

ARTICLES

THE GAELIC GOETZ: A CASE OF SELF-DEFENSE IN IRELAND

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ABSTRACT

For two years, the name Pádraig Nally was a household word in Ireland. Nally killed an intruder on his farm in a rural community by shooting him in the back as he was running away, already injured from a brutal beating. The intruder was a Traveller, a minority group in Ireland that is mistrusted and ostracized. The killing was so far from the paradigmatic self-defense claim that the trial judge refused to instruct the jury on a full justification defense. Indicted for murder, Nally was convicted of manslaughter under a doctrine in Ireland called ‘excessive force.’ After the appeals court reversed because this instruction was tantamount to a directed verdict of conviction, Nally was retried and acquitted. The verdict was praised by Nally’s supporters who sympathized with his fear and reaction, and criticized by those who claimed the crime was rooted in bigotry and prejudice.

This case raises similar questions to the high profile U.S. case, *People v. Goetz*. Taking advantage of the widespread awareness of this case, this Article discusses *Director of Public Prosecutions v. Nally* as an example of a controversial self-defense claim that resulted in an acquittal despite powerful evidence to the contrary. The case involves the doctrine of ‘excessive force’ once adopted in some Commonwealth countries, but now unique to Ireland where it allows for a manslaughter conviction. This Article suggests that juries struggle in cases involving lawful force that fall short of true justification because these juries are reluctant to punish overzealousness and

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bad judgment when responsive force is otherwise legitimate. Juries searching for compassionate alternatives find other ways of understanding the evidence. While a jury might still acquit a Nally or a Goetz because of the notoriety of their case, in the typical self-defense case, a manslaughter conviction based on excessive force presents an attractive option to an all-or-nothing approach. Excessive force mitigation is alive and well in Ireland, and, in a slightly revised version, finding a place in England also.

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I. INTRODUCTION

Every so often a crime story captures the interest and ignites the imagination of the public, commanding attention and monopolizing headlines throughout the trial, and even beyond. The momentum of such cases might derive from the infamy of the individuals involved, the upsetting nature of the crime, or the conjunction of the legal and moral questions implicated. In the United States, there have been more "trials of the century" than centuries themselves. This is the story of one such sensational case that took place in Ireland, *Director of Public Prosecutions (D.P.P.) v. Padraig Nally*.¹

Few Americans would have heard of Padraig Nally, but he dominated the media and conversation in 2006 during the three months I spent in Ireland just as Bernhard Goetz, "the subway vigilante,"² galvanized the general public and the legal community in New York twenty years earlier. Both *Goetz* and *Nally* are emblematic cases for many key issues of self-defense that continue to preoccupy legal theorists, judges, and increasingly, juries. Even af-

¹ D.P.P. v. Nally [2006] C.C.A. 128 (Ir.), available at <http://www.bailii.org/ie/cases/IECCA/2006/C128.html> (last visited Sept, 14, 2008).

² People v. Goetz, 68 N.Y.2d 96 (1986). Before the identity of the shooter was known, he was given this nickname by the N.Y. Post. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE; BERNHARD GOETZ AND THE LAW ON TRIAL 2 (1988). A partial trial transcript is available at CAROL A. ROEHRENBECK, *PEOPLE V. GOETZ: THE SUMMATIONS AND THE CHARGES TO THE JURY* (1989).

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ter twenty years, *Goetz* is the classic case introducing law students to self-defense doctrine.³

This Article, inspired by the drama of the *Nally* case and its similarities to *Goetz*, explores the controversies that continue to surround the use of deadly force in self-defense. Part II relates the compelling story of the killing in *Nally*, followed by a review of Irish law of self-defense. Close observation of this foreign case, so reminiscent of a canonical American case, provides an opportunity to reexamine what seems to be happening at trials where verdicts that reflect a defense-generous application of the law of self-defense confound common sense.

The Article further explores the notion of jury independence (a less aggressive form of jury nullification) as an explanation for the not guilty verdicts in both cases. It proffers a descriptive conclusion about what seems to be happening when juries are given broad freedom to apply fairly loose standards to upsetting and divisive facts, and suggests that, at least in these inflammatory cases, juries blur theoretical lines between the traditional defense categories of justification and excuse. Neither the *Goetz* nor the *Nally* jury deliberately set out to make the kind of public statement usually associated with nullification; nonetheless, their respective verdicts are best understood as a repudiation of the traditional objective weighing of proportionality in self-defense. Instead, these juries made a more personalized judgment about the blameworthiness of an individual who reacts out of fear, an analysis that seems to judge the actor, not the act, privileging the judgment of a person responding under extreme stress.

This Article argues that an already porous, progressively more subjective legal standard of self-defense that increasingly defers to jury evaluation enables acquittal-oriented jurors to import personal values into the process to achieve their desired result. This is a development that criminal law theory and practice should acknowl-

³ *People v. Goetz* appears in most Criminal Law casebooks in the section on self-defense. See, e.g., KATE E. BLOCH & KEVIN C. McMUNIGAL, *CRIMINAL LAW: A CONTEMPORARY APPROACH* 501 (2005); DAVID CRUMP, NEIL P. COHEN, LAURIE L. LEVENSON, JOHN T. PARRY & PENELOPE PETHER, *CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES* 297 (2005); JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 504 (4th ed. 2007); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 751 (7th ed. 2001); ELLEN S. PODGOR, PETER J. HENNING, ANDREW TASLITZ & ALFREDO GARCIA, *CRIMINAL LAW: CONCEPTS AND PRACTICE* 542 (2005); PAUL H. ROBINSON, *FUNDAMENTALS OF CRIMINAL LAW* 502 (2d ed. 1995).

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edge and may want to redress by recognizing more verdict options than traditional self-defense allows. In Ireland, a country whose relevant laws are largely the heritage of common law patchwork development, law reform efforts are underway to grapple with the inconsistencies and murkiness of its current standards regarding deadly defensive force, in part due to criticisms of existing law and its effects that surfaced in *D.P.P. v. Nally*.

II. NOTORIOUS CASES: FEAR, DEADLY FORCE AND ENSUING SOCIAL DISTRESS

The *Goetz* case was highly publicized locally and well known nationally. Most Americans still remember the 1984 mid-day shooting of four black teenagers during a holiday season New York City subway ride by a white man who claimed that he thought he was about to be robbed. He shot and injured them with an unlicensed gun, continued to fire, then ran away. The case preoccupied a public that both championed and denounced Bernhard Goetz. During an era of high crime rates in New York City, the case provoked intense feelings and loud debates about race relations, urban crime, ineffective policing, and whether Goetz was a hero or villain. The prosecution also produced legal precedent clarifying the statutory standard for self-defense in New York State,⁴ and generated scholarly analysis both about the role of race in the doctrine of justification⁵ and the behavior of juries in such highly charged cases.⁶

Despite his confession, his unlawful possession of a loaded weapon, and, by some accounts, his use of disproportionate force, Goetz was acquitted of attempted murder and assault.⁷ The jury found Goetz's use of deadly force, based on his factually mistaken,

⁴ Goetz, 68 N.Y.2d at 111-13.

⁵ Aaron Goldstein, *Race, Reasonableness, and the Rule of Law*, 76 S. CAL. L. REV. 1189, 1191 (2003); Camille A. Nelson, *Consistently Revealing the Inconsistencies: The Construction of Fear in the Criminal Law*, 48 ST. LOUIS U. L.J. 1261, 1267-74 (2004); Kenneth W. Simons, *Self-Defense, Mens Rea, and Bernhard Goetz*, 89 COLUM. L. REV. 1179, 1189 (1989) (book review); Michael Andrew Tesner, *Racial Paranoia as a Defense to Crimes of Violence: An Emerging Theory of Self-Defense or Insanity*, 11 B.C. THIRD WORLD L. J. 307 (1991); Cynthia Kwei Yung-Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996). Other articles include *Goetz* in a more general discussion of self-defense See, e.g., V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235 (2001).

⁶ JAMES P. LEVINE, JURIES AND POLITICS 1-8 (1991).

⁷ He was convicted of the weapon charge and sentenced to one year in prison. FLETCHER, *supra* note 2, at 198, 216-17.

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or at least prematurely formed, belief that the four youths were about to rob him to be not unlawful.⁸

Twenty years later, in County Mayo, Ireland,⁹ Pdraig Nally, a sixty-two year old bachelor farmer, killed a trespasser named John “Frog” Ward, a member of the marginalized Traveller community.¹⁰ While there was much public outrage condemning this violence, a similar number, or more, expressed deep sympathy for Nally and discounted the role that ethnicity played in triggering Nally’s lethal conduct. After two trials, a jury found Nally’s use of fatal force not unlawful despite his confession, his questionable belief that the intruder posed a threat of imminent physical harm, and his use of undisputed excessive force.¹¹

All of Ireland, a comparatively small country with only a few national media outlets, knew every detail of the crime and the legal aftermath of *Nally*.¹² Newspapers and the national television network, RTE, regularly covered the story from October 14, 2004, the day after the shooting, until its conclusion. This extensive reporting included the initial trial and conviction of manslaughter in the summer of 2005 (*Nally I*), the October 2006 reversal in the Court of Criminal Appeal,¹³ and the retrial and acquittal in Dublin’s Central Criminal Court on December 14, 2006 (*Nally II*). Declamations by public figures, letters to the editor, and bloggers filled much print and cyberspace with diverse opinions throughout the two-year course of the case.¹⁴

⁸ In New York State, the Penal Law provides for the lawful use of deadly force to prevent a robbery. N.Y. PENAL LAW § 35.15(2)(b) (McKinney).

⁹ “County Mayo, located in the west of Ireland, is the third largest county in the country with an area of 5,398 sq. km. (2,084 sq. miles) and a population of 110,713 according to the 1991 census.” <http://www.mayohistory.com/shorthistory.htm> (last visited July 26, 2008). Castlebar, the county’s largest town and its administrative center, has a population of about 10,700. <http://www.mayo-ireland.ie/Mayo/Towns/CasBar/CasBar.htm> (last visited Dec. 22, 2008).

¹⁰ See *infra* Part III.B. and accompanying notes.

¹¹ The Irish law of self-defense will be discussed *infra* in Part IV.

¹² The population of Ireland is about 4,100,000 people. See <https://www.cia.gov/cia/publications/factbook/print/ei.html> (last visited July 29, 2008).

¹³ The Court of Criminal Appeal consists of a Judge of the Supreme Court and two Judges of the High Court. It hears appeals from people convicted on indictments in the Circuit or Central Criminal Courts after the appellant obtains a certificate from the trial judge that the case is suitable for appeal. See <http://www.courts.ie/courts.ie/library3.nsf/pagecurrent/B68454B7DF792E6480256D8700502304>; see also RAYMOND BYRNE & J. PAUL McCUTCHEON, *THE IRISH LEGAL SYSTEM* § 7.38, 252 (4th ed. 2001).

¹⁴ See, e.g., *The Reality Is That We Rate Some Lives Over Others*, IRISH INDEPENDENT, Dec. 16, 2007; John Downes *et. al.*, *Nally’s Acquittal Brings Divided Response*, IRISH

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The Nally shooting occurred in a rapidly changing environment in Ireland. During the past decade, Ireland had transformed from a country with a lagging economy and persistent emigration into the booming “Celtic Tiger.”¹⁵ This prosperity increased its population as both immigrants and returning migrants filled its cities and expanded its suburbs. Its rural areas are shifting from traditional agriculture to commuting communities with few members of the younger generation taking over the responsibilities of the family farms. With these changes, new social problems have arisen and existing prejudices have been reinforced.

Crimes and trials that involve ordinary people often galvanize the public when the protagonists, their victims, their motives, and the circumstances evoke extreme empathic reactions. When Goetz repeatedly shot four black teenagers in the belief that they were about to mug him, his acts were widely debated. Many people frustrated by the high incidence of violent crime in that era hailed him as a hero and considered his actions understandable, even commendable. On the other hand, he was vilified as a racist and an outlaw who literally jumped the gun, overreacted, and then lost control. The case could not be discussed without addressing vigilantism, race, and close-to-the-surface feelings about black-on-white crime that percolated at that time.

The *Nally* case offered a very similar narrative of two archetypes who collide—the accused, a sympathetic insider who could be anyone’s favorite uncle, and the victim, the sinister outsider whose lifestyle would alienate most people—causing everyone else to choose sides in the aftermath. In lieu of the urban American version of the subway vigilante who takes matters into his own hands, *Nally* featured a familiar Irish folk figure, the hardworking, bachelor farmer living in isolation who bravely confronts a shady, good-

TIMES, Dec. 16, 2006, at 1; *Losses Suffered by All Far Outweigh Right or Wrong*, IRISH INDEPENDENT, Oct. 12, 2007.

¹⁵ “Ireland is a trade-dependent economy with growth averaging six percent in 1995-2006. Agriculture, once the most important sector, is now dwarfed by industry and services.” See “Ireland” in CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2008), available at <https://www.cia.gov/cia/publications/factbook/print/ei.html#Econ>. Industry now accounts for twenty-seven percent of the labor force. Although exports remain the primary engine for Ireland’s growth, the economy has also benefited from a rise in consumer spending, construction, and business investment. “Per capita GDP is 40% (forty percent) above that of the four big European economies and the second highest in the European Union behind Luxembourg.” See *id.*

for-nothing Traveller about to commit a crime.¹⁶ Their ensuing altercation riveted and divided Ireland, exposing longstanding prejudices and, some argue, the law's inadequacies. The settings and characters of the cases are different, but in the end, Nally provoked intense reactions in Ireland just as Goetz had in New York.

The *Goetz* case made a contribution to the interpretation of the law of self-defense in New York State, generated considerable scholarship, and has been described as the "tipping point" in New York City's history, leading to a substantial reduction in crime.¹⁷ It also provoked resounding debates about the role of race in American criminal law, and continues to do so to this day.¹⁸ Twenty years later, while the case remains a heuristic for a less happy era, its circumstances are largely divorced from today's vibrant New York City where the subways are considered safe at all hours.¹⁹

The facts of the crime, the legal odyssey and the public debates surrounding *D.P.P. v. Nally* echo in Gaelic cadence²⁰ its American predecessor. It is possible that the killing, the trials, and the social conditions that it created may fade from memory as Ireland continues its rapid transformation from an agrarian to an urban country, and as family farms and their solitary occupants vanish like the graffiti-ridden subways of New York City. But, there are some signals that the *Nally* upheaval may inspire some

¹⁶ One neighbor described the community reaction:

None of us deserves in our lives to suddenly be newspaper material, but those lovely, quiet, decent people are now part of folklore in a bad way. . . . Padraig Nally was a decent, quiet bachelor man, barely touched by the Celtic Tiger, one of the last of the small farmers, trying to make a living off farming when there's no living off farming. Are people like him now vulnerable . . . to a more aggressive type of Traveller?

A Community on Edge, IRISH TIMES, July 23, 2005, at 4.

¹⁷ MALCOM GLADWELL, *THE TIPPING POINT* 133-68 (2000).

¹⁸ "How should the law respond when one person (D) kills another person (V), who is black, because D believes that V is about to kill him, but D would not have so believed if V had been white? The canonical case raising this question is *People v. Goetz*." Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM L. REV. 119 (2008).

¹⁹ Even though he received a six-month jail sentence, *People v. Goetz*, 73 N.Y.2d 751 (1988), and was successfully sued for damages by one of the victims, see *infra* note 79, Goetz actually ran for a position in the City government in 2005. Andrea Peyser, *Blast from the Past: Goetz Reloads for Mayor Run in '05*, N.Y. POST, Apr. 21, 2005, at 12.

²⁰ Gaelic or Irish is a Celtic language spoken in mainly Ireland (Éire). According to the 1996 census, 1.43 million people in Ireland claim to have some knowledge of Irish, 353,000 of whom speak it regularly. See <http://www.omniglot.com/writing/irish.htm> (last visited July 1, 2008).

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reforms to Irish criminal law and legal practice, although there are fewer visible changes in Ireland's relations with its Travellers.

III. DIRECTOR OF PUBLIC PROSECUTIONS V. NALLY

This was quite an exceptional trial in which the people of Ireland divided themselves on social lines, to put it at its lowest. It was a highly emotional and fraught trial. It contained circumstances which I doubt were ever contemplated by judges who had anything to do with previous lines of authority . . . exist[ing] in this area.²¹

A. *The Facts*

The basic facts about the killing were never in controversy.²² On an October afternoon, while Nally was alone at his farmhouse listening to the radio, he heard a car pull into his driveway. When he investigated, he found the decedent's adult son, Tom Ward, sitting in the driver's seat of the car. When the son asked whether Nally's white car was for sale, the farmer asked about Ward's "mate" and was told he was around the back of the house. Nally went looking for the second man, John Ward. When Nally saw him pushing open the kitchen door, he went to a nearby shed and retrieved his single-barrel shotgun. Nally then shot Ward in the groin and hand, although he later claimed that the gun discharged accidentally. Following this, Nally and Ward engaged in a "ferocious physical struggle." Nally picked up a heavy piece of wood with which he struck Ward repeatedly across the head and upper body. During this struggle, which amounted to at least forty blows to his head and body, Ward's arm was broken. By this time, Tom Ward, John's adult son, had left the farm house in their car. Nally later said that he was concerned that Tom had gone for reinforcements.

