aggression accompanied by guilt. That is not to say that a person should succumb to his attacker. One must obviously be allowed to defend oneself. However, greater compassion should be shown to the innocent aggressor: by society, by its laws, and by the attacked person who must obey them.

⁷⁰ SANGERO, *supra* note 2, at 49-60 (section 1.5.3).

⁷¹ Fletcher, *supra* note 23, at 387.

⁷² Fletcher, *supra* note 23, at 381 (Decision of September 20, 1920, 55 *Entscheidungen des Reichsgerichts in Strafsachen* 82).

It is interesting to note that this compassion is absent from Leverick's discussion of the innocent aggressor, for she proposes to extend the application of self-defense against such a person.⁷³ This is the gist of her criticism:

Sangero accepts that his approach does not explain why it is **permissible** to kill or injure an innocent aggressor but he does not see this as a problem.... But there is a practical problem with Sangero's approach, as necessity is not universally recognized as a defence to murder.... First, it is a major weakness of the book ... a serious omission. Second, it is not at all obvious that necessity *should* operate as a defence where the accused has killed an innocent aggressor ... it is a weakness of his theory that, at best, it can only be regarded as providing a satisfactory account of a *subset* of self-defence cases – those involving a culpable aggressor.⁷⁴

One may wonder which of these compliments should be dealt first...

First, I have emphasized Leverick's use of the word "permissible" in the above quote, because, in my opinion, it reflects our different approaches to self-defense. Whereas I am searching for an act that is justified, Leverick is apparently satisfied with an act that is merely permissible.

Second, if the guilt of the aggressor is waived, then the unique quality of self-defense is lost in comparison to the other defenses of constraint – necessity and duress. This uniqueness is not only the attack of the aggressor but also his guilt in the attack and the use of defensive force against him.

Third, if the guilt of the aggressor is not required, then we are left with a very weak justification for self-defense; so much so that it does not make much sense to isolate self-defense from the broader defense of necessity. For example, Leverick is willing to also consider the separation of conjoined twins as a case of self-defense, viewing one twin as an aggressor against the other.⁷⁵ Leverick also argues that the killing of an innocent bystander is not a case of self-defense and should not be

⁷³ Leverick, *supra* note 1, at 568-71.

⁷⁴ Leverick, *supra* note 1, at 569-71.

⁷⁵ LEVERICK, *supra* note 4, at 9, 96.

justified.⁷⁶ Obviously. But what is the big moral difference between an innocent bystander and an innocent aggressor who is blameless due to insanity, age, or mistake? The element of guilt is absent in both of these cases. What about the right to life, on which Leverick places such a strong emphasis in her analysis of self-defense?⁷⁷ Is the attack itself really sufficiently important so that we as a society should lose all compassion towards these blameless individuals? Why should we encourage injury to an innocent (by allowing a defense of *justification*) and why is a defense of necessity not sufficient to deal with such tragic cases?

Fourth, a strong indication that a claim of self-defense is inappropriate when the attacked person harms an innocent aggressor is that in legal systems where this is accepted as self-defense, there has been a need to establish special rules for such cases. Thus, for example, even in German law, where the autonomy of the attacked person is emphasized as the only rationale for self-defense, and a duty to retreat is not accepted, such a duty has been established in the special case of an innocent aggressor.⁷⁸

Fifth, if Leverick indeed fears that the case of an innocent aggressor is not even suitable as an excuse (necessity),⁷⁹ then how will it be justified (self-defense) as she proposes? For much more is required in order to justify an act than to merely excuse the actor from responsibility.

Sixth, perhaps Leverick's difficulty stems from the history of English law. For many years, English courts refused to recognize the defense of "necessity"; and even when they have recognized it, they established a requirement of grave danger – a

⁷⁶ Leverick, *supra* note 1, at 52.

⁷⁷ See the discussion, Leverick, *supra* note 1, at 60. Perhaps it arises from this discussion that it is, in fact, Leverick's approach that is consequentialist?

⁷⁸ This is also stated, accompanied by references, in Leverick's book. Leverick, *supra* note 1, at 79.

