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APPENDIX "CODE-6"

PRINCIPLES OF CRIMINAL LIABILITY

Proposals for a New General Part of the *Criminal Code of Canada*

REPORT OF THE CANADIAN BAR ASSOCIATION CRIMINAL RECODIFICATION TASK FORCE

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PREFACE

The Criminal Code Recodification Task Force was created in Fall 1990 to address in a comprehensive fashion the reform of the General Part of the *Criminal Code of Canada*. The Task Force follows in the footsteps of the Special Committee on the Criminal Code chaired by Rocky Pollack, which operated from 1987 to 1989.

The specific objective of the Task Force is to provide the Canadian Bar Association with a sound basis for its recommendations for recodification and to coordinate the Association's contribution to law reform efforts in this field. This initiative could not be more timely. This report will form the basis of the Association's presentation to the House of Commons Standing Committee on Justice and the Solicitor General on recodification in the Fall of 1992.

The Canadian Bar Association is involved in reform of the criminal law on an ongoing and continuous basis. In the past year, the Association has made submissions to Parliamentary Committees on many amendments to the *Criminal Code* dealing with issues such as mental disorder, firearms control, and sexual assault. Many of these amendments have an impact, either direct or indirect, on the general principles of the criminal law. In addition, the Association has long been active in reform of other aspects of the criminal law, notably the law and policy of sentencing, corrections, and conditional release. All of these activities have underscored the urgent need for fundamental and comprehensive reform of the *Criminal Code*.

By creating this Task Force, the Executive of the CBA acknowledged its serious concern and the serious concern of many members of the Association that on its 100th anniversary the current *Criminal Code* is archaic, incomplete, poorly organized and difficult to understand. It was also recognized that lawyers have a responsibility to press for reform of the criminal law. While it is not lawyers alone who should participate in discussions over reform, as a group, we have a unique perspective which must be strongly voiced in this debate.

The Task Force includes individuals who are members of the defence bar, Crown counsel, members of the judiciary, and academics. This broad representation has helped to ensure that the issues were canvassed from a range of perspectives and that the competing interests are balanced in the recommendations for reform.

The goals of the Task Force include contributing to understanding of the general principles underlying our criminal law by the legal profession and the public. In addition to recommending options for reform, the report and the more detailed working papers which it is based on fulfill this function in an admirable fashion. This research and analysis will invigorate and inform the debate at the present time and into the future.

In carrying out its mandate, the Task Force has followed from and added to the superb work undertaken by the Law Reform Commission of Canada. Without the Commission's initial and ground-breaking studies, working papers and reports, the path to recodification could not have begun. It is difficult to imagine law reform efforts in the aftermath of the abolition of the Commission.

The Task Force identifies the *Criminal Code* as urgently in need of reform. The challenge must be taken by the federal government - and now.

The Canadian Bar Association is proud of the accomplishment of this Task Force and grateful for the efforts of those persons who contributed to the report. In particular, I would like to thank the Chair, Richard Peck, Q.C. of Vancouver for his exceptional contribution. I am confident that when members have read this report they will agree that it presents a clear, explicit and timely review of large and complex issues.

The Canadian Bar Association will continue to contribute to the reform of the criminal law and press for implementation of the recommendations in this report, now and in the years to come.

J.J. Camp, Q.C.
President, 1991-92

FOREWORD

The *Criminal Code of Canada* is now one hundred years old. Although it has served Canadians well over the last century it has only done this through the expedient of frequent legislative amendment. In the main, changes to the *Code* have been desultory, although comprehensive amendments have occurred, most notably in 1927 and 1955. The result is a patchwork document that has long since outlived its usefulness.

The composition of Canadian society has changed dramatically in the past 100 years. So, too, have many of the values and expectations of Canadians. A new *Criminal Code* is essential to respond to these changes. Advances in medical science, psychiatry and penology, to name a few, need to be recognized in the *Criminal Code* as do changes wrought by the *Canadian Charter of Rights and Freedoms*. The time for reform of the *Code* is upon us.

The arduous road toward recodification is already well-travelled. The Canadian Bar Association acknowledges the significant contributions made by criminal law reformers to date. In particular, the Association praises the work of the Law Reform Commission of Canada which has established a strong base of research, analysis and proposals for recodification efforts. These efforts were made possible by the strong leadership of Presidents, Justice Allen Linden and Justice Gilles Létourneau. The Task Force has drawn heavily upon the work of the Law Reform Commission in the preparation of this report.

The Canadian Bar Association has long been an active participant in criminal law reform through studies, governmental consultations and submissions to legislative bodies. The Association established the Criminal Code Recodification Task Force in order to respond in a comprehensive manner to the Law Reform Commission's Report 31, *Recodifying Criminal Law* and to make recommendations to the Parliamentary Committee studying the General Part of the *Criminal Code*.

The General Part of the *Criminal Code* deals with general principles of criminal liability, justifications, excuses, other defences and involvement in complete and incomplete crimes. The Task Force focused on selected issues within the General Part, leaving consideration of specific criminal offences and other aspects of the criminal law, such as sentencing, to a later date.

This report is the product of the Task Force's vigorous analysis and debate of seventeen selected criminal justice issues. The broad membership of the Task Force meant that diverse interests were represented and competing views on many issues expressed. This composition produced stimulating and healthy debate and, in some cases, an even division of opinion as to how the issue should be resolved. In every case these differences reflected honest and principled differences of opinion which will likely be experienced during the political and departmental examination of these issues. The Task Force decided that, rather than gloss over these differences, it ought to state the opposing views clearly and the arguments in favour of each so that the readers of this report will appreciate the underlying policy considerations and the consequence of adopting one or the other of the various alternatives.

The central theme of the Report is the principles of criminal liability. The Task Force has concluded that subjective fault is a principle of fundamental importance which must be respected in every provision of the new *Criminal Code*. It has been an integral part of the common law for centuries and is now recognized as a principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*. It is the best possible articulation of the differences between civil and criminal liability. All of the Task Force's recommendations are rooted in this fundamental principle.

The Task Force welcomes the benefits of codification. However, the clarity and accessibility which come through codification need not, indeed must not, fetter the creative powers of the common law. The new *Criminal Code* must strike a balance between a clear statement of the criminal law and a capacity to have the law evolve over time in response to changes which we cannot today even comprehend. Accordingly, the Task Force endorses a code model which allows room for continued development of the law, and in particular, common law defences, through judicial interpretation.

The Task Force recognizes that the criminal law must balance competing interests. In the Report, these interests have been recognized through recommendations on the appropriate use of the onus of proof, evidential burdens, public policy defences and the utilization of objective limitations on the use of force.

Many individuals have been actively involved in preparing this report. Members of the Task Force have given freely of their time to come together and exchange views. However, there are some who deserve special mention. Wayne Chapman Q.C. and J.J. Camp Q.C., Presidents of the Canadian Bar Association during the Task Force's mandate have supported the project throughout and provided the Task Force with the able assistance of national office staff Terence Wade, France Houle and Melina Buckley. The dedicated and invaluable efforts expended by researchers Keith Hamilton and Gil McKinnon were an invaluable contribution to the Report.

The Criminal Code Recodification Task Force is pleased to present this report to the Canadian Bar Association for consideration. It is our hope that it will be a significant contribution to the recodification effort. While the issues addressed in this report are complex, the recommendations are presented in the spirit of law reform and discussion and debate are welcome. The Task Force is proud of the result of its efforts to review the General Part of the *Criminal Code*. We believe that our recommendations would serve society well.

Richard C.C. Peck, Q.C.
Chair,
Criminal Code Recodification
Task Force

PART I: OVERVIEW

I. INTRODUCTION

A. The *Criminal Code of Canada*

Canada's first *Criminal Code* was passed by Parliament in 1892,[1] and became law in July 1893. Don Stuart[2] describes its origins:

> This *Code* dealt with substantive law and procedure. The former was largely founded on the English Draft *Code* of 1879 which in turn was primarily the work of Sir James Stephen. This extraordinary jurist had battled valiantly to have English criminal law codified. This he never achieved, apparently due to scepticism about the value of any codification of the common law, resistance to change within the legal profession and, one suspects, a petulant reluctance to allow one man to achieve so much so quickly.

Consolidations were made to the *Code* in 1906, 1927 and 1955, but its basic structure has remained substantially the same for nearly a century.

B. The reform process

In 1972 Parliament created the Law Reform Commission of Canada[3] which, in the ensuing two decades, published scores of Working Papers and Reports on many aspects of criminal law and procedure.

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1 S.C. 1892, c. 29.

2 D.R. Stuart, *Canadian Criminal Law, A Treatise*, 2d ed. (Toronto: Carswell, 1987) at 2.

3 *Law Reform Commission Act*, R.S.C. 1970 (1st Supp.), c. 23. Regrettably, the Law Reform Commission of Canada was abolished by the federal government in 1992.

In 1987 the Commission published Report 31, *Recodifying Criminal Law*, which contained recommendations for an entirely new *Criminal Code* for Canada. The first division of the report proposed a General Part, dealing with general principles of criminal liability, justifications, excuses, other defences and involvement in complete and incomplete crimes. The second major division, the Special Part, proposed a comprehensive re-structuring of criminal offences on all matters except trade and securities frauds, abortion, sex offences, prostitution and pornography.

Sentencing was not included, as that task had been performed by the Canadian Sentencing Commission.[4] Matters of criminal procedure were to be addressed separately by the Law Reform Commission in its forthcoming *Code of Criminal Procedure*.[5]

C. Referral to the Standing Committee on Justice

In 1990 the then Minister of Justice Doug Lewis announced his intention to refer the issue of a new *Criminal Code* to the House of Commons' Standing Committee on Justice and the Solicitor General. To assist the Committee, the Department published a framework document entitled *Toward a New General Part for the Criminal Code of Canada*, which summarized the main principles contained in the General Part as proposed by the Law Reform Commission of Canada, their rationale, the present law, Canadian and foreign recommendations for reform, and issues for consideration.

In 1991 the new Minister of Justice Kim Campbell re-affirmed the Government's commitment to table a new General Part of the *Criminal Code* in Parliament in time for it to become law by July 4, 1993, the 100th anniversary of the present *Code*.

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4 *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987).

5 The first volume of the Commission's proposed *Code of Criminal Procedure* was published in 1991 as: Report 33 - *Recodifying Criminal Procedure* (Ottawa: Law Reform Commission of Canada, 1991).

In February 1992 a subcommittee of the Standing Committee was struck, to examine in detail the various proposals for a new General Part.

D. The Canadian Bar Association's role

The Canadian Bar Association is Canada's national lawyers' organization and has, since its inception, had a keen interest in law reform.

Each provincial and territorial branch of the Association has a Criminal Justice Section, the membership of which typically includes prosecutors, defence counsel, law professors and members of the judiciary.

In 1987 Rocky Pollack, then Chair of the Canadian Bar Association's National Criminal Justice Section, was appointed chairperson of a task force to study the emerging Law Reform Commission of Canada's *Criminal Code* revision proposals. Michelle Fuerst and Heather Holmes are current Task Force members who were involved in its initiation, together with Manitoba Crown Attorney Bob Gosman, Vancouver criminal lawyer Terry La Liberté, ex-Northwest Territories legislator Joel Fournier and Calgary criminal lawyer Don McLeod. The Canadian Bar Association was unable to secure funding for continuation of this project and there was no significant action on the Law Reform Commission recommendations by the Department of Justice. Therefore the task force was disbanded and its members were unable to complete a report to the Canadian Bar Association Council.

In 1990 Richard Peck, Q.C., the next Chair of the Canadian Bar Association's National Criminal Justice Section, obtained approval and funding for the creation of a national task force on criminal recodification, to respond to the Law Reform Commission's Report and to make recommendations to the Standing Committee respecting the General Part of the new *Criminal Code*.

In his view, the Canadian Bar Association was uniquely qualified to play this role, for several reasons:

- its members across the country have enormous practical experience working in the criminal justice system on a daily basis;

- its members, representing prosecutors, defence counsel, academics and the judiciary, would be uniquely qualified to identify and balance the competing interests that arise, in developing a new General Part;

- its members, and others it could press into service, possess a detailed understanding of the complex legal issues which must be addressed when developing a new General Part;

- its members, especially the defence bar, are perhaps the only group which could articulately voice the concerns of those charged with criminal offences.

The Canadian Bar Association Task Force consisted of Richard Peck as Chair, one or more delegates from each provincial and territorial Criminal Justice Section, a justice of the British Columbia Court of Appeal, a justice of the Ontario Court, General Division, a law professor from the University of Victoria and the Canadian Bar Association's Senior Director of Legislation and Law Reform. A member of the Department of Justice's Criminal Law Review Project attended all the Task Force's meetings as an observer. The Task Force retained two practitioners from Vancouver to prepare research papers on the various issues.

The Task Force held five meetings between May 1991 and May 1992, in Winnipeg, Montreal, Toronto and Vancouver.

The Task Force recognized that financial and time restraints would preclude it from studying all the recommendations contained in the Law Reform Commission's Report 31, and selected 17 issues which it considered to be the most important. Extensive research papers were prepared on most of these topics, typically including a detailed discussion of the present law, a statement and analysis of Canadian and foreign proposals for reform, identification of issues for consideration and, in some cases, recommendations for reform.

This Report is the product of the Task Force's analysis of these difficult issues, and its vigorous debate on many of the more contentious matters. The broad membership of the Task Force meant that diverse interests were represented and competing views on many issues were expressed. This produced stimulating and healthy debate and, in some cases, an even division of opinion as to how the issues should be resolved.

In every case, these differences reflected honest and principled differences of opinion which likely will be experienced during the political and departmental examination of these issues. The Task Force decided that, rather than gloss over these differences, it ought to state the opposing views clearly and the arguments in favour of each, so that readers of this Report will appreciate the underlying policy considerations and the consequences of adopting one or other of the various alternatives.

The issues addressed in this Report are complex, and the Report at best presents a summary of the law, inadequacies in the law and competing models for reform. For a more complete discussion of each issue, the reader is referred to the research papers prepared by the Task Force listed in the Appendix to this Report.

E. Funding

This project could not have been undertaken without the generous financial support of:

- The Canadian Bar Association's Law For The Future Fund,
- the Department of Justice, Ottawa,
- the Law Reform Commission of Canada,
- the Alberta Law Foundation,
- the Barreau du Québec - Fonds d'études juridiques,
- the Law Foundation of British Columbia,
- the Law Foundation of Nova Scotia,
- the Law Foundation of Ontario,
- the Law Foundation of Prince Edward Island,
- the Law Foundation of Saskatchewan,
- the Manitoba Law Foundation,
- the New Brunswick Law Foundation,
- the Northwest Territories Law Foundation,
- the Yukon Law Foundation.

II. GUIDING PRINCIPLES

A. The need for a new *Criminal Code*

The Task Force endorses the Law Reform Commission's analysis of the shortcomings of the present *Criminal Code*:

> . . . it remains much the same in structure, style and content as it was in 1892. It is poorly organized. It uses archaic language. It is hard to understand. It contains gaps, some of which have been filled by the judiciary. And it fails to address some serious current problems. Moreover, it has sections which may well violate the *Canadian Charter of Rights and Freedoms.*[6]

A new *Criminal Code* is needed, and soon.