After this beating, John Ward limped away from Nally's property, alone on the public road. Nally returned to the shed to reload the shotgun then followed him. After that, he fired twice more from a distance of between twelve and fifteen feet. The second

²¹ Remarks of Mr. Justice Paul Carney at the conclusion of the first trial, *See Nally* [2006] C.C.A. 128 (Ir.) at 10. He also is reported to have said that this was the most difficult case on which he had worked during his fourteen year career as a judge of the Central Criminal Court. *Liberty, But Sharp Debate Will Rumble on for Years*, IRISH INDEPENDENT, Dec. 15, 2006.

²² This account paraphrases the statement of facts in the judgment of the Court of Criminal Appeal. *See Nally* [2006], C.C.A. 128 *passim*.

shot in Ward's back was fatal. Nally, realizing that he had killed Ward, picked up his body and threw it into an adjoining field. He then called the Garda, the Irish police.

B. *The Traveller Community*

The killing exposed the longstanding, quite overt animosity of many Irish toward Travellers, an itinerant Irish ethnic group with a separate identity, language, culture and history.²³ There are approximately 30,000 Travellers living in the Republic of Ireland, representing about one percent of the population. Another 1,500 live in Northern Ireland, and 10,000 live in the United States. Although they are as fully Irish as the majority population, unlike the Roma or gypsies in other parts of Europe, they are marginalized and ostracized—the victims of “ubiquitous prejudice.”²⁴ The Irish Government, however, refuses to recognize the Travellers as a distinct ethnic group since they do not differ from the majority population in terms of race, color, descent or national origin.²⁵ Thus,

²³ The factual information about the Traveller community in this section is drawn largely from Pavee Point, a human rights organization. See <http://www.paveepoint.ie> (last visited July 29, 2008). See also JANE HELLEINER, *IRISH TRAVELLERS: RACISM AND THE POLITICS OF CULTURE* (2000); *THE STRANGER IN OURSELVES: IRELAND'S OTHERS* (Michael Ó hAodha, David O'Donnell, & Colm Power, eds. 2007); Angelique Chrisafis, *Ireland's Nomads Expose a Racial Divide*, *THE GUARDIAN*, Nov. 26, 2005; Christina Coruth, *Irish Travellers, Ireland's Minority Culture* (2002), http://mi.essortment.com/irishtravellers_ryjv.htm.

²⁴ See *Irish Traveller Movement Expresses Shock at Verdict in Pdraig Nally Retrial*, http://www.itmtrav.com/publications/PR_Nallycase.html.

²⁵ See *Implementation of the International Covenant on Economic, Cultural and Social Rights, Initial Reports Submitted by State Parties under Articles 16 and 17 of the Covenant, Addendum: Ireland*, U.N. Economic and Social Council, 12th Sess. 16th mtg., U.N. Doc. E/1990/5/Add.34 (1999), ¶¶ 19-21, available at <http://www.unhcr.org/refworld/country,,CESCR,,IRL,4562d8b62,3f6ca3dc4,0.html> (last visited Dec. 23, 2008). This raises concerns that Travellers will not be able to avail themselves of human rights protections accorded by treaty to ethnic minorities. See Irish Human Rights Commission, *Travellers as an Ethnic Minority under the Convention on the Elimination of Racial Discrimination: A Discussion Paper* (Mar. 24, 2004), available at http://www.ihrc.ie/_fileupload/misc/Travellers_discussion_paper.doc. See also David Keane, *International Law and the Ethnicity of Irish Travellers*, 11 *WASH. & LEE RACE & ETHNIC L.J.* 43 (2005). Today, Travellers are included specifically in anti-discrimination provisions of the Equal Status Act. Equal Status Act, 2000 (Act No. 8/2000) (Ir.), available at <http://www.irishstatutebook.ie/2000/en/act/pub/0008/index.html> (last visited July 23, 2008). See HELLEINER, *supra* note 23, at 226-41. Membership in the traveling community also is listed along with “race, colour, nationality, religion, ethnic or national origins . . . [and] sexual orientation” as a group protected by hate crime legislation. Prohibition of Incitement to Hatred Act, 1989 (Act No. 19/1989) (Ir.), available at <http://www.irishstatutebook.ie/1989/en/act/pub/0019/index.html> (last visited July 23, 2008).

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discrimination against Travellers officially is not treated as a form of racism or even ethnic bias.²⁶

Travellers are indigenous to Ireland and, by some accounts, date back as far as the twelfth century.²⁷ In the past, Travellers, who often were tinsmiths by trade and thus known as Tinkers, now a derogatory term, moved about in horse drawn caravans. Today, their vehicles are mobile homes and trailers, but they often live “settled” in halting sites. Travellers are largely uneducated and unemployed, live in substandard caravans without government housing subsidies, and suffer from many economic and social barriers. They have an above-average infant mortality rate.

As itinerants, Travellers are stereotyped as shiftless, cunning, and idle, living off their wits instead of following traditional social norms of home and work. Consummate outsiders, they have been cast as both untrustworthy and sly, and, more recently, as objects of pity in need of rehabilitation. Some commentators describe the Travellers as victims of “overpolicing and underprotection.”²⁸ Others make even stronger claims that describe the prejudice against Travellers as a form of “caste-like apartheid.”²⁹

John Ward fit the negative Traveller stereotype of poverty, criminality, and unemployment. A forty-three-year-old father of eleven, his family lived at a Travellers’ “halting site” in Galway. He had a number of previous convictions for burglary and larceny offences and a violent disposition.³⁰ He made his livelihood in recycling, collecting scrap metal to sell, as do many Travellers.

C. The Legal Odyssey

1. The First Trial—Nally I

Nally was prosecuted in the Central Criminal Court in Castlebar, the administrative centre of County Mayo.³¹ This in it-

²⁶ Rory O’Connell, *The Right to Participation of Minorities and Irish Travellers*, 6 *STUD. ETHNICITY AND NATIONALISM* 6 (2006).

²⁷ HELLEINER, *supra* note 23, at 32-50.

²⁸ Aogan Mulcahy, *Travellers are Being Left to Feel Over-Policed and Under-Protected*, *IRISH TIMES*, Nov. 25, 2005, at 18.

²⁹ O’Connell, *supra* note 26, at 5 (quoting MICHAEL MACGREIL, *PREJUDICE IN IRELAND REVISITED* 341 (1996)).

³⁰ Following the verdict, it was revealed that there had been two unexecuted bench warrants for Ward’s arrest during the weeks before his killing. *Two Arrest Warrants Were Out on Traveller Shot Dead by Nally*, *IRISH TIMES*, Jan. 10, 2006, at 4.

³¹ The High Court consists of the President and thirty-five ordinary judges. The High Court has full jurisdiction in and power to determine all matters and questions whether of

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self was unusual. A local Circuit Court usually has jurisdiction over most criminal matters, but serious cases of murder, rape, aggravated sexual assault, treason, and piracy customarily are prosecuted in the Central Criminal Court in Dublin regardless of where the crime occurs. Since 2004, the Court has conducted some trials outside of Dublin but the effort to expand the presence of the Central Criminal Court more locally has been quite limited. The *Nally* case was the first serious crime to be tried in Castlebar.

a. The Evidence

Most of the evidence was undisputed. The jury heard both Nally's admission that he intended to kill Ward and the forensic evidence about the bludgeoning inflicted on Ward. The jury also heard about how Nally loaded and then reloaded his shotgun, discharging nearly forty rounds, finally hitting Ward fatally in the back.³²

Nally claimed self-defense as a householder. To support this claim, Nally and his sister described prior burglaries in recent months at homes of some of his neighbors. Some of his own property also had been pilfered. Nally was described as "obsessed" with other local crimes, especially an incident in which two brothers were tied up in their home and left to die several years earlier. His behavior became increasingly eccentric. He would sit outside his shed with his shotgun across his knees, writing down license numbers of suspicious looking cars. He put water on the clay path at his gate to preserve footprints. His sister had started staying with Nally on the weekends due to his anxieties and he began to have difficulty sleeping. He claimed to be "out of his mind with worry."³³ After his arrest, he also made a statement to the Garda that "When I got up yesterday morning, I knew something was going to happen . . . I had a premonition. I had a good idea this was

law or fact, civil or criminal, and to the constitutionality of any law. When the High Court exercises its criminal jurisdiction, it is known as the Central Criminal Court and consists of a judge or judges of the High Court. See <http://www.courts.ie/Courts.ie/library3.nsf/PageCurrentWebLookUpTopNav/The%20Courts> (last visited July 30, 2008).

³² At the conclusion of a criminal trial, an Irish judge typically summarizes the evidence in addition to directing the jury on point of law. BYRNE & McCUTCHEON, *supra* note 13, at 237. At the trial, Judge Carney's summary comprised forty-five pages of the record. The facts detailed in this section are drawn from the Transcript of Jury Instructions in *D.P.P. v. Nally*, pp. 77-122 [hereinafter Transcript] (on file with author).

³³ Tom Shiel, *Bachelor Farmer Describes Lead Up to Killing*, IRISH TIMES, July 15, 2005, at 2.

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going to happen.” And then he described the struggle with Ward as “[a] real movie-type effort.”³⁴

As the trial progressed, the testimony and ensuing news coverage strongly sympathized with Nally.³⁵ The details of his simple and completely recognizable life are reminiscent to many Irishmen of their own rural relatives. He lived in the same country house in which he was raised, and where, having left school to return to the family farm, he now lived alone without a phone, near a salmon stream. Described as “not an ostentatious man,” his modest car was fifteen years old and his tractor bought second-hand almost twenty years before. His sister said he was no longer outgoing, but instead depressed and growing more anxious and fearful.

Neighbors testified about Nally’s general reputation as a trustworthy gentleman. Always greeting passers-by with a smile, he was known as honest and kind. Further testimony revealed the quotidian details of the morning before the shooting down to food on the table and the program on the radio when Nally heard Ward’s car arrive.

Witnesses also described a changing rural Ireland, where farm-houses were unoccupied during the day because their owners now worked in town, and the ensuing increased insecurity and jitteriness.

Nally’s admission to the Garda that he had intended to kill Ward was revealed to the jury. At the trial, however, he modified this damaging statement by claiming to be protecting his property. His explanation for reloading the shotgun and continuing to fire was that “his mind had gone entirely.” At trial, Nally said he reloaded the gun with the thought of taking his own life.

Two psychiatrists who had treated Ward also testified for the defense that Ward had a difficult temper and a history of fighting. Evidence was introduced that he had a pending court date to answer charges of threatening a man with a hook.³⁶

b. The Jury

Responsibility for jury selection for the Circuit Criminal Courts rests with the County Registrar in each of the twenty-six counties, whereas juries for the Central Criminal Court are called

³⁴ *Id.*

³⁵ See, e.g., *The Pressure Had Got to Me*, IRISH TIMES, July 16, 2005, at 3.

³⁶ *What Drove a Shy, Kind Man to Kill?*, IRISH TIMES, NOV. 12, 2005, at 3.

in Dublin. Although the Central Criminal Court had begun to hear murder cases outside of Dublin, this innovation was relatively rare, so it was notable that such a case where feelings ran so high would be tried locally.³⁷ The notoriety of this case made this break from the norm particularly controversial, since the jury pool was drawn from the same rural community in which Nally lived and where a fairly significant Traveller population roamed looking for salvage and work. A local jury was presumed favorable to Nally and there were no Travellers empanelled.³⁸

c. The Jury Instructions

In an “unusual development,”³⁹ the prosecution requested the trial judge to rule that the jury be given a truncated version of self-defense in light of the evidence that the force used was so excessive that it could not be viewed as objectively reasonable. The facts were uncontroverted that a greatly incapacitated Ward had left Nally’s farm and was shot on the road at a time when Nally could himself have retreated to safety.

The trial judge refused to instruct the jury that it could consider a full self-defense claim in light of the evidence. Instead, he allowed a partial defense that could reduce the admitted killing from murder to a manslaughter-based doctrine in Ireland called “excessive defence.” In the salient portion of the jury directions, the judge stated:

Now self-defence permits of two different terms of defence. This is what is known as full self-defence, and where full self-defence operates, there is no crime at all. A person is entitled to use reasonable force to defend his life and to defend somebody else’s life, and if the force was reasonable having regard to all the circumstances then even though there was a killing and even though there was a deliberate killing, there is no crime

³⁷ Ireland permits both cause and peremptory challenges so that anyone with an interest in or connection to the case could be subject to challenge. Juries Act of 1976, sec. 20-21 (Act No. 4/1976) (Ir.), available at [http://www.smallclaimsonline.ie/Courts.ie/Library3.nsf/\(WebFiles\)/FA4DA65A42DA9CD6802570440034EC30/\\$FILE/Juries%20Act,%201976.pdf](http://www.smallclaimsonline.ie/Courts.ie/Library3.nsf/(WebFiles)/FA4DA65A42DA9CD6802570440034EC30/$FILE/Juries%20Act,%201976.pdf). Unlike in the U.S., potential jurors are not questioned by counsel and very little juror information is elicited in the selection process. Katie Quinn, *Jury Trials in the Republic of Ireland*, 72 *REVUE INTERNATIONALE DE DROIT PÉNAL* 197, 205 (2001); BYRNE & MC-CUTCHEON, *supra* note 13 § 6.134, at 236.

³⁸ *What Chance Has a Traveller Before an Irish Jury?*, *IRISH TIMES*, Dec. 16, 2006, at 15 (describing both juries as “Irish” and “a body of 12 Irish men and women” presumably signaling the absence of Travellers).

³⁹ Nally [2006] C.C.A. 128, at ¶ 4.

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committed. Now I have ruled in your absence that, on the facts of this case, a finding that the force used to kill John Ward was reasonable and necessary to the degree that no crime at all was committed and that it was totally and entirely justified would be a perverse finding, and it is not open to me to allow matters to go to you which I rule as a matter of law are perverse . . .

Now that ruling on my part is not the end of the matter because the law goes on to say that if the force used was excessive, but it was no more than the accused man considered necessary, then it is not murder, it is manslaughter. As I said, you apply the subjective test. In other words, you assess the state of belief that would operate having regard to his obsession, to his lifestyle, to his baggage, to his history.⁴⁰

With this instruction, the judge withheld from the jury the option of finding Nally fully justified, and therefore, of acquitting him on this ground. However, a defense request for an instruction on provocation was granted.⁴¹ Thus, the jury could reach a guilty verdict of murder or of manslaughter on either a theory of partial defense or provocation. Nothing in these instructions, however, expressed or implied that the jury did not have its usual powers to acquit the defendant either because of a deficiency in the prosecution's evidence or notwithstanding evidence of guilt.

d. The Verdict and Sentence

Nally was convicted of manslaughter in July 2005.⁴² In November, he was sentenced to six years in jail. The verdict and sentence were criticized by Ward's family and supporters for its leniency,⁴³ and met with anger and protests by Nally's.⁴⁴ Some legislators seized the moment to call for new laws ensuring a home-

⁴⁰ Transcript, *supra* note 32, at 72-73, quoting from but not citing *People v. (A.G.) v. Christopher Dwyer* [1972] I.R. 416 (Ir.). A failure to instruct the jury on this defense when supported by evidence would be reversible error. See, e.g., *D.P.P. v. O'Carroll* [2004] 3 I.R. 531 (Ir.).

⁴¹ *Id.*, at 74-77.

⁴² Nally, [2006] C.C.A. 128, at ¶ 2. The jury took a little more than two hours to reach its verdict. Steve Bird, *Farmer Living in Fear Shot Traveller Dead*, TIMESONLINE, July 21, 2005, available at <http://www.timesonline.co.uk/tol/news/uk/article546294.ece>.

⁴³ Lorna Siggins, *Dead Traveller's Wife Unhappy with Trial Verdict*, IRISH TIMES, July 23, 2005, at 3.

⁴⁴ Nally's friends and family had anticipated a much shorter, or even suspended, sentence. Kathy Sheridan, *Judge Tells of 'Most Socially Divisive' Case*, IRISH TIMES, Nov. 12, 2006, at 1. A controversial rally was postponed in favor of less confrontational efforts and because it was widely perceived as anti-Traveller. Lorna Siggins, *Travellers Welcome Decision to Postpone Nally Rally*, IRISH TIMES, Nov. 18, 2006, at 2. Nally's supporters also

owner's right to use deadly force,⁴⁵ but were criticized for opportunism.⁴⁶ Nally's effort to reduce his sentence was rebuffed, giving Judge Carney an opportunity to say again, "[t]he killing was unlawful and could not be regarded as anything else under the law."⁴⁷

The verdict raised legal problems almost immediately, presaging the concerns of the appellate court. Soon after the verdict, during an application for leave to appeal, Judge Carney was "considerably vexed" that the prosecutor had not made him aware of a decision that stands for the notion that there is a "right for the jury to be wrong."⁴⁸ Indeed, having been made aware of these authorities after the verdict, Judge Carney, "Ireland's most famous and colourful judge,"⁴⁹ remonstrated the prosecutor for creating this problem while insulating himself from criticism:

Now, that judgment [referring to the precedent in *D.P.P. v. Davis*] obviously has caused me great difficulty in this case.⁵⁰ It was a unanimous decision of the Supreme Court (and) was not opened to me, so I was not able to consider matters in the light of it. I don't accept [the prosecutor's] suggestion that even an experienced trial judge at the end of such a fraught trial is going to have bubbling at the top of his mind everything that the superior court might have said a decade ago.⁵¹

established a fund to help maintain his farm and organized a Christmas card-writing campaign to send cards to his prison. *Support Group for Farmer*, IRISH NEWS, Dec. 10, 2005.