⁷⁹ See Leverick's own emphasis of the word *should* in the previous quote in the text accompanying *supra* note 74.

threat of death or severe bodily harm.⁸⁰ Their main fear was that this defense would lead to a state of anarchy and that it is impossible to predict in which cases it could be used. Thus, in a legal system where the necessity defense is extremely restricted, a person attacked by an innocent aggressor may be left without any legal protection whatsoever. Consequently, there is a strong tendency to expand the application of self-defense, so that it may also encompass this “stepchild.”⁸¹ However, the approach in my book is not limited to any particular situation in a given legal system, but instead proposes a universal theory.

Seventh, Leverick’s claim – that my theory is only partial because it does not cover all cases of self-defense – is, to use her own characterization, odd, because, substantively, the case of the innocent aggressor is not self-defense, and certainly not a matter of justification; because it is rare compared to the cases of guilty aggressors; and because her competing theory limits itself *ab initio* only to the rare case of *killing* in self-defense.

D. The Elements of Private Defense

In this section of her review, Leverick claims that the “depth” of my analysis regarding the defense of property and the use of lethal force to prevent rape is “disappointing.” However, she does agree with my conclusions: the total rejection of the use of lethal force to protect property, given the value of life (of the aggressor), and its justification in order to defend against a rapist.⁸²

Regarding the defense of property, my response is very simple: Leverick only refers to one isolated page in my book (in the section dealing with the proportionality

⁸⁰ See D.W. Elliot, *Necessity, Duress and Self-Defence*, 1989 CRIM. L. REV. 611, 618-19.

⁸¹ It deserves mention that this limitation in English law has led one scholar to call for the justification of self-defense not only against the innocent aggressor but also in the absence of any attack – against natural dangers (!) Elliot, *supra* note 80, at 618.

⁸² Leverick, *supra* note 1, at 573-75.

requirement), while she ignores the detailed chapter devoted to Defence of Property⁸³ and the separate chapters dealing with Defence of Another Person's Property⁸⁴ and Defence of the Dwelling.^{85,86}

As to the use of defensive force against rape, I do admit that my discussion of this subject is indeed brief, assuming that most if not all readers will agree that even the use of lethal force is justified in such a case. However, the need for a broader discussion of this question derives from the problems created by Leverick's approach, which relies on only one factor to justify self-defense – the right to life. I shall deal below with the analysis of this issue in her book.

3. Second Reply – On Killing in Self-Defence

A. A General Characterization of the Book

On its cover, Leverick's book purports to be “a comprehensive analysis of the criminal defence of self-defence from a philosophical, legal and human rights perspective.” The philosophical aspect of the discussion is certainly interesting, however, her analysis does not propose a new theory and entails no significant innovation, compared to that, for example, contained in the writings of Thomson⁸⁷ and Uniacke.⁸⁸ As Leverick writes:

⁸³ SANGERO, *supra* note 2, at 252-62 (section 4.3).

⁸⁴ SANGERO, *supra* note 2, at 263-65 (section 4.4).

⁸⁵ SANGERO, *supra* note 2, at 266-78 (section 4.5).

⁸⁶ Parenthetically, it should be noted that, contrary to Leverick's statement that, “[t]he US Model Penal Code explicitly rules out the use of deadly force to protect property (s 3.06(3)(d)), but with an exception where the defendant faces an attempt to dispossess her of her dwelling (s 3.06(3)(d)(i)).” LEVERICK, *supra* note 4, at 133 & n.21. The actual arrangement in the U.S. Model Penal Code is much worse, and section 3.06(3)(d)(ii) permits lethal force in many additional cases. See the provision itself and the analysis in my book, SANGERO, *supra* note 2, at 179-80.

