

*Self-Defence in Criminal Law*. By BOAZ SANGERO. [Oxford: Hart Publishing. 2006. xviii, 376, (Bibliography) 8 and (Index) 8 pp. Hardback. £52.50. ISBN 9781841136073.]

*Killing in Self-Defence*. By FIONA LEVERICK. [Oxford: Oxford University Press. 2008. xxviii, 217, (Bibliography) 13 and (Index) 7 pp. Hardback. £55.00. ISBN 9780199283460.]

SELF-DEFENCE IS A TOPIC on which many an aspiring criminal lawyer has cut her teeth. The two recent contributions reviewed here are both concerned with the classic remit of private defence in established legal systems, in other words, with domestic criminal law's conception of self-defence.

Boaz Sangero's project and ambition – in which he largely succeeds – is to provide a doctrinally sound framework for the analysis and critique of self-defence as it operates in a variety of legal systems. His methodology is a mixture of inductive and deductive strategies. He first identifies what could be termed the paradigm case of self-defence: a defensive reaction against unwarranted attack, performed as a matter of right and evaluated as justified rather than merely excused. With these features in mind Sangero develops the rationale of self-defence. For him, the specific character of the defence rests on the confluence of three strands of justificatory factors. First, there is the normative value of the interest under attack – the life, bodily integrity, liberty or property of the person attacked. Secondly, there are considerations that make a threat to the protected interest that stems from an *attack* more serious than a comparable risk of harm arising from other causes. These are the fact that the attack violates the autonomy of the victim, giving rise to a legitimate private interest of the victim to reassert her autonomy by forcing a cessation of the attack; the culpability of the attacker; and the public benefit to be derived from the thwarting of attacks on innocent citizens (the protection of the social-legal order). Thirdly, Sangero asserts (within limits, and within those limits, rightly so) that the attacked person has a moral right – against the state – to resist aggression. This point is independently important in order to draw a line between self-defence and vigilantism.

But Sangero's structural analysis of self-defence is not exhausted by this listing of factors that tend to support self-defensive actions. He recognises that in each and every case, there is one consideration that militates against it. This consideration derives from a recognition of the legitimate interests of the attacker. Of course, the attacker has no legitimate interest in performing his attack on the victim. But, as a human being he has, just like his victim, legitimate interests in life, liberty, and so forth. These interests continue to matter even when the performance of the attack lays the attacker open to having self-defensive force used against him. They matter in two ways: first, by ensuring that no more than necessary force may be used against the attacker. Secondly, by opening up the possibility that in exceptional cases the force necessary to repel the attack is judged as so costly to the attacker that the attacked person is forced to sacrifice his interests rather than repel the attack. This latter consideration is developed by Sangero as a suitably qualified proportionality test. A simple comparison of expected physical harms to the attacked person and her attacker would fail to capture the moral importance of the attack itself. Given that the attacker voluntarily oversteps the boundaries of the law and violates the rights of his victim, and that he is at all times free to cease his attack, defensive action that causes greater injury to the attacker than the

victim would have suffered through the attack is, in principle, perfectly acceptable. It is only in extreme cases of disparity between potential consequences that, after taking into account the many additional factors weighing in favour of the victim of an attack, necessary defensive action can be judged impermissible.

Armed with this sophisticated understanding of the rationale of the defence, Sangero enters the debate on many of its long-standing problems. He addresses, *inter alia*, the immediacy requirement and the extent of any duty to retreat, the mental element of the defence, the principles that govern defence of another and the limitations that should be placed on the defence of property. He also offers good reasons why the case of the innocent attacker should be conceptualised as a case of necessity rather than private defence (though it remains a borderline case), and why putative self-defence ought to be seen as an exculpatory defence that follows the rules for mistakes of fact. Provoked attacks and the special problems raised by cases of battered women are likewise not overlooked. On all these issues Sangero has valuable thoughts to offer, and the analytical strength of his framework is powerfully demonstrated throughout.