⁴⁵ Mark Brennock, *Kenny Calls for Change in Law on Defending Homes*, IRISH TIMES, Nov. 17, 2006, at 9.

⁴⁶ Michael O'Regan, *Exploitation of Nally Case Raised*, IRISH TIMES, Nov. 25, 2005, at 8; *Travellers Take FG [Fine Gael Political Party] to Task Over Stance on Nally*, IRISH TIMES, Nov. 26, 2005, at 9.

⁴⁷ *Nally Manslaughter Conviction Appeal Refused*, IRISH TIMES, Dec. 6, 2005, at 4.

⁴⁸ Nally, [2006] C.C.A. 128, at ¶ 23. See *D.P.P. v. Mark Davis* [1993] 2 I.R. 1 (Ir.).

⁴⁹ *Final Verdict on Year in Court*, IRISH INDEPENDENT, Jan. 2, 2007, available at <http://www.independent.ie/national-news/final-verdict-on-year-in-court-57442.html>.

⁵⁰ The judge is reported as having said that this was the most difficult sentencing of his fourteen years on the bench. *Nally Judgment*, IRISH TIMES, Nov. 12, 2005, at 15; *Farmer Gets Six Years for Shooting Traveller*, IRISH NEWS, Nov. 12, 2005, at 17.

⁵¹ *Quoted in* Nally [2006] C.C.A. 128 at 10. Later, the appellate court also chastened trial counsel, particularly the prosecution, for failing to submit adequate written authorities to assist the trial judge's formulation of the jury instructions. Attributing the failure to the setting of the trial, the appeals court magnanimously observed that the location of the trial, "*procul ab urbe*—far from the city—[created] circumstances where the marshalling of written legal authorities may have posed certain practical difficulties." Nally [2006] C.C.A. 128 at 7.

2. *The Appeal*

On October 12, 2006, the Court of Criminal Appeal [“CCA”] quashed the conviction, directing a new trial.⁵² The self-defense instruction quoted above was the principal issue on appeal: Given the facts of the case, is the trial judge entitled to direct the jury, in effect, to bring in a verdict of guilty of either murder or manslaughter, and deprive them of the ability to acquit?⁵³

Although in Irish courts (as well as those in the United Kingdom), traditionally a judge may express an opinion about particular facts and even possible verdicts,⁵⁴ a judge cannot direct the jury to find the accused guilty.⁵⁵ This well-settled rule is of constitutional dimension in Ireland, so an instruction that directs a jury to return a guilty verdict is “an unconstitutional usurpation of the jury’s function” and violates the right to trial by jury.⁵⁶ This result was grounded in part on the longstanding principle that juries have the power to acquit even if such a result would be, as Judge Carney noted, “perverse.”⁵⁷ By instructing that they had only two options—murder, or the lesser crime of manslaughter if they believed that force was necessary to avert an attack, but the amount of force employed excessive—Judge Carney improperly divested the jury of its power to acquit. Thus, while a judge may direct a verdict of not

⁵² Criminal appeals from the Central Criminal Court are heard by the Court of Criminal Appeal, a court consisting of three judges drawn from the High Court and the Supreme Court. See Irish Courts Service, available at <http://www.courts.ie/courts.ie/library3.nsf/pagecurrent/B68454B7DF792E6480256D8700502304?opendocument&I=EN> (last visited July 1, 2008).

⁵³ Nally, [2006] C.C.A. 128, at ¶ 10.

⁵⁴ “It is open to a judge in an appropriate case to express an opinion that a particular verdict of guilty is the only one which would be reasonable or proper on the evidence, but that must of necessity fall short of the right to direct a verdict of guilty.” D.P.P. v. Mark Davis [1993] 2 I.R. at 14-15.

⁵⁵ In any appropriate case. . . the judge may sum up in such a way as to make it plain that he considers that the accused in guilty and should be convicted. I doubt however whether the most effective way of doing so would be for the judge to tell the jury that it would be perverse for them to acquit. R. v. Wang, 1 WLR 661 [2005](H.L.) (U.K.); Byrne & McCutcheon, *supra* note 13, at 237 (describing anecdotal evidence of reversals because of “overly robust” directions by the trial judge).

⁵⁶ GERARD HOGAN & GERRY WHYTE, THE IRISH CONSTITUTION 658 (1994).

⁵⁷ In D.P.P. v. Clarke, [1994] 3 I.R. 289 (Ir.), when instructing on the “Dwyer option,” the trial court said: “While the verdict is open to you, ladies and gentleman, and you could in theory acquit him of all responsibility, I say it appears to me that the facts . . . hardly admit of the possibility of an acquittal” This instruction was roundly criticized by the appeals court: “To say to a jury that something is only theoretically possible is in effect to invite them not to consider it at all” *Id.*

guilty in order to prevent a wrongful conviction, there is no reciprocal power to direct a verdict of guilty so that any instruction that might conflict with the views of the trial judge. Therefore, the factual question of whether Nally acted in self-defense was to be answered by the jury, including whether the force he used was reasonable or excessive. Judge Carney could have told the jury that he did not believe that the amount of force used in the case fell within the limits of the law of self-defense. The jury then could assess that view along with the evidence but, even knowing this opinion, would retain the final power to return a not guilty verdict notwithstanding the evidence or the judge's assessment. Instead the CCA said,

The jury's absolute right to decide the issue of guilt or innocence encompasses the power of the jury to deliver a verdict that might conflict with the views of the trial judge. Therefore, the factual question of whether Nally acted in self-defense was to be answered by the jury, including whether the force he used was reasonable or excessive. Judge Carney could have told the jury that he did not believe that the amount of force used in the case fell within the limits of the law of self-defense. The jury then could assess that view along with the evidence but, even knowing this opinion, would retain the final power to return a not guilty verdict notwithstanding the evidence or the judge's assessment. Instead the CCA said,

This Court has little doubt but that had the prosecution allowed this trial to proceed in the usual manner, the learned trial judge would have given appropriate directions to the jury in the usual form. That usual form would have enabled the trial judge [sic] express his opinion that the amount of force used could not in his view be objectively justified in the context of the defence of self-defence, but would have left the ultimate decision on that issue to the jury.⁵⁸

Because the CCA held that the Nally instructions usurped the jury's function, the Court ordered a new trial. Nally was freed from jail where he had been serving his six-year prison sentence. A request by the defense to conduct the retrial in County Mayo was denied.⁶⁰

INTERMISSION

This was the story I heard about one month after arriving in Ireland when, after the mid-October 2006 remand, the case was again in the news. I watched a tape of the RTE program about the case that aired in November 2005, just a few days after the sentence. On the show Nally was interviewed in his farmhouse giving his side of the story, and there was a staged reenactment of the crime.⁶¹ John Ward's son and wife were also on the pro-

⁵⁸ Davis, *supra* note 48; *see also* Wang, *supra* note 55.

⁵⁹ Nally, [2006] C.C.A. 128 at ¶ 10.

⁶⁰ *Date Set for Murder Trial*, IRISH NEWS, Oct. 24, 2006, at 11.

⁶¹ *See* <http://www.rte.ie/news/2005/1111/index.html>, Nov. 11, 2005.

gram. To my untutored eyes, the show was biased toward Nally. Nevertheless, given the sequence of events, and the fact that Ireland recognizes an imperfect self-defense, a manslaughter conviction seemed spot-on and to be the obvious outcome even if the jury had been instructed properly on self-defense.

3. *The Second Trial-Nally II*

The retrial, now for manslaughter in light of the verdict at the first trial, was moved to the Central Criminal Courts in Dublin. During jury selection on the first day, Judge Carney cautioned the jury of four women and eight men to disregard the publicity and public debate about the case.⁶² Mr. Justice Kevin O'Higgins presided over the remainder of the second trial. The trial lasted only a few days. Its evidence was largely identical to the first trial, including ballistics testimony that forty spent cartridges had been recovered and that both shots were fired within five yards. At this trial, the jury also was allowed to learn that Ward had a large number of previous criminal convictions.⁶³ Dramatically, during the trial, Nally suffered chest pains and was rushed to hospital, temporarily delaying the case.⁶⁴

The second jury was permitted to consider whether Nally acted in self-defense.⁶⁵ The jurors deliberated for between fifteen and eighteen hours (news accounts differ), requiring two nights at a hotel, and found Nally not guilty.⁶⁶

⁶² *Stern Warning to Jurors—Ignore All the Hype*, IRISH INDEPENDENT, Dec. 5, 2006, available at <http://www.independent.ie/national-news/stern-warning-to-jurors—ignore-all-the-hype-63036.html>.

⁶³ Ward is reported as having eighty previous convictions. See John Downes, Kathy Sheridan, Miriam Donohoe & Lorna Siggins, *Nally's Acquittal Brings Divided Response*, IRISH TIMES, Dec. 15, 2006, at 1.

⁶⁴ *Nally Case on Hold as He Suffers Chest Pain*, IRISH INDEPENDENT, Dec. 9, 2006, available at <http://www.independent.ie/national-news/nally-case-on-hold-as-he-suffers-chest-pain-63775.html>.

⁶⁵ The proceedings of the second trial and its jury instructions were not transcribed since there was no appeal. Despite my repeated requests, the Court graciously, but firmly, refused to provide a transcript to me, even at my own cost. Email from Geraldine Manners, Registrar, Court of Criminal Appeal, to Stacy Caplow, Professor of Law, Brooklyn Law School (Apr. 30, 2007, 10:32 EST) (on file with author). Nor did news accounts describe the jury instructions, unfortunately. Given the basis for the reversal, the basic difference between the instructions at the retrial presumably was an additional instruction on the complete self-defense that accompanied the instructions given at the first trial on murder, and manslaughter on a theory of both excessive force (as in Dwyer, [1972] I.R. 416 (Ir.)) and provocation.

⁶⁶ The instructions at the second trial were described as “stern” and, when combined with the prior conviction, likely to lead to a manslaughter verdict, so it was surprising that

4. *The Reaction: "Innocent, but Hardly a Hero"*⁶⁷

Emotions ran high after the acquittal, reflecting a bitter division of opinion.⁶⁸ Nally supporters expressed relief that his ordeal was over. Nally himself was surprised, but perhaps even a bit confounded by the verdict.⁶⁹ His most public reaction expressed his hope of getting his family shotgun back from the police.⁷⁰

Some in the Traveller community responded with bitterness and accusations of racism,⁷¹ expressing despair about their future.⁷² Others commented that the verdict proved that "we regard some lives as more precious than others."⁷³

The media reported the conflicting reactions of Nally supporters' denials that Traveller prejudice was involved, and the contrasting "stunned" reaction of Traveller groups that Nally was acquitted.⁷⁴ Some media commented that the law itself was outdated by allowing so few options other than acquittal as a means for expressing compassion in the form of mitigation for a killer.⁷⁵

John Ward's widow filed a wrongful death lawsuit against Nally. Although such claims are unusual in Ireland, reportedly

the deliberations lasted so long. *What Chance Has a Traveller Offender Before an Irish Jury?*, IRISH TIMES, Dec. 16, 2006, at 15; *Tears as Nally is Cleared of Killing*, IRISH INDEPENDENT, Dec. 15, 2006; Louise Hogan, *Farmer Cleared of Killing*, IRISH NEWS LIMITED, Dec. 15, 2006, at 6.

⁶⁷ *Declared Innocent, But Hardly a Hero of Our Times*, IRISH INDEPENDENT, Dec. 15, 2006.

⁶⁸ See Downes et al., *supra* note 63; *Declared Innocent, But Hardly a Hero of Our Times*, IRISH INDEPENDENT, Dec. 15, 2006; *Liberty, But Sharp Debate Will Rumble on for Years*, IRISH INDEPENDENT, Dec. 15, 2006; *Implications of Nally Verdict*, IRISH TIMES, Dec. 16, 2006.

⁶⁹ See *Nally Comments on His Acquittal*, RTE NEWS, Dec. 15, 2006, <http://www.rte.ie/news/2006/1215/nallyp.html>.

⁷⁰ *Nally Wants Gun Used to Kill Traveller Given Back*, IRISH INDEPENDENT, Dec. 21, 2006.

⁷¹ *Travellers Hold Vigil to Protest Nally's Acquittal*, IRISH INDEPENDENT, Dec. 20, 2006; *Irish Traveller Movement Expresses Shock at Verdict in Padraig Nally Retrial*, http://itmtrav.com/publications/PR_Nallycase.html.

⁷² *Time to Stop Apologizing*, IRISH TIMES, Jan. 31, 2007, at 17.

⁷³ *The Reality Is That We Rate Some Lives Over Others*, IRISH INDEPENDENT, Dec. 16, 2006.

⁷⁴ See, e.g., RTE NEWS, <http://rte.ie/news/2006/1215/nallyp.html> (last visited Nov. 23, 2008).

⁷⁵ Editorial, *Nally Case and the Law*, IRISH INDEPENDENT, Dec. 16, 2006, available at <http://www.independent.ie/opinion/editorial/nally-case-and-the-law-64711.html>; *Juries Have Few Options-It's Time to Overhaul Homicide Laws*, IRISH INDEPENDENT, Dec. 16, 2006, available at <http://www.independent.ie/national-news/juries-have-few-options—its-time-to-overhaul-homicide-laws-64824.html>.

they are on the rise, particularly in cases in which a controversial acquittal occurs.⁷⁶ In another twist of fate, Nally's son, John Jr., who had been in the car on the fateful day, was convicted of assault and sentenced to prison for having stabbed another man three times.⁷⁷

IV. EXCESSIVE FORCE: A UNIQUELY IRISH DEFENSE

When Padraig Nally committed a "crime of self-defense"⁷⁸ his actions awakened many of the factual and normative debates imbedded in the law's allowance of lethal force in self-defense. Like Goetz before him, Nally's perceptions and conduct were ambiguous and questionable, bumping up uncomfortably against the already difficult measurements required in such cases.

Because a successful claim of self-defense results in complete acquittal, the defense succeeds only if the individual acts with the intention of deflecting an attack by appropriate means. This requires an examination of the accused's state-of-mind at that time of the response—what did the actor know or believe to be happening, and did he react within appropriate boundaries? Subject to modern modifications in particular statutes, these basic elements are part of the legal tradition of both the United States and Ireland, and both countries derive their fundamental principles from British common law.⁷⁹

In short, a person whose life, physical safety or property is imminently threatened has the right to use the least amount of force necessary to avoid the attack. Looking at these traditional elements, the self-defense claims asserted in both the *Nally* and *Goetz* cases seem legally dubious, and to anyone placing a bet on an acquittal, that verdict would have been a long shot.⁸⁰ History proves this would have been a losing wager.

⁷⁶ *Nally Sued for 'Blood Money' Over Shooting*, IRISH INDEPENDENT, Feb. 6, 2007, available at <http://www.independent.ie/national-news/nally-sued-for-blood-money-over-shooting-53473.html>.

⁷⁷ Ann Healy, *Ward Son Gets Three Years for Knife Attack on Friend*, IRISH TIMES, July 18, 2007, at 4.

⁷⁸ With appreciation to FLETCHER, *supra* note 2.

⁷⁹ See generally FINBARR MCAULEY & J. PAUL McCUTCHEON, CRIMINAL LIABILITY 733-43 (2000) (tracing the history of lawful defensive force in Irish and English common law) and PAUL H. ROBINSON, 2 CRIMINAL LAW DEFENSES (1984).

⁸⁰ From the very time of his arrest, Nally asserted that he acted in self-defense when he admitted to intentionally killed Ward. He principally feared for his life but the facts of the case also imply a claim that he was protecting his home and farm property as much as his

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Even if it were possible to accept their respective explanations for their fear, and even if those explanations were both credible and reasonable from the defendants' perspectives, the two lethal shots fired by Nally as an injured John Ward ran down the road would cause any observer, including a properly instructed juror to doubt the claim of self-defense. This is equally true of the extra shots fired at one of Goetz's victims (who was crippled as a result of the incident) while he was seated, incapacitated and displaying

person. He attributed his response to his growing fear of living in isolation and others described this fear as eccentricity or even paranoia. *Transcript, supra* note 32, at 108-13. Goetz had cast his behavior in similar terms, using a metaphor of a cornered rat provoked by repeated assaults into becoming a "vicious killer." Fletcher, *supra* note 2, at 13. The chart below compares the facts of each case in the context of the legal elements of the various possible justification claims:

R
R

| | <i>Nally</i> | <i>Goetz</i> |
|--------------|---|--|
| Threat | From two people at isolated farm: one in car, one on property, recognized as Travellers To personal safety and home A person seen coming out of house No visible weapon No direct verbal threat No weapon recovered Alone | From four people: in crowded subway car during day, African- American Of robbery or physical violence Two people approached, asked for money No visible weapon No direct verbal threat Screwdrivers recovered from three people |
| Imminence | Already disabled attacker by beating and gun shot Shot attacker in back while injured and running away | Other possible attackers farther away Fired some shots after disabling individuals |
| Aggressor | Gun in home, used to injure then kill Injured and disabled victim by hitting repeatedly with wood stick Reloaded gun | Carrying unlicensed loaded weapon on person in subway |
| Necessity | Attacker no longer on property, running away Second trespasser no longer in vicinity Went inside home, came out again (opportunity to retreat) | Some shots at close range Other shots after moved farther down the subway car Moving subway (no opportunity to retreat) |
| Force Used | Deadly and fatal Multiple shots in back to already injured assailant | Deadly but non-fatal Multiple shots at each victim Wounds all four |
| Mental State | Admits intent to kill Claims loss of control | Admits intent to kill Claims loss of control |
| Charges | Murder | Attempted Murder Assault Reckless Endangerment Possession of Weapon |

no weapon.⁸¹ It is this portion of the story that gives rise to impression that the jury acquitted notwithstanding the evidence.

