

The limits of justifiable harm in defense of private property: a jurisprudential analysis from the perspective of proportionality principle

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Abstract. The right to defend private property is a fundamental yet contentious legal principle across jurisdictions. This paper examines the inherent tension between this right and the requirement for proportional force. Employing doctrinal analysis of key legislation (e.g., UK *Criminal Law Act 1967*) and case law (e.g., *R (Daly)*), alongside theoretical frameworks from Locke and Beccaria, this study asks: how can legal systems effectively balance the right to property defence with the paramount right to life, and what are the societal consequences of failing to do so? The analysis concludes that while the right to defend property is crucial, its exercise must be constrained by the proportionality principle to prevent unjustifiable violence and maintain social order. The findings advocate for clearer judicial guidelines to ensure consistent application of this balance.

Keywords: proportionality principle, private property defense, reasonable force, right to life

1. Introduction

In the majority of civilized criminal justice systems, the maxim of self-defense is one of the most universally recognised and yet intensely debated legal doctrines. At common law the definition of self-defense operates in three spheres. It allows a person to use reasonable force to: firstly, defending himself from attack, secondly, avert attacks against others. thirdly, defend his own property. In addition, section 3(1) of the *Criminal Law Act 1967* of the United Kingdom¹ provides that: A person may use reasonable force under the circumstances to prevent crime or to effect or assist in the lawful arrest of offenders, suspected offenders, or individuals unlawfully at large.

Hence, protecting private property is a fundamental part of any functioning society, but debates over what constitutes justified defensive force is still heated. When does the right to defend one's possessions cross into unjustifiable violence? This question lies at the intersection of law, social studies, and economic development, requiring in-depth examination.

This study aims to systematically explore the legitimacy boundaries of private property defense. Its core objective is to clarify the legal and practical basis for individuals to follow the principle of proportionality when exercising their defense rights in the process of protecting private property.

2. Legal and social basis for defending private property

2.1. Legal frameworks: universal recognition of property rights

The legal protection of private property is a core element of constitutional law, civil law and natural law across multiple jurisdictions. In the *Civil Code of China*, Article 3² explicitly provides that the personal rights, property rights and other legitimate rights and interests of civil subjects are protected by law, and no organisation or individual shall be infringed. Similarly, Article 1

¹ Criminal Law Act 1967, s. 3(1) (U.K.) <https://www.legislation.gov.uk/ukpga/1967/58/section/3>

² Civil Code of the People's Republic of China. (2020). Retrieved from <https://www.court.gov.cn/fabu-xiangqing-235281.html>

of *Protocol 1 of the European Convention on Human Rights*³ reflects the broader private property protection principle under international human rights, it states that "every natural or legal person is entitled to the peaceful enjoyment of his possessions." While someone might argue that if property is a fundamental right derived from labour, shouldn't its defence be equally robust? Proportionality seems to undermine these deep legal and philosophical foundations by restricting an owner's response. Property rights are essential, but legal systems balance various rights. Locke's concept of the "state of nature" precedes civil society governed by law, which recognizes life as the paramount right (*UDHR Art. 3, ICCPR Art. 6*) [1] Modern law does not allow unlimited punishment for theft. The *Entick v Carrington*⁴ protects against state intrusion but does not permit individuals to use deadly force. By preventing vigilante justice and ensuring that defense measures align with the actual threat to the protected right, proportionality upholds the rule of law.

2.2. Evolution of property concepts: adverse possession and natural rights

The form of possession has developed significantly in some jurisdictions, for example, the UK has the concept of adverse possession, that is, long-term use can replace legal ownership. *JA Pye (Oxford) Ltd v. Graham*⁵ is a crucial case that is related to the concept of adverse possession in the context of land ownership. Following this case, the *Land Registration Act 2002*⁶ came into force. This legislation introduced stricter requirements for adverse possession of registered land. Under the new law, adverse possessors had to register their claim with the Land Registry, which would notify the original owner and provide an opportunity for them to object. This change aimed to make it more challenging for individuals to acquire ownership through adverse possession, particularly for registered land. Also, from Locke's perspective, an individual's labour establishes natural right, any aggression against private property constitutes a violation of one's natural rights. In Locke's state of nature, individuals are entitled to punish violations of their property rights directly.

