The Abandonment of Proportionality: a Critical Analysis of s.43 of the Crime and Courts Act 2013

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Introduction

This paper will focus on the changes made to the law of self-defence by s.43 of The Crime and Courts Act 2013. Self-defence has undergone a number of legislative changes in recent years. S.43 amends s.76 of The Criminal Justice and Immigration Act 2008 by providing an enhanced defence to householders when their property is being burgled. Providing the householder believes themselves or another to be in danger, they are permitted to us 'up to grossly disproportionate' force in self-defence.

This can be contrasted with the previous law, which still applies in non-householder cases whereby an individual is permitted to use 'proportionate' force to the threat that is believed to be posed to themselves, others, or their property. The changes made by the 2013 Act therefore greatly extend the level of force permitted. Furthermore, this means that there are now two tests of self-defence in operation in England and Wales and the implications of this provide the foundation for this research.

There have been calls for an enhanced defence for the last decade. The instigating event for the campaign was the prosecution of Tony Martin, a Norfolk farmer who shot dead one intruder and severely injured another in 1999. This led to an appeal which reduced his conviction to one of

voluntary manslaughter on the basis of diminished responsibility in 2001,[1] and his subsequent release in 2003.

There was concern Martin would be subject to civil litigation, as the surviving intruder had been awarded legal aid to claim damages for the injuries suffered.[2] This led to a clause being included within the Criminal Justice Act 2003, namely s.329 which provides that civil claims brought by individuals injured in excessive self-defence would be struck out, unless the defender responded with 'grossly disproportionate' force.

Notably, in 2003 a poll by Radio 4 found that 37% of listeners wanted a new Bill to change the law to protect homeowners.[3] The Bill was to be put to the House of Commons by Stephen Pound MP but he failed to do this. The Bill[4] was eventually introduced to Parliament by Roger Gale MP. The Bill would have provided a defence to a householder who attacked a trespasser on his property. Ultimately, this Bill went no further after consultation with the DPP.[5]

[1] *R v Martin (Anthony)* [2001] All ER 435 (CA).
[2] Sapsted, D, *Burglar wins legal aid to sue Tony Martin* (*The Telegraph*: 6th July 2002) http://www.telegraph.co.uk/news/uknews/1400522/Burglar-wins-legal-aid-to-sue-Tony-Martin.html (accessed 16/03/2014; Watson, M. (2003), *Self-defence and the Home*, (2003) 167 JPN 486, pg. 1.
[3] *Martin Case tops BBC's Today poll*, (*BBC News*: 1st Jan 2004) http://news.bbc.co.uk/1/hi/uk/3360765.stm (accessed 14/4/14); *Law – The Verdict* (*BBC Today*: Jan 2004) http://www.bbc.co.uk/radio4/today/reports/misc/law_result_20040101.shtml (accessed 14/4/14).
[4] The Criminal Justice (Justifiable Conduct) Bill 2003-2004 found at http://www.publications.parliament.uk/pa/cm200304/cmbills/036/2004036.pdf (accessed 14/4/14).
[5] Manning, R. (2006), *Justifiable Force*, Barry Rose Law Publishers, pg. 166.

Another attempt to introduce a similar Bill was carried out by Conservative MP, Patrick Mercer, in 2005.The Bill[6] would have amended the Criminal Law Act 1967[7] in much the same terms as the 2013 Act operates. It provided an enhanced defence available to property owners, permitting them to use 'up to grossly disproportionate force' in defence of themselves, property and prevention of crime. The significant distinctions between this Bill and the 2013 Act are that the recent amendments are only concerned with 'the common law of self-defence'[8] and the bill potentially applied to those on commercial premises.[9]

Again, this Bill failed because it was not supported by the Labour Party, who formed Government at the time.[10] The Criminal Law (Amendment) (Protection of Property Bill)[11] was then put to Parliament by Anne McIntosh MP, which was essentially the same Bill as that put forward by Patrick Mercer MP a year prior.

The first legislative change to the law of self-defence occurred in 2008, with the Criminal Justice and Immigration Act. However, s.76 of the Act did not materially change the law of self-defence, but merely codified the existing provisions found in the common law. The first statutory change to the law of self-defence occurred via the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.148. The section provides that a defender has no duty to retreat, however this is a factor to be taken into account when determining the reasonableness of the force used.

[6] The Criminal Law (Amendment) (Householder Protection) Bill 2004-2005; found at http://www.publications.parliament.uk/pa/cm200405/cmbills/020/2005020.pdf (accessed 14/4/14).
[7] Which was the governing piece of legislation for self-defence at the time.
[8] This will be discussed in part 4 below.
[9] The Bill possibly applied to commercial premises in all contexts. The 2013 Act does extend to commercial premises in very specific circumstances (see part 4) but does not apply generally to commercial properties.
[10] Jefferson, M. (2005), *Householders and the Use of Force against intruders,* 69 J Crim L 405 2005, pg. 411
[11] 2005-2006; http://www.publications.parliament.uk/pa/cm200506/cmbills/018/2006018.pdf.

This leads to the changes made to the law by the Crime and Courts Act 2013; operating to provide the enhanced defence for householders that have been campaigned for by the Conservative Party for the last decade.

It will be argued that the rationale underlying the changes is at times unsatisfactory, particular in light of the substantive changes made. For instance, it appears to be unclear why the changes permit the defence to be relied upon by those in commercial premises in particular circumstances, who is not the 'startled householder' that the legislation is aimed at protecting.

This paper will proceed in five parts. In part 1, a detailed analysis of the law of self-defence, excluding the recent amendments, will be undertaken to provide a background for the law prior to the 2013 Act, which continues to apply when the enhanced defence does not. Part 2 will then consider the arguments which were advanced in favour of the enhanced defence available to householders, with the counter-arguments also being analysed.

The arguments against the changes will then be analysed in part 3. In particular, it will be argued that the 2013 Act may appear to conflict with the requirement of proportionality inherent in Article 2 of the European Convention of Human Rights, and that if the significance of the home is an accepted rationale for the changes, the requirement that the enhanced defence is only available when the aggressor is a trespasser lacks explanation.

In part 4, the substantive changes made by the 2013 Act will be examined. Considering the scope of the changes with an attempt to predict their application, this analysis will be carried out in light of the arguments for and against the provisions as outlined in the previous two parts. Finally, part 5 will conclude the discussion of the provisions of the 2013 Act.

1. Setting out the Defence

This part seeks to provide a brief overview of the law of self-defence within the criminal law of England and Wales. It will provide an introduction to many of the problematic areas of self-defence such as mistake and the concerns regarding Article 2 of the European Convention on Human Rights 1950.[12]

a) The Rationale of the Defence

Firstly, the basis for the right of individuals to defend themselves must be considered. The rationale of self-defence, at its most basic, is the right to prevent an attack against oneself. Notable attempts to explain the rationale of the defence have been put forward by Uniacke,[13] Leverick,[14] and Sangero.[15] Whilst each of these have their own merits, it is the position of Leverick which will be used in this discussion[16] - despite her analysis being limited to killing in self-defence.[17] Leverick's basis is a forfeiture approach grounded in the right to life, as protected by Article 2 ECHR, of both

[12] Henceforth referred to as the ECHR.
[13] Uniacke, S. (1996), *Permissible Killing,* Cambridge University Press; Uniacke's basis for self-defence is grounded on the right to life which is conditional on behaviour. Whilst this appears to very much the same as a forfeiture approach, Uniacke terms it specification.
[14] Leverick, F. (2006), *Killing in Self-Defence*, Oxford University Press.
[15] Sangero, B. (2006), *Self-Defence in Criminal Law*, Hart Publishing; Sangero's theory of self-defence is based on three things; i) the autonomy of the attacked, ii) the guilt of the aggressor, and iii) the social-legal order. The combination of these permits an individual to act in self-defence when they are under threat.
[16] Specifically due to similar rhetoric being used by David Carmeron when arguing that burglars *"leave their Human Rights outside*" when arguing in favour of the expanded defence; see: Prince, R. & Whitehead, T. '*David Cameron: burglars leave their human rights at the door*' (*The Telegraph*: 1st Feb 2010) http://www.telegraph.co.uk/news/politics/david-cameron/7104132/David-Cameron-burglars-leave-human-rights-at-the-door.html accessed 11/04/14.
[17] Although it can apply to lesser harms.

parties.[18] The right to life of the aggressor is forfeited when they pose an unjust immediate threat to the life of the defender, and there must be no other way in which the threat can be avoided.[19]

This has particular implications for this analysis, because it could be inferred that if the basis is the right to life of the individuals, that killing in defence of property could never by justified. Indeed, this is the conclusion reached by Leverick.[20] However, the substantive changes made by s.43 suggest that the enhanced defence will only apply when there is a threat, or a believed threat, to the life of the homeowners or those dear to him.[21] If the homeowner acts solely in defence of property the enhanced defence will not be available. Therefore, it is believed that Leverick's rationale for the right to self-defence is a suitable approach for the following discussion.

b) The Law of England and Wales

The scope of self-defence appears to be wide, with it being available to any offence which involves the use of force; not being confined to offences against the person. This is provided by *Renouf* [22] where it was held that self-defence should have been put to the jury regarding the offence of dangerous driving[23]; with the defendant ramming his car into another falling under the definition of 'force' for the purpose of s.3 of The Criminal Law Act 1967.[24]

[18] Leverick (2006), 3.
[19] Leverick (2006), pg. 66.
[20] Leverick (2006), 7.
[21] See part 4 below.
[22] *R v Renouf* [1986] 1 WLR 522 (CA).
[23] Also see: *R v Symonds (Jonathon Yoan)* [1988] Crim LR 280 (CA).
[24] The 1967 Act provides a defence of the 'prevention of crime' which operates within the same framework as self-defence.