It is also this portion of the story that introduces the plea of excessive force, a stubbornly tenacious feature of Irish law.

A. *Traditional Elements of Self-Defense*

Classic common law self-defense doctrine focuses both on the threat that elicits responsive force, and the nature of the response itself. First, the triggering event, an attack on the person or property, must be *imminent*. Second, the response must be *necessary* and *proportionate* to the attack itself.⁸² The use of force is not lawful once the threat is over either because the attacker has withdrawn or the attack can be avoided by some other less violent means. Nor is the use of force lawful if more force is used than reasonably would be required to ward off the attack. Self-defense, therefore, is a doctrine of conflict avoidance which requires the actor to use minimal force in reaction to a threat of harm. Thus, deadly force is warranted only when responding to an equally serious threat of death or great bodily injury.⁸³

The self-defense claim calls for an examination of two distinct aspects of the actor's knowledge. First, the actor must have a reasonable belief that he or she is being threatened with force and that responsive force is necessary to avert the attack. Historically, this belief was measured by a purely objective yardstick, but in modern times, the standard has become subjectivized, allowing for inquiry into the context and circumstances of the individual.⁸⁴ The belief still must be assessed in the context of reasonableness, taking into account these more individual personal factors.⁸⁵ Second, in addi-

⁸¹ Ten years later, Darrell Cabey sued Goetz and won a huge verdict. Adam Nossiter, *Bronx Jury Orders Goetz to Pay Man He Paralyzed \$43 Million*, N.Y. TIMES, Apr. 24, 1996, at A1.

⁸² DAVID ORMEROD, SMITH & HOGAN, CRIMINAL LAW 329-30 (11th ed. 2005); PETER CHARLETON, PAUL ANTHONY McDERMOTT, & MARGUERITE BOLGER, CRIMINAL LAW 1040 (1999); 2 ROBINSON, *supra* note 79, § 121, at 2-7. Proportionality is a component of necessity. Since lawful force is bounded by necessity, using more force than necessary would be *a priori* excessive.

⁸³ WAYNE R. LAFAVE, CRIMINAL LAW 540-41 (4th ed. 2003).

⁸⁴ This was the very issue in *Goetz*, 68 N.Y. 2d at 114-15, in which the New York State Court of Appeals adopted a modified objective standard to allow the defense to introduce into evidence prior experiences, such as an earlier mugging, that might explain the reasonableness of his belief in the imminent attack.

⁸⁵ The minority view expressed in the Model Penal Code § 3.04(1) appears to be wholly subjective, requiring only that the "actor believes" the use of force is necessary.

tion to believing that responsive force is warranted, the actor must only use as much force as reasonably necessary in relation to the attack itself.

In this calculus, there are two possible loci for error or mistake: the actor may incorrectly perceive the threat and/or may overestimate how much force is required. Common law has grappled with the effect that an error in judgment about the circumstances should have on the availability of the defense and fashioned a compromise: an honest yet reasonable mistake about the threat itself would not preclude the full defense in the U.S.⁸⁶ In England, even an *unreasonable* mistake about the threatened harm could exculpate entirely.⁸⁷ A few U.S. jurisdictions also recognize a qualified defense, often called an “imperfect defense,” that gives the jury the option of convicting for manslaughter in the event of an honest, but *unreasonable* mistake about the necessity of responsive force.⁸⁸

Problems arise, however, when an actor miscalculates and resorts to a level of force that is not reasonably related to the threat because the force was either excessive or the threat was over.⁸⁹

⁸⁶ See 2 ROBINSON, *supra* note 79, § 184(b), at 399-402; LAFAYE, *supra* note 83, at 542. Section 3.04(1) of the Model Penal Code leads to a somewhat contrary result. An unreasonable mistake might result in a conviction of a reckless or negligent crime. MODEL PENAL CODE § 3.09. R

⁸⁷ Beckford v. R., (1988) A.C. 130 (U.K.).

⁸⁸ LAFAYE, *supra* note 83, § 10.4(i), at 550, cases cited at n. 88; AM. JUR. HOMICIDE § 139 (2008); 3 A.L.R. 6th 543 (2005); 42 AM. JUR. TRIALS 151, § 22.5 (2008). In California, an unreasonable mistake about the imminence of danger negates the malice required for murder. *People v. Manriquez*, 36 Cal. Rptr.3d 340, 37 Cal. App.4th 457 (2005), *cert. denied* 126 S.Ct. 2359 (2006). See Note, Janet Grumer, *Developments in California Homicide Law: IX. Self-Defense*, 36 LOY. L.A. L. REV. 1575 (2003). The doctrine is recognized in other states. See, e.g., *Thomas v. Maryland*, 143 Md. App. 97, 113-14, 792 A.2d 368 (2002). Some homicide statutes codify the imperfect defense. See, e.g., Utah Code § 76-5-205(1)(c). The doctrine of imperfect self-defense also has been applied when a defendant would have had the right of self-defense but for an act of initial aggression, but not if excessive force was employed. See, e.g., *Lewis v. Bock*, 2006 U.S. Dist. LEXIS 4020, *16 (N.D. Mich. 2006). R

Interestingly, a few New York intermediate appellate courts have reduced a murder conviction to manslaughter when the defendant’s justification defense was imperfect, finding a lack of intent to kill. See, e.g., *People v. Alamo*, 128 A.D.2d 441, 443 (1st Dep’t 1987) (although the defendant fired seven times, jury could have found defendant’s intent was to injure not kill); *People v. Cox*, 203 A.D.2d 7, 7-8 (1st Dep’t 1994) (although defendant used excessive force beyond necessary self-defense, prosecution failed to prove intent to kill rather than to seriously injure).

⁸⁹ Courts in Commonwealth countries such as Australia and India have addressed this issue with a range of results. See M. Sornarajah, *Excessive Self-Defense in Commonwealth Law*, 21 INT’L & COMP. L.Q. 758 (1972); see *infra* Part IV.C.

The rules are less forgiving in these circumstances because it is assumed that anyone acting in self-defense believes that the amount of responsive force was essential, otherwise the conduct would amount to an intentional killing based on revenge. Thus, if the actor knows that the degree of force being used is unnecessary either because the threat is no longer imminent or because less force will suffice to avoid harm, his intent is no longer defensive but rather aggressive or vengeful, so the defense fails.

The assessment of whether responsive force is reasonably related to the harm threatened is objective; a wholly subjective inquiry would undermine the utilitarian imperative underlying self-defense based on necessity. Sometimes that question is answered by a statute, or pre-existing rule of law. For example, New York State permits the use of deadly force in response to a robbery,⁹⁰ or a home invasion that poses personal danger.⁹¹ When a statute does not expressly authorize the particular degree of force, the jury determines case-by-case whether the retaliatory force was proportionate to the threat.⁹² This decision requires situational or subjective measurements about comparative size or alternative defensive options, for example, in cases of women or children who, due to their lack of strength relative to their assailants, resort to deadly violence despite the use of lesser force against them.⁹³

B. 'Legitimate Defence' in Ireland⁹⁴

The *Nally* case was notable in Ireland for its emotionally charged and socially divisive facts, but in many less obvious ways it

⁹⁰ N.Y. PENAL LAW § 35.15 (McKinney).

⁹¹ *Id.* § 35.20.

⁹² There has been a confusing tradition of designating a mistake about proportionality as a "mistake of law," whereas a misjudgment about the threat itself is seen as a factual error. For example, using deadly force to prevent property damage is not permitted under traditional common law principles; any belief that such force is lawful would be a mistake of law. 2 ROBINSON, *supra* note 80, § 184(f), at 414-15. This labeling generates some of the same confusion that occurs in impossibility as a defense to an attempt that has been simplified by the approach of Model Penal Code § 5.01, which essentially eliminates the distinction. *See also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.07, 436-38 (4th ed. 2006).

⁹³ *See* Holly Macguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 416-19 (1991); Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1431 (1990) (reviewing CYNTHIA GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW* (1989)).

⁹⁴ The term "legitimate defence" in Ireland means the "lawful killing of another person in response to a threat to 'private' [the protection of persons or property] or 'public' interests." Law Reform Commission, *Consultation Paper: Legitimate Defence* 1 (LRC CP

raised unresolved issues about the limits of defensive force that recently had come under scrutiny.⁹⁵ Irish law regarding self-defense defenses is a combination of statutory and common law principles that permit and constrain the use of both lethal and non-lethal force in defense of self, family and home.⁹⁶ The lawfulness of the use of force in non-fatal offenses is determined by a statute that supplanted the common law defense.⁹⁷ In cases of fatal force, Irish law basically conforms to common law tradition, with a significant exception of particular relevance to the *Nally* case: the plea of excessive force that can lead to a manslaughter conviction. It is this notable, and confusing, doctrine that sets *Nally* apart from *Goetz*, and from most other Commonwealth countries.

1. *The Non-Fatal Offences against the Person Act of 1997*

The use of non-deadly force in self-defense or defense of another person is now controlled entirely by a statute. *The Non-Fatal Offences against the Person Act of 1997*⁹⁸ [hereinafter “the Act”]

41-2006) [hereinafter “*Legitimate Defence.*”], available at <http://www.lawreform.ie/Legitimate%20Defence%20Consultation%20Paper%20%20Nov%2006.pdf>. The Irish Law Reform Commission was established pursuant to the Law Reform Commission Act of 1975 to continuously review the laws of Ireland with the goal of proposing law reform. <http://www.lawreform.ie/> (last visited July 7, 2008).

⁹⁵ The consultation paper, *Legitimate Defence*, *supra* note 94, released in November 2006 immediately before the second *Nally* trial, addressed legitimate defenses and the use of fatal force.

⁹⁶ Irish law also gives substantial weight value to case law from England. BYRNE & McCUTCHEON, *supra* note 13, at 540.

⁹⁷ Some aspects of the Irish Constitution affect the law of justification. Enacted by plebiscite in 1937, the Constitution of Ireland, *Bunreacht na hÉireann*, is the basic law of the nation, superior to both legislative and common law. *Id.* at 545. It came into operation on December 29, 1937 after a plebiscite. The Constitution can be changed only by a referendum in which every citizen of Ireland, over the age of eighteen is entitled to vote. *See* Ir. CONST. 1937, available at [http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20\(Eng\)Nov2004.htm](http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20(Eng)Nov2004.htm).

Ir. CONST. 1937, art. 40-44 set forth fundamental rights guaranteed to all citizens of Ireland. Several sections are pertinent to cases of self-defense, and much more directly and specifically address issues of personal autonomy than does the U.S. Constitution. Article 40.3.2 mandates the State to protect every citizen from “unjust attack” and “in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.” Article 40.4 protects individuals against a deprivation of liberty save in accordance with law. Article 40.4.1 states that “No citizen shall be deprived of his personal liberty save in accordance with law.” Article 40.5 guarantees that “The dwelling of every citizen is inviolable and shall not be entered save in accordance with law.”

⁹⁸ Non-fatal Offences Against the Person Act of 1997, Articles 18-20 (No. 26/1997) (Ir.), available at <http://www.irishstatutebook.ie/1997/en/act/pub/0026/index.html> (last visited Dec. 23, 2008).

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authorizes the use of reasonable force in defense of person, family and home.⁹⁹ Departing from a historically objective standard, now an assessment of reasonableness depends on the circumstances as the accused believes them to be, a determination that generally is referred to the jury.¹⁰⁰ Many traditional features of common law doctrine were absorbed into the statute's reasonableness determination. For example, the duty to retreat before using force is no longer a distinct element of the defense but is now absorbed into the jury's overall assessment of the reasonableness of the use of force.¹⁰¹

The statute also reconfigured the standard of reasonableness from a purely objective calculation to require that the perceptions of the accused to be taken into account. The law requires the fact finder to enter the mind of the defendant.¹⁰²

The Act, therefore, significantly changed traditional principles of self-defense. The common law formal rules of imminence, necessity (including retreat), and proportionality have been delegated to the jury in its determination of the reasonableness of the actor's belief about the need to use force, and whether the force employed was reasonable under the circumstances.

2. *Irish Common Law Regarding Murder and Excessive Force Manslaughter*

The lawfulness of the use of fatal force, however, is still formally governed by case law, although it appears that some statutory standards have migrated into this realm.¹⁰³ For example, in his instructions to the jury at the first *Nally* trial, Judge Carney said,

We assess [self-defence and provocation] in light of what is known as the subjective test rather than the objective test. . . . [Y]ou do not look at how the accused behaved in the light of how you would expect the reasonable man to behave. You look at how the accused behaved in light of how you would expect

⁹⁹ "The use of force by a person . . . if only such as is reasonable in the circumstances as [the person] believes them to be, does not constitute an offence . . ." *Id.* at Art. 18(1).

¹⁰⁰ *Id.* at Art. 18(5).

¹⁰¹ "[I]t is difficult to resist the conclusion that, at least as far as the use of non-lethal force is concerned, the retreat requirement in Irish law is now bereft of anything that can meaningfully be described as a standard of conduct." McAULEY & McCUTCHEON, *supra* note 79, at 744.

¹⁰² CHARLETON ET AL., *supra* note 82, § 13.25, at 1034.

¹⁰³ *D.P.P. v. Barnes*, [2006] C.C.A. 165 (Ir.), available at <http://www.bailii.org/ie/cases/IECCA/2006/C165.html> (last visited July 10, 2008).

him to behave with all his history, warts, baggage, obsessions and everything.¹⁰⁴

A specific determination about the ingredients of imminence, necessity, retreat, and proportionality would be a prerequisite to any claim of justified force, including an evaluation of the honesty and reasonableness of the belief in the necessity of responsive force assessed from the perspective of the accused.

In every common law jurisdiction, including Ireland, self-defense can be a complete defense to murder.¹⁰⁵ Ireland also adopts a minority view that allows a qualified defense reducing murder to manslaughter in cases when the accused is entitled to use some force lawfully, but uses more force than is necessary under the circumstances.¹⁰⁶ The Irish Law Commission described “the Plea [of Excessive Defence]. . . as a panacea that might alleviate potentially harsh and unjust murder convictions.”¹⁰⁷

a. **Deadly Force in Self-Defense and Defense of Others**

A reasonable belief in the imminence of a threat and the necessity of responsive force to avert bodily harm is sufficient to justify its use as long as the force does not exceed the amount reasonably required to repel an attack. This requires a proportionality assessment: only a person whose life is threatened can lawfully respond with deadly force. According to one treatise, Ireland largely adopts a strict proportionality standard to assess the reasonableness of the amount of force employed.¹⁰⁸ But the recent comprehensive comparative survey of the Law Reform Commission concluded that Irish law is a hybrid in which “proportionality is relevant to the question of reasonableness but only insofar as there has been a gross departure from the standard.”¹⁰⁹

¹⁰⁴ Transcript, *supra* note 32, at 71.

¹⁰⁵ “A person is entitled to protect himself from unlawful attack. If in doing so, he uses no more force than is reasonably necessary, he is acting lawfully and commits no crime even though he kills his assailant.” Dwyer [1972] I.R. 416, at 429.

¹⁰⁶ Finbarr McAuley, *Excessive Force in Irish Law*, in *PARTIAL EXCUSES TO MURDER* 194, 195 (Stanley Meng Heong Yeo, ed. 1990).

¹⁰⁷ *Legitimate Defence*, *supra* note 94, § 7.134, at 289.

¹⁰⁸ CHARLETON ET AL., *supra* note 82, § 13.17, at 1032.

¹⁰⁹ *Legitimate Defence*, *supra* note 94, § 6.46, at 245. The Commission recommended the retention of a proportionality rule. *Id.* § 6.56, at 248.

