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Discussion Paper  
DEFENCE OF PROPERTY

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## I. INTRODUCTION

This discussion paper will address the defence of property and specifically the five sections of the Criminal Code which define its boundaries. In dealing with this defence it is the writer's opinion that it is unnecessary to be overly concerned with whether the defence is one of justification or excuse. Much has been said and written on this issue in other discussion papers, most notably, necessity and duress. The fact remains however that the defences likely came first and the labels second. If so, we should concentrate on the details of the defences and let the labels fall where they may.

One school of thought<sup>1</sup> suggests that while the justification/excuse distinction can sometimes be useful analytically, in reality the line between the two categories is unclear. This results in a classification scheme which is arbitrary, rigid and often confusing. To find further support for this proposition you need look no further than the two judgments of the Supreme Court of Canada rendered in R. v. Perka<sup>2</sup>. Chief Justice Dickson and Madam Justice Wilson wrote eloquent judgments justifying the distinction but then proceeded to virtually reverse each other's classification of the various defences.

That being said, traditionally, the defence of property has been considered one of justification, perhaps for no better reason than the Criminal Code uses the word "justified" in the relevant sections. This traditional classification is pointed out not because any significant consequence necessarily follows from it but rather, because we have already dealt with a close relative of this defence - namely, defence of the person. This latter defence has also traditionally

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<sup>1</sup> Two notable jurists in the group are Professors Don Stuart and Eric Colvin. See: Stuart, *Canadian Criminal Law* (2nd Ed) pp. 388-391, Colvin, *Principles of Criminal Law*. (2nd Ed) pp. 195-211, 208-211.

<sup>2</sup> [1984] 25 C.R. 233, 42 C.R. (3d) 113, [1984] W.W.R. 789.

been considered a "justification" defence. Whether or not they are both justifications or excuses, the point is, they are similar defences. They both outline situations in which the use of force that would otherwise be criminal becomes legalized. Furthermore, in both defences, the force is usually exerted upon someone acting unlawfully. Arguably then, our approach to both defences should reflect the basic similarity between them (and perhaps others). It will be useful therefore to consider again the questions raised in the paper dealing with defence of the person (especially since some of those issues may be missed here). More importantly, we should consider how we resolved those questions for defence of the person.

It is the writer's view that although the fine details of the two defences will necessarily be different, the broad principles should be consistent. Efficient time management would dictate that we simply answer the questions raised here in the same way we answered them when dealing with defence of the person. An alternative approach suggests that we consider the issues raised here in the context of this defence. If it turns out we have decided these questions differently from defence of the person then perhaps we should reconsider our earlier decisions.

## II. HISTORICAL PERSPECTIVE

Time constraints have effectively put a detailed historical review outside of the purview of this paper. Perhaps one is not required. In any event, it is clear the defence of property has a long history in the Common Law. One of the most oft quoted phrases on which many of our current provisions are based is the famous statement from *Semayne's Case* (1605)<sup>3</sup> that:

The house of everyone is to him as his ... castle and fortress, as well for his defence against injury and violence as for his repose.

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<sup>3</sup> (1605) 5 Co Rep. 91a, 77 E.R. 194 (K.B.)

This statement, leading to the so called rule that "a man's home is his castle" played a significant role in the development of the Common Law relating to police entry into private homes as well as the extent to which one could defend his property. The defence of property is undoubtedly part of the English tradition that placed high emphasis on property and enacted harsh penalties for property offenders. David Lanham in his article, "Defence of Property in the Criminal Law"<sup>4</sup> notes that Blackstone listed "Burglary" as a "forceable and atrocious crime" justifying the "infliction of death in [its] prevention".

Admittedly, our present law tends to regard most property offences as crimes far less serious than crimes against a person. This philosophical shift has also filtered through to the defence of property to the point that Martin J.A. in R. v. Baxter<sup>5</sup> stated that shooting at a mere trespasser could never be justified<sup>6</sup>.

Despite this shift, the Common Law tradition still pervades the interpretation of the statutory defences of person and property. In R. v. Deegan (1979)<sup>7</sup> the Alberta Court of Appeal held, that in considering whether an accused's force was reasonable in the circumstances, it was immaterial that he could have easily left his home since there was no duty on the accused to retreat to the point of giving up his "house to his adversary".

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<sup>4</sup> [1966] Crim. L.R. 368

<sup>5</sup> (1975) 27 C.C.C. (2d) 96 (Ont.C.A.)

<sup>6</sup> *Ibid*, p. 114

<sup>7</sup> (1980) 49 C.C.C. (2d) 417 (Alta. C.A.)

While not exhaustive by any stretch, these two cases highlight the central issues here: How far should the defence of property go? What property interests should be protected? What conduct should be protected from criminal responsibility?

### III. PRESENT STATUTORY PROVISIONS

The Criminal Code in sections 38 to 42 outlines the defences of personal property, dwelling-house and real property. In addition, s. 27 outlines the defence of preventing the commission of an offence to person or property. Although clearly relevant to property, section 27 is not considered as part of the defence of property and it will be left for those examining the legal use of force to prevent crime.

Sections 38 to 42 state:

#### **DEFENCE OF PERSONAL PROPERTY/Assault by trespasser.**

38. (1) Every one who is in peaceable possession of personal property, and everyone lawfully assisting him, is justified

- (a) in preventing a trespasser from taking it, or
- (b) in taking it from a trespasser who has taken it, if he does not strike or cause bodily harm to the trespasser.

(2) Where a person who is in peaceable possession of personal property lays hands on it, a trespasser who persists in attempting to keep it or take it from him or from anyone lawfully assisting him shall be deemed to commit an assault without justification or provocation. R.S., c. C-34, s.38.

#### **DEFENCE WITH CLAIM OF RIGHT/Defence without claim of right.**

39. (1) Every one who is in peaceable possession of personal property under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

(2) Every one who is in peaceable possession of personal property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it. R.S., c. C-34, s.39.

## **DEFENCE OF DWELLING**

**40.** Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, 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. R.S., c. C-34, s.40.

## **DEFENCE OF HOUSE OR REAL PROPERTY/Assault by trespasser.**

**41. (1)** Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

**(2)** A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property, or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation. R.S., c. C-34, s.41.

## **ASSERTION OF RIGHT TO HOUSE OR REAL PROPERTY/Assault in case of lawful entry/Trespasser provoking assault.**

**42. (1)** Every one is justified in peaceably entering a dwelling-house or real property by day to take possession of it if he, or a person under whose authority he acts, is lawfully entitled to possession of it.

**(2)** Where a person

**(a)** not having peaceable possession of a dwelling-house or real property under a claim of right, or

**(b)** not acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim or right,

assaults a person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be without justification or provocation.

Although not technically part of the defence of property, section 26 is also relevant to the issues to be determined. It states:

## EXCESSIVE FORCE.

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**. R.S., c. C-34, s.26.

Obviously the present defences relating to property are codified defences. However, by virtue of s. 8(3), there is theoretically room for the evolution of supplementary common-law defences of property that are not inconsistent with the Code. That latter requirement is perhaps insurmountable in light of the majority judgment in Perka where Dickson C.J.C. suggested it would be inconsistent for the judiciary to add to the scheme of "justification" defences in the Code.<sup>8</sup>

## IV. PRESENT STATE OF THE LAW

### A. Defence of Personal Property

Sections 38 and 39 of the Code provide a restrictive defence to those **defending** their peaceable possession of personal property.

Section 38(1) authorizes the possessor of personal property (and **anyone** lawfully assisting him/her) to prevent a trespasser from taking the property or to retake the property from a trespasser who has taken it. However, if the section authorizes force, it must be **minimal** since you cannot strike or cause bodily harm to the trespasser. Don Stuart suggests the section does not authorize the use of any force but rather merely authorizes the possessor to simply lay hands on the property to get it back<sup>9</sup>. This interpretation is strengthened by examining s. 38(2). This "deeming provision" is apparently supposed to provide the possessor with a defence of "self defence", and thus

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<sup>8</sup> *Perka*, *supra*, note 2, pp. 303-304 W.W.R.

<sup>9</sup> Stuart, *supra* note 1 pp. 418-419.



the right to use force, once the trespasser persists in attempting to take or keep the property. The subsection does this by deeming the persistent trespasser to have committed an assault without justification upon the possessor. This apparently would allow the possessor to use force in self-defence under s. 34. In other words, in retaking your property you cannot use force unless the trespasser persists or resists your attempts to retake your property. If that occurs you can use force provided it is no more than necessary within the meaning of s. 34.

It is submitted, Stuart takes the wording of s. 38(1) a little too far. The section authorizes some "force" in the sense that one is likely allowed to restrain or fend off the trespasser. But clearly, the right to strike the trespasser would only arise in the circumstances outlined by 38(2).