Furthermore, self-defence appears to be available not only when violence is used, but when there is a threat of violence.[25] The defence extend as far as the protection of others,[26] the protection of property,[27] and the prevention of crime generally.[28]

There are two main elements that must be satisfied for the use of force to be covered by self-defence. Firstly, the use of force must be necessary, and secondly, it should be proportionate in the circumstances.[29] These elements fall under the requirement for 'reasonable force', and both must be satisfied for the defence to be available to an individual.

i) Necessity

The first requirement is that the use of force is necessary. Allen states that 'the use of force is not justified if it is not necessary.'[30] The rationale of the defence, as outlined previously, is that the use of force must be necessary for the defence to be available – without it the rights of the aggressor are not forfeited. If the use of force is not necessary the defence will not be available.

However, this is only true to an extent. Due to the unique nature of necessity of defensive force being determined subjectively – there is the possibility that force could be necessary, even if there

[25] *R v Cousins (Robert William)* [1982] 2 WLR 621 (CA).
[26] *R v Duffy* [1967] 1 QB 63 (CA).
[27] *R v Faraj* [2007] EWCA Crim 1033 (CA).
[28] S.3 The Criminal Law Act 1967.
[29] Johnathan Herring (2010), *Criminal Law: Text, Cases, and Materials,* 4th Edition, Oxford University Press, pp. 640-643; Manning (2005), pg. 61.
[30] Allen, M. (2011), *Textbook on Criminal Law,* 11th Edition, Oxford University Press, pg. 206.

is no objective need for force.[31] This is in accordance with s.76 (4) of The Criminal Justice and Immigration Act 2008,[32] which provides:

'If D claims to have held a particular belief as regards the existence of any circumstances—

(a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but

(b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—

(i) it was mistaken, or

(ii) (if it was mistaken) the mistake was a reasonable one to have made.'

The case of *Gladstone*[33] is illustrative; the defendant (W) saw and individual (M) arresting a youth. M claimed to be a police officer, but could not product a warrant card when asked. Believing the youth was being unlawfully assaulted, W assaulted M. It was held that W's mistake did not need to be reasonable; he was judged in accordance with the circumstances that he honestly believed them to be at the time of the offence.

Therefore, the use of force does not have to be objectively necessary for the defence to be available. It is only required that the defendant *honestly* believed that the use of force was necessary for the defence to be available.

[31] A subjective standard is one which is determined by characteristics of the individual in question at the relevant time. An objective standard is determined by the standard of the 'reasonable man' (i.e. by how a reasonable person would have responded), and the individual characteristics of the individual in question may not be relevance. Self-defence involves the use of both of these standards. As regards to the necessity of the use of force, the defendant is judged by the circumstances he honestly believed to be the case (subjective). However, as for the level of force used, this is judge by the standards of the reasonable man (objective).
[32] CJIA.
[33] *R v Gladstone (Williams)* [1987] 3 All ER 411 (CA).

One particular requirement that the courts have insisted upon is that the use, or threat, of force against the defendant, by the aggressor,[34] must be sufficiently imminent to require the use of defensive force.[35] This is provided for by *Devlin v Armstrong*[36] where the claim of self-defence failed because the danger in question was not sufficiently imminent to deem her actions necessary in the circumstances.

However, this requirement of imminence does not preclude an individual for preparing for an anticipated attack,[37] [38] nor performing a pre-emptive strike[39] [40]; both can be justified in the circumstances. Nonetheless, the case of *Fegan*[41] appears to suggest that the threat posed must not be able to be reasonably met by more peaceful means for the use of force to be necessary. This could be indicative of a duty to retreat, however as will be discussed below – there is no such duty in English and Welsh law.

ii) Proportionality

The second requirement is that the force used must be reasonable in the circumstances as the defendant honestly believed them to be. As Aquinas states: 'somebody who uses more violence than

[34] The victim.
[35] Allen (2011), pg. 206.
[36] [1971] NI 13 (CA) – Northern Ireland.
[37] *Attorney-General's Reference No 2 of 1983* [1984] EWCA Crim 1 (CA).
[38] This has particular implication for possession offences, which is beyond the scope of this essay. See: *Evans v Hughes* [1972] 1 WLR 1452; Llewelyn, F. (2013), *Protecting lives, restricting knives – the issue of self-defence and possession offences,* Vol 3, Queen Mary Law Journal: Postgraduate Conference Edition: Taking Risks and Challenging Legal Thought.
[39] *R v Beckford* [1988] AC 130 (PC) – Jamaica; See Lord Griffiths at 144.
[40] Pre-emptive strikes will be discussed later in this part under the 'Other Factors' subheading.
[41] [1972] NI 80 (CA) – Northern Ireland.

necessary to defend himself will be doing something wrong'[42]; and if necessity were the only requirement individuals could kill in response to the most trivial interference.[43] Reasonable force requires that the force use is 'proportionate'. However, due to the operation of s.43 of the 2013 Act[44] there are now two schemes of self-defence. Namely, non-householder cases, permitted to use 'proportionate' force,[45] and householder cases, permitted to use up to 'grossly disproportionate' force.[46]

These schemes define what level of force is to be considered reasonable in particular circumstances. Reasonableness is the standard which the rationale for self-defence demands, if the force used is unreasonable – being excessive to the threat posed, then the defence will not be available[47]. Using Leverick's analysis to provide an extreme example; one is not permitted to kill in self-defence if the aggressor merely threatens to strike the defender; the aggressor will not have forfeited their right to life.

For Ashworth, the reasonableness of the force used, whether proportionate or disproportionate to the threat posed, is judged not on the beliefs of the defendant, but by an objective assessment –the standard of the 'reasonable man'.[48] This is demonstrated by *Owino*[49] where it was held that a misjudgement by the defendant as to the level of force required is not a defence. This is a mistake of

[42] Aquinas, T. (1265-1274), *Summa Theologica, II-II, Qu. 64, A.7.* http://www.egs.edu/library/thomas-aquinas/articles/summa-theologica-part-ii-ii-secunda-secundae-translated-by-fathers-of-the-english-dominican-province/treatise-on-the-cardinal-virtues-qq-47-170/question-64of-murder/ (accessed 6/5/14).
[43] Manning (2005), pg. 61.
[44] Which amends s.76 of The Criminal Justice and Immigration Act 2008.
[45] S.76(6) of The Criminal Justice and Immigration Act 2008.
[46] S.76(5) of The Criminal Justice and Immigration Act 2008.
[47] *R v Clegg* [1995] 1 AC 482 (HL).
[48] Ashworth, A & Horder, J. (2013), *Principles of Criminal Law*, 7th Edition, Oxford University Press, pg. 120.
[49] *R v Owino (Nimrod)* [1996] 2 Cr App R 128 (CA).

law, not fact. However, it would appear that there is some limited scope for mistakes regarding the level of force via the *dictum* in *Palmer*.[50]

If the force is deemed to be reasonable in the circumstances that the defendant honestly believes to be the case, then it will be 'justified in every sense'.[51] This applies to claims in both civil and criminal proceedings although there are distinctions between them.[52] [53] There is some guidance regarding reasonable force to be found in s.76 (7) of the 2008 Act;[54] however it does not adequately provide any reference as to a test to use when determining the proportionality of force used in self-defence.

iii) Other factors

There are a number of others factors to self-defence, which must be considered for the sake of completeness.[55] The first of these is mistake in self-defence. As previously stated, the defendant is judged by the circumstances that he reasonably believed to be the case, even if that belief is unreasonable.[56] One proviso to this is that the defendant cannot rely on a mistaken belief which is

[50] *R v Palmer* [1971] AC 814 (PC); see Lord Morris at 832. Further discussion on *Palmer* is to be found in part 2(b) regarding the reasonable force test.
[51] Ormerod, D. (2011), *Smith and Hogan's Criminal Law*, 13th Edition, Oxford University Press, pg. 386.
[52] *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25 (HL).
[53] This is unfortunately beyond the scope of this essay; as s.43 of the Crime and Courts Act 2013 does not extend to the defence of civil claims using self-defence. One significant difference between self-defence in civil and criminal cases is that in civil law an honest, but unreasonable mistake is no defence. However, it is worthy of note that civil actions for trespass to the person will be struck out where there is self-defence by the defendant, unless the action in self-defence is deemed to be 'grossly disproportionate'; s.329 the Criminal Justice Act 2003. This matches the standard of force in householder cases following the changes made by s.43 of The Crime and Courts Act 2013.
[54] Which provides: 'In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—

> (a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and
> (b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.'

