PROPOSALS TO AMEND THE CRIMINAL CODE (GENERAL PRINCIPLES)

DEFENCE OF THE PERSON--SECTION 37

1. Introduction:

I have been asked to assess the proposed new provisions in respect of defence of the person. In order to facilitate the discussion, it is appropriate to set out the new provisions and the current provisions.

The proposed section 37 would read as follows:

> **37.** (1) A person is not guilty of an offence to the extent that the person acts in self-defence or in defence of another person.
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> (2) A person acts in self-defence or in defence of another person if, in the circumstances as the person believes them to be,
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> (a) the person's acts are necessary for the defence of that person or the other person, as the case may be, against force or threatened force;
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> (b) the force is or would be unlawful; and
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> (c) the person's acts are reasonable and are proportionate to the harm that the person seeks to avoid.

The proposed section 37 would replace the current sections 34-37 of the Criminal Code which read as follows:

> **34.** (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.
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> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
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> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the

assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

35. (1) Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(a) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(b) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(c) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

As can be seen, section 34 deals with unprovoked assaults but distinguishes between situations where the person defending herself did not intend death or grievous bodily harm and situations where such harm was inflicted. Section 35 then deals with defence

against provoked assaults in accordance with the section 36 definition of provocation. Section 37 overlaps with the other provisions where the person is defending herself but also extends the defence to the defence of other persons.

2. The Policy Underlying the Provisions:

It is difficult to precisely discern the policy behind certain aspects of the proposed section 37. However, one policy concern is obvious: to reduce the undue complexity of the current provisions. There can be no doubt of this since the goal of simplicity is mentioned in both the Section by Section Commentary[1] and the Report of the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General.[2] For example, the present section 34(2), on its face, could apply whether or not the infliction of death or grievous bodily harm was intended; happily, case law[3] has largely[4] confined it to such harm of an intentional nature, on the sound reasoning that someone inflicting such harm unintentionally would

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[1] Section by Section Commentary, at 9.

[2] Canada, Report of the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General, First Principles: Recodifying the General Part of the Criminal Code of Canada (Ottawa: Queen's Printer, February, 1993) at 71. [Hereinafter "the Sub-Committee Report"]

[3] See, for example: R. v. Baxter (1975), 33 C.R.N.S. 22, at 37-38. (Ont. C.A.) This approach has been followed in several other cases. See the cases cited in Colvin, Principles of Criminal Law (2nd. ed., 1991), at 214 and Stuart, Canadian Criminal Law (2nd. ed., 1987), at 409.

[4] Though not exclusively if one places any stock in an obiter dictum by Dickson J. in R. v. Faid, [1983] 1 S.C.R. 265, at 273-74. Fortunately, his suggestion of yet another interpretation of s. 34(2) has not been adopted by any other court and seems to have been implicitly repudiated by the Supreme Court in R. v. Bayard (1989), 92 N.R. 376, reversing (1988), 29 B.C.L.R. 366 (B.C.C.A.).

be unlikely to meet the reasonable apprehension and reasonable belief requirements.

In a similar vein, there is, at present, considerable complexity in situations where the evidence is unclear as to whether the accused had provoked the initial assault or not, for different considerations apply as between sections 34 and 35. A good example of the resulting complexity in a charge to a jury is R. v. Bayard.[5]

Related to complexity are several contradictory features of the present provisions. For example, sections 34(1) and 37 contain proportionality requirements--that is, the defensive force may not exceed that which is necessary in the circumstances. On the other hand, sections 34(2) and 35 do not contain explicit proportionality requirements but are framed in terms of the defender's state of mind fettered by reasonableness standards. Given that frequently the sections may all be under consideration in a given case, the contradictions add to the undue complexity.

Other policy considerations behind the formulation of the new provisions include the avoidance of justification/excuse terminology, the extension of the defence to the defence of other persons in all circumstances, the deletion of the distinction bewteen provoked and unprovoked self-defence, and the rejection of a "halfway house" defence whereby excessive force in self-defence would not completely disentitle a defence to murder but would result instead in a conviction for manslaughter.[6]

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[5] Ibid. See the British Columbia Court of Appeal decision for an illustration of the complexity of the charge to the jury.