2.3.2.3 Social and Economic Rationale for Property Defense

From the social perspective, people have the right to protect their property and people themselves cannot be treated as owner's property. Since property is an object that can only be controlled by a subject and has no will or rights. However, as human beings, we are subjects endowed with reason, self-awareness, and moral capacity, with the ability to make our own decisions and take responsibility for ourselves. Hence, we have the right to ensure the safeness of our own property. Also, people gain natural rights from labour and as an essential part of natural rights, any infringement towards property constitutes the violation of natural rights.

From an economic perspective, the introduction of private property protection for firms might encourage the resource allocations that enable them for research and development. If the property of firms cannot be preserved, firms might have less incentive to increase in output, it might result in a decrease in aggregate supply. Simultaneously, as the firms are less willing to invest, aggregate demand might also fall. Thus, property protection may be crucial to the entire economy.

3. The Application of Proportionality Principle in Property Defence

3.1. Defining proportionality: a balancing test

The principle of proportionality, which originated in *German public law (Verwaltungsrecht)*⁷, serves as a fundamental doctrinal tool for balancing competing rights—whether between the state and the individual or among private actors. This framework was authoritatively articulated in *R (Daly) v Secretary of State*⁸ or the Home Department by Lord Steyn, who emphasized that any intrusion on rights must be justified and minimally impairing.

3.2. Core requirements for proportional defense

While property rights are deeply rooted in natural law theory (e.g., Locke's Second Treatise) and recognized as fundamental across legal systems, their defense is subject to strict proportionality constraints. Applying proportionality requires a nuanced reconciliation between the right to property [2]. The central question is what degree of force may permissibly be used against an aggressor. Three criteria define these limits:

³ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (as amended), Art. 1. (1952, March 20). Council of Europe. <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/09000016800f61b>

⁴ *Entick v Carrington*. (1765). EWHC KB J98. Retrieved from <https://www.lawteacher.net/cases/entick-v-carrington-1765.php>

⁵ *J A Pye (Oxford) Ltd and Others v Graham and Another* on 4 July 2002 Retrieved from: <http://www.bailii.org/uk/cases/UKHL/2002/30.html>

⁶ The Land Registration Act 2002. <https://www.legislation.gov.uk/ukpga/2002/9/contents>

⁷ German public law. (May 8 1949). <https://www.mygermanuniversity.com/subjects/public-law>

⁸ *R (Daly) v Home Secretary*. (2001). UKHL 26; 2 AC 532. Retrieved from. <https://lawprof.co/public-law/irrationality-review-cases/r-daly-v-home-secretary-2001-ukhl-26-2001-2-ac-532/>

Imminence: This requires that self-defense must be directed against an illegal infringement that is currently occurring or about to occur. This means that "retaliation" after the infringement has ended is not allowed, nor is "preemptive" action against a merely anticipated but not yet manifested threat.

Appropriateness: The strength of force used in self-defense must be proportional to the threat faced. This means that the law prohibits using force far exceeding the intensity of the infringement, such as using lethal weapons to counter a mere push or unarmed attack. The core idea is that the right to life is superior to property rights. For example, directly using lethal force to protect items like a phone or wallet is usually considered disproportionate.

Necessity: the defensive measure must be capable of actually preventing the loss. Retributive force after the fact is unjustifiable [3, 4].

While these criteria provide a structured judicial test, an overly rigid application risks undermining justice. Individuals in high-stress scenarios cannot be expected to calibrate responses with precision. Case law such as *R v Scarlett* acknowledges this, incorporating a subjective-reasonable standard: whether a reasonable person, under the same circumstances and perceptions, would deem the force necessary. The use of less-lethal alternatives (e.g., pepper spray) may further evidence an attempt to comply with proportionality, even if the response is not perfectly aligned.