Praise for the content of Sangero's book must be qualified in two respects. Chapter 2 is a somewhat unnecessary (but thankfully brief) summary of the development of self-defence in American and English law. With regard to the latter, the operation of section 5 of the Criminal Damage Act 1971 is to some extent misunderstood. It also has to be noted, with regret, that Sangero makes no direct use of the modern German literature on self-defence, but relies on a mere handful of articles on the German position published in English. Sangero thus misses the fact that, minor terminological differences notwithstanding, his proposed scheme is in substance virtually indistinguishable from the views espoused by leading modern scholars (see, for example, Claus Roxin's unparalleled *Strafrecht – Allgemeiner Teil I*, 4<sup>th</sup> edn. (Munich 2006), ch. 15, with a wealth of further references). This should in no way distract from the quality of Sangero's proposal but does keep in check any overheated claims to originality.

The main weakness of Sangero's book is the linguistic hardship inflicted on its readers. A kinder or more attentive copy-editor would surely have replaced "reasonability" with "reasonableness", weeded the text of constant points of "significant importance", and suggested suitable substitutes for key phrases such as "social-value-moral significance", "distinction [of] enormous moral and value importance", "value-substantive difference", and so on. These linguistic oddities on occasion hamper the reader's understanding, and certainly make the text a more onerous read than it ought to be. The saving grace throughout, is the high quality of the doctrinal analyses offered by Sangero. His book is worth the extra effort it requires of its readers.

Self-defensive killings in particular have troubled lawyers and philosophers alike, though there is one type of self-defensive killing the legitimacy of which seems fairly obvious to the lawyer: when a person, confronted with an attack on her life by a culpable attacker, slays the attacker in order to save her own life. Yet even with regard to this relatively clear-cut case it pays to be mindful of Sangero's general observation (on p. 9 of his book) that "concentration solely on situations of 'a life for a life' distorts the picture ... and makes it more difficult to find the appropriate rationale [for self-defence] and to determine the suitable legal practice". Fiona Leverick's book on *Killing in Self-Defence* provides, if nothing else, ample evidence for the astuteness of this remark.

Leverick starts by challenging the lawyer's traditional perception of the "life for a life" case as easy. She contends that cases where the victim of an attack is forced to kill the attacker in order to preserve her own life, are in fact morally deeply problematic. This is so because (1) such a killing is a self-interested one and (2) the attacker has a right to life. Rising to the challenge of providing a convincing moral explanation for why the victim of a deadly attack may kill to protect her own life, Leverick rejects consequentialist justifications that turn on the assumption that the attacker's life (at any rate, if he is culpable) "weighs less" or "counts for less" than the life of his victim, or on the assumption that a rule that allows victims of lethal attacks to defend themselves with deadly force will, by deterring attacks, lead to fewer lives being lost overall. The fact that the life of the victim is more valuable to the victim than the life of her attacker can possibly be to her, can likewise not ground an argument for why the victim is entitled to prefer her own life. Hence, the victim's right to self-defence must be grounded in her right to life, but if that is so, then according to Leverick we reach an impasse in that the attacker surely possesses the same right to life, and hence the same natural right to defend it. For Leverick, the only way of breaking the deadlock is to endorse the idea of forfeiture: The attacker, Leverick maintains (following earlier work by Judith Jarvis Thomson and Suzanne Uniacke), must be seen as "forfeiting" his right to life vis-à-vis his victim in the sense that for the duration of the attack, and only insofar as this is necessary to repel the attack, the attacker "loses" his right to life and can be repelled by deadly force.

This, with respect, is not a meaningful notion of "forfeiture". It hardly makes sense to speak of the attacker's right to life as being "forfeited" for the duration of the attack when precisely during this period his right to life is, in fact, still *protected* in the sense that only necessary and appropriate force may be used against him. Reference to "forfeiture" here merely paraphrases the desired result that the victim of a deadly attack may defend herself with deadly force. It fails to offer any independent moral reason why this might be the case.