[55] Although unfortunately there will be little time to consider any of them in any significant depth.
[56] *R v Williams (Gladstone).*

caused by intoxication, as per *O'Grady,*[57] the *dictum* of which is now statutory, due to s.76 (5) of the 2008 Act.[58] Furthermore, it is clear from *Martin*[59] that psychological characteristics of the defendant which make him likely to perceive heightened threats will not be contemplated when assessing mistake for in self-defence.[60]

Linked to mistake are unknown circumstances of justification. This is when a defendant could have acted in the way he did on the basis of a justification such as self-defence, but was not aware of the justifying circumstances. In *Dadson*[61], it was held that unknown circumstances do not provide a defence, because the defendant was not acting on the basis of that justification.[62]

A second concern is the possible effect of Article 2 of the ECHR[63], which protects the right to life, on self-defence. Article 2 provides:

'1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this

[57] *R v O'Grady* [1987] 3 All ER 420 (CA).
[58] Which provides:'(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.'
[59] *R v Martin (Anthony)* [2001] All ER 435 (CA).
[60] This has been criticised as running contrary to the authority of *Williams (Gladstone)* from which it would be believed that psychological and physical characteristics of the D would be taken into account when assessing the potential for a subjective mistake; particularly when it is considered that such evidence is allowed in cases of provocation. Furthermore, the reasoning of Lord Woolf is unsatisfactory when it is considered that Martin was charged with murder, and not a lesser offence. One of the possible reasons for this distinction is the fact that self-defence provides a complete defence, whereas provocation (now loss of control) provides only a partial defence, and does not result in an acquittal. Furthermore, self-defence is available to any offence which involves the use of force, whereas provocation is only a defence to murder; see Ashworth & Horder (2013), pp. 209-211.
[61] *R v Dadson* (1850) 2 Den 35 (Assizes).
[62] Affirmed in *Chapman v DPP* (1988) Times, 30 June (QBD), see also: Hogan B. (1989), *The Dadson Principle*, Crim LR 1989, Oct, 679-686.
[63] Which is implemented into domestic law by virtue of The Human Rights Act 1998.

penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a. in defence of any person from unlawful violence…'[64]

It is argued by Leverick,[65] drawing on case law,[66] that the position of English law regarding mistake is incompatible with the Convention, due to the requirement of Article 2 that the deprivation of life is only permissible when 'absolutely necessary'.[67] For Article 2, any mistake must be held for 'good reasons' – whereas English law, only requires an honest belief, it need not be reasonable.[68]

It is believed, that Article 2 and the current law on self-defence do conflict. A move to a 'reasonable belief' based approach could be beneficial in resolving this conflict, and would reflect mistake in other areas of criminal offences, such as consent in sexual offences.[69]

Thirdly, is the question of a duty to retreat – mentioned previously when discussing *Fegan*[70]- where there was a requirement that force in self-defence was used only when the defendant had retreated

[64] Article 2 continues: 'b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; c. in action lawfully taken for the purpose of quelling a riot or insurrection.'
[65] Leverick, F. (2002), *Is English self-defence law incompatible with Article 2 of the ECHR?* Crim LR 2002, May, 347-362.
[66] *McCann v United Kingdom* (1996) 21 E.H.R.R. 97; *Andronicou and Constantinou v. Cyprus* (1998) 25 E.H.R.R. 491; *Kelly et al. v. United Kingdom* (2001) 11 B.H.R.C. 1; *Gül v. Turkey* (2002) 34 E.H.R.R 435
[67] See also: Parsons, S. & Andoh, B. (2012), *Private and public defence in the criminal law and in the law of tort – a comparison,* J. Crim. L. 2012, 76(1), 22-28, pp. 27-28.
[68] Unfortunately, this argument is beyond the scope of this essay, but for further discussion see: Smith, J.C (2002), *The use of force in public or private defence and Article 2*, Crim LR 2002, Dec, 958-962, and Leverick, F. (2002), *The use of force in public or private defence and Article 2: A reply to Professor Sir John Smith*, Crim LR 2002, Dec, 963-967; *Bubbins v. UK* (2001) 41 EHRR 24 (ECtHR); *R (on the application of Bennett) v. HM Coroner for Inner South London* [2006] EWHC 196 (Admin) (QBD) approved in [2007] EWCA Civ 617 (CA).
[69] *DPP v Morgan* [1976] AC 182 (HL); s.1(1) of the Sexual Offences Act 2003.
[70] See pg, 7, footnotes 41.

before using force.[71] However, this is no longer the case. In *Bird*[72] it was stated by Lord Lane that there was no duty to retreat, but the possibility of retreat was a factor to consider when assessing the reasonableness and the necessity of force.[73]

This is on a statutory basis via s.148 of The Legal Aid, Sentencing and Punishment of Offenders Act 2012, which amends s.76 of the 2008 Act, which now provides:

'(6A) In deciding the question mentioned in subsection (3), a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a duty to retreat.'

Therefore an individual claiming self-defence has no duty to retreat. However, it is a factor that will still be considered when determining the availability of the defence.

Finally, are cases of self-induced attack; a claim to self-defence will fail where the defendant provokes the attack from the victim. This is stated by Lord Lowry in *Browne:*[74]

'The need to act must not have been created by conduct of the accused in the immediate context of the incident which was likely or was intended to give rise to that need [of self-defence].'

This is qualified by the limitation that a defendant may rely on the defence where the victim has reacted to the incitement in a manner that is disproportionate.[75]

[71] Ashworth (2013), pg. 209.
[72] *R v Bird* (1985) 81 Cr App R 110 (CA).
[73] Lord Lane at 114.
[74] *R v Browne* [1973] NI 96 (CA) – Northern Ireland.
[75] *R v Rashford (Nicholas)* [2006] Crim LR 647 (CA); *R v Keane* [2010] EWCA Crim 2514 (CA).

It is important to note that this rule does not preclude a defendant from going somewhere where he knows he will, or is likely to be attacked. The case of *Field*[76] illustrates this point. In this case the defendant was warned that W and others were intending to attack him. F did not heed this warning, and when W found F, F stabbed him in self-defence. F's plea of self-defence was not defeated by him refusing to stay inside despite the warnings. A distinction can be drawn between a person acting lawfully with the realisation of possible violence[77]and when a person provokes a self-induced attack and claims self-defence.[78]

The key aspects of self-defence have now been considered. Subsequently, the arguments for and against the changes made by the 2013 Act can now be addressed. This will be done in light of the discussion regarding the law of self-defence prior to the amendments, which still applies in circumstances where the enhanced defence have not.

2. Arguments for the Amendments

This part will examine the rationale behind the changes made by s.43 of The Crime and Courts Act 2013. There are three arguments underlying the changes made by s.43 which will be considered in turn. Firstly, it is argued that the previous balance of the law favoured the intruder over the

[76] *R v Field* [1972] Crim LR 435 (CA).
[77] *Beatty v Gillbanks* (1882) 9 QBD 308 (DC).
[78] As in *Browne.* The defendant shot and killed a policeman after being stopped in his vehicle. The rule in *Brown* regarding self-induced attack is to preclude an individual from claiming the defence for what is a deliberate act of violence. Self-defence only applies when an individual is acting to genuinely defend themselves and not to carry out an attack on another person under the guise of the defence.

homeowner,[79] secondly that the 'reasonable force' test was unclear,[80] and finally, that the law failed to recognise the significance of the home.[81]

a) Balance of the Law

The primary argument behind the expansion of self-defence which was undertaken by the Crime and Courts Act was that it was believed that the law favoured the intruder and did not protect the homeowner.[82] Damien Green MP[83] stated that the provisions of the 2013 Act 'provide an extra level of protection that is not currently available for householders in the particularly and terrifying circumstances of finding an intruder in their home.'[84] In particular, it was felt that the law of self-defence did not reflect that it was the burglar who was the 'villain', with the homeowner being the innocent party. Two *cause célèbres* are frequently cited in support of this argument – the cases of *Martin*[85] and *Hussain*[86].

In *Martin,* the defendant shot two individuals who were burgling his farmhouse. One of the victims died, and the other was injured. The defendant claimed that he shot the victims after being awoken by noises made during the burglary.[87] However, it was alleged by the prosecution that Martin had

[79] Christopher Grayling, *Chris Grayling speech in full*, (*Politics.co.uk*, 9th Oct 2012; http://www.politics.co.uk/comment-analysis/2012/10/09/chris-grayling-speech-in-full (accessed 12/3/14
[80] See Damien Green MP and Shailesh Vara MP in the Public Bill Committee; *Crime and Courts Bill [Lords]*, Ninth Sitting, PBC (Bill 115) 2012-2013, 5th Feb 2013.
[81] Miller, S. (2013), *"Grossly disproportionate": home owners' legal licence to kill*, J Crim L 2013, 77(4), 229-309, pg. 305.
[82] Malcolm, J.L. (2011). *Self-defence in England: Not Quite Dead,* accessed: http://www.alicemariebeard.com/scholars/texts/Malcolm_self-defence.doc (1/3/14), pg. 6.
[83] Minister of State for Policing and Criminal Justice.
[84] Public Bill committee, *Crime and Courts Bill* [Lords], pg. 287; see also, *Use of force in self defence at place of residence,* Crimminal Legal and Legal Policy Unit, (26 April 2013), Minister of Justice: Circular No. 2013/02.
[85] *R v Martin (Anthony)* [2001] EWCA Crim 2245 (CA).
[86] *R v Tokeer Hussain & Munir Hussain* [2010] EWCA Crim 94 (CA).
[87] See Lord Chief Justice Woolf in *Martin* at [12].

lain in wait for the victims, intended to kill or seriously injure them[88]. It was stated by Lord Woolf at paragraph 80 that:

'Mr Martin was entitled to use reasonable force to protect himself and his home, but the jury were surely correct in coming to their judgement that Mr Martin was not acting reasonably in shooting one of the intruders, who happened to be 16, dead and seriously injuring the other.'

Whilst we cannot know the basis on which the jury found the actions of Martin to be excessive it was not disputed that Martin shot the burglars from behind. This action appears *prima facie* excessive, because they did not pose a threat to him and appeared to be fleeing. The defendant's appeal that self-defence should have been available was dismissed. However, the court did reduce his conviction from murder to manslaughter on the grounds of diminished responsibility.[89]

In *Hussain* the defendants were brothers who were prosecuted after chasing fleeing burglars and striking the burglar they caught (Salem) over the head with a cricket bat, causing brain damage.[90] The prosecution focused solely on the injuries caused when Salem was defenceless on the ground, and not on the events which occurred inside Hussain's home. Self-defence was not available as Salem posed no threat.[91]

[88] See Lord Chief Justice Woolf in *Martin* at [13].