The scheme envisaged by s. 38(1) and (2) is altered somewhat by the restrictive interpretation given to s. 41(1) by Martin J.A. in Baxter<sup>10</sup>. Section 41(1) is a similar deeming provision relating to the defence of real property. Justice Martin suggested such a provision only applies where actual force has been used by the trespasser. That is, there could be no deemed assault by the trespasser where there was no assault in fact. Some suggest this strips the deeming section of its meaning. However, according to Martin J.A., the intent of subsection 41(1) is to deem that the trespasser who uses force in resisting the possessor has committed an assault and cannot later plead justification. This interpretation would seem to be equally applicable to s. 38(2).

While s. 38 is directed at situations where a "trespasser" is trying to take one's personal property, s. 39 is directed at situations where someone in peaceable possession *under a claim of right* resists the attempts of a party *entitled by law* to possession of the property. Section 39(2) provides that where your peaceable possession is not supported by a claim of right you are not

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<sup>10</sup> *Baxter*, *supra* note 5, pp. 114-115.

entitled to defend the possession against a person entitled by law to it. Although this second provision seems simple enough the fact remains -the question of whether any person is entitled by law to possession of property is a legal question that in most cases would not be clear until after the dust settled. Is s. 39(2) designed to impose absolute liability such that, if, at the end of the day, it is determined 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 a claim of right and thus entitled to the defence under s. 39(1).

As noted above, the central difference between ss. 38 and 39 is that s. 39(1) speaks of peaceable possession "under a claim or right" as apposed to s.38 which refers only to "peaceable possession". However, there are other differences in the wordings of the two sections. Section 38 speaks of the party being "justified" in resisting the trespasser. On the other hand, s. 39 indicates that one is "protected from criminal responsibility for defending that possession". There are differences too with respect to the use of force. Section 38(1) authorizes minimal force (at least initially). Section 39(1) authorizes as much force as is necessary to defend your possession.

These wording differences have led to competing views about the interrelationship of ss. 38 and 39. Professor Colvin<sup>11</sup> and the Law Reform Commission<sup>12</sup> apparently view s. 39 as protecting a stronger property claim than s. 38. For them, it is only where peaceable possession is also supported by a claim of right that one is justified in using necessary force. This is apparently their explanation for why s. 38(1) authorizes less force than s. 39(1).

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<sup>11</sup> Colvin, note 1, p. 223.

<sup>12</sup> Law Reform Commission, Working Paper no. 29, pp. 105-106.

It is submitted, this interpretation ignores the reality of s. 38(2). As indicated above, the combined effect of s. 38(1) and 38(2) is to authorize necessary force against a persistent trespasser. Why such a circuitous route was chosen is unclear but that fact should not be relied on to interpret s. 39 as protecting a stronger property claim.

It appears, the better view of the interrelationship of sections 38 and 39 is that put forth by Don Stuart. It is implicit in his analysis<sup>13</sup> that s. 38 is protecting the stronger property claim because one is defending peaceable possession as against a trespasser—someone acting unlawfully vis-a-vis the property. Under this view, the addition of the words "under a claim of right" in s. 39 is not for the purpose of providing a defence to stronger property claims. Rather, it is to indicate that the person entitled to the defence in s. 39 is the person who has *defacto illegal* possession but honestly believes, by mistake of fact or law, that he/she is entitled to possession. Seen this way, s. 39 is in fact protecting people with weaker property claims than those covered by s. 38. Further support for this might be found in the fact that s. 38 uses the word "justified" and s. 39 does not. In any event this view still leaves the question as to why s. 39 does not impose the same restrictions on the use of force as s. 38. Clearly that issue is perplexing. Colvin suggests the drafters wanted to make clear that those who are entitled to lawful possession are to use judicial remedies and not resort to self help.

There are very few reported cases dealing with the defence of personal property. As Stuart suggests, perhaps this is because in most cases the primary defence may be self-defence. That being said however, there are a number of basic issues which relate to the defence of personal property. However they will be dealt with after examining the defence of real property.

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<sup>13</sup> Stuart, note 1, pp. 418 - 419.

## B. Defence of Dwelling/Real Property

Sections 40, 41 and 42 are directed at defending "real" property (also sometimes referred to as "immovable" property). In many cases, it is unrealistic to speak of "defending property". For instance, a person relying on s. 41 need not necessarily be concerned with protecting the property *per se* but he/she will be entitled to the protection of s.41 if the other ingredients of the section are met. For example, in some cases the party relying on s. 41 might simply be trying to rid himself of an unwanted person.

The possessor may not have any concern at all about whether the unwanted person is a threat to the property or might damage the property. If he asks the unwanted party to leave and the party refuses, that party *ipso facto* becomes a trespasser and the possessor then has a right to use force to remove the trespasser.<sup>14</sup> In these situations the possessor is merely exercising a right incidental to peaceable possession. The Criminal Code protects the exercise of that right, even if done forcefully, provided the force was necessary.

Section 40 is specifically directed at protecting dwelling homes from unlawful forceable entry by others. However, it is difficult to conceive of a situation coming within s. 40 that would not also fall within s. 41. Don Stuart has summarized the object of s. 40 and 41 as follows:

There is a clear overlap between section 40 and section 41(1). Section 40 allows anyone in "peaceable possession" of a dwelling-house, assistants and agents, to use "as much force as is necessary" to prevent any unlawful and forceable breaking or entry. Section 41(1) allows anyone in "peaceable possession" of a dwelling-house or real property, assistants and agents, to use "no more force than is necessary" to

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<sup>14</sup> *R. v. Montague* (1949), 97 C.C.C. 29 (Ont. Co. Cl.), *R. v. Kirk*, [1934] O.R. 443, 62 C.C.C. 20 (Ont. C.A.) at pp. 446-7, OR.

prevent a trespass or remove a trespasser. Although this branch of the criminal law has fortunately never relied upon the intricacies of the law of property, a dwelling-house is obviously a form of real property. The Code probably distinguished a dwelling-house from real property to reflect the great common law tradition that "one's home is one's castle", respecting which one is entitled to mount an especially strong defence. However, this does make sense of the present provisions since those dealing with defence of a dwelling-house do *not* allow more force. Our courts have understandably concentrated on the more detailed provisions respecting trespassers in section 41(1). Clearly one who forcibly and unlawfully breaks or enters a dwelling-house is also a trespasser.

Our courts have rarely been called upon to provide strict definitions of the terms used by these sections. Section 2 of our Code defines "dwelling-house" as "the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence". This is wide, covering, for example, a rented apartment. "Peaceable possession" has not received precise analysis, although it has been held not to extend to a common hallway of an apartment building that was not part of the lease. The definition of "trespasser" has not troubled our courts and seems to refer to anybody who has no right or claim of right to be present<sup>15</sup>.

With respect to the issue of "trespasser" it would seem implicit in s. 41 that the nature of the trespass, while perhaps relevant to the question of the extent of force, is quite irrelevant to the right to use force. Even a "mere trespasser" could be subjected to force if he/she refused to leave voluntarily.<sup>16</sup> It is not necessary that the trespasser be a threat to the property or persons on it. Those types of trespasses are specifically dealt with in ss. 27 and 40.

It would also appear to be implicit in s. 41 that the party seeking to remove a trespasser does not have to consider force as a last resort. Nor would the person have to go to the police or seek other solutions. He has a right to use force. The possessor clearly has no obligation to retreat.<sup>17</sup>

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<sup>15</sup> Stuart, note 1, p. 415.

<sup>16</sup> Lanham, note 4, p. 373 *R. v. Montague*, *R. v. Kirk*, note 14.

<sup>17</sup> *R. v. Deegan*, note 7, p. 439-440.

Section 42 is a difficult section. Again, Professor Stuart has ably summarized its purpose as follows:

There are complex Code rules respecting the assertion of a right to a dwelling-house or other real property. A person commits the offence of forceable entry under section 73(1) if he enters real property in the peaceable possession of another in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace. This applies irrespective of entitlement to enter. If the possessor is without colour of right and detains it against the person entitled by law in a similar manner he commits the separate offence under section 73(2) of forceable detainer. This is the context in which section 42(1) declares that everyone who is lawfully entitled to possession of real property or his agent is justified in entering and taking possession of that property *peaceably and by day*. One justified by section 42(1) who is assaulted by one having peaceable possession of the real property or his agent is deemed by section 42(2) to have assaulted by provocation if that other had a claim or right. If there was no such claim of right the presumption is the other way (section 42(3)). Presumably the *Baxter* interpretation would be applied to these "deeming" provisions.

Section 42 amounts to an unbelievably circuitous route to guarantee the results that the right of someone to peaceably enter has to be exercised by day and has to yield to the claim of right of the actual possessor<sup>18</sup>. (emphasis his)

#### 1. Issues Arising from the Defence of Real Property

Because s. 41(1) is the broadest section and the one most often relied on it will form the focus of this discussion.