B. Codification

The Task Force supports the development of a comprehensive criminal *code*, for the reasons stated by the Law Reform Commission in Report 33 - *Recodifying Criminal Procedure*:

1. It introduces order and system into a mass of legal concepts and ideas and so presents the law as a homogeneous, related whole rather than as a series of isolated propositions.

2. It demands that one take stock of existing legal materials, and so forces an examination not only of the ideas existing in the state engaged in codification but also in all other civilized states.

3. It works to eradicate uncertainty in the law by bringing together the law into one place or book.

4. It makes the law more accessible to the average person.

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[6] Report 31 - *Recodifying Criminal Law* (Ottawa: Law Reform Commission of Canada, 1987) at 1.

5. Those engaged in the exposition of the law are assisted by being provided with an authorized framework within which to conduct their work.[7]

Having said that, the Task Force recognizes that our society's values change over time, and our present views of criminal liability may well be affected by advances in medical science, psychiatry, penology and a growing recognition of individual and group rights and liberties.

While the benefits of codification far outweigh a purely common law regime or our present hybrid model, we must build into any codification of the criminal law a flexibility which will enable legislators and the courts to adjust to new realities, changing values and new understanding of the human mind.

So, for example, the Task Force will recommend retention of a provision comparable to section 8(3) of the present *Criminal Code*, to the effect that "no defence, justification or excuse shall be unavailable unless expressly prohibited by this *Code*."

The clarity and accessibility which come through codification need not, indeed must not, fetter the creative powers of the common law. The new *Criminal Code* must strike a balance between a clear statement of the criminal law and a capacity to have that law evolve over time in response to changes which we cannot today even comprehend.

C. Criminal liability for subjective fault

In primitive stages of our society, the preservation of order was a matter of paramount importance. A prohibited act was one of absolute liability; a person was punished for having committed an offence, regardless of his or her state of mind.

It was only under the influence of Canon law and Roman law that the idea of moral blame first arose in England in the 13th century. This idea slowly evolved into the common law principle that *mens rea* or guilty mind was an essential element in criminal responsibility.

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7 *Supra*, note 5 at 1-2.

Canada's 1892 *Criminal Code* was enacted against this historical background, that there should be no criminal liability without personal fault. This underlying principle was recently endorsed by the Supreme Court of Canada:

> It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin: *actus non facit reum nisi mens sit rea.*[8]

Not only is a fault requirement firmly entrenched in the common law, it is now part of the constitution of Canada under section 7 of the *Charter of Rights and Freedoms.*[9]

The law is clear that the fault requirement must be subjectively determined; it is not enough that the "reasonable person" would have known, or that a specific accused should have known. That is the test for civil liability, but it has no place in determining criminal liability:

> Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such inquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.[10]

The Task Force believes very strongly that subjective fault is a fundamentally important principle which must be respected in every provision of the new *Criminal Code*. It has for centuries been an integral element of the common law, and is now recognized as a principle of fundamental justice under section 7 of the *Charter*. It is one of the fundamental distinctions between civil and criminal liability.

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8 *Reference re Section 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c. 288* (1985) 48 CR (3d) 289 at 318, per Lamer, J. The Latin expression is translated as: An act does not make the person doing it guilty unless it is accompanied by a guilty mind.

9 *Ibid.*

10 *R. v. Sault Ste. Marie* (1978) 40 CCC (2d) 353 (SCC) at 362, per Dickson, J.

PART II: PREAMBLE

III. DECLARATION OF PURPOSE AND PRINCIPLES

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a preamble to the following effect:

DECLARATION OF PURPOSE AND PRINCIPLES

WHEREAS the purpose of the criminal law is to ensure the protection and security of all members of Canadian society;

AND WHEREAS that purpose is fulfilled by setting standards which represent the limits of acceptable conduct and by proscribing culpable conduct which falls outside those limits;

AND WHEREAS the criminal law should be used in a manner which least interferes with the rights and freedoms of individuals;

AND WHEREAS the purpose of the *Criminal Code of Canada* is to set out the principles of the criminal law in a single document;

It is declared that the following principles will guide the interpretation and application of the *Criminal Code of Canada*:

(a) no one shall be criminally sanctioned unless that person has the requisite wrongful state of mind;

(b) the criminal law should only be resorted to when other means of social control are inadequate or inappropriate;

(c) persons who commit crimes must bear the responsibility for their actions;

(d) the criminal law is to be administered in a fair and dispassionate manner while recognizing the principles of tolerance, compassion and mercy that are integral values of Canadian society.

B. Discussion

The Task Force supports the inclusion of a preamble setting out the essential purposes and principles of the criminal law within the new *Criminal Code*. The existing *Code* does not contain a preamble, although the *Young Offenders Act* includes a declaration of principle.[11] The Law Reform Commission of Canada was divided on this issue, with the majority opposing the inclusion of a preamble and the minority favouring inclusion.[12]

The Task Force agrees with the view expressed by the minority of Commissioners that a preamble containing a declaration of principles will assist in the interpretation and application of the *Criminal Code*, particularly in difficult cases. The incorporation of a declaration of principles reinforces the view that the *Code* is more than an ordinary statute. Rather, it is a comprehensive and integrated document of fundamental importance. Like the *Code* itself, the preamble reflects Canadian values. The statement is clear and its meaning ascertainable. These factors are of prime importance in an area of law which has a strong, and perhaps unequalled, impact on all Canadians.

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[11] R.S.C. 1985, c. Y-1, section 3.

[12] *Supra*, note 6 at 7.

PART III: ESSENTIAL ELEMENTS OF AN OFFENCE

IV. THE PHYSICAL ELEMENT

A. The Task Force's recommendations

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Principle of legality

1. **No one is criminally liable for conduct that, at the time of its occurrence, was not an offence under this *Code* or under any other Act of the Parliament of Canada.**

Criminal liability

2. **Except where otherwise specifically provided, no one is criminally liable for an offence unless that person engages in the prohibited conduct, with the required blameworthy state of mind, in the absence of a lawful justification, excuse or other defence.**

Prohibited conduct

3. **Prohibited conduct consists of an act, omission or state of affairs committed or occurring in specified circumstances or with specified consequences.**

Omissions

4. No one is liable for an omission unless:

(a) that person fails to perform a duty imposed by this Act, or

(b) the omission is itself defined as an offence by this Act.

Causation

5. (1) A person causes a result when that person's acts or omissions significantly contribute to the result.

(2) A person may significantly contribute to a result even though that person's acts or omissions are not the sole cause or the main cause of the result.

(3) No one causes a result if an independent, intervening cause so overwhelms that person's acts or omissions as to render those acts or omissions as merely part of the history or setting for another independent, intervening cause to take effect.

Conscious involuntary conduct

6. (1) No one is liable for prohibited conduct which, although conscious, is involuntary.

(2) Prohibited conduct is involuntary if it was not within one's ability physically to control. Without limiting the generality of the foregoing, this includes:

(a) a spasm, twitch or reflex action,

(b) an act or movement physically caused by an external force, and

(c) an omission or failure to act as legally required due to physical impossibility.

(3) This section does not apply to conscious involuntary conduct due to provocation, rage, loss of temper, mental disorder, voluntary intoxication or automatism.

(4) If the involuntary prohibited conduct occurred because of a person's prior, voluntary blameworthy conduct, then that person may be held liable for that prior blameworthy conduct.

Automatism

7. (1) No one shall be convicted of an offence where the prohibited conduct occurred while that person was in a state of automatism.

(2) For the purposes of this section, automatism means unconscious, involuntary behaviour whereby a person, though capable of action, is not conscious of what he or she is doing, and includes unconscious, involuntary behaviour of a transient nature caused by external factors such as:

(a) a physical blow,

(b) a psychological blow from an extraordinary external event which might reasonably be expected to cause a dissociative state in an average, normal person,

(c) inhalation of toxic fumes, accidental poisoning or involuntary intoxication,

(d) sleepwalking,

(e) a stroke,

(f) hypoglycaemia,

(g) a flu or virus, and

(h) other similar factors.

(3) Subsection (1) does not apply to automatism which is caused by:

(a) mental disorder,

(b) voluntary intoxication, or

(c) fault as defined in subsection (5).

(4) For the purposes of this section, automatism is caused by mental disorder when the unconscious, involuntary behaviour arises primarily from an internal, subjective condition or weakness in the accused's own psychological, emotional or organic make-up, including dissociative states caused by the ordinary stresses and disappointments of life.

(5) Notwithstanding subsection (1), automatism is not a defence:

(a) to an intentional offence if a person voluntarily induces automatism with the intention of causing the prohibited conduct of that offence,

(b) to a knowledge offence if a person voluntarily induces automatism knowing that it is virtually certain that he or she will commit the prohibited conduct of that offence while in that state of automatism, or

(c) to a reckless offence if a person voluntarily induces automatism notwithstanding the fact that the person is aware of a risk that he or she will commit the prohibited conduct of that offence while in that state of automatism, and it is highly unreasonable to take that risk.

B. Discussion

1. Principle of legality

The Task Force endorses the Law Reform Commission's recommendation that the new *Criminal Code* contain a provision to the effect that no one is criminally liable for conduct that, at the time of its occurrence, was not an offence under the new *Criminal Code* or under any other Act of the Parliament of Canada.

As the Law Reform Commission rightly observes, conviction and punishment in such a case would be unjust because no punishment is deserved, self-contradictory because it stigmatizes as wrongdoers those who clearly are not, and pointless because no one can be deterred from doing what is not as yet against the law.

2. Criminal liability

While clause 2 may not, strictly speaking, be necessary because each of the three essential ingredients of criminal liability are dealt with in other sections of the *Criminal Code*, it serves two useful functions:

1. it clearly informs persons of the three essential ingredients of criminal liability, and

2. by stating that the prohibited conduct must be engaged in *with* the required mental state, it recognizes the requirement for the principle of contemporaneity, that the physical act and the blameworthy state of mind occur simultaneously.[13]

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13 Stuart, *supra*, note 2 at 305-309.

3. Prohibited conduct

This provision serves to define "prohibited conduct", a term which arises frequently throughout the new *Criminal Code*, as "an act, omission or state of affairs committed or occurring in specified circumstances or with specified consequences." More importantly, it:

1. recognizes that the physical element of an offence can consist of an act, an omission or a state of affairs,

2. includes the concept of a "state of affairs" to avoid the difficult act/omission classification problem which would otherwise exist for offences such as possession of property obtained by crime (s. 354), found loitering in or near a school ground (s. 179(1)(b)) and care or control of a motor vehicle while impaired (s. 253(a)), and

3. recognizes that criminal offences can be described as those which require proof of:

   a. specified circumstances, such as possession of property obtained by crime, which requires proof that the property possessed by the accused was stolen, or

   b. specified consequences, such as murder (s. 229(a)), which requires that the accused caused the death of another human being.

4. Omissions

This clause adheres to the common law position that there is no liability for omissions unless specifically imposed by law.

Subsection (a) creates liability for causing a criminal harm by omitting to perform a legal duty, such as providing necessaries of life to one's dependent children (s. 215(1)(a)). It is narrower than the existing law, as it requires that the legal duties which can result in criminal liability must be specifically set out in the new *Criminal Code*. Current law appears to allow for criminal liability for breach of any legal duty whether specified at

Several reasons favour this formulation. First, it is more easily understood than the wording adopted by the Supreme Court of Canada in *Smithers*. Second, it sets the threshold close to, but arguably slightly higher than, the present threshold. Third, it common law or in any federal or provincial statute.[14] The rationale for this change is the principle that the new *Criminal Code* should be comprehensive. Citizens should not only know what acts are criminal but also what omissions are criminal. Such information on omissions should be available by reference to the *Criminal Code*, without having to search through thousands of other statutory provisions or Court decisions.

Subsection (b) covers a host of *Criminal Code* offences which define the prohibited conduct in terms of failing to do something, such as in the case of failure to stop at the scene of an accident (s. 252(1)). This draft is narrower than that proposed by the Law Reform Commission in Report 31; s. 2(3)(b)(i) would extend criminal liability to omissions defined as a crime "by some other Act of the Parliament of Canada". The Task Force believes that the rule for acts and omissions should be the same. If the act or omission is serious enough to attract criminal liability, it ought to be included in the *Criminal Code* itself.

5. Causation

Many offences require proof that the accused *caused* a consequence. For example, in a charge of criminal negligence the Crown must prove that the accused either caused the death of another person (s. 220) or caused bodily harm to another person (s. 221).

In most "consequence" cases, the facts make it clear that the accused "caused" the consequence. But in a few cases, the accused's conduct may not be the sole or even the main cause, or there may have been an intervening cause. At what point should the accused be attached with criminal liability?

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14 See *R. v. Coyne* (1958) 124 CCC 176 (NBCA) and *R. v. Popen* (1981) 60 CCC (3d) 232 (Ont CA).

a. The threshold

The present Canadian law is set out by the Supreme Court of Canada in *Smithers v. The Queen*,[15] where the accused was charged with manslaughter. He and the victim had been ejected from a hockey game for fighting, and the accused was intent on continuing the fight outside. The victim was apparently extremely nervous about the challenge. The accused rushed at the victim and kicked him in the abdomen. The victim died several minutes later, from asphyxia resulting from aspiration of his own vomit due to the malfunction of his epiglottis, probably caused by the kick but which could also have been caused by panic or fear.

The Court upheld the manslaughter conviction, finding that:

> there was a very substantial body of evidence, both expert and lay, before the jury indicating that the kick was at least a contributing cause of death, outside the *de minimis* range, and that is all that the Crown was required to establish.[16]

In Report 31, the Law Reform Commission recommended that an accused "cause" a result only where the accused's conduct "substantially contributes to its occurrence".[17] The Federal-Provincial Working Group on Homicide recommended that criminal liability attach where the accused's conduct "significantly contributes to death."[18]

The Task Force is recommending that the new *Criminal Code* contain a provision to the effect that a person causes a result when that person's acts or omissions significantly contribute to the result.

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15 (1977) 34 CCC (2d) 427.

16 *Ibid.*, at 435.

17 *Supra*, note 6, Section 2(6) at 27.

18 *Final Report of the Federal-Provincial Working Group on Homicide* (June 1990, updated April, 1991) Recommendation 1 at 14.

Several reasons favour this formulation. First, it is more easily understood than the wording adopted by the Supreme Court of Canada in *Smithers*. Second, it sets the threshold close to, but arguably slightly higher than, the present threshold. Third, it establishes a fair test for when criminal liability should attach. In the Task Force's view, a person whose conduct "significantly contributes" to a result should be liable for that result; the Crown ought not to be required to prove that the accused's conduct "substantially contributed" to the result.

b. Sole or main cause

This clause reflects the present law, as stated in *Smithers*, and is consistent with the view expressed in *R. v. Kitching and Adams*[19] that:

> the conduct of a defendant in a criminal trial need not be shown to be the sole or 'effective' cause of a crime. . . . [T]here may be two or more independent operative causes of death.

c. Independent intervening cause

An example of independent intervening cause occurs in the following scenario. The accused assaults the victim, but the injuries are not life-threatening. The victim is taken to the hospital and while there receives incompetent medical treatment, causing death. Under this provision, the accused would not be criminally liable for the death, because the independent, intervening medical treatment rendered the accused's conduct an insignificant cause of the death.[20]

The Task Force prefers this wording to that proposed by the Law Reform Commission ("no other unforeseen and unforeseeable cause supersedes it")[21] because it is not clear what "supersedes" means. If it means that the new cause becomes an independent, intervening cause, then it parallels the Task Force's wording. But it might be interpreted to mean that the new cause is only "another" cause, and would have the effect of excluding criminal liability in circumstances where the Task Force would attach liability, that is, where the accused's conduct is not the sole or main cause.