[89] As governed by s.2(1) of the Homicide Act 1957. The partial defence, available only to murder, reduces a can reduce the offence to voluntary manslaughter on the basis that the defendant was suffering from an abnormality of mind which impaired his mental responsibility for his involvement in the killing.

Martin was suffering from paranoid personality order, in addition to depression. He claimed that this made him more likely as an individual to act in excessive self-defence. Such psychiatric conditions are not relevant in relation to self-defence, as discussed previously, however they were relevant to the issue of diminished responsibility.

[90] See Lord Chief Justice Judge in *Hussain* at [17] and [17].

[91] See Lord Chief Justice Judge in *Hussain* at [19].

Supporters of the reforms argue that these are examples of homeowners being unreasonably prosecuted for actions which they undertook in defence of themselves and their homes.[92] Comparatively, the homeowners received much longer sentences than the intruders.[93] This is evident in *Hussain* where the victim was not fit to plead in relation to the burglary due to the injuries he suffered, yet had gone on to commit further offences.[94] Contrastingly, the brothers received sentences of imprisonment at first instance,[95] which were reduced to suspended sentences on appeal.[96]

However, this reasoning is rejected as the *cause célèbres* cited in support of this argument are not cases of self-defence, and would not fall within the ambit of the enhanced defence. In relation to *Martin*, Patrick Mercer MP when discussing an earlier Bill with identical provisions[97] stated that the expanded defence would not apply, with self-defence continuing to be unavailable.[98] Furthermore, *Hussain* was a revenge attack on a burglar who did not pose a threat.[99] It too would not fall within the enhanced defence because the force was not used in a dwelling.[100]

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[92] Hennessey P, & Kite, M. *Tories back new rights to help home owners protect themselves from burglars,* (*The Telegraph*: 19th Dec 2009), http://www.telegraph.co.uk/news/uknews/law-and-order/6844682/Tories-back-new-rights-to-help-home-owners-protect-themselves-from-burglars.html (accessed 4/4/14).
[93] Whitehead, T. *Seven in ten burglars avoid prison, figures show* (*The Telegraph*: 8th April 2009), http://www.telegraph.co.uk/news/uknews/law-and-order/5119818/Seven-in-ten-burglars-avoid-prison-figures-show.html (accessed 1/5/14).
[94] See Lord Chief Justice Judge in *Hussain* at [13].
[95] Tokeer Hussain was sentenced to three years and three months imprisonment, and Munir two years and six months imprisonment.
[96] See Lord Chief Justice Judge in *Hussain* at [13], [45] and [46].
[97] The Criminal Law (Amendment Householder Protection) Bill 2004-2005.
[98] Broadbridge S., *Criminal Law (Amendment) (Householder Protection) Bill,* Research Paper 05/10, Home Affairs Section: House of Commons Library, pg. 27; Mercer, P. *Patrick Mercer: Even Tony Martin intruder said the law should be harder. So why on earth isn't it?* (*Mail Online*: 8th Sep 2012), http://www.dailymail.co.uk/news/article-2200445/PATRICK-MERCER-Even-Tony-Martin-intruder-said-law-harder-So-earth-isnt-it.html (accessed 14/4/14). See also Ann McIntosh discussing her Bill; *New bid for tougher intruder law*, (*BBC News*: 28th Oct 2005), http://news.bbc.co.uk/1/hi/uk_politics/4383970.stm (accessed 2/3/14).
[99] See Lord Chief Justice Judge at [34].
[100] See s.76(8A)(b) and part 4 below discussing the requirement of a householder case.

Elliott and Quinn state that the Crown Prosecution Service have only brought 11 prosecutions in the 15 years between 1990 and 2005[101] [102] concerning individuals defending both commercial and residential premises from burglars.[103] It is also noted by Squires that the UK courts have been historically sympathetic to self-defence cases.[104] When this is considered, it seems Miller's[105] conclusion that this argument does not justify the changes made to the law is unavoidable. The cases used in support are not self-defence, and there are so few cases that the change may only have a limited effect.[106]

On this basis, it would appear that the argument that the law was imbalanced is not a strong one. The cases cited in support of the argument would not be decided any differently under the new law. Additionally, there appear to be very few cases from which to base the conclusion that the law is in fact imbalanced, with only 11 in 15 years, including the two discussed above. It would appear that the reasonable force test was an adequate filter in permitting lawful actions of self-defence, and filtering unlawful actions from legal protection.

b) The Reasonable Force Test Lacks Clarity

[101] Elliott, C. & Quinn, F. (2008), *Criminal Law*, 7th Edition, Pearson Education, pg. 335.
[102] Although this figure has been dispute by the Telegraph; Miller, K. & Hennessy, P.; *We show that the fight-back figures are wrong,* (*The Telegraph* 1st Jan 2006), http://www.telegraph.co.uk/news/uknews/1481283/We-show-that-the-fight-back-figures-are-wrong.html (accessed 1/4/14).
[103] Note that the enhanced provisions do not usually include commercial premises; see part 4.
[104] Squires, P. (2006), *Beyond July 4th?: Critical Reflections on the Self-Defence Debate from a British Perspective,* 2 J.L. Econ. & Pol'y 221 2006, pg. 223.
[105] Miller (2013), pg. 303.
[106] With only 11 cases in 15 years between 1990 and 2005 according to a CPS informal trawl; Almandras, S. (2010), *Use of force against intruders,* Key Issues for the New Parliament 2010: House of Commons Library Research.

Secondly, is the argument that the reasonable force test[107] was unclear? Damien Green MP in the Lords Committee debate on the Crime and Courts Bill stated:

'The purpose of the provision is to give not only greater protection to householders, but greater clarity about the protection they can seek, not least so that judges know what Parliament intends.'[108]

The dissatisfaction from the reasonable force test stems from the question being one which is left to the discretion of the jury.[109] This means that the test can be difficult to adequately define, as the very definition of what is 'reasonable' is inherently circumstantial. It could therefore be difficult for an individual to know what level of force they are permitted to use in the circumstances in which they find themselves.

However, it is difficult to see how the amendments made by the 2013 Act clarify the law for the individual who seeks to rely on self-defence. The question of what is 'grossly disproportionate' still left to the 'black box' discretion of the jury.[110] The movement from one subjective standard to another ensures that the difficulties with the reasonable force test will remain.

The thinking underlying the criticism of the reasonable force test is rejected by Dennis[111] who states that it 'overlooks the significant of Lord Morris' dictum in Palmer'.[112] In *Palmer,*[113] Lord Morris stated

[107] This is still used in all cases of self-defence. However, the use of 'reasonable' in householder cases has been expanded to include disproportionate force.
[108] Public Bill committee, *Crime and Courts Bill* [Lords], pg. 278.
[109] Getzler, J. (2006), *Use of Force in Protecting Property,* 7 Theoretical Inq L 131 2006, pg. 151.
[110] Getzler (2006), pg. 151; see Lord Diplock in *Attorney-General for Northern Ireland's Reference (No. 1 1975)* [1977] AC 105 (HL), at 133.
[111] Dennis, I. (2000), *What should be done about the law on self-defence?* Crim LR 2000, Jun, 417-418.
[112] At pg. 417.
[113] *R v Palmer* [1971] AC 814.

that a person is not expected to 'weigh to a nicety the exact measure of his defensive action',[114] a statement which is now on a statutory footing via the operation of the s.76(7)(a) of the 2008 Act.[115]

The *dictum* of Lord Morris demonstrates that there is an element of discretion in favour of the defendant in the reasonable force test. It acknowledges the criticism of the test; that an individual may not know exactly what level of harm they are permitted to use in self-defence, and allows them a limited amount of leeway if they fall on the wrong side of the test. On this basis, the criticism that the reasonable force test lacks clarity seems inappropriate. The test appears to intentionally lack certainty to allow discretion in favour of the individual acting in self-defence, and the inherent flexibility in the test is one of the primary strengths of the law in this area.

Furthermore, it is arguable that the substantive changes made may confuse the law for two reasons. Firstly, as stated by Jenny Chapman MP,[116] there was already clarity in the law prior to the changes,[117] with a substantial amount of common law helping to define reasonable force. Whilst the question was ultimately left to the jury, the case law may have assisted them in their deliberations. This case law no longer provides any assistance as to the level of force which is permitted in self-defence under the enhanced doctrine.

Secondly, it is possible that the existence of two standards of self-defence could cause confusion within the law. This is compounded by important distinctions within the amendments, which mean that there can be a fine line between a householder case and a non-householder case; where significantly differing levels of force are permitted.[118]

[114] At pg. 832.
[115] Note that Dennis was writing prior to the enactment of the 2008 Act.
[116] Shadow Minister for Justice.
[117] Public Bill committee, *Crime and Courts Bill* [Lords], pg. 273.
[118] The requirements of a householder case will be discussed in detail in Part 4 (a).