Section 41(1) extends protection from criminal liability to:

- (i) Everyone in peaceable possession of a dwelling-house or real property,
- (ii) Everyone lawfully assisting the person in peaceable possession, and
- (iii) Everyone acting under the authority of the party in peaceable possession.

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<sup>18</sup> Stuart, note 1, pp. 417-418.

It would appear, the only property interest required is that of "peaceable possession". The Code does not define this phrase and the drafters must have thought it would be a question of fact for the Judge that did not require further definition. The modifier "peaceable" raises the issue as to whether the protection would be available to one protecting property in an "Oka" situation.

Another issue concerns the third category of individuals covered by the section and specifically the nature of the authorization required.

In R. v. Linn<sup>19</sup> the accused had pushed a trespasser off his parents' property and in doing so, the trespasser fell and suffered an "avulsion fracture" of the shoulder. The accused was convicted of assault causing bodily harm. The trial judge held the accused did not have "authority" within the meaning of s. 41(1) despite the fact that the accused was entitled to deal with his parents' property as his own; that he had keys for their residence; that he cared for the property when they were away on holidays; that he had, with his parents' consent, requested the same trespasser to leave a few weeks before; and that his parents had specifically told the accused that they did not want the trespasser bothering them anymore. The judge ruled that despite this general authority to deal with the property, to come within s. 41(1), the accused needed to show that he had received specific authorization from his parents to remove this specific individual if she ever showed up again.

It is the writer's opinion that the section does not require a form of authorization as specific as that suggested in Linn. To impose that requirement would seem to render the words "and everyone lawfully assisting him" in this section somewhat meaningless. In other words, if the

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<sup>19</sup> (1989), Unreported (Sask. Q.B.)

accused went and obtained specific authorization to remove a specific trespasser wouldn't he be "lawfully assisting" the party in peaceable possession?

It would seem that a person who has general authority to look after a piece of property should come within the ambit of s. 41(1). It is the Code that provides the specific authority to remove the trespasser provided the person is acting pursuant to some general authority vis-a-vis the property. If it were otherwise, the person looking after his neighbour's house would be prevented from removing an unexpected trespasser while the owner was away.

### C Issues Relating to the Defence of Property Generally

The other main issues which arise in the context of this defence concern the effect of mistakes and the test to determine whether the legal use of force was exceeded. For example:

Does the defence apply if the accused is in fact unauthorized to remove a trespasser but believes he is? Does it matter if his belief is unreasonable? The same questions arise in connection with the requirement that the other party be a trespasser. Is the accused's mistaken belief relevant?

Does the defence apply if, on the actual facts, the force was excessive, but on the facts that the accused believed, the force was necessary?

Does the defence apply if, on the facts known to the accused, the force was excessive from an objective standpoint but the accused honestly believed the force he used was necessary? Does it matter if the accused's belief was based on reasonable grounds?

Before the Committee can answer these questions it is necessary to look closer at the issues of extent of force and relevance of mistakes.

#### (1) Extent of Force

The sections dealing with the defence of property use similar provisions to define the extent of force that can be used:



Section 39 allows a defence "if he uses no more force than is necessary" to defend possession.

Section 40 allows a defence if the party uses "as much force as is necessary" to prevent forceable entry of a dwelling-house.

Section 41 allows a defence "if he uses no more force than is necessary" to remove a trespasser or prevent a trespass.

These provisions are similar to s. 34 which provides that someone who is assaulted may repel "force by force" provided it "is no more than is necessary to defend himself".

Different views have been put forth in determining the effect of these provisions. One interpretation which Professor Colvin suggests the plain words will bear is that the provisions essentially allow one to do "what it takes" to get the particular job done<sup>20</sup>. Therefore, what is necessary to remove a trespasser may differ greatly from what is necessary to prevent forceable entry of a dwelling-house. Furthermore, what is necessary to stop one party from forceably entering a home may be completely insufficient to stop another person from forceably entering a home. Accordingly, "what is necessary" will depend on the facts and circumstances of each case.

On this view of the provision there is an elastic limitation on the extent of force. If what was done was necessary to accomplish the particular goal then a defence exists. If the accused could show that there was simply no other way of removing a trespasser except by shooting at him then, on this view, he would be entitled to a defence since he did what was necessary in the circumstances. Further support for this view can be found in the fact that none of the sections contain any express limitation against force designed to kill or wound. (s. 38(1) does have a limited restriction against striking or causing bodily harm.) In Tremeeear's 1992 Annotated Code, the editors

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<sup>20</sup> Colvin, note 1, pp. 225-226.

note that ss. 39-41 do not import any objective element into the limitation of force.<sup>21</sup> They suggest that to import an objective element the sections would require wording such as "no more force than is *reasonably* necessary" or "no more force than he, *on reasonable grounds*, believed was necessary". It is not clear, whether in making these observations the editors support the literal interpretation set out above.

Despite the lack of an express limitation in the various sections, the courts have introduced a proportionality test which arguably goes beyond the wording of the sections. Admittedly, even on the literal interpretation, there is an element of proportionality. That is, the court has to determine whether, based on the circumstances, what the accused did was necessary to accomplish the approved goal. However, the proportionality test that appears to have been accepted in some provinces goes beyond this. It seems to require that the force used be directly proportionate to the injury or harm that the accused is trying to prevent. This leads to value judgments about the importance of property. It has prompted some courts to adopt a position consistent with the more recent English tradition that, in the defence of property, lethal force cannot be used in the absence of personal danger.<sup>22</sup> Those who are proponents of this view believe the use of dangerous or lethal force is completely out of proportion to the injury one is trying to prevent namely, trespass or damage to property. This view has been expressly adopted in Canada<sup>23</sup> and is part of the Law Reform proposal.

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<sup>21</sup> David Watt and Michelle Fuerst, *Tremeeur's 1992 Criminal Code*, pp. 80-81, commentary to ss. 39, 40 and 41

<sup>22</sup> See Lanham, note 4, pp. 369-372, Smith and Hogan, *Criminal Law* (6th Ed) p. 246.

<sup>23</sup> *Baxter*, note 5, *R. v. Figueria* (1981) 63 C.C.C. (2d) 409 at 411 (Ont. C.A.), *R. v. Clark*, (1983) 5 C.C.C. (3d) 264 at 271 (Alta. C.A.)

As noted in part II, in *Baxter*, Martin J.A. expressly approved of the English proportionality test. In discussing the defence of property he stated:

The section 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: see Report of Criminal Code Bill Commission, 1879, referred to in *Russell on Crime*, 12th ed (1964), p. 432.

Mr. Cooper referred the Court to authorities holding that the use of fire-arms is justified even though death ensues, in order to prevent burglary or arson: see 1 Hale, P.C. 487; 10 Hals., 3rd 3d., p. 721. The common law cast a special protection around the dwelling. In such cases there is, of course, an element of personal danger which may justify the use even of extreme force in self-defence. Moreover, s. 27 of the *Criminal Code* authorizes the use of as much force as is reasonably necessary to prevent the commission of any offence, for which the offender may be arrested without warrant, and that would be likely to cause immediate and serious injury to the person or property of anyone or to prevent anything being done that, on reasonable and probable grounds, the person using such force believes would, if it were done, constitute such an offence.

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Firing at a mere trespasser is, of course, not justifiable, and the trial Judge in the circumstances of the case correctly charged the jury that killing or causing grievous bodily harm to a trespasser could only be justified in self-defence: *R. v. Meade and Belt* (1823), 1 Lew. C.C. 184; *R. v. Scully* (1824), 1 C. & P. 319, 171 E.R. 1213; *R. v. McKay*, [1957] V.R. 560; Lanham, "Defence of Property in the Criminal Law", [1966] Crim. L.R. 368 at p. 372.<sup>24</sup>

While the *Baxter* approach may be desirable, it appears inconsistent with the wording of the statutory provisions. This becomes even clearer when you compare ss. 39, 40 and 41 to s. 27 which states:

27. Everyone is justified in using as much force *as is reasonably necessary*  
(a) to prevent the commission of an offence . . . (emphasis added)

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<sup>24</sup> *Baxter*, note 5, pp. 113, 114

As Colvin points out, the *Baxter* approach substitutes a test of "reasonableness" for a test of necessity<sup>25</sup>. As indicated above, while a reasonableness test may be desirable it should be expressly stipulated.