[6] This approach was rejected by the Supreme Court of Canada in R. v. Gee (1982), 29 C.R.(3d) 347 (S.C.C.); R. v. Brisson (1982), 29 C.R.(3d) 289 (S.C.C.); and R. v. Faid (1983), 33 C.R.(3d) 1 (S.C.C.). England has also rejected this partial defence: R. v. Palmer, [1971] A.C. 814 (P.C.) and R. v. McInnes, [1971] 3 All E.R.

Those other potential policy concerns will not be raised at this point in the paper but will be discussed when I consider the implications of the proposals. It must be said, however, that the broader policy aims of simplification and consistency are laudable in themselves. What is more debatable is whether these provisions have other, perhaps unintended, effects, a topic to which I shall turn below.

3. Do the Provisions Convey the Policy Effectively?

In light of the fact that discerning the policy underlying the provisions is itself a matter of some conjecture, it is equally conjectural to evaluate whether the policy is effectively conveyed in the provisions. Nevertheless, on the footing that simplicity and consistency were the predominant aims, I would agree that the provisions meet those aims. The overall length of the defence of the person provisions would be reduced to approximately one-third of their present length; the same conditions apply to all situations involving defence of the person; and, perhaps more important, the provisions are in terms that can be readily understood by most people, even if the application of those terms may prove somewhat more difficult.

Having said that, however, a caution is in order: simplicity and consistency are very desirable goals, but they should not be

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295 (C.A.). Australia, on the other hand, until recently accepted the defence (R. v. Howe (1958), 100 C.L.R. 448 (Aust. H.C.) and R. v. Viro (1978), 18 A.L.R. 257 (Aust. H.C.)), but recently in Zecevic v. D.P.P. (1987), 71 A.L.R. 641 (Aust. H.C.) reversed course and adopted the Canadian position. The Sub-Committee received a recommendation to implement the halfway house defence from the Canadian Bar Association: Report of the Canadian Bar Association Criminal Recodification Task Force, Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code of Canada (1992), Appendix "Code-6" to the Sub-Committee Report, supra, note 2. [Hereinafter referred to as "the CBA Task Force Report"].

achieved at the expense of justice and fairness, nor should we be deceived by **apparent** simplicity and consistency. If too much is left to judicial interpretation or too little guidance is given to judges and juries, not only may simplicity and consistency be lost, but justice and fairness may suffer as well. Whether those concerns are valid will be discussed in the next section.

4. Implications of the Provisions:

Some of the implications of the provisions have already been mentioned, namely, the standardizing and simplifying of the law concerning defence of the person. However, there are several more specific changes to the law which warrant discussion. For the sake of convenience, where I consider that amendments of the proposal are in order, I will so indicate in this section.

(a) The Avoidance of Justification/Excuse Terminology:

By adopting the terminology that a person is "not guilty of an offence to the extent that" she has acted in self-defence or defence of the person, the proposals would rid Canadian criminal law of the oft-criticized distinction between justifications and excuses. However, this would only be done in a partial way unless there are accompanying amendments to some other sections of the Criminal Code such as sections 25, 27, 30, 31, 32, 43, and 44. Therefore, if the justification/excuse dichotomy is to be abandoned, it should be done completely; otherwise, there may well be some conceptual confusion about the nature of and relationship between particular defences.