It would appear, even if the reasonable force test is deemed to lack clarity – which is true to an extent, the reforms do little to solve the issue. The amendment merely expands the ambit of permissible force in self-defence, and fails to address the problem that is cited in its favour. Bearing this in mind, it would appear that the amendments were not necessary to achieve this aim.

c) The Significance of the 'Home'

The final argument that will be considered is that the previous provisions which governed the law on self-defence failed to appreciate the significance of the home. It is argued that the law should permit individuals to use greater force due to the frightening nature of home invasions. An argument to this effect is put forward by Joyce Lee Malcolm, who argues that the scope of self-defence should be extended. Much of Malcolm's argument is based on the claim that crime is on the rise, and that this can be prevented by expanding the ambit of self-defence.[119]

However, when domestic burglary[120] rates are considered, this claim does not appear to be the case. The number of domestic burglaries in England and Wales between October 2012 and September 2013 was 222,291. This represented a drop of 5% on the previous year. Perhaps more significantly, this was a drop of 49% on the number of domestic burglaries ten years previously.[121]

Whilst these statistics are for police reported crimes, and therefore do not take into account unreported burglaries, it is submitted that these figures are nonetheless indicative of an overall

[119] Malcolm (2011), pp. 1-2.
[120] Whereas Malcolm focuses on violent and gun crime, it is believed that domestic burglary rates are the more telling indicator regarding the claim that the ambit of self-defence in the home should be expanded.
[121] Office for National Statistics, *Crime in England and Wales; Year Ending September 2013*, pg. 18; http://www.ons.gov.uk/ons/dcp171778_349849.pdf (accessed 13/3/14).

downward trend. In light of this, Malcolm's claims for an enhanced law of self-defence do not appear to be as pressing as made out to be.

Further academic support for the significance of the home is to be found in the work of Sangero, who states that there is a 'special emotional affinity between a person and his home'.[122] There has been some support in English and Welsh law of this line of thought prior to the 2013 Act. This is seen in *Hussey*[123] where the Lord Chief Justice, in quoting Archbold's *Criminal Pleading: Evidence and Practice* stated:

'In defence of a man's house, the owner or his family may kill a trespasser, who would forcibly dispossess him of it in the same manner as he might, by law, kill in self-defence a man who attacks him personally; with this distinction, however that in defending his home he need not retreat, as in other cases of self-defence, for that would be giving up his house to his adversary.'[124]

However, such an argument could be indicative of a shift towards a US-esque 'castle doctrine' whereby a homeowner may be permitted to kill an intruder simply for entering the property, even if they pose no threat to the life of the homeowner.[125] The problem with this shift is noted by Dennis who states:

'if an Englishman should be allowed to kill in defence in his castle - then the aggressive armed burglar can be safely be despatched, but so can be the ten-year-old body found stealing apples from the kitchen.'[126]

[122] Sangero (2006), pg. 267.
[123] *R v Hussey* (1924) 18 Cr App R 160.
[124] At pg. 161.
[125] The US models of self-defence will be considered later; along with cases such as that of Trayvon Martin.
[126] Dennis (2000), pg. 417.

Killing in defence of property is rejected emphatically by Leverick,[127] whose basis for self-defence is a rights-based forfeiture approach.[128] Interestingly, it has been stated by David Cameron PM that when a burglar enters another's home they 'leave their human rights outside'[129] – this claim is rejected; posing a threat to property does not lead to forfeiture of the right to life.

Killing to protect property would not sufficiently respect the right to life of the victim, and would possibly conflict with Article 2 of the ECHR, because the killing is not 'absolutely necessary'.[130] Such action would only be necessary when a significant threat to the individual is posed. It is noteworthy that that the enhanced defence requires that the householder believes that they are acting in defence of themselves, or another, and not in defence of their property.[131]

In conclusion, it would appear that none of the arguments in favour of the amendments made by the 2013 Act are particularly persuasive. On an analysis of the case law it does not appear that the law favoured the intruder over the homeowner; and it actually appears that the CPS and Courts were lenient in favour of the homeowner.[132] Furthermore, the changes made do not resolve the lack of clarity in the law prior to the amendments. Broadening the scope of the doctrine does not make the ambit of the defence any clearer; it simply means that it is available in more circumstances. It is

[127] Leverick (2006), 7.
[128] Leverick (2006), 2, See also 2 above discussing the rationale behind the defence.
[129] Prince, R. & Whitehead T. *David Cameron: burglars leave their human rights at the door*' (*The Telegraph*: 1st Feb 2010) http://www.telegraph.co.uk/news/politics/david-cameron/7104132/David-Cameron-burglars-leave-human-rights-at-the-door.html accessed 11/04/14.
[130] This will be discussed in depth in a 4.
[131] In accordance with the requirement of s.76(8A)(a) that it is a case of 'common law' self-defence; this will be discussed in 5.
[132] Lipscombe, S. (2013), *Householders and the criminal law of self-defence*, 10th Jan 2013, SN/HA/2959, pp. 3, 6-9.

possible that the changes will actually operate to confuse the defence due to the existence of two standards.

Finally, the notion that the sacredness of the home means it is worthy of special protection is rejected. Whilst the reasoning behind this rejection is focused on instances of killing in self-defence, the argument behind the change is unsatisfactory by itself due to the leeway already permitted to people using force in self-defence.

3. Arguments against the Amendments

This part will examine the arguments made against the changes to the law of self-defence. The first argument is that the changes unsatisfactorily broaden the scope of self-defence. The second is that the reforms will lead to increased violence, and the third is that the reforms may be contrary to Article 2 of the ECHR. Fourthly, the amendments conflate the defences of loss of control and self-defence, and finally, the changes discriminate against harm from within the home.

a) Broadening the Scope of Self-Defence

The first argument is that the changes unsatisfactorily broaden the scope of self-defence – legitimising the use of disproportionate force.[133] The provisions have been condemned by Liberty who state they are 'unnecessary and set a dangerously low threshold for what will be considered

[133] Wake, N. (2013), *Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives,* J Crim L 2013, 77(5), 433-457, pg. 456.

acceptable violence.'[134] Many of those who advocate this viewpoint are of the opinion that the previous law adequately protected homeowners.

This criticism relies upon the abandonment of the requirement of proportionality which does not sit easily with the rationale underlying self-defence as outlined in part 1. The abandonment of the requirement, in favour of permitting up to 'grossly disproportionate' force has been described as 'backwards and barbaric.'[135] This argument is particularly persuasive as without the requirement of proportionality the scenario outlined in the extreme example in part 1 would be self-defence. This is despite the fact that the action from the defender, in killing the victim, is unnecessary as the threat posed does not require such a response.

Of particular concern is that the enhanced defence could lead to a similar tragedy as the death of Trayvon Martin in the US.[136] [137] Martin was unarmed when he was shot dead by George Zimmerman, after an altercation between the two. This occurred after Zimmerman reported Martin to the police for looking suspicious in his neighbourhood at night-time, and had been warned by officers not to

[134] Liberty (2013), *Liberty's Report stage briefing on the Crime and Courts Bill in the House of Commons,* March 2013; http://www.liberty-human-rights.org.uk/pdfs/policy13/liberty-s-hoc-report-stage-briefing-crime-and-courts-bill-march-2013-.pdf (accessed 4/3/14), pg. 13.
[135] Hirsch, A.; *A barbaric take on self-defence,* (*The Guardian*: 2nd Feb 2010), http://www.theguardian.com/commentisfree/henryporter/2010/feb/02/self-defence-burglary-conservatives (accessed 7/04/14).
[136] Liberty (2013), pg. 14; Turner, J.; *The UK's new self-defence law opens the door for a Trayvon Martin case*, (*New Statesman*; 23rd July 2013) http://www.newstatesman.com/law/2013/07/uks-new-self-defence-law-opens-door-trayvon-martin-case (accessed 8/3/14).
[137] Also seen the recent case of Diren Dede a German exchange student, who was shot dead after entering into a garage, which was left open with a purse in view; *German student Diren Dede killed In 'castle doctrine' case,* (*BBC News*: 1st May 2014), http://www.bbc.co.uk/news/world-us-canada-27243115 (accessed 1/5/14); Associated Press & Daily Mail Reporter; *German exchange student, 17, shot dead by Montana homeowner honoured at memorial service in Hamburg,* (*The Daily Mail:* 4th May 2014) http://www.dailymail.co.uk/news/article-2619956/Slain-German-exchange-student-honored-memorial.html (accessed 6/5/14); the complaint in the case can be accessed here: http://www1.kpax.com/files/jpcopier@co.missoula.mt.us_20140428_152924.pdf (accessed 6/5/14).

follow Martin.[138] Zimmerman ignored this warning, but was acquitted on the basis of Florida's 'stand your ground' self-defence law.

Such legislation permits the use of deadly force when somebody feels they are at risk of bodily harm in a confrontation - with no duty to retreat.[139] Such legislation is distinct from the castle doctrine; which eliminate the requirement to retreat when a defender is in their home.[140] However, in many states this has been expanded to include areas such as cars.[141]

This has led to calls for the repeal of the 'stand your ground' law in Florida, and similar legislation in other states.[142] One concern is that due to the death of Martin, only Zimmerman's version of events could be put to the jury. This is an issue when any death occurs in self-defence, with it being possible that the events did not occur as claimed by the defendant. Of concern in *Martin* were the accusations of racial profiling at trial.

This case highlights the concerns with the amendments made to self-defence. To permit such force contradicts the principle of proportionality – which is one of the core tenets of self-defence. The movement towards populist reforms, which prioritises the views of the public over responsible law making, should be condemned.[143] It is hoped that due to the rare nature of such cases,[144] that the

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[138] Rudolf, J. & Lee, T. *Trayvon Martin Case Spotlights Flordia Town's History Of 'Sloppy' Police Work*, (*Huffington Post*; 4th Sep 2012), http://www.huffingtonpost.com/2012/04/09/trayvon-martin-cops-botched-investigation_n_1409277.html (accessed 8/3/14).

[139] Lerner, R.L. (2007), *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 Journal of Law, Economics, and Policy, *http://ssrn.com/abstract=961468*, pp. 7-18.

[140] Green, S.P. (1999), *Castles and Carjackers: Proportionality and the use of deadly force in defence of dwellings and vehicles,* 1999 U Ill L Rev 1 1999, pg. 6; Drake, D.M. (2007), *The Castle Doctrine: An Expanding Right to Stand Your Ground*, 39 St Mary's LJ 573 2007-2008, pg. 574.

