Self-Defence Against the Police

James Leavy *

The State of Northern Ireland

On August 12, 1969 the Apprentice Boys of Derry[1] held their annual parade. While the form of the demonstration is peaceful its purpose is not by any means conciliatory. The commemoration of the Protestant victory over the Stuart besiegers of Derry in 1689 has for its object a manifestation of the power which the Protestant minority holds in a city which is 70% Catholic. The Economist aptly described Derry in the following terms:

> If Belfast is a tough place, Londonderry is something else again. Londonderry's electoral system is set up to ensure that the one-third of its inhabitants who are Protestants and loyal to the British Crown will keep control in the City Council over the two thirds who are Roman Catholic and seek unity with the Irish Republic.[2]

Since October, this hegemony had been subject to serious pressures from a coalition of political and social groupings forming the Northern Ireland Civil Rights Association (N.I.C.R.A.) which included the political wing of the Republican Movement, *Sinn Féin* (whose military wing, the Irish Republican Army, was then quiescent), various members of Socialist and Communist movements in Northern Ireland and members of the conservative Nationalist Party. After the police had forcibly broken up a civil rights demonstration in October, 1968, the protests grew as did the reaction from militant Protestants, among whom Mr William Craig and the Reverend Ian Paisley were prominent. A general election had been held in Northern Ireland in February, 1969 which divided the hitherto monolithic Unionist Party and provided the Civil Rights Movement with parliamentary representation. Shortly thereafter, Captain Terence O'Neill, the reformist Prime Minister, was compelled to resign and by a one-vote majority the now bitterly divided Unionist Party chose his cousin, Major James Chichester-Clark, as his successor.

As the political manoeuverings increased in tempo the social climate steadily worsened. By the time the Apprentice Boys' parade

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[1] The Apprentice 'Boys' are in fact grown men and generally citizens of substance in Derry.

[2] *The Economist*, 12 October 1968, 16.

was organised, the city of Derry was in an extremely tense mood. However, the influence of the Orange Order (of which the Apprentice Boys are a sub-movement) was sufficiently great to overcome the obvious need to reduce tension by banning political demonstrations. In the words of the London *Sunday Times* the parade:

> ... therefore assumed on August 12 its normal form of 5,000 men wearing bowler hats... marching along the walls of Derry which enclose the old Protestant town and look down upon the impoverished Catholic Bogside. They were accompanied by bands and banners and sang "The Boyne" and other blood-curdling anti-Catholic songs. As they went some people in the parade threw pennies down into the Bogside.[3]

During the course of the parade the pennies were replaced by stones and fighting broke out between the Bogsiders and the Apprentice Boys. The Catholics quickly erected barricades in their ghettoes and the police were summoned to bring an end to the disorders. In most democratic societies the intervention of the police force should have a calming effect and should have been welcomed by those like the Bogsiders who were quite literally besieged. The police of Northern Ireland are not, however, a normally constituted or conventionally organised civil force. Unlike policemen elsewhere in the United Kingdom, members of the Royal Ulster Constabulary are permanently armed — not just with pistols but with troop carriers, scout cars, Sterling sub-machine guns and armored cars mounted with heavy machine guns.[4] The regular police force, 3,200 strong, which is in composition almost totally Protestant, was supplemented by the 'Special Constabulary' — the so-called 'B Specials', 10,000 in number.[5] The Cameron Commission appointed to inquire into the disturbances in Northern Ireland described the composition of the Specials as follows:

> Theoretically recruitment is open to both Protestant and Roman Catholic; in practice we are in no doubt that it is almost if not wholly impossible for a Roman Catholic recruit to be accepted.[6]

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[3] *The Sunday Times* "Insight Team", *Ulster* (1970), 114.

[4] *Cf.* Hastings, *Barricades in Belfast* (1970), 28.

[5] Constantine Fitzgibbon in *Red Hand — The Ulster Colony* (1972) describes the B Specials as follows at page 328:

> The B Specials were recruited from the Ulster Volunteer force as well as from the extremist Protestant riff raff... and were the nearest thing to Nazi Storm Troopers that the British Isles have ever produced behaving much as the S.A. did once Hitler had come to power.

A more favourable judgment is rendered on the 'Specials' by an ex-member of that force, Mr Wallace Clark, in an appendix to Mr Fitzgibbons' book.

[6] Cmd. 532. Quotations from the Report of the Commission are taken from the text published in the *Irish Times* (Dublin) of 12 September 1969.

In fact recruitment was open to members of the Orange Order only. These 10,000 half-trained men were allowed permanent access to automatic weapons and as members of the Orange Lodges were left in no doubt that their rôle was the maintenance of Unionist supremacy in Northern Ireland by any means, including the use of those weapons at their disposal.