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The leading Irish case regarding excessive force is *People v. Dwyer* in which the Supreme Court¹¹⁰ ruled that as long as the use of force was lawful *and* the accused honestly believed that amount of force was needed to repel the attack, then an instruction about manslaughter is required even though excessive force ordinarily would preclude self-defense.¹¹¹ As one of the *Dwyer* judges wrote:

[I]f the accused honestly believed that the force he did use was necessary, then he is not guilty of murder. The onus, of course, is upon the prosecution to prove beyond reasonable doubt that he knew that the force was excessive or that he did not believe that it was necessary If . . . it does establish that the force used was more than was reasonably necessary it has established that the killing was unlawful as being without justification . . . In those circumstances the accused . . . would be guilty of manslaughter.¹¹²

Another judge agreed with the decision but analyzed an honest mistake about excessive force as a proxy for lack of intent to kill, the *mens rea* required under the murder statute.¹¹³

His intention, however, falls to be tested subjectively and it would appear logical to conclude that, if his intention in doing the unlawful act was primarily to defend himself, he should not be held to have the necessary intention to kill or cause serious injury. The result of this view would be that the killing, though unlawful, would be manslaughter only.¹¹⁴

Dwyer focuses on the perspective of the actor when assessing the effect of a miscalculation regarding the amount of force necessary. *Dwyer* himself had used lethal force in response to an undisputedly real threat from two unarmed assailants. Under a strict proportionality analysis, deadly force would only be necessary and reasonable in response to an equally deadly threat. Therefore, because he used “more force than may objectively be considered necessary, his act is unlawful, and, if he kills, the killing is unlawful.”¹¹⁵ But, *Dwyer* continues to say that if the accused uses disproportion-

¹¹⁰ The Supreme Court is the court of final appeal in Ireland. See <http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/2D2779D5D7A9FEAB80256D8700504F7B> (last visited July 18, 2008).

¹¹¹ *Dwyer* [1972] I.R. 416. Until this time, case law in Commonwealth countries was inconsistent. See *infra* Part IV.C.

¹¹² *Dwyer* [1972] I.R. 416.

¹¹³ Criminal Justice Act, 1964 (No. 5/1964) (Ir.), available at <http://www.irishstatutebook.ie/1964/en/act/pub/0005/index.html>. *Dwyer* [1972] I.R. 416.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

ate force under an honest although incorrect belief that deadly force was required to repel an attack, then he or she should be convicted of manslaughter instead of murder.¹¹⁶ In effect, *Dwyer* sanctions mitigation when the accused committed an error of judgment in a difficult situation and was carried away. In any event, the decision belongs to the jury.

Irish law, therefore, benefits an accused who overreacts by recognizing a partial defense to murder in instances of excessive force, but only if the accused honestly, albeit mistakenly, believes that the degree of force used is required to repel an attack. Irish law reaches different results with respect to mistakes both about the threat and the degree of responsive force lawfully allowed. An honest *and* even *unreasonable* mistake about the threat itself would result in an acquittal, as long as the accused used reasonably proportional defensive force. In contrast, a miscalculation about the amount of lawful responsive force objectively necessary ends in a manslaughter conviction.¹¹⁷

The burden of proving that the defendant acted purposely to kill is on the prosecution.¹¹⁸ With respect to a self-defense claim, once raised by the defendant, Irish law also requires that the prosecution prove that the defendant knew that the force was excessive (murder) or that it was not reasonably related to the threat (manslaughter).¹¹⁹

The *Dwyer* decision itself is not a model of clarity,¹²⁰ but it does establish that voluntary manslaughter not murder is committed “where the prosecution establishes all the elements for murder

¹¹⁶ *Id.*; see also MCAULEY & McCUTCHEON, *supra* note 79, at 746.

¹¹⁷ MCAULEY & McCUTCHEON, *supra* note 79, at 743-46.

¹¹⁸ The onus, of course, is upon the prosecution to prove beyond a reasonable doubt that he knew that the force was excessive or that he did not believe that it was necessary. If the prosecution does not do so, it has failed to establish the necessary malice. If, however, at the same time it does establish that the force used was more than was reasonably necessary it has established that the killing was unlawful as being without justification and not have been by misadventure. In those circumstances, the accused in such a case would be guilty of manslaughter.

Dwyer [1972] I.R. 416.

¹¹⁹ MCAULEY & McCUTCHEON, *supra* note 79, at 755-56.

¹²⁰ In *Legitimate Defence*, *supra* note 94 the Law Reform Commission observes, “Unfortunately, the exact basis upon which excessive defenders are relieved of liability for murder but are found guilty of manslaughter remains unclear.” *Id.* §7.160, at 298.

but death isn't inflicted by *excessive force* in self-defense."¹²¹ The upshot of *Dwyer* is that if a defendant honestly believes he is defending himself, so that the murder would have been justified but for the amount of force used, he may be convicted of manslaughter and is entitled to a jury instruction to that effect.

Judge Carney actually properly instructed the jury consistently with the longstanding *Dwyer* holding:

I have ruled that the amount of force here cannot objectively be justified, but if you find that the accused man in his situation was using no more force than he considered reasonably necessary in the circumstances prevailing, murder would not be made out and the unlawful killing would be manslaughter.¹²²

Dwyer remains good law in cases of lethal force.¹²³ But its holding is out of sync with changes brought about by the Act, essentially leaving to the jury the resolution of the reasonableness of all elements of the defense, including the appropriateness of the responsive force. One treatise author speculates that there have been few homicide cases to test this proposition since prosecutors are averse to bringing a murder charge under circumstances where the accused likely will benefit at trial from the qualified defense.¹²⁴

b. Householder Self-Defense

Nally's right to use lethal force was complicated by the fact that Ward's intrusion occurred in his home. Irish laws governing the rights and duties of a homeowner against an intruder have been difficult to understand and apply, apparently leaving homeowners confused about their legal rights and obligations when confronted by an intruder.¹²⁵ The Irish Constitution protects all dwellings against unlawful entry and permits the use of force to protect the home.¹²⁶ Generally, the use of fatal force in defense of property

¹²¹ Law Reform Commission, *Report-Homicide: Murder and Involuntary Manslaughter* 76 LRC 87-2008, available at <http://www.lawreform.ie/publications/Homicide%20Report%20ONLINE.pdf>. The only cases cited by the LRC to support this rule are *Dwyer* and, ironically, *Nally*.

¹²² *Nally*[2006] C.C.A. 128 (Ir.), available at <http://www.bailii.org/ie/cases/IECCA/2006/C128.html> (last visited Sept, 14, 2008), at 74.

¹²³ *D.P.P. v. Ceka* [2004] C.C.A. 25 (Ir.); *D.P.P. v. O'Carroll* [2004] 3 I.R. 531 (Ir.); *D.P.P. v. Clarke*, [1994] 3 I.R. 289 (Ir.).

¹²⁴ McAULEY & McCUTCHEON, *supra* note 79, at 745.

¹²⁵ See Catherine O'Sullivan, *The Burglar and the Burglarized: Self-Defence, Home-Defence, and Barnes*, 17 IR. CRIM. L. J. 10 (2007).

¹²⁶ IR. CONST. 1937, art. 40.5: 1. Inviolability of the dwelling ("The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."); Ir.

would not be considered reasonable, so the common law placed a high burden on the property-holder to avoid unnecessary force or to avoid force altogether.¹²⁷ In cases of non-fatal force, the scope of permissible force in defense of a dwelling is now governed by the Act.¹²⁸ The reasonableness of the property-holder's response, including whether retreat should have occurred, is a question for the jury.¹²⁹

When death ensues, however, traditional common law rules prevail to limit deadly defensive force. Shortly after the *Nally* acquittal, the Court of Criminal Appeal had occasion to decide *D.P.P. v. Barnes*, an important case involving the rights of homeowners against burglars (and vice-versa).¹³⁰ A burglar charged with the murder of the householder claimed that he acted in self-defense when the occupant, returning to his house in the midst of the trespass, violently attacked the intruder, who then claimed to have killed in self-defense. Not surprisingly, the Court was unsympathetic to the defendant-trespasser, finding that when an intruder kills a householder during the course of a burglary, the killing can never be fully lawful; it can never be less than manslaughter since burglary is always an act of initial aggression.¹³¹

To analyze the burglar's proffered self-defense claim, the Court reviewed the law of permissible responses to a dwelling burglary. It had no difficulty finding, in light of the Constitution and the Act, that a person cannot be killed simply because he burglarizes a home.¹³² Yet, because a burglar is an aggressor, and the owner is not necessarily required to retreat from his own home, the owner may lawfully resort to appropriate deadly force to repel the

CONST., art. 40.3.1 ("The State guarantees by its laws to respect, and, thus as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.").

¹²⁷ It seems an elementary proposition . . . that a person cannot lawfully lose his life simply because he trespasses in the dwelling house of another with intent to steal. In as much as the State itself will not exact the forfeiture of his life for doing so, it is ridiculous to suggest that a private citizen, however outraged may deliberately kill him simply for being a burglar.

Barnes, [2006] C.C.A. 165; *see also* McAULEY & McCUTCHEON, *supra* note 79, at 774-75; CHARLETON ET AL., *supra* note 82, at 1029.

¹²⁸ Non-Fatal Offenses Against the Person Act of 1997 Article 18(1)(c) (No. 26/1997) (Ir.) ("A person may lawfully use force: . . . (i) to protect his or her property from appropriation, destruction or damage caused by a criminal act or from trespass or infringement.").

¹²⁹ McAULEY & McCUTCHEON, *supra* note 79, at 776.

¹³⁰ *Barnes* [2006] C.C.A. 165.

¹³¹ *Id.* at 10.

¹³² *Id.* at 15.

invasion. The Court then stated that a homeowner may lawfully employ “retaliatory” force to subdue, drive off, or detain an intruder in order to avert any threat. To determine whether there was a degree of force that might be excessive, the Court looked at the Act of 1997.¹³³ Adopting the mixed standard found in that statute, the Court endorsed a “reasonably necessary” standard regarding the use of non-deadly force to protect against a trespass. It concluded with the observation that liability would rarely attach to a homeowner unless the force was grossly disproportionate or malicious.¹³⁴

The Court’s analysis is premised on a theory of justification based on forfeiture by the burglar, an aggressor who can never be regarded as wholly blameless.¹³⁵ Thus, the burglar might be thought to have no right of self-defense against excessive force committed by the homeowner. However, the respect for life constraint expressed in Article 40 of the Irish Constitution permits limited recourse to lawful force by a burglar to resist disproportionate force by the owner. In sum, while a burglar cannot lawfully be killed simply for being a burglar, considerable leeway to use force is given to the householder. In balance, Barnes’ lethal defensive force was unreasonable.¹³⁶

The *Barnes* case is generally viewed as helpful for clarifying the legal contours of householder self-defense: 1) A person does not have to retreat to protect himself inside his home; 2) A home burglary is an act of aggression and thus a burglar is obliged to retreat before using defensive force; 3) Under some circumstances, lethal force used by the homeowner is reasonable.¹³⁷ Although the

¹³³ Section 18 states, in pertinent part: “The use of force if only such as is reasonable in the circumstances as he or she believes them to be [is allowed] by a person [to protect himself or herself] . . . from trespass”

¹³⁴ Barnes, [2006] C.C.A. 165, at 92.

¹³⁵ Several cases with similar facts have been reported by the English press. See, e.g., Gary Slapper, *The Law Explored: Self-Defence*, TIMESONLINE, Oct. 3, 1997, http://business.timesonline.co.uk/tol/business/law/columnists/gary_slapper/article2581201.ece?ILC-EVYcomments&ATTR=LAW. One notable English case involved an elderly man who wounded a burglar with a shotgun and was acquitted, but later had to pay damages to his victim. Gary Slapper, *Castles Built on Law*, 150 NEW L.J. 6941 (2000). There, the Court of Appeal established that a trespasser is owed a duty of care, even by a person defending his property, and can be compensated if his injuries exceed reasonable limits. *Revill v. Newberry*, [1996] Q.B. 567 (U.K.).

¹³⁶ Barnes, [2006] C.C.A. 165, at 20.

¹³⁷ Rachel McCrossan, *The Nature of the Offence of Burglary and the Permitted Response of a Victim of that Offence*, D.P.P. v. Barnes, 17 IR. CRIM. L.J. 30 (2007); Keith Spencer, *Self Defence and Defence of the Home*, 17 IR. CRIM. L.J. 17 (2007).

Barnes analysis ratifies *Nally*'s conduct to a great extent, even more remarkably, the cases clash on the important questions of the role of the jury, as will be noted below.

Although the two cases were decided less than a month apart, *Barnes* surprisingly makes no reference to *Nally* or to the Law Commission's consultation paper issued a month earlier. *Barnes* is a genuine step forward in clarifying the rules applying to lethal force in the home, but it also confirmed the imperative for a coherent statute.

3. *Proposed Legislation*

In reaction to feelings stirred by the portrait of the vulnerable homeowner typified by the *Nally* case, members of the Irish Parliament¹³⁸ sprang into action and proposed new homeowner legislation. Two bills were introduced by members of different political parties. The Defence of Life and Property Bill of 2006 offers amendments to the Non-Fatal Offences Against the Person Act.¹³⁹ It extends the occupant's lawful use of force to the curtilage of a dwelling.¹⁴⁰ This Bill also provides a complete defense to homicides (murder or attempted murder and manslaughter). In addition, it makes no effort to put the occupant's response in a framework of reasonableness.

The Criminal Law (Home Defence) Bill of 2006 is the second effort to address these issues.¹⁴¹ The Bill purports to amend the 1997 Act by creating a presumption that any non-lethal force is reasonable when used in defense of a home where an unlawful intruder remains inside.¹⁴² The Bill does not apply to charges of murder or other unlawful killing.¹⁴³ The Bill effectively eliminates the duty of retreat¹⁴⁴ and allows circumstances concerning limited

¹³⁸ In Gaelic, the Parliament is known as *Tithe An Oireachtas*. See <http://www.oireachtas.ie/ViewDoc.asp?fn=/home.asp>.

¹³⁹ Defence of Life and Property Bill (Bill No. 30/2006)(Ir.), available at <http://www.oireachtas.ie/documents/bills28/bills/2006/3006/b3006s.pdf>. The Bill was criticized as "an example of rushed legislation used to achieve a political goal . . ." Spencer, *supra* note 137, at 24.

¹⁴⁰ This would include a "driveway, access path, garden, yard, area, space, building, store, garage, and passage in the close vicinity of the dwelling." Defence of Life and Property Bill (Bill No. 20/2006) (Ir.), at § 1.

¹⁴¹ Criminal Law (Home Defence) Bill of 2006 (Bill No. 37/2006) (Ir.), available at <http://www.oireachtas.ie/documents/bills28/bills/2006/3706/b3706d.pdf>.

¹⁴² *Id.* at § 3.

¹⁴³ *Id.* at § 5.

¹⁴⁴ *Id.* at § 6(c).

options and decision making opportunities, as well as threats to family members inside, to be taken into account in the context of a rebuttal to the presumption.¹⁴⁵ Moreover, this provision uses the subjective terminology of an “honest belief” about options as the key to a determination of reasonableness. Finally, this Bill eliminates any potential tort liability for any injuries to a trespasser caused by the lawful occupant of a dwelling even those that might be the result of excessive force.¹⁴⁶

Some members of Parliament noted that any change in the law would be superfluous since there never actually were any instances of unjust convictions of homeowners who had behaved reasonably. Still others defended the current law as striking an appropriate balance between the rights of home occupants and trespassers.¹⁴⁷ For the time being, both Bills are dormant, possibly because some legislators consider these proposals to be unnecessary in light of current law, including the *Barnes* decision, and suspect them to be motivated by politics, taking advantage of the law and order sentiments aroused by *Nally*.¹⁴⁸ Meanwhile, the Law Reform Commission continues its work toward a possible legislative overhaul.

C. *Excessive Self-Defense in Other Commonwealth Jurisdictions*

The excessive force plea did not originate in Ireland, but its endurance there makes Ireland a stubborn outlier. Today, it is the only common law country to retain this defense.¹⁴⁹ Prior to *Dwyer*, a few cases in Australia and the United Kingdom had grappled with the effect on a murder charge of excessive force employed under conditions that a reasonable person would consider neces-

¹⁴⁵ *Id.* at § 7.

¹⁴⁶ *Id.* at § 4.

¹⁴⁷ These comments appeared in Parliamentary debates available at <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20060627.xml&Page=1&Ex=H15#H15>. See also Gene McKenna, *Laws to Protect Homeowners who Attack 'Not Necessary,'* IRISH INDEPENDENT, Aug. 6, 2007; Carl O'Brien, *Decision on Householders' Bill Gets Mixed Response,* IRISH TIMES, Aug. 8, 2007, at 2 (announcing Minister for Justice will not publish Defence of Life and Property Bill approved by prior cabinet in favor of leaving development of law to the courts).

¹⁴⁸ See O'Brien, *supra* note 147.

¹⁴⁹ McAuley, *supra* note 106, at 194. Only a token number of U.S. jurisdictions weakly allow the “imperfect defense” when the actor honestly believes that the excessive amount of force used was appropriate and necessary, but objectively it was not. See, e.g., *State v. Bell*, 121 P.3d 972, 978-79 (2005); KAN. STAT. ANN. 21-3403(1992) added section to manslaughter statute for intentional killings that result from unreasonable but honest belief in necessity of deadly force.

sary. In Australia, in *R. v. Howe*,¹⁵⁰ the defense of excessive force allowed a defendant to be convicted of manslaughter when he reasonably but mistakenly believed he was threatened with deadly force and needed to respond in kind.¹⁵¹ This doctrine was basically accepted in Australia, although with some controversy, until 1987 when *Zecevic v. D.P.P. (Victoria)* effectively eliminated excessive self-defense.¹⁵²

England applies a wholly subjective standard with respect to the belief in the threat justifying responsive force, so that a mistaken belief about the existence of an imminent threat of death of serious injury is tested subjectively (was it honest and genuine?) rather than objectively (was it reasonable?). Thus, the “imperfect defense” accepted in some U.S. jurisdictions referring to the perception of the threat itself is redundant in the U.K., where even an unreasonable mistake about the threat can be considered when judging the complete self-defense claim.¹⁵³

The United Kingdom considered but consistently refused to recognize excessive force self-defense, even if the defendant believes that the degree of force was reasonable when the force exceeded an objectively determined degree of necessity.¹⁵⁴ As a result, in the U.K. self-defense is essentially ‘all or nothing’—a murder conviction or an acquittal—until the legislature acts.