[141] Green (1999), pg. 3.

[142] Montana; Haake, K. *Missoula Rep. Hill looks to repear part of 'castle doctrine'* (*Missoulian*: 1st May 2014) http://missoulian.com/news/local/missoula-rep-hill-looks-to-repeal-part-of-castle-doctrine/article_68641320-d0cc-11e3-a1be-001a4bcf887a.html (accessed 1/5/2014).

[143] Skinner, S. (2005), *Populist politics and shooting burglars: comparative comments on the Lega Nord's proposal to reform Italian self-defence law,* Crim LR 2005, Apr, 275-284.

[144] With only 11 in the last 15 years.

reforms made will have little effect. However, there remains the possibility that the expanded defence will allow claims to the defence which should not fall within it on the basis of its rationale.

The counter-argument to this viewpoint is that individuals should have the right to defend themselves from attack,[145] which is predicated on the sanctity of the home argument as discussed previously. This argument states that the enhanced defence reflects the fear that householders experience when being burgled, and that they are not expected to act rationally when this is the case. In agreement with the arguments advanced it is believed by the author that that the test of reasonable force used prior to the amendment sufficiently protected householders, and the claim that the law expected householders to act rationally fails to attach weight to the *dictum* in *Palmer*.[146]

b) Encouraging more Violence

The second criticism is that the changes will encourage vigilantism by the homeowner against intruders[147] due to the legitimatisation of disproportionate force. This could subsequently increase the number of weapons carrying burglars, because they are aware of the greater threat homeowners may pose.[148] This would place homeowners at greater risk of attack.

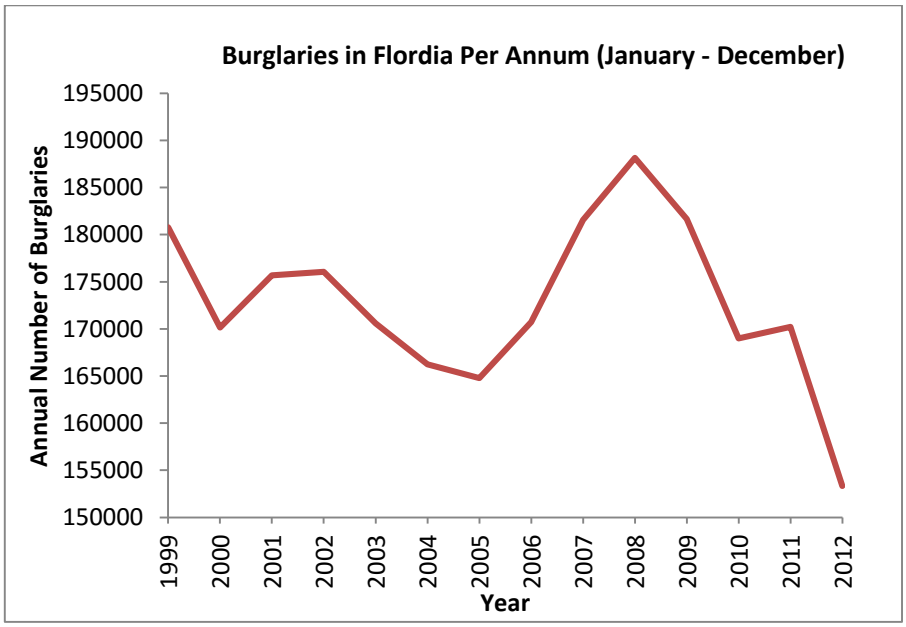
However, this critique is rejected by Malcolm who believes that the enhanced defence will discourage burglaries.[149] Cited in support of this argument is a statement by Brendon Fearon, the

[145] This has been discussed in 3.
[146] See criticism of Dennis (2000) in 3.
[147] Liberty (2013), pg. 14.
[148] Moore-Bridger, B. *Tory change of intruders law "licence to kill",* (*London Evening Standard*: 25th Jan 2010), http://www.standard.co.uk/news/torychange-of-intruders-law-licence-to-kill-6745373.html (accessed 21/3/14).
[149] Malcolm (2011), pp. 18

surviving burglar in *Martin*, claiming that the enhanced defence would have deterred him from burgling due to the greater threat homeowners posed to him.[150]

The validity of the claim that the enhanced defence may act as a deterrent can be assessed by considering the effect of similar provisions in other jurisdictions on burglary rates. For this purpose, Florida will be considered because in 2005 a 'stand your ground' law[151] was passed, enabling individuals to use deadly force with no duty to retreat. There is also a presumption of imminent danger when an intruder enters into a dwelling.

Somewhat surprisingly, the datum (see *fig*. 1) appears to show that during the time period immediately after the legislation was introduced burglary rates rose and did not fall.



[150] Ibid.

[151] See the 2013 Florida Statutes at: http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0776/0776ContentsIndex.html&StatuteYear=2013&Title=-%3E2013-%3E%20776.

fig 1[152]

However, there are a number of limitations with the datum that must be acknowledged. Firstly, the figures are official, so may not take unreported crimes into account. Furthermore, the figures in question include all burglaries in Florida which, unlike the UK data, makes no distinction between dwelling-home and other burglaries.

It is also noteworthy that the Florida legislation applies to all forms of self-defence, and is not confined to dwelling-home intrusion. It is possible that the legislation may have had a deterrent effect on other criminal behaviour. Finally, there are inherent differences between the two jurisdictions (such as the ownership of firearms[153]) which could mean that the effect of the legislation in the UK may be different.

On this basis, it would appear the claim that the enhanced defence would have a deterrent effect should be rejected. However, what must be noted is that the statistics considered do not establish the criticism that the amendments will lead to vigilantism and burglars carrying weapons. Therefore, this is not a satisfactory argument against the changes made by the 2013 Act.

c) The Amendment may Violate Article 2 ECHR

[152] Data gathered from http://www.fdle.state.fl.us/Content/FSAC/UCR/UCR-Home.aspx (accessed 1/4/14). Thanks to George Middleton for assistance with the graph.
[153] Firearms are much more readily available in the US due to the Second Amendment. In the UK a licence must be obtained to possess, own and use a firearm; and particular weapons (such as automatic rifles) are completely prohibited under The Firearms Act 1968.

Thirdly, it has been argued that the amendments may be contrary to Article 2 of the ECHR which protects the right to life.[154] The possible incompatibility of self-defence generally with Article 2 has been discussed previously,[155] and many of the concerns with the previous law continue to apply. The permission of up to 'grossly disproportionate' force in self-defence may fall foul of the 'absolute necessity' requirement contained in Article 2. The exceptions to Article 2 encompass not only the necessity of the force, as discussed previously, but also to the level of force used. Whilst this is not expressly stated in the text of Article 2 – it is clearly established in case law.[156]

An example is provided by *Wasilewska.*[157] Here, Mr Kałucki was shot dead after attempting to escape from armed police. The officers in question were from an anti-terrorist unit, and many of them did not bare visible signs which identified themselves as police. Furthermore, the officers claimed they attempted to resuscitate Mr Kałucki after he was shot, and also claimed they attempted to shoot the tyres of his vehicle, but no evidence of this was found.[158] In finding a violation of Article 2 it was clear from the judgement of the ECtHR that there is a 'principle of strict proportionality inherent in Article 2.'[159]

On this basis, the permission of disproportionate force by householders in self-defence is incompatible with Article 2(2) – as it permits a level of force which is not 'absolutely necessary'. If the amendments are found to be in breach then the courts may have to make a declaration of incompatibility in accordance with s.4 of the Human Rights Act 1998, or attempt to interpret the

[154] As incorporated into domestic law by The Human Rights Act 1998.
[155] See 2 regarding mistake and Article 2 ECHR.
[156] European Court of Human Rights, Fact Sheet – Right to life; http://www.echr.coe.int/Documents/FS_Life_ENG.pdf (accessed 28/3/14), pp. 2-3.
[157] *Wasilewska and another v Poland* [2010] ECHR 28975/04.
[158] Press Release – Chamber Judgements, *Police operation resulting in death of a suspect breached the convention,* 23rd Feb 2010; http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3042405-3360132 (accessed 28/3/13).
[159] At [45] of the decision of the ECtHR.

legislation in a manner which is compatible in accordance with s.3. There could also be challenges in the ECtHR which could lead to the UK being found in breach.

d) Conflation of Loss of Control and Self-Defence

Fourthly, it is argued by Wake[160] that the expanded defence overlaps with the defence of loss of control. Loss of control replaced the partial defence to murder of provocation[161] and is governed by s.54 of the Coroners and Justice Act 2009. Loss of control provides a defence when a defendant loses their self-control as a result of a qualifying trigger;[162] one of which is a fear of serious violence.[163]

Loss of control would provide a partial defence when a defender has killed in excessive self-defence,[164] with self-defence traditionally being unavailable due to the requirement of proportionality not being met as per *Clegg*.[165] Under the expanded defence an overlap would arise when the defendant has killed in disproportionate self-defence inside his home.[166]

However, the overlap causes difficulties because a defendant may seek to rely on the enhanced provisions of the 2008 Act, and in the alternative rely on loss of control. The difficulty with this is firstly, the defendant is arguing that his actions occurred in reasonable self-defence, but in the alternative that he acted excessively and lost his self-control.[167] The reversion to loss of control is

[160] Wake (2013), pp. 3-8.
[161] Provocation was a partial defence to murder, which result in a manslaughter conviction if successful. It required that the defendant lost his control due to some provoking act.
The new defence of loss of control requires that the defendant is provoked by a specified act; a 'qualifying trigger' and is therefore much narrower than the previous defence of provocation which was governed by s.3 of The Homicide Act 1957.
[162] S.54(1) of The Coroners and Justice Act 2009.
[163] S.54(3) of The Coroners and Justice Act 2009.
[164] Wake (2013), pp. 439-440.
[165] *R v Clegg* [1995] 1 AC 482 (HL).
[166] Wake (2013), pg. 438.
[167] Wake (2013), pg. 437.

difficult because the idea of a defendant who lost his control, but is acting reasonably, is contradictory.