I understand that Professor McGillivray will be addressing this aspect of the proposals in more detail. I shall not, therefore, devote much attention to it in this paper. Nevertheless, I support the abandonment of the justification/excuse terminology, primarily on the ground that it is not a meaningful

distinction in practical terms for the criminal law to maintain. In this respect, I endorse the criticisms that are frequently made of the distinction,[7] even while acknowledging that there is a rich body of opinion in the other direction.[8] I would only add that the adoption in the proposed section 37 of a subjective test for mistaken beliefs in the surrounding circumstances ("... in the circumstances as the person believes them to be ...") lends further support for the avoidance of justification terminology. This is because, while defence of the person has traditionally been viewed as a justification, a subjective approach to the circumstances is somewhat contradictory of the justificatory rationale that justified conduct is not wrongful conduct. Where an accused is exonerated on the basis of an unreasonable mistake about the circumstances and hence the need for defensive force, there is a strong argument that this is incompatible with the justificatory nature of the defence, even though, in my opinion, a subjective approach is preferable.

(b) "To the Extent That ...":

There is a problem with the wording of the new proposals that is, however, fairly easily remedied. The phrase, "to the extent that", frankly makes me uneasy. I am not certain of its origin nor why this particular terminology was chosen. My concern is that it is suggestive of self-defence and defence of the person being partial defences only. In the context of, for example, murder, might the provision not be interpreted as only serving to reduce murder to manslaughter? That is surely not the intention nor, perhaps, is the judiciary likely to interpret it in that fashion because of the longstanding acceptance of self-defence as a

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[7] See, for example, Colvin, supra note 3, at 208-11.

[8] Particularly in the person of George Fletcher. See for example, Fletcher, Rethinking Criminal Law (1978), Chapter Ten, "The Theory of Justification and Excuse".

completely exonerating defence. Nonetheless, some risk of that remains. A bigger risk might be that a jury instructed in the words of the section might accord it that interpretation. If the aim of the provisions is to simplify, why not choose simpler wording? The phrase "to the extent that" could easily be changed to "**if**" to ensure that defence of the person is a complete defence when not disproved by the Crown.

(c) Defence of Other Persons:

The new section 37 would permit the use of defensive force to protect persons other than the accused in all defensive force situations. This is in contrast to the situation now where such protection is provided only in the present section 37. The change is a positive development since such situations can frequently arise.

Moreover, the change in terminology from the present section 37, which only permits defensive force in relation to someone under the protection of the accused, to the simpler "in defence of another person" is also a positive move. The phrase "under his protection" is undefined, although it presumably is restricted to those persons to whom the accused owes a general duty of care--children, spouse, etc.[9] The new wording would provide much greater flexibility to cover circumstances where there is not necessarily a relationship of care between the accused and the person defended but where it is understandable that defensive force is justified.

In addition, a happy by-product of the proposals would be to remove the overlap between the present sections 34 and 37 in

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[9] This is the interpretation given it by Colvin, supra, note 3, at 217. This interpretation is reflective of the position at common law in England.

relation to self-defence. There would still be some overlap, however, with section 27 which permits the use of force to prevent the commission of serious offences. As mentioned previously, some consideration should be given to whether or not the wording of section 27 should also be amended to remove the justificatory terminology. Nevertheless, while there can potentially be overlap between section 27 and the defence of the person provisions in a given case, section 27 remains necessary because there are situations where it is just to permit force to prevent an offence even though neither defence of the person nor defence of property is engaged.

(d) The Subjective Approach to Circumstances ("... in the circumstances as the person believes them to be ...") and the Necessity, Reasonableness, and Proportionality Requirements:

The change to assess the circumstances through the eyes of the accused is a change to the existing law, although not so great as might first appear. It would move Canadian criminal law into line with English law in judging mistaken beliefs about defensive force on a subjective basis.[10] In the sense that it would accord more respect to background experiences that have a bearing on the perceptions of the person confronting apprehended or real threats of force, it would be a welcome change. It would, for example, give greater credence to the claim of a woman who had suffered repeated abuse from her partner that she, on the given occasion, saw the need to resort to defensive force, as occurred in the seminal Canadian case, R. v. Lavallee.[11] Self-defence and defence of the person situations involve circumstances where detached reflection about the need for force and options for escape are

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[10] R. v. Williams (1984), 78 Cr. App. R. 276 (C.A.); Beckford v. R., [1987] 3 All E.R. 425 (P.C.).