The police force was armed with a legal authority that is unexceeded anywhere in the non-totalitarian world. That authority is principally derived from the *Civil Authorities (Special Powers) Act*,[7] which is so wide ranging in the powers it accords to the police that Mr B.J. Vorster, when Minister of Justice, said of the infamous *Terrorism Act* [8] in South Africa that he would gladly have exchanged the whole of that legislation for one section of the Northern Ireland *Special Powers Act*.[9] He was probably referring to section 2(4) which reads:

> If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided for in the Regulations, he shall be deemed guilty of an offence against the Regulations.

The police force was armed with these powers to deal specifically with attempts to overthrow the constitutional order imposed in 1920 by a British government desperate for some means of extricating itself from the quagmire of Irish politics. Those powers left at the unchecked disposition of the Unionist Party were used to suppress all effective manifestation of anti-Unionist opinion. The police, especially the 'B Specials', were regarded by Catholics as a quasi-military wing of an Orange controlled Unionist Party.[10] From the beginning of the civil rights agitation in 1968 both the regular and the special constabulary had manifested physical hostility towards those with whose views they disagreed. On at least three occasions between

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[7] N.I. 12 & 13 Geo. V, c. 5. This act, annually renewed, was made a permanent measure in 1936.

The Cameron Commission admitted that this legislation was probably in violation of the Universal Declaration of Human Rights and its application has obliged Britain to remove Northern Ireland from the operation of the European Convention on Human Rights and Fundamental Freedoms.

[8] S.A. Statutes 1967, no. 83.

[9] *Cf.* Bernadette Devlin, *The Price of My Soul* (1969), 113.

[10] *The Sunday Times* "Insight Team", *Ulster* (1970), 33. "The two have been in effect the military arm of the Unionist Party. Both forces carried arms and had very little compunction about using them."

Cf. Hastings, *Barricades in Belfast* (1970), 29. "Some outside observers coming to Northern Ireland found themselves watching a force in action that at times looked to be — as certain persons undoubtedly intended — neither more nor less than the military arm of the Unionist Party."

October 4, 1968 and August 12, 1969 the police force had given grounds for severe concern to British authorities.

The Cameron Commission described the police handling of the October 4, 1968 demonstration in Derry as ill-coordinated and inept, saying:

> There was use of unnecessary and ill-controlled force in the dispersal of the demonstrators, only a minority of whom acted in a disorderly and violent manner. The wide publicity given by press, radio and television to particnlar episodes inflamed and exacerbated feelings of resentment against the police which had been already aroused by their enforcement of the ministerial ban.[11]

At the beginning of January, 1969 members of the Peoples Democracy (a student group) marched from Belfast to Derry to support civil rights demands. Outside the Village of Burntollet they were attacked by about 200 men under the command of Major Ronald Bunting, an ally of the Rev. Ian Paisley. One hundred of these men were later identified as members of the Special Constabulary. The arrival of the marchers created much tension in Derry since Paisleyite crowds attempted to interfere with the marches and meetings. On January 4, 1969 the R.U.C. was called into Derry to restore law and order. They went into the Bogside in their accustomed manner as described by the Cameron Commission:

> We have to record with regret that our investigations have led us to the unhesitating conclusion that, on the night of the 4th/5th January 1969, a number of policemen were guilty of misconduct which involved assault and battery, malicious damage to property in streets in the predominantly Catholic Bogside area giving reasonable cause for apprehension of personal injury among other innocent inhabitants, and the use of provocative sectarian and political slogans.[12]

On April 19, 1969 a civil rights meeting was held inside the walls of Derry — an action which in Protestant eyes amounted to sacrilege. Paisleyite crowds attacked the meeting and the police were called upon. "The police response was to drive the Catholics back into the Bogside and the result was a battle which lasted until midnight."[13]

Commenting on police activities on this night the Cameron Commission noted:

> We were presented with a considerable body of evidence to establish further acts of grave misconduct among members of the R.U.C. including,

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[11] *Irish Times* (Dublin), 12 September 1969, 4.

[12] *The Sunday Times* "Insight Team", *Ulster* (1970), 68. "This was a cool legal description of a night in which groups of burly R.U.C. men roamed through the Bogside crashing from time to time into the tiny terrace houses and even into a department store, dealing out arbitrary punishment with their baton. After that weekend 163 people were treated in hospital."

[13] *Sunday Times* (London), 14 November 1971, 16.