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19 [1976] 6 WWR 697 (Man CA).

20 See *R. v. Smith* [1959] 2 All E. R. 193 (Ct. Martial App. Ct.).

21 Report 31, *supra*, note 6, section 2(6) at 27.

d. Thin skulls

In *Smithers*, the Supreme Court of Canada endorsed the "thin-skull" rule of causation, stating: "It is a well-recognized principle that one who assaults another must take his victim as he finds him."[22]

The Task Force does not agree with that proposition, because it has the effect of imposing criminal liability for objective, rather than subjective, fault. If the accused does not know of the victim's "thin skull", and is not reckless as to its existence, no criminal liability should attach.

6. Conscious involuntary conduct

Subsection (1) reflects a fundamental component of our criminal justice system, that conduct must be voluntary before it can be culpable. Our society believes that human beings have the capacity to reason between right and wrong and to choose between right and wrong. If a person knows right from wrong, yet *chooses* to do wrong, then society is morally justified in holding that person responsible for that wrong. Conversely, it is morally repugnant to hold a person criminally responsible for conduct if that person does not have the capacity to reason or choose right from wrong.

In *R. v. Leary*, Mr. Justice Dickson stated:

> A person is accountable for what he wills. When, in the exercise of the power of free choice, a member of society chooses to engage in harmful or otherwise undesirable conduct proscribed by the criminal law, he must accept the sanctions which that law has provided for the purpose of discouraging such conduct. Justice demands no less. But, to be criminal, the wrongdoing must have been consciously committed.[23]

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22 *Supra*, note 15 at 437.

23 (1978) 33 CCC (2d) 473 (SCC) at 486.

Involuntary conduct can be conscious or unconscious. Medicine and law normally refer to unconscious involuntary conduct as automatism. The issues arising with each are complex, and the Task Force believes that dealing with them in separate sections in the new *Criminal Code* would facilitate drafting and comprehension.

Subsection (2) is restricted to physical involuntariness. Cases of moral involuntariness, such as where an accused commits an offence voluntarily but in necessitous circumstances or while under duress, are dealt with in other sections of the new *Criminal Code*.

With respect to subsection (2)(a), the common law already recognizes that spasms, twitches[24] and reflex actions[25] are involuntary acts, and ought not to be culpable.

Subsection (2)(b) is broad enough to cover:

- accidental movement, such as where an accused trips, falls or bumps into another person, or accidentally discharges a firearm;[26]
- unexpected mechanical failure of a car;[27] and
- physical compulsion, such as where A takes B's hand which is holding a knife and physically thrusts it into C.[28]

Subsection (2)(c) recognizes the defence of physical impossibility to perform a legal duty.

Subsection (3) would not excuse from liability, at least on the basis of voluntariness, an accused who committed an offence while provoked, in a rage, through loss of temper or because of mental disorder, voluntary intoxication or automatism. To

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24 See *Hill v. Baxter* [1958] 1 Q.B. 277 (Div Ct).

25 See *R. v. Wolfe* (1975) 20 CCC (2d) 382 (Ont CA).

26 See *R. v. Kolbe* [1974] 4 WWR 579 at 606 (Alta CA), and *R. v. Tennant and Naccarato* (1975) 23 CCC (2d) 80 at 96 (Ont CA).

27 See *R. v. Spurge* [1961] 2 All ER 688 at 691 (CA).

28 See *O'Sullivan v. Fisher* [1954] S. Australia State Reports 33 (SC).

some extent the law requires us to control our emotions, or in some cases expose ourselves to criminal liability if we allow these emotions to control us. While such factors would not negate voluntariness, they may give rise to other defences or, at the very least, be relevant considerations in sentencing.

Subsection (4) affirms that a person can be held responsible for prior, *voluntary*, blameworthy conduct which results in subsequent involuntary prohibited conduct. This is fair, if it can be shown that the voluntary conduct caused the involuntary conduct, and that the person knew that, or was reckless whether, the voluntary conduct would cause the involuntary but prohibited conduct.

7. Automatism

This draft codifies the present law as stated in *Rabey v. The Queen*,[29] in several respects. First, it adopts the Supreme Court's definition of automatism. Second, it distinguishes between insanity and automatism. Third, it excludes from automatism unconscious behaviour which is induced by insanity or voluntary intoxication.

The draft is new to the extent that it clarifies the situations in which automatism induced by the accused's own fault is a bar to its use as a defence.

Subsection (2) defines automatism as requiring that the prohibited conduct be both unconscious and involuntary. This serves to emphasize that lack of volition is the rationale for the defence, and eliminates the possibility of relying on the defence of automatism in cases where consciousness was impaired but the conduct was voluntary.

The draft lists seven examples of unconscious involuntary conduct from an external cause which meet the test. Subsection (2)(h) ("other similar factors"), leaves room for the courts to add to this list on a case by case basis.

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[29] (1980) 54 CCC (2d) 1 (SCC).

"Psychological blow" automatism in subsection (2)(b) follows *Rabey* in adopting an objective standard. The Task Force favours this approach as being consistent with automatism applying only to externally-caused behaviour. If a psychological blow would not cause an average, normal person in circumstances similar to the accused's to go into a state of dissociation, then that fact suggests that there is some internal, subjective weakness in this particular accused's make-up.

Having said that, the Task Force considers that the Law Reform Commission has made the defence too restrictive, in making all factors, both physical and psychological, subject to an objective test.[30] Its proposal would have the effect of ruling out automatism for a thin-skulled accused, a diabetic accused or an accused with an unexpected metabolic reaction.

Subsection (3) codifies the present law to the effect that:

- when unconscious, involuntary behaviour is caused by insanity, the defence of insanity applies and the defence of automatism does not;[31] and

- when unconscious, involuntary behaviour is caused by voluntary intoxication, the defence of intoxication applies and the defence of automatism does not.[32]

Subsection (4), in distinguishing between automatism caused by insanity and automatism caused otherwise, adopts the test laid down by Mr. Justice Martin in *R. v. Rabey*,[33] and subsequently approved by a majority of the Supreme Court of Canada in that same case.[34]

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30 See Working Paper 29 - *The General Part: Liability and Defences* (Ottawa: Supply and Services Canada, 1982), s. 7: "Every one is excused from criminal liability for unconscious conduct due to temporary and unforeseeable disturbance of the mind resulting from external factors sufficient to affect an ordinary person similarly."

31 See *Revelle v. The Queen* (1981) 21 CR (3d) 161 at 166 (SCC).

32 See *Revelle, ibid.*, and *R. v. Hartridge* (1966) 48 CR 389 (Sask CA).

33 (1977) 37 CCC (2d) 461 at 477-478 and 482-483 (Ont CA).

34 *Supra*, note 29.

Subsection (5) excludes the defence of automatism in cases where the state of automatism arose through the accused's own fault. As Mr. Justice Martin said in *Rabey*:

> [A]utomatism not resulting from disease of the mind leads to an absolute acquittal, unless induced by voluntary intoxication due to the consumption of alcohol or drugs or unless foreseeability or foresight with respect to its occurrence supplies the necessary element of fault, or *mens rea*, where negligence or recklessness constitutes a basis for liability.[35]

This draft deals with automatism induced by fault on the basis of the general principles governing *mens rea* or fault. An accused who is in a state of automatism is not liable for a particular crime unless the requisite fault element for that crime exists. Conversely, an accused is liable for a crime if, just prior to inducing the state of automatism, he or she had the requisite fault required for that crime.

Thus, A is guilty of assaulting B if A induced a state of automatism with the intention of assaulting B while in that state. The fact that the actual blow occurred while A was in an altered state of consciousness should not relieve A from liability for intentionally setting this chain of action in course.

However, if A was reckless or negligent in becoming automatic and committing an assault while in that state, that would not be a sufficient *mens rea* or fault to convict A of assault, which requires proof of the intentional application of force to another. A could, however, be liable for an offence such as criminal negligence causing bodily harm, if it is proved that A was aware of a risk that he or she would commit the prohibited conduct of that offence while in that state of automatism, and it was highly unreasonable to take that risk.

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[35] *Supra*, note 33 at 472.

V. THE MENTAL ELEMENT

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain provisions to the following effect:

Mental elements of an offence

8. (1) For the purposes of criminal liability, the mental elements of an offence are:

(a) intent,

(b) knowledge, and

(c) recklessness.

Intent

(2) A person acts intentionally with respect to prohibited conduct when the person wants it to exist or occur.

Knowledge

(3) A person acts knowingly with respect to prohibited conduct when the person is virtually certain that it exists or will occur.

Recklessness

(4) A person acts recklessly with respect to prohibited conduct when, in the circumstances actually known to the person:

(a) the person is aware of a risk that his or her act or omission will result in the prohibited conduct, and

(b) it is highly unreasonable to take the risk.

Prescribed state of mind applies to all aspects of prohibited conduct

(5) When the law defining an offence prescribes the state of mind required for the commission of an offence, without distinguishing among aspects of the prohibited conduct, that state of mind shall apply to all aspects of the prohibited conduct of the offence, unless a contrary intent plainly appears.

Residual rule

(6) Where the definition of a crime does not explicitly specify the requisite state of mind, it shall be interpreted as requiring proof of intent.

(7) Where the definition of a crime requires knowledge, a person may be liable if the person acts or omits to act intentionally or knowingly as to one or more aspects of the prohibited conduct in that definition.

Greater culpability requirement satisfies lesser

(8) Where the definition of a crime requires recklessness, a person may be liable if the person acts, or omits to act, intentionally or knowingly as to one or more aspects of the prohibited conduct in that definition.

B. Subjective fault

Earlier in this report the Task Force stated as one of its guiding principles that there should be no criminal liability without subjective fault.

Thus, it is crucial that the General Part of the new *Criminal Code* articulate clearly what states of mind must be proved, before criminal liability attaches.

In approaching this difficult task, the words of one scholar are apposite:

> More ink has been spilled over the guilty mind concept than any other substantive criminal law topic. Writers and judges speak of the fundamental "*mens rea*", "blameworthy state of mind", "culpability", "responsibility" or "fault" requirement. They resort to a bewildering variety of terminology and to semantic acrobatics. The subject brings a glint to the eyes of some scholars but a glaze to those of many others and of most judges. There can be few subjects where the basic principles are the subject of such dispute.[36]

C. Circumstances and consequences

Before discussing the mental element "paradigms" which have been developed by academics and law reform bodies, it would be helpful to elaborate on what was said about the "physical element" of offences in the preceding section of this report.

All crimes can be characterized as requiring proof of two or three constituent physical elements:

- *conduct:* the initiating act or muscular contraction which results in the prohibited conduct, such as squeezing the trigger of the pistol;

- *circumstances:* some offences require proof that certain circumstances exist. In possession of property obtained by crime, the Crown must prove the circumstance that the property possessed by the accused was stolen;

- *consequences:* some offences require proof that certain consequences occur. In murder, the Crown must prove that the consequence of the accused's wrongful act was the death of another human being.

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[36] Stuart, *supra*, note 2 at 117.

In theory, each criminal offence should specify what mental element or degree of fault must be proved for each of these three physical elements. That is the approach adopted by the Law Reform Commission in Report 31.[37] Australia, on the other hand, lumps everything into "circumstances", which is used as an all-inclusive term for acts, consequences and circumstances.

In England and New Zealand two categories are adopted: circumstances and consequences. This last approach is favoured by our Task Force, for several reasons. First, including "conduct" could give rise to complications, not the least of which is the probability that it would be understood by many as covering all elements of the *actus reus* and thus undermine the very purpose of having this provision. Second, conduct by itself does not attract criminal liability. It is prohibited only because it is done in specified circumstances, causes specified consequences, or both. As Glanville Williams observes:

> Writers have often pointed out that there is generally no harm in a man's crooking his right forefinger, unless it is (for example) around the trigger of a loaded gun which is pointing at someone. The muscular contraction, regarded as an *actus reus*, cannot be separated from its circumstances.[38]

For these reasons the Task Force earlier recommended that "prohibited conduct" be defined as an act, omission or state of affairs committed or occurring in specified circumstances or with specified consequences.

D. The fault element

When one refers to the mental element in crime, one is really talking about a spectrum of mental states. At one end, the accused desires a consequence to occur, or commits the prohibited act for the purpose of achieving the consequence. At the other end of the spectrum, the accused may act without adverting to the risk that the consequence might occur. In between are gradations of culpability: certainty, probability and possibility. This "fault spectrum" is set out in Table 1.

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37 *Supra*, note 6 at 21-23.

38 G. Williams, *Criminal Law: The General Part*, 2d ed. (London: Stevens & Sons, 1961) at 19.

TABLE 1: THE FAULT SPECTRUM

Mental State	Circumstances	Consequences
Desire		I want the consequences to occur
Certainty	I know that the circumstance exists	I know that the consequence will occur
Probability	I realize that the circumstance probably exists	I realize that the consequence will probably occur
Possibility	I realize that the circumstance possibly exists	I realize that the consequence will possibly occur
Inadvertence	It is a marked departure from the ordinary standard of reasonable care to engage in such conduct, to take the risk that such circumstances exist	It is a marked departure from the ordinary standard of reasonably care to engage in such conduct, to take the risk that such consequences will result

Since the Task Force has adopted as a guiding principle that there should be no criminal liability without subjective fault, mere inadvertence ought not to render an accused liable, because it punishes in circumstances where the accused did not advert to the risk, but should have (applying the "reasonable person" test). Hence, liability attaches because of what the accused ought to have known, rather than what he or she actually did know, and that introduces an objective test for culpability which, in the view of the Task Force, has no place in the criminal law.

At the other end of the spectrum, all would agree that the greater the degree of subjective fault, the greater should be the criminal sanction. Thus, a person who detonates a bomb in a building desiring to kill the person known to be inside, is more deserving of sanction than a person who detonates a bomb, not being sure whether there is anyone inside.

Because the criminal law needs the capacity to rank the seriousness of offences not just in terms of the damage caused, but also taking into consideration the mental culpability of the accused, we need to develop a system for categorizing offences which will distinguish between clearly identifiable levels of culpability, accommodate offences which require proof of circumstances or consequences, or both, and which limits criminal liability to instances of subjective fault.

In most cases, a higher degree of culpability will attach to a higher mental element. Thus, an accused who desires to kill all the passengers on an airplane by blowing it up will be more culpable than one who is reckless as to the deaths, wanting only to destroy the plane. But in some cases the accused's recklessness or indifference to the plight of the passengers might well disclose a culpability equal to that of a bomber who knows that there will be deaths, or desires them. Therefore, the new *Criminal Code* ought to articulate clearly the mental states which will attract liability, but ought to give Parliament some latitude to decide whether one mental state is more culpable than another.

