Criminal law protects society, denounces behaviour, reforms wrongdoers. These justifications of law - utilitarian (reductivist), formalist (retributive) and utilitarian (behaviourist) - are reflected in the rules relieving liability: the disutility or unjustness of punishing those who mistake law or fact or otherwise lack criminal capacity; who commit harm to avoid harm; or whose conviction is achieved at the cost of procedural fairness. Of the three categories, exculpatory defences (contextual excuses) are most difficult to reconcile, inter se and with principles of liability. 'The law must keep its promises,' according to Holmes J., but in the contextual excuses, circumstantial considerations displace accountabilty. 'Defence' is itself not a term of art but of practice and to speak of 'the defences' does nothing to resolve problems of inclusion. Proposals for reconciliation have not proven compelling.

Recodification proposals of the Canadian Law Reform Commission, the Canadian Bar Association and Justice Canada demonstrate increasing simplicity in the restatement of the general conditions of liability and relief, in pursuit of two goals: articulation (and resolution) of the common law; and public accessibility. Whether both can be accomplished is uncertain. As the Code is a hybrid which requires the common law to speak on a case-by-case basis, the professional/public divide is less antithetical than it appears. Bold and simple statement need not be resisted. Simplicity and generality enhance both accessibility and interpretation. Completeness (a third condition of accessibility) is difficult to ensure in the defences, if these remain open to common law additions.

Despite initial modification and subsequent overhaul, the Code reflects its 19th c. origins. Omissions in the General Part inspired a century of judicial ingenuity, while legislation has done little more than tinker. In addition to codifying and restating the law, the new Code must be able to accommodate future change in the normative and empirical framework of Canadian society. As the defences derive their rationale from this extralegal framework, flexibility is particularly important. Thus, for example, excusing intentional killing to defend property is problematic in a normative framework which values life over property. Should analysis shift to defence of the

person? Is a modified balance of harms test preferable? The Cartesian duality expressed in the definition of mental disorder is empirically indefensible and normatively suspect (McCraw).

Can the defences be rationalized? Are policy, approach, structure and organization of the defences in the White Paper consistent? The short answer here is no. Much work remains to be done and the basic framework should be reconsidered. While perfect consonence is unlikely in view of a disparate history and the extreme inconsistency of characterization in case law and academic literature, the defences are generally of three types: defences based on incapacity (mental disorder; intoxication; perhaps age); defences of contextual permission (duress; prevention of harm; protection of persons or property; perhaps mistake); procedural defences. Are there important omissions? Here, the short answer is a qualified yes. Should the scheme of incapacity, justification and excuse be retained? Although the distinction between justification and excuse is tenable in theory, it is incoherent in practice. Many 'justifications' are no longer seen as reflecting a greater good. The distinction lacks normative and organizational utility and should be dropped.

Reconciling the Defences: Policy, Approach, Structure, Organization

The General Part addresses 1] Conditions of Criminal Liability (thresholds of liability: intentional elements, the act requirement, jurisdiction, parties, corporations, the inchoate offences); and 2] The Defences (mistake, incapacity, contextual permission, abuse of process). A preamble to the defences, along the following lines, is recommended:

> Everyone has the right to life, liberty and security of the person and to the equal protection and due process of the law. Where interference with the rights or person of another amounting to a criminal offence is reasonably necessary in the circumstances as apprehended by the accused, the offence will be excused. A person deemed to lack capacity to consent can be touched for a demonstrably benevolent purpose. Except where altered by or inconsistent with this Act or any other Act of Parliament, every rule and principle of the common law that renders any circumstance a defence to a charge continues in force.

A preamble guides interpretation and increases accessibility by defining ambit and rationale. A preamble within the body of an Act has the force of a substantive provision and sets the

normative framework of interpretation [T.(V.)]. While conditions of liability are positive statements about the limits of law, defences are 'technicalities for getting guilty people off' or, conversely, excuses for the exercise of an exaggerated sense of rights. Thus limits to defences should be simple and explicit. Lack of explication has hampered legal reflection of profound changes in the understanding of accountability and the distribution of power. The strong normative component of the defences should be explicitly recognized.