With respect to the editors of *Tremear's*, the express substitution in s. 41 of a test of reasonableness such as the one employed in s. 27 would not necessarily render the test objective. Even a "no more than necessary" test can be entirely objective if no regard is given to the accused's belief. Substituting a test of reasonableness as used in s. 27 (and in England) merely changes the standard against which the trier of fact must ultimately judge the accused's conduct. On the "no more than necessary" test the trier of fact has to determine whether, in the circumstances, the force used was necessary. On the "reasonableness test" the trier of facts has to determine whether, in the circumstances, the force used was reasonable. The standard against which the trier of fact makes this decision is different in each case but both are equally objective - unless some account is taken of the accused's belief. The present statutory provisions do not make any reference to the accused's belief.

It is for this reason, that Stuart and Colvin both conclude that the language of the sections could support a truly objective test.<sup>26</sup> Interestingly enough, the editors of both *Tremear's* and *Martin's Criminal Codes* suggest the language "no more than necessary" implies a subjective test.<sup>27</sup> Perhaps this is because both are of the view that the *Baxter* interpretation of s. 34(1) (that the accused's belief is relevant despite the fact that no reference is made to it in the statute) is

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<sup>25</sup> Colvin, note 1, p. 226

<sup>26</sup> Stuart, note 1, p. 407, Colvin, note 1, p. 222.

<sup>27</sup> Watt and Fuerst, *supra*, note 21, Greenspan, *Martin's Annual Criminal Code 1992*, p. 78, synopsis to s. 41.

applicable to s. 41. In any event, as noted above, regardless of whether the standard is "necessary force" or "reasonable force" unless some account is taken of the accused's belief the test is entirely objective. While some can live with that standard, most would object. On the other hand, unless the matter is to be left up to each individual's own assessment of what is necessary (or reasonable), some objective standard is required.

At present, the trend is toward a subjective/objective test to determine the force issue. In other words, the law appears to allow for a reasonable mistake on the question of force. In *R. v. Weare* (1983) 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".<sup>28</sup> In doing so, the Court adopted the test employed several years before in *R. v. Taylor* (1970).<sup>29</sup>

In addition, the courts have also applied the self-defence doctrine that a person defending his property cannot be expected to measure the force with nicety.<sup>30</sup> This suggests that as long as the force used was roughly proportionate, the defence is available.

The natural reaction by subjectivists is that the incorporation of objective standards into defences is inconsistent with subjective fault. That very concern led this Committee to drop the objective component for the defence of the person. Surprisingly however, subjectivists like Colvin

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<sup>28</sup> (1983) 4 C.C.C. (3d) 494 at 499.

<sup>29</sup> (1970) 73 W.W.R. 636 (Ykn. Mag. Ct.).

<sup>30</sup> Baxter, note 5, at p. 111, *R. v. Clark*, note 23, at p. 271.

and Stuart both agree with having an objective component for the purposes of assessing whether an accused's response was justified. Colvin does so despite acknowledging that there should be, in principle, no difference between the significance of mistaken beliefs which relate to the definitional elements of an offence and those relating to the circumstances grounding a defence.<sup>31</sup> He rationalizes the requirement for an objective standard on the ground that the defence is one of justification which means the justified conduct must be untainted with culpability. Since an unreasonable mistake is a negligent mistake it can never justify the conduct.<sup>32</sup> Stuart also realizes the inconsistency and he attempts to deal with it as follows:

We shall discover that most existing defences invoke the objective standard. For example, despite a series of bewildering statutory rules, the essence of our defence of self-defence is that the accused is allowed to defend herself against an unlawful attack if, on the facts as she reasonably believed them to be, the force she used was reasonably necessary. Doesn't the criterion of reasonableness indicate an objective standard of simple negligence? Isn't this inconsistent with the law's otherwise conscientious concern to establish subjective fault in respect of serious criminal offences? What of the earlier preference in this treatise for limited criminal responsibility for objective negligence and a notion of gross negligence?

Such questions cannot be meaningfully answered at this general level. The precise criteria for each defence would be crucial. However, it seems safe to suggest that the objectivity here is a different matter to that in respect of the fault element. Justifications or excuses concern the policy question of whether, despite proof of *actus reus* and fault if required, the accused should nevertheless be absolved. Just as the definitions of various *actus rea* state the law's assessment of values in purely objective terms at some point the law has to do this also in respect of the definition of justifications. In most cases the search is for a compromise in which some individual factors are taken into account.<sup>33</sup>

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<sup>31</sup> Colvin, note 1, p. 206.

<sup>32</sup> Ibid, p. 208.

<sup>33</sup> Stuart, note 1, p. 391.

In England, a mistake about the existence of circumstances giving rise to a defence of self-defence or prevention of crime need not be reasonable.<sup>34</sup> It is likely this will be extended to the defence of property. However, the English test is not entirely subjective. Rather the accused's response is still measured against an objective standard - in their case - reasonableness. The English have however made this as subjective as possible given their wish to retain the objective measuring stick. In summary the English approach in a case of self-defence is:

A person may use force to defend himself or any other person provided that force is reasonable in the circumstances as he believes them to be.<sup>35</sup>

The recent English decisions which approved the above approach appear to be consistent with the decision of our Supreme Court in *R. v. Reilly*, (1985) where Ritchie J., speaking for the Court, stated that *in the absence of a statutory requirement of reasonableness*, the law did not require that a mistake be based on reasonable grounds even where that mistake related to the applicability of a defence.<sup>36</sup> For some reason, this statement in *Reilly* seems to have been missed or ignored by most courts and commentators.

Does *Reilly* mean that an accused is entitled to make an unreasonable mistake regarding the amount of force provided he can convince the trier of fact that he honestly held the belief? If so, does this mean the statute cannot provide for a standard of "necessary force" or "reasonable force"? The answer would appear to be "no". *Reilly* acknowledged that the statute can change the common-law and impose a requirement for reasonable mistakes. A provision that provides for a standard of necessary or reasonable force is in effect imposing a requirement that

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<sup>34</sup> *R. v. Williams*, [1987] 3 All E.R. 411 (C.A.), *Beckford v. R.* [1988], A.C. 130, [1987] All E.R. 425 (P.C.)

<sup>35</sup> *R. v. Williams*, note 34, p. 415

<sup>36</sup> (1985) 15 C.C.C. (3d) 1 at p. 8 (S.C.C.)

mistakes about the amount of force have to be reasonable (while other mistakes do not). Unless the *Reilly* statement of the common-law is a principle of fundamental justice in s. 7 of the Charter - there would be no legal bar to incorporating the "reasonable force" test. It would appear, if the *Reilly* approach was applied to our current defence of property provisions they would closely resemble the English approach.



## V LAW REFORM COMMISSION PROPOSAL

The Law Reform Commission's Proposal for recodifying the various defences of property are reproduced below along with the Commission's commentary to the provisions. The Commission's proposal for "mistaken belief" is set out at the end.

**3(11) Protection of Movable Property.** No one in peaceable possession of movable property is liable for using such force, not amounting to purposely causing the death of, or seriously harming, as is reasonably necessary to prevent another person from unlawfully taking it or to recover it from another person who has just unlawfully taken it.

### Comment

A society recognizing a right to property must allow protection of that right. This is provided in sections 38 and 39 of the *Criminal Code*. Subsection 38(1) provides that peaceable possessors may defend their property against trespassers. Subsection 38(2) provides that a trespasser resisting a peaceable possessor commits an assault. Section 39 provides that a peaceable possessor with a claim of right may defend the property even against a person lawfully entitled to it.

Clause 3(11) retains but simplifies the present law. It allows a peaceable possessor (including one who has just lost possession), whether or not with a claim of right, to defend his property by reasonable force against anyone trying to take it unlawfully. Any force used against the peaceable possessor by the latter will not be lawful, and will therefore automatically qualify as an assault. Thus the special provision contained in subsection 38(2) of the *Criminal Code* is neither necessary nor desirable; offences should not be defined in defence provisions. Insofar as clause 3(11) extends the defence of protection to peaceable possessors without claim of right, it is based on the policy of restricting the use of force to change the *status quo* and of compelling non-possessors to look to authority rather than to use self-help.

The exclusion of force amounting to purposely causing the death of, or seriously harming, is not found in the provision on defence of the person; it reflects the higher value set on persons than on property.

"Peaceable possession" is left undefined under the new Code as under the present *Criminal Code*. It means possession in circumstances unlikely to lead to violence resulting in personal injury or property damage.

**3(12) Protection of Immovable Property.**

- (a) **General Rule.** No one in peaceable possession of immovable property is liable for using such force, not amounting to purposely causing the death of, or seriously harming, as is reasonably necessary to prevent trespass, to remove a trespasser or to defend the property against another person unlawfully taking possession of it.
- (b) **Exception.** This clause does not apply to a peaceable possessor without a claim of right who uses force against a person who he knows is legally entitled to possession and who enters peaceably to take possession of that property.