⁸⁷ Judith J. Thomson, *Self-Defense and Rights*, in JUDITH J. THOMSON, RIGHTS, RESTITUTION AND RISK: ESSAYS IN MORAL THEORY 37ff (1986). It should be noted that

Here, the defence is examined from a rights perspective, focusing in particular on the right to life, as this is considered to be the most productive route to establishing the permissibility of self-defensive killing. As such, it builds to a certain extent on the work done by Suzanne Uniacke, in *Permissible Killing*.⁸⁹

In the terminological dispute between the two, Leverick prefers the “forfeiture approach” chosen by Thomson to the “specification approach” of Uniacke.⁹⁰

In effect, the scope of Leverick’s philosophical discussion is limited from the outset, since the book itself is restricted solely to *killing* in self-defense. Leverick explains this narrow choice by saying that “killing in self-defence is the most difficult type of self-defence to justify ... although it is almost certainly less common in practice than non-lethal self-defensive force.”⁹¹ She further argues that “if self-defensive killing can be justified, then other, lesser, types of self-defensive force can surely be justified too.”⁹²

This line of thinking seems to be logical. However, her focus on extreme cases of lethal force versus lethal force is both mistaken and misleading. Mistaken, because self-defense also applies to offences that do not entail killing, such as assault. Just as it is impossible to understand the criminal law in its entirety by just dealing with one offence, like killing, it is impossible to understand self-defense in its entirety by focusing solely on crimes that entail killing. Misleading, because the sole focus on cases of “a life versus a life” distorts the picture and makes it difficult both to

Thomson was not the first to write about forfeiture. See, e.g., Sanford H. Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 883 (1976); George P. Fletcher, *The Right to Life*, 13 GA. L. REV. 1371, 1380ff (1979). See also SANGERO, *supra* note 2, at 44ff, and the accompanying references.

⁸⁸ *Supra* note 46. It should be noted that Uniacke was not the first to write about specification. See, e.g., Thomson, *supra* note 87; Fletcher, *supra* note 87, at 1383ff. See also SANGERO, *supra* note 2, at 89, and the accompanying references.

⁸⁹ LEVERICK, *supra* note 4, at 2.

⁹⁰ LEVERICK, *supra* note 4, at 60-68.

⁹¹ LEVERICK, *supra* note 4, at 4.

⁹² LEVERICK, *supra* note 4, at 4.

conceive of a proper rationale and to formulate an adequate statutory arrangement for self-defense.

Our previous discussion of the duty to retreat illustrates the inherent problems of such a limited focus. Instead of viewing the picture in its entire complexity in order to find a proper rationale for self-defense that will provide adequate solutions for all situations, the focus on killing leads to a simplistic solution limited to “the right to life.”

Leverick further limits the scope of her analysis to “*self*-defence, as opposed to the defence of others or private defence more generally ... because it is the most difficult type of defensive act to justify, given the element of self-interest involved.”⁹³ However, this is the exact reason why a discussion is also necessary regarding other situations of private defense, e.g., the defense of others; the defense of property; and the defense of the dwelling – both in order to identify the exact rationale for their justification and in order to formulate the proper statutory arrangements for such cases.

One of the major shortcomings of Leverick’s philosophical discussion is the fact that she is satisfied with an explanation that killing is *permissible* and does not search for a real and strong justification.⁹⁴ An even bigger drawback is its view of the “right to life” as the be-all and end-all explanation for self-defense leading directly to a solution for all possible situations.⁹⁵

Apparently, due to these limitations in the scope of her analysis, not only is Leverick’s philosophical discussion lacking, but her discussion regarding proper legal arrangements is even more so. There are relatively detailed discussions of retreat, imminence of harm (although, in this matter, for some reason, Leverick only focuses

⁹³ LEVERICK, *supra* note 4, at 3-4.

⁹⁴ It is possible that the source of this narrow approach to self-defense is Uniacke’s book, *PERMISSIBLE KILLING*, *supra* note 46, which, according to Leverick, has had a very strong influence on her. LEVERICK, *supra* note 4, at 2.

⁹⁵ For additional examples, see LEVERICK, *supra* note 4, at 135, 166.

on the defense of battered women), self-generated self-defense, killing to protect property, killing to prevent rape, and mistake (although her discussion of mistake lacks treatment of a mistake as to the requirement of proportionality, as we will see below). However, there is a very prominent absence of discussion regarding many additional issues, primarily: the scope of application of the defense; which values may be justifiably defended; the source of danger and the nature of the attack (including resistance to illegal arrest, consent of the attacked person, holding property by force with a bona fide claim of right, etc.); the severity of the danger (including its probability); the necessity requirement; the proportionality requirement; the mental element; defense of another person, defense of property; defense of another person's property; defense of the dwelling; and deviation from the conditions of self-defense.