The preamble should address the right to the integrity of the person. Where breach of law is excused by law, s.7 of the Charter protects victims as well as offenders. Defences to interference with the rights of others must balance rights and liberties of both within a context which is principled, restrained and reflective of social values. No-one should be exposed to assault or other interference by reason of status. Committing the actus reus of an offence may be excused under certain circumstances where there is apprehension based on reasonable grounds of the need for such interference. Consent excuses most offences, subject to certain policy-based limits (Jobidon; sexual acts involving children). Children and others may lack power or capacity to consent, yet require limits on autonomy and human touch for benevolent purposes. Touching may be a necessity of life, assault life-preserving. Mistake, incapacity and abuse of process are included in a broad s.7 reference. The bulk of the Preamble addresses contextual permissions.

The defences should be inclusive and principled, drafted in simple, parallel and clear language. References to justification should be removed. While the Code imposes no duty of rescue outside circumstances which impose a legal duty, it does not address non-medical situations of rescue outside this ambit. Defences should be sufficiently broad to ensure non-liability of a good-faith rescuer.

The defences of contextual permission need further simplification. It is my view that these could be summarized and restated as protection of the person (any person), protection of property (any property), and prevention of harm to self or others, in circumstances not covered by the above. The test here should essentially require a reasonable apprehension in the circumstances as understood by the accused, with a rough balancing of harms committed and avoided, within fairly generous limits. Where death results, apprehension of death would need

to form part of the apprehended circumstances. I have not attempted to reformulate the defences to accord with this degree of simplicity, but strongly recommend further attempts to do so.

The White Paper codifies necessity, duress, automatism, intoxication, due diligence, officially-induced error and entrapment, most of the common law defences judicially recognized in Canada. Normative and social change, strong arguments for retaining common law defences may also be addressed in interpretation. If drafting is fair and broad, a purposive interpretation is stressed, constitutional interpretation is available and sentencing options continue to be developed, retention of common law defences may not be needed. If retained, a positive statement should appear in the Preamble.

The statement 'except insofar as it is altered by or inconsistent with' an Act of Parliament is problematic. Courts can refer to all common law defences in force since 1892 to define the ambit of a defence, unless the Code has clearly indicated displacement of the common law [Kowbel; Jobidon]. Common law duress was revived to avoid a limited statutory formulation [Paquette]. The common law rule requiring corroboration of children's evidence was retained despite legislative abolition [Bill C-15, Kendall]. Retention of common law defences is problematic where old vessels might be judicially sought for the retention of old values. Must abolition make direct reference to the common law?

I. Incapacity

Defences of incapacity should appear together. Capacity is both threshold issue and defence. Since Swain, mental disorder functions as a defence (but note Chaulk split: denial of mens rea, or capacity?), whereas age now functions as an immunity. In terms of the taxonomy of the defences, age, mental disorder and intoxication should appear togethr.

[13] Child under 12

The shifting scheme of presumptions of capacity based on Roman law is now no longer followed in the case of children. Juvenile offenders have been offered some form of procedural protection since the mid-19th c. Upper Canada Young Offender Act. Return to rebuttable presumption is unlikely in view of the requirements of The Convention on the Rights of the

Child. As a defence of incapacity, age may belong here. Reference might also be made to The Young Offenders Act. (Other status-based immunities (fitness to stand trial; diplomatic, judicial, prosecutorial and testimonial immunities) are defined elsewhere.)

[16] Mental Disorder; Automatism

Mental disorder is both denial of mens rea (Dickson SCJ in Chaulk) and denial of capacity (Chaulk dissent). It now clearly functions as a defence [Swain] and should be included here.

Pre-menstrual syndrome is a limited common-law defence in some jurisdictions but it is unclear whether it functions as volitional impairment which negates voluntariness (recurrence is problematic, Rabey) or mental disorder. Rarity of criminal outcome, treatability and rootedness in an ordinary physical event which over half of humanity has experienced, suggests it should not be codified but remain confined to sentencing (as in the UK). The question underscores the relative incoherence of these definitions.