> on this occasion also, personal injury and malicious damage to property. We regret to say that there appears to us to be ample *prima facie* evidence to support such charges.[14]

Among those who fell victims to the police were the family of one Samuel Devenney, a Bogside Catholic. In chasing some youths who had been throwing stones at them, the police:

> ... burst into the house and fell upon the Devenney family with batons and boots... Samuel Devenney was taken to hospital with a badly cut scalp.[15]

Devenney died of his injuries. This fact was disturbing enough for the Bogsiders. What was perhaps more disturbing was the fact that it was found impossible to trace the policemen who had committed the assault. On the night of April 19 senior police officers in Derry were not in control of their men. Police from other forces poured into Derry. No one knew who had sent them, where they were from nor what orders, if any, they had received. The desk log at the police station nearest the Bogside was not kept properly and no duty roster of any sort was maintained.

> Records are one essential element of a police force which is restrained by law but in Derry on the night of April 19, 1969 large segments of the R.U.C. had turned into a sectarian mob. The forces of law and order had themselves surrendered to lawlessness and to borrow the language of a famous American inquiry, the Devenney family were victims of a police riot.[16]

Five months later the R.U.C. and the 'B Specials' were ordered to restore law and order to the Bogside. The police drew up at the perimeter of the area and made repeated charges at the barricades:

> They were shouting 'I.R.A. scum' and 'Fenian bastards' as they began their charge and they batoned several bystanders ... including a uniformed first aid man.[17]

As well as batons the police were armed with C.S. gas — the first time this product had been used in the United Kingdom.[18] Each

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[14] *Irish Times* (Dublin), 12 September 1969, 4.

[15] *The Sunday Times* "Insight Team", *Ulster* (1970), 75-76.

[16] *Ibid.*, 76.

[17] *Ibid.*, 116.

[18] *Ibid.*, 111. "The [British] Ministry of Defence had been against any idea of the R.U.C. having C.S. but had caved in a few days earlier when, to their horror, they discovered that the R.U.C. already had C.N. C.S. is technically a smoke, but the Ministry view was that C.N. was a gas as defined and forbidden by the Geneva Convention. To remove the C.N., the Ministry had to provide C.S."

Russell Stetler, *The Battle of Bogside* (1972) describes in detail the use of C.S. gas by the R.U.C. during the incidents in question and its effects on the Bogsiders.

charge was repulsed by the Bogsiders armed with stones and petrol bombs.

> Samuel Devenney had died three weeks earlier: with his example in mind it was not necessary to be radical but only an ordinary family man to want to make sure that there was not another R.U.C. "punitive expedition" into the Bogside.[19]

The street fighting which began in Derry spread to Belfast and continued for three days until the British Government ordered its soldiers to assume the task of restoring order. The soldiers' arrival was considered a victory in the Bogside and the troops were greeted by the Catholics of Derry,[20] among whom Bernadette Devlin, elected M.P. for the Westminster Constituency of Mid-Ulster in April, 1969, had played a prominent rôle.

The intervention of the British Army was considered by most Unionist elements a major defeat [21] for it implied increased British involvement in the political situation — an involvement whose results could only be detrimental to the Unionist position.

Charges were brought against Miss Devlin, who had taken part in the disturbances and had telephoned the British Home Secretary to request despatch of the troops. The prosecution was in the name of Francis Irvine Armstrong, a member of the Royal Ulster Constabulary.

The Right of Self-Defence

Miss Devlin was charged with two counts of riotous behaviour (contrary to section 9(1) of the *Criminal Justice (Miscellaneous Provisions) Act* [22]) and with two counts of inciting persons unknown to riotous behavior (contrary to section 69(1) of the *Magistrates Courts Act* [23]). It was testified that on at least three occasions Miss Devlin had urged the Bogsiders to resist any police incursion into the Bogside with remarks such as "keep the barricades manned. If you fall back the black bastards will over-run the Bogside." It was also testified that Miss Devlin had herself thrown a stone in the direction

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[19] *Sunday Times* (London), 14 November 1971, 16.

[20] *The Sunday Times* "Insight Team", *Ulster* (1970), 141.

[21] *Sunday Times* (London), 14 November 1971, 17. "If it hadn't been for the ———ing British Army, complained one Unionist statesman to the former Prime Minister, now Lord O'Neill, we would have killed a thousand of them by Saturday."

[22] N.I. 1968, c.28.