¹⁵⁰ *Zecevic v. D.P.P.*, (1958) 100 C.L.R. 448 (Austl.).

¹⁵¹ According to one commentator, the excessive self-defense doctrine had been recognized in other Commonwealth jurisdictions including Canada, Malaysia, Nigeria, and India, even before *Howe*. M. Sornarajah, *Excessive Self-Defence in Commonwealth Law*, 21 *INT'L & COMP. L.Q.* 758 (1972). This author points out that other countries have rejected the doctrine. M. Sornarajah, *Excessive Self-Defence; Further Developments*, 24 *INT'L & COMP. L.Q.* 115 (1975) (discussing Dwyer as giving the doctrine “new impetus”).

¹⁵² “The use of excessive force in the belief that it was necessary in self-defence will not automatically result in a verdict of manslaughter.” [1987] 162 C.L.R. 645, 654 (Austl.). See also Stanley Meng Heong Yeo, *The Demise of Excessive Self-Defence in Australia*, 37 *INT'L COMP. L. Q.* 348 (1998).

¹⁵³ In England, a mistaken belief about the existence of an imminent threat of death of serious injury is tested subjectively (whether it was honest and genuine) rather than objectively (whether it was reasonable). *A Criminal Code for England and Wales* (Laws Com. No. 177), Vol. 1, clauses 27-30; see also CHARLETON et al., *supra* 82, § 13.24, at 1033 (citing *Beckford v. R.*, (1988) A.C. 130 (U.K.)) (“A genuine belief in facts which if true would justify self defence [is] a defence to a crime or personal violence because the belief negates the intent to act unlawfully.”).

¹⁵⁴ The leading case on this point is *R. v. Palmer*, (1971) A.C. 814 (P.C.) (U.K.); see also *R. v. Clegg*, (1995) A.C. 482 (H.L.) (U.K.).

Since English law never accepted the Australian approach that mandates an instruction on the qualified defense, excessive force would not preclude an acquittal.

If there had been an attack to that the defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defence action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken.¹⁵⁵

Unlike Ireland, therefore, the English courts begin by determining the subjective claim that the accused believed the reactive force was essential. Then, if the force used was reasonable under the perceived circumstances, an acquittal may result.¹⁵⁶

Self-defense law was reviewed in 2004 by the Law Commission in England.¹⁵⁷ The impetus for even considering change came from the difficulty in applying traditional self-defense doctrine to cases of abused individuals who kill where there may be a disparity of strength and size between antagonists so that objectively excessive lethal force might be warranted, as well as to householders who impulsively kill intruders. The Law Commission recommended against a separate partial defense of excessive force in favor of a reformulated partial provocation defense available to a defendant who uses disproportionate force out of fear of violence to himself or another.¹⁵⁸ Their recommendation revised the provocation defense, reducing murder to manslaughter if the defendant acted in response to

fear of serious violence towards the defendant or another; and a person of the defendant's age and of ordinary temperament *i.e.*, ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.¹⁵⁹

If this recommendation was adopted, the U.K. would codify a manslaughter option for individuals whose responsive force ex-

¹⁵⁵ Palmer, [1971] A.C. 814, at 844.

¹⁵⁶ R. v. Owino, [1996] 2 Crim. App. 128, at 128.

¹⁵⁷ LAW COMMISSION, PARTIAL DEFENCES TO MURDER: A FINAL REPORT (Aug. 6, 2004), available at [http://www.lawcom.gov.uk/docs/lc290\(2\).pdf](http://www.lawcom.gov.uk/docs/lc290(2).pdf). The Law Commission is an independent body set up by Parliament to review and recommend reform of the law in England and Wales. See <http://www.lawcom.gov.uk>.

¹⁵⁸ PARTIAL DEFENCES TO MURDER, *supra* note 157, at §§ 4.27-4.30.

¹⁵⁹ *Id.* at § 3.168(b).

ceeds the limits of strict objective necessity without labeling it “excessive self-defense.” The shift from a justification-based to a provocation-like approach suggests that the use of excessive force out of fear, even without a loss of control, is a morally acceptable response to an overreaction under extremely stressful and aberrant circumstances that deserves some leniency. The English recommendation appreciates that a disproportionate overreaction to some threats may be cool-headed, but nevertheless deserving of mitigation, thereby giving the jury more alternatives.¹⁶⁰

V. ACCOUNTING FOR ACQUITTALS: EXCESSIVE FORCE,
EMPATHETIC JURIES, AND A RELUCTANCE
TO SECOND-GUESS

Both Bernhard Goetz and Padraig Nally used deadly force against a person who seemed to no longer pose a threat. Separated by an ocean and two decades, two juries in cases in which defensive force was arguably—and, to many, indisputably—excessive, considered self-defense narratives in which villain-victim roles were inverted. Then, they acquitted. These juries considered evidence that refuted not only the legitimacy of the claim of the threat itself but also the necessity of a deadly response. Their respective juries were unwilling to condemn either the subway gunman or the Irish farmer after they had struggled to put themselves in the defendants’ shoes and had seen the world through their eyes.

This section will first examine several familiar explanations for these questionable verdicts. They are all plausible but nevertheless conjectural. Then, it will surface an alternative version of what happens in high-profile, socially disruptive self-defense cases where judgment is clouded by emotions and morality, where the acts themselves are anomalous, and where the actors’ culpability is ambiguous.

This latter theory suggests that jurors in self-defense cases seem comfortable with the task of assessing the subjective genuineness of the fear experienced by the accused. If the defendant is credible and his explanation makes sense, they say, “Yes, I believe he was afraid and can understand why.” In other words, they read-

¹⁶⁰ The Law Commission reiterated these recommendations in its more recent comprehensive report advocating for a new homicide act. *MURDER, MANSLAUGHTER AND INFANTICIDE*, LAW COM. NO. 304 (Nov. 28, 2006), at §§ 5.47-5.57, available at <http://www.lawcom.gov.uk/docs/lc304.pdf>.

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ily can apply a ‘subjectively-objective’ measuring stick that concludes, “I understand and agree that he had a right to strike back against his assailant.”

At the next step, however, when they have to judge how this genuinely and understandably frightened individual should react, traditionally an objective assessment, they balk at imposing an outsider’s judgment of the reaction because they think, “Who knows what I would do in that situation? I won’t punish him if all he did was miscalculate and hit/hurt/shoot the attacker too much.” Since most modern jurisdictions, including Ireland and New York, delegate to the jury the determination of the relationship between the triggering event and the reactive behavior, increasingly porous standards allow jurors to reconstitute self-defense into a judgment of the defendant’s personal accountability rather than a determination about the social value of his deeds.

After examining some customary accounts and reactions to the two verdicts, it is possible to offer an additional descriptive conclusion about what might well be happening: Once jurors have accepted the account of the threat and have subscribed to the defendant’s explanation for his fear, in the transition between stage one and stage two, self-defense transforms into a claim that more closely resembles an excuse. The jury is unwilling to condemn the actor, especially when he admits to being out of character, out of control, beside himself, demented, or deranged, as the defense claimed at these respective trials. This is particularly the case when the good guy - bad guy, villain - victim roles are reversed in the defense strategy and in the media, as was true in both *Goetz* and *Nally*.

Finally, this section will connect this hypothesis to the excessive force doctrine, a middle ground available to jurors reluctant to condemn the over-zealous as murderers. This would acknowledge the legitimacy of their fear, yet fix blame for failure to adhere to a standard of care. Essentially, the manslaughter conviction would be based on a finding of reckless or negligent use of deadly force. It is true that neither the *Goetz* nor *Nally II* jurors actually resorted to this alternative as a compromise in these sensational cases, probably because of the intense scrutiny these cases engendered. But in cases out of the glare of the spotlight of public opin-

ion, the verdict probably would have reflected this compassionate compromise, as it did in *Nally I*.¹⁶¹

A. *Conventional Explanations*

1. *People v. Goetz*

The case ran on two tracks. The first was the legal journey that required a threshold appellate court resolution of the appropriate governing legal standards before the case could even proceed to a verdict on Goetz's criminal responsibility, and then the trial.¹⁶² The second, the story heard by the public, experienced by the African-American community, and related in the media, boiled down to two competing narratives: the subway vigilante who stood up to the everyday grinding urban violence in the form of the African-American teenagers who represented New York City's threatening black youth of the day, versus the societal illness of skin-deep racism that exploded into unwarranted violence as a white man pulled the trigger because of his race-based assumptions. *Goetz* painfully exposed the role of race in the calculation of the justification defense, and generated a significant body of literature examining this issue.¹⁶³

Juror Mark Lesly provides the insider's perspective, in which he painstakingly recounts the jury's detailed analysis of the evidence in light of legal standards.¹⁶⁴ He never mentions race in his description of the deliberations, and maintains that the jurors took seriously their responsibility to fairly and impartially judge the facts. He says that the jury was not convinced that Goetz had in-

¹⁶¹ This argument does not squarely apply to *Goetz* since it was not a murder case. But one of the counts in the indictment was Reckless Endangerment in the First Degree, charging Goetz with engaging in conduct that creates a grave risk of death to another person by discharging a loaded firearm in an occupied subway car under circumstances that evince a depraved indifference to human life. N.Y. PENAL LAW §120.25 (McKinney). The jurors could have convicted him for this extreme reckless conduct. This could be viewed as an analogous compromise to convicting of manslaughter when using excessive force, essentially a negligent or possibly reckless response.

¹⁶² *Goetz*, 68 N.Y.2d 96.

¹⁶³ See, e.g., FLETCHER, *supra* note 2; CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* (2003); Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420 (1988); Garvey, *supra* note 18; Goldstein, *supra* note 5; Yung-Lee, *supra* note 5; Nelson, *supra* note 5; Nourse, *supra* note 5; Tesner, *supra* note 5.

¹⁶⁴ MARK LESLY, *SUBWAY GUNMAN: A JUROR'S ACCOUNT OF THE BERNHARD GOETZ TRIAL* 271-313 (1988). There has been no comparable dissection of either *Nally* jury's thinking during their deliberations.

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tended to kill the four men leading to a not guilty verdict on the attempted murder charges.¹⁶⁵ Their deliberations were complex and individualized because there were separate counts relating to each of the four victims, each of whom played a different role in the events as they unfolded. The jury also had to be persuaded beyond a reasonable doubt that he was *not* acting in self-defense with respect to other charges. After many days of deliberations, the jurors found that there was reasonable doubt about whether Goetz's shooting of four unarmed young men on a subway train was *not* a reasonable act.¹⁶⁶

Others of the twelve jurors, two of whom were black, agreed. They reportedly found the evidence contradictory and some of the prosecution case unconvincing. In news accounts, they disputed that race played a role in the verdict.¹⁶⁷

Professor Stephen Carter thinks that the jury accepted Goetz's explanations for his beliefs and even his claim that he lost control when he fired at one of the men who had already fallen after being shot. He believes that the public mythologized Goetz as an avenger whose conduct embodied their wished-for courage. He turned the tables on urban predators, and courageously regained control of the urban jungle.¹⁶⁸

Professor George Fletcher, who attended the trial and wrote a book that concerns both the trial proceedings and the many underlying legal and moral issues it raised, explains the verdict as a failure of proof. Goetz did not have to convince the jury that he was justified, even by a preponderance of the evidence; rather, the prosecutor had to prove his use of deadly force was unlawful.¹⁶⁹ But Fletcher opines that since justification defenses make a claim about the moral forfeiture of the victim-aggressor, the public has more trouble disassociating the verdict from a judgment of the victims' worth based on stereotypes associated with race.¹⁷⁰

Lillian Rubin, a psychotherapist whose book examines the social context of causes of crime among black youth, reconstructed

¹⁶⁵ *Id.* at 282.

¹⁶⁶ *Id.* at 312. See also FLETCHER, *supra* note 2, at 197.

¹⁶⁷ David E. Pitt, *Goetz is Cleared in Subway Attack; Gun Count Upheld; Goetz Jurors Found Both Sides' Evidence Difficult to Accept*, N.Y. TIMES, June 17, 1987, at A1.

¹⁶⁸ Carter, *supra* note 163, at 423.

¹⁶⁹ FLETCHER, *supra* note 2, at 202.

¹⁷⁰ *Id.* at 202-04.

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the case after its conclusion. She developed a psycho-sociological explanation for the verdict in a theory of national racism:

We worry about crime in our streets, on our subways and buses, in our homes. And because young black men between the ages of fifteen and twenty-four commit a disproportionate number of those crimes, when we fill in the outlines of the phrase "crime in the streets," we tend to color it black. When, therefore, a lone white man shoots down four black youths on a New York subway, our first national response is a celebration—our first and, tragically, also our last.¹⁷¹

Both Rubin and Fletcher allude to the tendency of the public, and the purposeful strategy of the defense, to reverse the roles of aggressor and aggrieved. The victims—black, young, rowdy, audacious, a gang—are easily misidentified as defendants, while Goetz, the accused white, lone subway rider, is spoken about in the language of victimization. This is the very essence of self-defense—the victim is the blameworthy aggressor, the defendant the innocent initial target of aggression—but when the tables turn, as they so easily do when the victims share characteristics with racial or ethnic groups labeled as predators, the roles, identities, and labels of the participants are hard to keep straight.

Fletcher also flirts with jury nullification as a potential factor in the acquittal. He asserts that the defense team counted on and helped to create an atmosphere for jury rebellion but chose not to pursue this direction overtly because none of the traditional moral principles justifying jury nullification really were present in *Goetz*.¹⁷² The law of assault or attempted murder itself is not unjust, nor was the indictment itself unjust or an abuse of government power. An acquittal in the face of the evidence might have been seen either as a request for a runaway sympathy vote or worse, a vote based on racism, therefore a risky and discreditable strategy.¹⁷³ Under these circumstances, the defense is better off appeal-

¹⁷¹ LILLIAN B. RUBIN, *QUIET RAGE: BERNIE GOETZ IN A TIME OF MADNESS* 260 (1989).

¹⁷² Fletcher speculates that the defense included a subversive nullification strategy, as an implicit companion to the overt self-defense claim. "[The defense] hoped that popular sympathy for their client would trigger defiance of the judge's instructions and an outright acquittal as a protest against the crime." FLETCHER, *supra* note 2, at 169.

¹⁷³ In brief, nullification occurs when juries respond to: a just law where an abuse of power by official misconduct has occurred (coerced confession, perjured testimony); a just law, unjustly applied to a particular defendant (harshness of sentence or selective prosecution); an unjust law as applied to anyone. *U.S. v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (defining nullification as a juror's "intentional disregard of the law as stated by the presid-

ing to juror sympathy obliquely while arguing self-defense than risking a backlash from the judge or the jurors who have been sworn to uphold the law. The flexible language of reasonableness allows for an appeal to the empathy of the jurors who can personalize their reasoning behind the doors of the jury room.

Professor James Levine, a political scientist, offers a slightly different version of the jury nullification account. He claims that the uncertainty of the evidence allowed the jurors to infuse their deliberations with “subjective sentiments and social interests,” resulting in what he terms a “political judgment,” ending in a compromise that blamed Goetz for what he clearly did wrong—carrying an unlicensed, loaded weapon—but withheld blame for his more morally ambiguous acts.¹⁷⁴

Whether the best explanation is a failure of proof, a jury that harbored unstated racial biases or a community judgment that Goetz, as everyman, did not deserve condemnation, the acquittal is undoubtedly a successful formal legal resolution because it ensued from an apparently fair trial that ended in a unanimous verdict by a racially mixed jury. Yet, the public in general and African-Americans in particular were dubious and disturbed about this apparent tolerance for questionable human instincts, biases, and behavior.

2. *D.P.P. v. Nally*

In contrast to *Goetz*, the *Nally* case to date has generated little analysis by either scholars or jurors. Reactions were largely expressed in news articles, editorials, letters to the editor, op-eds, blogs, and other sources of public opinion.¹⁷⁵ In Ireland, the con-

ing judge.” *Id.* at 608). These juries are trying to send a message to the community. W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 61 U. COLO. L. REV. 1075 (1996). Finally, some juries reach a verdict for lawless reasons such as racial prejudice. Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1191 (1997). Brown argues that, while the first three examples of jury nullification are within the power of the jury, and thus the rule of law, the fourth is not. *Id.* at 1192. *But see* Paul Butler, *Racially Based Jury Nullification*, 105 YALE L.J. 677 (1995)(arguing that African-American jurors should be able to “opt out” of American courts by acquitting “guilty” black defendants in certain cases). A comprehensive bibliography of articles, monographs, and cases related to jury nullification can be found at Teresa L. Conway, Carol L. Mutz & Joann M. Ross, *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393 (2004).

¹⁷⁴ LEVINE, *supra* note 6, at 2-4.