The Canadian Bar Association recommends that provocation by insult be a partial defence to any offence (punishable like attempt). If retained as a partial defence to murder, it should be placed with the homicide provisions. Is it covered by duress of circumstances? Based on earlier ideas of defence of honour (cf. duelling; the guardsman's defence; murder of an unfaithful partner or her lover), the defence seems archaic and highly gendered. Its narrow test (hot passion; reasonable person) excludes the victim of prolonged abuse who reacts to an insult whose import is imperceptible to anyone else. Where an insult implies physical threat, the analysis should take place under self-defence as defined in Lavallee. Where the issue is volitional impairment, the analysis should take place under mental disorder, as in Bobbit and Rabey. In cases in which women's violence toward women has paralleled men's violence toward men (weapons, insult, sexual jealousy), the defence of provocation does not appear to arise. This suggests that not just the defence, but also its application, is gendered. It should be abolished.

[35] Self-induced intoxication

As a form of incapacity requiring judicial determination, the provision should be grouped with mental disorder. Its social stigma is reflected in its limited ambit.

II. Ignorance or Mistake

[34]. Ignorance and mistake of law

----> Mistake of fact

A general provision for mistake of fact based on Pappajohn should be codified in the interests of clarity and completeness (and in place of the White Paper negligence test). Although it is essentially a denial of mens rea (as is mental disorder, above), like mental disorder, it functions as a defence. Case law suggests a variety of views on whether mistaken facts must exculpate of all wrongdoing or be transferable within the same class of offences and is unresolved. The Laskin position in Kundeus is preferred. A related common law defence is legal impossibility: where the act attempted is not prohibited by law although the defendant has a mistaken belief that it is, it should not be caught by the provision for impossibility in attempt. Mistake has particular application to defences requiring modified objective standard.

----> Abandonment

This is a possible common law defence not recognized in Canada. Clear intent to abandon, evidenced in an act which demonstrates a positive attempt to change the course of events (calling police, warning the victim), should be a defence to attempt and party liability. If the enterprise is clearly abandoned, attempt has not moved sufficiently close to completion; an accessory has made a timely and effective withdrawal. Codification may be a positive and encouraging statement of early withdrawal. Like mistake of fact and officially induced error, it addresses mens rea rather than the contextual circumstances of the offence.

III. Contextual Defences

[26] Excessive Force

Excessive force attracts liability and limits claims of defence. It is an important statement of limits of defence claims. If addressed in the Preamble, restatement is redundant.

[36] Duress by threats; circumstances

The limited common law defence of obedience to military orders should be amply covered by these provisions. Duress of circumstance overlaps the following defences.

[27] Use of Force to Prevent Commission of Offence

The problem is conflation with other defences: duress of circumstance, defence of person in authority, defence of person or property. It may be useful as a general provision which underlies explicit defences and in circumstances involving the defence or protection of third parties (a 'good Samaritan' defence). If retained, it should be redefined and retitled to focus on prevention of serious harm to the person or property of another, reflect a general condition particulized in ensuing defences, and be based on reasonable grounds. The word 'offence' should be omitted: those who lack criminal capacity (children; the mentally disordered) cannot commit an offence, yet this defence may be useful in exculpating those who use some form of force against them to prevent serious harm.

[25] Protection of Persons Administering and Enforcing the Law

The defence gives private citizens 'authorized or justified by law' authority to use 'as much force as is necessary' to do whatever is so authorized or justified [Eccles v. Bourque]. The section lacks specificity and could revive defences which no longer speak to present standards for protecting individuals from each other or empowering people to protect one another. Other other defences speak adequately to such situations. The section should be directed solely at peace officers trained and subject to high professional standards, the limits on use of force brought into congruence with current standards of policing and community norms and the terminology of justification removed. Other defences in the Code referring to specific exercise of police powers should be included here.

[37] Defence of the person

The defence as drafted in the White Paper needs to be reconsidered in terms of the limits placed on apprehension of and response to harm.

[38] Defence of property

As noted above, where a killing occurs in the defence of property, it is preferable that analysis shift to self-defence as defined in Lavallee.