B. Killing to Prevent Rape

Leverick devotes an entire chapter of her book to this subject, given her belief that it is not easy to explain why it is permissible for a potential rape victim to kill her assailant.⁹⁶ This is because the simplistic theory proposed in her book – based on the right to life – does not explain the logic of this. For, in such a case, Leverick also prefers the sacrifice of the life of the rapist even when he does not endanger the life of the victim.

In order to explain the problem, Leverick expresses the opinion that even when in danger of serious bodily injury (the examples that she provides are cutting off a person's finger and kneecapping), an attacked person should not be permitted to use lethal defensive force. In her opinion, as long as there is no danger of death, the attacked person must accept the injury.⁹⁷

To use Leverick's own characterization, I find this position "odd." It seems to derive from an incorrect understanding of self-defense. Since Leverick attempts to explain self-defense solely based on the right to life, and ignores other significant

⁹⁶ LEVERICK, *supra* note 4, at 143-58.

⁹⁷ LEVERICK, *supra* note 4, at 151-52.

values such as the guilt of the aggressor, the autonomy of the attacked person, and the social-legal order, she finds it hard to explain something that seems obvious – that the use of lethal defensive force is justified if it is necessary to fend off a rapist. The role of these important values in the equation underlying the rationale for self-defense is, *inter alia*, to explain why it is also justified to use (necessary and proportional) defensive force that is greater than the force used by the aggressor. An attacked person is certainly not expected to sit back and accept irreversible physical injury (amputation of a finger) or rape. The requirement of proportionality in self-defense (as opposed, for instance, to the justification of necessity, based on the lesser evil) is a flexible requirement: it is not necessary that there be equivalence between the expected physical injury to the attacked person (in the absence of self-defense) and the aggressor (as a result of the defensive action). It is enough that the defensive force is not out of all proportion to the force of the attack.

Leverick rejects the four harms of rape enumerated by Kates and Engberg as an explanation for the justification of the use of lethal defensive force: bodily injury, disease (such as HIV), pregnancy (and abortion), and psychological harm.⁹⁸ She doubts that “... this constitutes harm so great that it justifies killing to prevent rape,” and finds support for her position in the US Supreme Court judgment in *Coker v. Georgia*, where it was held that the death penalty is a disproportionate and unconstitutional penalty for the offence of rape.⁹⁹ In my opinion, the very fact that she raises this question demonstrates that, despite her professed lack of sympathy for consequentialist theories, it is her own approach – which focuses solely on the lethal outcome – that is actually consequentialist. However, self-defense is not the equivalent of criminal punishment, and its justification is not based on the justification for criminal punishment.¹⁰⁰

⁹⁸ LEVERICK, *supra* note 4, at 153ff.

⁹⁹ LEVERICK, *supra* note 4, at 155.

¹⁰⁰ See SANGERO, *supra* note 2, at 82 (rejection of the unacceptable theory, whereby self-defense is supposedly based on the punishment of the aggressor); *id.* at 188-92 (discussing Nozick’s proposal in this context).

At this point, Leverick offers the reason why, in her opinion, it is still justifiable to kill a rapist, and this is because “rape approaches the standard of a wrong equivalent to a deprivation of life itself.”¹⁰¹ She then cites scholars who, according to her, argue that “the rapist uses the victim as an object of sexual penetration, an act that has been given a particular significance by society, and, in doing so, denies the victim’s humanity.”¹⁰²

I do not doubt the scholars that Leverick relies on, although they have not compared rape to death, which is the far-reaching comparison that Leverick attempts to make. However, I do believe that, with a proper view of the justification for self-defense, Leverick would not have needed to go so far as to search for something that would, in her eyes, be equivalent to death. This is because, given the guilt of the aggressor, the autonomy of the attacked person (even when this does not concern human life), and the social-legal order, the justification for self-defense is so significant that there is no need to base it on equivalence between the physical harms (equivalence that is perhaps made necessary in fact by a consequentialist approach).