In seeking to articulate the various levels of culpability, law reform bodies have adopted a perplexing array of formulae. These are set out in Table 2.

TABLE 2: LEVELS OF CULPABILITY - COMPARATIVE USE OF TERMS

Canada	USA	England	Australia	New Zealand
Purpose	Purposely	Intentionally	Intentionally	Intention/ knowledge
Recklessness	Knowingly	Knowingly	Knowingly	Recklessness
Negligence	Recklessly Negligently	Recklessly	Recklessly Negligently	Heedlessness Negligence

One must approach these models cautiously, because the meaning ascribed to similar language may vary significantly among jurisdictions. For example, England and Australia use "intentionally" to cover the same levels of culpability as the Law Reform Commission of Canada encompasses with "purpose" (desire and certainty). The U.S. *Model Penal Code*, on the other hand, restricts "purpose" to desire. Similarly, there is no consistency in the use of "knowingly" and "recklessly". The way in which each jurisdiction's levels of culpability cover the "fault spectrum" is set out schematically in Table 3.

In drafting a new *Criminal Code*, one of the most challenging tasks is to develop a paradigm which will clearly, simply, comprehensively and accurately reflect our society's views respecting levels of culpability and subjective fault.

TABLE 3: COMPARISON OF APPROACHES TO FAULT AND LEVELS OF CULPABILITY

Mental State	Law Reform Commission of Canada	US Model Penal Code	England	Australia	New Zealand	CBA Task Force
Desire	Purpose	Purposely	Intentionally	Intentionally	Intention/ Knowledge	Intent
Certainty		Knowingly				Knowledge
Probability	Recklessness	Recklessly	Knowingly	Knowingly	Recklessness	Recklessness
Possibility	Negligence		Recklessly	Recklessly	Heedlessness	
Inadvertence		Negligently		Negligently	Negligence	

E. Discussion

1. Intent

The Task Force is recommending that the new *Criminal Code* provide that "a person acts intentionally with respect to prohibited conduct when the person wants it to exist or occur."

Intention is a difficult term to define, because it can mean a number of different things. In the present *Criminal Code*, it is sometimes used in the narrow sense of desiring a consequence. For example, section 265 defines assault as applying force intentionally to another person without their consent. Section 279 provides that everyone who kidnaps a person with intent to cause him to be confined or imprisoned against his will is guilty of an offence.

At the other extreme, J. C. Smith maintains[39] that "intention" can encompass the full range of *mens rea*: a consequence is desired, foreseen as certain to result, foreseen as a probable result of one's act or foreseen as a possible consequence of one's act.

The Law Reform Commission was of the view that "intention" gave rise to so many problems that it eliminated the concept from its proposed draft *Criminal Code*. It recommended that "purpose" be adopted, covering both direct intent situations where the accused desires the consequence to occur, and indirect or oblique intent, where the accused is virtually certain that the circumstance exists or the consequence will occur.

The Task Force debated at length the merits of the different formulations. It ultimately concluded that a separate level of culpability ought to be attached to the highest degree of fault (desire), and that it ought to be described as "intent", for the following reasons. First, intent is a term which is well-understood by judges and lawyers, and has deep roots in our common law. Second, it is important to distinguish between intent and motive, since the Crown must prove the first but not the second; using a term such as "purpose" may be understood by some as approximating motive, and may have the effect of slowly eroding that important distinction.

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[39] "Intention in Criminal Law," (1974) *Current Legal Problems* 93 at 108.

Third, it is preferable to restrict the highest level of culpability to its natural meaning - direct intent - and to deal with indirect intent through the concept of knowledge.

This approach will permit Parliament more flexibility in creating offences which address specific states of mind. For example, it could enact that the purposeful killing of another human being is first degree murder, and applying unlawful force to another, being virtually certain that death will ensue, is second degree murder.

2. Knowledge

The Task Force is recommending that the new *Criminal Code* provide that "a person acts knowingly with respect to prohibited conduct when the person is virtually certain that it exists or will occur."

A person can have knowledge of a consequence, in the sense of being virtually certain that it will occur, whether or not he or she desires it. Thus, if someone's object is to hit a person with a brick, but he knows that he can achieve it only by breaking the window behind which the person is standing, then he "knows" he will break the window in the process of hitting the person, even though he does not "want" to break the window.

Similarly, a person can have knowledge as to the circumstances of an offence, in the sense of knowing the surrounding facts. Thus, a person in possession of narcotics is liable if he or she has knowledge that the substance is a narcotic.

Knowledge may be established by proof of actual knowledge, where there is compelling evidence that the accused clearly knew that the property was stolen or that the white powder was cocaine. Liability may also attach where the Crown can prove that the accused was wilfully blind to a circumstance. A person who is offered a $1,000 video camera by a stranger at a pub for $100 may well "know" that the property is stolen if the person has become aware of the need for some inquiry,

but declines to make the inquiry because he or she does not wish to know the truth.[40]

The Law Reform Commission of Canada recommended against including a separate level of liability for "knowledge".[41] To the contrary, "knowledge" is specified as a separate fault element in the General Parts of the U.S. *Model Penal Code* (s. 2.02(2)(b)), the English Law Commission's *Draft Code* (s. 18(a)) and the Australian *Crimes Act* (s. 3F(1)(a)).

The Task Force recommends that knowledge be recognized in the new *Criminal Code* as a distinct level of culpability, for several reasons. It parallels the approach taken in the United States, England and Australia. Second, it is particularly appropriate for a number of offences in the *Code*, such as possession of stolen property, which are prohibited because of the offender's knowledge of the facts or circumstances surrounding the act. Third, it would clearly place the doctrine of wilful blindness within the notion of knowledge rather than recklessness, which is consistent with the Supreme Court of Canada's analysis in *Sansregret*. In the Task Force's view, wilful blindness is a rational and justifiable exception to the subjectivity principle which in other respects ought to pervade the new *Criminal Code*.

3. Recklessness

The Task Force is recommending that the new *Criminal Code* provide that:

> A person acts recklessly with respect to prohibited conduct when, in the circumstances actually known to the person:
>
> (a) the person is aware of a risk that his or her act or omission will result in the prohibited conduct, and
>
> (b) it is highly unreasonable to take the risk.

Recklessness is a relatively new concept in criminal law; it is only in the 1970s that the Supreme Court of Canada and the

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40 *Sansregret v. The Queen* (1985) 45 CR (3d) 193 at 207 (SCC).

41 *Supra*, note 30 at 25-26.

House of Lords recognized the extension of *mens rea* to include recklessness.[42]

Recklessness imposes liability for a thought process that is less than desiring a consequence, and less than virtual certainty that a circumstance exists or that a consequence will occur. At the same time, it requires proof that the accused adverted to or was aware of the risk that his or her act might probably or possibly result in the prohibited conduct.

In deciding on a formulation for recklessness, two models need to be considered: the subjective approach and the subjective/objective approach. Both are reflected in the Law Reform Commission's two alternative drafts in Report 31.[43]

The *subjective approach* (as proposed by the Law Reform Commission) states that a person is reckless if, in acting, the person is conscious that the circumstances will probably obtain or the consequences will probably occur. So, for example, a person would be liable for "reckless homicide" for shooting a rifle into a crowded living room, killing one of the guests, if the Crown could prove that the person was conscious that death would probably occur.

If liability were extended to encompass acts when the accused was conscious that the consequences would possibly exist, then the accused would be liable for shooting into a living room with only one person in it, if it was established that the accused was conscious of the risk that the shot might possibly kill that one person.

The *subjective/objective approach*, on the other hand, places the emphasis on the conscious assumption of an unjustified risk. Glanville Williams describes it thus:

> Recklessness is a branch of the law of negligence; it is that kind of negligence where there is foresight of consequences. The concept is therefore a double-barrelled one, being in part subjective and in part objective. It is subjective in that one must look into the mind of the accused in order to determine

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42 *R. v. Sault Ste. Marie, supra*, note 10, and *DPP v. Morgan* [1976] AC 182 (HL).

43 *Supra*, note 6 at 24.

> whether he foresaw the consequence. If the answer is in the affirmative, that is the end of the subjective part of the inquiry and the beginning of the objective part. One must ask whether in the circumstances a reasonable man having such foresight would have proceeded with his conduct notwithstanding the risk. Only if this second question, too, is answered in the affirmative is there subjective recklessness for legal purposes.[44]

The Task Force is in favour of the subjective/objective approach, for several reasons. First, it parallels the approach taken by the Americans, English, Australians and New Zealanders. Second, it is more flexible than the purely subjective approach, in that it permits a balancing of the relative risk and the social utility of the act. Take, for example, a doctor who performs surgery on a patient where there is a one in six chance that the patient will die from the operation. Using the Task Force's formulation, the doctor is aware of the risk that the procedure will result in the prohibited act (death), but it may not be highly unreasonable to take the risk, having regard to such factors as patient consent and the likelihood of death without the operation.

On the other hand, a person who plays Russian roulette with a friend's head is equally aware of the one in six risk that the act will result in the friend's death, and it is highly unreasonable to take the risk, because there is no social utility to the act.

The Task Force endorses the reasons advanced by Professor Stuart for the double-barrelled approach:

> It provides sufficient flexibility for policy considerations that would have no place if the inquiry were to remain purely one of subjective foresight. It also obviates the arbitrary choice of uncertainty, probability, likelihood or possibility as the standard of foresight required. Once the accused subjectively foresaw a consequence or circumstance, the degree of foresight involved is merely one of the factors to consider at the second stage of the test in deciding, objectively, whether the risk assumed or created was justified.[45]

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44 *Criminal Law*, *supra*, note 38 at 58.

45 Stuart, *supra*, note 2 at 140.

Under the Task Force's formulation, once the Crown has proved beyond a reasonable doubt that the accused was aware subjectively of the risk, then the objective element arises, under subsection (4)(b). Given the Task Force's view that negligence should not be codified, most members felt that it was appropriate to have the conscious risk-taking in recklessness measured against the objective standard of the reasonable person. By adopting the test of "highly unreasonable" instead of "substantial and unjustifiable risk" (U.S. *Model Penal Code*), the Task Force's formulation emphasizes the difference between recklessness and negligence.

4. Negligence

The debate continues as to whether criminal liability should attach for inadvertent negligence, when an accused did not subjectively realize that his or her act might result in the prohibited conduct, but should have.

The Law Reform Commission has recommended that the new *Criminal Code* include a "negligence" level of culpability, as follows:

> **Section 2(4)(b)**
>
> "Negligently." A person is negligent as to conduct, circumstances or consequences if it is a marked departure from the ordinary standard of reasonable care to engage in such conduct, to take the risk (conscious or otherwise) that such consequences will result, or to take the risk (conscious or otherwise) that such circumstances obtain.

This "marked departure" test is in accordance with recent decisions of the Supreme Court of Canada.[46] The Americans, Australians and New Zealanders have similar provisions; the English do not.

It is a fundamental policy decision whether the *criminal* law should impose liability for negligence. The arguments for and against each position have been forcefully advanced by many academics, and need not be repeated.

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[46] *R. v. Waite* (1989) 48 CCC (3d) 1, *R. v. Tutton* (1989) 48 CCC (3d) 129 and *R. v. Anderson* (1990) 75 CR (3d) 50.

The Task Force believes that the criminal law ought to punish only for subjective fault, and that there is no place in our new *Criminal Code* for liability for negligence. The Task Force's formulation for recklessness, importing an objective element, is as far as the criminal law should go. Provincial and Territorial legislatures have the legislative authority, and the will, to proscribe dangerous conduct on matters within their constitutional competence. That is a more principled response to any perceived problem, as it preserves to the stigma of the criminal law misconduct grounded in subjective fault. Appropriate sanctions for negligence exist in other areas of law, such as regulatory offences, provincial offences and civil law actions. Incorporating negligence into the criminal law is not necessary in order to address these concerns.

The Task Force endorses the observations of Professor Stuart:

> Arguments in favour of the objective standard in criminal law are persuasive but not overwhelming. They are not strong enough to proceed in a cavalier fashion. If we convict someone who was simply not thinking or who was not thinking properly, we must be honest about what we are doing - holding him up to an external (objective) standard which he did not meet. . . . Resorting to the objective standard may constitute an unconsidered pandering to those who maintain without evidence that an extension of the criminal law is needed for reasons of law and order. The commission of many common crimes such as assault, theft and burglary clearly result from conscious thought, even though momentary. Here the subjective awareness approach is well-established, workable and the most appropriate barometer of fault. Its main advantage is that it obligates the judging of the individual on *all* his own strengths and weaknesses. . . . Any wholesale resort to [an objective approach] could constitute a tool of repression against the less fortunate.[47]

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47 Stuart, *supra*, note 2 at 195.

5. Prescribed state of mind applies to all aspects of prohibited conduct

Subsection (5) of the Task Force's recommendation is intended to remove any doubt as to the fault element required in cases where the offence prescribes the state of mind required for the commission of the offence, without distinguishing among aspects of the prohibited conduct.

In such cases, the prescribed state of mind (intent, knowledge or recklessness) applies to all aspects of the prohibited conduct of the offence, unless a contrary intent plainly appears.

6. Residual rule

Subsection (6) of the Task Force's recommendation states that when the definition of a crime does not explicitly specify the requisite state of mind, it shall be interpreted as requiring proof of intent. This parallels the Law Reform Commission of Canada's recommendation,[48] which requires proof of purpose.

Similarly, subsection (7) provides that where the definition of a crime requires knowledge, a person may be liable if the person acts or omits to act intentionally or knowingly.

If Parliament wishes to create an offence of recklessness, then its attention should specifically be directed to that issue by having to insert "recklessness" in the definition of the offence. If "recklessness" were the residual rule, many more offences could be established by proof of recklessness than should be the case.

7. Greater culpability requirement satisfies lesser

Subsection (8) of the Task Force's recommendation is substantially the same as the Law Reform Commission's recommendation in clause 2(4)(c).

The Task Force agrees with the Law Reform Commission's comment, that this provision simply prevents the avoidance of liability by the accused having a higher level of culpability than that charged. For example, a person charged with reckless killing ought not escape conviction because he or she killed on purpose.

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[48] See Report 31, *supra*, note 6, section 2(4)(d).

VI. MISTAKE OF FACT

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain provisions to the following effect:

Mistaken belief in facts

9. No person is liable for an offence committed through lack of knowledge which is due to mistake or ignorance as to the relevant circumstances; but where on the facts as the person believed them he or she would have committed an included offence, the person shall be liable for committing that included offence.

Caution respecting belief

10. A court or jury, in determining whether a person had a particular belief in a set of facts, shall have regard to all the evidence including, where appropriate, the presence or absence of reasonable grounds for having that belief.

B. The present law

Mistake of fact is not addressed in the General Part of the present *Criminal Code*. It is, however, part of the criminal law of Canada by virtue of section 8(3), which provides:

> Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

1. The common law

In *Beaver v. The Queen,*[49] the accused was charged with possession of a narcotic. His conviction was overturned by the Supreme Court of Canada on the basis that he had an honest but mistaken belief that the substance was sugar, not a narcotic; thus he did not have the knowledge required for possession.