**Comment**

Land and buildings differ from goods and chattels in that the occupier's right can be seriously infringed by mere trespass; trespass to goods is rarely harmful in itself. For this reason slightly different rules are needed for their protection. These are presently contained in sections 40 to 42 of the *Criminal Code*. Section 40 gives a right of defence of a dwelling-house against forcible break-in or entry; section 41 gives a right of protection of real property against trespass and makes the trespasser's resistance an assault; and section 42 gives a right to a person entitled to real property to enter peaceably by day.

Clause 3(12) simplifies the law as follows. First, it provides one rule for all immovable property; the fact that the property is a dwelling-house may affect the degree of force that can reasonably be used. Second, it uses the term "immovable" as the logical contrast to "movable"; "real" contrasts not with "movable" but with "personal." Third, like clause 3(11) and for the same reasons, clause 3(12) avoids categorizing resistance as assault. Fourth, it disentitles a peaceable possessor without claim of right from using force against a non-possessor lawfully entitled to possession and entering peaceably to take possession.

**3(17) Mistaken Belief as a Defence**

- (a) **General Rule.** No one is liable if on the facts as he believed them he would have had a defence under clauses 3(1) or 3(8) to 3(16).

## VI. COMPARATIVE PROPOSALS

A.

New Zealand Crimes Bill

### *Protection of Property*

#### **48. Use of force in defence of movable property—**

(1) Every person who is in lawful possession of any movable property, and every person lawfully assisting that person, is protected from criminal responsibility for using reasonable force to resist an attempt by a trespasser to take possession of that property, or to retake possession of that property from a trespasser. 40

(2) This section does not apply to force intended to cause injury.

Cf. 1961, No. 43, s. 52; 1980, No. 63, s. 2 (2)

#### **49. Use of force in defence of land or premises—**

(1) Every person who is in lawful occupation or possession of a dwellinghouse, and every person lawfully assisting that person, is justified in using such force as may be reasonable, in the circumstances as the person believes them to be, to prevent the forcible breaking and entering of the dwellinghouse.

(2) Every person who is in lawful occupation or possession of any other land or premises, and every person lawfully assisting that person, is justified in using such force as may be reasonable to prevent any person from trespassing on the land or premises or to remove any trespasser.

(3) This section does not apply to force intended to cause injury.

Cf. 1961, No. 43, ss. 55, 56; 1980, No. 63, s. 2 (2)

**50. Assertion of right to land or premises—**Every person who is entitled to possession of any land or premises, or who is acting with the authority of a person who is so entitled, is justified in entering on the land or premises at any reasonable time for the purpose of taking possession of the premises.

Cf. 1961, No. 43, s. 57; 1980, No. 63, s. 2 (2)

**51. Exercise of right of entry—**Every person who has a right to enter on any land or premises is justified in peaceably entering on the land or premises in exercise of that right.

Cf. 1961, No. 43, s. 58

*General Provisions*

52. **Excessive force**—Every person who is authorised by law to use force is criminally responsible for any excessive force, according to the nature and quality of the act that  
85 constitutes the excess.

Cf. 1961, No. 43, s. 62

*Protection of Property*

*Clause 48* re-enacts without substantive amendment section 52 (1) of the present Act, relating to the use of force in defence of any movable property.

*Clause 49* combines and re-enacts without substantive amendment sections 55 and 56 (1) of the present Act, relating to the use of force in defence of a dwellinghouse or other premises.

*Clause 50* re-enacts with one amendment section 57 (1) of the present Act. This provides that a person who is lawfully entitled to the possession of any land or premises, or who is authorised by any other person who is lawfully entitled to the possession of any land or premises, may peaceably enter the land or premises for the purpose of taking possession of them. The present section requires the entry to be effected during the daytime.

This clause provides that it may be effected at any reasonable time.

*Clause 51* is based on section 58 of the principal Act, but the proviso to that section is dropped.

B. United Kingdom

The Law Commission in the United Kingdom decided to enact one primary justification defence with respect to the use of force in "public or private defence". This section (44) effectively covers self-defence and defence of property as well as the prevention of crime. Curiously enough, a second section dealing with the protection of persons and property is included as s. 185. The commentary suggest the two sections are in harmony with one exception: s. 185 is supposedly not limited to acts of force by the defender or the attacker. The sections and commentary are reproduced below:

44.—(1) A person does not commit an offence by using such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable—

- (a) to prevent or terminate crime, or to effect or assist in the lawful arrest of an offender or suspected offender or of a person unlawfully at large;
- (b) to prevent or terminate a breach of the peace;
- (c) to protect himself or another from unlawful force or unlawful personal harm;
- (d) to prevent or terminate the unlawful detention of himself or another;
- (e) to protect property (whether belonging to himself or another) from unlawful appropriation, destruction or damage; or
- (f) to prevent or terminate a trespass to his person or property.

(2) In this section, except where the context otherwise requires, "force" includes, in addition to force against a person—

- (a) force against property;
- (b) a threat of force against person or property; and
- (c) the detention of a person without the use of force.

(3) For the purposes of this section, an act is "unlawful" although a person charged with an offence in respect of it would be acquitted on the ground only that—

- (a) he was under ten years of age; or
- (b) he lacked the fault required for the offence or believed that an exempting circumstance existed; or
- (c) he acted in pursuance of a reasonable suspicion; or
- (d) he acted under duress, whether by threats or of circumstances; or
- (e) he was in a state of automatism or suffering from severe mental illness or severe mental handicap.

(4) Notwithstanding subsection (1), a person who believes circumstances to exist which would justify or excuse the use of force under that subsection has no defence if—

- (a) he knows that the force is used against a constable or a person assisting a constable; and

(b) the constable is acting in the execution of his duty, unless he believes the force to be immediately necessary to prevent personal harm to himself or another.

(5) A person does not commit an offence by doing an act immediately preparatory to the use of such force as is referred to in subsection (1).

(6) Subsection (1) does not apply where a person causes unlawful conduct or an unlawful state of affairs with a view to using force to resist or terminate it; but subsection (1) may apply although the occasion for the use of force arises only because he does anything he may lawfully do, knowing that such an occasion may arise.

(7) The fact that a person had an opportunity to retreat before using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was immediately necessary and reasonable.

(8) A threat of force may be reasonable although the use of the force would not be.

(9) This section is without prejudice to the generality of section 185 (criminal damage: protection of person or property) or any other defence.

45. A person does not commit an offence by doing an act which is justified or excused by—

- (a) any enactment; or
- (b) any "enforceable Community right" as defined in section 2(1) of the European Communities Act 1972; or
- (c) any rule of the common law continuing to apply by virtue of section 4(4).

185.—(1) A person does not commit an offence to which this section applies by doing an act which, in the circumstances which exist or which he believes to exist, is immediately necessary and 10 reasonable—

- (a) to protect himself or another from unlawful force or injury; or
- (b) to prevent or terminate the unlawful detention of himself or another; or
- (c) to protect property (whether belonging to himself or another) 15 from unlawful appropriation, destruction or damage.

(2) Section 44(3) (meaning of "unlawful") applies for the purposes of this section.

**Clause 44: Use of force in public or private defence**

12.24 *Function of the clause.* This clause, together with clause 185 (protection of person or property by acts causing destruction of or damage to property), would replace existing statutory and common law principles defining the circumstances in which a person has a defence to a charge of committing a crime involving the use of force. The clause could be invoked, for example, on a charge of murder or any violent offence against the person or an offence of criminal damage to property. But the clause states principles of the criminal law only. It does not (as section 3 of the Criminal Law Act 1967 does) affect civil liability in any way. A person may have a defence under the section yet remain liable in damages for assault or negligence.

12.25 *Eliminating inconsistency.* The clause seeks in principle to restate existing law and does so in as much detail as the authorities reasonably permit. But the law should also be consistent and the present law relating to the use of force varies according to the circumstances in indefensible ways. For example, if a person is charged with damaging property belonging to another and his defence is that he was defending his own property, section 5 (2) of the Criminal Damage Act 1971 applies and the test is whether he *believed* that what he did was reasonable; but if his defence is that he was defending his person, or that of another, the test at common law is whether what he did *was* reasonable. If he is charged with criminal damage by killing or injuring an aggressive dog, the result will vary according to whether he was defending his trousers or his leg—and he is likely to have a better chance of acquittal if it was his trousers. Clause 44 (together with clause 185) will eliminate such insupportable distinctions.