Furthermore, if Leverick’s conjecture is indeed the correct explanation for justifying the use of lethal force to prevent rape, then it may be challenged from two opposite directions. On the one hand, it can be argued that someone who commits a normal violent assault against someone else, that is non-sexual, in effect is also attempting to exploit that person as an object.¹⁰³ On the other hand, it may be argued that, if the amputation of a finger and kneecapping are not harms that justify lethal defensive force, then perhaps rape should be treated no differently. Leverick explains that even with serious bodily injury, a person can still go on living. But this is also the case with rape. I prefer the approach whereby the significant psychological harm that the rape victim is expected to suffer is enough to justify the use of lethal defensive force. Given the considerable guilt of the rapist, the serious harm to the autonomy of the rape victim (even if not to her life), and the significant damage to the social-legal

¹⁰¹ LEVERICK, *supra* note 4, at 157-58.

¹⁰² LEVERICK, *supra* note 4, at 157-58.

¹⁰³ Markus D. Dubber, *Making Sense of the Sense of Justice*, 53 *BUFF. L. REV.* 815, 838 (2005).

order, it is completely justified to use lethal defensive force if it is necessary in order to repel him.¹⁰⁴

C. Mistake (Putative Self-Defense)

Leverick conducts a relatively extensive discussion regarding the possibility of a mistake on the part of a person acting in self-defense.¹⁰⁵ Naturally, she makes many good points, however, due to limitations of space, I shall only refer to the drawbacks of her analysis on this subject.

First, Leverick's discussion fails to address the basic distinction between a justification and an excuse. This makes it difficult to understand the difference between a real act of self-defense, which is both legally and morally correct (a justification) and encouraged by society, and an act of putative self-defense, which stems from a mistake (an excuse) and is not justified, since it should not be encouraged, but is still exempt from criminal liability due to society's understanding of the grave situation in which the actor has found himself.¹⁰⁶ This important distinction leads to a more precise discussion. It also helps us to avoid the common error in the approach of Anglo-American law that views putative self-defense as a form of actual self-defense and, as we will show below, to avoid the erroneous requirement that the mistake be reasonable.

Second, while Leverick does distinguish between "mistake about an attack"¹⁰⁷ and "mistake about the amount of force necessary to repel an attack,"¹⁰⁸ two more important distinctions are absent from her discussion: the distinction between a mistake of fact and a mistake of law, as well as the distinction between a use of excessive force that is the result of a mistake and a use of excessive force that is not the result of a mistake. In effect, the latter case – of excessive self-defense – demands

¹⁰⁴ SANGERO, *supra* note 2, at 183-84.

¹⁰⁵ LEVERICK, *supra* note 4, at 159-76.

¹⁰⁶ For a more extensive discussion, see SANGERO, *supra* note 2, at 11-19, 282-96.

¹⁰⁷ LEVERICK, *supra* note 4, at 160-68.

¹⁰⁸ LEVERICK, *supra* note 4, at 169-76.

a totally separate discussion and not just one that is incidental to the subject of mistake. This is because these are two completely different cases: the first actually concerns a mistake while the second concerns an unmistaken actor in danger who indeed uses necessary defensive force that fails to satisfy the requirement of proportionality. This second case is a completely different issue, which demands a separate discussion because of analytical and theoretical reasons, and because it is common and because in various legal systems it has led to the development of special rules, such as the well-known Australian legal doctrine of “excessive self-defense.”¹⁰⁹

Third, because Leverick fails to make the important distinction between a mistake of fact (where the actor mistakenly believes that he is in danger or mistakenly believes that the defensive force that he uses is necessary) and a mistake of law (where the actor mistakenly believes that it is permissible for him to use more force than that allowed by the requirement of proportionality), her discussion is not sufficiently comprehensive and she does not draw the proper conclusions from the source upon which she relies. Thus, Leverick criticizes the report of the English Law Commission:¹¹⁰