Beaver was considered the authoritative statement on mistaken belief until the decision of the Supreme Court in *Pappajohn v. The Queen*.[50] In *Pappajohn*, the accused was charged with rape, and argued that he believed that the complainant had consented to intercourse. Mr. Justice Dickson (dissenting on other grounds) stated:

> Culpability rests upon commission of the offence with knowledge of the facts and circumstances comprising the offence. If, according to an accused's belief concerning the facts, his act is criminal, then he intended the offence and can be punished. If, on the other hand, his act would be innocent, according to facts as he believed them to be, he does not have the criminal mind and ought not to be punished for his act.[51]

Pappajohn also established that, with respect to offences requiring proof of intention or recklessness, the mistake of fact under which the accused operated need not be reasonable, so long as it was honestly held.

This is consistent with treating mistake of fact as negating the mental element. In cases of intention, belief in a mistaken fact, however unreasonable, is inconsistent with knowledge of that fact. For example, if A buys a car from B, believing that B has good title when B in fact does not, A's mistaken belief in that fact negates the mental element of theft, whether or not A's mistaken belief was reasonable.

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49 (1957) 118 CCC 129 (SCC).

50 (1980) 52 CCC (2d) 481.

51 *Ibid.*, at 493-494.

Similarly, in cases of recklessness, belief in a mistaken fact, however unreasonable, is inconsistent with consciously risking the existence of that fact. So, in the case of sexual assault, if A has sexual intercourse with B believing that she is consenting fully to the act when she is not, A's mistaken belief in that fact negates the mental element of the offence, whether or not his mistaken belief was reasonable.

While the English rule that a mistake of fact must in most cases be reasonable is stricter than the law in Canada, there may be little practical difference. If there are reasonable grounds for the belief, it is more likely that the trier of fact will find that the offender actually held that belief. As Mr. Justice Dickson observed in *Pappajohn*:

> The jury will be concerned to consider the reasonableness of any grounds found, or asserted to be available, to support the defence of mistake. Although "reasonable grounds" is not a precondition to the availability of a plea of honest belief in consent, those grounds determine the weight to be given the defence. The reasonableness, or otherwise, of the accused's belief is only evidence for, or against, the view that the belief was actually held and the intent was, therefore, lacking.
>
> Canadian juries, in my experience, display a high degree of common sense, and an uncanny ability to distinguish between the genuine and the specious. [52]

Reasonableness is, however, a prerequisite to advancing mistake of law in the case of offences which can be committed by negligence. In such cases, the focus is on conduct which is a marked departure from the standard of the reasonable person, and no mental element need be proven. Thus, mistake of fact cannot be advanced to negative *mens rea*, but it may show that the accused's mistaken belief was reasonable.

At common law, there are two situations in which mistake of law is not available. The first is where the accused is wilfully blind to a circumstance, such as that the property being purchased is stolen. An accused who is aware of the need for some inquiry, but declines to make the inquiry because he or

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[52] *Ibid.*, at 499-500.

she does not wish to know the truth is deemed, by the law, to have actual knowledge; hence, no mistake of fact exists.[53]

The second instance in which mistake of fact is not available arises in the case of general intent offences, where the mistake of fact is occasioned by voluntary intoxication. For example, if A assaults B while A is intoxicated, thinking that B is consenting to a fight, A's mistake of fact is only a defence if he honestly believed that B was consenting to the fight and A would have held the same mistaken belief if sober.[54]

Finally, the common law doctrine of transferred intent applies, so that an accused who has a mistaken belief in a set of facts which justifies an acquittal on the offence charged can nevertheless be convicted of another offence if the mistaken belief proves the *mens rea* for that other offence. Intent can be "transferred" in three mistake-of-fact situations:

- *within the same offence:* if the accused was actually importing hashish (a narcotic), the Crown need only prove that the accused knew he or she was importing any narcotic;[55]

- *to a less serious offence:* if the accused was actually assaulting a police officer but did not realize that the victim was an officer, the accused is guilty of common assault;[56]

- *to a more serious offence:* an accused who actually sold LSD (a restricted drug under the *Food and Drug Act*), but honestly believed that he or she was selling mescaline (a drug governed only by the *Food and Drug Regulations*), could be convicted of the more serious crime.[57]

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53 *Sansregret, supra,* note 40 at 208, per McIntyre, J. (SCC).

54 *R. v. Moreau* (1986) 28 CCC (3d) 359 (Ont CA).

55 *R. v. Blondin* (1970) 2 CCC (2d) 118 (BCCA); appeal dismissed (1971) 4 CCC (2d) 566 (SCC).

56 *R. v. McLeod* (1954) 111 CCC 106 (BCCA).

57 *R. v. Kundeus* (1975) 24 CCC (2d) 276 (SCC).

2. Statutory recognition of mistake of fact

Several *Criminal Code* provisions address the issue of mistake of fact, restricting the common law:

- *sexual assaults:* in section 150.1(4), it is not a defence to several enumerated offences "that the accused believed that the complainant was fourteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant;"

- *assault:* in section 265(4), "Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief;"

- *bigamy:* in section 290(2)(a), no one commits bigamy by going through a form of marriage if that person in good faith and on reasonable grounds believes that his spouse is dead."

Several other *Criminal Code* provisions which, long before the advent of the *Charter*, denied a defence of mistake of fact, have been struck down by the Supreme Court of Canada, on the ground that they created offences of absolute liability in violation of section 7 of the *Charter*.[58]

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[58] *R. v. Metro News Limited* (1986) 29 CCC (3d) 35 (Ont CA); leave to appeal refused (1986) 29 CCC (3d) 35n (SCC) (s. 163(6) - distributing obscene written material); *R. v. Nguyen* (1990) 59 CCC (3d) 161 (SCC) (s. 146(1) - having sexual intercourse with a female under the age of 14 years).

C. Shortcomings of the present law

1. Negating the mental element

It is unclear at present whether mistake of fact is an affirmative defence, or whether it merely negates the mental element of a crime. In *Pappajohn*, Mr. Justice McIntyre spoke of lack of knowledge of the circumstances of non-consent of the complainant in the traditional words of a defence of mistake of fact. Mr. Justice Dickson, on the other hand, preferred to view the concept as "negation of guilty intention". The Task Force agrees with the views of John Williams:

> It will be seen then, that mistake of fact is not a "defence" in the same sense that provocation, self-defence, duress, and necessity are defences. These latter defences *justify* or *excuse,* either partially or wholly, what would otherwise be criminal conduct. A mistake of fact which negates the *mens rea* renders the committed act innocent and thus there never arises any question of exonerating criminal conduct.[59]

2. Honest belief

The Task Force agrees with the present common law rule in Canada that an honestly held belief in a mistaken set of facts will negate the mental element in offences requiring proof of intention or recklessness, even where the belief was unreasonable. This is consistent with the guiding principle that there should be no criminal liability without subjective fault.

However, several *Criminal Code* provisions have whittled away this principle, such as by imposing a duty on the accused to take all reasonable steps to ascertain the age of the complainant (s. 150.1(4)) or believing on reasonable grounds that his spouse is dead (s. 290(2)(a)). Such provisions can create objective liability, and in such cases constitute an unacceptable violation of fundamental principles of criminal liability.

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59 "Mistake of Fact: The Legacy of *Pappajohn v. The Queen*", (1985) 63 Can. Bar Rev. 597 at 604-605.

Having said that, the Task Force would not be opposed to the new *Criminal Code* including a provision to the effect that the trier of fact should, in determining whether an accused had a particular belief in a set of facts, have regard to all the evidence including, where appropriate, the presence or absence of reasonable grounds for having that belief.

3. Negligence

There is, at present, only very limited scope for mistake of fact in the case of offences which can be established by proof of negligence.

As discussed earlier in this report, the Task Force believes very strongly that negligence is an inadequate degree of fault upon which to attach criminal liability; if offences requiring only proof of negligence are excluded from the new *Criminal Code*, then any inadequacies in the present application of mistake of fact disappear.

4. Voluntarily-induced intoxication

In *R. v. Moreau*,[60] Mr. Justice Martin observed that the rule which prevents mistake of fact, induced by voluntary intoxication, from being advanced in general intent offences is based on public policy considerations. For the reasons stated later in this report,[61] the categorization of offences into those of specific intent and general intent is unprincipled and must be eliminated from the new *Criminal Code*. Once done, the inadequacies of the present law will disappear.

5. Transferred mistake of fact

It violates our fundamental principles of criminal liability that an accused should be convicted of one offence, where his or her subjective fault proves only a different offence. The *mens rea*

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[60] *Supra*, note 54.

[61] See the section on Intoxication, page 100.

must coincide with the *actus reus*. The Task Force agrees with Glanville Williams that:

> The accused can be convicted where he both has the *mens rea* and commits the *actus reus* specified in the rule of law creating the crime, though they exist in respect of different objects. He cannot be convicted if his *mens rea* relates to one crime and his *actus reus* to a different crime, because that would be to disregard the requirement of an appropriate *mens rea*.[62]

The only exception to the general rule which the new *Criminal Code* should recognize is where the offence charged includes a lesser offence of which the accused may be found guilty.

D. Discussion

1. Honest belief

The Task Force agrees with the Law Reform Commission's proposal (clause 3(2)(a)), to the extent that it would allow even an unreasonably held belief in a mistaken set of facts to negate intention.

However, the Task Force disagrees with clause 3(2)(b), which provides that this general rule "shall not apply as a defence to crimes that can be committed by recklessness . . . where the lack of knowledge is due to the defendant's recklessness." This would have the effect of reversing the rule in *Pappajohn* in cases where an accused's recklessness in becoming intoxicated was the cause of him being mistaken as to whether the complainant consented to intercourse. For the reasons stated earlier, the Task Force is opposed to any such restriction; it would create criminal liability where there is no subjective fault.

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62 *Supra*, note 38 at 129.

2. Transferred mistake of fact

The Law Reform Commission recommended (clause 3(2)(a)) that an accused whose mistake of fact caused him to believe that he was committing an offence other than that charged, should be acquitted of the offence charged but convicted of attempting to commit the other offence, even where the other offence is more serious.

The Task Force is opposed to this provision. First, it renders the accused criminally liable for an offence which may be totally unrelated to the offence charged.

Second, it may well result in the police and Crown being lax in the laying of charges, as any charge laid against the accused would, if the accused alleges mistake of fact, effectively shift the onus to the accused to establish that he or she acted completely innocently.

Third, no other jurisdiction surveyed takes such an extreme position.

In the Task Force's view, mistake of fact should render an accused liable only for a lesser included offence. So, for example, an accused who did not realize that the person he was assaulting was a peace officer could be convicted of common assault.

3. Codified defences

The Task Force believes that clause 3(17) of the Law Reform Commission's recommendation is unnecessary. No other surveyed jurisdiction has such duplication or detailed codification.

VII. MENTAL DISORDER

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

11. No one is criminally liable for conduct if, through disease or mental disability, the person at the time:

(a) was incapable of appreciating the nature or consequences of such conduct, or

(b) believed what he or she was doing was morally right, or

(c) was incapable of conforming to the requirements of the law.

B. The capacity to choose between right and wrong

The criminal law has always presumed that persons are sane and responsible. Sanity — the capacity to reason and to choose right from wrong — is a precondition to criminal liability. An insane person does not have this capacity for criminal intent, and therefore ought not to be punished.

It is now recognized as a principle of fundamental justice under section 7 of the *Charter* that the criminal justice system cannot convict a person who was insane at the time of the offence.[63]

Parliament codified in section 16 of the present *Criminal Code* the criteria which must be established in order for an accused to be exempted from criminal liability on account of insanity. These provisions were based on *McNaghten's Case*[64].

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[63] *R. v. Swain* (1991) 63 CCC (3d) 481 (SCC).

[64] (1843) 10 Cl & Fin 200.

C. Section 16 of the present *Criminal Code*

Subsection 16(2) provides that

> a person is insane when the person is in a state of natural imbecility or has disease of the mind to an extent that renders the person incapable of appreciating the nature and quality of the act or omission or of knowing that an act or omission is wrong.

One of the great challenges facing Courts and juries is to understand the interrelationship between this *legal* test and the *medical* evidence respecting an accused's psychiatric condition, in determining whether he or she is legally responsible for the impugned conduct. In *R. v. Rabey,* Mr. Justice Martin observed:

> The evidence of medical witnesses with respect to the cause, nature and symptoms of the abnormal mental condition from which the accused is alleged to suffer, and how that condition is viewed and characterized from the medical point of view, is highly relevant to the judicial determination of whether such a condition is capable of constituting a "disease of the mind." The opinions of medical witnesses as to whether an abnormal mental state does or does not constitute a disease of the mind are not, however, determinative, since what is a disease of the mind is a legal question.[65]

1. Natural imbecility and disease of the mind

These are legal terms which are no longer used by the medical profession. They pre-date modern psychiatry; it was only in the 19th century that psychiatry had developed to the point where it claimed it could detect signs of madness not seen by the untrained eye.

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[65] *Supra*, note 33 at 473.

"Natural imbecility" was described in *R. v. Cooper* as being distinct from a disease of the mind; an "imperfect condition of mental power from congenital defect or natural decay as distinguished from a mind once normal which has become diseased."[66]

The Law Reform Commission recommended in Report 31 that this expression be replaced by "defect of the mind", to cover mental malfunction due to mental retardation which may not have been included under "natural imbecility" or "disease of the mind".

While the Task Force agrees with that concern, it believes that "mental disability" would be preferable; it has a less dehumanizing ring to it, and parallels the language of section 15 of the *Charter*.

"Disease of the mind" was described by Mr. Justice Dickson in *Cooper* as

> any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.[67]

It has a wide and flexible meaning, allowing the trial judge in each case to balance the competing interests of the protection of society and the degree to which mentally disordered persons should be held criminally responsible. As Mr. Justice Martin said in *R. v. Rabey*:

> Since the medical component of the term reflects or should reflect the state of medical knowledge at a given time, the concept of "disease of the mind" is capable of evolving with increased medical knowledge with respect to mental disorder or disturbance. [68]

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66 (1978) 40 CCC (2d) 145 (Ont CA) at 159; rev'd 51 CCC (2d) 129 (SCC).

67 *Ibid.*, at 144.

68 *Supra*, note 33 at 473.

At one time a psychopathic personality (sociopathy, personality disorder, character disorder) was not considered a disease of the mind but has now been recognized as such.[69]

The emergence of the automatism defence has focussed attention on finding a satisfactory definition for "disease of the mind." In *R.v. Rabey*, Mr. Justice Martin drew the following distinction:

> . . . the distinction to be drawn is between malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind which is the transient effect produced by some specific external factors such as, for example, concussion. [70]

The Task Force's recommendation proposes "disease" instead of "disease of the mind" for several reasons. First, it would be preferable to keep the definition as broad as possible, so that the new *Criminal Code* can accommodate new advances in medical science. Any internal mental disorder which results in an accused being incapable of appreciating the nature or consequences of such conduct, believing what he or she was doing was morally right, or rendering the accused incapable of conforming to the requirements of the law ought to excuse the conduct, whether or not the disorder was a disease "of the mind".

Second, the Task Force's proposed wording for a new automatism defence would make it abundantly clear that this provision applies only to mental disorders which are internal to the accused.