Moreover, the forfeiture theory is a spectacularly unpromising vantage point from which to understand cases of self-defence more broadly. Since Leverick never looks beyond the small world of self-defensive killings, it is unclear whether the notion of "forfeiture" she endorses is supposed to be of general application to the law of self-defence. If so, would she want to extrapolate from it a more general principle of symmetrical forfeiture, that is, ought we to say that the one who attacks his victim's property forfeits his own right to property, the one who attacks his victim's sexual autonomy forfeits his own sexual autonomy, etc? This hardly fits existing law, or moral instinct. Then, does an attacker perhaps forfeit *all* his rights (within the limitations of necessary force) through engaging in an attack? On such a reading of the "forfeiture theory" there would be no *logical* reason, at least, why the right to life should not be forfeited in every case of self-defence, and the theory would in fact amount to a rejection of proportionality constraints on necessary defensive acts.

Leverick, at least by implication, seems to work with a concept of symmetrical forfeiture. With this she predictably runs into fresh trouble. By the same route that made the easy case of a self-defensive killing into a hard one, the truly hard cases of self-defensive killings become deceptively easy. *Of course* we cannot kill in order to defend property because the attacker has not forfeited his right to life through such an attack. *Of course* we cannot kill to prevent rape where there is no present threat to the victim's life, because the

attacker has not forfeited his right to life through such an attack. (Though if we dislike this result too much we can – however unconvincingly – insist, with Leverick, that the sexual objectification of the victim in rape turns rape into a wrong equivalent to a deprivation of life itself, and have the attacker forfeit his right to life on those grounds.) These discussions are hardly helpful to a lawyer who seeks a convincing framework in which to resolve the moral limits of necessary defensive action against an attack.

All this is not to deny that many pertinent questions can be asked about the use of lethal force in self-defence, even in the comparatively easy case where the victim's life is under attack. These questions come in view once we pay attention to the precise objective of the defender. There is undoubtedly a wide range of defensive action that can fairly be described as using lethal force. A person can aim to kill and act in a manner that makes a deadly outcome likely; a person can act in that same manner but aim merely to injure and hope that no lives will be lost; a person can act in a different manner that creates some risk to life but consider that risk unlikely to materialize; a person can act in a manner that puts another person's life at risk without realising the danger they are creating, to list but a few. All these examples involve uses of "deadly force" under some description. In a book that is *centrally* concerned with killings in self-defence and turns on the wedge it drives, both morally and analytically, between lethal and non-lethal force, some fairly extensive discussions of variations of this sort would have been in order. Fatally for Leverick's project, the undifferentiated notion of lethal force she operates with throughout the first nine chapters of her book ("conduct resulting in the death of the aggressor" – p. 4) does not enable her to differentiate between these cases in her subsequent discussion. Nor is there any attempt to flesh out what is meant by a "deadly attack" on the victim, as though this was obvious. In the absence of this basic building block for her analysis, the whole edifice rests on quicksand.

To be sure, some chapters in Leverick's book are less affected by the weaknesses of the forfeiture theory than others. Her analysis of battered women cases in chapter 5 (on the imminence requirement) is basically sound, as are her discussions of self-generated self-defence in chapter 6 and of mistake in chapter 9. The chapter dealing with retreat, by contrast, is weak, mainly because it is insufficiently connected to moral issues raised by the victim's prior conduct. Unlike Sangero, Leverick never really captures the difference between retreat and withdrawal or breaks through to the reasons for the different principles governing these. The stand-alone final chapter on the impact of Article 2 of the European Convention on Human Rights (ECHR) on the law of self-defence (ch. 10) is useful as a summary and explication of the jurisprudence of the European Court of Human Rights, though it must be said that the route by which ECHR standards affect the operation of a defence in criminal law is more complex and indirect than the relatively straightforward crossing Leverick assumes here. But the reader who seeks answers to the more fundamental questions raised by Leverick at the start of her work had better turn to Sangero's book to find them. His analytical framework – presented earlier in this review – offers a structure that enables meaningful engagement with the questions Leverick poses. Her own book does not.

ANTJE DU BOIS-PEDAIN