Strangely enough, it seems to be accepted by some who argue in favour of allowing unreasonable mistake in relation to the *existence* of an attack that an unreasonable belief should *not* be permitted in relation to the level of force necessary to repel an attack. The English Law Commission, for example, has argued that unreasonable mistaken belief should be *permitted* in relation to the existence of an attack, stating that: “In Such circumstances it would be unjust ... if A, providing he did no more than would have been reasonably required to avoid an unexpected attack on himself, and not in a spirit of aggression or revenge, were to be exposed to criminal liability simply because of his mistaken or even negligent belief.” The Law Commission go on, however, to conclude that unreasonable mistake should *not* be permitted in relation to the degree of force necessary to repel an attack, explaining this as follows: “It is not for the defendant himself to adjudicate upon the reasonableness of the steps that he takes to prevent [an attack], because that would unfairly and dangerously exculpate defendants who had an irresponsible, irrational or anti-social notion of the extent to which it is acceptable to react when threatened with attack.” I think the Law Commission is correct in this, but it does seem

¹⁰⁹ SANGERO, *supra* note 2, at 298-310.

¹¹⁰ Due to the importance of this matter, the entire quote is cited.

logically to contradict the earlier statement that unreasonable mistaken belief should be permitted in relation to the existence of an attack.¹¹¹

Is it really that strange? Is it really a contradiction? In the first statement quoted by Leverick, the English Law Commission speaks of a mistake of fact – of an actor who mistakenly believes that he is in danger and, based on this mistaken belief, defends himself. Therefore, the Commission is convincing in its argument that the defendant should be shown leniency and be exempted from criminal responsibility. On the other hand, in the second quote, the commission is discussing a mistake of law – a mistake regarding the proportionality requirement, where the actor mistakenly believes that the law permits excessive force. And, indeed, the accepted attitude towards a mistake of law is that it does not exempt a person from criminal responsibility (unless it is unavoidable in a reasonable manner). Had Leverick made this important distinction between a mistake of fact (any mistake of fact – regarding both the very existence of danger and the necessity to use defensive force) and a mistake of law (a mistake regarding proportionality) then she would certainly not have scoffed at the analysis of the Commission.¹¹² And, perhaps she would also not

¹¹¹ LEVERICK, *supra* note 4, at 171.

¹¹² Parenthetically, it should be noted that Leverick's failure to distinguish between a mistake of fact and a mistake of law is also apparently the source of her criticism of my book, when she writes that I do not correctly describe English law. Leverick, *supra* note 1, at 564 n.9. In Leverick's opinion, the *Scarlet* ruling was reversed in *Owino* (*see id.*), and, for a more extensive discussion, see LEVERICK, *supra* note 4, at 170. However, whereas *Scarlet* dealt with a mistake of fact, *Owino* concerned a mistake of law. See SANGERO, *supra* note 2, at 111. In *Scarlet*, the court stated as follows: "we can see no logical basis for distinguishing between a person who objectively is not justified in using force at all but mistakenly believes he is and another who is in fact justified in using force but mistakenly believes that the circumstances call for a degree of force objectively regarded as unnecessary." *Id.* at 636. In *Owino*, the court held that, "[t]he jury have to decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or a threatened attack. In this respect a defendant must be judged in accordance with his honest belief, even though that belief may have been mistaken. But the jury must then decide whether the force used was reasonable in the circumstances as he believed them to be." *Id.* at 132-33. Let the reader be the judge.

have invested wasted energy in the less important distinction between a mistake regarding the danger and a mistake regarding the necessity of defensive force.

Fourth, Leverick proposes that a mistake – of any type – by the actor should not be taken into consideration if it is not a reasonable mistake. Her argument is as follows:

This, then, is the reason why we are permitted to kill someone *who is actually attacking us*: the justification form of self-defence. But when we kill a human being in *the mistaken belief that she is attacking us* (the excuse form of self-defence), the situation is different. There is no aggressor in reality. The perceived “aggressor,” like all human beings, possesses a right to life and she has *not* forfeited her right to life by becoming an unjust immediate threat to the life of another. Instead of killing someone who was threatening to violate our life, we have killed a human being who was posing no threat to us but was unfortunate enough to do something to suggest that she was about to attack us. This is why, in order to benefit from a complete acquittal, we need to offer a good reason for what we have done. If it were otherwise this would ignore the fact that the perceived aggressor had a right to life and a right to the protection of the criminal law against having her life taken for no good reason.¹¹³