[23] N.I. 1964, c.21.

of the police cordon.[24] She was found guilty on all four counts and was sentenced to six months imprisonment on each count, the sentences to run concurrently. Miss Devlin appealed from these convictions in the Magistrates Court to the Court of Appeal[24a] — composed exclusively of Protestants. (Since the inception of Northern Ireland in 1921 no Catholic has been found worthy to sit as a judge in the Court of Appeal.[25])

The substance of Miss Devlin's defence (and of her grounds for appeal) was the existence of a personal right and of a right belonging to the collectivity of which she was a member at the relevant time (August 12-15, 1969) to take such measures as were necessary for protection against the police force. Both the assertion of her personal right of self-defence and the claim of the right of collective self-defence were founded on a common law and on a statutory basis.[26]

The case which Miss Devlin sought to present involved the contention, based on the incidents referred to in this note, that the Royal Ulster Constabulary and, in particular, the 'B Specials', constituted a direct threat to the lives, safety and property of the inhabitants of the Bogside and that the measures adopted by her and counselled by her to members of the Bogside Community were justified as measures of self-defence. The Crown's case, in substance, was that no justification of self-defence could prevail against the operation of a lawfully constituted police force in the exercise of its duty. It was also contended that even if Miss Devlin's apprehensions regarding the hostility of the R.U.C. to the population of the Bogside

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[24] "[I]t landed short. From the position in which the appellant was standing when she threw the stone, there was little or no likelihood of it hitting a policeman": *per* Lord McDermott,L.C.J. [1971] N.I. 13, 19.

[24a] *Devlin* v. *Armstrong*, [1971] N.I. 13

[25] *Cf.* Andrew Boyd, *Holy War in Belfast* (1969) who also notes that only two Catholics have been appointed to the High Court since 1921.

[26] The Statutory defence is provided by section 3 of the *Criminal Law Act*, 15 & 16 Eliz. II, c.58:

1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

This argument was turned around by the Court which relied on the Common Law obligation, as explained in the *Bristol Riots* case (1832), 3 St.Tr., N.S. 1, 4, of aiding the police in the suppression of a riot as making it impossible "for her to find any legal justification for her conduct in aiding and encouraging the rioters as she undoubtedly did": [1971] N.I. 13, 36.

This aspect of the decision is dealt with in the note by Professor Leigh, in (1972) 35 M.L.R. 543. He also considers other secondary issues raised in the case.

could be legally justified, her reaction and her advice to the Bogside went far beyond what her apprehensions would reasonably require by way of self-defence.

The Court was thus invited to pronounce on two very important questions, one of fact and one of law: (1) were Miss Devlin's apprehensions regarding the Royal Ulster Constabulary correct, *i.e.* were her fears that the police would attack persons and property in the Bogside reasonable; and (2), if such reasonable fears existed, were Miss Devlin and the Bogsiders entitled to resort to violence as a means of self-protection. Any pronouncement by the highest judicial authority in Northern Ireland on these two points would of course have had significant political as well as legal repercussions. A decision in Miss Devlin's favour would effectively paralyse any police efforts in Catholic districts of the province and increase the already existing pressure in London for the abolition not only of the 'B Specials' (which was recommended by the Hunt Report and subsequently effected) but also of the regular constabulary. Given the links between the police and the governing Unionist Party,[27] a decision unfavourable to the R.U.C. would undoubtedly have severely compromised the Government of Northern Ireland in its dealings with the English authorities.[28]

The Court of Appeal, however, avoided any consideration of the question of fact and accorded only a passing reference to the question of law. Their Lordships (*per* Lord McDermott,C.J.) accomplished this by confirming the Magistrate's decision that the evidence of previous police conduct tending to support Miss Devlin's apprehensions was irrelevant and inadmissible and by a confused interpretation of the defence of necessity and more particularly the justification of self-defence in English law.

Self-defence is a factor of justification[29] of an otherwise illegal act:

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[27] *Cf. Irish Times* (Dublin), 12 September 1969, 4: "[T]he nature of the relationship of the R.U.C. to the Minister of Home Affairs makes it easy for the criticism to be put forward that the R.U.C. is essentially an instrument of party government" (quotation from Cameron Commission Report).

[28] Subsequent political events culminating in the abolition of Stormont and the assumption by London of direct control of the R.U.C. have tended to confirm the view that the R.U.C. as constituted at the time of the incidents in question had ceased to be an effective police force.

[29] The distinction between a legal justification and a legal defence is explained by Winn, L.J. in *Kenlin* v. *Gardiner*, [1967] 2 W.L.R. 129, 135: "It must always be borne in mind that it is for the prosecution to exclude justification and not for the defendant to establish it."