4. Social and moral consequences of banning exercise legitimate defense property rights

4.1. Undermining the social contract

Restricting legitimate property defense can destabilize the social contract [1]. When victims cannot exercise proportionate self-defense against unlawful aggression, two issues arise: deterrence erosion [5]. California's Proposition 47 illustrates this by decriminalizing thefts under \$950 without reinforcing preventive measures, it signals impunity, contradicting Beccaria's principle that "the certainty of punishment deters more than its severity" [6].

4.2. Eroding trust in institutions

Simultaneously, denying defense rights can lead to vigilante justice, causing a breakdown into a Hobbesian "war of all against all." Mexico's 90% unreported crime rate and South Africa's "necklacing" exemplify this collapse. When judicial institutions fail to maintain their monopoly on legitimate violence, communities turn to extrajudicial violence, replacing due process with cycles of retaliation.

Eventually, it might cause the public to question the government and lead to the failure of the judicial system. When crime rates are high but law enforcement is ineffective, people tend to give up reporting a crime. For example, crime rate in Mexico is estimated to be 90% unreported such developments not only erode the rule of law but also generate cycles of escalating violence, where private retribution substitutes for judicial accountability.

5. Discussion: reconciling tensions in property defense and proportionality

The tension between defending property and upholding proportionality requires nuanced solutions. Overly restricting defensive rights risks eroding deterrence and encouraging vigilantism, as seen in jurisdictions with ineffective justice systems. Conversely, unchecked force violates fundamental rights. To balance these concerns, several refined approaches are proposed.

Legislative clarity is essential. Statutes should explicitly incorporate the "reasonable person" standard, assessing defense from the defender's perspective under duress, not with hindsight. Laws must categorically prohibit deadly force for protecting trivial property alone, preventing grossly disproportionate outcomes.

Judicially, courts must apply proportionality contextually. Jury instructions should emphasize assessing imminence and necessity based on the defender's reasonable perception during the crisis, acknowledging the psychological realities of fear. This prevents victims from being penalized for impossible split-second decisions.

Ultimately, reinforcing state protection is paramount. Investing in effective policing and promoting non-lethal alternatives (e.g., security systems, pepper spray) reduces the need for private lethal force. By refining legal standards and strengthening public security, society can uphold the right to defense while affirming the supreme value of human life, avoiding the severe consequences of a failed social contract.

6. Conclusion

Overall, people have the right to defend their property. As long as the level of force used is reasonable and proportionate, they should not be held legally responsible. In evaluating the boundaries of lawful defense of private property, the proportionality principle emerges as a fundamental safeguard preserving not only legal coherence but also moral legitimacy. While there might be some people who argue that property losses can be addressed through insurance or legal recovery without resorting to violence.

Nevertheless, insurance is not a cure-all: minor crimes (such as phone snatching) often go uncompensated, and any increase in premiums is still borne by the public.

As Locke pointed out, every individual has the right to defend against violations of natural law. Thus, self-defense is a fundamental right for individuals protecting their property. Reasonable self-defense rights not only deter crime but also support social fairness. Current laws often make property defense too complicated, leaving many victims afraid to act when faced with infringement, or even penalized for just defending themselves. Such an approach not only undermines the law's deterrent power but also empowers criminals.

References

- [1] Locke, J. (1689). *Two Treatises of Government*. Chapter II. Awnsham Churchill.
- [2] Council of Europe. (1950, November 4). *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*. ETS No. 005. https://www.echr.coe.int/documents/d/echr/convention_ENG
- [3] Maine Legislature. (n.d.). *Title 17-A, §108: Use of force in defense of a person*. Retrieved from <https://legislature.maine.gov/statutes/17-a/title17-asec108.html>
- [4] Criminal Law. (2010). *Chapter 5: Criminal Defenses, Part 1*. <https://courses.lumenlearning.com/suny-criminallaw/chapter/5-2-self-defense/>
- [5] Beccaria, C. (1764/1986). *On crimes and punishments* (D. Young, Trans.). Hackett Publishing. (Original work published 1764)
- [6] California Secretary of State. (2014). *Proposition 47: The Safe Neighborhoods and Schools Act*. Retrieved from <https://www.sos.ca.gov/archives/2014-general-election/2014-ballot-measures>