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69 *A.G. Northern Ireland v. Gallagher* [1963] AC 349 at 382; *R. v. Borg* (1969) 4 CCC 262 at 269-270 (SCC); *Chartrand v. The Queen* (1975) 26 CCC (2d) 417 at 420 (SCC); *R. v. Simpson* (1977) 35 CCC (2d) 337 at 350 (Ont CA); *R. v. Rafuse* (1981) 53 CCC (2d) 161 (BCCA).

70 *Supra*, note 33 at 477.

2. Incapable of appreciating the nature and quality of an act or omission

In most trials the crucial issue is not whether the accused was suffering from natural imbecility or disease of the mind, but whether the abnormality "rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that the act or omission was wrong."

The *Criminal Code* is significantly different from the *McNaghten Rules*, by using the expression "*appreciating* the nature and quality of the act" in place of "*knowing*"; the *Criminal Code* test is much broader. In *Cooper v. The Queen*, Mr. Justice Dickson illustrated the difference:

> To "know" the nature and quality of an act may mean merely to be aware of the physical act, while to "appreciate" may involve estimation and understanding of the consequences of that act. In the case of the appellant, as an example, in using his hands to choke the deceased, he may well have known the nature and quality of that physical act of choking. It is entirely different to suggest, however, that in performing the physical act of choking, he was able to appreciate its nature and quality in the sense of being aware that it could lead to or result in her death. . . .
>
> Our *Code* postulates an independent test, requiring a level of understanding of the act which is more than mere knowledge that it is taking place; in short, a capacity to apprehend the nature of the act and its consequences. [71]

In section 16, the "nature" and "quality" of the act refer to different aspects of the act, but are generally used interchangeably. "Nature" refers to the physical character of the act,[72] while "quality" refers to the physical consequences of the act.[73] In *Kjeldsen v. The Queen*,[74] the Supreme Court of Canada ruled that this language excludes consideration of whether the accused had the ability to appreciate the emotional

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71 *Supra*, note 66, SCC decision at 146.

72 *R. v. Cracknell* [1931] OR 634 (Ont CA).

73 *R. v. Barnier* (1980) 51 CCC (2d) 193 (SCC).

74 (1981) 24 CR (3d) 289.

consequences or significance of the act; the Crown need only show that he had an appreciative awareness of striking with a stone, that it might cause death or injury.

The Task Force supports the Law Reform Commission's recommendations that the new *Criminal Code*:

1. retain the expression "*incapable* of appreciating"; this is consistent with the majority and minority judgments in *R. v. Chaulk*,[75] and

2. replace "*nature and quality* of the conduct" with "*nature or consequences* of the conduct"; this is consistent with the Supreme Court of Canada's recent decisions in *R. v. Barnier*,[76] *Kjeldsen v. The Queen*,[77] and *Cooper v. The Queen*.[78]

3. Incapable of knowing that an act or omission is wrong

Even if the first branch of section 16(2) is not satisfied because the accused was capable of appreciating the nature and quality of an act, the insanity plea might still succeed if the accused was incapable of knowing that the act was wrong. The debate over whether "wrong" should be interpreted narrowly to mean "legally wrong" or more broadly to mean "morally wrong" has heated up in recent years, with conflicting lines of authority in England, Australia and Canada.

The difference is of profound importance: if A kills B knowing that he is killing B, and knowing that it is illegal to kill B, but under an insane delusion that the salvation of the human race hinges on A's execution for the murder of B, and that God has commanded A to produce that result by these means, A's act

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75 (1990) 62 CCC (3d) 193 (SCC).

76 *Supra*, note 73.

77 *Supra*, note 74.

78 *Supra*, note 66.

is a crime if "wrong" means "legally wrong", but it is not a crime if it means "morally wrong".[79]

In Canada, the McRuer Report recommended a broad meaning for "wrong", not only in the legal sense but something that would be condemned in the eyes of mankind.[80] However, twenty years later, in *Schwartz v. The Queen*,[81] the Supreme Court of Canada ruled that "wrong" in section 16(2) means nothing more than to know that what one was doing was against the law.

It was only in *Chaulk v. The Queen* that the Supreme Court of Canada overruled its earlier decision. For the majority, Chief Justice Lamer stated:

> . . . the term "wrong" as used in s. 16(2) must mean more than simply legally wrong. In considering the capacity of a person to know whether an act is one that he ought or ought not to do, the inquiry cannot terminate with the discovery that the accused knew that the act was contrary to the formal law. A person may well be aware that an act is contrary to law but, by reason of "natural imbecility" or disease of the mind, is at the same time incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society. This would be the case, for example, if the person suffered from a disease of the mind to such a degree as to know that it is legally wrong to kill but . . . kills in the belief that it is in response to a divine order and therefore not morally wrong. [82]

The Task Force endorses the views of the minority of the Law Reform Commission in Report 31 that an accused should be exempted from criminal liability if he or she "believed that what he or she was doing was morally right."[83] A mentally

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79 Sir J. F. Stephen, *History of the Criminal Law of England* (London: McMillan and Co. 1883), Vol. II at 149; see also *R. v. Ratti* (1991) 62 CCC (3d) 105 (SCC).

80 *Royal Commission on the Law of Insanity as a Defence in Criminal Cases in Canada*, 1956 at 13.

81 (1976) 29 CCC (2d) 1.

82 *Supra*, note 75 at 230-233.

83 *Supra*, note 6 at 33.

disordered person who commits a crime believing that it is morally right to do so merits treatment, not punishment. This wording would allow for this result, but at the same time prevent exemption for the psychopath who acts, not believing it is right, but being indifferent to right and wrong.

4. Specific delusions

The Task Force agrees with the decision in *Chaulk* that subsection 16(3) does not add to or qualify the general defence of insanity under subsection 16(2), and supports the recommendation of the Law Reform Commission that it be deleted from the new *Criminal Code*.

5. Presumption of sanity and the burden of proof

Section 16(4) of the present *Criminal Code* provides that "everyone shall, until the contrary is proved, be presumed to be and to have been sane." Since the Supreme Court of Canada's decision in *Clark v. The King*,[84] insanity must be "proven" on the balance of probabilities.

The Supreme Court recently upheld this position in *R. v. Chaulk*, ruling that placing the burden of proof on the accused was a reasonable limit on section 11(d) of the *Charter*, the presumption of innocence, and could thus be justified under section 1 of the *Charter*:

> The presumption of sanity and the reversal of onus embodied in section 16(4) exist in order to avoid placing a virtually impossible burden on the Crown. . . . If an accused were able to rebut the presumption merely by raising a reasonable doubt as to his or her insanity, the very purpose of the presumption of sanity would be defeated and the objective would not be achieved.[85]

There is considerable debate as to which test should be incorporated into the new *Criminal Code*. The Law Reform Commission did not address this issue, leaving it for the

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[84] (1921) 35 CCC 261.

[85] *Supra*, note 75 at 222.

evidence provisions. One must examine the presumption of sanity and the burden of proof in the larger context of the consequences flowing from a finding that an accused is not guilty by reason of mental disorder. Following *R. v. Swain*,[86] there is now no automatic committal for treatment in a hospital under a Lieutenant-Governor's warrant for an indefinite period. Amendments to s. 614(2) resulting from *Swain* provide for a hearing to determine the current mental condition of the person; detention will be justified only if he or she is found to be dangerous due to insanity at the time of the offence.

In light of this new regime, those in favour of retaining the "balance of probabilities" test argue that:

1. it is unfair to commit an accused to a mental hospital only on the basis of a reasonable doubt having been raised respecting mental disorder;

2. it is unfair to require the Crown to prove sanity beyond a reasonable doubt; and

3. there is a risk that an accused might escape criminal liability by raising a reasonable doubt as to his or her sanity, and then successfully argue at a subsequent committal hearing that the Crown has not proved mental disorder on the balance of probabilities.

Those in favour of a "reasonable doubt" test maintain that:

1. there is no reason in principle to stray from the fundamental principle of criminal law that liability ought not to attach if the Crown cannot prove the mental element of the crime beyond a reasonable doubt;

2. there is little risk that an accused would successfully raise a reasonable doubt as to his or her sanity, only by leading evidence of bizarre conduct. In virtually every case, expert evidence will be necessary to establish that the bizarre conduct originated with a "disease of the mind;" and

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86 *Supra*, note 63.

3. the issue at the first stage is whether the accused was sane at the time of the offence. The issue at the second stage is whether the accused has a mental disorder at the time of trial, warranting committal. It is neither conceptually inconsistent nor contrary to the public interest for an acquittal to result from the accused raising a reasonable doubt at the first stage, and requiring the Crown to establish mental disorder on the balance of probabilities at the second stage.

On balance, the Task Force is persuaded by the arguments in favour of the "reasonable doubt" test so that, once there is some evidence of mental disorder, the Crown should have the burden of proving the accused's sanity beyond a reasonable doubt. The argument that adopting such a test would impose an intolerable or impossible burden on the Crown does not withstand empirical scrutiny. According to Professor Gerry Ferguson:

> The experience in the United States is particularly revealing. As of 1982, in half of the States and in all federal courts, once there is some evidence of insanity, the prosecution has the burden of proving the accused's sanity beyond a reasonable doubt. . . . I sampled the reported cases in those jurisdictions for the year 1982. In almost all of the cases there was at least some expert evidence supporting the accused's insanity plea. But in 28 of 30 cases, the defence of insanity failed; . . . the accused failed to raise a reasonable doubt. . . .[I]n jurisdictions where the accused had the burden of proof on a balance of probabilities, the accused's insanity plea failed 16 times in 17 cases.[87]

D. Irresistible impulse

Section 16(2) has often been criticized for basing its test for insanity on cognition (understanding) while discounting the emotional and conative (volitional) aspects of the mind's operations. In *Cooper v. The Queen*, Mr. Justice Dickson attempted to extend the cognitive test to emotional impairment, but that initiative was curtailed by the Supreme Court in *Kjeldsen*.

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87 "A Critique of Proposals to Reform the Insanity Defence," (1989) 14 *Queens L. J.* 135 at 148.

Similarly, volitional inability to prevent oneself from acting, known as "irresistible impulse", has traditionally been rejected as a ground of insanity because of the difficulty in distinguishing an irresistible impulse from one that was simply not resisted.

At present, neither emotional nor volitional inability can be advanced to establish insanity, unless it is shown that they are a symptom or manifestation of a disease of the mind.[88]

In the Task Force's view, the present law is too restrictive, because it means that an accused's emotional or volitional inability to refrain from committing the offence can only be a defence if it results from a disease of the mind which, by the section 16 definition, means that the accused does not have a cognitive understanding of the nature or quality of the act, or that it is wrong.

The Task Force believes that the new *Criminal Code* should broaden the defence of mental disorder to accommodate persons who, although they *know* what they are doing and that it is morally wrong, are "incapable of conforming to the requirements of the law." It would violate the fundamental principle of no criminal liability without subjective fault, to treat as a criminal a person who, through disease or mental disability, was incapable of preventing the conduct. In no other circumstance does the law presume to penalize such involuntary conduct.

E. Who can raise the issue?

In *Swain v. The Queen*, the Supreme Court of Canada found that the common law rule which allowed the Crown to raise evidence of insanity over and above the accused's wishes was a denial of liberty which was not in accordance with the principles of fundamental justice and not saved by section 1 of the *Charter*. The Court recommended that the common law rule be replaced:

> with a rule which would allow the Crown to raise independently the issue of insanity only after the trier of fact

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88 *R. v. Borg* (1969) 2 CCC 114 (SCC); *R. v. Abbey* (1982) 68 CCC (2d) 394 (SCC).

> had concluded that the accused was otherwise guilty of the offence charged. Under this scheme, the issue of insanity would be tried after a verdict of guilty had been reached, but prior to a conviction being entered. If the trier of fact then subsequently found that the accused was insane at the time of the offence, the verdict of not guilty by reason of insanity would be entered. Conversely, if the trier of fact found that the accused was not insane, within the meaning of section 16, at the time of the offence the conviction would then be entered. . . .
>
> An accused would, if he chooses not to do so earlier, raise the issue of insanity after the trier of fact has concluded that he or she was guilty of the offence charged, but before a verdict of guilty was entered.[89]

The Task Force recommends that the position favoured by the Supreme Court of Canada in Swain should be adopted, either by incorporating it into the Procedure sections of the new *Criminal Code*, or by allowing the common law, now set out in Swain, to regulate the procedure to be followed.

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89 *Supra*, note 63 at 39-41.

PART IV: DEFENCES, JUSTIFICATIONS AND EXCUSES

VIII. DEFENCE OF THE PERSON

A. Task Force's recommendations

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Defence of the person

12. (1) Every person is justified in using, in self-defence or in the defence of another, such force as, in the circumstances as that person believes them to be, it is reasonable to use.

Excessive force

(2) A person who uses excessive force in self-defence or in the defence of another and thereby causes the death of another human being is not guilty of murder, but is guilty of manslaughter.

B. The present law

1. Self-defence against unprovoked assault

Subsection 34(1) of the present *Criminal Code* authorizes a person to use force against another person if:

1. the accused was unlawfully assaulted,

2. the accused had not provoked the assault,

3. the accused did not intend to cause death or grievous bodily harm, and

4. the accused did not use more force than was necessary.

This test has subjective and objective elements. If the accused believed (subjective) that he or she was in imminent danger from an attack, then force is justified in self-defence, even though the accused may be mistaken in that belief.[90]

However, the force used by the accused in self-defence must not be excessive, viewed objectively. There are two qualifications to this rule. First, a person defending against an attack reasonably apprehended cannot be expected to weigh to a nicety the exact measure of necessary defensive action. Second, the accused is not necessarily outside section 34(1) merely because the force used results in death or grievous bodily harm.[91]

Under subsection 34(2), the use of force is justified if:

1. the accused was unlawfully assaulted,

2. the accused intended to cause death or grievous bodily harm in repelling the assault,

3. the accused caused death or grievous bodily harm under reasonable apprehension of death or grievous bodily harm from the assaultor, and

4. the accused reasonably believed that he or she could not otherwise preserve himself or herself from death or grievous bodily harm.

To succeed, the accused's apprehension of death or grievous bodily harm must be a reasonable one, and his or her belief must be based on reasonable and probable grounds. An

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[90] *R. v. Baxter* (1975) 27 CCC (2d) 96 (Ont CA).

[91] *R. v. Setrum* (1976) 32 CCC (2d) 109 (Sask CA).

accused may still be found to have acted in self-defence, even if he or she was mistaken in the perception of danger. However, reasonable and probable grounds must still exist for this mistaken perception in the sense that the mistake must have been one which an ordinary person using ordinary care would have made in the same circumstances.[92]

Unlike subsection 34(1), this provision does not import the principle of proportionate force. Rather, the test is whether the accused reasonably believed that the force used was proportionate. Thus, the jury should ask "Did the accused believe on reasonable and probable grounds that it was necessary to stab the assaultor in order to protect himself?" rather than "Was it necessary for the accused to stab the assaultor in order to protect himself?" Whether the amount of force used was disproportionate is proper to be considered by the jury only to the extent that it relates to whether the accused was under a *reasonable* apprehension of death or grievous bodily harm, and whether he or she had reasonable and probable grounds to believe that he or she could not otherwise protect himself or herself.[93]

2. Self-defence in the case of aggression

Section 35 deals with the situation of an accused who uses force in self-defence, after having first assaulted or provoked another, and that person retaliates. The accused's use of force is justified if:

1. the accused either:

   (a) assaulted the other person without justification and without intent to cause death or grievous bodily harm, or

   (b) provoked the other person without justification to assault the accused,

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92 *Reilly v. The Queen* (1984) 15 CCC (3d) 1 (SCC).