> ... if the accused can show that it was done only in order to avoid consequences which could not otherwise be avoided and which, if they had been followed, would have inflicted upon him and upon others, whom he was bound to protect, inevitable and irreparable evil, and no more was done than was necessary for that purpose, and the evil inflicted by it was not disproportionate to the evil avoided.[30]

It is thus founded upon the apprehension of an imminent danger by the actor and the taking of reasonable measures to counter the apprehended danger. While the apprehension of an imminent danger must be a reasonable one, "... reasonable grounds for such belief may however exist though they are founded on a genuine mistake of fact".[31]

The reasonableness of the measures taken in self-defence will depend on the degree of danger reasonably apprehended. The Court must therefore decide on the basis of the test in *R.* v. *Chisam* and the degree of apprehended danger whether reasonable grounds existed for the belief that an attack was imminent. It is only when these questions have been answered that the Court can properly address itself to the question of the reasonableness of the defence.

The Court of Appeal in *Devlin* v. *Armstrong* did not, however, choose to proceed in this fashion. Instead it decided that the measures taken in self-defence were unreasonable as being exercised against a police force in the exercise of its duty.

> The police were then in the throes of containing a riot in the course of their duty, and her interventions at that juncture were far too aggressive and premature to rank as justifiable efforts to prevent the prospective danger of the police getting out of hand and acting unlawfully which, as I have assumed, she anticipated.[32]

The argument which Miss Devlin was proposing was, however, that this particular police force constituted even while acting in the course of its duty an imminent danger to the Bogsiders. Any consideration of the reasonableness of her measures in self-defence required that the Court consider the reasonableness of the apprehensions just mentioned. Yet the evidence proffered by Miss Devlin going precisely to this question was not admitted and the question itself was deliberately avoided by the assumption that a police force acting under orders cannot as such constitute a threat to individuals justifying recourse to measures of self-defence.

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[30] *R.* v. *Mahomed*, [1938] A.D. (S.A.) 30. The quotation is from the headnote to the Report.

[31] *R.* v. *Chisam* (1963), 47 Cr.App.R. 130, *per* Parker, L.C.J., quoting from the judgment of Lord Normand in *Owens* v. *H.M. Advocate*, [1946] S.C.(J.) 119, 125. This decision was cited in *Devlin* v. *Armstrong*, [1971] N.I. 13, 33.

[32] [1971] N.I. 13, 33.

It is clear from the judgement of Lord McDermott that the Court of Appeal felt itself on secure ground in rejecting a plea of self-defence not only on the part of Miss Devlin but on the part of the Bogside Community to which she belonged at the time in question. Sir Dingle Foot, Miss Devlin's counsel, had suggested that English law admitted the right of a collectivity in danger to take such measures as were reasonably necessary to protect itself. For this proposition he could find only one real authority: a passage from Lord Mansfield's judgment in *R.* v. *Stratton* in which the eminent judge declared that a collectivity may be justified in resorting to extreme measures:

> ... but in that case it must be imminent extreme necessity; there must be no other remedy to apply for redress ... and in the whole they must appear clearly to do it with a view of protecting the society and themselves — with a view of preserving the whole.[33]

The Court refused to pronounce on the correctness of Lord Mansfield's remarks, preferring instead to note that the requisite conditions for such collective action could not be said to exist in the Bogside because:

> It is one thing to act for the best in some case of extreme necessity, where the forces of law and order are absent or have ceased to act in that capacity. It is quite another to fight against and seek to expel a lawfully constituted constabulary while acting in the execution of its proper functions.[34]

It is understandable that a court should feel some reluctance about considering the possibility that a legally constituted police force is in fact considered a threat by a substantial segment of the population which it ostensibly serves. Apart from the broader policy implications of a decision to that effect, the courts of Common Law jurisdictions face a jurisprudence which impliedly assumes that a policeman acting in the course of his duty may not be resisted.[35] The

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[33] (1779), 21 St.Tr. 1045, 1224.

[34] [1971] N.I. 13, 35.

[35] This jurisprudence was reviewed in *Donnelly* v. *Jackman*, [1970] 1 W.L.R. 562, which upheld the view noted. Cases such as *Davis* v. *Lisle*, [1936] 2 K.B. 434 and *Kenlin* v. *Gardiner*, [1967] 2 Q.B. 510 were distinguished on the basis that in the former the policeman had become a trespasser and in the latter that the officers had committed an assault — in each case the officers had ceased to act "in the course of their duty" as defined in *R.* v. *Waterfield*, [1964] 1 Q.B. 164, 171, using two criteria:

> whether a) such conduct falls within the general scope of any duty imposed by statute or recoguised at common law and b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