Seemingly, Leverick makes a distinction here between a justification and an excuse. However, apart from the semantic difference, her analysis actually ignores this important distinction. This is because we do not justify the act of the mistaken actor, and in no way do we encourage such an act, but rather only exempt the actor from criminal responsibility given his lack of guilt. We are not dealing with the responsibility of the aggressor (or the putative aggressor) but rather the criminal responsibility of the attacked person (or the putative attacked person). This responsibility must fit his guilt. If he was mistaken, and even if the mistake is unreasonable, it is not right to ascribe to him an offence requiring intent or awareness. At the most, we can ascribe to him an offence based on negligence, and perhaps even this would be too harsh.

¹¹³ LEVERICK, *supra* note 4, at 165-66.

When discussing an excuse, the relevant considerations are completely different from those regarding a justification. In order to understand the difficult situation into which a person has stumbled and to excuse him of criminal responsibility, it is not necessary that we share his weaknesses, i.e., that we consider his mistake to be reasonable. Ignoring a mistake because it is unreasonable, when the actor honestly believes that he is in danger and uses defensive force that he honestly believes is necessary in order to repel an attack, means that we are ascribing to him the same status as that of someone who is not acting in self-defense at all, but rather is acting criminally. This is unfair to him.

Even if the right to life is considered the central rationale for justifying self-defense, when this involves an excuse based on a mistake, this is not a magic formula for solving the problem. It certainly cannot restore the life of the victim (the putative aggressor). Even “the protection of the law” is of no avail here. To impose serious criminal liability on a negligent defender who mistakenly believes that he is in grave and immediate danger and kills a putative aggressor in order to defend himself is not only unfair but it does society no good: it is difficult if not impossible to deter future negligent actors, since by definition they are totally unaware of the real nature of the situation facing them.

Perhaps the source of Leverick’s erroneously harsh treatment of a person acting negligently by mistake is in the very fact that she is dealing with “*permission to kill.*” The meaning of self-defense is not that we are permitting the attacked person to kill the aggressor, but rather that we are justifying the use of necessary and proportionate defensive force. Sometimes this is lethal force. Even then, it is not correct to say that we are allowing someone to kill a person. The goal is not to kill the aggressor but to defend oneself against him, to fend him off. When this is the attacked person’s goal, then even if he perceives the situation incorrectly he is not committing an anti-social act that justifies the imposition of serious criminal liability. He too – as the putative aggressor – is unfortunate and deserves our compassion by being excused of criminal responsibility. But even if we do not show him mercy and choose to hold him criminally liable, the principle of guilt requires that we go no further than an

offence based on negligence. This is the full extent of his guilt. Unreasonableness is the precise meaning of negligence.

Enlisting Fletcher in support of her position, Leverick says that:

As Fletcher puts it, to allow unreasonable mistaken belief in self-defence is to “sanction thoughtless, negligent over-reaction” when instead, “the lack of restraint, the indulgence, the failure to discipline one’s reactions ... are all grounds for blaming the person who claims his wrongdoing is excused.”¹¹⁴

However, even if we accept this view, it is important to emphasize that the mistaken actor is guilty because of the very fact that he is negligent and, as such, deserves to be charged with a relatively less serious, negligence-based offence rather than an offence requiring intent or awareness.

To illustrate putative self-defense, Leverick gives two examples. The first is that of “the paranoid racist, who honestly believes that all black people are uncontrollably violent and likely to attack her”¹¹⁵ The second is the famous case of Bernard Goetz, the so-called “subway vigilante,” a white man who shot and injured four black youths who had demanded five dollars from him on a New York City subway train.¹¹⁶

The Goetz case is not a good example, since it was not an act of self-defense, but rather an act of revenge: the defendant was not mistaken and acted in the absence of any immediate danger, in a situation where there was absolutely no need to use defensive force, and certainly in crass disregard of the principle of proportionality. In fact, even the mental element required for self-defense – that his purpose was to defend himself – did not exist.¹¹⁷

¹¹⁴ LEVERICK, *supra* note 4, at 166.

¹¹⁵ LEVERICK, *supra* note 4, at 167.