12.26 *The form of subsection (1).* Subsection (1) is stated in slightly more complex terms than might be expected. It provides that a person does not commit an offence by using such force as, "in the circumstances which exist or which he believes to exist", is immediately necessary and reasonable to (in brief) prevent crime, effect a lawful arrest, prevent or terminate a breach of the peace, or protect person or property from unlawful acts. The reference to circumstances which the person using force *believes to exist* would ideally be omitted, leaving the case of mistaken belief to be catered for by clause 41 (belief in circumstance affording a defence). It is included, however, in order to bring out the force of the words "circumstances which exist" (meaning, which actually exist, whether or not the person using force is aware of the fact). These words are themselves included because the powers of arrest without a warrant granted by the Police and Criminal Evidence Act 1984 apply where a person "is in the act of committing", or "is guilty of", or "is about to commit", an arrestable offence, as well as when the arrestor has reasonable grounds for suspecting one of these things to be the case.<sup>47</sup> It has seemed necessary, for the sake of consistency, to apply clause 44 for all purposes, and not only that of arrest, to the case where as a matter of fact justifying circumstances exist. For an arrestor may also be preventing crime and, in doing so, protecting himself or another person from attack or some property from damage. It would be unacceptable to apply different principles to the same use of force in relation to its different purposes.<sup>48</sup>

12.27 *Permitted purposes of use of force.* The several paragraphs of subsection (1) require little comment:

- (a) *Prevention of crime: arrest.* This paragraph reproduces the effect in criminal law of section 3(1) of the Criminal Law Act 1967.
- (b) *Prevention of breach of peace.* In *Howell*<sup>49</sup> it was said that a breach of the peace occurs

"whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance."

It is clear from this that prevention of a breach of the peace, which is a common occasion for the use of force, is a wider concept than prevention of crime and requires separate protection. The effect of paragraph (b) is that it is not an offence to use force which is immediately necessary and reasonable to prevent a person being put in fear of the kind mentioned in the *Howell* dictum or to remove the cause of such fear where it already exists.<sup>50</sup>

- (c) *Defence of person*. This paragraph states the law as proposed by the Criminal Law Revision Committee.<sup>51</sup> The Committee's recommendation that the defence should be available to anyone who mistakenly believes in the existence of facts justifying the use of force in defence of himself or another anticipated a spate of decisions to the same effect.<sup>52</sup>
- (d), (e) and (f) *Prevention of unlawful detention; defence of property; prevention of trespass*. These paragraphs restate existing law.

12.28 "*Force*". Subsection (2), by giving an extended meaning to the word "force", ensures that subsection (1) permits the use of force against property, a threat of force against person or property and the detention of a person without the use of force (as well, of course, as force against a person).

12.29 "*Unlawful*". Paragraphs (c), (d) and (e) of subsection (1) permit the use of force against "unlawful" acts. An act (for example, a trespass) may be unlawful under the civil law although not criminal. Subsection (3), a somewhat technical provision, is concerned with cases in which, to avoid any uncertainty, the Code needs to declare that for the purposes of the section the behaviour of a person against whom force is used is "unlawful" although, if it were the subject of a criminal charge, that person would be acquitted. For example, it ought to be clear, without the need to resort to what may be uncertain principles of the law of tort, that one who is attacked with a dagger by a nine-year-old or by a person suffering from severe mental illness may use reasonable and necessary force in self-defence although his attacker is immune from criminal liability (clauses 32 (1) and 35 (1)).<sup>53</sup>

12.30 Where a person properly using force for a purpose mentioned in subsection (1) (c), (d) or (e) is unaware of the facts that would ground the acquittal of the person against whom he uses it, he will be protected by subsection (1) (without resort to subsection (3)) because of his belief in circumstances rendering the other's conduct "unlawful" in the sense of criminal. Resort to subsection (3) is therefore necessary only when the person using force is aware of the special facts.

12.31 It is sometimes lawful to arrest and to use reasonable force against a person because he is reasonably, though perhaps quite wrongly, suspected of some wrongdoing. For example, under the Police and Criminal Evidence Act 1984, any person may arrest without a warrant anyone whom he has reasonable grounds for suspecting to be committing an arrestable offence; and, under the Criminal Law Act 1967, the arrestor may use reasonable force to make the arrest. Subsection (3)(c) relates to the position in the criminal law of the wrongly (though reasonably) suspected person who resists arrest or uses force to defend himself against force reasonably used by the arrestor. The effect of subsection (3)(c) is that, with one important qualification, he does not commit an offence by using reasonable force to resist that arrest. Whatever the position in the civil law (which is unaffected by the subsection) a person should not, in our opinion, be guilty of an offence merely because he resists, and uses reasonable force to resist, an arrest which is not justified by the actual facts.<sup>54</sup> For the purposes of the subsection, the arrestor's conduct is "unlawful"; but neither the arrestor nor the resister is guilty of any offence. The same principle applies to an innocent person's defence of his property and for the other purposes of the section.



12.32 *Exception for lawful act of constable.* Subsection (4) states the important qualification referred to in the preceding paragraph. Where the person making the arrest is a constable acting in the execution of his duty, the suspected person must submit to arrest even if he is perfectly innocent and the constable's suspicion, though reasonable, is in fact mistaken. The suspect will commit an offence if he resists arrest and further offences if he uses force, whether against the constable or a person assisting him to carry out his duty. This is so even if he believes the arrest to be unlawful, unless he also believes there is "imminent danger of injury."<sup>55</sup> It is one thing to require the wrongly suspected person to submit to arrest. It is quite another to say that he must submit to the infliction of personal harm or even death. The effect of the subsection is that he does not commit an offence by using force which he believes to be immediately necessary to prevent such harm to himself or another innocent person. This is so even in the case where he is aware of the circumstances giving rise to the policeman's reasonable suspicion, that is to say, he knows that he is resisting the lawful, though mistaken, use of force.<sup>56</sup> The subsection in no way limits the present right to resist an unlawful arrest, whether by a constable or not.

12.33 *Preparatory acts.* Subsection (5) ensures that criminal liability (most obviously, under legislation prohibiting the possession of firearms or offensive weapons) will not attach to an act immediately preparatory to a use of force permitted by subsection (1).<sup>57</sup>

12.34 *Self-induced occasions for the use of force.* The effect of the first part of subsection (6) is that subsection (1) provides no defence to a person who deliberately provokes the very attack against which he then defends himself.<sup>58</sup> On the other hand, it is important to preserve the liberty of the citizen to go about his lawful business even if he knows that he is likely to be met by unlawful violence from others.<sup>59</sup> If he does so and is attacked he may defend himself.<sup>60</sup> The second part of subsection (6) so provides.

12.35 *Opportunity to retreat.* Subsection (7) restates the law, only recently clarified by the Court of Appeal in *Bird*,<sup>61</sup> on the significance of the defendant's having had an opportunity to retreat before using force. Although the fact that he had such an opportunity is relevant to the court's or jury's consideration of whether his use of force was immediately necessary and reasonable, it is not conclusive of the question and is simply to be taken into account together with other relevant evidence.

12.36 *Reasonable threats.* Subsection (8), which provides that a threat of force may be reasonable although the use of the force would not be, states the effect of *Cousins*.<sup>62</sup>

12.37 *Saving for other defences.* Subsection (9) preserves the full effect of other defences (particularly that provided by clause 185 (protection of person or property by damage to property)) which overlap the general defence provided by clause 44.

17.10 *Clause 185: protection of person or property.* This clause replaces section 5 (2)(b) of the 1971 Act, but not without significant amendment. The need to achieve consistency between the treatment of persons and of property and between defences permitting the use of protective measures has been mentioned elsewhere in this Report.<sup>13</sup> This explains the differences of substance between the 1971 provision and the present clause. The changes are as follows:

- (i) The protection of the person from force, injury or imprisonment is permitted, as well as the protection of property.
- (ii) Property may be protected from appropriation as well as from destruction or damage.

- (iii) The word "unlawful"<sup>14</sup> qualifies the acts against which protective measures may be taken. This means that the clause does not extend to the defence of property against an attack by an animal (such as an attack by a dog on sheep) that involves no crime or tort on the part of its owner. For this purpose, as for others,<sup>15</sup> the clause has to be eked out by resort to surviving common law defences (clause 45(c)).
- (iv) Action immediately necessary and reasonable in the circumstances which exist (even unknown to the actor) is permitted, and not only action called for in the circumstances which he believes to exist.
- (v) The test of the immediate necessity for, and the reasonableness of, the action taken is made objective.

17.11 *Relationship to clause 44* (use of force in public or private defence). The result is harmony between clauses 44 and 185 in all the respects just listed. But there is one difference between them. Clause 185 is not limited to the use of force; property might exceptionally be destroyed or damaged by means not involving force.

<sup>14</sup>As to s. 20, see *W. (A Minor) v. Dolbey* (1989) 88 Cr. App. R. 1, [1983] Crim. L.R. 681; *Grimshaw* [1984] Crim. L.R. 108; *Morrison*, *The Times* 12 November 1988.

<sup>15</sup>*Venna* [1976] O.B. 421.

<sup>16</sup>*Smith and Hogan*, *Criminal Law* 6th ed., (1988), 379; *Glanville Williams*, *Textbook of Criminal Law* 2nd ed., (1983), 171.