Miss Devlin might have argued that policeman who, according to the accounts of observers, charged into the Bogside shouting 'I.R.A. scum' and 'Fenian

courts admit the right to resist an unlawful arrest [36] but the justification of self-defence based on a reasonable mistake of fact cannot apparently prevail against a lawful arrest which the resister imagined to be unjustified.[37] The South African case of *R.* v. *Mahomed* [38] already referred to appears to constitute a limited exception to this absolute rule — an exception which English Courts have never apparently confronted. In that case the Appellate Division of the Supreme Court upheld a defence of necessity as justification for resisting police officers who were making a lawful arrest because the officers were accompanied by a mob which the resisters reasonably suspected would attack them were they to venture out of their house and offer themselves to the police. The majority view in that case made it clear that had no mob accompanied the officers, no grounds for resistance would have existed, while the dissenting judge insisted that even in the circumstances aforementioned the defendants could not justify resistance to police officers in the course of their duty.[39]

In France the tendency of the jurisprudence has been similar to that observed in the Common Law jurisdictions. Though article 11 of the *Declaration of the Rights of Man* states quite categorically that:

> ... tout acte exercé contre un homme hors les cas et dans les formes que la loi détermine est arbitraire et tyrannique: celui contre lequel on voudrait l'exécuter par la violence a le droit de le repousser par la force,

the Cour de Cassation has consistently favoured the view that an absolute presumption of legality must attach to the actions of police officers in the course of their duty, a presumption which excludes any right of resistance.

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bastards' and batoning a uniformed first-aid man had placed themselves beyond the criteria of *R.* v. *Waterfield* and thus were outside the course of their duty. This line of argument was not, however, adopted and neither *R.* v. *Waterfield* nor *Donnelly* v. *Jackman* were cited to the Court.

[36] *Kenlin* v. *Gardiner,* [1967] 2 W.L.R. 129.

[37] *R.* v. *Fennell,* [1970] 3 All E.R. 215.

[38] [1938] A.D. (S.A.) 30.

[39] The circumstances of this case contain many similarities to those in *Devlin* v. *Armstrong*:

> When the police on foot went through the barricade a crowd hostile to those behind the barricade went through at the same time. This crowd ran along Rossville Street, threw stones which broke some windows, made offensive sectarian remarks and threw stones towards the crowd which had been behind the barricade. This incursion and these actions were not restrained by the police. At all material times the police were heavily outnumbered by those opposing them: [1971] N.I. 13, 17.

However, *R.* v. *Mahomed* was not cited to the Court.

However, both in France and in the United States, an evolution in doctrinal thinking is discernible. Professor Vidal, for instance, argues eloquently in support of Ihering's view [40] that self-defence is not merely a right but a duty whose observance is an essential element of any legal system [41] and while Professor Donnedieu de Vabres is not entirely satisfied with the Hegelian aphorism that "an attack is a negation of the law, defence is a negation of the negation and therefore an affirmation of law", he concedes that the French Courts have been too reticent in the application of the principles of self-defence to resistance to police power.[42] In a recent and comprehensive survey of the question of legitimate resistance to authority, Professor Verhaegen not only argues that the law should acknowledge the right of resistance against policemen and other functionaries acting in the course of their duty but asserts that the existing Penal Code, if properly interpreted (and as explained in an impressive line of jurisprudence), would be found to provide for such a right.[43]

In the United States, the American Law Institute's *Model Penal Code* which dates from the early 1960's maintains the general proposition that:

> ... the use of force is not justifiable under this section
> 1) to resist an arrest which the actor knows is being made by a peace officer although the arrest is unlawful.[44]

However, the drafters are careful to state in their commentary on this article that:

> ... it has no application when the actor apprehends bodily injury as when the arresting officer unlawfully employs or threatens deadly force unless the actor knows that he is in no peril greater than arrest if he submits to the assertion of authority.[45]

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[40] *Cf.* Ihering, *Lutte pour le droit* (trad. O. de Meulenaere) (1893), 32:
[L]a lutte est le travail éternel du droit: le degré d'énergie avec lequel le sentiment juridique réagit contre une lésion du droit est une mesure certaine de la force avec laquelle un individu, une classe ou un peuple comprend pour lui et pour le but spécial de sa vie l'importance du droit.

[41] *Cours de Droit Criminel et de Science pénitentiaire* (1949), 358.

[42] *Traité de Droit Criminel* (1947), 229 and following.

[43] *La Protection pénale contre les Excès de Pouvoir et la Résistance légitime à l'autorité* (1969). Verhaegen recommends an addition to the 209th article of the French Penal Code which makes an act of rebellion any violent resistance to the police in the execution of their duty. The addition would provide:
Il n'y a ni crime ni délit lorsque les violences ou menaces étaient commandées par la nécessité actuelle prudemment appréciée de détourner d'un bien appartenant à soi-même ou à autrui les effets graves d'un flagrant excès de pouvoir.