93 *R. v. Bogue* (1976) 30 CCC (2d) 403 (Ont CA); *R. v. Mulder (No 1)* (1978) 40 CCC (2d) 1 (Ont CA); and *R. v. Ward* (1978) 4 CR (3d) 190 (Ont CA).

2. the other person retaliated,

3. the accused did not endeavour to cause death or grievous bodily harm,

4. the accused declined further conflict and quitted or retreated from it as far as it was feasible to do so, and

5. the accused used force:

   (a) under reasonable apprehension of death or grievous bodily harm from the violence of the other person, and

   (b) reasonably believing that the force was necessary in order to preserve himself from death or grievous bodily harm.

3. Preventing assault

Under section 37 the use of force is justified if:

1. the accused or someone under the accused's protection is assaulted, and

2. the accused uses no more force than is necessary to prevent the assault or its repetition.

4. Excessive force

Under section 26, "Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess."

The Supreme Court of Canada has ruled unequivocally that there is in Canada no qualified defence of excessive self-defence under this section, reducing murder to manslaughter.[94] The Court reasoned that the *Criminal Code* deals comprehensively with self-defence, and there is no policy justification for the Court introducing a common law defence of excessive self-defence.

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[94] *Brisson v. The Queen* (1982) 69 CCC (2d) 97 (SCC); *R. v. Faid* (1983) 2 CCC (3d) 573 (SCC); and *R. v. Beyard* (1989) 70 CR (3d) 95 (SCC).

C. Shortcomings of the present law

There are numerous flaws in the present statutory formulation.

First, it is too complex; section 35 in particular is almost incomprehensible. Citizens cannot hope to understand the law, or their rights and duties. A review of court decisions discloses that judges routinely misdirect juries on the effect of these provisions, and even properly instructed juries will find the charge bewildering.

Second, several provisions appear to conflict with each other. For example, under section 37 a person can only use proportionate force to prevent the repetition of an assault, whereas under section 34(2) a person is justified in causing death if he or she reasonably believes that such force is necessary to preserve that person's life.

Third, sections 26 and 37(2) appear to say much the same thing.

Fourth, it is not necessary to distinguish between assaults on an accused which are provoked and not provoked.

Fifth, it is not necessary to distinguish between intending and not intending to cause death or grievous bodily harm, as the accused's conduct will be measured against whether he or she used reasonable force.

Sixth, section 37(1) is unduly restrictive in authorizing the use of force in the defence of a third person only if that person is under the protection of the accused.

D. Recommendations for reform

Our society places a premium on the physical security of the person. It abhors personal violence and, in most circumstances where violence against the person is required, vests that power exclusively in the State.

One of the few exceptions to that general principle is the "defence of the person" justification. The challenge facing law reformers is to determine the circumstances in which society should find it acceptable for one person to apply force intentionally, and without consent, to another person.

The Task Force's recommendation, modelled on the New Zealand *Crimes Bill*, has a simplicity and elegance which bears no relation to the existing *Code*, but addresses all the essential elements for which provision needs to be made.

1. The accused's apprehension of being attacked

An accused who is actually being attacked should be permitted to use force against the attacker in self-defence. So should an accused who honestly believes he or she is being attacked.

The more difficult issue is whether the accused's belief of attack must be reasonable. For example, a slightly-built law professor walking down a dark lane, fearful of being attacked like many others in the area have been, carries a baton. A man runs up from behind and the professor hits him with the baton. In fact, the man is a jogger, not an assailant. However, the professor honestly believes that he is under attack.

If the professor's belief in being attacked was reasonable, then clearly he should be permitted to argue self-defence. But what if his belief was unreasonable? For example he may, because of self-induced intoxication or a neurosis, believe that he was under attack when a "reasonable person" in those circumstances would not.

The Task Force believes that an honestly-held belief, even if unreasonable, should give rise to the defence of self-defence. This is consistent with the Supreme Court of Canada's decision in *Pappajohn v. The Queen,*[95] and with the general principle that criminal liability should attach only for subjective fault.

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[95] *Supra*, note 50.

To those who fear that adoption of a subjective standard would lead to wholesale acquittals, the words of Mr. Justice Dickson in *Pappajohn* are apposite:

> The jury will be concerned to consider the reasonableness of any grounds found, or asserted to be available, to support the defence of mistake. Although "reasonable grounds" is not a precondition to the availability of a plea of honest belief . . , those grounds determine the weight to be given the defence. The reasonableness, or otherwise, of the accused's belief is only evidence for, or against, the view that the belief was actually held and the intent was, therefore, lacking.
>
> Canadian juries, in my experience, display a high degree of common sense, and an uncanny ability to distinguish between the genuine and the specious.[96]

2. Provocation by the accused

The present *Criminal Code's* provision dealing with assault in the case of aggression is lengthy and convoluted, and in the view of the Task Force unnecessary.

First, if the accused's provocation did not amount to an assault, then the combatant was not justified in applying force in response; any force applied by the combatant amounts to unlawful force entitling the accused to retaliate in self-defence.

Second, if the accused's provocation did amount to an assault, then the combatant was justified in applying force in response and, so long as the response was not excessive, it was lawful force and the accused has no justification for retaliating.

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[96] *Ibid.*, at 499-500.

3. The force used by the accused in self-defence

If an accused is justified in using force in self-defence, must the force be limited to that which the accused *reasonably* believed was sufficient for protection, or is the accused justified in applying force which he or she honestly believed was necessary, whether or not that belief was reasonable? In other words, should the new *Criminal Code* impose an objective or subjective standard?

For example, if the law professor in the lane described above was justified in defending himself against the man running up from behind, was he justified in applying only such force as a reasonable person in those circumstances would consider appropriate, or was he justified in applying as much force as he subjectively believed was necessary?

This is a difficult issue. On the one hand, it would be consistent with the principle enunciated in *Pappajohn* to endorse a subjective test, that an honest belief, however unreasonable, is a defence. On the other hand, the Task Force is concerned that legislating a subjective test would be an open invitation to use any amount of force.

On balance, the Task Force concluded that an objective test is preferable, and is recommending the statutory language adopted in the New Zealand *Crimes Bill*, section 41. The Law Reform Commission of Canada's recommendation[97] appears to adopt an objective test "using such force as was reasonably necessary". However, clause 3(17) would seem to contradict that interpretation by providing that "No one is liable if on the facts as he believed them he would have had a defence under clause . . . 3(10)."

4. Excessive force

If the new *Criminal Code* legislates the "reasonable force" test proposed above, then the Task Force strongly recommends that a special provision be added to the effect that the use of excessive force reduces murder to manslaughter.

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[97] Report 31, *supra*, note 6 at clause 3(10).

The arguments in support of this view, articulately set out in "Excessive Self-defence: A Need for Legislation",[98] include the following:

(1) The qualified defence is necessary to recognize the reduced moral culpability of a person acting "honestly", although unreasonably, when defending himself;

(2) The qualified defence is much more consistent with modern day conceptions of the distinctions between murder and manslaughter. . . . If the accused is acting "honestly", although "unreasonably", the criminal *mens rea* is much more consistent with a verdict of manslaughter than murder;

(3) Under the qualified defence, it will be open to the jury to convict on the lesser offence of manslaughter, which may avoid a complete "acquittal" where the jury feels there is some culpability requiring punishment; and

(4) The doctrine of excessive self-defence may also avoid a perverse conviction for murder when manslaughter would be more just.

5. Defence of third persons

The Task Force agrees with the Law Reform Commission that self-defence should extend to the defence of any other person, not just persons under the accused's protection, as section 37(1) presently provides.

6. Law enforcement exception

The Task Force strongly disagrees with the Law Reform Commission's recommendation that defence of the person "does not apply to anyone who uses force against a person reasonably identifiable as a police officer executing a warrant of arrest or anyone present acting under his authority."

The Committee can see no justification for fettering a citizen's right to defend himself or another in these circumstances. The general law respecting resisting arrest and obstructing a peace officer is an adequate protection to the police when they are acting in the execution of their duties. If they are acting outside the scope of their authority, citizens are entitled to protect themselves and others.

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[98] N.C. O'Brien, (1982-83) 25 Crim L. Q. 441-457.

IX. DEFENCE OF PROPERTY

A. Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Defence of property

13. (1) A person is justified in using such force as, in the circumstances which exist or which the person believes to exist, is reasonable:

(a) to protect property (whether belonging to that person or another) from unlawful appropriation, destruction or damage, or

(b) to prevent or terminate a trespass to that person's property.

(2) In no circumstances is it reasonable, in defence of property, to intend to cause death.

B. The present law

1. Defence of personal property

Subsection 38(1) of the present *Criminal Code* provides that a person in peaceable possession of personal property is justified in preventing a trespasser from taking it, or in taking it back from a trespasser, if the person does not strike or cause bodily harm to the trespasser.

Subsection 38(2) adds that where the person in peaceable possession lays hands on the personal property, a trespasser who persists in attempting to keep it or take it from that person is deemed to commit an assault.

Thus, where a trespasser attempts to take possession of personal property in the peaceable possession of a person, and that person lays hands on it, that person is justified in using force against the trespasser in order to retain possession of it.

Under subsection 39(1), a person who is in peaceable possession of personal property under a claim of right is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, provided that the person uses no more force than is necessary.

On the other hand, a person who is in peaceable possession without a claim of right is not justified or protected from criminal responsibility for defending their possession against a person who is entitled by law to possession of it.

Section 39 would, for example, justify a tow-truck operator using reasonable force against the owner of a vehicle, to retain possession of the vehicle which had been towed after being ticketed for parking in a tow-away zone. It would not protect a tow-truck driver who knew that the ticket was invalid because the vehicle was parked legally.

One of the difficulties with section 39 is the expression "entitled by law to possession of it," as this implies a legal determination of ownership, which in most cases would only be made long after the dispute arose. It is possible that this provision imposes absolute liability such that, if at the end of the day, it is determined that the retaking party was entitled by law to possession, the defence is unavailable, even though the possessor did not know it at the time. A possible answer to this question is that a person making this mistake might be held to have had a claim or right and thus be entitled to the defence under subsection 39(1).

2. Defence of a dwelling-house or real property

Section 40 provides that a person in peaceable possession of a dwelling-house is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority.

Subsection 41(1), which is much more frequently relied upon because of its broader language, provides that a person in peaceable possession of a dwelling-house *or real property* is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or in using force to remove a trespasser, provided that the person uses no more force than is necessary.

Under subsection 41(2), a trespasser who resists an attempt by a person in peaceable possession to prevent the trespasser's entry or to remove the trespasser, is deemed to commit an assault.

Section 42, which Stuart describes as "unbelievably circuitous",[99] provides in subsection (1) that everyone is justified in peaceably entering a dwelling-house or real property by day to take possession of it, if the person is lawfully entitled to possession of it, and subsection (2) provides that anyone who assaults a person taking such peaceable possession is guilty of an assault.

Unlike section 41, section 42 authorizes the use of force as of right, in order to prevent a trespasser from entering on a dwelling-house or real property or to remove a trespasser. This reflects the greater value which has traditionally attached to one's home than to one's chattels. Similarly, there is no duty on a person in peaceable possession of a dwelling-house to retreat to the point of giving up his or her house to an adversary.[100]

3. Extent of force

Sections 39, 40 and 41 use similar, but not identical, language to describe the degree of force which may be used:

- section 39: uses no more force than is necessary;
- section 40: uses as much force as is necessary; and
- section 41: uses no more force than is necessary.

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[99] *Supra*, note 2 at 418.

[100] *R. v. Deegan* (1980) 49 CCC (2d) 417 (Alta CA).

What is noticeably lacking from these formulations is the modifier "reasonably", as in section 37. This suggests a rather elastic meaning, as what is "necessary" will depend on the facts and circumstances of each case. According to Colvin, one interpretation which these words will bear is that they essentially allow one to do "what it takes" to get the particular job done.[101] In *R. v. Baxter*, Mr. Justice Martin adopted a proportionality test:

> The sections of the *Code* authorizing the use of force in defence of a person or property, to prevent crime, and to apprehend offenders, in general, express in greater detail the great principle of the common law that the use of force in such circumstances is subject to the restriction that the force used is necessary; that is, that the harm sought to be prevented could not be prevented by less violent means and that the injury or harm done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or harm it is intended to prevent.[102]

Commentators disagree as to whether these sections create an objective or subjective test. Stuart and Colvin both conclude that the language could support a truly objective test,[103] whereas the editors of Tremeear's *Criminal Code* (1992) and Martin's *Criminal Code* (1992) suggest that the language "no more than necessary" implies a subjective test.[104] At present, the trend is toward a subjective/objective test to determine the force issue, which would allow for a reasonable mistake on the question of force. In *R. v. Weare*,[105] the Nova Scotia Appeal Division held that the test under s. 41(1) was "whether or not an accused used more force than he, on reasonable grounds believed was necessary."

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101 E. Colvin, *Principles of Criminal Law*, 2d ed., (Toronto: Carswell, 1991) at 225-226.

102 *Supra*, note 80 at 113.

103 Stuart, *supra*, note 2 at 407, and Colvin, *supra*, note 101 at 222.

104 Watt and Fuerst at 80-81, and Greenspan at 78.

105 (1983) 4 CCC (3d) 494 at 499.

C. Recommendations for reform

1. Distinction between movable and immovable property

The Task Force has concluded that there is no reason in principle why the new *Criminal Code* should distinguish between defence of movable property and defence of immovable property.

The test for defending against the improper taking or occupation of either should be the same.

2. The circumstances in which force may be used

The Task Force believes that a subjective test should be applied to the consideration of the circumstances in which force may be applied. That is achieved through the expression "in the circumstances which exist or which the person believes to exist".

Thus, a person who believes that his or her property is about to be damaged or unlawfully taken is entitled to use force to prevent the damage or theft, even if the person is wrong in the belief, and even if it would be unreasonable for anyone to have that belief.

This parallels the Task Force's recommendation respecting defence of the person.

3. Reasonableness of the force used

The Committee believes that an objective test should be used to prescribe the amount of force which may be used in defence of property. This is achieved through the expression "by using such force as . . . is reasonable".

This parallels the Task Force's recommendation respecting defence of the person. As noted in that context, this position would appear to conflict with the Task Force's guiding principle that there should be no criminal liability without subjective

fault. However, we are here dealing not with a fault element, but with a defence based on justification, which means that the justified conduct must be untainted with culpability. Since an unreasonable mistake is a negligent mistake, it can never justify the conduct.[106]

4. The intentional causing of death

The Task Force recommends that it never be "reasonable", in the defence of property, to intend to cause death. This enshrines a fundamental value of our society that human life is always of more value than property interests.

The Task Force's proposal gives greater scope to the defence of property than does the Law Reform Commission's recommendation; the latter would not permit force which purposely causes the death of, or seriously harms, another person.