This has implications for defendants, because if their actions fall within the overlap between the two defences, they may have to choose between the two. This is because a claim of either of the defences precludes the other. This could be problematic; because if they claim self-defence and fail, they may not be able to rely on loss of control, and if they claim loss of control and succeed, they may have been able to claim self-defence which would have resulted in an acquittal, but are restricted from doing so.

e) Harm from within the Home

The final issue is that the expanded defence is not available when the harm originates from within the home. This is because of the requirement in s.76(8A)(d) of the 2008 Act[168] that the defendant believed the victim to be in, or entering, the building as a trespasser. This would preclude those from suffering domestic abuse originating from within the home from relying on the extended defence.[169] The 'startled householder' is in a better position than any other defendant who attempts to rely on self-defence.[170]

This is concerning because one of the arguments in favour of the changes was that the previous regime failed to recognised the significance of the home.[171] If such reasoning is accepted as the

[168] As amended by the 2013 Act.
[169] Wake (2013), pg. 451; for detailed discussion of this point in relation to US 'castle-doctrine' defences see; Carpenter, C.L. (2003), *Of the enemy within, the castle doctrine, and self-defense,* 86 Marq. L. Rev. 653 2002-2003.
[170] Wake (2013), pg. 448.
[171] See 3 above.

rationale behind the enhanced defence then it would appear it should be available to individuals such as battered persons[172] within the home.

This is because abuse and violence are equally damaging, regardless of their origin. For the individual suffering from abuse from within the home the only option may be to act violently, which could be disproportionate for the same reason the householder may act disproportionality – out of fear. It would appear this distinction regarding the availability of the defence is not tenable considering the underlying reasons behind the substantive changes.

In conclusion, many of the arguments against the changes made are persuasive. Particularly convincing are the arguments regarding the concerns with Article 2 and the issues from harm within the home. On the basis of these arguments it would appear that the changes made are unnecessary, and may cause more problems than it attempts to solve.

4. The Substantive Changes Made

This part will explore the substantive amendments to the law of self-defence by the 2013 Act, considering what a 'householder' case is, and exploring the nature of the 'grossly disproportionate' force test in light of the arguments for and against the changes. Particular reference is made to the law of burglary to determine what a householder case is, as well as to s.329 of the Criminal Justice

[172] Battered person syndrome is a condition which is suffered by persons who have suffered from abuse from another individual. This condition forms the basis for the battered woman defence which has been used in cases of domestically abused women who have killed their abusers; however such women have struggled to rely on the defence of provocation. It is yet to be seen exactly how their cases will be effected by the new defence of loss of control as a result of the 2009 Act; see the cases of *R v Ahluwalia* [1992] 4 All ER 889 (CA); *R v Thornton (No. 2)* [1996] 1 WLR 1174 (CA) and *R v Charlton* [2003] EWCA Crim 415 (CA).

Act 2004, which created a defence to civil actions brought by victims of excessive self-defence when the force was not 'grossly disproportionate'.

a) What is Householder Case?

According to s.76 (8A) of the 2008 Act (as amended) a householder case is one where:

(a) the defence concerned is the common law defence of self-defence;

(b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both);

(c) D is not a trespasser at the time the force is used; and

(d) at that time D believed V to be in, or entering, the building or part as a trespasser.

The first requirement is that a householder case is one where the action of the defendant falls under the 'common law of self-defence'. Whilst this phrase is unclear, it would appear from the Ministry of Justice Circular[173] that this section is intended to ensure that a householder may only rely on the enhanced defence when they are using force to protect themselves or others.[174] This would preclude an individual from relying on the defence when they are acting to protect property, or for any other purposes, such as revenge.[175]

[173] Ministry of Justice Circular No. 2013/02, *Use of force in self defence at place of residence,* pg. 5; also see the Joint Public Statement from the Crown Prosecution Services and the Association of Chief Police Officers (2013), *Householders and the use of force against intruders,* pg. 1, https://www.cps.gov.uk/publications/docs/householders_2013.pdf (accessed 3/4/14).

[174] Common law self-defence is traditionally only concerned with protection of the self, and possibly property. S.3 of The Criminal Law Act 1967 provides a defence to an individual who is using force to prevent the commission of a crime. See 2 above.

[175] See *R v Hussain.*

However, one issue with this is in many instances, an individual may presume that there is a threat to themselves or others, when their property is under threat despite objectively there being no threat to persons. This presumption is utilised in many US states which use a 'castle doctrine' defence. Is this to be assessed according to an objective or subjective determination? It is believed that due to the relationship between self-defence and mistake that this requirement would be subjective;[176] however there is a lack of clarity. Furthermore, if a subjective approach is taken, the enhanced defence may apply when there is no objective threat and the mistake by the householder is unreasonable.

The second requirement is contained in s.76 (8C) which provides:

'Where—

(a) a part of a building is forces accommodation that is living or sleeping accommodation for D,

(b) another part of the building is a place of work for D or another person for whom the first part is living or sleeping accommodation, and

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is forces accommodation.'

This requirement restricts the circumstances in which the enhanced defence will apply to circumstances when the force is used inside a building, or part of a building, that is a dwelling or forces accommodation. It is submitted that due to the identical language used both in the revised

[176] *R v Gladstone (Williams)*; See 2 above.

section of the CJIA and s.9 of the Theft Act 1968, which governs burglary, that the same interpretation will be applied by the courts.[177]

The requirement that the building, or part of it, is a 'dwelling' is likely to be uncontroversial.[178] However, the inclusion of 'forces accommodation' under the expanded defence could be a concern. In accordance with s.76 (8F) 'forces accommodation' must be interpreted in line with s.96 of the Armed Forces Act 2006.[179]

The availability of the extended defence to members of the Armed Forces is concerning. Such individuals (with the exception of their families) will be trained in the use of force; so would be in a better position to judge what force is in the reasonable circumstances than the 'startled householder' would be. There appears to be little reason for the extended doctrine to apply to such

[177] In particular the phrases 'building', 'part of a building' and 'entry'. A building requires a permanent structure of some sort; see *B and S v Leathley* [1979] Crim LR 314; *Norfolk Constabulary v Seekings and Gould* [1986] Crim LR 167. To constitute part of a building there must be some form of physical barrier; *R v Walkington* [1979] 2 All ER 716 (CA). For entry, it is widely accepted that entry does not require the whole body to be inside the building, and it does not require enough of the body to be inside the building to enable the D to commit his crime; *R v Brown* [1985] Crim LR 212 (CA); *R v Ryan* [1996] Crim LR 320 (CA)

[178] Commercial premises will be discussed below.

[179] For reference this section provides:

'(1) In this Part "service living accommodation" means (subject to subsection (2))–

(a) any building or part of a building which is occupied for the purposes of any of Her Majesty's forces but is provided for the exclusive use of a person [within subsection (1A)] , or of such a person and members of his family, as living accommodation or as a garage;

(b) any other room, structure or area (whether on land or on a ship) which is occupied for the purposes of any of Her Majesty's forces and is used for the provision of sleeping accommodation for one or more persons [within subsection (1A)]; or

(c) any locker which–

(i) is provided by any of Her Majesty's forces for personal use by a person [within subsection (1A)] in connection with his sleeping accommodation, but

(ii) is not in a room, structure or area falling within paragraph (b).

(1A) The following are persons within this subsection—

(a) a person subject to service law;

(b) a civilian subject to service discipline.

individuals - aside from the protection it would give to the members of the family who are not trained.[180]

Furthermore, the use of disproportionate force, by a member of the Armed Forces, upon property provided by the Crown, could lead to further issues. This is because the legitimisation of disproportionate force in such circumstances could lead to infringement of Article 2. This is particularly significant because, whilst the act may be private in nature, it is taking place on public authority[181] by an agent of the state. Therefore, there appears to be considerable problems with the availability of the enhanced defence to those in forces accommodation.

Further clarification as to the application of the requirement in s.76 (8A)(b) is provided by s.76(8B) of the Act which states that these criteria are fulfilled where:

> (a) a part of a building is a dwelling where D dwells;
>
> (b) another part of the building is a place of work for D or another person who dwells in the first part; and
>
> (c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is a dwelling.

Identical clarification is provided by s.76 (8C) in relation to forces accommodation.

The effect of these sections is that it would permit a defender to rely on the enhanced defence where they only dwell, or sleep, in part of the building, and the other part of that building is a place

[180] It is likely extended to such individuals due to the special nature of the home. This argument has been considered in detail in 3 above. However, it is the belief of the author that whilst the home may be worthy of protection; the law prior to the 2013 Act already afforded that protection.
[181] For the purposes of s.6 of The Human Rights Act 1998.

of work. For instance, this would allow a shopkeeper who lives above his shop to rely on the enhanced defence inside his shop, providing it is internally connected to his dwelling, and the other criteria of the defence are fulfilled.

However, the inclusion of this is problematic. This is because in cases such as the example provided above, the requirement that the intruder pose a threat to the householder may not be objectively met. It is possible, that the intruder, who has not entered the dwelling, is seeking to carry out a commercial burglary.