[44] Para. 3.04, 47.

[45] *Tentative Draft No. 8* (1958), 19.

Furthermore, the *Proposed New Federal Criminal Code*, part of the Final Report of the National Commission on Reform of Federal Criminal Laws, qualifies the right of self-defence with regard to police officers in this way:

> ... a person is not justified in using force for the purpose of resisting arrest, execution of a process or other performance of duty by a public servant under colour of law, but excessive force may be resisted.[46]

It is suggested that if either of these statements represented the law in Northern Ireland, then the Court would have been compelled to examine the question of whether Miss Devlin reasonably apprehended danger to herself and the people of the Bogside from the use of 'excessive force' by the police or of 'bodily injury' resulting from their actions. The Court would not be able to escape such an examination by the simple affirmation that the law does not countenance any violent resistance to a police force in the exercise of its lawful functions.

Just what the law in Northern Ireland is on this subject is difficult to determine because the justification of self-defence reposes largely on the Common Law and not on a statutory basis. If the interpretation of the rule in the case of resistance to police activity given in *Devlin* v. *Armstrong* be a correct statement of the law, then an enormous power is given to police forces whose actions are not subject to restraint so long as they can be said to have been in the course of duty — even where that duty consists in periodically terrorizing large elements of the community politically opposed to those in control of the constabulary. The common sense of the Common Law can hardly be supposed to countenance such a position. If an adequate policy basis for such a rule does exist it was not explained in *Devlin* v. *Armstrong*. It is suggested that no credible policy reason could be found for so wide an immunity and that an amendment of United Kingdom law along the lines of the American proposals noted should be undertaken.

The decision of the Court in dismissing Miss Devlin's appeal because she had used unreasonable force can also be interpreted in the following manner. Though Miss Devlin's case reposed essentially on the justification of self-defence there are grounds for supposing that the court treated the defence as one of necessity. Lord McDermott spoke in his judgement of self-defence being an alternative plea to that of justification which he considered as embracing both the Common Law plea of self-defence and the Statutory defence provided for in Section 3 of the *Criminal Law Act*. More particularly, in discussing the argument of a collective right of self-defence, the Lord

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[46] (1971), Para. 603.

Chief Justice specifically considered it as a plea of what Lord Mansfield in *R.* v. *Stratton* refers to as 'civil necessity'.

Whether a general defence of necessity exists in the law of England (or that of Canada, given the wording of article 7(2) of the *Criminal Code*) is still a disputed point. Professor Glanville Williams in his textbook on Criminal Law states that:

> ... notwithstanding the doubts that have been expressed it will here be submitted somewhat confidently that the defense exists in English law,[47]

an assertion which is backed by an impressive array of citations from jurists such as Bracton, Bacon, Coke and Hale and numerous judgments including the famous decision in *Manby and Richards* v. *Scott*.[48] This view has the quite recent support of Lord Denning [49] but it is by no means unchallenged. In an exhaustive article Mr Glazebrook has argued that apart from specific cases of statutory defences based on necessity, no such general defence is recognized in the law of England.[50] Even among those who are inclined to Professor Williams' view, there is a recognition that the courts are not enthusiastic about pleas based on concepts of necessity.[51]

Two reasons, at least, exist for this reticence. In the first place the legal distinction between 'necessity' and 'self-defence' is by no means clear. While French law distinguishes self-defence from necessity on the ground that in the former case it is the aggressor who is attacked while in the latter an innocent third party is made the victim [52] (the classic case is that of the storekeeper from whom a starving mother steals to feed herself and her child), no such sharp distinction is drawn in English law. Those who support the existence of a general defence of necessity tend to regard self-defence as one element of this justification — albeit one subject to fairly definite rules.[53] But, because a plea of self-defence exists as part of a defence of necessity rather than as a separate justification, a court faced with a general defence of necessity may in fact be dealing with what is properly a case of self-defence.

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[47] *Criminal Law — The General Part* 2d ed. (1961), 724.

[48] (1672), 1 Lev. 4, 83 E.R. 268.

[49] *Southwark London Borough Council* v. *Williams*, [1971] Ch. 736. Lord Denning admitted the existence of a general defence of necessity not only as regards criminal prosecutions but also in tort actions.