[11] R. v. Lavallee (1990), 76 C.R.(3d) 329 (S.C.C.).

lacking or severely limited. In addition, importing notions of reasonableness into such inquiries runs the grave risk of perpetuating stereotypes about the need for defensive force. Stereotypy has been, at least prior to Lavallee, a major barrier to vulnerable people, especially women in battery situations, from availing themselves of an opportunity to resort to defensive force at a time when the abuser is in some way incapacitated from or not actually engaged in applying force at the given moment. Therefore, a subjective approach on this question is more likely to be a just approach. Given, however, that Lavallee has already moved in the direction of contextualizing the objective portion of the tests set out in the present self-defence provisions, the recommended change to a wholly subjective approach to determining the circumstances is not an earthshaking development. Rather, it would move the law only slightly more in the direction of judging a defence of the person situation through the eyes of the actual accused.

The change also provides welcome clarification that mistakes are permissible both about the need to resort to defensive force and about the amount of force required.[12]

However, the proposed change is not without potential problems. The English position has been to exclude self-induced intoxication from consideration in evaluating the accused's belief in the circumstances.[13] This is, of course, incompatible with a

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[12] The present s. 34(2) is framed in terms of reasonable apprehension and belief, therefore allows room for reasonable mistakes about the amount of force. S. 34(1), in contrast, does not on its face provide room for mistaken beliefs of any kind. Both provisions, however, have been interpreted so as to permit reasonable mistakes about the need to resort to force in the first place: Baxter, supra, note 3. In addition, the generous allowance given to necessary force in s. 34(1) permits some scope for mistakes about the amount of force required where death or grievous bodily harm is not intended.

[13] R. v. O'Grady, [1987] 3 All E.R. 420 (C.A.); R. v. O'Connor, [1991] Crim. L.R. 135 (C.A.).

subjective approach to evaluating the circumstances, although it is consistent with the approach taken to the defence of intoxication in relation to mens rea.[14] The present proposals suffer from the defect of not indicating whether the English position will prevail as a limitation on the subjective approach or whether a completely subjective approach is intended.

Some clarification should be given because there is undue complexity in, for example, a murder case to permit intoxication to be considered by the trier of fact on the issue of mens rea, but not when evaluating whether the use of defensive force is exculpatory. Since defence of the person is frequently invoked in murder cases, avoiding this complexity seems sensible.[15] Moreover, to do so is consistent with the aim of the proposals to evaluate circumstances through the eyes of the accused.

To propose that intoxication be taken into account in determining the circumstances is not a licence for drunks to defend themselves. The person who is very drunk will effectively be deprived of advancing a defence based on a very unreasonable view of the circumstances simply because she will, by definition, have been too intoxicated to form a credible belief in the circumstances. On the other hand, for the accused only mildly impaired by alcohol or drugs, it is far simpler to assess the

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[14] If the law relating to intoxication were applied to this part of the provision, a mistake induced by self-induced intoxication would avail in the case of a specific intent offence but not for a general intent offence. This approach was rejected by the English Court of Appeal in O'Grady, ibid, at 423.

[15] It must be conceded that to do as I suggest will inject complexity where the offence is a general intent offence such as assault because the intoxication will be irrelevant in evaluating mens rea but would be relevant to the use of defensive force. The fault lies, however, with the much-criticized distinction between specific and general intent. Although it is not within my present mandate to address the intoxication rules, I note with regret that the proposed s. 35 would perpetuate the distinction.

circumstances from her point of view including the intoxication, rather than attempting to filter out the effect that the intoxication might have had on her perceptions and beliefs.

This feature of the proposals cannot be considered in isolation from the subsequent conditions that are enumerated for the defence to operate, namely, the requirements of the necessity to use defensive force and the reasonableness and proportionality of the force that is resorted to. What is given with the one hand in proposing a subjective approach is arguably taken away with the other by these requirements, particularly in the situations that are presently covered by section 34(2).