(43) (44)

Sections 43 and 44 (below) are anomalies. They assign juridical power over persons defined by status to another defined by status, without defining circumstantial limits and without procedural protection, in any other context a central condition of liability and punishment. They carry a presumption in favour of authority which hampers judicial assessment of disciplinary circumstances and degree of force. Arguments for retention are based on administrative convenience, now discounted as a rationale for lowering standards [Sault St. Marie; Motor Vehicles Reference Case]. These powers should not be reflected in a Code designed for the next century. Wife-beating, a related common-law defence, was grounded on similar juridical powers of heads of households, and was recognized in some jurisdictions well into this century. The defence was not incorporated into the 1892 Code. The defence of custodial authority, if it existed at common law, seems to have been rejected in Canada [Ogg-Moss; Nixon] and should not be codified. Other defences make ample provision for custodial circumstance.

[43] Correction of child by force

No group identified by an immutable charactistic - gender, ethnicity, capacity, age - should be singled out as the object of legal assault. This defence is a historical anachronism. Its original protective purpose (curtailment under Roman law of the life-death juridical powers of the pater familias) is exceeded by its licensing effect on caretaker violence. It is strongly implicated in child abuse and murder. Unlike other defences to assault, correction imposes no circumstantial limits. Using corporal punishment to instil obedience or reinforce learning is discredited. Other defences can be claimed where there is a legitimate need to control any person, whether the need for control derives from volition or volitional incapacity. The defence should be abolished.

[44] Master of ship maintaining discipline

Section 44 differs from s.43 in that being aboard ship is now a choice (occupationally or as a form of travel) and not an immutable status. Like s.43, the defence is an anachronism, derived from naval law developed when voyages of months or years rather than days or weeks was the norm, crew were pressed into service and ship-to-shore communication was unavailable. It gave a ship's captain authority to try offenders and pass sentence of imprisonment, whipping

or death. Other defences more suited to individualized circumstances are available. The defence should be abolished.

IV. Abuse of Process

Broadly derived from the power of the court to control its own process (protection of a vulnerable witness; exclusion of an obstreperous defendant; contempt; and to a lesser extent the pretrial process, abuse of process has an open-ended utility. Procedural fairness is protected by the Charter and abuse of process has been extensively developed in common law. Procedural defences differ from exculpatory defences in that conviction is barred on grounds of defects or abuses in processing cases rather than on exonerating circumstances associated with the accused. Abuse of process is a virtual defence, in that stay amounts to acquittal. A simple and principled statement should appear here; alternatively, it could be left to the Preamble. If restated here, entrapment and de minimis non curat lex would constitute part and example of abuse of process.

[39] **Entrapment**

---> Offence beneath the notice of law [de minimis]

Related to abuse of process, the doctrine is a useful guide to prosecutorial discretion. It has been judicially applied in cases in which there is no real abuse of process but a court of first instance disagrees with prosecutorial assessment of criminality [contra K.(M.)]. It is used in causation (ordinary hazards of life) but seems to fallen into desuetude elsewhere. De minimis accords with social norms and the principle that criminal law must be a last resort. Failing to return library books, trying out grapes at the supermarket, possessing a pipe with traces of an illegal substance measurable only by highly sophisticated technology and trifling assaults (the least unconsented touching of the person) may be beneath the attention of the criminal law. De minimis disposed of such cases earlier in the century but similar cases have since been successfully prosecuted. Revival may be problematic for 'zero tolerance' domestic violence policies set in response to systemic prosecutorial failures in domestic assaults; conversely, wise use of de minimis may restore credibility to such policies.

De minimis cushions the unintended effects of law reform. In changes of legislative or ministerial regime, overcharging is a problem (seizure of gay/lesbian materials after Butler; higher charge rates under The Young Offenders Act; increased charging of women under the Manitoba domestic violence policy). Although codification may increase litigation, this may be compensated by quick disposal of extremely minor cases.

Justification and Excuse

Given the heterogeneity of the origins and circumstances of the defences, it is not surprising that taxonomy debates retain their fascination and the defences continue to elude rationalization both inter se and within the context of criminal liability. Law and morality, a union rejected by criminal law for the vast majority of offences, come together in the calculation of the defences, permitting overarching moral concerns to cancel liability in recognition of some competing social good. To declare that a greater good is achieved by breaking the law than in keeping it (justification); or that an actor should be forgiven on grounds of humanity and moral compassion (excuse; incapacity), is to give extralegal considerations greater weight than the rule of law. In either case, one who commits a forbidden act with a blameworthy state of mind is exonerated. The majority of academic commentators (and the Supreme Court of Canada, Perka) view the distinction between these levels of exculpation as of fundamental importance.