<sup>17</sup>See para. 12.5 above.

<sup>18</sup>*Cf. Denton* [1981] 1 W.L.R. 1446.

<sup>19</sup>[1984] A.C. 463; that is, the principle that, where greater punishment can be imposed if a particular factual ingredient can be established than if it is not, two distinct offences exist.

<sup>20</sup>See para. 17.7 above.

<sup>21</sup>See para. 12.25 above.

<sup>42</sup>(1977), Law Com. No. 83.

<sup>43</sup>Law Com. No. 143, para. 13.25.

<sup>44</sup>*Willer* (1986) 83 Cr.App.R. 225; *Conway* [1988] 3 W.L.R. 1238. See also *Martin* [1989] 1 All E.R. 652, C.A. (driving while disqualified).

<sup>45</sup>*Graham* [1982] 1 W.L.R. 294 at 300, [1982] 1 All E.R. 891 at 906.

<sup>46</sup>See para. 12.13 above.

<sup>47</sup>Police and Criminal Evidence Act 1984, s. 24(4)-(6); cf., formerly, Criminal Law Act 1967, s. 2(2), (3) and (5).

<sup>48</sup>For fuller treatment of this matter, see Law Com. No. 143, paras. 13.34-13.36.

<sup>49</sup>[1982] O.B. 416, per Watkins L.J. at 427.

<sup>50</sup>Pace the Code team (see Law Com. No. 143, para. 13.39), we do not think it necessary to include in the Code a definition of "breach of the peace".

<sup>51</sup>Fourteenth Report: Offences against the Person (1980), Cmd. 7844, paras. 119-121.

<sup>52</sup>Especially the landmark decision in *Gladstone Williams* (1983) 78 Cr.App.R. 276 and *Beckford v. The Queen* [1988] A.C. 130 P.C.

<sup>53</sup>See also Appendix B, Examples 44(iv)-(vi).

<sup>54</sup>For example: P, a police officer, reasonably but wrongly suspecting D to be an armed, dangerous criminal, X, points a revolver at him. D seizes P's wrist and twists it until he drops the revolver. If D believes that he is in danger of personal harm his act should not be an offence, although P's act is lawful in every sense. (See, however, a dictum to the contrary of Lowry L.C.J. in *Browne* [1973] N.I. 96 at 107.)

<sup>55</sup>*Fennell* [1971] 1 Q.B. 428.

<sup>56</sup>See Appendix B, Examples 44(vi), (vii) and (viii).

<sup>57</sup>See Appendix B, Example 44(ix). The subsection is convincingly defended in Law Com. No. 143, para. 13.44.

<sup>58</sup>See Appendix B, Example 44(x). Cf. *Browne* [1973] N.I. 96, per Lowry L.C.J. at 107.

<sup>59</sup>See *Beary v. Gillbanks* (1882) 9 Q.B.D. 308.

<sup>60</sup>*Field* [1972] Crim. L.R. 435. See Appendix B, Example 44(xi).

<sup>61</sup>[1985] 1 W.L.R. 816, [1985] 2 All E.R. 513.

C. United States

The United States Model Penal Code provides a defence for the use of force for protection of property. Section 3.06 of the Model Penal Code and the explanatory note thereto are reproduced below.

**PRINCIPLES OF JUSTIFICATION**

**Section 3.06. Use of Force for Protection of Property.**

**(1) Use of Force Justifiable for Protection of Property.** Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor believes that such force is immediately necessary:

(a) to prevent or terminate an unlawful entry or other trespass upon land or a trespass against or the unlawful carrying away of tangible, movable property, provided that such land or movable property is, or is believed by the actor to be, in his possession or in the possession of another person for whose protection he acts; or

(b) to effect an entry or re-entry upon land or to retake tangible movable property, provided that the actor believes that he or the person by whose authority he acts or a person from whom he or such other person derives title was unlawfully dispossessed of such land or movable property and is entitled to possession, and provided, further, that:

(i) the force is used immediately or on fresh pursuit after such dispossession; or

(ii) the actor believes that the person against whom he uses force has no claim of right to the possession of the property and, in the case of land, the circumstances, as the actor believes them to be, are of such urgency that it would be an exceptional hardship to postpone the entry or re-entry until a court order is obtained.

**(2) Meaning of Possession.** For the purposes of Subsection (1) of this Section:

(a) a person who has parted with the custody of property to another who refuses to restore it to him is no longer in possession, unless the property is movable and was and still is located on land in his possession;

(b) a person who has been dispossessed of land does not regain possession thereof merely by setting foot thereon;

(c) a person who has a license to use or occupy real property is deemed to be in possession thereof except against the licensor acting under claim of right.

**(3) Limitations on Justifiable Use of Force.**

(a) **Request to Desist.** The use of force is justifiable under this Section only if the actor first requests the person against whom such force is used to desist from his interference with the property, unless the actor believes that:

(i) such request would be useless; or

(ii) it would be dangerous to himself or another person to make the request; or

(iii) substantial harm will be done to the physical condition of the property that is sought to be protected before the request can effectively be made.

(b) Exclusion of Trespasser. The use of force to prevent or terminate a trespass is not justifiable under this Section if the actor knows that the exclusion of the trespasser will expose him to substantial danger of serious bodily injury.

(c) Resistance of Lawful Re-entry or Recaption. The use of force to prevent an entry or re-entry upon land or the recaption of movable property is not justifiable under this Section, although the actor believes that such re-entry or recaption is unlawful, if:

(i) the re-entry or recaption is made by or on behalf of a person who was actually dispossessed of the property; and

(ii) it is otherwise justifiable under Subsection (1)(b) of this Section.

(d) Use of Deadly Force. The use of deadly force is not justifiable under this Section unless the actor believes that:

(i) the person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(ii) the person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other felonious theft or property destruction and either:

(A) has employed or threatened deadly force against or in the presence of the actor; or

(B) the use of force other than deadly force to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily injury.

(4) Use of Confinement as Protective Force. The justification afforded by this Section extends to the use of confinement as protective force only if the actor takes all reasonable measures to terminate the confinement as soon as he knows that he can do so with safety to the property, unless the person confined has been arrested on a charge of crime.

(5) Use of Device to Protect Property. The justification afforded by this Section extends to the use of a device for the purpose of protecting property only if:

(a) the device is not designed to cause or known to create a substantial risk of causing death or serious bodily injury; and

(b) the use of the particular device to protect the property from entry or trespass is reasonable under the circumstances, as the actor believes them to be; and

(c) the device is one customarily used for such a purpose or reasonable care is taken to make known to probable intruders the fact that it is used.

(6) Use of Force to Pass Wrongful Obstructor. The use of force to pass a person whom the actor believes to be purposely or knowingly and unjustifiably obstructing the actor from going to a place to which he may lawfully go is justifiable, provided that:

(a) the actor believes that the person against whom he uses force has no claim of right to obstruct the actor; and

(b) the actor is not being obstructed from entry or movement on land that he knows to be in the possession or custody of the person obstructing him, or in the possession or custody of another person by whose authority the obstructor acts, unless the circumstances, as the actor believes them to be, are of such urgency that it would not be reasonable to postpone the entry or movement on such land until a court order is obtained; and

(c) the force used is not greater than would be justifiable if the person obstructing the actor were using force against him to prevent his passage.

#### Explanatory Note

Subsection (1) states the basic rules governing justification for the use of force to protect property. Two situations are dealt with separately: the case where the actor is in possession of the property and uses force to prevent an interference with that possession; and the case where the actor attempts to retake property that has been unlawfully taken from him. In the first situation, the use of force is justifiable if the actor believes that it is immediately necessary to protect property that is, or is believed to be, in his possession or in the possession of another for whom he acts. The action may be taken to prevent or terminate an unlawful entry or other trespass upon land, or to prevent a trespass against or an unlawful carrying away of tangible property. In the second situation, the actor may use force to re-enter upon land or to retake personal property if he believes that he, or one who has authorized him, or one from whom he or the person authorizing him has derived title, was unlawfully dispossessed and is entitled to possession. In addition, one of two other conditions must be met: the force must be used immediately or on fresh pursuit after such dispossession; or the actor must believe that the person against whom the force is used has no claim of right to possession of the property and, in the case of land, that the circumstances are of such urgency that it would be an exceptional hardship to postpone the entry until a court order is obtained. It should be noted, as it was in connection with Section 3.04, that mistaken belief is governed by Section 3.09.

Subsection (2) sets forth three principles that govern the meaning of the term "possession" as used in Subsection (1). One who parts with the custody of property to another who then refuses to restore it to him is no longer in possession, unless the property is movable and is located on land in his possession. One who has been dispossessed of land does not regain possession, and thus the right to defend as a possessor, merely by setting foot on the land. And one who has a license to use or occupy real property is deemed to be in possession, except as against his licensor acting under a claim of right.