[50] Glazebrook, *The Necessity Plea in English Criminal Law*, (1972) 30 Camb. L.J. 87. The author of *Russell on Crime*, 12th ed. (1964) shares Mr Glazebrook's view, while the author of Kenny's *Outlines of Criminal Law*, 19th ed. (1966) appears to side with Williams — though the only authority cited for the existence of a general defence of necessity is Stephens' *Digest of the Criminal Law*.

[51] Gordon, *The Criminal Law of Scotland* (1967), 372.

[52] Bourat and Pinatel, *Traité de Droit pénal et de Criminologie* (1963), 277.

[53] Williams, *op. cit.*, 733.

This procedural difficulty is however relatively unimportant in explaining the reluctance of the courts to accept a general defence of necessity. Much more significant is the consideration of what the process involves on the part of the defendant and on the part of the courts themselves. For the defendant:

> ... in situations of necessity the agent is faced with a choice between two courses of action and he is required to choose by reference to the relative values attached by the law to the two courses and their results.[54]

But as Glanville Williams points out:

> It is for the courts to decide whether, on the facts as they appeared to the defendant, a case of necessity was in law made out, and this in turn involves deciding whether, on a social view, the value assisted was greater than the value defeated.[55]

In some cases the relative values are so clear both to the defendant and to the court, that a judge need feel no hesitation in justifying or condemning a defendant's conduct. But in cases where the relative values are not so clear, the defendant's conduct poses an unwelcome problem for the court which, in effect, has to decide *ex post facto*, whether the defendant's decision was legally correct, in a situation where the law ceases to be what is written in the Statute book but the observance of a higher value — a value whose assessment is left to the court itself. The judge has to decide, not whether the letter of the law was complied with but whether the defendant's conduct could be supported by a social value outweighing that of breaking the law. Such famous decisions as *R.* v. *Dudley and Stephens*[56] and *U.S.* v. *Holmes*[57] involved precisely this type of analysis, one for which judges are not especially well-equipped.

If, however, Ihering's proposition that self-defence is not merely a right but a duty be accepted (as the courts of the Common Law seem to — though with reservations in cases involving policemen) then the judge is not faced with the task of weighing the relative values of resistance to the attack and of not injuring another person. Provided that the response to the attack was reasonable, the judge can rest content in the knowledge that the right to self-defence is itself a value which the law regards as almost absolute. He is not required to agonise over the moral or social implications of the defendant's conduct. His only task is to determine whether the requisite elements for the justification of self-defence were present in the particular case. It is therefore understandable that judges

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[54] Gordon, *op. cit.*, 368.
[55] Williams, *op. cit.*, 746.
[56] (1884), 14 Q.B.D. 273.
[57] 26 Fed. Cas. 360 (1842).

should be hesitant about accepting general defences of necessity where a plea of self-defence is possible.

Yet in *Devlin* v. *Armstrong* the appellant pleaded self-defence quite specifically. The Court, however, as we have seen, did not attempt to discover whether the requisite elements for such a plea existed but declared that Miss Devlin's actions were unreasonable in the circumstances given that there can be no justification for violent resistance to a police force in the exercise of its duty. It is the submission of this note that such a proposition does not (or at least should not) represent the law of England or Northern Ireland. It does, however, represent a weighing by the court of the relative values of Miss Devlin's conduct and that of the Royal Ulster Constabulary. In the eyes of the Court the value of 'law and order', as represented by the police, had to prevail over the Bogsiders' fear of and antipathy towards that same force.

This type of judgement is proper in response to a plea of necessity but not to one of self-defence. What is interesting to note is that the 'weighing of values' was not done openly but was (whether intentionally or not) disguised under an interpretation of the existing law relating to self-defence. In other words the Court considered Miss Devlin's plea of self-defence as one of necessity and rendered its decision on the basis of necessity but in the language of a judgement dealing with a plea of self-defence. If nothing else, this sort of judgement indicates the need for an elaboration in Common Law jurisdictions of the distinction between the pleas of self-defence and necessity — an elaboration which will probably have to await the codification of the Criminal Law of England.[58]

However, the refusal of the Court to examine the relationship between the police and the people of the Bogside (a relationship which had been the subject of critical comments not only in the report of the Cameron Commission but also in those of the Hunt Committee and the Scarman Tribunal) and the obvious unwillingness to consider that the police might have provided any motive for the resistance of the Bogsiders tends to justify the criticism of political partisanship levelled at the judiciary in Northern Ireland and suggests that the courts are in need of the same reform which the British Government has imposed on the legislature, the executive and the police.

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[58] Both the American Law Institute's *Model Penal Code* (Para. 3.02) and the *Proposed New Federal Criminal Code* of the National Commission on Reform of Federal Criminal Laws (Para. 601) specifically admit a general defence of necessity.