Under the present Criminal Code provisions, a requirement that the defensive force be proportional to the threat to the accused is contained in sections 34(1) and 37 but not in sections 34(2) and 35 which are framed in terms of the perceptions of the accused bounded by considerations of reasonableness--i.e. a combination of objective and subjective standards.

The new provisions, however, would make proportionality a condition for all defensive force situations. The danger of a proportionality requirement, even if it is weighed generously in favour of the accused as present case law suggests,[16] is that it can be a more stringent requirement because it is purely objective. Indeed, it was a point of appeal in R. v. Bogue[17] that a proportionality requirement was wrongly injected by the trial judge into jury directions on section 34(2); it was felt that to do so was to prejudice the defence. The same consideration may apply with the new provisions unless it is made certain that the

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[16] See, for example, R. v. Cadwallader, [1966] 1 C.C.C. 380, at 387 (Sask. Q.B.); R. v. Bogue (1976), 30 C.C.C.(2d) 403, at 407-08 (Ont. C.A.); Baxter, supra note 3, at 38-39.

[17] Ibid.

subjective belief in the circumstances also applies to the belief in the amount of force required in the circumstances. There is the uncertainty in the proposals, however, that arises because one cannot know in advance whether the combination of a subjective approach to circumstances and a wholly objective proportionality test will be an improvement over the current law or a regression.

The juxtaposition of reasonableness in section 37(2)(c) with the proportionality requirement does not solve this problem, because it is a conjunctive requirement. Indeed, it adds unnecessary stringency to the defence overall. My ultimate fear in this regard is best illustrated on the facts of Lavallee.

Lavallee killed her abuser at a time when he was not actively engaged in assaulting her, although he had made a threat to kill her. He was actually leaving the room when she shot and killed him. On applying the new proposals to these facts, in the first instance she would be better placed to receive the benefit of the defence because of her wholly subjective belief that she was in peril that required deadly force in response. However, in applying the reasonableness and proportionality requirements, a trier of fact might be tempted to decide that she ought to have resorted to means short of death because (a) he was not actively assaulting her or advancing towards her and (b) he had on prior occasions threatened and harmed her obviously without killing her, hence, the present threat should be evaluated in a similar way--i.e. as not life-threatening.

The effect of Lavallee was to move the combined objective and subjective standards in section 34(2) closer to a subjective approach by contextualizing the objective portion. The new provisions separate the objective and subjective inquiries and thereby could lead to the rejection of the defence for someone in the position of Lavallee. Since Lavallee was a major breakthrough, both in providing greater sensitivity to the plight of battered

women and in contextualizing objective standards, it would be a pity for it to be inadvertently undone through legislative change.

I concede that the new section 37 should be interpreted as calling for combinations of objective and subjective tests for proportionality, necessity and reasonableness and that therefore my concern is misplaced. In response, however, I would submit that it is easier to contextualize an objective standard when it is directly and obviously combined with a subjective test, as in the reasonable apprehension test set out in section 34(2), than it is to contextualize a purely objective standard or to look at the questions separately as I fear might occur with the new provisions.

This is particularly so after the Supreme Court decision in R. v. Creighton,[18] which has established a uniform objective standard, at least insofar as culpability requirements are concerned. The implications of Creighton for objective standards in relation to defences external to the elements of offences are, of course, not yet clear. But it is ominous, in my opinion, for the Lavallee type of situation under the current section 34(2) because it will be the rare case where the woman in question lacked the capacity to exercise the uniform reasonable care standard that is now required. It was not clear from the majority judgment in Creighton whether the objective standard would continue to be evaluated in light of the accused's perception of the circumstances.[19] This may have been resolved insofar as section 34(2) is concerned by the more

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[18] R. v. Creighton (1993), 23 C.R.(4th) 189 (S.C.C.).