¹⁷⁵ Since the Court of Criminal Appeal’s decision was based on improper jury instructions, there was no direct law about self-defense generated by *Nally I* other than an affirmation of the *Dwyer* rule. In contrast, *Barnes* received some attention as a significant case

versation over the two-year course of the Nally case was less about legality and more about how the divergent stereotypes infiltrated both the prosecution and the national consciousness. The honest, hardworking, country farmer caught in a legal web and the dead itinerant ne'er-do-well Traveller competed for sympathy and understanding. Most media accounts favored Nally while few expressed much compassion for the dead man other than to refer to a "tragedy" for everyone involved. Even more than Goetz, the more homogeneous Irish public victimized Nally and demonized Ward, the crime-prone Traveller outsider.

As in *Goetz*, the acquittal could be the product of a deliberative, reliable and objective jury applying the law to the facts. Under this view, the jury could have applied the proper legal standard for self-defense, finding that it was reasonable for Nally to have believed he was about to be attacked, and that his reaction was objectively appropriate. This explanation falters in light of the earlier manslaughter conviction, when the original jury found that he did act in self-defense but used excessive force. Ironically, those County Mayo jurors, who might have been expected to go easy on their neighbor, probably had more immediate capacity to assess the familiar situation of the lonely farmer and the Traveller intruder. Their conviction carries much weight.

The *Nally II* verdict also could be understood as juror rebellion based on emotion and empathy and a dislike of the legal strictures within which they had to make a decision. First, the jurors simply may have disregarded legal standards, preferring to identify with the man who could have been their own relative at the expense of rational decision making, and to show him mercy despite the law.¹⁷⁶ Perhaps the jury believed that a homeowner's right to use lethal force against a trespasser is paramount irrespective of

about householder self-defense. See, e.g., O'Sullivan, *supra* note 125, McCrossan, *supra* note 137.

¹⁷⁶ Jury nullification is also recognized in the Irish legal system.

Both judges and legislators have accepted that while a jury properly instructed by the trial judge has no right to bring in a verdict for the accused which is against the evidence, yet they have a power to do so; and that the risks inherent in any efforts at controlling the exercise of that power would not be warranted. The use of the power to err in favour of the accused is left to the consciences of the jurors. In any event, what may seem to judges to be a perverse verdict of acquittal may represent the layman's rejection of a particular law as being unacceptable. So it is that such verdicts have often led to reform of the criminal law.

D.P.P. v O'Shea, [1982] I.R. 384, 438 (Ir.).

constitutional or statutory law to the contrary. The jury's acceptance of Nally's explanation of his fear and his extreme violence also could have derived from its members' own prejudices against Travellers.¹⁷⁷

Whether this is a morally justifiable act, a legally justifiable act, a circumstantially justifiable act, an unjustified act, or even an unjustified hate crime depends on which view accounts for the verdict most reliably or logically. One side of the debate in Ireland attempted to cast the case as a matter of understandable behavior for someone living in rural isolation, particularly when the laws offer few choices to juries in complicated situations.¹⁷⁸ Others asked whether Ward would be dead if he were not a Traveller.¹⁷⁹ And while Nally supporters denied that racism played a role in either the shooting or the verdict, at least one commentator observed sorrowfully that

[t]he bitter legal, political and social debate which followed Nally's acquittal for murder exposed the chasm that exists between Travellers and the settled community [non-Travellers]. What is perhaps more troubling, it revealed how difficult it is to have a frank and open debate, without accusations of prejudice and racism.¹⁸⁰

B. *Unconventional Explanations—“Judge Not, Before You Judge Yourself”*¹⁸¹

To reconsider the Goetz and Nally acquittals, assume that their respective juries had deliberated carefully and had decided that both of these men were genuinely fearful of being physically

¹⁷⁷ Ireland's increasingly diverse population is only beginning to stimulate questions about jury impartiality that previously had not been a concern in Irish legal culture. See, e.g., James M. Jeffers, *The Representative and Impartial Jury in the Criminal Trial: An Achievable Reality in Ireland Today?*, 18 IRISH CRIM. L.J. 34 (2008).

¹⁷⁸ See, e.g., *Juries Have Few Options—It's Time to Overhaul Homicide Laws*, IRISH INDEPENDENT, Dec. 16, 2006; *Nally Case and the Law*, IRISH INDEPENDENT, Dec. 16, 2006.

¹⁷⁹ See, e.g., *The Reality is That We Rate Some Lives over Others*, IRISH INDEPENDENT, Dec. 16, 2007 (“communal gut instinct for hierarchies telling us that, on balance, there are citizens' lives which are expendable for the greater good.”); *What Chance Has a Traveller Offender Before an Irish Jury?*, IRISH TIMES, Dec. 16, 2006, at 15; *Implications of Nally Verdict*, IRISH TIMES, Dec. 16, 2006, at 17 (“Travelling community has the right to feel hard done by.”).

¹⁸⁰ *Liberty, But Sharp Debates Will Rumble On for Years*, IRISH INDEPENDENT, Dec. 1, 2006, available at <http://www.independent.ie/national-news/liberty-but-sharp-debate-will-rumble-on-for-years-64666.html>.

¹⁸¹ Bob Marley, *Judge Not* (1961), available at <http://www.sing365.com/music/lyric.nsf/PrintLyrics?OpenForm&ParentUnid=8DF84D6F603DC3D248256F6600103C1A>.

harmed. In addition, their fears were understandable in the eyes of their peers given their personal histories, the particular setting, and the general environment. Assume further that the law permits the use of responsive force to repel an attack under these conditions.

Having thus concluded that the defendants were lawfully entitled to resort to defensive force (or at least that the prosecution had not proven that they were not), the jury now must resolve whether their responses were reasonably related to the threat. By the time the proportionality question is in the hands of these jurors, they have developed a great deal of understanding, belief, and sympathy for the defendant, and they are disposed to forgive. They have chosen to credit the fear. To accept the further claim that the accused considered the force to be appropriate and necessary, and, more importantly, that anyone else in his position would feel likewise, is a small and easy step. The decision to acquit regardless of the amount, degree, or strict necessity of the specific response is an extension of the empathy and respect for the individuality of the accused that are built up during deliberations or that may derive from juror identification with the accused based on shared norms.¹⁸²

A strong potential explanation for the verdicts in *Goetz* and *Nallyis* juror deference to the judgment of the individuals on the front lines. The legitimacy of fear of physical harm confirms the response and validates the beliefs of the individual involved. Jurors who already have identified with that person's fears will make this connection readily and be more hesitant to second-guess how a frightened, even terrified, person should have reacted. This is true even if the jury is told to apply an objective standard to assess whether the accused could have used less force, retreated, or otherwise avoided violence. For one thing, there is far less consensus about decisions to fight, to turn and run, or to call for help.¹⁸³ For another, in any group of people, a natural resistance to presuming or judging how someone else should or would behave in split-second reaction time under extreme pressure leads to a reasonable

¹⁸² After conducting an extensive experimental study, Dan M. Kahan and Donald Braman concluded that jurors in self-defense cases engage in instinctive "self-defensive" decision making "to form a view that affirms their group norms." Kahan & Braman, *Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 5-7 (2008).

¹⁸³ Every year in my Criminal Law class, students split fairly evenly about whether they would resist or run if confronted by a mugger, suggesting that there is no single predictable reaction to this threat.

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doubt sufficient for acquittal. Finally, this instinct to defer is enhanced when the jurors are more likely to find links, parallels, or similarities between themselves and the accused, and differences or disparities with the victim.

The impulse for jurors to exercise independence increases as a consequence of the lack of legal options. Greater constraints and inflexibility frustrates jurors so they may reach for creative inferences and explanations that yield more appealing solutions. Letters to the editors of Irish newspapers criticized the rigidity of the law in cases of self-defense: convict of murder or manslaughter, or acquit.¹⁸⁴ And Ireland offers even more choices than the U.K. or the U.S. *Goetz* juror, Mark Lesly, voiced similar distress about the constraints imposed by the available legal categories.¹⁸⁵ For jurors, these verdict choices insufficiently account for the more complex practical and moral dimensions of snap decision making in dangerous situations.

The *Nally I* jury had a much easier job without the full defense instruction, but, in the absence of this instruction, it is impossible to know whether it would have acquitted. The manslaughter option based either on excessive force or on provocation allowed them to avoid the severity of a murder conviction to compromise on a charge that was the most lenient and possibly the most accurate available at that trial. But when, even with identical evidence, *Nally II* permitted the full acquittal possibility, that jury had another path to travel. They had the freedom to acquit and they took advantage of it, even in a case where, in the words of Judge Carney, self-defense could not “objectively be justified.”¹⁸⁶

In cases where the potential verdicts all may seem too damning, some additional lesser verdict choices would make deliberations and outcomes more nuanced and reliable. A manslaughter verdict based on excessive force would fit more precisely since the conduct is largely negligent, or at worst reckless, if the response

¹⁸⁴ See, e.g., *Juries Have Few Options-It's Time to Overhaul Homicide Laws*, IRISH INDEPENDENT, Dec. 16, 2006.

¹⁸⁵ I suggest that the fault in failing to convict him lies not with the jury nor the judge nor the prosecutor, but with the deficiency in the justification laws . . . [which are] not specific enough about the alternatives *Goetz* should have been required to seek before being allowed to fire his gun as a legitimate act of self-defense.

LESLEY, *supra* note 164, at 315.

¹⁸⁶ Transcript, *supra* note 32, at 74.

was grossly disproportionate.¹⁸⁷ The verdict might be a more correct reflection of the degree of culpability. But in the absence of additional gradations of criminal responsibility, once a juror had empathized with Goetz's or Nally's fears, and could understand their reactions, even if their responses exceeded legally acceptable boundaries, that juror would be more unwilling to impose an outsider's values to a set of circumstances that he or she had not experienced. Given the harsh alternatives on the guilty verdict side, it is not hard to imagine that a juror would defer to the judgment of the person in the situation principally because all other options are too punitive.

To a hamstrung jury, acquittal begins to look like the fairest outcome in this world of scarce choices, and it is not so difficult to say, "We were not convinced that his behavior was *not* reasonable." And, if the acquittal cannot fit within the legal categories they are given, the jury may reinterpret the already malleable standards of justification and infuse some of the factors more traditionally associated with excuse defenses.

1. "*Acts Are Justified; Actors Are Excused.*"¹⁸⁸

If not-guilty verdicts can represent an impulse of a jury driven by compassion to ask its own questions or to provide its own interpretations of the evidence, then an acquittal could be seen as a derogation of its obligations, a form of nullification.¹⁸⁹ A more likely, and less radical, view is that the jury rebuffed the required external balancing of threat and reaction inherent in a self-defense in favor of the internal, individualized assessment of the emotional and psychological effects of fear and its consequences on judgment and self-control. Consciously or not, they have shifted the framework of their analysis.

It is not difficult to understand why a jury's thinking would metamorphose from the weighing of beliefs and conduct inherent in an analysis of reasonableness into an exploration of the accused's psyche and emotions during deliberations about the second phase of self-defense. When Goetz or Nally described their own

¹⁸⁷ See, e.g., MODEL PENAL CODE § 210.4, basing negligence on a "gross deviation" standard. *Id.* § 2.02(2)(d).

¹⁸⁸ 1 ROBINSON, *supra* note 79, § 25(d), at 100-01.

¹⁸⁹ The jury's power to enter an unreasonable verdict of not guilty, jury nullification, is generally understood as a corollary of the rule that there is no appeal from an acquittal. See *Jackson v. Virginia*, 443 U.S. 307, 318 n. 10 (1979).

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reactions, or when others portrayed them, they used such terms as disturbance, anxiety, frustration, dementia, paranoia, obsession, loss of control, explosive, and overreaction. Their stories are marked by strangeness and eccentricity.

In his taped statement, Goetz was described as appearing “agitated and angry” and “disturbed about what happened and anxious whether anyone in the legal system w[ould] understand him and the terror he experienced before he aimed and shot at Troy Canty and then pulled the trigger four more times.”¹⁹⁰ The defense expert offered testimony that supported Goetz’s claim that he was on “automatic pilot” when he continued to fire.¹⁹¹

Nally is depicted as growing increasingly peculiar in his isolation. His sister checked up on him every weekend. His compulsions and fearfulness manifested in many quirky behaviors before the incident. For example, he repeatedly told the police that “he was out of his mind with worry.”¹⁹² His conduct during the beating and shooting was always related as being out of character and exceptional.¹⁹³

Playing to the jurors’ emotions—compassion for the defendants, and distrust of or prejudice against the victims—at both trials, the victims were depicted in predatory and threatening terms. Fletcher describes how the *Goetz* jury saw a recreation of the crime staged with four black men “dressed like street toughs . . . in a version blatantly favorable to the defense . . . [that] began to reek with danger.”¹⁹⁴ The *Nally* juries were informed about John Ward’s extensive criminal and psychiatric background.¹⁹⁵

All of these characterizations encourage a big conceptual step away from the supposedly rational evaluation of self-defense even when it occurs in a volatile, split-second situation. Instead, overreaction to a threat begins to resemble a hot response that either

¹⁹⁰ FLETCHER, *supra* note 2, at 116, 118.

¹⁹¹ *Id.* at 120. The defense theory to explain the multiple, and seemingly unnecessary extra shots, coined two catch-phrases: “rapid succession” and “automatic pilot.” *Id.* at 174.

¹⁹² ‘*The Pressure Had Got to Me*,’ IRISH TIMES, July 16, 2005, at 3; *see also* Shiel, *supra* note 33, at 2.

¹⁹³ Michael Brennan, *Farmer Pleads ‘Not Guilty’ to Murder of ‘Burgling’ Traveller*, IRISH NEWS, July 14, 2005, at 22 (“I was out of my mind.”); Tom Shiel, *supra* note 33, at 2; *Nally ‘Demented with Fear’ of Attack, Says Neighbour*, IRISH TIMES, Dec. 8, 2006, at 5.

¹⁹⁴ FLETCHER, *supra* note 2, at 129.

¹⁹⁵ He had a history of “impulsive aggressive outbursts and auditory hallucinations” and had spent time as a psychiatric in-patient. *What Drove a Shy, Kind Man to Kill?*, IRISH TIMES, Nov. 12, 2005, at 3.

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lacks self-control, or is controlled by fear rather than reason. Anger, disturbance, or hysteria replaces restraint and common sense. The actor is altered by even these temporarily transformative and disabling conditions so that more objective measurements become increasingly difficult to apply. The jury shifts into a more subjective assessment of personal blameworthiness, and from there to blame the conditions rather than the person. The jurors may not be consciously flouting their duties, but when they are unable to separate themselves from the deeds they are being asked to judge, they reject the job of assessing blamings neutrally.

Excuse defenses focus on personal disabilities that exculpate individual accountability. An excuse is predicated on an abnormal condition, often arising externally like a threat, but also internally, like insanity or infancy, without which the defendant would not have committed the crime. The excusing condition could be temporary or permanent. In brief, the accused does not deserve to be punished because of this condition even though his conduct may be wrong.¹⁹⁶

Unlike the U.S. or other countries,¹⁹⁷ in Ireland, the defense categories of “justification” and “excuse” do not seem to dominate the literature. One treatise reviewing the evolution of defenses finds that various individual defenses have “emerged . . . through . . . competing application of conflicting doctrines . . . [and] dynamics includ[ing] compassion[, a] . . . concession to the realities of human frailty, a consideration of what is appropriate when confronted by unlawful conduct of another party, . . . and a desire enshrined in the Constitution to do what is just.”¹⁹⁸

Even without a jury instruction about an excuse such as duress, with the right set of facts, a jury drifts into that territory. When the only difference between acquittal and conviction is one of degree between appropriate and disproportionate retaliatory force, a mistake of perception under stressful circumstances, the

¹⁹⁶ See generally ROBINSON, *CRIMINAL LAW* § 9.1 (1999), at 477-80 (an excuse defense is a disability that causes an excusing condition); LAFAVE, *supra* note 83, § 9.1(4), at 448; SMITH & HOGAN, *supra* note 83, at 247-49 (U.K.). This article assumes that juries are unaware of theoretical differences between justification and excuse defenses that have generated much academic discussion. See, e.g., FLETCHER, *RETHINKING CRIMINAL LAW* (1978), chapt. 10 *generally*.

¹⁹⁷ See generally ROBINSON, *supra* note 79; JUSTIFICATION AND EXCUSE-COMPARATIVE PERSPECTIVES (Albin Eser & George P. Fletcher eds. 1987); JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW: A COLLECTION OF ESSAYS (Michael Louis Corrado ed. 1994).

¹⁹⁸ CHARLETON *et al.*, *supra* note 82, §12.10, at 1021-22.

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paradigm converts to one of unique personal circumstances fitting the language of excuse rather than justification.¹⁹⁹

2. *Nally I v. Nally II*

How does this relate to the verdicts in *Nally*? On its face, the reversal had nothing to do with excessive force; rather, it actually affirmed the vitality of the doctrine in Ireland. The formal basis for the reversal seems unassailable. The law in Ireland is clear that a judge may not direct a guilty verdict no matter how conclusive the evidence of guilt.²⁰⁰ But, in light of the overwhelming evidence of excessive force, the decision suggests that more may have been at stake than the narrow issue of jury instructions. The Court of Criminal Appeal gave *Nally* a second bite at the acquittal apple—an outcome that Judge Carney clearly had sensed was such a strong possibility that he purposefully withheld it from the jury, knowing that a total not guilty verdict would have been contentious and difficult to defend.