Furthermore, there is no requirement that the shopkeeper is in his residence at the time of the intrusion. It would appear to apply to shopkeepers and others who live in the building (the defence would not apply to customers[182]) regardless of the circumstances of the burglary place. In such circumstances, the enhanced defence goes beyond the ambit permitted by the rationale outlined earlier. The shopkeeper, when the burglary is taking place solely in the commercial premises, is not a 'startled householder' and his home is not under threat. The extended defence, even if the arguments in favour of it are accepted, should not apply.

The final requirement is that the defendant is not a trespasser at the time the force was used, and he believed that the intruder was a trespasser, or entering as a trespasser at the time. It is submitted that both these requirements will be interpreted in light of the case law on the meaning of trespasser under s.9 of The Theft Act.[183] Therefore, this will not be considered any further.

[182] Because of the requirement that the building is a dwelling where the defendant dwells; s.76(8B)(a).
[183] In accordance with *R v Collins*[1973] QB 100 (CA) a burglar is a trespasser when they are on the premises without permission, and aware of that fact. The requirement of awareness is not relevant for the purposes of s.43; which is concerned with the individual being there without permission. Also note that an individual can become a trespasser if permission to be on the premises is withdrawn, or if they act in excess of their permission to be on the premises; *R v Jones & Smith* [1976] 3 All ER 54 (CA).

b) What is Grossly Disproportionate Force?

If the requirements of a householder case are fulfilled, then, in accordance with s.76 (5A), the degree of force used by the defendant will only be unreasonable if it is 'grossly disproportionate' in the circumstances as he honestly believed them to be. The phrase mirrors the language in s.329 of the Criminal Justice Act 2003, which provides a defence to civil actions when the defendant acted in excessive self-defence. According to this Act, the defendant will have a defence providing the level of force is not 'grossly disproportionate'.

Despite the 'grossly disproportionate' force test being used for 10 years, there is scant case law as to the interpretation the courts will give to this phrase. The primary case on the matter is *Adorian.*[184] However, both the High Court and the Court of Appeal omitted to define what 'grossly disproportionate' force is.

The only indication as to what force would not be permitted was provided by Patrick Mercers MP, when discussing the earlier Criminal Law Bill.[185] Mercer states that his Bill, which used identical provisions as in the 2013 Act, would not apply to cases such as *Martin*. However, it would apply to *Osborn.*[186]

[184] *Adorian v. Commission of Police of the Metropolis*; [2008] EWHC 1081 (QB), [2009] EWCA Civ 18, [2010] EWHC 2861 (QB).
[185] The Criminal Law (Amendment Householder Protection) Bill 2004-2005.
[186] *R v Osborn* [2004] EWCA Crim 2059 (CA).

Brett Osborn was sentenced to five years imprisonment[187] for the killing of Wayne Halling. Halling ingested cocaine and began injuring himself. Two females left Osborn's house and were accosted by Halling. When they retreated into the property Halling attempted to follow them. Osborn stated that Halling came towards him, he then picked up a knife and stabbed Halling five times. Halling was taken away by paramedics but died on the way to hospital.[188]

As the matter on appeal was that of sentence, no comment was made by Justice Curtis regarding the level of force used. Furthermore, the opinion of Patrick Mercer MP is non-judicial, and was made in relation to a Bill that failed to pass a decade ago, so little weight can be attached to his opinion. It is submitted the question of 'grossly disproportionate' force is one which will be put to the jury, but the guidance they receive on this point is a different matter. The author hopes that the circular test from gross negligence manslaughter is not recycled here; to the effect that grossly disproportionate force is defined as force which is grossly disproportionate.[189]

Michael Wolkind QC[190] made the following comments on the 'grossly disproportionate' test:

'If I manage to tackle a criminal and get him to the ground, I kick him once, and that's reasonable, I kick him twice and that's understandable, three times forgivable, four times, debatable, five times, disproportionate, six times it's very disproportionate, seven times extremely disproportionate—

[187] Palmer, A. *Five years in prison for acting in self-defence*, (*The Telegraph*: 9/5/2004) http://www.telegraph.co.uk/news/uknews/1461346/Five-years-in-prison-for-acting-in-self-defence.html (accessed 12/3/14); It was reduced to three and a half years on appeal.
[188] See *Osborn* at [3] to [5].
[189] In accordance with the case of *R v Adomako* [1995] 1 AC 171 (HL) gross negligence is defined as negligence so gross as to warrant a criminal conviction. This is an ill-defined circular test.
[190] Who represented both Tony Martin and Munir Hussain.

eight times, and it's grossly disproportionate. It is a horrible test. It sounds like state-sponsored revenge.'[191]

This quotation outlines the wide range of force which may fall under the test contained within the 2013 Act and demonstrates how far the 'grossly disproportionate' force test could be interpreted. Wolkind provides a practical example of the core issue with the 'grossly disproportionate' force test; the abandonment of proportionality.

It is believed that the 'grossly disproportionate' force test is inherently unclear, and juries may struggle to apply it. The lack of guidance as to the level of force permitted, means homeowners and jurors would struggle to know what level of force is legally permissible.

In conclusion, it would appear there are problems with the implementation of the enhanced defence. The expanded defence including both forces accommodation and commercial premises[192] does not sit easily with the rationale for the changes outlined in part 2. In both instances it is likely that the defendant is not the 'startled householder' that the amendments seek to protect. Furthermore, the level of force permitted is inadequately defined, despite 10 years of utilisation in civil claims. This means the law is likely be more opaque than it was before the changes were made; this is an area for concern when it is remembered that the lack of clarity of the reasonable force test was one argument in favour of the amendments.

[191] Michael Wolkind QC, Sky News: Property Householder Self-Defence Rights, http://www.topcriminalqc.co.uk/property-householder-self-defence-rights-barrister-qc.html (accessed on 14/4/14).
[192] In specific circumstances.

5. Conclusion

Overall, it is believed the changes made by s.43 of the 2013 Act are unsatisfactory. On an analysis of the underlying rationale, there appears to be little persuasive argument in favour of the extended defence, particularly when the substance of those changes is borne in mind. Firstly, the argument that the law favoured the intruder is weak when it is considered that the cases cited in favour of this argument, *Martin*[193] and *Hussain*[194], are not be covered by the enhanced defence.

Secondly, whilst it is acknowledged that due to the discretionary nature of the reasonable force test it may be unclear, the *dictum* of *Palmer*[195] makes it clear that force on the borderline of proportionality will be judged in favour of the defender. Similarly, the changes do not resolve the lack of certainty. The changes have widened the ambit of the defence so higher levels of force fall within self-defence. The 'grossly disproportionate' force test is still left to the jury.

Finally, the sanctity of the home argument runs into difficulties when it is considered burglary rates have dropped significantly. Likewise, if this argument is accepted as the rationale underlying the changes it is unclear why the requirement that the intruder be a trespasser is accepted. Surely, if the sanctity of the home is the reason why householders should be afforded an extended defence, the origin of the threat should not matter, providing the threat occurs inside the home?

On this basis the arguments in favour of the changes appeared to be weak and were rejected. However, the difficulties with the extension of the defence did not end there. Firstly, it was argued that the changes unsatisfactorily broaden the scope of self-defence; with an abandonment of the

[193] *R v Martin (Anthony)* [2001] All ER 435.
[194] *R v Hussain (Tokeer) & Hussain (Munir)* [2010] EWCA Crim 94.
[195] *R v Palmer* [1971] AC 814.

requirement of proportionality, which is inherent within the rationale underlying self-defence. Linked to the abandonment of proportionality is the argument that the changes may be contrary to Article 2; due to the innate requirement of proportionality found within the Convention. Both of these arguments are accepted. The abandonment of proportionality is concerning, and could lead to tragedies such as that of Trayvon Martin occurring in the UK.

Other arguments considered include the reforms leading to vigilantism and violent crime. Whilst little evidence can be found of this; it is a possibility that cannot be ignored. The counter-argument to this statement was that the changes may result in fewer burglaries due to the deterrent effect that the provisions may have. On a study of Florida, similar provisions had no such effect, with burglaries appearing to increase.[196] On this basis the argument that the provisions would deter burglaries looks uncertain.

Finally, there is the argument the enhanced defence may lead to conflation of the defences of loss of control and self-defence. Whilst this is a practical concern; it would appear that there is an overlap between the two defences, which occurs despite the conflict between the two. One applies when the defendant was acting rationally, the other when he has lost his self-control.

It is believed that the previous law adequately protected the needs of the homeowner; and if anything, the 2013 Act creates more problems. Whilst, the provisions of the 2013 Act extend the protection afforded to homeowners, the existences of two categories of self-defence make the law opaque.

Additionally, as regards to the substance of the legislation; the extension of the 'grossly disproportionate' force test to include both those in Forces Accommodation, and owners of

[196] See discussion in part 4.

commercial premises[197] is concerning. The inclusion of these does not fit with the arguments in favour of the extension of the defendant in part 2, and it is concerning the defence extends to such individuals, as they may not be the 'startled householder' that the legislation intended to protect.

On the whole, it would appear that the enhanced defence is not necessary, but appeals to popular opinion. Cases such as *Martin* and *Hussain* have led to calls for an enhanced defence because it was felt that injustice was done, even though the amendments would have no effect on the decisions in those cases. It is believed that this legislation is not fit for purpose and causes more harm than good. The previous law provided sufficient protection and the view of the public that it did not, appears to be misplaced. Whilst it is not clear how the courts will interpret the 'grossly disproportionate' force test, it would appear that the permission of disproportionate force conflicts with Article 2 of the European Convention and will lead to legal challenges in the future.

[197] In particular circumstances.