¹¹⁶ See also *People v. Goetz*, 497 N.E.2d 41 (1986).

¹¹⁷ See GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL* (1988). And see the analysis of this case in SANGERO, *supra* note 2, at 177-78.

The first example – of the “paranoid racist” – is tendentious. On the one hand, even a racist may be justified in using necessary and proportionate force, with the required mental element (the purpose of defending oneself), despite his racism. On the other hand, there are numerous cases of putative self-defense where our sympathy will be with the mistaken “defender.” Thus, for example, in the *Assala* case,¹¹⁸ heard before the Israeli Supreme Court, a man went out one evening and left his rifle with his wife, for her protection. The wife was awoken at midnight by the sound of knocking at the front door. She asked “who is there”? There was no answer and the unidentified person went to the window and tried to open the shutter. The woman, imagining that a stranger was trying to rape her, was very frightened, took the rifle and fired three deadly shots through the shutter. It subsequently became clear that the deceased was her husband, who had returned home drunk, but not dangerous. The Supreme Court upheld Mrs. Assala’s acquittal. If her mistake was to be found reasonable, then there is no problem. But let us assume that under the circumstances her mistake was negligent. Is it conceivable that we ignore her mistake and treat her as harshly as a person who intentionally shoots someone to death – i.e., convict her of murder (or at least of manslaughter)? I believe that the proper choice is between an acquittal based on an excuse defense and a conviction for negligent homicide (whereas, even for this less serious offence, there is room for significant leniency in sentencing); and not between the serious offences of murder and manslaughter.

Parenthetically, it should be noted that the *Assala* ruling basically represents the court’s answer to the question with which Leverick has struggled so much – the justification for using lethal defensive force against an aggressor in order to prevent a rape. It is my belief that a proper view of self-defense and its rationale must undoubtedly lead to the conclusion that, in this case, there is no deviation from the requirement of proportionality (if this entails real defense; in a situation of real danger).

¹¹⁸ See Cr.A. 54/49 The Attorney General of Israel v. Assala, P.D. 4, 496. For an extensive discussion of this case, see SANGERO, *supra* note 2, at 290-91.

4. Epilogue: What is Self-Defense? Two Different Approaches

It seems to me that what we basically have here are two different approaches to the subject of self-defense. One approach seeks only “permission” for killing and views the right to life as a sufficient rationale. The other approach seeks a justification for self-defense and proposes a more complex rationale that is suited to all cases of self-defense and not just the extreme situation of a life versus a life. This rationale is based on three main factors that operate to justify the act of the defender: the autonomy of the attacked person, the guilt of the aggressor, and the social-legal order. The first approach is so harsh with the defender that it requires him to accept even the amputation of a finger or kneecapping. In contrast, the second approach gives due credit to the attacked person’s autonomy (and not just his life), to the guilt of the aggressor in creating the confrontation, and to the preservation of the social-legal order (that is a by-product of the defensive act), and is therefore more liberal with the defender and, for instance, allows the defender to use greater defensive force than (although, not force that is out of all proportion to) the force used by the aggressor.¹¹⁹

It is my hope that this Article (like Leverick’s article) will cause readers to read both books, in order to formulate their own opinions on this subject. Such discussions will certainly lead to further development of the theory, of the rationale for self-defense and, consequently, of suitable legal arrangements.

¹¹⁹ In the conclusion of her article, Leverick writes, *inter alia*, that “[o]n these issues we stand more or less together, in arguing for relatively strict conditions to be placed on the defence, especially where lethal force is involved.... In arguing for relatively strict rules governing self-defence, as he does, and regardless of his unusual approach, Sangero’s book is therefore to be welcomed.” Leverick, *supra* note 1, at 579. Indeed, in life, everything is relative. Compared to the autonomous approach of German law, for example, where the proportionality requirement is not obvious, my approach (like that of Leverick) is designed to significantly limit defensive force and might be considered harsh on the defender. However, in comparison to Leverick’s approach, which imposes such a strong duty to retreat and an inflexible proportionality requirement on the defender so that he must accept even an amputation of his fingers and kneecapping, my approach is much more liberal towards the defensive act of the attacked person.