Judge Carney's instruction was careless but understandable given the uncontested evidence and a well-founded belief that jurors are sympathetic to victims of home invasions, particularly when they are vulnerable bachelor farmers. The later acquittal confirms this instinct. The judge certainly made some mistakes.²⁰¹ He prejudicially characterized the self-defense claim as "per-

¹⁹⁹ Fletcher cites excessive force in a state of shock as an example of an "exotic . . . potential excuse." FLETCHER, *supra* note 196, § 10.3, at 799.

²⁰⁰ Davis, *supra* note 48. The same is true in the U.S. "Although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993); *United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 408 (1947). On the other hand, in the U.S., it is axiomatic that a judge has a duty to instruct on a lesser included offense or a defense only if supported by the evidence. *Mathews v. United States*, 485 U.S. 58, 63 (1988); *see, e.g., Kansas v. Bell*, 975 P.2d 239, 248 (2004); *Peavey v. Texas*, 248 S.W. 3d 455, 464 (2008); *Kirk v. State*, 656 S.E.2d 251 (Ga. 2008). A defendant does not have "the right to offer a particular defense or to demand [that] a jury be instructed on any theory." *Taylor v. Withrow*, 288 F.3d 846, 853 (6th Cir. 2002). A court, therefore, may properly refuse to instruct the jury about self-defense in the absence of evidence supporting the elements of the defense. *See, e.g., Lewis v. Bock*, 2006 U.S. Dist. LEXIS 4020, *17 (N.D. Mich. 2006) (failure to instruct on imperfect self-defense not error); *United States v. Poe*, 442 F.3d 1101, 1104 (8th Cir. 2006); *People v. Moore*, 797 N.E.2d 217 (Ill. App. Ct. 2d Dist. 2003); *People v. Hayes*, 502 S.E.2d 853, 871 (N.C. 1998).

²⁰¹ He never explicitly reminded the jury that a reasonable doubt could be the basis for a not guilty verdict irrespective of the persuasiveness of self-defense theory, since the prosecutor must disprove the self-defense claim. Transcript, *supra* note 32, at 60-123 (entire jury instruction).

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verse.”²⁰² Yet, he also never expressly told the jury it had no power to acquit in the event of sufficient evidence of the crime, or even to acquit notwithstanding the evidence.²⁰³

The appellate decision implies that an excessive force instruction cannot be given in isolation but must accompany an instruction on the full self-defense, thus becoming a species of “lesser included defense.” The C.C.A. may have intuited, as did Judge Carney, that a jury might well disregard all of the compelling evidence of excessive force to acquit anyway given the social and cultural context of the case. Given the facts, the ultimate acquittal makes sense only if it reflects a judgment about Nally personally, and the effects that Ward’s intrusion had on him, not whether his conduct was socially or legally acceptable.

The reversal gave the second jury a chance to judge the actor rather than his acts. An eavesdropper in the Dublin jury room in December 2006 might have heard jurors hypothesize about Nally’s fears: He was all alone and Ward might return. Ward might return with reinforcements. Nally had to use a firearm against the younger, stronger Ward. They might have talked about their own rural relatives’ isolation or their negative experiences with Travelers. Many of these explanations for Nally’s conduct were offered in the months leading up to the trials; now they had a chance to permeate the jury room. These theories might seem sufficiently rational to support a self-defense claim. Even the *Nally I* verdict reflected the first jury’s acceptance of his claims of fear otherwise he would have been convicted of murder. It is more difficult to imagine the second jury’s speculations about why Nally had to bludgeon Ward, shoot him, and then reload to kill the incapacitated fleeing man. The jury had to reach for reasons to connect the crippling fear under which he claimed to have been functioning to validate the deadly force, or to explain the violent manner of the

²⁰² *Id.* at 73. This language probably strikes U.S. readers as inflammatory, but the term may be more acceptable in Irish legal rhetoric.

²⁰³ A judge rarely would inform a jury of an affirmative power to acquit notwithstanding the weight of the evidence. The nullification power is not a right, *Sparf v. United States*, 156 U.S. 51, 102 (1895), therefore, U.S. courts generally refuse to give a jury instruction that it may ignore the law, *see, e.g., United States v. Edwards*, 1996 U.S. App. LEXIS 38757 (cases cited at *7) (2d Cir. 1996), and repudiate defense efforts to argue nullification, *see, e.g., United States v. Sepulveda*, 15 F.3d 1161, 1189-91 (1st Cir. 1993).

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killing to absolve him totally instead of convicting of manslaughter.²⁰⁴

To find support for the hypothesis that there may have been a hidden agenda in the C.C.A. to advance the rights of homeowners, compare *Nally* to *Barnes*. *Nally I* was reversed because the trial judge found that attack did not satisfy the elements of self-defense, so he limited the jury's options. The C.C.A. ruled that this was the equivalent of a directed verdict of conviction because the *Nally I* jury could return no lesser verdict than a manslaughter conviction. Yet, in *Barnes*, the same court said that the killing of a householder by a burglar-aggressor can never be less than manslaughter. This effectively removes the ability to acquit from the jury even if the intruder had used no more force that was reasonably necessary to repel an excessive attack by the householder. When the burglar, rather than the homeowner, is on trial for murder, the judge can direct the jury to convict. A jury evaluating the actions of a homeowner—*Nally*—has the full range of verdicts available, while the jury judging the burglar—*Barnes*—cannot acquit.

This blatant inconsistency is almost impossible to reconcile. The contradiction concerning the power of the jury to consider all the events and possible explanations for the defensive force seems entirely result-driven in favor of expanding homeowner rights. The Court of Criminal Appeal actually ignored its own decision in *Nally* in order to provide homeowners a much more expansive right to use fatal force, and to restrict the scope of lawful defensive force used by an intruder. By almost abolishing any constraints on a householder's deadly force, the C.C.A. has both fortified the full self-defense claim and eliminated the manslaughter mitigation because almost no amount of force would be considered excessive. The acquittal in the *Nally* retrial may be proof of unstated judicial values about defensive force at work at the appellate level that motivated the reversal, just as much as the values more directly expressed by the ultimate verdict.

The reversal contains a strong, albeit implicit, recognition not simply of the inherent power of the jury to acquit, but also an acknowledgment of the dynamics and tendencies of a jury in this type of case to struggle against the limitations of legal categories in

²⁰⁴ In Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996), the authors cite the *Goetz* acquittal as an example of a jury's validation of dignity and honor in circumstances when the accused uses excessive force. *Id.* at 330-32.

favor of a more libertarian rough justice that infuses rationality with compassion and subjectivity.

3. *Law Reform Efforts to Legislate a New Path*

The *Nally* case raises two issues regarding self-defense. The first is the localized question about the continuing viability of the excessive force defense. The second asks the more systemic question about not guilty verdicts in cases where there is strong evidence of excessive force. Even in Ireland, where a compromise verdict is available, the jury acquitted.

Ireland is exceptional for its recognition of a partial excessive force defense. The Court of Criminal Appeal decision in *Nally* is significant for its affirmation of the principle. The defense recognizes that there is a distinction between a cold-blooded murder and someone who acts overzealously, just as there is a difference between a cold-blooded murderer and someone who acts under provocation.²⁰⁵ It makes sense in a criminal law regime that makes allowances for provoking circumstances to also recognize mitigation for fear-based overreactions.

If flexibility and compassion has a place in self-defense doctrine, it should be recognized more overtly, and not based on a single case whose holding has been over-cited and oversimplified over thirty years. Prompted by the 1997 Act as well as confusing case law concerning fatal force, The Irish Law Reform Commission undertook its review of lethal defensive force in the context of an evolving reasonableness standard. But that standard is malleable, and achieves flexibility and simplicity principally by shifting decision-making to non-transparent juries, at the possible expense of true justice.²⁰⁶ Unless one of the *Nally II* jurors writes a tell-all book, the basis for their verdict always will be speculative.

The Law Reform Commission provisionally recommends the retention of an excessive force defense in the context of any kind of attack, even trivial, when

a mistaken defender . . . uses lethal force as a result of an honest but unreasonable mistake . . . in respect of any of the elements of the test for legitimate defence.²⁰⁷

²⁰⁵ Stanley Meng Heong Yeo, *Applying Excuse Theory to Excessive Self-Defence*, in PARTIAL EXCUSES, *supra* note 106, at 163.

²⁰⁶ See *Legitimate Defence*, *supra* note 92, § 1.07, at 6.

²⁰⁷ *Id.* § 7.280, at 326.

To the Commission, excessive force is negligent, or at worst, grossly negligent, therefore less culpable than intentional conduct.²⁰⁸ In general, the Commission recommends a proportionality standard that only prohibits “lethal defensive force where . . . it is *grossly disproportionate* to the threat for which the defence is required.”²⁰⁹ The Commission helpfully identifies factors that a jury could take into account in measuring proportionality, including the gravity of the attack, the number of individuals threatened and the number of attackers, the possibility of harm to others, and other possible consequences of the use of force.²¹⁰

One strong reason for preserving this doctrine is to reduce the likelihood that an “all or nothing” approach will produce unwarranted acquittals. Of course, the *Nally II* verdict undermines this rationale, since the second jury also had the option of convicting for manslaughter. However, that inconsistency can be explained by the exceptional drama and upheaval surrounding the case, and that it involved a home invasion. These factors may account for its extreme outcome, whereas the more typical excessive force case arises in barroom or poolroom brawls.²¹¹ By retaining a sliding scale of culpability based either on intent or mistake, and providing more choices to the jury to fit deviate conduct within the legal framework, a jury can achieve fairer results that the public can accept more readily in the vast majority of defensive force cases.

Although England never allowed an excessive force plea, the English Law Commission in recognition of the need to offer alternatives recommends categorizing excessive force as a type of partial responsibility, much like provocation. It recommends reformulating excessive self-defense as a variation of manslaughter based on fear.²¹² Apparently, this effort was motivated by an increasing number of cases involving the use of lethal force where abused people who kill when less force was required to avert the attack, and threatened householders will use deadly force against intruders.²¹³ The Commission redrafted the manslaughter statute to include a fear-induced manslaughter section immediately follow-

²⁰⁸ *Id.* § 7.275, at 325.

²⁰⁹ *Id.* § 6.68, at 250 (emphasis added).

²¹⁰ *Id.* § 6.69-6.83, at 250-54.

²¹¹ See, e.g., Clarke, [1994] 3 I.R. 289; D.P.P. v. O’Carroll, [2004] 3 I.R. 531 (Ir.).

²¹² *Partial Defenses to Murder*, supra note 158, § 3.168, at 70.

²¹³ *Id.* §§ 4.17-4.24, at 77-79.

ing the definition of provocation.²¹⁴ England has taken an additional step of creating a new crime instead of relying on a possibly artificial or inapt provocation instruction.²¹⁵ Under the proposed new partial defense in England, intent to kill is an element of the crime and the same standards of judging the defendant's behavior apply to both aspects of the reformulated definition.²¹⁶ Because provocation is based on a loss of control or reason, whereas acting out of fear may be rational and cool-headed, the respective defense definitions are distinct and separate even though they appear in the same section of manslaughter.

England amended its self-defense laws in 2008 to allow for consideration of excessive force in self-defense, although the new law did not enact a fear-based manslaughter option.²¹⁷ As in the past, whether the degree of force used is reasonable takes into account the circumstances as perceived by the defendant. But now, the legislation expressly acknowledges that a "person acting for a legitimate purpose may be able to weigh to a nicety the exact measure of any necessary action" and that an honest and instinctive belief in the need to use force is "strong evidence" of reasonableness.²¹⁸ These changes permit a full acquittal.

²¹⁴ At common law, self-defense and provocation were interrelated, in part due to the inclusion of an assault as one of the legally recognized types of provocation as well as an event that would justify lawful responsive force. LAFAYE, *supra* note 83, §15.2(b)(3), at 799; ROBINSON, *supra* note 196, § 14.1, at 709-10. This historical connection, as well as the evidence of Nally's aberrant violence, is illustrated by Judge Carney's dual instruction on excessive force and provocation as two manslaughter verdict options. The provocation instruction was *pro forma* and stated, in part:

If the reaction of the accused in totally losing his self control . . . appears to . . . have been strange, odd or disproportionate, that is a matter which [the jury is] entitled to take into consideration [T]he trial judge will tell the jury it is their job to decide, not whether a normal man or a reasonable man would have lost his self control in these circumstances, but whether this particular accused in his situation, with his peculiar history and personality, was provoked . . . to such an extent as totally to lose his self control.

Transcript, *supra* note 79, at 76-77. Since the *Nally I* jury did not explain its verdict, the manslaughter conviction could just as easily have been a judgment about provocation as about partial justification.

²¹⁵ In *Zecevic v. D.P.P.*, the case in which Australia abandoned the excessive force defense, the court suggested that provocation usually would provide an adequate framework for facts amounting to excessive force. (1987) 71 A.L.R. 641 (Austl.).

²¹⁶ "A person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint in the circumstances of the defendant might have reacted in the same or similar manner." PARTIAL DEFENCES, *supra* note 157, § 1.13(1)(b), at 11.

²¹⁷ Criminal Justice and Immigration Act, 2008 (c.4), s.76 (Eng.).

²¹⁸ *Id.* at s. 76(7). The language "to a nicety" appears in the leading U.K. case, Palmer, (1971) A.C. 814, at 844.

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Both the Irish and English versions of excessive force manslaughter offer a half-way house between murder and acquittal. The jury is tasked with assessing the relationship of the response to the harm threatened. While some juries may overly empathize with certain defendants, projecting their own feelings and fears onto the situation and therefore acquit, the middle ground offers a respectable and rational alternative in the more typical case.

VI. CONCLUSION

The frontier spirit of the *Nally* case seems to have migrated across the pond. Indeed, the “shoot first, ask questions later” approach seems more indigenous to the United States. In 2007, Texas adopted a new “castle” law that eliminated a duty of retreat before using deadly force to protect an individual’s own home.²¹⁹ A few months later, almost exactly a year after the acquittal in Dublin, a sixty-one year old white retiree, living with his daughter in a Houston, Texas suburb, fatally shot two men in the back while they were on his front lawn. Both of the dead men were dark-skinned illegal Colombian immigrants who had just burglarized a neighbor’s home. During the 911 call during which the operator repeatedly told him to keep his distance, he had said, “I’m going to kill them.”²²⁰

Six months after the killings, a Texas grand jury declined to indict him.²²¹ This exoneration echoes the generosity of the *Nally II* verdict, but in Texas, exoneration has legislative support, not just a jury’s blessing.

The contours of lawful self-defense are debated frequently, and, when a prominent killing or shooting occurs, the uproar can turn cacophonous. The legacies of *Goetz* and *Nally* in their respective environments contributed to raising consciousness about racial and cultural prejudice as well as to a national conversation about the difficult moral and legal questions surrounding self-defense. But there has been less impact on the development of long-term enduring legal standards than the brouhaha surrounding the cases

²¹⁹ TEX. PENAL CODE ANN. § 9.31 (Vernons). The statute adopts a presumption that the use of force is reasonable if the actor knew that the victim had unlawfully entered the actor’s habitation, vehicle, or place of business. The statute eliminates the duty of retreat.

²²⁰ Ralph Blumenthal, *Shootings Test Limits of New Self-Defenses Law*, N.Y. TIMES, Dec. 13, 2007, at A32.

²²¹ *Id.*

as they were taking place might have predicted.²²² At the least, the need for greater clarity about standards is acknowledged so that in the U.S. some states pass laws refining, extending, and expanding lawful defensive force rather than rely on common law traditions. In Ireland and England, cases like *Nally* and *Barnes* are providing impetus for legislative reform efforts.

In the final analysis, controversial acquittals have their greatest effect far away from the courtroom—in subway cars in New York City, farmhouses in County Mayo, and backyards in Houston. The legal case inevitably runs its course. However the verdict is analyzed, theorized, or interpreted, in the end, it is the community that has created the conditions giving rise to the use of lethal force that has to internalize and adjust to the consequences of the legal narrative to its social fabric and identity.

²²² In *Hardly the Trial of the Century* (reviewing GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL*), 89 MICH. L. REV. 1307 (1990), Prof. Franklin Zimring notes:

Indeed, one key to the sense of disappointment many will feel about this book is the fact that the Goetz trial does not deserve the close scrutiny Professor Fletcher provides. No great issue of morality or law was presented to the jury and none was decided Professor Fletcher's close observation of the trial provides no stunning new explanation of the jury verdict, in large part because that verdict generated no great sense of mystery among the general public or professional observers Perhaps the incident which gave Bernhard Goetz his measure of notoriety was interesting because it typified a longstanding conflict in the law of self-defense The book fails to find the deeper meanings of the trial of Bernhard Goetz, most probably because they do not exist.

Id. at 1309-10. In contrast, the legal principle that subjectivized that longstanding objective standard of reasonableness in self-defense, is considered to be "one of the most important decisions on the question in this century." Richard Singer, *The Resurgence of Mens Rea: II-Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C. L. REV. 459, 496 (1987).