[19] Indeed, a passage in Creighton, Ibid., at 217, suggests that the evaluation of the circumstances must be reasonable. This causes me a great deal of concern that contextualizing the reasonable person standard has ended, notwithstanding reassuring views to the contrary from Isabel Grant and Christine Boyle, "Equality, Harm and Vulnerability: Homicide and Sexual Assault Post-Creighton" (1993), 23 C.R.(4th) 252, especially at 253.

recent decision in R. v. Petel.[20] However, if Creighton has the dire effects I fear for objective tests other than in the present section 34(2), the wholly subjective approach to circumstances set out in the new section 37 may be a necessary reform.

Whether or not my fear actualizes, it would be desirable to ensure that the scales are not tipped the other way--that is, towards a too objective approach--by the separate focus on reasonableness and proportionality. In addition to that possible effect of section 37(2)(c) is the inclusion of a separate requirement of necessity in section 37(2)(a). The proposals would create three separate conditions for the use of defensive force: necessity, reasonableness, and proportionality. The proportionality requirements in the present sections 34(1) and 37 are in fact framed in terms of necessity (although it must be conceded that the present section 37(2) stipulates an additional proportionality requirement that may be redundant). In the new proposals, at the least, the redundancy between subsections (a) and (c) should be eliminated. In this case, the redundancy reinforces the proportionality standard in a way that threatens to overwhelm the subjective approach to circumstances and Lavallee. Surely it is overkill to have three separate requirements.

One way to minimize the problem would be to eliminate the reference to proportionality entirely. One mention of necessity is quite enough. Indeed, it would be preferable to change section 37(2)(a) to read: **the person's acts are reasonably necessary for the defence of the person** ... Subsection (c) could then be deleted. This would bring the provision quite close to that

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[20] R. v. Petel (1994), 26 C.R.(4th) (S.C.C.). The Court affirmed the approach taken in Lavallee but without mentioning Creighton or discussing whether the objective approach to culpability will be treated differently from objective portions of justifications and excuses.

advocated by the CBA Task Force Report.[21]

(e) Removal of the Distinction Between Provoked and Unprovoked Self-Defence:

A major change from the present law would be to remove the distinction between unprovoked and provoked self-defence. There is merit in two respects in removing this distinction. First of all, the present provisions are rather complex in this respect and when one considers that many situations raise the question of whether the accused was provoked or not, both types of self-defence have to be considered by the trier of fact. In the case of jury trials, this can be quite confusing for the jury.

Second, there is a policy issue involved in saying that a person who has "provoked" another to use force against her must face more stringent self-defence requirements if the provocation was not itself an illegal act. The present section 35 requires someone who provokes someone else to accept a minor assault in return. It can be questioned whether it is a fair policy to expect someone to tolerate force without retaliation in circumstances where she may have said something or gestured in a way that was insulting but was not a crime.

For these reasons, to remove the distinction between provoked and unprovoked defence of the person is a positive reform.

(f) "The Force is or Would be Unlawful":

This condition for the use of defensive force must be considered in conjunction with the removal of the distinction between provoked and unprovoked defence of the person. It may have been intended as a tit-for-tat for that modification. However, it

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[21] Supra, note 2, Appendix "Code-6", at 5A:77 and 186.

suffers from not having been clearly thought out. For example, it may rule out defensive force entirely where the accused has initiated the confrontation by assaulting the other party who is herself responding with defensive force. Now, the other party is behaving lawfully, with the result that the accused would be denied a right to use defensive force (unless, of course, she believes it is lawful to do so in the circumstances).

I cannot think that the intention in framing the proposals was to entirely rule out the defence in such circumstances. It may perhaps be answered by the concession to the accused's view of the circumstances, although I confess to unease that this will always be so--particularly if the three requirements of necessity, reasonability, and proportionality remain.

The situation is problematic, since it would require an accused to form some belief about the law. Section 34 which deals with ignorance and mistake of law would seem to rule out this sort of belief as exculpatory. Therefore, unless we are prepared to rely on the judiciary interpreting the provision in such a way as to permit defensive force in this situation, the proposal would greatly limit the defence.