Justification speaks to the act; excuse to the actor. Justification negates liability on grounds that the actor was right in choosing to act as she did and chose the lesser of two evils; excuse recognizes normative incapacity or normative involuntariness, innate or contextual, to choose otherwise. The dichotomy is widely defended on moral theory. Justification recognizes notional equality and individual choice: the justified actor has made an appropriate moral choice. The excused actor has not acted by choice but by force of circumstance, and is thus a lesser, not equal, actor. To conflate the two is to deny autonomy. Excuses do not always negative liability (provocation, intoxication; but necessity) and most are relevant only in sentencing (poverty,

stress, impulse, childhood deprivation and abuse, PMS). Extreme proponents of the distinction argue that excuse should be dealt with in sentencing, as only justification negatives liability.

Arguments for retaining and forefronting the justification/ excuse distinction are premised on the importance of judicial approbation of illegal conduct in highly limited and unusual circumstances: the need to distinguish real heroism from the compassionate recognition of human weakness. Conversely, if excuse can negative liability, then simple compassion can overrule clear declaration of law. Only justification carries the requisite moral valence to upset a legal finding. The distinction also finds support on grounds of tidyness, the promise held out by a simple dichotomy for a clear exculpatory scheme. But even in the best analyses, justification and excuse overflow into one another.

Does the dichotomy lead to clarity? Is there a tenable distinction? Do other classificatory schemes better suit a codification of the defences? The dichotomy has received strong criticism on grounds of distortion of case law; limitation placed on defences as presently framed; incoherence (as the competing taxonomies of Dickson and Wilson SCJ in Perka suggest, the division is not as clear as it seems); and the fundamental change required to morally educate through acquittal. The current scheme, which provides for limited liability, complete exculpation and stay of proceedings, is sufficiently complex and suggestive. A classification scheme based on justification and excuse poses more practical and theoretical problems than it solves.

'Justifications' like self-defence and 'excuses' like duress are both framed in reference to reasonable conduct. This represents, as Colvin points out, a 'minimalist rather than perfectionist standard' [Colvin (1992)]. The standard denies the higher morality of justification, and renders the distinction meaningless. A 'reasonable conduct' standard excludes from liability culturally-entrenched situational conduct in reference to 'generally accepted standards of contextual morality' [Colvin (1992)].

A multicultural society is premised on normative freedom supported by shared ideas of harms. Active public debate over case disposition, and the threat of vendetta in highly emotive situations, suggests that where an accused who has injured someone is acquitted on the basis of a contextual defence, it is better to stress norms of compassion, context and impairment over the

'higher morality' of justification. On a practical level, it is unlikely that the public is interested in such esoteric distinctions or that criminal dispositions are a vehicle capable of such education. Much more useful are clearly developed statements about the circumstances which relieve an accused from liability. Given debates over the exercise of police assault powers, citizens shooting people for property violation or corporal punishment of children, justification seems a shaky basis of exculpation. Conversely, committing offences with a gun at one's head or under threat to a loved one would seem justified to most people, yet duress is an excuse.

Justification in the common law tradition requires that conduct must be reasonable, based on a lesser of two evils calculation; while excuse permits honest unreasonable mistake. Both standards are problematic. A model of 'contextual permission' places an equal significance or moral valence on all exculpatory defences:

> The basic model of [contextual] permissions does not impose any particular standard of proportionality. It requires only that the harms be in such a balance that committing the actus reus is a reasonable course of action under the circumstances. [Colvin at 399]

The distinction between justification and excuse is of limited normative utility. Further, it ignores the unifying aspect of exculpation: a reasonable circumstantial balance of harms. To characterize excuses, justifications, incapacities and procedural defects as defences reflects common usage, promotes accessibility and is not fatal to continuity of interpretation along these lines.

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