Subsection (3) sets forth a series of limitations on the use of force authorized in Subsection (1). First, a request to desist must be made, unless the actor believes that the request would be useless, that it would expose himself or another to danger, or that the property would be harmed before the request could effectively be made. Second, the use of force to prevent or terminate a trespass is not justifiable under this section if the actor knows that the result will be to expose the trespasser to serious bodily injury. Third, no right is given to prevent a re-entry or recaption that is justified under Subsection (1)(b). And fourth, the right to use deadly force in the defense of property is curtailed. Deadly force may be used only if the actor believes that one of two situations exists: the person against whom the force is to be used is attempting to dispossess him of his dwelling otherwise than under a claim of right; or the person against whom the force is to be used is attempting to commit or consummate certain named crimes and either has used or threatened deadly force against or in the presence of the actor, or has put the actor in a position where the use of force other than deadly force to prevent the commission or consummation of the crime would expose the actor or another in his presence to serious bodily injury.

Subsection (4) deals with the use of confinement as protective force in this context, in the same terms as does Section 3.04(3) in the context of self-defense. The actor may use confinement so long as he takes all reasonable measures to terminate the con-

finement as soon as he knows he can do so with safety to the property, except in the case of arrests on a charge of crime.

Subsection (5) states three conditions that must be met before the use of a device for the purpose of protecting property will be justified: the device must not be one that creates a substantial risk of serious bodily injury; the use of the device must be reasonable under all of the circumstances as the actor believes them to be; and the device must be one that is customarily used for the purpose or must be used under circumstances where reasonable care is taken to make known to probable intruders that it is being used.

Subsection (6) deals with situations where the actor is being obstructed from going to a place where he may lawfully go. He may use force to pass a person if three conditions are met: the actor must believe that the obstructor has no claim of right to obstruct him; the obstruction must not be to prevent entry upon land that the actor knows to be in the possession of the obstructor, unless the circumstances are believed to be of such urgency that it would not be reasonable to postpone entry until a court order is obtained; and the force used must not be greater than would be justifiable if the obstructor were using force to prevent the passage.

For detailed Comment, see MPC Part I Commentaries, vol. 2, at 72.

D. Australia

The review committee of the Australian Crimes Act (1990) has combined the defences of person and property in one. It provides as follows:

*Division 11 - Defence of Persons or Property*

**Defence where person protecting a person or property**

"3Y. (1) It is a defence to a prosecution for an offence if the defendant proves that, in the circumstances that existed at the time or that the defendant believed to exist at the time, the relevant act was done, using such force as in those circumstances was immediately necessary and reasonable:

- (a) to effect or assist in the lawful arrest of a person who has committed or is suspected of committing an offence, whether against a law of the Commonwealth or otherwise, or of a person who is unlawfully at large; or
- (b) to protect himself or herself or another person from unlawful force or unlawful physical injury; or
- (c) to prevent or terminate an unlawful imprisonment; or
- (d) to protect any property from unlawful removal, destruction or damage; or
- (e) to prevent or terminate an unlawful trespass to his or her person or his or her property.

"(2) For the purposes of this section, an act is unlawful even though a person charged with an offence in respect of the act would be acquitted:

- (a) because of section 3G, 3H, 3M, 3P, 3Q, 3U or 3V; or
- (b) because of a law of, or a rule of the common law in force in, a State or Territory that corresponds to that section; or
- (c) because the person believed that an exempting circumstance existed.

"(3) Even though a person believed circumstances to exist that would justify the use of force, subsection (1) does not apply to the person in relation to a resulting use of force by the person if:

- (a) the person knew that the force was used against a constable or a person assisting a constable; and
- (b) the constable was acting in the course of his or her duty;

unless the person believed the force to be immediately necessary to prevent personal harm to himself or herself or to another person.



"(4) The fact that a person had an opportunity to retreat before using force is to be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was immediately necessary and reasonable.

"(5) Subsection (1) does not apply to a person who causes unlawful conduct or brings about an unlawful state of affairs with the intention of using force to resist or terminate it.

"(6) A threat of force may be reasonable even though the use of the force would not be.

## VII. ISSUES FOR CONSIDERATION

The preceding analysis has hopefully shed some light on the issues that need to be considered by the committee. The following list assumes that the committee will retain a defence of property, that all will agree that the current provisions are too complex and confusing, that agreement will exist to combine some of the provisions and delete deeming provisions.

1. What property interest should be protected? Should that interest be defined?
2. Against whom should force be allowed?
3. Should there be different standards for personal property, real property and dwelling-houses?
4. If a distinction is desirable between types of property should it be real/personal or moveable/immoveable?
5. If the protection of the defence is to be extended to those assisting or acting under the authority of the party in possession - is it necessary to further define these terms?
6. Should there be any standard against which the use of force must be measured?
7. If a standard is included, should that standard be one of "necessary force" or "reasonable (proportional) force"?
8. Should the provisions require mistakes about the circumstances giving rise to a defence to be reasonable?
9. Should the provisions stipulate (in addition to or in substitution for a "necessary force" test) a limit on the kind and nature of the force that will never be justified? ie. Should they include a provision that lethal force can never be used against a trespasser? Should they include that in retaking personal property you cannot cause bodily harm?
10. Should the provisions include a duty to retreat?
11. Should the defence apply if, on the actual facts, the accused was entitled to a defence but the accused was unaware of the circumstances that entitled him to a defence? (The *Dadson* issue)
12. Should the defence apply where the accused wrongly believes his act was justified in law when in fact no such justification existed? (Mistake of Law issue)
13. Finally, in drafting these provisions, should we opt for more detail like that found in the United States and English proposals and thus hopefully keep the courts on the path that we have charted?

entitled to defend the possession against a person entitled by law to it. Although this second provision seems simple enough the fact remains -the question of whether any person is entitled by law to possession of property is a legal question that in most cases would not be clear until after the dust settled. Is s. 39(2) designed to impose absolute liability such that, if, at the end of the day, it is determined 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 a claim of right and thus entitled to the defence under s. 39(1).

As noted above, the central difference between ss. 38 and 39 is that s. 39(1) speaks of peaceable possession "under a claim or right" as apposed to s.38 which refers only to "peaceable possession". However, there are other differences in the wordings of the two sections. Section 38 speaks of the party being "justified" in resisting the trespasser. On the other hand, s. 39 indicates that one is "protected from criminal responsibility for defending that possession". There are differences too with respect to the use of force. Section 38(1) authorizes minimal force (at least initially). Section 39(1) authorizes as much force as is necessary to defend your possession.

These wording differences have led to competing views about the interrelationship of ss. 38 and 39. Professor Colvin<sup>11</sup> and the Law Reform Commission<sup>12</sup> apparently view s. 39 as protecting a stronger property claim than s. 38. For them, it is only where peaceable possession is also supported by a claim of right that one is justified in using necessary force. This is apparently their explanation for why s. 38(1) authorizes less force than s. 39(1).

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<sup>11</sup> Colvin, note 1, p. 223.

<sup>12</sup> Law Reform Commission, Working Paper no. 29, pp. 105-106.

## B. Defence of Dwelling/Real Property

Sections 40, 41 and 42 are directed at defending "real" property (also sometimes referred to as "immovable" property). In many cases, it is unrealistic to speak of "defending property". For instance, a person relying on s. 41 need not necessarily be concerned with protecting the property *per se* but he/she will be entitled to the protection of s.41 if the other ingredients of the section are met. For example, in some cases the party relying on s. 41 might simply be trying to rid himself of an unwanted person.

The possessor may not have any concern at all about whether the unwanted person is a threat to the property or might damage the property. If he asks the unwanted party to leave and the party refuses, that party *ipso facto* becomes a trespasser and the possessor then has a right to use force to remove the trespasser.<sup>14</sup> In these situations the possessor is merely exercising a right incidental to peaceable possession. The Criminal Code protects the exercise of that right, even if done forcefully, provided the force was necessary.

Section 40 is specifically directed at protecting dwelling homes from unlawful forceable entry by others. However, it is difficult to conceive of a situation coming within s. 40 that would not also fall within s. 41. Don Stuart has summarized the object of s. 40 and 41 as follows:

There is a clear overlap between section 40 and section 41(1). Section 40 allows anyone in "peaceable possession" of a dwelling-house, assistants and agents, to use "as much force as is necessary" to prevent any unlawful and forceable breaking or entry. Section 41(1) allows anyone in "peaceable possession" of a dwelling-house or real property, assistants and agents, to use "no more force than is necessary" to

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<sup>14</sup> *R. v. Montague* (1949), 97 C.C.C. 29 (Ont. Co. Cl.), *R. v. Kirk*, [1934] O.R. 443, 62 C.C.C. 20 (Ont. C.A.) at pp. 446-7, OR.