Moreover, it would defeat the policy of simplification to a great extent since frequently there are situations where the evidence is conflicting about which party began the altercation. As the provision stands, a jury would have to be instructed that if the accused actually assaulted the other person first, resulting in that person defending herself, the accused would have no defence for subsequently applying force. At the same time, the jury would be instructed that if they found that the accused did not assault the other party first (that is, either the other party began the altercation or the accused only provoked the other party), the use of defensive force was permissible.

The solution, I think, is reasonably simple--delete this requirement entirely. The objection might be raised that defensive force against, for example, police officers effecting a lawful arrest would now be permitted. My response, however, is that such a person would have considerable difficulty in leaving the trier of fact in any doubt that she was acting in self-defence or defence of the person, at least where the police officer was in uniform or had announced her authority to the accused. An alternative would be to simply spell out that defensive force is not permitted in response to a lawful arrest.

(g) Excessive Force in Self-Defence:

The CBA Task Force Report[22] recommends inclusion of the half-way house defence that excessive force in self-defence, so long as it was predicated on a mistaken belief by the accused, should result in a qualified defence to a murder charge. A conviction for manslaughter would result instead. If the proposals did not include a subjective approach to the evaluation of the circumstances, I would wholeheartedly support the inclusion of this defence. The subjective approach to circumstances causes me to change my position and not make such a recommendation. This position, however, is dependent upon some changes being made to the proposals in moderating the three requirements of necessity, reasonableness, and proportionality and in moderating the requirement that the force against which the accused is responding be lawful. If such changes are not made, I would propose that the CBA Task Force Report recommendation be inserted into the provisions.

5. Suggested Modifications:

In the previous section, I proposed certain modifications to

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[22] Supra, note 2, Appendix "Code-6".

the proposals in light of problems that I believe are inherent in them. In this section, therefore, I will merely summarize those proposed modifications:

> 1. Abandon the justification/excuse terminology completely in the Criminal Code if it is to be abandoned in the proposed amendments. This would entail additional amendments to sections 25, 27, 30, 31, 32, 43, and 44;
> 2. Replace the wording "to the extent that" with "if" in section 37(1);
> 3. Clarify that evidence of the intoxication of the accused can be considered in evaluating the circumstances as the accused believes them to be;
> 4. Eliminate section 37(2)(c) entirely and modify section 37(2)(a) to read "reasonably necessary for the defence of that person or the other person ...";
> 5. Delete section 37(2)(b) entirely; alternatively, insert a new subsection (3) which rules out defence of the person against lawful arrest. (Of the two alternatives, however, I have a clear preference for the first because of the difficulties in anticipating the various situations surrounding the lawfulness of an arrest. One way of wording the exclusion to minimize such difficulties might be to parallel the wording of a similar restriction to provocation in section 232(4) so that the defence is still available to a person who knows that the arrest is illegal.)[23]
> 6. Providing that the modifications advocated in #4 and #5 (or something close to those recommendations) are implemented, I would not propose a qualified defence to

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[23] It would seem that s. 232(4) is intended to avoid the type of situation encountered in R. v. Dadson (1850), 4 Cox. C.C. 358 (Crown Cases Reserved) where a lack of knowledge by Dadson of the lawfulness of his actions was held to rule out the justified use of force.

murder of excessive force in self-defence; if, however, no changes are made with respect to those items, I would recommend such a defence in the form recommended by the CBA Task Force Report. It should, however, be added as a subsection to section 37 in order to make applicable the subjective approach to the circumstances contained in section 37(2).

In closing, I would add that adoption of my proposed modifications would be fully consistent with the presumed policy aim of simplification of the defence. My proposals would further this aim by shortening the legislation to a considerable extent and by consequently simplifying the necessary instructions to a jury.

The proposed section 37 as drafted is already a welcome improvement in some respects over the present law. Nevertheless, while I concede that some of my criticisms may border on excessive caution, I do think that some additional changes would improve the section. I welcome the opportunity to expand upon my reasons for the recommendations.

-Tim Quigley
Professor of Law, College of Law
University of Saskatchewan, Saskatoon, Saskatchewan