The Task Force believes that the Law Reform Commission formulation is too restrictive. First, it focuses on the result of the force (*i.e.* death or serious harm) rather than on the intent of the person who applies force. Second, there may be cases where it may be justifiable to intend to cause serious harm to another person, in the defence of property. The public is not at risk by keeping this option open, as the person applying such force would have to satisfy the trier of fact that it was reasonable in the circumstances to apply such force. In other words, the principle of proportionality will ensure that the defence is not abused.

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[106] Colvin, *supra*, note 101 at 208. See also Stuart, *supra*, note 2 at 391.

X. NECESSITY

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Necessity

14. (1) No one is criminally responsible for acting to avoid harm to oneself or another person or to avoid immediate serious damage to property, if the danger which he or she knows or believes to exist is such that in all the circumstances (including any of his or her personal characteristics that affect its gravity) he or she cannot reasonably be expected to act otherwise.

(2) Clause (1) does not apply to anyone who has knowingly and without reasonable excuse exposed himself or herself to the danger.

B. The present law

The present *Criminal Code* does not contain a provision on necessity; its acceptance depends on section 8(3), which preserves common law defences.

In *Morgentaler v. The Queen*,[107] the Supreme Court of Canada ruled that, while the common law defence of necessity is preserved by what is now section 8(3), there was in this case no evidence of the urgent necessity which may, in very exceptional circumstances, justify a violation of the criminal law.

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[107] (1975) 20 CCC (2d) 449.

Nine years later, the same Court unanimously and expressly recognized that the defence of necessity exists in Canadian law, and described its scope, in *Perka v. The Queen*.[108]

Stuart has summarized the essential elements required for the defence of necessity to succeed in Canada:

> (1) there must be circumstances of imminent risk where the action is taken to avoid a direct and immediate peril;
>
> (2) the accused's act must be inevitable, unavoidable and afford no reasonable opportunity for an alternate course of action that does not involve a breach of the law; and
>
> (3) the harm inflicted must be less than the harm sought to be avoided.[109]

C. Shortcomings of the present law

1. Spontaneity

In *Perka*, Chief Justice Dickson said that the accused must have faced "clear and imminent peril, where human instincts cry out for action and make a counsel of patience unreasonable." This implies that at least a degree of spontaneity is required, which the Ontario Court of Appeal took one step further in *R. v. Morgentaler, Smoling and Scott*.[110] There, it held that a lack of spontaneity automatically disqualifies the accused from entitlement to the necessity defence.

This position has been viewed as unduly harsh. For example, Colvin accepts that it is integral to the conception of necessity being an excuse (rather than a justification) that it must be confined to situations of overwhelming "involuntariness". He acknowledges that planning and deliberation are often difficult to reconcile with "involuntariness", but the two ideas are not totally incompatible.

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[108] (1984) 14 CCC (3d) 385 at 405-406.

[109] *Supra*, note 2 at 434.

[110] (1985) 48 CR (3d) 1.

Colvin cites the example of a mountaineer who is roped to a fallen companion and who cuts the rope in order to save himself from being dragged down with the companion. Here it is clear that one must die in order that the other will be saved. To impose a "spontaneity" limitation in such circumstances seems unfair:

> Should the defence be automatically excluded because discussions preceded the killing? This seems a crude way of disposing of the difficult issues raised by the case. It is difficult to see why a sense of compulsion should be discounted merely because it has been articulated and considered.[111]

2. No reasonable alternative

Under *Perka*, the defence of necessity would apply only where compliance with the law was demonstrably impossible.

Stuart concludes that literal insistence on this requirement would make the defence "almost extinct."[112]

3. Proportionality

In *Perka*, Chief Justice Dickson characterized necessity as an excusatory defence; as such, "appropriate and normal resistance" to pressure is required. However, a "balancing of evils" test is also suggested, which requires that the harm sought to be avoided must, objectively speaking, outweigh the harm inflicted. But this is consistent only with treating necessity as a justification, an idea the Court was at pains to reject.

As Galloway observes, there may be some cases where society wants to excuse the accused's conduct, even if the harm

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[111] *Supra*, note 101 at 204-205.

[112] *Supra*, note 2 at 447.

caused is equal to or greater than the harm sought to be avoided.[113]

4. Murder

It is not clear whether Canadian law permits necessity to be advanced in defence of murder. The well-known 19th century case of *R. v. Dudley and Stephens*[114] could be interpreted to exclude the defence in such cases.[115] In *Dudley*, three starving sailors in a lifeboat sacrificed the life of a cabin boy and ate his flesh in order to survive. The men were rescued four days later, and the defence of necessity was held not to apply in their trial for murder.

Colvin's example of the two mountaineers, cited earlier, illustrates how an absolute prohibition on necessity in cases of murder could result in injustices.

D. Recommendations for reform

1. Avoiding harm to persons or property

The Task Force agrees with the Law Reform Commission of Canada's recommendation that necessity excuse conduct which is aimed at avoiding harm to persons *or property*. We disagree with the English Commission's proposal which would exclude the defence when the only threatened harm is to property.

It should be recognized that making necessity applicable to "persons or property" is itself a significant limitation, as it would preclude the defence in cases where the accused acted to avoid harm to political or cultural values.

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113 D. Galloway, "Necessity as a Justification: A Critique of *Perka*" (1986) 10 Dalhousie L. J. 158.

114 (1884) 14 Q.B.D. 273.

115 In *Morgentaler*, Mr. Justice Dickson cited *Dudley* for this proposition.

2. Immediacy of the danger

The Law Reform Commission recommended that necessity should be available to an accused who acts "to avoid immediate harm to the person or immediate serious damage to property". The Task Force agrees with this formulation, with the exception that "immediate" should not be a requirement in the first instance of harm to the person.

For the reasons stated earlier, requiring spontaneity when acting to avoid harm to persons may well produce injustices. As Colvin observed, planning and deliberation are often difficult to reconcile with "involuntariness", but the two ideas are not totally incompatible.

The public is not at risk by keeping this option open, as an accused arguing necessity would have to satisfy the trier of fact that, even after deliberation, he or she could not be expected to have acted otherwise.

3. The subjective/objective test

The Task Force is recommending that a subjective test be adopted in determining whether a danger existed; that is achieved by use of the words "the danger which he or she knows or believes to exist." Thus, an accused mountaineer who honestly believed that he would die if he did not cut the rope, could argue that such action was necessary.

However, the Task Force believes that the accused's response should be objectively defined ("he or she cannot reasonably be expected to act otherwise"). This is consistent with treating necessity as an excuse rather than a justification. It permits the defence in cases where the accused's conduct was "involuntary" (in the sense that no ordinary person could be expected to have acted otherwise), and it avoids any "balancing of harms" or proportionality test.

This recommendation parallels the position advocated by the Task Force for defence of the person and defence of property.

4. Murder

The Task Force disagrees with the Law Reform Commission's recommendation, which would deny the defence of necessity to anyone who purposely causes the death of, or seriously harms, another person.

For the reasons advanced earlier, that is too harsh a rule. There may well be cases where the intentional causing of serious harm to, or even purposely causing the death of, another person ought to be excused. The safeguard which is built into the Task Force's recommendation, to prevent abuses, is that the trier of fact must be satisfied that, objectively determined, the accused could not be expected to have acted otherwise.

5. Creating the danger

The Task Force agrees with the English proposal that necessity should not apply to a person who "knowingly and without reasonable excuse exposed himself to the danger." Similar provisions have been included in the Australian report and the U.S. *Model Penal Code.*

It should be stressed that this exclusion should only apply where the accused *knew* of the danger; it would violate fundamental principles of criminal liability to extend the exclusion to instances where an accused recklessly or negligently did not contemplate that his or her actions would likely give rise to an emergency requiring the breaking of the law.

XI. DURESS

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Duress

15. No one is liable for committing a crime in response to a threat of harm to oneself or another person if the threat is one which in all the circumstances (including any of his or her personal characteristics that affect its gravity) he or she cannot reasonably be expected to resist.

B. The present law

Section 17 of the present *Criminal Code* states the excuse of duress:

17. A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused from committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

In *R. v. Carker (No. 2)*,[116] the Supreme Court of Canada held that the common law rules and principles respecting duress as an excuse or a defence had been codified and exhaustively defined in this section.

However, in *R. v. Paquette*,[117] the same Court resiled from that position declaring that, while the section 17 defence is not available to the actual perpetrator of an enumerated offence, the common law defence is available to an accused who is a party to the offence only by virtue of section 21(2) of the *Code*.

An articulate statement of the common law defence of duress is found in the Australian case of *R. v. Hurley and Murray*:[118]

> Where the accused has been required to do the act charged against him:
>
> (i) under threat that death or grievous bodily harm will be unlawfully inflicted upon a human being if the accused fails to do the act,
>
> (ii) the circumstances were such that a person of ordinary firmness would have been likely to yield to the threat in the way the accused did,
>
> (iii) the threat was present and continuing, imminent and impending,
>
> (iv) the accused reasonably apprehended that the threat would be carried out,
>
> (v) he was induced thereby to commit the crime charged,
>
> (vi) the crime was not murder, or any other crime so heinous as to be excepted from the doctrine,
>
> (vii) the accused did not, by fault on his part when free from the duress, expose himself to its application, and

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[116] (1967) 2 CRNS 16.

[117] (1976) 30 CCC (2d) 417.

[118] [1967] V.R. 526 (S.C. Victoria) at 543.

(viii) he had no means, with safety to himself, of preventing the execution of the threat,

then the accused in such circumstances at least, has a defence of duress.

C. Shortcomings in the present law

1. Threats of death or bodily harm

This limitation has been criticized as being unduly restrictive. It would, for example, exclude duress in a case where there is a threat to the accused's mental or psychological health.

Yeo argues that there should be no restriction on the type of threatened harm which should be recognized:

> . . . the rationale for allowing duress is societal compassion for human frailty in the face of extreme pressure or danger. This being the case, it could be argued that *every* type of threatened harm has the potential of being recognized provided that such harm has the effect of overwhelming a person of normal standing in the same position as the particular accused.[119]

2. Immediacy

The case of *R. v. Carker (No. 2)*[120] illustrates the unsatisfactory nature of this limitation. A prisoner isolated in his cell who was threatened by other rioting inmates with serious physical harm if he did not damage his cell was denied the excuse of duress. The Supreme Court of Canada ruled that since the accused and the threatening prisoners were locked in their cells at the time, the threats could only be carried out in the future, and thus they were not threats of immediate bodily harm.

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[119] S.M.H. Yeo, *Compulsion in the Criminal Law*, (Sydney: Law Book Co., 1990) at 69.

[120] *Supra*, note 116.

3. Threat by a person present

Carker also illustrates the inadequacy of the section 17 requirement that the threat must emanate from "a person who is present when the offence is committed." In that case, the Supreme Court of Canada found that the threatening prisoners, who were locked in their cells at the time of the threats, were not "present" within the meaning of section 17.

Whether the threatening party is present should not be relevant, provided that the other criteria are met.

4. Threat to harm a third person

It is unclear whether a threat to kill or injure another person can serve as a basis for this defence under section 17.[121] By contrast, the courts have extended the scope of the common law version of the excuse to include threats directed to other persons.[122]

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121 See Borins, J. "The Defence of Duress", (1982) 2 Crim. L.Q. 181.

122 *R. v. Morrison and McQueen* (1981) 54 CCC (2d) 497 (Ont Dist Ct).

5. Enumerated offences where duress does not excuse

The list of excluded offences in section 17 is much more extensive than in other Codes;[123] at English common law the only exempted crimes are murder and treason. The description of some of the excluded offences in section 17 has created anomalies with respect to which offences are "in" and which are "out". In *R. v. Robins*,[124] the Quebec Court of Appeal held that, while duress is not available to someone charged with forcible abduction, it can be a defence to the more serious crime of kidnapping.

D. Recommendations for reform

1. The threat of harm

The Task Force's recommendation that duress be available in response to a "threat of harm" is noticeably broader than section 17 of the present *Criminal Code* ("threats of immediate death or bodily harm") or clause 3(8) of the Law Reform Commission recommendation ("threats of immediate serious harm").

The Task Force believes that its recommendation, paralleling its "necessity" proposal, is preferable because it would permit the excuse to be argued in cases where there is a threat to the accused's mental or psychological health.

Such a broadly-worded provision would not put the public at risk, as the reasonableness of the accused's response to the threat will be measured against the severity of the threat.

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123 Stuart, *supra*, note 2 at 385.

124 (1982) 66 CCC (2d) 550.

2. Threats to third persons

The Task Force agrees with the recommendation of the Law Reform Commission, and all other surveyed jurisdictions, that the excuse of duress be available where the accused acts in response to a threat of harm to oneself "or another person."

3. Immediacy

As stated earlier, the Task Force believes that the "immediacy" requirement in section 17 of the *Criminal Code* and in the Law Reform Commission recommendation is unreasonable and unnecessary. At most, the immediacy of the threat is only one of the factors which need to be assessed in determining whether the accused's response was reasonable.

4. The presence of the threatening person

Carker illustrates the unfairness of the section 17 requirement that the threatening person be present at the time of the threat.

The absence in the Law Reform Commission's proposal of any reference to the source of the threat is to be welcomed; it should provide the trier of fact with some latitude in identifying the source of the threat and assessing the type of harm threatened. Most other surveyed jurisdictions take a similar view.

5. The subjective/objective test

It is not clear whether, under section 17, the accused's belief respecting the harm threatened must be reasonable.

The Task Force favours the English approach ("knows or believes"), as this is most consistent with generally-accepted principles of criminal liability. It parallels the Task Force's recommendation respecting "necessity."

With respect to the accused's response to the threat, the Task Force agrees with the "modified objective" approach recommended by the English Commission, which would assess the threat from all the circumstances, including personal characteristics that affect the gravity of the threat. The accused would benefit from the excuse if the threat was one which he or she could not reasonably be expected to resist in the circumstances.

The Task Force agrees with Stuart's view that the English standard, which takes into account some of the individual's characteristics and beliefs, "sensibly tries to balance the need to be more compassionate in a wider defence of duress against the need to bolster community values."[125]

The Task Force is concerned that the wording of the Law Reform Commission recommendation does not make clear what standard is being advocated.

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[125] *Supra*, note 2 at 406.

6. Exclusions

The Task Force believes that no offence ought to be automatically excluded from the application of the excuse of duress.

The Task Force agrees with Yeo that:

> how evil the act might be is not the primary determinant; it is whether the actor had committed the act under circumstances which makes punishing her or him unjust.[126]

To allay fears that the defence could become a "charter for terrorists", Yeo[127] points out that there are several very stringent requirements which have to be met before the defence will succeed.

First, the accused must meet the modified objective test that a person of ordinary fortitude with the accused's characteristics could also not have resisted the threat.

Second, the accused must use the minimum force necessary which, in some cases, might impose a duty on the accused to escape.

Third, the accused must not have been blameworthy in creating the need for the excuse in the first place.

Fourth, as a practical matter a jury is more likely to be circumspect in its compassion where the wrongful act was the murder of an innocent person.

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126 *Supra*, note 119 at 142.

127 *Ibid.*, at 147.